SPORTS BETTING AFTER SABERMETRICS: THE CASE FOR APPLYING PASPA RESTRICTIONS TO BETTING GROUPS

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INTRODUCTION

In 2008, Lehman Brothers laid off Joe Peta, a Stanford MBA graduate, months before the company collapsed during the housing crisis.[1] Three years later, Peta, an avid baseball fan, approached his friends with the idea of betting on baseball games using a statistical model he developed with the skills he honed on Wall Street and practicing the art of analyzing baseball statistics known as "sabermetrics."[2] Peta's idea intrigued so many people that he raised $1 million to use exclusively on baseball bets.[3] Over the course of the 2011 baseball season, Peta successfully gained a statistical advantage over Las Vegas sports bookmakers and made an unbelievable 41.03% return on investment.[4]

In an age when the sports industry produces billions of dollars in revenue every year, sports have evolved into high stakes businesses rather than the simple competitive organizations that entertain millions of Americans every year.[5] As sports like Major League Baseball and the National Football League begin to look more like Fortune 500 companies, savvy gamblers are beginning

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[1] Joe Peta, Trading Bases: A Story About Wall Street, Gambling, And Baseball (Not Necessarily in That Order) 96-106 (2013).

[2] *Id.* at 33.

[3] Steve Schaefer, *Betting On Baseball: The Next Hot Investment Strategy*, Forbes (Mar. 27, 2013, 12:32 PM), http://www.forbes.com/sites/steveschaefer/2013/03/27/betting-on-baseball-the-next-hot-investment-strategy/.

[4] Peta, *supra* note 1, at 251.

[5] Maury Brown, *Major League Baseball Sees Record Revenues Exceed $8 Billion For 2013*, Forbes (Dec. 17, 2013, 4:34 PM), http://www.forbes.com/sites/maurybrown/2013/12/17/major-league-baseball-sees-record-revenues-exceed-8-billion-for-2013/; Monte Burke, *How the National Football League Can Reach $25 Billion In Annual Revenues*, Forbes (Aug. 17, 2013, 6:30 AM), http://www.forbes.com/sites/monteburke/2013/08/17/how-the-national-football-league-can-reach-25-billion-in-annual-revenues/.

to treat them like the businesses bought and sold on the stock market.[6] Peta is not alone in his quest to use advancements in statistics to treat sports like the stock market. In 2010, Dallas Mavericks owner Mark Cuban's support of using sabermetrics inspired the launch of a London based sports betting hedge fund, Galileo, which touted their use of pure statistics to gain an advantage over sport odds makers.[7]

Betting on baseball like it is the stock market is in stark contrast to how sports betting is traditionally done. In antiquity, sports betting allowed individuals to better appreciate the value of athletics.[8] Those that had faith that their team or player would be victorious would place a bet on them and, if they won, the fans would be rewarded and inclined to bestow praise on the athlete or team.[9]

As support and comradery accompanied sports bets, so too did scandal and fraud. The early 1900's gave rise to one of the greatest sports betting scandal in history.[10] In 1919, Jewish mobster Arnold Rothstein bribed baseball's heavily favored Black Sox to intentionally lose the World Series to the Cincinnati Reds in the infamous Black Sox Scandal.[11] The scandal served as an example that even the most elite players and teams could be convinced to toss aside their competitive spirit for financial gain.[12] Seizing control of sports betting, the infamous reputation of organized crime often followed the practice throughout most of the century.[13]

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[6] Peta, *supra* note 1, at 38-39.

[7] *Centaur Galileo, Sports Betting Hedge Fun Inspired By Mark Cuban Collapses*, Huffington Post (Jan. 30, 2012, 7:11 PM), http://www.huffingtonpost.com/2012/01/30/centaur-galileo-sports-betting-hedge-fund_n_1242794.html. The hedge fund collapsed in 2012 with allegations that the fund was mismanaged. *Id.*

[8] David G. Swartz, Roll The Bones: The History of Gambling 25 (2006) (dating back to ancient Greece, citizens would bet on sporting events such as chariot races, foot races, discus and javelin throwing, wrestling, and boxing. Athletes would receive prize money and commemorations for their victories, but it was betting that increased civic appreciation of athletics).

