

**The House Advantage: How the Professional and Amateur Sports Protection Act Undermines Concepts of Federalism, and Severely Impacts New Jersey’s Gambling-Fueled Economy**

*Anthony C. D’Alessandro\**

<b>I. INTRODUCTION .....</b>	<b>80</b>
<b>II. BACKGROUND .....</b>	<b>81</b>
<b>A. New Jersey’s Gambling History .....</b>	<b>81</b>
<b>B. Sports Wagering in the United States and the Rise of Fantasy Sports.....</b>	<b>83</b>
<b>C. The Professional and Amateur Sports Protection Act .....</b>	<b>87</b>
<b>D. Past PASPA Challenges.....</b>	<b>88</b>
<b>E. The Sports Wagering Battle in New Jersey .....</b>	<b>90</b>
<b>III. ANALYSIS.....</b>	<b>94</b>
<b>A. Federalism Basis.....</b>	<b>94</b>
<b>B. Application to PASPA.....</b>	<b>98</b>
<b>C. Impact on New Jersey.....</b>	<b>103</b>
<b>IV. CONCLUSION .....</b>	<b>104</b>

---

\* J.D. Candidate, 2017, Seton Hall University School of Law; B.A., Economics and Political Science, 2014, Rutgers University. Thank you to my Mom and Dad, Jen, Yezin, Russ, and the rest of my family for (whether they knew it or not) all their support during this process. Also, thank you to Dean Mark C. Alexander and the *Circuit Review* members for all their insight and edits.

## I. INTRODUCTION

Professional and collegiate sports are colossal money-making industries in the United States consisting of ticket sales, concessions, television deals, internet subscriptions, merchandise and much more. Sports wagering, however, may be the one aspect of sports that is bigger than the games themselves. An estimated \$4 billion is wagered annually in Las Vegas alone, in addition to an estimated \$80 billion to \$380 billion that is wagered annually through illegal channels.<sup>1</sup> Allowing sports wagering to remain illegal nationally and continuing to have people bet on sports unlawfully is leaving billions of dollars untaxed and unregulated each year. In the past fifty years, the United States has experienced a substantial expansion in legalized gambling, with sports wagering being the only major holdout.<sup>2</sup>

The barrier that stands in the way of legalized sports wagering is the Professional and Amateur Sports Protection Act (PASPA), which is a 1992 federal statute that makes wagering on professional and amateur sports unlawful, except for in a few states that were grandfathered into the statute.<sup>3</sup> At the forefront of the legalization battle is the state of New Jersey, whose voters have approved sports wagering through a referendum and a state that could desperately use the revenue it in order to boost its gambling-fueled economy, but cannot implement it into its casinos and racetracks because of PASPA.<sup>4</sup>

The fight has been raging on in courts for years now in *NCAA v. Christie*, a series of Third Circuit cases where the professional and amateur sports leagues (the “Leagues”) challenged New Jersey’s implementation of legalized sports wagering, arguing that the State’s acts violated PASPA.<sup>5</sup> In 2013, the Third Circuit first held that PASPA was constitutional and that New Jersey’s attempt to legalize sports wagering violated PASPA.<sup>6</sup> After the Supreme Court denied certiorari, New Jersey’s second attempt to legalize sports wagering was once

---

<sup>1</sup> Will Hobson, *Sports gambling in U.S.: Too prevalent to remain illegal?*, THE WASHINGTON POST (Feb. 27, 2015), [https://www.washingtonpost.com/sports/sports-gambling-in-us-too-prevalent-to-remain-illegal/2015/02/27/f1088e4c-b7d3-11e4-9423-f3d0a1ec335c\\_story.html?utm\\_term=.ece1e446a9fe](https://www.washingtonpost.com/sports/sports-gambling-in-us-too-prevalent-to-remain-illegal/2015/02/27/f1088e4c-b7d3-11e4-9423-f3d0a1ec335c_story.html?utm_term=.ece1e446a9fe).

<sup>2</sup> *Id.*

<sup>3</sup> 28 U.S.C. § 3701 *et seq.* (2015).

<sup>4</sup> MaryAnn Spoto, *Sports betting backed by N.J. voters*, NJ.COM (Nov. 8, 2011, 10:10 PM), [http://www.nj.com/news/index.ssf/2011/11/nj\\_residents\\_vote\\_on\\_legalizin.html](http://www.nj.com/news/index.ssf/2011/11/nj_residents_vote_on_legalizin.html).

<sup>5</sup> *NCAA v. Governor of N.J.*, 730 F.3d 208 (3d. Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014), *and aff’d*, 799 F.3d 259 (3d. Cir. 2015), *and aff’d en banc*, 832 F.3d 389 (3rd Cir. 2016).

<sup>6</sup> *NCAA*, 730 F.3d at 240 (holding that nothing in PASPA violates the United States Constitution).

again struck down by the Third Circuit, with the dissenting judge in the first case writing the majority opinion of the second case.<sup>7</sup> In late 2015, an obviously split Third Circuit decided to vacate all of the previous opinions, and hear the case again en banc.<sup>8</sup> In August 2016, the Third Circuit once again affirmed the principles that the court had previously set forth, and held that PASPA is constitutional and that New Jersey's attempt to legalize sports wagering clearly violated the statute.<sup>9</sup>

The hypocrisy of the PASPA protections comes in the form of fantasy sports. These games allow people to create their own teams based on the players they believe will perform the best during games. Fantasy sports are legal because they are not gambling under the Internet Gambling Prohibition and Enforcement Act, which classifies fantasy sports as legal skill betting, instead of illegal chance betting.<sup>10</sup> Although some attorney generals in New York, Illinois and, most recently, Texas are beginning to challenge the legality of fantasy sports as lawful forms of gambling, these games continue to operate in most states.<sup>11</sup>

PASPA is causing economic harm to New Jersey and other states that can benefit from sports wagering, as these states are missing out on large increases in gambling revenue. Since the Third Circuit has ruled three times on sports wagering, it is now an issue that the Supreme Court should decide. PASPA is unconstitutional because it violates core concepts of federalism, and is barring New Jersey from implementing sports wagering, even though the voters have approved it.

## II. BACKGROUND

### *A. New Jersey's Gambling History*

New Jersey has a long history of gambling spanning back to the American Revolution, and it has played a pivotal role in New Jersey's

---

<sup>7</sup> *NCAA*, 799 F.3d at 268 (holding that New Jersey's law violates PASPA because it authorizes sports gambling by law).

<sup>8</sup> *NCAA v. Rebeck*, 2015 U.S. App. LEXIS 17839 (3d Cir. Oct. 14, 2015).

<sup>9</sup> *NCAA*, 832 F.3d at 402 (holding that New Jersey's law violates PASPA because it authorizes by law sports gambling, and PASPA remains constitutional).

<sup>10</sup> Internet Gambling Prohibition and Enforcement Act, 152 Cong Rec H 4978 § 101(3)(D)(ix)(II) (2006).

<sup>11</sup> Jacob Pramuk, *DraftKings, FanDuel lobby Congress amid legal challenges*, CNBC (Jan. 21, 2016 1:24 PM), <http://www.cnbc.com/2016/01/21/draftkings-fanduel-lobby-congress-amid-legal-challenges.html>.

economy ever since.<sup>12</sup> During the colonial era, New Jersey's culture was much more permissive of gambling than other colonies, using lotteries to raise money for military supplies, civic projects, and the construction of what is now Rutgers University.<sup>13</sup> In the 1830s, horse racing began to grow in popularity and became a vital part of New Jersey's gambling-funded economy.<sup>14</sup> Horse racing continues to remain popular today, as New Jersey currently operates three racetracks and multiple off-track betting centers.<sup>15</sup> Additionally, state-sponsored lotteries operate throughout New Jersey, and are available at convenience stores, liquor stores, supermarkets, and pharmacies throughout the State.<sup>16</sup> New Jersey does put part of lottery proceeds to good use, as thirty percent of all unclaimed lottery winnings are allocated to State institutions and State aid for education.<sup>17</sup>

In 1974, New Jersey voters first saw, and defeated, casino gambling on a ballot.<sup>18</sup> Then in 1976, a revised referendum was approved, by a slim margin, that limited gambling to the confines of the popular shore town, Atlantic City, New Jersey.<sup>19</sup> In 1978, Atlantic City opened Resorts International, its first hotel and casino, and gambling instantly proved to be a success by surpassing Las Vegas as the gambling capital of the United States for a period of time.<sup>20</sup> Atlantic City's beautiful beaches combined with casino gambling, world-class hotels and entertainment led the City to instantly become a New Jersey Shore landmark.

