

**POOR MAN WANNA BE RICH,  
RICH MAN WANNA BE KING\*:  
THE BATTLE TO LEGALIZE SPORTS  
BETTING IN THE GARDEN STATE**

*Matthew T. Mierswa\*\**

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\* BRUCE SPRINGSTEEN, *Badlands, on DARKNESS ON THE EDGE OF TOWN* (Columbia Records 1978).

\*\* J.D. Candidate, 2014, Seton Hall University School of Law; B.A. in Political Science, Villanova University, 2010. The author would like to thank Professor Thomas Healy for his candor during the drafting process, Christopher Keating for his diligence in the editing process, and Governor Christie for fighting this fight and creating such an entertaining topic to analyze.



## I. INTRODUCTION

On January 17, 2012, New Jersey Governor Chris Christie signed into law a resolution that would permit betting on sports at New Jersey casinos and racetracks.<sup>1</sup> This action contravened a federal law, the Professional and Amateur Sports Protection Act of 1992 (“PASPA”), which presently forbids the states from allowing legal sports betting, with four specific exceptions.<sup>2</sup> Although wagering on sports is prohibited in 46 states, studies have estimated that as much as \$380 billion changes hands per year in the United States as a result of illegal betting.<sup>3</sup> This number is over one hundred times the amount wagered legally at Nevada sports books in 2011.<sup>4</sup> Because states like New Jersey desire to turn this illegal activity into taxable business transactions, PASPA has not existed without controversy. In 2009, Delaware passed a law that would have expanded the types of sports wagering activity permitted within its borders, and in both 2007 and 2011 private citizens (in the latter case, New Jersey state legislators) sued to have PASPA declared unconstitutional.<sup>5</sup> Presently, five major athletic organizations have brought suit to enjoin the implementation of the New Jersey plan to permit sports betting, claiming that legalized sports betting in New Jersey would threaten the integrity of the athletic contests they oversee.<sup>6</sup> Given that New

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<sup>1</sup> Wayne Parry, *Christie Signs Sports Betting Bill Into Law*, ASSOCIATED PRESS, Jan. 17, 2012, <http://www.profootballweekly.com/2012/01/17/christie-signs-nj-sports-betting-bill-into-law>.

<sup>2</sup> Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701-3704 (1992); *see also id.* at § 3704 (creating exceptions that specifically apply to the pre-existing betting practices in the states of Delaware, Montana, Nevada, and Oregon, as well as for “pari-mutuel animal racing or jai alai games.” § 3704 also opened a one-year window in which New Jersey could pass a law qualifying it for an exemption of its own).

<sup>3</sup> NAT’L GAMBLING IMPACT STUDY COMM’N REPORT 2-14 (1999) *available at* <http://govinfo.library.unt.edu/ngisc/reports/finrpt.html>.

<sup>4</sup> *Sports Wagering Fact Sheet*, AMERICAN GAMING ASSOCIATION, <http://www.americangaming.org/industry-resources/research/fact-sheets/sports-wagering> (last visited Oct. 1, 2012).

<sup>5</sup> *Interactive Media Entm’t and Gaming Ass’n, Inc. v. Holder*, Civil Action No. 09-1301, 2011 WL 802106, at \*5-6 (D.N.J. Mar. 7, 2011) (discussing *OFC Comm Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009) and *Flagler v. U.S. Attorney for the Dist. of N. J.*, Civ. No. 06-3699, 2007 WL 2814657, at \*2-3 (D.N.J. Sept. 25, 2007)).

<sup>6</sup> *See generally* Complaint for Declaratory and Injunctive Relief, Nat’l Collegiate Athletic Ass’n v. Christie, No. CV124947, 2012 WL 3171566, at \*1 (D.N.J. Aug. 7,

Jersey's law violates PASPA on its face, the only viable defense the state has is to attack the constitutionality of the federal law. Importantly, none of the previous three suits involving PASPA reached any constitutional arguments.<sup>7</sup> Yet, even if New Jersey's constitutional challenge is not viable, there are numerous policy reasons why a repeal of PASPA should be explored.

Part II of this Note is an overview of the history of the Professional and Amateur Sports Protection Act and related litigation, including the ongoing lawsuit involving the state of New Jersey. Part III walks through the constitutional arguments made in New Jersey's cross-motion for summary judgment, and those arguments made again on appeal—arguments that were adopted in a dissenting opinion by Judge Vanaskie of the Court of Appeals for the Third Circuit. In Part IV, this Note explores a number of policy arguments against PASPA's blanket prohibition, as well as a number of game-fixing and point-shaving scandals that are often cited in support of banning sports betting. Finally, Part V makes the policy argument that even if New Jersey's constitutional challenges lack merit, PASPA should be revisited in light of this challenge because of the positive effects a repeal or revision are likely to have on gambling enforcement, as well as on New Jersey's economy.

## II. OVERVIEW OF PASPA

### A. *Legislative History*

On February 22, 1991, Senator Dennis DeConcini of Arizona introduced S. 474, the Professional and Amateur Sports Protection Act, which would prohibit sports gambling throughout the United

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2012) (complaint on behalf of Major League Baseball, the National Basketball Association, the National Collegiate Athletic Association, the National Football League, and the National Hockey League).

<sup>7</sup> See generally *Interactive Media Entm't and Gaming Ass'n*, 2011 WL 802106 (holding that plaintiffs lacked standing to sue); *OFC Comm Baseball*, 579 F.3d 293 (holding that the statute should be construed narrowly to limit Delaware to forms of gambling precisely as they existed at the time of the passage of PASPA); *Flagler*, 2007 WL 2814657 (holding that plaintiff lacked standing to sue).

States in locations where it did not already exist.<sup>8</sup> DeConcini asserted that the activities he sought to ban “threaten[] the integrity and character of, and public confidence in, professional and amateur sports, and instill[] inappropriate values in our Nation’s youth.”<sup>9</sup> As the bill passed through committee and moved closer to passage, a number of legislators spoke out against it, notably Frank Lautenberg of New Jersey.<sup>10</sup> Senator Lautenberg expressed concern that the format of the bill, creating an exception by which Nevada could permit sports betting at its casinos, would cause serious harm to the Atlantic City, New Jersey casino industry.<sup>11</sup> Senator Lautenberg’s criticism was undercut, however, by the passionate support the bill received from his fellow New Jersey senator, Bill Bradley.<sup>12</sup> As a former professional basketball player, Senator Bradley’s credibility in opposing legalized sports betting was apparently unassailable.<sup>13</sup> As a champion of PASPA, Bradley seriously damaged any chance New Jersey had of formulating a legitimate narrative of discrimination.<sup>14</sup>

President George H.W. Bush signed PASPA into law on October 28, 1992.<sup>15</sup> Thanks to the exceptions contained in § 3703, New Jersey had the opportunity to pass a law permitting sports betting within one year of the date PASPA became law.<sup>16</sup> As a result of the political infighting in the state legislature, as well as the lack of support from Senator Bradley, New Jersey did not pass such a law.<sup>17</sup>

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<sup>8</sup> 137 CONG. REC. S2,256-04 (daily ed. Feb. 22, 1991) (statement of Sen. Dennis DeConcini).

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

<sup>10</sup> 138 CONG. REC. S7,300-01 (daily ed. June 2, 1992) (statement of Sen. Frank Lautenberg).

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

<sup>12</sup> *See generally* Bill Bradley, *The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORT L. 5 (1992) (arguing vehemently for the passage of PASPA).

<sup>13</sup> Joseph F. Sullivan, *Gambling Debate Rages Anew Over Sports*, N.Y. TIMES, Nov. 20, 1991, <http://www.nytimes.com/1991/11/20/nyregion/gambling-debate-rages-anew-over-sports.html?pagewanted=all&src=pm>.

<sup>14</sup> *Id.*

<sup>15</sup> 138 CONG. REC. S18,332-01 (daily ed. Oct. 29, 1992) (statement of Sen. Dennis DeConcini).

<sup>16</sup> 28 U.S.C.A. § 3703 (West 1992).

<sup>17</sup> Joseph F. Sullivan, *Judges in Trenton Reject Sports Betting Plan*, N.Y. TIMES, Dec.

*B. Prior Litigation*

On August 7, 2006, James Flagler, a private citizen of New Jersey, filed suit against then-U.S. Attorney General Alberto Gonzales and Chris Christie, then the U.S. Attorney for the District of New Jersey, alleging that PASPA violates the 10<sup>th</sup> Amendment and is beyond the reach of the Commerce Power.<sup>18</sup> The district court ruled that the plaintiff did not satisfy constitutional or prudential standing requirements.<sup>19</sup> Specifically, the court found that Mr. Flagler failed to demonstrate that the federal prohibition on sports wagering activities represented an “injury-in-fact,” as well as that a favorable disposition on the case would have adequately redressed his perceived injuries.<sup>20</sup> Thus, although the challenge failed, the district court did not establish any precedent regarding PASPA’s constitutionality.

