

THE PENDULUM SWINGS: COMMERCE CLAUSE AND TENTH AMENDMENT CHALLENGES TO PASPA

*Thomas L. Skinner III**

The Professional and Amateur Sports Protection Act¹ (“PASPA”) prohibits betting, gambling, or wagering on competitive games (“sports betting,” “sports gambling,” or “sports wagering”) wherein professional or amateur athletes participate or are intended to participate.² Enacted in 1992, PASPA makes it illegal for any government entity or person to participate in or sponsor sports betting in all but a few states. Exemptions were carved out for pari-mutuel animal racing, jai-alai games, and for sports betting gambling schemes already in existence or that would become authorized within one year from the effective date of PASPA, provided that the municipality authorizing sports betting had continually operated a commercial casino gaming scheme throughout the previous ten years.³

A handful of states, including Nevada, Montana, New Jersey, Delaware and Oregon, benefited greatly from the carved out exemptions. It is clear that the Senate Judiciary Committee did not want to disrupt lawful sports gambling schemes already operating when PASPA was introduced as Senate Bill 474.⁴ Nevada and Montana share one exemption wherein PASPA permitted states that had conducted sports betting schemes at any time between January 1, 1976 and August 31, 1990 to continue them.⁵ Delaware and Oregon shared another exemption that permitted any sports wagering operations legally conducted between September 1, 1989 and October 2, 1991 to continue, which preserved the sports lotteries operating in Oregon and Delaware.⁶ Finally, New Jersey could have benefited from its own exemption that would have allowed it to introduce sports betting within one year of PASPA’s effective date.⁷ However,

* J.D. Candidate, May 2012, William S. Boyd School of Law, University of Nevada Las Vegas. I wish to acknowledge the brilliance I discovered in the writings of Dean Erwin Chemerinsky and Professor Thomas B. Colby, upon whose works this Note largely relies. I am grateful to two fine mentors who inspired me over the years to reach for success in business and life, Jim Higgins and Dave McGinn. I also wish to thank Kevin A. Spreng, Esq. for encouraging me to pursue law. Finally, and most importantly, I wish to thank my wife, Lisa, and my children, Matthew and Julie, for their endless support and for their inspiring hope in a bright future to come “when Daddy’s a lawyer.”

¹ Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701-3704 (2006).

² *Id.* § 3702(2).

³ *Id.* § 3704(a)(3)-(4).

⁴ Professional and Amateur Sports Protection Act, S. REP. NO. 102-248, at 8 (1992), reprinted in 1992 U.S.C.C.A.N. 3553, 3559.

⁵ 28 U.S.C. § 3704(a)(1).

⁶ *Id.* § 3704(a)(2).

⁷ *Id.* § 3704(a)(3).

New Jersey missed the one-year window for legalizing sports betting under PASPA, so today only Nevada enjoys the benefit of offering comprehensive sports betting. The other states benefit from limited sports betting or sports gambling in the form of lotteries.⁸

In the wake of the economic downturn of the last few years,⁹ states have sought to expand gambling to include sports betting as a potential source of new revenue to offset budget shortfalls.¹⁰ If states were to tap into the sports betting market, the economic benefit could be significant. While approximately \$2.5 billion is wagered legally in Nevada annually on sports,¹¹ that figure represents a mere sliver of the proverbial pie. The National Gaming Impact Study Commission found that the total amount wagered on sports annually by Americans was likely between \$80 billion and \$380 billion.¹² Clearly, from the perspective of a budget deficit-plagued state, this figure represents a potential revenue cash cow, if only it could be tapped.

Of course, the additional revenue to be gained by the licensing and taxing of sports betting is virtually unobtainable by all states except Nevada, since PASPA outlaws sports betting. As a result, some states have begun to challenge the federal law in the courts as an unconstitutional exercise of Congressional power in an effort to invalidate the law.¹³ While states have based their legal challenges on several theories,¹⁴ the most appropriate legal challenge cen-

⁸ By way of example, see *Nat'l Football League v. Governor of Del.*, 435 F. Supp. 1372, 1376 (D. Del. 1977) (containing a description of the Delaware sports lottery). Oregon eliminated its sports lottery, called "Sports Action," in 2005 (effective following the 2006-2007 NFL season) in order to become eligible to host post-season NCAA college basketball tournament games; see John Hunt, *Betting on March Madness payoff*, THE OREGONIAN, Feb. 25, 2009, http://www.oregonlive.com/collegebasketball/index.ssf/2009/02/betting_on_march_madness_payof.html; see also David D. Waddell & Douglas L. Minke, *Why Doesn't Every Casino Have a Sports Book?*, GLOBAL GAMING BUSINESS, July 2008, at 34, 35 (containing a brief description of sports wagering in each exempted state).

⁹ Anthony Karydakis, *How long will the recession last?*, CNNMONEY.COM, <http://money.cnn.com/2008/12/03/news/economy/karydakis.recession.fortune/index.htm> (last updated Dec. 3, 2008, 12:59 PM) (the recession of 2008 to be the longest since the Great Depression); Steve Matthews, *Longest U.S. Slump Since '30s Ended in June '09, Group Says*, BLOOMBERG (Sep. 20, 2010, 2:01 PM), <http://www.bloomberg.com/news/2010-09-20/u-s-recession-ended-in-june-2009-was-longest-since-wwii-nber-panel-says.html> (from the fourth quarter of 2007 until the second quarter of 2009, the U.S. economy was in its "biggest slump since the 1930s").

¹⁰ Diane M. Grassi, *States rush to legalize sports betting & expand gambling for revenue*, RENEWAMERICA (Mar. 13, 2010), <http://www.renewamerica.com/columns/grassi/100313>.

¹¹ *Sports Wagering*, <http://www.americangaming.org/industry-resources/research/factsheets/sports-wagering> (last visited Oct. 29, 2011); see also ROBERT M. JARVIS ET AL., GAMING CASES AND MATERIALS, 279 (2003).

¹² Nat'l Gambling Impact Study Comm'n, Final Report 2-14 (1999) available at <http://gov.info.library.unt.edu/ngisc/reports/2.pdf>.

¹³ Michael Beller, *Sports betting law faces unconstitutionality claim*, MEDILL WASHINGTON (June 9, 2010), <http://medilldev.net/2010/06/sports-betting-law-faces-unconstitutionality-claim/>.

¹⁴ See, e.g., Complaint and Demand for Declaratory Relief at 18, 21, 23, 26-27, 29, 31, 33, 35, *Interactive Media Entm't & Gaming Ass'n, Inc. v. Holder*, 2011 WL 802106 (D.N.J. 2011) (No. 09-1301) (plaintiff alleged that PASPA should be found unconstitutional under several theories relating to: (1) Commerce Clause, (2) Equal Protection, (3) vagueness and

ters around Congress's use of its Commerce Clause authority and whether that use constitutes an infringement of states' rights under the Tenth Amendment.

This Note will address the strength of the Commerce Clause argument (from a historical perspective) as the basis for challenging PASPA and whether opponents are likely to succeed under this theory in the courts. Part I will discuss the evolution of Commerce Clause jurisprudence through relevant case law history. In the twentieth century, the power to regulate under the Commerce Clause became one of the greatest and broadest sources of power ever assumed by Congress. However, Congress has not always maintained such broad authority under the Commerce Clause, as evidenced by cases from the previous century dating back to the framing of the Constitution. Furthermore, although the power to regulate under this constitutional provision is admittedly vast, the Supreme Court tempered the once seemingly unbridled authority in recent years.

Part II will discuss the relevant case law history of states' rights under the Tenth Amendment. Once esteemed as a protection against tyranny and a beacon representing the founding principle of government by the people, the Tenth Amendment has largely lost any real weight as a check on federal power. In fact, at times it seemed to have been figuratively put to death by the Supreme Court. The critical lever that determines the weight of the Tenth Amendment as a check on federal power lies in its construction. The Court has seemingly oscillated between two interpretations of the effect of the Tenth Amendment on Congressional power, which depending on the construction chosen may be outcome determinative with regard to the constitutionality of PASPA.

Part III will evaluate the potential outcomes and likely result of PASPA litigation based on a Commerce Clause or Tenth Amendment challenge before the Supreme Court. Although the subject matter of PASPA falls within the bounds of interstate commerce power, this section will discuss reasons why the constitutional challenges to PASPA should prevail. Most notably, PASPA violates the original meaning of the uniformity requirement of the Commerce Clause; it reaches too far into the zone of authority reserved to the states, as sovereigns, to regulate their citizens under the Tenth Amendment.

I. THE COMMERCE CLAUSE: A BRIEF HISTORY OF CONGRESS'S GREATEST POWER

With just sixteen simple words, the drafters of the Constitution of the United States granted Congress its greatest power: "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes."¹⁵ The power to regulate "among the several States" is known today as the "interstate commerce"¹⁶ power and is the source of power Congress uses to regulate domestic affairs of commerce. This is arguably the most important

overbreadth, (4) Tenth Amendment, (5) Eleventh Amendment, (6) First Amendment, (7) procedural Due Process, (8) substantive Due Process, and (9) privacy).

¹⁵ U.S. CONST. art. I, § 8, cl. 3.

¹⁶ *Fargo v. Stevens*, 121 U.S. 230, 239 (1887) ("...what has come to be known as interstate commerce. . .and which is called in the constitution of the United States 'commerce among the states'. . .").

enumerated power granted to Congress by the Constitution,¹⁷ and it has been the subject of the majority of Supreme Court cases dealing with the scope of congressional power and federalism.¹⁸

A. *Gibbons v. Ogden and Commerce as Intercourse*

The starting point¹⁹ for Commerce Clause analysis begins with the 1824 case of *Gibbons v. Ogden*.²⁰ In *Gibbons*, the Court considered whether a license given by the United States Congress to Thomas Gibbons to operate a steamboat service in the waters between New Jersey and New York violated the exclusive right granted by the Legislature of the State of New York to Aaron Ogden to operate a ferry boat in the same waters.²¹ The Court held that the federal grant preempted the monopoly granted by New York state law, and that the New York law, furthermore, was an impermissible restriction on interstate commerce.²² With this decision, the Court articulated that “commerce” was not limited “to traffic, to buying and selling, or the interchange of commodities” alone.²³ Rather, “commerce, undoubtedly, is traffic but it is something more: it is *intercourse*. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.”²⁴ And with that statement, the Court defined the scope of the commerce power as essentially encompassing all phases of business.²⁵

Additionally, the *Gibbons* Court clarified the phrase “among the several States” by construing it to mean commerce that was “intermingled with” the states.²⁶ “A thing which is among others, is intermingled with them. Commerce among the states, cannot stop at the external boundary line of each state, but may be introduced into the interior.”²⁷ But the Court was careful to make clear that the word “among” should be restricted to apply to commerce activity between two or more states, while the power to regulate commerce carried out wholly within a state was reserved to that state itself.²⁸ Ultimately, the Court declared that, within these boundaries, the Constitution granted Congress plenary power to regulate and prescribe rules for governing commerce among the states (interstate commerce) but not commerce within the states (intrastate commerce).²⁹

¹⁷ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 242 (3d ed. 2006).

¹⁸ *Id.*

¹⁹ *Id.* at 243.

²⁰ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

²¹ More specifically, New York granted the exclusive right to navigate all waters within its jurisdiction to Robert R. Livingston and Robert Fulton who subsequently granted a license to Aaron Ogden. *See id.* at 1-2.

