

PASPA’S GOT A BRAND NEW BAG: PRESIDENT TRUMP’S STATES’ RIGHTS BIAS FOR GAMBLING CALLS THE WINNING HAND

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I. INTRODUCTION

The Professional and Amateur Sports Protection Act (PASPA)¹ “is the *only* federal law that prevents a state from changing its public policy toward gambling.”² Gambling is inherently a states’ rights issue.³ Because of the differences of population, culture, religion, history, demographics, and professional sports franchises in the state, it must be up to each state to determine the availability of gambling within their own borders.⁴ States’ rights are the *only* way to rationally explain how Nevada has every gaming scheme imaginable, whereas its contiguous neighbor Utah, has no gaming at all.⁵ There are, however, federal acts that have *some* effect on gaming, including the Wire Act,⁶ Illegal Gambling Business Act (IGBA),⁷ Illegal Gaming Regulatory Act (IGRA),⁸ PASPA,⁹ and Unlawful Internet Gambling Enforcement Act

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1. Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. §§ 3701–3704 (1992).

2. WALTER CHAMPION AND I. NELSON ROSE, *GAMING LAW IN A NUTSHELL*, at 321 (1st ed. 2012) (emphasis added) [hereinafter Champion & Rose].

3. *Id.* at 10.

4. Richard McGowan, *The Dilemma That Is Sports Gambling*, 18 GAMING L. REV. & ECON. 670, 670 (2014).

5. Champion & Rose, *supra* note 2, at 10; *c.f.* Sam Kamin, *Cooperative Federalism and State Marijuana Regulation*, 85 U. COLO. L. REV. 1105, 1107–08 (2014).

6. Wire Act, 18 U.S.C. § 1084 (2018).

7. Illegal Gambling Business Act, 18 U.S.C. § 1955 (2018).

8. Indian Gaming Regulatory Act, 25 U.S.C. § 2701 (2018).

9. Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. §§ 3701–3704 (1992).

(UIGEA).¹⁰ However, UIGEA made little sense initially, and then was extensively muddled by attempts to comprehend it.¹¹

PASPA¹² is the bane of the very existence of Atlantic City and, hence, the bane of the State of New Jersey.¹³ PASPA¹⁴ is anomalous and created the “Las Vegas loophole”¹⁵ allowing Nevada a monopoly on legal sports gambling.¹⁶ However, there’s a new sheriff in town in the guise of President Donald Trump, a former casino owner in New Jersey, who “appears to support states’ rights, which would normally include gaming.”¹⁷ “It is difficult to see how PASPA can stand, since Congress has allowed almost a dozen exceptions to its supposedly complete ban on state-authorized sports betting, and is the only federal law that prevents a state from challenging its public policy toward gambling.”¹⁸

PASPA was signed into law in 1992¹⁹ and grandfathered states like Nevada, hence the “Las Vegas loophole,” by granting immunity for states that allowed sports wagering before October 2, 1991.²⁰ “New Jersey was given one year to” pass legislation that would allow sports books but failed to act.²¹

New Jersey voters finally got religion in November 2011 and amended their state constitution to allow sports betting on professional and amateur sporting events at Atlantic City casinos and state-wide horse tracks.²² After the amendment was passed,

10. Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361–5363 (2018).

11. Champion & Rose, *supra* note 2, at 51.

12. Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. §§ 3701–3704 (1992).

13. See Champion & Rose, *supra* note 2, at 131–32; see also Kate King, *New Jersey Rejects Atlantic City’s Fiscal-Recovery Plan*, WALL ST. J., Nov. 1, 2016, <https://www.wsj.com/articles/new-jersey-rejects-atlantic-citys-fiscal-recovery-plan-1478033955>; I. Nelson Rose, *New Jersey Sports Betting—Court Gets It Wrong Again*, 19 GAMING L. REV. & ECON. 564, 564–65 (2015) [hereinafter Rose, *Court Gets It Wrong*].

14. Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. §§ 3701–3704 (1992).

15. Champion & Rose, *supra* note 2, at 319.

16. *Id.*

17. I. Nelson Rose, *President Trump and the Future of Legal Gaming*, 20 GAMING L. REV. & ECON. 818, 819 (2016) [hereinafter Rose, *Future of Legal Gaming*].

18. Champion & Rose, *supra* note 2, at 321.

19. Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. §§ 3701–3704 (1992); see also Chil Woo, *All Bets Are Off: Revisiting the Professional and Amateur Sports Act*, 31 CARDOZO ARTS & ENT. L.J. 569, 569 (2013).

20. Champion & Rose, *supra* note 2, at 319.

21. *Id.*

22. See N.J. CONST. art. IV, § 7, cl. 2(D)–(F); see also Champion & Rose, *supra* note 2, at 320; *Official List Ballot Questions Tally for November 2011 General Election*, N.J. DIV. OF

New Jersey again strongly expressed their support for sports betting as a cure for their ailing casinos by enacting the New Jersey Sports Wagering Law (2012 Act),²³ which created a system of legalized, highly regulated sports wagering, comparable to Nevada.²⁴

The 2012 Act was repealed by New Jersey's 2014 law which disallowed prohibitions on sports wagering;²⁵ this Act was a reaction to the denial of certiorari in *NCAA v. Governor of New Jersey (Christie I)*,²⁶ which construed PASPA to apply only to state schemes that authorize by law sports wagering.²⁷ The NCAA sued again, and in *NCAA v. Governor of New Jersey (Christie II)*,²⁸ the Third Circuit inextricably held that PASPA also precludes states from enacting legislation *repealing* sports wagering prohibitions in casinos and at racetracks.²⁹

The State of New Jersey was granted certiorari on June 27, 2017;³⁰ this was *after* the acting Solicitor General, who was not

ELECTIONS (Dec. 6, 2011), <https://www.state.nj.us/state/elections/assets/pdf/election-results/2011/2011-official-gen-elect-public-question-results.pdf>.

23. See N.J. STAT. ANN. 5:12A-1-6 (2012) (repealed 2014); see also Clyde W. Barrow et al., *An Empirical Framework for Assessing Market Saturation in the U.S. Casino Industry*, 20 GAMING L. REV. & ECON. 397, 397 (2016).

[A] period of steady expansion from 1978 to 2006 made Atlantic City the United States' second largest commercial gambling state behind Nevada. At its peak, Atlantic City had 12 casinos generating \$5.2 billion in gross gaming revenue (GGR) in calendar year (CY) 2006. However, by mid-September of 2014, one-third of Atlantic City's 12 casinos had shuttered their doors, including the \$2.4 billion Revel, which had been hailed by many public officials and gaming industry leaders as the beginning of a rebirth for Atlantic City. The Atlantic City casino closures, which resulted in the loss of approximately 9,000 casino and hospitality jobs within less than a one-year period, were a direct result of declining GGR, which fell from \$5.2 billion in CY 2006 to \$2.6 billion (-50%) in CY 2014.

Id. at 398 (footnotes omitted).

24. See N.J. STAT. ANN. 5:12A-1-6 (2012) (repealed 2014); see also accompanying regulations N.J. ADMIN. CODE § 13:69N-1.2-1.4 (2019).

25. N.J. STAT. ANN. 5:12A-7-9 (2014).

26. *NCAA v. Christie*, 730 F.3d 208 (3d Cir. 2013) (en banc), *cert. denied*, 573 U.S. 931, 931 (2014) [hereinafter *Christie I*].

27. *Id.* at 236-37.

28. *NCAA v. Christie*, 832 F.3d 389, 391 (3d Cir. 2016), *cert. granted*, *Christie v. NCAA*, 137 S. Ct. 2327, 2327-28 (2017) (mem.), *rev'd sub nom. Murphy v. NCAA*, 138 S. Ct. 1461 (2018) [hereinafter *Christie II*].

29. *Id.* at 402 (emphasis added).

30. *Christie v. NCAA*, 137 S. Ct. 2327, 2327-28 (2017) (mem.) (*Christie* was consolidated with *New Jersey Thoroughbred Horsemen's Assn's, Inc. v. NCAA*. The question presented is whether a federal statute, PASPA, that prohibits adjustment or repeal of State law prohibitions on private conduct, impermissibly commandeers the regulatory power of states in contravention of the anti-commandeering doctrine.); see *Printz v. United States*, 521 U.S.

appointed by President Trump, wrote in an amicus brief to deny the petition for a writ of certiorari.³¹ Governor Christie was “thrilled” and “encouraged” by the decision of the United States Supreme Court to hear the case.³²

In its petition for a writ of certiorari, the State of New Jersey looked at the debacle this way:

PASPA purports to make it unlawful for States to “authorize by law” gambling on sports. In three divided, irreconcilable, and fundamentally incomprehensible decisions, the Third Circuit rejected New Jersey’s challenge that PASPA unconstitutionally commands how it regulates such gambling within its borders.³³

The attempt by the federal government to “takeover . . . New Jersey’s legislative apparatus is dramatic [and] unprecedented.”³⁴ “This is not a minor intrusion on state sovereignty. It is a sea change to our system of federalism.”³⁵

II. SCOTUS DENIES PASPA IN MURPHY V. NCAA

The Supreme Court of the United States (SCOTUS) in *Murphy v. NCAA* on May 14, 2018, held that PASPA was unconstitutional in a 6–3 decision³⁶ (Philip Murphy is the current Governor of New Jersey).³⁷ *Murphy* is the first time SCOTUS “expressly held that the federal government cannot order states, or state officials, to *do*

898 (1997); *New York v. United States*, 505 U.S. 144 (1992); see also Nick Corasaniti & Joe Drape, *New Jersey’s Appeal of Sports Betting Ban Heads to Supreme Court*, N.Y. TIMES, June 27, 2017, <https://www.nytimes.com/2017/06/27/nyregion/new-jerseys-appeal-of-sports-betting-ban-heads-to-supreme-court.html> [hereinafter Corasaniti & Drape].

31. Brief for the United States as Amicus Curiae at 23, *Christie v. NCAA*, 137 U.S. 2327 (2017) (Nos. 16-476, 16-477).

32. Corasaniti & Drape, *supra* note 30.

33. Petition for Writ of Certiorari at 2, *Christie v. NCAA*, 137 U.S. 2327 (2017) (No. 16-476).

34. *Id.* at 3.

35. *Id.* at 4.

36. *Murphy v. NCAA*, 138 S. Ct. 1461, 1468, 1485 (2018) (“Alito, J., delivered the opinion of the Court, in which Roberts, C.J., and Kennedy, Thomas, Kagan, and Gorsuch, JJ., joined, and in which Breyer, J., joined as to all but Part VI-B [Severability]. Thomas, J. filed a concurring opinion. Breyer, J., filed an opinion concurring in part and dissenting in part. Ginsburg, J., filed a dissenting opinion, in which Sotomayor, J., joined, and in which Breyer, J., joined in part.”).

