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# Off the Board: *NCAA v. Christie* Challenges Congress to “Move the Line” on the Professional and Amateur Sports Protection Act

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## Abstract

*NCAA v. Christie*, a recent landmark sports-betting case, is making its way through the federal courts and reigniting the fight for sports-betting opportunities in the United States. The Professional and Amateur Sports Protection Act (PASPA) is at the center of the dispute in that case. PASPA currently allows only four U.S. states to conduct sports-betting schemes in their casinos. Even if PASPA is held to be constitutional after *NCAA v. Christie* plays out in the courts, Congress should modify PASPA to allow states to regulate their own sports-betting enterprises. Without modification, billions of dollars in tax revenues and income from legitimate sports-betting industries that could go to the United States instead will continue to go to offshore Internet operations, back-room book makers, and organized crime. Sports bettors in the United States who do not live in or frequent one of the four states that sanction sports betting instead turn to offshore and illegal outfits to place their bets. Courts have struggled to develop an effective solution of obtaining jurisdiction over foreign entities that license gambling websites. However, with minimal enforcement power to regulate foreign and illegal betting outfits, it is time now to modify PASPA to grant every U.S. state an opportunity to use revenue-generating sports betting to relieve debt from their current fiscal budgets. Instead of outlawing 46 states from conducting their own sports-betting schemes, Congress should modify PASPA to allow each state to decide for itself whether it

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wants to sanction a sports-betting scheme within its jurisdiction. By allowing each state to experiment as a laboratory with a sports-betting scheme—tailored to each state’s specific needs—a national solution will emerge, which in time can be implemented into more appropriate and effective federal regulation.

### Table of Contents

I.	INTRODUCTION .....	376
II.	THE CURRENT STATE OF SPORTS BETTING IN THE UNITED STATES.....	382
	A. Sports Betting Is a Robust Enterprise in the United States.....	382
	B. Gamblers Use the Internet to Place Their Sports Bets.....	383
	C. Territorial Jurisdictional Problems with Regulating Internet Gambling.....	385
III.	FEDERAL LAWS THAT PREVENT STATES FROM LEGALIZING SPORTS BETTING .....	386
	A. Professional and Amateur Sports Protection Act.....	387
	1. Pre-PASPA Opposition .....	389
	2. New Jersey’s Case (2009): <i>Interactive Media             Entertainment &amp; Gaming Association, Inc. v. Holder</i> .....	390
	3. Delaware’s Case (2009): <i>Office of the Commissioner of             Baseball v. Markell</i> .....	391
	B. Unlawful Internet Gambling Enforcement Act.....	393
IV.	<i>NCAA v. CHRISTIE</i> .....	395
V.	REASONS TO ALLOW STATES TO LAWFULLY REGULATE SPORTS- BETTING SCHEMES .....	397
	A. States as Laboratories for Experiment.....	399
	B. How States Can Benefit from Sports Betting .....	402
VI.	CONCLUSION.....	404

#### I. INTRODUCTION

Congress should modify the Professional and Amateur Sports Protection Act<sup>1</sup> (PASPA) to allow each state to decide whether to sanction sports betting in its jurisdiction. Each state would act as a laboratory for sports betting, and a national solution can emerge, which in time can be implemented into more appropriate and effective federal regulation. Discourse on the legitimacy of PASPA is not new,<sup>2</sup> but a

1. 28 U.S.C. §§ 3701–3704 (2006).

2. See, e.g., Anthony G. Galasso, Jr., Note, *Betting Against the House (and Senate): The Case for Legal, State-Sponsored Sports Wagering in a Post-PASPA World*, 99 KY. L.J. 163 (2010); Eric Meer, Note, *The Professional and Amateur Sports Protection Act (PASPA): A Bad Bet For the States*, 2 UNLV GAMING L.J. 281 (2011); Erica N. Reib, Comment, *Ante Up or Fold: What Should Be Done About Gambling in College Sports?*,

recent landmark sports-betting case filed by the National Collegiate Athletic Association (NCAA) and the four major sports leagues (Major League Baseball (MLB), the National Basketball Association (NBA), the National Football League (NFL), and the National Hockey League (NHL))<sup>3</sup>—and backed by the Department of Justice—is making its way through the federal courts and is reigniting the fight for sports-betting opportunities in the United States. The lawsuit, seeking to prevent New Jersey from bringing Las Vegas-style sports betting to its Atlantic City casinos by enjoining New Jersey from implementing its Sports Wagering Law,<sup>4</sup> alleges that the New Jersey law violates PASPA.<sup>5</sup>

However, the problems with PASPA go beyond those being addressed in this “fight for the future of American sports gambling”<sup>6</sup> playing out in *NCAA v. Christie*.<sup>7</sup> PASPA has lost its relevancy in today’s age of Internet gambling. The policies<sup>8</sup> favored by Congress

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21 MARQ. SPORTS L. REV. 621 (2011); Chil Woo, Note, *All Bets Are Off: Revisiting the Professional and Amateur Sports Protection Act (PASPA)*, 31 CARDOZO ARTS & ENT. L.J. 569 (2013); Michael C. Macchiarola, *Rethinking Sports Wagering*, 85 IND. L.J. SUPPLEMENT 1 (2010), <http://bit.ly/HVmYn5>.

3. See Complaint for Declaratory & Injunctive Relief, *NCAA v. Christie*, 926 F. Supp. 2d 551 (D.N.J. 2013) (No. 12-4947(MAS)(LHG)) [hereinafter *Christie Complaint*], available at <http://bit.ly/1amwDOa>.

4. N.J. STAT. ANN. §§ 5:12A-1 to -6 (West 2012).

5. See *Christie Complaint*, *supra* note 3, at 2.

6. Kevin Braig, *NCAA v. Christie: Administrative Law Point May Determine Future of Sports Betting*, DINSMORE & SHOHL LLP (Feb. 20, 2013), <http://bit.ly/1amwJVX>.

7. The NCAA and the other leagues allege that “[g]ambling on amateur and professional sports threatens the integrity of” sports and is “fundamentally at odds” with the principles of integrity associated with sports, and that the proliferation of sports gambling “threatens to harm the reputation” of the leagues and could “adversely affect the way the public views amateur and professional sports.” See *Christie Complaint*, *supra* note 3, at 3. New Jersey counters that the NCAA and the professional leagues lack standing to enforce PASPA and that PASPA is unconstitutional because it treats states unfairly and “commandeer[s]” a state’s right by requiring local officials to ban sports gambling. Verified Answer & Affirmative Defenses of Defendant-Intervenor New Jersey Thoroughbred Horsemen’s Ass’n, Inc. at 14, *NCAA v. Christie*, 926 F. Supp. 2d 551 (No. 12-4947(MAS)(LHG)).

8. The policies favored by Congress when it enacted PASPA in 1992 that are part of the legislative record includes:

The spread of legalized sports gambling would change forever—and for the worse—what [professional and amateur sports] 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.

. . . .

Teenage gambling-related problems are increasing. Of the approximately 8 million compulsive gamblers in America, 1 million of them are under 20.

when it enacted PASPA in 1992 require Congress to update the statute and accept that it is ineffective.

Americans *illegally* wager between \$80 billion and \$380 billion per year on sports.<sup>9</sup> Foreign and illegal outfits are thriving in this market at the expense of the United States because of outdated and ineffective laws.<sup>10</sup> In 1992, Congress enacted PASPA<sup>11</sup> to curtail the growth of teenage gambling and to protect the integrity of our national pastimes by suppressing the development of sports gambling.<sup>12</sup> However, with the rise of sports-betting websites and illegal sports-betting schemes, PASPA has failed to achieve its goals of suppressing the development of sports gambling and, worse, has denied needed revenues for states. Congress should modify PASPA to allow each state to determine for itself whether its citizens find sports betting repugnant or whether they want to allow this type of gambling in their backyards.<sup>13</sup> With states having unique

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Governments should not be in the business of encouraging people, especially young people, to gamble.

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Sports gambling is a national problem. The harms it inflicts are felt beyond the borders of those States that sanction it. The moral erosion it produces cannot be limited geographically. Once a State legalizes sports gambling, it will be extremely difficult for other States to resist the lure. The current pressures in such places as New Jersey . . . to institute casino-style sports gambling illustrate the point. Without Federal legislation, sports gambling is likely to spread on a piecemeal basis and ultimately develop irreversible momentum. . . . “[T]he interstate ramifications of sports betting are a compelling reason for federal legislation.”

....

Although the committee firmly believes that all such sports gambling is harmful, it has no wish to apply this new prohibition retroactively to [States] which instituted sports lotteries prior to the introduction of our legislation.

S. REP. NO. 102-248, at 5–8 (1991), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3555–59.

9. NAT’L GAMBLING IMPACT STUDY COMM’N, FINAL REPORT 2-14 (1999) [hereinafter GAMBLING REPORT], *available at* <http://bit.ly/9EZYbg>. Although the statistics cited from this report are from 1999, there are several other statistics throughout this Article that will show that illegal sports betting is still a robust enterprise in the United States.

10. For example, in 2010, foreign online gambling revenues totaled approximately \$30 billion. DAVID O. STEWART, ONLINE GAMBLING FIVE YEARS AFTER UIGEA 4 (2011), *available at* <http://bit.ly/19zZv0W>.

11. *See* Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227 (1992).

12. Bill Bradley & Serene Murphy, *The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORT L. 5, 5–6 (1992).

13. This modification could take the form of a moratorium on PASPA, similar to the House of Representatives bill H.R. 3797 introduced by Rep. Frank LoBiondo in January 2012 to permit a four-year period for States to enact statutes that allow for sports betting; these statutes would be exempt from PASPA following the four-year moratorium.

needs, they can act as laboratories for experimentation.<sup>14</sup> As a result, a national approach to regulating sports betting can emerge.<sup>15</sup> Allowing states to act as laboratories for experiment is a progressive, small-scale, low-risk undertaking,<sup>16</sup> and is a solution that could best help states capture billions of dollars from sports betting currently being sent to offshore and illegal outfits.<sup>17</sup>

Although so much money is wagered illegally each year on sports betting, Americans legally wagered only \$2.3 billion a year on sports betting in Nevada in 1998.<sup>18</sup> This difference shows how Americans want to wager on sports betting, but are limited in how they may do so legally. In 2006, Congress recognized this rise in illegal sports betting and enacted the Unlawful Internet Gambling Enforcement Act (UIGEA).<sup>19</sup> Congress wanted to curtail the rise of sports-betting websites by preventing banks and other financial institutions from transmitting funds from the United States to Internet casinos and to make lotteries based on sports events illegal.<sup>20</sup> However, UIGEA has been ineffective in slowing the rise of Internet sports betting because of the way sports-betting websites can operate.<sup>21</sup>

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14. See Maeva Marcus, *Louis D. Brandeis and the Laboratories of Democracy*, in *FEDERALISM AND THE JUDICIAL MIND: ESSAYS ON AMERICAN CONSTITUTIONAL LAW AND POLITICS* 75, 77–78, 86–87 (Harry N. Scheiber ed., 1992).

