

2014

The Failure of the Professional and Amateur Sports Protection Act

Matthew D. Mills
false

Follow this and additional works at: <https://digitalcommons.du.edu/selj>

Recommended Citation

Matthew D. Mills, The Failure of the Professional and Amateur Sports Protection Act, 16 U. Denv. Sports & Ent. L.J. 215 (2014).

This Article is brought to you for free and open access by Digital Commons @ DU. It has been accepted for inclusion in Denver Sports & Entertainment Law Journal by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

The Failure of the Professional and Amateur Sports Protection Act

**THE FAILURE OF THE PROFESSIONAL AND AMATEUR SPORTS
PROTECTION ACT**

Matthew D Mills *

ABSTRACT

For the last fifty years, the federal government has been aggressively battling illegal gambling by enacting legislation. The most recent act, The Professional and Amateur Sports Protection Act (PASPA), prohibits states from authorizing and licensing sports gambling. New Jersey recently challenged the constitutionality of PASPA, in *NCAA v. Governor of N.J.*, where the Third Circuit held that nothing in PASPA offends the United States Constitution. Though New Jersey has appealed the Third Circuit's ruling to the United States Supreme Court, there has been no indication whether the Supreme Court will grant a writ of certiorari.

This Comment will explore the likelihood of the United States Supreme Court granting New Jersey a writ of certiorari. It will take a detailed look into the flawed legal reasoning relied upon by the Third Circuit in *NCAA v. Governor of N.J.*, while explaining how PASPA is unconstitutional. After exposing PASPA's inefficiencies and the harms it poses, this Comment will conclude with a suggested beneficial structure to control and capitalize on sports gambling.

INTRODUCTION

The Professional and Amateur Sports Protection Act ("PASPA")¹ is unconstitutional, ineffective, and counter-

*The author is a December 2014 Juris Doctor candidate at the University of Mississippi School of Law. He received his Bachelors degree from Western Michigan University in 2012. He wishes to thank his family and friends for their constant love in support in all that he does. The author wishes to note that the arguments made here are not meant to persuade individuals to gamble, but rather expose the constitutional issues raised by, and the repercussions of PASPA.

University of Denver Sports and Entertainment Law Journal

productive. Enacted in 1992, PASPA makes it a federal crime for states to license sports gambling.² Congress passed PASPA with the intent of prohibiting state authorized sports gambling.³ Rather than being concerned with the moral issues of gambling or the potential detriment gambling poses to society, Congress' concern was "the integrity of, and public confidence in, amateur and professional sports."⁴ Congress believed that the legalization of sports gambling would increase the number of people who engage in sports betting and, in turn, lead to suspicion over controversial plays causing fans to believe games were being influenced by outside sources.⁵ While PASPA may have been passed with admirable intentions, it nevertheless offends the Constitution, is redundant, and is detrimental to state economies, while being economically beneficial to criminals.

Part I of this Comment will examine how PASPA violates the Constitution by analyzing commandeering and equal sovereignty principles. Part II focuses on the inefficiency of PASPA through inspecting both the lack of impact the act has had on sports betting, as well as identifying the devices already preserving the integrity of sports. Part III highlights the harms caused as a result of PASPA. Finally, Part IV suggests a viable alternative to PASPA.

¹28 U.S.C. § 3701 et seq. (1992). The main provision in PASPA essentially states neither a state nor an individual may "sponsor, operate, advertise, or promote . . . 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." *NCAA v. Governor of N.J.*, 730 F.3d 208, 215-16 (3d Cir. 2013) (citing 28 U.S.C. § 3702).

² *Governor of N.J.*, 730 F.3d at 214-15.

³ *Id.* at 216 (citing S. REP. NO. 102-286, at 4 (1991) *reprinted in* 1992 U.S.C.C.A.N. 3553, 3555).

