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## BETTING AGAINST PASPA: WHY THE FEDERAL RESTRICTIONS ON SPORTS GAMBLING ARE UNCONSTITUTIONAL AND HOW THEY HURT THE STATES

### I. INTRODUCTION

The debate surrounding the legalization of sports gambling resurfaced nationally when the Supreme Court decided to review the Third Circuit's holding in *National Collegiate Athletic Ass'n v. Governor of New Jersey* ("*Christie II en banc*").<sup>1</sup> To date, proponents of legalized sports gambling have been unsuccessful in attempting to challenge its federal prohibition.<sup>2</sup> However, sports gambling has presented an interesting topic of legal debate throughout American history.<sup>3</sup>

Gambling was a large part of old American society.<sup>4</sup> But as sports grew increasingly popular, gambling became associated with moral and social stigmas.<sup>5</sup> In 1992, Congress responded by passing the Professional and Amateur Sports Protection Act ("PASPA" or "the Act"), which prohibits states from operating sports gambling

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1. 832 F.3d 389 (3d Cir. 2016) (en banc) [hereinafter *Christie II en banc*], *cert. granted sub nom. Christie v. Nat'l Collegiate Athletic Ass'n*, 137 S. Ct. 2327 (June 27, 2017). See also Matt Bonesteel, *In Surprise Move, Supreme Court Says It Will Take on New Jersey Sports-Betting Case*, WASH. POST (June 27, 2017), [https://www.washingtonpost.com/news/early-lead/wp/2017/06/27/in-surprise-move-supreme-court-says-it-will-take-on-new-jersey-sports-betting-case/?utm\\_term=.dcde5e597908](https://www.washingtonpost.com/news/early-lead/wp/2017/06/27/in-surprise-move-supreme-court-says-it-will-take-on-new-jersey-sports-betting-case/?utm_term=.dcde5e597908) [<https://perma.cc/ET5W-QWMD>] (stating even if New Jersey is not granted permission to operate unrestricted sports gambling scheme by Supreme Court, resurfacing debate nationally could lead to reduced levels of restriction by Professional and Amateur Sports Protection Act).

2. See generally *Christie II en banc*, 832 F.3d 389 (holding against New Jersey in its challenge to PASPA); *Nat'l Collegiate Athletic Ass'n v. Gov. of N.J.*, 799 F.3d 259 (3d Cir. 2015) [hereinafter *Christie II*] (holding against New Jersey in its challenge to PASPA), *reh'g en banc granted, opinion vacated* Order Sur Petitions for Rehearing En Banc, Nos. 14-4546, 14-4568, 14-4569 (3d Cir. Oct. 14, 2015), and *aff'd* 832 F.3d 389 (3d Cir. 2015); *Nat'l Collegiate Athletic Ass'n v. Gov. of N.J.*, 730 F.3d 208 (3d Cir. 2013) [hereinafter *Christie I*] (holding against New Jersey in its challenge to PAPSAs).

3. See *infra* notes 34–56 and accompanying text (explaining transition from perception of gambling as civic duty to immoral and corrupt activity).

4. See Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State Sponsored Gambling*, 34 B.C.L. REV. 11, 12 (1992) (explaining that use of state lotteries was important tool for governments to bolster weak tax base).

5. For a discussion on the changes in public perception that coincided with the rise in sports gambling popularity, see *infra* notes 19–56 and accompanying text (explaining government's desire to intervene and sharply crack down on sports gambling industry during this time due to enhanced corruption).

schemes.<sup>6</sup> This was an important milestone in the history of American sports gambling, but today the Act faces tremendous pressure due to questions about its effectiveness and constitutionality.<sup>7</sup> With millions of potential revenue dollars on the line, some states have decided to make the effort to challenge PASPA in court.<sup>8</sup> Challengers allege that the law is counterproductive in targeting corruption and raises constitutional concerns.<sup>9</sup> Supporters of PASPA, mainly the NCAA and professional sports leagues, argue that it prevents corruption associated with sports gambling.<sup>10</sup>

Part II(A) of this article provides a historical background on sports gambling in the United States between the 18th century and the early 1990s, when PASPA was enacted.<sup>11</sup> Part II(B) discusses the controversial language of PASPA and the implications of this language on statutory interpretation.<sup>12</sup> Part II(C) details some of the high-profile legal challenges to PASPA, which were largely influ-

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6. See 28 U.S.C. §§ 3701–3704 (2012) (serving as primary obstacle for states attempting to legalize sports gambling today).

7. See Dustin Gouker, *New Congressional Bill Would End Sports Betting Ban, but What Are Its Odds of Passing Soon?*, LEGAL SPORTS REP. (May 25, 2017), <https://www.legalsportsreport.com/14148/congress-sports-betting-bill-paspa/> [https://perma.cc/4ZT7-NR7H] (mentioning another potential milestone called Gaming Accountability and Modern Enhancement Act (“GAME”) presented by House Energy and Commerce Committee in Congress that would repeal PASPA). See also *infra* notes 201–215 and accompanying text (providing examples of how legalization would lead to increased regulation of gambling and decreased levels of gambling-related corruption); *infra* notes 98–176 and accompanying text (explaining New Jersey’s argument that PASPA is coercive and raises concerns of equal sovereignty because of relatively unrestricted gambling laws that exist only in Nevada).

8. See *infra* notes 181–196 and accompanying text (highlighting potential tax dollars and job creation that could benefit states if not for PASPA funneling resources to criminal organizations and offshore websites).

9. See Andy Staples, *The NCAA Needs to Start Planning for a World Where Sports Betting is Widely Legal*, SPORTS ILLUSTRATED (June 30, 2017), <https://www.si.com/college-football/2017/06/30/ncaa-gambling-paspa-sports-betting-compensation> [https://perma.cc/9BWG-JUAH] (stating NBA players would have little incentive to fix games today because doing so would require risk of forfeiting eight-figure salaries for relatively small reward). See also *Christie I*, 730 F.3d 208, 214 (3d Cir. 2013) (highlighting New Jersey’s constitutional arguments regarding issues of standing, Commerce Clause, anti-commandeering, and equal sovereignty).

10. See *Christie I*, 730 F.3d at 221–22 (agreeing with leagues’ legal standing argument to bring suit against New Jersey for potential corruption-related harm caused by increased gambling on sports).

11. See *infra* notes 19–56 and accompanying text (highlighting shifts in gambling trends among specific sports and discussing major sports betting scandals).

12. See *infra* notes 57–67 and accompanying text (focusing on debate about meaning of PASPA’s language which prohibits states from “authorizing” sports wagering schemes).

enced by its controversial language, discussed in Part II(B).<sup>13</sup> Next, Part III explains why PASPA is unconstitutional and how it negatively affects states.<sup>14</sup> Part III(A) discusses the unconstitutionality of PASPA and how it violates the “anti-commandeering” doctrine under the Supreme Court’s Tenth Amendment jurisprudence, explained in Part III(A)(1).<sup>15</sup> Part III(A) analyzes legal issues historically surrounding the ban on sports gambling, including equal sovereignty, standing, and the Commerce Clause, all of which have been litigated in federal court.<sup>16</sup> Part III(B) argues that PASPA is bad law from a policy perspective and engages the counter-argument that PASPA protects consumers by comparing sports gambling in legal and illegal markets globally.<sup>17</sup> Finally, Part III(B) explains why the alleged social concerns associated with sports gambling are not adequately addressed by PASPA and describes the evolution of Americans’ moral views on sports gambling since its enactment.<sup>18</sup>

## II. BACKGROUND: SETTING THE STAGE FOR A SUPREME COURT SHOWDOWN

### A. The History of American Sports Gambling

Gambling has existed for hundreds of years in the United States.<sup>19</sup> In 18th century America, the government used gambling revenue to “build cities, establish universities, and even to help finance the Revolutionary War.”<sup>20</sup> Sports gambling in America traces

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13. See *infra* notes 68–90 and accompanying text (demonstrating different ways in which states have chosen to challenge PASPA and explaining why such challenges have been unsuccessful to date).

14. See *infra* notes 91–238 and accompanying text (analyzing PASPA from legal, economic, social, and moral perspectives and discussing its role in protecting consumers).

15. See *infra* notes 98–176 and accompanying text (discussing where PASPA fits in small body of Supreme Court case law regarding Tenth Amendment with respect to anti-commandeering).

16. See *infra* notes 141–176 and accompanying text (noting that while legal issues not pertaining to anti-commandeering have been litigated, importance of issues at Supreme Court level is minimal in comparison).

17. See *infra* notes 200–215 and accompanying text (focusing primarily on legal market in United Kingdom).

18. See *infra* notes 229–238 and accompanying text (arguing that since negative moral perception of sports gambling was used to promote passage of PASPA, shift towards more positive moral perception should play role in argument today).

19. See Chil Woo, Note, *All Bets Are off: Revisiting the Professional and Amateur Sports Protection Act (PASPA)*, 31 CARDOZO ARTS & ENT. L.J. 569, 571 (2013) (explaining that gambling was used during colonial times for fundraising by local governments).

20. Rychlak, *supra* note 4, at 12.

its roots back to a sport known as “pedestrianism,” a form of race-walking that gained popularity in England and spread to the United States as people gambled on the results.<sup>21</sup> In addition to pedestrianism, colonists bet on “horse races, cockfights, and bare-knuckle brawls” for entertainment.<sup>22</sup>

Throughout the 19th and into the 20th century, horseracing became the most popular sporting event for gamblers, although it was initially reserved for the wealthy.<sup>23</sup> However, after the Civil War, more racetracks came into existence and people from all socio-economic backgrounds began to participate.<sup>24</sup> By the 1920s, there were more than 300 racetracks throughout the United States and thousands of “off-track” betting facilities.<sup>25</sup> But as Americans’ interests shifted more towards team sports in the 1930s, betting on horseracing began to decline steadily.<sup>26</sup>

After the decline of horseracing, the growth of baseball filled the void for Americans looking to gamble on sports.<sup>27</sup> Professional sports in general became increasingly popular during the early 20th century, and, as a result, this period became known as the “Golden Age of Sports.”<sup>28</sup> This increased popularity led to a sharp rise in

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21. See generally Allen Moody, *History of Sports Betting*, THOUGHTCO, <https://www.thoughtco.com/history-of-sports-betting-3116857> [https://perma.cc/EZ8K-SGVQ] (last updated May 2, 2017) (providing general history of sports gambling globally and transition of sports gambling from other parts of world to United States over time). See also *In the 1870's and 80's, Being a Pedestrian Was Anything But*, NPR (Apr. 3, 2014), <https://www.npr.org/2014/04/03/297327865/in-the-1870s-and-80s-being-a-pedestrian-was-anything-but> (explaining that bets were placed on, for example, which competitors would be first to drop out of race or which would be first to reach 100 miles in distance traveled).

22. Jeremy Martin, *History of Sports Betting and the Point Spread*, DOC'S SPORTS SERV. (May 30, 2017), <https://www.docsports.com/sports-betting-history.html> [https://perma.cc/KX6H-NKYZ] (discussing foundations of sports gambling in United States dating back to Founding Fathers and early colonists).

23. See *id.* (discussing evolution of initial stages of sports gambling in United States).

24. See *id.* (marking beginning of massive rise in sports gambling popularity that continues to grow today).

25. See *id.* (providing Americans with greater access to sports gambling and contributing to rapid growth in sports gambling industry prior to popularity of developed professional sports leagues).

26. See *id.* (explaining that downturn in horseracing occurred primarily as a result of formation of professional sports leagues, which quickly became popular among Americans).

27. See Moody, *supra* note 21 (marking rise in popularity of gambling on professional sports leagues as opposed to events like pedestrianism and horse racing).

