New Jersey Goes “All In” for Sports Gambling: Examining the Constitutionality of the Professional and Amateur Sports Protection Act

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NEW JERSEY GOES "ALL IN" FOR SPORTS GAMBLING: EXAMINING THE CONSTITUTIONALITY OF THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT

Tyler W. Mullen*

Abstract

Despite being illegal in all but a handful of U.S. jurisdictions, sports gambling has developed into a multi-million dollar industry. Eager to capitalize on the potential revenues, New Jersey recently challenged the constitutionality of the Professional and Amateur Sports Protection Act ("PASPA"), the federal sports gambling law. PASPA effectively prohibits the vast majority of states from operating or sanctioning sports gambling schemes. However, the particular methods that PASPA uses to achieve this objective raise serious federalism concerns. While the Third Circuit recently rejected New Jersey’s constitutional challenges to PASPA, this Comment argues that the court reached the wrong conclusions on two main issues.

First, PASPA directly commands state legislatures to refrain from legalizing sports gambling. Because PASPA prohibits states’ regulation of sports gambling, rather than prohibiting sports gambling itself, PASPA violates the Anti-Commandeering Principle. Second, in light of the U.S. Supreme Court’s recent Shelby County v. Holder decision, PASPA is unconstitutional. Because the disparate treatment of states under PASPA is not “sufficiently related” to achieving the law’s intended purposes, as Shelby County mandates, PASPA violates the Equal Sovereignty Doctrine.

The federalism issues raised by PASPA are complex and intricate, and many states have publically backed New Jersey. Although the PASPA litigation could be well on its way to the U.S. Supreme Court, the outcome remains uncertain. Only time will tell if New Jersey’s last roll of the dice leads to the end of PASPA, or nation-wide sports gambling going bust.

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I. INTRODUCTION: SPORTS GAMBLING—AMERICA’S BEST KEPT SECRET

Pick-em’s, parlays, teasers, pleasers, and monsters.

Many may not know whether these words are the names of exotic firecrackers, lyrics from a children’s nursery.
rhyme, or something else entirely. In fact, these peculiar terms are the names of various types of sports wagers commonly offered in Las Vegas casinos, on offshore gambling websites, and in back-room offices of local bookies.¹

Even though sports gambling exists mainly on the periphery of the law, public support for sports gambling has become far more common as of late.² Indeed, sports gambling has “evolved during the past few decades from a shady, quasi-legal activity to a widely accepted recreational activity.”³

Popular culture reflects the growing acceptance of sports gambling. Recent Hollywood blockbusters such as Two for the Money, Bookies, and the Oscar-nominated Silver Linings Playbook all prominently feature sports gambling.⁴ Also commonplace are television and sports radio hosts speaking openly about favorable wagers or point spreads, often giving their suggested ‘picks’ for interested

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2. See James Surowiecki, A Call to Action, NEWYORKER.COM (Feb. 11, 2013), http://nyr.kr/1fhG7cf.


listeners. Even President Barack Obama makes public his NCAA March Madness bracket each year.

The sheer number of individuals that bet on sporting events, legally or illegally, further demonstrates America’s growing comfort with sports gambling. According to a 2012 poll conducted by ESPN, approximately 118 million Americans gamble on sports in some fashion each year. Still, perhaps the most interesting sports gambling statistics do not concern the gross number of annual participants, but instead the massive amounts of money wagered each year.

In 2012, approximately $3.45 billion was wagered in Nevada’s sports books, the only legal sports books in the United States taking bets on a full range of sporting events and leagues. Incredibly, the sports wagers placed


6. See Matt Compton, President Obama's Bracket for the 2013 NCAA Men's Basketball Tournament, WHITEHOUSE.GOV (Mar. 20, 2013), http://1.usa.gov/1eQWXDX.


legally in Nevada in 2012 constituted less than one percent of total sports wagers nationwide. In fact, the National Gambling Impact Study Commission estimated that the amount of money wagered illegally on sports in 2011 may have been as high as $380 billion.

With public sentiment favoring sports gambling steadily growing, and with such large amounts of money involved, states are primed to capitalize on the booming sports gambling market. Unfortunately, due to federal legislation, implementing any sort of state-sanctioned sports gambling scheme remains illegal for the vast majority of states.

The Professional and Amateur Sports Protection Act ("PASPA"), the primary focus of this Comment, prohibits states from legalizing sports gambling. PASPA contains exemptions for a handful of states, most notably Nevada,

Sportsbook, FoxSPORTS.COM (Feb. 11, 2014), http://foxs.pt/ima73ne. In 2013, on Super Bowl Sunday alone, $98,936,798 was wagered on the Super Bowl, with casinos turning a collective profit of $7,206,460. Id.


10. Id.

11. See Drape, supra, note 5.


13. Id.
allowing the exempted states to legally sanction sports gambling.\textsuperscript{14} However, because most states cannot sanction sports gambling in casinos or racetracks, the vast majority of wagers occur illegally through bookies or offshore bookmakers.\textsuperscript{15}

This Comment examines the constitutionality of Congress’ use of PASPA as a means of prohibiting sports gambling. Part II.A and II.B will provide brief historical backgrounds of PASPA and the New Jersey Sports Wagering Law\textsuperscript{16}—the state law that incited the PASPA litigation—respectively. Part II.C will articulate the central constitutional issues, and corresponding caselaw, relevant to New Jersey’s Third Circuit appeal. Part III will argue against the Third Circuit’s conclusion that PASPA is constitutional. More specifically, Part III.A will analyze the constitutionality of PASPA under the Anti-Commandeering Principle, and Part III.B will do the same under the Equal Sovereignty Doctrine. Furthermore, Part III.C will recommend potential paths New Jersey could follow to secure

\begin{itemize}
\item \textsuperscript{14} See id. § 3704.
\item \textsuperscript{15} Gary Payne, Sports Betting Already Happens; Government Might as Well Regulate It, USNEWS.COM (June 15, 2012), http://bit.ly/MdvWOV.
\end{itemize}
legalized sports gambling. Finally, Part IV will conclude the Comment, briefly summarizing the Comment’s main points and providing some final thoughts.

II. BACKGROUND

A. Professional and Amateur Sports Protection Act

Enacted by Congress in 1992, the Professional and Amateur Sports Protection Act (“PASPA”) prohibits states from sanctioning sports gambling. More specifically, PASPA makes it unlawful for states “to sponsor, operate, advertise, promote, license or authorize by law or compact . . . a lottery . . . or other betting, gambling, or wagering scheme . . . on one or more competitive games in which amateur or professional athletes participate.” PASPA also makes it unlawful for any “person to sponsor, operate, advertise, or promote [a sports gambling scheme], pursuant to the law or compact of a government entity.”

According to the Senate Judiciary Committee, PASPA aimed to halt the spread of state-sanctioned sports gambling and maintain the integrity of professional and

18. Id.
19. Id.
amateur sports. Congress feared that pervasive state-sanctioned sports gambling would lead to an increase in gambling addiction, especially among young adults. Congress also feared that widespread sports gambling could undermine public confidence in nation-wide sporting events. If governments widely sanctioned sports gambling, then sports fans may be more inclined to believe that the “fix was in” any time a controversial play occurred or a team failed to cover a point spread.

Even while harboring the addiction and cheating apprehensions, Congress recognized that sports gambling could significantly benefit states. Congress conceded that government regulation of sports gambling could bring states massive revenues, and that some states, especially Nevada, already relied on sports gambling revenue as a form of essential industry. Accordingly, Congress opted not to snuff out the few state-sanctioned sports gambling schemes

21. Id. at 5.
22. Id.
23. Id.
25. Id.
already in existence by allowing exemptions from PASPA.\textsuperscript{26} Nevada, Oregon, Delaware and Montana are the only states qualifying for some type of exemption under PASPA.\textsuperscript{27}

The exemptions granted under PASPA differ based on whether, at certain specified points prior to PASPA, a state had a) authorized sports gambling by statute and/or b) actually implemented some type of sports gambling scheme.\textsuperscript{28} Based on PASPA’s exemption criteria, Nevada receives a complete exemption, allowing Nevada to sanction wagers on individual sporting events and sports lotteries.\textsuperscript{29} By contrast, the other exempted states—Delaware, Oregon, and Montana—are only allowed to sanction limited sports lotteries and parlay bets.\textsuperscript{30} All other states are precluded from sanctioning sports gambling.\textsuperscript{31}


\textsuperscript{27} AGA Study, supra note 8. As of June 2012, however, Nevada is the only state where sports wagering on a full range of sporting events is legal, regulated, policed, and taxed. Id.

\textsuperscript{28} See 28 U.S.C. § 3704.

\textsuperscript{29} See Nat’l Collegiate Athletic Ass’n v. Governor of N.J., 730 F.3d 208, 216 (3d Cir. 2013).

\textsuperscript{30} See id. Oddly enough, considering the current lawsuit, section 3704(a)(3) of PASPA contains a provision—specifically included for New Jersey’s benefit—which would have allowed New Jersey to receive an exemption from PASPA. See MaryAnn Spoto, Referendum to Ask N.J. Residents if They Want to Allow Gambling on Professional Sports, NJ.COM (Nov.
B. New Jersey’s Sports Waging Law

When Congress originally considered PASPA, some New Jersey politicians, especially U.S. Senator Bill Bradley (NJ-D), staunchly supported the measure.\textsuperscript{32} However, in the last few years, New Jersey’s stance on state-sanctioned sports gambling changed dramatically.\textsuperscript{33} After the massive destruction to New Jersey’s shoreline caused by Hurricane Sandy in 2012 and the exponential increase in casino and gaming competition from other states, New Jersey lawmakers found their state in dire economic straits.\textsuperscript{34} New Jersey citizens and lawmakers now view sports gambling as a means

\footnotesize{4, 2011), http://bit.ly/1bNHtKV. Had New Jersey’s legislature passed a sports wagering scheme within one year of PASPA’s enactment, the scheme would have been grandfathered under PASPA’s exemptions. Id. Unfortunately, New Jersey’s legislature failed to take the necessary steps to secure the exemption during the brief window of opportunity. Id.