⁴ *Id.*

⁵ *Id.*

I. PASPA IS UNCONSTITUTIONAL

A. Background

The case, *NCAA v. Governor of N.J.*,⁶ was recently brought before the Third Circuit of the United States. Here, New Jersey passed its own sports wagering law.⁷ The major professional sports leagues immediately brought a lawsuit, claiming New Jersey is prohibited, by PASPA, from allowing legal sports wagers.⁸ In the suit, New Jersey attacked the constitutionality of PASPA.⁹ Specifically, New Jersey contended that PASPA's ban on the authorization of sports betting commandeers states, and that "equal sovereignty" is violated by PASPA's allowance of four states to license sports gambling while banning forty-six from doing so.¹⁰

The Third Circuit found PASPA does not commandeer state legislatures because it does not affirmatively force states to enact a law.¹¹ While emphasizing the "choices" PASPA offers, the court explained PASPA simply forces states to choose between

⁶ *Id.* at 214

⁷ Jordan Hollander, Recent Development, *Ball's in the Supreme Court's Court: Update of New Jersey's Sports Betting Lawsuit*, RUTGERS J.L. & PUB. POL'Y., Mar. 20, 2014, <http://www.rutgerspolicyjournal.org/balls-supreme-courts-court-update-new-jersey's-sports-betting-lawsuit> (citing *New Jersey Election Results - Other*, STAR-LEDGER (Nov. 9, 2011, 3:55 PM), <http://www.nj.com/starledger/results-ballot/>). Like many states, New Jersey was looking to enhance state revenue. Prior to New Jersey's attempt to legalize sports gambling, the New Jersey Legislature heard testimony that sports gambling would not only suppress the illegal sports-wagering market but also greatly enhance state revenue. *Governor of N.J.*, 730 F.3d at 217.

⁸ *Governor of New Jersey*, 730 F.3d at 214.

⁹ *Id.* New Jersey also challenged the League's standing and injury. *Id.* To establish standing, a plaintiff must show (1) "injury in fact," (2) causation, and (3) redressability of the injury. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). The Third Circuit unanimously found the Leagues have standing because the legalization of sports betting will cause the Leagues reputational harm, which may be remedied in court. 730 F.3d at 220.

¹⁰ *Id.* at 214.

¹¹ *Id.* at 227.

University of Denver Sports and Entertainment Law Journal

having unauthorized sports gambling or banning sports gambling.¹² The court stated that "equal sovereignty" is not offended because the Commerce Clause is aimed at finding national solutions that may affect states differently.¹³ It held in a 2-1 ruling that, "nothing in PASPA violates the U.S. Constitution."¹⁴

On February 12, 2014, New Jersey filed a petition for certiorari to the United States Supreme Court.¹⁵ To date, there has been no indication whether the Supreme Court will hear the case. However, only four of nine Supreme Court Justices votes are needed to grant certiorari,¹⁶ and the Court's recent anti-commandeering rulings in *New York v. United States*,¹⁷ coupled with Justice Ginsberg's recent dissent in *Shelby County v. Holder*,¹⁸ suggest there may be an increased likelihood in the United States Supreme Court hearing the case.¹⁹ If the Supreme Court does decide to hear *NCAA v. Governor of N.J.*,²⁰ it will likely find PASPA unconstitutional.

¹² *Id.* at 233.

¹³ *Id.* at 238.

¹⁴ *Id.* at 240-41. The court expanded explaining PASPA "neither exceeds Congress' enumerated powers nor violates any principle of federalism implicit in the Tenth Amendment." *Id.* at 240.

¹⁵ Hollander, *supra* note 7 (citing Ryan Hutchins, *NJ Appeals Sports Betting Case to U.S. Supreme Court*, STAR-LEDGER (Feb. 18, 2014, 1:17 PM), http://www.nj.com/politics/index.ssf/2014/02/nj_appeals_sports_betting_case_to_us_supreme_court.html; *see also* Petition for a Writ of Certiorari, *Governor of N.J.*, F.3d 208 (No. 13-967)).

¹⁶ *Id.* (citing *Donnelly v. DeChristoforo*, 416 U.S. 637, 648 (1974) (Stewart, J., concurring) ("We are bound here, however, by the 'rule of four.' That rule ordains that the votes of four Justices are enough to grant certiorari and bring a case before the Court for decision on the merits.")).

¹⁷ *Id.* (citing *New York v. United States*, 505 U.S. 144 (1992)).

¹⁸ 133 S. Ct. 2612, 2649 (2013) (Ginsburg, J. dissenting).

¹⁹ *See* Hollander, *supra* note 7 (citing *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (Ginsburg, J. dissenting)).

²⁰ 730 F.3d 208, 214 (3rd Cir. 2013).