[9] *Id.*

[10] Selwyn Raab, Five Families 40 (2005).

[11] *Id.*

[12] *Id.*

[13] *Id.*

Today, Las Vegas is home to the most extensive, legalized sports gambling available.[14] Vegas has over 150 licensed sports books, as well as the ability to bet on both collegiate and professional sports.[15] Despite the extensiveness of Vegas betting, illegal bets still account for a vast majority of sports betting.[16] It is estimated that illegal sports betting garners $360 billion in revenue annually.[17]

This Article addresses the emerging concerns stemming from sports betting as part of a personal investment group, how betting in this fashion violates the Professional and Amateur Sports Protection Act ("PASPA"), and whether PASPA is adequately equipped to alleviate any of the concerns that large-scale sports betting creates. The comment will examine how sabermetrics has made betting on sports similar to an investment, but should still be treated as gambling. Part I will describe the emergence of sabermetrics and its applicability to sports betting. Since the analytical framework of sabermetrics focuses primarily on baseball, this article will discuss the statistics as applied to baseball. Part II will discuss the relationship between gambling and investing. Part III will discuss PASPA and why its legislative history and related case law supports using injunctive relief to stop potentially expansive, group style betting. Ultimately, the paper will argue that betting groups or hedge funds that exclusively bet on sports for profit violate PASPA's restriction on sports gambling and negatively impact the integrity of the game.

I. SABERMETRICS

Before the early 2000's, baseball enthusiasts held firmly to one single tenant: the team with the most money wins more often.[18] Traditionally, dominant teams such as the Yankees invest

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[14] Robert M. Jarvis, Jr., Shannon L. Bybee, J. Wesley Cochran, I. Nelson Rose, Ronald J. Rychlak, Gaming Law Cases and Materials 279 (2003).

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Michael Lewis, Moneyball: The Art of Winning an Unfair Game 20 (2004). "At the opening of the 2002 season, the richest team, the New York Yankees, had a payroll of $126 million while the two poorest teams, the Oakland A's and the Tampa Bay Devil Rays, had payrolls of less than a third of that, about $40 million. A decade before, the highest payroll team, the New York Mets, had spent about $44 million on baseball

over $100 million into their payroll and find themselves contenders for the World Series.[19] The paradigm shifted after the 2002 baseball season, in which the Oakland Athletics ("the A's") won 102 games out of the 162 game season.[20] This accomplishment would not have been unusual except that the A's payroll was only a mere $34 million, which was approximately one-third of the Yankees payroll that year.[21] Although many dismissed the A's spectacular achievement as an aberration, others saw A's general manager Billy Beane's success as signaling the emergence of a new age of baseball: sabermetrics.[22]

The way in which statistics clears through rhetoric and common misconceptions allows individuals to accurately predict a team's performance over the course of a year.[23] In prior years, Bill James's[24] yearly publication of the *Baseball Abstract* and his work *Bill James Historical Abstract*, both tomes dedicated to detailing baseball statistics, influenced a generation of baseball owners and managers.[25] For example, in baseball, by comparing and analyzing the relationship between variables such as batting average

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players and the lowest payroll team, the Cleveland Indians, a bit more than $8 million. The raw disparities meant that only the rich teams could afford the best players. A poor team could afford only the maimed and the inept, and was almost certain to fail. Or so argued the people who ran baseball." *Id.*

[19] *Id*. The New York Yankees have won 27 World Series Championships. MLB.com, http://mlb.mlb.com/mlb/history/postseason/mlb_ws.jsp?feature=club_champs (last visited April 24, 2014).

[20] Lewis, *supra* note 18, at XII-XIII.

[21] *Id.*

[22] *Id.* at XIV.

[23] Peta, *supra* note 1, at 45-46.

[24] Bill James is regarded as the father of sabermetrics. His ability to analytically break down the game of baseball into previously unknown quantifiable measurements such as Runs Created, Major League Equivalency, and Win Shares has garnered him high praise throughout the sport. He is a recipient of the Henry Chadwick Award given by the Society For American Baseball Research. *Bill James*, Society For American Baseball Research, http://sabr.org/about/bill-james (last visited April 24, 2014).

