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THE FEDERALISM JACKPOT IN *MURPHY V. NCAA*: GOING ALL IN ON ANTI-COMMANDEERING FAILS TO PROTECT THE VULNERABLE

Erik Shannon

"In gambling the many must lose in order that the few may win"[1]
- George Bernard Shaw

1. GEORGE BERNARD SHAW, FABIAN ESSAYS IN SOCIALISM 129 (New York, The Humboldt Publishing Co. 1891).

I. INTRODUCTION

Gamblers wagered a staggering $4.9 billion dollars on sporting events in Las Vegas last year.[2] In a recent survey, a majority of the American public stated that sports gambling should be legalized.[3] These trends show a clear rise in the popularity of sports gambling, yet many do not realize that gambling substantially contributes to a disproportionate decrease in the liberty of vulnerable populations.[4] Extensive research has shown that problem gambling is directly linked to income and geography.[5] It is evident from this research that

2. *A Look Inside the Numbers of Sports Betting in the U.S. and Overseas*, SPORTS BUSINESS JOURNAL (April 16, 2018), https://www.sportsbusinessdaily.com/Journal/Issues/2018/04/16/World-Congress-of-Sports/Research.aspx (explaining that the amount of money bet on sports in Las Vegas has risen every year since 2003 and is up 440 percent since 1984).

3. *See* Peter Moore, *Americans: Gambling is Morally Acceptable and Should be Legalized*, YOUGOV (Sept. 23, 2014, 8:36 AM), https://today.yougov.com/topics/lifestyle/articles-reports/2014/09/23/gambling (showing that 52 percent of Americans think that gambling in general is morally acceptable and 67 percent think that sports gambling should be legalized).

4. *See* Thijs Bol et al., *Income Inequality and Gambling: A Panel Study in the United States (1980-1997)*, 34 SOCIOLOGICAL SPECTRUM 61 (2014) (arguing that income inequality increases the average expenditure on gambling); *But see* Elizabeth A. Freund & Irwin L. Morris, *Gambling and Income Inequality in the States*, 34 THE POLICY STUDIES JOURNAL 265 (2006) ("These results suggest that the increasing prevalence of various forms of nonlottery gambling will have little effect on income inequality.").

5. Natale Canale et al., *Income Inequality and Adolescent Gambling Severity: Findings from a Large-Scale Italian Representative Survey*, 8 FRONTIERS IN PSYCHOLOGY 1, 2 (2017) ("Problem gambling also has a social and geographical gradient. For instance, adults experiencing gambling-related harm (i) live in areas of greater deprivation, (ii) are unemployed, and (iii) have lower income.").

there are a variety of issues of inequality that could expand as a result of state-sponsored sports gambling.[6]

In *Murphy v. NCAA*, the Supreme Court held that the Professional and Amateur Sports Protection Act ("PASPA") §3702, which prevents States from "licens[ing]" and "authoriz[ing]" sports gambling schemes, violated the anti-commandeering doctrine.[7] The anti-commandeering doctrine is the principle that the federal government cannot require states or state officials to adopt or enforce federal law.[8] Congress cannot issue direct orders to the governments of the States because it is not an enumerated power within the Constitution.[9] The Court declared the entire statutory scheme unconstitutional based on this violation in §3702.[10] The Court's opinion reinvigorated the proponents of the anti-commandeering doctrine and drove a wedge between federal and state law.

Murphy v. NCAA highlights the stark conflict between federalism principles and the harmful effects of legalized sports gambling. Analysis and refinement of anti-commandeering is crucial because the doctrine will affect future jurisprudence of hot-button issues.[11] This

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6. Les Bernal, *Government Bookies Feed Inequality*, N.Y. TIMES (Jan. 31, 2014, 4:39 PM), https://www.nytimes.com/roomfordebate/2014/01/31/the-stakes-off-the-field-and-at-the-betting-window/government-bookies-feed-inequality ("States would not only be promoting a destructive habit for millions of Americans, *but transferring wealth from the have-nots to the haves*.") (emphasis added).

7. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S.Ct. 1461 (2018); *see* 28 U.S.C.A. § 3702 (1992) ("It shall be unlawful for—(1) a governmental entity to sponsor, operate, advertise, promote, *license*, or *authorize* by law or compact, or (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.") (emphasis added).

8. *See* Mike Maharrey, *Anti-Commandeering: An Overview of Five Major Supreme Court Cases*, TENTH AMENDMENT CENTER (May 23, 2018), https://tenthamendmentcenter.com/2018/05/23/anti-commandeering-an-overview-of-five-major-supreme-court-cases/.

9. U.S. CONST. amend. X ("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."); *see also* U.S. CONST. art. I, § 8 (listing the enumerated powers designated to the United States).

10. *Murphy*, 138 S.Ct. at 1484 ("[W]e hold that no provision of PASPA is severable from the provision directly at issue in these cases.").

11. *See* Steven Schwinn, *Symposium: It's time to abandon anti-commandeering (but don't count on this Supreme Court to do it)*, SCOTUSBLOG

Article argues that the Supreme Court's strict adherence to the anti-commandeering doctrine—without taking into account the perverse effects on the personal liberty of underprivileged United States citizens—is unrealistic in today's jurisprudence.

Part I (A) of this Article outlines the Supreme Court's creation and usage of the anti-commandeering doctrine over the last three decades. Part I (B) outlines the background of PASPA and its demise in *Murphy v. NCAA*, as well as a historical account of sports gambling in the United States. Part II (A) examines the reasons the Supreme Court struck down § 3702 of PASPA and the variety of effects it will have on the poorest in society. Next, Part II (B) psychological aspects of gambling and (C) the state budgetary incentives in the sports gambling context will be analyzed. Lastly, (D) potential future anti-commandeering contexts will be explored, and most importantly (E) judicial solutions to combat the current inequitable balancing of federalism and policy interests will be outlined. Unpacking the case study of PASPA highlights that, when interpreting anti-commandeering issues, the Supreme Court should realistically counter-balance policy issues against a strict and expansive adherence to the doctrine in order to protect the liberty of the most vulnerable in society.

II. BACKGROUND OF ANTI-COMMANDEERING AND SPORTS GAMBLING HISTORY

A. Maturation of the Anti-Commandeering Doctrine in Supreme Court Jurisprudence

The Supreme Court's federalism jurisprudence protects the dual system of government established in the Constitution.[12] The Court formulated the anti-commandeering doctrine out of federal principles to meet this objective.[13] This relatively young doctrine was

(Aug. 17, 2017, 10:44 AM), http://www.scotusblog.com/2017/08/symposium-time-abandon-anti-commandeering-dont-count-supreme- court/ (discussing the unworkability of the doctrine).

12. *See* Margaret Hu, *Reverse-Commandeering*, 46 U.C. DAVIS L. REV. 535, 537 (2012) (explaining the constitutionally prescribed system of shared governance).

13. *See* Gregory R. Bordelon, *The De-Federalization Gamble: A Workable Anti-Commandeering Framework for States Seeking to Legalize Certain Vice Areas*, 20 ATLANTIC L.J. 103, 104 (2018) ("Generally speaking, the anti-

established in two Supreme Court cases: *New York v. United States* in 1992[14] and *Printz v. United States* in 1997.[15] This section summarizes the doctrine's Constitutional roots and its formulation in these pivotal cases to clarify how it progressed to its current form.