On May 14, 2009, Delaware Governor Jack Markell signed a law that would permit “point spread bets . . . over/under bets . . . and . . . multi-game parlay bets.”<sup>21</sup> Following a request from Governor Markell, the Delaware Supreme Court ruled in an advisory opinion on May 29, 2009, that the legislation did not violate state law.<sup>22</sup> The same five entities that are plaintiffs in the ongoing New Jersey suit sought an injunction against the Delaware plan.<sup>23</sup> The U.S. District Court for the District of Delaware denied the injunction and the leagues were granted an interlocutory appeal to the Third Circuit Court of Appeals.<sup>24</sup> In *Markell*, the Third Circuit’s analysis focused on the language of PASPA outlining the exception under which Delaware had qualified.<sup>25</sup> The opinion turns on the interpretation of a single phrase: “**to the extent that the scheme was conducted by that State.**”<sup>26</sup> Delaware interpreted this phrase to mean that since it had

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18, 1993, <http://www.nytimes.com/1993/12/18/nyregion/judges-in-trenton-reject-sports-betting-plan.html?pagewanted=2&src=pm>.

<sup>18</sup> *Flagler*, 2007 WL 2814657, at \*1.

<sup>19</sup> *Id.*, at \*2.

<sup>20</sup> *Id.*, at \*2, \*3.

<sup>21</sup> *Markell*, 579 F.3d at 295.

<sup>22</sup> *Id.* at 295-96.

<sup>23</sup> *Id.* at 295.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 300-04.

<sup>26</sup> *Id.* at 301 (emphasis in original).

conducted some form of sports betting, it remained eligible to conduct any other form of sports betting.<sup>27</sup> The majority sided with the leagues' interpretation, that the inclusion of such a phrase within the statute exhibited Congress' intent to limit Delaware to precisely the scheme that existed at the time of the passage of PASPA.<sup>28</sup> The constitutionality of PASPA was never raised by Governor Markell, nor addressed by the court.<sup>29</sup>

On March 7, 2011, New Jersey State Senators Raymond Lesniak and Stephen Sweeney, in conjunction with three New Jersey Horsemen's Associations and iMEGA, a group that publicizes internet gambling, brought suit against Attorney General Eric Holder and Paul Fishman, U.S. Attorney for the District of New Jersey, challenging the constitutionality of PASPA.<sup>30</sup> The plaintiffs alleged nine counts in which Congress exceeded its constitutionally delegated authority in enacting PASPA.<sup>31</sup> The district court found that iMEGA and the Horsemen's Associations did not meet the injury-in-fact or redressability requirements to have standing in the case.<sup>32</sup> The court also held that Senators Sweeney and Lesniak failed to satisfy the injury in fact and redressability requirements, as well as the requirements to achieve "institutional standing" under *Coleman v. Miller*.<sup>33</sup> Finally, the court concluded that only states— rather than private individuals— have the requisite standing to make Tenth Amendment challenges.<sup>34</sup>

### C. *History of the New Jersey Law*

On Election Day 2011, New Jersey voters supported by a nearly two-to-one margin a non-binding referendum that suggested

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<sup>27</sup> *Markell*, 579 F.3d at 301.

<sup>28</sup> *Id.*

<sup>29</sup> *iMEGA v. Holder*, No. 09CV01301, 2011 WL 802106, at \*5 n.2 (D.N.J. Mar. 7, 2011).

<sup>30</sup> *Id.* at \*1.

<sup>31</sup> See generally Complaint and Demand for Declaratory Relief, *iMEGA v. Holder*, No. 09CV01301, 2009 WL 4890878, \*1 (D.N.J. Mar. 23, 2009).

<sup>32</sup> *iMEGA*, 2011 WL 802106, at \*4 (D.N.J. Mar. 7, 2011).

<sup>33</sup> *iMEGA*, 2011 WL 802106, at \*6, \*7 (D.N.J. Mar. 7, 2011) (citing *Coleman v. Miller* 307 U.S. 433 (1939)).

<sup>34</sup> *Id.* at \*8, \*9.

permitting sports betting at Atlantic City casinos, the racetracks at Monmouth Park, The Meadowlands, Freehold Raceway, the Atlantic City Race Course, and a former track in Cherry Hill.<sup>35</sup> In the face of such overwhelming support, an amendment to the New Jersey State Constitution was passed, establishing the constitutionality of a future law permitting sports betting.<sup>36</sup> On November 21, 2011, Senator Raymond Lesniak introduced a bill in the New Jersey State Senate “permit[ting] wagering at casinos and racetracks on certain professional and collegiate sports or athletics events.”<sup>37</sup> One week later, on November 28, Assemblyman John Burzichelli sponsored an identical version of Lesniak’s bill.<sup>38</sup> In the statement accompanying the initial drafts, legislators established tax rates to be paid by casinos and racetracks on future sports book income, as well as the conditions that would apply to the state’s newfound tax revenues.<sup>39</sup> The bulk of tax revenues paid to the state will fund programs for senior citizens and individuals with disabilities.<sup>40</sup> A small percentage will fund community and economic development projects throughout the state and a percentage of the registration fee paid by the casinos and racetracks will fund treatment programs for compulsive gamblers.<sup>41</sup>

The bill went through two revisions in the New Jersey State Assembly, the more notable of the two eliminating the ability of patrons to place bets with licensed entities through use of the internet or other electronic devices.<sup>42</sup> The Assembly bill replaced its Senate counterpart as the final version on January 9, 2012, and passed by a unanimous vote on the same day.<sup>43</sup> On January 17, 2012,

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<sup>35</sup> Wayne Parry, *NJ voters: We want to bet on sports if US says yes*, ASSOCIATED PRESS (Nov. 9, 2011), <http://www.businessweek.com/ap/financialnews/D9QT8KIG0.htm>.

<sup>36</sup> N.J. Const., Art. IV, § 7, para. 2 (amended Dec. 8, 2011).

<sup>37</sup> S. 3113, 214th Leg. (N.J. 2011).

<sup>38</sup> A.B. 4385, 214th Leg., 1st Ann. Sess. (N.J. 2011).

<sup>39</sup> A.B. 4385, 214th Leg., 1st Ann. Sess. (N.J. Nov. 28, 2011).

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

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

<sup>42</sup> A.B. 4385, 214th Leg., 1st Ann. Sess. (N.J. Jan. 17, 2012) (omissions from §§ 2(d), (e)).

<sup>43</sup> Permits Wagering at Casinos and Racetracks on Certain Professional and Collegiate Sports or Athletic Events, A.B. 4385, 2010-11 Sess. (N.J. 2010), replaced by



Governor Chris Christie signed the final version of the bill into law, officially defying PASPA.<sup>44</sup> In public statements, Assemblyman Burzichelli explained that “sports gaming is already taking place, but the only people taking advantage of it are bookies and criminal enterprises. This opens the door for New Jersey to implement well-regulated sports gambling.”<sup>45</sup> In an attempt to aid New Jersey’s efforts to make legalized sports wagering a reality, Congressmen Frank Pallone, Jr. and Frank LoBiondo introduced two bills in the U.S. House of Representatives, one that would exempt New Jersey from PASPA and another that would grant all states a four year-window—terminating on January 1, 2016—in which to pass laws legalizing sports betting.<sup>46</sup> Both bills were assigned to committee on January 23, 2012, and as of this writing both have yet to be reported out of committee.<sup>47</sup>

*D. Sports Leagues Seek to Enjoin New Jersey Law*

On August 7, 2012, the National Basketball Association, the National Collegiate Athletic Association, the National Football League, the National Hockey League, and Major League Baseball filed suit to enjoin the implementation of the New Jersey Law.<sup>48</sup> The plaintiffs allege a single injury, specifically that New Jersey’s law violates PASPA.<sup>49</sup> The leagues base their claim of injury on the assertion that if wagering on the outcomes of their games is

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S.B. 3113 on Jan. 9, 2012, available at <http://www.njleg.state.nj.us/bills/BillsByNumber.asp>.

<sup>44</sup> Wayne Parry, *Christie Signs Sports Betting Bill Into Law*, ASSOCIATED PRESS (January 17, 2012), <http://www.profootballweekly.com/2012/01/17/christie-signs-nj-sports-betting-bill-into-law>.

<sup>45</sup> *Burzichelli, Wagner & Caputo Bill To Position New Jersey To Implement Well-Regulated Sports Gaming Signed Into Law*, TARGETED NEWS SERVICE, Jan. 17, 2012 (Lexis).

<sup>46</sup> Press Release, Rep. Frank Pallone, Jr., Pallone and LoBiondo Team Up to Bring Sports Gaming to New Jersey (Apr. 26, 2012) (Lexis).

<sup>47</sup> *H.R. 3797: Sports Gaming Opportunity Act of 2012*, GOVTRACK, <http://www.govtrack.us/congress/bills/112/hr3797> (last visited Oct. 23, 2012); *H.R. 3809: New Jersey Betting and Equal Treatment Act of 2012*, GOVTRACK, <http://www.govtrack.us/congress/bills/112/hr3809> (last visited Oct. 23, 2012).