[25] Allen St. John, *Powered By Bill James and Friends, The Red Sox Win (Another) Moneyball World Series*, Forbes (Oct. 31, 2013, 9:22 AM), http://www.forbes.com/sites/allenstjohn/2013/10/31/powered-by-bill-james-and-friends-the-red-sox-win-another-moneyball-world-series/. Six months before the release of Michael Lewis' book *Moneyball*, detailing the A's 2002 success utilizing sabermetrics, Red Sox owner John Henry hired Bill James to apply his analytical frameworks to the team. *Id.* Subsequently, the Red Sox won the World Series in 2004, 2007, and 2013 breaking their legendary eighty six-year curse of not having won a World Series since they traded Babe Ruth to their rivals the Yankees. *Id*.

("AVG"), on-base percentage ("OBP"), slugging percentage ("SLG"), and isolated power ("ISO") one can accurately predict the number of runs that a team will score over a season.[26]

The variables' are further refined by using multiple regression analyses to measure the effect independent and dependent variables have on one another.[27] Once an accurate run total is determined, the formula of $R^{1.83}/(R^{1.83}+RA^{1.83})$ where R is "runs scored" and RA is "runs allowed" yields a fairly accurate winning percentage.[28] For example, the 2010 Cleveland Indians scored 646 runs and allowed 752 runs.[29] When entered into the formula, the result is a .4309 winning percentage or 69.8 games won during the course of the season.[30] The Indians won sixty-nine games in 2010.[31] Las Vegas typically uses a team's predicted winning percentages to create their betting line.[32] As a result of sabermetrics, it is possible to a great degree to predict the success or failures of a team within only a small margin of error.[33]

II. THE RELATIONSHIP BETWEEN GAMBLING AND INVESTING

Two types of risk taking that are closely related, but often treated and viewed differently, are gambling and investing.[34] In a

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[26] Peta, *supra* note 1, at 21. A team will score a little more than one run for every two hits in baseball. *Id.*

[27] *Id*. at 41.

[28] *Id*. at 36-37. This formula derives from Bill James's original formula for predicting winning percentages, which was $R^2/(R^2+RA^2)$. *Id.*

[29] *Id*. at 37.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 16.

[33] *Id.* at 37. It should be noted that there are several other variables that should be accounted for in order to obtain an accurate prediction of a team's success such as cluster luck and the increasing or decreasing success of individual player performance over time to name a few. *Id.* When the total number of runs is known, James's formula is incredibly accurate. For example, Ole Miss's baseball team scored 323 runs and allowed 237 runs during the 2013 season. *See Ole Miss Season Statistics*, OleMissSports, http://www.olemisssports.com/sports/m-basebl/stats/2012-2013/teamcume.html (last visited Apr. 24, 2014). When entering these numbers into the formula $323^{1.83}/ (323^{1.83} + 237^{1.83})$ it yields a .638 winning percentage or 38.3 wins during a college season of sixty total games. Ole Miss won thirty games in 2013 demonstrating how predicting runs can lead to accurately predicting a team's success.

[34] Christine Hurt, *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox*, 86 B.U. L. Rev. 371, 372 (2006).

broad sense, gambling and investing have little to distinguish them from one another because they both involve spending money with the hope of receiving more money in return.[35] Traditionally, it is thought that a person gambles when they go to a casino roulette table, place $100 on black, and either end up the lucky winner of $100 capitalizing on their 47.37% chance of success or the unlucky loser to the house's 5.26% statistical advantage.[36] On the other hand, purchasing physical property or a legal instrument in hopes that the item will later increase in value and be redeemed at a greater price is viewed as an investment. Both involve taking a risk for a greater payout without the certainty that a profit will be the result.

Similarly, investing in the stock market maintains the essential elements necessary for gambling: consideration, chance, and reward.[37] Some courts have even been known to consider futures speculation contracts as illegal gaming contracts.[38]

Despite the broad similarities between the two concepts, there are several reasons why gambling is different from investing. One such difference is that, socially, it is more acceptable to invest rather than gamble because, in part, gambling is often tied to societal problems such as increased crime rates.[39] This negative perception of gambling has led states to initially restrict gambling, yet allow similar types of investments.[40]

Another unique difference between investing and gambling is the ability for investors to practice risk management.[41] Investors will invest in prospects that have low risk, low reward and those that have high risk, high reward. Determining whether an investment is high risk or low risk requires examining and analyzing variables that are not necessarily concrete. For example, when a person is looking to invest in company stock,

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[35] *Id.* at 373.

