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## Let States Regulate Sports Gambling within their Borders

Constitutional Principles at Stake in Supreme Court Case *Christie v. NCAA*

By Michelle Minton \*

Every year, millions of Americans gamble on sports. Whether betting on the Super Bowl or filling out a March Madness bracket, many adults see betting on sports as a harmless way to enhance their enjoyment of the games. Few realize, however, that apart from a few privileged states and types of sporting events, most of this friendly wagering is illegal. That prohibition does nothing to prevent criminal activity, while putting otherwise law-abiding citizens in conflict with law enforcement, sometimes with deadly consequences.<sup>1</sup>

A little-known law enacted by Congress in 1992, the Professional and Amateur Sports Protection Act (PASPA), barred all but a handful of states from enacting laws to legalize sports gambling. As the name implies, PASPA's purpose was to protect sports from corruption. Some believed increased gambling on games would increase the likelihood of match-fixing. Yet, over the last 25 years, PASPA has failed to stop the spread of illegal sports gambling, prompted the rise of an enormous gambling black market, increased criminals' profits, prevented states from raising millions in tax revenue and enacting consumer protections, and made stopping corruption in sports *more* difficult.

Worst of all, PASPA represents a threat to our nation's federal structure by taking decision-making authority away from state capitals and placing it in Washington, D.C.

The United States Supreme Court will rule next year on whether or not PASPA unconstitutionally commandeers state legislatures, but Congress should not wait for the courts to fix the critical error it made. It should repeal PASPA and all other federal gambling laws that threaten state sovereignty.<sup>2</sup>

**Consumer Impact.** When Congress enacted PASPA, the nation's sports gambling market was estimated to be around \$40 billion a year. Today, illegal gambling on sports is estimated to be a \$140 to \$400 billion industry. In 2017, Americans illegally wagered more than \$10 billion on the NCAA Men's Basketball Championships alone.

By disallowing states from regulating the activity, PASPA has made it nearly impossible for law enforcement to protect those consumers who choose to gamble on sports. Not only does this leave consumers vulnerable, and allow criminal organizations to profit and thrive, it also makes corruption in sports more likely.

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\* Michelle Minton is a Senior Fellow at the Competitive Enterprise Institute.

In Europe, where sports betting has been widely legalized, sports leagues work with the gambling industry to prevent and prosecute corruption and match-fixing. Because bookies are the first to notice the signs of a fixed game, due to anomalies in betting patterns, they have become the early warning system for the European sports leagues. Bookies alert leagues to possible corruption, allowing them to investigate and put a stop to it.<sup>3</sup> In the United States, even bookies who want to alert the authorities cannot do so for fear of prosecution.

**State Revenue Impact.** Not only does PASPA put both consumers and sports at risk, it also costs states hundreds of millions of dollars in potential tax revenue that could be used toward public projects or services.<sup>4</sup>

**New Jersey's Lawsuit.** In 2012, New Jersey voters overwhelmingly approved a constitutional amendment to repeal the state's prohibition on sports betting at race tracks and casinos.<sup>5</sup> In response, sports leagues, led by the National Collegiate Athletics Association (NCAA), sued New Jersey, arguing that this form of decriminalization amounted to a *de facto* authorization of sports gambling in violation of PASPA. The Third Circuit Court of Appeals agreed with the leagues' logic, but New Jersey appealed the decision, asserting that, while Congress may regulate individual behavior, it "lacks the power to directly compel the States to require or prohibit [certain] acts."<sup>6</sup> As New Jersey argues in its case, by directly barring state legislatures from amending or repealing their own statutes, PASPA violates state sovereignty and directly conflicts with the U.S. Constitution's 10<sup>th</sup> Amendment.

In June 2017, the U.S. Supreme Court recognized potential merit in New Jersey's reasoning and agreed to review the matter. The court will schedule oral argument for the case, *Christie v. NCAA*, with a ruling expected by the summer of 2018.<sup>7</sup> In addition to the policy consequences for sports betting, there are many important constitutional principles at stake in the case, including states' ability to decide upon a host of other controversial matters.

**Constitutional Federalism.** The 10<sup>th</sup> Amendment to the U.S. Constitution states that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Founders included this clause as a bulwark against the unchecked expansion of federal power, making it clear that Congress' authority extended only to those powers enumerated in the Constitution, with the rest reserved for the states. Thus, while Article I sanctions federal regulation of commerce between the states and with foreign governments, it reserves the power to regulate commerce *within* the states to state governments.