<sup>48</sup> Complaint for Declaratory and Injunctive Relief, Nat’l Collegiate Athletic Ass’n v. Christie, No. CV124947, 2012 WL 3171566, at \*1 (D.N.J. Aug. 7, 2012).

<sup>49</sup> *Id.* at ¶ 32.

permitted “[their] reputation and goodwill will be irreparably damaged . . . including but not limited to the fact that the proliferation of sports gambling will adversely affect the way that the public views amateur and professional sports.”<sup>50</sup> The suit seeks declarations that the law and the as-yet-unwritten regulations violate federal law, and an injunction preventing the implementation of both.<sup>51</sup>

Days later, on August 10, the plaintiffs moved for summary judgment and alternatively a preliminary injunction “to preserve the status quo pending a final decision on the merits of their claim.”<sup>52</sup> The leagues assert that they are entitled to summary judgment because the New Jersey law explicitly violates PASPA.<sup>53</sup> Further, the leagues assert that PASPA does not violate the Commerce Power, the Equal Protection Clause, or the Tenth Amendment, and they seek to permanently enjoin New Jersey from implementing its law.<sup>54</sup> Alternatively, the leagues seek to enjoin implementation of the law to preserve the status quo until a decision is reached on the merits of the lawsuit.<sup>55</sup>

The state of New Jersey filed its response on September 7, 2012, in the form of a motion to dismiss the suit for lack of standing.<sup>56</sup> The state asserted that the leagues failed to allege a sufficient “injury-in-fact” as required by the U.S. Constitution.<sup>57</sup> Further, the state argued that the claimed injury was not “fairly traceable” to the law in question.<sup>58</sup> New Jersey also contended that Congress, while creating a

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<sup>50</sup> *Id.* at ¶ 34.

<sup>51</sup> *Id.* at ¶ 35.

<sup>52</sup> Brief in Support of Plaintiffs’ Motion for Summary Judgment and, If Necessary, to Preserve the Status Quo, a Preliminary Injunction, Nat’l Collegiate Athletic Ass’n v. Christie, No. 12-cv-04947, 2012 WL 3964728, at \*1 (D.N.J. Aug. 10, 2012).

<sup>53</sup> *Id.*

<sup>54</sup> *See id.*

<sup>55</sup> *Id.*

<sup>56</sup> Brief in Support of Defendants’ Motion to Dismiss Pursuant to FED. R. CIV. P. 12(b)(1), Nat’l Collegiate Athletic Ass’n v. Christie, No. 3:12-cv-04947, 2012 WL 3964552, at \*1 (D.N.J. Sept. 7, 2012).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

private right of action, may not lower the threshold for standing beneath the “floor” that exists pursuant to Article III.<sup>59</sup>

On October 15, 2012, New Jersey published final regulations for sports betting that permit the New Jersey Division of Gaming Enforcement to accept license applications and grant licenses as soon as January 9, 2013.<sup>60</sup> U.S. District Judge Michael Shipp heard oral arguments on the standing issue on December 18, 2012.<sup>61</sup> Judge Shipp ruled that the leagues do in fact have standing to sue by meeting all three requirements, and a subsequent round of oral arguments on dueling motions for summary judgment took place on February 14, 2013.<sup>62</sup> On February 1, 2013, the U.S. Department of Justice joined the suit and filed a brief in support of the constitutionality of PASPA.<sup>63</sup> On February 28, 2013, Judge Shipp granted the sports leagues’ motion for summary judgment, declaring that PASPA is in fact constitutional.<sup>64</sup> New Jersey took an expedited appeal to the Third Circuit.<sup>65</sup> The Third Circuit affirmed, but one member of the panel accepted New Jersey’s arguments that PASPA does not legislate evenly amongst the several states.<sup>66</sup>

### III. NEW JERSEY’S CLAIMS THAT PASPA IS UNCONSTITUTIONAL

New Jersey’s initial cross-motion for summary judgment pointedly challenged the standing of the plaintiffs and raised a

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<sup>59</sup> *Id.*

<sup>60</sup> Donald Wittkowski, *Final regulation approved for sports betting in New Jersey*, THE PRESS OF ATLANTIC CITY, Oct. 16, 2012 (Lexis).

<sup>61</sup> Hoa Nguyen, *Lawyers involved in sports betting mandated to appear in Trenton*, THE PRESS OF ATLANTIC CITY, Oct. 23, 2012 (Lexis).

<sup>62</sup> Brent Johnson, *U.S. justice department dismisses N.J.’s claim that sports betting ban is unconstitutional*, THE STAR-LEDGER, Feb. 2, 2013, [http://www.nj.com/politics/index.ssf/2013/02/us\\_justice\\_department\\_dismisses.html](http://www.nj.com/politics/index.ssf/2013/02/us_justice_department_dismisses.html).

<sup>63</sup> *Id.*

<sup>64</sup> Nat’l Collegiate Athletic Ass’n v. Christie, No. 12-4947, 2013 WL 772679 (D.N.J. Feb. 28, 2013).

<sup>65</sup> Christopher Baxter, *Christie administration files notice of appeal in federal sports betting case*, THE STAR-LEDGER (March 13, 2013), [http://www.nj.com/politics/index.ssf/2013/03/christie\\_administration\\_files.html](http://www.nj.com/politics/index.ssf/2013/03/christie_administration_files.html).

<sup>66</sup> NCAA v. Christie, 730 F.3d 208, 241 (3d Cir. 2013).

number of constitutional arguments against PASPA.<sup>67</sup> New Jersey asserted three arguments: (1) that PASPA violates the Tenth Amendment, (2) that PASPA exceeds Congress' Commerce Power, and (3) that PASPA deprives the 46 states not exempted by PASPA of both due process and equal protection.<sup>68</sup> Judge Shipp denied New Jersey's motion, and the Third Circuit affirmed his decision; but since one of three Third Circuit judges who heard the case agreed with pieces of New Jersey's argument for PASPA's unconstitutionality, and other states have commenced the process to potentially pass laws similar to that of New Jersey's, it is reasonable to presume that the Supreme Court will address each argument in this case at some point in the future.

A. *Tenth Amendment*

The language of the Tenth Amendment prohibits Congress from intruding on areas reserved for the states.<sup>69</sup> During the legislative process that created PASPA, Senator Chuck Grassley voiced his concerns that PASPA intruded upon an area traditionally reserved to the states.<sup>70</sup> Grassley argued— accurately— that the regulation of lotteries and casino gaming has traditionally been a state concern, and asserted that it would be a serious overreach for the federal government to tell the states how they may or may not raise revenue.<sup>71</sup> Thus far, opponents of PASPA have found it difficult to mount a challenge on Tenth Amendment grounds because of the difficulties of establishing standing— the reason why the challenges in both *Flagler* and *iMEGA* failed without reaching the merits.<sup>72</sup> In the instant case, however, the parties challenging PASPA are the defendants, eliminating that procedural hurdle.<sup>73</sup>

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<sup>67</sup> Memorandum in Support of Defendants' Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, *NCAA v. Christie*, No. 3:12-cv-04947, 2012 WL 6020639, at \*1 (D.N.J. Nov. 21, 2012).

<sup>68</sup> *Id.* at II(A-C).

<sup>69</sup> U.S. CONST. amend. X.

<sup>70</sup> S. Rep. No. 102-248, at 12 (1992).

<sup>71</sup> *Id.*

<sup>72</sup> See discussion of *Flagler* and *iMEGA*, *supra* Part I.

<sup>73</sup> *Nat'l Collegiate Athletic Ass'n v. Christie*, No. CV124947, 2012 WL 3171566, at \*1 (D.N.J. Aug. 7, 2012).

New Jersey argues that the plain language of PASPA violates the “anti-commandeering” principle protected by the Tenth Amendment and established in *New York v. United States*.<sup>74</sup> Since New Jersey law permits sports wagering to be conducted by licensed casinos and racetracks, PASPA— by virtue of the Supremacy Clause— requires state officials to implement the federal scheme rather than the laws of New Jersey.<sup>75</sup> Congress does not have the power to direct states to regulate their own citizens.<sup>76</sup> By its terms, PASPA does not outlaw sports wagering activity, but rather it prevents states from making sports wagering legal.<sup>77</sup> While Congress is permitted to restrict the behavior of a state,<sup>78</sup> New Jersey is not proposing to run any sports betting operations itself.<sup>79</sup> The State even acknowledges that prohibiting “only State-run or State-sponsored sports betting” would be consistent with *New York v. United States*, and suggests an alternate construction of the statute to limit its prohibition to such State-run schemes.<sup>80</sup>

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<sup>74</sup> 505 U.S. 144 (1992). The essence of the “anti-commandeering principle” is that if Congress directs state legislatures to act in a certain way, the usual recourse that exists in the democratic system is taken away from the citizens of the state in question. For example, if the citizens of New Jersey supported legal sports betting by a two-to-one majority, but the state legislature disagreed, voters would subsequently have the opportunity to remove from office those with whom they disagreed and replace them with pro- sports betting state legislators. Such recourse is unavailable at the national level. Frank Lautenberg and Robert Menendez are but two of one hundred members of the Senate, and New Jersey’s twelve Representatives, although one of the largest delegations in the House, leave 423 seats for which the citizens of New Jersey do not vote.

