Journal of Business & Technology Law

Volume 14 | Issue 1 Article 6

Murphy v. Nat'l Collegiate Athletic Ass'n: The Court Legalizes Sports Gambling, but Constitutional Questions Remain

Joseph Stiers

Follow this and additional works at: https://digitalcommons.law.umaryland.edu/jbtl

Recommended Citation

Joseph Stiers, *Murphy v. Nat'l Collegiate Athletic Ass'n: The Court Legalizes Sports Gambling, but Constitutional Questions Remain*, 14 J. Bus. & Tech. L. 135 ()
Available at: https://digitalcommons.law.umaryland.edu/jbtl/vol14/iss1/6

This Notes & Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Journal of Business & Technology Law by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Murphy v. Nat'l Collegiate Athletic Ass'n: The Court Legalizes Sports Gambling, but Constitutional Questions Remain

JOSEPH STIERS*

In *Murphy v. Nat'l Collegiate Athletic Ass'n*,[1] the Supreme Court held the Professional and Amateur Sports Protection act of 1992 (PASPA) violated the anti-commandeering doctrine under the Tenth Amendment for prohibiting the modification or repeal of state-law restrictions on private conduct.[2] The decision added yet another exception to the list of anti-commandeering drafting rules formed out of *New York v. United States*[3] and *Printz v. United States*.[4] *Murphy* abrogated PASPA, resulting in the legalization of sports gambling under federal law.[5]

The outcome of this case was a major victory for the gambling industry and presents an extraordinary instance of judicial legislation.[6] Unlike *New York* and *Printz*, where a relatively minor portion of the statute was severed,[7] the *Murphy* Court elected to abrogate all of PASPA.[8] Although Congress could redraft a version of PASPA prohibiting sports gambling without commandeering the states, the current

---

* Joseph Stiers, J. BUS. & TECH. L.

[1] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).

[2] *Id.* at 1473-74.

[3] 505 U.S. 144, 145 (1992).

[4] 521 U.S. 898 (1997).

[5] *Murphy*, 138 S. Ct. at 1484.

[6] *See infra* Part IV.B.

[7] *See infra* Part II.A.

[8] *Murphy*, 138 S. Ct. at 1484.

© 2018 Joseph Stiers

Congress is unlikely to address an apolitical issue from twenty-six years ago.[9] As a result, the Supreme Court effectively legalized sports gambling across America.[10]

While this decision acted as a remedy for New Jersey and other states regarding sports gambling, the anti-commandeering doctrine does not address the more relevant question of whether the federal government can impose regulations on some states while exempting others.[11] *Murphy* did not remedy the critical flaw of PASPA, which was designed to stop the "spread of sports gambling" by allowing states that previously authorized sports gambling to maintain such laws, while barring future states from participation.[12] This question was addressed under the "doctrine of equal sovereignty of the states" by the Third Circuit in 2013,[13] but not discussed by the Supreme Court, leaving the issue unresolved.[14] In the future, laws that grant certain states economic advantages over others will need to be addressed on equal sovereignty grounds.[15]

I. THE CASE

On December 8, 2011, the New Jersey Legislature amended the New Jersey Constitution to permit sports gambling in

---

[9] *See infra* note 173 and accompanying text.
[10] *See infra* Part IV.B.
[11] *See infra* Part IV.C.
[12] *Id.*
[13] *See* Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208 (3d Cir. 2013) (stating that the petitioners should have challenged the validity of the grandfathering provision, rather than PASPA's general prohibition of sports gambling).
[14] Christie v. Nat'l Collegiate Athletic Ass'n, 189 L. Ed. 2d 806, *cert. denied* 134 S. Ct. 2866, (2014).
[15] *See infra* Part IV.C; Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 730 F.3d 208, 237 (3d Cir. 2013); Nw. Austin Mun. Utility Dist. No. One v. Holder, 557 U.S. 193 (2009); Shelby Cty., Ala. v. Holder, 133 S. Ct. 2612 (2013).

Atlantic City casinos and New Jersey racetracks.[16] Subsequently, the legislature amended the Casino Control Act to allow sports wagering.[17] On August 7, 2012, the National Collegiate Athletic Association (NCAA) filed a complaint,[18] claiming that the Sports Wagering Law violated the Professional and Amateur Sports Protection Act of 1992 (PASPA).[19] PASPA prohibited states and individuals from sponsoring, operating, advertising, promoting, licensing, or authorizing any form of gambling on competitive games involving amateur or professional athletes.[20] When PASPA was enacted, Congress provided a one-year window for states which operated licensed casinos to authorize sports wagering, but New Jersey declined to enact sports-wagering laws at that time.[21]

In February 2013, the U.S. District Court for the District of New Jersey held that PASPA was constitutional and preempted New Jersey's Sports Wagering Law.[22] The court granted a permanent injunction against New Jersey's Sports Wagering Law.[23] New Jersey appealed and the United States Court of Appeals for the Third Circuit upheld the decision in *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey* (hereinafter, *Christie I*), holding that PASPA did not violate the anti-commandeering principle under the Tenth

---

[16] N.J. CONST., art. IV, sec. VII, paras. 2(D), (F).
[17] N.J.S.A. 5:12A-1 *et seq.* (2011).
[18] Nat'l Collegiate Athletic Ass'n v. Christie, 926 F. Supp. 2d 551, 553 (D.N.J.), *aff'd sub nom.*, Nat'l Collegiate Athletic Ass'n v. Governor of *N.J.*, 730 F.3d 208 (3d Cir. 2013).
[19] PASPA, 28 U.S.C. §§ 3701-3704 (2012).
[20] *Id.* § 3702.
[21] *Id.* § 3704.
[22] *See Christie*, 926 F. Supp. 2d at 554 (holding that the Government had a rational basis for PASPA, and that PASPA did not violate the Tenth Amendment).
[23] *Id.* at 578.

Amendment.[24] The Third Circuit also held that the principle of equal sovereignty was insufficient grounds to invalidate PASPA.[25] In the majority opinion, Judge Fuentes rejected the anti-commandeering claim because PASPA did not force states to take an affirmative action, but added that the prevention of a state's right to repeal its own laws would violate the anti-commandeering doctrine.[26] New Jersey petitioned for certiorari and was denied.[27]

In response to Judge Fuentes' opinion, the New Jersey State Senate enacted Senate Bill 2250, partially repealing the state's existing prohibitions on sports gambling, but only allowing sports wagering at licensed casinos and racetracks.[28] Governor Christie vetoed the bill, claiming it was an "attempt to circumvent the Third Circuit's Ruling . . .[.]"[29] On October 17, 2014, Governor Christie changed positions and signed Senate Bill 2460, repealing New Jersey's prohibition on sports wagering.[30] The repeal stated provisions, which only allowed sports wagering at casinos and racetracks.[31]

Following the 2014 Law, the NCAA again sued New Jersey on the grounds that the new law was preempted by PASPA.[32] The district court held the 2014 Law was

---

[24] Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 730 F.3d 208, 237 (3d Cir. 2013).
[25] *Id.* at 239.
[26] *Id.* at 232.
[27] Christie v. Nat'l Collegiate Athletic Ass'n, 134 S. Ct. 2866, 189 L. Ed. 2d 806 (2014) (cert. denied).
[28] S. 2250, 216th Leg., 1st Sess. (N.J. 2014) (vetoed).
[29] Christie v. Nat'l Collegiate Athletic Ass'n, 2016 WL 7321803 (U.S.), 9 (Brief opposing cert.).
[30] S. 2460, 216th Leg. (N.J. 2014).
[31] *Id.*
[32] Nat'l Collegiate Athletic Ass'n v. Christie, 61 F. Supp. 3d 488, 492 (D.N.J. 2014), *aff'd sub nom.* Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 799 F.3d 259 (3d Cir. 2015), *reh'g en banc granted, opinion vacated* (Oct. 14, 2015), *on reh'g en banc*, 832 F.3d 389 (3d Cir. 2016), and

preempted by PASPA[33] and the Amateur and Professional Sports Leagues were entitled to permanent injunction.[34] New Jersey appealed and the Third Circuit Court of Appeals affirmed the district court's decision, noting, "[t]he presence of the word 'repeal' does not prevent us from examining what the provision actually does, [which] . . . does not change the fact that the 2014 Law selectively grants permission to certain entities to engage in sports gambling."[35] Judge Fuentes dissented, standing by his original opinion from *Christie I*, that PASPA's prohibition of a state-law repeal violated the anti-commandeering doctrine within the Tenth Amendment.[36] In August 2016, the case was reheard, *en banc*, and the Third Circuit affirmed that New Jersey's 2014 Law effectively authorized sports gambling by specific entities, in violation of PASPA.[37] New Jersey petitioned for certiorari, which was granted on June 27, 2017.[38] The Supreme Court consolidated *Murphy v. Nat'l Collegiate Athletic Ass'n* with *New Jersey Thoroughbred Horsemen's*

---

aff'd sub nom. Nat'l Collegiate Athletic Ass'n v. Governor of *N.J.*, 832 F.3d 389 (3d Cir. 2016).

