Volume 27 | Issue 1 Article 2

3-22-2020

A Slam Dunk for States' Rights: The Impact On Constitutional Federalism And Federal Regulations Following The Supreme Court In Murphy V. NCAA

Christopher Bret Alexander

COMMENTS

A SLAM DUNK FOR STATES' RIGHTS: THE IMPACT ON CONSTITUTIONAL FEDERALISM AND FEDERAL REGULATIONS FOLLOWING THE SUPREME COURT IN *MURPHY V. NCAA*

On May 5, 2018, in Louisville, Kentucky, rain soaked the ground, and twelve-hundred pound thoroughbreds rounded the bend toward the finish line.[1] Thousands of people grasped their wagers, watching as the first hoof crosses the mark.[2] Justify won the Kentucky Derby, and spectator Bill Krackomberger made $150,000 on a $500 bet he placed three months ago.[3]

I. Hedging Bets: An Introduction

Since its inception, sporting events and gambling have been intrinsic pastimes in America's culture.[4] Modern sporting events, such as football, baseball, basketball, and hockey have grown in popularity and developed from traditional sporting events such as archery, jousting, fencing, and horse racing.[5] Gambling, on the other hand, has been historically treated as a "vice" and banned throughout most of the United States until the 1930s.[6] However,

1. *See* Justin Sayers, *This is Now the Wettest Kentucky Derby Ever and More Rain is Coming*, Louisville Courier J. (May 5, 2018) https://www.courier-journal.com/story/sports/horses/triple/derby/2018/05/05/louisville-rain-flash-floods-kentucky-derby/583870002/ [https://perma.cc/WU8X-992U] (describing conditions of 2018 Kentucky Derby); *see also* Andrew Joseph, *How One Bettors' $500 Bet on Justify to Win the Kentucky Derby Turned Into $150K*, USA Today (May 6, 2018) https://ftw.usatoday.com/2018/05/justify-kentucky-derby-bettor-futures-bet-300-to-1-150k-gambling [https://perma.cc/VXZ7-N6JU] (describing winners of 2018 Kentucky Derby).

2. *See* Joseph, *supra* note 1 (illustrating sports gambling wagers as risky but worthwhile, involving luck and chance when betting odds are set at 300-to-1).

3. *See id.* (demonstrating risk paid off with large payout from surprise win).

4. *See Where the Ponies Run for the Masses*, N.Y. Times (May 31, 1908), https://www.nytimes.com/1908/05/31/archives/where-the-ponies-run-for-the-masses-long-island-the-cradle-and.html [https://perma.cc/B75H-3ULJ] (emphasizing sporting events have rich history such as horse racing on Long Island, New York dating back to 1665).

5. *See* Daniel Kelly, *Sports in the 1600's*, 1600 Sports (Dec. 2, 2012), http://1600sports.blogspot.com/ [https://perma.cc/U8K6-EUYR] (discussing evolution of sports).

6. *See* Vice, Oxford English Dictionary (2d ed. 1989) (defining vice as "depravity of corruption of morals; evil, immoral or wicked habits or conduct; indul-

during the Great Depression, state laws prohibiting gambling were "gradually loosened" as a way to increase tax revenue.[7]

Over time, state laws continued to legalize different forms of gambling ranging from horse races to nonprofit bingos and lotteries.[8] As more states considered legalizing sports gambling, the growing trend pressured Congress to pass the Professional and Amateur Sports Protection Act ("PASPA") in 1992 to prevent states from legalizing sports gambling.[9] Twenty years later, New Jersey became the first state to challenge the constitutionality of PASPA.[10] Initially resulting in defeat, New Jersey again challenged the constitutionality of PASPA two years later, this time successfully arguing that Congress could not commandeer the states' autonomy under the Tenth Amendment.[11] In accordance with anti-commandeering principles established in *New York v. United States*[12] and *Printz v. United States*,[13] the Supreme Court ruled PASPA unconstitutional.[14]

---

gence in degrading pleasures or practices"); s*ee also* Steve Durham & Kathryn Hashimoto, HISTORY OF GAMBLING IN AMERICA 34–35 (2010) (describing history of gambling from organized crime to changes in different state laws resulting in economic development of casinos).

7. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1469 n.1 (2018) (citing Kay C. James, NAT. GAMBLING IMPACT STUDY COMM'N, FINAL REPORT, p. 2–1 (1999)) (illustrating that attitudes about gambling have swung back and forth in America particularly when politicians promised increased tax revenues).

8. *See id.* at 1469 n.2 & 4–5, (citing Atl. City Racing Ass'n. v. Attorney Gen., 498 A.2d 165, 167–68 (N.J. 1985); Bingo Licensing Law, N.J. Stat. Ann. § 5:8–24; and State Lottery Law, N.J. Stat. Ann. § 5:9–1) (illustrating development from total ban to slow legalization of gambling in New Jersey).

9. *See generally* 28 U.S.C. § 3702 (prohibiting authorization and legalization of sports gambling not only from individuals but also majority of states); *see also Murphy*, 138 S. Ct. at 1470 n.19–20 (citing S. Rep. No. 102–248, at 5; S. Hrg. 102–499, at 10–14) (exemplifying fears about sports gambling that could have been resolved with regulation rather than prohibition).

10. *See* Christie v. Nat'l Collegiate Athletic Ass'n, 573 U.S. 931 (2014) (solidifying defeat with denial of certiorari); *see also* Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208 (3d Cir. 2013) [hereinafter *Governor I*] (affirming New Jersey District Court's decision in 2-1 split); *see also* Nat'l Collegiate Athletic Ass'n v. Christie, 926 F. Supp. 2d 551, 577 (D.N.J. 2013) [hereinafter *Christie I*] (rejecting Sports Wagering Act of 2012).

11. *See* Nat'l Collegiate Athletic Ass'n v. Christie, 61 F. Supp. 3d 488 (D.N.J. 2014) [hereinafter *Christie II*] (rejecting Sports Wagering Act of 2014), *aff'd en banc*, 832 F.3d 389 (3d Cir. 2016), *cert. granted*, 137 S. Ct. 2327 (2017), *rev'd*, 138 S. Ct. 1461 (2018) (overturning all prior reasoning in favor of PASPA, and ruling it unconstitutional); *see specifically* U.S. CONST. amend. X (stating "the 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").

12. 505 U.S. 144, 188 (1992).

13. 521 U.S. 898, 935 (1997).

14. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018) (utilizing N.Y. v. United States, 505 U.S. 144 (1992) and Printz v. United States, 521 U.S. 898 (1997), to overturn PASPA as unconstitutional).

The holding meant Congress could not prohibit states from modifying or repealing state law under the United States Constitution.[15] The ruling's ramifications have yet to fully be seen, but widespread state legalization of sports gambling, as well as additional litigation opposing federal regulations, is sure to ensue.[16]

This Note examines the Supreme Court's decision in *Murphy v. NCAA*,[17] starting with a discussion of the case facts in Part II.[18] Part III includes an explanation of the background surrounding *Murphy*, including a discussion of PASPA and its disputed statutory provisions.[19] Subsequently, Part IV illustrates the Supreme Court's analysis involving federalism issues, and Part V critically examines the Court's decision with potential implications on drug, immigration, environmental, and tax law.[20] Finally, with a landmark decision from the Supreme Court, Part VI discusses *Murphy*'s constitutional impact on other commandeering regulations and the need to implement a regulatory framework for sports gambling.[21] In conclusion, the Supreme Court's holding in *Murphy* has upended traditional notions of dual sovereignty and empowered states to reject affirmative or prohibitive federal regulations analogous to the now unconstitutional PASPA.[22]

II. A RISKY GAMBLE: THE FACTS OF *MURPHY V. NCAA*

Congress enacted PASPA to prohibit state-sanctioned sports gambling with the legislative intent to protect young people and safeguard the integrity of sports.[23] PASPA made it unlawful for states to permit any type of sports gambling scheme on professional

15. *See id.* at 1466 (holding PASPA violates anti-commandeering doctrine).

16. *See* Sam Kamin, *Murphy v. NCAA: It's About Much More Than Gambling on Sports*, THE HILL (May 15, 2018, 8:00 AM), https://thehill.com/opinion/judiciary/387653-murphy-v-ncaa-its-about-much-more-than-gambling-on-sports [https://perma.cc/M34P-ZED6] (elaborating on ramifications of decision and impact on variety of issues used to empower states' rights).

17. 138 S. Ct. 1461 (2018).

18. For a discussion of PASPA, *see infra* notes 49–128 and accompanying text.

19. *See Murphy*, 138 S. Ct. 1461 at 1480 (emphasizing ruling will effect much more than just sports gambling). For a discussion of the facts, *see infra* notes 23–48 and accompanying text.

20. For a summary of the holding, *see infra* notes 129–183 and accompanying text; For further analysis of the *Murphy* decision's, *see infra* notes 186–220 and accompanying text.

21. For an analysis of the impact, *see infra* notes 221–297 and accompanying text.

22. For a discussion of this thesis, *see infra* notes 298–303 and accompanying text.

23. *See Murphy*, 138 S. Ct. at 1482–84 (describing Congressional intentions for drafting and enacting PASPA).

or amateur competitive games or athletes.[24] In 2011, a referendum to legalize sports gambling provided voters in New Jersey the opportunity to voice their opinion.[25] The voter referendum passed with overwhelming approval and permitted the state legislature to amend New Jersey's constitution.[26] Following the sports-wagering amendment, the New Jersey legislature quickly passed the Sports Wagering Act of 2012 ("SWA of 2012").[27] The SWA of 2012 was designed to issue licenses and regulate the operation of sports pools to wager on professional and amateur sporting events at casinos and racetracks.[28] The SWA of 2012 and its legalization of sports gambling was immediately enjoined by five leagues under PASPA.[29] The United States and the NCAA argued the authorization of sports gambling directly conflicted with PASPA and despite the State of New Jersey's best arguments that PASPA was unconstitutional, the District Court upheld the law.[30] On appeal, the Third Circuit affirmed PASPA as well because the SWA of 2012 was an

24. *See* 28 U.S.C. § 3702(1) (1992) (stating "[i]t shall be unlawful . . . for a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact").

25. *See* S. Con. Res. 49, 214th Leg. (N.J. 2010) (drafting official ballot question to read: "Shall the amendment to Article IV, Section VII, paragraph 2 of the Constitution of the State of New Jersey, agreed to by the Legislature, providing that it shall be lawful for the Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City and at racetracks, in-person or through an account wagering system, on the results of professional, certain college, or amateur sport or athletic events, be approved?").

26. *See id.* (passing legislation with voter support); *see generally* MaryAnn Spoto, *Sports Betting Back by N.J. Voters,* NJ.COM (updated Mar. 30, 2019), https://www.nj.com/news/index.ssf/2011/11/nj_residents_vote_on_legalizin.html [https://perma.cc/TY6N-M7F5] (announcing election results and its potential implications); *see also Official General Election Results: Public Question,* N.J. DIV. OF ELECTIONS (Nov. 8, 2011) *available at* https://www.state.nj.us/state/elections/assets/pdf/election-results/2011/2011-official-gen-elect-public-question-results.pdf [https://perma.cc/LSA3-4NV6] (detailing voter turnout and determining sixty-four percent of New Jersey's population voted in 2011 to approved of change).

27. *See* N.J. CONST., art. IV, § VII, para. 2 (amending by voter referendum); *see also* N.J. Stat. Ann. § 5:12A–1 (discussing statutory provisions, including twenty-one year-old wagering minimum age requirement and creation of regulatory division in Casino Control Commission with broad discretion).

28. *See* § 5:12A–1 (describing "[a]n Act permitting wagering at casinos and racetracks on the results of certain professional or collegiate sports or athletic events").

29. *See Christie II*, 61 F. Supp. 3d 488, 490–91 (D.N.J. 2014) (listing five leagues that filed suit against New Jersey: National Collegiate Athletic Association ("NCAA"), National Baseball Association ("NBA"), National Football League ("NFL"), National Hockey League ("NHL"), and Major League Baseball ("MLB")).

30. *See Christie I*, 926 F. Supp. 2d 551, 577 (D.N.J. 2013) (rejecting Sports Wagering Act of 2012 because of linguistics and practical applications contradicting PASPA).

authorization of sports gambling rather than a partial repeal of prohibitions.[31] After the Supreme Court denied certiorari, the uncertainty of PASPA's constitutionality continued to perpetuate itself.[32]

Following the judicial defeat, New Jersey legislature used the judge's opinion to formulate a new law attempting to legalize sports gambling within PASPA.[33] The legislature drafted a new law in accordance with the Third Circuit's opinion to partially repeal state laws prohibiting sports gambling, rather than an authorizing sports gambling.[34] The New Jersey legislature passed the Sports Wagering Act of 2014 ("SWA of 2014"), the law at issue in *Murphy*, and New Jersey Governor Chris Christie hesitantly signed it into law on October 17, 2014.[35]

Soon, the five leagues under PASPA sued the State of New Jersey again, seeking a permanent injunction.[36] After a similar analysis, the District Court again struck down the New Jersey law in favor of upholding PASPA's constitutionality.[37] The state appealed to the Third Circuit, not once but twice, continuing to argue the law violated the Tenth Amendment's anti-commandeering principle.[38] The Third Circuit was apprehensive about overturning

31. *See Governor I*, 730 F.3d 208, 215 (3d Cir. 2013) (affirming District Court's decision in 2–1 split that SWA of 2012 was incompatible with PASPA).

32. *See* Christie v. Nat'l Collegiate Athletic Ass'n, 573 U.S. 931 (2014) (denying writ of certiorari to review PASPA & implications on New Jersey's SWA of 2012).

33. *See Christie II*, 61 F. Supp. 3d 488, 506 n.15 (D.N.J. 2014) (relying on *Governor I*, 730 F.3d at 241–51) (suggesting repeal of gambling prohibitions "in whole or in part" may be constitutional under PASPA but providing no alternative suggestions to formulate new law in accordance).