1. Dual Sovereignty

The Constitution establishes federalism principles through a system of shared governance between Congress and the states.[16] This dual sovereignty system sets out specific enumerated powers to the federal government and leaves the remaining powers to the states.[17] How to uphold this simple principle is one of "the oldest question[s] of constitutional law."[18]

The Constitution is the sole justification for a system of dual-sovereignty. From an originalist perspective, state sovereignty is still a valid principle because the Framers of the Constitution intended for and required state ratification. In addition to this interpretive backing, the numerous benefits of this governmental system include, but are not limited to: (1) state government structures offer a testing grounds and competitive framework for developing the best legislation;[19] (2) the variety of states allows for citizens to choose where to live based on their preferences;[20] (3) it allows for more political accountability and participation;[21] and (4) states provide a place where individuals

commandeering principle prevents the federal government from using states as intermediaries to implement or execute law.").

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

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

16. *See* Hu, *supra* note 12, at 537.

17. *Id.* at 546.

18. H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 635 (1993) (quoting *New York* 505 U.S. at 149).

19. *See* Hu, *supra* note 12, at 546-47 ("State governments offer a multiplicity of regulatory regimes, which in turn provides both a testing lab and a competitive framework for developing the best policies.").

20. *See* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 51, 57 (2004) (arguing that dual sovereignty creates regulatory diversity that benefits society).

21. *See* Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1648 (2006) ("Rather, the key point is that state regulatory autonomy is needed to realize the values that federalism is typically thought to advance, including accountability.").

and groups can rally against national policies and federal overreach.[22] It is important to remember that these values can only be upheld in a dual-sovereign system if states have counter-balancing power against federal overreach.[23]

In addition to governmental power being vertically distributed between federal and state government, it is horizontally spread between the three branches of the federal government.[24] The judicial branch has increased its commitment to "polic[ing] the boundaries of federal and state power in order to ensure that any inroads on state sovereignty are proscribed."[25] This boom in judicial protections of dual-sovereignty has been called the "federalism revival" and has "breath[ed] new life into the [Tenth] Amendment's seemingly truistic language."[26] The Court has the unique ability to restrain the power of Congress and states, not explicitly from the text of the Constitution, but from applying that "truism" to legislative action.[27] This boom in

22. The Supreme Court consistently curbs the overstep of the federal government. *See e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (explaining that the many benefits to decentralized government include that "it will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.").

23. *Id.* ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."); *but see* Jose V. Romero, Jr., *Pros and Cons of Federalist Set-Up*, THE MANILA TIMES (Mar. 17, 2018), https://www.manilatimes.net/pros-and-cons-of-federalist-set-up/386745/ (listing potential downsides to a weaker federal government, including: the protection of special interest groups (i.e. casinos), a greater disadvantage for poorer states and communities (i.e. gamblers), and obstructs action on national issues (i.e. the prevention of the spread of sports gambling)).

24. THE FEDERALIST NO. 51 (James Madison) ("In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.").

25. *See* Hu, *supra* note 12, at 548.

26. *See* Siegel, *supra* note 21, at 1630-31 (explaining judicial protection of federalism values and how best to protect state sovereignty).

27. United States v. Darby, 312 U.S. 100, 123-24 (1941) ("The amendment states but a truism that all is retained which has not been surrendered."); *see also* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States

judicial protection of dual-sovereignty came to head in the 1990's, with the Rehnquist Court striking down two laws on the basis of the anti-commandeering doctrine.

2. *New York v. United States*

Congress enacted the Low-Level Radioactive Waste Policy Act of 1980 in order to mitigate an enlarging radioactive waste disposal problem within the United States.[28] This Act allowed states to enter into interstate compacts or treaties restricting "the use of their disposal facilities to waste generated within member States."[29] Congress believed the Act would encourage states to create formalized relationships in order to best dispose of radioactive waste.[30] By 1985, only three states entered into formalized compacts.[31] Congress amended the law to incentivize more states to create mechanisms to dispose of low-level radioactive waste within their borders.[32] The incentive at issue in *New York*, dubbed the "take-title provision," mandated state compliance with the Act by January 1, 1996 or the state would be ordered to take ownership of all radioactive waste within its border and be liable for all resulting damage.[33]

Two New York counties challenged the constitutionality of this incentive structure because citizens within their borders opposed the radioactive waste sites created in their home counties based on the Act.[34] The Supreme Court upheld the first two incentives but struck down the take-title provision due to its violation of the anti-commandeering doctrine.[35] Justice O'Connor, writing for the Court, reasoned that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to

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respectively, or to the people."); *New York*, 505 U.S. at 156-57 ("The Tenth Amendment . . . restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which . . . is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States.").

28. Pub. L. No. 96-573, 94 Stat. 3347, 1985 amendments at Pub. L. No. 99-240, 99 Stat. 1842, codified at 42 U.S.C. §§ 2021b *et seq.*

29. *New York*, 505 U.S. at 151.

30. *Id.* at 153.

31. *Id.* at 151.

32. *Id.* at 152 ("The Act provides three types of incentives to encourage the States to comply with their statutory obligation to provide for the disposal of waste generated within their borders.").

33. *Id.* at 153–54.

34. *Id.* at 154.

35. *Id.* at 175.

Congress's instructions,"[36] and that the take-title provision "crossed the line distinguishing encouragement from coercion."[37] In sum, the Supreme Court struck down the take-title provision because States are not required to blindly follow the directions of the Federal Government.[38]

New York is significant because it established the anti-commandeering doctrine within Supreme Court precedent. [39] Although the Court's holding is limited to Congress's ability to compel state legislatures, the Court would expand the doctrine to executives five years later in an equally important case, *Printz v. United States*.

3. *Printz v. United States*

Following the assassination attempt on President Ronald Reagan, in which Press Secretary James Brady was nearly killed, the country gradually shifted towards stricter gun regulation.[40] In 1994, Congress passed the Brady Handgun Violence Prevention Act[41] which required the Attorney General of the United States to create a national background-check system by November 30, 1998.[42] In the interim before this national system was established, a state's chief law enforcement officer ("CLEO") was required to perform the background checks.[43] Arizona and Montana CLEOs challenged the constitutionality of the interim provision[44] and the case eventually

36. *Id.* at 162.
37. *Id.* at 175.
38. *Id.* at 188 ("States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead 'leaves to the several States a residuary and inviolable sovereignty,' The Federalist No. 39, p. 245 (C. Rossiter ed. 1961), reserved explicitly to the States by the Tenth Amendment.").
39. *See* BORDELON, *supra* note 13, at 129.
40. *Id.*
41. Pub. L. 103-159 (codified at 18 U.S.C. §§ 921, 922).
42. *Printz*, 521 U.S. at 902.
43. *Id.* at 903.
44. *Id.* at 905 ("Petitioners here object to being pressed into federal service, and contend that congressional action compelling state officers to execute federal laws is unconstitutional.").

reached the Supreme Court, after the District Courts[45] declared the provision unconstitutional and the Ninth Circuit reversed, finding no constitutional discrepancies.[46]

The five-justice majority of the Supreme Court held the interim background-check provision unconstitutional due to the anti-commandeering doctrine.[47] Justice Scalia, writing for the majority, states early in the opinion that "[f]rom the description set forth above, it is apparent that the Brady Act purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme."[48] The Court imported the anti-commandeering principle used in *New York*, protecting the freedom of state legislators, applying it to state executive officers.[49] The Court summarized the anti-commandeering doctrine with new rigidity by stating that, "It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty."[50] Regardless of the governmental branch that is directed to act, if Congress purports to issue orders directly to state actors the legislation is constitutionally invalid under the anti-commandeering doctrine.

B. History of Sports Gambling in the United States

To understand the policy effects of sports gambling, it is crucial to expound on its regulatory history in the United States. The American public and its politicians have had a cyclical relationship with sports gambling; decades of acceptance have consistently been

45. Printz v. United States, 854 F. Supp. 1503 (D. Mont. 1994), *aff'd in part, rev'd in part, dismissed in part sub nom*. Mack v. United States, 66 F.3d 1025 (9th Cir. 1995), *rev'd sub nom.* Printz v. United States, 521 U.S. 898 (1997); Mack v. United States, 856 F. Supp. 1372 (D. Ariz. 1994), *aff'd in part, rev'd in part, dismissed in part*, 66 F.3d 1025 (9th Cir. 1995), *rev'd sub nom.* Printz v. United States, 521 U.S. 898 (1997).