[33] *Id.* at 506.

[34] *Id.* at 508.

[35] Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 799 F.3d 259, 266 (3d Cir. 2015), *reh'g en banc granted, opinion vacated* (Oct. 14, 2015), *on reh'g en banc*, 832 F.3d 389 (3d Cir. 2016), *cert. granted sub nom.* New Jersey Thoroughbred Horsemen's Ass'n, Inc. v. Nat'l Collegiate Athletic Ass'n, 137 S. Ct. 2326 (2017), and *cert. granted sub nom.* Christie v. Nat'l Collegiate Athletic Ass'n, 137 S. Ct. 2327 (2017).

[36] *Id.* at 271 (Fuentes, J., dissenting).

[37] *See* Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 832 F.3d 389, 396-402 (3d Cir. 2016), *cert. granted sub nom.* New Jersey Thoroughbred Horsemen's Ass'n, Inc. v. Nat'l Collegiate Athletic Ass'n, 137 S. Ct. 2326 (2017), and *cert. granted sub nom.* Murphy v. Nat'l Collegiate Athletic Ass'n, 137 S. Ct. 2327 (2017).

[38] Murphy v. Nat'l Collegiate Athletic Ass'n, 137 S. Ct. 2327 (2017) (cert. granted).

Ass'n v. Nat'l Collegiate Athletic Ass'n[39] to answer the question of whether a PASPA unconstitutionally commandeered the regulatory power of the states by prohibiting the repeal of state law.[40]

II. LEGAL BACKGROUND

The Tenth Amendment states, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[41] For most of the modern era, the Tenth Amendment acted as little more than a declaratory relationship between the states and national government.[42] In 1992, the Court shifted gears, invalidating an environmental regulation on Tenth Amendment grounds for commandeering states to enforce federal law in *New York v. United States*.[43] The anti-commandeering doctrine was reinforced five years later in *Printz v. United* States,[44] but remained narrow in scope.[45] In similarly surprising fashion, the equal sovereignty doctrine recently emerged in *Shelby Cty., Ala. v. Holder*.[46] The unique structure of PASPA has raised both anti-commandeering and equal sovereignty questions.[47]

---

[39] N.J. Thoroughbred Horsemen's Ass'n, Inc. v. Nat'l Collegiate Athletic Ass'n, 137 S. Ct. 824 (2017).
[40] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).
[41] U.S. CONST. amend. X.
[42] United States v. Darby, 312 U.S. 100, 124 (1941).
[43] 505 U.S. 144, 188, (1992).
[44] *See* 521 U.S. 898, 935 (1997) (ruling that a portion of the Brady Act conscripting state law enforcement officers to assist in carrying out the federal law was unconstitutional commandeering under the Tenth Amendment).
[45] *See Christie I*, 730 F.3d at 231 ("[S]tatutes prohibiting the states from taking certain actions have never been struck down even if they require the expenditure of some time and effort or the modification or invalidation of contrary state laws.").
[46] 133 S. Ct. 2612 (2013).
[47] *See Christie I*, 730 F.3d at 231-40.

Section II.A conveys the history of the Tenth Amendment and the emergence of the anti-commandeering doctrine in *New York v. United States* and *Printz v. United States*. Section II.B examines the equal sovereignty principle. Section II.C discusses the political conditions leading up to New Jersey's challenge of PASPA and the implications of interstate politics on federal law.

A. *New York* and *Printz* rewrite the Tenth Amendment: The emergence of the anti-commandeering doctrine.

The modern anti-commandeering doctrine formed out of *New York v. United States*, but anti-commandeering principles date back to 1842 in *Prigg v. Pennsylvania*.[48] In *Prigg*, the Supreme Court held that the states cannot be compelled to enforce national law and it "might" be unconstitutional for the national government to compel states to carry out federal duties.[49] Subsequently, other cases upheld this language, but only when a law directly forced states to act affirmatively.[50] During the twentieth century, the Court rarely considered Tenth Amendment challenges, given the Federal Government's enumerated rights to preempt state law, within the Commerce[51] and the Supremacy Clauses.[52]

The Federal Government regularly coerces states to comply with federal regulations via preemption under the Supremacy Clause or via federal spending powers.[53]

---

[48] Prigg v. Com. of Pa., 41 U.S. 539 (1842).
[49] *Id.* at 615-16.
[50] *See, e.g.*, Com. of Ky. v. Dennison, 65 U.S. 66, 109-10 (1860), *overruled by* Puerto Rico v Branstad, 483 US 219 (1987).
[51] U.S. CONST. art. I, § 8, cl. 3.
[52] U.S. CONST. art. VI, cl. 2.
[53] *See* New York v. United States, 505 U.S. 144, 145 (outlining traditional methods Congress uses to coerce states into complying with federal regulations).

Therefore, Congress need not create laws that expressly mandate affirmative enforcement by state officials.[54] In *New York v. United States*, the Low-Level Radioactive Waste Policy Act[55] provided three compliance incentives. The third incentive acted more like a mandate—forcing states to take possession of radioactive waste.[56] The Court in *New York*, relied heavily on dicta from *FERC v. Mississippi,*[57] and *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*[58] to determine that a Tenth Amendment limitation existed on Congress's power to commandeer states.[59] At the time of *New York v. United States*, anti-commandeering under the Tenth Amendment was relatively unprecedented.[60] The Court even cited an unusual 1911 opinion[61] in search of affirmative support.[62] The Supreme Court did not intend to overrule centuries of precedent supporting federal preemption, but rather carved out a narrow exception, barring the Federal Government from compelling state legislatures to enforce federal law.[63]

This exception broadened in *Printz*, where the Court invalidated a provision of the Brady Act[64] requiring state law

---

[54] *See id.*

[55] Low Level Radioactive Waste Policy Act of 1980, PUB. L. NO. 96–573, 94 Stat. 3347 (1980).

[56] *New York*, 505 U.S. at 169.

[57] 456 U.S. 742, 758-59 (1982).

[58] 452 U.S. 264, 288 (1981).

[59] *New York*, 505 U.S. at 168-69.

[60] Although *New York* relied on dicta from *Hodel* and *Ferc*, both of those cases ultimately upheld federal preemption. *See FERC*, 456 U.S. at 749; *Hodel*, 452 U.S. at 288.

[61] Coyle v. Smith, 221 U.S. 559 (1911). The Court in *Coyle* discussed the equal sovereignty requirement for new states admitted to the union, but also held that Federal statute could not prevent a state from relocating its capital under the Tenth Amendment. *Id.*

[62] *New York*, 505 U.S. at 162 (citing *Coyle v. Smith*, 221 U.S. at 565).

[63] *New York*, 505 U.S. at 179.