B. Congress is Not Authorized to Regulate How States Regulate Sports Gambling

When the Third Circuit heard *Governor of N.J.*, Judge Vanaskie stated in his dissent that PASPA is an "unconstitutional exercise of congressional authority."²¹ Rather than being a federal statute that directly regulates interstate commerce, as permitted by the Commerce Clause, PASPA does not allow states to authorize sports gambling.²² Not allowing a state to authorize an activity is the equivalent of controlling how a state treats that activity.²³

In *New York v. United States*, the United States Supreme Court held a federal law unconstitutional because "the Act commandeered the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program."²⁴ The Framers of the Constitution gave "Congress the power to regulate individuals, not States."²⁵ This does not mean Congress cannot encourage a state to regulate in a certain way, but the Commerce Clause only authorizes Congress to regulate interstate commerce directly, it does not authorize Congress to regulate the "state governments' regulation of interstate commerce."²⁶ Further, nothing in *New York* limited federalist principles to instances where Congress required an affirmative act to be done by the states.²⁷ Rather, the Court in *New York* stated "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel

²¹ *Id.* at 241 (Vanaskie, J., dissenting).

²² *Id.*

²³ *Id.*

²⁴ *New York*, 505 U.S. 144, 176 (1992) (citing *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288) (1981) (emphasis original)).

²⁵ *Id.* at 166.

²⁶ *Id.*

²⁷ *Governor of New Jersey*, 730 F.3d at 245 (Vanaskie, J., dissenting) (citing *New York*, 505 U.S. at 166).

University of Denver Sports and Entertainment Law Journal

the States to require or prohibit those acts."²⁸ Acts are commandeering when it directly compel states to enforce a federal regulatory program.²⁹

PASPA controls how states are forced to regulate interstate commerce,³⁰ which goes against the finding in *New York* that the federal government cannot regulate the state governments' regulation of the state's interstate commerce.³¹ The fact that PASPA does not affirmatively direct states to regulate, technically the prohibited states can continue to have unregulated gambling,³² is not fatal to New Jersey's "commandeering" argument. PASPA "dictates how [states] must regulate sports gambling"³³ by requiring "federal policy . . . telling the states that they may not regulate an otherwise unregulated activity"³⁴ and that is enough to be unconstitutional when analyzed under the proper authority.

There is no distinction between the federal government compelling state governments to create or enforce laws, and the federal government restricting state governments from creating or enforcing laws,³⁵ as the federal government is doing with PASPA. In both instances, the federal government is overstepping its boundaries and violating states' rights. Allowing the federal government to force states to decide between allowing unregulated sports gambling and prohibiting all sports gambling is in violation of the Constitution.³⁶

²⁸ *New York*, 505 U.S. at 166 (citing *FERC v. Mississippi*, 456 U.S. 742-66 (1982); *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 288-89 (1981); *Lane County v. Oregon*, 74 U.S. 71, 76 (1868)).

²⁹ *Hodel*, 452 U.S. at 288 (1981) (internal citations omitted).

³⁰ *Governor of New Jersey*, 730 F.3d at 245 (Vanaskie, J., dissenting) (citing *New York*, 505 U.S. at 166).

³¹ *New York*, 505 U.S. at 166.

³² *Governor of New Jersey*, 730 F.3d at 233.

³³ *Id.* at 249 (Vanaskie, J., dissenting) (emphasis original).

³⁴ *Id.*

³⁵ *Id.* at 251.

³⁶ *Id.*

C. "Equal Sovereignty" is Offended When Four States are Permitted to License Sports Gambling While Forty-Six are Not

*Shelby County v. Holder*³⁷ was heard before the United States Supreme Court just months prior to the Third Circuit hearing *Governor of N.J.*³⁸ In *Shelby County*, the Supreme Court held a key part of the United States Voting Rights Act of 1965 unconstitutional because it forced some, but not all, states to obtain federal permission before enacting or changing any voting law.³⁹ The Court made their ruling on the grounds that the 1965 law offended well-established principles of equal sovereignty.⁴⁰ One factor mentioned in the opinion, was that there was much more parity in both voter turnout and minorities in state offices in the South.⁴¹ Further, there was considerable federal legislation already protecting the same issue; therefore, the United States Supreme Court found federal legislation easier to overturn.⁴² Essentially, the federal voting requirement in question was redundant and outdated. The Supreme Court noted, "If Congress had started from scratch [presently], it plainly could not have enacted the present [federal law]."⁴³ The Court continued to emphasize this point by stating there is no reason to preserve legislation merely because it was previously necessary.⁴⁴

In *Governor of N.J.*,⁴⁵ the Third Circuit utilized the equal sovereignty analysis from *Shelby County*.⁴⁶ It's interpretation of the

³⁷ 133 S.Ct. 2612 (2013).