15. If Congress wants to continue to have a national approach to regulating sports betting, it can see how states have successfully adopted new gambling laws, what has been the best and most effective approach to regulating legal sports betting, and adopt that scheme. The national approach that emerges could either be for the United States to adopt a sports-betting scheme akin to one of the statutes enacted by a state after the states have had a chance to experiment; or, the national approach could be to repeal PASPA altogether and leave sports gambling regulation to the several states.

16. See Marcus, *supra* note 14, at 78, 87.

17. Although Americans are wagering somewhere between \$80 billion and \$380 billion a year illegally on sports betting, only a modest amount of money is being wagered legally. See *GAMBLING REPORT*, *supra* note 9, at 2-14.

18. *Id.*

19. 31 U.S.C. §§ 5361–5367 (2006).

20. *Id.*

21. A PricewaterhouseCoopers study found that UIGEA is a failure because millions of Americans continue to gamble online every single day, and there has been an increase in online gaming participation by Americans despite UIGEA. *Representative Jim McDermott Labels UIGEA a Failure and Calls for Regulation*, *POKERROOMREVIEW* (Jan. 31, 2008), <http://bit.ly/1dP2Ptr>; see also Hillary LaClair, *\$52 Billion Lost to the UIGEA*, *SPORTSINTENSITY* (Feb. 25, 2006), <http://bit.ly/1gYQsiS>. In fact, Jeffrey Sandman, spokesman for the Safe and Secure Internet Gambling Initiative says: “The current ban on Internet gambling has proved to be a failure as millions of Americans continue to gamble online each day.” *Prohibition on Internet Gambling a Failure: U.S. Federal Reserve, Treasury Department and Financial Service Companies Call Proposed Rules Unworkable*, *SAFE & SECURE INTERNET GAMBLING INITIATIVE*, (Feb. 26, 2009), <http://bit.ly/1aBXC06>.

Internet sports betting is international and no domestic law can regulate this global enterprise. Internet sports-betting enterprises can conduct their business and locate their servers outside of the United States and have their websites accessible from anywhere in the world without having a physical presence established in any one place.<sup>22</sup> The international community has struggled to obtain jurisdiction over these Internet sports-betting houses.<sup>23</sup> Without effective regulation over these foreign entities, sports-betting enterprises will continue to prosper by deriving revenues from sports betting that could be going to our domestically housed casinos—like those in Atlantic City, New Jersey—which, in turn, could generate benefit for the states in tax revenue and income. Instead, PASPA and UIGEA indirectly steer billions of dollars to illegal and foreign sports-betting enterprises.<sup>24</sup>

Therefore, Congress should modify PASPA to allow states to regulate their own sports-betting enterprises. Without modification, billions of dollars in tax revenues and income from legitimate sports-betting industries that could go to the United States instead will continue to go to offshore Internet operations, back-room book makers, and organized crime.<sup>25</sup> Most sports bettors in the United States, who do not live in, or frequent, one of the four states that sanction sports betting in compliance with PASPA,<sup>26</sup> instead turn to offshore and illegal outfits to

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22. See Kevin A. Meehan, Note, *The Continuing Conundrum of International Internet Jurisdiction*, 31 B.C. INT'L & COMP. L. REV. 345, 346 (2008); see also Ronald J. Mann, *Emerging Frameworks for Policing Internet Intermediaries*, J. INTERNET L., Dec. 2006, at 1. For example, the sports-betting website BetPhoenix is licensed by Costa Rica and has a server located in the United Kingdom, but does not have a physical presence established in any one place. See *BetPhoenix.com*, URLMETRICS, <http://bit.ly/183NJSC> (last updated Nov. 13, 2013); *FAQs, BETPHOENIX*, <http://bit.ly/183NtTA> (last visited Nov. 18, 2013). Similarly, BetUS Sportsbook is licensed in Central America and the Netherlands Antilles and has a server located in Panama, but does not have a physical presence established in any one place. See *BetUSCasino.com*, URLMETRICS, <http://bit.ly/1fPjIFy> (last updated Nov. 13, 2013); *FAQs, BETUS*, <http://bit.ly/1dADpp> (last visited Nov. 18, 2013).

23. See Tim Gerlach, Note, *Using Internet Content Filters to Create E-Borders to Aid International Choice of Law and Jurisdiction*, 26 WHITTIER L. REV. 899, 907–12 (2005); see also Meehan, *supra* note 22, at 348–49.

24. See, e.g., Gary Payne, *Sports Betting Already Happens; Government Might As Well Regulate It*, U.S. NEWS & WORLD REPORT (June 15, 2012), <http://bit.ly/HZLBiM>; Gillian Spear, *Think Sports Gambling Isn't Big Money? Wanna Bet?*, NBCNEWS.COM (July 15, 2013, 4:16 AM), <http://nbcnews.to/1bCyrCC>.

25. See generally GAMBLING REPORT, *supra* note 9.

26. In considering PASPA, the Senate Judiciary Committee stated that “[a]lthough the committee firmly believes that all such sports gambling is harmful, it has no wish to apply this new prohibition retroactively . . . or to prohibit lawful sports gambling schemes . . . that were in operation when the legislation was introduced.” S. Rep. No. 102-248, at 8, reprinted in 1992 U.S.C.C.A.N. 3553, 3559. Accordingly, PASPA provided the following exceptions:

(a) Section 3702 shall not apply to—

place their bets.<sup>27</sup> Courts have struggled to develop an effective solution of obtaining jurisdiction over foreign entities that license gambling websites.<sup>28</sup> With minimal enforcement power to regulate foreign and illegal betting outfits, it is time now to modify PASPA to allow every U.S. state an opportunity to use revenue-generating sports betting to relieve debt from their current fiscal budgets.

Part II of this Article summarizes the current state of sports betting in the United States, including the impact that sports-betting websites have had on the industry, and describes the difficulties of regulating sports-betting websites. Part III reviews the laws that prevent legalized sports betting in the United States, including some past and present

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- (1) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990;
  - (2) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity where both—
    - (A) such scheme was authorized by a statute as in effect on October 2, 1991; and
    - (B) a scheme described in section 3702 . . . actually was conducted . . . at any time during the period beginning September 1, 1989, and ending October 2, 1991, pursuant to the law of that State or other governmental entity;
  - (3) a betting, gambling, or wagering scheme . . . conducted exclusively in casinos located in a municipality, but only to the extent that—
    - (A) such scheme or a similar scheme was authorized, not later than one year after the effective date of this chapter, to be operated in that municipality; and
    - (B) any commercial casino gaming scheme was in operation in such municipality throughout the 10-year period ending on such effective date pursuant to a comprehensive system of State regulation. . . .

28 U.S.C. § 3704 (2006).

Section 3704 “grandfathered in” those lawful sports gambling schemes in operation when PASPA was enacted. PASPA’s “grandfather clause” resulted in exceptions for four states: Delaware, Oregon, Montana and Nevada. Additionally, New Jersey was the only other state qualified to establish *sports* gambling within the one-year period outlined in Section 3704(a)(3). However, New Jersey chose not to exercise that opportunity within the allotted window.

27. And, even those gamblers who live in Delaware, Montana, and Oregon likely have to place *illegal* sports bets because, although these are three of the four states that allow some sports betting under PASPA, these states only offer parlay bets and not single-game bets.

28. See *Interactive Media Entm’t & Gaming Ass’n, Inc. v. Attorney Gen.*, 580 F.3d 113, 116–17 (3d Cir. 2009); see also *Stevo Design, Inc. v. SBR Marketing Ltd.*, No. 2:11-CV-00304-LRH-CWH, 2013 WL 4648581, at \*2–3 (D. Nev. Aug. 29, 2013); *3M Co. v. Christian Invs. LLC*, No. 1:11cv0627 (TSE/JFA), 2012 WL 5531343, at \*4–5 (E.D. Va. Aug. 2, 2012); *United States v. Lombardo*, 639 F. Supp. 2d 1271, 1289–90 (D. Utah 2007); *United States v. BETONSPORTS PLC*, No. 4:06CV01064 CEJ, 2006 WL 3257797, at \*2 (E.D. Mo. Nov. 9, 2006).

challenges to PASPA and the earlier Delaware and New Jersey challenges to PASPA, which paved the way for *NCAA v. Christie*. Part IV briefly discusses *NCAA v. Christie*, what issues are at the forefront of the arguments in that case, and what is at stake for the future of American sports gambling. Part V explains why, regardless of the outcome in *NCAA v. Christie*, individual states should be able to experiment with sports betting, primarily so revenue and income can remain in the United States instead of being sent to overseas and illegal sports-betting enterprises; this Part concludes by summarizing the benefits of regulating and taxing sports betting.

## II. THE CURRENT STATE OF SPORTS BETTING IN THE UNITED STATES

PASPA currently prevents 46 U.S. states from conducting sports-betting schemes.<sup>29</sup> Of the four states that do allow sports betting, Nevada is the only one without restrictions.<sup>30</sup> With limited access to traditional sports-betting schemes in U.S. casinos, sports bettors are turning to sports-betting websites sponsored by offshore companies to make their bets. Despite efforts by federal and state governments to limit Internet gambling, the industry has continued to thrive as one of the most successful Internet industries.<sup>31</sup> A substantial reason for the success of Internet gambling is that the international community has made little progress in its efforts in developing a uniform standard of Internet jurisdiction.<sup>32</sup> As a result, domestic laws have little to no effect on sports-betting websites licensed by offshore entities.<sup>33</sup>

### A. *Sports Betting Is a Robust Enterprise in the United States*

Sports betting could be an enormous source of revenue for states if they were allowed to regulate their own sports-betting schemes. Traditional casinos and state lotteries that include sports-betting services generate nearly \$85 billion in annual revenues.<sup>34</sup> Nevada has the largest

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29. See Michael P. Fecteau, *All for Integrity or All for Naught: The Battle Over State Sponsored Sports Betting*, 7 GAMING L. REV. 43, 45 (2003).