[64] The Brady Act, 18 U.S.C. § 922 (2012).

enforcement officers to take part in background checks for gun purchasers.[65] In *Printz*, the Court additionally ruled that Congress cannot circumvent the holding from *New York*, by "conscripting the State's officers directly."[66]

While the anti-commandeering doctrine expanded in *Printz*, the Supreme Court had not struck down any federal laws on commandeering grounds post-*Printz*.[67] Congress properly reacted to the rulings in *New York* and *Printz* and carefully developed subsequent regulations to avoid actively commandeering state officials.[68] The constitutionality of conditional spending and preemption maintains overwhelmingly precedential support.[69] Further, in *Reno v. Condon*,[70] the Supreme Court relied on *South Carolina v. Baker*,[71] distinguishing *New York* and *Printz*, and significantly narrowing the scope of the anti-commandeering doctrine.[72] In *Condon*, the Court acknowledged that the Driver's Privacy Protection Act did burden state officials with

---

[65] Printz v. United States, 521 U.S. 898, 935 (1997).
[66] *Id.*
[67] *See, e.g.*, Reno v. Condon, 528 U.S. 141, 150 (narrowing the precedential scope of *New York* and *Printz*).
[68] *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 542 (2012). While this case involved a Tenth Amendment issue of excessive use of federal spending powers, the drafters of the Affordable Care Act were careful not to directly conscript state legislatures or state officials to enforce the individual mandate. *Id.*
[69] *See* New York v. United States, 505 U.S. 144, 160 (citing a series of precedents supporting the constitutionality of conditional spending and federal preemption).
[70] 528 U.S. 141 (2000).
[71] 485 U.S. 505 (1988).
[72] *See Condon*, 528 U.S. at 150-51 ("Such 'commandeering' is, however, an inevitable consequence of regulating a state activity. Any federal regulation demands compliance. That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal standards regulating that activity is a commonplace that presents no constitutional defect.") (quoting South Carolina v. Baker, 485 U.S. 505, 515 (1988)).

the "day-to-day responsibility for administering its complex provisions."[73] Nevertheless, the Court held that the state regulation did not qualify as commandeering because the regulation did not seek to control the manner in which state officials regulated private parties.[74] *Condon* effectively limited the scope of *New York* and *Printz* to laws and regulations that directly conscript states or state officials to carry out federal orders.[75] Simply burdening state officials with the day-to-day work of compliance is insufficient grounds for a Tenth Amendment claim.[76]

B. The emergence of the equal sovereignty doctrine.

The doctrine of equal sovereignty emerged out of dicta from *Nw. Austin Mun. Utility Dist. No. One v. Holder*[77] and was implemented in *Shelby Cty., Ala. v. Holder*.[78] Prior principles supporting equal sovereignty are scattered throughout the Constitution. Article I, § 8, cl. 1 requires uniformity in duties and imposts.[79] Article I, § 9, cl. 6 requires uniformity in regulation of state ports to prevent economic advantages between states.[80] Article IV, § 2, cl. 1 prevents states from discriminating against citizens of other states, granting citizens the right to freely travel among states with the full legal rights of in-state residents.[81] Additionally, the Supreme Court held that equal sovereignty was an essential principle

[73] *Id.* at 150.
[74] *Id.*
[75] *Id.* at 150-51.
[76] *Id.*
[77]557 U.S. 193, 203 (2009).
[78]133 S. Ct. 2612 (2013).
[79] U.S. CONST. art. I, § 8, cl. 1.
[80] *Id.*, § 9, cl. 6.
[81] U.S. CONST. art. IV, § 2, cl. 1. (The Privileges and Immunities Clause).

when admitting new states to the Union.[82] Later, in *State of S.C. v. Katzenbach*,[83] the Court distinguished *Coyle*, holding that equal sovereignty only applied to the admittance of new states.[84]

In 2013, *Shelby Cty*. overruled *Katzenbach*, finding § 4(b) of the Voting Rights Act of 1965[85] to be unconstitutional under the doctrine of equal sovereignty.[86] Citing dicta from *Coyle*, *United States v. Louisiana,*[87] and *Northwest Austin*, the Court concluded that equal sovereignty was a longstanding constitutional principle.[88] While *Shelby Cty*. presented equal sovereignty as an established state right, the breadth of this holding has been questioned.[89] First, *Shelby Cty*. was a five to four decision.[90] Second, the holding in *Shelby Cty*. limited the scope of a longstanding statute designed to prevent voter discrimination, which is politically controversial.[91] Third, the principle of equal sovereignty has yet to be extended to matters beyond the admittance of new

[82] *See* Coyle v. Smith, 221 U.S. 559, 567 (1911) (holding that U.S. CONST. art. 4, § 3 specifically grants equal sovereignty to newly admitted states).
[83] 383 U.S. 301 (1966), abrogated by Shelby Cty., Ala. v. Holder, 133 S. Ct. 2612 (2013).
[84] *Id.* at 329.
[85] 52 U.S.C. § 10101 (2012).
[86] 133 S. Ct. at 2623-24.
[87] 382 U.S. 288 (1965).
[88] *See* 133 S. Ct. at 2623-24 ("[T]he constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.") (quoting Coyle v. Smith, 221 U.S. 559, 567 (1911)).
[89] *See, e.g.*, *Christie I*, 730 F.3d 208, 239 (3d Cir. 2013) (distinguishing *Shelby Cty.'s* equal sovereignty holding from PASPA on several grounds).
[90] *Shelby Cty.*, 133 S. Ct. at 2631.
[91] *See Shelby Cty.*, 133 S. Ct. at 2632-35; 2640-41 (Ginsburg, J., dissenting) (citing several modern, "second-generation barriers" to minority voting and factual examples of racially-motivated voting procedures that were blocked by the reauthorization of the VRA's preclearance requirement in 2006).

states and voting rights.[92] In *Christie I*, the Third Circuit addressed the equal sovereignty concerns of PASPA,[93] but elected not to extend *Shelby Cty.'s* holding.[94] The *Christie I* court explained, "there is nothing in *Shelby County* to indicate that the equal sovereignty principle is meant to apply with the same force outside the context of 'sensitive areas of state and local policymaking.'"[95]

The Third Circuit also indicated that New Jersey incorrectly applied the principle of equal sovereignty.[96] "It is noteworthy that Appellants do not ask us to invalidate § 3704(a)(2), the Nevada grandfathering provision that supposedly creates the equal sovereignty problem."[97] While statutory grandfather clauses have been held constitutional,[98] prior cases did not address grandfather clauses that specifically granted rights to certain states while prohibiting those rights from the other states.[99] The emergence of the equal sovereignty doctrine indicates that the specific type of grandfather clause utilized in PASPA could have constitutional problems.[100]

---

[92] *See Christie I*, 730 F.3d at 239.
[93] *Id.* at 237-39.
[94] *Id.* at 239.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *See* Minnesota v. Clover Leaf Creamery, 449 U.S. 456 (1981); *see also* City of New Orleans v. Dukes, 427 U.S. 297 (1976).
[99] *Compare Christie I*, 730 F.3d at 239 (analyzing the constitutionality of a grandfather clause that discriminates between the legal rights of states) *with Minnesota v. Clover Leaf Creamery*, 449 U.S. at 471 (upholding the constitutionality of a grandfather clause affecting the legal rights of private businesses with residual effects on interstate commerce).
[100] *See Shelby Cty.*, 133 S. Ct at 2624 ([A]s we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.") (citing 557 U.S., at 203, 129 S.Ct. 2504).

C. PASPA

The Professional and Amateur Sports Protection Act of 1992 was enacted with rational basis[101] under the Commerce Clause of the Constitution.[102] Congress has long recognized a federal interest in regulating gambling.[103] Specifically, Congress created PASPA to prevent the spread of sports gambling, while allowing a grandfather clause to protect state economies that already significantly relied on sports gambling.[104] There was very little reaction to the law in 1992 because states that prohibited sports gambling had no interest in authorizing it.[105] In 1992, very few states authorized casino gambling, which was extremely limited outside of Nevada and New Jersey.[106]

This began to change in the late 1990s and early 2000s when a wave of states began legalizing casino gambling.[107] The rapid growth of state-authorized casino gambling was largely a reactionary economic phenomenon.[108] When new states legalized casino gambling, neighboring states'

---

[101] New Jersey did not contest that PASPA met the rational basis test. The purpose of PASPA was to "stop the spread of state-sanctioned sports gambling." *Christie I*, 730 F.3d at 239.

[102] U.S. CONST. art. I, § 8, cl. 3.