37. *Id.* at 1461.

anything.”³⁸ The question before SCOTUS was whether PASPA’s provision that makes it unlawful for a state to authorize sports gambling schemes “is compatible with the system of ‘dual sovereignty’ embodied in the Constitution.”³⁹

Anti-commandeering doctrine “says the federal government cannot command the states to become mere agents of the national authority.”⁴⁰ “The anticommandeering doctrine . . . is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States.”⁴¹ “The Constitution limits state sovereignty in several ways.”⁴² Congress’ legislative powers are limited; “[t]he Constitution confers on Congress . . . only certain enumerated powers. Therefore, all other legislative power is reserved for the States.”⁴³ “And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority.”⁴⁴

The PASPA provision that prohibits “state authorization of sports gambling—violates the anticommandeering rule. That provision unequivocally dictates what a state legislature may and may not do.”⁴⁵ “It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.”⁴⁶

The second edition of *Gaming Law in a Nutshell* (Jan. 2018) correctly predicted that a SCOTUS majority will likely “declare PASPA an unconstitutional intrusion on states’ police powers, but only because it requires states keep sports betting illegal.”⁴⁷ But SCOTUS, in *Murphy*, went far beyond that prediction: it was the

38. I. Nelson Rose, *The Supreme Court Changes Everything*, GAMBLING AND THE LAW (June 4, 2018), <http://www.gamblingandthelaw.com/the-supreme-court-changes-everything/> (emphasis added) [hereinafter Rose, *Supreme Court Changes Everything*].

39. *Murphy*, 138 S. Ct. at 1468.

40. WALTER CHAMPION & I. NELSON ROSE, *GAMING LAW IN A NUTSHELL* 95 (2d ed. 2018) [hereinafter Champion & Rose 2d ed.].

41. *Murphy*, 138 S. Ct. at 1475.

42. *Id.*

43. *Id.* at 1476.

44. *Id.*

45. *Id.* at 1478.

46. *Id.*

47. Champion & Rose 2d ed., *supra* note 40, at 176.

first time that SCOTUS “expressly held that the federal government cannot order states, or state officials, to do anything,” which was unprecedented and unexpected.⁴⁸ Albeit, the Third Circuit’s decision that PASPA prevents New Jersey from changing its clinical laws is patiently abound.

Furthermore, the absurdity is heightened by the fact that the New Jersey legislature and New Jersey voters desperately want to legalize sports betting.⁴⁹ After *Murphy*,⁵⁰ New Jersey, which had been preparing for PASPA’s dismantlement, said it was ready to open betting windows by the end of June 2018.⁵¹

III. STATES’ RIGHTS GENERALLY

“[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government.”⁵² The key to Federalism, which our Founding Fathers embraced, is a decentralized government.⁵³ The Tenth Amendment to the United

48. Rose, *Supreme Court Changes Everything*, *supra* note 38.

49. *Id.*

50. *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

51. See Rose, *Supreme Court Changes Everything*, *supra* note 38; C. Costigan & I. Nelson Rose, *At Least Five Judges Expected to Rule in Favor of Legalized Sports Betting in U.S.*, GAMBLING 911 (Mar. 5, 2018), <https://www.gambling911.com/gambling/least-five-judges-expected-rule-favor-legalized-sports-betting-us.html> (“I believe that at least five and perhaps six or more of the Justices will rule that Congress does have the power, under the Interstate Commerce Clause, to regulate and even outlaw sports betting. But in the absence of a coherent federal policy, let alone a comprehensive regulatory system, the states are free to deal with sports betting as they wish. Which means we will have a dozen states with legal, regulated sports betting by next year.”); see also Chris Kirkham & Rachel Bachman, *Leagues, States Make Sports-Betting Play*, WALL ST. J., May 16, 2018, <https://www.wsj.com/articles/after-sports-betting-decision-states-leagues-vie-for-shares-of-the-action-1526397736>; Adam Liptak & Kevin Draper, *Supreme Court Ruling Favors Sports Betting*, N.Y. TIMES, May 14, 2018, <https://www.nytimes.com/2018/05/14/us/politics/supreme-court-sports-betting-new-jersey.html>; Andrew Beaton, *Why the NFL Stopped Seeing Gambling as a Threat—and Started to See a Windfall*, WALL ST. J., May 15, 2018, <https://www.wsj.com/articles/why-the-nfl-stopped-seeing-gambling-as-a-threat-and-started-to-see-a-windfall-1526411528>; Rick Maese, *With Sports Betting Legal, New Jersey’s Monmouth Park Aims to Take Wagers Soon*, WASH. POST, May 14, 2018, https://www.washingtonpost.com/sports/with-sports-betting-legal-new-jerseys-monmouth-park-aims-to-take-wagers-soon/2018/05/14/8c58cce4-5782-11e8-858f-12becb4d6067_story.html?noredirect=on&utm_term=.5187d9aae778; Nick Corasaniti, *Game On! Legislature Approves Sports Betting in New Jersey*, N.Y. TIMES, June 7, 2018, <https://www.nytimes.com/2018/06/07/nyregion/sports-betting-new-jersey.html>.

52. Amicus Brief of Pacific Legal Foundation, Competitive Enterprise Institute, and Cato Institute in Support of Pet’rs at 5, *Christie v. NCAA*, 137 U.S. 2327 (2017) (No. 16-476) (quoting Gregory v. Ashcroft, 501 U.S. 452, 457 (1991)) [hereinafter Amicus Brief for Pacific Legal Foundation].

53. *Id.*

States Constitution and its separation of powers clause⁵⁴ limits the federal government to only those powers that are granted in the Constitution.⁵⁵

The Tenth Amendment states that the powers that are not delegated to the federal government by the Constitution, or prohibited for the states, “are reserved to the States respectively, or to the people.”⁵⁶ The states then use the Tenth Amendment to exert exemptions from various badly written federal regulations, such as PASPA.⁵⁷ The Tenth Amendment⁵⁸ states the “truism that all is retained” by the states, other than that “which has not been [*specifically*] surrendered”;⁵⁹ this allows the states to fully exercise their reserved powers.⁶⁰

Federalism provides a government that is “sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.”⁶¹ The United States will declare a federal law unconstitutional for violating the Tenth Amendment when the federal government compels the state to enforce federal statutes,⁶² such as PASPA.⁶³ This is especially so after the passage of New Jersey’s 2014 Act⁶⁴ as misinterpreted by the illogical *Christie* decisions.⁶⁵ That is why the Supreme Court, in a very unusual decision, granted certiorari.⁶⁶ And why the Supreme Court in *Murphy v. NCAA*, in an unprecedented 6–3 decision, ignored the

54. U.S. CONST. amend. X.

55. *Id.*; see *United States v. Sprague*, 282 U.S. 716, 733 (1931).

56. U.S. CONST. amend. X.

57. 28 U.S.C. §§ 3701–3704 (2018).

58. U.S. CONST. amend. X.

59. *United States v. Darby Lumber*, 312 U.S. 100, 124 (1941).

60. *Id.*

61. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); Amicus Brief for Pacific Legal Found. et al., *supra* note 52, at 5 (quoting Michael McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1491–1511 (1987)).

62. Amicus Brief for Pacific Legal Found. et al., *supra* note 52, at 4 (citing *New York v. United States*, 505 U.S. 144, 162 (1992)).

63. 28 U.S.C. §§ 3702–3704 (1992).

64. N.J. STAT. ANN. 5:12A-7–9 (2014).

65. See, e.g., *Christie I*, 730 F.3d 208, 214 (3d Cir. 2013) (en banc) *cert. denied*, 573 U.S. 931, 931 (2014); *Christie II*, *NCAA v. Christie*, 832 F.3d 389, 393 (3d Cir. 2016), *cert. granted*, *Christie v. NCAA*, 137 S. Ct. 2327, 2327 (2017) (mem.).

66. Petition for Writ of Certiorari, *Christie v. NCAA*, 137 S. Ct. 2327, 2328 (2017) (No. 16-476).

“wisdom” of three Third Circuit Court of Appeals opinions and held that PASPA was unconstitutional.⁶⁷

The Constitution is not understood to grant Congress the power to force the states to govern according to the whims of Congress.⁶⁸ Federalism “is one of the Constitution’s structural protections of liberty.”⁶⁹ “In the tension between federal and state power lies the promise of liberty”⁷⁰—“freedom is enhanced by the creation of two governments.”⁷¹ Federalism denies “any one government complete jurisdiction over all the concerns of public life,” therefore, it protects the individual’s liberty from the vagaries of unchecked arbitrary power.⁷²

Federalism promotes political accountability;⁷³ “[t]he resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power.”⁷⁴

Additionally, Federalism provides a means of discovering “better public policies through experimentation.”⁷⁵ States become “laboratories” to experiment with vexing local problems,⁷⁶ such as Atlantic City’s loss of five out of twelve casinos.⁷⁷ Federalism can only be preserved if the judiciary determines appropriate roundness between federal and state power.⁷⁸ The Supreme Court

67. *Murphy v. NCAA*, 138 S. Ct. 1461, 1478 (2018).

68. *New York v. United States*, 505 U.S. 144, 162 (1992); Amicus Brief of Pacific Legal Foundation et al., *supra* note 52, at 4 (quoting *Brown v. E.P.A.*, 521 F.2d 827, 839 (9th Cir. 1975), *vacated as moot* 431 U.S. 99 (1977)).

69. *Printz v. United States*, 521 U.S. 898, 921 (1997); *see Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991).

70. *Id.* at 459.

71. *Alden v. Maine*, 527 U.S. 706, 758 (1999).

72. Amicus Brief of Pacific Legal Foundation et al., *supra* note 52, at 6 (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011)).

73. *See FTC v. Tior Title Ins. Co.*, 504 U.S. 621, 636 (1992); *see also United States v. Lopez*, 514 U.S. 549, 576 (1995) (Kennedy, J., concurring).

74. Amicus Brief of Pacific Legal Foundation et al., *supra* note 52, at 7 (quoting *Lopez*, 514 U.S. at 577).

75. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49–50 (1973); Amicus Brief of Pacific Legal Foundation et al., *supra* note 52, at 7 (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting)).

76. Amicus Brief of Pacific Legal Foundation et al., *supra* note 52, at 7 (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting)).

77. *Barrow*, *supra* note 23, at 398.