31. See Governor of N.J., 730 F.3d at 216.


34. See id.
to halt the downward spiral of Atlantic City’s once burgeoning casino and hotel industry.\(^3^5\)

Since 2007, competitive and economic forces drove Atlantic City’s casino revenue down by 40 percent, from $5.2 billion in 2006 to approximately $3 billion in 2012.\(^3^6\) Realizing the need for change, New Jersey lawmakers have scrambled to revitalize the state’s casino and hotel industry, attempting to implement sports gambling even after recognizing that such attempts conflicted with PASPA.\(^3^7\)

Serious attempts to sanction sports gambling first began in 2011.\(^3^8\) In a non-binding referendum, New Jersey citizens demonstrated their support for legalized sports

\(^3^5\) See J Freedom du Lac, Atlantic City Battles to End Losing Streak, THE GUARDIAN WEEKLY (Sept. 10, 2013), http://bit.ly/NDDOdn. New Jersey also recently legalized online gambling, another area fraught with legal uncertainties, to help revitalize the state’s economy. See Niraj Chokshi, At Least 10 States Expected to Consider Allowing Online Gambling this Year, WASHINGTONPOST.COM (Feb. 5, 2014), http://wapo.st/1etIc9T. The efforts have proved successful thus far, as operators of the online gambling sites generated approximately $8.3 million in December of 2013 alone. See id.

\(^3^6\) Freedom du Lac, supra note 35.


The referendum passed by a very comfortable majority, and spurred New Jersey Governor Chris Christie to initiate the fight against the federal ban. In response to the overwhelming support, New Jersey’s legislature passed the Sports Wagering Law, which Governor Christie signed on January 17, 2012. The law legalized sports wagering at Atlantic City casinos and racetracks.

Approximately seven months later, the National Collegiate Athletic Association, joined by the National Football League, the National Basketball Association, the National Hockey League, and Major League Baseball, attempted to enjoin implementation of the Sports Wagering Law. In response, New Jersey filed a cross motion challenging PASPA’s constitutionality.

39. Id.
40. See id.
45. Id. Although there have been at least three other judicial challenges to PASPA, none of the previous...
The ensuing litigation began in the United States District Court for the District of New Jersey, where the court ruled against New Jersey.\textsuperscript{46} The case then headed to the U.S. Court of Appeals for the Third Circuit, where, once again, New Jersey suffered defeat.\textsuperscript{47}

C. Constitutional Issues Raised by PASPA


\textsuperscript{46} Christie, 926 F.Supp 2d at 579. Although the loss in the district court served to derail the momentum that New Jersey garnered leading up to the case, New Jersey lawmakers still felt that the arguments for state-sanctioned sports gambling would ultimately prevail. See David Porter, Christie Says NJ will Appeal Sports Betting Ruling, ASSOCIATED PRESS (Mar. 1, 2013), http://bit.ly/1bNJabf. New Jersey Senator Ray Lesniak even went so far as to call the district court ruling on PASPA a “patent misinterpretation of the constitution.” Id. Governor Chris Christie, also expressing confidence in New Jersey’s position, vowed to take the case all the way to the U.S. Supreme Court, if necessary. Matt Friedman, Christie Says N.J. will Appeal Sports Betting Case to U.S. Supreme Court, NJ.com (Sept. 17, 2013), http://bit.ly/1m9EPJo.

\textsuperscript{47} See Nat’l Collegiate Athletic Ass’n v. Governor of N.J., 730 F.3d 208, 215 (3d Cir. 2013).
constitutional defects. The first major defect concerns the Anti-Commandeering Principle and the second concerns the Equal Sovereignty Doctrine. Both constitutional principles are cornerstones of America’s dual sovereignty system of federalism.


The Anti-Commandeering Principal proceeds from the Tenth Amendment of the U.S. Constitution. At its most basic, the Principle stands for the proposition that the federal government, although supreme when acting within its constitutionally enumerated powers, may not act beyond

48. See Governor of N.J., 730 F.3d at 214. Although New Jersey articulated other challenges, see Christie 926 F.Supp at 554, this Comment will only focus on the Anti-Commandeering and Equal Sovereignty challenges. New Jersey also challenged Congress’ power to regulate all intra-state gambling and the sports leagues’ standing, among other things. Id.

49. Governor of N.J., 730 F.3d at 214.

50. See id.

51. See U.S. Const. amend. X (“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.” (emphasis added)). See also Printz v. United States, 521 U.S. 898, 919 (1997) (“Residual state sovereignty was . . . implicit, of course, in the Constitution’s conferral upon Congress of not all government powers, but only discrete, enumerated ones . . . which [by] implication [were] rendered express [in] the Tenth Amendment[].”).
those enumerated powers by forcing states to implement federal policy.\textsuperscript{52}

Applying the Anti-Commandeering Principle to PASPA, then, there is at least a \textit{prima facie} commandeering worry caused by PASPA’s \textit{modus operandi}.\textsuperscript{53} More precisely, because PASPA prohibits states’ regulation of sports gambling, rather than simply regulating sports gambling outright, PASPA impermissibly enlists state governments to implement federal policy.\textsuperscript{54} Unfortunately for New Jersey, the Third Circuit disagreed with New Jersey’s interpretation of PASPA, concluding that PASPA does not impermissibly commandeer state legislatures.\textsuperscript{55}


\textsuperscript{53} See \textit{Governor of N.J.}, 730 F.3d at 241 (Vanaskie, J., dissenting).

\textsuperscript{54} See \textit{New York v. United States}, 505 U.S. 144, 178 (1992) (“Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.”). The general thrust of New Jersey’s anti-commandeering argument is, therefore, procedural rather than substantive. \textit{Governor of N.J.}, 730 F.3d at 227. There is little dispute that Congress could regulate sports gambling under the Commerce Clause if a proper constitutional procedure were utilized. \textit{Id.} at 225. But, because PASPA uses states as instruments to regulate sports gambling, there are significant anti-commandeering issues. See \textit{Id.} at 241 (Vanaskie, J., dissenting).

\textsuperscript{55} See \textit{Governor of N.J.}, 730 F.3d at 237.
The Governor of New Jersey court began its analysis by distinguishing PASPA from laws struck down in prior anti-commandeering challenges. Notably, the court pointed out, all laws previously invalidated under the Anti-Commandeering Principle required states to actively undertake a federal program or follow a federal order.\textsuperscript{56}

In \textit{New York v. United States},\textsuperscript{57} for example, the “take title provision” of the Low-Level Radioactive Waste Policy Amendments Act was struck down.\textsuperscript{58} Under the take title provision, states effectively had a choice between two options: states could choose to (1) regulate the disposal of radioactive waste within their borders pursuant to congressional instruction, or (2) take title to the radioactive waste and incur liability for any damages caused by the waste.\textsuperscript{59}

\begin{itemize}
  \item \textsuperscript{56} See \textit{Printz v. United States}, 521 U.S. 898, 935 (1997) (striking down a federal law requiring state officials to conduct background checks on firearms purchasers until a federally implemented program could be established); \textit{New York v. United States}, 505 U.S. 144, 177 (1992) (concluding that federal legislation forcing states to take title of radioactive waste not properly disposed of, or regulated pursuant to congressional instructions, was unduly coercive).
  \item \textsuperscript{57} \textit{New York v. United States}, 505 U.S. 144 (1992).
  \item \textsuperscript{58} \textit{Id.} at 177.
  \item \textsuperscript{59} See \textit{New York}, 505 U.S. at 174-76.
\end{itemize}
The New York Court struck down the take title provision because it "crossed the line [between] encouragement and coercion." Likewise, in Printz v. United States, the Court invalidated the Brady Handgun Violence Prevention Act, which federally mandated that state officials conduct background checks on individuals attempting to purchase handguns. Judging from these cases, then, the U.S. Supreme Court appears principally focused on coercion and commandeering when it comes to anti-commandeering challenges.

In Governor of New Jersey, however, the Third Circuit attempted to limit the Anti-Commandeering Principle to

60. Id. at 175. The coercion standard adopted by the U.S. Supreme Court in New York has become the standard of review for Anti-Commandeering cases. See Printz, 521 U.S. at 935. See also, Nat’l Fed’n of Indep. Bus. V. Sebelius, 132 S.Ct. 2566, 2581-82 (2012) (striking down, as unduly coercive, a provision of Affordable Care Act that would have withheld federal Medicaid grants to states unless they expanded Medicaid eligibility requirements).


62. Id. at 902 (1997). Although Printz is certainly important to any anti-commandeering analysis, New York is more analogous to the PASPA case because New York concerns state legislatures rather than other state agents. See Printz, 521 U.S. at 935. Thus, the remainder of the Comment will focus more heavily on comparing the PASPA case to New York than to Printz.

63. See Printz, 521 U.S. at 935; New York, 505 U.S. at 176.
situations where Congress actively commands states.\(^{64}\) According to the Third Circuit, an anti-commandeering analysis hinges on whether federal legislation commands states to \textit{affirmatively} take action on behalf of the federal government.\(^{65}\) Under the Third Circuit’s Affirmative Command Standard, laws containing affirmative commands, like the ones in \textit{New York} and \textit{Printz}, are the only types of laws that could impermissibly commandeere states.\(^{66}\) Thus, the Third Circuit reasoned, because PASPA only \textit{prohibits} states from doing things—namely, legalizing and regulating sports gambling—PASPA cannot possibly constitute impermissible commandeering.\(^{67}\)

To further bolster its position, the Third Circuit likened PASPA to laws that survived anti-commandeering challenges.\(^{68}\) Two such laws cited by the Third Circuit were the laws at issue in \textit{Hodel v. Virginia Surface Mining &

\[\text{64. See Nat’l Collegiate Athletic Ass’n v. Governor of N.J., 730 F.3d 208, 231 (3d Cir. 2013).}\]

\[\text{65. For the remainder of this Comment, the Third Circuit’s analytical framework may be referred to as the “Affirmative Command Standard.”}\]

\[\text{66. See Governor of N.J., 730 F.3d at 231.}\]

\[\text{67. Id. (“PASPA does not require or coerce the states to lift a finger—they are not required to pass laws, to take title to anything, to conduct background checks, to expend any funds, or to in any way enforce federal law.”).}\]

\[\text{68. Id. at 234-37.}\]
Reclamation Association\textsuperscript{69} and FERC v. Mississippi.\textsuperscript{70} In both cases, the U.S. Supreme Court upheld the federal laws, even though the laws infringed on state autonomy, because the laws still left states with a great deal of policymaking discretion.\textsuperscript{71}

