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DEPAUL v. COMMONWEALTH: A LOOK AT POLITICAL CONTRIBUTIONS ASSOCIATED WITH THE HORSE-RACING INDUSTRY

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I. INTRODUCTION

In July of 2004, Pennsylvania enacted the Pennsylvania Race Horse Development and Gaming Act ("Gaming Act" or "Act"). The Act functioned as a vessel through which the state legislature could introduce legalized slot machine gaming in Pennsylvania and brought with it hopes of increased state revenue and additional forms of tax relief. The Act was designed to maintain the integrity of the gaming industry and protect the public through strict regulation and policing of gaming activities. Included within the Gaming Act are various tools for accomplishing the legislature's goals, one of which is Section 1513, entitled "Political Influence." Section 1513 identifies a class of individuals within the gaming industry and prohibits its members from making certain political contributions. Specifically, this section bans certain individuals from contributing financially to local political party committees, groups organized in support of local candidates, or the campaigns of candidates running for local public office.

In 2008, the Supreme Court of Pennsylvania reviewed and decided DePaul v. Commonwealth, in which the Petitioner challenged the constitutionality of this political ban as being an "overly broad and unlawfully discriminatory infringement of the rights to free expression and association." These rights are guaranteed by Article I, Sections 7, 20, and 26 of the Pennsylvania Constitution.

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3 4 PA. CONS. STAT. § 1102 (2004).
4 Id. at § 1513, declared unconstitutional by DePaul v. Commonwealth, 969 A.2d 536 (Pa. 2009).
5 Id. at § 1513(a).
6 Id.
7 DePaul, 969 A.2d at 538.
8 Id.
The Petitioner in *DePaul* was a local businessman who held a 9.54% controlling interest in Philadelphia Entertainment and Development Partners ("PEDP"), a company which owned a local casino. According to definitions provided in the Gaming Act, that ownership interest qualified Petitioner as a "principal" and subjected him to the political ban. Wholly unaware of Section 1513's prohibitions, he made twenty-one political contributions in 2006, a number of which fell within the Section 1513 restrictions. Upon realizing his error, Petitioner requested a total refund of his contributions and entered into a consent decree with the Pennsylvania Gaming Control Board ("Control Board").

The resulting court opinion in *DePaul* addressed the conflict between the Gaming Act's primary objective, the protection of public confidence, and that of the judiciary, the protection of constitutional rights. By examining the decision in *DePaul*, this Comment analyzes how courts might strike a balance between the competing interests of the public at-large and those of individuals affiliated with racing and gaming facilities.

In Section II, this Comment discusses the legal background of *DePaul*. Next, Section III presents Petitioner's constitutional claims. Section IV examines the court's survey of similar judicial decisions, while Section V discusses and interprets the Supreme Court of Pennsylvania's holding. Finally, Section VI considers the implications of that decision for the gaming industry.

**II. BACKGROUND**

**A. Statutory Background**

*DePaul* evaluated the constitutionality of the Gaming Act's Section 1513 political ban on two grounds. First, the court assessed the ban's restriction of the right of free speech and association which are guaranteed by Article I, Section 7 of the Pennsylvania Constitution.

Second, it considered whether the ban violated Article I, Section 26 of the state constitution which restricts unlawful or baseless discrimination against any person's civil rights.

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9 Id.
11 *DePaul*, 969 A.2d at 539.
12 Id. at 539-40.
13 Id. at 540.
14 Id. at 541.

The Gaming Act had a number of goals which included furthering the tourism market, promoting and assisting the horse racing industry, and generating new revenue for the state of Pennsylvania. One additional, relevant purpose was to maintain and enhance public trust in local elected officials in the advent of slot machine gambling. Section 1102 specifically articulated the Pennsylvania legislature’s desire to maintain the integrity of gaming regulations in order to prevent actual corruption or the appearance of corruption that may result from campaign contributions, as well as “ensure bipartisan administration of [the Act]; and avoid actions that may erode public confidence in the system of representative government.”