[103] *See, e.g.*, Champion v. Ames, 188 U.S. 321 (1903) (upholding federal law prohibiting sales of lottery tickets as valid exercise of Government commerce power).

[104] *See Christie I*, 730 F.3d at 239.

[105] New Jersey and certain other states had the option to legalize sports gambling within one year of the enactment of PASPA, but elected to maintain state-law prohibitions. PASPA, 28 U.S.C. § 3704 (2012).

[106] Various tribal casinos existed outside of state jurisdiction. Certain states also legalized riverboat casino and low stakes gambling parlors. George G. Fenich, *A Chronology of Legal Gaming in the U.S.*, 3 GAMING RES. & REV. J. 65, 70-5 (1996).

[107] J. Nelson Rose, *Gambling and the Law®: The Third Wave of Legal Gambling*, 17 VILL. SPORTS & ENT. L.J. 361, 384-85 (2010).

[108] *See id.*

economies suffered as residents crossed borders to gamble at casinos.[109] In response, states traditionally opposed to casino gambling began legalizing gambling to counteract money lost to neighboring states.[110] As a result, New Jersey's casino income was devastated by emerging casinos in West Virginia, Delaware, Pennsylvania, Maryland, and eventually New York.[111] This recent development made PASPA relevant as New Jersey scrambled to revive its struggling gaming economy.[112]

III. THE COURT'S REASONING

In *Murphy v. National Collegiate Athletic Ass'n*, the Supreme Court held that PASPA violated the anti-commandeering doctrine under the Tenth Amendment.[113] Further, the Court held that § 3702(1) was not severable from PASPA, effectively removing all federal prohibitions on sports gambling.[114] The majority interpreted PASPA's ban on any new authorization as commandeering on the grounds that a state's act of repealing old laws inherently authorizes the previously prohibited conduct from those laws.[115] "[S]tate 'authorization' makes sense only against the backdrop of prohibition or regulation[,]" and thus the Court reasoned that

---

[109] *See id.*

[110] *See id.* at 186 (describing the domino effect of state authorized gambling).

[111] *See Atlantic City Gaming Revenue: Annual Statistics for Total, Slot, Table, & Internet Win, 1978-2016*, UNLV CENTER FOR GAMING RESEARCH, 1, 2 (Jan. 2017), http://gaming.unlv.edu/reports/ac_hist.pdf (showing declining revenues in Atlantic City casinos from 2007 through 2015).

[112] N.J. STAT. ANN. 5:12A-7 (2014), *invalidated by NCAA v. Governor of N.J.*, 832 F.3d 389, 402 (3d Cir. 2016).

[113] 138 S. Ct. 1461, 1474 (2018).

[114] *Id.* at 1483-84.

[115] *Id.* at 1474.

a state cannot prohibit authorization without prohibiting repeal.[116]

Despite the government's claim that "a statute should not be held unconstitutional if there is any reasonable interpretation can save it[,]"[117] the Court determined that no interpretation could save PASPA.[118] The majority then presented a structural argument for the importance of the Tenth Amendment and the history of the anti-commandeering doctrine, concluding that the anti-commandeering is important to (1) prevent tyranny, by balancing powers between the national and state government; (2) promote political accountability by making Congress accountable for its own regulations; and (3) to "prevent[] Congress from shifting the cost of regulations to the states."[119]

The Court then stated that PASPA violated the anti-commandeering doctrine by "unequivocally dictat[ing] what a state legislature may and may not do."[120] The majority further distinguished other preemption cases to show that those cases did not directly commandeer state legislative processes.[121] The Court concluded the preemption discussion by stating, "regardless of the language sometimes used by Congress and this Court, every form of preemption is based on a federal law that regulates the conduct of private actors, not the States."[122]

Throughout this analysis, the majority firmly abrogated § 3702(1) of PASPA for regulating the conduct of

---

[116] *Id.*

[117] *See id.* at 1475 (citing Jennings v. Rodriguez, 138 S.Ct. 830, 841-42 (2018)).

[118] *Murphy*, 138 S. Ct. at 1478-79.

[119] *Id.* at 1475-77.

[120] *Id.* at 1478.

[121] *Id.* at 1479.

[122] *Id.* at 1481.

the states.[123] The more controversial and impactful aspect of this decision followed with the Court's subsequent analysis of the severability of § 3702(2), restricting private conduct.[124] The majority reasoned that Congress would not have wanted § 3702(2) to remain if § 3702(1) was abrogated because § 3702(1) and § 3702(2) were meant to work in tandem.[125] The Court explained that § 3702(1) existed to enable a lawsuit against the state, while § 3702(2) existed for potential suits against private actors for the same goal of preventing state legalization of sports gambling.[126] Accordingly, the Court concluded that § 3702(2) must also be stricken as well as PASPA's provisions prohibiting the advertising of sports gambling.[127]

In the dissent, Justice Ginsburg took the opposite approach, stating "[n]othing in these § 3702(1) and § 3702(2) prohibitions commands States to do anything other than desist from conduct federal law proscribes."[128] The dissent further attacked the majority's severability decision by highlighting its unusual divergence from the ordinary approach of only severing problematic portions, while leaving the statute intact.[129] The dissent concluded by attacking the majority's assumptions about congressional intent, arguing that Congress intended to stop sports gambling regimes and there was no rational basis to conclude Congress would have preferred no statute versus allowing § 3702(2) to remain.[130]

Justice Breyer, concurring in part and dissenting in part, elaborated on the issue of severability, contending that § 3702(2) did not intend to work in tandem with § 3702(1),

---

[123] *Id.*
[124] *Murphy*, 138 S. Ct. at 1481.
[125] *Id.* at 1482-83.
[126] *Id.* at 1483.
[127] *Id.* at 1483-84.
[128] *Id.* at 1489 (Ginsberg, J. dissenting).
[129] *Id.* at 1489.
[130] *Murphy*, 138 S. Ct. at 1490.

but was rather a safety net against the potential severability of § 3702(1).[131] Additionally, Justice Thomas added a concurring opinion, which warned the Court against its recent approach to severability, which in his belief, impedes on longstanding limitations on judicial power.[132]

IV. ANALYSIS

The Supreme Court's decision to overturn PASPA under the anti-commandeering doctrine likely will have minimal precedential value, yet enormous effects on the sports and gambling industries.[133] PASPA was drafted in an extremely unusual manner[134] and this decision, like prior anti-commandeering decisions, will serve to eliminate this particular method of drafting.[135] Whether the Court decided this case correctly, depends heavily on the interpretation of the word "authorization."[136]

---

[131] *See id.* at 1488 (Breyer, concurring in part and dissenting in part) ("The first says that a State cannot authorize sports gambling schemes under state law; the second says that (just in case a State finds a way to do so) sports gambling schemes that a State authorizes are unlawful under federal law regardless.").

[132] *See id.* at 1485-87 (Thomas, J. concurring). Justice Thomas's strongly admonished the Court's recent approach to severability, yet declined to dissent in this case, citing that neither party asked the Court to reconsider the severability precedents. *Id.* at 1487.

[133] *See infra* Part IV.A.1.

[134] *See* PASPA, 28 U.S.C. § 3702(1) (prohibiting governmental entities from authorizing sports gambling by law, rather than outright prohibiting sports gambling as conduct).

[135] Since *New York*, Congress cannot draft a statute conscripting state governments to enforce federal regulations. 505 U.S. 144, 188 (1992). Since *Printz*, Congress cannot draft statutes that conscript state officials to enforce federal regulations. 521 U.S. 898, 935 (1997). After *Murphy*, Congress can no longer draft statutes that appear to prohibit states from repealing or modifying their own laws. 138 S. Ct. 1461, 1474 (2018).