³⁸ 730 F.3d. 208 (2013).

³⁹ 133 S.Ct. at 2630, 2631.

⁴⁰ *Id.* at 2630.

⁴¹ *Id.* at 2618, 2626.

⁴² *See id.* (Thomas, J., concurring).

⁴³ *Id.* at 2630 (alteration in original). Evidenced by the actions of the New Jersey Legislature, if Congress were to attempt to enact PASPA now, it is not likely they would be as successful.

⁴⁴ *Id.* PASPA is not only unnecessary, it is unwanted. I believe that if PASPA were to be held unconstitutional, New Jersey would be one of many states to legalize sports gambling.

⁴⁵ *Governor of N.J.*, 730 F.3d 208.

University of Denver Sports and Entertainment Law Journal

voting rights in *Shelby County*⁴⁷ is crucial to New Jersey's argument that PASPA analogously violates states' right to equal sovereignty.⁴⁸ The Third Circuit distinguished the two cases, finding the regulation of gambling through the Commerce Clause distinguishable from the regulation of elections under the Reconstruction Amendments, stating, voting rights are "fundamentally different from PASPA,"⁴⁹ in that, "the Framers of the Constitution intended the States to keep from themselves . . . the power to regulate elections."⁵⁰ The Third Circuit continued their broad interpretation of the Commerce Clause, by explaining that there are multiple scenarios outside of correcting local evils where departure from equal sovereignty is allowed.⁵¹

The Court, in *Governor of N.J.*,⁵² misinterpreted the reasoning behind the holding of *Shelby County*.⁵³ In *Shelby County*, the legislation in question forced some, *but not all*, states to enforce a federal law⁵⁴ similar to the requirements of PASPA.⁵⁵ Gambling may have been prohibited in forty-six states at the time of the enactment of PASPA,⁵⁶ but much has since changed regarding the amount of money wagered each year,⁵⁷ as well as the economic situations of most states. As in *Shelby County*,⁵⁸ there is already

⁴⁶ 133 S.Ct. 2612 (2013).

⁴⁷ *Id.*

⁴⁸ *Governor of N.J.*, 730 F.3d at 237 (citing *Shelby County v. Holder*, 133 S. Ct. 2612 (2013)).

⁴⁹ *Id.* at 238.

⁵⁰ *Id.* (citing *Shelby Cnty.* 133 S.Ct. at 2623, 2624).

⁵¹ *Id.* at 239.

⁵² *NCAA v. Governor of N.J.*, 730 F.3d 208 (3d Cir. 2013)

⁵³ *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

⁵⁴ *Id.* at 2618 (emphasis added).

⁵⁵ *Governor of N.J.* 730 F.3d at 214-16.

⁵⁶ *Id.* at 215.

⁵⁷ *Sports Wagering*, AM. GAMING ASS'N, <http://www.americangaming.org/industry-resources/research/fact-sheets/sports-wagering> (last visited Apr. 9, 2014). The American Gaming Association is the leading voice in the casino industry. *Id.* (follow hyperlink "About" and then "Membership").

⁵⁸ *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).

federal legislation that accomplishes the purpose of PASPA. "Section 1084 of Title 18 of the United States Code makes it a federal crime to use wire communications to transmit sports bets in interstate commerce unless the transmission is from and to a state where sports betting is legal."⁵⁹ Additionally, there is a federal law that makes it a crime to influence or attempt to influence any sporting contest.⁶⁰ As such, it is not necessary to continue to enforce PASPA.

Justice Ginsburg, in her *Shelby County* dissent, has essentially explained the holding means PASPA is a law that discriminates between states.⁶¹ If the Supreme Court were to hear *NCAA v. Governor of N.J.*,⁶² it would likely analyze equal sovereignty principles differently than the Third Circuit, as it did in *Shelby County*, and rule that PASPA violates both equal sovereignty and commandeering principles.