46. *Mack*, 66 F.3d 1025 (9th Cir. 1995), *rev'd sub nom.* Printz v. United States, 521 U.S. 898 (1997).

47. *Printz*, 521 U.S. at 933.

48. *Id.* at 904.

49. *See* BORDELON, *supra* note 13 at 133 (explaining that the Court was hesitant to distinguish cases on such a fine line between legislative and executive action).

50. *Printz*, 521 U.S. at 935.

followed by stages of strong regulatory legislation.[51] Understanding these cycles is an important step in the analysis of PASPA and related litigation. They simultaneously illuminate both the detrimental side-effects and the tax incentives of sports gambling in the government context.

1. 18th Century: Gambling-Funded Revolution

Gambling has been a part of American culture since its genesis.[52] In fact, all thirteen original colonies, many historical American universities, and even the Revolutionary War were funded by gambling.[53] In addition to engaging in general lotteries, early Americans bet on "pedestrianism," a race-walking sport that was imported from England, and also "horse races, cockfights, and bare-knuckle brawls" for entertainment purposes.[54] Following these origins, gambling was gradually abandoned throughout the 19th Century as the federal and state governments developed more efficient taxation systems.[55]

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51. *See* Justin Fielkow, Daniel Werly & Andrew Sensi, *Tackling PASPA: The Past, Present, and Future of Sports Gambling in America*, 66 DEPAUL L. REV. 23, 25 (2016) ("The United States has had a complicated on-again, off-again relationship with gambling throughout its history."); Brett Smiley, *A History of Sports Betting in the United States: Gambling Laws and Outlaws*, SPORTS HANDLE (Nov. 13, 2017), https://sportshandle.com/gambling-laws-legislation-united-states-history/ (last visited Sept. 13, 2019) ("[T]he U.S. has witnessed a long tug-of-war between gambling laws, and people who want to enjoy gambling in various forms, including sports betting.").

52. Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C.L. REV. 11, 12 (1992) ("Two hundred years ago, government-sanctioned lotteries were common throughout America. Lacking a strong central government and burdened with a weak tax base, early Americans viewed lotteries as legitimate vehicles for raising revenue. Lottery proceeds were used to build cities, establish universities, and even to help finance the Revolutionary War.").

53. *See* Smiley, *supra* note 51.

54. *See* Jeremy Martin, *History of Sports Betting and the Point Spread*, DOC'S SPORTS SERV (May 30, 2017), https://www.docsports.com/sports-betting-history.html (last visited Sept. 13, 2019) (discussing early American sports gambling); *See also generally* Allen Moody, *History of Sports Betting*, THOUGHTCO, https://www.thoughtco.com/history-of- betting-3116857 (May 2, 2017) (outlining the general history of global and American sports gambling).

55. Rychlak, *supra* note 54, at 12. *See also* A.R. Spofford, LOTTERIES IN AMERICAN HISTORY, S. Misc. Doc. No. 57, 52d Cong., 2d Sess. 195 (1893) (Annual Report of the American Historical Society) (the Librarian of Congress wrote of "a general public conviction that lotteries are to be regarded, in

2. 20th Century: Sports Gambling Scandals and Regulation

Even as the United States turned away from lotteries, Americans shifted their focus towards sports gambling. The country was full of organized gambling houses that provided guests the chance to gamble on typical casino games, but also organized sporting events.[56] This popularity, combined with little to no regulation, led to numerous sports gambling scandals, including: the 1919 Chicago Black Sox World Series scandal,[57] a college basketball scandal in the 1950s,[58] and years, later the famous Pete Rose betting scandal in the late 1980s.[59] These scandals not only highlighted the immense popularity of gambling on sports, but also the need to regulate it for the integrity of the games.[60] The federal government, in a constant battle between potential revenue and the negative social effects of sports gambling, eventually shifted back towards stricter regulation following these athlete scandals.[61]

Reacting to the fear of organized crime, Congress enacted numerous statutes to put a stop to sports gambling rings.[62] In 1961,

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direct proportion to their extension, as among the most dangerous and prolific sources of human misery").

56. *See* COMM'NON THE REV. OF THE NAT'L. POL'Y TOWARD GAMBLING, GAMBLING IN AMERICA 169 (1976), (1976) https://ia802205.us.archive.org/4/items/gamblinginameric00unit/gamblinginamericc00unit.pdf (noting that by 1850 there were over six thousand gambling houses in New York City alone, which equates to one gambling house for every eighty-five residents of the city).

57. Evan Andrews, *The Black Sox Baseball Scandal*, HISTORY (Oct. 9, 2014), https://www.history.com/news/the-black-sox-baseball-scandal-95-years-ago (last visited Sept. 13, 2019).

58. *See* Chil Woo, *All Bets Are off: Revisiting the Professional and Amateur Sports Protection Act (PASPA)*, 31 CARDOZO ARTS & ENT. L.J. CARDOZO ARTS & ENT. L.J. 569, 573 (2013).

59. *See* Jeff Merron, *Biggest Sports Gambling Scandals*, ESPN (Feb. 7, 2006), http://www.espn.com/espn/page2/story?page=merron/060207 (last visited Sept. 13, 2019).

60. *See* Fieklow, et al., *supra* note 51, at 27 (stating sports gambling legislation was rooted in strong negative public perceptions that developed following player scandals and the rise of organized crime).

61. *See* Rychlak, *Rychlak supra* note 52, at 13–14 ("Throughout history, governments have been torn between a desire to tap gambling's enormous potential as a source of revenue and a fear of its associated social ills.").

62. Fielklow et al., *supra* note 51, at 27.

three of these laws were passed including the Federal Wire Act,[63] the Travel Act of 1961, [64] and the Interstate Transportation of Paraphernalia Act of 1961.[65] The main purpose of these laws was to hinder the influence of organized crime on sports.[66] Additionally, Congress passed the Sports Bribery Act of 1964[67] and the Illegal Gambling and Business Act.[68] Historically, Native American tribes have been given more freedom to operate gaming operations, but in 1988 Congress passed the Indian Gaming Regulatory Act that provided more regulation of typical casino games.[69] Despite these stiff

63. 18 U.S.C. § 1084 (1961) ("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 not more than two years, or both.").

64. 18 U.S.C. § 1952 (1961) ("(a) Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—

(1) distribute the proceeds of any unlawful activity").

65. 18 U.S.C. § 1953 (1961) ("Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined under this title or imprisoned for not more than five years or both.").

66. Att'y Gen. Robert F. Kennedy, *In Support of Legislation to Curb Organized Crime and Racketeering* 18 (May 17, 1961), https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/05-17-1961.pdf ("[T]he federal government is not undertaking the almost impossible task of dealing with all the many forms of casual or social wagering which so often may be effected over communication facilities. It is not intended that the [Wire Act] should prevent a social wager between friends by telephone. This legislation can be a most effective weapon in dealing with one of the major factors of organized crime in this country without invading the privacy of the home or outraging the sensibilities of our people in matters of personal inclination and morals.").

67. 18 U.S.C.A. § 224 (1964) ("Whoever carries into effect, attempts to carry into effect, or conspires with any other person to carry into effect any scheme in commerce to influence, in any way, by bribery any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery that contest, shall be fined under this title, or imprisoned not more than 5 years, or both.").

68. 18 U.S.C. § 1955 (1970) ("Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.").

