

May, 2010

THE PLIGHT OF PASPA: IT'S TIME TO PULL THE PLUG ON THE PROHIBITION

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Abstract

The Professional and Amateur Sports Protection Act (PASPA) has completely denied forty-six states from adopting any type of state-sponsored sports betting scheme. The Act, which became law in 1992, exempted four states (Nevada, Delaware, Oregon, and Montana), allowing those states to continue to operate the state-sponsored sports betting schemes that had been in place prior to the Act's adoption. The Federal Government along with the NFL, MLB, NBA, NHL, and NCAA are concerned that legalized sports betting jeopardizes the integrity of our national pastimes. However, sports' betting persists unregulated through underground, illegal bookies and amongst various online sports betting websites. This article argues that PASPA's original purpose is outdated and that the Act is in violation of the Tenth Amendment and Commerce Clause within the United States Constitution.

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I. INTRODUCTION

In 1992, the Washington Redskins defeated the Buffalo Bills 37-24 to win Super Bowl XXVI. Mark Rypien became the Super Bowl MVP after throwing for two-hundred and ninety-two yards and scoring two touchdowns. At that time, Nevada was the only state in which an individual could legally bet on the outcome of the game. Seventeen years later, nothing has changed, but the Federal Government has passed laws to make sure that no other state encroaches on Nevada's exclusivity in this area. Included among those laws is the Professional and Amateur Sports Protection Act (PASPA), which President George H. W. Bush signed into law on October 28, 1992.

PASPA is a federal law that makes it illegal for a governmental entity or person to sponsor, operate, advertise, promote, license, or authorize any type of gambling based on one or more amateur or professional competitive games or on how the athletes perform in those games.¹ The sports betting exceptions to the rule stated above are: 1) If a state had a type of gambling scheme in place at any time on or between January 1, 1976 and August 31, 1990, or 2) If a state authorized a gambling scheme by statute on or before October 2, 1991 and the scheme was conducted in the state at any time between September 1, 1989 and October 2, 1991.² Under the exceptions, PASPA permits the type of gambling scheme in the state that had the scheme in place. Based on that exception, four states were entitled to avoid the Act's reach: Nevada, Montana, Oregon, and Delaware.³ Indian reservations are not exempt.

PASPA also allowed one more legal option for a state to sponsor sports betting. If a state that already legalized casino gambling decided to implement sports wagering exclusively in its existing casinos at any point within a one-year window after PASPA's adoption, that state would have been granted a legal exemption under the Act.⁴ While this particular exemption would have allowed a state like New Jersey to currently benefit financially from state-sponsored betting if it had established sports wagering in the early 1990's, it still does nothing to void the inequity inherent in the Act. Not all states receive equitable treatment under PASPA.

This article will examine the justification behind PASPA's enactment, the history of sports betting in America leading up to the

1. 28 U.S.C. §3702 (2000).

2. 28 U.S.C. §3704 (2000).

3. Jeffrey Standen, *PASPA Under Fire*, The Sports Law Professor, Mar. 25, 2009, <http://thesportslawprofessor.blogspot.com/2009/03/papsa-under-fire.html>.

4. 28 U.S.C. §3704.

passage of PASPA, failed attempts at states to circumvent PASPA's limitations, reasons that the Act should be determined as unconstitutional by a court of law, and why PASPA's original purpose is outdated.

II. SPORTS BETTING IN THE UNITED STATES AND AN OVERVIEW OF PASPA

A. Justification for Passage

Until 1992, Congress had, for the most part, turned a blind eye when it came to state-sanctioned gambling. However, in the 1950's and 1960's, Congress did begin to investigate the gambling industry, particularly in relation to organized crime's role in the industry's growth.⁵ In 1961, Congress passed the Wire Act of 1961, which made it illegal for any person "engaged in the business of betting or wagering" to use wire communication in the effort of making bets or wagers, receiving information about bets or wagers that would aid a gambler, or accepting money or credit based on bets or wagers, across state lines.⁶ In the 1970's, Congress enacted the Racketeering Influenced and Corrupt Organizations (RICO) statutes.⁷ These statutes reveal that the Federal Government was concerned about potential harms arising from the spread of gambling; yet for an extended period after the passage of the Wire Act, Congress remained on the sidelines when it came to purely gambling-related legislation. Until the passage of PASPA, Congress made little attempt to implement a serious restriction on state-sponsored sports betting.

In the Committee on the Judiciary's Senate Report recommending that PASPA become a law, the committee justified promoting the Act for its important public purpose of maintaining "the integrity of our national pastime."⁸ The Committee presumed that state-sponsored legalized gambling influences minors to gamble, removes public confidence in the legitimacy of sport matches, and takes away the "wholesome entertainment" value of sporting events.⁹ As far as the second contention is concerned, there was a general fear that fans would become suspicious about controversial plays and believe that players were involved in game fixing when the teams on which the gamblers were placing bets did not cover the point-spread.¹⁰ While very few constituents were alive when it

5. Aaron Slavin, *The "Las Vegas Loophole" and the Current Push in Congress Towards a Blanket Prohibition on Collegiate Sports Gambling*, 10 U. Miami Bus. L. Rev. 715, 716 (2002).

6. 18 U.S.C. § 1084 (2000).

