# THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT (PASPA): A BAD BET FOR THE STATES

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ABSTRACT

*Sports gambling is a multi-billion dollar industry in America today, but state and local governments, by and large, do not benefit in any way. The Professional and Amateur Sports Protection Act (PASPA), a 1992 federal law, restricts all but a handful of states from legalizing sports gambling. This has allowed a thriving shadow economy of mob-associated bookies and offshore websites to operate with virtual impunity. PASPA's restrictions have not received much attention—until recently. The severity of the recent recession has forced state governments to get creative and find new sources of tax revenue, and many states have turned to sports gambling as a solution to raise additional revenues. Unfortunately, PASPA limits them from legalizing, regulating, and taxing the activity, which would enable state and local governments to enjoy millions of dollars in new tax revenue, job growth, and increased intrastate economic activity.*

*This Note explores the historical regulation of sports gambling in America and the forces that gave rise to PASPA. After analyzing the purported goals of PASPA in light of present conditions, this Note concludes that it is evident that PASPA has failed to accomplish those goals. PASPA supports a thriving shadow economy of illegal sports gambling providers, unfairly restricts the sovereignty and economic freedom of the states, and makes detecting athlete and referee bribery extremely difficult. Therefore, PASPA is a bad bet for the United States, and it should be repealed.*

## I. INTRODUCTION

In May 2009, Delaware Governor Jack Markell signed a bill that would make Delaware the second state in the United States to have legalized, regulated, and taxed sports betting on *any* professional and amateur American sporting event, a decision intended to help close the projected $700 million

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deficit for the 2010 budget.[1] The new venture was expected to generate between $22.5 million and $30.6 million for Delaware's General Fund[2] from a sports betting tax, higher food and beverage sales at state-sanctioned sportsbooks, and increased betting at the horse tracks, slots, and other games adjacent to the sportsbooks.

Delaware's plan came to a screeching halt in late August of 2009, right before the start of the NFL season, when the United States Court of Appeals for the Third Circuit ruled that the Professional and Amateur Sports Protection Act ("PASPA")[3] barred Delaware from implementing most of its proposed plan.[4] The Circuit Court held that Delaware was restricted from offering single-game bets and bets on any professional or amateur sporting event other than NFL contests; the state could only allow multiple-bet wagers ("parlay" wagers) on NFL games, the same scheme that existed in Delaware in 1976.[5] At the case's conclusion, Andre Bouchard, the attorney representing Delaware, said that even though the court ruled against Delaware, "there will still be legal betting in Nevada, there will be illegal betting across the country including Delaware, and there will be betting on the Internet."[6]

Bouchard's comments highlight three realities about the popularity of sports gambling in America today, and the ease in which gambling providers operate. In a 1999 report, the National Gaming Impact Study Commission ("NGISC") found that American gamblers *illegally* wagered as much as $380 billion a year on sports.[7] In 2008, Internet gaming was approximately a $20 billion industry, with sports betting representing a large and ever-growing por-

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[1] Chad Millman, *Jack Markell is ready to legalize sports betting in Delaware. The ramifications across the political landscape could be significant*, ESPN.COM, http://sports.espn.go.com/espnmag/story?id=3968082 (last visited Feb. 4, 2011); ESPN.COM NEWS SERVICE, *Sports betting now legal in Delaware,* ESPN.COM (May 14, 2009, 1:37 PM), http://sports.espn.com/espn/news/story?id=4166612. This Note focuses on betting on the sporting events of the four major professional North American sports leagues–the National Basketball Association (NBA), the National Football League (NFL), the National Hockey League (NHL), and Major League Baseball (MLB)–as well as betting on the sporting events of the National Collegiate Athletic Association (NCAA). Other types of competitive betting, such as horse racing and jai alai have a different regulatory framework and will not be considered.

[2] OFFICE OF MGMT. & BUDGET, EXEC. DEP'T OF THE STATE OF DEL. OMB MEMORANDUM, SPORTS BETTING REPORT AS PER HJR 10 OF THE 144TH GEN. ASSEM. 2, 12 (2008), *available at* http://finance.delaware.gov/publications/sportsbetting.pdf [hereinafter DELAWARE SPORTS BETTING REPORT].

[3] 28 U.S.C. §§ 3701-3704 (2006). This Act is also known as the Bradley Act.

[4] Office of the Comm'r of Baseball v. Markell, 579 F.3d 293, 301-04 (3d Cir. 2009).

[5] *Id.* at 304.

[6] Jef Feeley & Phil Milford, *Delaware Sports Betting Plan Challenged by Lawyers (Update 2)*, BLOOMBERG.COM (Aug. 24, 2009), http://www.bloomberg.com/apps/news?pid=21070001&sid=aUMKSSrS3P2E.

[7] NAT'L GAMBLING IMPACT STUDY COMM'N REPORT 2-14 (1999) *available at* http://govinfo.library.unt.edu/ngisc/reports/finrpt.html [hereinafter NGISC REPORT].

tion of the industry.[8] Americans also legally wager $2.5 billion a year in licensed Nevada sportsbooks.[9]

In light of these stark realities, PASPA continues to either prohibit or substantially limit almost every state from allowing state-sanctioned (or state-run) sports betting.[10] This Note argues that to have a sensible sports betting regulatory framework, the federal government should repeal PASPA and respect the states' rights to regulate and tax sports gambling if they so choose, while still enforcing interstate violations of state law via existing federal enforcement tools. This Note focuses on the federal regulation of sports betting vis-à-vis its impact on state regulatory efforts and its overall impact on the American sports bettor.

Part I is an overview of the major federal statutes governing sports betting. Although Part I focuses on the laws of "offline" sports betting, it also briefly touches on federal Internet sports betting regulation, an issue that has recently garnered a great deal of media attention and legal scholarship. The online sports betting industry is analyzed because it directly impacts the ability of state governments to offer competing forums for sports gambling.

Part II examines the purported goals of PASPA and whether those goals have been realized in the eighteen years since its enactment. By examining the law's legislative history, this Note concludes that it is plainly evident those goals have not been met.

Part III analyzes the effects of repealing PASPA. This section focuses mainly on the economic effects, but it touches on the legal, political, and social effects as well.

This Note, then, concludes by proposing a workable regulatory framework, were PASPA repealed and replaced with a state-governed regime. This Note recommends that the federal government repeal PASPA and continue to enforce any interstate violations of sports betting law under other existing federal statutes, while allowing each state to decide whether to prohibit or regulate sports betting.

## II. Overview of Federal and State Law

American sports betting has existed since professional and amateur teams and leagues were formally established and organized in the late nineteenth century.[11] By the early twentieth century, betting on sporting contests was "preva-

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[8] *See* Joe Drape, *Web Site Puts Focus on the Fix in Sports Bets*, N.Y. Times, May 25, 2008, at A1 (estimating Internet gaming to surpass $20 billion in 2008); *Fact Sheets: Industry Issues, Sports Wagering*, Am. Gaming Ass'n, http://www.americangaming.org/Industry/factsheets/issues_detail.cfv?id=16 (last visited Feb. 6, 2011) (citing a Christiansen Capital Advisors (CCA) study which tracks online sports betting as generating $4.29 billion in revenues in 2005, more than double the $1.7 billion generated by online sports betting in 2001).

[9] Michael Levinson, *A Sure Bet: Why New Jersey Would Benefit From Legalized Sports Wagering*, 13 Sports Law. J. 143, 144 (2006) (citing *In re* Grand Casinos, Inc., 2000 WL 34030564, at *12 (D. Minn. Mar. 28, 2000)).

[10] *See* Millman, *supra* note 1.

[11] David G. Schwartz, Cutting the Wire: Gambling Prohibition and the Internet 29-30 (William R. Eadington ed., 2005).

lent" and a "widespread phenomena."[12] Although it was "never exactly legal," authorities did not bother to enforce the prohibition because the activity largely consisted of casual bets amongst fans.[13] The local and casual nature of sports betting, however, soon became a popular national business that caught the federal government's attention.[14] During the middle of the twentieth century, organized crime syndicates became the primary operators of sports gambling schemes throughout the United States.[15] These criminal operations were sophisticated and worked across state lines, accepting wagers and passing along betting information through phones and telegraphs, openly defying state authorities.[16]

With state governments ill-equipped to combat these syndicates on their own, then Attorney General, Robert Kennedy lobbied Congress to pass legislation to give the federal government the necessary tools and power to fight organized crime and its control of illegal gambling.[17] After intense pressure, Congress yielded to Kennedy's request and passed a series of laws—the Wire Act,[18] the Travel Act,[19] the Interstate Transportation of Wagering Paraphernalia Act,[20] and the Illegal Gambling and Business Act[21]—all analyzed below.

Furthermore, Congress has intermittingly stepped in and regulated intrastate sports gambling activity. The 1951 federal tax on Nevada sports betting[22] and PASPA[23]—two controversial acts—are considered below.

Last, with the rise of the Internet and the subsequent growth of online sports betting, Congress passed the Unlawful Internet Gambling Enforcement Act[24] in 2006 to combat all forms of online gambling.

### *A. 1960s and 1970s Federal Sports Betting Legislation*

During the 1960s and early 1970s, Congress enacted the Wire Act, the Travel Act, the Interstate Transportation of Wagering Paraphernalia Act, and the Illegal Gambling and Business Act to combat organized crime's grip on illegal sports gambling.[25]

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[12] *Id*.

[13] *Id.* at 30.

[14] *Id.* at 100.

[15] *Id.* (citing *Hearings Before the Committee on the Judiciary of the United States Senate, 87th Congress, First Session, on* S. 1653, S. 1654, S. 1655, S. 1656, S. 1657, S. 1658, S. 1665, 87th Cong., 6 (1961)).

[16] *Id.* at 99.

[17] *Id.* at 93-95.

[18] *See* 18 U.S.C. § 1084 (2006).

[19] *See id.* § 1952 (2006).

[20] *See id.* § 1953 (2006).

[21] *See id.* § 1955 (2006).

[22] RICHARD O. DAVIES & RICHARD G. ABRAM, BETTING THE LINE: SPORTS WAGERING IN AMERICAN LIFE 122 (2001).

[23] 28 U.S.C. §§ 3701-3704 (2006).

[24] 31 U.S.C. §§ 5361-5367 (2006).

[25] Kiran S. Raj, *Drawing a Line in the Sand: How the Federal Government Can Work With the States to Regulate Interstate Gambling*, 56 EMORY L.J. 777, 783, 786-87 (2006-07); Erlenbaugh v. United States, 409 U.S. 239, 285 (1972) (citations omitted).