28. Woo, *supra* note 19, at 573 (referring to rise in popularity and attendance of professional baseball, professional and collegiate football, and collegiate basketball).

sports gambling.<sup>29</sup> But during this time, bettors were restricted on the types of wagers they could place, which prevented widespread growth of the industry despite great demand.<sup>30</sup> In an effort to address these limitations, bookmakers (“bookies”) developed the point-spread system in the 1940s, which allowed gamblers to bet on the accuracy of a particular score line rather than just the binary outcome of a competition.<sup>31</sup> This created a massive increase in the amount of sports gambling in the United States because it eliminated the limitations that both bettors and bookies faced prior to the existence of the point-spread system.<sup>32</sup> With the point-spread system in place, sports gambling continues to increase in popularity.<sup>33</sup>

The public perception of gambling, on the other hand, has varied over time.<sup>34</sup> For example, playing the lottery was initially perceived by the public to be a civic duty because colonies were using its revenues to finance local governments.<sup>35</sup> However, as gambling-related corruption became more prevalent over time, America’s perspective on betting shifted negatively.<sup>36</sup>

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29. See *id.* (causing many to become suspicious of connection between rise in popularity of professional sports and increased instances of corruption and scandal).

30. See Moody, *supra* note 21 (explaining that under such restrictions, gamblers were forced to risk too much money when betting on prohibitive favorite in sporting events to deem making wagers reasonable).

31. See *id.* (explaining that point system allowed bettors to gamble on any sport regardless of relative strengths and weaknesses of opposing teams, opening door for more sports gambling activity).

32. See *id.* (referring to fact that point-spread system was key in capturing previously-unrecognized demand for sports gambling by providing betting access on almost any professional sporting event).

33. See *Christie I*, 730 F.3d 208, 214 (3d Cir. 2013) (“Betting on sports is an activity that has unarguably increased in popularity over the last several decades.”).

34. See Woo, *supra* note 19, at 573 (referring to instances such as 1919 Black Sox Scandal in professional baseball that contributed to negative perception of sports gambling at times throughout history). See also Jeff Merron, *Biggest Sports Gambling Scandals*, ESPN (2009), <http://www.espn.com/espn/page2/story?page=merron/060207> [<https://perma.cc/CF3G-W8JT>] (noting additional scandals related to sports gambling throughout history that contributed to negative perception, such as 1951 point-shaving scandal in college basketball, banning of Pete Rose from professional baseball for betting on games in which he was involved as player and manager, and Boston College’s connection to mob activity with respect to “point shaving” in college basketball in late 1970s).

35. See Woo, *supra* note 19, at 571–72 (citing CHARLES T. CLOTFELTER & PHILIP J. COOK, *SELLING HOPE: STATE LOTTERIES IN AMERICA* 32–33 (1991)) (noting use of state lotteries as source of significant revenue for state governments).

36. See Zach Schreiber, Comment, *The Time Is Now: Why the United States Should Adopt the British Model of Sports Betting Legislation*, 27 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 353, 360 (2017) (discussing shifts between positive and negative public perception of sports gambling from mid 1800s to 1930s).

In 1951, thirty-five former and active college basketball players were accused of fixing at least eighty-six games.<sup>37</sup> As a result, some high-profile athletes were banned from collegiate and professional basketball.<sup>38</sup> In addition, the perennial powerhouse Kentucky Wildcats, winners of back-to-back NCAA championships at the time, were banned from play in the 1952–53 season.<sup>39</sup>

Another famous scandal that negatively affected public perception of sports gambling was an incident involving Pete Rose, an icon in professional baseball in the 1980s.<sup>40</sup> Rose was caught betting on professional baseball games in which he was personally involved as a manager and subsequently received a lifetime ban from the game of baseball.<sup>41</sup> Not only did the lifetime ban cost Rose a potentially long, lucrative career as a baseball manager, but it denied him what would have been a guaranteed place in professional baseball's Hall of Fame.<sup>42</sup>

The most famous match-fixing scandal in American history, baseball's 1919 "Black Sox Scandal," was the biggest contributor to the trend of negative perception towards sports gambling.<sup>43</sup> Several players from the 1919 White Sox, considered to be one of the greatest teams in the history of professional baseball, carried out a plan to fix the World Series in exchange for payoffs from gamblers associated with organized crime.<sup>44</sup> As a result, eight White Sox players were banned from baseball, but the suspected fixers, including Arnold Rothstein, a notorious New York mobster and gambler at

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37. See Merron, *supra* note 34 (noting that twenty of these players were convicted along with fourteen gamblers).

38. See *id.* (referring mainly to Ralph Beard and Alex Groza, both All-Americans at University of Kentucky and first-team NBA All-Stars prior to receiving bans from sport of basketball).

39. See *id.* (pointing out particular significance of this "death penalty" because of high profile nature of team and fact that team was favored once again to repeat as national champions).

40. See *id.* (explaining Rose's eventual admission to betting on baseball games after initially denying all allegations).

41. See *id.* (noting then-MLB commissioner A. Bartlett Giamatti's statement after publicizing Rose's lifetime ban, "[l]et no one think [Rose's betting] did not hurt baseball").

42. See *id.* (using severity of Rose's punishment to demonstrate perceived severity of such actions at this time).

43. See Woo, *supra* note 19, at 572 (detailing infamous bribe by notorious gangster Arnold Rothstein to members of Chicago White Sox to throw 1919 World Series against Cincinnati Reds).

44. See Alan Solomon, *The Black Sox*, CHI. TRIB. (2017), <http://www.chicagotribune.com/news/nationworld/politics/chi-chicagodays-blacksox-story-story.html> [<https://perma.cc/C9FP-56JY>] (citing rumor that White Sox pitcher Eddie Cicotte hit Cincinnati Reds leadoff batter with second pitch of opening game of series as signal to bettors that fix was taking place).

the helm of the scheme, received no punishment.<sup>45</sup> Although not the first incident of match fixing in American professional sports, the 1919 World Series had a major impact on the public's perception of sports gambling because it came at a time when the popularity of the World Series was greater than ever before.<sup>46</sup> By the 1960s, public perception was negative enough to persuade Congress to pass legislation banning certain interstate gambling.<sup>47</sup>

This trend continued as President George H.W. Bush signed PASPA into law in 1992, instituting the legal restrictions on sports gambling that exist today.<sup>48</sup> Proponents of PASPA argued that it was necessary for the protection of the integrity of sports and the protection of minors from the so-called "vice" of gambling.<sup>49</sup> They argued that state-sanctioned sports gambling was problematic because it attracted additional gamblers who would only bet in state-sanctioned schemes.<sup>50</sup> When former NFL Commissioner, Paul Tagliabue, was asked how state-sanctioned sports gambling would make a difference on the market given the fact that huge amounts of money were already being gambled illegally on sports, he responded "there will be millions of Americans induced and seduced into gambling if this growth industry is permitted to take the imprimatur of the state and support state-sanctioned point-spread betting."<sup>51</sup>

More recently, however, society's perception of sports gambling has shifted back in favor of a more lenient approach to regulation of the activity.<sup>52</sup> Americans today view the legalization of

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45. See *id.* (explaining that scandal destroyed one of baseball's great teams and had "shaken" America's national game).

46. See *id.* (highlighting fact that 1919 World Series was so popular because it was first major sporting event after World War I).

47. See *id.* (referring to Federal Wire Act of 1961, which was enacted to "crack down" on gambling orchestrated by organized crime members).

48. See Justin Fielkow et al., *Tackling PASPA: The Past, Present and Future of Sports Gambling in America*, 66 DEPAUL L. REV. 23, 29–30 (2016) (explaining that although most states had already banned sports betting on their own prior to this act, PASPA eliminated states' freedom to legalize sports gambling even if they desired to do so). See also 28 U.S.C. §§ 3701–3704 (2012) (making it unlawful for any state to "sponsor, operate, advertise, promote, license, or authorize" sports wagering schemes) (emphasis added).

49. See Fielkow et al., *supra* note 48, at 29–30 (stating PASPA emerged from strong negative public perception that developed around sports gambling).

50. See *id.* (serving as primary argument for proponents of PASPA in push to implement Act in early 1990s).

51. *Id.* at 31 (quoting Tagliabue).

52. See, e.g., Wayne Parry, *Poll: Nearly Half in US Support Legalized Sports Betting*, SEATTLE TIMES (Nov. 1, 2016), <http://www.seattletimes.com/business/poll-nearly-half-in-us-support-legalized-sports-betting/> (citing poll by Fairleigh Dickinson Uni-



sports gambling more favorably than they did in the late twentieth century, though for different reasons than in the past.<sup>53</sup> Even the commissioners of several professional sports leagues, whose predecessors represented a driving force behind the implementation of today's restrictions on sports gambling in the United States, publicly expressed opinions recognizing the change.<sup>54</sup> This shift in perception rekindled national attention on the issue and even led to federal lawsuits.<sup>55</sup> The combination of positive public perception and advances in modern technology have increased gamblers' willingness and ability to circumvent PASPA, which prompted Congress to create even more laws in an attempt to fortify its anti-sports initiative.<sup>56</sup>

### B. PASPA's Controversial Language and Its Implications

PASPA makes it unlawful for a state to "sponsor, operate, advertise, promote, license, or *authorize*" sports wagering schemes.<sup>57</sup> This language, specifically the use of the word "authorize," creates a debate on statutory interpretation.<sup>58</sup> The major question surrounding the application of this statute is whether it considers a state's repeal of existing sports gambling prohibitions a form of authorization.<sup>59</sup> Proponents of PASPA argue that a repeal of laws that pro-

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versity showing 48% of Americans are in favor of changing federal law to legalize sports gambling compared to 39% not in favor).

53. See *id.* (explaining that those in favor of sports gambling hold this opinion because of fact that gambling on sports occurs despite being illegal and that legalization would bring in revenue for states).

54. See generally *American Attitudes on Sports Betting Have Changed*, AM. SPORTS BETTING COALITION (2017), <http://www.sportsbettinginamerica.com/about/> [https://perma.cc/5L2J-E4RL] (referring to NFL commissioner Roger Goodell, NBA commissioner Adam Silver, former NBA commissioner David Stern, MLB commissioner Rob Manfred, and NHL commission Gary Bettman).

55. See *id.* (mentioning New Jersey's eight-year legal battle in federal court against PASPA, which was supported by citizens of New Jersey).

56. See Timothy Furman, Comment, *Going All In: New Jersey and the Sports Betting Landscape*, 14 DEPAUL BUS. & COM. L.J. 111, 113–14 (2015) (citing 31 U.S.C. §§ 5361–5367 (2012)) (discussing Unlawful Internet Gambling Enforcement Act passed in 2006, which limits ability of growing number of offshore websites to conduct financial transactions with customers in United States).

57. 28 U.S.C. § 3702 (emphasis added).

58. See Daniel L. Wallach, *US Sports Betting: Why Statutory Interpretation May Be Key to New Jersey's Efforts to Legalize Gambling*, LAWINSPORT (July 1, 2015), <https://www.lawinsport.com/features/item/us-sports-betting-why-statutory-interpretation-may-be-key-to-new-jersey-s-efforts-to-legalize-gambling> [https://perma.cc/75PR-2B9J] (raising key question as to meaning of word "authorize").

59. See *id.* (discussing that when term is not defined in statute, courts generally interpret term under ordinary meaning, which in this case benefits states looking to challenge PASPA because dictionaries define "authorize" as "to give legal authority" and "to grant authority or power to. To give permission for; sanction").

hibit sports gambling is a form of authorization because it effectively allows the activity to occur.<sup>60</sup> Challengers of PASPA argue that a repeal of prohibitions on sports gambling is not an authorization of the activity because it does not result in any state involvement in sports gambling.<sup>61</sup> In other words, challengers of the Act argue that in order to “authorize” sports gambling, states have to license or affirmatively promote the activity.<sup>62</sup>

The Act allows states that already had sports gambling operations in place to apply for an exemption from the law “to the extent that the scheme was conducted by that State” prior to PASPA.<sup>63</sup> In addition, it allowed any state that had commercial casinos for at least ten years prior to its enactment to authorize legal sports gambling within one year of the effective date.<sup>64</sup> However, no states are specifically named in the PASPA legislation.<sup>65</sup> Nevada, Oregon, Montana, and Delaware, the four states that had sports gambling laws in place prior to PASPA, were the only states to take advantage of the exemptions.<sup>66</sup> “Of these four states, Nevada is the only one” that permits sports gambling “without any significant restrictions.”<sup>67</sup>

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60. *See id.* (explaining that repeal of laws prohibiting sports gambling is equivalent to decriminalization of sports gambling, which is an impermissible circumvention of PASPA).