[136] Writing for the majority, Justice Alito determined that authorization could only possibly be considered in the context of existing prohibitions

The Court overstepped its bounds by striking down PASPA rather than merely severing § 3702(1).[137] The majority's assumptions about whether Congress would have wanted PASPA to remain if § 3702(1) was stricken were quite speculative.[138] A deeper look into the history of PASPA and the reasoning behind the strange drafting of this statute reveals that the majority's assumptions about the intent of Congress in 1992 were likely mistaken.[139]

Further, the anti-commandeering doctrine cannot resolve the issue of whether Congress should be able to prohibit conduct in some states while allowing it in others.[140] The Constitutional question regarding statutes that discriminate between states' rights will likely need to be addressed by the Court, as neighboring states compete in a race-to-the-bottom to legalize gambling, marijuana, and other future conduct.[141] States are approaching a unique

---

and therefore a bar on state authorization was effectively a bar on repealing existing state laws. *Murphy*, 138 S. Ct. at 1474. Writing for the dissent, Justice Ginsburg concluded that PASPA does nothing more than command states to "desist from conduct federal law proscribes." *Id.* at 1489 (Ginsburg, J. dissenting).

[137] *Id.* at 1489 (Ginsburg, J. dissenting) ("When a statute reveals a constitutional flaw, the Court ordinarily engages in a salvage rather than a demolition operation . . . .").

[138] *See id.* at 1482-1484 (majority opinion) (engaging in a series of *if-then* inquiries into what Congress would have wanted if it had known that § 3702(1) was invalidated).

[139] *See id.* at 1488 (Breyer, J. concurring in part and dissenting in part) (*citing* S. REP. No. 102–248, at 4–6 (1991)) (explaining that the "obvious" purpose of PASPA was to "keep sports gambling from spreading[]" and Congress could have created § 3702(2) as a "backup, called into play is subsection (1)'s requirements, directed to the States, turned out to be unconstitutional—which, of course, is what happened.").

[140] *See infra* Part IV.C.1.

[141] *See, e.g.*, Lucy Dadayan, *The Blinken Report: State Revenues from Gambling: Short-Term Relief, Long-Term Disappointment*, THE NELSON A. ROCKEFELLER INSTITUTE OF GOVERNMENT I, at 2 (April, 2016) (indicating that between 1990 and 2015, the number of states authorizing

crisis, where economic interests conflict with traditional state social welfare interests.[142] The Supreme Court did not address equal sovereignty in the current case because that argument was rejected by the Third Circuit in *Christie I* and certiorari was denied.[143]

Section IV.A analyzes the impact of *Murphy* on the scope of the anti-commandeering doctrine. Section IV.B criticizes the Court's application of the severability doctrine to invalidate all of PASPA and questions the Court's "political accountability" justification for its decision to abrogate PASPA under anti-commandeering. Section IV.C explains why laws like PASPA should be addressed under the equal sovereignty principle and assesses the future impact of the Court's decision in *Murphy*.

A. Did the Court expand the anti-commandeering doctrine to include inaction or merely require Congress to draft more carefully?

Writing for the majority, Justice Alito determined that state authorization is a concept that could "make sense only against a backdrop of prohibition or regulation."[144] The opinion also discussed the history of anti-commandeering

casino gambling increased from two to seventeen); *see also* Joseph MisuIonas, *These Charts Show the Evolution of America's Marijuana Laws Over Time*, CIVILIZED (Aug. 31, 2017), http://www.civilized.life/articles/evolution-america-marijuana-laws-charts/ (displaying the rapid growth of legalized marijuana; since 1996, 28 states legalized medical marijuana with eight states legalizing recreational marijuana).

[142] *See* Dadayan, *supra* note 141, at 5 (citing efforts to counteract interstate competition for gambling revenue as a purpose for why states legalize gambling).

[143] Christie v. Nat'l Collegiate Athletic Ass'n, 134 S. Ct. 2866 (mem.) (2014).

[144] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 146, 1474 (2018).

and concluded that the three most significant justifications for the anti-commandeering principle were: protection of liberty, political accountability, and prevention of cost-shifting to the states.[145] Subsequently, the Court decided that prohibiting state authorization of sports gambling violated the anti-commandeering rule.[146]

"The provision unequivocally dictates what a state legislature may and may not do. And this is true under either our interpretation or that advocated by respondents and the United States."[147]

This statement subtly expands the anti-commandeering doctrine to include inactions.[148] Previously, the anti-commandeering doctrine only applied when federal law conscripted state governments or state officials to take a positive action.[149] Yet, how can the anti-commandeering doctrine prevent Congress from making laws prohibiting conduct within the states when the Supremacy Clause dictates that federal law is the supreme law of the land?[150] The Court answers this question, quoting *New York*: "the Constitution 'confers upon Congress the power to regulate individuals, not States[.]'"[151]

Based on the *Murphy* Court's interpretation, this means that states can authorize any type of conduct, simply because Congress lacks the power to regulate the states.[152] In reality, these authorizations should be meaningless because Congress still has the authority to prohibit people from engaging in state-authorized conduct that is preempted

---

[145] *Id.* at 1477.
[146] *Id.* at 1478.
[147] *Id.*
[148] *See id.* (holding PASPA invalid under the anti-commandeering doctrine for dictating what a state legislature "may not do.").
[149] *See infra* Part II.A.
[150] *See* U.S. CONST. art. VI, cl. 2.
[151] *Murphy*, 138 S. Ct. at 1479 (quoting *New York*, 505 U.S. at 166).
[152] *C.f. id.*

by federal law.[153] Therefore, the prohibition of sports gambling on private businesses and individuals is entirely permissible under the Supremacy Clause and the anti-commandeering doctrine.[154] This is exactly what PASPA did in § 3702(2); thus the Court's decision in Murphy is quite puzzling and even more bizarre as applied to severability.[155] A logical interpretation of *Murphy* would lead to a conclusion that the anti-commandeering doctrine was not significantly expanded and PASPA might have remained intact if Congress had never confused the Court by separately regulating the states in § 3702(1).[156]

B. The Court's application of the severability doctrine was severely misguided, creating an instance of extreme judicial legislation in defiance of the principle of political accountability.

Quoting the Senate Report, Justice Breyer explained Congress's purpose for PASPA by stating, "[t]he obvious answer is that Congress wanted to 'keep sports gambling from spreading.'"[157] To accomplish that goal, Congress employed unusual drafting language intended to only prohibit sports gambling in states that had not already

---

[153] *See* U.S. CONST. art. VI, cl. 2; *see also Murphy*, 138 S. Ct. at 1476 (explaining preemption, stating "when federal and state law conflict, federal law prevails and state law is preempted").
[154] *See supra* note 151 and accompanying text.
[155] 28 U.S.C. § 3702(2) (2012).
[156] The Court's fragile severability analysis rests on the assumption that § 3702(2) of PASPA is meant to support § 3702(1), rather than act as its own independent provision. *Murphy*, 138 S. Ct. at 1474-1485.
[157] *Id.* at 1488 (Breyer, J. concurring in part dissenting in part) (quoting S. REP. No. 102–248, at 4–6 (1991)).

authorized sports gambling.[158] The Supreme Court's decision to invalidate all of PASPA, based on highly speculative statutory interpretation is quite troubling, especially when actual legislative intent was available and discussed in dissenting opinions.[159] Part 1 discredits the Court's severability analysis. Part 2 questions whether the Court's decision in *Murphy* actually furthered political accountability and suggests that accountability needs to be addressed under a different area of law.

1. The Court's severability analysis rested on the false assumption that § 3702(2) of PASPA could not or was not intended to preempt all potential state authorizations of sports gambling.

In her dissent, Justice Ginsburg accurately described the majority's reasoning as a "plain error [that] pervasively infects the Court's severability analysis."[160] The modern severability test asks "'[w]ould Congress still have passed' the valid sections 'had it known' about the constitutional invalidity of the other portions of the statute?"[161] This requires the Court to make an inquiry into statutory intent.[162] The error in the Court's severability analysis is

[158] *See* 28 U.S.C. § 3702(1) (prohibiting states from authorizing sports gambling, implicitly allowing states that had already authorized sports gambling to continue legal operations); *Id.* § 3704 (explicitly grandfathering in states with existing legal gambling schemes and allowing a one-year window for states with existing casino gambling to authorize sports gambling).

[159] *See generally* S. REP. No. 102–248 (1991); *see also Murphy*, 138 S. Ct. at 1488-90.

[160] *Murphy*, 138 S. Ct. at 1490 (2018) (Ginsburg, J. dissenting).