*1. The Wire Act*

The Wire Act makes it a crime for anyone "being engaged in the business of betting or wagering [to] knowingly use . . . a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest[.]"[26] The law exempts the transmission of information to assist in the placing of sports bets between two states that allow sports betting.[27]

In clarifying the reach of the law, Kennedy stated that:

> [T]he Federal Government is not undertaking the almost impossible task of dealing with all the many forms of casual or social wagering which so often may be effected over communications. It is not intended that the [Wire Act] should prevent a social wager between friends by telephone. This legislation can be a most effective weapon in dealing with one of the major factors of organized crime in this country without invading the privacy of the home or outraging the sensibilities of our people in matters of personal inclination and morals.[28]

The Act was not meant to affect a citizen's ability to gamble on sports in accordance with applicable state law, but was enacted solely to help state authorities fight organized crime by disrupting their sports gambling businesses.[29]

*2. The Travel Act*

Enacted the same year as the Wire Act, the Travel Act criminalizes traveling or

> us[ing] the mail or any facility in interstate or foreign commerce, with intent to . . . (1) distribute the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity[.][30]

Like the Wire Act, the Travel Act was enacted to help state authorities combat organized crime's control of illegal gaming.[31] The Act only applies to a "business enterprise" that continuously engages in an activity outlawed by

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[26] 18 U.S.C. § 1084(a) (2006).

[27] *Id.* § 1084(b) (2006).

[28] SCHWARTZ, *supra* note 11, at 100 (citing *Hearings Before the Committee on the Judiciary of the United States Senate, 87th Congress, First Session, on* S. 1653, S. 1654, S. 1655, S. 1656, S. 1657, S. 1658, S. 1665, 87th Cong., 6 (1961)).

[29] *See* Raj, *supra* note 25, at 784 (citing Tony Glover, *Will Online Gaming Turn Out to Be a Busted Flush?*, SUNDAY BUS., Sept. 11, 2005, at 1) (stating that "one could argue that the Wire Act had less to do with helping states enforce their ban on gambling than it did with halting the growth of the criminal empires and organized crime syndicates that fed off gambling"). It is important to note that at the time of the Wire Act's passage and in the time since then, the evidence of organized crime's monopolistic control of illegal sports betting is arguably not as strong as it was over other gambling activities like illegal horse racing and slots. SCHWARTZ, *supra* note 11, at 119-129. The entrepreneurial, quasi-independent "bookies" or "bookmakers" that operate sports betting rings out of their own homes are major players in the illegal sports betting world. *Id.* Nevertheless, because many bookmakers still have some ties to organized crime, fighting the activity continues to remains a high priority for law enforcement officials. *Id.*

[30] 18 U.S.C. § 1952 (2006).

[31] Raj, *supra* note 25, at 786 (citations omitted).

state or federal statute.[32] Thus, gamblers placing bets with illegal business enterprises are not subject to federal prosecution under the Travel Act.[33]

*3. The Interstate Transportation of Wagering Paraphernalia Act*

The Interstate Transportation of Wagering Paraphernalia Act criminalizes the interstate or foreign transportation of "any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game[.]"[34] The Act attempts to "erect[ ] a substantial barrier to the distribution of certain materials used in the conduct of various forms of illegal gambling" by cutting off gambling supplies and thus has a more specific goal than its companion statutes.[35]

*4. The Illegal Gambling Business Act (IGBA)*

IGBA targets large-scale illegal gambling activities and corrupt government officials who facilitate them.[36] IGBA criminalizes the operation of an "illegal gambling business," defined as any business that "(1) is a violation of the law of a State political subdivision in which it is conducted, (2) involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business; and (3) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day."[37] Like its predecessor statutes, IGBA does not contain a provision that criminalizes the activities of individual bettors; rather, it only targets the illegal operators.[38]

*B. Federal Intervention in State Sports Betting Policy*

Traditionally, state and local governments have regulated gambling, gaming, and lotteries.[39] In 1978, Congress reaffirmed this understanding when it passed the Interstate Horseracing Act, clarifying that "the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders[.]"[40] Nevertheless, the federal government has intervened twice in state gambling policy: in 1951, Congress imposed a tax on Nevada sports gambling; and in 1992, the federal government banned almost all states from sanctioning sports gambling.

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[32] *Id.* at 787 (citing CHARLES DOYLE, INTERNET GAMBLING: OVERVIEW OF FEDERAL CRIMINAL LAW 11 (2003)).
[33] *Id.*
[34] 18 U.S.C. § 1953 (2006).
[35] Erlenbaugh v. United States, 409 U.S. 239, 246 (1972) (citations omitted).
[36] Raj, *supra* note 25, at 787 (citing Richard P. Shafer, *Requirement of 18 U.S.C.A § 1955, Prohibiting Illegal Gambling Business, That Such Businesses Involve Five or More Persons*, 55 A.L.R. FED. 2 (2006)).
[37] 18 U.S.C. § 1955(b)(1) (2006).
[38] United States v. King, 834 F.2d 109, 113 (6th Cir. 1987) (citing H.R. REP. NO. 91-1549, 91st Cong. (1970)) (placing a bet with an illegal gambling business is not illegal under the IGBA, in light of the Congressional intent to attack the revenue sources of organized crime).
[39] *See* 15 U.S.C. § 3001(a)(1) (2006).
[40] *Id.*

*1. 1951 Federal Tax on Nevada Sports betting*

In 1951, Congress imposed an annual fifty-dollar excise tax on bookmakers and a ten-percent tax on all sports bets.[41] The tax only impacted Nevada,[42] the sole state to have any form of legalized sports betting. Intending to discourage sports betting in the wake of a national basketball betting scandal, the tax drove Nevada casinos out of the sports betting industry because it became too unprofitable to offer the activity.[43] Instead, the heavy tax allowed illegal underground "turf clubs" to flourish, depriving local, state, and federal governments of substantial tax revenue.[44] These clubs were shady enterprises that often evaded the full tax in a number of crafty ways.[45] Eventually, Congress reduced the tax to two percent in 1974, and Nevada experienced an economic boom as sports betting returned to profitable levels at state-sanctioned casinos, while the federal government was able to collect its tax at the lower rate.[46] The incident taught federal policymakers an important lesson: Congress can try to prohibit or discourage sports gambling, but underground bookmakers will continue to serve the public's demand.[47] It would be four decades before the federal government again involved itself in state sports betting policy.

*2. Professional and Amateur Sports Protection Act (PASPA)*

In 1992, Congress passed PASPA, also called the Bradley Act, named after former basketball star and then-New Jersey Senator Bill Bradley, the bill's champion and sponsor.[48] PASPA states:

> It shall be unlawful for [either] . . . a governmental entity . . . or a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.[49]

Although PASPA prohibits all state-sanctioned or state-run sports gambling schemes, it carved out an exemption for any state that allowed or operated a sports betting scheme at any time between 1976 and 1990.[50] This grandfathered the Nevada sportsbooks, the limited Oregon sports lottery, the limited Delaware sports lottery, and the limited sports pool betting in Montana.[51] It also provided a one-year window for New Jersey to legalize sports betting, or else face PASPA prohibition.[52]

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[41] DAVIES & ABRAM, *supra* note 22, at 122.
[42] *Id.*
[43] *Id.* at 122-23.
[44] *Id.* (citations omitted).
[45] *Id.* at 123-25.
[46] *Id.* at 127. Congress eventually reduced the tax to .025% in 1983. *Id.* at 128.
[47] *See id*. at 122-27.
[48] S. REP. NO.102-248, at 4 (1992).
[49] 28 U.S.C. § 3702 (2006).
[50] *Id.* § 3704(a)(1) (2006).
[51] *Id.*; David D. Waddell & Douglas L. Minke, *Why Doesn't Every Casino Have a Sports Book?*, GLOBAL GAMING BUS., July 9, 2008, at 36.
[52] 28 U.S.C. § 3704(a)(3) (2006). Waddell & Minke, *supra* note 51, at 36.

The Department of Justice ("DOJ") was vehemently opposed to the legislation.[53] The DOJ was concerned that PASPA was a fundamental federal intrusion on the rights of the states to set their own gambling policy and to raise revenues.[54] The DOJ was also troubled that the law allowed amateur and professional sports organizations to seek civil injunctions.[55]

PASPA's legislative history reflects the law's three basic goals: (1) to stop the spread of state-sponsored sports gambling, (2) to maintain sports' integrity, and (3) to reduce the promotion of sports gambling among America's youth.[56] Before analyzing PASPA more thoroughly in Parts II and III, this part concludes with an overview of sports gambling at the state level, and with a brief discussion of Internet sports gambling regulation.

### *3. Sports Gambling Laws at the State Level*

PASPA fully exempted Nevada and partially exempted Oregon, Delaware, and Montana from the sports gambling prohibition.[57] The other forty-six states are completely prohibited from sanctioning or operating a professional or amateur sports betting scheme.[58] PASPA gave New Jersey the opportunity for an exemption, but the state failed to meet the necessary standards in time.[59] The following summaries describe what type of sports betting federal law permits, what type of betting currently exists at the state level, and recent legislative and political developments at the state level.

#### *a. Nevada*

Nevada is the only state that offers the full-range of legal sports wagering for all of the major professional and collegiate sports.[60] The Nevada Gaming Commission and the State Gaming Control Board regulate sports gambling within the state.[61]

#### *b. Oregon*

From 1989 until 2007, Oregon operated a sports betting lottery called "Sports Action" which allowed Oregonians to make parlay bets on NFL games.[62] However, on July 1, 2007, the Oregon Legislature repealed Sports Action in an effort to attract collegiate basketball tournaments to its state.[63] Part III discusses this repeal further.

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[53] *See* S. REP. NO.102-248, at 12.
[54] *Id.* at 13.
[55] *Id.*
[56] *Id.* at 4-5.
[57] *See* 28 U.S.C. § 3704(a) (2006); Waddell & Minke, *supra*, note 51, at 36.
[58] *See* 28 U.S.C. § 3704(a) (2006); Waddell & Minke, *supra* note 51, at 36.
[59] Waddell & Minke, *supra* note 51, at 36.
[60] *Id.* at 35.
[61] *Id.*
[62] *Id.*
[63] *Id.*; *see also* Oregon Lottery, Sports Action℠/Monday Night Scoreboard℠ Q&A 1-2 (on file with author).