61. *See id.* (explaining New Jersey’s argument in *Christie II* and *Christie II en banc* that “authorize” does not mean merely “to permit” or “to allow” but rather to affirmatively sanction something).

62. *See id.* (quoting Judge Julio M. Fuentes of Third Circuit, “[a] repealer is a removal of the restrictions and of all criminal laws, but it doesn’t mean that the government is saying ‘go ahead and engage in that activity’”).

63. 28 U.S.C. § 3704; *see also* OFC Comm Baseball v. Markell, 579 F.3d 293, 304 (3d Cir. 2009) (holding that phrase “to the extent” in PASPA is construed narrowly, therefore Delaware can only allow multi-game bets on NFL games because that is specifically what it allowed prior to PASPA); *What Is PASPA?—Professional & Amateur Sports Protection Act of 1992*, LEGAL GAMBLING USA (2015), <http://www.legalgamblingusa.com/articles/what-is-paspa.html> [<https://perma.cc/4CDW-29DW>] (meaning that under PASPA states are permitted to sanction sports gambling in same manner they sanctioned it prior to PASPA).

64. *See* § 3704(a)(3)(B) (stating exception); *see also* Michael Levinson, Comment, *A Sure Bet: Why New Jersey Would Benefit from Legalized Sports Wagering*, 13 SPORTS L. J. 143, 149 (2006) (explaining that exemption was created with New Jersey in mind because of its casino operations in Atlantic City).

65. *See* Anthony G. Galasso, Jr., Comment, *Betting Against the House (and Senate): The Case for Legal, State-Sponsored Sports Wagering in a Post-PASPA World*, 99 Ky. L.J. 163, 163–64 (2011) (meaning no states were given an explicit exception to PASPA and “grandfather clause” was generally applicable for states that had sports betting in place prior to PASPA).

66. *See id.* at 164 (mentioning New Jersey’s failure to take advantage of exception, thus barring state from allowing sports gambling activity currently).

67. Furman, *supra* note 56, at 113 (citation omitted) (referring to lack of restrictions on things such as accepting multiple-game bets as opposed to bets on outcome of single game).

## C. Notable Challenges to PASPA

When Congress initially debated PASPA, the Department of Justice opposed its enactment and the Act has been criticized often since it was passed.<sup>68</sup> During the Act's 1991 congressional hearing, one representative commented, "my reaction is that we're trying to close the barn door here after it's already been opened and a great many of the horses have escaped. I just don't know whether we can corral those horses and put them back in the barn."<sup>69</sup>

States have also challenged PASPA.<sup>70</sup> In 2009, the Court of Appeals for the Third Circuit heard *OFC Comm Baseball v. Markell*<sup>71</sup> regarding former Delaware Governor Jack Markell's proposed legislation authorizing point-spread bets on individual games, over/under bets on individual games, and multi-game parlay bets.<sup>72</sup> Several major sports leagues subsequently filed suit for violations of PASPA.<sup>73</sup>

Today, New Jersey is the most adamant challenger of PASPA.<sup>74</sup> In 2011, New Jersey citizens successfully voted to amend the state's constitution and allow the state legislature to legalize sports gambling.<sup>75</sup> In 2012, the state legislature legalized sports betting despite knowing its laws directly conflicted with PASPA.<sup>76</sup> This was

68. See Ryan M. Rodenberg & John T. Holden, *Sports Betting Has an Equal Sovereignty Problem*, 67 DUKE L.J. ONLINE 1, 4 (2017) (mentioning Department of Justice's disapproval of way in which PASPA was drafted and referring to PASPA's negative legislative history).

69. *Id.* (quoting *Professional and Amateur Sports Protection Act: Hearing on H.R. 74 Before the Subcomm. on Econ. & Commercial Law of the H. Comm. on the Judiciary*, 102d Cong. 92 (1991) (statement of Rep. Mazzoli)) (referring to fact that PASPA was being implemented too late to be effective because underground market for sports betting was already well developed).

70. See, e.g., *OFC Comm Baseball v. Markell*, 579 F.3d 293, 295 (3d Cir. 2009) (Delaware's challenge of PASPA).

71. 579 F.3d 293 (3d Cir. 2009).

72. See *id.* at 295 (noting Governor Markell's efforts to implement sports betting legislation).

73. See *id.* at 293 (listing plaintiffs, including Major League Baseball, National Basketball Association, National Collegiate Athletic Association, National Football League, and National Hockey League, which all requested court to enjoin Delaware from permitting previously-mentioned betting schemes).

74. See Furman, *supra* note 56, at 111 (discussing New Jersey's efforts to bring sports betting to Atlantic City).

75. See Christopher L. Soriano, *The Efforts to Legalize Sports Betting in New Jersey—A History*, N.J. LAW. 22, 24 (Apr. 2013), [https://www.duanemorris.com/articles/static/soriano\\_njlawyer\\_0413.pdf](https://www.duanemorris.com/articles/static/soriano_njlawyer_0413.pdf) [<https://perma.cc/9XHR-4CNB>] (noting that this served as first major step by New Jersey in its campaign to fight PASPA).

76. See *id.* ("The legislation allowed the Division of Gaming Enforcement to approve a casino licensee's application to operate sports betting, and to allow the division and the New Jersey Racing Commission to jointly approve a racetrack's application to operate sports betting.").

essentially New Jersey's invitation to the proponents of PASPA to engage in a legal battle to rebut its argument that PASPA is unconstitutional.<sup>77</sup>

In January 2012, New Jersey governor Chris Christie signed the legislation to allow sports betting in New Jersey.<sup>78</sup> In the 2013 case *National Collegiate Athletic Association v. Governor of New Jersey* ("Christie I"),<sup>79</sup> several professional and amateur sports leagues took to the courts in an attempt to strike down New Jersey's proposed sports gambling laws.<sup>80</sup> They argued that these laws were in direct violation of the federal restrictions on sports gambling under PASPA.<sup>81</sup> The Court of Appeals for the Third Circuit held in favor of the sports leagues and rejected New Jersey's argument that PASPA is unconstitutional as a violation of the Tenth Amendment.<sup>82</sup>

In 2014, New Jersey responded with a more creative approach to its attempt to legalize sports gambling in *National Collegiate Athletic Association v. Governor of New Jersey* ("Christie II").<sup>83</sup> In light of the Third Circuit's holding in *Christie I*, which held that PASPA did not affirmatively require action by prohibiting states from repealing bans on sports wagering, but rather let states choose which laws to leave in place, the state decided to partially repeal its existing prohibitions on sports gambling instead of affirmatively legalizing sports gambling as it had previously done.<sup>84</sup> The NCAA and the

77. *See id.* (explaining New Jersey's strategy to purposely violate PASPA with intention to put forth its constitutional arguments when challenged in federal court).

78. *See* Sarah Coffey, *N.J. Moves Towards Legal Sports Betting this Fall*, in *Time for NFL Season*, NAT'L L. REV. (May 25, 2012), <https://www.natlawreview.com/article/nj-moves-towards-legal-sports-betting-fall-time-nfl-season> [<https://perma.cc/9B8U-DH5Y>] (explaining then-Governor Christie's plans to implement sports betting systems in New Jersey racetracks and casinos in Fall of 2012).

79. 730 F.3d 208 (3d Cir. 2013).

80. *See generally id.* (marking first major step in New Jersey's legal challenge to prove PASPA's unconstitutionality).

81. *See id.* at 214 ("A conglomerate of sports leagues, displeased at the prospect of State-licensed gambling on their athletic contests, has sued to halt these efforts. They contend, alongside the United States as intervening plaintiff, that New Jersey's proposed law violates a federal law that prohibits most states from licensing sports gambling, the Professional and Amateur Sports Protection Act of 1992 (PASPA).").

82. *See id.* at 237 (establishing key point of legal controversy that continues to be biggest question today regarding whether PASPA is constitutional).

83. 799 F.3d 259 (3d Cir. 2015), *reh'g en banc granted, opinion vacated* Order Sur Petitions for Rehearing En Banc, Nos. 14-4546, 14-4568, 14-4569 (3d Cir. Oct. 14, 2015), and *aff'd* 832 F.3d 389 (3d Cir. 2015).

84. *See id.* at 264 (citing N.J. STAT. ANN. § 5:12A-7 (2014), *invalidated by Christie II en banc*, 832 F.3d 389 (3d Cir. 2016), *cert. granted sub nom.* Christie v. Nat'l Collegiate Athletic Ass'n, 137 S. Ct. 2327 (June 27, 2017)) (noting New Jersey's second attempt to pass law to legalize sports betting).

major sports leagues filed suit once again, and the court held against New Jersey.<sup>85</sup> Upon rehearing, the en banc Third Circuit affirmed the decision.<sup>86</sup> The court held that New Jersey's use of the word "repeal" was not enough to escape the fact that its legislation effectively authorized sports gambling.<sup>87</sup> According to the court, although New Jersey was accomplishing its objective through a repeal, the action had the effect of affirmatively authorizing sports gambling in violation of PASPA.<sup>88</sup> The opinion stated that "a state's decision to selectively remove a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators is, in essence, 'authorization' under PASPA."<sup>89</sup>

But this development was historic because the Supreme Court granted certiorari to the en banc decision, meaning it will review the constitutionality of PASPA for the first time.<sup>90</sup>

### III. ANALYSIS: PASPA'S QUESTIONABLE CONSTITUTIONALITY AND HOW STATES WOULD BENEFIT FROM LEGAL SPORTS GAMBLING

Part A of this section provides a detailed discussion of the constitutional issues surrounding PASPA.<sup>91</sup> Part III (A)(1) analyzes the Third Circuit's review of *Christie II* and argues that the Supreme Court should overturn the en banc decision because PASPA violates

85. See *id.* at 268 (holding that New Jersey's legislative action violated PASPA).

86. See *Christie II en banc*, 832 F.3d at 402 (refusing to strike PASPA despite New Jersey's repeated attempts to assert violations of Tenth Amendment).

87. See *id.* at 397 ("The presence of the word 'repeal' does not prevent us from examining what the provision actually does, and the Legislature's use of the term does not change that the 2014 Law selectively grants permission to certain entities to engage in sports gambling.").

88. See *id.* at 398 ("We conclude that the 2014 Law violates PASPA because it authorizes by law sports gambling.").

89. *Id.* at 401.

90. See *Christie v. Nat'l Collegiate Athletic Ass'n*, 137 S. Ct. 2327 (June 27, 2017); Nick Corasaniti, *New Jersey's Appeal of Sports Betting Ban Heads to Supreme Court*, N.Y. TIMES (June 27, 2017), <https://www.nytimes.com/2017/06/27/nyregion/new-jerseys-appeal-of-sports-betting-ban-heads-to-supreme-court.html> ("The Supreme Court agreed . . . to hear an appeal from Gov. Chris Christie and the state of New Jersey to allow betting on professional and collegiate sports at the state's casinos and racetracks."). See also *Supreme Court Procedures*, UNITED STATES COURTS, <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> [<https://perma.cc/82FN-9CMB>] (defining granting of "certiorari" as Supreme Court's decision to review decision of lower court even though it is under no obligation to hear case).