Atlantic City experienced a few decades of prosperity, but as time went on, several factors led to the City's recent demise, including, the revitalization of Las Vegas; luxury casinos in Connecticut, Pennsylvania, and New York; outdated Atlantic City hotels and casinos; failure to rejuvenate the City's residential community; and online gambling. In March 2016, Atlantic City's failing casinos and housing crisis caused New Jersey to consider a state-takeover of the

---

<sup>12</sup> *New Jersey gambling: A historical snapshot*, NJ GAMBLING WEBSITES, <http://www.njgamblingwebsites.com/new-jersey-gambling-history/> (last visited Oct. 16, 2016).

<sup>13</sup> *Id.*

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

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> N.J.S.A. 5:9-17.

<sup>18</sup> *History of Casino Gambling in Atlantic City*, ATLANTIC CITY FREE PUBLIC LIBRARY, <http://www.acfpl.org/ac-history-menu/atlantic-city-heritage-collections/15-heston-archives/68-history-of-casino-gambling-in-atlantic-city> (last visited Oct. 16, 2016).

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

<sup>20</sup> *New Jersey gambling: A historical snapshot*, *supra* note 12.

City, which would shut down all nonessential government services.<sup>21</sup> Still with all of its issues, Atlantic City's five casinos generated over \$2.6 million in taxes during July 2016 alone.<sup>22</sup> Sports wagering could help generate even more in taxes payable to New Jersey, bring visitors back into Atlantic City, and give the City the boost it so desperately needs in order to bring it back to its glory days.

### *B. Sports Wagering in the United States and the Rise of Fantasy Sports*

Sports wagering is growing at an exceptionally fast rate, and most of it goes untaxed and unregulated.<sup>23</sup> Nearly \$4 billion is bet on sports each year in Las Vegas, while an estimated \$80 billion to \$380 billion is wagered illegally, through offshore online betting houses, office pools, and neighborhood bookmakers.<sup>24</sup> This means that billions of dollars go unregulated and untaxed on sports wagering alone each year. In the past fifty years, the gambling industry in the United States has expanded vastly with the evolution of lotteries, casino gambling, and online gambling: with the only holdout being sports wagering.<sup>25</sup>

One of the motivating factors for originally banning sports wagering was to protect the integrity of highly-profitable professional and amateur sports, mostly due to the negative stigma attached to gambling.<sup>26</sup> Over time, however, a different, less-negative viewpoint on sports gambling has arose.<sup>27</sup> Sports announcers give their picks for who is going to win each game, President Obama has been filling out a National Collegiate Athletic Association (NCAA) tournament bracket each year, and major newspapers and sports websites offer up-

---

<sup>21</sup> Joel Rose, *Atlantic City Faces Financial Collapse, Cringes At State Takeover*, NPR (Mar. 24, 2016, 9:59 AM), <http://www.npr.org/2016/03/23/471618590/atlantic-city-faces-financial-collapse-cringes-at-state-takeover>.

<sup>22</sup> *New Jersey Online Gambling Revenue*, PLAY NJ, <https://www.playnj.com/new-jersey/revenue/> (last updated Dec. 2016).

<sup>23</sup> Hobson, *supra* note 1.

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

<sup>25</sup> *See id.*

<sup>26</sup> *See* NCAA v. Governor of N.J., 730 F.3d 208, 216 (3d. Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014), *and aff'd*, 799 F.3d 259 (3d. Cir. 2015), *and aff'd en banc*, 832 F.3d 389 (3rd Cir. 2016) (citing S. REP. No. 102-248, at 4 (1991), *reprinted in* 1992 U.S.C.A.N. 3553, 3556, noting the Committee's concern that "[w]idespread legalization of sports gambling would inevitably promote suspicion about controversial plays and lead fans to think 'the fix was in' whenever their team failed to beat the point-spread").

<sup>27</sup> Tim Dahlberg, *Column: Time to do away with sports betting stigma*, THE HUFFINGTON POST (May 26, 2012, 6:22 PM), <http://www.huffingtonpost.com/huffwires/20120526/tim-dahlberg-052612/>.

to-the-minute betting lines.<sup>28</sup> Due to the fact that sports wagering has become more prevalent, it has also become more mainstream and accepted.

Particularly in the past few years, fantasy sports have taken the spotlight, especially daily and weekly fantasy sports, where players can change their team accordingly, considering injuries and poor performances. As of August 2015, 56.8 million people in the United States and Canada had already played fantasy sports in 2015 alone.<sup>29</sup> This was before football, the most popular fantasy sport, even began its season.<sup>30</sup> Additionally, the number of participants had already exceeded the more than the 41 million people that had played the entire previous year.<sup>31</sup> Fans now find themselves not only being loyal to their favorite teams, but also cheering for other teams or individual plays that will benefit their own fantasy teams each week.<sup>32</sup> In 2015 alone, daily fantasy sports were expected to generate around \$2.6 billion in entry fees, mostly from two main websites, FanDuel and DraftKings.<sup>33</sup> These websites allow participants to enter various fantasy games ranging in size and wager amount.<sup>34</sup> The websites allow participants to enter into new games with new teams every week, instead of being stuck with the same season-long fantasy teams. This allows players to enter different games and place different wagers every day.

The legality of online, daily fantasy sports is a highly debated issue. In 2006, Congress enacted the Internet Gambling Protection and Enforcement Act (the Act), based on findings that Internet gambling is primarily funded through payment system instruments, credit cards, and wire transfers, leading to growing debt collection problems.<sup>35</sup> The Act prohibits placing “bets and wagers” online, unless individual states allow it. The Act describes “bets and wagers” as the “staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game predominantly subject to chance, upon an agreement or understanding that the person or another person

---

<sup>28</sup> See Chil Woo, Note, *All Bets Are Off: Revisiting The Professional and Amateur Sports Protection Act (PASPA)*, 31 CARDOZO ARTS & ENT. L.J. 569, 589 (2013).

<sup>29</sup> John Affleck, *What's behind fantasy football's surprising popularity*, FORTUNE (Sep. 12, 2015), <http://fortune.com/2015/09/12/fantasy-football-growth/>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Timothy Fong, *Daily Fantasy Sports Are Clearly Gambling*, U.S. NEWS AND WORLD REPORT (Oct. 6, 2015, 8:00AM), <http://www.usnews.com/debate-club/are-daily-fantasy-sports-gambling/daily-fantasy-sports-games-are-clearly-gambling>.

<sup>34</sup> *Id.*

<sup>35</sup> Internet Gambling Prohibition and Enforcement Act, 152 Cong Rec H 4978 § 2 ch. 4(a)(1), (3).

will receive something of value in the event of a certain outcome.”<sup>36</sup> The Act carves out fantasy sports as an exception, because the winning outcomes reflect the knowledge and skill of the participants.<sup>37</sup>

Congress takes issue with people placing bets online, and ratified this Act because of the easy access to the Internet, and the easy access to obtain money that people cannot afford to lose. At the same time, however, Congress distinguishes between games of chance, like roulette, blackjack, and poker, which are illegal online, and games of skill, like fantasy sports, which are legal.<sup>38</sup> In doing so, Congress declared that participating in online fantasy sports is not illegal gambling because it does not require the staking or risking of money subject to chance, but rather subject to skill. Therefore, partaking in online fantasy sports is legal gambling.<sup>39</sup>

To determine whether a game is classified as a game of chance or skill, courts look to the dominant factor in determining the outcome of the game.<sup>40</sup> Although courts disagree about whether games like poker and backgammon are chance or skill, there is no doubt that players need to understand the game and know how to handle certain situations.<sup>41</sup> There is still, however, an incredible amount of chance involved in proving the player’s success.<sup>42</sup> This same analysis can be applied to fantasy sports, as there is skill involved in picking players and knowing individual matchups for the game, but then there is still an enormous amount of chance involved in determining the outcome, like player performance, physical and emotional health, injuries, weather, and substitutions. For example, in football, a certain running-back may seem like a great pick for a game, but if the other team comes out and scores three touchdowns in the first quarter, the running back may not see much of the ball for the rest of the game because the team may

---

<sup>36</sup> *Id.* § 101(3)(6)(A).