30. *Id.*

31. See generally Keith Furlong, *Gaming Continues as an Internet Success Story, Despite Obstructions from the U.S. Government: The Industry Uses Self-Regulation To Fill the Void Left by Governmental Inaction*, 9 GAMING L. REV. 211 (2005) (describing how gambling on the Internet has become such a successful industry).

32. See Meehan, *supra* note 22, at 348–49; see also Eric J. Carlson, Note, *Drawing Dead: Recognizing Problems with Congress' Attempt to Regulate the Online Gambling Industry and the Negative Repercussions to International Trade*, 32 SUFFOLK TRANSNAT'L L. REV. 135 (2008).

33. See, e.g., Carlson, *supra* note 32, at 154–55.

34. Andrea L. Marconi et al., *Facilitating Financial Transactions in the Age of Internet Gambling: Compliance with the Unlawful Internet Gambling Enforcement Act*,



sports-betting enterprise in the United States with over \$3.45 billion wagered in its sportsbooks alone in 2012, which netted these sportsbooks a total of \$170 million in gross revenue.<sup>35</sup> With somewhere between \$80 billion to \$380 billion wagered illegally on sports every year,<sup>36</sup> it is evident that regardless of the laws, sports bettors will find a way to place their bets. With PASPA allowing only four states some type of sports betting within their borders, gamblers are forced to find different avenues to place their bets.

*B. Gamblers Use the Internet to Place Their Sports Bets*

Illegal sports gambling in the United States has increased significantly since the advent of the Internet and the possibilities of e-commerce opportunities have made offshore sportsbooks and gambling websites accessible to bettors worldwide, including the in United States, where sports betting is largely illegal. The number of countries that have legalized some form of Internet gambling shows how vast this industry really is. There are approximately 85 countries that offer legal but regulated sports betting.<sup>37</sup> In 2006, 500 companies operated over 2,300 gambling websites worldwide, and over 80 countries have legalized Internet gambling.<sup>38</sup> In 2005, Internet sports gambling saw \$4.29 billion in revenues.<sup>39</sup> Compare that to the \$1.7 billion in online sports-betting revenues in 2001.<sup>40</sup> Some of these sports-betting websites include BetPhoenix, BetUS.Sportsbook, the Greek Sports Book, Sports.com, and Bookmaker SportsBook.<sup>41</sup> With the increased regulation of sports betting in the United States, most sports bettors are turning to offshore

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126 Banking L.J. 602, 602–03 (2009) (citing Frank Vandall, *Why We Are Outraged: An Economic Analysis of Internet Gambling*, 7 RICH. J. GLOBAL L. & BUS. 291, 291 (2008); Maria Starr, Internet Gambling Revenues Up 28 Percent, GAMBLING BEAT (Mar. 1, 2006), <http://bit.ly/17GIXex>); Starr, *supra*.

35. *Sports Wagering*, AM. GAMING ASS'N, <http://bit.ly/y92TSj> (last visited Oct. 23, 2013) [hereinafter *Gaming Facts*].

36. GAMBLING REPORT, *supra* note 9, at 2–14.

37. STEWART, *supra* note 10, at 4.

38. Michael McCarthy & Jon Schwartz, *New Legislation May Pull the Plug on Online Gambling*, USA TODAY (Oct. 3, 2006, 3:29 AM), <http://usat.ly/Id4VIE>; see also Jason K. Gross, *Internet Gambling & the Law—Prohibition vs. Regulation*, METROPOLITAN CORP. COUNS., Aug. 2006, at 11, available at <http://bit.ly/19AmDwj> (citing approximately 2,100 sites and 300 companies outside the United States).

39. *Gaming Facts*, *supra* note 35.

40. *Id.*

41. See, e.g., *Online Sportsbooks & Racebooks*, ONLINE CASINO CITY, <http://bit.ly/1jhe0w7> (last visited Oct. 30, 2013). Many of these sports-betting websites are licensed by the United Kingdom, the Netherlands Antilles, Kahnawake, and Antigua and Barbuda. See JAMIE WIEBE ET AL., AN OVERVIEW OF INTERNET GAMBLING REGULATIONS 16 (2008), available at <http://bit.ly/1aNr2w4>; *Gambling Jurisdictions for Online Operators*, GAMBLING SITES (last visited Nov. 18, 2013), <http://bit.ly/17hIVr6>.

sports-betting websites or to illegal gambling outfits to place their bets. FBI estimates of the amount illegally wagered bets on March Madness provide evidence of this trend;<sup>42</sup> “[t]he FBI estimates that more than \$2.5 billion is illegally wagered annually on March Madness each year.”<sup>43</sup> Additionally, more bets are placed on the Super Bowl than on any other single game;<sup>44</sup> approximately \$98.9 million was wagered legally on the Super Bowl in 2013 in Las Vegas casinos alone.<sup>45</sup> Gambling websites continue to reap a large portion of these profits from Americans, with an estimated 80 percent of Internet gambling profits coming from the United States alone.<sup>46</sup> Regulating these websites has proven problematic because of the obstacles associated with obtaining jurisdiction over them. Without a uniform standard for obtaining jurisdiction over these websites, it will be difficult to enforce judgments against them if they violate domestic law.<sup>47</sup>

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42. March Madness is the NCAA Division 1 basketball post-season tournament to determine the national championship team; it is a once-a-year event in which 68 college basketball teams participate.

43. *Gaming Facts*, *supra* note 35.

44. *Id.*

45. *Id.*

46. Daniel Schorn, *I-Gaming: Illegal And Thriving*, CBS NEWS (Nov. 20, 2005), <http://bit.ly/I1Bv0Z>; see also Bill Britt, *Barred in US; Set to Blossom in UK*, *MARKETING*, Oct. 11, 2006, at 21, available at <http://bit.ly/I1z3rg> (“The world’s leading online gambling companies may be based in the UK and Gibraltar, but until now, the bulk of their revenues have come from the US.”); Gross, *supra* note 38, at 11 (“Despite the international locales of Internet gaming firms, they derive most of their income from Americans.”).

47. See Joel Weinberg, Comment, *Everyone’s a Winner: Regulating, Not Prohibiting, Internet Gambling*, 35 SW. U. L. REV. 293, 307 (2006). Weinberg notes:

Since all Internet gambling websites have located themselves outside the United States, any judgment would go unenforced, unless the nation in which the Internet gambling operator was located gave full faith and credit to the American court’s judgment. Foreign governments which license and draw revenue from Internet gambling would most likely not enforce an American judgment against an Internet gambling operator, as enforcement would have a negative effect on profits.

*Id.* (footnote omitted). See also Kraig P. Grahmann, *Betting on Prohibition: The Federal Government’s Approach to Internet Gambling*, 7 NW. J. TECH. & INTELL. PROP. 162, 165 (2009) (“[T]he government usually cannot remedy [the] deceptive practices [of Internet casinos] because all Internet casinos operate outside the jurisdiction of the United States.”); Joseph J. McBurney, Note, *To Regulate or to Prohibit: An Analysis of the Internet Gambling Industry and the Need for a Decision on the Industry’s Future in the United States*, 21 CONN. J. INT’L L. 337, 357 (2006) (describing the United Kingdom’s approach to Internet gambling).

C. *Territorial Jurisdictional Problems with Regulating Internet Gambling*

National regulation is one approach to Internet gambling, but Internet gambling is an international problem, and without some type of international treaty, resolving issues of international jurisdiction will prove difficult.<sup>48</sup> Internet gambling cases have caused problems for traditional international jurisdictional law because most gambling websites are licensed by foreign entities, resulting in conflicts among nations due to differing substantive laws about Internet regulations and policies.<sup>49</sup> The international community has made little progress toward developing a uniform standard for Internet jurisdiction, causing domestic laws to have a minimal effect on foreign entities that license gambling websites.<sup>50</sup> The convenience of access to the Internet is part of this problem: “The touch of a few keystrokes enables people to communicate, engage in commerce, and interact with others around the world. This ability to cross international borders without leaving one’s living room has created a jurisdictional void that has yet to be filled.”<sup>51</sup>

The geography of the Internet world poses a serious problem for jurisdiction.<sup>52</sup> An Internet gambling company can conduct its businesses and locate its servers in a certain location with a website accessible from anywhere in the world, without having a physical presence established in a certain area.<sup>53</sup> It is extremely difficult to identify the location of a particular user of gambling websites, which is only exacerbated by gambling websites’ tendency to hide their locations.<sup>54</sup> In the end:

Traditional principles of international jurisdiction, particularly territoriality, are poorly suited for this environment of geographic anonymity. Courts have struggled to develop a satisfactory solution [to the problem of obtaining jurisdiction over foreign entities that license Internet gambling websites], yet no progress has been made toward a uniform global standard of Internet jurisdiction.<sup>55</sup>

Without an international treaty for Internet gambling, foreign countries will continue to undercut the United States’ efforts to regulate Internet gambling. Domestic laws have put a stranglehold on the efforts

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48. See generally Meehan, *supra* note 22 (describing the major issues involved with international Internet jurisdiction).

49. *Id.* at 345–46; 348–49.

50. *Id.*

51. *Id.* at 345 (footnote omitted).

52. *Id.* at 348–49.

53. Meehan, *supra* note 22, at 349; see also Mann, *supra* note 22, at 9.

54. Meehan, *supra* note 22, at 349; see also Mann, *supra* note 22, at 9.

55. Meehan, *supra* note 22, at 349.

of individual states to sanction some forms of sports betting with little to no effect on foreign and illegal sports-betting enterprises.

### III. FEDERAL LAWS THAT PREVENT STATES FROM LEGALIZING SPORTS BETTING

Several domestic laws have attempted to regulate gambling in the United States.<sup>56</sup> The Article's focus is on PASPA and UIGEA, while

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56. Other domestic laws include the Wire Act, 18 U.S.C. § 1084 (2006); the Travel Act, 18 U.S.C. § 1952 (2006); and the Illegal Gambling Business Act, 18 U.S.C. § 1955 (2006).