78. *See Gregory v. Ashcroft*, 501 U.S. 452, 460–62 (1991); *Printz v. United States*, 521 U.S. 898, 935 (1997); Amicus Brief of Pacific Legal Foundation et al., *supra* note 52, at 8 (quoting *New York v. United States* 505 U.S. 144, 178, 187 (1992)).

will intervene “when the federal government jump[s] offside[s] and commandeer[s] states or their officials.”⁷⁹

“Judicial intervention is necessary because political checks are weak.”⁸⁰ “The federal government has plenty of options in its play book to address pressing issues without eroding the Constitution’s structural protections for federalism.”⁸¹

A congressional mandate that existing state-law prohibitions be maintained in spite of the wishes of the local electorate undermines our system of representative democracy by foisting the blame for an increasingly unpopular federal policy on state officials that must carry out the federally petrified state-law prohibitions. And the matter is made worse by the fact that, while the Third Circuit insist that PASPA affords the States room to respond to the demands of their citizens, the range of permissible policy options remains unknown.⁸²

The people of New Jersey spoke overwhelmingly when they changed the Constitution in 2011,⁸³ enacted the N.J. Sports Wagering Law in 2012,⁸⁴ and passed the law of 2014.⁸⁵

IV. FEDERALISM AND THE ANTI-COMMANDEERING DOCTRINE

The Third Circuit’s en banc opinion⁸⁶ undermines Federalism and threatens a state’s individual liberty by significantly limiting the scope of the court’s commandeering decisions.⁸⁷ The so-called anti-commandeering doctrine under *New York*⁸⁸ and *Printz*⁸⁹ is that Congress, within the scope of its enumerated powers, may only regulate by acting directly upon citizens but *may not* require the states to govern to Congress’ instructions.⁹⁰ “Yet, *Christie II* directly violates the anti-commandeering principle by authorizing

79. Amicus Brief of Pacific Legal Foundation et al., *supra* note 52, at 8.

80. *Id.*

81. *Id.* at 9.

82. Reply Brief of Petitioners at 4, *Christie v. NCAA*, 137 U.S. 2327 (2017) (No. 16-476).

83. N.J. CONST. art. IV, § VII, cl. 2 (D)–(F) (amended 2011).

84. N.J. STAT. ANN. § 5:12A-1–6 (2012).

85. N.J. STAT. ANN. § 5:12A-7–9 (2014).

86. *Christie II*, 832 F.3d 389, 389 (3d Cir. 2016).

87. See *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992).

88. *New York*, 505 U.S. at 188.

89. *Printz*, 521 U.S. at 935.

90. *New York*, 505 U.S. at 162 (quoting *Lane Cty. v. Oregon*, 74 U.S. 71, 76 (1868)).

a federal court injunction mandating that a State reinstate prohibitions it has chosen to repeal.”⁹¹

The en banc decision of the Third Circuit in *Christie II*⁹² generates enormous uncertainty and inhibits the state’s ability to address New Jersey’s problem in renewing alleged illegal sports betting.⁹³ In *Christie II*,⁹⁴ the Third Circuit was unclear how it “would evaluate the legality of *any* state action other than the specific” request by the people of New Jersey to repeal its sports betting regime.⁹⁵ Here, the boundaries of a federal preemption are inherently unclear.⁹⁶ In *Christie I*,⁹⁷ the Third Circuit “held that the anti-commandeering doctrine would be violated if Congress could prevent a State from ‘repealing an existing law’ because that” is a difference without a distinction as it regards “forcing a State to take the ‘affirmative action’ of enacting a new law stating the opposite.”⁹⁸ That is, preventing a state from repealing an existing law is no different than forcing it to pass a new law.⁹⁹

The leagues and the NCAA still argued that PASPA’s “partial repeal of prohibitions does not ‘require New Jersey to keep any of its existing laws on the books’ because New Jersey *could still* ‘repeal its sports wagering prohibitions entirely.’”¹⁰⁰ However, “this argument . . . misses the point.”¹⁰¹ A partial repeal of New Jersey’s Sports Betting Law would also violate the anti-commandeering doctrine.¹⁰²

91. Reply Brief of Petitioners, *supra* note 82, at 3.

92. *Christie II*, 832 F.3d 389 (3d Cir. 2016).

93. Reply Brief of Petitioners, *supra* note 82, at 10.

94. *Christie II*, 832 F.3d at 389.

95. Reply Brief of Petitioners, *supra* note 82, at 10 (emphasis added).

96. *Id.*

97. *Christie I*, 730 F.3d 208, 232 (3d Cir. 2013) (en banc).

98. Reply Brief of Appellants Stephen M. Sweeney & Vincent Prieto at 18, *NCAA v. Christie*, 730 F.3d 218 (3d Cir. 2013) (No. 14-4568) (quoting *Christie I*, 730 F.3d at 232) [hereinafter Reply Brief of Appellants].

99. *Christie I*, 730 F.3d at 232.

100. Reply Brief of Appellants, *supra* note 98, at 18 (emphasis added).

101. *Id.*

102. *Id.*; see also Amicus Brief of Pacific Legal Foundation et al., *supra* note 52, at 18.

The judge’s role has famously been analogized to an umpire calling balls and strikes. In this case, the Court is being asked to define the strike zone against which federal laws that appear to commandeer states will be judged. This question is of immense doctrinal and practical importance. The boundary must be clearly defined if the anti-commandeering doctrine is going to continue to protect federalism and individual liberty. While it took the Cubs 108 years to win another World Series, this Court need not wait that long to clarify this important doctrinal area.

Accordingly, the question of whether PASPA allows an entire repeal of sports wagering prohibitions is of little consequence.¹⁰³ A federal statute, such as PASPA, is incapable of a constitutional interpretation that would “prevent [the] State from ‘repealing [its] existing law[s]’” to any degree.¹⁰⁴ The Third Circuit concluded in *Christie I* that “as between two plausible statutory constructions, we ought to prefer the one that does not raise a series of constitutional problems.”¹⁰⁵ Therefore, PASPA’s specific prohibitions, including authorization by law of a sports wagering scheme, can equate to a partial repeal of some of New Jersey’s prohibitions on sports wagering.¹⁰⁶ Anti-commandeering limits federal power by requiring the internalization of the policy costs.¹⁰⁷ “The anti-commandeering doctrine promotes political accountability at both the federal and state levels by ensuring that voters hold the correct politicians accountable for unpopular policies.”¹⁰⁸ “If commandeering were allowed, state officials might take the fall for unpopular policies over which they have no control.”¹⁰⁹ “The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power.”¹¹⁰

The Third Circuit illogically sees PASPA as compelling the states to *maintain* prohibitions against sports betting.¹¹¹ “We need not . . . articulate a line whereby a partial repeal of a sports wagering ban amounts to an authorization under PASPA, if indeed such a line could be drawn.”¹¹² “Noticeably, the majority does not explain why all partial repeals are not created equal or explain

Id.

103. Reply Brief of Appellants, *supra* note 98, at 19.

104. *Id.* at 18.

105. *Christie I*, 730 F.3d 208, 233 (3d Cir. 2013).

106. *Id.*; see also Reply Brief of Appellants, *supra* note 98, at 18–19.

107. Amicus Brief of Pacific Legal Foundation et al., *supra* note 52, at 6 (citing Bridget A. Fahey, *Consent Procedures and American Federalism*, 128 HARV. L. REV. 1501, 1598 (2015)); see also Brian Galle, *Does Federal Spending “Coerce” States? Evidence from State Budgets*, 108 NW. U. L. REV. 989, 996 (2014).

108. Amicus Brief of Pacific Legal Foundation et al., *supra* note 52, at 6 (citing *New York v. United States*, 505 U.S. 144, 182–83 (1992)); Bridget A. Fahey, *Consent Procedures and American Federalism*, 128 HARV. L. REV. 1501, 1598 (2015).

109. Amicus Brief of Pacific Legal Foundation et al., *supra* note 52, at 6 (citing Andrew B. Coan, *Commandeering, Coercion and the Deep Structure of America Federalism*, 95 B.U. L. REV. 1, 4 (2015)).

110. *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring).

111. *Christie II*, 832 F.3d 389, 396 (3d Cir. 2016).

112. *Id.* at 402.

what distinguishes the 2014 Law from those partial repeals that pass muster.”¹¹³ The court “makes it clear that under PASPA as written, no repeal of any kind will evade the command that no State ‘shall . . . authorize by law’ sports gambling.”¹¹⁴

The Third Circuit opinion motivated Judge Fuentes, in his dissent, to ask “[w]ould the State violate PASPA if it [first repealed all its existing prohibitions, then] later enacted limited restrictions regarding age requirements and places where wagering could occur?”¹¹⁵

Conant v. Walters held that “preventing the state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated.”¹¹⁶ “But if the federal government could indefinitely impose its will on states after they initially agree, that would threaten these cooperative federalism arrangements, with far reaching [e]ffects.”¹¹⁷

The *Christie* decision entices a state to adopt federal policy as its own, and then forbids the state from making changes.¹¹⁸ The federal government can then respond to state protestations that, despite all appearances, the state is not commandeered since it was *not* compelled to adopt the policy originally.¹¹⁹ If that were the case, states would be hesitant to cooperate in implementing federal environmental policy, for example, if they knew that it could permanently relinquish their sovereignty.¹²⁰

A similarly narrow reading of the anti-commandeering doctrine could also affect the legalization of marijuana, despite federal prohibitions.¹²¹ State experimentation in decriminalizing

113. *Id.* at 407 (Vanaskie, J., dissenting).

114. *Id.* at 409.

115. *Id.* at 405 (Fuentes, J., dissenting); see *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238–39 (1985).

116. 309 F.3d 629, 646 (9th Cir. 2006) (Kozinski, J., concurring); see *Christie I*, 730 F.3d 208, 245 (3d Cir. 2013) (Vanaskie, J., concurring in part and dissenting in part).

117. Amicus Brief of Pacific Legal Foundation et al., *supra* note 52, at 13; cf. Robert Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1174 (1995) (discussing environmental statutes and cooperative federalism).

118. Amicus Brief of Pacific Legal Foundation et al., *supra* note 52, at 13.

119. See *Christie II*, 832 F.3d at 401–02.

120. Amicus Brief of Pacific Legal Foundation et al., *supra* note 52, at 13–14; cf. Richard B. Stewart, *Pyramids of Sacrifice—Problems of Federalism in Mandating State Implementations of National Environmental Policy*, 86 YALE L.J. 1196, 1243–50 (1977) (discussing constitutional limitations over federal environmental policies).

121. See Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 81–88 (2015).

marijuana is only possible because “the federal government cannot require states to enact or maintain on the books any laws prohibiting marijuana.”¹²² But the Third Circuit’s rationale would forbid the states from *any* further liberalization.¹²³

V. SPORTS BOOKS GENERALLY

Adam Silver, the thoughtful National Basketball Association (NBA) Commissioner, now supports the demise of PASPA, even though the NBA has opposed the expansion of legal sports betting for more than two decades.¹²⁴ “I believe that sports betting should be brought out of the underground and into the sunlight where it can be appropriately monitored and regulated.”¹²⁵ PASPA was enacted in response to increased efforts by some states, especially Nevada, to initiate licensing procedures for legalizing sports wagering.¹²⁶ PASPA is “a federal law that prohibits most states from licensing sports gambling.”¹²⁷

“Until the mid-1970s, sports betting was mostly limited to illegal bookies, who took bets in person or by phone.”¹²⁸ With the popularity of Monday Night Football in 1970, “[s]ports books not only became large and numerous in Nevada, [but] they were viewed as profit centers and enticements” for While-netting by casinos.¹²⁹ “By 1985 all of the small independent sports books were closed, replaced by multi-million dollar casino sports books with dozens of giant video screens.”¹³⁰ Other states looked at legalized sports betting as a means of raising revenue; the Oregon and

122. *Id.* at 102–03; see Sam Kamin, *Cooperative Federalism and State Marijuana Regulation*, 85 U. COLO. L. REV. 1105, 1107 (2014); Austin Raynor, *The New State Sovereignty Movement*, 90 IND. L.J. 613, 626 (2015).