_Hodel_ involved a scheme of cooperative federalism\textsuperscript{72} which gave states the choice of either (1) allowing the federal government to implement national regulatory standards for surface mining, or (2) have the states implement their own regulatory programs consistent with the national standards.\textsuperscript{73} The legislation at issue in _FERC_ granted states even more freedom.\textsuperscript{74} States only had to

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\textsuperscript{71}. See _FERC_, 456 U.S. at 764-65; _Hodel_, 452 U.S. at 304-05.
\textsuperscript{72}. Cooperative federalism schemes are federally mandated schemes giving states the option between (1) allowing the federal government to implement uniform federal standards within state borders at no cost to the states, or (2) implementing their own state-created, but federally approved, standards with state funds. See Phillip J. Weiser, Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act, 76 N.Y.U. L. Rev. 1692, 1696 (2001).
\textsuperscript{73}. See _Hodel_, 452 U.S. at 271-72.
\textsuperscript{74}. See _FERC_, 456 U.S. at 746.
\end{flushleft}
"consider" whether to implement certain regulatory standards for energy efficiency, but need not implement any standards if they decided against doing so.\textsuperscript{75}

In both \textit{Hodel} and \textit{FERC}, the ultimate policy decisions were left to the states and no unduly coercive influences or ultimatums existed.\textsuperscript{76} Accordingly, because the Third Circuit interpreted PASPA as allowing states a large amount of policymaking leeway, the Third Circuit viewed PASPA as more akin to the laws upheld in \textit{Hodel} and \textit{FERC} than the laws struck down in \textit{New York} and \textit{Printz}.\textsuperscript{77}

The Third Circuit also pointed out instances where the U.S. Supreme Court upheld federal laws that directly prohibited state conduct, just like PASPA.\textsuperscript{78} Generally speaking, federal prohibitions on state action constitute valid preemption\textsuperscript{79} when: (1) a state’s action, if not

\begin{itemize}
  \item \textsuperscript{75} Id.
  \item \textsuperscript{76} See \textit{FERC}, 456 U.S. at 764-65; \textit{Hodel}, 452 U.S. at 304-05.
  \item \textsuperscript{77} See \textit{Nat’l Collegiate Athletic Ass’n v. Governor of N.J.}, 730 F.3d 208, 233 (3d Cir. 2013).
  \item \textsuperscript{78} See \textit{Governor of N.J.}, 730 F.3d at 234-35.
  \item \textsuperscript{79} Congress’ ability to preempt state law is derived from the Supremacy Clause. \textit{U.S. Const. VI}, cl. 2. When federal law conflicts with state law in an area falling within the sphere of Congress’ enumerated powers, the federal law will take precedence. See \textit{New York v. United States}, 505 U.S. 144, 168 (1992). Remember, though, that “the Supremacy Clause elevates only laws that are otherwise
prohibited, would render a federal regulatory scheme inoperative, or (2) a state’s action is prohibited under a law of general applicability. Each type of permissible prohibition will now be explained, in turn.

First, Congress may prohibit state action where a federal regulatory scheme is so comprehensive that the scheme precludes conflicting state regulation in the same field. Congress’ preemption authority, therefore, necessarily encompasses the outright banning of certain state activities “to ensure that States [do] not undo federal [regulation] with regulation of their own.”

The Third Circuit applied this principle to PASPA, viewing PASPA as a corollary to an existing regulatory

within Congress' power to enact,” which is why, this Comment will argue, PASPA should not receive Supremacy Clause deference. Governor of New Jersey, 730 F.3d at 231.


81. See Reno v. Condon, 528 U.S. 141, 151 (2000) (upholding a federal prohibition on state action because the federal law was generally applicable).

82. See 16A AM. JUR. 2D Constitutional Law § 234 (2013).

framework for sports gambling. As such, the court reasoned, PASPA’s prohibitions work in tandem with other federal laws preventing the spread of sports gambling, and are therefore constitutional.

The second type of permissible prohibition concerns generally applicable laws. State action may be preempted if the state action is subject to a generally applicable federal law. Thus, because PASPA prohibits individuals, as well as states, from operating sports wagering schemes, the Third Circuit concluded that PASPA’s prohibitions were generally applicable, and therefore constitutional.

84. See Nat’l Collegiate Athletic Ass’n v. Governor of N.J., 730 F.3d 208, 236 (3d Cir. 2013).

85. See id.

86. A generally applicable law is a law that applies to all parties, states and individuals, equally. See, e.g., Reno v. Condon, 528 U.S. 141, 151 (2000) (“The [law at issue] regulates the States as the owners of databases.” (emphasis added)).


2. The Equal Sovereignty Doctrine: *Shelby County v. Holder* and the Sufficient Relation Test

Besides PASPA’s Anti-Commandeering issues, PASPA also implicates the Equal Sovereignty Doctrine. The Equal Sovereignty Doctrine delineates the permissible boundaries of unequal treatment imposed on states by the federal government. After the U.S. Supreme Court’s recent holding in *Shelby County v. Holder*, the Equal Sovereignty Doctrine can be expressed in the following manner: any unequal treatment imposed on states by Congress “must be justified by current needs, and any disparate geographic coverage must be sufficiently related to the problem that it targets.”

Leading up to the Third Circuit appeal, the odds appeared heavily stacked against New Jersey. However,


90. *Id.* at 2622.


just hours before oral arguments, the U.S. Supreme Court decided _Shelby County v. Holder_, a ruling that revitalized and expanded the Equal Sovereignty Doctrine. The sudden change in precedent substantially fortified New Jersey’s position at the last minute. Still, the outcome remained

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94. Prior to _Shelby County_, the Equal Sovereignty Doctrine was thought only to apply when new states were admitted to the union. See _NCAA v. Christie_, 926 F.Supp. 551, 557 (2013). However, _Shelby County_ “changed both the framework of review and the principle on which [the Equal Sovereignty Principle] is exercised,” allowing courts to apply the Equal Sovereignty Doctrine in situations besides admittance to the Union. Reva B. Siegel, _The Supreme Court 2012 Term: Foreword_, 127 HARV. L. REV. 1, 70 (2013).

uncertain because *Shelby County*’s subject matter differed substantially from the subject matter of the PASPA case.  

*Shelby County* dealt with the Voting Rights Act ("VRA"), a federal statute passed in 1965 requiring some local voting jurisdictions, but not all, to obtain preclearance from federal authorities before significantly altering voting procedures.  

Congress originally implemented the VRA to combat racial discrimination at the ballot box, especially in highly segregated Southern counties.

The *Shelby County* opinion, written by Chief Justice Roberts, stated that, although differential treatment between jurisdictions may have been justified when the VRA was originally implemented, the VRA’s geographic distinctions were no longer “sufficiently related to the problem that [the VRA] targets.” This new ‘sufficiently related’ standard of scrutiny is highly significant with


97. *Shelby County*, 133 S. Ct. at 2618.

98. Id.

99. *Shelby County*, 133 S. Ct. at 2627 (explaining that the data relied on to justify the VRA is no longer indicative of current voter turnout, indicating that the VRA has achieved its intended purpose).
regard to PASPA.\textsuperscript{100} The sufficiently related standard represents a considerable departure from the easily cleared rational basis standard, which previously governed Commerce Clause legislation.\textsuperscript{101} As Justice Ginsburg explicitly pointed out in \textit{Shelby County}, whether PASPA "remain[s] safe given the Court’s expansion of equal sovereignty[]" could be a future issue for the Court to wrestle with.\textsuperscript{102}

At oral arguments, counsel for New Jersey seized upon the ‘sufficiently related’ language, arguing that the exemptions granted to Nevada and other states are not sufficiently related to achieving PASPA’s purposes.\textsuperscript{103} Counsel for the sports leagues responded, arguing that, if \textit{Shelby County} did in fact introduce a new standard of review into the equal sovereignty jurisprudence, the new standard should be considered \textit{sui generis}.\textsuperscript{104}

\textsuperscript{100} See \textit{supra}, note 94.


\textsuperscript{102} \textit{Shelby County}, 133 S. Ct. at 2649 (Ginsburg, J., dissenting).

\textsuperscript{103} Oral Argument at 22:30, Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208, available at http://1.usa.gov/1bNMx23.

\textsuperscript{104} \textit{Id.} at 46:00.
Unfortunately for New Jersey, the Third Circuit agreed with the sports leagues’ position by a 2-1 margin.\textsuperscript{105} The court stated that “there is nothing in Shelby County to indicate that the equal sovereignty principle is meant to apply with the same force outside the context of sensitive areas of state and local policymaking.”\textsuperscript{106} Even the lone dissenter, Judge Thomas I. Vanaskie, agreed with the majority’s equal sovereignty analysis, reiterating that the Shelby County rule did not apply to PASPA.\textsuperscript{107}

III. Analysis

The issues presented by the PASPA case go deeper than merely the legality of sports gambling.\textsuperscript{108} PASPA implicates important federalism principles that help to protect the Constitution’s dual sovereignty system.\textsuperscript{109} This part of the

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\textsuperscript{105} Nat’l Collegiate Athletic Ass’n v. Governor of N.J., 730 F.3d 208, 240 (3d Cir. 2013).
\textsuperscript{106} Id. at 239. Surprisingly, considering the weight that many legal experts attributed to the Shelby County decision, the Third Circuit spent relatively little time discussing the merits of the equal sovereignty issue, focusing instead on the Anti-Commandeering challenges. Id. at 237-240.
\textsuperscript{107} See id. at 241. Judge Vanaskie’s dissent only criticized the majority’s anti-commandeering analysis. Id.
\textsuperscript{108} See supra Part II.C at p. 15.
\textsuperscript{109} See supra Part II.C at p. 15.
\end{flushleft}
Comment will critically assess the constitutional issues raised by PASPA, beginning with the Anti-Commandeering issues and then moving on to the Equal Sovereignty issues.

A. The Anti-Commandeering Principle

The Anti-Commandeering principle arguably contains two prongs that, when combined, effectuate the Anti-Commandeering Principle’s overall purpose. The two prongs include: (1) Protecting states’ sovereign autonomy from an overreaching federal government;\(^{110}\) and (2) Making sure proper government officials are held accountable for policy decisions affecting states’ citizenry.\(^{111}\) PASPA is incompatible with both prongs of the Anti-Commandeering Principle.\(^{112}\)


\(^{111}\) See id. at 168.