91. See *infra* notes 98–176 and accompanying text (using holding in *Christie* cases as framework for constitutional analysis of PASPA).

the anti-commandeering doctrine.<sup>92</sup> Parts III (A)(2), III (A)(3), and III (A)(4) analyze other legal issues addressed by the Third Circuit in *Christie I*, *Christie II*, and *Christie II en banc*.<sup>93</sup>

Part (B) of this section argues that PASPA is bad law from a policy perspective.<sup>94</sup> Part III (B)(1) examines the economic benefits that PASPA forces states to miss out on by prohibiting a legal sports gambling market in the United States.<sup>95</sup> Part III (B)(2) argues that PASPA has counterproductive effects on consumer protection by highlighting the major differences between legal and illegal sports gambling markets.<sup>96</sup> Parts III (B)(3) and III (B)(4), respectively, discuss why the social and moral concerns raised by proponents of PASPA are largely without merit.<sup>97</sup>

### A. The Constitutionality of PASPA

*Christie II en banc* is the most recent high-profile case detailing the major legal issues behind sports gambling in the United States.<sup>98</sup> After New Jersey's attempt to circumvent PASPA by partially repealing its existing sports gambling laws, the National Collegiate Athletic Association (NCAA) and a number of professional leagues sued seeking an injunction against the enactment of the legislation.<sup>99</sup> The plaintiffs in this case included the NCAA, the National Basketball Association (NBA), the National Football League (NFL), the National Hockey League (NHL), and Major League

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92. See *infra* notes 108–140 and accompanying text (providing detailed analysis on Third Circuit's decision to deny New Jersey's challenge to PASPA based on Tenth Amendment, equal sovereignty, legal standing, and Commerce Clause).

93. See *infra* notes 141–176 and accompanying text (discussing law surrounding equal sovereignty, standing, and Commerce Clause as it relates to PASPA).

94. See *infra* notes 177–238 and accompanying text (discussing aspects of sports gambling related to economics, consumer protection, costs to society, and morality).

95. See *infra* notes 181–199 and accompanying text (noting most importantly that primary effect of keeping sports gambling illegal is to shift resources to criminal activity and offshore websites without reducing overall amount of gambling).

96. See *infra* notes 200–215 and accompanying text (using legal sports gambling market in United Kingdom as primary subject of comparison).

97. See *infra* notes 216–238 and accompanying text (weighing benefits and costs of sports gambling from perspective of states).

98. See generally *Christie II en banc*, 832 F.3d 389 (3d Cir. 2016), cert. granted sub nom. *Christie v. Nat'l Collegiate Athletic Ass'n*, 137 S. Ct. 2327 (June 27, 2017). (upholding PASPA's constitutionality for the time being).

99. See generally *Christie II*, 799 F.3d 259 (3d Cir. 2015), reh'g en banc granted, opinion vacated Order Sur Petitions for Rehearing En Banc, Nos. 14-4546, 14-4568, 14-4569 (3d Cir. Oct. 14, 2015), and *aff'd* 832 F.3d 389 (3d Cir. 2015) (arguing that New Jersey's proposed law violated federal prohibition on sports gambling and could potentially cause reputational harm to NCAA and leagues).

Baseball (MLB).<sup>100</sup> After the Third Circuit held for the sports leagues in *Christie II*, and affirmed en banc, the Supreme Court granted certiorari.<sup>101</sup>

The most important constitutional issue presented in this case was whether PASPA violates the Tenth Amendment under the Supreme Court's "anti-commandeering doctrine."<sup>102</sup> The Supreme Court's two well-known decisions in this area, discussed below, stand for the general principle that the federal government cannot commandeer state governments.<sup>103</sup> In other words, the federal government cannot coerce states into taking certain legislative actions.<sup>104</sup> PASPA presents an interesting distinction with regard to this principle because it *prohibits* states from *repealing* their laws banning sports gambling, but it does not actually *force* states to take any affirmative action.<sup>105</sup> Likely, whether the Supreme Court finds PASPA's requirement that states *not* do something to be an instance of unconstitutional commandeering will decide its holding.<sup>106</sup> Along with this Tenth Amendment issue, the Third Circuit has addressed issues of equal sovereignty, standing, and the Commerce Clause with respect to PASPA.<sup>107</sup>

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100. See *id.* at 259 (listing plaintiffs, which represented each of the four major American sports leagues and the major American collegiate athletic body).

101. See *Christie v. Nat'l Collegiate Athletic Ass'n*, 137 S. Ct. 2327 (2017); see also UNITED STATES COURTS, *supra* note 90 (defining granting of "certiorari" as Supreme Court's decision to review decision of lower court even though it is under no obligation to hear case).

102. See *Christie II en banc*, 832 F.3d at 399–403 (discussing anti-commandeering doctrine).

103. See generally *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding Congress may not force states to implement or carry out federal programs because it is violation of state sovereignty); *New York v. United States*, 505 U.S. 144, 188 (1992) (explaining that while Congress could regulate disposal of radioactive waste under Commerce Clause due to interstate nature of market, it could not force states to take title to such waste).

104. See generally *Printz*, 521 U.S. at 935; *New York v. United States*, 505 U.S. at 159–62 (highlighting instances of federal government forcing states to use states' own resources to carry out federal programs as evidence of unconstitutional commandeering).

105. See *Christie II en banc*, 832 F.3d at 402 ("Put simply, PASPA does not impose a coercive either-or requirement or affirmative command.").

106. See *id.* (focusing primarily on distinction between forcing states to take affirmative action and prohibiting states from taking action as it relates to anti-commandeering).

107. See generally *Christie I*, 730 F.3d 208, 215–37 (3d Cir. 2013) (outlining major legal issues litigated between sports leagues and New Jersey).

# 1. *The Anti-Commandeering Doctrine*

The notion of commandeering concerns federalism, a foundational aspect of American constitutional law that reserves certain sovereign authority to the states.<sup>108</sup> The text of 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.”<sup>109</sup> There are two seminal decisions by the Supreme Court that overturned laws based on unconstitutional commandeering by the federal government.<sup>110</sup>

The first case is *New York v. United States*,<sup>111</sup> which overturned a federal statute requiring states to either dispose of, or take title to, radioactive waste produced within their borders.<sup>112</sup> The Court in *New York* held that the federal government cannot force states to take title to the waste.<sup>113</sup> The Court decided that Congress crossed the line between lawful encouragement and unlawful coercion by forcing states to take title to the waste as an alternative to regulating pursuant to Congress’s direction.<sup>114</sup>

The second case, *Printz v. United States*,<sup>115</sup> overturned a federal law requiring local and state governments to implement mandatory background checks before issuing firearm permits.<sup>116</sup> The Court in *Printz* held that not only is Congress prohibited from compelling states to enact or enforce a federal regulatory program under *New York*, but it is also prohibited from forcing state officials to adminis-

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108. See *Printz*, 521 U.S. at 915–17 (serving as one of two well-known Supreme Court holdings specifically about anti-commandeering subset of federalism).

109. U.S. CONST. amend. X.

110. See generally *Printz v. United States*, 521 U.S. 898; *New York v. United States*, 505 U.S. 144 (1992) (providing context for how rare such cases reach Supreme Court).

111. 505 U.S. 144 (1992).

112. See *id.* at 188 (providing classic example of impermissible commandeering by federal government where Congress forces state to take affirmative action).

113. See *id.* (explaining that Congress may entice states to act in certain ways, but cannot coerce states into acting as it did in this case).

114. See *id.* at 187–88 (explaining that there are constitutional methods of achieving self-sufficiency in radioactive waste disposal, such as withholding incentives to states as means of encouraging them to adopt regulatory schemes, but forcing states to take title to waste is not one of them).

115. 521 U.S. 898 (1997).

116. See *id.* at 902 (providing second classic example of impermissible commandeering by federal government where Congress forces state to take affirmative action).



ter or enforce a federal regulatory program.<sup>117</sup> In other words, under *Printz*, Congress cannot circumvent the prohibition set forth in *New York* by enlisting state officials to carry out a regulatory program.<sup>118</sup>

Both of these cases represent the greater constitutional principle that the federal government cannot shield itself from a potentially negative voter response by coercing states into carrying out the programs it wants to implement.<sup>119</sup> If not for this principle, state officials would be subject to negative voter reaction for unpopular decisions they had no role in making.<sup>120</sup> Together, *New York* and *Printz* establish the principle that states alone are responsible for state policy and that Congress cannot force the states, or any of the states' officers, into service at the expense of the states.<sup>121</sup> Ultimately, the anti-commandeering doctrine is a constitutional safeguard that protects states against an overpowering federal government seeking to undermine the political process.<sup>122</sup>

The Supreme Court will address this anti-commandeering framework again when it reviews the Third Circuit's holding in *Christie II en banc*.<sup>123</sup> In this case, New Jersey argued that PASPA violates the anti-commandeering doctrine because it involves federal legislation forcing states to carry out the federal government's anti-gambling program.<sup>124</sup> The court rejected New Jersey's argu-

117. See *id.* at 933–34 (distinguishing facts from *New York v. United States* and explaining that Congress cannot take away states' sovereignty, even when no policymaking is involved).

118. *Id.* at 935 (“It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.”).

119. See generally *id.*; *New York v. United States*, 505 U.S. at 182–83 (providing one main point of constitutional reasoning behind general disfavor of commandeering by federal government).

120. See Jonathan Wood & Ilya Shapiro, *Christie v. NCAA: Anti-Commandeering or Bust*, FEDERALIST SOC'Y (Nov. 10, 2017), <https://fedsoc.org/commentary/publications/christie-v-ncaa-anti-commandeering-or-bust> [<https://perma.cc/C3TY-ZASQ>] (“Commandeering also undermines the political process by obscuring the officials who are responsible for a given policy.”).

121. See *id.* (stating that PASPA is violation of anti-commandeering because it dictates to New Jersey what its laws must be, thus preventing New Jersey from deciding its own policy).

122. See *id.* (“By preserving political accountability, the anti-commandeering principle aligns government with the preferences of the governed and creates incentives for states to find better, smarter ways to promote the public interest, without necessarily favoring more or less government.”).

123. See *Christie v. Nat'l Collegiate Athletic Ass'n*, 137 S. Ct. 2327 (June 27, 2017) (granting certiorari to New Jersey).

124. *Christie II en banc*, 832 F.3d 389, 399–402 (3d Cir. 2016) (drawing comparison to federal government forcing states to take title to waste in *New York* and federal government forcing states to do background checks on gun purchasers in

ment that unless PASPA provides for options beyond a complete repeal or a complete ban on sports wagering, it violates the anti-commandeering doctrine because it prohibits states from creating their own policy.<sup>125</sup>

The court distinguished PASPA from the law struck down by the Supreme Court in *New York* by stating that the law in that case *required* the state to take action.<sup>126</sup> The court held that because of this distinction, PASPA is not coercive in nature and does not unconstitutionally commandeer the states.<sup>127</sup> New Jersey unsuccessfully argued that PASPA did require affirmative state action because it forced the state to maintain the laws it already had banning sports gambling.<sup>128</sup>

This distinction is one that raises a major constitutional question.<sup>129</sup> The Supreme Court will have to address the issue of what exactly *New York* and *Printz* represent.<sup>130</sup> One possibility is for the Court to hold that *New York* and *Printz* represent the principle that the federal government cannot force states to use their own resources to carry out a federal program.<sup>131</sup> If the Court takes this route, PASPA could be upheld as constitutional because it does not

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*Printz* in sense that PASPA effectively prohibits New Jersey legislature from implementing sports gambling program as it sees fit within its borders), *cert. granted sub nom. Christie v. Nat'l Collegiate Athletic Ass'n*, 137 S. Ct. 2327 (June 27, 2017).

125. *See id.* (deeming argument too broad in sense that not all partial repeals are created equal).