34. *See id.* at 492 (noting legislatures attempted to draft new law as constitutional based on recommendations following an injunction from Third Circuit judges).

35. *See id.* (noting Governor Christie originally vetoed legislation with formal statement called "Governor Christie's Statement Vetoing S.2250, ECF No. 12-11" because it was "novel attempt to circumvent . . . Third Circuit's ruling" that "[ignored] federal law rather than working to reform federal standards, is counter to our democratic traditions and inconsistent with . . . Constitutional values I have sworn to defend and protect").

36. *See* Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 832 F.3d 389, 394 (3d Cir. 2016) [hereinafter *Governor II*] (seeking to settle violation of New Jersey's laws under PASPA with permanent injunction).

37. *See Christie II*, 61 F. Supp. 3d at 498, 503–04, 506 (rejecting SWA of 2014 with reliance on previous analysis for SWA of 2012 as unconstitutional).

38. *See Governor II*, 832 F.3d at 401 (resulting in another steadfast decision that PASPA "does not command states to take affirmative actions, and it did not present a coercive binary choice"); *see also* Steven D. Schwinn, *Symposium: It's Time to Abandon Anti-Commandeering*, SCOTUSBLOG (Aug. 17, 2017, 10:44 AM), https://www.scotusblog.com/2017/08/symposium-time-abandon-anti-commandeering-dont-count-supreme-court/ [https://perma.cc/ZD3L-W3K4] (defining anti-com-

PASPA under the guise of commandeering and decided to affirm the lower court decision, retracting its partial repeal suggestion as an impractical theoretical analysis.[39] The Supreme Court granted certiorari and evidently found PASPA to be unconstitutional in *Murphy*.[40]

Murphy was argued on December 14, 2017, with the state of New Jersey urging that PASPA violated the anti-commandeering principle because "it regulates a State's exercise of its lawmaking power by prohibiting it from modifying or repealing its laws prohibiting sports gambling."[41] On the other hand, the leagues and the United States argued PASPA did not "command the States to take any affirmative action" and thus could not violate the commandeering principle.[42] Ultimately, the Court made parallels to the federal laws struck down in *New York* and *Printz*, but drew distinctions from the federal laws upheld in *South Carolina v. Baker*,[43] *Reno v. Condon*,[44] *Hodel v. Virginia Surface Mining*,[45] and *F.E.R.C. v. Mississippi*.[46] The federal laws in all four of these cases were upheld as constitutional under the Commerce Clause and were not in violation of the Tenth Amendment, unlike PASPA.[47] The Court held PASPA to be incompatible with our system of "dual sovereignty" and an outright violation of the Constitution.[48]

---

mandeering as "the federal government cannot require states or state officials to adopt or enforce federal law").

39. *See Governor II*, 832 F.3d at 400 (indicating reluctance to invalidate PASPA because Supreme Court only "invalidated laws on anti-commandeering grounds on only two occasions").

40. *See* Christie v. Nat'l Collegiate Athletic Ass'n, 137 S. Ct. 2327, 2328 (2017) (providing New Jersey with opportunity to argue PASPA is unconstitutional with grant of certiorari); *see also* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1484–85 (2018) (overturning all prior reasoning in favor of PASPA and ruling it unconstitutional).

41. *Murphy*, 138 S. Ct. at 1471 (citing *Christie I*, 926 F. Supp. 2d at 561–62) (emphasizing New Jersey's main points of argument).

42. *Id.* at 1471 (citing *Governor II*, 832 F.3d at 401) (emphasizing fact that "PASPA does not require or coerce the states to lift a finger").

43. 485 U.S. 55 (1988).

44. 528 U.S. 141 (2000).

45. 452 U.S. 264 (1981).

46. 456 U.S. 742 (1982).

47. For a further discussion of case holdings, see *supra* notes 43–46 and accompanying text.

48. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1478 (2018) (describing analogy of armed guards attempting to stop votes that supports inherent conflict in creating two governments instead of one; holding PASPA as violation that underscores constitutional blueprint of decentralized government).

III. THE COMPETITIVE TENSIONS OVER THE LEGALIZATION OF SPORTS GAMBLING IN THE STATE OF NEW JERSEY AND PASPA

Although New Jersey has advocated for the legalization of sports gambling in recent years, the state was not always as progressive with its views on gambling.[49] In 1897, a voter referendum in New Jersey banned gambling in the state.[50] As a result, all forms of gambling were illegal in New Jersey from 1897 until 1939, until the state legalized racetrack gambling.[51] Enforcement of the New Jersey gambling ban was riddled with influences of organized crime, particularly in Atlantic City where illegal casinos and bookmaking operators thrived.[52] Over the next fifty years, the New Jersey legislature legalized different types of gambling – parimutuel betting, raffles, bingo, amusement gaming, lotteries, and eventually casinos in Atlantic City.[53] In 1992, the federal government intervened to protect consumers and the integrity of sports with the passage of PASPA, banning state authorization and private actors' abilities to wager on sporting events.[54] Until 2012's passage of the Sports Wagering Act, New Jersey had never officially legalized sports betting.[55]

---

49. For a further discussion of New Jersey's historical approach to sports gambling, see *infra* notes 50–55 and accompanying notes.

50. *See Gambling in New Jersey – Current Laws and Regulations,* GAMBLING-SITES.COM, https://www.gamblingsites.com/online-gambling-jurisdictions/us/new-jersey/ [https://perma.cc/GK9A-5THD] (last visited Jan. 29, 2020) (offering comprehensive guide to historical gambling laws).

51. *See The Complete History of Gambling in Atlantic City*, NJONLINEGAMBLING https://www.njonlinegambling.com/atlantic-city-history/ [https://perma.cc/S34S-KHRD] (last visited Jan. 29, 2020) (describing history of Atlantic City and gambling laws in New Jersey).

52. *See id.* (recognizing Atlantic City's reputation with organized crime).

53. *See* Richard Lehne, *A Contemporary Review of Legalized Gambling in New Jersey,* 50 J. RUTGERS U. LIBR. 47, 62–89 (1988) (describing development of gambling in New Jersey up until 1988).

54. *See* 28 U.S.C. § 3702 (1992) (banning sports wagering in United States); *see also* Mark Brnovich, *Betting on Federalism: Murphy v. NCAA and the Future of Sport Gambling,* 2018 CATO SUP. CT. REV. 247, 257 (2018) (addressing concerns that sports gambling is seen as regressive tax, legalizes bad behavior, and threatens the integrity of sporting events by opponents or critics of its legalization).

55. *See* Brnovich, *supra* note 54, at 247 (noting Hawaii and Utah do not have any forms of legalized gambling and contrasting 2017 poll in which fifty–five percent of Americans approved of gambling).

A. Unfounded Fears Leading to the Passage and Enactment of PASPA

The 102nd United States Congress based its decision to pass and enact PASPA on a number of unfounded fears.[56] In 1919, a conglomerate of sports gamblers "fixed" the World Series by convincing Chicago White Sox players to deliberately lose the game against the Cincinnati Reds in exchange for money.[57] Shortly after this scandal, the federal government took a more laissez-faire approach to regulating the stock market, but never regulated or prohibited sports gambling as immoral.[58] Conversely, the legislature ratified the Eighteenth Amendment and enacted the Volstead Act, both of which effectively banned alcoholic beverages nationwide in order to regulate the morality of citizens.[59] Organized crime was at its prime during the era of alcohol prohibition from 1920 to 1933, but continued to thrive up until the 1980s.[60] As time progressed, organized crime grew and sought "to corrupt legitimate sectors of our society," including gambling and sports wagering.[61] In 1992, instead of narrowly tailoring a law to address specific organized crime and its illegal activities specifically, Congress broadly prohib-

56. For a further discussion on the unfounded fears that led to the PASPA, see *infra* notes 57–62 and accompanying text.

57. *See 1919 World Series*, MLB.COM, http://mlb.mlb.com/mlb/history/postseason/mlb_ws_recaps.jsp?feature=1919 [https://perma.cc/UL27-QP3Y] (last visited Jan. 5, 2020) (discussing scandal, scores, and backlash surrounding rigged World Series).

58. *See id.* (describing backlash surrounding rigged game that resulted in lifetime suspensions of players, but no regulations); *see also* S. David Young, *The Case of the Stock Market: Freedom vs. Regulation*, FOUND. FOR ECON. EDU. (Mar. 1, 1984), https://fee.org/articles/the-case-of-the-stock-market-freedom-vs-regulation/ [https://perma.cc/VPU4-DA9Y] (describing lack of regulation leading up to Great Depression in 1929).

59. *See* Mark Barrett, *Legislating Morality After Prohibition*, FIRST THINGS (Dec. 11, 2013), https://www.firstthings.com/blogs/firstthoughts/2013/12/legislating-morality-after-prohibition [https://perma.cc/YK3V-DQQ9] (commenting on moral legislation of morality from prohibition of alcohol to prohibition of sports gambling and beyond).

60. *See* Dave Roos, *How Prohibition Put the 'Organized' in Organized Crime*, HISTORY (updated Feb. 22, 2019), https://www.history.com/news/prohibition-organized-crime-al-capone [https://perma.cc/FBB9-RVUT] (explaining Eighteenth Amendment history and mob crimes).

61. *See* Ronald Reagan, *Declaring War on Organized Crime*, N.Y. TIMES (Jan. 12, 1986), https://www.nytimes.com/1986/01/12/magazine/declaring-war-on-organized-crime.html [https://perma.cc/ZNV8-7K33] (expressing that organized crime had become "far more encompassing and wide-reaching than in the past" leading to Organized Crime Control Act of 1970, among other federal laws to hinder organized crime).

ited states and private actors from gambling on sporting events throughout the United States.[62]

The provision of PASPA, Section 3702(1), at issue in *Murphy* made it unlawful for "a government entity to sponsor, operate, advertise, promote, license, or authorize by law or compact" to participate in sports gambling or wagering schemes.[63] PASPA prohibited a comprehensive list of activities, including lotteries, sweepstakes, and wagering schemes based on one or more competitive games with professional leagues, amateur league, or team players.[64] The enforcement of PASPA did not make sports gambling a federal crime, nor did it include violation fines.[65] Rather, the enforcement of PASPA required the United States Attorney General, as well as professional and amateur sports organizations, to enjoin an action prohibited by the text of the law, specifically state authorization at issue here.[66]

Under PASPA, New Jersey was given the option of legalizing sports gambling in Atlantic City – provided that it did so within one year of the law's effective date.[67] The New Jersey state legislature lacked the interest and support to legalize sports gambling at that time in the 1990s, but in 2011, the State rethought its' stance after

62. *See* 28 U.S.C. § 3702(1) (1992) (banning state authorized sports wagering in U.S.); *see also* Grutter v. Bollinger, 539 U.S. 306, 334 (2003) (reiterating constitutional notions that means to accomplish objectives must be narrowly framed).

63. *See* §§ 3701–3704 (prohibiting variety of different activities, but not defining "scheme" in statute); *see also id.* § 3702(1) (defining "government entity" as: "a State, a political subdivision of a State, or an entity or organization including an entity or organized described in section 4(5) of the Indian Gaming Regulatory Act (25 U.S.C. § 2703(5) (1992), that has government authority within territorial boundaries of the United States, including on land described in section 4(4) of such Act (§ 2703(4)").

64. *See* § 3702(2) (prohibiting "a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a government entity" to participate in "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 amateurs or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games").

65. *See* § 3703 (stating "a civil action to enjoin a violation of § 3702 may be commenced in an appropriate district court of the U.S. by the Attorney General . . . or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation").

66. *See id.* (noting method or lack thereof for enforcement); *see also* Brnovich, *supra* note 54, at 247 (requiring collaborative effort of federal government with sports leagues).

67. *See* § 3704(a)(3) (stating "a betting, gambling, or wagering scheme, other than a lottery described in paragraph (1), conducted exclusively in casinos located in a municipality, but only to that extent"); *see also* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1469 (2018) (explaining Atlantic City's applicability under this provision because no other application existed at time).

once again falling on tough times.[68] Since New Jersey missed the opportunity to legalize sports gambling, Nevada has been the only state in the country that benefited from a monopoly on the law.[69] Montana, Oregon, and Delaware were also grandfathered into PASPA because these states had legalized limited forms of individualized sports gambling rather than casino-like sports gambling prior to the statutory time period.[70] New Jersey no longer wanted sports gambling to be a monopoly enterprise and looked to the people, as well as the state legislature, to undo it.[71]

On November 8, 2011, New Jersey residents voted on whether the state constitution should be amended to allow the legislature to vote on the legalization of sports gambling.[72] While there was little public debate about the proposed amendment, battle lines were drawn among trade associations and a small number of weary casinos.[73] For instance, the Casino Association of New Jersey supported the measure, while some casinos like Harrah's Entertainment broke with the trade association and warned the measure was "premature"

68. *See Murphy*, 138 S. Ct. at 1472 (mentioning stiff casino competition facing Atlantic City in Northeast United States).

69. *See* JD McNamara, *General Summary of Sports Betting in Nevada*, ROTOGRINDERS, https://rotogrinders.com/sports-betting/nevada-online-sports-betting [https://perma.cc/QHE8-ASMP] (last visited Nov. 15, 2019) (discussing Nevada as one of four states with comprehensive legislative framework that authorizes and regulates sports betting, codified in 1949 under Title 41: Gaming; Horse Racing; Sporting Events §§ 462–467).

70. *See* § 3704(a)(1) (allowing Nevada, Montana, Oregon, and Delaware to keep its state laws authorizing sports gambling since laws were passed between January 1, 1976 and August 31, 1990); *see also* Duke Chen, *States Offering Legal Sports Betting*, OFFICE OF LEGISLATIVE RESEARCH (Feb. 9, 2018), *available at* https://www.cga.ct.gov/2018/rpt/pdf/2018-r-0059.pdf [https://perma.cc/3GDD-HWV9] (summarizing types of games each states with limited sports betting offer).