7. *Id.*

8. S. Rep. No. 102-248, at 4 (1992), *reprinted in* 1992 U.S.S.C.A.N. 3553, 3555-56.

9. *Id.*

10. Michael Fecteau, *All For Integrity or All For Naught: The Battle Over State-Sponsored Sports Betting*, 7 Gaming L. Rev. 43, 44-45 (2003).

occurred, it is likely that a majority of those in the Committee had heard of the infamous Black Sox Scandal of 1919, when sports bettors were able to bribe Black Sox players to throw the World Series. Over seventy years had passed since that terribly damaging event, and the major sports leagues were committed to ensuring that it remained a matter of history.

The Committee's worst fear was that Florida would authorize sports betting in the early 1990's, and that without some sort of federal regulation, other states would take notice of Florida's action and quickly follow suit.¹¹ There was reason to believe that if one state adopted legalized sports betting, many others would pursue the same avenues. Senator Bill Bradley, formerly a professional basketball player and three-term Democratic United States Senator from New Jersey, particularly concerned about the potential harmful effects of legalized sports betting, warned the country that thirteen states were considering legislation to make it legal to place wagers on sports events.¹² He purported that if Florida were to authorize sports betting, the rest of the states would act in a corresponding manner. Many legislators were concerned that once states adopted sports betting, there would be no way to rescind that right from the states thereafter, and these legislators pointed out that thirty-two states and Washington D.C. already had state-sponsored lottery games.¹³ It would be effortless for states to justify the addition of sports betting to their existing lotteries.

B. 1977 case: NFL v. Delaware

While Congress had for the most part, given the states the freedom to act as they pleased regarding state-sponsored betting prior to enactment of PASPA in 1992, the National Football League (NFL) was not content with allowing states free rein at their betting parlors. In 1977, the NFL sued the state of Delaware. The NFL and its twenty-eight member clubs took the position that Delaware's parlay sports lottery was not actually a game predominated by chance, and that since chance was not the dominant factor in placing a winning bet, the sports lottery violated Delaware's constitutional lottery exception.¹⁴ The NFL wanted preliminary and permanent injunctive relief preventing Delaware from allowing any sports

11. S. Rep. No. 102-248, at 4 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3555-56.

12. See Sen. Bill Bradley, *The Professional and Amateur Sports Protection Act - Policy Concerns Behind Senate Bill 474*, 2 *Seton Hall J. Sport L.* 5, 8 (1992).

13. S. Rep. No. 102-248, at 4 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3555

14. Jeffrey Standen, *NFL v. Delaware: Round II*, *The Sports Law Professor*, July 24, 2009, <http://thesportslawprofessor.blogspot.com/2009/07/nfl-v-delaware-round-ii.html> (To fit within Delaware's constitutional lottery exception, a lottery must include consideration, prize, and chance).

wagering.¹⁵ The Court did not grant either claim and dismissed the NFL's claims that Delaware's sports betting games violated the Equal Protection Clause of the Fourteenth Amendment and Commerce Clause of the United States Constitution.¹⁶

At the time that the NFL filed suit against the Governor of Delaware and Director of the Delaware State lottery, Delaware had three different sports betting games under its football lottery system.¹⁷ The Court invalidated only one of the three games; the Court abrogated the game because, under its rules, a possibility existed where the government would give an inordinate amount of prize money from the revenues collected in the lottery game.¹⁸ The Court upheld the other two Delaware sports betting games, requiring a sports bettor to pick no less than three teams to cover the point spread in the same week's slate of games, because chance is the dominant factor in a sports bettor winning prize money.¹⁹ The Court adopted the dominant factor rule, which permitted the continued existence of sports betting games as long as a sports bettor was more apt to winning prize money based on chance than actual skill.²⁰

The Court's holding in *National Football League v. Governor of State of Delaware* only upheld two of the three sports betting games under Delaware's existing football lottery. Importantly, the Court did not discuss the legality of single-bet games under the dominant factor rule, but it did find that chance was the dominant factor in picking the team that will cover the point spread in three or more games. Judge Stapleton, who wrote the opinion in the case, noted that the result of sports games is contingent on factors such as the "weather, the health and mood of the players and the condition of the playing field."²¹ Such factors leave correctly picking the result of an individual sports game to chance, as well as correctly picking the result of three sports games. Later in his opinion, Judge Stapleton noted, "no one knows what may happen once the game has begun."²² While these statements are dicta, the Court should have considered them in its ruling on the recent question in Delaware, further analyzed below.

Additionally, the Court published the opinion fifteen years prior to the enactment of PASPA. Had the Court not upheld the sports betting

15. *National Football League v. Governor of State of Del.*, 435 F. Supp. 1372, 1375 (D.C. Del. 1977).

16. *Id.*

17. *Id.* at 1376 (The three games were, "Football Bonus", "Touchdown", and "Touchdown II", and all three games were under a sports betting scheme titled, "Scoreboard").

18. *Id.* at 1388 (Touchdown II was the invalidated game).

19. *Id.* at 1385.

20. *Id.* at 1384.

21. *Id.* at 1385.

22. *Id.* at 1386.

games in Delaware, the state would not have been one of the four states considered exceptions under the Professional and Amateur Sports Protection Act.

C. Delaware in 2009

Thirty-two years after the Governor of Delaware and the Director of the Delaware State lottery successfully defended themselves against the National Football League's attempt to invalidate the state of Delaware's sports betting scheme, the NFL, along with Major League Baseball, National Basketball Association, National Hockey League, and National Collegiate Athletic Association again filed suit against the Governor of Delaware. This time, it was not only over a claim that the state of Delaware was about to implement a sports betting scheme that violated the state's constitution, but also that such a plan violated PASPA.