\(^{112}\) The Anti-Commandeering analysis will proceed as follows: First, Part III.A.1 will argue that the Third Circuit adopts an erroneous standard to analyze PASPA’s constitutionality under the first prong. In a nutshell, the Third Circuit believes PASPA does not impermissibly commandeer states because PASPA imposes no affirmative requirements. See Nat’l Collegiate Athletic Ass’n v. Governor of N.J., 730 F.3d 208, 231(3d Cir. 2013). Part III.A.1 suggests a different standard, which, instead, focuses on state autonomy. More specifically, Part III.A.1 will argue that the proper anti-commandeering standard does not focus so much on affirmative commands, but with how coercive Congress’ instructions are in light of New York v. United States. See New York, 505 U.S. at 176. Parts III.A.1.a and III.A.1.b will go one step further, articulating exceptions to the New York standard, but
1. State Sovereignty and Autonomy

PASPA violates the Anti-Commandeering Principle by using state legislatures as instruments in achieving federal policy. The actual text of PASPA forbids government entities from regulating sports gambling schemes. But, prohibiting states from regulating a certain activity is entirely different than regulating the activity outright.

The dissent in Governor of New Jersey makes clear that “PASPA prohibits states from authorizing sports gambling . . . thereby direct[ing] how states must treat [sports gambling].” But, the majority does not view such ultimately concluding that PASPA falls under neither exception. Part II.A.2 will argue, under the second anti-commandeering prong, that PASPA presents serious accountability dangers. Specifically, because state electorates will not realize the origin of the sports gambling ban, state lawmakers could improperly be held accountable for PASPA’s shortcomings. See New York, 505 U.S. at 168.

113. See Nat’l Collegiate Athletic Ass’n v. Governor of N.J., 730 F.3d 208, 241 (Vanaskie, J., dissenting).


115. See New York, 505 U.S. at 166 (“We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.”).

negative commandeering as problematic. As the majority correctly points out, no federal law has ever been struck down solely because the law included a federal prohibition. The majority is too quick to conclude, however, that the lack of any directly analogous cases are a point in PASPA’s favor; indeed, the opposite is true.

No U.S. Supreme Court anti-commandeering cases “limited the principles of federalism . . . to situations [where] Congress directed affirmative activity on the part of the states.” In fact, rather than focusing on affirmative commands, like the majority, a proper anti-commandeering inquiry is broader and more abstract. The correct inquiry concerns whether state legislatures, state officials, or other state processes are hijacked by a federal mandate, not whether the mandate contains an affirmative command. In essence then, the Anti-Commandeering Principle concerns state autonomy.

117. See Id. at 231.

118. Id. at 229-230.

119. Id. 245 (Vanaskie, J., dissenting).

120. See New York, 505 U.S. at 175-76 (discussing the unconstitutionality of laws which commandeer state governments into the service of the federal government).

121. See, e.g., Printz v. United States, 521 U.S. 898, 935 ([W]e hold that Congress cannot circumvent [the New York rule] by conscripting the State's officers
Both logic and U.S. Supreme Court precedent support the proposition that the Affirmative Command Standard is improper, and that state autonomy is paramount. As the majority admits, there is no substantive difference, logically, between legislation cast as an affirmative command and legislation cast as a prohibition. Judge Vanaskie, in dissent, rhetorically quips that "[s]urely the structure of Our Federalism does not turn on the directly."). See also New York 505 U.S. at 175 ("Either type of federal action [under the take title provision] would ‘commandeer’ state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution."); Alden v. Maine, 527 U.S. 706, 749 (stating that Congressional power to force a state court to hear private suits against a non-consenting state impermissibly “turn[s] the State against itself and ultimately . . . commandeer[s] the entire political machinery of the State against its will”).

122. See Nat’l Collegiate Athletic Ass’n v. Governor of N.J., 730 F.3d 208, 245 (3d Cir. 2013) ("Whether stated as a command to engage in specific action or as a prohibition against specific action, the federal government's interference with a state's sovereign autonomy is the same." (emphasis added) (Vanaskie, J., dissenting)).

123. See cases cited supra note 121.

124. Governor of N.J., 730 F.3d at 233 ("To be sure, we take seriously the argument that many affirmative commands can easily be recast as prohibitions. For example, the background check rule of Printz could be recast as a requirement that the states refrain from issuing handgun permits unless background checks are conducted by their officials.").
phraseology used by Congress in commanding the states how to regulate.”

If the majority’s Affirmative Command Standard were adopted, then the federalism protections established in *New York* and *Printz* would be rendered hollow. Congress could easily circumvent the Anti-Commandeering Principle by simply phrasing federal laws as prohibitions, rather than as affirmative commands. On the other hand, an emphasis on state autonomy avoids the confusing semantic hurdles associated with the majority’s approach.

Still, even if the courts decide to adopt a state-autonomy standard rather than the Third Circuit’s Affirmative Command Standard, PASPA could nevertheless pass constitutional muster. Precedent shows that not all

125. *Id.* at 245 (Vanaskie, J., dissenting).

126. *See id.* (Vanaskie, J., dissenting).

127. *See id.* (Vanaskie, J., dissenting). The majority unsatisfyingly dismisses this worry, retorting that to disregard the Affirmative Command Standard would “imperil a plethora of acts currently termed as prohibitions on the states.” *Governor of New Jersey*, 730 F.3d at 233. Curiously though, the majority fails to cite any examples of such laws or explain why endangering existing laws should be a determinative factor in deciding PASPA’s constitutionality. *Id.*
Congressional interference with state autonomy is unconstitutional.\textsuperscript{128}

The first type of permissible restriction concerns degrees of federal imposition. If the federal government’s imposition on state autonomy is not severe enough to reach the “coercion” high water-mark set in \textit{New York}, then the imposition is allowable.\textsuperscript{129} The second type of permissible restriction concerns specific \textit{kinds} of federal impositions. If the imposition is part of a preemptive regulatory scheme, or is a generally applicable law, then the imposition is allowable.\textsuperscript{130}

\begin{itemize}
\item \textsuperscript{128} As a brief reminder, recall that there are two permissible types of congressional restrictions on state autonomy notwithstanding the Anti-Commandeering Principle. See discussion \textit{supra} at pp. 18-22.
\item \textsuperscript{130} See discussion \textit{supra} at pp. 21-23. See also \textit{Reno v. Condon}, 528 U.S. 141 (2000) (prohibiting state DMVs from distributing drivers’ information prior to receiving individual’s consent); \textit{South Carolina v. Baker}, 485 U.S. 505 (1988) (prohibiting states from issuing bearer bonds as part of a generally applicable law).
\end{itemize}
a. First Permissible Restriction: Passing the New York Coercion Standard

PASPA is unduly coercive and cannot be held constitutional by virtue of giving states sufficient legislative discretion.\textsuperscript{131} PASPA, from a coerciveness standpoint, is more similar to the law at issue in New York than those at issue in Hodel and FERC.\textsuperscript{132} Under the laws at issue in both Hodel and FERC, the state government made the ultimate decision whether it would, or would not, regulate.\textsuperscript{133} Although in New York, the state also made the ultimate ‘choice,’ insofar as the state made a final decision, the New York Court stated that, “[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all.”\textsuperscript{134} Thus, to survive anti-commandeering scrutiny, states must be given a meaningful choice, not just an illusory or non-existent one.\textsuperscript{135}

\textsuperscript{131} See Nat’l Collegiate Athletic Ass’n v. Governor of N.J., 730 F.3d 208, 250 (3d Cir. 2013) (“PASPA strips any regulatory choice from state governments.” (Vanaskie, J., dissenting)).

\textsuperscript{132} See id.


\textsuperscript{134} New York, 505 U.S. at 176.

\textsuperscript{135} See id.
Unfortunately, PASPA leaves states just two unconstitutionally coercive choices with no meaningful legislative discretion.\textsuperscript{136} Because PASPA prohibits states from sanctioning sports gambling schemes,\textsuperscript{137} states are essentially left with the options of: (1) completely outlawing sports gambling, or (2) allowing sports gambling to go completely unregulated.\textsuperscript{138}

The majority describes these two options as allowing states “much room . . . to make their own policy,”\textsuperscript{139} but in reality PASPA presents states with a mere Hobson’s choice; no matter which option a state chooses, the state is left unable to meaningfully regulate sports gambling.\textsuperscript{140}

Furthermore, the two options that PASPA leaves for states—i.e., total prohibition of sports gambling or

\textsuperscript{136} See Governor of N.J., 730 F.3d at 250 (“PASPA strips any regulatory choice from state governments.” (Vanaskie, J., dissenting)).


\textsuperscript{138} Governor of N.J., 730 F.3d at 232 (“We do not see how having no law in place governing sports wagering is the same as authorizing it by law.”).

\textsuperscript{139} Id.

\textsuperscript{140} Keep in mind that regulation and prohibition are “not synonymous.” People v. Gadway, 28 N.W. 101, 103 (Mich. 1886). Thus, Congress’ allowing states to prohibit sports gambling is not identical to allowing states the power to regulate, license, or tax sports gambling. Id.
completely unregulated sports gambling—are arguably even more coercive than the options left to states in New York.\textsuperscript{141} Comparing the options available under PASPA to the options available in New York supports this proposition.

The option to completely ban sports gambling under PASPA certainly leaves states with less room to make policy than the first option from New York.\textsuperscript{142} At least in New York, states could implement their own regulatory scheme in accordance with congressional instructions, if they chose to do so.\textsuperscript{143} PASPA gives states no room for regulation, only total prohibition.\textsuperscript{144}

Comparing the other options available to states in New York and \textit{Governor of New Jersey} is a closer analysis. In New York the federal government forced states to become liable for damages associated with radioactive waste if the states chose not to regulate the waste.\textsuperscript{145} Undoubtedly, imposing liability on states that chose not to regulate the

\textsuperscript{141} See supra notes 134-38 and surrounding text.

\textsuperscript{142} See \textit{Governor of N.J.}, 730 F.3d at 250 (Vanaskie, J., dissenting).

\textsuperscript{143} New York v. United States, 505 U.S. 144, 175 (1992).

\textsuperscript{144} See \textit{Governor of N.J.}, 730 F.3d at 250 (Vanaskie, J., dissenting).