<sup>37</sup> *Id.* § 101(3)(D)(ix)(II) (2006) (“participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization (as those terms are defined in section 3701 of title 28) and that meets the following conditions: . . . (II) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.”).

<sup>38</sup> *Id.*

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

<sup>40</sup> Michael Trippiedi, Note, *Daily Fantasy Sports Leagues: Do You Have The Skill to Win at These Games of Chance?*, 5 UNLV GAMING L.J. 201, 215 (2014).

<sup>41</sup> *Id.* at 216.

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

favor passing over running to score points faster. The same ratio of skill to chance is prevalent in daily fantasy sports as in most casino table games, and none of these games should be classified as having chance or skill as the dominant factor.

FanDuel and DraftKings contend that fantasy sports are legal because they are games of skill.<sup>43</sup> A few states, however, believe that fantasy sports are gambling and either have acted, or are considering acting. For example, Arizona, Iowa, Louisiana, Montana and Washington have long had prohibitions on fantasy sports.<sup>44</sup> In the last few months of 2015, Nevada and New York took similar stances on the issue, declaring fantasy sports illegal gambling and sending cease-and-desist letters to both DraftKings and FanDuel.<sup>45</sup> On the other hand, Pennsylvania, Massachusetts, Georgia and New Jersey have not taken any action yet, but have considered enacting their own rules.<sup>46</sup> New Jersey for example, would much rather see fantasy sports regulated under state rules than have them completely shut down.<sup>47</sup> Although some states have banned or want to ban daily fantasy sports, they remain legal in most of the country.

Although the Leagues remain vehemently opposed to state-sponsored sports wagering, the Leagues not only approve daily fantasy sports, but also have no problem taking a piece of the gold mine for themselves.<sup>48</sup> The National Football League (NFL) has allowed teams to sign multi-year deals with fantasy sports providers, leading the way for fifteen teams to sign deals including “stadium signage, radio and digital advertising and other promotions in exchange for an undisclosed amount.”<sup>49</sup> The Major League Baseball (MLB) recently expanded its exclusive partnership with DraftKings and “has emblazoned its logo throughout several stadiums this season, including behind home plate

---

<sup>43</sup> Internet Gambling Prohibition and Enforcement Act, 152 Cong Rec H 4978 § 101(3)(D)(ix)(II) (2006).

<sup>44</sup> David Purdum & Darren Rovell, *N.Y. AG declares DraftKings, FanDuel are illegal gambling, not fantasy*, ESPN (Nov. 11, 2015), [http://espn.go.com/chalk/story/\\_/id/14100780/new-york-attorney-general-declares-daily-fantasy-sports-gambling](http://espn.go.com/chalk/story/_/id/14100780/new-york-attorney-general-declares-daily-fantasy-sports-gambling).

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

<sup>46</sup> Wayne Perry, *New Jersey lawmaker seeks to regulate daily fantasy sports*, ASSOCIATED PRESS (Nov. 3, 2015, 2:32 AM), <http://bigstory.ap.org/article/1cbad9ebf5ba480d88003fea30db5631/new-jersey-lawmaker-seeks-regulate-daily-fantasy-sports-0>.

<sup>47</sup> *Id.*

<sup>48</sup> *See* Brent Schrottenboer, *FanDuel signs deals with 15 NFL teams, escalating daily fantasy integration*, USA TODAY (Apr. 21, 2015, 10:42 PM), <http://www.usatoday.com/story/sports/2015/04/21/daily-fantasy-sports-fanduel-draftkings-nfl-mlb-nhl-nba/26149961/>.

<sup>49</sup> *Id.*

and on the centerfield wall.”<sup>50</sup> The National Hockey League (NHL) also signed on with DraftKings, making it the official fantasy game of the NHL, allowing the site to use all of its intellectual property.<sup>51</sup> Finally, not only do thirteen National Basketball Association (NBA) teams have partnerships with FanDuel, but the NBA itself signed a contract with the site, including an equity stake in the site.<sup>52</sup> It is a hypocrisy that the Leagues are battling with New Jersey to stop sports wagering in order to protect the integrity of their games, yet they are financially intertwined with daily fantasy sports.

The popularity of sports gambling has been mounting over time and only seems to be growing with the advancement of the Internet. As fantasy sports continue to gain popularity, it appears the negative characteristics associated with illegal gambling are beginning to wear off.<sup>53</sup> Fantasy sports do not carry the typical negative stigmas of gambling like decreased economic productivity, increased crime, and the erosion of morality that illegal gambling still carries. Instead, fantasy sports betting lead to an increase in the health of the economy.<sup>54</sup> It is very possible that the same could happen to sports wagering, should it become nationally legal, which could possibly lead to a stimulation in the economy similar to the effect of daily fantasy sports.

### *C. The Professional and Amateur Sports Protection Act*

Enacted in 1992, PASPA makes it unlawful for a governmental entity or person to sponsor, operate, advertise, promote, license, or authorize by law or compact,

a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.<sup>55</sup>

---

<sup>50</sup> *Id.*

<sup>51</sup> Darren Heitner, *NHL Does Multi-Year Exclusive Deal with DraftKings*, FORBES (Nov. 10, 2014, 7:55 AM), <http://www.forbes.com/sites/darrenheitner/2014/11/10/nhl-does-multi-year-exclusive-deal-with-draftkings/>.

<sup>52</sup> Darren Heitner, *FanDuel Signs Multi-Year Partnerships With 13 NBA Teams*, FORBES (Jun. 23, 2015, 8:54 AM), <http://www.forbes.com/sites/darrenheitner/2015/06/23/fanduel-signs-multi-year-partnerships-with-13-nba-teams/>.

<sup>53</sup> Nathaniel J. Ehrman, Article, *Out of Bounds?: A Legal Analysis of Pay-To-Play Daily Fantasy Sports*, 22 SPORTS L.J. 79, 114 (2015).

<sup>54</sup> See generally *id.* at 108–12.

<sup>55</sup> 28 U.S.C.S. § 3702 (2015).

PASPA does not apply to some states that were exempted from the statute.<sup>56</sup> In order to qualify for the exception, states had to have at least a ten-year history with licensed gambling, and states that met that stipulation only had one year to apply to be grandfathered in under the legislation.<sup>57</sup> Nevada, Oregon, and Delaware were the only states that applied and were exempted from PASPA.<sup>58</sup> At the time of PASPA's enactment, an exemption was carved out for New Jersey, but only if New Jersey enacted a sports gambling scheme within one year of PASPA's enactment.<sup>59</sup> New Jersey did not do so, and, therefore, the PASPA exemption expired and New Jersey remained barred from implementing sports wagering.<sup>60</sup>

Looking to the statute's legislative history, the Senate Judiciary Committee noted the problems arising from sports wagering, highlighting its concern for the integrity of sports, and that widespread legalization of gambling would promote suspicion about controversial plays and lead fans to think that games are fixed.<sup>61</sup> The Senate Report characterized sports wagering as a national problem because "the moral erosion it produces cannot be limited geographically," and "because once a state legalizes sports wagering, it will be extremely difficult for other states to resist the lure."<sup>62</sup> Moreover, the Senate Report stated "its concurrence with the then-director of New Jersey's Division of Gambling Enforcement's statement that 'most law enforcement professionals agree that legalization has a negligible impact on, and in some ways enhances, illegal markets.'"<sup>63</sup>

#### *D. Past PASPA Challenges*

PASPA remained untouched for nearly two decades before it was challenged. In recent years, the sports gambling industry has boomed and states want to take advantage of the positive economic impact that sports wagering can bring in the form of increased revenue.

---

<sup>56</sup> *Id.* § 3704.

<sup>57</sup> *What is PASPA? – Professional & Amateur Sports Protection Act Of 1992*, LEGALGAMBLINGUSA.COM, <http://www.legalgamblingusa.com/articles/what-is-paspa.html> (last visited Oct. 16, 2016).