[161] United States v. Booker, 543 U.S. 220, 246 (2005) (quoting Denver Area Ed. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 767 (1996) (plurality opinion).

[162] *See Murphy*, 138 S. Ct. at 1486 (Thomas, J. concurring).

clear from the first inquiry: "If Congress had known that States would be free to authorize sports gambling in privately owned casinos, would it have nevertheless wanted to prevent States from running sports lotteries?"[163] The Court adequately concluded that it would have been odd to allow sports gambling in casinos, but not in state lotteries,[164] but failed to explain why it is assumed sports gambling in casinos would not still be prohibited under § 3702(2).[165] Next, the Court wrongly concluded that Congress would not want to ban sports gambling as private conduct if it were authorized by state law.[166] Both of these conclusions rested on the false assumptions that § 3702(2) of PASPA would not preempt state laws authorizing sports wagering or Congress did not intend § 3702(2) to be interpreted that way.[167] § 3702(2) regulated private conduct, which is entirely permissible under the Commerce and Supremacy Clauses.[168] Therefore, the Court employed circular reasoning to invalidate § 3702(2), based off a false assumption that § 3702(2)'s prohibitions on private conduct would not preempt any laws created by states authorizing sports gambling.[169]

It is puzzling to consider how the Court managed to reach its conclusion. Perhaps, if Congress had merely reversed the order of §§ 3702(1) and 3702(2) of PASPA, first

---

[163] *Id.* at 1482 (majority opinion).
[164] *See id* at 1482-83 (highlighting the irregularity of a statute that would ban sports gambling through lotteries but allow it in casinos, when lottery betting is generally considered more benign than heavier wagering in casinos).
[165] *See id.* at 1488 (Breyer, J. concurring in part and dissenting in part) (suggesting that § 3702(2) acted as a failsafe to prohibit sports gambling, regardless of whether § 3702(1) remained intact).
[166] *Id.* at 1483 (majority opinion) (citing the history of the federal approach to gambling, which historically only violated federal law under 18 U.S.C. 1953 when gambling was also prohibited under state law).
[167] *See id.* at 1483-84.
[168] *Id.* at 1488 (Breyer, J. concurring in part and dissenting in part).
[169] *See supra* notes 150-153 and accompanying text.

prohibiting sports gambling as private conduct, and then barring state authorization as a corollary, the statute would have been ruled lawful under ordinary federal preemption.[170] This reveals the crucial flaw in the Court's severability analysis because the Court's methodology would also allow any state authorization of private conduct to override a federal preemption, contradicting the Supremacy Clause of the U.S. Constitution.[171]

2. The Court's holding allowed Congress to further avoid political accountability.

In *Murphy*, the Court emphasized the value of political accountability and concluded the opinion stating "the choice is not ours to make."[172] In reality, the Supreme Court, rather than Congress, will be accountable for the legalization of sports gambling across America.[173] The issue of accountability exposes the crucial flaw of PASPA from its very onset.[174] Congress intended to prevent the spread of sports gambling, but also wanted to avoid accountability for economic harm of shutting down existing sports gambling

---

[170] *See Murphy*, 138 S. Ct. at 1488 (Breyer, J. concurring in part and dissenting in part) ("The first says that a State cannot authorize sports gambling schemes under state law; the second says that (just in case a State finds a way to do so) sports gambling schemes that a State authorizes are unlawful under federal law regardless.").

[171] *See supra* notes 150-153 and accompanying text.

[172] *Murphy*, 138 S. Ct. at 1484 (2018).

[173] *See* Herb Jackson, *Sports Betting: Congress May try to Regulate, but Passage of any Legislation is a Long Shot*, USA TODAY NETWORK (May 15, 2018, 11:19 AM), https://www.usatoday.com/story/news/politics/2018/05/15/sports-betting-congress-may-try-new-regulations-but-odds-high/609817002/.

[174] PASPA was drafted intentionally to avoid political accountability by allowing states that permitted sports gambling in 1991 to continue lawful operations, while prohibiting future authorization in states with existing laws barring sports gambling. 28 U.S.C. §§ 3702-3704 (2012).

enterprises.[175] By simply stating no state may authorize sports gambling and incorporating a grandfather clause, Congress avoided all accountability—sports gambling remained illegal in states that did not want it, while it remained legal in states with existing schemes.[176] This allowed Congress to mitigate the harmful effects of sports gambling without incurring the blame of the harmful economic effects of shutting down existing sports gambling enterprises.[177] *Murphy* does not solve this issue of accountability; *Murphy* merely prevents Congress from prohibiting a state governmental entity from creating a particular law authorizing unwanted conduct.[178] Congress can still draft laws prohibiting the actual conduct, while exempting states with laws already allowing such conduct.[179] Therefore, Congress could still draft a law identical to PASPA in effects.[180]

Like most anti-commandeering cases, *Murphy* should not have significant precedential impact, but rather require Congress to draft more carefully in the future.[181] The Court

---

[175] *See, e.g.*, S. REP. 102-248 at 8 (1992) ("Although the committee firmly believes that all such sports gambling is harmful, it has no wish to apply this new prohibition retroactively to Oregon or Delaware, which instituted sports lotteries prior to the introduction of our legislation. Neither has the committee any desire to threaten the economy of Nevada, which over many decades has come to depend on legalized private gambling, including sports gambling, as an essential industry, or to prohibit lawful sports gambling schemes in other States that were in operation when the legislation was introduced.").

[176] *See* PASPA, 28 U.S.C. §§ 3702-3704.

[177] *See supra* note 175.

[178] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1481 (2018).

[179] *C.f. id.*

[180] *C.f. id.*

[181] *See* New York v. United States, 505 U.S. 144, 145 (1992) (preventing Congress from drafting future laws directing state governments to carry out federal regulations); *see also* Printz v. United States, 521 U.S. 898, 935 (1997) (preventing Congress from drafting future laws directing state officials to carry out federal regulations).

declined to address the core issue with PASPA—whether Congress can enact laws that prohibit conduct in some states, while allowing it in others.[182] The Third Circuit addressed this under the doctrine of equal sovereignty of the states in *Christie I*, but rejected New Jersey's claim and the Supreme Court's denied certiorari on that issue.[183] Likely, the impact of a federal statute that discriminates among states must eventually be addressed by the Supreme Court.[184]

C. Interstate economic competition is affecting state laws across the country, which may cause Congress to impose new models of PASPA, which will need to be addressed under equal sovereignty.

When PASPA was passed, New Jersey could not foresee the loss of its casino gambling revenues resulting from casino legalization in neighboring states.[185] Pennsylvania and West Virginia could not have predicted the Great Recession and the steep decline of the coal and steel industries, leading for the need for new revenue sources.[186] Maryland could not have foreseen the emergence of casinos along its northern, eastern, and western borders.[187] States have competing economic

---

[182] *See infra* note 183 and accompanying text.
[183] *See Christie I*, 730 F.3d 208, 238-39 (3d Cir. 2013) (rejecting the appellants' equal sovereignty argument and holding that the principle of equal sovereignty was meant to apply on the narrow grounds of "sensitive areas of state and local policymaking.") (quoting Shelby Cty., Ala. v. Holder, 133 S. Ct. 2612, 2624 (2013)).
[184] *See infra* Part IV. C.
[185] *See* Dadayan, *supra* note 141, at 5-7 (analyzing the rapid expansion of legalized gambling on the East Coast in the last fifteen years).
[186] *See id.* at 6 (explaining the effects of the Great Recession, incentivizing states to legalize gambling to help balance budgets and curb declining tax revenues).
[187] *See id.* at 5 (highlighting states' incentives to legalize gambling to "counteract interstate competition for gambling revenue.").

interests and these interests are dynamic.[188] New Jersey's decision to legalize sports gambling was a direct reaction to the decline of its Atlantic City casinos, resulting from casino legalization in neighboring states.[189]

Laws like PASPA leave state economies defenseless against the economic impact of neighboring states' legalization of gambling, marijuana, prostitution, and other future laws that create interstate competition.[190] PASPA's invalidation remedied this issue as applied to sports gambling, but did nothing to prevent future laws from being created in the exact same manner, so long as the drafters direct prohibitions at conduct rather than the state authorization of such conduct.[191] Part 1 explains how interstate economic competition may lead to future laws like PASPA, which will need to be addressed under equal sovereignty, rather than anti-commandeering. Part 2 assesses the direct effects of *Murphy* and warns against the judicial legislation.