II. PASPA IS INEFFECTIVE

The Judiciary Committee's report supporting PASPA states that the Act's purpose is to prohibit sports gambling and to maintain the integrity of sports.⁶³ The PASPA legislation has been futile in accomplishing Congress' goal.⁶⁴ If the United States Supreme Court does not rule PASPA unconstitutional, Congress should enact legislation repealing PASPA because it is inefficient and redundant.

⁵⁹ *Governor of N.J.*, 730 F.3d at 247 (Vanaskie, J., dissenting).

⁶⁰ *Id.*

⁶¹ Hollander, *supra* note 7 (citing *Shelby Cnty.*, 133 S. Ct. at 2649 (Ginsburg, J. dissenting)).

⁶² 730 F.3d 208 (2013)

⁶³ *Id.* at 216 (citing S. REP. NO. 102-248, at 4 (1991) *reprinted in* 1992 U.S.C.C.A.N. 3553).

⁶⁴ *Sports Wagering*, AM. GAMING ASS'N, <http://www.americangaming.org/industry-resources/research/fact-sheets/sports-wagering> (last visited Nov. 15, 2014). The sports bets placed legally in Nevada represent less than one-percent of all sports bets nationwide. *Id.*

A. *PASPA Has Not Significantly Reduced Sports Gambling*

Despite the widespread ban on sports gambling, the overwhelming majority of sports bets are illegal.⁶⁵ In a study conducted in 2012 by the American Gaming Association, it was found that "Nevada's legal sport wagering represents less than one percent of all sports betting nationwide."⁶⁶ The same study found that \$3.5 billion dollars were legally wagered in Nevada, while the "National Gambling Impact Study Commission estimated illegal sport wagers amount to as much as \$380 billion annually."⁶⁷ About twenty years after the enactment of PASPA, there still remains a large number of bets and an incredible amount of money being wagered illegally. This is conclusive evidence that PASPA has not proved to be a useful deterrent in Congress' war against sports gambling.

B. *PASPA is Redundant*

PASPA does not provide sports leagues with any meaningful protection that was not already in place when it was enacted.⁶⁸ During the 1950's, organized crime became the major operator of sports gambling.⁶⁹ The mob was able to connect bookies from the East Coast to the West Coast, which greatly expanded the organized crimes' monopoly on sports gambling.⁷⁰ After intense pressure from the Justice Department in the early 1960's, Congress began to pass legislation with the intent to hinder sports gambling.⁷¹ Prior to PASPA, the federal government enacted the Wire

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See Brian Tuohy, *Why Sports Gambling Should be Legal*, SPORTS ON EARTH, <http://www.sportsonearth.com/article/62954908/> (last visited Apr. 21, 2014).

⁶⁹ *Id.*

⁷⁰ *Id.* ("The mob set up a national lay-off system in the 1950s, connecting bookies in major cities. It smoothed out the process, while maximizing the financial return."). *Id.* This system continues today, allowing organized crime to maximize gambling profits. *Id.*

⁷¹ *Id.*

University of Denver Sports and Entertainment Law Journal

Act⁷² in 1961, which outlawed the use of wire communications in gambling, unless the transmission was between states where sports betting was legal, and the Sports Bribery Act⁷³ in 1964, which made it a federal crime to bribe a player, coach, or referee to influence a game.⁷⁴ In 1970 during the Nixon Administration, Congress enacted the Organized Crime Control Act⁷⁵, making a violation of state gambling law a federal crime, while adding gambling to the crimes that could authorize a wiretap.⁷⁶ These are a few of the many federal acts that provide the same essential protections in preserving the integrity of sports as PASPA.

Even without legislation, individual sports leagues have an enormous incentive to prevent outside influence of games.⁷⁷ Leagues stay in business because they capture the interest of fans and fans are interested because their desire to see competitive gamesmanship. If a league had a game fixed, the harm would be extremely detrimental.⁷⁸ If a league consistently had games fixed, the harm may be fatal. If leagues were unable to provide untarnished, pure games, the league would lose its legitimacy and in turn, lose its fans. Leagues recognize this and utilize their resources to self-regulate without direction from the federal government.⁷⁹

⁷² 18 U.S.C.A. §§ 1081-1084 (West 2014).

⁷³ 18 U.S.C.A. § 224 (West 2014).

⁷⁴ Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208, 247 (3d Cir. 2013).