<sup>58</sup> *NCAA v. Governor of N.J.*, 799 F.3d 259, 261 (3d. Cir. 2015), *vacated by* NCAA v. Rebut, 2015 U.S. App. LEXIS 17839 (3d Cir. Oct. 14, 2015).

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

<sup>60</sup> *Id.*

<sup>61</sup> *NCAA v. Governor of N.J.*, 730 F.3d 208, 216 (3d. Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014), *and aff'd*, 799 F.3d 259 (3d. Cir. 2015), *and aff'd en banc*, 832 F.3d 389 (3rd Cir. 2016).

<sup>62</sup> *Id.*

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

In 2009, PASPA was first challenged in the Third Circuit case, *Office of the Comm'r of Baseball v. Markell*, where Delaware proposed allowing three types of sports gambling in the State, including multi-game (parlay) betting.<sup>64</sup> In 1977, this type of parlay betting had already been upheld in Delaware because it was confined to just NFL games, and because it involved three types of sports games, making chance the dominating factor.<sup>65</sup> Here, Delaware argued that because it had implemented a similar betting scheme in the past and because Delaware was grandfathered into PASPA, it could then allow the new sports gambling proposals.<sup>66</sup> The Third Circuit held that Delaware could adopt the new gambling schemes because Delaware was grandfathered into PASPA, and the proposed gambling scheme was very similar to the one upheld in 1976.<sup>67</sup> Although the Third Circuit upheld Delaware's sports gambling scheme, it provided a blow for other states hoping to legalize sports gambling, as the Third Circuit also upheld PASPA's grandfathering clause, continuing to only allow sports gambling schemes that had been enacted in the past as the only exceptions to PASPA.<sup>68</sup>

In 2011, the constitutionality of PASPA was challenged in *Interactive Media Entm't & Gaming Ass'n v. Holder*. There, a New Jersey non-profit corporation, which disseminated electronic gaming information via the Internet, alleged that PASPA violated various provisions of the Constitution, including the Commerce Clause, the First Amendment, the Tenth Amendment, the Eleventh Amendment, the Due Process Clause, and the Equal Protection Clause.<sup>69</sup> The United States District Court for the District of New Jersey dismissed the non-profit corporation's claim for lack of standing, therefore, not addressing PASPA's constitutionality claims.<sup>70</sup>

The Third Circuit is the only Circuit Court to ever hear a PASPA challenge, or a case involving sports wagering. The United States Supreme Court has never heard any case regarding PASPA's constitutionality or sports wagering.

---

<sup>64</sup> *Office of the Comm'r of Baseball v. Markell*, 579 F.3d 293, 295 (3d. Cir. 2009), *cert denied*, 559 U.S. 1106 (2010).

<sup>65</sup> *Id.* at 296.

<sup>66</sup> *Id.* at 297.

<sup>67</sup> *Id.* at 304 (holding that "under federal law, Delaware may, however, institute multi-game (parlay) betting on at least three NFL games, because such betting is consistent with the scheme to the extent it was conducted in 1976").

<sup>68</sup> *Id.*

<sup>69</sup> *Interactive Media Entm't & Gaming Ass'n v. Holder*, 2011 U.S. Dist. LEXIS 23383, at \*2-5 (D.N.J. Mar. 7, 2011).

<sup>70</sup> *Id.* at \*32 (granting the government's motion and dismissing plaintiffs' complaint for lack of standing).

*E. The Sports Wagering Battle in New Jersey*

Prior to 2011, New Jersey was against sports wagering, as the New Jersey Constitution prohibited it, which may be the reason why New Jersey did not take advantage of PASPA's exemption within the one-year window.<sup>71</sup> However, the views of New Jersey voters have changed in the two decades since PASPA's enactment.<sup>72</sup> In 2011, a New Jersey referendum was held to legalize sports wagering and it was approved by the voters.<sup>73</sup> When asked about the referendum, Senator Raymond Lesniak, who was a sports wagering advocate, said, "[i]t was a bigger win than we expected. There's a strong movement to fight the federal ban in New Jersey."<sup>74</sup> New Jersey legislators were in favor of legalizing sports wagering, and with the approval of the referendum, voters were also onboard with legalizing sports wagering.<sup>75</sup>

In response to the referendum, the New Jersey Constitution was amended, stating in relevant part:

It shall also be lawful for the Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City on the results of any professional, college, or amateur sport or athletic event, except that wagering shall not be permitted on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates regardless of where the event takes place.<sup>76</sup>

Voters approved the constitutional amendment, and legislators subsequently enacted the sports wagering law.<sup>77</sup> This new law established a comprehensive regulatory scheme, license requirement for operators, extensive documentation, minimum cash reserves, and access to security and surveillance systems.<sup>78</sup>

Following the enactment of the New Jersey Sports Wagering Law, the Leagues, which include the NBA, MLB, NCAA, NFL, and NHL,

---

<sup>71</sup> N.J. CONST. Art. IV, § 7, Para. 2.

<sup>72</sup> *NCAA v. Governor of N.J.*, 730 F.3d 208, 217 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014), *and aff'd*, 799 F.3d 259 (3d Cir. 2015), *and aff'd en banc*, 832 F.3d 389 (3d Cir. 2016).

<sup>73</sup> MaryAnn Spoto, *Sports Betting Backed by N.J. Voters*, NJ.COM (Nov. 8, 2011, 10:10 PM), [http://www.nj.com/news/index.ssf/2011/11/nj\\_residents\\_vote\\_on\\_legalizin.html](http://www.nj.com/news/index.ssf/2011/11/nj_residents_vote_on_legalizin.html).

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

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

<sup>76</sup> N.J. CONST. Art. IV, § VII, Para. 2(D).

<sup>77</sup> N.J. Stat. Ann. §§ 5:12A-1 *et seq.*

<sup>78</sup> *NCAA v. Governor of N.J.*, 799 F.3d 259, 262 (3d Cir. 2015), *vacated by NCAA v. Rebuck*, 2015 U.S. App. LEXIS 17839 (3d Cir. Oct. 14, 2015).

brought an action against New Jersey Governor Chris Christie challenging PASPA's constitutionality and seeking an injunction ("*Christie I*").<sup>79</sup> The United States District Court for the District of New Jersey upheld PASPA's constitutionality, and found that the Leagues were entitled to summary judgment and a permanent injunction.<sup>80</sup> The case was subsequently appealed to the Third Circuit.<sup>81</sup>

First in *Christie I*, the Third Circuit examined whether the Leagues had standing to bring the suit.<sup>82</sup> Focusing mostly on whether the Leagues had suffered an "injury-in-fact," the Leagues argued that they did have standing because their games were the New Jersey law's central focus, and that the increase in sports gambling would put the integrity of their games at risk.<sup>83</sup> The Third Circuit held that reputational harm is a cognizable injury-in-fact and that the enactment of the law created increased incentives for game-rigging.<sup>84</sup> Therefore, the Third Circuit held that the Leagues did in fact have standing.<sup>85</sup>

After holding that the Leagues had standing, the Third Circuit examined PASPA's constitutionality. First, the Third Circuit looked at Congress's power under the Commerce Clause.<sup>86</sup> Acknowledging that this power is broad, the court found that both gambling and the Leagues' contests (whether considered together or separately) affect interstate commerce.<sup>87</sup> Also, even though New Jersey's gambling activities may be purely intrastate themselves, they "substantially affect interstate commerce given the reach of gambling, sports, and sports wagering" across state lines.<sup>88</sup> The court concluded that Congress can regulate sports wagering under the Commerce Clause.<sup>89</sup>

Next, the court turned to whether PASPA commandeered the states. New Jersey argued that "PASPA's operation over their own

---

<sup>79</sup> *NCAA v. Governor of N.J.*, 730 F.3d 208, 214 (3d. Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014), *and aff'd*, 799 F.3d 259 (3d. Cir. 2015), *and aff'd en banc*, 832 F.3d 389 (3rd Cir. 2016).

<sup>80</sup> *NCAA v. Christie*, 926 F. Supp. 2d 551, 579 (D.N.J. 2012) (holding that PASPA is a constitutional exercise of Congress's powers pursuant to the Commerce Clause, and does not violate the Tenth Amendment, Due Process Clause, Equal Protection Principles, nor Equal Footing Doctrine).

<sup>81</sup> *NCAA*, 730 F.3d at 217.

<sup>82</sup> *Id.* at 217–24.