<sup>75</sup> N.J. STAT. ANN. § 5:12A-2 (West 2012).

<sup>76</sup> *New York*, 505 U.S. at 188.

<sup>77</sup> See 28 U.S.C.A. § 3702 (West 1992) (“It shall be unlawful for a governmental entity to sponsor, operate . . . betting, gambling, or wagering scheme based . . . on one or more competitive games in which amateur or professional athletes participate. . .”).

<sup>78</sup> *Reno v. Condon*, 528 U.S. 141, 151 (2000).

<sup>79</sup> N.J. STAT. ANN. § 5:12A-2 (West 2012).

<sup>80</sup> Memorandum in Support of Defendants’ Cross-Motion for Summary Judgment and in Opposition to Plaintiffs’ Motion for Summary Judgment, Nat’l Collegiate Athletic Ass’n v. Christie, No. 3:12-cv-04947, 2012 WL 6020639, at \*1, II(A)(1)(3) (D.N.J. Nov. 21, 2012) (hereinafter “Defendants’ Cross-Motion”).

*B. Commerce Clause*

The “Applicability” section of PASPA creates a number of very specific exceptions to the blanket prohibition on sports betting.<sup>81</sup> In fact, these exceptions were expressly contemplated to exempt the four states to which they apply, as well as potentially New Jersey.<sup>82</sup> New Jersey rests its Commerce Clause arguments on the idea that there exists a “fundamental principle that all the States enjoy equal sovereignty.”<sup>83</sup> The claim is that PASPA violates this principle because it does not target a “local evil” and its “disparate geographic coverage is [not] sufficiently related to the problem that it targets.”<sup>84</sup> Prior to enacting PASPA, congressional findings concluded that “[w]ithout Federal legislation, sports gambling is likely to spread on a piecemeal basis and ultimately develop an irreversible momentum.”<sup>85</sup> Per New Jersey’s arguments, this finding tends to demonstrate that Congress did not consider sports wagering a purely local evil. New Jersey argues that the kind of “grandfathering” undertaken by PASPA is generally only permitted to assist with incremental reforms, rather than existing permanently to treat states differently.<sup>86</sup> As a result, the precedent set by PASPA could be extended by Congress to limit any form of business or manufacturing to states in which it already takes place.<sup>87</sup> The Supreme Court has apparently abandoned the idea that there is a uniformity requirement within the Commerce Clause, but has never expressly held as such.<sup>88</sup>

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<sup>81</sup> 28 U.S.C.A. § 3704 (West 1992).

<sup>82</sup> 138 Cong. Rec. H11,756-02 (daily Ed. Oct. 5, 1992) (statement of Rep. William Hughes).

<sup>83</sup> *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) (internal quotations omitted).

<sup>84</sup> *Id.*

<sup>85</sup> S. Rep. No. 102-248, at 5 (1991).

<sup>86</sup> Defendants’ Cross-Motion, *Nat’l Collegiate Athletic Ass’n v. Christie*, No. 3:12-cv-04947, 2012 WL 6020639, at \*1, II(B) (quoting *Delaware River Basin Comm’n v. Bucks Cnty. Water & Sewer Auth.*, 641 F.2d 1087, 1098 (3d Cir. 1981)).

<sup>87</sup> See Defendants’ Cross-Motion at II(B) (“[N]o principled basis would exist to deny Congress the right to similarly limit car manufacturing to Michigan, cigarette manufacturing to Virginia, or fish processing to Alaska.”).

<sup>88</sup> Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 Va. L. Rev. 249, 324 n.267 (2005).

*C. Due Process and Equal Protection*

Finally, New Jersey argues that while the Supreme Court has declined to acknowledge the Uniformity Requirement, the Court still recognizes that the claimed discrimination may be “of such an injurious character as to bring into operation the due process clause of the Fifth Amendment.”<sup>89</sup> PASPA is not a “facially neutral” statute, as the exemptions contained within explicitly contemplate the states to which they apply.<sup>90</sup> As New Jersey argues, what Congress did with PASPA was identify an issue that it sought to remedy, and then ban the problem behavior solely in the places where it was already illegal.<sup>91</sup> Such a ban denies New Jersey a substantial amount of revenue while four other states enjoy a federally-sanctioned monopoly.<sup>92</sup> Further, such discrimination by the federal government is only permissible “where the ‘statute’s disparate geographic coverage is sufficiently related to the problem it targets.’”<sup>93</sup> The claim here is that the geographic coverage of PASPA is essentially inversely related to the problem it targets by banning sports betting exclusively in jurisdictions where bans already exist.

The state claims that there is not even a rational basis for believing that the passage of a law permitting sports gambling in New Jersey was not injurious to the public interest in 1992, but had become so in 2012.<sup>94</sup> Rational basis review is a form of scrutiny used by the Supreme Court to assess the validity of commercial legislation that unfairly discriminates amongst groups of people.<sup>95</sup> Although this is the most deferential form of scrutiny undertaken by the Supreme Court, it is still a standard that must be met by challenged legislation.

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<sup>89</sup> Defendants’ Cross-Motion at II(C) (quoting *Currin v. Wallace*, 306 U.S. 1, 14 (1939)).

<sup>90</sup> 138 Cong. Rec. H11,756-02 (daily ed. Oct. 5, 1992) (statement of Rep. William Hughes).

<sup>91</sup> Defendants’ Cross-Motion at II(C).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* (quoting *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009)).

<sup>94</sup> *Id.*

<sup>95</sup> *U.S. v. Carolene Products*, 304 U.S. 144, 152 (1938).

#### IV. POLICY ARGUMENTS FOR AND AGAINST PASPA

##### A. *Gambling Laws in the United States Have Consistently Evolved from Outright Prohibition to Close and Careful Regulation*

Gambling has existed in various forms since the dawn of human history, as people have consistently sought out activities that involve risks and rewards.<sup>96</sup> Yet throughout most, if not all, of the history of the United States there have existed large and passionate movements to eliminate it from society.<sup>97</sup> As a result, laws and regulations concerning gambling in its multitude of forms have evolved continuously over the past four hundred years at the local, state, and national levels.<sup>98</sup> Prior to 1978, Nevada was the only state in which casino gaming legally took place.<sup>99</sup> As of this writing, legal casino gaming exists in thirty-eight of the fifty states.<sup>100</sup> In the 1840s and 1850s, a large number of states banned lotteries that had existed for any number of years.<sup>101</sup> Even the United States Supreme Court weighed in, referring to lotteries as “element[s] that will be confessedly injurious to the public morals.”<sup>102</sup> Eventually, lotteries ceased to exist in the United States until they were revived when New Hampshire created a biannual lottery in 1963.<sup>103</sup> As of this writing, forty three states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands all operate and regulate their own lotteries in at least one form.<sup>104</sup>

While casino gaming and lotteries have gained prominence and

<sup>96</sup> DAVID G. SCHWARTZ, *ROLL THE BONES: THE HISTORY OF GAMBLING* 5-6 (2006).

<sup>97</sup> *Id.* at 140-157.

<sup>98</sup> U.S. *Gambling Timeline*, CAPE COD TIMES, <http://www.capecodonline.com/apps/pbcs.dll/article?AID=/20070724/CASINO/707240303> (last visited Oct. 20, 2012).

<sup>99</sup> SCHWARTZ, *supra* note 97, at 427-28.

<sup>100</sup> AMERICAN GAMING ASSOCIATION, 2011 AGA SURVEY OF CASINO ENTERTAINMENT 4 (2011), *available at* <http://www.americangaming.org/sites/default/files/uploads/docs/sos/aga-sos-2011.pdf>.

<sup>101</sup> SCHWARTZ, *supra* note 97, at 150.

<sup>102</sup> *Champion v. Ames*, 188 U.S. 321, 357 (1903).

<sup>103</sup> SCHWARTZ, *supra* note 97 at 387.

<sup>104</sup> *Lottery Results*, UNITED STATES GOVERNMENT, <http://www.usa.gov/Topics/Lottery-Results.shtml> (last visited Oct. 20, 2012).



legal legitimacy in recent decades, PASPA moved the regulation of sports wagering in the opposite direction. As described above, each form of gambling was at one time similarly situated to the others—ruled illegal by many states but available to the public in certain others. Then in 1992, before the vast majority of states had the opportunity to explore the sports wagering environment, PASPA eliminated the practice nationwide.<sup>105</sup> As noted by Senator Chuck Grassley during the debate over PASPA, the federal ban on sports wagering is essentially the only time that the federal government has involved itself in the direct regulation of gambling activities.<sup>106</sup> Notwithstanding the historical veracity of Grassley's statement in 2013, with the exception of the regulation of gambling on Native American lands, the regulation of lotteries, casinos, and racetracks is presently carried out on a state-by-state basis, rather than by the federal government.<sup>107</sup> Independent of the question of whether a unique federal ban such as PASPA violates the Tenth Amendment or another tenet of the Constitution, it is counterintuitive that governmental treatment of sports betting has followed the reverse trajectory of other forms of gambling activity.