⁷⁵ 18 U.S.C.A. § 1961 *et seq.* (West 2013).

⁷⁶ Nelson Rose, *Anti-Sports Betting Law*, GAMBLING AND THE LAW, <http://www.gamblingandthelaw.com/index.php/columns/57-146antisportsbettinglaw> (last visited Apr. 9, 2014). Professor Nelson I. Rose is a Distinguished Senior Professor at Whittier Law School. He is a leading authority on gambling law with more than 1,500 published works. *Id.*

⁷⁷ BRIAN TUOHY, LARCENY GAMES: SPORTS GAMBLING, GAME FIXING AND THE FBI 68 (2013).

⁷⁸ *Id.* at 70.

⁷⁹ Tuohy, *supra* note 68.

University of Denver Sports and Entertainment Law Journal

Every player in Major League Baseball, the National Football League, the National Basketball Association, and the National Hockey League is required to sign a Collective Bargaining Agreement, which prevents the members of each respective league from gambling on their own sport.⁸⁰ The language and punishment utilized in each league vary but they all aim at deterring players from gambling.⁸¹ Also, the above named leagues all employ a Security Division to monitor individuals and teams to ensure the players and coaches do not partake in conduct that is detrimental to the league.⁸² These Security Divisions have been more than effective, as they are often staffed with former members of the FBI, CIA, DEA, and Secret Service.⁸³ Major League Baseball has not admitted a fixed game since 1919, no National Hockey League player is known to have thrown a game since the 1940s, the National Basketball Association states it has not had points shaved since 1954, and the National Football League claims not a single game has been influenced.⁸⁴

There is a direct correlation between the legalization of sports gambling and the level of integrity within sports. If more states were to legalize gambling, there would causally be more integrity in sports.⁸⁵ The legalization of sports gambling would also result in an increase of oversight on the sports leagues.⁸⁶ Not only would the leagues be under more scrutiny, but they would also have an increase in the reliability of one of their most useful

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² TUOHY, LARCENY GAMES: SPORTS GAMBLING, GAME FIXING AND THE FBI, *supra* note 77, at 62.

⁸³ *Id.*

⁸⁴ Tuohy, *supra* note 68. Tuohy reminds his readers that infamous basketball referee, Donaghy, "was not arrested or convicted of fixing a game" referring to the National Basketball Association's claim about points shaving. *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

instruments in detecting outside influence within a game, the Las Vegas odds.⁸⁷

The Security Division of each league monitors the odds set, legally, in Las Vegas.⁸⁸ They look for unnatural changes in the odds, as these changes often indicate the presence of an outside influence.⁸⁹ The problem the league Security Divisions face is that the Las Vegas odds are solely influenced by money that is bet legally, which is minimal compared to the money that is being bet illegally.⁹⁰ If the odds were a representation of all the bets placed on a given event, rather than just the small fraction of legal bets that they are based off, the Security Divisions would be more effective identifying an influenced game. That being said, it is indisputable that increasing the amount of wagers placed legally would only aid the leagues in detecting a potential outside influence.⁹¹

III. PASPA IS COUNTERPRODUCTIVE

PASPA forbids states from authorizing and licensing sports gambling.⁹² This reduces potential state revenue⁹³ and allows criminals to capitalize on the same revenue opportunity.⁹⁴ If the

⁸⁷ Tuohy, *supra* note 77 at 58.

⁸⁸ *Id.* at 62.

⁸⁹ *Id.* at 58-62.

⁹⁰ *Sports Wagering*, AMERICAN GAMING ASSOCIATION, <http://www.americangaming.org/industry-resources/research/fact-sheets/sports-wagering>. Brian Tuohy has spoken to Las Vegas sports book employees, all of which agreed that the last place a fixer would be betting is Las Vegas considering they can easily hide their bet among the hundreds of billions of dollars being bet illegally, Tuohy, *supra* note 78 at 60. The result is monitoring the Las Vegas odds are not nearly as beneficial to a given league as it would be if gambling were legal. *Id.*

⁹¹ Tuohy, *supra* note 68.

⁹² *NCAA v. Governor of N.J.* 730 F.3d. 208, 214 (3d Cir. 2013) (citing 28 U.S.C. §3701).