²² CHEMERINSKY, *supra* note 17, at 244.

²³ *Gibbons*, 22 U.S. (9 Wheat.) at 189.

²⁴ *Id.* at 189-90 (emphasis added).

²⁵ CHEMERINSKY, *supra* note 17, at 244.

²⁶ *Gibbons*, 22 U.S. (9 Wheat.) at 194; *see also* CHEMERINSKY, *supra* note 17, at 244.

²⁷ *Gibbons*, 22 U.S. (9 Wheat.) at 194.

²⁸ *Id.* at 194-95.

²⁹ *Id.* at 195-96.

B. *Intrastate Commerce*

For the next half century, the Court rarely had occasion to revisit the scope of the commerce power bestowed on Congress, apart from a handful of post-Civil War cases.³⁰ But in 1871, the Court further extended the somewhat broad scope of the commerce power defined under *Gibbons* by affirming Congress's authority to license ships that operated entirely intrastate.³¹ In *The Daniel Ball*, the Court held such regulation was permitted so long as the merchandise being transported originated in another state or ultimately ended up in another state.³² The Court reasoned that unsafe ships in intrastate commerce could adversely affect ships in interstate commerce.³³ Thus, the commerce power was extended to reach even intrastate activity.

However, contemporaneously with *The Daniel Ball*, the Court also invalidated federal laws enacted under the commerce power for intruding too far into intrastate trade. For instance, the Court first held a federal law to be outside the scope of Congress's commerce power in *United States v. Dewitt*,³⁴ in which the Court invalidated a federal law regulating the sale of petroleum oils that could catch fire at temperatures below 110 degrees.³⁵ The Court concluded that the law touched on "a police regulation, relating exclusively to the internal trade of the state" and was thus not a valid application of federal commerce power.³⁶ Therefore, while the commerce power was originally established as somewhat broad in scope per *Gibbons*, it was clear that the Court limited the scope of the power by characterizing the Commerce Clause as "a virtual denial of any power to interfere with the *internal* trade and business of the separate states."³⁷ Wholly intrastate activity was off limits to Congress.

C. *Dual Federalism and Zones of Authority*

Over the next several decades, and following the enactment of The Interstate Commerce Act of 1887 and the Sherman Antitrust Act of 1890, Congress began a period of heightened federal economic regulation based on Commerce Clause authority.³⁸ The Court, by this time controlled by *laissez-faire* conservatives who were opposed in principle to economic regulations, invalidated many laws for exceeding the scope of Congress's Commerce Clause authority.³⁹ In what some commentators might refer to as an "activist" approach, the Court based its Commerce Clause jurisprudence during this period in what is now termed "*dual federalism*": federal and state governments, as separate sovereigns, have separate zones of authority; the courts are left to protect those powers reserved to the states by interpreting the Commerce Clause narrowly

³⁰ CHEMERINSKY, *supra* note 17, at 246.

³¹ *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 565 (1870).

³² *Id.*

³³ *Id.* at 564; *see also* CHEMERINSKY, *supra* note 17, at 246.

³⁴ *United States v. Dewitt*, 76 U.S. (9 Wall.) 41 (1869).

³⁵ *Id.* at 45.

³⁶ *Id.*

³⁷ *Id.* at 44 (emphasis added).

³⁸ CHEMERINSKY, *supra* note 17, at 247.

³⁹ *Id.*

and enforcing the Constitution against the federal government whenever it exceeds the boundaries of its federal zone of authority.⁴⁰

The dual federalism era resulted in the development of three doctrines that governed the enforcement of narrow constitutional limits on Congress's commerce power.⁴¹ First, the Court defined "commerce" narrowly in order to leave a clear zone of power to the states.⁴² Second, the Court maintained that "among the states" meant that Congress could only regulate if a *substantial effect* on interstate commerce existed.⁴³ Third, the Tenth Amendment reserved a zone of authority specifically to the states that Congress could not invade regardless of whether the regulated activities involved interstate commerce.⁴⁴ These three doctrines proved fatal to any federal legislation during the period that hinted at encroaching on the zone carved out for states, particularly when the legislation targeted economic activity.⁴⁵

However, the Court did relax its application of these doctrines when dealing with federal *morals legislation*,⁴⁶ including gambling laws. For example, as early as 1903 the Court affirmed Congress's authority to regulate activities it considered immoral, including gambling. In *Champion v. Ames*⁴⁷ the Court upheld a federal law that made it illegal to transport lottery tickets from one state to another.⁴⁸ The Court compared Congress's prerogative to regulate lotteries with that of the states' power to regulate the same within their borders, and concluded:

If a state, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with power to regulate commerce among the several states, provide that such commerce shall not be polluted by the carrying of lottery tickets from one state to another?⁴⁹

Thus, whereas states could regulate morals within their jurisdictions, Congress could regulate the same "evils" to prevent them from becoming part of interstate commerce, even if the immoral activities themselves were purely performed intrastate.⁵⁰

⁴⁰ *Id.* at 248.

⁴¹ CHEMERINSKY, *supra* note 17, at 248. For a compelling analysis supporting why the Progressive Era Supreme Court's narrow interpretation of the Commerce Clause was consistent with the original meaning of "commerce" and "among the states," see Professor Randy E. Barnett's discussion of the constitutional text compared to contemporaneous dictionaries, Constitutional Convention speeches, the Federalist Papers, and other historical documents. Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001).

⁴² CHEMERINSKY, *supra* note 17, at 248.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* (emphasis added).

⁴⁷ *Champion v. Ames*, 188 U.S. 321 (1903).

⁴⁸ *Id.* at 363.

⁴⁹ *Id.* at 356.

⁵⁰ But note that while the *Champion* Court rooted much of its decision in morals-based reasoning, it actually framed the issue in the case as whether there was any "solid foundation" whereby Congress could "regulate the carrying of lottery tickets from one State to another." *Id.* at 353 (emphasis added). It concluded and repeated time and again that Con-

Compare *Champion* with *Hammer v. Dagenhart*.⁵¹ In *Hammer*, the Court held unconstitutional a federal law prohibiting the shipment of goods manufactured by companies that employed child labor.⁵² The law only regulated the transfer of goods in interstate commerce. However, the Court invalidated the law because it ostensibly controlled production of the goods, an activity that occurred entirely intrastate.⁵³ *Hammer* and *Champion*, are therefore similar in that they both represent Congress's attempt to regulate the interstate movement of items otherwise produced and regulated purely intrastate. The only real difference between these decisions is that the Court viewed gambling activity in *Champion* as a moral evil and thus upheld the law, even though the law in *Champion*, like the law in *Hammer*, essentially regulated intrastate activity traditionally reserved to the states.

D. Cumulative Effect and the Great Expansion of the Commerce Power

By the 1930's, the Great Depression had left the country crippled. Economic conditions, political sentiment, and the intellectual frailty underlying some of the Court's decisions, combined taken together, operated to pressure the Court into a shift in its Commerce Clause jurisprudence.⁵⁴ The country was crippled by the devastation of the Great Depression. Many of the decisions handed down by the Court seemed to be supported by arbitrary distinctions (e.g., the *Champion* decision compared to *Hammer*), and political pressure for change climaxed when President Roosevelt introduced legislation to increase the size of the Supreme Court to fifteen Justices.⁵⁵

The Court's sentiment subsequently shifted in favor of Congress's economic regulations and opened the door for the commerce power to ascend to new levels.⁵⁶ Beginning in 1937 with *N.L.R.B. v. Jones & Laughlin Steel Corp.*,⁵⁷ the Court began an unprecedented run in favor of expanding the com-

gress had the power to regulate lottery tickets, but only as "subjects of *traffic*." *Id.* It further explained that states had the power to legislate the suppression (or not) of lotteries within their borders, while Congress could regulate only the trafficking of lottery tickets in interstate commerce. *Id.* at 357. The Court emphasized that the federal legislation in question did "not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of any State. . . It has not assumed to interfere with the completely internal affairs of any State." *Id.* That Court recognized in no uncertain terms that the power to regulate lotteries directly fell within the police power reserved to the states. *Id.* at 364-65.

⁵¹ *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

⁵² *Id.* at 276.

⁵³ *Id.* at 273-74 (the Court concluded that the Constitution gave Congress power over interstate commerce "to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture").

⁵⁴ CHEMERINSKY, *supra* note 17, at 254-55.

⁵⁵ *Id.* at 255-56; see also BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 195-96, 232 (2009); for more on the "court packing" ploy, see ROBERT JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY, A STUDY OF A CRISIS IN AMERICAN POLITICS* 197-235 (1941).

⁵⁶ Justice Owen Roberts' shift in position, making him the fifth vote in two watershed cases dealing with laws of the type that had previously been struck down by the Court is commonly referred to as "the switch in time that saved nine." See generally, JACKSON, *supra* note 55, at 197-235; FRIEDMAN, *supra* note 55, at 195-96, 225-36.

⁵⁷ *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

merce power that lasted nearly sixty years. A triad of cases in which the Court overruled previous decisions essentially recast Congress's commerce power as broadly expansive in scope. First, in *N.L.R.B.* the Court upheld the National Labor Relations Act, which gave employees the right to collective bargaining, prohibited discrimination against union members, and created the National Labor Relations Board to enforce the law.⁵⁸ The Court reasoned that because labor relations affected commerce (per Congress's extensive and detailed findings) it could be regulated.⁵⁹

Second, in 1941 the Court upheld the Fair Labor Standards Act of 1938 in *United States v. Darby*.⁶⁰ The law made it unlawful to ship in interstate commerce anything made by employees who were not paid the federal minimum wage. The Court rejected its previous notion that manufacturing was not part of commerce.⁶¹ Instead, it redefined commerce to include production, explaining that "[w]hile manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of commerce" under the plenary power granted to it by the Constitution.⁶²

The Court rounded out the opening of a new era of expansive commerce power jurisprudence with the final case in the trio: *Wickard v. Filburn*.⁶³ With its *Filburn* decision, the Court made clear that it had completely rejected its pre-1937 Commerce Clause doctrines.⁶⁴ Upholding the enforcement of a wheat production quota against a small dairy farmer under the Agricultural Adjustment Act, the Court rejected fact-based distinctions it previously used to determine the scope of Congress's power, including distinctions between commerce and production, or indirect and direct impact on interstate commerce.⁶⁵ Instead, the Court would not invalidate a law simply because the farmer's effect on interstate commerce was insignificant or trivial in and of itself; rather, the Court declared that where his "contribution to the demand for wheat may be trivial by itself, [it] is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."⁶⁶ Therefore, the Court determined, even small acts of personal activities, such as growing wheat for home consumption, were within the reaches of federal legislation if those individual activities, when combined with others, could create a nontrivial *cumulative effect* on interstate commerce.⁶⁷

⁵⁸ *Id.* at 49; CHEMERINSKY, *supra* note 17, at 256.

⁵⁹ *See N.L.R.B.*, 301 U.S. at 31 (the law defined "affecting commerce" as being "in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce").

⁶⁰ *United States v. Darby*, 312 U.S. 100, 125 (1941).

⁶¹ *Compare with Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled by United States v. Darby*, 312 U.S. 100, 113 (1941).

⁶² *Darby*, 312 U.S. at 113.

⁶³ *Wickard v. Filburn*, 317 U.S. 111 (1942).