*c. Delaware*

In 1976, Delaware operated a sports betting scheme that allowed bettors to place parlay bets on NFL games.[64] The lottery was discontinued after the 1976 NFL season[65] because it was not an economically viable program for the State to maintain.[66] In 2009, Delaware's governor legalized Nevada-style sports betting but was blocked by the Third Circuit from implementing his plan in full.[67] Due to the Third Circuit's August 2009 ruling, Delaware is limited in what it can offer. The state cannot offer single-game betting or betting on sporting contests other than NFL games, but it now offers parlay NFL betting on bets of three or more NFL games, with some variation of the bet available as well.[68]

*d. Montana*

Montana voters have chosen to allow state-licensed sports pools, fantasy sports leagues, and sports tab games.[69] The referendum limits sports gambling to only those types of schemes, and thus does not allow a Montana bettor to place a bet on a single game or bundle of games.[70]

*e. New Jersey*

PASPA gave New Jersey a one-year window of opportunity to legalize sports betting, but the state legislature was unable to forge a consensus and pass the appropriate legislation in time.[71] New Jersey, therefore, must comply with PASPA's restrictions[72] even though it is considered a pioneer in the gaming industry. Recently, New Jersey has attempted to build momentum towards the eventual legalization of sports betting through federal litigation, state legislation, and the voter referendum process.[73]

In March 2009, New Jersey State Senator Raymond Lesniack filed a lawsuit in the District of New Jersey claiming, among other things, that PASPA unconstitutionally discriminates among the states by allowing four states to offer sports betting while disallowing the other forty-six states from enjoying

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[64] Waddell & Minke, *supra* note 51, at 35.

[65] *Id.* at 36.

[66] Suzette Parmley and Joelle Farrell, *Delaware Still Plans to Bet on NFL Games* PHILLY.COM, Aug. 26, 2009, http://articles.philly.com/2009-08-26/news/25276480_1_sports-lottery-jack-markell-video-lottery (Delaware used a similar gaming scheme for one NFL season in 1976, but it was discontinued after disappointing results).

[67] *See supra* notes 2-9 and accompanying text.

[68] Katherine Santiago, *Delaware Opens Sports Betting On Professional Football*, NJ.COM (Sept. 10, 2009 3:51 PM), http://www.nj.com/news/index.ssf/2009/09/delaware_opens_betting_on_prof.html.

[69] Waddell & Minke, *supra* note 51, at 35.

[70] *Id.; see also* Amy Beth Hanson, *NCAA clarifies sports betting policy; OK for Montana to host playoffs,* HELENAIR.COM, (Aug. 7, 2009 12:00 AM) http://helenair.com/sports/article_e0150da9-0dab-55eb-8725-b688a9cd1be5.html *(*"State and university officials argued that Montana law allows betting on fantasy sports leagues, not on the outcome of single events, which was prohibited under NCAA rules." The NCAA concurred that this was in fact the state's policy.).

[71] Waddell & Minke, *supra* note 51, at 36.

[72] *Id.*

[73] *Id.*

the privilege.[74] California State Senator Roderick Wright, who chairs his state's gambling committee, publicly announced that he supported the New Jersey lawsuit as well.[75] The case was dismissed in March 2011 for lack of standing.[76] Additionally, Lesniak successfully steered a proposed amendment to the New Jersey state constitution through the Senate State Government, Wagering, Tourism and Historic Preservation Committee, which would constitutionally permit sports betting in New Jersey.[77] If the full Senate approves the change, New Jersey voters would be able to vote on a referendum whether to accept the constitutional amendment, though the amendment is predicated on a repeal of PASPA.[78] Additionally, both houses of the New Jersey Legislature have introduced resolutions calling on the United States Congress to repeal PASPA.[79]

#### *f. Other States*

In January 2010, Rhode Island State Senators John Tassoni, John McBurney, and James Doyle introduced a Joint Resolution calling on Congress to repeal PASPA.[80] In February 2010, using almost identical language, Missouri State Representatives Jason Grill and Mike Colona also introduced a Joint Resolution calling on Congress to repeal PASPA.[81] Although, as of this writing, the resolutions have yet to pass their respective chambers, both are symbolic of the growing dissatisfaction with PASPA at the state level.

In February 2010, a subcommittee in the Iowa State Senate approved a bill legalizing sports betting, which now faces a vote in the full Senate.[82] Even though PASPA prohibition bars them from legalizing the activity, some state senators are trying to drum up support for a federal repeal of the law.[83]

### *C. Internet Sports Gambling*

For purposes of this Note, the federal regulatory framework that governs Internet sports gambling is only briefly discussed. Because this Note focuses on the states' ability to legalize sports betting at brick and mortar venues within their respective jurisdictions, an extensive analysis of Internet sports gambling

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[74] Complaint at 18-20, Interactive Media Entm't & Gaming Ass'n, Inc. v. Holder, No. 3:09-cv-01301 (D. N.J. Mar. 23, 2009).

[75] Patrick McGreevy, *California May Benefit from Legalizing Sports Betting, State Senator Says*, L.A.TIMES.COM (Aug. 1, 2010), http://articles.latimes.com/print/2010/aug/01/local/la-me-sports-gambling-20100802.

[76] Interactive Media Entm't & Gaming Ass'n, Inc., No. 09-1301 (GEB) (D.N.J. Mar. 7, 2011).

[77] Press Release, Jason Butkowski, *Lesniak- Van Drew Constitutional Amendment to Allow for Sports Wagering Advances*, POLITICKERNJ.COM (Feb. 8, 2010), http://vip.politickernj.com/jbutkowski/36689/lesniak-van-drew-constitutional-amendment-allow-sports-wagering-advances.

[78] *Id.*

[79] Waddell & Minke, *supra* note 51, at 36.

[80] S. J. Res. 2028, Gen. Assemb., Jan. Sess. (R.I. 2010).

[81] H.R. Con. Res. 22, 95th Gen. Assemb., 2d Reg. Sess. (Mo. 2010) [hereinafter Missouri Resolution].

[82] Jennifer Jacobs, *Iowa Lawmakers Back Bill for Pro Sports Gambling*, USATODAY.COM, (Feb. 4, 2010), http://www.usatoday.com/sports/2010-02-04-iowa-sports-gambling_N.htm.

[83] *Id.*

legislation is not necessary. However the rise of the online sports gambling industry, despite the federal prohibition, is a key factor to this Note's argument: as the industry continues to grow and attract the American sports bettor's dollar, the states are continuously unable to compete for this business through their own legalized land-based sportsbooks while subject to PASPA prohibition.

It is a federal crime to operate an online gambling website, but by all accounts the federal government has failed to curb the rise of the ever-growing business.[84] The industry's regulatory and economic structure is considered below.

*1. Wire Act, Travel Act, and IGBA*

Before 2006, federal authorities could use the Wire Act, the Travel Act, and IGBA to prohibit the operation of Internet gambling websites.[85] A few courts held that sports betting websites violate the Wire Act, because the Internet is a wire facility and these websites are "in the business of" transmitting bets or betting information.[86] The Travel Act and IGBA would likely also prohibit sports gambling website operators, but no court has opined on the matter.[87]

However, these three acts proved to be inadequate to prosecute the full-range of online gaming for two reasons: (1) contrary to the Department of Justice's stance, federal courts held that the Wire Act only applied to sports betting and not to other forms of online betting, and (2) many online betting sites are located offshore beyond the jurisdictional reach of U.S. courts.[88] From 1993 to 2003, Congress made multiple attempts to address Internet gambling and cure these deficiencies before finally enacting the Unlawful Internet Gambling Enforcement Act of 2006.[89]

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[84] Matthew Garrahan, *Push to Reform US Online Gambling Laws*, FT.COM, (Mar. 26, 2011, 2:59 PM), http://www.ft.com/cms/s/0/28abad3c-570e-11e0-9035-00144feab49a.html#axzz1I6ONs231 ("Although millions of Americans play online poker, it is illegal to own or operate a site from within the US, which means the biggest companies are all based off-shore.")

[85] Brant M. Leonard, Note, *Highlighting the Drawbacks of the UIGEA: Proposed Rules Reveal Heavy Burdens*, 57 DRAKE L. REV. 515, 515 (2009) (citations omitted).

[86] In *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001), the Second Circuit found Jay Cohen, owner and president of an Antigua-based sportsbook website, guilty of violations of the Wire Act. *Id.* at 73-78. The court held that the Internet is a type of wire facility, and the website "marketed [itself] to the public for the express purpose of transmitting [sports] bets and betting information." *Id.* at 76. In *In re MasterCard Int'l Inc*., 313 F.3d 257 (5th Cir. 2002), the Fifth Circuit stated that the Wire Act's prohibition applied only to betting on sports, and thus affirmed grant of summary judgment to the plaintiffs who facilitated online betting transactions for non-sports bets. *Id.* at 263.

[87] The Travel Act would seemingly prohibit operators of Internet sports betting websites provided they violate a state antigambling law, since such operators are a "business enterprise involving gambling" and the Internet can easily be classified as a "facility in interstate or foreign commerce." Leonard, *supra* note 85, at 521 (citing 18 U.S.C. § 1952(a)-(b) (2006)). Similarly, the IGBA would criminalize such operations if it is found to be an "illegal gambling business" in accordance with the statute's requirements. *Id.* at 521-22 (citing 18 U.S.C. § 1955(a) (2006)).

[88] *Id.* at 522-23 (citing *In re* Mastercard Int'l Inc., 132 F. Supp. 2d 468, 480-81 (E.D. La. 2001), *aff'd* 313 F.3d 257 (5th Cir. 2002)).

[89] *Id*. at 525.