71. *See* Adam Thew, *PASPA Repeal: What Does it Mean for the American Sports Betting Market?* LEXOLOGY (May 22, 2018), https://www.lexology.com/library/detail.aspx?g=B5b38add-e604-4424-ad0a-98001e155d4b [https://perma.cc/WU4A-7VG5] (discussing implications of Nevada no longer having monopoly on sports gambling); *see also* Richard N. Velotta, *Supreme Court Sports-Betting Ruling to Have Limited Nevada Impact,* LAS VEGAS REV. JOURNAL (Apr. 28, 2018, 8:20 AM), https://www.reviewjournal.com/sports/betting/supreme-court-sports-betting-ruling-to-have-limited-nevada-impact/ [https://perma.cc/BQW2-2KUP] (elaborating on Nevada Gaming Commission Chairman Tony Alamo's surprising comments about PASPA, stating to press that "I don't think it will affect Nevada at all").

72. *See Official General Election Results: Public Question,* NEW JERSEY DIVISION OF ELECTIONS (Nov. 6, 2011), *available at* https://www.state.nj.us/state/elections/assets/pdf/election-results/2011/2011-official-gen-elect-public-question-results.pdf [https://perma.cc/C2BN-ZLV3] (explaining referendum text).

73. *See* Suzette Parmley, *Sports Betting Bill in N.J. Gets Put on Hold*, PHILA. INQUIRER (June 11, 2010), https://www.philly.com/philly/business/20100611_Sports_betting_bill_in_N_J__gets_put_on_hold.html [https://perma.cc/6MR3-GQSD] (discussing support for and against).

without overturning PASPA.[74] Voters overwhelmingly approved the constitutional amendment, with sixty-four percent of voters supporting the legislature to legalize gambling on professional, college, and amateur sports events.[75]

B. Strike 1 and Strike 2: The SWA of 2012 and the Judiciary

The New Jersey legislature enacted its first law attempting to authorize sports gambling in 2012 ("SWA of 2012").[76] Litigation of SWA of 2012 ensued in the infamous *NCAA v. Christie* [hereinafter *Christie I*],[77] in which the plaintiff, a conglomerate of sports teams and the United States Attorney General, argued the SWA of 2012 violated federal law under PASPA.[78] The defendant, the State of New Jersey and its respective parties, argued PASPA went beyond Congress's power under the Commerce Clause to violate the protected sovereign rights of states.[79] The defendants did not argue PASPA violated the Commerce Clause, but argued it violated the Tenth Amendment, the Due Process Clause, Equal Protection Principles, and the Equal Footing Doctrine.[80]

First, under the Commerce Clause, Congress has well established broad powers to enact legislation.[81] Here, the district court used the legislative record prior to the passage of PASPA to support a rational basis needed to prove a "sufficient nexus" between interstate commerce and the regulation of sports betting to pass the law and its grandfathered provisions.[82] Accordingly, the court concluded Congress had the constitutional authority to regulate gambling pursuant to the Commerce Clause.[83]

74. *See id.* (discussing opinions on new sports betting initiative).

75. For a further discussion of voter turnout, see *supra* note 25 and accompanying text.

76. *See* N.J. STAT. ANN. § 5:12A–1 (2013) (implementing first round of sports gambling laws following voter referendum and amendment).

77. 926 F. Supp. 2d 551 (D.N.J. 2013).

78. *See id.* at 578–79 (D.N.J. 2013) (noting the SWA of 2012 was enjoined by plaintiffs in attempt to gain permanent injunction).

79. *See id.* at 558 (arguing while defendants favored SWA of 2012, plaintiffs argued in favor of PASPA and its constitutionality under U.S. Constitution).

80. *See id.* at 578 (listing wide array of arguments to overcome Commerce Clause powers of Congress and application of Supremacy Clause).

81. *See id.* at 558 (citing Fry v. United States, 421 U.S. 542, 547 (1975)) (establishing broad powers of interstate commerce regulation).

82. *See id.* at 559 (citing Gonzales v. Raich, 545 U.S. 1, 22 (2005)) (applying commerce clause test of whether there existed rational basis for PASPA).

83. *See id.* at 559 ("[I]llegal gambling has been found by Congress to be in the class of activities which exerts an effect upon interstate commerce" (quoting United States v. Riehl, 460 F.2d 454, 458 (3d Cir. 1972))).

Second, Congress cannot compel a state to take affirmative action under the Tenth Amendment.[84] Here, the district court refused to expand the construction of *New York* and *Printz* to include prohibitive actions based on precedent and the rule that statutes are "presumptively constitutional."[85] Accordingly, the court concluded Congress did not usurp state sovereignty because PASPA did not cross the line "distinguishing encouragement from coercion" under the Tenth Amendment.[86]

Third, the Due Process Clause and Equal Protection Principles derived from the Fifth Amendment were upheld because the federal government had a "legitimate interest in stemming the tide of legalized sports gambling and provided ample support for upholding PASPA pursuant to rational basis review."[87] Additionally, the court dismissed the Equal Footing Doctrine because there was not "good cause" to expand an outdated and rarely used constitutional mechanism.[88] Thus, the district court found the plaintiffs' permanent injunction valid and the defendants' arguments void.[89] The district court held PASPA was constitutional and preempted the SWA of 2012.[90]

---

84. *See id.* at 551, 567 (referencing U.S. CONST. amend. X, N.Y. v. United States, 505 U.S. 144 (1992), and Printz v. United States, 521 U.S. 898, 921 (1997) to determine "whether Congress may direct or otherwise motivate the States to regulate in a particular field in a particular way").

85. *See id.* at 557 (citing Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 537 (2012)) (emphasizing basic tenets of constitutional law as stating statutes are presumptively constitutional).

86. *See id.* at 567 (citing *New York*, 505 U.S. at 175) (arguing negative command that prohibits state from enacting any laws legalizing or licensing sports betting was affirmative command requiring state to maintain prohibitions on sports gambling from New Jersey perspective; arguing PASPA did not require states to conduct any legislative, executive, or regulatory acts from U.S. perspective).

87. *Id.* at 576 (using Fifth Amendment to determine Congress' stated purpose to extinguish legalized sports wagering was legitimate and rationally related to Congressional aims to stop "irreversible momentum" of sport gambling, noting exceptions were allowable because law was not meant to eradicate problem, but merely to contain it).

88. *See id.* at 577 (citing Coyle v. Smith, 221 U.S. 559, 579 (1995)) (explaining antiquated Equal Footing Doctrine as providing states added to United States to be admitted on "equal footing" with original thirteen colonies).

89. *See id.* at 578–79 (summarizing action).

90. *See id.* (noting "as drafted the two statutory regimes cannot co-exist," as such "if PASPA [was] held to be constitutional, then [SWA of 2012] must be stricken as preempted by the Supremacy Clause. Conversely, if this court finds PASPA unconstitutional, it must be invalidated and [SWA of 2012] may be implemented"). As drafted the two statutory regimes cannot co-exist. Accordingly, if PASPA is held to be constitutional, then the SWL must be stricken as preempted by the Supremacy Clause. Conversely, if this Court finds PASPA unconstitutional, it must be invalidated and NJ SWL may be implemented.

On appeal, the Third Circuit court affirmed the district courts' judgement.[91] The Third Circuit held PASPA was constitutional under the Commerce Clause because sports gambling wagers and national sports leagues are both economic activities that "substantially affect" interstate commerce.[92] Thus, the SWA of 2012 was preempted and invalidated by the Supremacy Clause because the New Jersey law was "precisely what PASPA says the states may not do – a purported authorization by law of sports wagering."[93] Appellants continued to argue that PASPA overextended the Commerce Clause leading to a violation of the anti-commandeering doctrine and equal sovereignty principle.[94] The Third Circuit differentiated PASPA from *New York* and *Printz* by stating PASPA did not require states to "lift a finger," reasoning only affirmative commands not prohibitive commands have been struck down under the anti-commandeering principle.[95]

Additionally, only two modern cases have applied the Equal Sovereignty Principle.[96] The Third Circuit determined PASPA's preferential treatment for states covered by the grandfathering clause was fundamentally different, declining to find a constitutional violation.[97] In dicta, the Third Circuit suggested the only two options: a complete repeal of its sports gambling prohibitions in accordance with state law or a complete ban in compliance with PASPA.[98] In essence, the majority opinion determined PASPA was

91. *See Governor I*, 730 F.3d 208 (3d Cir. 2013) (affirming decision of *Christie I*) (upholding PASPA and prohibition of sports gambling constitutional).

92. *See id.* at 225–26 (noting gambling regulations may be regulated under Commerce Clause because gambling is "rational" and "quintessentially economic").

93. *See id.* at 227 (noting state law is preempted by federal law under Supremacy Clause, as such "it is not telling the state what to do, it is barring them from doing something they want to do" however application of preemption to invalidate state law has never been interpreted as "an invasion" of state sovereignty).

94. *See id.* at 250 (emphasizing on appeal PASPA's impermissible prohibition of states from enacting legislation to license sports gambling and focusing on PASPA's unique exception to permit Nevada to license widespread sports gambling while banning other state from doing so).

95. *See id.* at 231 (relying on precedent in N.Y. v. United States, 505 U.S. 144 (1992), and Printz v. United States, 521 U.S. 898 (1997), as "palpable" distinction from Supreme Court's anti-commandeering cases because statutes prohibiting states from taking certain actions have never been struck down, even if requiring cost, time, effort, modification, or invalidation of contradicting state laws).

96. *See id.* at 237–38 (citing Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193 (2013) and Shelby Cty., Ala. v. Holder, 570 U.S. 529 (2013)) (dismissing Equal Sovereignty claims).

97. *See id* at 238 (citing *Nw. Austin*, 557 U.S. 193) (dismissing Equal Sovereignty claims).

98. *See id.* at 232 (describing New Jersey's legislature saw "meaningful distinction" between repeal and authorization, but just because two tough options does

constitutional and suggested a distinction between repealing and authorizing sports gambling laws.[99]

C. Foul Balls: The SWA of 2014 Involved Recanting Dicta for the Judiciary

On October 9, 2014, the Supreme Court denied certiorari for the Third Circuit's holding regarding the SWA of 2012, leaving the State of New Jersey with no other option than to repeal the unconstitutional law and try again to legalize sports gambling.[100] That same day, the New Jersey legislature introduced another law, known as the SWA of 2014, "partially repealing prohibitions against sports wagering" at casinos and racetracks.[101] The bill passed four days later on October 14, 2014, but was vetoed by Governor Chris Christie who voiced his dismay with the law as a "novel attempt to circumvent the Third Circuits' ruling."[102] The SWA of 2014 was eventually signed into law on October 17, 2014 and explicitly stated "it shall be construed to repeal State laws and regulations."[103] Litigation ensued in *NCAA v. Christie*,[104] the second suit of the same name [hereinafter *Christie* II], in which the state of New Jersey argued PASPA did not preempt the SWA of 2014 because the partial repeal was "expressly authorized" by the Third Circuits' interpretation of PASPA.[105]

---

not mean no options, quoting "the fact that Congress gave the states a hard or tempting choice does not mean that they were given no choice at all, or that the choices are otherwise constitutional").

99. *See id.* ("We do not read PASPA to prohibit New Jersey from repealing its ban on sports wagering . . . . Nothing in these words *requires* that the states keep any law in place . . . . We do not see how having *no law* in place governing sports wagering is the same as authorizing it by law.").

100. *See* Christie v. Nat'l Collegiate Athletic Ass'n, 134 S. Ct. 2866, 2866 (2014) (solidifying defeat of SWA of 2012's with denial of certiorari); *see also Christie II*, 61 F. Supp. 3d 488, 495 (D.N.J. 2014) (describing SWA of 2014's swift implementation).

101. *See* N.J. STAT. ANN. § 5:12A–7 (2015) (passing decriminalization and legalization of sports gambling after referendum); *see also* S. 2250, 216th Leg. (N.J. 2014) (repealing SWA of 2012 and multitude of state prohibition on sports gambling prior to enactment of PASPA, including casino and horse racetrack gambling).

102. For a further discussion of the passage of SWA of 2014, see *supra* note 95 and accompanying text. SWA of 2014 passed with 28–10 and 73–4–0 vote counts in New Jersey legislature.

103. *See Christie II*, 61 F. Supp. 3d 488, 495 (D.N.J. 2014) (citing § 5:12A–8) (illustrating clever attempt by legislatures to prevent preemption and evade federal law).

104. 61 F. Supp. 3d 488 (D.N.J. 2014).

105. *See id.* at 495 (emphasizing legislature's attempt to draft law in accordance with Third Circuit dicta because court expressly held PASPA would not "prohibit New Jersey from repealing its ban on sports wagering" which was later

Despite a second opportunity to provide helpful insight, the district court did not address the constitutionality of PASPA and instead, merely incorporated the doctrine of preemption.[106] The district court concluded, with the support of jurisprudence, that the SWA of 2014 was clearly preempted and did not violate the anti-commandeering principle.[107] The second opinion from the district court simply relied upon the Third Circuit's prior rebuttal that PASPA commandeered states, despite the defendants argument that PASPA "impose[d] an affirmative requirement on states . . . by prohibiting them from repealing anti-sports wagering provisions."[108]

The Third Circuit determined nothing in PASPA required New Jersey to uphold their state law prohibitions on sports gambling, providing states with two binary choices.[109] Seemingly a partial repeal, the SWA of 2014 lead to the same results as the SWA of 2012 because there was "no practical difference in effect between its repeal and authorization."[110] Furthermore, the district court reviewed the legislative intent of PASPA in order to determine whether preemption was applicable.[111] The purpose of PASPA was to stop the "irreversible momentum" of sports betting.[112] Likewise, the goal of PASPA was "to ban gambling pursuant to a state scheme because Congress was concerned that state-sponsored gambling carried with it a label of legitimacy that would make the activity appealing."[113] Thus, the SWA of 2014 created "a label of legitimacy for sports wagering pursuant to a state scheme" directly conflicting with

---

retracted); see *supra* note 30 (listing same plaintiffs who brought lawsuit against New Jersey).