\textsuperscript{145} See \textit{New York}, 505 U.S. at 174-75.
radioactive waste was a highly coercive tactic. However, the opportunity cost states endure as a result of PASPA is potentially an even greater economic affliction than the speculative damages arising from improperly discarded radioactive waste. Thus, there is, at the very least, an argument that PASPA is even more coercive than the law struck down in New York.

b. Second Permissible Restriction: Federal Preemption of State Action

Besides laws failing to constitute New York style coercion, complete prohibitions on state actions that are part of a federal preemptive scheme can be constitutional. Recall that federal prohibitions on

146. See New York, 505 U.S. at 176.


148. To be clear, PASPA need not be more coercive than the law at issue in New York to be unconstitutional, but need only “commandeer[] the legislative processes” of the states. New York, 505 U.S. at 176. The above reasoning is included merely to show that PASPA may be even more coercive than the law at issue in New York, which constitutes a very high degree of coercion.

149. See discussion supra pp. 18-22.
state action are constitutional, provided the prohibitions:
(1) preempt state law in order to preserve a federal regulatory scheme,\textsuperscript{150} or (2) are part of a generally applicable law.\textsuperscript{151} PASPA falls under neither of these two categories.

First, PASPA does not preempt state law in a field where Congress has already established a regulatory scheme.\textsuperscript{152} This is essentially because, contrary to the majority’s assertions, there is no federal regulatory scheme regulating sports gambling.\textsuperscript{153}

The congressional power to prohibit state action or negative state laws in order to preserve a federal regulatory scheme is contingent upon there already being a federal regulatory scheme in place.\textsuperscript{154} If Congress had the authority, in the first instance, to simply ban state


\textsuperscript{151} See Reno v. Condon, 528 U.S. 141 (2000) (allowing federal government to prohibit DMVs from distributing drivers’ information as part of a generally applicable law).

\textsuperscript{152} See Nat’l Collegiate Athletic Ass’n v. Governor of N.J., 730 F.3d 208, 247 (3d Cir. 2013) (Vanaskie, J., dissenting).

\textsuperscript{153} See id.

\textsuperscript{154} See id.
action as means of implementing federal policy, the entire dual sovereignty structure of the constitution would be meaningless.\textsuperscript{155} State sovereignty would have very little protection from federal overreach, even in fields Congress chose not to regulate.\textsuperscript{156} Thus, for PASPA to constitutionally bar states’ sanctioning of sports gambling, there would need to be a federal regulatory scheme already in existence that PASPA’s prohibitions are designed to protect.\textsuperscript{157}

Unfortunately, as the dissent points out, “other federal statutes relating to sports gambling do not aggregate to form the foundation of a federal regulatory scheme.”\textsuperscript{158} Of the four federal statutes with any conceivable relation to sports gambling, none establish

\textsuperscript{155}. Legislative history supports limiting Congress’ preemption power. See Shelby County v. Holder, 133 S. Ct. 2612, 2623 (“A proposal to grant [Congress] authority to ‘negative’ state laws was considered at the Constitutional Convention, but rejected in favor of allowing state laws to take effect, subject to later challenge under the Supremacy Clause.”).

\textsuperscript{156}. See Governor of N.J., 730 F.3d at 245 (“An interpretation of federalism principles that permits congressional negative commands to state governments will eviscerate the constitutional lines drawn in New York and Printz that recognized the limit to Congress’s power.” (Vanaskie, J., dissenting)).

\textsuperscript{157}. See id. at 246 (Vanaskie, J., dissenting).

\textsuperscript{158}. Id. at 247 (Vanaskie, J., dissenting).
general guidelines or rules regulating sports gambling.\textsuperscript{159} Thus, because there is no federal scheme that PASPA purports to protect, PASPA cannot be deemed constitutional on that a basis.

As for the second type of permissible preemption, PASPA is not a generally applicable law which happens to encompass state conduct.\textsuperscript{160} PASPA is not a generally

\begin{itemize}
\item \textsuperscript{159} See, e.g., Wire Act, 18 U.S.C. § 1084 (outlawing the use of wire communications to transmit sports bets between states where at least one of the state’s laws prohibit sports betting); 18 U.S.C. §224 (making it illegal to influence the outcome of sporting events through bribery); 18 U.S.C. § 1307 (excepting certain types of information from the general prohibition against mailing or transporting information relating to lotteries); 18 U.S.C. § 1953 (prohibiting transportation of wagering paraphernalia in interstate commerce between states where sports betting is illegal). The reasons that these four statutes do not aggregate to form a federal regulatory scheme are as follows. Both the §1084 of the Wire Act and § 1953 presuppose that some states will pass individualized sports gambling legislation. See Governor of N.J., 730 F.3d at 247 (Vanaskie, J., dissenting). Thus, these laws cannot constitute a federal regulatory scheme because they are dependent on state law to be effective. Id. Furthermore, § 224 would be fully functional regardless of sports gambling’s legality. Id. Bribing a player or official to influence a sporting event would still be illegal regardless of sports gambling. Id. Finally, § 1953, which only bans gambling paraphernalia from traveling in interstate commerce, says nothing about gambling paraphernalia in states where sports gambling is legal, indicating a reverence for state law. Id.
\item \textsuperscript{160} Governor of N.J., 730 F.3d at 248 ("PASPA is not an example of a generally applicable law that subjects states to the same federal regulation as private parties.") (Vanaskie, J., dissenting). 
\end{itemize}
applicable law because PASPA does not directly regulate private individuals.\textsuperscript{161} Section 3702(2) of PASPA only bars private individuals from operating sports gambling schemes if the individuals operate the schemes pursuant to state law.\textsuperscript{162} Thus, private individuals are entitled to operate sports gambling schemes, provided states do not actively sanction the private schemes.\textsuperscript{163} States, on the other hand, are categorically banned from authorizing or operating sports gambling schemes.\textsuperscript{164} Consequently, PASPA cannot legitimately be touted as a generally applicable law.


\textsuperscript{162.} Id. In fact, section 3702(2) of PASPA is entirely redundant. Any sports gambling scheme operated by private citizens and deemed illegal under section 3702(2) would already be illegal under section 3702(1). If the private individual was operating the scheme pursuant to state law, which is what PASPA bans, then the private scheme was necessarily already sanctioned by the state, which is also banned under PASPA. However, further evincing PASPA’s lack of general applicability, if the individual was operating a sports gambling scheme in the absence of state sanction, then neither section 3702(1) or section 3702(2) would apply. Therefore, section 3702(2) has no independent function.

\textsuperscript{163.} Governor of N.J., 730 F.3d at 232–33 (“Congress in PASPA itself saw a difference between general sports gambling activity and that which occurs under the auspices of state approval and authorization, and chose to reach private activity only to the extent that it is conducted ‘pursuant to State law.’”).

\textsuperscript{164.} Governor of N.J., 730 F.3d at 232–33.
because, under identical circumstances, PASPA applies to states and not individuals.\textsuperscript{165}

The majority’s attempt to categorize PASPA as a generally applicable law is therefore misguided. PASPA’s constitutionality must, therefore, be judged by the coercion standards set out in \textit{New York}, not by the general applicability exception from \textit{Baker} and \textit{Reno}.\textsuperscript{166}

2. Political Accountability

Another major, although less abstract, rationale for the Anti-Commandeering Principle, concerns political accountability.\textsuperscript{167} The Third Circuit did not directly address accountability problems because, the court concluded, accountability problems only exist after a determination of impermissible commandeering has been

\begin{enumerate}
\item \textsuperscript{165} See \textit{New York} v. United States, 505 U.S. 144, 160 (1992).
\item \textsuperscript{166} See \textit{Reno} v. Condon, 528 U.S. 141, 150 (2000) ("We . . . reject the State’s argument that the DPPA violates the principles laid down in either \textit{New York} or \textit{Printz}. We think, instead, that this case is governed by . . . [\textit{Baker}]. In \textit{Baker}, we upheld a statute that prohibited states from issuing unregistered bonds because the law ‘regulated state activities,’ [under a generally applicable law] rather than ‘seeking to control or influence the manner in which States regulate private parties.’" (quoting \textit{South Carolina} v. \textit{Baker}, 485 U.S. 505, 514-15)(emphasis added)).
\item \textsuperscript{167} See \textit{New York}, 505 U.S. at 168. For the purposes of this Comment, political accountability encompasses political, social, and economic ramifications that could be improperly attributed to state or federal officials.
\end{enumerate}
made.\textsuperscript{168} And, because the majority determined that PASPA did not commandeer New Jersey, the court sidestepped the accountability issue.\textsuperscript{169} Nevertheless, political accountability constitutes the second prong of the Anti-Commandeering Principle, and PASPA presents serious accountability issues.

One of the most basic checks on Congressional power is the looming threat of negative repercussions accompanying the passage of unpopular laws.\textsuperscript{170} However, this basic accountability mechanism fails to function if voters have

\textsuperscript{168} Governor of N.J., 730 F.3 at 235, note 15 ("To strike down any law that may cause confusion as to whether a prohibition comes from the federal government or from a State's choice, before considering whether that law actually commandeers the States, is to put the cart before the horse."). The Governor of New Jersey court went on to say that, according to Reno, "simply raising the specter of accountability problems is [not] enough to find an anti-commandeering violation." Id. But, the Reno Court that established this position was referring to a law deemed to be generally applicable. See Reno, 528 U.S. at 150. But, because PASPA is not generally applicable, the Reno position is inapposite, and the majority's disregard for accountability was a mistake. See Governor of N.J., 730 F.3 at 235, note 15.