While the courts have expanded federal authority by broadly interpreting what constitutes *interstate* commerce, PASPA's prohibition against states legalizing *intrastate* sports betting pushes us toward a future in which the federal government functionally has no limits on its power. In particular, the Third Circuit's interpretation of PASPA—that it not only prevents states from authorizing sports gambling but also handcuffs state legislatures from modifying their own gambling laws—edges us dangerously close to becoming a nation of states that are little more than puppets of the federal government.

**The Anti-Commandeering Doctrine.** The “anti-commandeering doctrine,” an integral feature of federalism, is one of the central arguments against PASPA. The doctrine, established over 175 years of judicial precedent, forbids Congress from compelling states to enact certain policies and from forcing state officials to implement federal law.<sup>8</sup> Without this protection, Congress could compel states to do its bidding at no cost to itself and without regard for state finances, values, or priorities.

If the Third Circuit opinion stands, PASPA would not only prohibit legal sports betting throughout the nation, but also bar most state legislatures from amending their own laws regulating sports betting. As New Jersey argues, this would allow Congress to commandeer the states.

**Government Accountability.** Individual citizens communicate their will by voting for their representatives in government. The closer a government is to the voters, the more responsive it is to their concerns. Thus, states can be more responsive to the needs and wishes of their residents than Congress. Placing more decision-making power in Washington, D.C., as PASPA does, greatly dilutes voters’ ability to influence policy.

**The Principle of Private Non-Delegation.** Democratic accountability requires the maintenance of the “non-delegation” principle articulated in Article I of the Constitution: “All legislative powers herein granted shall be vested in a Congress of the United States.” Without this principle, members of Congress could pass along legislative powers to entities that are not answerable to citizens through the electoral process, thus insulating themselves from responsibility for policies that might prove unpopular.

With regard to PASPA, section 3703 vests “the Attorney General of the United States [or] a professional sports organization or amateur sports organization” with the authority to enjoin and sue states that allegedly violate the law when it sees fit. Essentially, this confers on sports leagues the power to decide what types of sports wagering they will or will not allow states to pursue.

The danger in allowing private entities like sports leagues to decide how and when to enforce PASPA is that their actions are driven by self-interest, potentially to the detriment of other private parties. For example, the leagues have chosen not to raise PASPA concerns about states allowing daily fantasy sports (DFS) gambling, which allows players to place wagers on the performance of specific athletes on a given day. DFS could arguably be defined as “sports gambling,” but the leagues have not raised this concern, perhaps because member organizations—the National Basketball Association, National Hockey League, and Major League Baseball—maintain lucrative sponsorship contracts with DFS businesses.<sup>9</sup>

**The Equal Sovereignty Doctrine.** As described by Congress, the purpose of PASPA was to address a “national problem” that “cannot be limited geographically.”<sup>10</sup> However, the law exempts from its prohibition sports gambling schemes and activities authorized and conducted within states prior to PASPA’s enactment. Through this grandfather clause, PASPA essentially grants Nevada a monopoly on legal, single-event sports gambling.<sup>11</sup> As

New Jersey has argued, this preferential treatment of Nevada and a few other states— Delaware, Montana, and Oregon—that had parlay sports betting, in which players place bets on multiple games at once, violates the equal sovereignty or “equal footing” doctrine. This doctrine holds that Congress may not discriminate among states when enacting policy.

Equal sovereignty derives from the guarantee of sovereign powers and sovereign immunity granted by the Constitution’s 10<sup>th</sup> and 11<sup>th</sup> Amendments. Court precedent states that Congress may only enact laws that treat states unequally when it provides a rationale for why a particular “problem” requires laws that are disadvantageous to certain states.<sup>12</sup>

PASPA’s unequal application of its prohibition against legalizing sports gambling runs afoul of the equal sovereignty doctrine and should be struck down. It is possible that the Supreme Court could sever this section from the law, leaving the blanket prohibition in place and eliminating the grandfathering that allows these few states the limited ability to offer legal sports gambling.<sup>13</sup> While such a ruling would ameliorate PASPA’s equal sovereignty problem, it would amplify the law’s conflict with the 10<sup>th</sup> Amendment.

**Conclusion.** PASPA is in direct conflict with our nation’s founding principles of federalism, which ensures government’s accountability to citizens.

Regardless of whether one agrees with Congress’ claim that it should protect the reputation of private sports leagues by preventing sports betting, the law has failed on all accounts.<sup>14</sup> In 1991, the sports betting market in the United States was estimated at \$40 billion a year.<sup>15</sup> Today, Americans spend nearly \$150 billion on illegal sports gambling.<sup>16</sup> In addition to forcing law-abiding citizens to engage in unlawful behavior, the prohibition prevents states from enacting consumer protections, thwarts law enforcement from investigating and prosecuting illicit activity, and unlawfully blocks state lawmakers from acting on the will of their own residents.