⁶⁴ CHEMERINSKY, *supra* note 17, at 258.

⁶⁵ *Id.*

⁶⁶ *Filburn*, 317 U.S. at 127-28.

⁶⁷ CHEMERINSKY, *supra* note 17, at 259.

Essentially, the new rule or test was that Congress could regulate anything using the commerce power as long as the activity, when taken cumulatively across the country, provided some minimal degree of rational basis for the Court to find a substantial effect on interstate commerce.⁶⁸ Thus, the Court initiated an era in which it affirmed Congress's ever-broadening and expansive commerce power. As a result, between 1937 and 1995 the Court did not hold a single federal law to have exceeded the constitutional scope of Congress's commerce power.⁶⁹

E. *Gibbons Redux: A Return to Limits on the Commerce Power*

The *corpus juris* remained unchanged until 1995 when the Court again shifted course and pulled back on Congress's seemingly open-ended prerogative to legislate using the commerce power. In *United States v. Lopez*⁷⁰ the Court struck down the Gun-Free School Zones Act of 1990.⁷¹ In that case, the federal law prohibited possessing a gun within one thousand feet of a school.⁷² The Court held the law was not substantially related to interstate commerce.⁷³ In so doing, and after surveying the history of decisions interpreting the Commerce Clause, the Court clarified three categories of interstate commerce activity that may be regulated under the commerce power. Congress may: (1) "regulate the use of the *channels* of interstate commerce,"⁷⁴ such as hotels and restaurants along the public highways, (2) "regulate and protect the *instrumentalities* of interstate commerce,"⁷⁵ including persons and things of commerce like railroads, and (3) "regulate those activities having a *substantial relation* to interstate commerce."⁷⁶ The Court had laid out a framework for curbing the ever-expanding commerce power wielded by Congress.

Then, in *United States v. Morrison*,⁷⁷ the Court affirmed the new three-part test specified in *Lopez* for analyzing the limits of Congress's commerce

⁶⁸ *Id.*; see *Hodel v. Indiana*, 452 U.S. 314, 323-34 (1981) ("A court may invalidate legislation enacted under the Commerce Clause *only if* it is clear that there is *no rational basis* for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." (emphasis added)).

⁶⁹ CHEMERINSKY, *supra* note 17, at 259.

⁷⁰ *United States v. Lopez*, 514 U.S. 549 (1995).

⁷¹ *Id.* at 567.

⁷² See 18 U.S.C. § 922(q)(2)(A) (2006); *Id.* § 921(a)(25).

⁷³ *Lopez*, 514 U.S. at 567.

⁷⁴ *Id.* at 558 (emphasis added); see also *Pierce Cnty., Wash. v. Guillen*, 537 U.S. 129, 146-47 (2003) (The Court upheld federal statutes that made traffic studies by local governments not discoverable if they were done as part of an application for federal funding. Justice Thomas explained that "[i]t is well established that the Commerce Clause gives Congress authority to regulate the use of the channels of interstate commerce. . . [The federal statutes] can be viewed as legislation aimed at improving safety *in the channels* of interstate commerce. As such, they fall within Congress' Commerce Clause power" (emphasis added)); see also Mitchell N. Berman, *Guillen and Gullability: Piercing the Surface of Commerce Clause Doctrine*, 89 IOWA L. REV. 1487, 1498 (2004).

⁷⁵ *Lopez*, 514 U.S. at 558 (emphasis added).

⁷⁶ *Id.* at 558-59 (emphasis added).

⁷⁷ *United States v. Morrison*, 529 U.S. 598 (2000).

power, but *Morrison* narrowed the commerce power even more.⁷⁸ The case centered on whether the civil damages provision of the federal Violence Against Women Act was constitutional.⁷⁹ The law permitted victims of gender violence to sue for money damages and was supported by detailed legislative findings that state protections for women victims of domestic violence and sexual crimes were inadequate.⁸⁰ The Court rejected the law, because it dealt with an area of noneconomic activity traditionally governed by the states. Specifically, the Court said:

Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.⁸¹

Thus, the Court rejected Congress's findings that ostensibly confirmed a link between domestic violence and its impact on interstate commerce.

Applicable to the gambling analysis here, the Court declared "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez*, '[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.'"⁸² The Court limited the commerce power by declaring that Congress *could not regulate noneconomic activities*, even when Congress's findings indicated that the cumulative effect of the noneconomic activities substantially affected commerce.

To be clear, the Court affirmed in *Gonzales v. Raich*⁸³ that economic activity includes the intrastate production of goods sold in interstate commerce, so cumulative impact can be used to determine substantial effect when activity is economic in nature.⁸⁴ In *Raich*, the Court held it was constitutional for Congress to use the commerce power to prohibit the cultivation and possession of medicinal marijuana, even though California had created an exemption for medical use in its marijuana laws.⁸⁵

Therefore, at least for now, it appears settled that Congress may regulate within constitutional bounds using the commerce power whenever one of the three areas outlined in *Lopez* are the subject of the legislation: *channels* of interstate commerce, *instrumentalities* of interstate commerce, or *economic activities* that have a *substantial effect* on interstate commerce. Thus, consistent with *Gibbons*, the *Lopez* Court affirmed the plenary nature of Congress's authority to legislate matters of interstate commerce,⁸⁶ but only when such matters are actually within the constitutional bounds of interstate commerce.

⁷⁸ *Id.* at 608-09.

⁷⁹ *Id.* at 601.

⁸⁰ CHEMERINSKY, *supra* note 17, at 267.

⁸¹ *Morrison*, 529 U.S. at 613.

⁸² *Id.* at 614 (quoting *United States v. Lopez*, 514 U.S. 549, 557 n.2 (1995)).

⁸³ *Gonzales v. Raich*, 545 U.S. 1 (2005).

⁸⁴ *Id.* at 17-20.

⁸⁵ *Id.* at 9; *see also* CHEMERINSKY, *supra* note 17, at 271.

⁸⁶ *United States v. Lopez*, 514 U.S. 549, 566 (1995).

II. THE TENTH AMENDMENT

The Tenth Amendment provides that all “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.”⁸⁷ The meaning of this amendment has been the topic of much debate.⁸⁸ Generally, the question is whether or not the Tenth Amendment should be considered to be a judicially enforceable restraint on congressional power. The answer lies in the construction of the amendment, and the significance to this Note is that the amendment’s affect on PASPA challenges may turn on which interpretation the Court applies.

One view is that the Tenth Amendment is not a separate constraint on congressional power.⁸⁹ Instead, it is merely a truism reflecting the fact that Congress only has power to legislate when given authority by the Constitution.⁹⁰ Under this approach, the Court cannot hold a federal law to be unconstitutional as a violation of the Tenth Amendment, but rather can only strike a federal law for violating other provisions of the Constitution.⁹¹

The competing view is that the Tenth Amendment is, in fact, a restraint on Congress that protects sovereign states from federal intrusion.⁹² This approach would draw the boundaries of federalism boldly and vigorously and defend from federal encroachment the zone of activity reserved exclusively to the states. Under this approach, the Court may hold a federal law to be unconstitutional as a Tenth Amendment violation whenever Congress intrudes into the reserved zone of activity.⁹³ The values most often cited as reasons for advancing the federalism of this approach are: (1) preventing federal tyranny, (2) enhancing democracy by safeguarding government that is closer to the people, and (3) allowing states to serve as laboratories for new ideas.⁹⁴ Regardless of the values cited by proponents of either view, the dispute over the competing interpretations of the Tenth Amendment is ultimately a policy debate about the importance of protecting state sovereignty via federalism and whether the judiciary or the political process is best suited to take on the role of protecting state prerogatives.⁹⁵

Not surprisingly, the Court’s view on federalism and the construction of the Tenth Amendment has closely paralleled its Commerce Clause jurisprudence. In fact, the commerce power and the Tenth Amendment protection of

⁸⁷ U.S. CONST. amend. X.

⁸⁸ See generally, DAVID SHAPIRO, *FEDERALISM: A DIALOGUE* (1995); Lynn A. Baker, *The Revival of States’ Rights: A Progress Report and a Proposal*, 22 HARV. J.L. & PUB. POL’Y 95 (1998); Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763 (2006); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994); Robert A. Schapiro, *Justice Stevens’s Theory of Interactive Federalism*, 74 FORDHAM L. REV. 2133 (2006); Norman R. Williams, *The Commerce Clause and the Myth of Dual Federalism*, 54 UCLA L. REV. 1847 (2007).

⁸⁹ CHEMERINSKY, *supra* note 17, at 313.

⁹⁰ See *infra* note 105, at 124.

⁹¹ CHEMERINSKY, *supra* note 17, at 313.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

states' rights are simply two sides of the same coin. On one side, the Commerce Clause gives authority to Congress. Once that authority is duly established under the Constitution, Congress may act. However, on the other side, the Tenth Amendment restricts that authority if it intrudes upon states' rights.

A. *Plenary Power*

In the nineteenth century, the Court followed the first approach by upholding federal laws as constitutional so long as Congress acted within the scope of its enumerated authority.⁹⁶ According to the *Gibbons* Court, Congress's commerce power was "complete in itself" without limitations save those prescribed in the Constitution.⁹⁷ Chief Justice Marshall explained that while the Constitution grants authority to Congress over limited objects, the power granted "is plenary as to those objects" and the commerce power "is vested in Congress as absolutely as it would be in a single government."⁹⁸ The commerce power was *not to be limited in any way by state sovereignty*, but rather only by the people through the political process.⁹⁹ Judicially enforced limits to protect the states found no place in *Gibbons*.¹⁰⁰

B. *State Authority Preserved*

However, in the early twentieth century and until 1937, the Court shifted to the second approach. During this period, the Court held in *Hammer v. Dagenhart* that the Tenth Amendment reserved control over *production* to the states.¹⁰¹ In finding that the regulation of production of goods was off limits to federal regulation, the Court explained that the purpose of the Commerce Clause was to give Congress power to regulate interstate commerce and "not to give it authority to control the states in their exercise of the police power over local trade and manufacture."¹⁰² The *Hammer* Court indicated that regulation of hours worked by children was a matter of "purely state authority."¹⁰³ Federal laws that intruded on this zone of authority were unconstitutional violations of the Tenth Amendment.¹⁰⁴ So, while the commerce power may have been broad, it had its limits, and the courts could curtail the power if it encroached upon traditional state authority.

C. *Decline of the Tenth Amendment Check on Federal Power*

From 1937 to the 1990's, the Court reverted back somewhat to the first approach – that the Tenth Amendment was not a separate constraint on Congress's commerce power. In *United States v. Darby*¹⁰⁵ the Court upheld the constitutionality of the Fair Labor Standards Act of 1938 which made it unlaw-

⁹⁶ *Id.*

⁹⁷ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824).

⁹⁸ *Id.* at 197.

⁹⁹ *Id.*

¹⁰⁰ CHEMERINSKY, *supra* note 17, at 246.

¹⁰¹ *See Hammer v. Dagenhart*, 247 U.S. 251, 269, 271-72 (1918).

¹⁰² *Id.* at 273-74.

¹⁰³ *Id.* at 276.

¹⁰⁴ CHEMERINSKY, *supra* note 17, at 313.