126. *See id.* at 402 (referring to requirements to take title to radioactive waste and perform background checks for firearm purchases forced on states by Congress).

127. *See id.* at 402 (“We reject the notion that PASPA presents states with a coercive binary choice or affirmative command and conclude, as we did in *Christie I*, that it does not unconstitutionally commandeer the states.”).

128. *See id.* at 393 (arguing that Congress was effectively coercing states by forcing them to retain bans on sports gambling).

129. *See* Amy Howe, *The 10th Amendment, Anti-Commandeering and Sports Betting: In Plain English*, SCOTUS BLOG (Aug. 14, 2017), <http://www.scotusblog.com/2017/08/10th-amendment-anti-commandeering-sports-betting-plain-english/> [<https://perma.cc/BK25-TUMN>] (distinguishing well-understood principle that federal government cannot “commandeer” state to enforce federal law from PASPA which is prohibitive in nature).

130. *See generally* *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). *New York* and *Printz* could either be interpreted narrowly to deem Congress’s prohibition of a repeal constitutional, or broadly to deem Congress’s prohibition of a repeal unconstitutional. *See infra* notes 131–134 and accompanying text.

131. *See* *New York v. United States*, 505 U.S. at 174 (“A State whose citizens do not wish it to attain the Act’s milestones may devote its attention and its resources to issues its citizens deem more worthy; the choice remains at all time with the residents of the State, not with Congress.”).

force states to take any affirmative action through the use of state resources.<sup>132</sup>

Another possibility is for the Court to hold that the federal government cannot coerce state legislatures to govern pursuant to a federal agenda in any way, regardless of whether such coercion is affirmative or prohibitive in nature.<sup>133</sup> This principle is embodied in then-New Jersey governor Chris Christie's quote that PASPA is "dramatic, unprecedented, and in direct conflict with the Court's Tenth Amendment jurisprudence barring Congress from controlling how the States regulate private parties."<sup>134</sup>

The Court should overturn the decision of the Third Circuit because it effectively allows Congress to dictate to New Jersey what its laws must be.<sup>135</sup> This violates the anti-commandeering doctrine because it contradicts the constitutional principles of federalism and shields elected officials from political accountability at the federal level.<sup>136</sup> Rather than instituting a federal ban, PASPA forbids states from authorizing sports gambling.<sup>137</sup> In 1932, Justice Louis Brandeis delivered the opinion for the Supreme Court in *New State Ice Co. v. Liebmann*<sup>138</sup> and famously stated that the "[d]enial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>139</sup> If PASPA is upheld, it would deter states from taking the experimental risks identified by the

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132. See Howe, *supra* note 129 (serving as narrow interpretation of anti-commandeering doctrine on spectrum of constitutionally prohibited acts by federal government).

133. See *Printz*, 521 U.S. at 920–21 ("[T]he Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people.").

134. Howe, *supra* note 129 (quoting Chris Christie).

135. See Jonathan Wood, *Symposium: In Sports-Betting Case, the Supreme Court Should Bet on Federalism*, SCOTUS BLOG (Aug. 16, 2017), <http://www.scotusblog.com/2017/08/symposium-sports-betting-case-supreme-court-bet-federalism/> [<https://perma.cc/T77Y-RD94>] (outlining history of New Jersey's challenge to PASPA and issues to be addressed by Supreme Court).

136. See *id.* ("PASPA also undermines traditional federalism principles by denying states the ability to experiment with novel solutions to vexing public policy problems.").

137. See *id.* (highlighting fact that institution of federal ban on sports gambling would have been politically unpopular with Nevada due to establish sports gambling industry in Las Vegas).

138. 285 U.S. 262 (1932).

139. *Id.* at 311.

Court in *New State Ice*, which provide tremendous benefits to the entire nation.<sup>140</sup>

## 2. *Equal Sovereignty Among the States*

The doctrine of equal sovereignty is based on the principle that all states are offered equal power and authority with respect to one another.<sup>141</sup> The most recent case to reach the Supreme Court regarding equal sovereignty is *Shelby County v. Holder*.<sup>142</sup> There is much debate among Supreme Court Justices about whether the Constitution actually requires equal sovereignty among states.<sup>143</sup> The majority opinion written by Chief Justice Roberts in *Shelby County* states, “not only do States retain sovereignty under the Constitution, there is also a ‘fundamental principle of equal sovereignty’ among the States.”<sup>144</sup> Critics of this opinion describe the holding as a conclusion drawn by the majority with little support.<sup>145</sup> In striking down a law related to the regulation of elections, the Court in *Shelby County* argued that the power to regulate elections is granted heightened protection because it was something the Framers specifically emphasized as belonging to the states.<sup>146</sup> But this

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140. See Wood, *supra* note 135 (explaining that if PASPA is upheld it would give Congress power to pass laws similar to PASPA that forbid states from repealing their own laws even if laws turn out to be expensive, ineffective, or politically unpopular).

141. See, e.g., Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1089 (2016) (discussing equal sovereignty). But see *id.* at 1090 (noting on contrary that some constitutional experts, including Judge Richard Posner and Justice Ginsburg, argue there is no equal sovereignty doctrine in U.S. Constitution).

142. 570 U.S. 529 (2013) (striking down portion of Voting Rights Act of 1965 because of restrictions placed on some states and not others).

143. See Colby, *supra* note 141, at 1089 (mentioning sharp 5-4 split among justices in *Shelby Cty.* decision as evidence of this fact, with Justices Roberts, Scalia, Kennedy, and Alito joining in majority opinion, Justice Thomas concurring, and Justices Ginsburg, Breyer, Sotomayor, and Kagan dissenting).

144. See *Shelby Cty.*, 570 U.S. 544 (quoting *Nw. Austin Mun. Util. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

145. See *id.* at 588 (Kagan, J., dissenting) (“Today’s unprecedented extension of the equal sovereignty principle outside its proper domain—the admission of new States—is capable of much mischief. Federal statutes that treat States disparately are hardly novelties.”); Colby, *supra* note 141, at 1089 (pointing out widespread criticism of opinion from both left and right and surprising lack of support for decision given important status of case).

146. See *Shelby Cty.*, 570 U.S. at 546 (“More specifically, ‘the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.’”) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461–62 (1991); *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)).

aspect of the holding also has its critics.<sup>147</sup> One professor argues that “statutes like PASPA are constitutionally questionable” given the holding in *Shelby County*.<sup>148</sup>

In *Christie I*, New Jersey argued that Nevada, which has the least restrictive sports gambling environment in the United States, receives preferential treatment under PASPA with respect to other states in violation of the equal sovereignty doctrine.<sup>149</sup> The Court of Appeals for the Third Circuit rejected this argument, and though it acknowledged the similarities between PASPA and the law struck down in *Shelby County* with regard to equal sovereignty, it pointed out that the Court in *Shelby County* recognized heightened constitutional protection for election law.<sup>150</sup>

### 3. *Standing and Harm to the Plaintiff*

In order to bring any legal proceeding, a plaintiff must have standing.<sup>151</sup> This means a plaintiff must show that he suffered actual harm from the violation of a legally protected interest, that the harm is traceable to actions of the defendant, and that a favorable ruling by a court would redress the injury.<sup>152</sup>

In *Christie I*, New Jersey argued that the sports leagues lacked standing to bring suit in court.<sup>153</sup> The leagues argued they would suffer harm from legal sports gambling because of the negative perception associated with an inevitable increase in match fixing.<sup>154</sup> New Jersey asserted that the leagues’ claim regarding negative public perception was speculative and that the leagues failed to show

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147. See Rodenberg & Holden, *supra* note 68, at 2 (explaining Justice Ginsburg’s dissenting opinion in *Shelby Cty* that raised question as to whether PASPA would “remain safe given Court’s expansion of equal sovereignty’s sway”).

148. *Id.* (quoting Colby, *supra* note 141, at 1091).

149. See *Christie I*, 730 F.3d 208, 237–39 (3d Cir. 2013) (referring to fact that Nevada is only state lawfully operating virtually unrestricted sports betting schemes).

150. See *id.* at 238 (distinguishing between PASPA and election law addressed in *Shelby Cty* in that *Shelby Cty* represented “an uncommon exercise of congressional power” because “the Framers of the Constitution intended the States to keep for themselves . . . the power to regulate elections.”) (quoting *Shelby Cty.*, 570 U.S. at 546).

151. See, e.g., *Standing*, CORNELL L. SCH. LEGAL INFORMATION INST., <https://www.law.cornell.edu/wex/standing> [<https://perma.cc/44KV-4B39>] (last visited Mar. 3, 2018) (explaining requirement for obtaining favorable judgment in court apart from substantive merits of legal claim).

152. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

153. See *Christie I*, 730 F.3d at 218 (basing argument on fact that leagues suffer no harm from legalization of sports gambling in New Jersey).

154. See *id.* (claiming fans naturally suspect players to have hidden financial motives to fix games when sports gambling is legal).

any harm from an increase in *legalized* sports betting.<sup>155</sup> The trial court relied on *OFC Comm Baseball v. Markell* to reject New Jersey's argument, holding that "reputational injury is a legally cognizable harm that may confer standing."<sup>156</sup> Additionally, the trial court stated that there were sufficient facts in the record to support the leagues' claims and withstand New Jersey's argument that the harm was speculative.<sup>157</sup>

The court also addressed the leagues' claim that they would become the object of state-licensed gambling and suffer reputational harm if New Jersey was permitted to legalize sports gambling.<sup>158</sup> It held that there was sufficient evidence that legalizing sports gambling is linked to increased incentives for match fixing.<sup>159</sup> The court came to this conclusion partly based on a report by the National Gambling Impact Study Commission prepared at Congress's request explaining that athletes are "often tempted to bet on contests in which they participate, undermining the integrity of sporting contests."<sup>160</sup> As such, the court rejected New Jersey's argument that the gambling activities of unknown third parties could not cause injury to the leagues.<sup>161</sup> The court referred to the leagues' argument for standing as a "straightforward conclusion, particularly given the stigmatizing effect of having sporting contests associated with gambling, a link that is confirmed by commonsense and Congress' own conclusions."<sup>162</sup>

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155. *See id.* (emphasizing word "legalized" to imply that legalization would create no risk for additional negative perception because it would shift sports gambling from illegal channels to legal, regulated markets without increasing total amount of gambling).

156. *Id.* (discussing trial court's reasoning); *see also* *OFC Comm Baseball v. Markell*, 579 F.3d 293, 302 (3d Cir. 2009) (blocking Delaware from expanding currently-existing sports gambling scheme).

157. *See Christie I*, 730 F.3d at 220–22 (concluding that record indicated that potential for reputational harm to leagues was more than mere speculation, referring to fact that Congress also reached conclusion that there is link between legalizing sports gambling and harm to integrity of professional sports when it passed laws addressing gambling and sports, and citing studies presented in court "showing that: (1) some fans from each league viewed gambling as a problem area for leagues . . . ; (2) some fans did not want a professional sports franchise to open in Las Vegas . . . ; and (3) a large number of fans oppose expansion of legalized sports betting").

158. *See id.* at 219 (stating that legalization would permit New Jersey to profit off of leagues' product).

159. *See id.* at 221 (noting that Congress reached same conclusion when it passed PASPA).

160. *Id.* (quoting 1999 National Gambling Impact Study Commission).

161. *See id.* at 222 (comparing claim to libel and breach of contract in sense that judicially rectifiable claims can exist where harm is brought upon plaintiff through reaction of third parties).

162. *Id.* at 224 (footnote omitted).