<sup>83</sup> *Id.* at 218.

<sup>84</sup> *Id.* at 221–22.

<sup>85</sup> *Id.* at 223–24.

<sup>86</sup> *Id.* at 224.

<sup>87</sup> *NCAA*, 730 F.3d at 224.

<sup>88</sup> *Id.* at 226.

<sup>89</sup> *Id.*

state law violated the anti-commandeering principle, which bars Congress from conscripting the states into doing the work of federal officials.”<sup>90</sup> The court rejected New Jersey’s argument, and found that the principles New Jersey cited may abstractly be used to support their position, and accepting their position would result in “an undue expansion of the anti-commandeering doctrine.”<sup>91</sup> The court also placed heavy weight on the fact that the previous statutes that it struck down under the anti-commandeering principle were affirmative commands to the states, and nothing like PASPA.<sup>92</sup> PASPA operates as a law of pre-emption, which is constitutional under the Supremacy Clause.<sup>93</sup>

Finally, the court analyzed whether PASPA violated equal sovereignty to the states by allowing the grandfathered states to continue operating sports wagering schemes while other states, like New Jersey cannot. The court struck down the equal sovereignty issue, explaining, “[t]hat [since] New Jersey seeks Nevada’s preferential treatment, and not a complete ban on the preferences, [it] undermines [New Jersey’s] invocation of the equal sovereignty doctrine.”<sup>94</sup> Also, the court explained that New Jersey did not cite a case where the grandfathering rationale was used to justify a violation of equal sovereignty, which was most likely because “only two Supreme Court cases in modern times have applied the equal sovereignty principle.”<sup>95</sup>

In *Christie I*, the Third Circuit ultimately held that nothing in PASPA violated the Constitution, as the statute neither exceeded Congress’s enumerated powers nor violated any principles of federalism.<sup>96</sup> After the Third Circuit ruled in favor of the Leagues, New Jersey appealed to the United States Supreme Court, but certiorari was denied.<sup>97</sup>

Seemingly unfazed by *Christie I*, New Jersey’s legislature passed a new law in 2014 which states in relevant part:

[A]ny rules and regulations that may require or authorize any State agency to license, authorize, permit or otherwise take action to allow any person to engage in the placement or acceptance of any wager on any professional, collegiate, or

---

<sup>90</sup> *Id.* at 227.

<sup>91</sup> *Id.* at 237.

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

<sup>93</sup> *NCAA*, 730 F.3d at 237.

<sup>94</sup> *Id.* at 239.

<sup>95</sup> *Id.* at 240.

<sup>96</sup> *Id.*

<sup>97</sup> *NCAA v. Governor of N.J.*, 799 F.3d 259, 263 (3d Cir. 2015), *vacated by NCAA v. Rebeck*, 2015 U.S. App. LEXIS 17839 (3d Cir. Oct. 14, 2015).

amateur sport contest or athletic event, or that prohibit participation in or operation of a pool that accepts such wagers, are repealed.<sup>98</sup>

This new law permitted New Jersey casinos and racetracks to allow sports betting without state regulation and licensing.<sup>99</sup> Governor Christie explained that he signed the bill into law because it adhered to PASPA, responded to the issues of the federal courts, and specified that no one under the age of twenty-one could bet, and that bets were not allowed to be placed on games involving New Jersey teams, or events in New Jersey.<sup>100</sup>

The enactment of the 2014 Law led the Leagues to bring about a second case challenging the Law under PASPA (“*Christie II*”).<sup>101</sup> As it did in *Christie I*, the United States District Court for the District of New Jersey once again granted summary judgment in favor of the Leagues and issued a permanent injunction against New Jersey.<sup>102</sup> New Jersey subsequently appealed to the Third Circuit for a second time.<sup>103</sup>

In 2015, the Third Circuit once again struck down New Jersey’s attempt to legalize sports wagering in *Christie II*.<sup>104</sup> The court reasoned that: (1) although the 2014 Law allowed sports wagering at casinos and racetracks, conduct of the sort is completely prohibited by PASPA; (2) although the 2014 Law is labeled as a repealer, it is actually an authorization; and (3) the court “will not read statutory provisions to be surplusage,” and, therefore, the statute clearly violates PASPA.<sup>105</sup> The result of *Christie II’s* was to leave sports wagering unlawful in New Jersey.

On October 14, 2015, the Third Circuit vacated its opinion in *Christie II*, and granted an en banc hearing of the case.<sup>106</sup> In August 2016, the Third Circuit’s en banc decision once again held that the 2014 Law violated PASPA because it authorized, by law, sports gambling, and that PASPA continues to remain constitutional.<sup>107</sup> In this Third

---

<sup>98</sup> N.J. Stat. § 5:12A-7.

<sup>99</sup> *Id.*

<sup>100</sup> Brent Johnson, *Christie signs law allowing sports betting in N.J.*, NJ.COM (Oct. 17, 2014, 4:53PM), [http://www.nj.com/politics/index.ssf/2014/10/chris\\_christie\\_signs\\_law\\_allowing\\_for\\_sports\\_betting\\_in\\_nj.html](http://www.nj.com/politics/index.ssf/2014/10/chris_christie_signs_law_allowing_for_sports_betting_in_nj.html).

<sup>101</sup> *NCAA*, 799 F.3d at 259.

<sup>102</sup> *Id.* at 263.

<sup>103</sup> *Id.* at 264.

<sup>104</sup> *Id.* at 267.

<sup>105</sup> *Id.* at 264–67.

<sup>106</sup> *NCAA v. Rebeck*, 2015 U.S. App. LEXIS 17839 (3d Cir. Oct. 14, 2015).

<sup>107</sup> *NCAA v. Governor of N.J.*, 832 F.3d 389, 402 (3d Cir. 2016).

Circuit decision, the Court focused heavily on the anti-commandeering doctrine, once again ruling that PASPA does not present states with a coercive binary choice or affirmative command.<sup>108</sup> Therefore, it did not violate the anti-commandeering doctrine.<sup>109</sup>

On October 7, 2016, New Jersey petitioned for writ of certiorari to the Supreme Court, and as of the date of this comment, the petition is pending.<sup>110</sup> Although PASPA does violate principles of federalism, sports wagering cannot remain illegal under PASPA, while fantasy sports continue to be legal. Per sports-law expert Daniel Wallach, “the rise of daily fantasy sports . . . may pave the way for legalized sports gambling overall in the United States.”<sup>111</sup> Wallach believes that Congress cannot have it both ways, and must either apply PASPA to daily fantasy sports, or repeal PASPA altogether.<sup>112</sup>

### III. ANALYSIS

#### *A. Federalism Basis*

During the Constitutional Convention, federalism played an integral part in keeping the country bound to a common core of governance, while preserving the individual identity of the sovereign states. During the times leading up to the creation of the United States Constitution, James Madison described federalism as, “the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments . . . [t]he different governments will control each other, at the same time that each will be controlled by itself.”<sup>113</sup> Alexander Hamilton agreed that “the system, though it may not be perfect in every part, is, upon the whole, a good one.”<sup>114</sup> The inclusion of federalism with two distinct governments was a substantial revision to the Articles of Confederation, and formed the basis for the United States Constitution.

---

<sup>108</sup> *Id.* at 400–02.

<sup>109</sup> *Id.* at 402.

<sup>110</sup> *Christie v. National Collegiate Athletic Association*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/christie-v-national-collegiate-athletic-association-2/> (last visited Dec. 28, 2016).

<sup>111</sup> Matt Bonesteel, *New Jersey’s attempt at legalized sports betting suffers another big setback in court*, THE WASHINGTON POST (Aug. 9, 2016), <https://www.washingtonpost.com/news/early-lead/wp/2016/08/09/new-jerseys-attempt-at-legalized-sports-betting-suffers-another-big-setback-in-court/>.

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

<sup>113</sup> THE FEDERALIST NO. 51, at 256 (James Madison) (Yale Univ. Press ed., 2009).

<sup>114</sup> THE FEDERALIST NO. 85, at 353 (Alexander Hamilton) (J. & G. S. Gideon ed., 1845).