*2. Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA)*

Congress sought to rectify the uncertainties that existed in the online gaming regulatory system by passing the UIGEA, a last-minute attachment to the SAFE Port Act, a port security bill.[90] It appears that few legislators read the bill's language and provisions, and the law has subsequently garnered a vast amount of criticism.[91]

The UIGEA has three important provisions. First, the Act makes it a crime for a "person engaged in the business of betting or wagering [to] knowingly accept, in connection with the participation of another person in unlawful Internet gambling[,]" a financial transaction including credit and electronic fund transfers.[92] Thus, the UIGEA makes it a crime for Internet betting sites to accept bets, with some minor exceptions.[93]

Second, the UIGEA requires all U.S. financial institutions, including banks, credit card companies, and e-wallet services, to prohibit funding Internet gaming financial transactions, mandating these financial institutions to set up procedures to reasonably identify and block such transactions.[94] The UIGEA instructs the Federal Reserve and the U.S. Attorney General to prescribe regulations to guide financial institutions with these procedures.[95]

Last, the UIGEA gives U.S. district courts jurisdiction to prohibit transactions related to illegal Internet gambling.[96] The DOJ and state attorney general can sue in federal court to restrict Internet service providers from allowing illegal Internet gambling transactions to operate.[97] This provision tries to cure the jurisdictional drawback that existed in the previous legal framework by giving federal judges the ability to remove the illegal websites altogether.[98]

Thus, the UIGEA attempts to restrict Internet gambling by regulating the financial institutions that facilitate the business and the websites that run the operations,[99] leaving gamblers immune from prosecution. Though enforce-

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[90] Leonard, *supra* note 85, at 527; *see also* Jonathan Weisman, *Internet Gambling, Ports Deal Reached*, WASH. POST, Sept. 30, 2006, at A8.

[91] *See, e.g.,* I. Nelson Rose, *Viewpoint: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, 10 GAMING L. REV. 537, 538 (2006) (arguing the language of UIGEA is actually an impediment to curing the Wire Act's deficiencies); Nicholas M. Wajda, Note, *Over-Playing a Weak Hand: Why Giving Individual States a Choice is a Better Bet for Internet Gambling in the United States*, 29 T. JEFFERSON L. REV. 313, 328-29 (2007) (pointing out the obvious loopholes that will render the UIGEA ineffective); *see generally* Leonard, *supra* note 85, at 529-36 (describing how the UIGEA restricts the government from collecting a large amount of tax revenue, is difficult to enforce, is at odds with the rest of the world's stance, and places a significant burden on United States financial institutions).

[92] 31 U.S.C. § 5363 (2006).

[93] Leonard, *supra* note 85, at 527.

[94] 31 U.S.C. § 5364(a) (2006).

[95] *Id.* Leonard, *supra* note 85, at 527 (citing 31 U.S.C. § 5364 (2006)).

[96] 31 U.S.C. § 5365(a) (2006); Leonard *supra* note 85, at 528 (citing 31 U.S.C. § 5365 (2006)).

[97] 31 U.S.C. § 5365(b)(1)(A),(2)(A) (2006); Leonard *supra* note 85, at 528 (citing I. Nelson Rose, *Viewpoint: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, 10 GAMING L. REV. 537, 540 (2006)).

[98] Leonard, *supra* note 85, at 528.

[99] *Id.* at 526-28.

ment officials have not yet utilized the UIGEA, many leading gaming commentators believe that the statute's loopholes will make the law ineffective.[100]

In July 2010, the effort to repeal a large part of the UIGEA passed a significant hurdle, as the House Committee on Financial Services approved the Internet Gambling Regulation, Consumer Protection and Enforcement Act.[101] However, the bill would keep the prohibition on Internet sports gambling in place, while legalizing other forms of online gambling, such as poker.[102] As of this writing, the bill is still being taken up in the House of Representatives, but the outcome remains unclear.[103]

A thorough analysis of Internet sports betting policy is beyond the scope of this Note's analysis, but it is important to recognize that Internet gambling is a booming multi-billion dollar industry.[104]

Americans have a voracious appetite for sports betting, whether it is on the Internet, through bookies, or at casinos. Illegal providers will continue to appease the public's demand[105] and are willing to openly defy federal prohibitions. Though the UIGEA and PASPA are part of the federal government's broader efforts to eradicate sports gambling, they impact their targets differently: Internet gambling websites are privately-run foreign businesses that have little problem profiting from blatant violations of the UIGEA, while state governments are sovereign entities that cannot and will not violate PASPA. PASPA enables bookies to step into the void by illegally accepting offline bets, operating alongside their illegal online counterparts in America's multi-billion dollar shadow sports gambling economy.

## III. ANALYZING PASPA'S EFFECTIVENESS

PASPA attempted to: (1) stop the spread of state-sanctioned or state-run sports gambling, (2) maintain sport's integrity, and (3) reduce the promotion of sports gambling among America's youth.[106] Whether any of these goals have been realized is a matter of debate.

### *A. Stopping the Spread of Sports Gambling*

PASPA certainly has stopped the spread of *state-sanctioned* and *state-run* sports gambling because it restricts any state, other than the four exempted ones, from legalizing the activity.[107] In fact, the spread has reversed, with Ore-

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[100] *See* John Helyar, *New anti-gambling law won't stop online bettors*, ESPN.COM (Oct. 3, 2006), http://sports.espn.go.com/espn/news/story?id=2611872 (quoting leading gaming commentator I. Nelson Rose as stating, the UIGEA "will have very minor effects" and law Professor Joseph Kelly stating the UIGEA is "highly unenforceable"); *see also supra* note 91 and accompanying text.

[101] Bill Ordine, *The Smart Money: Internet gambling bill takes a step*, THE PHIL. INQUIRER, July 30, 2010, at D1.

[102] *Id.*

[103] Javad Heydary, *New Bill Gives Online Gambling Another Chance*, TECHNEWSWORLD, (Mar. 30, 2011, 5:00 AM), http://www.technewsworld.com/story/72147.html.

[104] Drape, *supra* note 8, at A1.

[105] *See supra* notes 6-8 and accompanying text.

[106] S. REP. NO. 102-248, at 4-5 (1992).

[107] *See* 28 U.S.C. § 3702 (2006); Waddell & Minke, *supra* note 51, at 35.

gon abandoning its sports lottery in 2007.[108] By restricting the ability of states to offer sanctioned sports betting, however, PASPA's larger purpose *generally* was to "keep sports gambling from spreading."[109] On this count, supporters and critics alike would agree that PASPA has utterly failed.[110]

Any American bettor who wishes to place a bet on a sporting event today has many available avenues. Casual wagers between friends and coworkers are an American tradition, especially during the NFL's Super Bowl[111] and the NCAA March Madness Basketball Tournament.[112] In addition, risk-seeking bettors often turn to their neighborhood bookie to place a wide variety of bets.[113] Bettors can also book a trip to Nevada and gamble on any team in any sport, professional or amateur, to his or her heart's (and wallet's) delight.[114] Moreover, a bettor can now take a trip to Delaware and place parlay bets on NFL games, the most popular sport to bet on.[115] Sports bettors can also conveniently hop online and make any bet on any team in any sport.[116] Further, there is arguably no federal law (and almost no state law) that bars an individual from placing these bets.[117] It is quite clear that PASPA's underlying aim—curbing the spread of sports gambling by reducing the providers—has not succeeded because the demand is so strong. Illegal providers have recognized this and profit from the virtual blanket prohibition on the states.

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[108] Waddell & Minke, *supra* note 51, at 35.

[109] S. REP. NO. 102-248, at 5.

[110] *See supra* notes 6-8 and accompanying text.

[111] *Fact Sheets: Industry Issues, Sports Wagering*, AM. GAMING ASS'N, http://www.americangaming.org/Industry/factsheets/issues_detail.cfv?id=16 (last visited Feb. 6, 2011) ("of the total amount bet on the Super Bowl, only about 1.5 percent is wagered legally"; approximately $81.5 million was wagered legally in Nevada sportsbooks in 2009). While he did not place a wager, President Barack Obama has gotten into the predicting act, correctly picking the Pittsburgh Steelers as the 2009 Super Bowl champion. Christina Bellantoni, *Obama picks Pittsburgh for Super Bowl*, THE WASH. TIMES (Jan. 29, 2009), http://www.washingtontimes.com/weblogs/bellantoni/2009/Jan/29/obama-picks-pittsburgh-for-super-bowl/.

[112] "The FBI estimates more than $2.5 billion a year is illegally wagered on March Madness[,]" while between $80 million and $90 million is bet each year in Nevada sportsbooks. *Fact Sheets: Industry Issues, Sports Wagering*, AM. GAMING ASS'N, http://www.americangaming.org/Industry/factsheets/issues_detail.cfv?id=16 (last visited Feb. 6, 2011). President Obama also filled out a 2009 March Madness bracket on ESPN, correctly predicting the North Carolina Tar Heels as the men's basketball champions. *See* Andy Katz, *Presidential pick 'em at the White House*, ESPN.COM, Mar. 28, 2009, http://sports.espn.go.com/ncb/ncaatourney09/columns/story?columnist=katz_andy&id=3991859. Even former Chief Justice William Rehnquist reportedly organized an annual March Madness pool for money. Chad Millman, *Fight For Sports Betting Rages On*, ESPN.com, (Jan. 21, 2010 7:27 AM), http://insider.espn.go.com/insider/insider/news/story?id=4841822.

[113] *See generally* SCHWARTZ, *supra* note 11, at 119-29.

[114] Waddell & Minke, *supra* note 51, at 35.

[115] Santiago, *supra* note 68.

[116] *See* Leonard, *supra* note 85, at 515; *see also* SPORTSBOOK.COM.

[117] *See supra* notes 1-8 and accompanying text. *See also* Susan Powell, *Online Poker and Gambling to Become Legal in The US?*, THE DAILY PLANET DISPATCH, Mar. 28, 2011, http://dailyplanetdispatch.com/online-poker-and-gambling-to-become-legal-in-the-us/857431/ (discussing the debate as to whether online gambling is actually illegal from the gambler's perspective).

Much has changed in the gaming world in the eighteen years since PASPA was enacted. In 1992, when American public sentiment appeared to be against any type of legalized gambling, only two states—New Jersey and Nevada—permitted casino gambling. Today, more than a dozen states have casinos, and dozens more have Indian reservation casinos, lotteries, and other forms of gambling.[118] The Internet has made all types of gambling, including sports gambling, easily accessible.[119] Thousands of articles a year are written analyzing sports betting techniques and strategies, and television commentators and sports radio disc jockeys openly discuss sports betting trends and predictions.[120] In short, our culture today is much more accepting of all types of gambling, including sports gambling. Stopping "sports gambling from spreading" is an outdated and unrealistic goal. PASPA should be repealed so that governments can profit from the insatiable demand while legitimizing the wrongly maligned suppliers. In a capitalist system, it is bad national policy to prohibit such a booming industry.