\textsuperscript{169} Governor of N.J., 730 F.3 at 235, note 15.

imperfect information.\textsuperscript{171} When the federal government commandeers state governments, coercing them to enact federal policies, state politicians’ constituents may become confused regarding the source of the policy.\textsuperscript{172}

When such confusion occurs, state officials may “bear the brunt of public disapproval, while the federal officials . . . remain insulated from the electoral ramifications.”\textsuperscript{173} Thus, because voters may not realize the origin of PASPA’s prohibition, state lawmakers could suffer the consequences of Congress’ mandate.\textsuperscript{174}

PASPA’s prohibitory nature does not render the accountability problem any less acute.\textsuperscript{175} On the contrary, New Jersey’s current status could prove the opposite true.\textsuperscript{176} New Jersey voters clearly support sports gambling, as demonstrated by the referendum passed in sports

\begin{itemize}
\item \textsuperscript{171} Id.
\item \textsuperscript{172} See New York v. United States, 505 U.S. 144, 168 (1992).
\item \textsuperscript{173} Id. at 169.
\item \textsuperscript{174} See Governor of N.J., 730 F.3d at 245 (“PASPA implicates the political accountability concerns voiced by the Supreme Court in New York and Printz.” (Vanaskie, J., dissenting)).
\item \textsuperscript{175} See id. at 246 (Vanaskie, J., dissenting).
\item \textsuperscript{176} See id.
\end{itemize}
gambling’s favor.\footnote{177} Yet many voters likely wonder why, even in light of immense public support, sports gambling remains illegal in New Jersey.\footnote{178} Apparently then, PASPA’s prohibitions on state action are just as confusing to the public as affirmative commands.\footnote{179}

Furthermore, unlike the cooperative federalism scheme in \textit{Hodel},\footnote{180} PASPA precludes state legislatures from having even minimal input on the prohibition for which they may be held accountable.\footnote{181} In \textit{Hodel}, states could choose to regulate the surface mining industry themselves, or allow

\footnote{177. See \textit{supra} note 39 and accompanying text.}

\footnote{178. \textit{Governor of N.J.}, 730 F.3d at 246 (Vanaskie, J., dissenting).}

\footnote{179. \textit{Id.} at 246 (Vanaskie, J., dissenting). One may wonder why preemption, where federal law commonly displaces state law, is not invalidated based on accountability concerns. The reason is because preemptive laws are passed “in full view of the public.” \textit{New York v. United States}, 505 U.S. 144, 168 (1992). Because the federal government is regulating an entire field, there will be much less confusion concerning the source of a policy during preemption. \textit{Id.} Likewise, accountability problems do not arise where Congress utilizes cooperative federalism schemes, like those at issue in \textit{Hodel}. See \textit{supra} note 72 and accompanying text. Where Congress encourages state regulation of a field, rather than coercing it, the state officials still “remain responsive to the local electorate’s preferences.” \textit{New York}, 505 U.S. at 168.}

\footnote{180. See \textit{supra} note 72 and accompanying text.}

\footnote{181. See \textit{New York v. United States}, 505 U.S. 144, 168 (1992) (“Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate’s preferences.”).}
Congress to regulate.\textsuperscript{182} Either way, however, state lawmakers were properly held accountable because the ultimate decision was left to the states. PASPA, on the other hand, leaves state legislators open to blame for something they had absolutely no role in enacting.\textsuperscript{183}

Besides empowering federal lawmakers to distance themselves from PASPA politically, the federal ban also enables federal lawmakers to escape any backlash associated with PASPA’s economic burdens.\textsuperscript{184} Although true that PASPA does not impose any new costs on the states, like the laws struck down in \textit{New York} and \textit{Printz}, PASPA’s economic significance is measured by opportunity cost.\textsuperscript{185}

The argument for considering opportunity cost in calculating commandeering burdens is a serious one, and the opportunity costs imposed by PASPA are two-fold.\textsuperscript{186} First,

\begin{itemize}
\item \textsuperscript{182} Hodel v. Va. Surface Mining & Reclamation Ass’n, 452 U.S. 264, 271 (1981).
\item \textsuperscript{183} See id.
\item \textsuperscript{184} See \textit{Printz v. United States}, 521 U.S. 898, 930 (1997) (arguing that forcing state governments to absorb the financial burden of federal programs contributes to accountability problems).
\item \textsuperscript{185} See \textit{Neil S. Siegel, Commandeering and Its Alternatives: A Federalism Perspective}, 59 \textit{VAND. L. REV.} 1629, 1642-43 (2006) (suggesting that opportunity cost ought to be considered in calculating the economic impact of commandeering).
\item \textsuperscript{186} See id.
\end{itemize}
if states were able to legalize sports gambling, they would likely expend less resources policing illegal gambling.¹⁸⁷ Second, the potential tax revenues, not to mention licensing fees and a kick-start to local tourism industries, represent potentially hundreds of millions of dollars lost by states each year.¹⁸⁸

Many constituents often vote based on the financial bottom-line. Under PASPA, voters may hold state politicians accountable for the money siphoned away from state treasuries and into foreign bookmakers’ pockets.¹⁸⁹ Voters may look at the booming sports gambling market in Las Vegas and wonder why their states have not tapped into the lucrative sports gambling industry, not even considering that the reason is a federal ban.¹⁹⁰

¹⁸⁷. See Chil Woo, All Bets are Off: Revisiting the Professional and Amateur Sports Protection Act, 31 CARDOZO ARTS & ENT. L.J. 569, 590 (2013) (examining the premise that state-regulated sports gambling would undermine illegal gambling and organized crime).

¹⁸⁸. See supra notes 8-10 and accompanying text.


¹⁹⁰. See Nat’l Collegiate Athletic Ass’n v. Governor of N.J., 730 F.3d 208, 246 (3d Cir. 2013) (Vanaskie, J., dissenting).
Of course, the perfectly-informed voter would realize the true reasons why most states cannot sanction sports gambling; but the Anti-Commandeering Principle’s accountability prong is not designed to protect the perfectly-informed voter.\textsuperscript{191} The accountability prong is designed to protect the everyday, less-than-perfectly-informed voter, and PASPA’s framework is too confusing to pass constitutional muster.\textsuperscript{192}

B. The Equal Sovereignty Doctrine

Along with the Anti-Commandeering Principle, the Equal Sovereignty Doctrine protects the “power, dignity and authority” of every U.S. state.\textsuperscript{193} Although perceived as a relatively inconsequential doctrine for decades, the Equal Sovereignty Doctrine was recently revitalized\textsuperscript{194} by the U.S. Supreme Court in \textit{Shelby County v. Holder}.\textsuperscript{195} Under the new and expanded formulation of the Equal Sovereignty Doctrine,

\begin{itemize}
  \item 192. See Governor of N.J., 730 F.3d at 246 (“[A]ccountability concerns arising from PASPA's restraint on state regulation . . . counsel in favor of concluding that it violates principles of federalism.” (Vanaskie, J., dissenting)).
  \item 194. See supra note 94.
\end{itemize}
any unequal treatment imposed upon states by Congress “must be justified by current needs, and any disparate geographic coverage must be sufficiently related to the problem that [the law at issue] targets.” The following will examine the PASPA litigation in light of the newly formulated Shelby County test.

1. Shelby County Test Applies to PASPA

The Third Circuit’s analysis of the equal sovereignty issue in Governor of New Jersey concluded that the equal sovereignty test formulated in Shelby County was sui generis, and therefore inapplicable to PASPA. However, the Third Circuit reached the wrong conclusion in regard to Shelby County’s applicability to the PASPA.


197. The Equal Sovereignty analysis will proceed as follows: Part III.B.1 will argue that the equal sovereignty test announced in Shelby County applies to PASPA, contrary to the Third Circuit’s conclusion. Part III.B.2 will then analyze PASPA under the Shelby County test. Part III.B.2.a will agree with the Third Circuit that, for the purposes of preventing the spread of state sanctioned sports gambling and protecting certain reliance interests, PASPA passes the Shelby County test. But, Part III.B.2.b will conclude that, due to shifting societal norms, PASPA’s geographic coverage formula is no longer sufficiently related to preventing gambling addiction or preserving the integrity of sports. Therefore, PASPA fails the Shelby County test.

198. See supra p. 27.
The Third Circuit began by distinguishing the Voting Rights Act ("VRA"), the law at issue in Shelby County, from PASPA.\textsuperscript{199} The court rightly pointed out that the VRA, which was grounded in the Reconstruction Amendments and regulated state election procedures,\textsuperscript{200} differs markedly from PASPA, which, if grounded anywhere in the Constitution, is grounded in the Commerce Clause.\textsuperscript{201}

Because the VRA concerns state elections, an area that “the Framers of the Constitutions intended the States to keep for themselves,” the heightened scrutiny applied by the Court in Shelby County was appropriate.\textsuperscript{202} But, the Third Circuit reasoned, because PASPA fundamentally concerns regulation of interstate commerce, an area much less important than basic civil rights, the Shelby County test is inapposite.\textsuperscript{203} The Third Circuit, however, fails to produce a convincing account of why the importance of the

\textsuperscript{199} See Nat’l Collegiate Athletic Ass’n v. Governor of N.J., 730 F.3d 208, 238 (3d Cir. 2013) ("[T]he VRA is fundamentally different from PASPA.").  
\textsuperscript{200} See supra p. 25.  
\textsuperscript{201} Governor of N.J., 730 F.3d at 224.  
\textsuperscript{202} Shelby County, 133 S. Ct. at 2623.  
\textsuperscript{203} See Governor of N.J., F.3d at 239.
issue under federal control makes the Equal Sovereignty Doctrine any less applicable.\textsuperscript{204}

Certainly “finding national solutions” to problems under the ambit of the Commerce Clause “will necessarily affect states differently.”\textsuperscript{205} But that point is uncontroversial, not to mention completely lacking as a justification for the Third Circuit’s issue-importance rationale. There is little dispute that Congress may treat states differently under the Commerce Clause if there are valid reasons to do so.\textsuperscript{206} But the idea that Congress may treat states differently under the Commerce Clause, when the disparate treatment does not significantly effectuate federal policy, if at all, is much less appealing.\textsuperscript{207}

The \textit{Shelby County} test should be applied to Commerce Clause legislation, in addition to situations like those presented by the VRA, precisely because applying the sufficiently related test can take into account an issue’s importance, among other things.\textsuperscript{208} Surprisingly, the Third

\textsuperscript{204. Id.}

\textsuperscript{205. Id. at 238}

\textsuperscript{206. See Shelby County, 133 S. Ct. at 2627.}

\textsuperscript{207. See id.}

\textsuperscript{208. See id. at 2628 (stating that, to apply the sufficiently related test, courts must consider “current political conditions”).}
Circuit criticizes the sufficiently related test for being “overly broad” and requiring “a one-size-fits-all test for equal sovereignty analys[es].”

But, Shelby County’s sufficiently related test is anything but a one-size-fits-all test; at its core, the sufficiently related test is balancing test. Many factors, including the importance of the issue at hand and the disparity of treatment among states, are given weight in the calculus. Importantly though, each geographic area treated differently from the default is accorded its own sufficiently related test. Such an approach is far

209. Governor of N.J., 730 F.3d at 238.

210. Judging by the Shelby County Court’s application of the sufficiently related test, the calculus seems very similar to a Fourteenth Amendment equal protection analysis. See Shelby County, 133 S. Ct. at 2627–30. Like an Equal Protection strict scrutiny analysis, which balances the level of discrimination against the narrowness of the law at issue, the sufficiently related test offers heightened judicial scrutiny when members of a particular class—in this case states—are discriminated against. See Ann K. Wooster, Equal Protection and Due Process Clause Challenges Based on Racial Discrimination -- Supreme Court Cases, 172 A.L.R. Fed. 1, 2 (2013).