Before filing a suit against the state, Roger Goodell, the Commissioner of the NFL, wrote a letter to Jack Markell, the Governor of Delaware, urging him to reject any proposal permitting a sports lottery in Delaware.²³ In his letter, Goodell did not separate sports betting games that he endorsed from sports betting games that he did not approve.²⁴ Instead, Goodell strongly urged Governor Markell to reject any sports lottery proposal, underlining that statement at the end of the first paragraph of the letter.²⁵ Goodell justified his position by claiming that the NFL must provide honest athletic contests and have the American public perceive all games as honest.²⁶ In order to restrict the creation of new gamblers, as Goodell put it, he was thoroughly against any sports betting scheme, which included the sports lottery used in 1976 and exempted by PASPA.²⁷

On March 25, 2009, with Delaware having announced plans to offer sports betting as a part of its lottery for the start of the NFL season, the NFL, MLB, NBA, NHL, and NCAA filed suit against the state.²⁸ In 1977, the National Football League was the only plaintiff to sue the state of Delaware for its sports betting scheme. This time the NFL brought reinforcements for its cause, while maintaining the lead in the litigation. The plaintiffs were not challenging that Delaware be allowed to offer lottery games based on the outcomes of sports contests, as that was decided

23. Letter from Roger Goodell, Commissioner, National Football League, to Jack Markell, Governor, State of Delaware (Mar. 17, 2009), *available at* <http://www.delawareonline.com/assets/pdf/BL131700329.PDF>.

24. *See Id.*

25. *See Id.*

26. *Id.*

27. *Id.*

28. S. Rep. No. 102-248, at 4 (1992), reprinted in 1992 U.S.C.C.A.N. 3553, 3555

in the affirmative back in 1977. Instead, the leagues challenged Delaware's right to offer gamblers the option to place wagers on the outcome of single games (consisting of either picking the winner of a game based on a determined spread or guessing that the total points scored by both teams will be above or below a given value), which Delaware wanted to permit in order to raise state revenues.²⁹

Once again, the NFL, this time in conjunction with some other big leagues, challenged the state of Delaware's proposed sports betting scheme because the leagues believed that the scheme ran contrary to Delaware's constitution, which only allows sports betting games if they are based predominantly on chance. While the NFL understood that the holding in *National Football League v. Governor of State of Delaware* was still valid precedent, in 2009, Delaware wanted to introduce single game sports betting, which the plaintiffs claimed did not pass the dominant factor rule established in the 1977 case. Additionally, the plaintiffs challenged the proposal because the proposed scheme was entirely different from the sports betting scheme in place prior to the enactment of PASPA in 1992. Besides bets on the outcomes of single games, Delaware was interested in introducing bets for all professional and amateur sports leagues, with collegiate games involving a Delaware school and professional or amateur games including Delaware teams exempt from the offering.³⁰

Jack Markell attempted to preempt the claims made by the leagues. In March, Markell asked the Delaware Supreme Court to provide an advisory opinion concerning the legality of the sports betting scheme that the state wished to adopt.³¹ That scheme endorsed the offering of single game bets, and the Governor questioned whether such a bet involved enough chance so that chance is the dominant factor when a sports bettor places a wager.³² On May 27, 2009, the Delaware Supreme Court confessed that Markell raised a valid issue, but that they did not have a definitive answer.³³

Jack Markell did not respond to Commissioner Goodell's letter, however, until a day after the NFL, et al. filed the lawsuit.³⁴ In his response, Markell mentioned the obvious fact that with or without Delaware re-instating a sports lottery, American citizens place millions of dollars

29. *Id.*

30. *OFC Comm Baseball v. Markell*, 579 F.3d 293, 296 (Del. 2009).

31. Gabe Feldman, What happens in Delaware..., Sports Law Blog, May 29, 2009, <http://sports-law.blogspot.com/2009/05/what-happens-in-delaware.html>.

32. *Id.*

33. *Id.*

34. See Letter from Jack Markell, Governor, State of Delaware, to Roger Goodell, Commissioner, National Football League (Mar. 26, 2009), available at <http://www.delawareonline.com/assets/pdf/BL131701329.PDF>.

every week on the slate of NFL games for that given week.³⁵ As I will discuss further in Section IV, below, Markell dedicated a paragraph to explaining that a legal and state regulated sports wagering system is preferable to encouraging people to bet illegally and secretly.³⁶ He admonished the NFL for having a large problem with Delaware's attempt to administer any type of sports lottery by exposing the NFL's contracts with broadcast and cable networks (like ESPN, which features predictions by Chris Berman and Hank Goldberg) that promote betting lines on their websites.³⁷

Without a doubt, a person betting on a single game has a much better likelihood of winning prize money than someone who has to pick three or more games correctly before winning the same prize. More skill is involved in determining what team will cover the single game, but does that necessarily mean that correctly picking the team that will cover the spread entails more skill than chance, or is it that chance is still the dominant factor? The leagues took the position that single game bets did not leave enough of the outcome of a wager to chance, and on July 28, 2009 filed a motion for preliminary injunction with the intention to enjoin the state of Delaware from implementing any type of sports betting scheme other than the NFL parlay system it had in place prior to the enactment of PASPA.³⁸ The U.S. District Court denied the motion for an injunction based on Judge Gregory Sleet's opinion that an injunction would bring irreparable harm to the state of Delaware and that restricting the state's opportunity to raise money for its budget is against the public's interest.³⁹

Judge Sleet's decision was not without merit. The granting of preliminary injunctions is permissible only in exceptional situations. The important precedent established in *NutraSweet Co. v. Vit-Mar Enterprises, Inc.*, lays out four necessary elements that produce an exceptional situation: 1) The plaintiff is likely to succeed on the merits; 2) Denial will result in irreparable harm to the plaintiff; 3) Granting the injunction will not result in irreparable harm to the defendant; and 4) Granting the injunction is in the public interest.⁴⁰ In order for a judge to grant a preliminary injunction, the plaintiff must prove all four elements.⁴¹ Yet on appeal, the U.S. Court of Appeals Third Circuit vacated Judge Sheet's order and said that the leagues were not required to prove the elements in *NutraSweet Co.*, because the

35. *Id.*

36. *Id.*

37. *Id.*

38. *Office of the Com'r of Baseball v. Markell*, 2009 WL 2450284 (D.Del. 2009).