69. *See* 25 U.S.C. §§ 2701-2721 (1988).

regulations, illegal sports gambling continued and even proliferated.[70] In 1976, the Commission on the Review of the National Policy Toward Gambling reported that over two-thirds of the country gambled and over 80% of the population approved of that practice.[71] The Commission recommended, and Congress agreed, that the regulation of gambling be de-prioritized in politics.[72] In the end though, the Commission and Congress decided to maintain the then-current state prohibitions on sports gambling.[73]

3. 21st Century: More Regulation, Divided Opinions

At the turn of the century, professional sports leagues waged a war on sports gambling.[74] Sports leaders admitted that "sports gambling threatens the character of team sports."[75] Their worries proved right in 2007 when there was yet another sports gambling scandal, as an NBA referee was charged with intentionally influencing the outcomes of games for gambling profit.[76] Congress once again passed another law, the Unlawful Internet Gambling Enforcement Act,[77] to curb the booming internet gambling business and put more of a burden on banks to block illegal gambling transactions.[78] The cyclical nature of sports gambling opinions once again led to softened stances on its

70. *See* Smiley, *supra* note 51.

71. COMM'N ON THE REV. OF THE NAT'L. POL'Y TOWARD GAMBLING, *supra* note 56, at ix.

72. *See* Fielklow et al., *supra* note 51, at 28; *see also* COMM'N ON THE REV. OF THE NAT'L. POL'Y TOWARD GAMBLING, *supra* note 56, at 1 ("Gambling is inevitable. No matter what is said or done by advocates or opponents of gambling in all its various forms, it is an activity that is practiced, or tacitly endorsed, by a substantial majority of Americans.").

73. *Id.* (explaining that lifting the sports gambling bans would be unwise because it would provide very little state revenue and current tax policies prevent potential state-run systems from being able to compete with organized crime rings).

74. S. REP. NO. 102-248 at 4 (1991)[hereinafter *Senate Report*] ("Sports gambling threatens the character of team sports. Our games embody our very finest traditions and values. They stand for clean, healthy competition. They stand for teamwork. And they stand for success through preparation and honest effort. With legalized sports gambling, our games instead will come to represent the fast buck, the quick fix, the desire to get something for nothing. The spread of legalized sports gambling would change forever—and for the worse—what our games stand for and the way they are perceived".) (quoting then -NFL Commissioner Paul Tagliabue).

75. *Id.*

76. *Donaghy Under Investigation for Betting on NBA Games*, ESPN (July 20, 2007), http://www.espn.com/nba/news/story?id=2943095.

77. 31 U.S.C. § 5362 (2006).

78. *See* Smiley, *supra* note 51.

legality. Immediately preceding *Murphy v. National Collegiate Athletic Association*, an increase in technological capabilities coupled with sports commissioners[79] pushing for its legality created a strong push for both legalized gambling and judicial protection of state independence from federal government overreach.

4. PASPA and Sports Gambling

As noted, the history of sports gambling is riddled with peaks and valleys of regulation.[80] The Professional and Amateur Sports Protection Act ("PASPA") was enacted by Congress in 1992 as part of an upswing on sports gambling regulation. In this section PASPA and its litigation history will be outlined to better understand the context of the Supreme Court decision in *Murphy v. National Collegiate Athletic Association*.

On February 22, 1991, Senate Bill 474 was introduced with bipartisan support.[81] Then- Senator Joe Biden declared that the legislation was necessary because, otherwise, sports gambling would spread state by state and develop "irreversible momentum," threatening the integrity of organized sports and harming youth.[82] With 13 states closing in on legalizing their own state-sponsored gambling laws, the major sports commissioners and the majority of Congressmen and women united in favor of PASPA.[83] Senator Chuck

79. *See generally American Attitudes on Sports Betting Have Changed*, AM. SPORTS BETTING COALITION (2017), http://www.sportsbettinginamerica.com/about/ (mentioning the change in perceptions of NFL commissioner Roger Goodell, NBA commissioner Adam Silver, former NBA commissioner David Stern, MLB commissioner Rob Manfred, and NHL commission Gary Bettman).

80. *See* Fielkow et al., *supra* note 51, at 25.

81. *Senate Report*, *supra* note 74, at 3.

82. *Id.* at 5; *see also* Fielklow et al., *supra* note 51, at 30 ("At the time, the primary arguments in favor of PASPA were (1) protecting the integrity, and preserving the character, of sports; (2) shielding America's impressionable youth from vice; and (3) restricting any further spreading of state-authorized sports gambling.") (citing *Prohibiting State-Sanctioned Sports Gambling: Hearing on S. 473 and S. 474 Before the Subcomm. On Patents, Copyrights and Trademarks of the S. Comm. On the* Judiciary, 102d Cong., 1st Sess. 7 (1992)).

83. *See* 138 CONG. REC. 32439 (1992) (statement of Rep. Hamilton Fish, Jr., Member, H. Comm. on the Judiciary) ("If a large number of States and localities make betting on sports a public institution, they are really incorporating it into the fabric of public policy and implicitly giving it the stamp of an official sanction."); *Professional and Amateur Sports Protection Act: Hearing on H.R. 74 Before the Subcomm. on Economics and Commercial Law of the S. Comm. on the Judiciary*,

Grassley, one of the few opponents of PASPA, with a keen eye to future litigation argued that the statute would directly impede state freedom, which in turn would lead to future Constitutional challenges.[84] The Department of Justice raised similar concerns of Congressional overreach of state freedoms.[85] Despite these legitimate apprehensions, PASPA was signed into law on October 28, 1992 by President George H.W. Bush.[86]

PASPA contains both a "grandfather" provision that allows the city of Las Vegas and other established gambling areas to maintain their sports gambling business[87] and a provision stating that Atlantic City, New Jersey can establish legalized gambling if it does so within one year of the law's effective date.[88] New Jersey decided to forgo this option; instead, its citizens voted to amend the State Constitution years later to make it lawful for the state legislature to authorize sports gambling.[89] Following this vote, the New Jersey legislature used the amendment to pass the "Sports Wagering Law" that legalized sports gambling statewide.[90]

New Jersey's state legislation immediately came under attack from professional sports leagues and the NCAA. The NCAA brought suit against New Jersey Governor Chris Christie in federal court

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102d Cong., 1st Sess. 26, 52 (1991) ("There will be millions of additional Americans induced and seduced into gambling if this growth industry is permitted to take the imprimatur of the State and support State-sanctioned point-spread betting.") (statement of NFL Commissioner Paul Tagliabue).

84. *Senate Report*, *supra* note 74, at 12.

85. *Id.* (arguing that there are additional issues with PASPA including: (1) the Grandfather Clause which allowed certain states such as Delaware and Nevada to continue allowing legalized sports gambling, (2) the fact that illegal gambling rings would now have a monopoly on the billion dollar industry, and (3) that federal intrusion into state decision making would interfere with state revenue in this case).

86. Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227 (codified as amended at 28 U.S.C. §§ 3701–3704 (2012)).

87. *Id.* §§ 3704(a)(1)-(2) (2012).

88. *Id.* § 3704(a)(3) (2012).