*B. Sports Betting, Like Narcotics and Alcohol, Becomes Far More Lucrative When Illegal*

Despite PASPA's blanket prohibition on sports wagering, a 1999 study estimated that as much as \$380 billion changed hands in that year alone as a result of illegal sports betting.<sup>108</sup> In contrast, customers wagered \$3.45 billion legally at Nevada sports books in 2012.<sup>109</sup> Although no estimate is completely accurate, if illegal sports wagering outnumbers legal sports wagering activity in the United States by a

<sup>105</sup> Professional and Amateur Sports Protection Act, 28 U.S.C.A. §§ 3701-3704 (West 1992).

<sup>106</sup> S. Rep. No. 102-248, at 12 (1992).

<sup>107</sup> AMERICAN GAMING ASSOCIATION, 2012 AGA SURVEY OF CASINO ENTERTAINMENT 11-22 (2012) *available at* [http://www.americangaming.org/sites/default/files/uploads/docs/sos/aga\\_sos\\_2012\\_web.pdf](http://www.americangaming.org/sites/default/files/uploads/docs/sos/aga_sos_2012_web.pdf).

<sup>108</sup> AMERICAN GAMING ASSOCIATION, *Sports Wagering Fact Sheet*, <http://www.americangaming.org/industry-resources/research/fact-sheets/sports-wagering> (last visited Oct. 1, 2012).

<sup>109</sup> *Id.*

factor of over one hundred ten to one, it would appear that PASPA has failed. This situation represents an example of an attempt to legislate a certain “immoral” behavior in the United States falling well short of its intended result of eliminating that behavior. During Prohibition, incredible amounts of money could be made dealing in illegal liquor. Since the mid-1960s, the “War on Drugs” has only served to make narcotics trafficking more lucrative. And PASPA, despite what the major sports leagues would have the public believe, actually makes it easier to question the integrity of athletic contests by de-regulating sports wagering activity and creating opportunities for organized crime to flourish.

There are numerous examples of violence that emerges from the organized crime domination of illegal gambling of all kinds. When New York City closed its Off Track Betting parlors in December of 2010, crime syndicates across the five boroughs gladly stepped in to handle the action.<sup>110</sup> In and around South Philadelphia in the late 1980s and early 1990s, small-time bookmakers often outperformed mob-connected bookies to the point where the Scarfo crime family attempted to put a stop to their businesses, by force.<sup>111</sup> Crews of thugs employed by the syndicate broke into the home of one bookie, duct-taping him to a chair and striking him with a pistol repeatedly to “encourage” payment of protection money.<sup>112</sup> As the dominant force in “underground” activities in the area, the Philadelphia mob would not stand for others crowding out their business, and since their targets were not likely to go to the police, their options were expansive.<sup>113</sup> At the other end of the spectrum, one well-known bookie in the area earned the nickname “The Gentleman Gambler” because it was so out of the ordinary for someone in his position to not engage in physical coercion to ensure repayment of

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<sup>110</sup> Larry McShane, *Mob on track to win: With OTB gone, bookies are riding high with Belmont Stakes on the horizon*, N.Y. DAILY NEWS, June 5, 2011, available at <http://www.nydailynews.com/news/crime/mob-track-win-otb-bookies-riding-high-belmont-stakes-horizon-article-1.128694>.

<sup>111</sup> SEAN PATRICK GRIFFIN, GAMING THE GAME 42-43 (2011).

<sup>112</sup> *Id.* at 52.

<sup>113</sup> *Id.*

debts.<sup>114</sup> In Chicago, organized crime factions make more money from bookmaking operations than from any other source.<sup>115</sup> So profitable is this business that they will stop at nothing to prevent anyone from stealing even miniscule profits from them. For example, in one instance, an organized crime faction resorted to blowing up a competitor's van with the competitor inside.<sup>116</sup> PASPA, by keeping the world of sports betting in the shadows, enables bookies to essentially torture clients into paying back debts, and encourages violent intimidation tactics between competitors attempting to monopolize the trade in a given geographic area.

The organized crime that thrives as a result of PASPA is the modern relative of early twentieth century bootleggers. From 1920 until 1933, the sale, manufacture, and transportation of alcohol were forbidden in the United States.<sup>117</sup> Rather than eliminating the consumption of alcohol as intended, Prohibition created an underground market for alcohol, a supply vacuum into which a number of sophisticated criminal enterprises gladly stepped.<sup>118</sup> Al Capone, arguably the most famous criminal in U.S. history, gained every ounce of his fame and fortune by flouting the law brazenly and openly.<sup>119</sup> Eventually, the situation became so untenable and the ban so impractical that the Twenty-First Amendment repealed Prohibition on December 5, 1933.<sup>120</sup> At this point a small number of bootleggers continued in the industry, but a majority left the liquor business altogether.<sup>121</sup> In fact, one of the most popular— and profitable— pursuits of the criminal underworld following Prohibition was the gambling racket.<sup>122</sup>

In the second half of the twentieth century, a new form of

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<sup>114</sup> *Id.* at 45.

<sup>115</sup> *Crime Inc.: The Big Business of Illegal Gambling* (CNBC television broadcast Dec. 10, 2009), available at <http://www.cnbc.com/id/34039744>.

<sup>116</sup> *Id.*

<sup>117</sup> STEPHEN FOX, *BLOOD AND POWER* 15-18 (1989).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 44-46.

<sup>120</sup> U.S. CONST. amend. XXI.

<sup>121</sup> FOX, *supra* note 118, at 52-60.

<sup>122</sup> *Id.* at 98-104.

Prohibition exists against a different caliber of illicit substances. Since approximately July 1969, the United States government has engaged in a large-scale campaign to eliminate the drug trade both within the United States and abroad.<sup>123</sup> Despite billions of dollars spent on this elusive goal throughout the ensuing four-plus decades, statistics point to these efforts being for naught.<sup>124</sup> The “War on Drugs” has had an effect similar to Prohibition in enhancing the monetary incentive for groups of individuals to get into the business of providing illegal goods.<sup>125</sup> The business has become so lucrative as a result of draconian enforcement efforts that groups bearing little to no resemblance to the traditional mafia have entered the equation and earned themselves a substantial profit while perpetrating horrific acts of violence to maintain— and expand— their market share.<sup>126</sup>

*C. Game-Fixing and Point-Shaving Have Created Huge Scandals  
In Multiple Sports*

In spite of the historical evidence that prohibiting activities only makes them more profitable and by extension less honest, the plaintiffs in *NCAA v. Christie* insisted that legal sports wagering would harm the integrity of the games they facilitate.<sup>127</sup> It would appear that they have a perfect example of their theory in Tim Donaghy. Donaghy was a National Basketball Association (“NBA”) referee who bet on NBA games, including games to which he was personally assigned, and additionally provided inside information about games to friends who subsequently placed their own bets.<sup>128</sup> Donaghy pled guilty to two federal conspiracy counts, and he received a sentence of

<sup>123</sup> *Timeline: America’s War on Drugs*, NPR, <http://www.npr.org/templates/story/story.php?storyId=9252490> (last visited Oct. 2, 2012).

<sup>124</sup> See Eduardo Porter, *Numbers Tell of Failure in Drug War*, N.Y. TIMES, Jul. 4, 2012, at B1.

<sup>125</sup> FOX, *supra* note 118, at 362-66.

<sup>126</sup> *Id.* at 411-20.

<sup>127</sup> Complaint for Declaratory and Injunctive Relief, Nat’l Collegiate Athletic Ass’n v. Christie, No. CV124947, 2012 WL 3171566, at \*1 (D.N.J. Aug. 7, 2012).

<sup>128</sup> Alan Schwartz & William K. Rashbaum, *N.B.A. Referee Is the Focus of a Federal Inquiry*, N.Y. TIMES (Jul. 21, 2007), [http://www.nytimes.com/2007/07/21/sports/basketball/21referee.html?\\_r=2&ref=sports&oref=slogin](http://www.nytimes.com/2007/07/21/sports/basketball/21referee.html?_r=2&ref=sports&oref=slogin).

fifteen months in prison.<sup>129</sup> The plaintiffs argued that legalizing sports gambling will create more Tim Donaghys.<sup>130</sup> On the other hand, if sports wagering were legal and completely transparent, it would be far easier to monitor and regulate it, forcing any potential Donaghy copycats out of the shadows and drastically reducing the danger of certain groups of people placing bets on games.<sup>131</sup>

Further, the most famous “point-shaving” scandals in U.S. history have involved college players— individuals who would require a lower monetary incentive to become involved in illicit activity.<sup>132</sup> Point shaving involves conduct by players (or officials) during a game that does not affect the outcome, but alters the margin of victory so that the losing team “covers the spread.”<sup>133</sup> The two most notorious point shaving scandals in U.S. history involved the 1950-51 City College of New York (“CCNY”) basketball team and the 1978-79 Boston College basketball team.<sup>134</sup> Although it is logical to presume that unpaid collegiate athletes are more susceptible to the pressures potentially exerted by individuals looking to control the outcome of games, it is important to view these scandals in the proper context. Both the CCNY<sup>135</sup> and the Boston College<sup>136</sup> scandals involved local, small-time gangsters with personal connections to the players in question. In a world where wagering on sports was and is illegal in the jurisdiction in which these men resided, the point-shaving schemes they operated were an easy way to make a quick buck without any corporate competition.