⁹³ Michael Levinson, Comment, *A Sure Bet: Why New Jersey Would Benefit from Legalized Sports Wagering*, 13 MARQ. SPORTS L. REV. 143, 152 (2006).

⁹⁴ Tuohy, *supra* note 77 at 42-45.

University of Denver Sports and Entertainment Law Journal

United States Supreme Court does not rule PASPA unconstitutional, Congress should enact legislation repealing PASPA because it is counter productive.

A. The Elimination of PASPA Would Give States the Opportunity to Enhance Their Revenue

States would benefit if they were able to tax the money wagered on sports games. For example, New Jersey has an eight percent tax on all gross casino revenue.⁹⁵ A recent study shows that legalizing sports wagering in Atlantic City casinos would enhance tax revenue by five to eight million dollars annually.⁹⁶ The numbers, related to New Jersey here, are not limited to New Jersey. States without casinos could capitalize on the revenue, by allowing and taxing legal gambling at other gambling establishments. It is difficult, if not impossible, to argue against the fact that the legalization of gambling in any given state would greatly enhance state revenue.

States would also generate income indirectly.⁹⁷ Gambling establishments not only profit from traditional casino games, they often include restaurants, shops, and hotels.⁹⁸ The legalization of sports gambling would attract an entirely new consumer group to casinos. The increase in customers would likely result in the creation of jobs within the casinos. Casinos along with their in-house, ancillary services would undoubtedly benefit economically from the increase in consumers, which would indirectly benefit the state.

⁹⁵ Levinson, *supra* note 93 at 152 (citing N.J. STAT. ANN. 5:12-144 (West 2005)).

⁹⁶ *Id.* (citing N.J. Assembly 3493, 211th Leg., 2004-2005 Leg. Sess. (Jan. 10, 2005)).

⁹⁷ *Id.* at 152-53.

⁹⁸ *Id.*

B. PASPA Promotes Criminal's Interests

Evidenced by the evolution in federal gambling legislation,⁹⁹ gambling is a giant, underground industry that is incredibly difficult to detect and prosecute. The total revenue of Nevada's sports books in 2012 was \$170 million, which was generated by \$3.45 billion in wagers.¹⁰⁰ The remaining 2012 wagers, an estimated \$380 billion, provide criminals revenue at a similar ratio.¹⁰¹ History shows that the prohibition of victimless vices lead to underground markets where criminals, who are willing to break the law, are able to capitalize. By outlawing sports gambling, the federal government is giving money to criminals.¹⁰² The increase in criminal revenue gives criminals better leverage to convince coaches, players, and referees to influence games.

IV. SOLUTION: LEGALIZE AND PRIVATIZE

If the Supreme Court or Congress determines that sports gambling should be legalized at the discretion of individual states, the next question would be whether the public or private sector should control it.

A. The Public Sector Should Not Risk It

When taking bets, the bookie's job is to set the odds so that an equal amount of money is bet on each team.¹⁰³ When the money is even, the bookie benefits because the winners are paid the losers' money and the bookie profits from taking their percentage called

⁹⁹ Nelson Rose, *Anti-Sports Betting Laws*, GAMBLING AND THE LAW, <http://www.gamblingandthelaw.com/index.php/columns/57-146antisportsbettinglaw>. (last visited Apr. 9, 2014).

¹⁰⁰ *Sports Wagering*, AMERICAN GAMING ASSOCIATION, <http://www.americangaming.org/industry-resources/research/fact-sheets/sports-wagering>

¹⁰¹ If the illegal wagers placed in Nevada were placed legally, Nevada would have generated an additional \$18.72 billion in revenue. *Sports Wagering*, *supra* note 57.

¹⁰² See generally Touhy, *supra* note 77, at 42-45.

¹⁰³ Touhy, *supra* note 77, at 26.

University of Denver Sports and Entertainment Law Journal

the "vig."¹⁰⁴ However, when the money is unbalanced, the bookies are at risk.¹⁰⁵ They may get lucky and have the team with the lesser amount of money wagered on them win, giving them a surplus of money to distribute amongst few winners. Yet, they could just as easily find themselves in the opposite scenario, without enough money to distribute amongst a large amount of winners. When the money is unbalanced the bookies are unable to transfer the bettor's money amongst the bettors, which results in the bookie being responsible for paying off the debts with their own funds.