39. *Id.*

40. *NutraSweet Co. v. Vit-Mar Enterprises, Inc.*, 176 F.3d 151, 153 (3d Cir.1999).

41. *See Opticians Ass'n of Am. v. Indep. Opticians of Am.*, 920 F.2d 187, 192 (3d Cir.1990).

Court was ready to make a decision on the merits of the case.⁴² The Court held that under the authority of PASPA, Delaware may serve bettors with the right to place wagers on parlays involving three or more game outcomes, because the Court upheld such a scheme in 1976.⁴³ However, Delaware may not make any substantive change from that particular sports betting scheme.⁴⁴ The Court found that if it allowed Delaware to accept bets placed on the outcome of single games or games in leagues other than the NFL, that would constitute a substantial change from the scheme conducted in the state of Delaware prior to the enactment of PASPA, and is thus prohibited.⁴⁵

Because the Court found that PASPA clearly limited what types of sports bets Delaware was permitted to offer, the Court was able to avoid involving itself in the difficult discussion concerning whether picking the correct outcome of single games is dominantly a matter of chance. Focusing on the federal claim allowed the Court to avert the Delaware State Constitutional question. In lieu of engaging in a lengthy discussion over whether correctly selecting the outcome of a single game is predominantly a matter of chance, the Court simply stated that altering Delaware's exempted three-plus game parlay sports betting scheme to allow single game bets is a substantive change and thus not permitted by PASPA.⁴⁶ The Court held, however, that a non-substantive change, like changing or adding betting locations is acceptable.⁴⁷ This substantive vs. non-substantive distinction is an issue that should have been investigated in a full trial.

The U.S. Court of Appeals Third Circuit committed an error by vacating Judge Sheet's order to deny a preliminary injunction, and turned what began strictly as a decision of whether to grant a preliminary injunction to the plaintiffs, into a decision on the merits. The standard is not that the Court is prohibited from making a decision on the merits after a lower court denies a preliminary injunction, but that it should only be done in unusual cases and when "the facts are established or of no controlling relevance."⁴⁸ Additionally, the scope of an appellate court is normally limited to searching for a lower court's abuse of discretion.⁴⁹ As Jeffrey Standen, Professor of Law at Willamette University, notes, at a full trial Delaware could have fully disclosed the type of bets the state wished to

42. See *OFC Comm Baseball*, 579 F.3d at 300.

43. *Id.* at 304.

44. *Id.* at 303.

45. *Id.* at 304.

46. Jeffrey Standen, *Delaware's Next Step*, *The Sports Law Professor*, Aug. 25, 2009, <http://thesportslawprofessor.blogspot.com/2009/08/dela.html>.

47. *Id.*

48. *Thornburgh v. Amer. Coll. of Obst. & Gyn.*, 476 U.S. 747, 757 (1986).

49. *Id.*

offer, granted more details about the bets Delaware offered before it was grandfathered an exception by PASPA, and provided expert opinions on whether a single bet game involves enough chance to make it permissible under Delaware's constitution.⁵⁰ Perhaps the Court would have found that PASPA does not clearly limit the type of bets that Delaware wished to make available. The Court of Appeals never gave the state an opportunity to present its case. Standen makes a cogent point, which is that this is not an abortion case.⁵¹ It is not an unusual case where legal rights or human lives will be altered or destroyed without quick action by the Court.

Unfortunately, the hasty decision of the U.S. Court of Appeals Third Circuit will probably stand as guiding precedent, restricting the state of Delaware from implementing any creative type of sports betting scheme to bring additional funds to help back its budget. On September 29, 2009, the U.S. Court of Appeals for the Third Circuit refused Delaware's petition to have a full en banc hearing, upholding its previous decision on the merits to restrict the state to the sports betting scheme Delaware had in place prior to PASPA.⁵² Delaware's only recourse is to appeal its case to the United States Supreme Court, which is unlikely to happen, according to Governor Jack Markell's spokesperson.⁵³

D. New Jersey

Delaware is fighting for its right to offer single-game sports betting under its exempt status granted within PASPA. New Jersey is one of the forty-six states not granted exempt status under the Act. Like Delaware, the state of New Jersey has a desire to allow state-sponsored sports betting that would include single-game and parlay bets. Such a program would help to alleviate the state's budgetary concerns. State Senator Raymond Lesniak believes that through the implementation of legalized state-sponsored sports betting, the state of New Jersey would generate billions of dollars in sports betting, rake in roughly \$100 million per year through the taxation of prize money, and rejuvenate the suffering state casinos and horseracing facilities.⁵⁴ As Senator Lesniak stated, "Our casinos are suffering, our racetracks are dying, and our state budget needs revenues."⁵⁵ Why are the state of New Jersey and the other forty-six states without any exemption

50. Standen, *supra* note 46.

51. *Id.*

52. Cris Barrish, *Del. sports betting appeal denied*, The News Journal, Sept. 29, 2009, <http://www.delawareonline.com/article/20090929/NEWS01/90929022>.