123. Jacob Sullum, *Victories for Eight of Nine Marijuana Initiatives Hasten the Collapse of Prohibition*, REASON.COM (Nov. 9, 2016), <https://reason.com/2016/11/09/victories-for-eight-of-nine-marijuana-in>.

124. Adam Silver, *Opinion, Legalize Sports Betting*, N.Y. TIMES, Nov. 13, 2014, <https://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html>.

125. *Id.*

126. Christie I, 730 F.3d 208, 215, 224 (3d Cir. 2013).

127. *Id.* at 214, 234.

128. Champion & Rose, *supra* note 2, at 315. Illegal sports gambling has a long and sordid history in the United States. Look no further than to the Black Sox Scandal of 1919, when the Chicago White Sox purposefully lost the World Series. PATRICK THORNTON, *People v. Cicotte: The Black Sox and Baseball's Most Famous Trial*, in LEGAL DECISIONS THAT SHAPED BASEBALL 77, 77–78 (2012).

129. Champion & Rose, *supra* note 2, at 318.

130. *Id.* at 318.

Delaware State Lotteries started taking bets on National Football League (NFL) games.¹³¹ “The NFL, which hates and fears sports betting as a possible corruption of its sport, lobbied Congress to stop the proliferation.”¹³² President George H.W. Bush in 1992 signed PASPA into law, which created a moratorium on sports betting but allowed a compromise with Nevada, better known as the “Las Vegas Loophole.”¹³³ States that authorized sports books prior to October 2, 1991, were immune from legislation; New Jersey was given one year to legalize sports betting in its Atlantic City casinos, but the state legislature failed to do so.¹³⁴ In the last ten years, sports wagering has become more prevalent and socially acceptable.¹³⁵ Also, Daily Fantasy Sports (DFS), which one could say is a type of online sports book, is now legal (and lucrative) in nineteen states.¹³⁶

In *Office of the Commissioner of Baseball v. Markell*,¹³⁷ the Third Circuit Court of Appeals reviewed an exception to PASPA,¹³⁸ which made a distinction between sports wagering schemes that were merely authorized and those that were actually conducted.¹³⁹ In *Markell*, the court agreed with professional and collegiate sports leagues¹⁴⁰ that the implementation of the Delaware Sports Lottery Act¹⁴¹ violated PASPA.¹⁴² “Because single-game betting was not ‘conducted’ by Delaware between 1976 and 1990, such betting is

131. *Id.* at 318–19.

132. *Id.* at 319.

133. *Id.*

134. *Id.*

135. Anthony C. D'Alessandro, *The House Advantage: How the Professional and Amateur Sports Protection Act Undermines Concepts of Federalism and Severely Impacts New Jersey's Gambling-Fueled Economy*, 13 SETON HALL CIR. REV. 79, 83–84 (2016).

136. Jake Lestock, *Tackling Daily Fantasy Sports in the States*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 2018), <http://www.ncsl.org/research/civil-and-criminal-justice/tackling-daily-fantasy-sports-in-the-states.aspx>; see, e.g., I. Nelson Rose, *What Should Daily Fantasy Sports Do Now?*, 19 GAMING L. REV. & ECON. 683, 683 (2015) [hereinafter Rose, *What should DFS Do Now?*]; I. Nelson Rose, *Are Daily Fantasy Sports Legal?*, 19 GAMING L. REV. & ECON. 346, 346, 348 (2015) [hereinafter Rose, *Are DFS Legal?*].

137. 579 F.3d 293, 300–01 (3d Cir. 2009).

138. 28 U.S.C. § 3704(a)(2) (2018).

139. *Markell*, 579 F.3d at 297, 300–01.

140. *Id.* at 301, 303–04 (The college sports league indicated in *Markell* was the NCAA.); see also *O'Bannon v. NCAA*, 802 F.3d 1049, 1079 (9th Cir. 2015) (holding that the NCAA rules barring compensation to student-athletes for the use of their names, images, and likeness were subject to antitrust laws).

141. DEL. CODE ANN. tit. 29, §§ 4801–4839 (2013).

142. *Markell*, 579 F.3d at 304.

beyond the scope of the exception in §3704(a)(i) of PASPA and thus prohibited under the statute's plain language."¹⁴³

VI. PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT (PASPA)

PASPA¹⁴⁴ was masterminded by former Senator, and NBA great, Bill Bradley of New Jersey.¹⁴⁵ He was concerned with the expansion of sports gambling in state lotteries.¹⁴⁶ PASPA was passed to stop any increase in the proliferation of gambling on sporting events.¹⁴⁷ Under PASPA:

It shall be 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.¹⁴⁸

PASPA is a unique federal law which “froze the states forever into the forms of sports betting they had more than two decades ago.”¹⁴⁹ PASPA allows about a dozen states to have some form of

143. *Id.*

144. 28 U.S.C. §§ 3701–3704 (2018).

145. Rose, *Court Gets It Wrong*, *supra* note 13, at 565.

146. See, e.g., Sen. Bill Bradley, *The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORTS L. 5–7 (1992).

147. Rose, *Court Gets It Wrong*, *supra* note 13, at 564; see I. Nelson Rose, *Supreme Court Asks for More Info on NJ's Sports Betting*, 21 GAMING L. REV. & ECON 147, 147 (2017).

PASPA is one of the most radical federal laws ever enacted . . . by Congress which prevents states from legalizing a form of betting. Because states, and not the federal government, have always had the sole power to determine what they want their public policies to be toward gambling within their borders, the statute is an open affront to state sovereignty and the idea of federalism.

Id.

148. 28 U.S.C. § 3702 (1992).

149. I. Nelson Rose, *Betting on Sports Betting*, 18 GAMING L. REV. & ECON. 953, 955 (2014) [hereinafter Rose, *Betting on Sports Betting*].

sports betting; however, the other thirty-eight states, “plus the District of Columbia, Puerto Rico, and other United States possessions, are locked out” from legalized sports betting forever.¹⁵⁰ These exemptions indicate that the scope of § 3702 is, at best, “somewhat unclear.”¹⁵¹ PASPA prevents state legislatures from passing state laws that allow their citizens to make legal sports bets.¹⁵²

In prior litigation between the State of New Jersey and the NCAA, the scope of PASPA’s influence was narrowed because of a “series of constitutional problems.”¹⁵³ The inevitable conclusion was that PASPA does not (and cannot) broadly dictate the contents of state gaming law but merely prohibits states from “the issuance of gambling licenses or the affirmative authorization *by law* of gambling schemes.”¹⁵⁴ In the 2014 Law,¹⁵⁵ New Jersey merely repealed existing prohibitions on sports wagering,¹⁵⁶ which the court has agreed¹⁵⁷ does *not* give a stamp of “state approval and authorization” to that wagering.¹⁵⁸ PASPA does not, and cannot, “prohibit New Jersey from repealing its ban on sports” gambling.¹⁵⁹

150. *Id.*

151. Greater New Orleans Broadcasting Ass’n v. United States, 527 U.S. 173, 180 (1999).

152. Rose, *Betting on Sports Betting*, *supra* note 149, at 955; *see also* Justin Fielkow et al., *Tackling PASPA: The Past, Present, and Future of Sports Gambling in America*, 66 DEPAUL L. REV. 23, 23 (2017).

153. *Christie I*, 730 F.3d 208, 233 (3d Cir. 2013).

154. *Id.* at 232 (emphasis in original; alterations and internal quotation marks omitted); *see also* Brief for Appellants Christopher J. Christie, David L. Rebeck, and Frank Zanzucki at 25, *NCAA v. Christie*, 799 F.3d 259 (3rd Cir. 2015) (No. 14-4546) [hereinafter Brief of Appellants Christie et al.].

155. N.J. STAT. ANN. 5:12A-7–9 (2014).

156. *Christie I*, 730 F.3d at 232.

157. *Id.*

158. *Id.*

159. *Id.*; *see also* Petition for Writ of Certiorari, *supra* note 33, at 3–4.

This [F]ederal takeover of New Jersey’s legislative apparatus is dramatic, unprecedented, and in direct conflict with this Court’s Tenth Amendment jurisprudence barring Congress from controlling how the States regulate private parties. Never before has congressional power been construed to allow the federal government to dictate whether or to what extent a State may repeal, lift, or otherwise modulate its own state-law prohibitions on private conduct. And never before has federal law been enforced to command a State to give effect to a state law that the State has chosen to repeal . . .

If Congress can freeze in place existing state laws by prohibiting contrary state-law “authorizations,” then the federal government can effectively force States to enact federal policies and thus will have greatly aggrandized its own power while foisting accountability for those policies entirely onto the States. Future efforts by States to legalize private conduct currently prohibited by state law—anything from recreational use of marijuana, to carrying concealed firearms, to working on

The court held that *if* New Jersey chose to repeal in whole or in part its ban on sports wagering, then PASPA would allow the state more room to make its own policy within that choice.¹⁶⁰ The 2014 Act repealed certain existing prohibitions and, therefore, that conduct was explicitly approved in *Christie I*.¹⁶¹ *Christie I* held that a repeal of any sort does not equate to an authorization and “rests on a false equivalence.”¹⁶²

“Any application of PASPA that conscripts New Jersey’s law enforcement officials to enforce a federal mandate under threat of contempt cannot be right and is the opposite of this Court’s decision in *Christie I*.”¹⁶³ PASPA was narrowly construed in *Christie I* so as “to avoid the commandeering of a state[’s]” sovereignty, saving PASPA from constitutional illegalities.¹⁶⁴ “The District Court’s injunction turns this Court’s holding in *Christie I* upside down by applying PASPA in a way that violates the very constitutional limitations of the Tenth Amendment that this Court’s interpretation saved PASPA from violating.”¹⁶⁵

VII. NEW JERSEY’S SPORTS WAGERING ACT

*Christie I*¹⁶⁶ was a lawsuit against New Jersey’s Sports Wagering Act.¹⁶⁷ The District Court in *Christie I*¹⁶⁸ dropped the ball and incorrectly concluded that PASPA allows New Jersey *only* an all or nothing¹⁶⁹ choice between full preservation of existing anti-sports gambling laws or a complete repeal.¹⁷⁰ This is a “Hobson’s Choice,” that is no real choice at all. It appears that the District

Sundays—can be thwarted not just by a direct federally enforced prohibition of that conduct, but now also by a federal ban on state legislation that “authorizes” such conduct. This is not a minor intrusion on state sovereignty. It is a sea change to our system of federalism.

Id.

160. *Christie I*, 730 F.3d at 233.

161. Brief for Appellants Christie et al., *supra* note 154, at 25.

162. *Christie I*, 730 F.3d at 233.