106. *See id.* at 498–99 (ignoring issue of PASPA's constitutionality and possible violation of anti-commandeering to focus on whether PASPA preempts SWA of 2014).

107. *See id.* at 502 (supporting district court to overturn SWA of 2014 was linguistic technicalities from prior Third Circuit opinion ruling on SWA of 2012).

108. *Id.* at 500 (illustrating possible affirmative command from prohibitive command).

109. *See id.* at 500–01 (describing binary choices "between repealing their prohibitions on sports gambling entirely or retaining total bans" offered by court will be recognized as no choice).

110. *Id.* at 504 (noting distinctions between repeal and authorize is impractical).

111. *See id.* at 503–04 (noting legislatures passed SWA of 2014 in less than week and provided no legislative history for court examination, creating interpretation issues when compared to PASPA).

112. *See id.* at 504 (referencing PASPA's purpose because Congress was "cognizant that states were beginning to consider a wide variety of gambling schemes that would allow sports gambling in their states").

113. *Id.* at 499 (referencing PASPA's goal).

the intent of PASPA and simultaneously preempted under the Supremacy Clause.[114]

On appeal, the Third Circuit sitting en banc upheld the district court's ruling that PASPA preempted the SWA of 2014 because the latter violated the federal law with the authorization of sports gambling.[115] Here, the Third Circuit's opinion focused not on whether PASPA commandeered the states, but on whether a partial repeal of sports gambling prohibitions was equivalent to the authorization of sports gambling.[116] The Third Circuit rejected its own previous suggestion, "a repeal cannot constitute an authorization," as unnecessary dicta because it was "too facile" of a distinction to apply.[117] It reasoned that a partial repeal is not a complete repeal because New Jersey is still attempting to authorize sports gambling.[118] Thus, the SWA of 2014 did not make the binary choice offered and cannot be upheld because it is "not a situation where there are no laws governing sports gambling in New Jersey."[119]

Unlike the decision on SWA of 2012, the Third Circuit, here, refused to articulate what the SWA of 2014 would need to do to avoid conflicting with the authorization ban of sports gambling under PASPA.[120] The drafters of the SWA of 2014 attempted to evade the Supremacy Clause with an explicit legislative statement that the law did not intend to violate PASPA; however, "the force of the Supremacy Clause is not so weak that it can be evaded by mere mention of a particular word."[121] The Third Circuit concluded

114. *See id.* at 504–05 (discussing reasons why courts "have been unwilling to allow states to do indirectly what they may not do directly"); *see also id.* (citing Howlett ex rel. Howlett v. Rose, 496 U.S. 356, 382–83 (1990)) (reinforcing that "[t]he force of the Supremacy Clause is not so weak that it can be evaded by mere mention of a word").

115. *See Governor II*, 832 F.3d 389 (3d Cir. 2016) (affirming District Court's ruling that PASPA was constitutional and preempted SWA of 2014).

116. *See id.* at 396–97 (discussing PASPA's prohibition of affirmative authorization by law); *see also id.* at 401–02 (rejecting argument that PASPA "presents states with a coercive binary choice or affirmative command[s]," concluding it is not unconstitutionally commandeering).

117. *See id.* at 397, 401 (rejecting its own dicta on appeal incorporated into SWA of 2014).

118. *See id.* at 410 (discussing reasons why New Jersey should not be allowed to repeal its sports gambling prohibitions even though it doesn't establish comprehensive scheme like SWA of 2012).

119. *Id.* at 396 (illustrating how SWA of 2014 still authorizes gambling).

120. *See id.* at 406 (stopping short of issuing additional suggestion to support or reject).

121. *Id.* at 398 (internal quotation marks omitted) (quoting Howlett ex rel. Howlett v. Rose, 496 U.S. 356, 382–83 (1990)). For a further discussion on the Supremacy Clause, see *supra* note 109 and accompanying text.

SWA of 2014 violated PASPA with an authorization and denied anti-commandeering principle violations.[122]

In his dissent, Judge Vanaske rebutted the constitutionality of PASPA on appeals for both the SWA of 2012 and SWA of 2014.[123] On the first appeal, the Third Circuit judge did not deny the authority of Congress to regulate gambling pursuant to the Commerce Clause.[124] However, the judge raised anti-commandeering concerns involving political accountability and dual sovereignty.[125] Specifically, that PASPA unconstitutionally "seek[s] to control or influence the manner in which States regulate private parties."[126] Regardless of the distinction between affirmative and prohibitive commands, the "federal government is regulating how states regulate."[127] On the second appeal, the Third Circuit judge again raised federalism concerns with strong conviction.[128] The judge relented that the State of New Jersey did exactly what the majority opinion suggested, yet the majority opinion here retracts its dicta.[129] In doing so, it neglects a meaningful distinction, and asserts a false equivalence between repealing and authorizing sports gambling.[130] Evidently, Judge Vansake's opinion that the distinction between repeal and authorization was "unworkable" and left

122. *See id.* at 402 (summarizing holding to reject dicta, affirm PASPA, and ignore potential constitutional issues).

123. *See Governor I*, 730 F.3d 208 (3d Cir. 2013) (Vanaske, J., concurring in part and dissenting in part) (concluding PASPA's regulations do not just regulate interstate commerce or activities but dictate what states are permitted to do and how states must treat sports gambling); *see also Governor II*, 832 F.3d at 406–11 (Vanaske, J., dissenting) (upholding constitutional principles despite being in dissent, ultimately in accordance with Supreme Court's decision in Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1484–85 (2018)).

124. *See Governor I*, 730 F.3d at 241, 249 (Vanaske, J., concurring in part and dissenting in part) (commenting on Commerce Clause powers).

125. *See id.* at 248–49 (raising valid anti-commandeering concerns).

126. *Id.* at 251 (quoting S.C. v. Baker, 485 U.S. 505, 514–15 (1988)) (citing Reno v. Condon, 538 U.S. 141, 150 (2000)) (supporting New Jersey's commandeering arguments).

127. *See id.* at 251 (emphasis omitted) (referencing precedent in N.Y. v. United States, 505 U.S. 144, 181 (1992) and Printz v. United States, 521 U.S. 898, 921 (1997) as evidence).

128. *See Governor II*, 832 F.3d at 407–08 (Vanaske, J., dissenting) (quoting Prigg v. Com. of Pennsylvania, 41 U.S. 539, 541 (1842)) (finding false equivalency between repeal and authorization and commandeering, stating "[t]he Supreme Court has never considered Congress's legislative power to be so expansive").

129. *See id.* at 407 (describing how majority opinion choose to excise its previous dicta, even though it was "cornerstone of the holding in *Christie I*").

130. *See id.* at 406–07 (demonstrating frustration at court for dicta not upheld and recognizing facile distinction is impossible to implement regardless of whether N.J.'s ability or action to permit sports gambling under PASPA).

states with no choice was vindicated when the Supreme Court granted certiorari.[131]

IV. AGAINST ALL ODDS: THE SUPREME COURT'S RATIONALE IN *MURPHY V. NCAA*

After a careful analysis, the Supreme Court concluded that PASPA violated the anti-commandeering principle of the United States Constitution, holding provision 28 U.S.C. Section 3702(1), prohibiting the government from gambling, could not be upheld under any other constitutional mechanism nor was it severable from Section 3702(2), prohibiting individuals from gambling.[132] The Court determined Congress lacked the constitutional power to directly compel states to require or prohibit legislation under the Tenth Amendment.[133] Thus, the Court could not uphold the law in its current form, under the Supremacy Clause or preemption theory, nor any other constitutional mechanism.[134] In reversing the Third Circuit, the Supreme Court reasoned that commandeering an affirmative action and imposing a prohibition were "empty" distinctions.[135] Thereafter, the Court held PASPA and its nationwide ban on state authorized sports gambling schemes unconstitutional.[136]

131. *See* Christie v. Nat'l Collegiate Athletic Ass'n, 137 S. Ct. 2327, 2328 (2017) (granting writ of certiorari). For a further discussion on the opinion, see *supra* note 123 and accompanying text.

132. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1489 (2018) (allowing New Jersey and other states to legalize sports gambling).

133. *See id.* at 1476–77 (describing how Congress overstepped its constitutional power to enact PASPA).

134. *See id.* at 1481 (determining PASPA could not be upheld under Supremacy Clause because it did not satisfy requirements, leaving no applicable way to uphold PASPA); *see specifically* U.S. CONST. art. VI cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *see also The Supremacy Clause and the Doctrine of Preemption,* FINDLAW, https://litigation.findlaw.com/legal-system/the-supremacy-clause-and-the-doctrine-of-preemption.html [https://perma.cc/VG4U-7XDK] (last visited Jan. 6, 2020) (defining preemption theory as "based on the Supremacy Clause, federal law preempts state law, even when the laws conflict. Thus, a federal court may require a state to stop certain behavior it believes interferes with, or is in conflict with, federal law").

135. *See Murphy*, 138 S. Ct. at 1478 (2018) (emphasizing lack of difference between repeal and authorization).

136. *See id.* at 1479–81 (comparing and contrasting commandeering cases that were found to be unconstitutional versus commandeering cases that were not found constitutional).

A. The Linguistics of the Anti-Authorization Term in 28 U.S.C. Section 3702(1) and an Interpretation of a Partial or Total Repeal of the Provision

To determine the validity of a repeal, the Court addressed the validity of arguments involving state authorization of sports gambling in the Petitioners' and Respondents' briefs.[137] The Third Circuit could not conclusively determine "which, if any, partial repeals [would be] allowed," but originally hinted a repeal could be possible without violating PASPA.[138] Moreover, Respondents and the government agreed a repeal of gambling prohibitions could be possible, but failed to identify a distinction between a partial and complete repeal.[139] In an attempt to rectify the disparity, the Court articulated a potential partial repeal, only to determine the result would be contrary to legislative intent and counterintuitive to the framework of PASPA.[140] The Court favored the Petitioners' definition of state authorization, summarizing it as when a state completely or partially repeals their sports gambling prohibitions prior to PASPA "'authorize[ing] that activity."[141] However, the Court rationalized the "[statute] would still violate the anti-commandeering principle" regardless of a definition.[142]

137. *See id.* at 1472–74 (relying on Brief for Petitioners in No. 16-476 (supporting partial or total repeal) and Brief for Respondents in Opposition in No. 13-967 (supporting neither partial nor total repeal with support of the text referring to "authorization by law" in 28 U.S.C.S. § 3702(1) and "pursuant to the law" in 28 U.S.C.S. § 3702(2), applying to all "government entities" as defined by the statute)); *see also* Paul Mulshine, *The Supreme Court's Decision to Legalize Sports Betting: That's Real Progress*, NJ.COM (Jan. 30, 2019), https://www.nj.com/opinion/2018/05/the_supreme_courts_decision_to_legalize_sports_bet.html [https://perma.cc/V4RH-RKPP] (noting "a state is not regarded as authorizing everything . . . it does not prohibit or regulate").

138. *See Governor II*, 832 F.3d 389, 402 (3d Cir. 2016) (maintaining possibility of repeal but rejecting clever maneuver by New Jersey legislatures to incorporate into law at issue into their opinion in *Governor I*, 730 F.3d 208 (3d Cir. 2013) into law at issue, emphasizing PASPA does not prohibit New Jersey from repealing sports gambling prohibitions, rather "it is left up to each state to decide how much a law enforcement priority it wants to make of sports gambling, or what the exact contours of the prohibition will be").

139. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1475 (2018) (emphasizing lack of clarity or "clear line" between partial and total repeal).

140. *See id.* at 1475 (explaining states can enact laws "enabling, but not requiring" local government to authorize sports gambling instead of state but local authorization could be problematic).

141. *See id.* at 1474 (rebutting Respondents' definition; noting definition is irrelevant since PASPA is unconstitutional regardless of definition selected).

142. *Id.* at 1474–75 (stating "The repeal of a state law banning sports gambling not only 'permits' sports gambling (petitioners' favored definition); it also gives those now free to conduct a sports betting operation the 'right or authority to act;' it 'empowers' them (respondents' and the United States' definition)").

B. Extending Anti-Commandeering Protections Under the Tenth Amendment

The majority reiterated its belief in the importance of anti-commandeering because the United States Constitutional principle protects liberty, promotes political accountability, and prevents regulation cost shifting.[143] The Supreme Court has seldom dealt with anti-commandeering cases, as *Murphy* is only the third Supreme Court case to strike down federal action.[144]

The first anti-commandeering case ruled unconstitutional was *New York*, where "the Court held that a federal law unconstitutionally ordered the State to regulate in accordance with federal standards."[145] The second anti-commandeering case was *Printz*, in which "the Court found that another federal statute unconstitutionally compelled state officers to enforce federal law."[146] *Murphy* is now the third Supreme Court case involving a federal law that the Court ruled unconstitutional due to its violation of the commandeering doctrine embedded in the United States Constitution.[147]

The Court out rightly rejected the distinction of commandeering – affirmative action versus prohibitive action – as a "matter of happenstance" and held Congress could not issue an order to state legislatures "in either event."[148] This constituted a major shift in the understanding of anti-commandeering principle, rejecting the previous belief that only affirmative action by the federal government could be considered commandeering the states.[149] It had long been established that as long as the federal government did not request affirmative action, such as passing new legislation or allocating enforcement funds, the federal government was not com-

143. *See id.* at 1477 (emphasizing division of authority between States and Federal government as being for "[the] protection of individuals," not States preventing "the risk of tyranny and abuse from either front;" noting voters who dislike effects or costs of regulation know what elected officials to blame or credit, ensuring political responsibility is not blurred by commandeering) (citing N.Y. v. United States, 505 U.S. 144, 181 (1992), Printz v. United States, 521 U.S. 898, 921 (1997), and Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

144. *See id.* at 1471 (illustrating minimal jurisprudence precedent).

