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By Kate Main*

Introduction

Congress passed the Professional and Amateur Sports Protection Act (“PASPA”), also known as the Bradley Act, in 1992 to define the legal status of sports betting.¹ PASPA was enacted under the Commerce Clause as 28 U.S.C. § 3701, and made state-sanctioned sports betting illegal.² However, the statute carved out exceptions for Oregon, Delaware, and Montana, and licensed sports pools in Nevada.³ Prior to the passage of the Act, during public hearings, the Senate found that sports gambling was a national problem, and that the states that allowed it created interstate ramifications.⁴

Many states would like PASPA to be repealed, and increase their tax revenues through sports gambling. It has been asserted that PASPA is unconstitutional under the Tenth Amendment, as gambling regulation is not a right explicitly granted to the federal government, and as such should be reserved for the states.⁵ New Jersey amended its constitution in 2011 to permit sports gambling.⁶ In 2012, the National Collegiate Athletic Association, the National Basketball Association, the National Football League, the National Hockey League, and the Major League Baseball filed suit against New Jersey’s governor in response to the constitutional amendment.⁷ The U.S. District Court in New Jersey found for the sports leagues.⁸ An appeal by the state to the Third Circuit Court of Appeals

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¹ 28 U.S.C. §§ 3701-04 (1992).

² 28 U.S.C. § 3702.

³ Ryan M. Rodenberg & John T. Holden, *Sports Betting Has an Equal Sovereignty Problem*, 67 Duke L.J. Online 1 (2017).

⁴ Bill Bradley, *The Professional and Amateur Sports Protection Act – Policy Concerns Behind Senate Bill 474*, 2 Seton Hall J. Sport L. 5, 6 (1992).

⁵ U.S. Const. amend. X.

⁶ See Joshua M. Peles, *NCAA v. N.J.: New Jersey Rolls the Dice on a Tenth Amendment Challenge to the Professional and Amateur Sports Protection Act*, 22 Jeffrey S. Moorad Sports L.J. 149 (2015).

⁷ See Nat’l Collegiate Athletic Ass’n v. Governor of New Jersey, 730 F.3d 208 (3rd Cir. 2013).

⁸ See *id.*

upheld the District Court's decision, which upheld the constitutionality of PAPSA and enjoined New Jersey's constitutional amendment from becoming effective.⁹ The Third Circuit held that PASPA was a legitimate exercise of Congress's power under the Commerce Clause, that PASPA did not violate the anti-commandeering principle, and that PASPA was not invalid under the doctrine of equal sovereignty.¹⁰ The Supreme Court agreed to hear *Christie v. NCAA* and *NJ Thoroughbred Horseman v. NCAA* on June 27, 2017.

Discussion

Senator Bradley proposed the bill premised on the notion that the revenue earned by the states through sports gambling "is not enough to justify the waste and destruction attendant to the practice...legalizing sports gambling would aggravate the problems associated with gambling. As a society, we cannot afford this result."¹¹ Senator Bradley proposed that sufficient precedent existed to justify the bill as Congress had regulated gambling activities in the past and "exercised its Commerce Clause powers to regulate activities that are arguably more intrastate than sports gambling without running afoul of the Tenth Amendment."¹² While PASPA may have the lofty goal of reducing the "waste and destruction" that gambling creates in society, many states now disagree that the tax revenue states would earn is insufficient to justify allowing sports gambling. Nevada allows betting on any live sporting event.¹³ Nevada sportsbooks made \$19.7 million in profits from Super Bowl XLVIII.¹⁴ As allowing sports betting would clearly boost state revenues, several state legislatures have attempted to enact legislation allowing sports betting, contravening PASPA.¹⁵ New Jersey is one such state, attempting to legalize sports betting through a constitutional amendment.

⁹ *See id.*

¹⁰ *Id.*

¹¹ Bill Bradley, *The Professional and Amateur Sports Protection Act – Policy Concerns Behind Senate Bill 474*, 2 *Seton Hall J. Sport L.* 5, 6 (1992).