In February 2013, as *NCAA v. Christie* awaited a decision by Judge

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<sup>129</sup> *Donaghy Sentenced to 15 Months in Prison in Gambling Scandal*, ASSOCIATED PRESS (Jul. 30, 2008), <http://sports.espn.go.com/nba/news/story?id=3509440>.

<sup>130</sup> Complaint for Declaratory and Injunctive Relief, Nat'l Collegiate Athletic Ass'n v. Christie, No. CV124947, 2012 WL 3171566, at \*1 (D.N.J. Aug. 7, 2012).

<sup>131</sup> *E.g.* professional athletes (Alex Karras), coaches (Pete Rose) and referees (Donaghy).

<sup>132</sup> Jason Goldstein, Note, *Take the Money Line: PASPA, Bureaucratic Politics, and the Integrity of the Game*, 11 VA. SPORTS & ENT. L.J. 362, 371-72 (2012).

<sup>133</sup> See SCHWARTZ *supra* note 99, at 372-73.

<sup>134</sup> See Goldstein, *supra* note 133, at 371-72.

<sup>135</sup> See Joe Goldstein, *Explosion: 1951 Scandals Threaten College Hoops*, ESPN (Nov. 19, 2003), [http://espn.go.com/classic/s/basketball\\_scandals\\_explosion.html](http://espn.go.com/classic/s/basketball_scandals_explosion.html).

<sup>136</sup> *United States v. Burke*, 700 F.2d 70, 73-75 (2d Cir. 1983).

Shipp on the motions for summary judgment, match-fixing in international soccer suddenly grabbed global headlines.<sup>137</sup> Criminal syndicates throughout Asia allegedly influenced the outcome of 680 matches in the years from 2009-2012, including matches as prominent as the group stage of the UEFA Champions League.<sup>138</sup> That the world's most popular sport, and more specifically that sport's most popular annual competition, could be infiltrated in such a way is a major story. For the purposes of this Note, the most important factor is that the groups fixing these matches are also betting on them *legally*, seemingly undercutting arguments that legal betting reduces the risk of match-fixing.<sup>139</sup> These criminals place their bets in legitimate sports books, mostly located in Manila, which eschew regulation in favor of volume, allowing for the kinds of profits that make match-fixing a worthwhile risk.<sup>140</sup>

*D. Open and Well-Regulated Gambling Would Have Inhibited  
Historic "Fixing" Scandals*

In the case of Tim Donaghy, there is no guarantee that he would have been prevented from betting on games that he officiated had legal gambling existed, but the likelihood that he would have gotten away with it for so long is greatly diminished. The overwhelming majority of sports wagering that occurs in the United States today is

<sup>137</sup> *Outside the Lines: Global Soccer Match-Fixing Scandal* (ESPN television broadcast Feb. 8, 2013), available at <http://soccernet.espn.go.com/video/espnfc/video?id=1332501&cc=5901>.

<sup>138</sup> *Id.* The UEFA Champions League is a competition featuring the prior year's champions (and second and third place squads, depending on country) from domestic leagues across Europe. Each of the thirty-two teams plays a home and away series against the other three teams in its "group" and the top two in each group advance to a sixteen team bracket featuring similar home and away matches where the scores are aggregated to determine who advances. Given the annual presence in the competition of the wealthiest and most popular clubs in the world, this competition receives an inordinate amount of attention from all corners of the globe.

<sup>139</sup> Brett Forrest, *All the World is Staged*, ESPN THE MAGAZINE, May 28, 2012, available at [http://espn.go.com/sports/soccer/story/\\_/id/7927946/soccer-wilson-raj-perumal-world-most-prolific-criminal-match-fixer-espn-magazine](http://espn.go.com/sports/soccer/story/_/id/7927946/soccer-wilson-raj-perumal-world-most-prolific-criminal-match-fixer-espn-magazine).

<sup>140</sup> Brett Forrest, *Surprised by the match-fixing scandal? You shouldn't be*, ESPN FC UNITED (Feb. 8, 2013, 9:23 AM), [http://soccernet.espn.go.com/blog/\\_/name/espnfcunited/id/3254?cc=5901](http://soccernet.espn.go.com/blog/_/name/espnfcunited/id/3254?cc=5901).

under the table.<sup>141</sup> PASPA's ban on sports wagering creates a serious monetary incentive for individuals or groups to facilitate illicit gambling by members of the general public, as the demand remains as high as ever and the risk creates premium prices for the service. Furthermore, this world of neighborhood bookies and cash transactions is incredibly difficult for law enforcement to track.<sup>142</sup> Conversely, wagering done at Las Vegas sports books, casinos, and racetracks is subject to an incredible amount of scrutiny.<sup>143</sup> Large wins always garner some kind of inquiry into their legitimacy, *even when accomplished by someone who is expected to win*.<sup>144</sup> Las Vegas sports books are also reluctant to accept inordinately large wagers, and are known to lower their limits and engage every ounce of their surveillance might on those who place wagers of even four figures.<sup>145</sup> Concededly, Michael Konik's account of his time "running money" for a big time gambler shows exactly how individuals with enough resources can get around these limitations. Yet Konik's story also makes clear just how quickly suspicion fell on him simply because of the amount of money he wagered at a given time, despite the fact that he was employed specifically to reduce suspicion.<sup>146</sup> The suspicion Konik received rose and fell proportionally with his successes and failures, which hovered

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<sup>141</sup> NAT'L GAMBLING IMPACT STUDY COMM'N REPORT 2-14 (1999), *available at* <http://govinfo.library.unt.edu/ngisc/reports/finrpt.html>.

<sup>142</sup> SEAN PATRICK GRIFFIN, *GAMING THE GAME* xxv, xxvi (2011). In fact, the FBI only caught on to Donaghy after a probe of the Gambino crime family directed them to professional gambler Jimmy Battista, a high school classmate of Donaghy's and one of the men to whom Donaghy passed information.

<sup>143</sup> *See generally* MICHAEL KONIK, *THE SMART MONEY* (2006) (detailing a multi-year association between gambling journalist Konik and a consortium of big-money gamblers who used men like Konik to place their bets because of the casino's reticence to accept certain high-volume players' money).

<sup>144</sup> *Poker star Phil Ivey wins \$11.5 million, but casino refuses to pay*, L.A. TIMES (Oct. 10, 2012), <http://www.latimes.com/sports/sportsnow/la-sp-sn-phil-ivey-london-casino-refuses-to-pay-20121010,0,6445151.story>. Phil Ivey is likely the most famous poker professional in the world today and the most successful player of the 21<sup>st</sup> Century, but wins in certain large amounts are still subject to intense scrutiny in the highly-regulated betting parlors of Las Vegas and the United Kingdom.

<sup>145</sup> *See* KONIK, *supra* note 144 at 28, 29. It is worth noting that Michael Konik had no connections to game-fixing or point shaving, could not have won more than 60 percent of his bets overall, and often had several exceptionally poor runs at picking games, yet the casinos still took considerable steps to curtail his behavior.

<sup>146</sup> KONIK, *supra* note 144 at 29.

around fifty-five percent.<sup>147</sup> While it is completely accurate to say that game fixing still *could* exist in a world with widespread legal sports betting, these examples— and others below— show that legalization, regulation, and scrutiny make that risk exceedingly minimal.

Also instructive to consider is the personality of today's big-time *legal* gambler. The individuals who engage in the high-stakes wagering that Las Vegas casinos fear are supremely competitive, but they are not the type of people that attempt to win at all costs.<sup>148</sup> Rather, these individuals want to win as a result of being the best at what they do and by being smarter than everyone else, motivations that carry a certain amount of inherent integrity.<sup>149</sup> The big time legal sports bettor sees himself as no different from a hedge fund manager— which may not be the best argument for integrity— attempting to predict which sides will make the most money and trusting that research, skill, and exploiting market inefficiency result in winnings that exceed losses.<sup>150</sup>

Another important consideration is the difficulty of fixing a game or shaving points in today's high-compensation— and information-saturated— sporting environment. The most famous game-fixing scandal of all time involved the 1919 Chicago White Sox “throwing” the World Series against the Cincinnati Reds.<sup>151</sup> Gangster Arnold Rothstein paid eight members of the White Sox \$10,000 each to allow the Reds to win.<sup>152</sup> Despite being the far superior team based upon both talent and that season's performance, the White Sox fell to the Reds five games to three.<sup>153</sup> The two best players on the White

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<sup>147</sup> See KONIK, *supra* note 144. Given the “vig” charged by sports books to ensure that they remain profitable, an individual needs to win 55 percent of the time to break even.