145. *Anticommandeering Principle – Sports Gambling Prohibition*, 33. NO. 6 FED. LITIGATOR NL 5 (discussing holding of *New York*, 505 U.S. 144, as it relates to *Murphy*, 138 S. Ct. 1461).

146. *Id.* (discussing outcome of *Printz*, 521 U.S. 898, and its impact on *Murphy*, 138 S. Ct. 1461).

147. *See Murphy*, 138 S. Ct. at 1478 (holding PASPA unconstitutional in third major commandeering case).

148. *See id.* at 1478 (extending logic of commandeering within reason to include either event).

149. *See id.* at 1489 (illustrating impact of decision on future commandeering cases).

mandeering the states.[150] Following the Supreme Court's reasoning in *Murphy*, now even if the states are not required to "lift a finger," the prohibitive action requested by the federal government like PASPA will commandeer the states.[151] The Court held PASPA "unequivocally" violated the anti-commandeering principle because the specific provision of the federal law "dictate[d] what a state legislature may and may not do."[152]

The Respondents and the United States unsuccessfully argued *New York* and *Printz* were inapplicable in this case because the federal laws at issue in those cases "told states what they must do instead of what they must not do."[153] Respondents relied on four cases involving federal laws that were unsuccessfully argued as commandeering, but were upheld under different constitutional mechanisms such as the Commerce Clause or Supremacy Clause.[154] The Court rebutted the use of these cases and their prior decisions as precedent, stating they were "misread" and did not support the constitutionality of the PASPA provision at issue.[155] The Court rejected the notion it has upheld unconstitutional commandeering in the past, reiterating the Court has "never" upheld a federal statute that commandeered the state's legislative process within its own states' border.[156]

---

150. *See Christie I*, 926 F. Supp. 2d 551, 570 (D.N.J. 2013) (ruling in accordance with traditional and established anti-commandeering doctrine).

151. *See Governor II*, 832 F.3d 389, 402 (3d Cir. 2016) (quoting *Governor I*, 730 F.3d 208, 231 (3d Cir. 2013) (overturning law)).

152. *Murphy*, 138 S. Ct. at 1478 ("It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.").

153. *Id.* at 1478 (citing Brief for Respondents at 19, Christie v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018) (Nos. 16-476, 16-477), 2017 WL 4684747, at *19)) (arguing commandeering occurs "only when Congress goes beyond precluding state action and affirmatively commands it").

154. *See id.* at 1478 (noting case law precedent in *South Carolina v. Baker*, 485 U.S. 505 (1988), *Reno v. Condon*, 528 U.S. 141 (2000), *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), and *F.E.R.C. v. Mississippi*, 456 U.S. 742 (1982) as differentiator not applied in this case).

155. *See id.* at 1478 (setting court records straight that Respondents and United States misread precedent).

156. *See id.* at 1461 ("[I]n none of them did we uphold the constitutionality of a federal statute [commanding] state legislatures to enact or refrain from enacting state law."). For a further discussion, see *supra* note 43–46 and accompanying text.

C. Rebutting the Presumption of Validity Under the Supremacy Clause

The Supreme Court rejected the argument that PASPA could be upheld by preemption theory under the Supremacy Clause.[157] Universally, federal law is supreme if it conflicts with state law, but the provision at issue here did not satisfy the two requirements for preemption theory.[158] Regardless of the statute, preemption theory only works if the federal law is constitutional and regulates the conduct of private actors, not the states.[159] The PASPA provision is not a constitutional exercise of power because it (1) commandeers the states and (2) does not regulate private actors.[160] In essence, state law does not conflict with federal law if the federal government overstepped its constitutional limits by commandeering and regulating states, which is exactly what happened in *Murphy*.[161] The Court recognized the potential for 28 U.S.C. Section 3702(2) to be upheld under the Supremacy Clause because the provision regulates private actors rather than states, although that provision was not at issue in the case.[162]

D. The Dilemma of Modern Severability Precedent and Congressional Intent

After determining 28 U.S.C. Section 3702(1) was unconstitutional, the Court posed the question of severability: whether the prohibition of authorization and licensing "doom[ed] the remain-

157. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1479 (2018) (rejecting Respondents' and United States' arguments to uphold PASPA under another constitutional mechanism of federal lawmaking; providing "a rule of decision" under preemption, not independent grant of Congressional power) (citing Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1383 (2015)).

158. *See id.* at 1480–81 (summarizing three types of preemption as conflict, express, and field preemption in which "every form of preemption is based on a federal law that regulates the conduct of private actors, not the States").

159. *See id.* at 1478 (reiterating federal government cannot commander states under another constitutional mechanism like preemption if law is still commandeering, illustrating commandeering doctrine does not apply when "Congress evenhandedly regulates an activity in which both States and private actors engage").

160. *See id.* at 1479 (describing two requirements for preemption to apply which are not met).

161. *See id.* at 1481 (emphasizing this provision of law was unconstitutional).

162. *See id.* (contrasting 28 U.S.C. § 3702(1) with § 3702(2) to determine if second provision could survive under preemption theory had entire law not been ruled unconstitutional because federal government isn't commandeering states and merely regulating conduct of private actors).

der of the law."[163] Severability is a principle that allows unconstitutional provisions within legislation to be eliminated, while keeping the rest of the bill intact.[164] The *Murphy* Court answered affirmatively.[165] Severing the PASPA provisions would have allowed the Supreme Court to strike down the prohibition of sports gambling authorization for states, while upholding the prohibition of sports gambling authorization for private actors.[166] No provision of PASPA was severable from the provision at issue for the following three reasons.[167] First, Congress would likely not have prohibited commercial activities that are permitted for private parties if Congress knew it would result in "a scheme sharply different" from Congress intended from the enactment of PASPA.[168] Second, Congress intended the two provisions to work together "in tandem" to implement a comprehensive federal policy, and "if Congress had known that the latter provision would fall, we do not think it would have wanted the former to stand alone."[169] Third, Congress rarely prohibited or restricted advertising and it was unlikely Congress would have wanted the advertising provision to limit First Amendment rights without accomplishing a larger legislative goal.[170] As the Court noted in the concurrence, severability is a form of judicial

163. *See id.* at 1482 (posing question of severability in attempt to save PASPA); *see generally Severable*, BLACK LAW'S DICTIONARY (11th ed. 2019), available at Westlaw (defining severable as "admitting of severance or separation, capable of being divided; capable of being severed from other things to which it was joined, and yet maintaining complete and independent existence").

164. *See Severable*, BLACK LAW'S DICTIONARY (defining severable)

165. *See Murphy*, 138 S. Ct. at 1484 (stating Supreme Court would not try to save PASPA via severability).

166. *See Severable*, BLACK LAW'S DICTIONARY (referencing severability definition).

167. *See Murphy*, 138 S. Ct. at 1484 (explaining logic for striking down PASPA in its entirety).

168. *See id.* at 1462 ("[I]t is 'evident that [Congress] would not have enacted those provisions which are within its power, independent of [those] which are not.'" (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987)); Free Enterprise Fund v. Public Company Accounting Oversight Bd., 561 U.S. 477, 509 (2010) (noting "whether the law remains 'fully operative' without the invalid provisions without rewriting the statute as a whole" is important issue); R.R. Ret. Bd. v. Alton R. Co., 295 U.S. 330, 362 (1935) (noting Courts "cannot rewrite a statute and give it an affect altogether different" than what Congress intended as lawmakers)).

169. *Id.* at 1463 (illustrating adverse result of provision would make private conduct violation of federal law, but only if sports gambling was permitted by state law; noting enforcement scheme doesn't make sports gambling federal crime with jail time or financial penalties, but enforces law via civil lawsuits against states by US Attorney General and sports organizations).

170. *See id.* at 1485 (demonstrating how government rarely forbid advertising, providing cigarettes as example of heavily regulated industry but banned due to First Amendment).

lawmaking and involves a guessing game of Congressional intent and should not be overused.[171] For those reasons, the Court held no provision of PASPA was severable.[172]

E. Homerun: Certiorari Granted to Interpret the Tenth Amendment

The ruling of *Murphy* was not simply about the authorization or legalization of sports gambling; rather, the decision was really about states' rights.[173] The lower courts were wary about upsetting the status quo of federal regulations surrounding the Tenth Amendment.[174] The courts indicated that political accountability for PASPA, a benchmark for anti-commandeering principles, was not an issue.[175] The lower court recommended that the "remedy is not through passage of a state law or through the judiciary, but through the repeal or amendment of PASPA in Congress."[176] However, the remedy would be difficult if not impossible as New Jersey is just one state in the national election process and national lawmakers would "remain insulated from the electoral ramification of their decision."[177]

The ruling in *Murphy* turned on whether or not an affirmative and prohibitive command from the federal government implicates the anti-commandeering principle.[178] The Constitution provides

171. *See id.* at 1486 (describing reasoning and concurrence); *see also* Marbury v. Madison, 5 U.S. 137 (1803) (noting judicial review originated from this case).

172. For a further discussion of severability issues with provision context, see *infra* note 173–178.

173. *See Murphy*, 138 S. Ct. at 1461 (demonstrating widespread implications beyond just sports gambling).

174. *See Governor II*, 832 F.3d 389, 410 (3d Cir. 2016) (affirming District Court's decision en banc) (ignoring commandeering issue); *see also Governor I*, 730 F.3d 208, 250 (3d Cir. 2013) (affirming District Courts decision in 2-1 split); *Christie I*, 926 F. Supp. 2d 551, 578 (D.N.J. 2013) (rejecting SWA of 2012); *Christie II*, 61 F. Supp. 3d 488, 491 (D.N.J. 2014) (rejecting SWA of 2014).

175. *See generally Christie II*, 61 F. Supp. 551 (D.N.J. 2013) (excluding political accountability as potential issue in rationale all together).

176. *Christie I*, 926 F. Supp. at 555 (mentioning political accountability as potential issue in rationale but dismissing it as invalid).

177. *Id.* (suggesting practicality for N.J. to sway public opinion of entire country); *see also Governor I*, 730 F.3d at 240–41 (reaffirming decision and quoting: "[New Jersey] and any other state may wish to legalize gambling on sports within their borders are not without redress. Congress may again choose to do so or, more broadly, may choose to undo PASPA although. It is not our place to usurp Congress' role simply because PASPA may become an unpopular law. The forty – nine states that do not enjoy PASPA").

178. *See Murphy*, 138 S. Ct. at 1478 (recognizing the lower court's ruling on both SWA of 2012 and SWA of 2014 ignored or misinterpreted the possibility of anti-commandeering implications); *see also id.* at 1476 (relying upon U.S. Constitution and Tenth Amendment).

that the federal government and the states, with fundamental sovereign powers, creates a "dual sovereignty" system.[179] The constitutional structure allows the federal and state government to regulate their respective citizens, however the federal government cannot regulate state governments.[180] The federal government has "plenary legislative power, but only certain enumerated powers."[181] Therefore, all other powers not designated are reserved for state governments.[182] Congress has the authority to pass legislation, but under the Tenth Amendment, does not have the authority to directly command or compel States to enact or "enforce a federal regulatory program."[183]

V. ALL IN: CRITICAL ANALYSIS OF THE SUPREME COURT'S RULING IN *MURPHY V. NCAA*

The Supreme Court's decision in *Murphy* creates a new binding precedent and expands the concept of anti-commandeering.[184] The lower courts continuously dismissed New Jersey's constitutionality concerns implicated by PASPA, so much so, that the Supreme Court's ruling to overturn PASPA as a violation of anti-commandeering principles was pleasantly surprising.[185] Specifically, the

179. *See* Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) (noting sovereignty limits, like preemption, that require federal law to supersede state law if conflict exists).

180. *See Murphy*, 138 S. Ct. at 1476 (explaining Constitution "confers upon Congress powers to regulate individuals, not States" (quoting New York v. United States, 505 U.S. 144, 166 (1992)). State sovereignty originated in the Declaration of Independence until the Constitution limited individual state sovereignty for sovereignty of the whole country, of which Founding Fathers debated between Virginia and New Jersey plan; emphasizing our Founding Fathers chose the New Jersey plan to ban direct orders to States but allow direct orders to private actors to further federalism after experiencing Articles of Confederation which lacked authority for Congress "in most respects to govern the people directly" leading to inefficient and ineffective governance. *See id.* at 1476 (quoting *New York*, 505 U.S. at 166)).

181. *Id.* at 1485 (discussing congressional limits on its authority to legislate, quoting "[t]he Constitution gives Congress no such power" to regulate states' citizens).

182. *See id.* at 1475 (expressing limits and abilities of Congress to require or prohibit certain acts).

183. *See id.* at 1476 (explaining compelling federal interest does not suffice to conscript States as agents or intermediary because if strong enough interest then federal government would act directly, mentioning consent is not valid defense to commandeering because States cannot consent to unconstitutional or illegal act of Congress).

184. *See generally id.* at 1461 (establishing new landmark anti-commandeering precedent).

185. For a further discussion of this ruling, see *supra* note 127 and accompanying text.

Third Circuit was reluctant and even borderline unwilling to challenge the status quo of commandeering precedent, whereas the Supreme Court immediately recognized the unconstitutionality of PASPA.[186] The *Murphy* ruling not only legalized sports gambling, but more importantly, was an attempt to restore the constitutional balance of power among the federal government and states.[187]

A. Reaffirmation and Expansion of Precedential Consistency

The lower court's rationale showed it was irrefutable that Congress had the ability to regulate a plethora of activities, including sports gambling, under the Commerce Clause.[188] Congress simply needed a sufficient nexus to substantially affect interstate commerce in order to uphold PASPA under the Commerce Clause, and by definition sports gambling does just that.[189] However, following the application of the Commerce Clause, the district court, in their first opinion, should have held that PASPA unconstitutionally commandeered the states.[190] Unfortunately, the lower courts deliberated on PASPA three more times and neglected to readdress the constitutionality of the law.[191]

The Supreme Court correctly interpreted PASPA to be unconstitutional after attempting to follow the logic of the lower courts and its distinction between repeal and authorization.[192] In practice, the application of such a distinction in theory was implausible,

186. *See generally Governor I*, 730 F.3d 208 (3d Cir. 2013) (refusing to rule in accordance with U.S. Constitution and Tenth Amendment because Third Circuit did not properly interpret anti-commandeering doctrine implicated and was too deferential to Congress in implementing constitutional laws); *Governor II*, 832 F.3d 389 (3d Cir. 2016) (refusing same).