163. Brief of Appellant New Jersey Thoroughbred Horsemen’s Ass’n, Inc. at 29, *NCAA v. Christie*, 799 F.3d 259 (3d Cir. 2015) (No.14-4569).

164. *Id.*

165. *Id.*

166. *Christie I*, 730 F.3d at 208.

167. N.J. STAT. ANN. c. 231 (2012).

168. *NCAA v. Christie*, 926 F. Supp. 2d 551 (D.N.J. 2013).

169. *Id.* at 572.

170. *Id.* at 556.

Court¹⁷¹ placed more emphasis on the dissent in *Christie I*¹⁷² than the majority opinion. *Christie I* was the NCAA's attempt to obtain a New Jersey's sports book.¹⁷³ *Christie I*, however, allowed New Jersey more room in enacting a partial repeal of sports betting prohibitions.¹⁷⁴

New Jersey realized that to save Atlantic City it needed to pass legislation that would allow sports books and circumvent the poorly conceived PASPA.¹⁷⁵ “[T]he State of New Jersey . . . sought to license gambling on certain professional and amateur sporting events.”¹⁷⁶ New Jersey's Sports Wagering Act¹⁷⁷ “permits State authorities to license sports gambling in casinos and racetracks and casinos to operate ‘sport pools.’”¹⁷⁸ The Leagues¹⁷⁹ argued that the Sports Wagering Act would illegally “increase the total amount of gambling on sports available, thereby souring the public's perception of the League as people suspect that games are affected by individuals with a perhaps competing hidden monetary stake in their outcome.”¹⁸⁰ The Third Circuit's en banc version of *NCAA v. Governor of the State of New Jersey*,¹⁸¹ which was portentously and surprisingly granted certiorari on June 27, 2017,¹⁸² held that the Sports Wagering Act had the effect of authorizing sports gambling in contravention of PASPA.¹⁸³

But as usual, when an en banc opinion deciphers an inherently idiosyncratic statute, the dissents are more poignant than the majority's opinion.¹⁸⁴ The dissent by Judge Fuentes starts with the obvious inconsistency of the majority opinion, which is the fact that the people of New Jersey, by a 2:1 margin, “passed a referendum

171. *Id.* at 551.

172. *Christie I*, 730 F.3d 208, 241 (3d Cir. 2013) (Vanaskie, J., dissent).

173. *Id.* at 208.

174. *Id.* at 233.

175. 28 U.S.C. §§ 3701–3704 (1992); S. 2460, 216th Leg., 1st Ann. Sess. (N.J. 2014); Rose, *Court Gets It Wrong*, *supra* note 13, at 565.

176. *Christie I*, 730 F.3d at 214.

177. N.J. STAT. ANN. §§ 5:12A-1–6; *see also* N.J. ADMIN. CODE §§ 13:69N-1.1–13:69N-1.17 (regulations implementing the law).

178. *Christie I*, 730 F.3d at 217 (citing N.J. STAT. ANN. §§ 5:12A-1–6; N.J. ADMIN. CODE § 13:69 N-1.1).

179. This refers to the NCAA, NBA, NFL, NHL, and MLB, who were all parties to the lawsuit in *Christie I*.

180. *Christie I*, 730 F.3d at 218.

181. *Christie II*, 832 F.3d 389 (3d Cir. 2016).

182. *Christie v. NCAA*, 137 S. Ct. 2327, 2327 (2017) (mem.).

183. *Christie II*, 832 F.3d at 396.

184. *Id.* at 402 (Fuentes, J., with Restrepo, J., dissenting); *Id.* at 406 (Vanaskie, J., dissenting).

to amend the New Jersey Constitution to allow the New Jersey legislature to ‘authorize by law’ sports betting.”¹⁸⁵ The People have spoken! The New Jersey Constitution was specifically amended so that “[i]t shall . . . be lawful for the Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City on the results of any professional, college, or amateur sport, or athletic event.”¹⁸⁶ Likewise, the constitution was amended to specifically allow sports books “at current or former running and harness horse racetracks.”¹⁸⁷

The 2014 Act (the Repeal)¹⁸⁸ was a response to *Christie I*¹⁸⁹ and avoided violating PASPA since it does not authorize by law sports betting.¹⁹⁰ The text and the lawmakers’ instructions make it clear that the Act is a “repeal” of state laws and regulations that prohibit and regulate sports betting in New Jersey.¹⁹¹

New Jersey’s Sports Wagering Act¹⁹² could theoretically be declared invalid for several reasons.¹⁹³ The 2014 Act could arguably violate the New Jersey State Constitution, which includes the 2011 New Jersey constitutional amendment that empowers only the State legislature to authorize sports betting.¹⁹⁴ The New Jersey Constitution describes the regulations that follow casino gambling:

It shall be lawful for the Legislature to authorize by law the establishment and operation, under regulation and control by the State, of gambling houses or casinos within the boundaries . . . of Atlantic City . . . and to license and tax such operations and equipment used in connection therewith. . . . The type and number of such casinos or gambling houses and of the gambling games which may be conducted in any such establishment shall be determined by or pursuant to the term

185. *Id.* at 402–03 (Fuentes, J., with Restrepo J., dissenting).

186. N.J. CONST. art. IV, § 7, cl. 2(D).

187. N.J. CONST. art. IV, § 7, cl. 2(F).

188. N.J. STAT. ANN. §§ 5:12A-7–9 (repealed 2018).

189. *Christie I*, 730 F.3d 208 (3d Cir. 2013).

190. N.J. STAT. ANN. §§ 5:12A-7–9 (repealed 2018); S. 2460, 216th Leg., 1st Ann. Sess. (N.J. 2014).

191. N.J. STAT. ANN. § 5:12A-8 (repealed 2018).

192. N.J. STAT. ANN. §§ 5:12 A-1–6 (repealed 2014).

193. Rose, *Court Gets It Wrong*, *supra* note 13, at 568.

194. *Id.* at 568; see N.J. CONST. art. IV, § 7, cl. 2(D), (F); N.J. STAT. ANN. §§ 5:12A-7.

of the law authorizing the establishment and operation thereof.¹⁹⁵

“PASPA expressly prevents a state from regulating, directly or indirectly, any form of sports betting. . . . [I]t is impossible to believe that sports betting in Atlantic City casinos would be unregulated. Under well-established gaming law, states regulate *everything* that takes place on the grounds of tracks and casinos.”¹⁹⁶

The 2014 Act basically repealed all regulations that pertain to gambling in New Jersey.¹⁹⁷ But, “[d]oes anyone really believe that the New Jersey Division of Gaming Enforcement, a part of the State Attorney General’s office, would allow known organized crime figures to take bets on sports events on the floors of Atlantic City casinos?”¹⁹⁸ “Prior to PASPA, the few federal anti-gambling laws that were enacted by Congress were *always limited to helping* the states enforce their public policies toward gambling.”¹⁹⁹

The Sports Wagering Act²⁰⁰ expressly “create[d] a system of legalized, highly-regulated sports wagering (much like exists in Nevada).”²⁰¹ *Christie I* expressly holds that nothing in the text of PASPA requires New Jersey to affirmatively maintain any of its existing laws prohibiting sports wagering.²⁰² In response to *Christie I*, the New Jersey Legislature enacted the 2014 Act, which repeals the Sports Wagering Act, including sports wagering regulations.²⁰³ “Section 2 of the 2014 Act makes clear that the Legislature intends for this partial repeal to allow private, unregulated sports wagering in a manner consistent with PASPA.”²⁰⁴ “In essence, the 2014 Act creates several areas in New Jersey where sports wagering is neither banned nor subject to any affirmative state rules or regulations specifically governing such wagering.”²⁰⁵ The 2014 Act was passed by an overwhelming

195. N.J. CONST. art. IV, § 7, cl. 2(D).

196. Rose, *Court Gets it Wrong*, *supra* note 13, at 568 (emphasis in original).

197. N.J. STAT. ANN. §§ 5:12A-17 (repealed 2018).

198. Rose, *Court Gets it Wrong*, *supra* note 13, at 568.

199. *Id.* at 565 (emphasis added).

200. N.J. STAT. ANN. § 5:12A-2(a) (repealed 2014).

201. Reply Brief of Appellants, *supra* note 98, at 3.

202. 730 F.3d 208, 231–33 (3d Cir. 2013) (en banc).

203. N.J. STAT. ANN. §§ 5:12A-7–9 (repealed 2018); S. 2460, 216th Leg., 1st Ann. Sess. (N.J. 2014).

204. Reply Brief of Appellants, *supra* note 98, at 7.

205. *Id.*

majority in both houses of the Legislature (28–1 in the Senate and 73–4 in the Assembly) and was signed into law by Governor Christie on October 17, 2014.²⁰⁶ “The Legislature’s wide bipartisan support for the 2014 Act reflects New Jersey voters’ desire to no longer prohibit sports wagering at casinos and racetracks.”²⁰⁷

VIII. DFS LEADS THE WAY

Daily Fantasy Sports (DFS) is another example of America’s contradictory approach to gambling.²⁰⁸ Of course, regulating gambling is entirely a states’ rights issue with each state devising its own approach to gambling and other “sins.”²⁰⁹ Unlike Traditional Fantasy Sports (TFS) leagues, which consist of fans who “own” teams and draft players,²¹⁰ “in [DFS], every single team may own the same players.”²¹¹ Fantasy Sports is “the act of building and competing with imaginary sports teams comprised of real-life athletes.”²¹² “Fantasy sports is played by fans who pay a fee to enter and compete . . . for valuable prizes.”²¹³ The teams consist of athletes from real-world teams, but “[t]he only thing that is real is the statistics generated by the individual athletes” that are combined by computers to determine the winners.²¹⁴ DFS, however, can be started and finished in one day.²¹⁵

The two major DFS sites, DraftKings and FanDuel, were making money through massive advertisements, but a scandal in 2015²¹⁶ brought unwanted legal scrutiny, including governmental

206. See *New Jersey Senate Bill 2460*, LEGISCAN, <https://legiscan.com/NJ/bill/S2460/2014> (last visited Aug. 12, 2019).

207. Reply Brief of Appellants, *supra* note 98, at 8.

208. See generally Champion & Rose, *supra* note 2, at 1–2.

209. *Id.* at 76–92.

210. See Michael Trippiedi, *Daily Fantasy Sports Leagues, Do You Have the Skill to Win at These Games of Chance?*, 5 UNLV GAMING L.J. 201, 207 (2014) (footnotes omitted).

211. *Id.* at 220; Walter T. Champion, Jr. & I. Nelson Rose, *Daily Fantasy Sports and the Presidential Debate*, 27 MARQ. SPORTS L. REV. 301, 317 (2017).

212. See David O. Klein et al., *Fantasy Sports: The Rapidly Developing Legal Framework*, KLEIN MOYNIHAN TURCO, LLP (Sept. 18, 2015), <http://www.kleinmoynihan.com/fantasy-sports-the-rapidly-developing-legal-framework>.