#### 4. Congress's Power Under the Commerce Clause

According to the Supreme Court, the Commerce Clause of the Constitution gives Congress “considerabl[e] . . . latitude in regulating conduct and transactions.”<sup>163</sup> The Commerce Clause grants Congress the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>164</sup> At its core, it allows Congress to regulate activity that “substantially affects interstate commerce” if the activity “arise[s] out of or is connected with a commercial transaction.”<sup>165</sup> Importantly, regulation of such activity is disfavored if it is not considered economic in nature.<sup>166</sup>

As a threshold matter, the court in *Christie I* was forced to address whether Congress had the authority to enact PASPA under the Commerce Clause.<sup>167</sup> In its analysis, it held that gambling on sports is an economic, financial transaction and leagues are inherently economic because they operate as for-profit entertainment businesses.<sup>168</sup> Therefore, according to the court, because the leagues are inherently economic and their organizations generate revenue throughout the nation, the leagues’ operations “substantially affect” interstate commerce.<sup>169</sup> In addition, the court relied on precedent and cited *United States v. Riehl*,<sup>170</sup> which stated “gambling involves the use and has an effect upon interstate commerce.”<sup>171</sup>

New Jersey proceeded to argue that PASPA is unconstitutional under the Commerce Clause because it “reaches unlimited betting activity that cannot possibly affect interstate commerce” by prohibiting gambling that is completely intrastate in nature such as wagers

163. *Id.* (alteration in original) (quoting *United States v. Morrison*, 529 U.S. 598, 608 (2000)).

164. U.S. CONST., art. I, § 8, cl. 3.

165. *Christie I*, 730 F.3d at 224 (alteration in original) (quoting *United States v. Lopez*, 514 U.S. 549, 561 (1995)).

166. *See id.* at 224 (citing *Lopez*, 514 U.S. at 567) (claiming Congress does not have authority under Commerce Clause to prohibit weapon possession near schools because it is non-economic activity); *see also id.* (citing *Morrison*, 529 U.S. at 613) (claiming Congress does not have authority under Commerce Clause to enact law prohibiting violence against women because it is non-economic activity).

167. *See id.* at 224–26 (addressing Commerce Clause argument and implying this is relatively weak argument by New Jersey).

168. *See id.* at 225 (citing fact that National Football League describes itself as “complex business model that includes a diverse range of revenue streams, which contribute . . . to company profitability”).

169. *See id.* (“[T]here can be no serious dispute that the professional and amateur sporting events at the heart of the Leagues’ operations “substantially affect” interstate commerce.”).

170. 460 F.2d 454 (3d Cir. 1972).

171. *Christie I*, 730 F.3d at 225 (quoting *Riehl*, 460 F.2d at 458).

between friends or family members.<sup>172</sup> The Court swiftly dismissed this argument pointing to the fact that PASPA addresses gambling “schemes” carried out “pursuant to law or compact.”<sup>173</sup> According to the court, examples of casual betting among friends or family are not prohibited by PASPA, as PASPA only prohibits “systematic plan[s]” carried out pursuant to state law.<sup>174</sup> The court also articulated that even if such activity is regulated under PASPA, it would not violate the Commerce Clause because Congress had a “rational basis for concluding that the activity in the aggregate has a substantial effect on interstate commerce.”<sup>175</sup> Ultimately, the court concluded that PASPA is not unconstitutional in any way with respect to the power given to Congress by the Commerce Clause.<sup>176</sup>

## B. PASPA’s Failure from a Policy Perspective

PASPA harms states because it strips them of the opportunity to increase economic output on the back of the sports gambling industry.<sup>177</sup> It has failed to adequately protect consumers by enabling a shift from controlled, regulated betting environments to a massive underground illegal market.<sup>178</sup> Protecting the integrity of sporting events and monitoring the mental health of bettors is encumbered by PASPA because it prohibits the implementation of technological safeguards in the industry.<sup>179</sup> PASPA is also unneces-

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172. *Id.* at 225 (quoting Brief of Appellant New Jersey Thoroughbred Horsemen’s Ass’n at 34, *Christie I*, 730 F.3d 208 (No. 13-1714)).

173. *Id.* (citing 28 U.S.C. § 3702).

174. *Id.* at 225 (quoting *Scheme*, BLACK’S LAW DICTIONARY (9th ed. 2009)) (rejecting New Jersey’s interpretation of PASPA that Congress is regulating all “competitive games” involving “amateur or professional athletes”).

175. *Id.* at 226 (citing *Gonzalez v. Raich*, 545 U.S. 1, 19–20 (2005)) (explaining holding in prominent Supreme Court Commerce Clause case in which Court held that Congress had power under Commerce Clause to regulate wheat production even when activity was intrastate in character because interstate market for wheat was substantially affected in aggregate).

176. *See id.* at 215 (highlighting weakness in New Jersey’s Commerce Clause argument in that it did not raise any significantly problematic legal issues and was not highly compelling).

177. *See infra* notes 181–199 and accompanying text (referring to tax revenues, job creation, and attracting tourists as ways to increase economic output).

178. *See infra* notes 200–215 and accompanying text (arguing that PASPA’s unintended consequences have caused harm to consumers in sports gambling industry by forcing them to transact with illegal organizations in uncontrolled environments).

179. *See infra* notes 216–228 and accompanying text (discussing use of technological safeguards to track suspicious betting activity and monitor bettors for unhealthy tendencies).



sary because a majority of Americans now perceive sports gambling to be a morally acceptable activity.<sup>180</sup>

### 1. *The Opportunity Cost of PASPA*

According to the State of New Jersey, “sports betting in the United States . . . is a \$500 billion per year industry,” but most of the activity occurs illegally.<sup>181</sup> According to the American Sports Betting Coalition, \$56 billion of the \$58 billion that will be wagered on the 2017–2018 NFL season will be done so illegally.<sup>182</sup> Since 1992, when states could no longer decide to legalize sports gambling under PASPA, most of the revenue generated from this industry has been funneled to organized crime and offshore websites.<sup>183</sup> Legalizing sports gambling and “creating a regulated market for sports betting would create up to \$26.6 billion in annual economic impact.”<sup>184</sup> Legalization could also lead to the creation of an estimated 152,000 jobs in the United States.<sup>185</sup> These jobs could pay total wages of \$7.5 billion annually to employees.<sup>186</sup> The United Kingdom, for example, benefits from employing over 100,000 people in the sports gambling industry.<sup>187</sup> Sports gambling allows the

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180. See *infra* notes 229–238 and accompanying text (noting major shift from 1992 when PASPA was enacted).

181. *Christie I*, 730 F.3d at 215 (stating New Jersey’s argument that PASPA is ineffective because it led to increased amount of sports gambling and shift to illegal markets rather than reduction in sports gambling).

182. See AM. SPORTS BETTING COALITION, *supra* note 54 (making argument that Americans are not responding to PASPA by refraining from sports gambling, but instead placing bets in unregulated, underground environment).

183. See Andrew Vacca, Comment, *Sports Betting: Why the United States Should Go All In*, 11 WILLAMETTE SPORTS L.J. 1, 2 (2014) (implying correlation between enactment of PASPA and increase in illegal gambling entities due to lack of government regulation).

184. Stacy Papadopoulos, *Symposium: Lift the Harmful, Failing Federal Ban on Sports Betting (Corrected)*, SCOTUS BLOG (Aug. 15, 2017, 2:26 PM), <http://www.scotusblog.com/2017/08/symposium-lift-harmful-failing-federal-ban-sports-betting/> [<https://perma.cc/B86R-7WV4>] (accounting for overall impact of legal sports gambling such as increased tourism, not just revenues generated directly from betting).

185. See Jonathan D. Salant, *Casino Industry Launches Campaign to Legalize Sports Betting*, NJ.COM (June 13, 2017), [http://www.nj.com/politics/index.ssf/2017/06/casino\\_industry\\_launches\\_effort\\_to\\_legalize\\_sports.html](http://www.nj.com/politics/index.ssf/2017/06/casino_industry_launches_effort_to_legalize_sports.html) [<https://perma.cc/UWR2-2QGQ>] (citing statistics from American Sports Betting Coalition).

186. See Papadopoulos, *supra* note 184 (providing economic benefit directly to citizens beyond potential increase in tax revenues generated from sports gambling).

187. See Zach Schreiber, *supra* note 36, at 374 (explaining one aspect of success of British model for legalization of sports gambling).

United Kingdom to generate more than \$7 billion in annual gross domestic product.<sup>188</sup>

Some communities in the United States pay millions of dollars to finance projects for the creation of new stadiums for sports teams in hopes that these venues will generate revenue by attracting major events.<sup>189</sup> If sports gambling was legal, revenue from betting could be used to aid in the financing of these sports-related projects that benefit communities.<sup>190</sup> The Oakland Raiders' move to Las Vegas is one example of such a project.<sup>191</sup> When discussions of the Raiders' possible relocation began, politicians and businesses were eager to see the move come to fruition because of the benefits that accompany the presence of a prominent professional sports franchise.<sup>192</sup> As part of the deal, Raiders owner Mark Davis and investor Sheldon Adelson would only commit \$1.15 billion of the nearly \$2 billion necessary for the construction of the new stadium.<sup>193</sup> In situations like these, it makes sense to allow states and cities to recoup the public funding used to close these financing gaps by capitalizing on sports gambling, which would create revenue directly in addition to supplementing non-gaming revenues indirectly by serving as an additional draw for customers.<sup>194</sup> If sports

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188. See *id.* (arguing this serves as further evidence that legal sports gambling creates major economic benefits).

189. See Jonathan Crowl, *Politicians, Experts Emphasize Multiple Benefits of Legalized Sports Gambling*, THE POST GAME (Mar. 4, 2015), <http://www.thepostgame.com/blog/spread-sheet/201502/politicians-experts-focus-multiple-benefits-legalized-sports-gambling> [<https://perma.cc/42SE-6WXY>] (giving example of Minneapolis, which spent \$150 million, along with \$348 million of Minnesota state funding, for \$1 billion venue for Minnesota Vikings that won bids to host 2018 Super Bowl and 2019 men's Final Four).

190. See *id.* (providing example of areas directly related to sports and gaming industry that could benefit economically from legalized sports gambling).

191. See Brittany Bronson, *Politicians Place a Bet on a Stadium, and Vegas Pays for It*, N.Y. TIMES (Oct. 7, 2016), <https://www.nytimes.com/2016/10/07/opinion/politicians-place-a-bet-on-a-stadium-and-vegas-pays-for-it.html> (detailing mixed public opinion about whether potential economic impact of Raiders' presence justifies use of approximately \$750 million in public funding).

192. See *id.* (noting relocation supporters' claims that stadium could produce up to \$800 million in new economic activity per year).

193. See *id.* (explaining that remaining balance would be supplemented through public funding by increased tax on hotel rooms).

194. Cf. Brett L.L. Abarbanel, *Estimating the Indirect Contribution of Sports Books: Sports Wagering as a Driver of Other In-House Revenues*, U. NEV., LAS VEGAS, C. HOTEL ADMIN. (2009), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.885.5028&rep=rep1&type=pdf> [<https://perma.cc/N75S-FCWS>] (discussing relationship between revenues generated by sports gambling and overall revenue of casinos by pointing to fact that sports gamblers often use winnings from bets on other amenities within casino).

gambling was not legal in Nevada, it is unlikely that the Raiders' relocation would have been feasible for the city of Las Vegas.<sup>195</sup>

Legalization could also help in places like New Jersey, where sports gambling legislation has been introduced in an effort to revitalize Atlantic City's once-thriving casino industry.<sup>196</sup> Striking down PASPA could generate up to \$173 million in revenue and create thousands of new jobs for New Jersey.<sup>197</sup> One politician in Atlantic City stated, "[i]t's my sincere hope that the Supreme Court will rule in our favor to finally legalize sports betting here in New Jersey . . . . Having sports betting will be another tool in our arsenal to attract more visitors and revenue to Atlantic City."<sup>198</sup> Many feel that New Jersey is unduly burdened by PASPA because of the revenue-generating opportunities it misses out on despite being better prepared to handle sports gambling than other states due to its existing casino gaming infrastructure.<sup>199</sup>

## 2. *A Counterproductive Effect on Consumer Protection*

Many of the issues PASPA attempts to eradicate could be dealt with more efficiently through the use of technological safeguards that only exist in legalized markets.<sup>200</sup> In this sense, the legalization of sports gambling in the United States would lead to more protection for consumers because it would create transparency in the gambling market.<sup>201</sup> Brad Schimel, Attorney General of Wisconsin,

195. See Bronson, *supra* note 191 (comparing Las Vegas to St. Louis, which still owes approximately \$144 million on Rams' stadium despite fact that team left city, and San Diego, which is still in debt from 1997 renovation of Chargers' stadium).