187. *See Murphy*, 138 S. Ct. at 1477 (restoring separation of power between Legislative and Judicial branches, as well as, restoring balance of power between states and federal government).

188. For a further discussion on the establishment of gambling regulations, see *supra* note 79 and accompanying text.

189. For a further discussion of the establishment of interstate application, see *supra* note 78 and accompanying text.

190. *See Christie I*, 926 F. Supp. 2d 551, 557 (D.N.J. 2013) (exploiting congressional statutes should not be presumed constitutional to protect constitutional limits).

191. *See Governor I*, 730 F.3d at 241 (affirming district court's decision to reject Sports Wagering Act of 2014); *see also Christie II*, 61 F. Supp. 3d 488, 508 (D.N.J. 2014) (rejecting Sports Wagering Act of 2014); *see also Governor II*, 832 F.3d at 402 (affirming District Courts decision en banc; illustrating legislative history that could have been prevented for litigation and judicial efficiency if logical reasoning applied).

192. *See Murphy*, 138 S. Ct. at 1466 (overturning all prior reasoning in favor of PASPA and ruling it unconstitutional).

resulting in the same unconstitutional result.[193] Anti-commandeering precedent, in *New York* and *Printz*, only dealt with affirmative commands not prohibitive commands.[194] Lower courts should rely on more than precedent, and should review historical documents, like the Federalist Papers, to interpret and better understand the framers' intentions.[195] Thus, the lower courts narrowly misinterpreted case law precedent to include only affirmative commands that "told states what they must do instead of what they must not do" as unconstitutional instead of including both affirmative and prohibitive commands as unconstitutional.[196] Here, the distinction is null because PASPA is equivalent to having federal officers "installed in state legislative chambers . . . armed with the authority to stop legislators from voting on any offending proposals."[197]

States have seldom been successful in using the Tenth Amendment as a rebuttal to overreaching and seemingly unconstitutional regulations from the federal government.[198] Accordingly, the two time Third Circuit dissenter Judge Vanaske argued against PASPA and appropriately predicted the law would leave the states with no choice.[199] Courts should not be so quick to dismiss potentially valid arguments that may challenge the status quo since constitutional protections are more important than mere statutory interpretations.[200]

Unlike the Supreme Court, the lower courts' rulings were blinded by the rule that assumed Congressional actions are "presumptively constitutional."[201] However, the Supreme Court may

193. *See id. at* 1478 (rejecting linguistic distinctions between repeal and authorize).

194. For a further discussion of these cases, see *supra* note 158 and accompanying text.

195. *See generally* THE FEDERALIST NO. 45, (James Madison) (concerning dual sovereignty and elaborating on ideas that "powers delegated by the proposed Constitution to the federal government are few and defined"). "Those which are to remain in the State governments are numerous and indefinite." *Id.*

196. *See Murphy*, 138 S. Ct. at 1472–73 (suggesting lower court ignored constitution and defied logic).

197. *Id.* at 1478 (quoting "[a] more direct affront to state sovereignty is not easy to imagine").

198. For a further discussion of balance of power, see *supra* note 151 and accompanying text.

199. For a further discussion of the dissent points, see *supra* notes 118–125 and accompanying text.

200. *See Murphy*, 138 S. Ct. at 1479 (demonstrating careful analysis needed to uphold inherent federalism).

201. For a further discussion on rule assumptions, see *supra* note 81 and accompanying text.

wish to rethink this assumption because courts can make the wrong assumption, as evidenced by the *Murphy* decision.[202] Instead, courts should carefully analyze the validity of each statue with skepticism in an attempt to protect states from an imbalance of power.[203] The importance of the anti-commandeering doctrine should not be underestimated to combat federal government actions from infringing upon state rights concerning liberty, political accountability, and cost shifting implications.[204] *Murphy* is now the third anti-commandeering case and further expands the doctrine to include prohibitive commands in addition to affirmative commands.[205]

B. Restoration of Separation and Balance of Power

The provision at issue, 28 U.S.C. Section 3702(1), violated the commandeering doctrine and was incorrectly upheld under the Supremacy Clause by the lower courts.[206] A federal law can only trump state law under the Supremacy Clause when the law is constitutional and regulates private actors, not states.[207] Here, PASPA cannot preempt SWA of 2014; however, the Supreme Court noted that if the provision 28 U.S.C. Section 3702(2) was at issue, the analysis would have upheld PASPA as constitutional under the Supremacy Clause.[208] In an attempt to severe the first provision from the second provision, the Supreme Court reviewed the congressional intent of PASPA and determined Congress intended this to be a comprehensive policy and it would not make sense to strike one provision without striking the other.[209] Therefore, it is possible *Murphy* could set a new precedent to ensure the upholding of separation of powers and prevent judicial lawmaking.[210]

---

202. For a further discussion on the importance of anti-commandeering, see *supra* note 150 and accompanying text.

203. *See Murphy*, 138 S. Ct. at 1479 (explaining courts must be nuanced in statutory analysis).

204. *See id.* at 1489 (detailing three important issues to state rights).

205. For a further discussion on lack of distinction between prohibitive and affirmative commands, see *supra* note 132 and accompanying text.

206. For a further discussion on provision overturned, see *supra* note 169 and accompanying text.

207. For a further discussion of the two requirements needed to uphold Supremacy Clause, see *supra* note 165 and accompanying text.

208. *See Murphy*, 138 S. Ct. at 1481 (majority and dissent) (noting possibility of different outcome).

209. For a further discussion of PASPA severability, see *supra* note 172–174 and accompanying text.

210. For a further discussion on the concerns about frequent judicial lawmaking, see *supra* note 175 and accompanying text.

The majority opinion distinguished itself from the dissent over the issue of modern severability precedent.[211] However, in the concurrence, Justice Thomas agreed with the Court's opinion in its entirety, but expressed concerns about modern severability precedent as contradicting the founding fathers' traditional limits on judicial authority.[212] Justice Thomas reasoned that statutory interpretation and severability required courts to make "nebulous [inquiries] into hypothetical congressional intent" and moved courts "dangerously close to issuing advisory opinions."[213] The dissent believed the unconstitutional provision can and should have been severed from the constitutional provision to save PASPA.[214] As such, the dissenting judges lamented the "wrecking ball" approach rather trying to "accomplish what Congress sought to achieve."[215]

The founding fathers intended to keep the three branches of government distinct from one another, but with each possessing in-

211. *See Murphy*, 138 S. Ct. at 1484 (diverging on whether to save PASPA via severability).

212. *See id.* at 1485 (citing Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 769 (2010)) (concurring to warn of infringement on separation of powers between judiciary and legislature with severability discussed in dissent that empowers judicial branch to become lawmakers on national policy decisions) (discussing original and historical precedent on severability doctrine available to early American courts was in stark contrast to development modern precedent on severability doctrine)); *see also* Marbury v. Madison, 5 U.S. 137, 177 (1803) (stating "it is emphatically the province and duty of the judicial department to say what the law is" through interpretation not severability because judicial review was merely a "by-product" of judicial process).

213. *Murphy*, 138 S. Ct. at 1486 (Thomas, J. concurring) (noting statuary interpretation and severability require Court to guess what Congress "would have intended had it known that part of its statute was unconstitutional" with or without evidence) (citing U.S. v. Booker, 543 U.S. 220, 258 (2005)); *see also* Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 77 (1937) (illustrating irrational credence to hypothetical intentions); *see also* Brian Charles Lea, *Situational Severability*, 103 VA. L. REV. 735, 788–803 (2017) (risking complete and endless reworking of law to make it operable for goals)).

214. *See Murphy*, 138 S. Ct. at 1487–90 (dissenting Breyer, J., Ginsberg, J., Sotomayer, J.) (noting means as unconstitutional, not ends; posing idea that alternative constitutional theories could uphold "means to achieve its ends"). The dissenting Justices argued neither provision "commands States to do anything other than desist from conduct federal law proscribes," essentially describing majority opinion on commandeering and relied heavily on opinion of *New York* and *Printz*. *Id.* at 1489 (Ginsburg, J., dissenting).

215. *See id.* at 1489–90 (Ginsburg, J. dissenting) (dissenting that people would blur lines of political accountability because law would "unmistakably" be charged to congressional, not state, legislative action; dissenting from majority to severe unconstitutional provision and keep constitutional provision because "[o]n no rational ground can it be concluded that Congress would have preferred no statute at all if it could not prohibit states from authorizing or licensing such schemes").

herent power.[216] It is unlikely the framers could have imagined the severability precedent would evolve into judicial activism, as illustrated in the Third Circuit's recommendations.[217] The courts should revert to simply declining to enforce an unconstitutional statute in its entirety, and allow the legislature to remand the law, rather than "sever and excise" the statute.[218] The reversal of modern severability precedent to traditional notions of judicial review will restore the separation of powers, similar to the restoration of the balance of powers.[219] *Murphy* has the potential to be a landmark severability case, in addition to its anti-commandeering milestones, with the possibility of strengthening fundamental concepts like "dual sovereignty."[220]

VI. PARLAYING THE WIN: THE IMPACT OF A HOMERUN RULING FOR FUTURE WINNING STREAKS OF STATES' RIGHTS CASES

The Supreme Court's decision in *Murphy* will have historical, rippling effects on federalism – increasing scrutiny of federal regulations that affirmatively or prohibitively command states to refrain from a specific course of action.[221] The Court's ruling will impact a variety of areas of law and has already been cited several times to bolster arguments for states' rights against federal regulation.[222]

216. *See generally* THE FEDERALIST NO. 40 (James Madison) (describing our founding fathers' intent for creating separation of power between branches and balance of powers between governments).

217. *See Murphy*, 138 S. Ct. at 1485 (applying intent to Third Circuit decisions' determining court should not have given suggestion that had to be retracted as unnecessary dicta especially since suggestion is not even sound advice when applied).

218. *See id.* at 1487 (citing Zuni Public School Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 119 (2007) (Scalia, J., dissenting) and stating America should have a "government of laws, not men" and courts would do harm by creating hypothetical legislative intentions) (rebutting dissents' overextended modern precedent approach).

219. For a further discussion of the balance of powers, see *supra* note 216 and accompanying text.

220. *See Murphy*, 138 S. Ct. at 1471 (explaining victory helps uphold state sovereignty from infringement of its rights and rights of its people under constitutional federalism principles and protections embodied in U.S. Constitution by our Founding Fathers).

221. *See* Illya Somin, *Federalism Comes Out as the Winner in Murphy v. NCAA*, THE REGULATORY REVIEW (July 10, 2018), https://www.theregreview.org/2018/07/10/somin-federalism-comes-out-winner-murphy-v-ncaa/ [https://perma.cc/Z7E8-5QD9] (applying *Murphy* ruling to more than sports law).

222. *See* Brackeen v. Bernhardt, 937 F.3d 406, 430 (5th Cir. 2019) ("Congress's legislative powers are limited to those enumerated under the Constitution.") (citing *Murphy*, 138 S. Ct. at 1476); *see also* U.S. v. California, 921 F.3d 865, 888 (9th Cir. 2019) ("The Constitution . . . 'confers upon Congress the power to regulate individuals, not States.'") (quoting *Murphy*, 138 S. Ct. at 1476); Extenet

The ramifications of ending PASPA's prohibition on sports gambling is far from over, and laws on the state and federal level will need to be reconciled.[223] The Supreme Court recognizing the regulation of sports gambling is an important policy choice.[224]

The Court discussed potential ramifications of its decision to strike down PASPA and hinted at a potential need for new regulations to replace the void.[225] Sports gambling will inevitably proliferate, but will not be allowed to grow unchecked, perpetuating thriving illegal activity.[226] To provide uniformity, legislatures will be compelled to pass new constitutional regulations by additional regulations in order to create a regulatory framework to protect consumers and the integrity of sports.[227]

A. Implications on Federal Regulations in Favor of State Regulations

The Supreme Court decision upends the traditional notion of "dual sovereignty" and creates a balance of power tension.[228] The

Sys. v. Pelham, 377 F. Supp. 3d 217, 224–25 (S.D.N.Y. 2019) ("This 'anticommandeering doctrine . . . withhold[s] from Congress the power to issue orders directly to the States.'" (quoting *Murphy*, 138 S. Ct. at 1475)).

223. *See* Ryan Rodenberg, *Sports Betting Myth Busters: PASPA is Part of a Federal Framework of Gambling Laws*, LEGAL SPORTS REPORT (Jan. 8, 2018), https://www.legalsportsreport.com/17391/sports-betting-myth-busters-paspa-framework/ [https://perma.cc/HPF5-PN67] (describing how PASPA simply banned sports betting and different states had their own sports betting laws prior to enactment of PASPA).

224. *See Murphy*, 138 S. Ct. at 1484 (recognizing potential ramifications for ruling law unconstitutional; emphasizing "the choice is not ours to make," and main responsibility of courts is to interpret laws and determine consistency with U.S. Constitution not create regulations).

225. *See id.* (discussing need for Congressional or state action).

226. *See* Brendan F. Conley, *Home the Rise of the Daily Fantasy Sports Industry Can Catalyze the Liberalization of Sports Betting Policies in the United States,* 66 BUFF. L. REV. 715, 722 (2018) (criticizing growth of illegal gambling under PASPA and need to prohibit illegal market for "a number of [consumer] regulations and safeguards" with oversight protection); *see also* Brnovich, *supra* note 54, at 259 (stating effective regulations need "to ensure the integrity of the game, protect the player, and keep criminal elements from infiltrating the industry").