The Wire Act was enacted well before the rise of broadband technology, email, and websites, and has been found to be the backbone of federal gambling law; it was “one of the first laws used to question the legality of Internet gambling[.]” *See* Grahmann, *supra* note 47, at 167. The Wire Act prohibits those “engaged in the business of betting or wagering [from] knowingly us[ing] a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers[.]” or for any “wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting the placing of bets or wagers” on any sporting event or contest. 18 U.S.C. § 1084(a). Ambiguities and limitations on the Wire Act prevent it from having a significant effect on prohibiting Internet gambling. *See, e.g.,* Weinberg, *supra* note 47, at 303–04. Weinberg states:

For example, in *In re Mastercard Int'l, Inc.*, . . . the Fifth Circuit Court of Appeals interpreted the Wire Act to cover only sporting events, which excludes Internet gambling casinos from the Wire Act. Furthermore, the Wire Act's language, “transmission of a wire communication,” is ambiguous because it could be construed to include both receiving and sending information, or only sending information.

*Id.* *See also* Grahmann, *supra* note 47, at 167–68 (discussing whether the Wire Act applies to non-sports betting and to wireless technologies); Michael J. Vener, Comment, *Internet Gambling Law: Is Prohibition Really Good Policy?*, 15 SW. J.L. & TRADE AM. 199, 203 (2008) (providing that one of the Wire Act's main ambiguities comes from the language “those engaged in the business[.]” which has led courts to conclude that the Wire Act applies only to businesses and to not private individuals); Frank Ahrens, *U.S. Outlaws Internet Gambling*, SEATTLE TIMES, Oct. 14, 2006, <http://bit.ly/IIBCJX> (“Courts have disagreed [with legislators], saying betting on sports teams over the Internet is illegal, but wagering on casino games, such as poker, is not.”); Marc S. Friedman & Athena Cheng, *From Poker to the Pokey: The Laws Governing Online Gambling*, LAW.COM (July 14, 2006), <http://bit.ly/1fPAxQR>.

The Travel Act prohibits using a facility in interstate commerce to intentionally conduct an unlawful activity. 18 U.S.C. §1952(a); *see also* Vener, *supra*, at 204 (noting that two prongs must be met to constitute a violation of the Travel Act—the defendant must be a business and that business must violate federal or state law). The Travel Act suffers from some of the same problems as the Wire Act, specifically that only operators, and not bettors, can violate the Travel Act. *See* Vener, *supra*, at 204.

The Illegal Gambling Business Act makes it a crime to conduct a gambling enterprise that is prohibited in the state in which the activity occurs if the enterprise “involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business[.]” and if it is in continuous operations for more than 30 days or has a gross revenue of \$2,000 in a single day. 18 U.S.C. § 1955(a)–(b). Because the Illegal Gambling Business Act and the Travel Act depend on the illegality of Internet gambling in the states, they have ultimately been unsuccessful in curtailing Internet gambling because whether Internet gambling is illegal in the states remains an open

considering the past and present challenges to PASPA, and the ineffectiveness of UIGEA to prevent Internet sports gambling.

A. *Professional and Amateur Sports Protection Act*

PASPA is the major federal law that stands in the way of legalized sports betting. Congress, pursuant to an 88-to-5 vote in the Senate,<sup>57</sup> enacted PASPA in 1992 to stop the spread of gambling on professional and amateur sports. To that end, PASPA made it unlawful for a state to authorize a sports wagering system, except for the states with preexisting sports wagering laws. The proponents of the bill worried that state-sanctioned sports betting would send the message to youth that sports are not about sportsmanship and personal achievement, but about money.<sup>58</sup> The proponents of PASPA opined that making sports betting illegal in the United States would prevent our national pastimes from being compromised by sports betting and help curtail the problems with gambling among the American youth.<sup>59</sup> These proponents were also concerned about the association between sports betting and organized crime and corruption.<sup>60</sup> Ultimately, PASPA's proponents argued that the

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question. Ultimately, the Acts overlook and fail to address the applicable "process by which electronic gaming fundamentally occurs." See John D. Andrie, *A Winning Hand: A Proposal for an International Regulatory Schema with Respect to the Growing Online Gambling Dilemma in the United States*, 37 VAND. J. TRANSNAT'L L. 1389, 1397 (2004).

57. See U.S. Senate Roll Call Votes, 102nd Congress—2nd Session, U.S. SENATE: LEGISLATION & RECORDS, <http://1.usa.gov/1gYRoDN> (last visited Oct. 30, 2013).

58. *Professional and Amateur Sports Protection Act of 1992: Hearing on H.R. 74 Before the Subcomm. on Econ. & Commercial Law of the H. Comm. on the Judiciary*, 102d Cong. (1991) [hereinafter *Hearings*] (citing Ricardo Chavira, *The Rise of Teenage Gambling: A Distressing Number of Youths Are Bitten Early by the Betting Bug*, TIME, Feb. 25, 1991, at 78 (reporting that gambling counselors had previously stated that very few of their patients were teenagers, but that around the time of PASPA's enactment, about seven percent of their problem gambling cases involved teenagers)). The author also mentioned two studies that had been conducted on the problems with teenage gambling: one by California psychologist Durand Jacobs, in which Jacobs surveyed 2,700 high school students in four different states and concluded that students are two-and-a-half times more vulnerable to become problem gamblers than adults; another by Henry Lesieur, a sociologist at St. John's University, who revealed that there are eight times as many gambling addicts among college students as among adults. See Chavira, *supra*.

59. See Bradley & Murphy, *supra* note 12, at 5–6.

60. See generally Aaron J. Slavin, Comment, *The "Las Vegas Loophole" and the Current Push in Congress Towards a Blanket Prohibition on Collegiate Sports Gambling*, 10 U. MIAMI BUS. L. REV. 715, 727–29 (2002) (citing *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983)). One notorious scandal was the Boston College point shaving scheme in which Rocco and Anthony Perla paid Boston College center Rick Kuhn a bonus for throwing a game or playing with less than full effort so that they would win by betting against Boston College. For example, if the point spread was Boston College minus 8 (meaning that Boston College would need to win by at least 9 points for a bet on Boston College to be successful), the Perlas would bet against Boston College

revenues earned through sports gambling are not enough to justify the problems it creates.<sup>61</sup>

PASPA provides that it is unlawful for:

(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or

(2) 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.<sup>62</sup>

States are only allowed to conduct sports-betting schemes as they did between 1976 and 1990; if a state did not conduct a sports-betting scheme at that time, it will never be able to conduct a sports-betting scheme unless PASPA is modified.<sup>63</sup>

With so much money being wagered illegally on sports every year, it is evident that PASPA has not curtailed sports betting in the United States.<sup>64</sup> Although proponents of PASPA had good intentions when enacting the law, the Internet has made PASPA obsolete. Sports betting occurs all over the world; with so many websites outside of the United States welcoming sports bets, the only possible solution to restricting the development of sports betting overall would be some type of international law, which is beyond the scope of this project. Frankly, no domestic law can tame an international animal as large as sports betting.

Sports betting persists unregulated through illegal and offshore betting schemes and continues to deprive states of much needed revenues. The fiscal benefits that states can derive from state sanctioned sports-betting schemes now outweigh PASPA's initial, well-intended benefits. Although PASPA is the law, it faced vehement opposition from state lotteries and state legislatures when it was enacted in 1992, and continues to face such opposition.<sup>65</sup>

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and Kuhn would attempt to make Boston College win by less than 9 points. As a result, Kuhn would receive a bonus for his deliberate poor play, usually about \$2,500 per incident. *See id.*

61. S. REP. NO. 102-248, at 7 (1991).

62. 28 U.S.C. § 3702 (2006).

63. *See* Bradley & Murphy, *supra* note 12, at 9–10.

64. *See supra* Part II.A.

65. *See, e.g.,* Bradley & Murphy, *supra* note 12, at 11 n.24.

### 1. Pre-PASPA Opposition

Historically, the federal government has left the regulation of gambling to the states pursuant to states' Tenth Amendment powers, which allow them to regulate intrastate activity.<sup>66</sup> This background prompted Donna Sytek,<sup>67</sup> a member of the New Hampshire House of Representatives who opposed PASPA, to comment:

For Congress to preempt this state authority is an unwarranted and unnecessary intrusion into the affairs of state governments and another blow to principles of federalism. In our view, states must have maximum flexibility in exploring all possible revenue options, including sports lotteries, to balance their budgets and provide needed services.<sup>68</sup>

States need every opportunity to explore revenue-generating avenues in these dire financial times. A recent survey observed that “[t]he 50 states are facing one of the worst fiscal periods in decades.”<sup>69</sup> Instead of allowing a state to determine for itself whether it wants to conduct a sports-betting scheme within its borders, PASPA has left American sports bettors at the whim of illegal and foreign outfits. Also, PASPA discriminates among the states and has, in effect, given Nevada a virtual monopoly on legal sports betting.<sup>70</sup> Without modification, illegal and foreign gambling outfits will continue to prosper on American dollars. Unfortunately for opponents of PASPA, past challenges to gambling statutes have been unsuccessful,<sup>71</sup> and two recent challenges to

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66. See Slavin, *supra* note 60, at 740; see also Bradley & Murphy, *supra* note 12, at 11.

67. Representative Sytek spoke on behalf of the National Conference of State Legislatures.

68. *Hearings*, *supra* note 58, at 62. Thomas O’Heir, Director of the Massachusetts State Lottery, also testified during these hearings: “[I]ssues of lotteries and wagering have traditionally been issues for the states to resolve. . . . Congress should not be telling the states how they can or cannot raise revenue. This is particularly true when Congress is discriminating between the states, as this legislation blatantly does.” *Id.* at 68.

69. NAT’L GOVERNORS ASS’N & NAT’L ASS’N OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF STATES, at vii (June 2009), available at <http://bit.ly/HVzTVV>.

70. See Michael C. Macchiarola, *Securities Linked to the Performance of Tiger Woods? Not Such a Long Shot*, 42 CREIGHTON L. REV. 29, 30 (2008); see also Phil Sheridan, *Hypocrisy on Delaware Sports Betting*, PHILA. INQUIRER, May 19, 2009, at D1 (“If anything, the legal obstacles to sports gambling serve mostly to give Las Vegas a monopoly—which is about as un-American an idea as you can imagine.”).