53. *Id.*

54. Jon Hurdle, *New Jersey files suit on sports-betting ban*, Mar. 23, 2009, Reuters, <http://www.reuters.com/article/sportsNews/idUSTRE52M6SX20090323>.

55. *Id.*

under PASPA, suffering discrimination with the unfortunate consequences of not having the option of a new outlet to raise state revenue? Senator Lesniak made a valid point when he asked, “How can Congress say to the people of the state of New Jersey, 'You do not have this right that the people in Nevada do?’”⁵⁶

In March 2009, the Interactive Media Entertainment & Gaming Association (iMEGA) and the aforementioned Senator Lesniak, filed a complaint and demand for declaratory relief with the United States District Court for the District of New Jersey.⁵⁷ Noticing the revival of state-sponsored sports betting in neighboring Delaware, New Jersey had an interest in curing the competitive imbalance presented by PASPA’s constraints. As discussed in the Introduction, if New Jersey had decided to implement sports wagering exclusively in its existing casinos at any point within a one-year window after PASPA’s adoption, New Jersey would have been granted the same legal exemption as Delaware, Nevada, Montana, and Oregon, under PASPA.⁵⁸ Unfortunately, the state of New Jersey was unable to pass legislation within the one-year window despite many efforts by legislators to do so, which would have allowed state-sponsored sports betting.⁵⁹ In fact, there existed a joint resolution to give the constituents of New Jersey the option of legalizing state-sponsored sports betting, but the legislature did not pass the resolution, and the 1993 ballot never contained the referendum question.⁶⁰ Because of New Jersey’s inability to pass legislation allowing state-sponsored sports betting in the extremely restrictive one-year window, the state will not be able to implement any type of sports-betting scheme as long as PASPA remains on the books.

Senator Lesniak and iMEGA are not the first plaintiffs to file a complaint about PASPA’s unconstitutionality within the state of New Jersey. In 2007, James Flager, a citizen of New Jersey, filed a complaint claiming that PASPA violates the Tenth Amendment of the United States Constitution and is not within the powers of Congress under the Commerce Clause.⁶¹ While Mr. Flager never received a full trial due to the Court accepting a summary judgment motion by the defendants based on Mr. Flager’s lack of subject matter jurisdiction, the plaintiff’s actual claim had merit, as I will discuss in Section III(A), below.⁶² Mr. Flager’s valid arguments; however, were never heard.

56. *Id.*

57. *See* iMEGA v. Holder, No. 09cv01301-GEB-TJB (D. N.J. filed Mar. 23, 2009).

58. 28 U.S.C. §3704 (2000).

59. Hurdle, *supra* note 54.

60. *In re* Casino Licensees, 633 A.2d 1050, 1051 (N.J. Super. App. Div. 1993).

61. Flager v. U.S. Attorney for Dist. of N.J., WL 2814657, at *1 (D. N.J. 2007)

62. *Id.* (The Court held that it lacked subject matter jurisdiction because the Plaintiff could not establish that he had suffered an injury in fact or show any harm that he suffered that was concrete and

III. RELATED CONSTITUTIONAL LAW PRINCIPLES SUGGEST STRIKING DOWN PASPA

A. Tenth Amendment

The Tenth Amendment of the Constitution of the United States of America reads, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁶³ Under the auspices of the Tenth Amendment, Congress cannot force any state or states to adopt a particular sports betting law, nor enslave states from adopting state-sponsored sports betting games. PASPA does not force states to adopt a sports betting law. Instead, it effectively prevents any one of the forty-six nonexempt states from approving any type of sports betting law, which runs directly contrary to the purpose of the Tenth Amendment. Whether or not the economy is in a recession, states should have the right to raise revenue through a state-sponsored sport betting scheme if they choose to do so. With the adoption of PASPA, the Federal Government has effectively hampered the right of states to decide how they will generate funds to pay for their budgetary items.

The Committee on the Judiciary that supported the passage of PASPA did everything in its power to guarantee that Nevada was unaffected by the Act. It noted that it had no desire to threaten the economy of Nevada, since sports betting is an essential industry on which the state depends to provide needed funds.⁶⁴ Senator Chuck Grassley, writing his Minority Views, mentioned that in the early 1990s, Nevada was amassing \$1.8 billion per year from its state-sponsored sports betting scheme.⁶⁵ In 2006, the Nevada State Gaming Control Board listed that the state received \$2.4 billion from sports betting.⁶⁶ In 1990, all fifty states accumulated a total of \$20.6 billion in gross revenue from its various lottery schemes.⁶⁷ Thus, Nevada’s sports betting scheme was earning that state more than one-twelfth of the total revenue that all states received from any kind of lottery (including the popular Powerball lottery), combined. This situation exhibits the fact that if a state has the opportunity to provide a legal sports betting

particularized, and actual or imminent. Plaintiff also could not establish that declaring PASPA unconstitutional would likely allow him to gamble on professional and amateur sports.)

63. U.S. Const. amend. X.

64. S. Rep. No. 102-248, at 8 (1992), *reprinted in* 1992 U.S.S.C.A.N. 3553, 3559.

65. S. Rep. No. 102-248, at 12 (1992), *reprinted in* 1992 U.S.S.C.A.N. 3553, 3563.

66. Coleman Cowan, *The Line on NBA Betting*, July 30, 2007, BusinessWeek, http://www.businessweek.com/bwdaily/dnflash/content/jul2007/db20070730_172552.htm.