¹⁰⁵ *United States v. Darby*, 312 U.S. 100 (1941).

ful to ship goods in interstate commerce that were produced by employees paid less than the prescribed minimum wage.¹⁰⁶ With its decision, the Court expressly overruled *Hammer v. Dagenhart* and rejected its prior holding that control of production of goods put into interstate commerce was reserved to the states. In *Darby*, the Court at once extended commerce authority to include production and practically extinguished any strength previously retained by the Tenth Amendment for limiting federal power.¹⁰⁷

In fact, during this period the Court cited only one Tenth Amendment violation, and even that decision was eventually expressly overruled.¹⁰⁸ That case was *National League of Cities v. Usery*,¹⁰⁹ in which the Court considered a challenge to the 1974 amendments to the Fair Labor Standards Act. The law extended minimum wage and maximum hour provisions to almost all employees of states and their political subdivisions. The Court held the law violated the Tenth Amendment by “operat[ing] to directly displace the States’ freedom to structure integral operations in areas of *traditional governmental functions*”¹¹⁰ because it forced states to “substantially restructure traditional ways in which [they] have arranged their affairs.”¹¹¹ The problem with the outcome of the case was that the Court indicated an unconstitutional encroachment into state affairs, but did not define what would be considered a “traditional governmental function.”¹¹²

Consequently, nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*,¹¹³ after distinguishing several cases from *Usery*, the Court finally expressly overruled it as “unsound in principle and unworkable in practice.”¹¹⁴ In holding that the Fair Labor Standards Act applied to the states, the Court reasoned that leaving it to the courts to make policy decisions about “traditional” government functions “invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.”¹¹⁵ The Court then acknowledged the “special and specific position” that states occupy within the constitutional system that should be reflected by limits on Congress’s commerce power, but instructed that those limits should be imposed by the political process.¹¹⁶ Therefore, as a result of the Court’s suggestion, the Tenth Amendment as a check on federal power was virtually dead.¹¹⁷

¹⁰⁶ *Id.* at 117, 121.

¹⁰⁷ *Id.* at 124 (“The Amendment states but a truism that all is retained which has not been surrendered.”).

¹⁰⁸ See generally *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985).

¹⁰⁹ *Nat’l League of Cities*, 426 U.S. at 835-37.

¹¹⁰ *Id.* at 852 (emphasis added).

¹¹¹ *Id.* at 849.

¹¹² CHEMERINSKY, *supra* note 17, at 319.

¹¹³ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

¹¹⁴ *Id.* at 546-47.

¹¹⁵ *Id.* at 546.

¹¹⁶ *Id.* at 556 (“The political process ensures that the laws that unduly burden the States will not be promulgated.”).

¹¹⁷ But see Justice Rehnquist’s lament and prediction that the Tenth Amendment protection of states’ rights would rise again. *Id.* at 580 (Rehnquist, J., dissenting).

D. Federalism Reborn

Nevertheless, in the 1990's the Court again appeared to breathe new life into the Tenth Amendment as a constitutional limitation on congressional power.¹¹⁸ Within a decade, the Court resurrected the Tenth Amendment's limitation on federal commerce power in what Professor Chemerinsky describes as a "new federalism."¹¹⁹

First, in *New York v. United States*¹²⁰ the Court invalidated the Low-Level Radioactive Waste Policy Amendments Act as a violation of the Tenth Amendment.¹²¹ In that case, the federal law imposed a duty on states to dispose of radioactive waste and required states to "take title" to all waste generated within their borders or else be liable for damages claims due to the waste.¹²² The Court noted that Congress had authority under the Commerce Clause to regulate radioactive waste disposal, but held that Congress violated the Tenth Amendment by imposing the "take title" provision upon the states, because that provision crossed the line from incentive to *coercion by commandeering* the "legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."¹²³ Thus, Congress may not force "state legislatures to adopt laws or state agencies to adopt regulations."¹²⁴ Furthermore, "allowing Congress to commandeer state governments would undermine government accountability because Congress could make a decision, but the states would take the political heat and be held responsible for a decision that was not theirs."¹²⁵

Five years after *New York*, the Court decided *Printz v. United States*¹²⁶ holding that the Brady Handgun Violence Prevention Act also violated the Tenth Amendment.¹²⁷ Among other things, the Brady Act required local law enforcement officers to perform background checks on prospective handgun purchasers (on an interim basis until a federal program was put in place).¹²⁸ Echoing *New York*, the Court invalidated the portion of the federal law requiring states to perform background checks, because it allowed Congress to impermissibly commandeer state officials to implement a federal mandate.¹²⁹ Writing for the Court, Justice Scalia said:

The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or

¹¹⁸ CHEMERINSKY, *supra* note 17, at 322.

¹¹⁹ *Id.* at 326.

¹²⁰ *New York v. United States*, 505 U.S. 144 (1992).

¹²¹ *Id.* at 177.

¹²² *Id.* at 174-75.

¹²³ *Id.* at 176.

¹²⁴ CHEMERINSKY, *supra* note 17, at 324.

¹²⁵ *Id.*

¹²⁶ *Printz v. United States*, 521 U.S. 898 (1997).

¹²⁷ *Id.* at 935.

¹²⁸ *Id.* at 902-03.

¹²⁹ *Id.*

benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.¹³⁰

Finally, in *Reno v. Condon*,¹³¹ the Court rounded out recent “new federalism” jurisprudence by rejecting a Tenth Amendment challenge – signaling a key boundary to challenges of the kind – and upholding the federal law in question.¹³² South Carolina had challenged the Driver’s Privacy Protection Act, which restricted the ability of states to disclose personal information without the driver’s consent.¹³³ The Court held that the law was a valid reflection of Congress’s commerce power because the sale and release of personal information was an article in the interstate stream of commerce.¹³⁴ Furthermore, it held that the law did not attempt to regulate the states in their *sovereign capacity to regulate citizens*, but rather it regulated states as the owners of databases.¹³⁵ In addition, the Court reasoned that the law did not require states to enact any laws or regulations or require state officials to assist in the enforcement of federal statutes governing citizens (as in *Printz*).¹³⁶ Thus, the law was upheld as a lawful exercise of congressional power that did not run afoul of the Tenth Amendment.¹³⁷

Ultimately, the Tenth Amendment’s bite appears to have teeth, however small, once again. The current stance of the Court is that Congress’s Commerce Clause power, while plenary in the area of interstate commerce, is limited to that realm. Congress may not freely trample into the zone of authority reserved to the states, beyond which areas of traditional government functions are exercised by the states. The Court is still likely to give a great deal of deference to Congress, especially considering that many areas involving the Tenth Amendment may better be resolved through the political process. However, the Court will certainly intervene whenever federal law attempts to commandeer state sovereignty or interferes with states in their sovereign capacity to regulate citizens.

III. LIKELY OUTCOMES OF PASPA CHALLENGES

With the above illustration as a historical backdrop of Commerce Clause and Tenth Amendment jurisprudence, how is the Supreme Court likely to rule on a constitutional challenge to PASPA? As to the commerce power, the answer is complicated and depends on the Court’s interpretation of the constitutional scope of the Commerce Clause. Here, the key questions are whether Congress has reached beyond its constitutionally enumerated authority, and whether uniformity is required by the Constitution. If so, has Congress failed to exercise the commerce power uniformly as required? The Supreme Court’s

¹³⁰ *Id.*

¹³¹ *Reno v. Condon*, 528 U.S. 141 (2000).

¹³² *Id.* at 147-48.

¹³³ *Id.* at 144.

¹³⁴ *Id.* at 148.

¹³⁵ *Id.* at 151.

¹³⁶ *Id.*

¹³⁷ *Id.*

ultimate decision on the constitutionality of PASPA will be informed by the answers to questions such as these.

Despite arguments to the contrary, the Supreme Court will likely uphold PASPA as a valid exercise of Congress's Commerce Clause authority. Such a result is probable given the enormous expansion of the commerce power during the last century, buoyed by the precedent of an errant line of dicta-based reasoning that underscores the misunderstood uniformity requirement of the commerce power. Therefore, considering the general presumption of constitutionality afforded legislation enacted under the Commerce Clause,¹³⁸ coupled with the doctrine of stare decisis, relief, if any is to be found, will more likely come as the result of a Tenth Amendment challenge.

The pendulum of federalism appears to be swinging again toward the protection of states' rights. Here, the essential questions are whether Congress breached the boundaries of the zone of authority reserved to the states by enacting PASPA, and whether the states, under PASPA, are simply being regulated as participants in commerce or as sovereigns carrying on their traditional government functions. As with the Commerce Clause challenge, the Court may be inclined to reject a Tenth Amendment challenge, despite its plausible merits.

Nevertheless, if challengers of PASPA can persuasively articulate the nuances of a few key constitutional arguments with respect to the Commerce Clause and the Tenth Amendment, then there is a chance they may convince the Court to strike down PASPA. The following sections illuminate how those nuances may best be understood and thus applied as challenges to PAPSAs.

A. *The Commerce Clause Challenge*

The Constitution clearly enumerates and grants the commerce power to Congress under Article I "to regulate commerce. . . among the several states."¹³⁹ Under the modern test, a valid law regulating interstate commerce must fall within one of the three areas the *Lopez* Court articulated as valid exercises of the commerce power.¹⁴⁰ PASPA appears to satisfy at least one requirement of that test. Specifically, the law regulates sports wagering, a billion dollar gambling industry, which is an economic activity having a substantial effect on interstate commerce.¹⁴¹ Gambling is big business and sports wagering is a significant part of it.

Thus, notwithstanding the common sense observation that PASPA is fundamentally unfair in its differing treatment of the various state governments, it appears to fall squarely within constitutionally enumerated Commerce Clause authority. As such, it will likely be difficult, if not impossible, for opponents of PASPA to prevail under contemporary Commerce Clause analysis. Fortunately, however, the argument may not end there. Surprisingly, the most promising direct attack on PASPA as an unconstitutional execution of the commerce

¹³⁸ *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

¹³⁹ See U.S. CONST. art. I, § 8, cl. 3.

¹⁴⁰ See Part I.E, *supra*.

¹⁴¹ Nat'l Gambling Impact Study Comm'n, Final Report 2-14 (1999) available at <http://govinfo.library.unt.edu/ngisc/reports/2.pdf>.

power may be rooted in the little known and misunderstood doctrine of the uniformity requirement inherent in constitutional commerce power.

1. Failed Uniformity Arguments

Neither the plaintiffs in recent cases making their way through the Federal courts, nor the original opponents of PASPA in Congress were able to articulate artfully the uniformity requirement of the Commerce Clause. In fact, the plaintiffs in one recent case failed to include a constitutional challenge in their complaint altogether, so there was no occasion for them to argue for uniformity.¹⁴² Apparently, that approach was a strategy by design, as they merely wanted to urge expansion of the exemption carved out in PASPA for Delaware. This strategy is a lost opportunity. In contrast, plaintiffs in *Interactive Media Entertainment & Gaming Association, Inc. v. Holder*¹⁴³ (“*IMEGA*”) did allege the unconstitutionality of PASPA as a Commerce Clause violation. However, the plaintiffs’ complaint merely claimed:

77. One of the purposes of the Constitutional Convention of 1787 was to unify the prevailing view among the States that Congress should be vested with the power to regulate matters involving interstate commerce so long as this power was uniformly applied throughout the United States.