The state legislature set out to achieve this goal by writing a number of regulatory provisions into the Act. Section 1103 sets the groundwork by defining pertinent terminology, including the term “principal.” The Act defines a “principal” as a person having an ownership interest in restricted gaming activity. This definition includes officers, directors, and any other person who owns a beneficial interest or has a controlling interest in a gaming applicant or licensee. For the purposes of the Act, an “applicant” is defined as a person who requests permission to engage in a gaming activity that is restricted therein, for example, installing slot machines.

Section 1513 then imposed upon those individuals a restriction on political contributions. Specifically, the Act prohibited principals of slot machine licensees, licensed manufacturers, licensed suppliers, and licensed racing entities from making political contributions to local candidates for public office or to local political parties. Section 1513 also went so far as to ban attendance at political functions such as dinners, meetings, and fundraising events that required the purchase of a ticket.

To enforce the political ban and other regulations, the Gaming Act required that a Pennsylvania Gaming Control Board (“Control Board”) be established and, within that board, a Bureau of Investigations and Enforcement (“Bureau”) be created. The Control Board’s website, which

16 Id. at § 1102 (11).
17 Id. at § 1102 (11).
18 Id. at § 1103.
19 Id.
20 Id.
22 Id. at § 1513(a).
23 Id. at § 1513(d).
24 Id. at §§ 1201(a), 1517(a).
it is required to create and maintain by statute,²⁵ states that its mission is to “protect the interest of the public by ensuring the integrity of legalized gaming through the strict enforcement of the law and regulations....”²⁶ The Bureau, although existing entirely within the Control Board, acts independently in matters relating to the political ban.²⁷ As the independent body for enforcing those ban provisions, it is empowered investigate and review all permit or license applicants and generally monitor all gaming operations.²⁸


The constitutional challenge in DePaul derived from freedoms guaranteed by the Pennsylvania Constitution. Article I, Section 7 of the state constitution provides that “the free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print out on the subject....”²⁹ This, in conjunction with the right of petition granted by Article I, Section 20, provides generous protection for freedom of speech and association.³⁰ Additionally, Article I, Section 26 establishes that neither the state nor its agencies may discriminate against an individual’s exercise of his civil rights in an unlawful or baseless manner.³¹ These constitutional guarantees, although slightly broader in reality, are considered equal to the U.S. Constitution’s First Amendment Right of Free Speech for the purposes of this Comment.

B. Political Corruption

Many of the Gaming Act provisions, Section 1513 in particular, are premised upon the belief that racing and gaming industry leaders use wealth and influence to sway local politicians to act in the industry’s best interests. Society fears that this enables casinos and other gaming facilities to unfairly influence the entire political process.³² This is evidenced by a “long-standing and strong sensitivity to the evils traditionally associated with ... gambling when it is unregulated” in America.³³ Gambling regulations do little to quiet these fears; for even when regulatory processes are put into

²⁵ Id. at §1513 (a.2) (1).
²⁸ Id. at § 1517 (a)-(a.1).
³³ DePaul, 969 A.2d at 545.
place, their integrity is often called into question.\textsuperscript{34} Arguably, a regulation process that is laxly monitored and enforced, while created with noble intentions, leads to erosion of confidence in the integrity of a state’s representative government.

Furthermore, a significant percentage of Americans consider gambling to be an activity that is “rife with evil” and mischievous in terms of the public welfare and morality.\textsuperscript{35} These some people do not even believe that gambling should be legal, much less loosely regulated. Therefore, it would be irresponsible to ignore the possibility that popular public disapproval of gambling may in fact outweigh the activity’s economic benefits for the state, whatever its regulations or restrictions.