71. See, e.g., *United States v. Smaldone*, 485 F.2d 1333, 1342 (10th Cir. 1973) (rejecting defendants’ argument that a federal anti-gambling statute violates the Commerce Clause because Congress is attempting to regulate intrastate activities); *United States v. Becker*, 461 F.2d 230, 233 (2d Cir. 1972) (rejecting defendants’ argument that Congress exceeded its power under the Commerce Clause by enacting a federal gambling statute); *United States v. Riehl*, 460 F.2d 454, 458 (3d Cir. 1972)

PASPA from the states of New Jersey and Delaware have also failed, providing the backdrop to *NCAA v. Christie*.

2. New Jersey's Case (2009): *Interactive Media Entertainment & Gaming Association, Inc. v. Holder*

On March 23, 2009, a group that included New Jersey State Senator Raymond Lesniak and representatives from the gaming industries in New Jersey filed a suit to overturn PASPA, arguing that it violates the U.S. Constitution.<sup>72</sup> The plaintiffs contended that PASPA discriminates against New Jersey and violates the Fourteenth Amendment because it allows the four states that had operated sports betting between 1976 and 1990 to continue to do so but does not allow any other states to conduct sports-betting schemes.<sup>73</sup> The plaintiffs also argued that PASPA violates the Fifth Amendment, as it is unduly overbroad and vague.<sup>74</sup> Furthermore, the plaintiffs stated that PASPA violates the Commerce Clause because it fails to impose uniform standards for sports betting throughout the United States.<sup>75</sup> Ultimately, the group's claim was unsuccessful; the case was dismissed for lack of standing.<sup>76</sup>

Senator Lesniak believed that PASPA deprives states of a vast economic endeavor that is enjoyed by foreign Internet licensing companies and illegal outfits, stating that, "[PASPA] deprives the State of New Jersey of over \$100 million of yearly revenues, as well as depriving our casinos, racetracks and Internet operators of over \$500 million in gross income."<sup>77</sup> New Jersey State Senator Jeff Van Drew stated that this cannot await a constitutional court challenge which could take years.<sup>78</sup>

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(rejecting defendants' argument that Congress lacked any rational basis in determining that intrastate gambling affects interstate commerce); *United States v. Harris*, 460 F.2d 1041, 1049 (5th Cir. 1972) (rejecting defendants' argument that the right to regulate local gambling activity is to be reserved to the states).

72. *Interactive Media Entm't & Gaming Ass'n, Inc. v. Holder*, No. 09-1301 (GEB), 2011 WL 802106 (D.N.J. Mar. 7, 2011); see also generally Jon Hurdle, *New Jersey Files Suit on Sports-Betting Ban*, REUTERS (Mar. 23, 2009, 6:20 PM), <http://reut.rs/1Izimo> (summarizing New Jersey's challenge to PASPA).

73. *Id.* See also *Lesniak Announces Sports Betting Lawsuit*, N.J. SENATE DEMOCRATS (Mar. 23, 2009), <http://bit.ly/1aBYyc0> [hereinafter *Lesniak Announcement*].

74. See *Lesniak Announcement*, *supra* note 73.

75. See generally Hurdle, *supra* note 72.

76. See *Holder*, 2011 WL 802106, at \*1.

77. Hurdle, *supra* note 72.

78. See Press Release, N.J. Senate Democratic Office, *Lesniak-Van Drew Constitutional Amendment to Allow for Sports Wagering Advances* (Feb. 8, 2010), available at <http://bit.ly/1dOQiWZ>; Hurdle, *supra* note 72 ("We cannot afford to be naïve about illegal sports betting.").



As of 2009, New Jersey had been unsuccessful in its efforts to implement a sports-betting scheme. Its legislature proposed a bill that would have legalized in-person wagering on sports events in New Jersey casinos, but it was struck down as a violation of PASPA.<sup>79</sup> This defeat was particularly unfortunate because New Jersey faced a budget deficit of \$2.2 billion at the time.<sup>80</sup>

3. Delaware's Case (2009): *Office of the Commissioner of Baseball v. Markell*

Delaware's Governor, Jack Markell, signed into legislation the Sports Lottery Act<sup>81</sup> (the "Delaware Act") that allowed Delaware's current sports-betting operation to expand beyond what it offered between 1976 and 1990.<sup>82</sup> Essentially, the Delaware Act would allow betting on sports other than football, and for single-game bets on football.<sup>83</sup> Governor Markell expected to bring in \$50 million to \$100 million in revenue from the Delaware Act, which would significantly help Delaware's projected \$700 million budget deficit.<sup>84</sup> On July 24, 2009, all major and collegiate sports leagues and associations<sup>85</sup> filed a suit claiming that elements of Delaware's proposed sports-betting scheme violated PASPA.<sup>86</sup> Four days after the complaint was filed, the major and collegiate sports leagues and associations filed for a preliminary injunction.<sup>87</sup>

Delaware argued that its expansion of sports betting did not violate PASPA, interpreting the PASPA exemption to allow the state to expand

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79. See Press Release, N.J. Senate Democratic Office, *supra* note 78, see also *Lesniak Announcement*, *supra* note 73.

80. See Jon Hurdle, *New Jersey Governor Declares Fiscal Emergency*, REUTERS (Feb. 11, 2010, 4:14 PM), <http://reut.rs/b0sGv1>.

81. DEL. CODE ANN. tit. 29, § 4825 (West 2012).

82. See *Office of Comm'r of Baseball v. Markell*, 579 F.3d 293, 304 (3d Cir. 2009) (stating that the purpose of the Delaware Act was to allow betting on sports other than football and single-bet action on football when Delaware was only offering three-game parlay bets on football when PASPA enacted).

83. *Id.* at 295–96.

84. See Chad Millman, *Jack Markell Is Ready to Legalize Sports Betting in Delaware*, ESPN THE MAGAZINE (Mar. 10, 2009), <http://es.pn/LjDz>.

85. The leagues and associations that filed suit against Delaware's proposed sports-betting scheme were the National Football League, National Basketball Association, National Hockey League, Major League Baseball, and the National Collegiate Athletic Association.

86. Verified Complaint at 2–3, *Office of Comm'r of Baseball v. Markell*, No. 09-538 (D. Del. July 24, 2009), 2009 WL 2378572.

87. Plaintiffs' Opening Brief in Support of Their Motion for Preliminary Injunction, *Office of Comm'r of Baseball v. Markell*, No. 09-538 (D. Del. July 28, 2009), 2009 WL 4899717.

its sports-betting scheme.<sup>88</sup> The pertinent contest was over specific language in PASPA indicating that states are allowed to conduct sports betting “to the extent the scheme was conducted” between 1976 and 1990.<sup>89</sup> Delaware argued that if a state conducted sports betting between 1976 and 1990, then it could continue to allow betting on sports to the fullest extent that it wished, including taking any type of bet on all sports.<sup>90</sup> The Third Circuit disagreed, construing this section to mean that states could conduct sports betting exactly and no further than they did between 1976 and 1990.<sup>91</sup>

Although not presented with a direct constitutional challenge to PASPA, the Third Circuit found that PASPA was “not . . . ambiguous.”<sup>92</sup> In addition, the *Markell* court held the argument that a state’s sovereignty requires it to be permitted to implement a betting scheme of that state’s choosing “unpersuasive.”<sup>93</sup> The *Markell* court also recognized the “grandfathering” provisions of PASPA, stating that “[a]lthough PASPA has broadly prohibited state-sponsored sports gambling since it took effect on January 1, 1993, the statute also ‘grandfathered’ gambling schemes in individual states ‘to the extent that the scheme was conducted by that State’ between 1976 and 1990.”<sup>94</sup>

This ruling meant that Delaware could only offer three-game parlay bets on football games because that was the extent to which it conducted sports betting between 1976 and 1990.<sup>95</sup> The Third Circuit held that elements of Delaware’s sports-betting act violated PASPA,<sup>96</sup> and after remand, the district court permanently enjoined Delaware from implementing its proposed betting scheme.<sup>97</sup> Delaware then petitioned

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88. See *Office of Comm’r of Baseball v. Markell*, 579 F.3d 293, 301 (3d Cir. 2009).

89. *Id.* at 300–01.

90. See *id.* at 301.

91. *Id.* at 301–02.

92. *Id.* at 302.

93. *Markell*, 579 F.3d at 303.

94. *Id.* at 296–97.

95. See *id.* at 303–04. A simple example shows why Delaware wanted to be able to offer single-game bets instead of only offering parlay bets. Let us say Mr. Sports Bettor, who lives in Delaware, wants to place a \$5,000 bet on the Super Bowl. He goes into his local Delaware casino to make this bet. Mr. Bettor tells the casino that he would like to bet \$5,000 on the Arizona Cardinals to win the Super Bowl. The casino informs Mr. Bettor that he cannot place a single bet on the Super Bowl because, in Delaware, sports bettors can only place three-game parlay bets. So, to bet his \$5,000, he will have to bet on three different games and win all of them to win any money. He will get the implied odds for taking such a risk, but if any of the three bets fails, then he loses all his money. A sports bettor who just wants to make a single bet on the Super Bowl will either call his local bookie or go to an Internet sports betting website to make his bet.

96. *Id.* at 304.

97. *Order, Office of Comm’r of Baseball v. Markell*, No. 09-538 (D. Del. Sept. 1, 2009).

the Supreme Court of the United States for writ of certiorari, but it was denied.<sup>98</sup>

*B. Unlawful Internet Gambling Enforcement Act*

Congress' most recent move to combat the problems associated with Internet gambling is the Unlawful Internet Gambling Enforcement Act of 2006.<sup>99</sup> Legislators signed the bill<sup>100</sup> into law right before Congress recessed in 2006, and it was approved by a vote of 409 to 2.<sup>101</sup>

UIGEA contains a thorough regulatory scheme that affects and limits the activity of parties and enterprises involved in Internet gambling, including financial transaction providers and payment systems.<sup>102</sup> To prevent Americans from gambling online, Congress turned its attention to payment methods used to fund Internet gambling.<sup>103</sup> Section 5363, the “[p]rohibition on acceptance of any financial instrument for unlawful [I]nternet gambling,” reads:

No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling—

- (1) credit . . . extended to or on behalf of such other person . . . ;
- (2) an electronic fund transfer . . . from or on behalf of such other person;
- (3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or
- (4) the proceeds of any other form of financial transaction . . . which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person.<sup>104</sup>

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98. *Markell v. Office of Comm’r of Baseball*, 130 S. Ct. 2403 (2010) (mem.), *denying cert.* to 579 F.3d 293 (3d Cir. 2009).