<sup>148</sup> *But c.f. id.* with *60 Minutes: Sports Betting: Billy Walters* (CBS television broadcast Jan. 16, 2011) (*available at* <http://www.cbsnews.com/video/watch/?id=7253011n>). Although Michael Konik changed the names of the individuals portrayed in his book, it is widely believed that Billy Walters is the real-life identity of “Big Daddy Rick Matthews”, the main character in Konik's memoir.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> SCHWARTZ, *supra* note 97, at 339.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*



Sox, Ed Cicotte and Joe Jackson, who were both involved in the scandal, each made \$6,000 *per year*.<sup>154</sup> By involving themselves in Rothstein's plot, the two best players on the team— individuals who are arguably essential if one wants to be certain of influencing the outcome of a best-of-nine series— nearly doubled their yearly salaries.<sup>155</sup> In contrast, the eight *lowest-paid* players on the 2012 World Series champion San Francisco Giants each made between \$480,000 and \$483,000.<sup>156</sup> Legal sports books are loath to permit wagers higher than \$55,000 on a single professional game.<sup>157</sup> As this \$55,000 limit would only net a profit of \$50,000 if successful, and such limits are often merely academic and are lowered dramatically once someone dares to approach them, it would simply not be cost-effective for gamblers to pay eight U.S. professional athletes— especially the higher-compensated and higher-profile players necessary to a successful fix— a sufficient amount of money to induce them to throw away the opportunity of winning a championship.

As far as college athletics are concerned, the Boston College and CCNY situations are easily contrasted with the experience of the University of Nevada-Las Vegas ("UNLV") basketball program. Although constantly under investigation by the NCAA for violations— real and alleged— of rules governing recruiting and the amateur status of student-athletes, and once the subject of a federal probe

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<sup>154</sup> Paul D. Stoudohar, *Baseball's Changing Salary Structure*, BUREAU OF LABOR STATISTICS (Fall 1997). Compensation and Working Conditions Fall 1997 at 3, available at <http://www.bls.gov/opub/mlr/cwc/baseballs-changing-salary-structure.pdf>.

<sup>155</sup> The World Series operated under a best-of-nine format at that time, but is currently best-of-seven.

<sup>156</sup> *San Francisco Giants Salary/Payroll Information-2012*, ESPN, [http://espn.go.com/mlb/team/salaries/\\_/name/sf/san-francisco-giants](http://espn.go.com/mlb/team/salaries/_/name/sf/san-francisco-giants) (last visited Month XX, 201X).

<sup>157</sup> See KONIK, *supra* note 144, at 22, 23. This figure was simply Konik's experience with two major Las Vegas sports books, and almost exclusive wagering on professional football. If sports wagering were legal in New Jersey, a state where four professional teams play— and eleven more play within 30 miles of its borders— it is reasonable to believe that scrutiny would be even higher and limits even lower, especially for sports where individual players have more influence, such as basketball, or directly determine whether the opposing team scores, such as soccer and ice hockey.

regarding connections to a known game-fixer, UNLV has never been connected by concrete evidence to gambling activity or point shaving.<sup>158</sup> This example should show how legal and highly regulated sports wagering eliminates the market for nefarious individuals who possess the proclivity to alter the outcome of games to stay in business.

The mere fact that UNLV is permitted to compete in intercollegiate athletics underscores the hypocrisy of the NCAA in signing on to the lawsuit against New Jersey. The NCAA does maintain a policy preventing states, where single-game betting is legal, from hosting any part of a national championship, but any injury that the organization claims in the instant lawsuit is fallacious in light of the continued existence of the UNLV athletic program. Moreover, the NCAA has permitted repeated iterations of the Mountain West Conference Men's Basketball Tournament and 21 (and counting) annual "Las Vegas Bowls" to take place in Las Vegas.<sup>159</sup> The existence of these long-standing events, plus the addition of the 2013 and 2014 Pacific-12 Conference Men's Basketball Tournaments in the heart of Sin City completely contradict the arguments made in the instant lawsuit.<sup>160</sup> If the NCAA would suffer a concrete and particularized injury in New Jersey, how has it not suffered such injury to this point in Nevada?

The international soccer scandal is slightly more vexing in light of the fact that the criminal syndicates engaging in match-fixing place their bets legally. But the atmosphere in which these bets are placed is a far cry from the pervasive regulatory scheme that undoubtedly would be a part of legalized sports betting in New Jersey. This chaotic culture allows individuals to place massive wagers, as well as fix and bet on matches in the third or fourth division of obscure nations not

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<sup>158</sup> Greg Garber & Kory Kozak, *Twenty years later, UNLV still indignant*, ESPN (Apr. 1, 2010), <http://sports.espn.go.com/ncb/tournament/2010/columns/story?id=5045144>.

<sup>159</sup> *Bowl Facts*, LAS VEGAS BOWL, <http://www.lvbowl.com/facts.php>.

<sup>160</sup> See Chris Dufresne, *Conference tournaments take their chances in Las Vegas*, L.A. TIMES, Mar. 12, 2013, <http://articles.latimes.com/2013/mar/12/sports/la-sp-0313-pac-12-basketball-gambling-20130313>.

known for footballing prowess, all without arousing much suspicion.<sup>161</sup> The obscurity of the vast majority of the supposedly fixed matches is the perfect cover, but would be unavailable to gamblers within the United States. Primarily, although soccer's popularity has been on the rise in the United States for decades, it is likely that wagering options on the sport would be seriously limited. As Michael Konik's experiences again exemplify, both the most popular— i.e., Super Bowl— and least popular— soccer, tennis, small-time college football— events have lower betting limits and are subject to more scrutiny before a single wager is placed.<sup>162</sup> If an individual walked into the hypothetical future sports book at Monmouth Park Raceway and attempted to wager even \$5,000 on a USL PRO— the third division of professional soccer in the United States— match between the Rochester Rhinos and the Harrisburg City Islanders, there would be an immediate inquiry and any foul play would most certainly be uncovered.

**V. CONGRESS SHOULD REPEAL PASPA OR REVISE THE BAN TO ALLOW NEW JERSEY TO MOVE FORWARD**

*A. New Jersey's Constitutional Challenges— Already Denied  
Once— Do Not Appear Destined For Success*

On February 28, 2013, Judge Michael Shipp granted the plaintiffs' motion for summary judgment, enjoining implementation of New Jersey's proposed sports betting regulations.<sup>163</sup> Judge Shipp reasoned that PASPA is an appropriate use of the Commerce Power, that it does not force New Jersey to act in a certain way, and that Congress had a rational basis to enact PASPA in the way that it did.<sup>164</sup> On September 17, 2013, a panel of the Third Circuit Court of Appeals affirmed Judge Shipp's grant of summary judgment to the

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<sup>161</sup> See Forrest, *supra* note 141.

<sup>162</sup> KONIK, *supra* note 144.

<sup>163</sup> Nat'l Collegiate Athletic Ass'n v. Christie, 926 F. Supp. 2d 551, (D.N.J. 2013) *aff'd sub nom.* NCAA v. Governor of New Jersey, 730 F.3d 208 (3d Cir. 2013).

<sup>164</sup> *Id.* at \*2.

sports league plaintiffs by a vote of 2-1.<sup>165</sup>

Regarding New Jersey's Commerce Clause arguments, the state puts itself at a disadvantage by relying on an argument that does not appear to have been accepted by the Supreme Court since 1923.<sup>166</sup> However, if New Jersey's interpretation of the uniformity concept is accurate, and the idea is merely dormant rather than explicitly rejected, one would think that they could have a few sympathetic ears on the Supreme Court. The argument for a uniformity requirement is one rooted in an analysis of the Framers' intent.<sup>167</sup> Thus, even someone with a perfunctory understanding of the Court's current composition could make the educated guess that there are at least a few justices who would be open to any legal theories—grounded in legitimate precedent, of course—that would limit Congress' power under the Commerce Clause. Although scholars proposing to revisit the uniformity principle concede that such an interpretation is not wholly consistent with Justice Scalia's brand of originalism, it is not outlandish to think that these arguments would get the attention of Justice Scalia and others.<sup>168</sup>

As economic legislation, a review of PASPA on equal protection grounds would likely be rational basis review.<sup>169</sup> Yet as New Jersey's brief reminds us, "[t]hrough the rational basis test is deferential, it 'is not a toothless one.'"<sup>170</sup> In fact, in *Lawrence v. Texas*, the Supreme Court asserted that it has "never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons."<sup>171</sup> The stated purpose of PASPA is to curtail sports betting in this country because such behavior "threatens to change

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<sup>165</sup> Nat'l Collegiate Athletic Ass'n v. Christie, 730 F.3d 208 (3d Cir. 2013).

<sup>166</sup> See *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

<sup>167</sup> Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249, 263-88 (2005).

<sup>168</sup> *Id.* at 302-08.

<sup>169</sup> *United States v. Carolene Products*, 304 U.S. 144, 152 (1938).

<sup>170</sup> Defendants' Cross-Motion, *Nat'l Collegiate Athletic Ass'n v. Christie*, No. 3:12-cv-04947, 2012 WL 6020639, at \*1 II(C) (D.N.J. Nov. 21, 2012) (quoting *Matthews v. DeCastro*, 429 U.S. 181, 185 (1976)).