78. Under the Commerce Clause, Congress is required to legislate uniformly amongst the several states. . .

92. PASPA allows Nevada, Delaware, Oregon, and Montana to have a cartel on Sports Betting in general in the United States to the detriment of the remaining 46 states.¹⁴⁴

In a reply to defendant’s Motion to Dismiss, the *IMEGA* plaintiffs attempted to explain:

With regard to the regulation of gambling, the Tenth Amendment requires uniformity between states. . .The United States Supreme Court has stated that *occasionally* there is no requirement of national uniformity when Congress exercises its power under the Commerce Clause to determine whether Federal regulation will apply. *However, such cases sustaining a lack of uniform treatment under the Tenth Amendment are*

¹⁴² Petition for Writ of Certiorari, *Office of Com’r of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009) (No. 09-914), *cert. denied mem.*, 130 S.Ct. 2403 (2010) (presenting only two questions on certiorari: “1. Whether the Professional and Amateur Sports Protection Act (“PASPA”) prohibits Delaware from offering sports lotteries to generate revenues to help alleviate its substantial budget deficits and satisfy its constitutional balanced-budget obligations. 2. Whether the panel below erred as a matter of law in deciding the merits in an appeal of a denial of a preliminary injunction brought pursuant to 28 U.S.C. § 1292(a), where the factual record had not been developed and final adjudication of the merits turned on contested factual considerations.”).

¹⁴³ Complaint and Demand for Declaratory Relief, *supra* note 14, at 18. Although this case was dismissed for lack of standing, New Jersey Senator Raymond Lesniak, one of the plaintiffs, promised to bring the suit again after a referendum to legalize sports betting in the state goes to voters in November 2011. The Senator had previously convinced the state legislature to pass a bill legalizing the practice, but the bill was vetoed by the governor. See Mary-Ann Spoto, *Federal judge throws out lawsuit claiming N.J. sports betting ban is unconstitutional*, THE STAR-LEDGER, March 8, 2011, http://www.nj.com/news/index.ssf/2011/03/federal_judge_throws_out_lawsu.html.

¹⁴⁴ Complaint and Demand for Declaratory Relief, *supra* note 14, at 18, 20.

only held to apply when the subject matter of the litigation requires, or is only susceptible to, non-uniform treatment.¹⁴⁵

Rather inartfully, the plaintiffs then attempted to distinguish their case from *Currin v. Wallace*¹⁴⁶ (upon which the defense relied), while analogizing it to *Secretary of Agriculture v. Central Roig Refining Co.*¹⁴⁷ (which plaintiffs believed supported their case).¹⁴⁸

First, the *IMEGA* plaintiffs merely pointed out that unlike PASPA the tobacco regulation at issue in *Currin* did not make tobacco markets illegal while establishing interstate tobacco markets that disparately impacted certain states.¹⁴⁹ The plaintiffs attempted to draw the inference that since PASPA makes sports betting illegal for some states but not others, then it is unconstitutional. Surprisingly, the plaintiffs failed to state even that plainly. While the *IMEGA* plaintiffs made a valid point, they made no additional argument to explain why that point mattered, rendering it completely ineffective.

Second, the *IMEGA* plaintiffs alleged that the non-uniform nature of PASPA was unlike the disparate regulations controlling the production and refining of sugar in *Central Roig*, because the Court in that case only stated there was no requirement for “geographic uniformity” under the Commerce Clause.¹⁵⁰ In *Central Roig*, the costs of sugar production in U.S. states were different than in Puerto Rico, which gave rise to an exception of the uniform regulation of the sugar trade. The *IMEGA* plaintiffs claimed that, unlike the case in *Central Roig*, there was no geographic purpose for PASPA to ignore the uniformity requirement.¹⁵¹

Third, the *IMEGA* plaintiffs argued that since an anti-gambling advertising statute was invalidated for “containing a variety of exemptions, some with obscured congressional purposes,” PASPA likewise should be invalidated on similar grounds.¹⁵² These arguments were feeble attempts to call into question PASPA’s unfair discrimination against states due to non-uniformity; unfortunately, they lacked a necessary foundation in constitutional support.

The congressional record on the bill that became PASPA, Senate Bill 474,¹⁵³ reveals an even more disappointing attempt at challenging PASPA’s discrimination against the states by calling for uniformity. In fact, after including several paragraphs on the states’ rights issue, the record includes only a few sentences on the discrimination issue, merely amounting to an identification of the matter without any substantive argument against it: “Perhaps even more troubling, this legislation would blatantly discriminate between the States.

¹⁴⁵ Brief of Plaintiffs Interactive Media Ent’m’t & Gaming Ass’n, Inc. in Opposition to Defendants’ Motion to Dismiss at 28, *Interactive Media Entm’t & Gaming Ass’n, Inc. v. Holder*, 2011 WL 802106 (2011) (No. 09-1301) (emphasis in original) [hereinafter *Interactive Media Opposition*].

¹⁴⁶ *Currin v. Wallace*, 306 U.S. 1 (1939); see *infra* notes 160, 211 and accompanying text.

¹⁴⁷ *Sec’y of Agric. v. Cent. Roig Ref. Co.*, 338 U.S. 604 (1950).

¹⁴⁸ *Interactive Media Opposition*, *supra* note 145, at 29-30.

¹⁴⁹ *Id.* at 29.

¹⁵⁰ *Cent. Roig*, 338 U.S. at 616.

¹⁵¹ *Interactive Media Opposition*, *supra* note 145, at 29-30.

¹⁵² *Id.* at 31-32 (quoting *Greater New Orleans Broad. Ass’n v. United States*, 527 U.S. 173 (1999) (internal quotes omitted)).

¹⁵³ S. 474, 102d Cong. (1992) (enacted).

Under S. 474, Nevada, Oregon, and Delaware would be grandfathered. Thus, these three States would be granted a Federal monopoly on lawful sports wagering to the exclusion of the other 47 States.”¹⁵⁴ This was simply inadequate to challenge PASPA successfully.

If future challengers of PASPA expect to carry the Court, they must better articulate the constitutional arguments that refute discrimination between the states, including the constitutional foundation supporting the lost uniformity requirement of the Commerce Clause.

2. *Understanding the Lost Uniformity Requirement*

The above allegations, while mostly legitimate, were little more than empty arguments. They lacked the substance required to prevail over the Court’s seemingly settled, yet incomplete, Commerce Clause position. It is true that the modern Court has routinely indicated that the Constitution does not require uniformity in the exercise of the commerce power over the states.¹⁵⁵ Rather, the Court has stated, Congress is free to “regulate states unevenly” under the commerce power.¹⁵⁶ In fact, the Court has even gone so far as to describe the notion that congressional action might be invalid for lack of uniformity as having “no warrant.”¹⁵⁷ After all, the Court reasoned, the commerce power is plenary, so Congress may use its discretion when wielding that power.¹⁵⁸

Found in the pages of the Court’s opinions, this trend buoyed proponents’ confidence in PASPA’s constitutionality, even though the law clearly discriminated against all but a few states.¹⁵⁹ The law’s sponsor, Senator Bill Bradley, rationalized that since the Supreme Court “explicitly held that there is no requirement of uniformity when Congress is exercising its power pursuant to the Commerce Clause,” then there was “no legitimate constitutional basis” for contesting the law for discriminating among the states.¹⁶⁰

Thus, by its plain language, PASPA carved out discriminatory exemptions for specific states.¹⁶¹ Congress had “no wish to apply this new prohibition retroactively to Oregon or Delaware, which instituted sports lotteries prior to

¹⁵⁴ S. REP. NO. 102-248, at 11 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3563 (Minority Views of Senator Grassley).

¹⁵⁵ Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249, 259 nn. 32-34 & 36 (2005).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 259.

¹⁵⁹ *Id.*

¹⁶⁰ Bill Bradley, *The Professional and Amateur Sports Protection Act – Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORT L. 5, 17-18 (1992). Senator Bradley cited to *James Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311 (1917) and *Currin v. Wallace*, 306 U.S. 1 (1939), but his conclusion was based on an egregious constitutional error committed by the Court. As discussed later in this Part III, *James Clark Distilling* did not, in fact, explicitly hold that uniform treatment of the states was not a requirement of the Commerce Clause, and the *Currin* Court misunderstood *James Clark Distilling* and its previous line of cases; *see also* Colby, *supra* note 155, at 260.

¹⁶¹ 28 U.S.C. § 3704(a)(1)-(3) (2006).

the introduction of [the federal] legislation,”¹⁶² nor did it wish to apply the prohibition to Montana’s form of sports betting already existing in bingo parlors.¹⁶³ And, of course, Congress had no “desire to threaten the economy of Nevada, which over many decades has come to depend on legalized private gambling, including sports gambling, as an essential industry.”¹⁶⁴

Significantly, the National Conference of State Legislatures, the National Association of State Budget Officers, the North American Association of State and Provincial Lotteries, and the Council of State Governments opposed PASPA for, among other reasons, its unequal treatment of the states.¹⁶⁵ Furthermore, the Department of Justice, in a letter to Senator Biden, then Chair of the Judiciary Committee, expressed its concerns about the constitutionality of the proposed law.¹⁶⁶

Despite concerns about its constitutionality, PASPA passed anyway. But did that mean the uniformity concern was unfounded? Not in the least. Professor Colby made a thorough and compelling argument supporting the Commerce Clause’s uniformity requirement based on historical research of the Framers’ intent, historical documents, and political impetus for including the commerce power in the Constitution.¹⁶⁷ In his view, the “uniformity constraint on the commerce power was of the utmost importance to the framing generation, and it is highly unlikely that the Constitution would have been proposed or ratified without it.”¹⁶⁸ He asserts that the modern Court’s interpretation of commerce power uniformity is flawed and should be returned to the proper construction that provided for uniform application of the commerce power among the states.¹⁶⁹

The uniformity requirement of the commerce power was of fundamental importance to the Framers.¹⁷⁰ But based on a plain text reading of the section, notes Professor Colby, the modern Supreme Court has repeatedly stated, but has not explicitly held, that the Constitution does not require or constrain Congress to legislate uniformly among the states under the Commerce Clause.¹⁷¹ Today’s Court is likely to reach the same conclusion, finding a “straightforward textual reading” of the Constitution to support the constitutionality of PASPA, because of the way in which the Commerce Clause contrasts with the Bankruptcy Clause and the Tax Uniformity Clause.¹⁷² Both the Bankruptcy Clause and the Tax Uniformity Clause explicitly require uniform regulation, while the

¹⁶² JUDICIARY COMM., S. REP. NO. 102-248, at 8 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3553, 3559.

¹⁶³ 138 CONG. REC. 12,973 (daily ed. June 2, 1992) (statement of Sen. DeConcini).

¹⁶⁴ S. REP. NO. 102-248, at 8.

¹⁶⁵ Colby, *supra* note 155, at 256-57.

¹⁶⁶ Letter from W. Lee Rawls, Assistant Att’y Gen., U.S. Dep’t of Justice, to Sen. Joseph R. Biden, Jr. Chairman, Comm. on the Judiciary, United States S. (Sept. 24, 1991) *available at* http://federalgaminglaw.com/page18/files/PAPSAletters_DOJ_Senate91.pdf.

¹⁶⁷ *See generally* Colby, *supra* note 155.

¹⁶⁸ *Id.* at 311.

¹⁶⁹ *Id.* at 255.

¹⁷⁰ *Id.* at 253.

¹⁷¹ *Id.* at 252.