213. Rose, *Are DFS Legal?*, *supra* note 136, at 347.

214. *Id.*

215. *Id.*

216. See generally Complaint, *New York v. DraftKings, Inc.* (Nov. 17, 2015), http://www.ag.ny.gov/pdfs/DK_Complaint.pdf (No. 453054) (indicating DraftKings’ scandal based on New York’s lawsuit against them); Tim Casey, *FanDuel, Facing Opposition, Maintains Its Visibility in New York*, N.Y. TIMES (Nov. 23, 2015), <https://www.nytimes.com/2015/11/24/sports/>

threats that “DFS operators would be arrested unless they stopped taking players from . . . New York.”²¹⁷ The New York Attorney General wrote a cease and desist letter to DraftKings and FanDuel on November 10, 2015.²¹⁸ The Attorney General concluded that DFS operations constituted illegal gambling.²¹⁹ The issue in determining the legality of a daily fantasy game was whether there are sufficient skill elements to keep it out of the realm of sports betting.²²⁰ DFS appears to be legal under current federal laws and should be legal in the majority of states, since it will be categorized as a game (just like season-long fantasy sports).²²¹

DFS is now legal in nineteen states.²²² DFS is a glorified sports book; if those states can legislate its legality, why cannot they legislate PASPA’s illegality?

On August 3, 2016, Governor Andrew Cuomo signed a bill legalizing DFS in New York.²²³ State laws that expressly legalize DFS also establish consumer protection regulations.²²⁴ State DFS laws can act as a guide for the Supreme Court to circumvent PASPA and allow the states to regulate sports betting on their own. Also, the Leagues “promote and profit from products that are akin to gambling on sports, such as pay-to-play fantasy leagues.”²²⁵

daily-fantasy-sports-site-facing-opposition-maintains-its-visibility-in-city-arenas.html (demonstrating FanDuel’s advertisements throughout a major college basketball event); Joe Drape & Jacqueline Williams, *Scandal Erupts Around Fantasy Sports Businesses*, HOUS. CHRON. Oct. 5, 2015, <https://www.houstonchronicle.com/sports/texans/article/Scandal-erupts-around-fantasy-sports-businesses-6552515.php> (describing the “major scandal” that erupted involving FanDuel and DraftKings); Peggy Fikac, *Abbot: No Curbs on Fantasy Sports but Some State Lawmakers Suggest the Issue Should Be Examined Further*, HOUS. CHRON., Oct. 23, 2015, at A1 (discussing the FBI and New York Attorney General’s inspection into FanDuel’s and DraftKings’ practices).

217. See generally Rose, *What Should DFS Do Now?*, *supra* note 136, at 683.

218. Letter from Kathleen McGee, Chief, Internet Bureau, *Notice to Cease and Desist and Notice of Proposed Litigation Pursuant to New York Executive Law § 63(12) and General Business Law § 349* (Nov. 10, 2015), https://ag.ny.gov/pdfs/Final_NYAG_DraftKings_Letter_11_10_2015.pdf.

219. *Id.*

220. Rose, *Are DFS Legal?*, *supra* note 136, at 348.

221. I. Nelson Rose, *The UIGEA and the Law of Unintended Consequences*, 19 GAMING L. REV. & ECON. 504, 505 (2015).

222. Jake Lestock, *Tackling Daily Fantasy Sports in the States*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 2018), <http://www.ncsl.org/research/civil-and-criminal-justice/tackling-daily-fantasy-sports-in-the-states.aspx>.

223. Glenn Blain, *Exclusive: Daily Fantasy Sports Sites Bet Nearly \$800G on Push to Make Games Legal in New York*, N.Y. DAILY NEWS (Aug. 7, 2016), <https://www.nydailynews.com/news/national/daily-fantasy-sports-sites-bet-800g-legal-push-article-1.2741112>.

224. See I. Nelson Rose, *New York Legalizes Fantasy Sports*, 20 GAMING L. REV. ECON. 564, 565 (2016).

225. Christie I, 730 F.3d 208, 223 (3d Cir. 2013) (en banc).

DFS, “in conjunction with Major League Baseball (MLB) and the National Basketball Association (NBA), have hired lobbyists to promote and affirmatively legalize daily fantasy sports.”²²⁶

There is power and money behind the legalization and regulation of DFS that will segue into support for the demise of PASPA.²²⁷

Most of the lobbying money comes from FanDuel and Draft Kings, the two largest DFS operators, who control almost the entire market. But they have powerful allies. The extremely rich and powerful sports leagues, with the sole exception of the NCAA, love DFS. Even the fanatically anti-gambling NFL allows its team-owners to be directly involved with DFS operators. Mass media companies, like ESPN, also love DFS. Teams and broadcasters need viewers, and DFS players watch athletic events to the bitter end, even when it is a blow-out. They want to know how the individual real-world athletes in their fantasy team do, because the statistics generated by those athletes are the only thing that matters.²²⁸

New York Senate Bill 8153 establishes a system of registration, regulation, and taxation, but also allows DFS operators to continue to take players while the system is being put into place.²²⁹ The New York Legislature declared DFS a contest of skill; accordingly, since DFS is not gambling, it should keep the federal regulators at arm’s distance.²³⁰ On paper, PASPA²³¹ “prohibits any state from legalizing new forms of sports betting.”²³² Since DFS is now legal in New York, it is highly unlikely that prosecutors will pursue “operators of games that have been expressly made legal by state legislatures.”²³³ The sports leagues,

226. Marc Edelman, *Regulating Fantasy Sports: A Practical Guide to State Gambling Laws, and a Proposed Framework for Future State Legislation*, 92 IND. L.J. 653, 654 (2017).

227. Rose, *New York Legalizes Fantasy Sports*, *supra* note 224, at 564.

228. *Id.* at 565; *see generally* Zachary Shapiro, *Regulation, Prohibition and Fantasy: The Case of FanDuel, DraftKings, and Daily Fantasy Sports in New York and Massachusetts*, 7 HARV. J. SPORTS & ENT. L. 277, 280–81 (2016) (discussing the media stations and major sports leagues that partnered with FanDuel and DraftKings); Paul Suh, *Daily Fantasy Sports: A Call for Clear Guidelines*, 13 HASTINGS BUS. L.J. 351, 356–57 (2017) (stating that DraftKings and FanDuel use their substantial revenue to appeal to sports organizations for partnerships).

229. S. 8153, 2015–2016 Leg. Sess. (N.Y. 2015).

230. *See* Rose, *New York Legalizes Fantasy Sports*, *supra* note 224, at 565.

231. 28 U.S.C. §§ 3701–3704 (2018).

232. *See* Rose, *New York Legalizes Fantasy Sports*, *supra* note 224, at 566.

233. *Id.*

which have the power to sue states under PASPA,²³⁴ will decline to do so since they all support DFS.²³⁵ This synergy for DFS, with its connection to sports betting, will assist in the dismantling of PASPA.

IX. NAT'L COLLEGIATE ATHLETIC ASS'N V. CHRISTIE

Christie I, more formally known as *Nat'l Collegiate Athletic Ass'n v. Christie*,²³⁶ was a lawsuit brought by the NCAA, NBA, NFL, National Hockey League (NHL), and MLB seeking an injunction against Christopher J. Christie, Governor of the State of New Jersey, et al., from implementing New Jersey's Sports Wagering Act.²³⁷ The District Court of New Jersey found in *Christie I*²³⁸ that the plaintiffs had standing to challenge New Jersey's Sports Wagering Law.²³⁹ The Sports Wagering Law²⁴⁰ was a result of the New Jersey legislature amending the New Jersey Constitution on December 8, 2011, to permit sports betting.²⁴¹ This amendment was a direct response to the rapid decline of Atlantic City's casinos, where by mid-September 2014, one-third of its casinos shuttered their doors.²⁴² Sports betting was meant to be a panacea for an ailing economy.²⁴³

On August 7, 2012, the Leagues²⁴⁴ filed a complaint alleging that the Sports Wagering Law violated PASPA.²⁴⁵ The Leagues argued "that the integrity of their games and reputation with their fan base will be injured by implementation of the Sports Wagering

234. 28 U.S.C. §§ 3701–3704.

235. See Rose, *New York Legalizes Fantasy Sports*, *supra* note 224, at 566.

236. *NCAA v. Christie*, 926 F. Supp. 2d 551 (D.N.J. 2013), *aff'd*, 730 F.3d 208 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014) (mem.).

237. N.J. STAT. ANN. §§ 5:12A-1–6 (2012).

238. *NCAA v. Christie*, No. 12-4947, 2012 WL 6698684 (D.N.J. Dec. 21, 2012).

239. *Id.* at *3.

240. N.J. STAT. ANN. §§ 5:12A-1–6.

241. N.J. CONST. art. IV. § 7 cl. 2(D)–(F).

242. Barrow, *supra* note 23, at 398.

243. See generally *Christie I*, 730 F.3d 208, 214 (3d Cir. 2013) (en banc) ("Seeking to address . . . illegal sports wagering . . . and to improve its economy . . . New Jersey . . . sought to license [sports] gambling."); D'Alessandro, *supra* note 135, at 82–83; Fielkow et al., *supra* note 152, at 24; Joel Rose, *Atlantic City Faces Financial Collapse, Cringes at State Takeover* (NAT'L PUB. RADIO broadcast Mar. 24, 2016, 9:59 AM ET), <http://www.npr.org/201603/23/471618590/atlantic-city-faces-financial-collapse-cringes-at-state-takeover>.

244. The Leagues refers to the NCAA, NBA, NFL, NHL, and MLB, who were all parties to the lawsuit in *Christie I*.

245. *NCAA v. Christie*, No. 12-4947, 2012 WL 6698684, at *2 (D.N.J. Dec. 21, 2012).

Law.”²⁴⁶ The court granted standing to sue on December 21, 2012,²⁴⁷ and plaintiffs’ motion for summary judgment was granted on February 28, 2013.²⁴⁸ Most importantly, the court held that New Jersey’s Sports Wagering Law was preempted by PASPA,²⁴⁹ and plaintiffs were entitled to a permanent injunction of the Sports Wagering Law.²⁵⁰

On September 17, 2013, the Third Circuit upheld PASPA’s constitutionality and continued the permanent injunction of the Sports Wagering Law.²⁵¹ The Third Circuit majority opinion was limited in scope:

We are cognizant that certain questions related to this case—whether gambling on sporting events is harmful to the games’ integrity and whether states should be permitted to license and profit from the activity—engender strong views. But we are not asked to judge the wisdom of PASPA or of New Jersey’s law, or of the desirability of the activities they seek to regulate. We speak only to the legality of these measures as a matter of constitutional law.²⁵²

The court recognized that New Jersey had strong arguments in support of its Sports Wagering Law as a matter of public policy.²⁵³ The Third Circuit in *Christie I*²⁵⁴ understood that the threshold question was whether the Leagues will suffer *any* injury if New Jersey violates PASPA²⁵⁵ even though the Leagues already reap the benefits of a sports book in Nevada.²⁵⁶ The Leagues alleged “that they will suffer reputational harm if such activity expands.”²⁵⁷ That begs the question, since the horses are already out of the barn. The court agreed that New Jersey’s “Sports Wagering Law does not directly regulate the Leagues, but instead regulates the activities that *may* occur at the State’s casinos and

246. *Id.*

247. *Id.* at *1, 3.