Concepts of federalism are found throughout the Constitution, but three main areas apply to PASPA. First, the Supremacy Clause establishes that the Constitution and federal laws and treaties made under the Constitution, “shall be the supreme law of the land; and the Judges in every State shall be bound thereby.”<sup>115</sup> Next, the Commerce Clause confers upon Congress an express provision to regulate interstate commerce “among the several States.”<sup>116</sup> Finally, the Tenth Amendment expressly states that powers not delegated to the federal government are “reserved to the States respectively, or to the people.”<sup>117</sup> These provisions make the Constitution and federal law supreme over state law, but also gives states their own power to make their own laws where the federal government does not have authority.

The Supreme Court has spoken on issues of federalism stemming from the Supremacy Clause and the Tenth Amendment numerous times.<sup>118</sup> First, in *South Carolina v. Baker*, at issue was a federal statute that removed “the federal income tax exemption for interest earned on publicly offered long-term bonds unless the bonds were issued in registered form.”<sup>119</sup> The Court held that the statute did not violate the Tenth Amendment or principles of federalism because: (1) the states must use the political process to protect themselves from congressional regulation, and South Carolina was not deprived from using the political process; and (2) the statute was a regulatory scheme and did not control or influence the manner in which states could regulate private parties, and the “commandeering” that occurs, in an inevitable consequence of the regulation.<sup>120</sup>

Next, in *New York v. United States*, a federal statute was at issue regarding low-level radioactive waste by the states, and the statute included a take-title provision that forced states to “take title” to waste if it was not disposed of by a certain date.<sup>121</sup> The statute was struck down because it unconstitutionally compelled the states to act or administer a federal regulatory program.<sup>122</sup> The Court relied on principles of federalism throughout the opinion.<sup>123</sup> First, the Court

---

<sup>115</sup> U.S. CONST. art. VI, cl. 2.

<sup>116</sup> U.S. CONST. art. I § 8, cl. 3.

<sup>117</sup> U.S. CONST. amend. X.

<sup>118</sup> *E.g.*, *South Carolina v. Baker*, 485 U.S. 505 (1988); *New York v. United States*, 505 U.S. 144 (1992); *Printz v. United States*, 521 U.S. 898 (1997); *Reno v. Condon*, 528 U.S. 141 (2000).

<sup>119</sup> *Baker*, 485 U.S. at 507.

<sup>120</sup> *Id.* at 512–14.

<sup>121</sup> *New York v. United States*, 505 U.S. at 149–154.

<sup>122</sup> *Id.* at 188. (holding that “the Federal Government may not compel the States to enact or administer a federal regulatory program”).

<sup>123</sup> *See id.* at 155.

explained that state residents have the ability to decide whether or not the state will comply with federal policy choices, and forcing states to regulate diminishes accountability on both the federal and state levels.<sup>124</sup> Although Congress has powers to govern directly, the Constitution does not force states to directly govern according to Congress's instructions.<sup>125</sup> Congress does not have the power to simply "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."<sup>126</sup> The Court also clarified that although the federal government can preempt state regulation contrary to federal interest and hold out incentives to states for not complying, the Constitution does not authorize "Congress simply to direct the States to provide for the disposal of the radioactive waste generated within their borders."<sup>127</sup> *New York* ultimately held that Congress violated the Tenth Amendment when it directed the states to regulate in a particular way regarding radioactive waste.<sup>128</sup>

Additionally, in *Printz v. United States*, at issue was a federal statute's provisions that required the Attorney General to establish a national system for distributing firearms, and forced distributors to instantly perform background checks on possible gun owners.<sup>129</sup> Relying on the *New York* holding, the Court struck down the statute as unconstitutional because it compelled the states to enforce a federal regulatory program.<sup>130</sup> The Court reasoned that "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."<sup>131</sup> In addition, it makes no difference whether policymaking is involved, and there is no need for a case-by-case analysis, because such commands are simply unconstitutional and violate dual sovereignty.<sup>132</sup> In *New York*, the Court held that Congress cannot compel the states to act or enforce a regulatory program,<sup>133</sup> and then in

---

<sup>124</sup> *Id.* at 168.

<sup>125</sup> *Id.* at 162.

<sup>126</sup> *Id.* at 161 (quoting *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288 (1981)).

<sup>127</sup> *New York v. United States*, 505 U.S. at 188.

<sup>128</sup> *Id.*

<sup>129</sup> *Printz v. United States*, 521 U.S. 898, 902 (1997).

<sup>130</sup> *Id.* at 935.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *New York v. United States*, 505 U.S. 144, 161 (1992).

*Printz*, the Court held that Congress cannot circumvent that prohibition by recruiting state officers directly.<sup>134</sup>

Finally, in *Reno v. Condon*, the Court was faced with a federal statute that regulated the disclosure of personal information contained in state motor vehicle department's records, and restricted states' ability to disclose a driver's personal information without the driver's consent.<sup>135</sup> Similar to the statute at issue in *Baker*, the Court upheld the statute because it was consistent with the constitutional principles of federalism set forth in both *New York* and *Printz*, and did not require the states to enact any laws or regulations.<sup>136</sup> The Court reasoned that the statute did not require the States to regulate their own citizens, and did not require state officials to assist in the enforcement of any federal statutes.<sup>137</sup>

The Commerce Clause is yet another important federalism basis. The Supreme Court has established a legal framework to determine when Congress has the power to regulate under the provision. The Commerce Clause gives Congress "considerabl[e] . . . latitude in regulating conduct and transactions."<sup>138</sup> Congress may regulate an activity that "substantially affects interstate commerce" if it "arise[s] out of or [is] connected with a commercial transaction."<sup>139</sup> Even where activities are purely intrastate, Congress can still regulate them if they substantially affect interstate commerce.<sup>140</sup> Where an activity

be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'<sup>141</sup>

From the aforementioned analysis, it is clear that the Commerce Clause is a broad constitutional power that gives Congress much discretion in regulating commerce amongst the states.

The Constitution itself, as well as the foregoing United States Supreme Court cases, have established the precedent that federal courts must rely on when dealing with federalism issues. *New York* and *Printz*

---

<sup>134</sup> *Printz*, 521 U.S. at 935.

<sup>135</sup> *Reno v. Condon*, 528 U.S. 141, 143–44 (2000).

<sup>136</sup> *Id.* at 151.

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

<sup>138</sup> *United States v. Morrison*, 529 U.S. 598, 608 (2000).

<sup>139</sup> *United States v. Lopez*, 514 U.S. 549, 561 (1995).

<sup>140</sup> *See Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

<sup>141</sup> *Id.*

are the only two cases in which the Supreme Court has struck down statutes under the anti-commandeering doctrine, and *NCAA* marks the first time that the Third Circuit has heard such an issue.<sup>142</sup>

### *B. Application to PASPA*

PASPA violates the core principles of federalism that are enumerated in the Constitution and clarified by the Supreme Court. The three federalism issues involved in PASPA are: (1) whether Congress can regulate sports wagering under the Commerce Clause; (2) whether PASPA violates equal sovereignty of the States; and (3) whether PASPA commandeers the states.<sup>143</sup>

First, Congress has the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>144</sup> Congress may regulate any economic activity that “substantially affects interstate commerce” if it “arise[s] out of or is connected with a commercial transaction.”<sup>145</sup> There is little doubt that Congress can regulate sports wagering under the Commerce Clause. Both sports and gambling (considered either separately or together) are economic activities, and they both substantially affect interstate commerce.<sup>146</sup> Additionally, PASPA does not unconstitutionally regulate purely local activities.<sup>147</sup>

PASPA, however, does direct the states on how to act, rather than regulate interstate commerce. Guided by federalism principles, “[s]tates are better positioned to craft state-specific solutions to local concerns, thereby serving as laboratories for novel policies.”<sup>148</sup> The government that is closest to the people understands the specific details surrounding the circumstances, and thus is more responsive to those who are affected, rather than the more distant government.<sup>149</sup> When drafting PASPA, Congress wanted to curtail the negative effects sports gambling would have on professional and amateur sports, as well as limit the negative effects of gambling in general.<sup>150</sup> PASPA, however,

---

<sup>142</sup> *NCAA v. Governor of N.J.*, 730 F.3d 208, 229 (3d. Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014), *and aff’d*, 799 F.3d 259 (3d. Cir. 2015), *and aff’d en banc*, 832 F.3d 389 (3rd Cir. 2016).