67. S. Rep. No. 102-248, at 12 (1992), *reprinted in* 1992 U.S.S.C.A.N. 3553, 3562.

scheme, the profits that the state earns from that scheme can become a major driving force behind a solvent budget. Thus, why should the Federal Government deny all other states the same right as Nevada, which is to offer not only parlay style games, but also single game wagers? Oregon, one of the four exempt states, and a state not known for its sports betting scheme, was still effective in accruing \$14.5 million in gross revenue and over \$4.5 million in net revenue in the first two years (1990 and 1991) of allowing parlay bets.⁶⁸ Projections reported in 1992 revealed that the thirty-two states that already operated lotteries (including non-sports related lotteries) could earn \$712 million on average from the implementation of a sports betting scheme.⁶⁹ One can only imagine the type of profits those same states could generate today.

Even the PASPA-exempted states, like Oregon, have solid ground to challenge the law based on a Tenth Amendment violation claim. Within the opinion of *OFC Comm Baseball v. Markell*, the most recently decided case concerning PASPA, the U.S. Court of Appeals Third Circuit noted that state sovereignty does nothing to negate the fact that Congress altered the usual constitutional balance with respect to sports wagering after PASPA was adopted.⁷⁰ The lack of proper justification to change this constitutional balance is extremely disconcerting. Oregon and Delaware are entitled to earn more than the amount that they are limited to receive under their grandfathered position within PASPA.

B. Commerce Clause

Article I, Section 8, Clause 3 of the United States Constitution, also known as the *Commerce Clause*, endows Congress with the power “To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”⁷¹ Since the 1937 case of *NLRB v. Jones & Laughlin Steel Corp.*, and up to the 1995 case of *U.S. v. Lopez*, Congress was able to justify many federal laws through a broad construction of its Commerce Clause authority.⁷² However, from *Lopez*, and well into the twenty-first century, the Supreme Court has often ignored the Federal Government’s Commerce Clause arguments that attempted to justify intrusion on areas of traditional state control.⁷³ *Lopez* established three categories that enabled

68. S. Rep. No. 102-248, at 13 (1992), *reprinted in* 1992 U.S.S.C.A.N. 3553, 3563.

69. S. Rep. No. 102-248, at 14 (1992), *reprinted in* 1992 U.S.S.C.A.N. 3553, 3564.

70. *OFC Comm Baseball*, 579 F.3d at 303.

71. U.S. Const. art. I, §8, cl. 3.

72. Aaron Slavin, *The “Las Vegas Loophole” and the Current Push in Congress Towards a Blanket Prohibition on Collegiate Sports Gambling*, 10 U. Miami Bus. L. Rev. 715, 720-21 (2002).

73. *Id.*

Congress to regulate activity: (1) “Congress may regulate the use of the channels of interstate commerce,” (2) “Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities,” and 3) Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.”⁷⁴ The playing of amateur and professional games occurs in every state, with fans, players, coaches, and other team personnel crossing state lines in order to perform at the events. Additionally, people who wish to place bets on sports games are often required to cross state lines to place their wagers. Even though a gambler places a bet within the state that he visits, that intrastate activity may still be considered a part of interstate commerce.

However, Congress cannot justify its power under the clause if it does not treat each state in the same fashion. A purpose of the Commerce Clause is to ensure uniformity across all fifty states. There is nothing uniform about PASPA. The National Conference of State Legislatures, the National Association of State Budget Officers, the North American Association of State and Provincial Lotteries, and the Council of State Governments all perceived the unequal treatment of states under the Act, and expressed their opposition to it prior to its enactment, but based their opposition on an Equal Protection violation instead of focusing on the Commerce Clause's relevance.⁷⁵ This was clearly an error in judgment. The Commerce Clause should have been the organizations' focal point. As Justice Story stated in 1833, the Constitution prevents “any possibility of applying the power to...regulate commerce, injuriously to the interests of any one state, so as to favour or aid another.”⁷⁶ In 1870, the U.S. Supreme Court went further and enunciated that uniformity in commercial regulations was a main concern for those in the Confederation who pushed for a new Constitution, and that the new Constitution had the purpose of remedying the lack of uniformity in the old system.⁷⁷ The Framers of the Constitution desired uniform treatment of states in order to prevent

74. U.S. v. Lopez, 514 U.S. 549, 558 (1995).

75. See Prohibiting State-Sanctioned Sports Gambling: Hearing on S. 473 and S. 474 Before the Subcomm. on Patents, Copyrights, and Trademarks of the S. Comm. on the Judiciary, 102d Cong. 99-190, 231-35 (1991); Professional and Amateur Sports Protection Act: Hearing on H.R. 74 Before the Subcomm. on Econ. and Commercial Law of the House Comm. on the Judiciary, 102d Cong. 58-72, 88-100 (1991); S. Rep. No. 102-248, at 7, 13 (1992), reprinted in 1992 U.S.C.C.A.N. 3553, 3558, 3563.

76. 2 Joseph Story, Commentaries on the Constitution of the United States §1011 (Boston, Hilliard, Gray, and Co. 1833).