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

249. *Id.* at 556.

250. *Id.* at 578–79.

251. *Christie I*, 730 F.3d 208, 215 (3d Cir. 2013) (en banc).

252. *Id.*

253. *Id.*

254. *Id.* at 219–20.

255. 28 U.S.C §§ 3701–3704 (2018).

256. *Id.* at § 3704; Anthony N. Cabot & Robert D. Faiss, *Sports Gambling in the Cyberspace Era*, 5 CHAP. L. REV. 1, 7 (2012).

257. *Christie I*, 730 F.3d at 219.

racetracks.”²⁵⁸ The majority’s opinion is nothing if not reluctant in vindicating PASPA:

If baseball is a game of inches, constitutional adjudication may be described as a matter of degrees. The questions we have addressed are in many ways *sui generis*. Neither the standing nor the merits issues we have tackled permit an easy solution by resorting to a controlling case that provides a definitive “Eureka!” moment. Our role thus is to distill an answer from precedent and the principles embodied therein.²⁵⁹

The majority conclusion included the caveat that “New Jersey and any other state that may wish to legalize gambling on sports within their borders are not left without redress.”²⁶⁰

Judge Vanaskie, in dissent, asserted that “PASPA is no ordinary federal statute that directly regulates interstate commerce or activities substantially affecting such commerce.”²⁶¹ PASPA is inherently different since it “prohibits states from authorizing sports gambling and thereby directs how *states* must treat such activity.”²⁶² “Indeed, according to my colleagues, PASPA essentially gives the states the choice of allowing totally unregulated betting on sporting events or prohibiting all such gambling.”²⁶³ “Moreover, contrary to the majority opinion’s suggestion, other federal statutes relating to sports gambling do not aggregate to form the foundation of a federal regulatory scheme that can be interpreted as preempting state regulation of sports gambling.”²⁶⁴ Judge Vanaskie concluded that, “[i]n sum, no case law supports permitting Congress to achieve federal policy objectives by *dictating* how states regulate sports gambling.”²⁶⁵ However, New Jersey’s writ for certiorari was denied on June 23, 2014.²⁶⁶

Christie I held that PASPA prohibits only licensing and authorization of sports wagering.²⁶⁷ New Jersey explicitly relied

258. *Id.* (emphasis added).

259. *Id.* at 240.

260. *Id.*

261. *Id.* at 241 (Vanaskie, J., concurring in part, dissenting in part).

262. *Id.* (emphasis in original).

263. *Id.*

264. *Id.* at 247.

265. *Id.* at 251 (emphasis added).

266. *Christie I*, NCAA v. Christie, 573 U.S. 931 (2014).

267. *Christie I*, 730 F.3d at 233.

on that decision when it passed the 2014 Act, which was a partial repeal of its prohibitions on sports wagering.²⁶⁸ The 2014 Act removed criminal and civil prohibitions that barred casinos and racetracks from accepting sports wagers from persons under twenty-one years of age and specifically repealed any laws or regulations that could be construed as authorizing sports wagering in violation of PASPA.²⁶⁹ The Leagues brought a second lawsuit seeking to enjoin the enforcement of the 2014 Act.²⁷⁰ In this lawsuit (*Christie II*), the Leagues alleged the 2014 Act was functionally indistinguishable from the Sports Wagering Act of 2012.²⁷¹

The District Court of New Jersey again found that the Leagues were entitled to summary judgment and a permanent injunction.²⁷² The court held that the 2014 Act, “[w]hile novel . . . , still conflicts with PASPA and thus must yield to the federal law.”²⁷³ “The primary question . . . is whether PASPA, a federal statute that prohibits sports wagering pursuant to a state scheme, preempts a state law that *partially repeals* New Jersey’s prohibitions on sports wagering at casinos and racetracks in the state.”²⁷⁴ The court held that the 2014 Act “is invalid, under the Supremacy Clause of the United States Constitution” and is preempted by PASPA.²⁷⁵

The Third Circuit Court of Appeals, en banc, affirmed the district court’s opinion that the 2014 Act had the effect of authorizing sports gambling and as such violated PASPA.²⁷⁶ New Jersey argued that the 2014 Act was a “lawful exercise in the space PASPA affords states to create their own policy.”²⁷⁷

Judge Fuentes’s dissent disagrees with the majority’s assessment that “the ‘selective’ nature of the 2014 Repeal *amounts to* ‘authorizing by law’ a sports wagering scheme.”²⁷⁸ “That is, because the State retained certain restrictions on sports betting, the majority *infers* the authorization by law. I cannot agree with

268. S. 2460, 216th Leg., 1st Ann. Sess. (N.J. 2014).

269. *Id.*

270. *NCAA v. Christie*, 61 F. Supp. 3d 488, 495 (D.N.J. 2014).

271. *Id.* at 491.

272. *Id.*

273. *Id.* at 492.

274. *Id.* at 498 (emphasis in original).

275. *Id.* at 508.

276. *Christie II*, 832 F.3d 389, 392 (3d Cir. 2016).

277. *Id.* at 401.

278. *Id.* at 403 (Fuentes, J., dissenting) (emphasis in original).

this interpretation of PASPA.”²⁷⁹ Judge Vanaskie also dissented, reminding the court that the *Christie I* majority left “much room” for the State to formulate their own policy on sports gambling.²⁸⁰ Judge Vanaskie concluded that:

I dissented in *Christie I* because the distinction between repeal and authorization is unworkable. Today’s majority opinion validates my position: PASPA leaves the States with no choice. While *Christie I* at least gave the States the option of repealing, in whole or *in part*, existing bans on gambling on sporting events, today’s decision tells the States that they must maintain an anti-sports wagering scheme. The anti-commandeering doctrine, essential to protect State sovereignty, prohibits Congress from compelling States to prohibit such private activity. Accordingly, I dissent.²⁸¹

The state of New Jersey argued that certiorari must be granted since *Christie II* “cuts deeply into the core of the reserved sovereignty of the States.”²⁸² Unusually, the Supreme Court granted certiorari on June 27, 2017.²⁸³

X. EPIC SYSTEMS CORP. V. LEWIS AND THE ROLE OF COURTS IN INTERPRETING STATUTES

Epic Systems Corp. v. Lewis was a 5–4 SCOTUS opinion decided on May 21, 2018,²⁸⁴ just a week after *Murphy*, which was a typical conservative majority decision, written by Gorsuch, J., with Roberts, Kennedy, Thomas, and Alito, J.J., joining.²⁸⁵ Justice Gorsuch, of course, was at the time Trump’s only SCOTUS appointment.²⁸⁶ The *Epic Systems* holding is the perfect rationale for *Murphy* choosing the Constitution over a poorly written federal statute, PASPA.²⁸⁷ *Epic Systems* ruled that companies can use

279. *Id.* (Fuentes, J., dissenting) (emphasis in original).

280. *Id.* at 408 (Vanaskie, J., dissenting) (quoting *Christie I*, 730 F.3d 208, 233 (3d Cir. 2013) (en banc)).

281. *Id.* at 411 (Vanaskie, J., dissenting) (emphasis in original).

282. Petition for Writ of Certiorari, *supra* note 33, at 1.

283. *Christie v. NCAA*, 137 S. Ct. 2327, 2327 (2017) (mem.).

284. *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1612 (2018).

285. *Murphy v. NCAA*, 138 S. Ct. 1461, 1468 (2018).

286. Following *Epic Systems*, Justice Kavanaugh joined Justice Gorsuch as President Trump’s second SCOTUS appointment.

287. *See Epic Systems.*, 138 S. Ct. at 1624, 1648.

arbitration clauses in employment contracts to stop workers from initiating class action lawsuits.²⁸⁸

Justice Gorsuch saw this case as asking whether previously agreed-to arbitration clauses precluded class action suits.²⁸⁹ To Justice Gorsuch the answer was clear: “It is this Court’s duty to interpret Congress’s statutes as a harmonious whole rather than at war with one another.”²⁹⁰ Justice Gorsuch held that “[t]he NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum.”²⁹¹ Justice Gorsuch continued: “More recently still, the disagreement has grown as the Executive has disavowed the Board’s (most recent) position, and the Solicitor General and the Board have offered us battling briefs about the law’s meaning.”²⁹² Does this discussion sound familiar? The Court looked at the Arbitration Act: “You might wonder if the balance Congress struck in 1925 between arbitration and litigation should be revisited in light of more contemporary developments. You might even ask if the Act was good policy when enacted.”²⁹³ In *Epic Systems* lawyers for the federal government appeared on both sides—an Obama lawyer for the National Labor Relations Board (NLRB) and a Trump lawyer arguing for the employers.²⁹⁴ The employees’ theory in *Epic Systems* “runs afoul of the usual rule that Congress ‘does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouse holes.’”²⁹⁵

Justice Gorsuch continued that:

[i]t’s more than a little doubtful that Congress would have tucked into the mousehole of Section 7’s catchall term an elephant that tramples the work done by these other laws; flattens the parties’ contracted-for dispute resolution

288. *Id.* at 1619.

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 1621.

293. *Id.* at 1621–22.

294. *Id.* at 1618–19; Adam Liptak, *Supreme Court Upholds Workplace Arbitration Contracts Barring Class Actions*, N.Y. TIMES, May 21, 2018, <https://www.nytimes.com/2018/05/21/business/supreme-court-upholds-workplace-arbitration-contracts.html>.

295. *Epic Systems*, 138 S. Ct. at 1626–27 (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001)).

procedures; and seats the Board as supreme superintendent of claims arising under a statute it doesn't even administer.²⁹⁶

That is, it is unreasonable and illogical to imply that the goal of Congress in writing PASPA was to eliminate a state's gambling scheme, especially when it was undeniably the will of the people of New Jersey to legalize sports betting.²⁹⁷ "It's easy, too, to see why the 'reconciliation' of distinct statutory regimes 'is a matter for the courts,' not agencies."²⁹⁸

Justice Gorsuch looked at the concept of bootstrapping:

An agency eager to advance its statutory mission, but without any particular interest in or expertise with a second statute, might (as here) seek to diminish the second statute's scope in favor of a more expansive interpretation of its own—effectively "bootstrap[ing] itself into an area in which it has no jurisdiction."²⁹⁹

"All of which threatens to undo rather than honor legislative intentions. To preserve the balance Congress struck in its statutes, courts must exercise independent interpretive judgment."³⁰⁰

In *Murphy*, Justice Ginsburg in her dissent would salvage PASPA rather than destroy it.³⁰¹ Justice Gorsuch in *Epic Systems* also dealt with a dissent by Justice Ginsburg: "The dissent sees things a little bit differently. In its view, today's decision ushers us back to [an] . . . era when this Court regularly overrode legislative policy judgments. The dissent even suggests we have resurrected the long-dead 'yellow dog' contract But like most apocalyptic warnings, this one proves a false alarm."³⁰²

296. *Id.* at 1627.