### *B. Maintaining Sports' Integrity*

The concern that the integrity of professional and amateur sports games could be tainted by legalized sports gambling also prompted PASPA's passage.[121] Paul Tagliabue, former commissioner of the NFL, testified before Congress:

> Sports gambling threatens the character of team sports. Our games embody our very finest traditions and values. They stand for clean, healthy competition. They stand for teamwork. And they stand for success through preparation and honest effort. With legalized sports gambling, our games instead will come to represent the fast buck, the quick fix, the desire to get something for nothing. The spread of legalized sports gambling would change forever—and for the worse—what our games stand for and the way they are perceived.
>
> Sports gambling threatens the integrity of, and public confidence in, amateur and professional sports. Widespread legalization of sports gambling would inevitably promote suspicion about controversial plays and lead fans to think "the fix was in" whenever their team failed to beat the point-spread.[122]

By and large this remains the public stance of the NFL, MLB, NHL, and NCAA, all of whom publicly supported PASPA's enactment.[123] However, many critics believe this is a hypocritical stance since the leagues benefit from

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[118] *Fact Sheets, States with Gaming*, AM. GAMING ASS'N, http://www.americangaming.org/Industry/factsheets/general_info_detail.cfv?id=15 (last visited Feb. 11, 2011).

[119] *See generally* Drape, *supra* note 8, at A1, A12; *see generally* Mark Griffiths, *Internet gambling: issues, concerns, and recommendations*, CYBERPSYCHOL. BEHAV., Dec. 2003, at 557, 557-68.

[120] For example, Bill Simmons, a popular columnist on ESPN.com, writes a weekly NFL column picking winners and losers against the point spread for every game. Bill Simmons, Sports Guy's World, ESPN.COM, http://sports.espn.go.com/espn/page2/simmons/index (last visited Feb. 7, 2011).

[121] S. REP. NO. 102-248, at 5 (1992).

[122] *Id.*

[123] *Id.* at 3, 8.

sports bettors' interest and enjoy extremely profitable relationships with media companies who publicize the weekly betting lines.[124]

Despite PASPA's best efforts, the legitimacy of professional and amateur sporting events is still frequently called into question. Nowhere is this more evident than in the events that transpired during the 2007 NBA season.[125] Ex-NBA referee Tim Donaghy worked in the league for thirteen years until federal officials discovered that he was betting on games, including games he officiated, during the latter part of his officiating career.[126] Donaghy's gambling was linked to the Gambino mafia family, and he stated on national television that the mafia threatened members of his family if he did not give them his betting picks.[127] Donaghy was eventually sentenced to fifteen months in prison on charges of conspiracy to engage in wire fraud and transmitting betting information through interstate commerce; he was released in late 2009.[128] A public nightmare for the NBA and its image, the event magnified not only the inability of one of the major professional leagues to police its own insiders but also the inability of PASPA to protect professional sports' integrity.[129]

The incident also forced league commissioner David Stern, an early proponent of PASPA, to finally rethink his public stance on sports betting.[130] In late 2009, when asked if it was in the best interest of the NBA to support the

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[124] Many Internet articles are written for nationally recognized sports media websites, such as ESPN.com, whose parent companies also have multibillion-dollar television contracts with the leagues to broadcast their games. In a letter to NFL Commissioner Roger Goodell, Delaware Governor Markell pointed out the NFL's contradictory stance against legalized sports gambling by stating, "the NFL negotiates contracts with all of the principal broadcast networks and those contracts generate billions of dollars in revenues for the NFL and the team owners. Importantly, each of these companies owns and operates websites that provide the betting lines which are viewed by bettors in every state in the nation, regardless of whether the viewers in that State can legally wager on the games. . . . Presumably the NFL's decision to allow ESPN and other parties with which the NFL contracts to promote gambling on NFL games reflects your belief that the value of the NFL franchise is enhanced by that programming. In short, the notion that the NFL has aggressively and actively fought against betting on its games is belied by the very programming the NFL indirectly endorses and from which it handsomely profits." Letter from Jack A. Markell, Delaware Governor, to Roger Goodell, NFL Commissioner, (Mar. 26, 2009) [hereinafter Markell Letter], *available at* http://www.delawareonline.com/assets/pdf/BL131701329.PDF. Markell also pointed out that "[t]he NFL also contracts with ESPN to broadcast [the] NFL's premier game, Monday Night football, and the network programming includes both Hank Goldberg (the "Pigskin Prognosticator") and Chris Berman (the "Swami"), both of which (sic) offer their analysis and predictions of each game with the spread." *Id.*

[125] *Donaghy sentenced to 15 months in prison in gambling scandal*, ESPN.COM (July 30, 2008 1:53 AM), http://sports.espn.go.com/nba/news/story?id=3509440 [hereinafter ESPN.COM NEWS SERVICES].

[126] *Ex-NBA Ref Tim Donaghy's Personal Foul, 60 Minutes: Disgraced Ref Talks About Betting Scandal, The Mob, And How He Got Caught*, CBSNEWS.COM (Dec. 6, 2009), http://www.cbsnews.com/stories/2009/12/03/60minutes/main5880547.shtml (printed version of a prior CBS Television Broadcast from Dec. 3, 2009).

[127] *Id.*

[128] *Id*. ("Donaghy spent 11 months of his sentence in prison and was released last month").

[129] *See id; see also* ESPN.COM NEWS SERVICES, *supra* note 125.

[130] Ian Thomsen, *Inside the NBA, Weekly Countdown: Stern Open to Legalized Betting, Rule Changes*, SI.COM (Dec. 11, 2009 2:26 PM), http://sportsillustrated.cnn.com/2009/writers/ian_thomsen/12/11/weekly.countdown/index.html.

legalization of sports betting, Stern replied that "[i]t has been a matter of league policy to answer that question, 'No,' . . . [b]ut I think that that league policy was formulated at a time when gambling was far less widespread—even legally."[131] Stern also acknowledged that the NBA can no longer be morally opposed to the activity since so many state governments don't consider it immoral."[132] He also went as far as saying that, "it's now a matter of national policy: Gambling is good . . . [W]e have moved to a point where th[e] leap [of accepting legalized sports gambling on NBA games] is a possibility[.]"[133] Stern also acknowledged the possibility of sports betting as a new stream of revenue for his league.[134]

If one of the premier professional sports leagues now publicly supports legalized sports gambling, then the federal government should revisit the possibility of reforming its national gambling policy. With serious problems confronting the United States today, sports betting no longer seems like a "wrong" worth combating or enforcing. Moreover, the increasing use of steroids and performance enhancing drugs in sports arguably threatens the integrity of the games[135] more than sports gambling ever has. Congress should reconsider PASPA in light of today's social mores and shifting attitudes.

### *C. Reducing the Promotion of Sports Gambling Among America's Youth*

Congress also claimed that PASPA was necessary because "[s]tate sanctioned sports gambling will promote gambling among our Nation's young people."[136] Congress was primarily concerned with the proliferating technology "that makes sports gambling 'more convenient' and 'highly seductive' to children."[137] Congress believed that "[g]overnments should not be in the business of encouraging people, especially young people, to gamble."[138]

Two glaring weaknesses lie in this reasoning. First, there are more avenues today for young people to bet on sports than ever before.[139] Young adults are just a few clicks away from betting on sports during their seven hours of daily Internet browsing time.[140] Sports betting pools are also quite common throughout America's schools.[141] Restricting the states' ability to legalize

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131 *Id.*
132 *Id.*
133 *Id.*
134 *Id.*
135 *See* Robert Schlesinger, *Steroids, Baseball and the Hall of Fame*, USNEWS.COM (July 26, 2009), http://www.usnews.com/opinion/blogs/robert-schlesinger/2009/07/26/steroids-baseball-and-the-hall-of-fame.html (pointing to the effect of illegal steroids on the integrity of sports).
136 S. REP. No. 102-248, at 5 (1992).
137 *Id.* at 5.
138 *Id.*
139 *See supra* notes 1-9 and accompanying text.
140 Tamar Lewin, *If Your Kids are Awake, They're Probably Online*, N.Y. TIMES, Jan. 20, 2010, at A1 (stating that "[t]hose ages 8 to 18 spend more than seven and a half hours a day with [electronic and Internet] devices").
141 *See* Jeff Roberts, *Teen bookies, bettors roam school hallways*, NORTHJERSEY.COM (Dec. 6, 2009 10:23 AM), http://www.northjersey.com/news/education/gambling120509.html (stating that "experts say sports gambling by teenagers has infiltrated every high school in the state").

sports gambling does nothing to stop these activities from taking place. Further, state legalization would not increase the activity among America's youths because state-sanctioned or state-run venues would certainly have strictly-enforced minimum age requirements, much in the same manner as venues that host lotteries, pari-mutuel betting, casinos, and slots.[142] Such requirements do not put governments in "the business of encouraging [young] people . . . to gamble."[143]

Second, Congress was worried that young people would find "new technologies" that promoted sports gambling "highly seductive[,]" while making the activity more "convenient for children[ ]" to participate in.[144] Since 1992, new technologies have proliferated in the hands of young people.[145] PASPA has not curbed young people's access to such technologies, and a repeal of PASPA would not suddenly lead to a surge in sports betting on high-tech devices among the nation's youth. Instead, governments should promulgate rules that regulate the ability of technologies to offer sports bets, while allowing the larger adult public to gamble at legal venues.[146]

Youth gambling is a serious problem that should be confronted, but not through an outright prohibition on the entire public. PASPA has not helped the problem, and its repeal will not compound it. Instead, Congress and state governments should address the issue of youth gambling through smarter and more focused regulations.

## IV. The Potential Effects of Repealing PASPA

It is time for Congress to re-evaluate PASPA in light of its goals and the realities of the sports gambling industry today. Were PASPA repealed, many states may presumably continue to ban sports betting.[147] However, those states that elect to legalize and regulate the activity will enjoy a number of economic benefits.[148] Additionally, legitimizing the activity results in greater transparency and an increased ability to detect misconduct.[149]

### *A. Potential Growth of State-Sponsored Sports Betting*

The Senate Judiciary Committee Report on PASPA stated that, "[w]ithout Federal legislation, sports gambling is likely to spread on a piecemeal basis [through state-instituted legislation] and ultimately develop an irreversible momentum."[150] Though this prediction may have some legitimate concerns, enough constraints exist to limit unchecked nationwide growth.

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[142] *Minimum Age to Gamble in the United States*, World Casino Directory, http://www.worldcasinodirectory.com/gambling_age_chart.htm. (last visited Feb. 4, 2011).
[143] *See* S. Rep. 102-248, at 5 (1992).
[144] *Id.*
[145] *See e.g.*, Lewin, *supra* note 140, at A1, A3.
[146] Sports bettors can now gamble on hand-held devices the size of smart-phones in real time; a new technology that many believe has a lucrative future. Matt Villano, *In Las Vegas, Sports Books in a Pocket*, N.Y. Times, Dec. 28, 2009, at B1, B6.
[147] *See infra* Part IV.A.
[148] *See infra* Part IV.B.
[149] *See infra* Part IV.C.
[150] S. Rep. No. 102-248, at 5 (1992).