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

discrimination.⁷⁸ PASPA goes directly against that tenant. It discriminates based on drawn state lines, which should only allow the Act to withstand heightened scrutiny if it can be shown that it was established to solve a localized problem that does not exist outside of, or only exists within, Delaware, Montana, Nevada, and Oregon.⁷⁹ It cannot be justified by any compelling, nondiscriminatory reasoning, and there has never been an argument as to why Delaware, Montana, Nevada, and Oregon should have a special exempt status, other than the fact that they possessed a sports betting scheme in place prior to 1992. This is especially true for a state like Delaware, which did have a sports betting scheme in place prior to PASPA's adoption, but had not actually used the scheme since the 1970s.⁸⁰

Congress did state that sports betting is a national problem.⁸¹ In fact, the Federal Government went as far as to say, "The moral erosion it produces cannot be limited geographically."⁸² If sports betting is a national problem and states like Delaware, Montana, Nevada, and Oregon are not immune from its reach, then why should they have a favored status over the rest of the forty-six states in the union? On the other hand, if there is no compelling reason to ban sports gambling at all, then there is no valid purpose of the Act in the first place.

A state like New Jersey, which has a need to attract more tourists and generate additional funding to cure its devastated budget, cannot settle these needs by means of any type of state-sponsored betting. Meanwhile, its small neighbor of Delaware, which has no city to rival the glitz and glamour of Atlantic City, is able to offer limited forms of state-sponsored sports betting. Even Delaware is enslaved by its old scheme of offering only parlay bets including three or more sports games, due to the fact that was the lottery system in place prior to the enactment of PASPA in 1992. Nevada holds a monopoly as the only state in the union permitted to accept sports betting wagers on parlays and single-games. This affords the state an insurmountable advantage against the other three exempted states and the forty-six non-exempt states, to take in revenue from the taxation of its state-sponsored sports betting scheme.

In February 2009, the New Jersey State Senate unanimously passed a resolution that urged the Federal Government to lift the ban on state-sponsored sports betting.⁸³ If states did not have concern about attaining

78. Thomas B. Colby, *The Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 Va. L. Rev. 249, 289 (2005).

79. *Id.* at 339.

80. S. Rep. No. 102-248, at 13 (1992), *reprinted in* 1992 U.S.S.C.A.N. 3553, 3563.

81. S. Rep. No. 102-248, at 5 (1992), *reprinted in* 1992 U.S.S.C.A.N. 3553, 3556.

82. *Id.*

83. *See iMEGA v. Holder*, No. 09cv01301-GEB-TJB (D. N.J. filed Mar. 23, 2009).

the ability to engage in legalized state-sponsored sports betting, there Commerce Clause violation would be an afterthought. However, with states extremely interested in offering, at a minimum, the type of sports betting scheme present in the state of Delaware, which is a restrictive scheme due to the non-allowance of single-bet wagers, the Federal Government must begin to take this issue seriously.

PASPA gives no justification for granting four-out-of-fifty states the right to have a form of sports betting scheme, other than the fact that those states had a scheme in place prior to the passage of the Act. The same lack of justification exists to answer the question of why the four states that are exempt do not share identical rights within the group in terms of the type of sports betting schemes allowed.

IV. PASPA'S PURPOSE IS OUTDATED

Beyond the constitutional justifications backing the push to repeal the Professional and Amateur Sports Protection Act, there are also common sense reasons that stipulate the Act as being outdated and no longer necessary. Abolishing organized crimes' role in athletic events and maintaining the integrity of professional and amateur sports has long been a worthy goal in the Federal Government's legislative efforts concerning sports betting. A world completely devoid of sports betting may be the solution to accomplish both of those goals. Realistically, suppressing sports betting on a large scale is impossible, and the existence of PASPA only serves to propel sports bettors to other mediums, which are more difficult to track and which may prevent states from taxing to raise revenues. There is no taxation of illegal sports wagers transpiring via underground, private bookies, which along with online betting sites, have gained a monopoly on sports betting in all of the states that are not exempt in some fashion by PASPA. There is no way of knowing exactly how much money bettors transfer to illegal bookies, but in 1992, the estimated figure amounted to approximately \$40 billion and was consistently growing.⁸⁴ In 2009, Joe Brennan Jr., Chairman of the Interactive Media Entertainment & Gaming Association (iMEGA), estimated the unprotected, non-regulated sports wagering at \$380 billion.⁸⁵ PASPA has only served as an impetus to grow the businesses of these non-taxable and non-regulative entities. For example, illegal sports wagering operations have flourished in New Jersey, a state that has vocalized its desire to introduce state-sponsored sports betting. In November 2007, police uncovered a \$22 million illegal sport

84. Cowan, *supra* note 66.

85. *Two US Senators Oppose iMEGA Challenge to Sports Betting Law*, July 24, 2009, iMEGA, <http://www.imega.org/2009/07/25/two-us-senators-oppose-imega-challenge-to-sports-betting-law/>

betting ring operated in New Jersey that had involved at least four men affiliated with organized crime.⁸⁶

The Federal Government and the various professional and amateur leagues should focus on reducing the illegal sports betting and on restoring some integrity in their sports, by actually allowing the states to sponsor their own sports betting schemes. As Senator Grassley acknowledged, illegal numbers games were popular before states began to sponsor their own number lottery games.⁸⁷ Perhaps state-sponsored sports betting schemes will have a similar effect on the success, or lack thereof, of illegal, underground bookies. The only place that could presently serve as a case study is the state of Nevada, because it is the one state that offers parlay and single game bets.