297. *See, e.g.,* *NCAA v. Christie*, 61 F. Supp. 3d 488, 491 (D.N.J. 2014) (observing that in 2011 the people of New Jersey voted for a constitutional amendment authorizing sports gambling).

298. *Epic Systems*, 138 S. Ct. at 1629 (quoting *Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 685–86 (1975)).

299. *Id.* (quoting *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638, 650 (1990)) (alterations in original).

300. *Id.*

301. *Murphy v. NCAA*, 138 S. Ct. 1461, 1489 (2018) (Ginsburg, J., dissenting, with whom Sotomayor, J. joins, and with whom Breyer, J. joins in part).

302. *Epic Systems*, 138 S. Ct. at 1630.

XI. CONCLUSION

President Trump is something of a “quirky” enigma; he is the only President who has no experience either in politics or the military. He is also the only billionaire President and one with a myriad of branding conflicts. He owned a casino in Atlantic City and understands the necessity of sports gambling as a panacea to solve the city’s economic woes.³⁰³ He appears to be an advocate of states’ rights, which should create the necessary synergy in the Trump Supreme Court to spell the demise of PASPA.³⁰⁴

NBA Commissioner Adam Silver in an op-ed piece in the New York Times supported the legalization of sports betting in Atlantic City.³⁰⁵ As Commissioner Silver wrote, “[i]n 1992, [sports] leagues supported the passage by Congress of the Professional and Amateur Sports Protection Act, or Pasma, which generally prohibits states from authorizing sports betting. But despite legal restrictions, sports betting is widespread . . . [as] a thriving

303. See Nelson Rose, *Will Trump Accidentally Destroy Las Vegas?*, 21 GAMING L. REV. & ECON. 1, 3, 11 (2017) [hereinafter Rose, *Will Trump Destroy Las Vegas?*] (President Trump conducts diplomacy with China over Twitter); D’Alessandro, *supra* note 135, at 82–83, 104–05. Although this is a very limited list, for anecdotal evidence of President Trump’s “quirkiness,” see, e.g., Richard Cherwitz, Opinion, *Trumpian Language is Strategic Rhetoric*, HOUS. CHRON., June 12, 2018, <https://www.houstonchronicle.com/opinion/outlook/article/Trumpian-language-is-strategic-rhetoric-Opinion-12985542.php> (“Since being elected president of the United States, perhaps well before, Trump has a track record of unethical behavior, racist discourse and disregard for the truth.”); Maureen Dowd, *Vlad, the Trump Impaler*, N.Y. TIMES, July 8, 2017, <https://www.nytimes.com/2017/07/08/opinion/sunday/putin-trump-bannon-taxes.html> (Trump’s White House was described as “dysfunctional [and] dystopian.”); Michael Grynbaum, *Trump’s Spat with Anchor Escalates*, HOUS. CHRON., July 1, 2017, at A1; Michael M. Grynbaum, *‘Morning Joe’ Hosts and Trump Bring National Enquirer into Their Feud*, N.Y. TIMES, Jun. 30, 2017, https://www.nytimes.com/2017/06/30/us/mika-brzezinski-trump-tweets.html?rref=collection%2Fbyline%2Fmichaelm.grynbaum&action=click&contentCollection=undefined®ion=stream&module=stream_unit&version=search&contentPlacement=1&pgtype=collection; Catherine Lucy, *Trump Doesn’t Seem to Be Heeding Calls to Tone Down Tweets*, LAS VEGAS SUN, July 1, 2017, <https://lasvegassun.com/news/2017/jul/01/trump-doesnt-seem-to-be-heeding-calls-to-tone-down/>; Jake Pearson, *Smackdown! Trump Seen Ripping Tactics Straight from Pro Wrestling Hype*, WASH. TIMES, July 3, 2017, <https://www.washingtontimes.com/news/2017/jul/3/donald-trump-insults-tactics-borrowed-wwe-pro-wres/>.

304. See generally Corasaniti & Drape, *supra* note 30 (explaining that the NFL, MLB, and NBA appear poised to defeat PASPA and that the NCAA is the lone opponent; however, New Jersey could certainly eliminate collegiate sports as a betting option); Rose, *Will Trump Destroy Las Vegas?*, *supra* note 303. But the NCAA has their own problems—there is a tremor in the force as exemplified by *Northwestern and CAPA*, DFS, *O’ Bannon*, *O’ Bannon* attorney’s fees, *Keller* settlement, Grant-in-Aid cap antitrust settlement, concussions, *Jenkins*, and, of course, PASPA.

305. Silver, *supra* note 124.

underground business that operates free from regulation or oversight.”³⁰⁶ However, “[t]imes have changed since Paspas was enacted.”³⁰⁷ In the last twenty-five years, there are more lotteries and casinos, Internet gambling, and DFS.³⁰⁸ “There is an obvious appetite among sports fans for a safe and legal way to wager on professional sporting events.”³⁰⁹ Also, “[o]utside of the United States, sports betting and other forms of gambling are popular, widely legal and subject to regulation. In England, for example, a sports bet can be placed on a smartphone, at a stadium kiosk or even using a television remote control.”³¹⁰

Commissioner Silver urges Congress to “adopt a federal framework that allows states to authorize betting on professional sports, subject to strict regulatory requirements and technological safeguards.”³¹¹ “But I believe that sports betting should be brought out of the underground and into the sunlight where it can be appropriately monitored and regulated.”³¹²

The Supreme Court’s *decision to grant certiorari* to review *Christie II* was “a bit of a surprise after Jeffrey B. Wall, the acting solicitor general of the United States, [but not a Trump appointee,] asked the [C]ourt in May [of 2017] not to hear the case.”³¹³ The Supreme Court had already addressed PASPA’s idiosyncrasies in *Greater New Orleans Broad. Ass’n, Inc. v. United States* where it

306. *Id.* “Because there are few legal options available, those who wish to bet resort to illicit bookmaking operations and shady offshore websites. There is no solid data on the volume of illegal sports betting activity in the United States, but some estimate that nearly \$400 billion is illegally wagered on sports each year.” *Id.*

307. *Id.*

308. *Id.* “Gambling has increasingly become a popular and accepted form of entertainment in the United States. Most States offer lotteries. Over half of them have legal casinos. Three have approved some form of Internet gambling, with others poised to follow.” *Id.*

309. *Id.*

310. *Id.*

These requirements would include: mandatory monitoring and reporting of unusual betting-line movements; a licensing protocol to ensure betting operators are legitimate; minimum-age verification measures; geo-blocking technology to ensure betting is available only where it is legal; mechanisms to identify and exclude people with gambling problems; and education about responsible gaming. Without a comprehensive federal solution, state measures such as New Jersey’s recent initiative will be both unlawful and bad public policy.

Id.

311. *Id.*

312. *Id.*

313. Corasaniti & Drape, *supra* note 30.

asserted that PASPA “includes a variety of exemptions, some with obscured congressional purposes.”³¹⁴ And of course, PASPA is inherently illogical.³¹⁵ Daniel Wallach, a sports and gambling lawyer from Florida, believed that “PASPA’s days may be numbered.”³¹⁶ He was correct.³¹⁷ *Murphy v. NCCA* opened the door for legalized sports betting in every state that desired it; now:

professional sports leagues, gambling operators and state governments are vying for their share of potentially billions of dollars of new revenue. [The *Murphy*] ruling is expected to set the stage for a frenzy of negotiations in statehouses across the U.S. on tax rates and possible charges by leagues, all of which could determine how quickly sports betting takes off in newly regulated markets.³¹⁸

In fact, even the NCAA opened the doors for states that legalize “sports gambling to host NCAA championship events,”³¹⁹ and the mercurial NFL now believes that sports betting will help professional football grow especially with the vital demographic group of young men between ages of 18 and 49.³²⁰ Many of the proposed state bills authorizing sports books allow bettors to use mobile and online betting options.³²¹ New Jersey Governor Phil Murphy signed legislation on June 11, 2018, allowing sports betting on June 14, 2018; the Governor

signed the bill just three weeks after the state won a U.S. Supreme Court victory paving the way for all 50 states to allow sports gambling. The new law allows licensed casinos and

314. 527 U.S. 173, 179 (1999).

315. See Rose, *Court Gets it Wrong*, *supra* note 13, at 953–60.

316. Corasaniti & Drape, *supra* note 30; see also I. Nelson Rose, *The Most Important Case of the Century*, GAMBLING AND THE LAW (Nov. 14, 2017) <http://www.gamblingandthelaw.com/the-most-important-case-of-this-century/>; Chris Kirkham & Brent Kendall, *Supreme Court to Hear Arguments Over Sports-Betting Ban*, WALL ST. J., Dec. 2, 2017, <https://www.wsj.com/amp/articles/supreme-court-to-hear-arguments-over-sports-betting-ban-1512216001> (“The Supreme Court’s decision is expected in June. . . . New Jersey, New York, Mississippi, Pennsylvania, and Connecticut have already passed legislation to position themselves for sports betting should the Supreme Court rule in favor of states, and about a half-dozen other states have considered similar measures.”); Walter Slocombe & Fay Vincent, *The Supreme Court Takes Up Sports Betting*, WALL ST. J., Dec. 3, 2017, <https://www.wsj.com/articles/the-supreme-court-takes-up-sports-betting-1512338058>.

317. *Murphy v. NCAA*, 138 S. Ct. 1461, 1485 (2018).

318. Kirkham & Bachman, *supra* note 51.

319. *NCAA Eases Ban on Gambling States*, HOUS. CHRON., May 18, 2018, at C9.

320. Beaton, *supra* note 51.

321. Maese, *supra* note 51; see also Liptak & Draper, *supra* note 51.

racetracks to offer sports betting in a taxed, regulated setting. Monmouth Park, a horse track near the Jersey shore that has been preparing for this day for more than a year, said it would start taking bets Thursday morning [6/14/18].³²²

*Murphy v. NCAA*³²³ is the most important SCOTUS decision in decades. It reflects President Trump's states' rights bias, albeit as reflected in a fun house mirror. Justice Kagan, an allegedly liberal associate justice appointed by Democratic President Barack Obama, joined the conservative majority. Why? The easy answer is that PASPA is a very bad law. It does not pass the smell test. It also unnecessarily excoriated New Jersey, which has its own problems (just watch *Jersey Shore* reruns and you will understand). *Murphy* can be reduced to this—"PASPA's provision prohibiting state authorization of sports gambling schemes violates the anticommandeering rule" because it "*unequivocally* dictates what a state legislature [might or might] not do"; and gambling has always been the *sole* prerogative of the states.³²⁴

322. *New Jersey Ready to Accept Wagers*, HOUS. CHRON., June 12, 2018, at C6.

323. 138 S. Ct. 1461 (2018).

324. *Id.* at 1466–67, 1475–82 (emphasis added).