¹⁷² *Id.*

Commerce Clause does not.¹⁷³ So, unless opponents of PASPA can persuade the Court to reconsider the underlying constitutional genesis of the Commerce Clause, and its elusive uniformity requirement, the Court will likely reject a commerce power challenge.

To that end, opponents of PASPA should appeal to the Court's reverence for historical tradition to urge it to drop the modern trend in favor of a rule consistent with the Framers' original intent and "the once-settled general understanding of the scope of the commerce power."¹⁷⁴ As Professor Colby explains:

It would probably come as a surprise to Senator Bradley, and to many members of the current Supreme Court, that Justice Story once declared quite matter-of-factly that the Constitution "prevent[s] any possibility of applying the power to . . . regulate commerce[] injuriously to the interests of any other state, so as to favour or aid another." And the Justices might be even more shocked to learn that the Court itself once decreed that, because "the want of uniformity in commercial regulations[] was one of the grievances of the citizens under the Confederation[] and the new Constitution was adopted, among other things, to remedy th[at] defect[] in the prior system," the Constitution provides that "Congress. . . is forbidden to make any discrimination in enacting commercial or revenue regulations."¹⁷⁵

Thus, there is historical evidence supporting the proposition that the Commerce Clause requires an element of uniformity, even without an express phrase to that effect in the text of the Constitution.

Furthermore, much like the Court was able to find the principle of Equal Protection of citizens inherent in the Fifth Amendment's Due Process Clause,¹⁷⁶ so too can the Court find a requirement for fundamentally fair, uniform treatment among the states inherent in the Commerce Clause. Of course, ordinary principles of statutory construction would reject such an interpretation, instead requiring a plain text analysis. Certainly, if the object of construction were a statute, then where two clauses include a uniformity requirement while another does not, the rules of construction would foreclose extension of the uniformity provision to the latter.¹⁷⁷ However, the object of interpretation is not a statute. As Chief Justice Marshall once said, "we must never forget that it is a constitution we are expounding."¹⁷⁸

The Constitution was adopted, in part, to ensure the efficiency and nondiscrimination of commercial regulations.¹⁷⁹ Professor Colby describes the "effi-

¹⁷³ See U.S. CONST. art. I, § 8, cl. 1, 3-4.

¹⁷⁴ Colby, *supra* note 155 at 262.

¹⁷⁵ *Id.* at 262-63 (quoting from 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1011 (Boston, Hilliard, Gray, and Co. 1833) and *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 431 (1870)).

¹⁷⁶ See *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954).

¹⁷⁷ The canon of construction implied here is *expressio unius est exclusio alterius*, a "canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." BLACK'S LAW DICTIONARY 494 (abr. 8th ed. 2005).

¹⁷⁸ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis omitted). Along the same lines, Judge Learned Hand once mused, "There is no more likely way to misapprehend the meaning of language – be it in a constitution, a statute, a will or a contract – than to read the words literally, forgetting the object which the document as a whole is meant to secure." Cent. Hanover B. & T. Co. v. C.I.R., 159 F.2d 167, 169 (2d Cir. 1947).

¹⁷⁹ Colby, *supra* note 155 at 289.

ciency” goal as requiring “uniform rules” and the “nondiscrimination” goal as requiring “uniform treatment” of the states.¹⁸⁰ He explains that while the Framers were originally concerned with both “uniform rules” and “uniform treatment” of the states,¹⁸¹ eventually the uniform rules requirement eroded away.¹⁸² Thus, the erosion of the uniform rules requirement made it possible for Congress to enact laws regulating interstate commerce that were flexible enough to incorporate state law preferences, while still remaining uniform in their treatment of all states. In other words, the ultimate outcome or effect of specific legislation may differ from one state to another, due to nuances at the state level, but the federal law itself must still treat states uniformly.

A trio of cases both affirms the existence of a uniform treatment requirement for Commerce Clause power and explains how the requirement has come to be forgotten. In a dormant Commerce Clause case called *Leisy v. Hardin*,¹⁸³ the Court explained that “interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system.”¹⁸⁴ That case dealt with the appropriate role of state regulation regarding the sale of alcoholic beverages shipped in interstate commerce.¹⁸⁵ The Court noted that the power to regulate interstate commerce rested exclusively with Congress, but Congress could exercise that power “to permit the states to decide for themselves whether to prohibit the importation of alcoholic beverages” into their borders.¹⁸⁶

Consequently, Congress enacted the Wilson Act, which did just that – it “allowed the states to preclude the sale of imported liquor.”¹⁸⁷ During congressional debates on the proposed law, members of Congress agreed that the Commerce Clause mandated uniformity; the only dispute was to what extent that uniformity requirement was meant to reach.¹⁸⁸ Opponents of the Wilson Act argued that the proposed law would be unconstitutional for lack of uniform rules, not uniform treatment, claiming

[t]he laws and regulations prescribed by the States would be as various as the characteristics of their population and wholly wanting in uniformity. The very object of [the Commerce Clause] in the Constitution was to create uniformity . . . and yet [the Wilson Act] would destroy all uniformity. [The Wilson Act] would destroy the interstate-commerce clause of the Constitution and all the purposes for which it was enacted originally.¹⁸⁹

The concern was that allowing states to impose their own sets of rules would create inefficiency in commerce and differing results in each state.¹⁹⁰

¹⁸⁰ *Id.*

¹⁸¹ See generally Colby, *supra* note 155.

¹⁸² *Id.* at 289.

¹⁸³ *Leisy v. Hardin*, 135 U.S. 100 (1890).

¹⁸⁴ *Id.* at 109.

¹⁸⁵ *Id.* at 110.

¹⁸⁶ Colby, *supra* note 155, at 293-94.

¹⁸⁷ *Id.* at 294.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 294-95 (citing 21 CONG. REC. 5369 (1890) (statement of Rep. Culberson) and 21 CONG. REC. 4966, 4957 (1890) (statement of Sen. Vest) (internal quotations omitted)).

¹⁹⁰ See generally *id.* at 294-96.

In contrast, proponents of the Wilson Act countered that Congress could “allow for nonuniform results without running afoul of the uniformity constraint on the commerce power” as long as the states are treated alike.¹⁹¹ Supporters of the law explained that the “effect of the bill . . . will be *to leave every State in the Union free to determine for itself what its policy shall be* in respect of the traffic in intoxicating liquors” which is constitutionally valid because it gives “*no preference to one State over another.*”¹⁹² The prevailing view, then, was that differing outcomes in the enforcement of federal law stemming from the differences in varying state policies was permissible, as long as no state was treated differently or its policies granted a preference by the federal legislation.

When the Wilson Act faced challenges in the courts, the previous arguments of the legislative debates echoed once again. Opponents, seeking strict uniformity of rules, argued that the law “lack[ed] the element of uniformity, which . . . is an indispensable requisite of the regulation of interstate commerce.”¹⁹³ They claimed that the Framers intended that laws enacted by the commerce power be “uniform in operation” resulting in “a uniform rule of regulation throughout the country.”¹⁹⁴ Furthermore, if state laws were to differ on the subject, then “there would always be that want of uniformity in regulation . . . which we have seen is a requisite of any regulation of inter-state commerce.”¹⁹⁵

On the other hand, supporters of the Wilson Act defended its constitutionality by affirming its uniform treatment of the states. They countered: “‘It is a regulation of commerce, uniform and general in its operation’ in that it applies equally to all of the states; ‘the want of uniformity,’ to the extent that there was one, resulted from divergent state laws, which did not affect the constitutionality of the federal statute.”¹⁹⁶

The Court agreed with supporters of the Wilson Act and upheld the law. In *Wilkerson v. Rahrer*,¹⁹⁷ the Court’s decision confirmed what *Leisy* stood for: that “a law allowing all of the states to regulate as they saw fit did not violate the Commerce Clause.”¹⁹⁸ Implying that the Commerce Clause mandated uniformity in treatment (or nondiscrimination between the states) the Court said, “[Congress] has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose *uniformity is not affected by variations in state laws.* . . .”¹⁹⁹ In other words, says Professor Colby, “in the relevant constitutional sense, the federal statute was uniform in that it applied equally in every state (uniform treatment); it was only a differ-

¹⁹¹ *Id.* at 295.

¹⁹² *See id.* at 295 (citing CONG. REC. 4954 and 4965 (1890)) (emphasis added).

¹⁹³ Colby, *supra* note 155, at 296 (citing Brief for the Appellee at 19, *In re Rahrer*, 140 U.S. 545 (1891) (No. 1529)) (emphasis omitted).

¹⁹⁴ *Id.* at 296 (citing Brief for the Appellee at 40 and 22, *In re Rahrer*, 140 U.S. 545 (1891) (No. 1529)).

¹⁹⁵ *Id.* at 296 (citing Brief for the Appellee 25, *In re Rahrer*, 140 U.S. 545 (1891) (No. 1529)) (emphasis omitted).

¹⁹⁶ *Id.* at 296-97 (citing Brief for the Appellant at 14, *In re Rahrer*, 140 U.S. 545 (1891) (No. 1529)).

¹⁹⁷ *In re Rahrer*, 140 U.S. 545 (1891).

¹⁹⁸ Colby, *supra* note 155, at 297.

¹⁹⁹ *In re Rahrer*, 140 U.S. at 561 (emphasis added).

ence in state laws that led to nonuniformity in the alcohol market (nonuniform rules). And that difference was not of a constitutional dimension.”²⁰⁰ Thus, the issue appeared to be settled.

Unexpectedly however, while affirming this issue for a third time, the Court’s poor choice of language “sowed the seeds of the evisceration” of the Commerce Clause uniformity constraint in future cases.²⁰¹ In the 1917 case *James Clark Distilling Co. v. Western Maryland Railway Co.*,²⁰² the Court considered the constitutionality of the Webb-Kenyon Act, which was enacted to address the ineffectiveness of the Wilson Act.²⁰³ The Webb-Kenyon Act banned the shipment of alcohol into “dry states,” or states that prohibited (or tightly restricted) the sale of alcohol.²⁰⁴ Opponents of the law raised the same issues that were raised in *Leisy* and *Rahrer*; that is to say, the law “would subvert the whole intent, spirit, and purpose of the commerce clause, which is essentially to establish a uniform system.”²⁰⁵

The Court again rejected those arguments and sustained the law, just as it had done in *Leisy* and *Rahrer*. The Commerce Clause did not require uniformity in the operating rules within states in order for federal law to remain true to the Constitution – as long as the federal law treated states equally. The Court stated,

[S]o far as uniformity is concerned, there is no question that the act *uniformly applies* to the conditions which call its provisions into play – that its provisions apply to all the States, – so that the question really is a complaint as to the want of uniform existence of things to which the act applies and not to an absence of uniformity in the act itself.²⁰⁶

Thus, the Court had again reiterated that a federal law was valid when it applied equally to the states, while not requiring uniform rules of ultimate enforcement of the law in every state. The Webb-Kenyon Act was still within the constraint of constitutional uniformity even if some states chose to permit the sale of alcohol within their borders (precluding enforcement of the law) while other states did not (requiring enforcement of the law).