<sup>171</sup> *Lawrence v. Texas*, 539 U.S. 538, 582 (2003).

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the nature of sporting events from wholesome entertainment for all ages to devices for gambling.”<sup>172</sup> The Senate report makes clear that there is a heavy dose of morality behind the push to ban sports betting.<sup>173</sup> Congress’ desire to cure what it believed to be a moral evil may not, under established precedent, justify discriminating against the state of New Jersey in its desire to raise revenue, while permitting the very same activity to go on unfettered in Nevada.

Although the “equal footing” arguments put forth by New Jersey have not gained traction, the Tenth Amendment arguments have not fallen on deaf ears. Although these arguments were not successful on appeal, Judge Thomas Vanaskie wrote a dissenting opinion in which he posited that PASPA is unconstitutional because it impermissibly commandeers the New Jersey state government for federal purposes.<sup>174</sup> The text of PASPA’s prohibition can be interpreted as telling state legislatures how to legislate, but the plain meaning of the statute is more suggestive of an outright prohibition of a specific activity.<sup>175</sup> Judge Vanaskie points out that all other forms of gambling activity are presently— and for most of history have been— regulated by individual states, which would mean that the federal government has intruded on an area traditionally reserved for the states.<sup>176</sup> Because other forms of gambling are governed by state law, the average person is likely to believe that sports betting is so governed.<sup>177</sup> Thus, if citizens possess a strong desire for legal sports betting— and the 2011 referendum says that they do— it stands to reason that they would take out their frustrations on state legislators who are “denying” them such an opportunity. This would insulate federal legislators from the consequences of passing an unpopular law, which is the essence of the Supreme Court’s anti-commandeering jurisprudence.<sup>178</sup> New Jersey would have a stronger argument if

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<sup>172</sup> S. REP. NO. 102-248, at 5 (1991).

<sup>173</sup> *Id.*

<sup>174</sup> Nat’l Collegiate Athletic Ass’n v. Christie, 730 F.3d at 241.

<sup>175</sup> 28 U.S.C.A. 3702 (West 1992).

<sup>176</sup> NCAA v. Christie, 730 F.3d at 241 (Vanaskie, J., dissenting).

<sup>177</sup> *Id.* at 246.

<sup>178</sup> *Id.*

PASPA required state and local authorities to enforce its terms,<sup>179</sup> rather than the FBI,<sup>180</sup> but Judge Vanaskie's point is well taken. Moreover, as Judge Vanaskie writes, the language of PASPA specifically prohibits states from licensing sports betting operations, rather than simply prohibiting sports betting.<sup>181</sup> PAPA's directive to refrain from acting is no different from requiring states to act in a certain way, which was ruled unconstitutional in *New York and Printz*.<sup>182</sup> There is no federal regulatory scheme governing sports betting that preempts state regulation, but instead PASPA "set federal parameters as to how states may regulate sports gambling."<sup>183</sup>

*B. How New Jersey Stands To Gain*

Although New Jersey faces an uphill battle in its attempt to declare PASPA unconstitutional, the arguments are there. Judge Vanaskie feels that PASPA impermissibly commandeers state apparatus to fulfill the will of Congress, and with the possibility that other states will follow New Jersey's example, the Supreme Court may want to consider this issue. Yet, regardless of the constitutionality of PAPA, Congress should utilize PASPA's newfound publicity to examine just how practical and necessary the ban actually is. The history of laws governing other forms of gambling, as well as the prohibition of alcohol and the "War on Drugs" have shown that permission in conjunction with close regulation destroys the incentives for illegal activity.

If one divides the \$388 billion estimate— the amount of money believed to be wagered illegally each year— by forty-six— the number of states where sports wagering is presently illegal— it can be estimated that New Jersey sports books would see approximately \$8.4 billion wagered annually.<sup>184</sup> It is unlikely that such a figure is wholly

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<sup>179</sup> See *Printz v. United States*, 521 U.S. 898 (1997).

<sup>180</sup> See generally SEAN PATRICK GRIFFIN, *GAMING THE GAME* (2011) (detailing the FBI investigation that resulted in the conviction of Tim Donaghy).

<sup>181</sup> Nat'l Collegiate Athletic Ass'n v. Christie, 730 F.3d at 245 (Vanaskie, J., dissenting).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 249.

<sup>184</sup> *Sports Wagering Fact Sheet*, AMERICAN GAMING ASSOCIATION,

accurate, given that it represents a 300 percent increase over what is annually wagered in Las Vegas, but it is the best estimate that can be made from data that presently exists.<sup>185</sup> Further, New Jersey's proximity to New York City, Philadelphia, Baltimore, Washington, D.C., and Boston does provide a much larger pool of avid sports fans and potential bettors than the population centers within a similar radius of Las Vegas. If it is an accurate estimate, one can expect gross revenue for New Jersey sports books to be around \$412.3 million annually, based on the fact that Nevada sports books generate revenue at around 4.9 percent of the total amount wagered.<sup>186</sup> New Jersey's current tax rate on "gross gaming revenue"—the amount a casino earns as revenue after paying guest winnings—is 8 percent, with an additional option of a 1.25 percent community investment alternative or a 2.5 percent investment alternative.<sup>187</sup> The original sports wagering bill states that sports wagering revenues will be subject to both the 8 percent tax and the 1.25 percent community investment alternative.<sup>188</sup> Nine and one-fourth percent of \$412.3 million yields estimated annual tax revenue for the state of New Jersey of \$38.1 million. This figure would represent a 13.7 percent increase over 2011 New Jersey tax revenues from gaming.<sup>189</sup> These numbers take on added importance in light of the fact that state income from casino taxes in New Jersey dropped by 9.6 percent in fiscal year 2011 compared to fiscal year 2010.<sup>190</sup> Further, the regulations published by the state as of October 15, 2012, would

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<http://www.americangaming.org/industry-resources/research/fact-sheets/sports-wagering> (last visited October 1, 2012).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> AMERICAN GAMING ASSOCIATION, 2012 AGA SURVEY OF CASINO ENTERTAINMENT, 19 (2012), *available at* [http://www.americangaming.org/sites/default/files/uploads/docs/sos/aga\\_sos\\_2012\\_web.pdf](http://www.americangaming.org/sites/default/files/uploads/docs/sos/aga_sos_2012_web.pdf).

<sup>188</sup> A.B. 4385, 214th Leg., 1st Ann. Sess. (N.J. Nov. 28, 2011) (Statement).

<sup>189</sup> *See* AMERICAN GAMING ASSOCIATION, 2012 AGA SURVEY OF CASINO ENTERTAINMENT 19 (2012), *available at* [http://www.americangaming.org/sites/default/files/uploads/docs/sos/aga\\_sos\\_2012\\_web.pdf](http://www.americangaming.org/sites/default/files/uploads/docs/sos/aga_sos_2012_web.pdf). New Jersey's 2012 "Gaming Tax Revenue" was \$277.60 million, down from \$305.50 million in 2011.

<sup>190</sup> OFFICE OF LEGISLATIVE SERVICES, 2012 REVENUE SNAPSHOT 2 (2012), *available at* [http://www.njleg.state.nj.us/legislativepub/budget/FY12\\_Year\\_End\\_Final.pdf](http://www.njleg.state.nj.us/legislativepub/budget/FY12_Year_End_Final.pdf).

require locations that apply for licenses to pay a \$50,000 registration fee, as well as a continued “resubmission fee” of \$50,000 every five years.<sup>191</sup> As there are twelve casinos in Atlantic City and four racetracks that are eligible for licenses, New Jersey stands to gain up to \$800,000 in these fees in 2014, 2019, 2024, and beyond, with a certain percentage of that money going towards compulsive gambling treatment and prevention programs.<sup>192</sup> As small as these numbers appear in the context of New Jersey’s 2012 budget of \$31.7 billion,<sup>193</sup> it would help to close the 6.8 percent gap between New Jersey’s 2011 and 2012 budgets.<sup>194</sup> Legal sports betting in New Jersey will provide a significant economic benefit to the state, a major reason why Governor Christie is such a staunch supporter of the measure.

## VI. CONCLUSION

Given recent developments in potentially expanding the legality of internet gaming, Congress would be well-served by examining the inconsistency of gambling regulation in this country. Whether it is reopening the grace period to allow New Jersey to pass appropriate legislation, or opening the possibility of legal sports betting in all 50 states, any move to cut back on PASPA’s prohibition would allow for an increase in revenue for the affected states with minimal downside if enacted appropriately. The potential developments in this saga should have Federalism scholars— not to mention sports fans and wise guys across New Jersey— paying rapt attention for years to come.

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<sup>191</sup> Donald Wittkowski, *Final regulation approved for sports betting in New Jersey*, THE PRESS OF ATLANTIC CITY, Oct. 16, 2012

<sup>192</sup> *Id.*

<sup>193</sup> Kate Zernike, *Christie Signs Budget, but Also Vetoes Pieces*, N.Y. TIMES, Jun. 30, 2012 at A18.

<sup>194</sup> *Id.*