[36] *Roulette*, The Wizard of Odds, http://wizardofodds.com/games/roulette/ (last updated Mar. 2, 2013).

[37] Jarvis, *supra* note 14, at 52.

[38] *See* Rohrer v. Traina, 342 N.E.2d 390 (Ill. App. Ct. 1976); McDaniel v. Tullis, Craig & Co., 11 S.W.2d 203 (Tex. Civ. App. 1928).

[39] Hurt, *supra* note 34, at 425-426.

[40] *Id.* at 406-407.

[41] Peta, *supra* note 1, at 137.

they may look at the industry the company is in, the business model that the company follows, and the track record of the company's CEO to determine whether the investment is risky.

When investors or the brokers they work with define the risk, it is possible for the odds that the investor will make money to be better than losing money. In an investment situation, companies have the incentive to perform well, which is exactly what the investor is relying on.[42] The ability to diversify one's betting helps offset the chances of losing money. Of course, there are times when investors will lose money no matter how well they manage their risk, but risk management focuses on the long-term goal of making money, not the short-term reward.[43]

In comparison, most gambling involves defined odds against the gambler. No matter how one bets on roulette, the chance that one number will hit is always 2.63% and no amount of assessment or betting will change this fact.[44] Therefore, the odds are always against the gambler in a casino with the rare exception of a black jack card counter.

In addition, gambling is done with the purpose of being entertained with the bonus of winning money, while investments are done solely for the purpose of making money.[45] As Joe Peta explains, "[w]hen a bunch of us are huddled around a craps table at the Bellagio, only MGM Resorts qualifies as an investor with an edge. The rest of us are merely paying for entertainment."[46] The house's statistical edge usually causes gamblers to lose money in the long term.

Sports betting is different from most gambling because it is based on speculation, which utilizes both chance and skill, much like investments.[47] The odds are not definite and, therefore, it is more susceptible to statistical analysis to yield the best prediction

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[42] *Id.* at 73. "Would you ever tie your financial interests to someone who didn't share the same incentives that get you paid? It would be like agreeing to be Adam Sandler's agent and getting paid by the Oscar nomination instead of a percentage of box-office gross." *Id.*

[43] *Id.* at 126-127.

[44] *Roulette*, The Wizard of Odds, http://wizardofodds.com/games/roulette/ (last updated Mar. 2, 2013).

[45] Peta, *supra* note 1, at 220. "Gambling with the purpose of making money is often confused with gambling as entertainment or, in the worst case, addiction." *Id.*

[46] *Id.* at 221.

[47] Hurt, *supra* note 34, at 387-390.

that a certain sporting event will occur in a certain way.[48] Sports betting's speculative nature is why many argue that it should be allowed to the same extent that trading stocks is allowed.[49] Still, sports betting is not normally subject to the same type of regulation as investments.[50] Therefore, caution should be used when sports bets are treated as investments.

III. PASPA

In 1992, Congress passed the Professional and Amateur Sports Protection Act, which placed a federal ban on sports betting.[51] PASPA makes it unlawful for:

> (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or
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> (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.[52]

Congress's purpose in passing PASPA was to curtail sports betting in order to maintain integrity in sporting events.[53] As a compromise with Nevada, Montana, Delaware, and Oregon–all states that already had established sports wagering games–the bill created an exception for sports gambling in those states authorized prior to October 2nd, 1991 known as the "Las Vegas Loophole."[54] Only Oregon and Nevada opted out of PASPA, with

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48 Peta, *supra* note 1, at 95-96.
49 Hurt, *supra* note 34, at 405.
50 *Id.* at 394-403.
51 28 U.S.C.A. § 3702 (West 1992).
52 *Id.*
53 S. REP. 102-248, at 4 (1992). "Senate bill 474 serves an important public purpose, to stop the spread of State-sponsored sports gambling and to maintain the integrity of our national pastime." *Id.*
54 Ronald J. Rychlak, *A Bad Bet: Federal Criminalization of Nevada's Collegiate Sports Books*, 4 Nev. L.J. 320, 323 (2004).