99. 31 U.S.C. §§ 5361–5367 (2006).

100. Security and Accountability for Every Port Act of 2006 (SAFE Port Act), Pub. L. No. 109-347, 120 Stat. 1884 (codified in scattered sections of 6 U.S.C. and 31 U.S.C.), *available at* <http://1.usa.gov/1bLyUCK>.

101. *Final Vote Results for Roll Call 516*, OFF. CLERK, U.S. HOUSE REPRESENTATIVES (Sept. 30, 2006, 12:32 AM), <http://1.usa.gov/1bVAoS.C>.

102. *See* Marconi et al., *supra* note 34, at 603.

103. *See id.*

104. 31 U.S.C. § 5363.

However, a major problem with UIGEA, through all its structural jargon, is that it does not explicitly make Internet gambling illegal; it just tries to restrict “the mechanism by which an online account is funded.”<sup>105</sup> This factor has led to the opportunity to circumvent UIGEA through a creative banking industry with financial instruments that are not restricted by anti-gambling prohibitions.<sup>106</sup> UIGEA’s rule of construction that “[n]o provision of this [Act] shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States”<sup>107</sup> is also problematic. Commentators interpret this section to mean that gambling is only prohibited when it violates a state or federal law; thus UIGEA does not expand the scope of federal law.<sup>108</sup> As a result, UIGEA only enforces laws that have already been enacted.<sup>109</sup> In the context of this Article, UIGEA simply enforces the prohibitions of PASPA, but as applied to the Internet.<sup>110</sup>

UIGEA fails to remove a previously existing gap in online gambling because gamblers can simply use a foreign third-party money transfer to avoid a transaction between United States financing institutions and the Internet gambling business.<sup>111</sup> Internet gambling businesses that use foreign card systems for funding will not be subject to UIGEA.<sup>112</sup> Ultimately, UIGEA does not achieve its stated intentions of prohibiting parties in the United States from placing sports bets on the Internet. All a potential sports bettor in the United States must do is fund his or her accounts through third-party payment processors that are not

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105. Allyn Jaffrey Shulman, *Legal Landscape of Online Gaming Has Not Changed*, CARDPLAYER.COM (Oct. 5, 2006), <http://bit.ly/1gYRQSD>.

106. See generally Grahmann, *supra* note 47, at 177.

107. 31 U.S.C. § 5361.

108. See generally Jessica M. Gulash, *The Unlawful Internet Gambling Enforcement Act’s Effects on the Online Gambling Industry*, U. PITT. J. TECH. L. & POL’Y (Apr. 1, 2007), <http://bit.ly/1845i4U> (concluding that sports betting continues to be the only form of online gambling that violates federal law).

109. See Shulman, *supra* note 105. Some legislators promoting the UIGEA believe that Internet gambling is already illegal via the Wire Act, and thus contend that prohibiting U.S. customers from funding their online accounts will prevent U.S. customers from gambling online, even where the jurisdictional reach of the Wire Act formerly prevented them from doing so. See *id.* To the contrary, UIGEA “applies, if and only if, the gambling is already illegal under current law.” *Id.* But cf. *United States v. Cohen*, 260 F.3d 68, 78 (2d Cir. 2001) (affirming conviction under the Wire Act of the owner of an Antigua bookmaking company for placing sports bets on behalf of New York customers).

110. See *id.*

111. Nelson Rose, *New UIGEA Regs Put Benefits and Burdens on States*, 13 GAMING L. REV. & ECON. 1, 4 (2009).

112. See Joseph M. Kelly, *Financial Transaction Providers Needn’t Worry Too Much About Complying with UIGEA Rules*, 13 GAMING L. REV. & ECON. 196, 201 (2009).

covered by UIGEA.<sup>113</sup> On the other end, sports-betting websites can bypass UIGEA's restrictions by simply operating under a foreign license.<sup>114</sup>

UIGEA and PASPA combine to restrict 46 states from operating a sports-betting scheme within their borders, but fail to curtail sports betting. As such, PASPA should be modified to allow states to experiment with their own sports-betting schemes in light of all the benefits that can be derived from state-sanctioned sports betting, not only because the laws thus far are ineffective, but also because its constitutionality is, again, suspect and being challenged in *NCAA v. Christie*.

#### IV. *NCAA v. CHRISTIE*

On January 17, 2012, New Jersey Governor Chris Christie signed into law New Jersey's Sports Wagering Law,<sup>115</sup> an act passed by the New Jersey State Legislature to permit wagering at casinos and racetracks on the results of certain collegiate and professional sports or athletic events.<sup>116</sup> If the gambling law becomes effective, casinos and racetracks across New Jersey will be able to apply for licenses and commence gambling operations on amateur and professional sports.<sup>117</sup>

On August 7, 2012, the NCAA, along with the MLB, NFL, NBA, and NHL (collectively, "the Leagues"), filed suit in the U.S. District Court for the District of New Jersey<sup>118</sup> alleging that the Sports Wagering Law enacted by New Jersey violates the terms of PASPA.<sup>119</sup> The NCAA and the Leagues sued Governor Christie and other state officials to prevent the implementation of New Jersey's Sports Wagering Law. New Jersey and other defendants who intervened in the case argue that PASPA violates the U.S. Constitution and cannot be used by the NCAA and the Leagues to prevent the implementation of legalized sports wagering. The NCAA and the Leagues disagree. If New Jersey is correct, it will be permitted to enact its proposed sports-wagering scheme. If it is not, New Jersey will be prohibited from enacting sports wagering because PASPA, as a federal law, overrides New Jersey's law.

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113. *See id.*

114. *See id.*

115. N.J. STAT. ANN. §§ 5:12A-1 to -6 (West 2012).

116. *See, e.g.,* Matt Friedman, *Gov. Christie Signs Bill Allowing Gamblers to Place Bets on Pro, College Sports Teams*, STAR-LEDGER (Jan. 17, 2012, 3:28 PM), <http://bit.ly/yaUdx6>.

117. N.J. STAT. ANN. § 5:12A-2 (West 2012).

118. *See generally* *Christie* Complaint, *supra* note 3.

119. *Id.* at 10.

The NCAA and the Leagues argue that “[g]ambling on amateur and professional sports threatens the integrity of . . . sports and is fundamentally at odds” with the principles of integrity associated with sports.<sup>120</sup> The NCAA and the Leagues further argue that the proliferation of sports gambling “threatens to harm the reputation” of the Association and the major leagues, and could “adversely affect the way the public views amateur and professional sports.”<sup>121</sup> New Jersey counters that the NCAA and the Leagues lack standing to enforce PASPA<sup>122</sup> and that PASPA is unconstitutional because it treats states unfairly and commandeers a state’s right by requiring local officials ban sports gambling.<sup>123</sup>

On February 28, 2013, the opinion of District Judge Shipp in this case stated several findings. First, the court noted that “PASPA is a rational expression of Congress’ powers under the Commerce Clause . . . that PASPA allows legalized sports wagering to continue in those states where it was lawful at the time of its enactment does not deprive the statute of constitutionality because Supreme Court precedent permits ‘grandfathering.’”<sup>124</sup> The court then said that “PASPA does not violate the Tenth Amendment because it does not force New Jersey to take any legislative, executive, or regulatory action,” and also “does not raise the political accountability concerns outlined by the Supreme Court’s Tenth Amendment jurisprudence.”<sup>125</sup> Lastly, “regarding [New Jersey’s] additional allegations, the [c]ourt . . . determined that Congress had a rational basis to enact PASPA in the manner it chose.”<sup>126</sup>

The court added:

Although some of the questions raised in this case are novel, judicial intervention is generally unwarranted no matter how unwise a court considers a policy decision of the legislative branch. As such, to the extent the people of New Jersey disagree with PASPA, their remedy is not through passage of a state law or through the judiciary, but through the repeal or amendment of PASPA in Congress.<sup>127</sup>

Although this Article does not address the constitutionality of PASPA, it discusses reasons Congress should modify PASPA.

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120. *Id.* at 3.

121. *Id.*

122. Answer & Affirmative Defenses of Defendants Christopher J. Christie, David L. Rebeck, & Frank Zanzuccki at 7, *NCAA v. Christie*, 926 F. Supp. 2d 551 (D.N.J. 2013) (No. 3:12-cv-04947), 2013 WL 328197.

123. *Id.*

124. *NCAA v. Christie*, 926 F. Supp. 2d 551, 554–55 (D.N.J. 2013).

125. *Id.* at 555.

126. *Id.*

127. *Id.*

## V. REASONS TO ALLOW STATES TO LAWFULLY REGULATE SPORTS-BETTING SCHEMES

Despite PASPA's noble, stated policy objectives, the proliferation of Internet sportsbooks since 1992 has significantly increased the levels of sports gambling activity in the United States. As such, sports gambling is not as taboo in a "Pete Rose" sense as it historically was. In fact, the mainstream public has generally accepted various forms of sports-betting activities, such as fantasy sports leagues, NCAA March Madness office pools, Super Bowl squares, and widely accessible betting lines and game spreads in newspapers and online pregame reports. However, even with increased sports-betting activities since the online boom of the '90s, the public interest and fan base of professional and amateur sports has not waned, as popularity and revenues are at an all-time high.<sup>128</sup> In fact, in 2009, NBA Commissioner David Stern acknowledged this shift in the public perception of sports gambling in a *Sports Illustrated* interview, when he remarked: "[Gambling] may be a little immoral, because it really is a tax on the poor. . . . But having said that, it's now a matter of national policy: Gambling is good."<sup>129</sup>

In recognizing this shift in the perception of sports betting from being amoral conduct to a potentially beneficial activity, allowing states to regulate their own sports-betting schemes would empower them to derive much-needed tax revenues and income from the legitimate sports-betting industry and would help get American dollars back to the states.<sup>130</sup> Individual states acting as laboratories for experiment could

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128. *Compare Sports Industry Overview*, PLUNKETT RESEARCH, LTD., <http://bit.ly/HsMXhJ> (last visited Oct. 30, 2013), with *Discrepancies in N.F.L. Revenue*, N.Y. TIMES, July 2, 1992, <http://nyti.ms/bFQVi2> (showing that revenues for the National Football League in 2011–2012 were estimated to be about \$9 billion, compared with only \$1.3 billion in 1990).