If a state were to take the place of the bookie the state would then be susceptible to losing a large amount of money on a continual basis.¹⁰⁶ A potential headline in the Wall Street Journal could read, "The State of New York Loses 200 Million Dollars on the Jets Game."¹⁰⁷ This danger would be present during every sporting event and the public sector should not take that risk.

B. The Private Sector is Equipped to Control Sports Gambling

If a state were able to legalize gambling, private companies should be allowed to risk their own money in the gambling market. After all, it is much less detrimental to society to have a private company go bankrupt compared to a state. Despite the potential risks, it is likely that many private entrepreneurs would be willing to enter this industry, as they have been in Las Vegas for quite some time.

Allowing privatized sports betting and enhancing the public sector's revenue are not mutually exclusive. No state would legalize gambling without being able to increase its revenue. States

¹⁰⁴ The "vig" or "juice" is the fee bookies charge on every wager. Originally the fee was around twenty percent of the total bet (a \$6 wager has a chance to win \$5). Today, the standard is ten percent (an \$11 wager has a chance to win \$10). Touhy, *supra* note 77, at 26.

¹⁰⁵ Touhy, *supra* note 77, at 26.

¹⁰⁶ Touhy, *supra* note 77, at 351 (quoting Schettler).

¹⁰⁷ Touhy, *supra* note 77, at 351 (quoting Schettler).

University of Denver Sports and Entertainment Law Journal

would likely tax each and every bet and do so at a high rate.¹⁰⁸ A high state tax rate on sports gambling would be a viable concession made in the process of legalizing sports gambling. Also, as discussed, the states would benefit indirectly as well.¹⁰⁹

CONCLUSION

PASPA is unconstitutional as it violates commandeering and equal sovereignty principles. Despite recent case law¹¹⁰ and Justice Ginsberg's mention of the potential demise of the Act,¹¹¹ there is no guarantee that the United States Supreme Court will grant a writ of certiorari to *Governor of N.J.* And even if the Supreme Court does decide to hear the case, it may uphold the Third Circuit's ruling. If this happens, Congress should pass legislation repealing PASPA.

PASPA has yet to prove itself effective. The purpose of PASPA is to limit gambling and protect the integrity of sports.¹¹² However, it has been twenty years since PASPA's enactment and legal gambling is still dwarfed by illegal gambling.¹¹³ Prior to PASPA, there was already federal legislation¹¹⁴ and league Security Divisions, each have been successful in preventing the outside influence of games.¹¹⁵

¹⁰⁸ Levinson, *supra* note 93, at 152 (citing N.J. Stat. Ann. 5:12-144 (West 2005)).

¹⁰⁹ Levinson, *supra* note 93, at 152-153.

¹¹⁰ See generally *New York v. United States*, 505 U.S. 144 (1992); See generally *Shelby Cnty. v. Holder*, 133 S.Ct. 2612 (2013).

¹¹¹ See generally *Shelby Cnty.*, at 2632 (Ginsburg, J., dissent).

¹¹² *Nat'l Collegiate Athletic Assoc. v. Governor of N.J.*, 703 F.3d 208, 216 (2013) (citing S. REP. NO. 102-286, at 4 (1991)) (*reprinted in* 1992 U.S.C.C.A.N. 3553).

¹¹³ *Sports Wagering*, *supra* note 57.

¹¹⁴ Nelson Rose, *Anti-Sports Betting Laws*, GAMBLING AND THE LAW, <http://www.gamblingandthelaw.com/index.php/columns/57-146antisportsbettinglaw> (last visited Apr. 9, 2014).

¹¹⁵ Touhy, *supra* note 77, at 62.

University of Denver Sports and Entertainment Law Journal

PASPA is counter-productive. It prevents states from enhancing revenue,¹¹⁶ while enabling criminals.¹¹⁷ Under PASPA, organized crime has a monopoly on the highly lucrative sports gambling trade. The increase in criminal revenue allows criminals to gain greater leverage to motivate coaches, players, and referees to influence a game.

Deciding whether or not to legalize gambling is a decision best left to each individual state. And where gambling is legalized, it is a business best run by the private sector. By legalizing and privatizing sports gambling both the integrity in sports, and the revenue of the public sector will increase directly and indirectly.

¹¹⁶ See Levinson, *supra* note 93, at 152.

¹¹⁷ Touhy, *supra* note 77, at 42-25.