196. See Salant, *supra* note 185 (providing another example of how sports gambling could serve to promote goals of many communities).

197. See Jessica Gresko & Nicholas Huba, *Court Suggests it May Side with New Jersey in Sports Betting Case*, PRESS OF ATLANTIC CITY (Dec. 4, 2017), [http://www.pressofatlanticcity.com/news/press/casinos\\_tourism/court-suggests-it-may-side-with-new-jersey-in-sports/article\\_1561694f-661e-56a2-a131-915c13b8246e.html](http://www.pressofatlanticcity.com/news/press/casinos_tourism/court-suggests-it-may-side-with-new-jersey-in-sports/article_1561694f-661e-56a2-a131-915c13b8246e.html) [<https://perma.cc/BK39-669W>] ("If the PASPA ban is struck down, New Jersey is expected to generate more than \$173 million in additional tax revenue and see the creation of more than 3,633 jobs, according to a study from Oxford Economics.").

198. *Id.* (quoting Assemblyman Vince Mazzeo, D-Atlantic County).

199. See *id.* (quoting Assemblyman Chris Brown of Atlantic County, "[a]t a time when we are revitalizing Atlantic City and hundreds of millions of dollars are leaving the state on sports betting, the federal ban is only punishing New Jersey residents").

200. See Furman, *supra* note 56, at 118 (discussing benefits of repealing PASPA).

201. See Michelle Minton, *Law Enforcement Joins Coalition to End Sports Gambling Ban*, COMPETITIVE ENTERPRISE INST. (June 13, 2017), <https://cei.org/blog/law-enforcement-joins-coalition-end-sports-gambling-ban> [<https://perma.cc/DP8R-6Q52>] (explaining American Gaming Association's reasoning behind new coalition to end ban on sports betting).

stated “[t]he rampant illegal sports betting that currently exists continues to fuel other activities and provides no consumer protections.”<sup>202</sup>

Increased transparency from legalization would allow law enforcement to focus more resources on other important areas of concern.<sup>203</sup> According to one former FBI Director, “a regulated market combined with modern data analytics technology makes it easier to track sports wagering, identify suspicious and anomalous betting patterns, and strengthen the integrity of games.”<sup>204</sup> For example, blockchain technology, which is used by cryptocurrencies like Bitcoin and allows data to be distributed without being copied, can be used in the sports gambling industry to increase regulatory transparency and provide secure systems for bettor payouts.<sup>205</sup> Several companies using blockchain technology already exist and have expressed interest in capturing the market for legal sports gambling.<sup>206</sup>

In the United Kingdom, legitimate companies take bets on various sporting events and set odds based on the likelihood of possible outcomes for each game.<sup>207</sup> Under this system, consumers are better protected from fraudulent activities such as match-fixing, line-altering, and other illegal conduct because the operations are overseen by the companies themselves along with official gaming commissions created to protect the integrity of the operations.<sup>208</sup>

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202. *Id.* (quoting Schimel).

203. *See id.* (insinuating shift in focus towards things such as violent crime from activities involving consensual transactions among adults would be more efficient).

204. Ed Davis et al., *The Federal Sports Betting Ban Has Failed: Let’s Legalize and Regulate It*, THE HILL (June 12, 2017, 9:40 AM), <http://thehill.com/blogs/congress-blog/politics/337367-the-federal-sports-betting-ban-has-failed-lets-legalize-and> [<https://perma.cc/F27E-F5RL>] (citing opinion of Tim Murphy, co-author of article and former FBI deputy director).

205. *See Revolutionizing Sports Betting by Harnessing the Power of Blockchain Technology*, PR NEWswire (Dec. 13, 2017, 8:30 AM), <https://www.prnewswire.com/news-releases/revolutionizing-sports-betting-by-harnessing-the-power-of-blockchain-technology-663884093.html> [<https://perma.cc/6DGJ-UZ7E>] (explaining that blockchain uses database of encrypted transactions in form of blocks arranged in chains to make transactions immutable, which can be used to create secure, trusted payment platforms for sports gambling market).

206. *See id.* (referring to publicly traded companies such as BTL Group, Riot Blockchain, NetCents Technology, and Leeta Gold Corp. currently utilizing blockchain technologies).

207. *See* Schreiber, *supra* note 36, at 375 (explaining how legalized, legitimate sports gambling creates safer environment for bettors).

208. *See id.* (explaining why betting companies share information with each other and how U.K. Gambling Commission protects bettors from cheating and other fraudulent activities).

In 2007, a British sports gambling company that utilizes these safeguards stated that on one occasion it “noticed irregular betting patterns of a professional tennis match in Europe, prompting a subsequent investigation by the Association of Tennis Professionals,” which is an example of how legalization and regulation can help prevent fraudulent activity.<sup>209</sup> The sports gambling industry in the United Kingdom also shows that legalization protects consumers by creating an environment of cooperation between the government and private companies in the industry.<sup>210</sup> This cooperation is mutually beneficial because governments have an interest in rooting out organized crime and private companies rely on their reputational integrity for financial success.<sup>211</sup>

Throughout the United States, the lack of transparency between state governments and unlawful gambling operations creates significant problems.<sup>212</sup> Domestically, those who choose to bet illegally are often cheated out of their winnings.<sup>213</sup> Revenues from illegal gambling are also used to finance other organized crime activity.<sup>214</sup> One professor and criminologist argues that while individuals placing bets may be a harmless activity, illegal gambling operations actually support organized crime activities that victimize others.<sup>215</sup>

### 3. *Sports Gambling as a Social Concern*

One major concern that many opponents of legalized sports gambling have is that lifting the restrictions on sports gambling

209. *Id.* (quoting Woo, *supra* note 19, at 593).

210. *See id.* at 376 (stating private sports gambling companies in United Kingdom are required to report suspicious betting activity to government which helps government control organized crime).

211. *See id.* (exemplifying how, in legal betting markets, critical bond between government and private organizations helps establish safe betting environment).

212. *See* JAY S. ALBANESE, VA. COMMONWEALTH UNIV., *ILLEGAL GAMBLING & ORGANIZED CRIME: AN ANALYSIS OF FEDERAL CONVICTIONS IN 2014 I* (2015), [https://galtery.mailchimp.com/03373c05c46b5e9a6eb445537/files/Albanese\\_Illegal\\_Gambling\\_OC\\_Report\\_2014\\_cases\\_FINAL.pdf](https://galtery.mailchimp.com/03373c05c46b5e9a6eb445537/files/Albanese_Illegal_Gambling_OC_Report_2014_cases_FINAL.pdf) [<https://perma.cc/M2SY-Z8TP>] (showing that betting is not inherently problematic, but gambling-related issues by organized crime do exist in markets where sports gambling is illegal).

213. *See id.* at 1–2 (providing examples of how PASPA removes protections for consumers of sports gambling rather than decreasing access).

214. *See id.* at 1 (stating example of negative effects beyond sports gambling industry fueled by PASPA-created underground market for betting).

215. *See* ALBANESE, *supra* note 212, at 1 (stating that illegalization empowers organized crime members to allocate betting profits to harmful activities, which could be avoided if states could combat organized crime involvement in sports gambling with regulations).

would lead to negative effects on society.<sup>216</sup> In the eyes of one former federal prosecutor, “[f]or the two-thirds of Americans who rarely or never engage in commercial gambling, the [legalization of sports gambling] will be negative . . . . Anyone fairly and comprehensively evaluating the unbiased, independent academic health-care and economic evidence readily finds that it weighs in favor of continuing prohibitions . . . .”<sup>217</sup> A clinical psychologist at the University of Sydney Gambling Treatment Clinic in Australia referred to the legalization of sports gambling in Australia as “gambalization” and noted an increase in the number of negatively-impacted sports bettors since sports gambling became legal.<sup>218</sup> According to Australian Gambling Statistics, Australians lost nearly \$815 million of the \$7.1 billion they bet on sports in 2014 and 2015.<sup>219</sup> Some opponents of sports gambling legalization see that as a sign that addiction has become a problem.<sup>220</sup>

Another issue raised by opponents of sports gambling legalization is the increased likelihood of match-fixing.<sup>221</sup> Former NFL Commissioner Paul Tagliabue was one of the primary forces behind the argument that gambling causes corruption in sports and threatens the integrity of the games.<sup>222</sup> In his September 1991 congressional testimony, he stated “sports gambling threatens the integrity of, and public confidence in, team sports. Sports lotteries inevitably foster a climate of suspicion about controversial plays and intensify cynicism with respect to player performances, coaching decisions, officiating calls and game results.”<sup>223</sup>

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216. See, e.g., David Purdum & Ryan Rodenberg, *Future of Sports Betting: The Pitfalls*, ESPN (Nov. 1, 2016), [http://www.espn.com/chalk/story/\\_/id/17910253/the-future-sports-betting-go-wrong-sports-betting-was-legal-united-states](http://www.espn.com/chalk/story/_/id/17910253/the-future-sports-betting-go-wrong-sports-betting-was-legal-united-states) [<https://perma.cc/EU74-4EPS>] (pointing to instances of addiction to sports gambling and media’s coverage of betting odds in places like Australia).

217. *Id.* (quoting former federal prosecutor Michel K. Fagan).

218. See *id.* (citing Dr. Christopher Hunt, who recalled seeing only “one or two” troubled sports bettors every six months prior to legalization of sports gambling in Australia but noticed increase subsequent to legalization).

219. See *id.* (noting increase from previous year).

220. See *id.* (arguing that this is evidence that sports gambling spiraled out of control once it was legalized).

221. See Fielkow et al., *supra* note 48, at 30 (presenting most widely-used argument by proponents of PASPA in favor of retaining ban on sports betting).

222. See *id.* (showing influence of NFL on climate of sports gambling in United States).

223. *Id.* (quoting *Prohibiting State-Sanctioned Sports Gambling: Hearing on S. 473 and S. 474 Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*, 102d Cong., 1st Sess. 7 (1992) (statement of Paul Tagliabue)).

However, legalizing sports gambling would actually have a positive effect on the integrity of sports.<sup>224</sup> Modern technological safeguards, which could be utilized if sports gambling was legalized and properly regulated, could help to monitor unusual betting activities and identify people with gambling problems.<sup>225</sup> In countries that permit sports gambling, match fixing “scandals [are] more readily exposed and violators” are more easily punished due to increased regulation.<sup>226</sup> In countries like China and India, where match fixing and corruption is rampant, all forms of sports gambling are illegal.<sup>227</sup> Several soccer leagues in countries that ban sports gambling such as Singapore, Malaysia, and China have collapsed due to loss of sponsorships triggered by instances of match fixing.<sup>228</sup>

#### 4. *Changing Moral Views Surrounding Sports Gambling*

The Senate Judiciary Committee’s report recommending the passage of PASPA stated that the Act “serves an important public purpose, to stop the spread of State-sponsored gambling and to maintain the integrity of our national pastime.”<sup>229</sup> It further argued that the threat of expanding sports wagering is “undermin[ing] public confidence in the character of professional and amateur sports” and “promot[ing] gambling among our Nation’s young people.”<sup>230</sup> Again addressing the moral aspect of sports gambling, the report states:

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224. *See id.* at 47–48 (noting NBA Commissioner Adam Silver’s stance that environment surrounding sports betting has changed since enactment of PASPA).