129. Ian Thomsen, *Weekly Countdown: Stern Open to Legalized Betting, Rule Changes*, SPORTS ILLUSTRATED (DEC. 11, 2009, 2:26 PM), <http://bit.ly/819nSh>. Also, in his 2009 Sports Illustrated interview, Commissioner Stern believed that the policies driving the prohibition of sports gambling were "formulated at a time when gambling was far less widespread" and that a new approach regarding sports betting is needed. *Id.* He stated that "we have moved to a point where that leap [to regulated sports gambling] is a possibility. . . ." *Id.*

130. *States Move to Collect New Revenue from Sports Gambling for Critical Government Programs*, SAFE AND SECURE INTERNET GAMBLING INITIATIVE, <http://bit.ly/1aNyAPo> (last visited Nov. 1, 2013) [hereinafter *States Move*]. Jeffrey Sandman, spokesperson for the Safe and Secure Internet Gambling Initiative, stated:

While some form of gambling is allowable in almost every state, it is totally hypocritical that there would be a line drawn in the sand for sports gambling, an activity that continues and is estimated to illegally generate up to \$380 billion per year in the U.S. . . . A prohibition on sports gambling means that billions of dollars in much-needed tax revenue that could be used for education and other government programs is being lost to bookies and off-shore Internet

best help states capture the billions of dollars in tax revenue and income lost to illegal sports betting, and in time could lead to a national solution for the regulation of sports betting.

States can directly capture revenue from sports betting by the increase in taxes that they will derive from taking sports bets. States can also benefit indirectly by being able to provide more jobs for their citizens with the opening of sportsbooks in their casinos. Finally, and most importantly, by allowing states to conduct their own sports-betting schemes, the billions of dollars yearly that are going to offshore companies and illegal sports-betting outfits would instead go to individual states that hope to climb out of their current fiscal demise. Given that many states are dealing with severe financial problems as 48 of the 50 states are “faced [with] real-time or projected funding shortages[,]”<sup>131</sup> this increase in revenue would be invaluable.

Additionally, the National Gambling Impact Study Commission acknowledges that introducing legalized, but regulated, sports gambling in the United States would “undermin[e] illegal gambling and the organized crime it supports.”<sup>132</sup> As we see with the foreign online sportsbook industry, the sports-gambling industry is largely run by big businesses; these businesses are closely regulated in their jurisdictions, which strongly disincentivizes betting scandals that could bruise their credibility and expose them to liability.<sup>133</sup> Additionally, the regulation of the sports-gambling industry would likely provide an impetus for this legal, but regulated, sports-gambling business to self-regulate to protect

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gambling operators. . . . Rather than trying to stop consenting adults from doing something that’s enjoyable to them, specifically, betting on sports, poker or other games, Congress and our state governments should look to legalize and regulate land-based and Internet gambling activities as a way to protect consumers and recoup billions in revenue[.]

*Id.*

131. M. Alex Johnson, *Budget Crises Swamp the States*, NBCNEWS.COM, (MAY 26, 2009, 6:28 AM), available at <http://nbcnews.to/17Gwt5n>. See also STATE BUDGET CRISIS TASK FORCE, FULL REPORT 6 (2012), available at <http://bit.ly/LWgGEY>. In fact, currently state governments are suffering through the most severe fiscal crises in decades. According to the Center on Budget and Policy Priorities, the 2007 recession “caused the largest collapse in state revenues on record[,]” and, although revenues began to grow again in 2010, they were “not growing fast enough to recover fully soon.” Phil Oliff et al., *States Continue to Feel Recession’s Impact*, CTR. ON BUDGET & POL’Y PRIORITIES, <http://bit.ly/WDa0M> (last updated June 27, 2012). See also Jeremy Gerst & Daniel Wilson, *Fiscal Crises of the State: Causes and Consequences*, FED. RES. BANK S.F. (June 28, 2010), <http://bit.ly/90vwYY>. And, already, 31 states are projecting or addressing budget shortfalls totaling \$55 billion for the 2013 fiscal year. See Oliff et al., *supra*.

132. GAMBLING REPORT, *supra* note 9, at 1-5.

133. For example, the United Kingdom’s sportsbook company William Hill has a market value of over £1 billion and is one of several gambling companies publicly traded on the London Stock Exchange. See *Key Facts*, WILLIAM HILL, <http://bit.ly/1dbqpV4> (last visited Nov. 1, 2013).



the integrity of the business.<sup>134</sup> And, business need not remain powerless against organized crime; rather than risk fraudulent losses to their own revenues due to the activities of racketeers, they will be motivated to alert the authorities of suspicious or irregular sports-betting activities.<sup>135</sup> This positive incentive rebuts Congress's prediction at the time it enacted PASPA: that increased sports-betting activities would lead to *more* scandal and corruption.<sup>136</sup> To the contrary, state-regulated sports-betting schemes should generate robust oversight of suspicious and illegal sports-betting activity. This oversight will serve to prevent future sports-betting scandals and fraud, which will ultimately help to *preserve* the integrity of professional and amateur sports in the United States. As such, Congress should modify PASPA to allow states to experiment with sports-betting schemes.

A. *States as Laboratories for Experiment*

The theory of states as laboratories for experimentation derives from the foundations of federalism. Justice Brandeis, dissenting in *New State Ice Co. v. Liebmann*,<sup>137</sup> opined that states can make substantial contributions as experimental laboratories for the development of economic programs.<sup>138</sup> Justice Brandeis viewed this experimental laboratory theory as a progressive, small-scale, and low-risk undertaking.<sup>139</sup> Justice Brandeis wrote:

Denial of the right to experiment may be fraught with serious consequences to the nation.<sup>[140]</sup> It is one of the happy incidents of the federal system that a single courageous state may, if its citizens

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134. See John Pierik, *Bets Deals an Integrity Issue: AFL*, NORTHERN DAILY LEADER (May 22, 2013, 3:00 AM), <http://bit.ly/1aHNsmR> (describing steps taken to ensure integrity in Australian sports betting, noting that “[t]he [Australian Football League] has deals with betting agencies, allowing it to check on irregular practices, which have already resulted in players and officials being caught for gambling on matches”).

135. See *supra* note 134; see also *How Is Online Poker Regulated*, ONLINE POKER SITES, <http://bit.ly/1bLEjX2> (last visited Nov. 23, 2013) (“[T]he ability to monitor and self-regulate the games independently decreases the likelihood of being cheated or falling victim to scams.”).

136. See S. REP. NO. 102-248, at 6 (1992) (“The committee recognizes that sports gambling offers a potential source of revenue for the States, but . . . believes the risk to the reputation of one of our Nation’s most popular pastimes, professional and amateur sporting events, is not worth it.”).

137. *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (Brandeis, J., dissenting).

138. *Id.* at 311.

139. See Marcus, *supra* note 14, at 78, 87.

140. Arguably the amount of money that is illegally wagered on sports each year is the evil that has resulted from not allowing states to experiment with their own sports-betting schemes.

choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.<sup>141</sup>

Every state is different and has a variety of needs; as a result, if states are allowed to experiment with sports betting, each would find its own solution to deriving tax revenue and income from legitimate regulation of the sports-betting industry within its jurisdiction.<sup>142</sup> For example, some states may operate a sports-betting scheme themselves, overseeing the administration and logistics of the scheme,<sup>143</sup> whereas other states may merely sanction and license sports betting, allowing private casinos to compete with each other and offer varying odds, payouts, and incentives to attract more gamblers.<sup>144</sup> States that choose to operate their own sports-betting schemes might decide to do so in a manner similar to how they provide traditional lotteries, by offering “tickets” at various retailers licensed to sell them. States with Indian casinos may also need to address additional considerations that states without Indian casinos can avoid.<sup>145</sup>

As discussed above, most U.S. sports bettors place their sports bets online.<sup>146</sup> Although the reason for this online “preference” may be necessity because there are likely no local, legal places for those gamblers to place sports bets, sports bettors are nonetheless accustomed to betting online. Perhaps a trailblazing state may find that offering in-state online sports betting is the best way to attract sports bettors from

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141. *Liebmann*, 285 U.S. at 311.

142. Of course, states can draft their own sports-betting schemes that address some of the concerns that prompted PASPA in the first place. For example, Delaware and California have had bills with provisions prohibiting wagering on state college sports. This shows that those states recognize the possible corrupting influence sports gambling can have on amateur athletics, while still allowing for the possibility of gambling on professional sports. Also, perhaps future state sports-betting bills can be drafted to prevent current or former amateur or professional athletes from being eligible to win sports bets; incidentally, although I think such a provision would survive constitutional scrutiny, I doubt this would work on a practical level, but who knows what a creative legislator could come up with. Along the same lines, to address the concerns of those who are pro-PASPA, these laws could also set aside money to combat gambling addiction and gambling destitution, provisions which the California bill included.

143. This seems to be the approach that Delaware wanted to take with its proposed sports lottery, offering “sports lottery agent” licenses to qualified applicants. See H.R. 100, 145th Gen. Assemb. (Del. 2009), available at <http://1.usa.gov/1bKizyg>.

144. In early 2013, California also attempted to legalize sports betting by permitting authorized operators of gambling establishments to offer sports betting. See S. 190, 2013–2014 Sess. (Cal. 2013), available at <http://bit.ly/1jhbC8z>.

145. See *id.* (including provisions relating to the federal Indian Gaming Regulatory Act of 1988).

146. See *supra* Part II.B.

the foreign websites. This option, though, could potentially face many legal hurdles that land-based sports betting would not.<sup>147</sup>

Furthermore, thorough testing by states in a variety of contexts could lead to a national solution for the regulation of sports betting that could be implemented nationwide if Congress wished to continue to regulate sports betting. Experimentation will be safeguarded by what Justice Brandeis said is the power of the Court to strike down a statute that arises from experimentation if it is found to be “arbitrary, capricious or unreasonable.”<sup>148</sup> And, the notion that liberalization of federal regulation to allow for state experimentation is desirable is not that far-fetched.