1. A wave of legalization of formerly prohibited conduct is rippling through the states.

Current trends shows that states cannot properly protect residents from perceived threats[192] to social welfare when

---

[188] *See id.* at 5-6.

[189] *See* N.J.S.A. 5:12A-1 (2011) (citing the critical challenges that jeopardize New Jersey's casinos as an important backbone of the state economy and the need to change the regulatory rules to compete in "an ever-expanding national gaming market.").

[190] *See supra* note 141 and accompanying text.

[191] *See supra* notes 150-153 and accompanying text.

[192] This Article does not intend to take a stance on the social welfare value of laws prohibiting certain private conduct, but rather intends to highlight a current economic issue where states are changing laws designed to police conduct in reaction to external economic forces.

those threats are in close vicinity, across state borders.[193] In casino gambling, data showed that propagation of casinos ultimately had negative effects on the economy of the states.[194] State economies benefit when a large portion of these revenues are funded by residents of neighboring states.[195] In situations of "border hugging," neighboring states face a dilemma: if the state legalizes gambling, then its residents and its economy will suffer long-term negative effects.[196] If the state elects to keep gambling illegal, then the state will suffer these same consequences, but the revenue recouped by the casinos is captured by neighboring states.[197] As a result, the majority of states legalized gambling, accepting the inevitable societal cost in order to reap the consolation benefit of state casino revenues.[198] Equilibrium

---

[193] *See* Jamisen Etzel, *The House of Cards is Falling: Why States Should Cooperate on Legal Gambling*, 15 N.Y.U. J. OF LEGIS. & PUB. POL'Y 199, 201 (2012) (documenting the race-to-the-bottom forcing states to change their laws in response to legislation from neighboring states).

[194] *See id.* at 215-22 (explaining the diminishing and ultimately negative economic returns from the saturation of casino gambling, resulting in an equilibrium where states can no longer benefit from tourism revenue, leading to shrinking economies from residents' direct losses, businesses being displaced by casinos, and portions of casino revenue being diverted out-of-state to corporate employees and shareholders).

[195] States cannot grow their economies simply by siphoning income from their own residents—gambling income has always been funded by tourism. *See id.* at 224 (noting over a billion dollar decline in Atlantic City's gross revenues, since Pennsylvania legalized casino gambling); *see also* Dadayan, *supra* note 141, at 32 (Appendix Table 8) (showing revenue declines in older casino states as new states legalized casino gambling).

[196] Etzel, *supra* note 193 at 235-37.

[197] Etzel compares this situation to the classic "prisoner's dilemma." *See id.* at 214-15; 235-36.

[198] *See* Dadayan, *supra* note 141 at 31 (Appendix Tables 7) (showing the rapid growth of state-authorized casino gambling from 1990 to 2010); *see also* Etzel, *supra* note 193, at 236 (explaining how border-hugging casinos benefit by exporting costs, by gaining revenues from out-of-state

occurs when money can no longer be extracted from out-of-state residents; at this point, all the states suffer the social and economic consequences.[199] The cycle begins once again, when a new law is created authorizing another formerly-prohibited conduct.[200]

This pattern is exemplified by the facts surrounding the current case.[201] New Jersey lost its casino gambling tourism income after neighboring states reacted and adjusted to New Jersey's economic advantage.[202] New Jersey attempted to reclaim some of that advantage by authorizing sports gambling.[203] In the short-term, the first state to authorize conduct reaps the benefits of tourism income, until neighboring states react, leading to diminishing, and finally negative returns.[204] Unfettered, this pattern can lead to a long cycle of decay.

PASPA intended to stop the spread of sports gambling, while protecting Nevada's economy, which relies heavily on the gambling industry.[205] Regardless of Congress's

residents, but also unintentionally influence the neighboring states to change their laws to counteract this gain).

[199] These consequences include loss of productivity, displacement of demand for other goods, a decline in local business, regulatory capture resulting from state competition to lure gamblers, and increases in gambling addiction. Etzel, *supra* note 193, at 214, 228.

[200] *See, e.g.*, 28 U.S.C. § 1702 (PASPA); *see also* Etzel, *supra* note 193, at 229 (citing a Nevada industry campaign to reduce the gambling age from 21 to 18, following the Great Recession and Indiana's recent amendment to remove the requirement that riverboat casinos operate on water).

[201] *See supra* Part I.

[202] *See* Etzel, *supra* note 193, at 207 ("Pennsylvania politicians were extremely cognizant of the capital outflow caused by Atlantic City casinos and repeatedly went on record to claim that legalization was needed to stop it.").

[203] *See* N.J.S.A. 5:12A-1 *et seq.* (2011).

[204] *See* Etzel, *supra* note 193, at 219.

[205] *See* S. Rep. No. 102-248, at 8 ("Although the committee firmly believes that all such sports gambling is harmful, it has no wish to apply this new prohibition retroactively to Oregon or Delaware, which instituted sports

intentions, laws must not be structured in this manner.[206] Discriminatory federal law-making precludes state legislatures from defending against neighboring states' attempts to extract money via tourism revenue.[207] Although, states' defensive legislation may cause a greater overall harm,[208] it would be more unjust to federally authorize certain states to exploit the economies of others.[209] Given this lose-lose situation, future protection of residents' social welfare likely will fall further into the hands of the Federal Government.[210] The Court's decision in *Murphy* will likely expose this issue by creating a new race-to-the-bottom for sports gambling.[211] Until the Court readdresses the issue of equal sovereignty from *Christie I*, the door remains open for

---

lotteries prior to the introduction of our legislation. Neither has the committee any desire to threaten the economy of Nevada, which over many decades has come to depend on legalized private gambling, including sports gambling. . . . ").

[206] PASPA effectively grants a monopoly on a particular industry to three states. *See id.*

[207] *C.f.* Etzel, *supra* note 193, at 220 ("[S]tate leaders believe that if their residents are already gambling, it is better that they gamble within the home state than anywhere else. That is, if a state is already incurring costs from gambling, it might end up with a better bargain by legalizing and realizing benefits.").

[208] *See id.* at 232 (explaining that once an equilibrium is reached where states are mostly only serving their own residents, revenue influx from legalized gambling erodes, while socio-economic problems incur).

[209] *See* Ryan M. Rodenberg & John T. Holden, *Sports Betting & Equal Sovereignty*, 67 DUKE L.J. ONLINE 1, 12 (2017) (discussing Senator Grassley's proposed amendment to end the PASPA grandfather clause, citing multiple senators' discontent with PASPA's discriminatory nature).

[210] *See* Etzel, *supra* note 193, at 245 ("Only the federal government is capable of creating a consistent regulatory approach that is all encompassing and based on a single set of objectives.").

[211] *See infra* Part IV.C.2.