\textbf{III. DePaul's Claims}

Petitioner’s main claim in \textit{DePaul} was that the Gaming Act’s political ban was “overly broad and unlawfully discriminatory” so as to violate Petitioner’s constitutional rights of political expression and association.\textsuperscript{36} Petitioner asserted that the Act affected his constitutional rights and therefore required strict scrutiny review, the highest level of judicial scrutiny.\textsuperscript{37} Strict scrutiny requires a showing that the contested statute serves a compelling government interest and is “narrowly tailored” to achieve that interest.\textsuperscript{38} Petitioner argued that the ban in Section 1513 could not survive such review because it was not narrowly-tailored and served a purpose other than that articulated by the legislature.\textsuperscript{39}

The legislature articulated the apparent purpose of the Act in Section 1102, entitled “Legislative Intent,” stating that the political ban was enacted to prevent corruption of the type that normally results when members of any major industry makes large campaign contributions.\textsuperscript{40} In light of that provision, however, a ban of all political contributions, regardless of size, would appear to be overly-inclusive. Another questionable characteristic of the ban is that it failed to require a connection between the licensed gaming industry and the “recipient political candidate.”\textsuperscript{41} Finally, the legislature also failed to indicate any “scintilla of evidence” that would connect licensed gaming and political contributions to political corruption within the state of Pennsylvania.\textsuperscript{42}

\textsuperscript{36} DePaul, 969 A.2d at 538.
\textsuperscript{37} Id. at 552.
\textsuperscript{38} Id. at 540.
\textsuperscript{39} Id. at 543.
\textsuperscript{40} 4 PA. CONS. STAT. § 1102 (11) (2004) (amended 2010).
\textsuperscript{41} DePaul, 969 A.2d at 543.
\textsuperscript{42} Id. at 540-41.
IV. THE COURT’S ANALYSIS

To begin its analysis, the DePaul court imposed a heavy burden for overturning the Section 1513 ban, adopting the view that all doubts as to the constitutionality of the statute were to be resolved in favor of the legislative enactment. Thus, it required that the ban be construed, when possible, to preserve its constitutionality.

A. Application of Strict Scrutiny

The DePaul court first determined the applicable standard of review. Using its previous decisions as guidance, the court found the constitutional freedoms of speech and association were implicated by the freedom of political expression limited by Section 1513. The court then declared strict scrutiny the appropriate level of review where freedom of expression is at issue. Although Section 1513 implicated this freedom, the court also stated that the quantity of expression does not increase substantially in correlation with the quantity of contribution. It follows that political contribution bans, irrespective of size, restrict political expression and are therefore subject to strict scrutiny review. As a result, the constitutional question for the court became whether the Section 1513 ban was narrowly tailored to accomplish the compelling state interest of preventing the “actual or appearance of corruption” resulting from campaign contributions by principles in a large and influential industries.

B. The Court’s Survey of Other Jurisdictions

With strict scrutiny established as the appropriate measure of review, the court next looked to jurisdictions that had decided similar constitutional questions. At the time of that survey, nineteen states had legalized either “racinos” or some other form of gambling.

Among those nineteen states, the legislative approaches to political bans in the gaming industry were anything but uniform. Five states had enacted statutes imposing blanket bans to political contributions, however,

43 Id. at 545-46 (citing Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 877 A.2d 383, 393 (Pa. 2005)).
44 DePaul, 969 A.2d at 546 (quoting In re William L., 383 A.2d 1228, 1231 (Pa. 1978)).
45 DePaul, 969 A.2d at 548.
46 Id.
47 Id. at 547 (quoting Buckley v. Valeo, 424 U.S. 1, 20-21 (1976)).
48 Id. at 544.
49 Id. at 548 (defining a “racino” as a combined racetrack and casino).
50 Id.
51 Id. at 551.
52 Id. at 543.
only two states’ courts, New Jersey and Louisiana, upheld these blanket bans in the face of a First Amendment challenge. Notably, only one of those bans would apply to an individual in Petitioner’s particular ownership position. The remaining fourteen states imposed either very specific restrictions or no restrictions at all.

The courts upholding political bans required their respective legislatures to demonstrate both a sufficiently important state interest and a closely tailored means of protecting that interest. Specifically, the political ban could not be an “unnecessary abridgment of associational freedoms.” For example, bans survived judicial review when they applied solely to casino “key employees,” defined as “persons in a supervisory capacity or empowered to make discretionary decisions which regulate casino operations.” This select prohibition was found to be narrowly tailored to protect governmental processes from unlawful influence. Therefore, these types of limited bans stand a better chance of withstanding constitutional review.