Lawmakers justified the passage of PASPA by claiming that sports wagering is morally obtrusive, but if made legal among all fifty states, instead of only four of them, the wagering could be largely regulated. Regulating sports betting was Congress' goal. Ironically, by signing PASPA into law, the government has lost its ability to effectively regulate sports betting, because all bets have gone underground or online. As Bill Eadington, Director of the Center for the Study of Gambling and Commercial Gaming at the University of Nevada, so eloquently stated at the 1999 National Association of Collegiate Directors of Athletics (NACDA) gambling-education session, "There is a fundamental reality that we as Americans have had enough experience with now that we need to come to grips with, and that is that prohibition, whether it's for alcohol, illicit drugs or sports wagering, does not make the demand for an activity go away. Rather, it drives it underground and it pushes transactions outside of the protection of contract."⁸⁸

If the NFL and the other major sports leagues that filed suit against the Governor of Delaware are so concerned about protecting the integrity of their respective games and furthering fans' interests in every single regular season game, they would logically embrace sports betting, as it has the capacity to create fans. Individuals may become more involved when they might not care about a particular game without the personal excitement of the wager. When the New England Patriots slaughtered the Tennessee Titans in Week 6 of the 2009 NFL season, very few fans were watching in

86. Gary Trask, *Legislators make a push for legalized sports wagering in Atlantic City*, Casino City Times, Jan. 28, 2008, <http://garytrask.casinocitytimes.com/article/legislators-make-a-push-for-legalized-sports-wagering-in-atlantic-city-39492>

87. S. Rep. No. 102-248, at 16 (1992), *reprinted in* 1992 U.S.S.C.A.N. 3553, 3566.

88. See Kay Hawes, *NACDA Panelists Discuss Wide Spectrum of Gambling Issues*, The NCAA News, July 5, 1999, http://web1.ncaa.org/web_files/NCAANewsArchive/1999/19990705/active/3614n05.html.

the fourth quarter. How many more people would have been watching had they placed a bet on the over/under on that particular game? Organized crime is not a concern in that instance, and those bets do not jeopardize the integrity of the game of football. Fantasy football is here to stay, and so are single-game and parlay sports betting. If it is not legal for states to sponsor sports betting within their borders, sports bettors will look elsewhere, possibly to their underground bookies and online betting sites. The losers are the states, who are unable to accumulate any revenue from the bookies or online sites.

Governor Markell recognized the NFL's concern with ensuring the maintenance of the integrity of its game.⁸⁹ In his response to Commissioner Goodell, he even offered solutions to create a "highly regulated environment," which included the full backing of the Delaware State Police.⁹⁰ Markell wanted to enhance the NFL's integrity, by arranging a meeting between the state police and NFL security personnel, so that all entities could come to an agreement concerning important enforcement issues.⁹¹ Eight days after Commissioner Goodell sent Governor Markell his threatening letter, the NFL, MLB, NBA, NHL, and NCAA filed suit. This left little time for Governor Markell to send an appropriate response, and by the time he sent one, it was too late to envision that Commissioner Goodell would even consider it. On the other hand, if Goodell had received the response immediately following the delivery of his letter, it is still highly doubtful that he would have taken it seriously. The NFL seemed to be on a mission to prevent the state of Delaware from implementing any type of sports betting scheme, even the one permitted under PASPA's exemption. The NFL could have used its money to help enforce regulations in Delaware, instead of spend it on counsel to fight Delaware's attempt to allow sports betting. Integrity of the game was merely an excuse.

In its battle against the state of Delaware in 1977 and then again in 2009, the NFL made certain to focus on examining Delaware's State Constitution. Specifically, the league attempted to prohibit the offering of bets based on the outcome of single games, because there was not enough chance inherent in making those picks. If that is the case, then one must question how the sportsbooks in Nevada stay alive. The NFL should also examine the success of the underground bookies and new gambling internet sites created by the. The fact of the matter is that trying to pick the result of a game in any sport is laden with chance, and that is what makes the sport particularly interesting to most fans. Unpredictable elements that occur just prior to the start of a game or during the game make "skillful bets" seem

89. See Letter from Jack Markell *supra* note 34.

90. *Id.*

91. *Id.*

preposterous. Hindsight is often 20/20, but sportsbooks do not operate within hindsight.

The Federal Government and various sports leagues have good intentions, but they are attempting to achieve their goals through unsuccessful means. If actual and perceived legitimacy is the main priority, then it is senseless to focus on the lay fan that places a bet or two per week. Instead, the leagues need to use their cumulative resources to prevent referees like former NBA referee Tim Donaghy from betting on games that he officiates, or managers like Pete Rose from betting on games that involve the team that they manage. These cases make fans of the game skeptical, not whether their next-door neighbor correctly selected the winner of the mid-season matchup between the Miami Dolphins and New York Jets.

If PASPA was eliminated, courts would no longer have an excuse to continue to prevent states from raising the funds they desperately need to rescue their budgets. States would have a possibility, call it a chance, to extinguish their deficit spending and possibly return to a time when they enjoyed surpluses. Such a scenario may be more likely than one where a sports bettor picks the correct outcome in of a single sports game. If the Federal Government and the NFL, MLB, NBA, NHL, and NCAA are still concerned, Joe Maloof can ease their apprehension. As the part owner of the NBA's Sacramento Kings, WNBA's Sacramento Monarchs, and Palms Casino in Las Vegas stated, "When it's regulated, it's safer. There's no hanky-panky."⁹²

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92. Michael McCarthy and A.J. Perez, *Pro leagues, NCAA resist push by states to legalize betting*, USA Today, July 28, 2009, http://www.usatoday.com/sports/2009-07-27-sports-betting_N.htm.

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