227. *See generally* Brnovich, *supra* note 54, (discussing alternative frameworks on state and federal level that will have tax and uniformity implications to be addressed). New federal regulations would have to be constitutionally sound regulation though Congressional mechanisms, directly imposed on private actors and not states, and allow states to work out regulations which could lead to conflict, or the federal government could provide a federal framework for nationwide uniformity. *See id.* (reviewing framework suggestions).

228. *See generally* Brnovich, *supra* note 54, (discussing how federalism protects individuals from government); *see also* Richard Frank, *What Does Sports Gambling Have to Do with Environmental Law? A Lot, Potentially, Following the Supreme Court's Murphy v. NCAA Decision,* LEGAL PLANET (June 19, 2018), https://legal-planet.org/2018/06/06/what-does-sports-gambling-have-to-do-with-environmental-law/

six-to-three decision in *Murphy*, written by Justice Alito, will spur a host of litigation rebutting the federal government's attempt to intervene in the state's legislative process.[229] The potential for litigation will attempt to shift power from the federal government back to the states.[230] Further, states will likely challenge areas of law currently regulated by the federal government under the guise of other constitutional mechanisms, arguing a violation of the Tenth Amendment and the anti-commandeering principle.[231] Therefore, the Supreme Court's ruling will have unintended consequences that extend beyond sports gambling, specifically to immigration, drug enforcement, environmental, and taxing authority law.[232]

First, the anti-commandeering principles reaffirmed in the PASPA holding will have implications on immigration law and states' rights to maintain sanctuary cities.[233] By definition, sanctuary cities "limit how much local law enforcement officials can comply with federal immigration authorities."[234] Under the current administration, President Trump and now former Attorney General Jeff Sessions "waged an ongoing series of legal battles" over sanctuary cities violating federal immigration law.[235] In January 2017,

---

[https://perma.cc/8YX6-79JL] (reviewing commandeering principle as "aphorism" and historical context of Virginia versus New Jersey Plan); *see generally* Gregory R. Bordelon, *The De-Federalization Gamble: A Workable Anti-Commandeering Framework for States Seeking to Legalize Certain Vice Areas,* 20 ATL. L.J. 103 (2018) (discussing potential for uncertainty given rulings implications are broad in scope and will lead to push back from states to stop federal government from exercising influence and control within states).

229. *See Murphy*, 138 S. Ct. at 1489 (demonstrating number of Justices favoring majority opinion, none of them outright rejecting core holding regarding constitutionality of PASPA and even attempt to save remainder of law).

230. *See* Ilya Somin, *What Supreme Court Victory For Sports Gambling Means For Marijuana, Sanctuary Cities,* USA TODAY (May 15, 2018), https://www.usatoday.com/story/opinion/2018/05/15/sports-gambling-supreme-court-federalism-marijuana-sanctuary-cities-column/610876002/ [https://perma.cc/KK6F-P2S2] (illustrating shifting power from federal to state level of government with wide influences).

231. *See generally* Bordelon, *supra* note 228 (noting importance to empower states and curtail federal regulations that are incoherent or incompatible with U.S. Constitution).

232. For a further discussion of the law affected, see *infra* notes 233–271and accompanying text.

233. For a further discussion on immigration law, see *infra* notes 233–244 and accompanying text.

234. *See* Kaitlyn Schallhorn, *Sanctuary Cities: What are They?,* FOX NEWS (Mar. 22, 2018), https://www.foxnews.com/politics/sanctuary-cities-what-are-they [https://perma.cc/V4YH-7TZH] (defining and describing sanctuary cities from San Francisco, California in 1989 to entire states like California today that are ignoring federal immigration law).

235. *See* Illya Somin, *Fight Over Sanctuary Cities is Also a Fight Over Federalism*, THE HILL (April 7, 2018), https://thehill.com/opinion/immigration/381998-

President Trump issued an Executive Order pulling virtually all federal grants from cities and states that violate 8 U.S.C. Section 1373 and then-Attorney General Sessions imposed conditions on Department of Justice ("DOJ") Grants as well.[236] The Executive Order is unconstitutional for two reasons: first, "[o]nly Congress has the power to spend money or impose conditions on federal grants," and second, following the decision in *Murphy* the federal government cannot commandeer the states with prohibitive commands.[237]

Both President Trump's and then-Attorney General Sessions' actions have been challenged in federal court, resulting in a win for state rights in accordance with the principles of federalism upheld in *Murphy*.[238] Specifically, in *City and Cty. of S.F. v. Sessions*,[239] the district court ruled that Trump's Executive Order is unconstitutional because it violated the Spending Clause; additionally, California argued that even if passed by Congress, the conditions at issue would be unconstitutional under the anti-commandeering doctrine.[240] Likewise, in *City of Phila. v. Att'y Gen.*,[241] the Third Circuit ruled that Sessions' grant conditions were ruled unconstitutional because they violated the Separation of Powers; Philadelphia also argued that even if passed by Congress the condition at issue would be unconstitutional under the anti-commandeering doctrine.[242] Supposedly, it is possible that 8 U.S.C. Section 1373 may also be similarly overturned, but the federal government will likely

fight-over-sanctuary-cities-is-also-a-fight-over-federalism [https://perma.cc/7GM4-5EQB] (discussing current litigation).

236. *See* 8 U.S.C. § 1373 (2019) ("Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.").

237. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1475 (2018) (noting Congress cannot commandeer states); *see also* Somin, *supra* note 238 (noting Executive cannot impede on Legislative branch's powers).

238. *See* Illya Somin, *Trump Administration Loses Yet Another Sanctuary City Case – this Time in the US Court of Appeals for the Third Circuit,* REASON (Feb. 20, 2019, 3:13 PM), https://reason.com/volokh/2019/02/20/trump-administration-loses-yet-another-s [https://perma.cc/DKR6-4JME] (explaining three conditions AG placed on DOJ grants).

239. 372 F. Supp. 3d 928 (N.D. Cal. 2019).

240. *See id.* at 947 (supporting ruling with high odds Ninth Circuit will likely affirm).

241. 916 F.3d 276 (3d Cir. 2019).

242. *See id.* at 284 (supporting ruling with high odds that Supreme Court will likely not grant certiorari); *see also* Somin, *supra* note 235 (explaining if authority not granted to it in Constitution, it "literally has no power to act . . . unless and until Congress confers power upon it." (citing La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986))).

argue that immigration is an enumerated power, which preempts the states' authority on such matters.[243] Therefore, *Murphy* creates a strong defense for states against federal infringement on dual sovereignty and bolsters the argument in favor of sanctuary cities.[244]

Second, the anti-commandeering principles reaffirmed in the PASPA holding will have implications on drug enforcement and states' right to legalize medical and recreational marijuana.[245] In 1937, the Marijuana Tax Act "essentially made the plant illegal in the United States," and in 1971, the Controlled Substances Act prohibited recreational and medical marijuana as a "Schedule I" drug.[246] As of 2018, after years of costly prohibition, ten states legalized recreational marijuana and thirty-four states legalized medical marijuana.[247] The prohibition of sports gambling is analogous to the prohibition of marijuana because the legislative intent to regulate the morality and the states' desire to cash in on tax revenue is uncanny, so much so that marijuana advocates even wrote an amicus brief for the State of New Jersey.[248]

Despite a recent reversal of the Cole memo, which halted federal enforcement of marijuana prohibitions due to limited resources, it is evident that the federal government has not done enough to stem the tide of marijuana as a priority.[249] Robert

243. For a further discussion on § 1373, see *supra* note 231 (elaborating on § 1373)*; see generally* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018) (reiterating potential implications on more than just sports gambling).

244. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1475 (2018) (reiterating potential implications on more than just sports gambling).

245. For a further discussion on drug enforcement, see *infra* notes 235–242 and accompanying text.

246. *See* Allison McNearney, *The Complicated History of Cannabis in the US*, HISTORY (April 20, 2018), https://www.history.com/news/marijuana-criminalization-reefer-madness-history-flashback [https://perma.cc/GYF9-UMU7] (describing first law prohibiting marijuana nationwide); *see also* 21 U.S.C. § 812 (2019) (listing marijuana as Schedule I drug along with heroin).

247. *See Marijuana Overview,* NAT'L CONFERENCE OF STATE LEGIS. (Dec. 14, 2018), http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx [https://perma.cc/8WN8-GBRQ] (numbering states with recreational marijuana); *see also State Medical Marijuana Laws*, NAT'L CONFERENCE OF STATE LEGIS., (Mar. 5, 2019) http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx [https://perma.cc/HYK3-AHHK] (numbering states with medical marijuana).

248. *See* Vince Silwoski, *U.S. Supreme Court Sets a Great Precedent for Cannibis,* CANNALAWBLOG (May 16, 2018), https://www.cannalawblog.com/u-s-supreme-court-sets-a-great-precedent-for-cannabis/ [https://perma.cc/NP4G-7V7S] (distinguishing current marijuana law from issue in Gonzales v. Raich, 545 U.S. 1 (2005), and concluding it would be "hard to imagine any other outcome" if federal government tried to shutter states' rights).

249. *See* Scott Bomboy, *Federal Marijuana Policy Change Raises Significant Questions,* CONSTITUTION DAILY (Jan. 4, 2018) https://constitutioncenter.org/blog/fed-

Mikos, a law professor at Vanderbilt University, recently stated that "[t]he agency simply doesn't have the spare resources that would be needed to mount an effective campaign against today's marijuana industry," let alone the will of the people.[250] Eventually, it is possible that marijuana prohibitions may be overturned, but the federal government will rely on the traditional notion of the Supremacy Clause regarding such matters.[251] Therefore, *Murphy* creates a strong defense for states against federal infringement on dual sovereignty and bolsters the argument in favor of marijuana use.[252]

Third, the anti-commandeering principles reaffirmed in the PASPA holding will have implications on environmental law and states' rights to refuse to implement mandates.[253] The majority of federal environmental regulations are enforced by the Environmental Protection Agency ("EPA") and adopted by the states via "cooperative federalism."[254] Cooperative federalism involves the federal government and the states cooperating "to develop and implement a federal policy."[255]

Within environmental law, these arrangements tend to border on unconstitutional coerciveness and can leave a state that "voluntarily agreed to cooperate at one time [finding] itself coerced into enforcing a costly, ineffective, or unpopular policy forever, if Con-

---

eral-marijuana-policy-change-raises-significant-questions [https://perma.cc/SQ6U-WWTL] (reversing President Obama's DOJ Attorney memo to limit enforcement of marijuana was policy decision, likewise President Trump's DOJ Attorney memo to make enforcement of marijuana a priority is policy decision too but states are pushing back following *Murphy*, stating it is "undue federal infringement").

250. Mike Maharrey, *Law Professor Tells State Legislators Feds Can't Enforce Their Marijuana Laws*, TENTH AMEND. CENTER (Sept. 7, 2018), https://blog.tenthamendmentcenter.com/2018/09/law-professor-tells-state-legislators-feds-cant-enforce-their-marijuana-laws/ [https://perma.cc/939B-MP7T] (elaborating on statement that "[t]he anti-commandeering rule empowers the states to legalize an activity, for purposes of state law, even when Congress forbids the same activity" and why government cannot and will not crack down on marijuana at National Conference of State Legislatures 2018 Legislative Summit in Los Angeles, California).

251. *See generally* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018) (reiterating potential implications on more than just sports gambling).

252. *See id.* at 1475 (reiterating potential implications on more than just sports gambling).

253. For a further discussion on environmental law, see *infra* notes 243–249 and accompanying text.

254. *See* Jonathan Wood & Illya Shapiro, *Christie v. NCAA: Anti-Commandeering or Bust,* 18 FEDERALIST SOC'Y REV. 56, 59 (2017) *available at* https://object.cato.org/sites/cato.org/files/articles/christie_v_ncaa_for_fedsoc_rev.pdf [https://perma.cc/YBN3-TWKQ] (describing EPA and cooperative federalism among feds and states).

255. *See id.* (illustrating how issues can arise when dealing with mandates).

gress forbade subsequent state reform."[256] Thus, the anti-commandeering principle in *Murphy* may be used to promote participation in such programs with the assumption that states may withdraw at a later date.[257] It is possible that some regulations involving the California water crisis, the construction of more nuclear power plants, and the protection of coal mines may also be overturned, given few arguments from the federal government supporting environmental mandates.[258] Therefore, *Murphy* has created a strong defense for states against federal infringement on dual sovereignty and bolsters the argument for less environmental mandates.[259]

Fourth, the anti-commandeering principles reaffirmed in the PASPA holding will have implications on tax law and states' rights with regards to congressional limitations on tax authority.[260] It is not possible to argue that "a whole host of federal statutes limit the tax authority of states and their subdivisions," which accordingly to *Murphy* is unconstitutional for two reasons.[261] The Supreme Court ruled that "Congress cannot issue [a] direct order to state legislatures" because it would be contrary to the anti-commandeering principle.[262] Further, the Supreme Court ruled that Congress cannot use the Supremacy Clause as a defense because preemption theory only applies to private actors not states.[263] Since any affirmative and prohibitive command can now theoretically implicate the anti-commandeering principle, federal laws will now be more harshly scrutinized.[264]

Some potential areas of contention for future tax law litigation include laws beginning with the words "No State . . . ."[265] For instance, the federal government currently prohibits states from im-

256. *Id.* (providing context to potential environmental litigation cases).

257. *See id.* (discouraging state participation would harm environment).

258. *See* Frank, *supra* note 228 (emphasizing importance of ruling as "bulwark" for states).

259. *See generally* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1461 (2018) (reiterating potential implications on more than just sports gambling).

260. For a further discussion on taxing authority, see *infra* notes 250–258 and accompanying text.

261. Daniel Hemel, *Justice Alito, State Tax Hero?,* MEDIUM (May 15, 2018), https://medium.com/whatever-source-derived/justice-alito-state-tax-hero-333830d097ab [https://perma.cc/4X2H-A5BM] (arguing there are implications on state taxing authority as well).