211. See Shelby County, 133 S. Ct. at 2627.

212. See id. at 2627 (“We have also previously highlighted the concern that ‘the preclearance requirements in one state [might] be unconstitutional in another’.” (quoting Northwest Austin Municipal Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009)).
from a one-size-fits-all method, as each geographic region necessarily elicits different considerations.

The VRA provides a good example. In the 1960’s, when the VRA was first passed, obstacles preventing minorities from effectively voting were largely a problem in southern states.\(^{213}\) Therefore, mandating that the southern states require preclearance before changing local election polices was sufficiently related to remedying the discrimination problems in those states.\(^{214}\) However, if Congress would have imposed the same preclearance requirements on the New England states, in an attempt to remedy the problems in the South, the Congressional solution would not have been sufficiently related to remedying the discrimination problems.\(^{215}\) Indeed, it would have been wholly irrational.

2. PASPA Fails to Pass the Shelby County Test

If the Third Circuit had properly applied the Shelby County test to PASPA, the federal law likely would have been held unconstitutional. While PASPA is certainly not

\(^{213}\) See id. at 2624.

\(^{214}\) Id. at 2627.

\(^{215}\) Similarly, the majority opinion in Shelby County concludes that, due to the shifting norms from the 1960’s to today, the coverage formula that “met [the] test in 1965 . . . no longer does so.” Shelby County, 133 S. Ct. at 2627. The geographical coverage formula from 1965, still being imposed on the southern states in 2013, was no longer relevant to any voter disparity problems. See id. at 2626.
as ridiculous as the New England example mentioned above, PASPA nevertheless fails the sufficiently related test because the law has little impact on achieving PASPA’s intended goals. This comment will now analyze PASPA’s exemptions under the Shelby County test, beginning with the grandfathering clause.

PASPA’s grandfathering clause, included in section 3704, exempts certain states from PASPA’s prohibitions, the most notable being Nevada. Congress based the exemptions on states’ previous implementation of sports gambling schemes within states’ borders. But, PASPA’s mechanism for granting exemptions raises suspicions under the Equal

216. The Third Circuit was correct in concluding that grandfathering clauses, generally, present no federalism problems. See Nat’l Collegiate Athletic Ass’n v. Governor of N.J., 730 F.3d 208, 239-40 (3d Cir. 2013). Grandfathering clauses contain no inherent problems, so long as the specific grandfathering provision passes muster under the Shelby County test. See id. at 240.


218. The reasons for constructing PASPA this way are vexing at first blush, but clearer upon close consideration. Had Congress implemented a nationwide ban on sports gambling, Congress would have needed to exert even greater efforts to exempt Nevada’s sports gambling industry from the ban. See Oral Argument at 28:50-29:15, Nat’l Collegiate Athletic Ass’n v. Governor of N.J., 730 F.3d 208, available at http://1.usa.gov/1bNMx23. Such favoritism would likely have appeared even more suspicious than granting a few states exemptions from the overall prohibition on state sanctioning because the states already sanctioned sports gambling. Id.
Sovereignty Doctrine because states are ultimately treated unequally. 219

A sufficient relation analysis must begin with a law’s intended goals. 220 PASPA’s goals include: (1) stopping the spread of state sanctioned sports gambling; (2) preserving Nevada’s reliance interest; (3) preventing gambling addiction, especially among the young; and (4) preserving the integrity of professional and amateur sports. 221 After identifying the law’s goals, the next step is to determine whether the method of discriminating among states to achieve the law’s purpose is “justified by current needs” and “sufficiently related” to the geographic regions that it covers. 222 The following sub-sections will analyze each of PASPA’s four goals, and their levels of relatedness to PASPA’s geographic coverage.

a. First and Second Purposes: Stopping the Spread of State-Sanctioned Sports Gambling & Protecting Reliance Interests

The Third Circuit opinion focuses exclusively on PASPA’s objective of stopping the spread of state-


220. Id. at 26327.

221. See supra pp. 7-9.

222. Shelby County, 133 S. Ct. at 2627.
sanctioned sports gambling.\textsuperscript{223} Considering this purpose, PASPA likely passes the \textit{Shelby County} test.\textsuperscript{224} As the majority pointed out, Congress did not wish to completely ban sports gambling.\textsuperscript{225} To do so would destroy certain states’ already established sports gambling markets.\textsuperscript{226}

Rather, in an attempt to satisfy both, seemingly inconsistent, aims (prohibiting sports gambling on the one hand and protecting it on the other) PASPA adopted a more modest aim: prohibiting new states from sanctioning sports gambling, thereby halting sports gambling’s spread.\textsuperscript{227} In this regard, PASPA’s exemptions for states already relying on sports gambling income are more than sufficiently related to stopping the spread of state-sanctioned sports gambling while protecting reliance interests.\textsuperscript{228} In fact,

\begin{itemize}
  \item \textsuperscript{223} \textit{Governor of New Jersey}, 730 F.3d at 239.
  \item \textsuperscript{224} Creatively, New Jersey argued that the coverage formula in PASPA was completely unrelated to prohibiting sports gambling because the law outlawed sports gambling only in states where sports gambling was already non-existent. However ingenious this argument may have been, it is slightly dishonest. PASPA’s aim was not to completely ban sports gambling, but to stop new states from sanctioning sports gambling, as is discussed infra.
  \item \textsuperscript{225} See supra, pp. 7-9.
  \item \textsuperscript{226} See supra, pp. 7-9.
  \item \textsuperscript{227} See \textit{Governor of New Jersey}, 730 F.3d at 239.
  \item \textsuperscript{228} Id. (“Targeting only states where the practice did not exist is thus more than sufficiently related to the
PASPA is precisely tailored to achieve those two purposes. At least considering these goals, then, PASPA’s departure from the Equal Sovereignty Doctrine can be justified.

   b. Third and Fourth Purposes: Preventing Gambling Addiction & Preserving the Integrity of Sports

   Surprisingly, the majority opinion completely ignores the other two purported reasons for PASPA, including: (1) preventing gambling addiction, and (2) preserving the integrity of professional and amateur sports. Regarding both of these goals, PASPA fails an equal sovereignty analysis.

   PASPA’s coverage formula is completely immaterial to either reducing gambling addiction or protecting the integrity of sports. Although prohibiting state-sanctioned sports gambling arguably reinforces any negative stigma associated with sports gambling, the statistics show problem, it is precisely tailored to address the problem.”).

229. Id.

230. See supra, pp. 7-9.

231. See Malagrino, supra note 189, at 377. (“PASPA has lost its relevancy in today’s age of Internet gambling.”).
that the prohibition does little, if anything, to actually stop sports wagers from being placed.\textsuperscript{232}

The massive explosion in online sports gambling far outpaced the growth of sports gambling in Nevada.\textsuperscript{233} In fact, sports gambling is more accessible than ever before, primarily because of the hundreds of offshore sports gambling books currently accessible to U.S. citizens.\textsuperscript{234}

Such dramatically changing societal norms must be considered when analyzing PASPA’s constitutionality, just as societal differences between the 1960’s and the late 2000’s were considered when analyzing the VRA.\textsuperscript{235} The justification problems caused by the increasing availability of online sports gambling parallel the

\textsuperscript{232} See supra note 9 and accompanying text.

\textsuperscript{233} Chil Woo, All Bets are Off: Revisiting the Professional and Amateur Sports Protection Act, 31 Cardozo Arts & Ent. L.J. 569, 590 (2013) (“Congress' desire to prevent teenagers from exposure to sports gambling has become moot in light of the ease of accessibility to this activity through the Internet.”). Some may wonder whether sports gambling rates would be even higher in PASPA’s absence, but the data indicates that PASPA is, more likely, wholly irrelevant. See id. at 589.

\textsuperscript{234} See id.

\textsuperscript{235} Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2627 (2013).
problems associated with justifying the VRA in a 21st century America.\textsuperscript{236}

Due to shifts in societal norms, what may have once been an effective and constitutional means of solving a national problem—by applying different rules to different states—is no longer acceptable because of changes in national attitudes and practices.\textsuperscript{237} Thus, because PASPA’s prohibitions do almost nothing to prevent the accessibility of sports gambling in today’s day and age, PASPA’s disparate treatment of states is no longer justified.\textsuperscript{238} PASPA’s prohibitions simply fail to curb compulsive gambling by making sports gambling less accessible.\textsuperscript{239}

Similarly, because sports gambling occurs at such a high rate, even under PASPA, imposing prohibitions on specific states does very little to protect the integrity of amateur or professional sports.\textsuperscript{240} Worries about point-

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\item \textsuperscript{236} Id. at 2627-2628.
\item \textsuperscript{237} Id.
\item \textsuperscript{238} See Malagrino, supra note 231.
\item \textsuperscript{239} See Woo, supra note 233, at 590 ("Congress' desire to prevent teenagers from exposure to sports gambling has become moot in light of the ease of accessibility to this activity through the Internet.").
\item \textsuperscript{240} Id. Another consideration is the possibility that amateur and professional sports do not need protection. Even with the massive amounts of sports gambling occurring, 2014’s Super Bowl XLVIII secured the
shaving or fixing games will likely exist regardless of whether the wagers are state-sanctioned.

If an individual is bold enough to conspire to fix a sporting event, that person almost certainly won’t be deterred from placing an illegal wager on the event to capitalize on the conspiracy.\textsuperscript{241} Furthermore, for someone trying to capitalize on a few shaved points, an illegal wager is not even necessary under PASPA.\textsuperscript{242} A crooked player or official would need only to enlist the services of an accomplice to place an otherwise legal wager in a Nevada casino.\textsuperscript{243} Thus, PASPA’s exemptions are completely irrelevant with regard to preserving the integrity of sports; as long as PASPA grants exemptions to any state, the federal law will be unable to effectively protect the integrity of sports.

\textsuperscript{241} Furthermore, the individual could be subject to sanctions under 18 U.S.C. §224, which outlaws influencing the outcome of sporting events by bribery. See supra note 159.