89. N.J. CONST. art. IV, § 7, ¶ 2 (2012).

90. *See* N.J. STAT. ANN. §§ 5:12A-1 to 5:12A-6 (2012), *invalidated* by Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 730 F.3d 208 (3d Cir. 2013); *see also N.J. Moves Towards Legal Sports Betting This Fall, in Time for NFL Season*, NATIONAL LAW REVIEW (May 25, 2012), https://www.natlawreview.com/article/nj-moves-towards-legal-sports-betting-fall-time-nfl-season ("We intend to go forward and allow sports gambling to happen, if someone wants to stop us, they'll have to take action to stop us.") (quoting Governor Chris Christie).

claiming that the new law violated PASPA.[91] New Jersey responded by claiming that "PASPA unconstitutionally infringed the State's sovereign authority to end its sports gambling ban."[92] The District Court found no violation,[93] and the Third Circuit affirmed because PASPA does not impose any affirmative action upon the states.[94] The Supreme Court denied review in 2013 because PASPA did not prohibit New Jersey from removing previously enacted gambling prohibitions.[95] In its brief opposing certiorari, the United States admitted that PASPA does not force New Jersey to maintain legislation enacted prior to PASPA and it could repeal these prohibitions. In 2014, New Jersey enacted and framed a new sports gambling statute as a "repealer" statute that repealed its previous sports gambling prohibition.[96] The NCAA once again filed suit in federal court.[97] The District Court ruled in favor of the NCAA[98] and the Third Circuit affirmed.[99] The Third Circuit did not accept New Jersey's "artful" attempt at making the law a repeal statute, instead holding that the law indeed violates PASPA.[100] In 2017, the Supreme Court finally granted review to settle the crucial constitutional question that arose in the preceding litigation.

91. *See* Nat'l Collegiate Athletic Ass'n. v. Christie, 926 F.Supp.2d 551 (D.N.J. 2013).

92. *Murphy*, 138 S.Ct. at 1471.

93. *Christie*, 926 F.Supp.2d at 573.

94. Nat'l Collegiate Athletic Ass'n. v. Christie, 730 F.3d 208 (3d Cir. 2013).

95. *Murphy*, 138 S.Ct. at 1472.

96. *Id.*

97. Nat'l Collegiate Athletic Ass'n. v. Christie, 61 F.Supp.3d 488 (D.N.J. 2014).

98. *Id.* at 508.

99. Nat'l Collegiate Athletic Assn. v. Governor of N.J., 832 F.3d 389 (3d Cir. 2016).

100. *Id.* at 401 (explaining that the 2014 law "selectively remove[s] a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators").

III. ANALYSIS: ANTI-COMMANDEERING DOCTRINE AND THE LIBERTY OF VULNERABLE POPULATIONS

A. Section 3702 of PASPA Ruled Unconstitutional Due to Anti-Commandeering Doctrine

In 2018, the Supreme Court once again employed the anti-commandeering doctrine, this time to strike § 3702 of PASPA.[101] The court lays out three arguments in favor of the anti-commandeering doctrine: structural protections of liberty, political accountability, and its prevention of Congress shifting the costs of regulation onto the States.[102] Although the principles were reasonable, the Supreme Court missed the mark when it failed to defer to legislature because its strict adherence to the anti-commandeering doctrine undervalues the negative effects the policy has on state sovereignty and its benefits. This section evaluates the Supreme Court's arguments and analyzes the competing policy interests that should have held more weight during the Court's anti-commandeering analysis.

The most crucial argument that the majority employed is that the doctrine protects individual liberty. The argument was that the protection of state sovereignty is not for the benefit of the states, but rather for the benefit of the individual.[103] As stated in *Printz* and quoted in *Murphy*, a "healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[104] But, the balance between individual liberty and congressional oversight is delicate. Government has the responsibility to protect its citizens while sports gambling has addictive qualities that not only hurts individuals, but also extends to the families, sports leagues and communities.[105] The anti-commandeering doctrine needs

101. *Murphy*, 138 S.Ct. at 1478 ("The PASPA provision at issue here—prohibiting state authorization of sports gambling—violates the anticommandeering rule.").

102. *Id.* at 1477.

103. *Id.* ("[T]he constitution divides authority between federal and state governments *for the protection of the individuals*.") (citing New York v. United States, 505 U.S. 144, 181 (1992)) (emphasis added).

104. *Printz*, 521 U.S. at 921 (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

105. *Contra* Barney Frank, *With Gambling, Personal Freedom is Always the Best Bet, Says Barney Frank*, US NEWS (June 1, 2009, 2:08 PM), https://www.usnews.com/opinion/articles/2009/06/01/with-gambling-personal-freedom-is-always-the-best-bet-says-barney-frank ("There are people who believe

to better balance current sports gambling laws with individual freedoms.

Second, the majority argued that the anti-commandeering doctrine fosters political accountability. The reasoning is that when states are forced to impose certain regulations promulgated by Congress, the responsibility for said political actions are "blurred."[106] Individuals that wish to debate or change the regulation would not know who to go to or who to vote against in order to achieve their goal. In the case at hand, this argument bears little weight because PASPA does not actually force states to carry out any action.[107] The anti-commandeering analysis needs to take into account this distinction even though the Supreme Court rejected it in *Murphy*.[108] Citizens would know which lawmakers to hold accountable because Congress is the only political body taking action which is not a violation of federalism principles.

Lastly, the Court argued that the principle prevents Congress from shifting the cost of regulation onto state governments. Yet, if Congress were to pass a law forcing state governments to enforce a policy, then the federal government does not need to weigh the expected costs and benefits of the program because it has no effect on the federal government.[109] This bears no weight on the analysis though because

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that it is appropriate to use the law to impose on others personal, religious, or moral tenets, whether or not they deal with behavior that impinges on others. Obviously, society has an obligation to enforce those aspects of morality that protect people from others. Murder, robbery, fraud, and arson, for example, should be harshly prosecuted. But personal behavior that harms no one ought to be within the sphere of personal autonomy.").

106. *Murphy*, 138 S.Ct. at 1477.

107. Brief for Respondents at 59, Christie v. Nat'l Collegiate Athletic Ass'n, 137 S.Ct. 2327 (2017) (Nos. 16-476, 16-477), 2017 WL 4684747, at *59 ("In full compliance with the anti-commandeering doctrine, Congress effectuated its intent without resorting to anything like the affirmative commands that doomed the statutory provisions at issue in *New York* and *Printz*.").

108. *Murphy*, 138 S.Ct. at 1478 ("It was a matter of happenstance that the laws challenged in *New York* and *Printz* commanded 'affirmative' action as opposed to imposing a prohibition. The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event."); *see also id.* at 1489 (Ginsburg, J., dissenting) (arguing that the non-commandeering aspects of PASPA are severable from the unconstitutional aspects).

109. *Id.* at 1477; *see also* Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1360 (2001) ("If our system of political checks is to rest on a foundation of popular loyalty, the people need to know when to get upset and at whom. The system requires a certain degree of transparency. It must be clear when the national government has acted, as opposed to the states, so that the people can

once again PASPA does not force states to take action. It simply prevents them from sponsoring sports gambling. The Supreme Court did not believe in this distinction, but it does prevent the cost shifting that anti-commandeering principles are meant to protect against.

B. Psychology of Gambling and its Effect on Vulnerable

An unrefined and expansive anti-commandeering doctrine allows for tangible negative effects on vulnerable populations. There is a direct link between gambling and loss of liberty. If there is legalized, accessible sports gambling, certain vulnerable populations will have their personal liberty disproportionately limited based on addiction. This section highlights the psychological effects of gambling and its severe impact on susceptible groups. It creates a foundation to argue that these policy concerns outweigh the constitutional concerns of the Supreme Court.

1. Sports Gambling Psychology and the Loss of Liberty

Numerous scientific studies suggest that sports gambling is intimately connected to addiction. If states allow sports gambling, inequality will increase based on it taking the liberty away from individuals, families and communities alike. In May 2013, the American Psychiatric Association officially classified pathological gambling as an addiction rather than an impulse-control disorder.[110] This crucial distinction shifted gambling within the scientific community from a personal choice issue to an illness-oriented approach. This decision was based on neuroscience studies that proved that gambling and drug addictions are far more connected than previous research indicated.[111]

Additionally, inequality plays a causal role in risk-taking behavior.[112] The largest number of gamblers come from the poorest

provide feedback to the political process that resulted in the action. Without transparency and accountability, political safeguards do not have the necessary information to operate.").