<sup>143</sup> *Id.* at 224.

<sup>144</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>145</sup> *United States v. Lopez*, 514 U.S. 549, 561 (1995).

<sup>146</sup> *NCAA*, 730 F.3d at 224–25.

<sup>147</sup> *Id.* at 225–26.

<sup>148</sup> Brief Amicus Curiae of Pacific Legal Foundation and Cato Institute in Support of Petitioners at 8, *Christie v. NCAA*, 2014 U.S. S. Ct. Briefs LEXIS 1105 (Mar. 17, 2014) (No. 13-967).

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

<sup>150</sup> *NCAA*, 730 F.3d at 216.

does not keep states, like New Jersey, which could use the economic increase from sports gambling, in mind. New Jersey has a history of gambling and, currently, a strong reliance on gambling. As such, New Jersey could use sports wagering to boost its economy. Since each state knows best of whether it could benefit from something, like sports wagering, it should be an issue left to the states to decide. For these reasons, sports wagering should be a locally-regulated activity and not congressionally banned.

The problem with relying on Congress's Commerce Clause power, is that PASPA is a reach of the power that goes too far. The Commerce Clause only allows Congress to regulate interstate commerce directly, "it does not authorize Congress to regulate state governments' regulation of interstate commerce."<sup>151</sup> By enacting PASPA, Congress did exactly what the Court in *New York* said was unconstitutional under the Commerce Clause. PASPA is not a regulatory scheme, and while Congress could have regulated sports gambling directly under the Commerce Clause, it did not.<sup>152</sup> Instead, "[Congress] chose to set federal parameters as to how states may regulate sports gambling."<sup>153</sup> There is "no case law that allows Congress to achieve federal policy objectives by dictating how states regulate sports gambling."<sup>154</sup> PASPA does not regulate state activities or interstate commerce, but rather, it seeks to control or influence how states regulate private parties, which is a distinction that the Supreme Court has recognized as significant in *Baker, Reno*, and *New York*.<sup>155</sup>

Furthermore, an equal sovereignty issue arises, because PASPA grandfathered a few states into the statute, and thus does not ban sports wagering in those states.<sup>156</sup> The equal sovereignty principle has been understood to apply to the Commerce Clause.<sup>157</sup> The Constitution's framers, as well as case law that follows, provided "evidence that the Commerce Clause did not allow regulations inconsistent with the equal sovereignty principle."<sup>158</sup> There has also been some evidence in the Supreme Court of this as well, especially through Justice Ginsburg's recognition that statutes enacted under congressional powers other than

---

<sup>151</sup> *New York v. United States*, 505 U.S. 144, 166 (1992).

<sup>152</sup> *NCAA*, 730 F.3d at 249 (Vanaskie, J., dissenting).

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

<sup>154</sup> *Id.* at 251 (Vanaskie, J., dissenting).

<sup>155</sup> *Id.*

<sup>156</sup> Spoto, *supra* note 4.

<sup>157</sup> Brief Amicus Curiae of Pacific Legal Foundation and Cato Institute in Support of Petitioners at 10–12, *Christie v. NCAA*, 2014 U.S. S. Ct. Briefs LEXIS 1105 (Mar. 17, 2014) (No. 13-967).

<sup>158</sup> *Id.*

the Fifteenth Amendment, “most notably statutes enacted pursuant to the Commerce Clause, raise ‘equal sovereignty’ issues.”<sup>159</sup>

By continuing to allow sports wagering in a few states, PASPA not only fails to achieve its main goal of keeping sports games legitimate, because there are still places available for people to go and bet on games, but also treats the states unfairly. Therefore, PASPA’s ban on sports wagering in only some states is a violation of the equal sovereignty principle and too broad a use of the Commerce Clause. Applying the equal sovereignty principle to the Commerce Clause will “prevent ‘a few States in Congress [from] secur[ing] a monopoly of certain branches of trade and business to themselves, to the injury, if not to the destruction, of their less favored neighbors.’”<sup>160</sup> Currently, since only a few states can implement sports wagering, those states hold a monopoly in the nation for legalized sports wagering. If Congress wanted to regulate sports wagering for its negative effects, then it would either repeal PASPA and regulate how state gambling schemes are implemented, or it would prohibit all states from allowing sports wagering. Until that point, PASPA stands as a violation to the equal sovereignty principle and is too far a reach of Congress’s Commerce Clause power.

Next, as illustrated in *New York* and *Printz*, the federal government cannot direct states to enact legislation, or “commandeer” the states, nor can it direct state officials to implement federal policy.<sup>161</sup> As laid out in *New York*, Congress does not have authority to directly require that the states do or not do something, and while the Commerce Clause power allows Congress to regulate interstate commerce directly, “it does not authorize Congress to regulate state governments’ regulation of interstate commerce.”<sup>162</sup> Additionally, in *Printz*, the Court held that Congress cannot compel state officers directly, nor can it “issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”<sup>163</sup> As Justice Vanaskie explained in the dissent of *Christie I*, “[n]o legal principle exists for finding a distinction between the federal

---

<sup>159</sup> *Id.* at 7–8 (citing *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2649 (2013) (Ginsburg, J., dissenting)).

<sup>160</sup> *Id.* at 12 (quoting Joseph Story, *Commentaries on the Constitution of the United States* § 957 (Thomas Cooley ed. 1873)).

<sup>161</sup> *NCAA v. Governor of N.J.*, 730 F.3d 208, 244 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014), *and aff’d*, 799 F.3d 259 (3d Cir. 2015), *and aff’d en banc*, 832 F.3d 389 (3d Cir. 2016) (Vanaskie, J., dissenting).

<sup>162</sup> *New York v. United States*, 505 U.S. 144, 166 (1992).

<sup>163</sup> *Printz v. United States*, 521 U.S. 898, 935 (1997).

government compelling state governments to exercise their sovereignty to enact or enforce laws on the one hand, and restricting state governments from exercising their sovereignty to enact or enforce laws on the other hand.”<sup>164</sup> Guided by previous Supreme Court opinions, Congress may regulate the commercial activity themselves, provided states have a choice about whether to implement regulations consistent with federal standards, let federal regulation preempt state law, require states to consider federal regulations, or even encourage states to regulate in a particular way; but Congress cannot compel states to implement federal policy, or commandeer them.<sup>165</sup>

Here, there is no doubt that PASPA “regulate[s] state governments’ regulation of interstate commerce.”<sup>166</sup> PASPA does this in a selective, uneven and random way, by only prohibiting sports wagering in forty-seven states, but still allowing it in a few. PASPA prohibits some states from authorizing sports wagering and dictates the way states regulate interstate commerce, therefore, contravening principles of federalism.<sup>167</sup> The Supreme Court “has been explicit” that “the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions,” and this is exactly what PASPA does.<sup>168</sup>

Although *New York* and *Printz* both involved statutes in which Congress affirmatively forced the states to engage in an act, the principles set forth apply to cases where Congress prohibits certain conduct, like PASPA. As Judge Vanaskie pointed out, affirmative commands to engage in conduct can be rephrased as prohibitions against not engaging in that same conduct.<sup>169</sup> Judge Vanaskie went on to explain how permitting negative commands to state governments will alter *New York*’s and *Printz*’s holdings that limited Congress’s power to compel states to adopt federal policy.<sup>170</sup> Separating negative prohibitions from affirmative mandates nullifies important structural protections inherent in the concept of dual sovereignty.<sup>171</sup>

Compelling the states to regulate or not to regulate takes away the political accountability that federalism sought to promote. When the

---

<sup>164</sup> *NCAA*, 730 F.3d at 251 (Vanaskie, J., dissenting).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 245 (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 251 (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)).

<sup>169</sup> *Id.* (Vanaskie, J., dissenting).

<sup>170</sup> *NCAA*, 730 F.3d at 251 (Vanaskie, J., dissenting).