¹² *Id.*

¹³ *See* Joshua M. Peles, *NCAA v. N.J.: New Jersey Rolls the Dice on a Tenth Amendment Challenge to the Professional and Amateur Sports Protection Act*, 22 *Jeffrey S. Moorad Sports L.J.* 149 (2015).

¹⁴ *Id.*

¹⁵ *Id.*

The Third Circuit analyzed the constitutionality of PASPA in *NCAA v. Governor of New Jersey*.¹⁶ The court in *NCAA* found that PASPA was in fact constitutional, as it was regulating an activity that was in fact economic and that substantially affected interstate commerce.¹⁷ However, the court narrowly focused on PASPA's failure to impose affirmative restrictions on the states in its Tenth Amendment analysis.¹⁸ The Tenth Amendment states "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."¹⁹ Lotteries and gambling have traditionally been regulated by the states.²⁰ Following the Third Circuit's ruling in *NCAA*, the New Jersey legislature enacted a bill that focused not on authorizing sports betting, but rather on repealing current state law prohibitions, allowing sports betting in licensed casinos and racetracks.²¹ This law was also challenged in another suit in the Third Circuit ("*NCAA II*"). The Third Circuit again upheld the constitutionality of PASPA.²²

The Supreme Court has agreed to hear *NCAA II* on appeal. Although it is obviously impossible to know how the Court will rule, many legal experts believe PASPA will finally be declared unconstitutional. There is evidence that PASPA has failed to accomplish its stated purposes, as sports betting popularity has increased since its enactment, including amongst youths.²³ It is also likely that when subjected to Supreme Court scrutiny, PASPA will

¹⁶ See 730 F.3d 208.

¹⁷ *Id.* at 224-25.

¹⁸ See Joshua M. Peles, *NCAA v. N.J.: New Jersey Rolls the Dice on a Tenth Amendment Challenge to the Professional and Amateur Sports Protection Act*, 22 Jeffrey S. Moorad Sports L.J. 149 (2015).

¹⁹ U.S. CONST. amend. X.

²⁰ See Joshua M. Peles, *NCAA v. N.J.: New Jersey Rolls the Dice on a Tenth Amendment Challenge to the Professional and Amateur Sports Protection Act*, 22 Jeffrey S. Moorad Sports L.J. 149 (2015).

²¹ Justin Fielkow, et. al., *Tackling PASPA: The Past, Present, and Future of Sports Gambling in America*, 66 DePaul L. Rev. 23, 39 (2016).

²² See *National Collegiate Athletic Ass'n v. Governor of New Jersey*, 799 F.3d 259 (3rd Cir. 2015).

²³ See generally Kyle Wyant, *Do Not Pass Go, Do Not Collect \$231 Million Dollars: How NCAA v. Governor of New Jersey Could Negatively Affect Nevada's Monopoly on Sports Betting*, 7 UNLV Gaming L. J. 223 (2017).

fail on the basis of the equal sovereignty doctrine.²⁴ Additionally, PASPA is vulnerable under the “anti-commandeering” doctrine under the Tenth Amendment.²⁵ Historically, states have exercised their police power to regulate gambling subject to overarching federal laws.²⁶ PASPA removes this power and puts the onus on the States to enforce federal regulation.²⁷ It is likely that the Supreme Court will recognize this aspect as violating the Tenth Amendment’s anti-commandeering principle. The Court may decide to allow states to regulate sports betting themselves, and perhaps begin to bring in massive revenues from sports gambling activities.

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²⁴ Ryan M. Rodenberg & John T. Holden, *Sports Betting Has an Equal Sovereignty Problem*, 67 *Duke L.J. Online* 1, 39 (2017).

²⁵ Stephen Weinstein, *The Stakes Are High: The Professional and Amateur Sports Protection Act is Constitutionally Vulnerable and Reflects Bad Policy*, 33 *Touro L. Rev.* 1309, 1329 (2017).

²⁶ *Id.*

²⁷ *Id.*