262. *See id.* (referencing *Murphy* and its anti-commandeering holding).

263. *See id.* (referring to *Murphy* and its preemption holding).

264. *See id.* (criticizing potentially every federal law, stating any federal law that say "state cannot regulate X" should be scrutinized as commandeering).

265. *See id.* (interpreting anti-commandeering holding to apply broadly to any prohibitive command, or at least allow states to make argument against them).

posing any taxes on internet access under the Internet Tax Freedom Act, limits states from imposing high taxes on electricity generated from intrastate commerce, and protects members of Congress and out-of-state businesses from property taxes.[266] Looking forward, it is possible that these tax prohibitions may be overturned without compensation, withholding any valid arguments from the federal government supporting its taxing powers on such matter.[267] Therefore, it will likely be a matter of time before litigation arises, *Murphy* creates a strong defense for states against federal infringement on dual sovereignty and bolsters the argument in favor of taxing authority.[268]

Thus, despite the implications of *Murphy* on immigration, drug enforcement, environmental, and taxing authority law, the Supreme Court's decision will likely not open the floodgates to litigation.[269] Rather, the reaffirmation and expansion of anti-commandeering principles will provide leverage for states' rights and bolster defenses against federal regulations.[270] Going forward, *Murphy* will be referenced frequently as a win for states, regardless of the regulatory framework adopted to replace PASPA and legal sports gambling.[271]

B. The Reconciliation of Conflicting Federal Laws

For roughly twenty years, PASPA has not conflicted with any federal laws.[272] However, now the uncertainty of what the federal

266. *See id.* (citing 47 U.S.C. § 151 (2019) ("No State . . . may impose any . . . [t]axes on Internet access . . . ."); *see also* 15 U.S.C. § 391 ("No State . . . may impose or assess a tax on or with respect to the generation or transmission of electricity which . . . results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce."); *see also* 4 U.S.C. § 113 (2019) ("No State . . . in which a Member of Congress maintains a place of abode for purposes of attending sessions of Congress may, for purposes of any income tax . . . treat such Member as a resident or domiciliary . . . .").

267. *See generally* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018) (reiterating potential implications on more than just sports gambling).

268. *See id.* at 1475 (reiterating potential implications on more than just sports gambling).

269. *See* Frank, *supra* note 228 (illustrating a "wide swath" of other issues where state and federal interests often "diverge," potentially leading to litigation conflicts).

270. *See id.* (mentioning *Murphy* as potential litigation strategy for state rights).

271. For a further discussion on potential regulation resolutions, see *infra* notes 273–287 and accompanying text.

272. *See* Chuck Humphrey, *US Federal Gambling Laws*, GAMBLING-LAW-US, http://www.gambling-law-us.com/Federal-Laws/ [https://perma.cc/8DJ5-EPS5] (last visited Jan. 29, 2020) (listing federal gambling laws).

government may do could lead to sports gambling restrictions through three major federal laws, each originally intended to weaken illegal interstate activities supporting organized crime.[273] These federal regulations — the "Federal Wire Act",[274] "Illegal Gambling Business Act",[275] and "Unlawful Internet Gambling Enforcement Act"[276] — will need to be reconciled to prevent conflicting federal laws and varying state laws that may adversely affect consumers, leagues, and regulators creating a compelling need for a uniform federal regulatory framework.[277]

Currently, the federal government is actively attempting to fill and expand the void of PASPA using the Wire Act.[278] On January 15, 2019, the DOJ released a legal memo discussing the applicability of the Wire Act to non-sports gambling.[279] The DOJ's decision to apply "all but one of the prohibitions of the Wire Act" to the gaming industry is not only a major setback to the development of legal sports gambling but also to the gaming industry as a whole.[280] Following the interpretation, New Jersey and a few other states chal-

273. *See generally* Jennifer Gaynor et al., *Will You Soon Be Able to Legally Bet on Sports Outside of Nevada?*, 26 NEV. LAW. 8 (2018) (referencing 18 U.S.C. § 1804 as "The Federal Wire Act", 18 U.S.C. § 1955 as "The Illegal Gambling Business Act", and 31 U.S.C. § 5361 as "The Unlawful Internet Gambling Enforcement Act").

274. *See* 18 U.S.C. § 1804 (2019) ("Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned . . . .").

275. *See* §1955 (paraphrasing elements as: conduct that finances, managers, supervises, directs, or owns, all or in part of illegal gambling business that is violation of law).

276. *See* §5361 (prohibiting "anyone in the business of betting or wagering from accepting anything of value in the furtherance of illegal online wagering" and requiring financial institutions to block transfer for online gambling).

277. *See* Gaynor et al., *supra* note 273, at 9 (posing questions about state law, such as: "who will regulate sports wagering within their state; the taxes and licensing fees to impose; the licensing process and who will be subject to licensing; who can take sports wagers; what events may be wagered upon; and whether licenses may accept wagers that are placed over the telephone or via the internet").

278. *See* The Legal Blitz, *Trump Administration Takes Aims at Online Gambling in Sudden Wire Act Reversal*, ABOVE THE LAW (Jan. 16, 2019), https://abovethelaw.com/2019/01/trump-administration-takes-aim-at-online-gambling-in-sudden-wire-act-reversal/ [https://perma.cc/5PDQ-WX9Q] (noting shock to memo announcement).

279. *See* U.S. DEP'T OF JUSTICE, OFFICE OF THE DEPUTY ATTORNEY GENERAL, APPLICABILITY OF THE WIRE ACT, 18 U.S.C. § 1084, TO NON-SPORTS GAMBLING, (Jan. 15, 2019) *available at* https://www.justice.gov/file/1124286/download [https://perma.cc/YV6C-TVZQ] (including all gambling in law).

280. *See id.* at n.1 (noting its application in almost every situation regarding gambling).

lenged the DOJ in federal court stating that the "DOJ [was] breaking both the legislative intent of the Wire Act and findings in at least two federal circuit courts, all of which point to the idea the Wire Act only deals with sports wagering."[281] States are seeking a repeal of the DOJ's interpretation that contradicts precedent and the inherent interstate nature of the gaming industry.[282]

Given these developments, it seems the federal government does not intend to pullback its federal regulations on sports gambling following the defeat of PASPA.[283] Thus, despite the dysfunctional partisanship in Washington D.C. today, it is likely a new federal regulatory framework will be introduced.[284] If regulations are enacted, they will need to protect states' rights and reconcile current laws with a common set of standards to foster the development of sports wagering and gambling in accord with the Commerce Clause.[285]

C. Recommendations for a Federal Regulatory Framework

On August 29, 2018, Senator Chuck Schumer (D-NY) recognized the ramifications of the Supreme Court's decision and put forth a potential comprehensive federal framework.[286] The framework outlined three pillars: "[1] protecting young people and those suffering from gambling addiction, [2] protecting the integrity of the game, and [3] protecting consumers and individuals placing bets."[287] Specifically, the framework posited imposing age restrictions on betting and discouraging advertisements targeting young people, therefore allowing the leagues to determine acceptable bets

281. *See* Dustin Gouker, *All Aboard The Wire Act Case: NJ, PA, Michigan Leaf Challenge to DOJ in Federal Court,* ONLINE POKER REPORT (Mar. 9, 2019), https://www.onlinepokerreport.com/35844/pa-and-michigan-want-to-join-wire-act-case/ [https://perma.cc/M3J8-H6GY] (providing context to ongoing litigation over DOJ memo).

282. *See id.* (explaining complete contradiction in jurisprudence).

283. *See id*. (reiterating federal law still prohibits certain gambling transactions).

284. For further discussion on political partisanship on Capitol Hill today, see *infra* notes 287–297 and accompanying text.

285. *See* Dustin Gouker, *National Council On Problem Gambling: States Have Done 'Poorly' On Building Sports Betting Laws*, LEGAL SPORTS REPORT (Mar. 4, 2019), https://www.legalsportsreport.com/29897/ncpg-on-sports-betting-2019/ [https://perma.cc/T7SX-DDKF] (demonstrating need for reconciliation of conflicting laws and issues with internet via state commission regulation).

286. *See* Tal Axelrod, *Schumer Outlines Federal Sports Betting Framework,* THE HILL (Aug. 29, 2018), https://thehill.com/homenews/senate/404212-schumer-outlines-federal-sports-betting-framework-report [https://perma.cc/AT4B-H3FY] (discussing potential federal regulations).

287. *Id.* (describing three pillars of law).

made from official data.[288] The use of an integrity fee may also be utilized to increase monitoring.[289] From a regulatory perspective, the framework would help minimize conflicts of law "to prevent uncertainty and confusion for the league, state governments, consumers, and fans alike."[290] If new federal regulations are proposed for a national uniform approach to sports gambling, it will be through constitutional means and may be met with reluctant acceptance or more likely stern pushback.[291]

The casino industry is already working with leagues "to ensure proper protections and integrity" of sports wagering with the help of state policy by legislatures, regulators, and operators.[292] Likewise, states are working quickly to legalize sports gambling, with twelve to twenty states currently attempting to pass legislation.[293] Self-evident regulation and consistency would be preferred, but regulators must act quickly, with or without the guidance of the federal government on a uniform framework.[294] For instance, in 2017, customers bet nearly five billion dollars in Nevada — a small fraction of the potential tax revenue for other states attempting to legalize sports gambling.[295] Thus, sports gambling will not only benefit gamblers, but will also allow the states and leagues to profit from the mutual benefit of legalizing sports gambling.[296] Until otherwise

288. *See id.* (specifying caveat to potential regulations).

289. *See* Conley, *supra* note 226, at 774 (stating integrity fees or 1% tax on bets "would help [leagues] to regulate and enforce transparent, legal gambling operations, [to] offset any threats to . . . image and public perception").

290. Axelrod, *supra* note 286 (discussing benefits of federal regulation).

291. *See* Patrick Moran, *Anyone's Game: Sports-Betting Regulations after Murphy v. NCAA*, CATO INST., (Mar. 11, 2019), https://www.cato.org/publications/legal-policy-bulletin/anyones-game-sports-betting-regulations-after-murphy-v-ncaa [https://perma.cc/4ZWX-YUVR] (speculating alternative approaches to federal regulations and possible criticism from states).

292. *See id.* (facilitating government regulation rather than industry self-regulation).

293. *See* Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every State Stands,* ESPN, http://www.espn.com/chalk/story/_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states [https://perma.cc/W5JF-9Y94] (last updated Dec. 30, 2019) (following development of state level legalization); *supra* note 273, at 9 (describing Nevada as possible model for state regulation).

294. *See* Axelrod, *supra* note 290 (describing federal regulations as "abject failure" and giving rise to activity on black market and if regulations are not created properly will spur illegal activity to corrupt "wholesome entertainment").

295. *See* Brnovich, *supra* note 54, at 259 (emphasizing states will legalize sports gambling for money but it will be interesting to see what happens to Nevada now that its' monopoly is coming to end starting this year Delaware, not New Jersey, will be the first state to permit legal sports wagering bets).

296. *See* Conley, *supra* note 226, at 772 (illustrating "industry can endure, if not thrive, while the consumer gets much-needed regulatory protections, competi-

noted, states should regulate sports gambling similar to that of Nevada and wait to see if the federal government intervenes to create uniformity.[297]

VII. CONCLUSION

In conclusion, congressional policy was poorly executed when PASPA was passed, which led to an unnecessary and unconstitutional ban on sports gambling for more than twenty years.[298] New Jersey persistently argued PASPA was unconstitutional, despite multiple judicial losses at the district and appellate level, culminating with the Supreme Court eventually validating their argument.[299] The Supreme Court found PASPA unconstitutional in *Murphy* because it violated state sovereignty protected under the Tenth Amendment of the U.S. Constitution.[300]

The *Murphy* ruling is now the third case involving federal laws that were struck down under the anti-commandeering principle and will be more influential on federal-state regulations than gambling long-term.[301] The ramifications of the ruling are yet to be fully seen, but the burgeoning field of legal sports gambling will be widespread and the development of sports gambling regulations will need to be assessed for the best interest of all parties.[302] As for *Murphy*'s impact on state autonomy, the odds are in the states'

---

tive safeguards, and transparency, and the states reap the benefits of increased revenue").

297. *See* Wayne Perry, *States Eye Sports Betting, Wrestle with Regulatory Details*, AP (Nov. 27, 2018) https://www.apnews.com/922420cc9c6b44cbb0dee83b7df31ab1 [https://perma.cc/N2Z2-MTPY] (describing regulatory uncertainty among states legalizing sports gambling).

298. For further discussion of longtime gambling prohibitions in America and its first challenge from New Jersey, see *supra* notes 49–55 and accompanying text.

299. For further discussion of litigation challenges in order for New Jersey to legalize sports gambling, see *supra* notes 76–131 and accompanying text; *see also* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018) (vindicating challenges).

300. For further discussion of Supreme Court's decision in favor of legalizing sports gambling via Tenth Amendment, see *supra* notes 132–136 and accompanying text.

301. For further discussion of *New York* and *Printz* as only two other cases decided under anti-commandeering doctrine, see *supra* note 39 and accompanying text.

302. For further discussion of regulations to support the growth of sports gambling and add consumer protections, see *supra* notes 286–297 and accompanying text.

favor, and it's time for sports gambling institutions to place their bets.[303]

*Christopher Bret Alexander**

303. For further discussion of future state challenges to drug, immigration, environment, and tax law, see *supra* notes 271–297 and accompanying text.

* M.B.A., J.D. Candidate, May 2020, Villanova Charles Widger School of Law. I would like to thank my family and friends who have endlessly supported me throughout all of my academic endeavors. I would like to especially thank my parents, Christopher and Mary, my siblings, Shannon and David, and my Aunt Margaret. I dedicate this comment to my late maternal grandparents, John Francis and Mary Teresa (nee Coll) Killeen, a pair of mid-century 20th Irish immigrants who sought a better life in America for future generations because they believed the impossible was possible.