Courts ruling in favor of blanket bans also held that the size of a political contribution does not determine or reflect its potential to cause corruption. For example, a ban on large political contributions could be easily circumvented by a large number of smaller contributions. Also, these courts refuted the necessity of an obvious or specified relationship between the politician who receives the contribution and the gaming industry providing it because public officers often “wield power or influence beyond that which is inherent in [their] official duties.”

Blanket ban proponents argue that the “evils traditionally associated with casino gambling” are too difficult to prevent with narrow legislation. Jurisdictions adopting this view perceive concentration of wealth in the gaming industry as an inevitable precursor to political corruption. However, this assertion sometimes lacks the evidence needed to support it.

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54 DePaul, 969 A.2d at 549.
55 Id. (stating that the New Jersey ban would not apply to an individual who merely owns an interest in a business concern that owns an interest in the ownership of a gaming facility).
56 Id. at 549.
57 Id. at 549.
58 Id. at 550 (quoting Soto, 565 A.2d at 1100).
59 DePaul, 969 A.2d at 550.
60 DePaul, 969 A.2d at 545 (citing Schiller Park Colonial Inn, Inc. v. Berz, 349 N.E.2d 61, 66 (Ill. 1976)) (noting that in Berz, 349 N.E.2d at 66, the Illinois Supreme Court rejected an overbreadth argument similar to the one in Petitioner in DePaul).
61 Id. (noting that the Berz Court rejected the effectiveness of corruption prevention laws that prohibited contributions above a certain dollar amount).
62 Id. (citing Berz, 349 N.E.2d 61, 67 (Ill. 1976).
63 DePaul, 969 A.2d at 551 (quoting Soto, 565 A.2d at 1093-1094).
64 See DePaul, 969 A.2d at 551.
V. HOLDING

Ultimately, the *DePaul* court held that the appropriate test for determining the constitutionality of blanket political bans is to assess the relationship between the statute’s legislative intent and the regulation used to achieve it.\(^6^5\) Section 1102 of the Gaming Act recognizes that the Act’s primary objective of “protect[ing] the public.”\(^6^6\) One other objective listed in Section 1102, in direct reference to the Section 1513 political ban, stated that a political ban is necessary to prevent “the actual or appearance of corruption that may result from large campaign contributions….”\(^6^7\)

The *DePaul* court found that the legislative intent articulated a fairly narrow governmental interest and that banning all political contributions was not a narrowly drawn means of furthering that interest.\(^6^8\) Consequently, the court held that the Section 1513 political ban violated Article I, Section 7 of the Pennsylvania Constitution and enjoined its enforcement.\(^6^9\) The Pennsylvania legislature has not enacted any law nor otherwise amended the Section 1513 political ban to address the articulated concerns at the date of this Comment’s publication.\(^7^0\)

VI. IMPLICATIONS AND CONSEQUENCES

The recent economic recession caused a dramatic decrease in betting and earnings at equine industry racetracks.\(^7^1\) In hopes of raising revenues, many racetracks have considered adding on-site gambling, most commonly in the form of slot machines.\(^7^2\) States such as Pennsylvania have seen increases in new tax revenue, the creation of thousands of jobs, and reinvigoration of its horse industry, making on-site gambling an attractive