\textsuperscript{242} See supra pp. 8-9.

\textsuperscript{243} See supra pp. 8-9.
Even with the massive increase in sports gambling, legal and illegal, the integrity of professional and amateur sports has remained intact. Some individuals even argue that widespread state-regulated sports gambling would lead to less fraud in professional and amateur sports because of better oversight.

These considerations do enough to tip the balance of a Shelby County test in favor of unconstitutionality. PASPA’s geographical exemptions are not sufficiently related to preventing gambling addiction or preserving the integrity of sporting events given today’s sports gambling climate. Indeed, the exemptions are wholly irrelevant to achieving at least half of PASPA’s purposes. Because PASPA’s exemptions bear an insufficient relation to preventing gambling addiction or protecting the integrity of sports, PASPA violates the Equal Sovereignty Doctrine.

244. See Woo, supra note 233, at 590.

245. Id. at 593 (“[A] state regulated system of sports betting [would] improve monitoring and enforcement controls on suspicious and illegal betting activity, thus helping to preserve the integrity of sports by early detection and investigation of potential fraud.”).


248. In fairness, it should be noted that, because the Shelby County test is an extremely new and radical
C. Recommendations: Paths to State-Sanctioned Sports Gambling

As long as PASPA remains in effect, states will remain unable to sanction sports gambling. The goals for sports gambling advocates, then, include either eliminating or repealing PASPA. The following sub-sections will discuss how New Jersey should proceed to maximize the chances of legalizing state-sanctioned sports gambling.

1. Judicial Intervention

New Jersey’s first course of action should be to seek a writ of certiorari from the U.S. Supreme Court. Because departure from previous U.S. Supreme Court precedent, there are lingering questions regarding its application. Specifically, there is no indication of whether (1) any insufficiency under the Shelby County test will make a law unconstitutional, or (2) whether all intended purposes of a federal law must be insufficiently related to the law’s implementation mechanism for the law to be unconstitutional.


250. This Comment’s recommendations will proceed as follows: First, Part III C.1 will discuss judicial intervention. Then, Part III C.2 will discuss legislative possibilities. Finally, although perhaps not under New Jersey’s control, Part III C.3 will briefly discuss the possibility of executive restraint in enforcing PASPA. The best course of action, from New Jersey’s standpoint, is to exhaust both judicial and legislative avenues in trying to eliminate PASPA.

251. At the time of submission, New Jersey had submitted a petition for the writ of certiorari and is currently awaiting a response. See Steven Stradbrooke,
the Third Circuit has already deemed PASPA constitutional, and denied New Jersey’s request for an en banc hearing, the final source of judicial relief is the U.S. Supreme Court.\textsuperscript{252} A U.S. Supreme Court decision may provide faster resolution than legislative action at this point because the case has already proceeded through the district and appellate courts. However, the outcome of an appeal to the U.S. Supreme Court is impossible to predict.

Furthermore, there is not even a guarantee the Court will hear the case.\textsuperscript{253} Only one appellate division has ruled on the matter, so there is no circuit split enticing the Court to hear the case.\textsuperscript{254} Also, from a purely statistical standpoint, there is a very slim chance that the Court will take the case.\textsuperscript{255} Still, a number of factors

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254. See Nat’l Collegiate Athletic Ass’n v. Governor of N.J., 730 F.3d 208 (3d Cir. 2013).
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seemingly increase New Jersey’s chance of being granted a hearing.

There are five factors weighing in favor of the Court granting New Jersey a writ of certiorari. First, the Third Circuit opinion contained a strong dissent, and the controversy presented in the case is constitutional in nature. Second, the economic impact of legalized sports gambling could be very substantial to many states. Third, West Virginia, Georgia, Kansas, and the Commonwealth of Virginia all filed amicus briefs in support of New Jersey, indicating that the issue is of national import. Fourth, the U.S. Supreme Court has never heard a case on the federal government’s ability to regulate sports


257. See supra note 8-9 and accompanying text.

258. Governor of New Jersey, 730 F.3d at 213. A potential legal battle also appears to be brewing in Pennsylvania over the legality of sports gambling. See Mark Nootbaar, State Police Bet Against PA Gambling Law, WESA.FM (Jan. 29, 2014, 4:20 PM), http://bit.ly/1lMFDjR (involving police and district attorneys refusing to arrest and prosecute persons for conducting Super Bowl gambling pools).
Finally, in light of the Court’s Shelby County decision and a particularly favorable line of Tenth Amendment cases from the 1990’s, the U.S. Supreme Court appears to be seizing any opportunity to revive the Tenth Amendment and state sovereignty.

If the U.S. Supreme Court does grant certiorari, then New Jersey would be wise to stick with the arguments formulated above. Although the appellate court may have been hesitant to declare a federal law with such wide national import unconstitutional, the U.S. Supreme Court could be more receptive to the anti-commandeering and equal sovereignty arguments.

2. Legislative Action

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259. See Brennan, supra note 256 (noting that the U.S. Supreme Court has never heard a case involving PASPA).


261. See Kermit L. Hall, Paul Finkelman & James W. Ely, Jr., American Legal History: Cases and Materials 624 (4th ed. Oxford University Press 2011) ("One of the most conspicuous themes of the Supreme Court under Chief Justice William Rehnquist has been the revival of a high regard for state autonomy."); Erwin Chemerinsky, Constitutional Law, 183, (Vicki Been et al. eds., 3d ed. 2009) (considering the thesis that the Supreme Court has steadily been resurrecting the Tenth Amendment); Neil S. Siege, Commandeering and Its Alternatives: A Federalist Perspective, 59 Vand. L. Rev. 1629, 1630-31 (2006) ("The Tenth Amendment experienced something of a federalism revival during the 1990s.").
If New Jersey fails to secure a writ of certiorari or loses in the U.S. Supreme Court, then the only real remaining option would be to begin a congressional campaign to repeal or alter PASPA. A legislative solution could turn out to be a particularly fruitful approach, given America’s recent attitude toward sports gambling. 262

As previously noted, the acceptance of sports gambling in America is at an all-time high. 263 With the increasing social liberalization of America, gaining enough popular support for Congress to repeal PASPA and legalize sports gambling is likely not a question of “if,” but a question of “when.” 264 In fact, New Jersey has already taken steps to introduce bills to congress in an attempt to legalize state-sanctioned sports gambling. 265

262. See supra Part I.

263. See supra Part I. Interestingly, the U.S. appears to be a late-comer to the sports gambling scene, as sports gambling is a commonly accepted activity in many other parts of the world. See Sam Gardner, The Rambling, Gambling World of a Las Vegas Sportsbook, FOPSPORTS.COM (Feb. 11, 2014), http://foxs.pt/1ma73ne.

264. See supra Part I.

265. John Brennan, Pallone, LoBiondo Reintroduce Their Sports Betting Bills, NORTHJERSEY.COM (Feb. 13, 2013) http://bit.ly/1c4EalN. United States congressmen Frank LoBiondo and Frank Pallone, Jr. have both introduced separate bills to Congress with the hopes of legalizing state-sanctioned sports gambling in New Jersey. Id.
Perhaps the biggest challenge to a Congressional solution lies within Congress itself, rather than with public sentiment. Senate Majority Leader Harry Reid (D) has a vested interest in maintaining his state’s monopoly on sports gambling, and would likely campaign against attempts to expand sports gambling’s legalization.\textsuperscript{266}

To overcome possible resistance, congressmen interested in repealing PASPA should present sports gambling in the most favorable light possible. For example, presentation of the issues should focus on the enormous, untapped economic potential that comes with states-sanctioned sports gambling,\textsuperscript{267} the large percentage of the population supports sports gambling,\textsuperscript{268} or the fact that states could act as political and economic laboratories for state-run sports gambling operations.\textsuperscript{269}

3. Executive Restraint?

One final possibility, which New Jersey admittedly has little control over, is if the Department of Justice simply decided not to enforce PASPA, even if PASPA remained on the

\begin{footnotesize}
266. \textit{Id.}
267. \textit{See supra} notes 8–9 and accompanying text.
268. \textit{See supra} note 7 and accompanying text.
\end{footnotesize}
books. Although this is seemingly a long shot, it is possible. Consider the following:

In 2013, Colorado and Washington established state regulatory schemes for Marijuana, which allow individuals to possess and sell small amounts of Marijuana for recreational use.270 These state laws, however, are in direct conflict with federal drug regulations, which categorically prohibit the possession and sale of Marijuana.271 The Marijuana situation, which bears uncanny resemblance to the situation presented by PASPA, leaves the President and his administration two choices: (1) invoke federal preemption and take a stand against Marijuana, or (2) do nothing.272

Interestingly, President Obama has chosen the second option, refusing to enforce the federal standards and allowing states to implement their own laws.273


271. See id.

272. See id.

Conceivably, then, a similar approach could be taken with PASPA. PASPA could remain a valid law, but if there is no agency enforcing PASPA, states could sanction sports gambling without any major repercussions.\textsuperscript{274}

IV. CONCLUSION: IT’S ONLY A MATTER OF TIME

This Comment has examined the different arguments against PASPA, as well as some general policy reasons supporting legalized sports gambling. Ultimately, this Comment concluded that PASPA is an unconstitutional exercise of congressional authority. PASPA commandeers state legislatures, prohibiting the legislatures from regulating sports gambling in violation of the Anti-Commandeering Principle. PASPA also impermissibly discriminates among states, subjecting states to disparate treatment that is not sufficiently related to achieving PASPA’s purported goals in violation of the Equal Sovereignty Doctrine. Although this Comment’s thesis

\textsuperscript{274} Still, this outcome is very unlikely. Because the PASPA lawsuit was initiated by five major sports leagues with serious financial support, it is unlikely that the federal government would turn blind eye to state-sanctioned sports gambling. See Nat’l Collegiate Athletic Ass’n v. Christie, 926 F.Supp 2d 551, 553 (D.N.J. Feb. 28, 2013).
appears strong, every court to consider the issue thus far has disagreed.

Only time will tell what the U.S. Supreme Court will eventually say about PASPA. The matter will inevitably reach the U.S. Supreme Court, assuming Congress does not address the issue first. To speed up the process, states could make their disapproval of PASPA’s prohibition more apparent. In the meantime, sports gambling advocates will just need to continue booking flights to Las Vegas, or taking their chances with shadier, unregulated, and unsupervised sports gambling options