*1. State Laws and State Constitutions as Constraints*

At common law, three elements are necessary for an illegal betting lottery: (1) the distribution of prizes; (2) according to chance; (3) for a consideration.[151] American courts have interpreted the second element to require that the lottery be one where chance is the "dominant factor," so that lotteries that have a small element of skill involved still fall under the legal definition of lottery.[152]

At common law, sports betting lottery easily meets the first and third elements, because gamblers stake a given sum of money on sporting contests for the opportunity to win more money.[153] Additionally, most courts at common law held that sports betting lotteries were predominated by chance rather than skill.[154] These courts reasoned that the winner of a sports bet is determined by the outcome of the game, which is determined in turn by:

> a function of myriad factors such as the weather, the health and mood of the players, and the condition of the playing field. Some educated predictions can be made about each of these but each is also subject to last minute changes and to an element of the unknowable, or to put it another way, to an element of chance.[155]

Almost all states have adopted statutes resembling the common law's definition when crafting their sports gambling prohibitions.[156] While a few states target individual bettors, almost all state statutes target the bookmakers or

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[151] Affiliated Enters. Inc. v. Waller, 5 A.2d 257, 259 (Del. Super. Ct. 1939) (citing State v. Emerson, 1 S.W.2d 109 (Mo. 1927)).

[152] Nat'l Football League v. Governor of Delaware, 435 F. Supp. 1372, 1383-84 (D. Del. 1977) (citations omitted) (stating that "over the last ten years the trend towards acceptance of the dominant fact rule . . . has continued and expanded" and citing to court decisions in New Jersey, Pennsylvania, Alaska, and California).

[153] *See* Jon Boswell, Note, *Fantasy Sports: A Game of Skill That is Implicitly Legal Under State Law, and Now Explicitly Legal Under Federal Law*, 25 CARDOZO ARTS & ENT. L. J. 1257, 1263 (2008) ("Since consideration and prize elements are present in a typical fantasy league, where participants pay an entry fee with the understanding that they will win a prize if they win their league, under most state laws, the legality of such leagues turns on whether the leagues' outcomes depend on the requisite level of chance." The same logic applies to sports betting, where participants stake a sum of money with the understanding that they will win more money if they win their bet.).

[154] *Nat'l Football League*, 435 F. Supp. at 1385.

[155] *Id.* The statement particularly holds true for parlay gambling since "the element of chance that enters each is multiplied by [the number of games betted on within the parlay bet]." *Id.* However, controversy exists as to whether a single-game bet is considered to be a bet of chance or skill. *In re* Request of the Governor for an Advisory Opinion, 2009 WL 1475736, at *8 (Del. May 29, 2009). In its advisory opinion to Governor Markell, the Delaware Supreme Court stated, "wide areas of disagreement exist between studies, and internal inconsistencies within studies, addressing single game betting and the issue of whether chance or skill predominates." *Id.*

[156] *See, e.g.,* HAW. REV. STAT. § 712-1220(4) (1973) (defining gambling as "stak[ing] or risk[ing] something of value upon the outcome of a contest of chance or a future contingent event not under [the gambler's] control or influence[.]"). TENN. CODE ANN. § 39-17-501(1) (2009) ("[g]ambling is contrary to the public policy of this state and means risking anything of value for a profit whose return is to any degree contingent on chance[.]"). MICH. COMP LAWS § 750.301 (2003) ("[a]ny person . . . who, directly or indirectly, takes, receives, or accepts from any person any money . . .with the agreement, understanding or allegation that any money . . . will be paid or delivered to any person . . . contingent upon the result of any race, contest, or game or upon the happening of any event not known by the parties to be certain, is guilty of a misdemeanor[.]").

bookies that accept bets from the public.[157] Some state constitutions take a strong stand and completely prohibit the state legislature from enacting state-sanctioned or state-run sports gambling legislation.[158] Other state constitutions require voter approval for legalization.[159] In almost all states, the legislature would be required to pass a law to legalize sports gambling.[160] Enacting such laws may be politically difficult, especially in states where such a move may be unpopular.[161] Although the repeal of PASPA would certainly provide an opportunity for states to legalize sports gambling, each state would still be required to comply with statutory and constitutional restrictions while mustering the necessary legislative votes to approve a state-run or state-sanctioned scheme.[162]

Sports gambling would likely spread on a "piecemeal basis" were PASPA repealed. Delaware's recent legislative battle and the recent actions of New Jersey, Missouri, Rhode Island, Iowa, and California signal that at least a handful of states are ready and willing to consider instituting legalized sports gambling in their states.[163] However, there is no evidence that this would cause an "irreversible momentum" across the country. Enough political, social, statutory, constitutional, and procedural hurdles exist that would eventually slow the momentum.[164] Nevertheless, a state that can successfully institute a profitable, safe, and transparent system can serve as a template for other states that wish to

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[157] *See, e.g.,* N.Y PENAL LAW § 225.00(9) (McKinney 1994) (defining bookmaking as "advancing gambling activity by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcomes of future contingent events."). ALA. CODE § 13A-12-20 (2) (1977) (defining bookmaking as "advancing gambling activity by unlawfully accepting bets from members of the public as a business, rather than in a casual or personal fashion, upon the outcome of future contingent events.").

[158] *See, e.g.,* UTAH CONST. art. VI, § 27 ("[t]he Legislature shall not authorize any game of chance, lottery or gift enterprise under any pretense or for any purpose."). CAL. CONST. art. IV § 19 ("[t]he Legislature has no power to authorize lotteries, and shall prohibit the sale of lottery tickets in the State[,]"; "The Legislature has no power to authorize, and shall prohibit, casinos of the type currently operating in Nevada and New Jersey").

[159] *See, e.g*., N.J. CONST. art. IV § 7 ¶ 2 ("[n]o gambling of any kind shall be authorized by the Legislature unless the specific kind, restrictions and control thereof have been heretofore submitted to, and authorized by a majority of the votes cast by, the people at a special election or shall hereafter be submitted to, and authorized by a majority of the votes cast thereon by[.]"); MONT. CONST. art. III § 9 ("[a]ll forms of gambling, lotteries, and gift enterprises are prohibited unless authorized by acts of the legislature or by the people through initiative or referendum.").

[160] *See, e.g.,* N.Y. CONST. art. I § 9 ("no lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature[.]"); IDAHO CONST. art. III § 20 cl. 1 ("[g]ambling is contrary to public policy and is strictly prohibited except for . . . [a] state lottery which is authorized by the state if conducted in conformity with enabling legislation[.]").

[161] *See* Campbell Robertson, *Video Bingo Has Alabamians Yelling Everything But*, N.Y. TIMES, Nov. 12, 2009, at A16, A21 (highlighting how many Alabama citizens, government officials, district attorneys and preachers opposed legalizing video bingo because of the public's moral stance on gaming issues).

[162] *See supra* notes 156-160 and accompanying text.

[163] *See supra* Part II.B.3.

[164] *See supra* notes 147-149 and accompanying text.

pass similar legislation. Congress must consider these implications in repealing PASPA.

*2. Outside Economic Constraints on States*

Governments may find that legalizing sports gambling is an economically unappealing option, even if given the legal opportunity. State governments compete to recruit professional franchises and amateur sports tournaments to play in their cities, because these are lucrative opportunities.[165] The professional and amateur sports leagues are highly opposed to the spread of any legalized sports gambling and lobby hard for its prohibition.[166] The leagues exert a significant amount of leverage over states that consider legalizing sports betting by threatening to bar any professional franchise or collegiate tournament from competing or appearing in their state.[167] In light of this tradeoff, state governments must weigh their economic alternatives: either legalize sports gambling and enjoy the economic benefits or try to keep or recruit a professional franchise or collegiate tournament.[168]

Recently, both Delaware and Oregon—two of the four states that were granted a partial exemption from PASPA—weighed these economic alternatives, and each state made a different choice.[169] In 2005, the Oregon legislature passed House Bill 3466 eliminating their sports lottery at the conclusion of the 2006-2007 NFL season.[170] The Oregon Lottery abolished the lottery in an effort to attract NCAA tournaments to the state.[171] The Lottery further stated that, "the bill's proponents pointed to the potential revenue that could be generated in the state by people from throughout the country traveling to Oregon to attend these NCAA basketball games, particularly the men's games."[172] The Oregon Lottery claimed they were eliminating the sports lottery even though it was "very successful, having posted all-time sales records the past two years," because "the NCAA had said as long as there were sports betting games being offered in Oregon, they would not permit a site in Oregon to host an NCAA

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[165] In early 2008 for example, Oklahoma City citizens approved a $121.6 million sales tax extension for improvements to their downtown arena, and the state legislature passed a law issuing $60 million in payroll tax exemptions over the next 15 years, in an effort to attract the NBA's Seattle Supersonics franchise to their state. OKLA. H. R., APPROPRIATIONS OVERVIEW (2009) at 7, *available at* http://www.okhouse.gov/Documents/AppropriationsProcessFY2009.pdf. The legislature stated that "the presence of an NBA team in the state will result in increases in sales, income, and ad valorem tax revenue . . ." *Id.*

[166] *See* Markell Letter, *supra* note 124.

[167] ASSOC. PRESS, *NFL, NCAA oppose Del. gambling bill*, ESPN.COM, (Mar. 27, 2009 3:34 AM), http://sports.espn.go.com/espn/news/story?id=4019996 (NCAA spokeswoman Stacey Osburn asserts that, "NCAA policy prohibits the staging of any session of an NCAA championship in any metropolitan area where legal sports wagering is allowed").

[168] *See id.*

[169] *See supra* Part II.B.3.

[170] H.R. 3466, 73d Leg., 2005 Oregon Laws Ch. 810 (Or. 2005).

[171] Carla "KC" Hanson, *Oregon Sports Action Laid to Rest*, BLUEOREGON (Feb. 9, 2007), http://www.blueoregon.com/2007/02/oregon_sports_a (The 2005 Legislature overwhelmingly voted to abolish Sports Action, hoping to encourage the NCAA to end its Oregon freeze-out.).