\(^{65}\) See *DePaul*, 969 A.2d at 552.
\(^{68}\) *DePaul*, 969 A.2d at 552-53.
\(^{69}\) Id. at 554. Despite the court’s ruling, in the 194\(^{th}\) regular Session of the General Assembly, the Pennsylvania Legislature voted to leave Section 1513 intact, making only minor grammatical and structural changes. To address the court’s rejection of the political ban in *DePaul*, the legislature instead added two new provisions to Section 1102, “Legislative intent.” New Section 10.1 states: “The General Assembly has a compelling interest in protecting the integrity of both the electoral process and the legislative process by preventing corruption and the appearance of corruption which may arise through permitting any type of political contributions by certain persons involved in the gaming industry and regulated under this part.” New Section 10.2 states: “Banning all types of political campaign contributions by certain persons subject to this part is necessary to prevent corruption and the appearance of corruption that may arise when political campaign contributions and gambling regulated under this part are intermingled.” 4 PA. CONS. STAT. § 1102 (10.1),(10.2) (2010).
\(^{70}\) See Pennsylvania Gaming Control Board, http://www.pgc.state.pa.us (follow “Licensure” hyperlink; then follow “Political Influence Statement” hyperlink) (last visited Oct. 5, 2010).
\(^{72}\) Id.
option for the racing and gaming industry and the states in which they are located.73 This trend is particularly relevant for Kentucky, home to multiple racetracks, including Churchill Downs, the site of the world’s most renowned thoroughbred horse race, the Kentucky Derby. In Kentucky, the addition of slot machines would transform the state’s pre-existing racetracks into “racinos.” A proposal to allow slot machines in Kentucky’s racetracks has in recent years been both contemplated and rejected by the Kentucky General Assembly and has been the topic of heated debate in neighboring Ohio.74

While on-site gambling promises to benefit Kentucky and other horse-racing states, the decision in DePaul reveals that it also has the potential for negative consequences. States that do not already allow slot machine gambling would need to enact statutes that include strict regulatory provisions and establish some form of a gaming control board. DePaul’s exploration of the Pennsylvania Gaming Act reveals that regulations are necessary to ensure governmental credibility and prevention of corruption within industries of considerable wealth. This is particularly true in regards to states such as Kentucky, where the horse racing industry is incredibly influential and important to the local economy.

Furthermore, DePaul exposes the possibility that such regulatory gaming laws can jeopardize constitutional rights. Although the DePaul court declared the blanket ban unconstitutional, the court’s analysis included a survey of many jurisdictions that have upheld and continue to impose political bans on certain categories of individuals. This is a serious issue for states such as Kentucky and Ohio to consider when weighing the costs and benefits of adding slot machine gambling to their racetracks. Specifically, legislatures should consider whether the new revenue would justify potentially sacrificing an individual’s First Amendment rights.

It must also be noted that the DePaul court ordered strict scrutiny review of political bans under racing and gaming statutes. Because such a heightened level of will likely be imposed in other jurisdictions as well, states implementing political bans must be prepared to demonstrate both a sufficiently compelling interest and a closely tailored means of protecting that interest. Specifically, state legislatures should ensure that their bans do not cause any “unnecessary abridgment of associational freedoms.”75

When reviewing these bans, courts should consistently apply the strictest

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75 DePaul, 969 A.2d at 549 (citing Casino Ass’n of La v. La. ex rel. Foster, 820 So.2d 494, 509 (La. 2002)).
standard of review to ensure great stability and confidence in the protection of First Amendment rights.

VI. CONCLUSION

The DePaul court struck down the Pennsylvania Gaming Act’s Section 1513 political ban even though it served two legitimate public purposes: protecting public confidence and preventing government corruption. Most similar blanket bans have met the same fate in other courtrooms nationwide. While state governments have an understandably strong interest in the regulation and integrity of the racing and gaming industry, DePaul shows that such an interest, unless it can satisfy the strict scrutiny standard of review, will not outweigh an individual’s First Amendment rights to freedom of speech and expression. States have extreme difficulty proving their political bans to be constitutional, as evidenced by the fact that only two United States jurisdictions have upheld complete blanket bans.76

State governments must be applauded for any steps made towards regulating and controlling the racing and gaming industry. Those efforts surely bolster public confidence in the honesty and integrity of the state’s governmental functions. Such attempts must, however, be coupled with an acute awareness of personal rights, for before the state is a protector of its economy and government, it is a protector of its people and their constitutional rights.

76 DePaul, 969 A.2d at 549.