<sup>171</sup> Tyler Valeska, Article, *Reverse Line Movement: How the Third Circuit’s Decision in National Collegiate Athletic Association v. Governor of New Jersey Contravenes the Anti-Commandeering Doctrine*, 10 NW. J. L. & SOC. POL’Y 461, 479 (2015).

federal government directs states to regulate, the state is usually blamed for the negative effects of the regulation, especially when the regulation is politically unpopular.<sup>172</sup> When states are forced to adopt federal regulatory programs, Congress can take credit for solving problems without having to ask its constituents to pay for the solutions with higher federal taxes, and the states are put in the position of taking the blame for its burdensomeness and defects.<sup>173</sup> New Jersey voters approved sports wagering and, therefore, it is easy for voters to blame the State for not having it implemented, while Congress is really at fault. States can operate some forms of gambling, like lotteries and casinos, while others, like sports wagering, remain illegal because of policy choices that Congress chose to implement; therefore, creating accountability concerns undermining principles of federalism.<sup>174</sup> PASPA has done exactly that in prohibiting the states from implementing sports wagering, and leaving the states to bear the crux of public disapproval.

Although the federal government cannot force the states to adopt policy, it does have the power to regulate the states through preemption, which makes state laws that conflict with federal laws invalid.<sup>175</sup> If Congress identifies a problem that “falls within its realm of authority” then it may provide a solution directly or provide incentives for states to comply with the solution.<sup>176</sup> It thus follows that a state law contrary to a federal regulatory or deregulatory scheme is void under the Supremacy Clause and principles of preemption.<sup>177</sup>

PASPA, however, does not operate under a regulatory or deregulatory scheme. PASPA does not tell the states how to regulate sports wagering, but rather completely prohibits states from “sponsor[ing], operat[ing], advertis[ing], promot[ing], licens[ing], or authoriz[ing]” gambling on sports.<sup>178</sup> Also, it is not a deregulatory measure, as its purpose was to “stem the spread of state-sponsored sports gambling, not let it go unregulated.”<sup>179</sup> The majority opinion in *Christie I* does not cite to any case that sustained a “federal statute that purported to regulate the states under the Commerce Clause where

---

<sup>172</sup> *New York v. United States*, 505 U.S. 144, 169 (1992).

<sup>173</sup> *Printz v. United States*, 521 U.S. 898, 930 (1997).

<sup>174</sup> *See NCAA v. Governor of N.J.*, 730 F.3d 208, 246 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014), *and aff'd*, 799 F.3d 259 (3d Cir. 2015), *and aff'd en banc*, 832 F.3d 389 (3d Cir. 2016) (Vanaskie, J., dissenting).

<sup>175</sup> U.S. CONST. art. VI, cl. 2.; U.S. CONST. art. I, § 8, cl. 3.

<sup>176</sup> *NCAA*, 730 F.3d at 246 (Vanaskie, J., dissenting).

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

<sup>178</sup> 28 U.S.C. § 3702(1).

<sup>179</sup> *NCAA*, 730 F.3d at 247 (Vanaskie, J., dissenting).

there was no underlying federal scheme of regulation or deregulation.”<sup>180</sup> Therefore, “PASPA stands alone in telling the states that they may not regulate an aspect of interstate commerce that Congress believes should be prohibited.”<sup>181</sup> PASPA is unconstitutional because its prohibition of state-authorized sports gambling does not emanate from a federal regulatory scheme that expressly or implicitly preempts state regulation that would conflict with federal policy, but instead attempts to implement federal policy by telling the states that they may not regulate an otherwise unregulated activity.<sup>182</sup>

Finally, although the Third Circuit has heard challenges on PASPA before, the Circuit is not bound by stare decisis to rule PASPA constitutional based on federalism grounds.<sup>183</sup> In *Office of the Commissioner of Baseball*, the Third Circuit dealt with the question of which sovereign had the authority, under either the “usual” or “altered” constitutional balance, to regulate sports gambling, and held that Congress has the authority to regulate sports gambling when it does so itself.<sup>184</sup> In this case, however, the Third Circuit was faced with the issue of whether Congress has the authority to regulate how states regulate sports gambling.<sup>185</sup>

PASPA violates core concepts of federalism, and unconstitutionally regulates the states in their regulation of sports gambling. PASPA violates principles of federalism articulated by the Supreme Court, especially those principles explained in *New York and Printz*.<sup>186</sup>

### *C. Impact on New Jersey*

New Jersey is stuck in the middle of this intra circuit conflict about whether PASPA is unconstitutional.<sup>187</sup> *Christie II* changed what *Christie I* said was wrong about the New Jersey Sports Wagering Law, but the analysis and holdings of both cases undermine the Constitution and the Supreme Court.<sup>188</sup>

---

<sup>180</sup> *Id.* at 246, n.4 (Vanaskie, J., dissenting).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 248 (Vanaskie, J., dissenting).

<sup>183</sup> *Id.* at 250 (Vanaskie, J., dissenting).

<sup>184</sup> *Office of the Comm’r of Baseball v. Markell*, 579 F.3d 293, 303 (3d. Cir. 2009), *cert denied*, 559 U.S. 1106 (2010).

<sup>185</sup> *NCAA*, 730 F.3d at 250 (Vanaskie, J., dissenting).

<sup>186</sup> *Id.* at 251 (Vanaskie, J., dissenting).

<sup>187</sup> *Petition for Rehearing En Banc for Appellant New Jersey Thoroughbred Horsemen’s Association, Inc. at 2, NCAA v. Governor of N.J.*, 799 F.3d 259 (3d. Cir. 2015) (C.A. NO. 14-4569).

<sup>188</sup> *Id.*

Additionally, New Jersey voters, who approved sports wagering in the state, are suffering. The voters are frustrated that what they approved has not been implemented. Additionally, Monmouth Park Racetrack and other racetracks in New Jersey, which badly need sports wagering to survive, cannot yet accept wagers, and as casinos continue to close, Atlantic City needs an economic boost that sports wagering can bring.<sup>189</sup> Sports gambling can bring New Jersey's economy exactly what it needs. There are multiple ways in which sports wagering can increase state revenue including: recapturing money lost to illegal gambling; collecting taxes and fees from private casinos; encouraging people to get out to casinos and racetracks where they will spend more money on gambling, restaurants, and entertainment; and increasing traffic in casinos and racetracks, which can lead to increased employment.<sup>190</sup> Sports gambling is a multi-billion dollar business, and by making it legal, it could get even bigger and have a positive impact on economies.

Look to Nevada, a state grandfathered into PASPA, for example. There, legal sports wagering brings 30 million visitors to Nevada each year and provides employment for thousands of people.<sup>191</sup> That equates to millions of people spending millions of dollars each year on hotels, amenities, restaurants, and entertainment. New Jersey is currently not able to experience this boom in economic growth because sports wagering is illegal, so people stay home and bet on unregulated, black market games, instead of visiting the State's casinos and racetracks where they would spend more money than just that spent on wagers.

#### IV. CONCLUSION

PASPA should be ruled unconstitutional as it is too broad an implementation of the Commerce Clause, violates the Tenth Amendment and equal protection of the states, and commandeers the states. The desire for a separation of state and federal governments played an integral part in the Constitution's creation. Social issues, like sports wagering, should be left up to the states, as each state is more intuned to its citizens' wants and needs than the federal government. Additionally, PASPA bars states, like New Jersey, from the opportunity to regulate and tax a lucrative activity that is currently

---

<sup>189</sup> *Id.* at 2, 9.

<sup>190</sup> Dylan Oliver Malagrino, Article, *Off the Board: NCAA v. Christie Challenges Congress to "Move the Line" on the Professional and Amateur Sports Protection Act*, 118 PENN. ST. L. REV. 375, 402–403 (2013).

<sup>191</sup> *Id.* at 404.

occurring mostly underground. PASPA cites worries about maintaining sports' integrities as a reason for its existence, yet fantasy sports, which create the same, and if not more worries, are still legal. As a result, New Jersey, which desperately could use sports wagering to improve its economy, is not able to implement this type of gambling into its casinos and racetracks, even though the voters have already approved it.

In a song about Atlantic City, New Jersey's own rock laureate, Bruce Springsteen, may have predicted the City's fate, singing, "[e]verything dies baby that's a fact, but maybe everything that dies someday comes back."<sup>192</sup> Although Atlantic City may be going through financial and social difficulties, if PASPA is ruled unconstitutional for violating principles of federalism, then legal sports wagering can give Atlantic City, and the rest of New Jersey, the economic boom that it desperately needs in order revive its gambling-fueled economy.

---

<sup>192</sup> BRUCE SPRINGSTEEN, *Atlantic City* (Columbia Records 1982).