[172] *Id.*

men's or women's basketball tournament game."[173] Given the choice between keeping their successful sports lottery and hosting the NCAA college basketball tournament, Oregon chose the latter.[174]

Conversely, Delaware chose to legalize sports betting, even in the face of vehement opposition and threats from the sports leagues.[175] Although Delaware is not a likely destination for a professional sports franchise, the NCAA threatened to ban all collegiate playoff games in Delaware if the state legalized sports betting.[176] Nevertheless, Delaware approved state-sponsored sports betting in May 2009, anticipating millions of dollars in revenue.[177]

The powerful lobbying forces of the professional and amateur sports leagues can exert a tremendous amount of influence on sports gambling legislation.[178] This power stands as another check on PASPA's incorrect assumption that legalized sports gambling will spread through an "irreversible momentum" across the U.S.[179] It is more likely that allowing state-sanctioned sports gambling would result in a trickle of legalization at the state level, instead of a flood.

### *B. The Economic Benefits of Legalized Sports Gambling*

Legalized sports gambling can be extremely profitable. After analyzing the various economic benefits of legalized sports gambling, this section concludes that state and local governments would likely experience an increase in tax revenue, job creation, and greater economic activity from sports gambling's "crossover effects," if they chose to legalize the activity.

#### *1. Tax Revenues from Sports Gambling*

Lawmakers have three basic options when regulating vices like sports gambling: (1) ban the activity and appropriate significant resources to combat the ill in an attempt to fully or substantially eradicate it; (2) permit existing piecemeal legislation to remain on the books while putting few, if any, resources behind the enforcement of those laws; or (3) legalize, regulate, and tax the activity.[180] Though the second option reflects the status quo, it is becoming apparent that the third option may be the preferred policy choice of some cash-strapped state governments.[181] As the Missouri House of Representatives argued in its January 2010 Concurrent Resolution:

> [T]he federal sports wagering ban is not effective in curbing illegal sports gambling, so that lifting the ban on sports wagering would allow state gaming enforcement agencies to properly regulate and police this activity . . . Missouri would benefit

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173 *Id.*
174 *See id.*
175 Markell Letter, *supra* note 124; ASSOC. PRESS, *supra* note 167.
176 ASSOC. PRESS, *supra* note 167.
177 *See supra* notes 1-9 and accompanying text.
178 *See* Markell Letter, *supra* note 124; *see also* ASSOC. PRESS, *supra* note 167.
179 S. REP. NO. 102-248, at 5 (1992).
180 DAVIES & ABRAM, *supra* note 22, at 167 (citing William Eadington, Comments before National Association of Athletic Directors (June 15, 1999) (summary available in *NCAA News*, July 5, 1999)).
181 *See supra* Part II.B.3.

> significantly from an end to the federal ban, as sports wagering in this state would be subject to the existing gambling taxes in Missouri, thereby generating more income for the State of Missouri[.][182]

Choosing a workable tax rate is integral to having a successful legal sportsbook because too high of a tax can make a sportsbook unprofitable and drive the activity out of the law's watchful eye.[183] Congress learned this lesson in the 1950s when it taxed gambling revenues at a ten-percent rate.[184] Eventually the federal government lowered the tax, which allowed state-sponsored sports betting in Nevada to take hold.[185] Currently, Nevada levies a 6.5% tax on gross gambling revenue,[186] and local governments add on an additional one-percent tax.[187] Though Delaware never officially announced an effective tax rate for their proposed sports betting system, the initial proposal indicated that the state could run a profitable venture if it split proceeds with vendors equally.[188] Delaware defends its system as a profitable source of revenue, having collected $830,000 in the system's first three months of operation.[189] Though this number is not likely to make a dent in the budget deficit, it is indicative of the vast amount of potential tax revenue the state could collect if it were allowed to fully legalize sports gambling.

Until recently, the United Kingdom had a robust sports betting industry.[190] A number of private-sector companies, some trading on national stock exchanges, continue to offer sports betting within the UK and generate billions of dollars a year in revenue.[191] The UK historically taxed these companies at high rates—a fifteen percent tax on gross profits, a fifteen percent value added tax (VAT), and the standard corporate tax.[192] In 2002 alone, the UK collected nearly $700 million in revenue from sports betting companies.[193] Recently though, some UK-based companies ditched their land-based operations and moved to offshore islands to enjoy the friendlier tax laws, cutting off a large

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[182] Missouri Resolution, *supra* note 81.

[183] *See* DAVIES & ABRAM, *supra* note 22, at 122-27.

[184] *Id.* at 122; RICHARD A. MCGOWAN, THE GAMBLING DEBATE 57 (2008).

[185] DAVIES & ABRAM, *supra* note 22, at 127-28.

[186] As defined by the American Gaming Association, "Gross Gambling Revenue (GGR) is the amount wagered minus the winnings returned to players, a true measure of the economic value of gambling. GGR is the figure used to determine what a . . . gaming operation earns before taxes, salaries and other expenses are paid — the equivalent of "sales" not "profit." *Fact Sheets, General Info*, *Gaming Revenue: 10-Year Trends,* AM. GAMING ASS'N, *available at* http://www.americangaming.org/Industry/factsheets/general_info_detail.cfv?id=Select%20a%20Factsheet (last visited Feb 5, 2011).

[187] MCGOWAN, *supra* note 184, at 57.

[188] DELAWARE SPORTS BETTING REPORT, *supra* note 2, at 2-3.

[189] Tom Byrne, *Delaware Sports Betting Beats Revenue Projection*, WHYY NEWS AND INFO. (Dec. 1, 2009), http://whyy.org/cms/news/government-politics/2009/12/01/delaware-sports-betting-beats-revenue-projection/24384.

[190] Drape, *supra* note 8, at A1; *see also* Bill Wilson, *Sports Betting Industry Looks to Protect Itself*, BBC.CO.UK, http://www.bbc.co.uk/news/business-11309620.

[191] *See also* Wilson, *supra* note 190.

[192] Press Release, Ladbrokes PLC, Ladbrokes Sportsbook Relocates Ahead of Schedule (Mar. 11, 2009), http://www.ladbrokesplc.com/media-centre/press-releases/releases-2009/2009-11-03.aspx.

[193] MCGOWAN, *supra* note 184, at 58 (citing Jason Pawlina, Betting on College Sports: Nevada vs. The Others, Insight, Christiansen Capital Advisors, LLC, May 29, 2003).

source of tax revenue for the UK government.[194] The experience highlights the importance of targeting a workable tax rate, something U.S. state policymakers must consider when formulating their own policies.

Immediately prior to PASPA's passage, the United States was going through another recession. Like today, state governments were ridden with debt and gaping budget deficits, prompting a number of sports gambling proponents to lobby governments to legalize and tax sports betting.[195] In September of 1991, William Johnson of *Sports Illustrated* inquired as to "why we have been so stupid as to leave [a] lucrative and hugely popular segment of sport to the Mob and the office pool for so long[?]"[196] He bemoaned that sports gambling profits are "all . . . under-the-table money, no more available to the tax man than were the millions in bootleg liquor profits during Prohibition or are the Colombian cartels' take from the sale of cocaine in America today."[197] Like Governor Markell today, Johnson argued twenty years ago:

> [t]hirty states have budget deficits, some of them catastrophic . . . [h]owever, only a handful of states allow wagering on sports events . . . taxing 100% of our sports gambling action would bring in billions of dollars. Those billions might not solve all the woes of our various insolvent state governments, but they couldn't hurt.[198]

"Billions of dollars" may be a significant exaggeration, and accurately predicting actual tax revenues is rather difficult given the myriad of factors one must consider. Nevertheless, Johnson's larger point still rings true almost twenty years later. The NGISC Report estimates that approximately $380 billion a year is illegally wagered on sporting events.[199] Widespread legalization of sports betting would presumably drive a significant portion of "underground" gamblers to legal venues.[200] Assuming, for argument's sake, that the entire $380 billion could be legally wagered in the United States and that 4.6% of total wagers are kept by the sportsbook operator (i.e., the gross gambling revenue), legal sportsbooks would gross approximately $17.48 billion nationwide, to be taxed and distributed at appropriate levels to state and local governments.[201] This number is a best-case and speculative scenario, but it is demonstrative of the vast amount of untapped tax revenue of which states such as Delaware are in desperate need.

### *2. Other Increases In Economic Activity*

Because the full range of legalized sports betting exists only in Nevada, it is difficult to ascertain what kind of broader economic impact more widespread legalization could have. The NGISC Report stated that "[b]ecause sports wagering is illegal in most states, it does not . . . contribute to local economies

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[194] Graeme Wearden, *Ladbrokes Confirms Gibraltar Move for Online Gambling*, GUARDIAN.CO.UK, (Aug. 6, 2009 10:34 AM), http://www.guardian.co.uk/business/2009/aug/06/ladbrokes-online-gaming-moves-gibraltar.

[195] *See e.g.* William Oscar Johnson, *A Sure Bet to Lower Debt*, SPORTS ILLUSTRATED, Sept. 2, 1991, at 20.

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] NGISC REPORT, *supra* note 7, at 2-14.

[200] MCGOWAN, *supra* note 184, at 56-57.

[201] *See id.*

and produces few jobs."[202] However, like tax revenue predictions, Nevada can be a comparable economic case study for states considering legalization.

Besides tax revenue, the most direct economic impact legalized sports wagering would have is job creation. The Department of Labor estimates that "gaming and sports book writers and runners" accounted for 14,790 jobs nationwide in 2009, the vast majority of which were employed in Nevada.[203] These workers' median annual wage was almost $23,460 a year.[204] With the United Stated unemployment rate hovering around ten percent, and a higher rate in many states, legalized sports gambling can help soften the economic misery.

Legalized sports wagering also has measurable "crossover effects."[205] The crossover effect assumes that either: (1) sports bettors would play other games while at the legal sportsbook; (2) sports bettors would bring other people with them to play other games at the casino;[206] and/or (3) sports bettors or their guests would purchase food, beverage, or hotel accommodations while gambling.[207] Las Vegas sportsbook experts "conservatively estimate" a ten percent increase in slot machine play attributable to an adjacent sportsbook.[208] A portion of Delaware's $50-$100 million revenue projection assumes a crossover effect to the state-run racinos (combined race track casino) and higher food and beverage sales at state-run venues.[209] Delaware envisions allowing a number of privately owned venues throughout the state, such as sports bars, to sell sports betting tickets, which the state would also tax.[210]

Currently, Nevada has a virtual monopoly on legalized sports betting and other states want a piece of the economic pie.[211] Nevada may be opposed to a change in the status quo, though it is unclear whether it would actually be adversely affected by widespread legalization. On the one hand, Nevada would lose its near monopolistic control of the industry.[212] However, only one percent of national sports gambling activity is wagered in Nevada sportsbooks.[213] It is more likely that the nationwide pie would grow larger with more states sanctioning the activity, bringing a large portion of the current illegal bets within legal play.[214] Nevada would still remain the gambling capital of America, so it would only risk losing those gamblers who travel to the state

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202 NGISC REPORT, *supra* note 7, at 2-14.