110. *See* Ferris Jabr, *The Science of Health: Gambling on the Brain*, 309(5) SCI. AM. 28–30 (Nov. 2013).

111. *Id.* (explaining current neuroscience research in order to compare the release of dopamine within the brain "reward system" for addictive gambling and drug addiction).

112. "Inequality" refers to vulnerable populations. *See* Sandeep Mishra, Leanne S. Son Hing & Martin L. Lalumiére, *Inequality and Risk-Taking*, 13(3)

segments of the population, as gambling is viewed as a vehicle out of poverty.[113] Gambling creates a perceived opportunity for social mobility and a relief from the anxieties and stressors of being poor.[114] Gambling can become a form of "economic predation"[115] as vulnerable populations can be exploited in order to create revenue for casinos, sports leagues, or even state governments. This vicious incentive cycle will create perverse incentives to increase gambling availability which in turn will lead to more addiction and poverty within society. The federal government has the ability to create laws that prevent the use of certain drugs in order to protect society from the various negative impacts of the use of these drug (i.e. addiction, crime, etc.). The anti-commandeering doctrine is a valid federalism principle, but it should not prevent Congress from acting on the need to regulate sports gambling. Just as drugs are regulated due to their addictive qualities, the federal government should be allowed to regulate sports gambling without a rigid interpretation of anti-commandeering doctrine getting in the way.

2. Impact on Vulnerable Populations

Beyond the poor, legalized state-sponsored sports gambling would disproportionately affect other vulnerable populations including teenagers and young adults, chemically-dependent individuals, and the Native American population. First, in Italy, where

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EVOLUTIONARY PSYCHOL. 1–11, at 9 (2015) ("The effect of inequality on risk-taking manifested in short time frames, suggesting that inequality is a salient motivator of risk-taking to which people are acutely sensitive. In everyday situations, it is possible that victims of inequality would experience persistent feedback emphasizing such inequalities (e.g., repeated group-based discrimination, stigmatization of the poor), potentially leading to even greater elevation of risk-taking. . . . This study has important policy implications: Aiming to affect modifiable circumstances that motivate risk-taking, such as inequality in access to health care, education, wealth, and other opportunities, may lead to significant reductions in risky behavior.").

113. Monica Straniero, *How Gambling Contributes to Inequality*, VITA INT'L (Apr. 13, 2016), http://www.vitainternational.media/en/article/2016/04/13/how-gambling-contributes-to-inequality/325/ ("[P]oor man's stock exchange").

114. *See* Bol, *supra* note 4, at 65.

115. *See* Straniero, *supra* note 113 ("One thing is for sure: Gambling is a form of *economic predation*. Today, amid massive budget shortfalls, politicians are scrambling to find new sources of revenue in the hope to solve their economic issues. But while the reality of doing so is far from beneficial, the effects of the expansion of gambling on low-income and disadvantaged individuals have failed to receive adequate consideration.") (emphasis added).

there are notoriously weak gambling laws, a research study shows that youth are especially at risk of becoming addicted to gambling and even more so for youth in the lower economic segments of the population because of their lack of social support from parents and teachers.[116] Additionally, young people have more technological skills and interest in sports which makes sports gambling more attractive and accessible.[117] Second, as mentioned earlier, alcoholism, drug-abuse and problem gambling share many diagnostic features and often times affect the same individuals.[118] Third, Native American populations have traditionally been given control of gambling markets without state regulation. This is a form of reparation on the part of the United States government for the previous mistreatment of Native Americans.[119] If state-sponsored sports gambling was legalized, it would significantly cut into the gambling revenue of Native American tribes. All of these groups, which the Supreme Court should strive to protect, will be negatively affected by the *Murphy* decision. These groups deserve to be protected and not forgotten due to strict adherence to federalism principles. Simply put, state-sponsored sports gambling will harm these specific groups by leading to both decreased liberty and increased inequality.

C. Perverse State Budgetary Incentives

Every year state legislators scramble to balance the state government's budget. They debate tax structures and revenue models

116. *See* Canale, *supra* note 5, at 3 ("Indeed, the lack of social support might exacerbate the impact of income inequality on adolescent problem gambling. Thus, the present study intended to clarify the additive role of social support and macro-level factors related to adolescent gambling severity.").

117. *See* Carmen Messerlian, et al., *Gambling, Youth and the Internet: Should We Be Concerned?*, 13 THE CANADIAN CHILD AND ADOLESCENT PSYCHIATRY REV. 3, 5 (Feb. 2004) ("Governments, the industry and the public have a responsibility to protect youth from potentially harmful products and activities. Public policy should reflect the changing social climate and aim to protect youth from access to gambling products and exposure to gambling promotion."); *see also* John Warren Kindt & Thomas Asmar, *College and Amateur Sports Gambling: Gambling Away Our Youth?*, 8 VILL. SPORTS & ENT. L.J. 221 (2002).

118. Justin D. Wareham & Marc N. Potenza, *Pathological Gambling and Substance Use Disorders*, 36(5) AM. J. DRUG ALCOHOL ABUSE 242–47 (2010).

119. *See generally* Eric S. Lent, *Are States Beating the House?: The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 GEO. L.J. 451, 453–54 (2003) (Outlining the decision in California v. Cabazon Band of Mission Indians, Native American gaming legislation (Indian Gaming Regulatory Act), and the history of Native American gaming).

to eventually compromise on a balanced budget. Due to the Supreme Court's ruling in *Murphy*, state legislators can now legalize sports gambling in order to boost revenue. This creates a perverse incentive for states to legalize sports gambling which preys on the vulnerabilities in society in order to create revenue to assist in balancing the state's budget. This section will summarize the key difference between state and federal budgets and discuss sports gambling revenue projects to assert that states are incentivized to legalize sports gambling which in turn disproportionately taxes vulnerable populations.

1. State Budgets vs. Federal Budgets

On its face it may appear that gambling revenue is new wealth, but in reality it is just current wealth being redistributed unequally.[120] The issue created by the *Murphy* decision is that states can now create their own gambling schemes to collect "voluntary taxes"[121] from gamblers in order to balance their budgets. State budgets are mandated to be balanced every year, whereas the Federal Government can run a deficit and borrow money to meet its financial obligations.[122] This key budgetary difference means that state legislatures have the perverse incentive, balancing budget over protecting vulnerable citizens, to legalize sports gambling. It may appear as if individuals are simply using their individual liberty to participate in this "voluntary tax," but it is not as simple as new tax revenue being collected from citizens. This scheme unequally redistributes wealth from society's poorest to the government. State legislatures know about the negative health and policy effects of gambling on vulnerable populations but are still incentivized to collect the vast revenues created by sports gambling to meet the requirement of a balanced budget.[123] Congress, and in turn the courts, must be able to circumvent valid federalism principles in order to protect society from these perverse incentives associated with state-sponsored gambling schemes.

120. *See* Straniero, *supra* note 113 ("gambling produces no new wealth, only redistribution of currency on an inequitable basis.").

121. *Id.*

122. *The Difference Between Federal, State and Local Governments' Budgets*, GOVSPEND, https://www.govspend.com/2017/11/14/the-difference-between-federal-state-and-local-governments-budgets/.

123. Straniero, *supra* note 113 ("Raising more revenues using voluntary taxes is politically easier than cutting spending, (benefits), or raising income taxes, property taxes, general sales taxes, or other unpopular taxes.").