In fact, “[i]n recent years . . . , there have been a number of [c]ongressional bills proposed that would relax some of the rules related to interstate online gambling” with the payment of a federal licensing fee.<sup>149</sup> Additionally, despite the current federal government’s flat-ban approach to Internet gambling, “it is generally understood that the states retain control over whether to prohibit or regulate online gambling within their borders, based on certain caveats contained within the Wire Act and UIGEA.”<sup>150</sup> For example, UIGEA does not prohibit purely *intrastate* wagering so long as certain conditions are met.<sup>151</sup>

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147. These legal hurdles are beyond the scope of this Article. It is worth mentioning, however, that the Department of Justice argued that although it no longer interprets the Wire Act as prohibiting *all* forms of Internet gambling involving interstate commerce, the Wire Act clearly still prohibits Internet *sports* gambling involving interstate commerce. See generally Virginia A. Seitz, *Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act*, Memorandum Opinion for the Assistant Attorney General, Criminal Division, U.S. DEPT. JUST. (Sept. 20, 2011), <http://1.usa.gov/rB9Y6E>. For states to be able to offer online sports betting, either: (i) Congress would need to amend the Wire Act; or (ii) online sports betting could only be available to people located in the state *and* the state likely would have to argue successfully that such online sports betting would not be involved in interstate commerce—quite a tall order.

148. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

149. *Entertainment, Media and Communications Tax Newsletter*, PWC 2 (Dec. 2011), <http://pwc.to/1amUj54>. Examples of these congressional bills include: the Internet Gambling Regulation, Consumer Protection, and Enforcement Act, H.R. 2267, 111th Cong. (2009); the Internet Gambling Regulation and Tax Enforcement Act, H.R. 4976, 111th Cong. (2010); and the Bipartisan Tax Fairness and Simplification Act, S. 3018, 111th Cong. (2010). *Id.*

150. *Id.*

151. *Id.* (noting that intrastate gambling is legal under UIGEA, “provided that the state verifies the age and in-state presence of the person gambling”). The newsletter also states:

With the technological ability to monitor accurately a person’s exact location, through geolocation, the barrier to intrastate regulation and taxation of Internet gambling may be removed. Just as importantly, states may be able to monitor

State regulation of sports betting is the most feasible option, as it should be up to the states to decide if they find sports betting repugnant to their populations or whether they should allow this type of gambling. Support for state regulation of gambling within state lines comes via Congress's policy findings in enacting the Interstate Horse Racing Act.<sup>152</sup> Congress allows states to regulate their own horse-betting schemes because "[s]tates should have the primary responsibility for determining what forms of gambling may legally take place within their borders."<sup>153</sup> However, with billions of dollars currently being sent from the United States to offshore sports-betting websites and to foreign and illegal sports-betting schemes, state experimentation is currently the best solution to derive revenues from the regulation of sports gambling for those states that want to.

### *B. How States Can Benefit from Sports Betting*

In 1992, when Congress enacted PASPA to prevent the growth of state-regulated sports gambling, it predicted that the potential harms created from legalized state-sponsored sports betting were too great to outweigh the benefits of such sports-betting schemes.<sup>154</sup> However, the U.S. sports-gambling landscape has changed; PASPA, UIGEA, and other gambling-related legislation have been ineffective.

States need to be able to seek out every feasible avenue possible to alleviate the current state of their fiscal budgets. The primary benefit of allowing sports betting is that states can increase revenue. Other forms of gambling (e.g., lotteries and general casino games) provide states with generally steady sources of revenue.<sup>155</sup> There are a variety of ways that sports betting can add to state revenue:

- (1) Repealing or modifying PASPA to allow states to self-regulate sports gambling would recapture money from foreign sports-gambling outfits. Keeping money local could help communities prosper.<sup>156</sup>

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how wagers are placed and funds transferred to ensure that online gambling does not violate the Wire Act prohibition on wire transfers of funds.

*Id.*

152. 15 U.S.C. § 3001–3007 (2006).

153. *Id.* § 3001(a)(1).

154. See S. REP. NO. 102-248, at 7 (1991) (noting that “[t]he answer to State budgetary problems should not be to increase the number of lottery players or sports bettors, regardless of the worthiness of the cause”).

155. See Lucy Dadayan et al., *From a Bonanza to a Blue Chip? Gambling Revenue to the States*, ROCKEFELLER INST. 2 (June 19, 2008), <http://bit.ly/1b45ZM0> (noting that state-sponsored gambling generates a consistent amount of revenue).

156. One potential drawback to any state-sponsored sports-betting scheme is that gambling tends to prey on lower income residents. See, e.g., STEVEN G. KOVEN &

- (2) If states permit private casinos to operate their own sports-betting schemes, they should be able to collect more taxes and fees from their casinos. Allowing sports wagering in U.S. casinos will help increase the gross revenue of each casino and thus will result in an increase of money generated through the casino tax.<sup>157</sup>
- (3) Legalized sports betting can also encourage gamblers to place live bets on sports. Instead of sitting at home and making a bet with an illegal bookie or risking their money with an unknown foreign website, sports bettors might be more inclined to seek out a traditional casino that they can trust with their bets. This could lead to more traffic inside casinos, which will help casinos derive more money through their restaurants and boutiques.<sup>158</sup>
- (4) Increased local traffic within casinos can lead to more employment to meet this increased demand.<sup>159</sup>

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THOMAS S. LYONS, *ECONOMIC DEVELOPMENT: STRATEGIES FOR STATE AND LOCAL PRACTICE* (2d ed. 2010), *excerpt available at* <http://bit.ly/1aNzdsg> (calling gambling a regressive tax that disproportionately hurts the poor). These sports bettors may or may not have already been betting with foreign websites, but like higher income residents, legalized sports betting would make it easier for them to place bets regardless of whether they gambled previously.

157. “According to a tax revenue analysis prepared by PricewaterhouseCoopers, taxation of regulated Internet gambling is expected to generate between \$8.7 billion to \$42.8 billion in federal revenues over its first 10 years.” *States Move*, *supra* note 130. On the other hand, some have argued that tax revenue from gambling exhibits a “displacement effect” because people often finance their gambling activities by reducing their consumption of other goods or services, so any gain in tax revenue from gambling could be offset by a decrease in tax revenue from other sources. *See* CHARLENE WEAR SIMMONS, CAL. RESEARCH BUREAU, *GAMBLING IN THE GOLDEN STATE: 1998 FORWARD* 54–55 (2006) (citing Jim Landers, *The Effect of Casino Gambling on Sales Tax Revenues in States Legalizing Casinos in the 1990s*, 38 ST. TAX NOTES, 1073, 1074–75, 1078–81 (2005)), *available at* <http://bit.ly/1bVvV9f>. *See also* Douglas M. Walker, *Overview of the Economic and Social Impacts of Gambling in the United States*, in OXFORD HANDBOOK ON THE ECONOMICS OF GAMBLING 2 (Leighton Vaughan Williams & Donald Siegel eds., 2012), *available at* <http://bit.ly/18447Cx> (noting that casinos in some states can have a negative effect on tax revenues, possibly because they “cannibalize” other revenue-generating sources). Walker also notes that lotteries, unlike casinos, tend to have positive effects on tax revenues. *See* Walker, *supra*, at 9. This may be a reason for states to offer sports betting along the lines of lottery schemes instead of in casinos.

158. This increase in casino traffic will most likely come from locals as opposed to tourists. *See generally* William R. Eadington, *The Spread of Casinos and Their Role in Tourism Development*, in CONTEMPORARY ISSUES IN TOURISM DEVELOPMENT (Douglas G. Pearce & Richard W. Butler eds., 1999), *available at* <http://bit.ly/17hFYp7> (discussing potential difficulties with replicating Las Vegas-style casino tourism).

159. *See* Walker, *supra* note 157, at 2.

- (5) This trend is evidenced by Nevada's sports-betting scheme, which is currently the only one without restrictions. As the National Gambling Impact Study Commission reported:

Because sports wagering is illegal in most states, it does not provide many of the positive impacts that other forms of gambling offer. In particular, illegal sports wagering does not contribute to local economies and produces few jobs, which it could do if it were legal. Unlike casinos or other destination resorts, sports wagering does not create other economic sectors.<sup>160</sup>

In fact, the American Gaming Association found that “[l]egal sports wagering helps bring more than 30 million visitors to Nevada each year and provides employment for thousands of people.”<sup>161</sup>

By modifying PASPA, states like New Jersey will be able to enjoy the opportunities that have been made available to Nevada through sports betting. Most significantly, by allowing states to conduct their own sports-betting schemes, more American dollars will be wagered legally with our borders.

## VI. CONCLUSION

Although legalizing sports betting and developing appropriate regulations still require much more legislative processes, this Article shows there exists an alternate path to allowing individual states to derive benefits from sports betting. Given that the current laws have proven ineffective, Congress should consider allowing experimentation in this age where states are seeking to find ways to relieve their current fiscal woes. Such a system has the greatest potential to lead to a national solution for the regulation of sports betting suitable for implementation by every state wishing to carry out a sports-betting scheme. By modifying PASPA, the arbitrary differences that exist among states in their ability to offer sports betting within their borders will also be eliminated.

Without fully comprehending the scope of sports betting, Congress continues to believe the development of sports betting will be suppressed by PASPA and UIGEA. What Congress fails to understand is that sports betting is a global phenomenon. Without a uniform standard for determining international Internet jurisdiction, Internet sports-betting companies will continue to bypass laws such as PASPA and UIGEA.

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160. See GAMBLING REPORT, *supra* note 9, at 2-14.

161. *Gaming Facts*, *supra* note 35.

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Additionally, these Acts are diverting billions of dollars from state sponsored sports-betting schemes as they continue to allow illegal sports-betting enterprises to thrive. PASPA and UIGEA force sports bettors who place bets from the United States to send most of their money to illegal and foreign sports-betting schemes. Without modification, 46 states will never be able to offer sports betting. States should be able to decide for themselves whether they consider sports betting to be repugnant to their citizens. No domestic law will be able to underscore the interest in sports betting. Sports betting is inevitable, and no matter what is said or done by advocates or opponents, many Americans will continue to practice the activity. As a result, the time has come to modify PASPA because the benefits states can derive from sanctioned sports betting far outweigh its theoretical detriments.