203 *See* Occupational Employment and Wages for Gaming and Sports Book Writers and Runners, U.S. DEP'T OF LABOR: BUREAU OF LABOR STATISTICS, May 2008, *available at* http://www.bls.gov/oes/current/oes393012.htm. Besides employees who work at casino sportsbooks, this number also includes employees who assist in the operation of games such as keno and bingo, and thus is slightly overstated for purposes of this Note. *Id.*

204 *Id.*

205 DELAWARE SPORTS BETTING REPORT, *supra* note 2, at 12-13.

206 *Id.* at 12.

207 *See* Millman, *supra* note 1.

208 *Id.*

209 Millman, *supra* note 1.

210 *Id.*

211 *See supra* Part III.B.3.

212 *See supra* Part III.B.3.

213 *See supra* notes 1-9 and accompanying text.

214 *See supra* notes 2-10 and accompanying text.

solely to gamble on sports.[215] Thus, the adverse effects on Nevada's economy are likely minimal.

Governor Markell sought to legalize sports gambling and make Delaware the only state "east of The Mississippi" to offer the activity,[216] allowing gamblers on the east coast to legally bet on sports without having to take a cross country trip to Nevada. More states have now gotten into the act and are looking to spread the sports gambling pie across the country.[217]

### *C. Greater Transparency In Detecting Sports Gambling Misconduct*

Many proponents of legalized sports betting argue that by legalizing the activity, authorities will be better positioned to combat athlete or referee fraud or misconduct. With widespread legalization, sports betting could actually become more transparent, which would enable sporting and enforcement officials to detect and address possible signs of wrongdoing.[218]

It is a federal crime to knowingly "carr[y] into effect, attempt[ ] to carry into effect or conspire[ ] with any other person to carry into effect any scheme . . . to influence, in any way, by bribery any sporting contest."[219] There are dozens of known instances of such bribery in American professional and collegiate sports history, constantly shaking the integrity of organized sport.[220] Not all instances are ultimately uncovered, so it is difficult to accurately assess how widespread the phenomenon is,[221] though the aforementioned Donaghy

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[215] *See* Chad Millman, *It Only Takes One*, ESPN.COM, (Dec. 16, 2009 12:22 PM), http://insider.espn.go.com/insider/insider/news/story?id=4747561 (quoting NBA Commissioner David Stern as stating that, "Las Vegas is a vacation and destination resort, and they have sports gambling [as well]").

[216] Millman, *supra* note 1.

[217] *See supra* Part III.B.3.

[218] Drape, *supra* note 8, at A1 (Over a seven-year period, online gambling web site BetFair has called attention to suspicious betting activity in dozens of sports, prompting investigations regarding gambling cheating schemes in horse racing, soccer, and tennis.).

[219] 18 U.S.C. § 224 (2006).

[220] *See e.g.* Michael McCarthy, *Point-shaving Remains a Concern in College Athletics*, USA TODAY, (May 9, 2007 4:06 PM), http://www.usatoday.com/sports/college/2007-05-08-point-shaving-cover_N.htm (discussing allegations of point-shaving against University of Toledo running back Harvey "Scooter" McDougle Jr. and listing five point-shaving scandals from college basketball that have occurred in the last 60 years.).

[221] Recently, Professor Justin Wolfers from the University of Pennsylvania's Wharton School of Business reviewed sixteen years of college basketball results, and found that "point shaving" had occurred in about 1 percent of the games. Drape, *supra* note 8, at A1, A12. Point shaving is where an athlete ensures his team does not cover the point spread, in return for money or gifts from a sports bettor. *Id.* at A12. In 2005, the NCAA released a survey they conducted amongst student-athletes that "found that 35 percent of male athletes and 10 percent of female athletes said they had bet on college sports in the previous year, [while] 1.1 percent of Division I football and .5 percent of Division I men's basketball players reported accepting money for playing poorly in a game." *Id.* Additionally, "2.3 percent of the Division I football players and 2.1 percent of the Division I men's basketball players surveyed said they had been asked to influence the outcome of a game because of gambling debts, and 1.4 percent of the football players and 1 percent of the basketball players acknowledged actually affecting the outcome." *Id.* Professor Wolfers said there was more potential for corruption in American sports, since more money was bet illegally and without regulation. *Id.*

scandal is just the latest example.[222] A very small percentage of sports betting takes place legally in the United States today, so it is extremely difficult to detect whether any specific player, team, or game is attracting more than the usual amount of betting activity.[223] Outsiders looking to influence the outcome of a sporting event through athlete or referee bribery are not likely to place their bets in Nevada and risk being detected.[224]

If legalized sports betting spreads, enforcement officials should be able to better detect unusual betting patterns.[225] Although critics often speculate that legalized sports betting will lead to "easy money" and widespread bribery, electronic computer tracking has proven that it may now be possible to track suspicious activity.[226] Betfair, an England-based website, has detected match-fixing scandals in a number of local sporting events due to the heavy volume of betting its website accepts and monitors.[227] Betfair has successfully brought a degree of transparency to sports betting and has increased accountability by supplying real-time information to the thirty-two governing bodies it cooperates with.[228] The system, as set up, works much the way insider trading investigations work in the financial markets: the greater the market's informational liquidity, the easier it should be to detect fraud and manipulation.[229] Las Vegas Sports Consultants Inc. ("LVSC") has adopted Betfair's approach in the United States by monitoring suspicious betting activity.[230] LVSC sets betting lines for sporting events, but it also has developed a system to detect "unusual" patterns which could be indicative of possible misconduct.[231] LVSC passes this information onto enforcement and sporting officials.[232] However, LVSC's system is only effective at detecting bets placed in Las Vegas casinos; it cannot properly monitor online betting on American sports because it cannot view individual online bets, and it is incapable of monitoring bets placed with bookies.[233] If PASPA were repealed and sports gambling were widespread, a system would be in place all around the country to detect any unusual gambling patterns on all American sporting events.[234]

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[222] *See* Thomsen, *supra* note 130.

[223] *See* Tamara Audi & Adam Thompson, *Oddsmakers In Vegas Play New Sports Role*, WALL ST. J., Oct. 3, 2007, at A1.

[224] *See id.* (Sources in Las Vegas say they didn't pick up irregularities in this summer's NBA refereeing case, speculating that wagers on the games may not have been large enough to influence betting lines or that bets were placed outside Nevada.).

[225] *See id.* (In September 2005, Las Vegas Sports Consultants Inc., which advises casinos on sporting events, became suspicious of bets associated with the University of Toledo and alerted the Nevada Gaming Control Board. In March 2007, the FBI reportedly uncovered a gambling cheating scheme involving a University of Toledo football player.).

[226] Drape, *supra* note 8, at A1.

[227] *Id.*

[228] *Id.* at A12.

[229] *See id.*

[230] Audi & Thompson, *supra* note 223, at A1 ("We can tell you every single bet ever placed and who made it, from what funds and where those funds are going . . . It is a complete audit trail, and we want to share it with the governing bodies of sports.").

[231] *Id.*

[232] *Id.*

[233] *Id.*

[234] DAVIES & ABRAM, *supra* note 22, at 156.

## V. CONCLUSION

Proponents of PASPA may have believed that the statute was a laudable piece of legislation in 1992, but it is now evident that the law ultimately fell short of its professed goals while simultaneously restricting state and local governments from pursuing valuable sources of revenue and economic activity. Regardless of whether one criticizes or supports legalized sports gambling, everyone agrees that the activity is more widespread and popular in the United States than ever before.[235] American sports bettors gamble billions of untaxed dollars a year with illegal bookies and websites, while the states are restricted from legalizing the activity, a policy that hurts everyone involved except those profiting from breaking the law.

The federal government has historically been better at policing interstate violations of state sports gambling laws than at prohibiting the activity altogether from the federal level.[236] Whether the prohibition in its current form is even constitutional is a separate issue that this Note has only briefly touched upon but one that the New Jersey District Court is now contemplating.[237] Repealing PASPA would lead to some states fully or partially legalizing sports gambling, but it would certainly not lead to an avalanche of legalization across the United States given the existing economic, social, political, legal, and constitutional hurdles.[238] The Wire Act enables the federal government to ensure that no interstate violations of state laws take place, so that citizens in states that prohibit sports gambling cannot place sports bets in legal states through the telephone and Internet.[239] This system gives the states the sovereign freedom to choose whether to legalize sports gambling—a freedom that traditionally was always theirs—while using the federal government's power to ensure that all state laws are upheld and enforced.

Delaware's recent partial legalization, New Jersey and Iowa's recent legislative activity, the failed federal lawsuit in U.S. District Court in New Jersey, and Missouri and Rhode Islands' recently proposed symbolic resolutions all indicate two increasingly obvious realities.[240] First, all of these states are starved for cash and are looking to sports gambling as a new and potentially lucrative source of tax revenue, job growth, and economic activity.[241] Second, all of these states are dissatisfied with PASPA and want it repealed.[242] The pleas and demands for a repeal will grow louder until the federal government is finally forced to confront the situation. Hopefully, Congress or the federal courts will recognize that PASPA (1) has failed to accomplish what it set out to do, (2) continues to support a thriving shadow economy of mob-associated bookies and offshore websites, (3) unfairly restricts the sovereignty and eco-

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[235] *See supra* notes 6-8 and accompanying text.

[236] *See supra* Part II.

[237] For a detailed discussion of this issue, see Thomas P. Colbey, *Revitalzing the Forgotten Uniformity Constraint on the Commerce Power*, 91 U. VA. L. REV. 249 (2005).

[238] *See supra* Part IV.A.

[239] 18 U.S.C. § 1084(a) (2006).

[240] *See supra* Part II.B.

[241] *See supra* Part IV.B.

[242] *See supra* Part II.B.

nomic freedom of the states, and (4) makes detecting possible athlete and referee bribery more difficult.[243] PASPA is a bad bet that is no longer worth gambling on.

[243] *See supra* Parts III-IV.