2. Sports Gambling Effect on State Revenue

There are currently eight states that have legalized sports gambling and twenty-three states with proposed sports gambling legislation.[124] In its first year of legalized gambling, Pennsylvania has brought in $385 million dollars from primarily up front licensing fees as well as from online casino, sportsbooks, mini-casino auction profits and tax revenue from lottery expansion and daily fantasy sports.[125] Similarly, New Jersey has also had explosive growth since state-sponsored sports gambling was legalized.[126] Examining the data from this early-adopting state makes two things clear: (1) there is a lot of money to be made, and (2) the market is continually growing.

Month	**Total Wagered**	**Total Revenue**
June 2018	$16.4 million	$3.5 million
July 2018	$40.7 million	$3.8 million
August 2018	$95.6 million	$9.2 million
September 2018	$184 million	$23.9 million
October 2018	$260.7 million	$11.7 million
November 2018	$330 million	$21.2 million

Many economic analysts believe that legalized sports gambling will have a limited impact on fixing state budget problems.[127] Sports

124. Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every State Stands*, ESPN (Aug. 2, 2019), http://www.espn.com/chalk/story/_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states.

125. Chris Murphy, *Gambling Fills the Gaps in Pennsylvania State Budget*, SBC AMERICA (Dec. 10, 2018), https://sbcamericas.com/2018/12/10/gambling-fills-the-gaps-in-pennsylvania-state-budget/.

126. *Sports Betting Revenue 2019*, THE LINES, https://www.thelines.com/betting/revenue/.

127. Paul Davidson, *Supreme Court Sports Betting Decision is Unlikely to Fix State Budget Problems*, USA TODAY (May 14, 2018), https://www.usatoday.com/story/money/2018/05/14/supreme-court-sports-betting-ruling-unlikely-relieve-budget-crises/609317002/ ("A study last year by Oxford Economics for the American Gaming Association found that legalizing sports betting would generate $3.4 billion in state and local tax revenue across the country.

gambling only makes up a small fraction of traditional casino earnings and an even smaller proportion of what would be taxed if it were a private enterprise.[128] This skepticism of the workability of balancing a budget via gambling revenue does not mean that state governments will not be incentivized to collect revenue by the millions from gambling citizens. Although the revenue may only cover a small fraction of the total budget, states will continue to have economic incentive to legalize sports gambling.

D. Potential Judicial Solutions to Balance Federalism Concerns and Policy

The *Murphy* decision highlights the need for a reasonable solution to prevent Federalism concerns from mitigating Congressional policy interests. Opening up the floodgates of legalized sports gambling allows state legislatures to prey on vulnerable groups. The only thing preventing Congress from enacting PASPA is the judicial backlash based on the anti-commandeering doctrine. This section analyzes various judicial solutions, including the avoidance doctrine, the severability doctrine, the necessary and proper clause, and the commerce clause. These judicial solutions will allow courts to circumvent the anti-commandeering doctrine when interpreting statutes to protect these vulnerable groups without overstepping state sovereignty.

1. Constitutional Avoidance Doctrine

The avoidance canon seeks to balance the protection of constitutional rules while also showing respect for the actions of elected officials[129] by presuming that Congress intends to enact laws that are constitutional.[130] While interpreting a statute and analyzing its validity, a court "will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."[131] In

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But that would still represent just about 0.3% of all state and local government revenue, excluding federal funding.").

128. *Id.*; *see also* Michelle Minton, *Congress Already Ruined Sports Betting Once; Don't Let Them Do It Again*, WASHINGTON EXAMINER (Oct. 1, 2018), https://www.washingtonexaminer.com/opinion/op-eds/congress-already-ruined-sports-betting-once-dont-let-them-do-it-again.

129. Gunnar P. Seaquist, *The Constitutional Avoidance Canon of Statutory Construction*, 71 THE ADVOC. (TEXAS) 25, 25 (2015).

130. *See* Reno v. Condon, 528 U.S. 141, 148 (2000).

131. Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 348 (1936).

recent jurisprudence courts have been less willing to strike down statutes if they can be construed to avoid constitutional difficulty.[132]

The respondents in *Murphy* made the argument that the courts had over-expanded the term "authorize" which violated the avoidance doctrine.[133] The Supreme Court reasoned that even the alternate interpretation of "authorize," that it did not force state legislatures to carry out any specific action, made the statute a violation of the anti-commandeering doctrine.[134] Even though the Court rejected the respondent's argument, they did admit that Congress could regulate sports gambling directly.[135] It could have been argued that an alternative reading of PASPA shows that Congress was planning to regulate sports gambling directly, rather than forcing the states to act. In future anti-commandeering doctrine cases litigants could employ this strategy and use the doctrine in order to avoid the constitutional problem and presumably get closer to the intent of the legislature. In the vast majority of cases, Congress is not trying to overstep the freedom of states, and this doctrine will allow courts to let their opinions follow this assumption. Avoidance doctrine may be useful to avoid striking statutes due to anti-commandeering decisions.

2. Severability Doctrine

The severability doctrine, the main interpretive tool the dissent argues for in *Murphy*, allows courts to cut out any unconstitutional sections of a statute and leave the remaining statutory provisions intact.[136] The court must decide if the legislature would have intended

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132. Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, HARV. L. REV. 2109, 2111 (2015) ("The canon has thus in practice morphed into a twisted corollary: a court should not strike down a law if it can be judicially rewritten to avoid constitutional difficulty. We call this move the 'rewriting power.' … [T]he rewriting power…we call *active* avoidance—using the avoidance canon to usher in legal change.").

133. Brief for Respondents, *supra* note 107 at 38 ("Courts are supposed to read statutes to avoid constitutional difficulties, not to create them."). The Respondents believed that the Court expanded "authorize" to entail commandeering when they could have interpreted the word more simply to avoid the Constitutional difficulty.

134. *Murphy*, 138 S.Ct. at 1475 ("The plausibility of the alternative interpretations is debatable, but even if the law could be interpreted as respondents and the United States suggest, it would still violate the anticommandeering principle. . . .").

135. *Id.* at 1484–85 ("Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own.").

136. *See* David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639, 639 (2008).

the valid remaining sections to stand on their own after striking another part of the statute for being unconstitutional.[137] The Supreme Court in *Murphy* decided that the Congress that enacted PASPA would likely not want to sever the rest of the statute from §3702(1).[138] Although the Court has reasoned analysis, §3702(2) could hold its own if §3702(1) was removed from the statute. This would simply prevent private citizens from operating sports gambling businesses without commandeering state authority. If this severability analysis was accepted by the courts and sports gambling was legalized in certain states, it would mirror the current issue regarding marijuana legislation. Private actors who operate a sports gambling business would be following state laws but be in violation of federal law. In short, this severability solution is an incomplete means to protect federal law from anti-commandeering principles.

3. Necessary and Proper Clause and the Commerce Clause

Under Article I, Section 8 of the Constitution, Congress has the power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof."[139] Additionally, the Commerce Clause states that Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[140] The post-New Deal courts enlarged Congressional power by employing both of these Constitutional

137. *Id.* at 645 ("[A] court should refrain from invalidating more of the statute than is necessary. . . . [W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid.") (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 683 (1987)); *see also* Ayotte v. Planned Parenthood of N. New England, 546 U.S.320, 329 (2006) ("[W]e try not to nullify more of a legislature's work than is necessary, for we know that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'").

138. *Murphy*, 138 S.Ct. at 1483 (explaining that Congress intended the provisions in §3702(1) and §3702(2) to work together in suing the state that authorized and private entity that owned the gambling operation).