Regardless of how the Supreme Court rules in *Christie v. NCAA*, Congress should act to repeal PASPA and all other federal gambling laws that threaten the sovereignty of the states and put representative government at risk.

## Notes

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<sup>1</sup> See the case of Sal Culosi: Dave McKenna, “Bets and Bullets: A small-time gambler’s death by SWAT,” Deadspin, December 6, 2015,

<http://deadspin.com/bets-and-bullets-a-small-time-gamblers-death-by-swat-1677469592>.

<sup>2</sup> For example, the Federal Wire Act of 1961 and the Unlawful Internet Gambling Enforcement Act of 2006.

<sup>3</sup> “FIFA’s Early Warning System signs integrity agreement with Unibet,” Totally Gaming News, October 25, 2016,

<http://totallygaming.com/news/betting/fifas-early-warning-system-signs-integrity-agreement-unibet>.

<sup>4</sup> Darren Heitner, “How legalized sports betting could bring in \$6.03 billion annually by 2023,” Forbes.com, September 27, 2017, <https://www.forbes.com/sites/darrenheitner/2017/09/27/how-legalized-sports-betting-could-bring-in-6-03-billion-annually-by-2023/>.

<sup>5</sup> Matt Friedman, “Gov. Christie signs bill allowing gamblers to place bets on pro, college sports teams,” NJ.com, January 17, 2012,

[http://www.nj.com/news/index.ssf/2012/01/gov\\_christie\\_signs\\_bill\\_allowi\\_4.html](http://www.nj.com/news/index.ssf/2012/01/gov_christie_signs_bill_allowi_4.html).

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- <sup>6</sup> *New York v. United States*, 505 U.S. 144 (1992),  
<https://supreme.justia.com/cases/federal/us/505/144/case.pdf>.
- <sup>7</sup> *Christie v. National Collegiate Athletic Association*, 832 F.3d 389 (3<sup>rd</sup> Cir. 2016) *cert granted* (U.S. July 27, 2017) (No. 16-476).
- <sup>8</sup> *Prigg v. Com. of Pennsylvania*, 41 U.S. 539, 541 (1842).
- <sup>9</sup> Legal Sports Report, DFS Partnership / Sponsorship Tracker, accessed September 8, 2017,  
<https://www.legalsportsreport.com/dfs-sponsorship-tracker/>.
- <sup>10</sup> Senate report no. 102-248, Professional and Amateur Sports Protection (1991), p. 5,  
[https://ipmall.law.unh.edu/sites/default/files/hosted\\_resources/SportsEntLaw\\_Institute/Congressional%20Reports%20and%20Hearings/Senate\\_Report%20102\\_248.docx](https://ipmall.law.unh.edu/sites/default/files/hosted_resources/SportsEntLaw_Institute/Congressional%20Reports%20and%20Hearings/Senate_Report%20102_248.docx).
- <sup>11</sup> While Nevada is the only state with a legal scheme for single-game sports gambling in the Union, according to Florida State University Professor Ryan M. Rodenberg's analysis of legislative history, "no fewer than nine states" are exempt from PASPA's prohibition in some way. Ryan M. Rodenberg and John T. Holden, "Sports Betting has an Equal Sovereignty Problem," *Duke Law Journal*, Vol. 67 (2017), pp. 1-39,  
<https://dlj.law.duke.edu/2017/06/sports-betting-has-an-equal-sovereignty-problem/>.
- <sup>12</sup> *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).
- <sup>13</sup> Rodenberg and Holden.
- <sup>14</sup> Steven Titch and Michelle Minton, "Time to End the Madness around March Madness," *OnPoint* No. 224, Competitive Enterprise Institute, March 2, 2017,  
<https://cei.org/content/time-end-madness-around-march-madness>.
- <sup>15</sup> Andrew Beyer, "Commentary: Betting bill hard to understand," *Washington Post*, November 16, 1991, p. G9,  
[http://articles.latimes.com/1991-11-17/sports/sp-219\\_1\\_sports-betting-measure](http://articles.latimes.com/1991-11-17/sports/sp-219_1_sports-betting-measure).
- <sup>16</sup> American Gaming Association, "Gaming industry shines light on national consumer protection week," news release, March 8, 2017, <https://www.americangaming.org/newsroom/press-releasess/gaming-industry-shines-light-national-consumer-protection-week>.