Congress to make new "stop the spread" laws, discriminating and disadvantaging certain states.[212]

2. The Court's decision in Murphy *has directly sparked another race-to-the-bottom between states to legalize sports gambling.*

"[C]ustomers can't wait to begin wagering on sports . . . [t]his region is a hotbed of both professional sports and college athletics, and we look forward to becoming a destination for fans in West Virginia, Virginia, Maryland, and Washington, D.C.," said Scott Saunders, General Manager at Hollywood Casino in Charles Town, West Virginia.[213] Intense advertising campaigns have already begun, targeting the dense population of the Washington D.C. suburbs, which is strikingly reminiscent of the advertising campaigns in the early 2000s, which led to the domino effect legalization of casinos across Mid-Atlantic States.[214] This time around, many states learned their lesson and are reacting much faster in response to neighboring competition.[215] New Jersey, West Virginia, Delaware, and Mississippi swiftly integrated

[212] *See* Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 730 F.3d 208, 239 (3d Cir. 2013), *abrogated by* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018) (characterizing PASPA's policy of "[t]argeting only states where [sports gambling] did not exist" as a rational means to stop the spread of sports gambling).
[213] Drew Hanson, *Sports Betting is Coming to Charles Town. Will it Impact Maryland's Casinos?*, WASH. BUS. J., (Aug. 20, 2018, 8:45 PM), https://www.bizjournals.com/washington/news/2018/08/20/sports-betting-is-coming-to-charles-town-how-will.html.
[214] *See supra* Part IV.C.1.
[215] Ryan Rodenberg, *State-by-State Sports Betting Bill Tracker*, ESPN, (last updated Sept. 19, 2018), http://www.espn.com/chalk/story/_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states (documenting twenty-seven states that have either legalized sports gambling or are in the process of trying to legalize it).

full scale sports gambling operations at licensed casinos.[216] Additionally, New York, Pennsylvania, and Rhode Island have recently passed bills legalizing sports gambling.[217] Other states such as Maryland, Virginia, and the District of Columbia are again suffering the consequences of lagging behind in this financial footrace.[218] Maryland attempted to pass a bill calling for a referendum on sports gambling, which passed in the House of Delegates by an overwhelming 124-14 vote.[219] However, the bill stymied in the Senate, due to questions of whether sports gambling should be allowed only in casinos or also at racetracks.[220]

Perhaps there is not as great a sense of urgency regarding sports gambling because sports gambling encompasses a much smaller market than casino gambling as a whole.[221] Nevertheless, the competitive advantage of drawing customers from neighboring states is significant enough to change state laws throughout the country.[222] This

---

[216] *Id.*

[217] *Id.*

[218] Matt Bonesteel, *Legal Sports Gambling Inches Closer to the DMV as Charles Town Readies Sportsbook for Liftoff*, D.C. Sports Bog, WASH. POST (Aug. 9, 2018), https://www.washingtonpost.com/ news/dc-sports-bog/wp/2018/08/09/legal-sports-gambling-inches-closer-to-the-dmv-as-charles-town-readies-sportsbook-for-liftoff/?noredirect=on&utm_term=.a6702b70ecef.

[219] H.D. 1014, 438th Sess. (Md. 2018).

[220] Opinion, *With Supreme Court Sports Betting Decision, Maryland Will be Behind the Curve on Gambling Again. That's Not Such a Big Deal*, BALT. SUN (May 14, 2018), http://www.baltimoresun.com/news/ opinion/editorial/bs-ed-0515-sports-betting-20180514-story.html.

[221] Sports betting only makes up two percent of gaming revenue in Nevada. Scott Dance, *Maryland General Assembly Leaders Open to Special Session on Sports Betting, but Gov. Hogan is not*, BALT. SUN (May 15, 2018, 1:35 PM), http://www.baltimoresun.com/news/maryland /politics/bs-md-sports-betting-session-20180515-story.html.

[222] *See* Rodenberg, *supra* note 215 (documenting the reactions of twenty-seven states taking steps to legalize sports gambling within the first four months after the Supreme Court's decision in *Murphy*).

raises the question of whether states can realistically decide their own laws on issues that involve interstate economic competition.

For context, imagine a small state surrounded by other states with casinos, marijuana dispensaries, and brothels located minutes from the state borders. Certainly, that state would be forced to legalize these same establishments or money would continue to pour across its borders, crippling the state economy.[223] Further, if federal law could prohibit the small state from legalizing these establishments, the state would be powerless to protect its economy.[224] Therefore, the federal government will need to intervene at some point, but it should not recreate discriminatory PASPA-like laws.[225]

This reality leads back to a critical issue from *Murphy*—political accountability.[226] Would Congress pass a law prohibiting a harmful activity if the prohibition damaged the economies of states already authorizing the activity?[227] After *Murphy*, Congress can no longer disguise discriminatory laws using phrases like "it shall be unlawful for a governmental entity to . . . authorize . . . " a certain type of conduct—Congress would have to state directly that the conduct is now illegal, but also exempt the states that already legalized that conduct.[228] For example, Congress could prohibit recreational marijuana use as conduct, and then exempt Alaska, California, Colorado, Massachusetts, the District of Columbia, Oregon, Washington.[229] Such a law

---

[223] *C.f.* Etzel, supra note 193, at 236 (explaining the issue of border-hugging).
[224] *See supra* note 207 and accompanying text.
[225] *See id.*
[226] *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1477 (2018).
[227] *See supra* Part IV.B.2.
[228] *See* PASPA 28 U.S.C. § 3702.
[229] *See id.; see also State Marijuana Laws in 2018 Map*, GOVERNING: THE STATES AND LOCALITIES (Mar. 30, 2018), http://www.governing.com/gov-

would be entirely permissible under *Murphy*, but Congress might not want to expose itself to the scrutiny of a blatantly discriminatory statute.[230] In this example, Congress would be forced to take accountability in the future: either (1) for shutting down recreational marijuana dispensaries and harming state economies[231] or (2) for making a law that clearly discriminates among states.[232] If employed, the second option should eventually be held unconstitutional—certainly the Constitution did not intend to give the federal government the authority to decide which states can thrive and which states must suffer economic decline.[233]

Nevertheless, it is still uncertain whether Congress would actually assume the political accountability for prohibiting potentially harmful conduct across all states when that conduct is legal and supported by industries in certain states.[234] This particular accountability issue speaks more to the nature of a representative democracy than a discussion for the Court.[235] In reality, the potential harm of

---

data/safety-justice/state-marijuana-laws-map-medical-recreational.html.

[230] *See supra* notes 174-177 and accompanying text.

[231] *See supra* note 175 and accompanying text.

[232] *See* Equal Sovereignty, supra Part II.B.

[233] The Privileges and Immunities Clause prohibits states from imposing laws preventing citizens from traveling to and engaging in lawful conduct in other states. If states are federally prohibited from imposing the same laws on their own citizens, then those states could be subject to a severe and unresolvable competitive disadvantage, which runs contrary to the structure of the U.S. Constitution. *See* U.S. CONST. art. IV, § 2, cl. 1; *see also infra* Part II.B.

[234] *See, e.g.*, S. REP. 102-248 at 8 (1992) (explicitly stating that Congress did not want PASPA to prohibit sports gambling in all of the states to avoid harming Nevada's sports gambling industry).

[235] The question of whether Congress will or will not assume accountability for passing a statute is an issue of deference to the will of the people rather than an issue of allocating accountability between the federal and state governments. *C.f.* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1477 (2018).

the conduct to be regulated is not as determinative as its popularity, although these factors are correlated.[236] Certainly, Congress could pass general prohibitions across the states, but will only assume accountability if the prohibitions gain sufficient popularity to outweigh the negative sentiment, associated with shutting down industries and cutting jobs.[237]

If the Supreme Court invalidated the next *PASPA-like* law on equal sovereignty grounds, this would at least restore the natural structure of our democracy.[238] The federal government could regulate issues stemming from interstate economic competition and ultimately those regulations would be decided by the people.[239]

CONCLUSION

In *Murphy v. Nat'l Collegiate Athletic Ass'n*, the Court invalidated PASPA for violating the anti-commandeering doctrine under the Tenth Amendment.[240] This decision is unsettling because the legal analysis was quite arbitrary, while the actual impact of the decision reshaped gambling laws across the country.[241] *Murphy* was decided by a divided Court and grounded largely on uncertain statutory interpretation, relating to anti-commandeering and severability.[242] The case failed to resolve PASPA's crucial

---

[236] *See supra* note 234 and accompanying text.
[237] The Fair Labor Standards Act of 1938, 29 U.S.C. § 203 provides an example of a federal regulation across all states that gained enough popularity with the people to outweigh the economic costs.
[238] *See supra* Part II.B.
[239] *See supra* note 235 and accompanying text.
[240] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1473-74 (2018).
[241] *See supra* Part IV.B.
[242] *See generally* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1473-74 (2018).

flaw because certiorari was granted for the wrong question of law.[243] PASPA was invalidated, yet an effectively identical law could still be enacted.[244] These issues will need to be reevaluated in the near future on equal sovereignty grounds.

[243] *See supra* Part IV.C.
[244] *See supra* notes 150-151 and accompanying text.