225. *See id.* at 47 (serving as evidence that legalization actually helps promote intended goals of PASPA and eradicates issues presented by proponents of PASPA).

226. STEPHEN F. ROSS ET AL., PENN STATE INST. FOR SPORTS L., POL’Y AND RES., *Reform of Sports Gambling in the United States: Lessons from Down Under* 2, <https://pennstatelaw.psu.edu/sites/default/files/White%20Paper%20%28web%20draft%29.pdf> [<https://perma.cc/YN64-VQYU>] (explaining that not all countries choose to protect integrity of sports by banning sports gambling because legalization can lead to more stringent oversight); *see also Christie II en banc*, 832 F.3d 389, 265 (3d Cir. 2016) (“[PASPA] has also been criticized for encouraging the spread of illegal sports gambling and for making it easier to fix games, since it precludes the transparency that accompanies legal activities.”), *cert. granted sub nom. Christie v. Nat’l Collegiate Athletic Ass’n*, 137 S. Ct. 2327 (June 27, 2017).

227. *See* STEPHEN F. ROSS ET AL., *supra* note 226, at 2 (making point that outlawing sports gambling completely does not necessarily serve to protect integrity of sports and prevent match fixing).

228. *See id.* (citation omitted) (referring to instances of Pirelli and China Central TV backing out of sponsorship deals for soccer leagues).

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

230. *Id.*

[PASPA] represents a judgement that sports gambling . . . is a problem of legitimate Federal concern for which a Federal solution is warranted. 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.<sup>231</sup>

One instance highlighting the issue of integrity in sports gambling is the NBA's Tim Donaghy Scandal of 2007.<sup>232</sup> Donaghy plead guilty to participation in a gambling scheme in which he accepted money from gamblers in exchange for secret information on games that he refereed.<sup>233</sup> As a result, a major issue of fan skepticism surrounding the integrity of sporting events developed.<sup>234</sup>

Today, American attitudes regarding the morality of sports gambling are more positive.<sup>235</sup> At the time PASPA was introduced in Congress, many people saw sports gambling as an inherently immoral activity.<sup>236</sup> Now, nearly two-thirds of Americans believe that it is not immoral to gamble on sports.<sup>237</sup> This sentiment was expressed by NBA Commissioner Adam Silver when he stated that sports gambling "has increasingly become a popular and accepted form of entertainment."<sup>238</sup>

231. *Id.*

232. See Mike Fish, *Donaghy Sentenced to 15 Months in Prison in Gambling Scandal*, ESPN (July 30, 2008), <http://www.espn.com/nba/news/story?id=3509440> [<https://perma.cc/4NMZ-DWZ9>] (showing effects of rigged NBA games on confidence of people who watch games).

233. See *id.* (mentioning Donaghy's statement to U.S. District Judge that he "brought shame on himself, his family and the profession").

234. See *id.* (explaining one University of Pennsylvania professor's quote that "any fan who sees anything other than transparency will have questions").

235. See, e.g., Rodenberg & Holden, *supra* note 68, at 8 (changing from previously negative perception shown by PASPA's 1991 Senate Report referring to sports gambling as "national problem"); see also *Christie II en banc*, 832 F.3d 389, 395 (3d Cir. 2016) ("PASPA is not without its critics, even aside from its economic impact. It has been criticized for prohibiting an activity, i.e., sports gambling, that its critics view as neither immoral nor dangerous."), *cert. granted sub nom. Christie v. Nat'l Collegiate Athletic Ass'n*, 137 S. Ct. 2327 (June 27, 2017).

236. See Rodenberg & Holden, *supra* note 68, at 8 (citing PASPA's 1991 Senate Report referring to moral erosion caused by sports gambling).

237. See Lisa Cannon Green, *Is Sports Gambling Moral? You Bet, Americans Say*, LIFEWAY RES. (Jan. 22, 2016), <http://lifewayresearch.com/2016/01/22/is-sports-gambling-moral-you-bet-americans-say/> [<https://perma.cc/ES47-E362>] (citing new study about change in Americans' beliefs regarding sports gambling).

238. See Amelia Curotto, Note, *Hanging on by a "Tail": New Jersey's 2014 Effort to Legalize Sports Gambling Stays Alive in the Third Circuit*, 23 JEFFREY S. MOORAD SPORTS L.J. 481, 506 (2016) (quoting Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. TIMES (Nov. 13, 2014) [http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adamsilver-legalize-sports-betting.html?\\_r=1](http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adamsilver-legalize-sports-betting.html?_r=1)) (referring to fact that Americans are demanding more secure and legal ways to bet on sports).



## IV. CONCLUSION

New Jersey's challenges to PASPA in the *Christie* cases exposed significant issues related to the statutory interpretation and constitutionality of PASPA.<sup>239</sup> The use of the word "authorize" leaves much room for interpretation within the statute.<sup>240</sup>

The anti-commandeering doctrine is also a major problem for PASPA.<sup>241</sup> The view that *New York* and *Printz* only prohibit Congress from forcing states to use their own resources to carry out federal programs is too narrow.<sup>242</sup> The Supreme Court should strike down PASPA because it effectively strips states of the power to legislate as they see fit within their own borders.<sup>243</sup>

PASPA is also a failure from a policy perspective.<sup>244</sup> A legal sports gambling market would lead to tremendous economic benefits.<sup>245</sup> Not only would it generate tax revenue, but it would also provide much-needed financial assistance for states by creating jobs and increasing overall economic production.<sup>246</sup>

In terms of consumer protection, PASPA has failed because it funnels money from legal, regulated schemes to illegal, corrupt organizations.<sup>247</sup> Some of these organizations use profits generated

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239. For a detailed discussion on the legal issues surrounding PASPA, see *supra* notes 57–176 and accompanying text (explaining New Jersey's attempt to partially repeal sports gambling laws and how lack of affirmative legalization created issues about meaning of word "authorize" and 10th amendment).

240. See Wallach, *supra* note 58 (explaining New Jersey's argument in *Christie* that "authorize" does not mean merely "to permit" or "to allow" but rather to affirmatively sanction something); see also *supra* notes 57–176 and accompanying text (including New Jersey's argument in *Christie* that partial repeal of sports gambling laws was effectively decriminalization, but not authorization, of activity).

241. For a detailed discussion of the anti-commandeering doctrine, see *supra* notes 108–140 and accompanying text (discussing *New York v. United States* and *Printz v. United States*, two Supreme Court decisions that make up body of case law for anti-commandeering doctrine).

242. See *supra* notes 130–134 and accompanying text (comparing narrow interpretation that is unlikely to be accepted by Supreme Court to interpretation asserted by New Jersey calling for broader view of holdings).

243. See *supra* notes 135–140 and accompanying text (contradicting primary purpose of anti-commandeering doctrine, which is to protect states from coercion by federal government and prohibit federal government from using state legislatures as shields from negative voter response).

244. See *supra* notes 177–238 and accompanying text (discussing shortcomings and unintended negative consequences of PASPA).

245. See *supra* notes 181–199 (showing that not only could states generate tax revenue from sports gambling and provide boost to economies, legalization would eradicate corruption and reduce levels of organized crime).

246. See Papadopoulos, *supra* note 184 (estimating \$26.6 billion in annual economic impact nationally from legal sports gambling industry).

247. See Guy Bentley, *Time to End the Failed Ban on Sports Betting*, WASH. EXAMINER (June 15, 2017), <http://www.washingtonexaminer.com/time-to-end-the>

from illegal schemes to fuel organized crime of greater concern to the public than any sports gambling-related concerns.<sup>248</sup> PASPA is counterproductive because it prohibits the increased oversight and regulation of sports gambling that would reduce the likelihood of match fixing and scandals.<sup>249</sup>

The argument that there is a societal cost to legalizing sports gambling is misguided.<sup>250</sup> Many professional and amateur sports leagues argue that legalization would lead to corruption in the form of match fixing scandals and create a negative perception about sports.<sup>251</sup> Others argue that issues related to gambling addiction would become more prevalent in society if the public is granted easier access to betting.<sup>252</sup> A comparison of illegal sports gambling in the United States and legalized sports gambling in other countries shows that neither is true.<sup>253</sup>

As history has shown, public perception on sports gambling has fluctuated over time and is currently on an up-tick relative to the 1990s when PASPA was enacted.<sup>254</sup> Gambling is no longer perceived as an immoral activity.<sup>255</sup> This shift to a more positive public

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failed-ban-on-sports-betting/article/2626063 [https://perma.cc/27FJ-U5LM] (demonstrating that PASPA has failed in sense that it diverts billions of dollars to organized crime and gives corrupt organizations power to manipulate industry with no oversight).

248. See AM. GAMING ASS'N: ILLEGAL GAMBLING ADVISORY BOARD, LAW ENFORCEMENT SUMMIT ON ILLEGAL SPORTS BETTING: AFTER-ACTION REPORT 3 (2016), [https://www.americangaming.org/sites/default/files/After%20Action%20Report\\_PDF-Web.pdf](https://www.americangaming.org/sites/default/files/After%20Action%20Report_PDF-Web.pdf) [https://perma.cc/9RCZ-JFU4] (arguing that law enforcement does not have enough information to combat organized crime related to sports gambling without power to regulate, therefore funds are funneled to violent crime instead of tax revenue for states).

249. See *id.* at 5–6 (showing that match fixing is attractive in illegal gambling environments because of lack of oversight, but this corruption is reduced in legalized environment due to elimination of market for illegal gambling).

250. See *supra* notes 216–228 and accompanying text (arguing legalization would not lead to increased likelihood of addiction to gambling and corruption related to sporting events).

251. See, e.g., *Christie I*, 730 F.3d 208, 215 (3d Cir. 2013) (discussing these arguments).

252. See Purdum & Rodenberg, *supra* note 216 (discussing issue of gambling addiction); see also *supra* notes 218–220 and accompanying text (using example of what some see as problems related to addiction in Australia to support claim).

253. For a detailed discussion on analysis of benefits compared to costs of legalizing sports gambling, see *supra* notes 177–238 and accompanying text (finding mainly that PASPA has not succeeded in reducing levels of gambling on sporting events, but instead led to unintended consequence of creating massive, unregulated betting schemes operated illegally).

254. See Parry, *supra* note 52 (noting Americans' increasingly positive views with respect to morality of gambling).

255. See *id.* (insinuating that because negative public perception played role in PASPA's enactment, positive public perception could play role in its repeal).

perception should be used to garner support in opposition to PASPA in the same way it was used to influence the enactment of PASPA during a period of relatively negative perception.<sup>256</sup>

With PASPA in place, states are missing out on millions in revenue and consumers are less safe because sports gambling is unregulated.<sup>257</sup> Legalization would shift the sports betting market to a legal environment where states could provide better protection for their citizens, fortify their economies, and generate much-needed tax revenue.<sup>258</sup> Americans are betting on sports more now than they ever have in the past and the time has come to officially deem PASPA a failure.<sup>259</sup>

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256. *See id.* (meaning that use of public support could be powerful tool for lawmakers in favor of legalization to persuade other members of Congress to support repeal of PASPA).

257. For a detailed discussion on why PASPA is counterproductive, see *supra* notes 181–215 and accompanying text (arguing that PASPA’s primary effect is to shift betting to illegal markets rather than stop it from happening).

258. *See supra* notes 181–215 (using such benefits to show that PASPA primarily serves to aid criminals who take advantage of consumers in unregulated sports gambling markets and use proceeds for gambling schemes to fund other kinds of illegal activity).

259. *See Christie I*, 730 F.3d 208, 214 (3d Cir. 2013) (“Betting on sports is an activity that has unarguably increased in popularity over the last several decades.”); *see also* Papadopoulos, *supra* note 184 (explaining loss of billions of dollars in potential economic impact due to PASPA).

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