Nevada having the broadest array of gambling on sports with 153 licensed sports books and collegiate sports betting.[55]

Recently, New Jersey challenged the constitutionality of PASPA after passing a state sports gambling law.[56] PASPA specifically contained a provision that allowed the New Jersey betting haven, Atlantic City, to facilitate sports gambling if the state passed a law allowing it to do so within one year of PASPA's enactment.[57] New Jersey did not capitalize on the opportunity, but after nearly twenty years, the state's perspective changed.[58] The Third Circuit Court of Appeals determined that the federal law was within Congress's power under the Commerce Clause and upheld the district court's decision.[59]

To date, PASPA's utility has been confined to regulating states that wish to enact sports gambling legislation, not individuals or businesses.[60]

A. PASPA Prohibits a "Person" from Operating a Sports Wagering Scheme

PASPA is notably known for preventing states from establishing sports gambling laws.[61] Despite being used against states, PASPA's prohibition on sports gambling does apply to "persons" as well.[62] As defined by PASPA, "'[p]erson' includes corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[63]

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[55] *Id.* "Oregon ran a state lottery game based on National Football League games, Sports Action . . . ." *Id.*

[56] NCAA v. Christie, 926 F. Supp. 2d 551 (D.N.J. 2013) *aff'd sub nom.* NCAA v. Governor of New Jersey, 730 F.3d 208 (3d Cir. 2013).

[57] See *Governor of New Jersey*, 730 F.3d at 216 (3d Cir. 2013).

[58] *Id.* at 217.

[59] *Id.* at 225. New Jersey also argued that PASPA unconstitutionally commandeered power inherently given to the states and that it violates the equal sovereignty of the states by favoring Vegas. *Id.* The Third Circuit Court of Appeals rejected both arguments. *Id*.

[60] *See generally*, OFC Comm Baseball v. Markell, 579 F.3d 293 (3d Cir. 2009); Interactive Media Entm't & Gaming Ass'n, Inc. v. Holder, 2011 WL 802106 (D.N.J. Mar. 7, 2011); *Governor of New Jersey*, 730 F.3d at 216; Flager v. U.S. Attorney for Dist. of N.J, 2007 WL 2814657 (D.N.J. Sept. 25, 2007).

[61] *Id*.

[62] S. REP. 102-248, at 9 (1992).

[63] *Id.*

Furthermore, the prohibition on betting applies whether the betting is based on skill, chance, or a combination of both.[64]

By banning "persons" from "operating" or "promoting" sports betting schemes the legislature acknowledged that, in addition to states, individuals could cause damage to the sports industry.[65] Nowhere is this danger more present than in the group context of a business. Individual prosecutions under PASPA are essential to containing the illegal sports gambling epidemic, especially when betting on sports becomes a business. Billions of dollars are illegally spent on sports gambling every year.[66] Although much of these illegal bets include friendly wagers between family and friends, many of them involve large sums of money. Betting groups, like Joe Peta's, gamble large sums of money on baseball games.[67] By allowing a single person to bet for various people spread throughout the United States, the pervasiveness of sports gambling is no longer limited to Las Vegas.

Promoting large-scale sports betting schemes could also lead to investment-like fraud. After advertising that your betting scheme essentially guarantees a return, people will be more willing to invest. The more the betting scheme designer is able to get investors, the more likely that the investment appears legitimate. Even being associated with sports can lend legitimacy to business dealings.[68] Once the creator of the betting group receives all the money they desire, there is very little to prevent them from taking the money and disappearing.[69] Enforcing PASPA against individuals that advertise these mass-betting schemes helps prevent investment like fraud before it happens and serves as a deterrent to future violators.

The use of an injunction against individuals running large scale betting groups is appropriate and would serve as an effective

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[64] *Id.*

[65] *Id.*

[66] Jarvis, *supra* note 14, at 279.

[67] Schaefer, *supra* note 3.