Unfortunately, the Court did not end its discussion of the issue there. In what Professor Colby calls “at best dysfunctionally inarticulate, at worst an ill-considered and erroneous dictum,” the Court penned a statement that “alone spawned the line of cases recounting the principle that there is no uniformity requirement in the exercise of the commerce power.”²⁰⁷ Following its explanation in support of uniform treatment, the Court stated: “But aside from this it is obvious that the argument seeks to engraft upon the Constitution a restriction not found in it, that is, that the power to regulate conferred upon Congress obtains subject to the requirement that regulations enacted shall be uniform

²⁰⁰ Colby, *supra* note 155, at 297 (emphasis omitted).

²⁰¹ *Id.* at 298.

²⁰² *James Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311 (1917).

²⁰³ *Id.* at 320-21.

²⁰⁴ Colby, *supra* note 155, at 297.

²⁰⁵ *Id.* (quoting 49 CONG. REG. 2904 (1913)).

²⁰⁶ *James Clark Distilling Co.*, 242 U.S. at 326-27 (emphasis added).

²⁰⁷ Colby, *supra* note 155, at 300.

throughout the United States.”²⁰⁸ Professor Colby’s analysis of the issue suggests the Court was referring to the argument by challengers of the law urging uniform rules, not uniform treatment. This is supported by the fact that the Court subsequently examined *Leisy* again and concluded that it “plainly refute[d]” the argument before the Court (rejecting uniform rules, but requiring that interstate commerce “be governed by a uniform system”).²⁰⁹ Ultimately, the Court simply meant to say that the statute in question was “uniform because it treat[ed] all of the states the same. Those who demand more – that a single, uniform rule must ultimately apply to individuals in every state – are asking for something that the Constitution does not require.”²¹⁰

These ill-crafted and myopic comments resulted in a shift away from the uniformity requirement once revered by the Court and inherent in the Commerce Clause. Instead of promulgating the existence of the requirement, the Court killed it off. In *Currin v. Wallace*,²¹¹ some twenty years later, the Court lost sight of the meaning of its previous decisions and, relying on *James Clark Distilling*, wrongly rejected the notion of any kind of uniformity restraint on the commerce power. The Court opined, “To hold that Congress in establishing its regulation is restricted to the making of uniform rules would be to impose a limitation which the Constitution does not prescribe. There is no requirement of uniformity in connection with the commerce power.”²¹²

This unfortunate error in constitutional law jurisprudence should be revisited, because as was discussed earlier, the uniformity requirement of the commerce power was “perhaps [the Framers’] single most fundamental concern at the [Constitutional] Convention.”²¹³ The uniformity constraint was so important to the Framers that it is doubtful whether the Constitution would have been adopted without it.²¹⁴ Stripping the uniformity requirement from the commerce power, especially as understood by the Framers, creates the potential for fundamental unfairness and discrimination towards the states. This is precisely the problem with PASPA.

Other commentators agree that there is no logical reason for PASPA to discriminate against most states by carving out exceptions that create a “federal monopoly on lawful sports wagering” for a select few.²¹⁵ As one PASPA opponent, Senator Charles Grassley, posited, “There is simply no basis, as a matter of Federal policy, for allowing sports wagering in three States while prohibiting it in forty-seven, nor any rational basis, or support for the language of [PASPA].”²¹⁶

²⁰⁸ *James Clark Distilling Co.*, 242 U.S. at 327.

²⁰⁹ Colby, *supra* note 155, at 299.

²¹⁰ *Id.* at 300.

²¹¹ *Currin v. Wallace*, 306 U.S. 1 (1939).

²¹² *Id.* at 14.

²¹³ Colby, *supra* note 155, at 313.

²¹⁴ *Id.* at 311.

²¹⁵ Michael Levinson, *A Sure Bet: Why New Jersey Would Benefit from Legalized Sports Wagering*, 13 *SPORTS LAW. J.* 143, 174 (2006) (citing S. REP. NO. 102-248, at 11 (1992), reprinted in 1992 U.S.C.C.A.N. 3553, 3562).

²¹⁶ S. REP. NO. 102-248, at 11 (1992), reprinted in 1992 U.S.C.C.A.N. 3553, 3563 (Minority Views of Senator Grassley).

A careful look at the scope of the Commerce Clause suggests PASPA is unconstitutional. Although the nature of the regulation promulgated by PASPA may be duly authorized by the enumerated commerce power of Article I, it must be applied uniformly to the several states. PASPA, by providing an exemption that allows four states to offer sports betting, but denying the same prerogative to the other forty-six, contradicts the uniformity requirement of the Commerce Clause. With the PASPA question looming, the Court will soon have an opportunity to recast the current Commerce Clause test to include once again the lost uniformity constraint so critical to the Framers.

Embracing Justice Story's admonition that the Commerce Clause was not to be used to "regulate commerce[] injuriously to the interests of any one state, so as to favour or aid another,"²¹⁷ the appropriate test for the constitutionality of Commerce Clause legislation should be *Lopez*, set upon the bedrock of fundamental fairness afforded to the states via uniform treatment. In other words, a federal law is valid when it regulates the *channels* of interstate commerce, *instrumentalities* of interstate commerce, or *economic* activities that have a *substantial effect* on interstate commerce, *so long as* the law treats states uniformly, meaning *no state is granted an unfair preference*. Only then will it pass constitutional muster.

The weak attempts by PASPA challengers to argue the uniformity requirement thus far will not be sufficient to win over the Court. Challengers' arguments must articulate the evolution of the error leading to the elimination of the requirement, which is supported both by historical accounts of the Framing as well as case law – especially when read in context. Even so, there is no guarantee the Court will take on the issue. Then again, there is effectively no chance for the restoration of this lost requirement by the Court if challengers fail to present evidence sufficient to make the arguments persuasively.

If the Court can be persuaded to revisit the evolution of the uniformity requirement, it may be possible to persuade it to recast the *Lopez* test to include the uniformity constraint, under which PASPA almost certainly would be rendered unconstitutional as a blatant violation of uniform treatment of the states. However, even if the Court does not agree with the above analysis, and chooses not to revisit the uniformity constraint on the commerce power, PASPA may still fall as a Tenth Amendment violation of states' rights.

B. The Tenth Amendment Challenge

1. Traditional State Authority and the Value of Federalism

Just as the Court's action with regard to the Commerce Clause question is uncertain, it is also unclear whether the Court will accept a Tenth Amendment challenge. The overall weight of precedent over the last century seems to favor the rejection of a federalism challenge. However, the Court's relatively recent shift in Tenth Amendment jurisprudence at the close of the twentieth century may have turned the tide. Thus, the way in which challengers frame the Tenth Amendment problem may provide an opportunity to carry the Court.

²¹⁷ 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1011 (Boston, Hilliard, Gray, and Co. 1833).

Opponents of PASPA must convince the Court that a law of this type undermines the critical nature of federalism. More specifically, PASPA threatens the opportunity for states to contribute to the development of policies and values that define the nation. Furthermore, it simply encroaches too far into the zone of authority traditionally reserved to state governments.

States, with distinct community values, are necessary to further principles of federalism. In discussing the values of dualism, one commentator noted that a key argument in support of federalism is that “dualist models of federalism generally correspond to an understanding of states as distinctive communities of value.”²¹⁸ The values espoused by the citizenry of the different states contribute to justify the boundaries separating federal and state authority; furthermore, values may differ immensely between states. This “diversity of views” between the states “requires a broad policy market” that is a catalyst whereby “distinctive republican communities [] realize the outcomes of their deliberations.”²¹⁹ Moreover, the divergence of competing values between the states “also helps to suggest proper lines between national and state authority. With regard to the issues on which the states differ, states should enjoy autonomy. On matters of overlapping beliefs, federal control may be appropriate.”²²⁰

This premise was touched upon in Justice Kennedy’s concurrence in *Lopez*. While observing that it was doubtful any state would argue that prohibiting students from carrying guns on school grounds was unwise policy, he recognized that “considerable disagreement exist[ed] about how best to accomplish” the goal of keeping guns out of schools.²²¹ Moreover, Kennedy declared that such a circumstance underscores the value of “the theory and utility of our federalism,” whereby “the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.”²²² Kennedy’s concerns were not novel, but merely reflected the outgrowth of the seed Justice Brandeis planted sixty years earlier, before the Commerce Clause’s historic expansion of power, and later echoed by Justices Powell and O’Connor. Justice Brandeis explained:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment might be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.²²³

Justice Powell agreed and questioned “how leaving the States virtually at the mercy of the Federal Government, without recourse to judicial review, will enhance their opportunities to experiment and serve as laboratories.”²²⁴ And Justice O’Connor rounded out the idea by reiterating that “[c]ourts and com-

²¹⁸ Shapiro, *supra* note 88, at 140.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

²²² *Id.*

²²³ *New State Ice Co., v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

²²⁴ *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 567-68 n.13 (1985) (Powell, J., dissenting).

mentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas.”²²⁵

Consistent with this rationale is the fact that states view sports betting with differing degrees of acceptance – from completely embracing all forms of sports betting, to limiting the practice to lotteries, to outright rejection of sports betting and gambling in all forms.²²⁶ Why not, then, preserve to states the autonomy to regulate and control the extent and nature of gambling within their borders? Just as the proponents of the Wilson Act explained 120 years ago with regard to the internal state policies for regulating intoxicating liquor, each state should be permitted today to be “*free to determine for itself what its policy shall be*” with regard to the internal regulations of sports betting.²²⁷ This is an area in which the federal government should not interfere.²²⁸

2. PASPA as Morals Legislation

PASPA proponents successfully skirted the legality of the states’ rights issue by casting PASPA as morals legislation. As discussed previously, morals legislation is one area in which the Court has been known to defer to the legislature, even when constitutional authority was suspect. Where the Court might in other instances be inclined to invalidate a law for encroaching on states’ rights, it has been less likely to do so in areas of morals legislation. Indeed, the core policies behind PASPA are morals-based.²²⁹ Senator Bradley called PASPA an “attempt to stem the growth of teenage gambling and protect the integrity of sports.”²³⁰ He reasoned that the “revenue earned by states through sports gambling [was] not enough to justify the waste and destruction attendant to the practice.”²³¹ Bradley summarized the opposition’s arguments as encompassing the two primary contentions discussed here – the Tenth Amendment states’ rights issue and the Commerce Clause uniformity issue.²³² Yet, while acknowledging the arguments, Bradley confidently assured PASPA supporters that both contentions could be rejected as “foreclosed” by federal case law.²³³

Relying on *Champion v. Ames*,²³⁴ as the “closest the Court has come” to addressing the constitutionality of laws like PASPA, Bradley postulated that the Court’s discussion of Congress’s ability to legislate “an evil. . . carried on

²²⁵ Fed. Energy Regulatory Comm’n v. Mississippi, 456 U.S. 742, 7888 (1982) (O’Connor, J., dissenting).

²²⁶ See *Types of Gaming by State*, <http://www.americangaming.org/industry-resources/research/fact-sheets/states-gaming> (last visited Aug. 17, 2011).

²²⁷ Colby, *supra* note 155, at 295 (citing 21 CONG. REC. 4954 (1890) (statement of Sen. Wilson) (emphasis added)).

²²⁸ Congress clearly advanced this premise in other areas of gambling, including the Interstate Horse Racing Act of 1978. 15 U.S.C. § 3001(a) (2006) (“The Congress finds that (1) the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders.”) (emphasis added).

²²⁹ See Bradley, *supra* note 160, at 7.

²³⁰ *Id.* at 5.

²³¹ *Id.* at 6.

²³² *Id.* at 11.