139. U.S. CONST. art. I, § 8.

140. *Id.*

principles. The courts upheld various federal statutes as necessary and proper means to achieve legitimate commerce regulation.[141]

It is not disputed that Congress may employ the commerce power in order to regulate gambling nationwide.[142] The specific commandeering issues within PASPA takes more critical analysis. A large amount of sports gambling takes place on the internet, with large sums of money crossing borders.[143] The respondents in *Murphy* could have argued that because of these statistics and the fact that the sports franchises are located in different states, sports gambling qualifies as interstate commerce. Next, they would argue that because of the harmful effects of gambling, much like illegal drugs, it is necessary and proper for Congress to control this interstate commerce. This constitutional backdoor argument is slightly attenuated but could be an additional way to avoid the anti-commandeering doctrine. All in all though, this would not solve the overarching issue of a broadened anti-commandeering doctrine preventing the Supreme Court from reasoned analysis to protect individual liberty.

4. Reasonable Constraints on Anti-Commandeering

Even if these methods could be used in different factual circumstances, is it realistic for the judicial branch to turn a blind eye to the loss of liberty in vulnerable populations in order to follow a doctrine not rooted in the text of the Constitution? There should be a shift in anti-commandeering doctrine analysis that allows the Court to realistically protect against harmful policy and yet still protect the aims of the doctrine.

The best solution to balance federalism and policy considerations is to set reasonable and articulable bounds on the anti-commandeering

141. Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 807–08 (1996) ("[T]he New Deal Court's own constitutional justification for its radical expansion of the scope of federal power over commerce was that the congressional measures in question were valid exercises of the power granted by the Necessary and Proper Clause and were not direct exercises of the power to regulate commerce among the several states. That is, the Court did not simply and directly enlarge the scope of the Commerce Clause itself, as is often believed. Rather, it upheld various federal enactments as necessary and proper means to achieve the legitimate objective of regulating interstate commerce.").

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

143. James Stocks & Co, *Share of the online gambling market worldwide in 2015, by product*, STATISTA, https://www.statista.com/statistics/248655/segmentation-of-online-gambling-market/ (last visited Jan. 18, 2019) (illustrating that online gambling made up 48 percent of sports gambling worldwide in 2015).

doctrine. The anti-commandeering doctrine has no explicit basis in the text of the Constitution, as it was judicially created out of federalism principles in *New York* and *Printz*.[144] The previous legal arguments can assist in narrowing the doctrine, but strict judicial constraints are necessary to prevent the doctrine from stifling the protection of the vulnerable. The anti-commandeering doctrine is not completely unworkable, but it needs to be contained in a way to prevent judicial overstep into Congress' protection of the vulnerable.

First, the anti-commandeering doctrine should not be used to strike a law that does not force state action. This preemption argument was the respondent's strongest in *Murphy*.[145] This constraint on the doctrine will allow Congress to regulate certain harmful activities without forcing states to enforce the law. For example, say Congress decided to ban certain prescription pain-killers because they were found to be too addictive. If the law said that no state could legalize and set up a state-sponsored pharmacy for this drug, it would not commandeer the state to take action. Rather, Congress would be able to regulate a dangerous drug and prevent its use without state interference. This simple solution will allow Congress to weigh the difficult policy decisions without forcing the state to take any actions that the anti-commandeering doctrine is meant to protect.

Next, and most importantly, the judicial branch should have the ability to step in to protect citizens from state law taking away their liberty. If states have a perverse incentive to create a harmful law, the anti-commandeering doctrine should not create a judicial blockade preventing Congress from stopping it. One of the main mischiefs that the anti-commandeering doctrine is meant to protect against is government tyranny and the loss of individual liberty. Congress, and in turn the courts, should have the ability to regulate addictive behaviors that hurts vulnerable individual's liberty even though it may partially benefit a specific state.

Additionally, this action can be taken without forcing the state to incur the cost of the regulation, another mischief that the doctrine is

144. *See* SCHWINN, *supra* note 11 ("Students of the Constitution can be excused for scratching their heads at the anti-commandeering doctrine. That's because this rule, which says that the federal government can't require states or state officials to adopt or enforce federal law, has no basis in the text or history of the document. It has only weak support in precedent.").

145. Brief for Respondents, *supra* note 107 at 18 ("While PASPA requires states to refrain from engaging in certain conduct and from embracing certain policies, it does not force them to adopt federally-prescribed policies or to enforce federal law.").

trying to protect against. Returning to the previous example, if, hypothetically, the California legislature legalized a state-sponsored pharmacy to help lower pain-killer prices and create valuable tax revenue, Congress could respond by passing legislation that prevents this state action. The legislation would be based on research that the pain-killer was too addictive and took the liberty away from vulnerable perpetual pain patients in the long run. This would prevent California from setting up the state-sponsored pharmacy and outlaw the pain-killer without shifting the cost of regulation onto the state. If challenged in the courts, the law would unfortunately be struck due to the *Murphy* decision. That decision emphasizes the anti-commandeering doctrine's protection of individual liberty, when in reality its failure to analyze detrimental policy affects allows for a decrease in liberty amongst the most vulnerable.

The main counter-argument to slimming the doctrine in the context of PASPA is that it is consistently unclear whether a law protects or harms. It is argued that states are "laboratories"[146] for the nation as a whole to experiment with the legalization of sports gambling. This allows individuals the freedom to choose for themselves whether they want to participate in a more regulated gambling environment.[147] Although these arguments are valid, they ignore the prevalence of addiction in vulnerable populations and the fact that upholding PASPA will actually increase liberty for individuals and families.

The judicial branch should reverse course and limit the anti-commandeering doctrine so that it does not cover a situation where state incentives and the interests of the vulnerable come in conflict.

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146. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) ("To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

147. This argument assumes that individuals will use illegal and less regulated means to sports gamble if it is outlawed on a federal level. *See* Gary Martin, *Supreme Court Strikes Down Law Banning Sports Betting Outside Nevada*, LAS VEGAS REVIEW-JOURNAL (May 14, 2018) https://www.reviewjournal.com/sports/betting/supreme-court-strikes-down-law-banning-sports-betting-outside-nevada/ ("The American Gaming Association, which represents casinos, praised the ruling, saying it could snuff out what it says is a $150 billion a year black market that has thrived offshore and under the radar in the U.S.").

The valid federalism principles[148] upheld by the anti-commandeering doctrine can be protected, while also allowing Congress to police sports gambling that disproportionately harms susceptible citizens. A judicially created Constitutional argument should not serve as a barrier to legislation that protects these individuals. The judicial branch serves as a valuable check on the legislative branches policy analysis, but the court should curb the ever-expanding anti-commandeering doctrine set forth in *Murphy*.

IV. CONCLUSION

Without federal oversight, legalized sports gambling will lead to drastic societal problems by decreasing the personal liberty of vulnerable populations via addiction. States will be incentivized to authorize sports gambling schemes to create revenue from the pockets of the vulnerable. To prevent this from happening, the judicial systems must set reasonable bounds to constrain both the broad use of the anti-commandeering doctrine and policy analysis. Are these neutral principles possible in the judicial system? In one sense they are not; when the Supreme Court analyzes constitutional issues, it simply appears to be doing the same policy analysis that the legislature undertakes. By strictly adhering to and expanding anti-commandeering doctrine by shaping PASPA as simply an anti-state liberty statute, the Supreme Court ignores the negative effects of gambling. On the other hand, if a neutral principle were viewed as realistic, judges could realize the limitations of the anti-commandeering doctrine and set articulable limits on its use. These limits include only using the doctrine to strike legislation that forces explicit state action and when the state incentives do not conflict with the protection of vulnerable citizens. Either way, by having a realistic view of the modern court and allowing judges at every level to balance state sovereignty and the necessity to legislate against harmful actions can prevent the harm of a rigid view of anti-commandeering. Otherwise, the same federalism debate will prevent Congress from protecting citizens in a variety of future and present contexts. The Supreme Court must fold on its *Murphy* decision, or else Congress' hands will be tied for years to come.

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148. Including, but not limited to, clear political accountability, preventing regulation cost-shifting, and allowing states the freedom to legislate how they choose. *See* Siegel, *supra* note 21.