[68] *American Greed:sudden Death/Hip Hop Hustle*, CNBC (Apr. 4, 2014), http://www.cnbc.com/live-tv/american-greed/full-episode/udden-deathhip-hop-hustle/221248579721. A recent episode of CNBC's American Greed focuses on how J.D. Salinas was part of a $39 million scheme to defraud investors. *Id.* Several NCAA men's basketball coaches such as Billy Gillispi and Lute Olson invested in bonds with Salinas and he took advantage of their support to further defraud investors. *Id.*

[69] *Id.*

deterrent for a crime that is commonly committed. The remedy currently allowed under PASPA is an injunction.[70] Since there are so many people that make individual sports bets in states that fall under the PASPA ban, it is impractical to think that all of them could be prosecuted. Still, the law would best be effectively used both to prevent states from passing sports betting laws and against "persons" that run large scale betting operations. By doing so, the federal government would be sending a stronger message to individuals that it not concerned with betting between friends and family but is concerned about potentially expansive sports betting across state borders.

B. Integrity of the Game

Investment style sports betting should be treated as gambling rather than an investment because it negatively impacts the integrity of the game. The purpose of PASPA is to stem sports gambling in an attempt to keep the integrity of the game free from the risks gambling exposes it to.[71] Gambling is historically associated with being a tax on low-income individuals, increased criminal activity, divorce, addiction, bankruptcy, domestic abuse, and addiction.[72] By allowing extensive sports gambling to occur on the scale of stock market investment, the negative aspects of gambling are more likely to permeate throughout sports.

To treat sports wagering like the stock market promotes all the traditionally negative aspects that betting on sports invokes, with none of the upside that betting on a team provides. First, when a "broker" begins to solicit people to invest in their sports wagering scheme, those that decide to join it do not necessarily know what team they place their bet on. Investors therefore have no incentive to cheer for one team or another. Betting on a game is often a personal investment of both time and money. When a person bets on a team, they have decided to watch them, cheer for them, and perhaps even socialize with fans they would not normally engage. By betting on sports like it is the stock market,

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70 S. REP. 102-248, at 9 (1992).
71 *Id*.
72 Hurt, *supra* note 34, at 403.

the game loses the increased entertainment value that a traditional bet would provide.

Even if investors are aware of what bets will be placed over a season, the nature of investment-like betting dilutes the ability of a team to create a loyal fan base. Placing diverse investments in order to manage risks means that you are cheering for multiple teams that may be competing with each other in the same conference. A person could choose a sports team to follow and then make bets on teams they do not necessarily care about, but their time and energy would be divided because of the financial incentive. Betting in this way promotes passive engagement with sports, much like the passive engagement investors have when they invest in the stock market.[73]

Additionally, sports betting does not have the same positive value as investments. Investments are not only a bet that a company will be successful, but also go right into a companies capital stream so that they can use it to better the company and, hopefully, enrich supportive investors. Investing in sports betting does not give teams any money directly. Instead, it only enriches the gambler or Vegas, preventing sports teams from utilizing any money made from the entertainment that they provide. The feeling of becoming part of the success of a company when someone invests for does not translate to sports betting.

CONCLUSION

PASPA's constitutionality and overall effectiveness are questionable to say the least.[74] Even so, the law has not been utilized enough by prosecutors for anyone to determine whether injunctive relief is an effective remedy for sports gambling. Even if the Supreme Court decides to declare the PASPA unconstitutional, states should consider banning large betting groups. Instituting injunctive relief against large betting groups

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[73] *Id.* at 387.

[74] *See* Jordan Hollander, *Ball's in the Supreme Court's Court: Update on New Jersey's Sports Betting Lawsuit*, Rutgers J.L. & Pub. Pol'y (Mar. 20, 2014), *available at* http://www.rutgerspolicyjournal.org/balls-supreme-courts-court-update-new-jersey%E2%80%99s-sports-betting-lawsuit. New Jersey has appealed the Third Circuit Court of Appeal's decision to grant an injunction against the state and filed a writ of certiorari with the United States Supreme Court. *Id.*

would be a way to address the large-scale illegal sports betting that negatively impacts the integrity of the game and send a message to individual sports bettors that there are limits to how one can bet on sports.