²³³ *Id.* at 12.

²³⁴ *Champion v. Ames*, 188 U.S. 321 (1903).

through interstate commerce,” was definitive on the issue.²³⁵ Bradley contended that here, as in the lottery regulation of *Champion*, Congress may regulate sports betting as a “moral and social wrong” affecting interstate commerce.²³⁶

To bolster that proposition, PASPA proponents claimed that *Perez v. United States*²³⁷ left no doubt about Congress’s ability to regulate activities considered immoral.²³⁸ In *Perez*, the Court considered the constitutionality of a portion of the Consumer Credit Protection Act that prohibited the use of extortionate means to collect extensions of credit; in other words, the law prohibited “loan sharking.” The Court held that the Commerce Clause extended to “those activities intrastate which so affect interstate commerce,”²³⁹ and because congressional findings were “quite adequate” in indicating that loan sharking was closely tied to interstate organized crime, loan sharking, although a purely intrastate activity, could be legislated with the commerce power.²⁴⁰

Bradley explained that Congress relied on findings by the Subcommittee on Patents, Copyrights and Trademarks indicating sports betting negatively impacted “compulsive gambling among teenagers” and that the problem was becoming an epidemic across the nation.²⁴¹ This, he claimed, justified the use of the commerce power to regulate sports betting, just as congressional findings of interstate ties to organized crime justified legislating loan sharking in *Perez*.²⁴²

Finally, PASPA proponents relied on cases like *United States v. Smaldone*,²⁴³ which upheld the constitutionality of a federal gambling statute using the reasoning in *Perez*.²⁴⁴ Smaldone and other codefendants were convicted under the statute for participating in illegal bookmaking of sporting events. The Tenth Circuit Court of Appeals concluded the statute represented a “valid and constitutional exercise of power under the Commerce Clause,” and the argument that the statute exceeded interstate commerce power was “foreclosed” by the Supreme Court’s ruling in *Perez*.²⁴⁵ The Tenth Circuit likened the loan sharking statute in *Perez* to the illegal bookmaking statute in *Smaldone*, noting that the legislative history behind the illegal bookmaking statute was “replete” with examples of congressional findings “concerning the detrimental impact that illegal gambling has on interstate commerce,” including a report that “gambling is the greatest source of revenue for organized crime.”²⁴⁶

²³⁵ Bradley, *supra* note 160, at 12-13 (citing *Champion v. Ames*, 118 U.S. 321, 357-58 (1903)).

²³⁶ *Id.* at 14.

²³⁷ *Perez v. United States*, 402 U.S. 146 (1971).

²³⁸ Bradley, *supra* note 160, at 14.

²³⁹ *Perez*, 402 U.S. at 151.

²⁴⁰ *Id.* at 155.

²⁴¹ Bradley, *supra* note 160, at 15.

²⁴² *Id.* at 14-15.

²⁴³ *United States v. Smaldone*, 485 F.2d 1333 (10th Cir. 1973).

²⁴⁴ *Id.* at 1343.

²⁴⁵ *Id.* at 1342.

²⁴⁶ *Id.* at 1342-43.

But does a congressional finding that sports betting negatively impacts “compulsive gambling among teenagers” really justify use of the commerce power to ban sports wagering in some states but not others? Arguably, no. How would the Court react if Congress banned beer sales, based on a finding that doing so would curb national underage drinking rates, in all states except the state with the highest consumption rate, California,²⁴⁷ simply because it did not want to disrupt California’s sizeable tax revenue from beer sales? Or how would the Court react if, based on a finding that suggested an almost guaranteed reduction in cancer-related deaths from smoking, Congress banned the sale of tobacco in all states, except the two states with the highest smoking rates, Kentucky and West Virginia,²⁴⁸ because smoking was already so established there that Congress did not desire to disrupt the tax base those states had come to rely on? Although the hypothetical findings in both scenarios seem reasonable (and may in fact be true), it seems absurd to suggest that Congress would ever be able to enact such laws constitutionally.

Yet, both scenarios are similar to the PASPA problem, as both would arguably represent an attempt to regulate a “moral and social wrong” or “an evil. . . carried on through interstate commerce,”²⁴⁹ seemingly justifiable by legislative findings. Notwithstanding the similarities, the Court would most likely strike those laws as invalid exercises of the Commerce Clause power, both for not being uniform in their treatment of the states and for infringing upon the rights of states to regulate the health, safety, welfare, and morals of their citizens, which is inherent in the police power reserved to them by the Constitution. Remember, eight years after PASPA was enacted, the Court in *Morrison* stated that congressional findings alone are not sufficient to warrant federal commerce power legislation that encroaches on states’ rights.²⁵⁰

While the Court appears to defer to Congress in the area of national morals regulation in cases like *Champion*, *Perez*, and *Smaldone*, that is not necessarily the case for all morals regulation. *Champion*, *Perez*, *Smaldone*, and the other case law relied upon by PASPA sponsors, may not “foreclose” the issue of PASPA’s constitutionality at all. The *Champion* Court, while including morals-based policy rationales and rhetoric in its decision, more accurately based its holding on the nature of the commerce itself, rather than the morality of the subject matter being regulated. The law regulating lotteries under the commerce power was upheld because it regulated the trafficking of lottery tickets through interstate commerce, not because lotteries themselves were viewed as immoral.

²⁴⁷ Beer Institute, *Shipment of Malt Beverages and Per Capita Consumption by State 2009*, (June 18, 2010), available at [http://beerinstitute.org/BeerInstitute/files/ccLibraryFiles/File name/000000001059/State%20data%20per%20capita%20consumption%202003%20to%202009.pdf](http://beerinstitute.org/BeerInstitute/files/ccLibraryFiles/File%20name/000000001059/State%20data%20per%20capita%20consumption%202003%20to%202009.pdf) (last visited Mar. 26, 2011) (showing 22,958,866 units of 31-gallon barrels shipped to California).

²⁴⁸ Centers for Disease Control and Prevention, *State-Specific Prevalence of Cigarette Smoking and Smokeless Tobacco Use Among Adults – United States, 2009*, MORBIDITY & MORTALITY WKLY, REP., Nov. 5, 2010 1393, at 1400, available at <http://www.cdc.gov/mmwr/pdf/wk/mm5943.pdf> (Kentucky and Virginia have the highest current smoking prevalence rate at 25.6%).

²⁴⁹ See *supra* Part III.B.2.

²⁵⁰ See *United States v. Morrison*, 529 U.S. 598, 614 (2000).

3. *Regulating Commerce versus Regulating Sovereigns*

PASPA proponents' reliance on *Perez* and *Smaldone* is faulty for yet another reason. As discussed above, the legislative findings in those cases were not enough, alone, to support the exercise of the commerce power. In fact, the *Perez* Court required a connection, or substantial relationship, to interstate commerce as well.²⁵¹ While legislative findings might be useful for framing the policy issues behind PASPA, its proponents' reliance on *Perez* and *Smaldone* to support the use of legislative findings to justify PASPA by analogy is simply inadequate. Moreover, whether based on a morals justification or not, the laws at issue in *Champion*, *Perez*, and *Smaldone* only restricted actions of citizens in interstate commerce. They did not impede the sovereign capacity of state governments to continue to regulate the actions of those citizens – a key distinguishing characteristic of PASPA.

The Court made clear in *New York v. United States* that the proper scope of the Commerce Clause is that it only extends to the regulation of citizens²⁵² of the states and to states as participants in commerce,²⁵³ but not to states as *sovereigns*. More particularly, the Court explained that even when the Constitution authorizes Congress to compel or prohibit certain acts, Congress may not directly compel the states to do the same.²⁵⁴ “The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it *does not* authorize Congress to regulate state governments' regulation of interstate commerce.”²⁵⁵ For instance, whereas Congress's mandate that states perform background checks under a federal gun control law was prohibited by the Constitution,²⁵⁶ its restriction on the ability of states to disclose personal information about drivers obtained from driver license applications was upheld.²⁵⁷ The former federal law was invalidated for allowing Congress to commandeer the sovereignty of state government in order to implement a federal mandate. In contrast, the latter law was sustained because it merely regulated states as market participants engaged in the sale and release of personal information, which the Court deemed to be an article in the interstate stream of commerce.²⁵⁸

By this analysis, PASPA is and should be declared unconstitutional by the Supreme Court. While the Commerce Clause would deem it proper for Congress to regulate sports betting in interstate commerce, PASPA oversteps its bounds when it infringes upon states' rights to authorize and regulate sports betting carried out and performed wholly within their borders. The extent to which PASPA could be valid must be limited to the federal regulation of interstate trafficking of sports betting between citizens of different states. It must not infringe upon the sovereignty of the states themselves.

²⁵¹ See *Perez v. United States*, 402 U.S. 146, 156-57 (1971).

²⁵² *New York v. United States*, 505 U.S. 144, 166 (1992).

²⁵³ See *Reno v. Condon*, 528 U.S. 141, 151 (2000).

²⁵⁴ *New York*, 505 U.S. at 166.

²⁵⁵ *Id.* (emphasis added).

²⁵⁶ *Printz v. United States*, 521 U.S. 898, 902 (1997).

²⁵⁷ *Condon*, 528 U.S. at 148.

²⁵⁸ *Id.*

IV. CONCLUSION

A review of Commerce Clause and Tenth Amendment jurisprudence suggests that PASPA is unconstitutional. While it is certainly based in the realm of enumerated constitutional authority, PASPA goes beyond the scope intended by the Framers. If PASPA challengers can persuade the Court to revisit the genesis of the uniformity requirement, and its subsequent misplaced evolution, then the Court may find a reason to restate the *Lopez* test so that it includes the uniformity-in-treatment constraint.²⁵⁹ If successful, PASPA almost certainly would be rendered unconstitutional as a blatant violation of uniform treatment of the states.

Still, the most likely challenge to prevail, given the current legal environment, is the Tenth Amendment challenge. PASPA oversteps its bounds and infringes upon the rights reserved to the states to authorize and regulate sports betting within their borders. PASPA would be a valid exercise of authority if it simply regulated the interstate trafficking of sports betting between citizens of different states, but because it infringes upon the sovereignty of the states themselves, it should not prevail.

Unfortunately, despite the soundness, validity, and appeal of the above arguments, this writer believes it may be difficult to carry the Court. The enormous expansion of Commerce Clause power, *stare decisis*, and an emergent, yet not fully developed, Tenth Amendment check on the commerce power, make immediate relief likely to be elusive in spite of the merits.

In the end, even if the Court rejects each of the challenges discussed above, opponents are not without options. They can still take solace in the fact that it may be possible to overturn PASPA using the good old-fashioned political process. PASPA was justified largely on the idea that sports betting was an evil to be suppressed, but perhaps a shifting public sentiment and a distilling of the arguments over the years by commentators have created an environment ripe for legislative repeal.²⁶⁰

²⁵⁹ Although in the majority in *Lopez*, Justice Thomas wrote a concurrence as well urging the Court to reformulate its Commerce Clause test into a narrower one: "I write separately to observe that our case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause." *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

²⁶⁰ Fewer people may be viewing gambling as a "moral and social wrong." In fact, fifty percent of the population now approves of casino gambling. *See 50% Favor Casino Gambling In Their State*, RASMUSSEN REPORTS (Aug. 9, 2010), http://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/august_2010/50_favor_casino_gambling_in_their_state.