MURPHY V. NCAA: WRONGLY DECIDED BY THE SUPREME COURT (AND HERE'S WHY)

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This Article argues that the U.S. Supreme Court's majority opinion striking down the Professional and Amateur Sports Protection Act (PASPA) in Murphy v. NCAA[1] *failed to convincingly establish sufficient cause to upset the Constitution's allocation to the federal government of protective, supervisory, and prohibitive powers over interstate and foreign commerce. These powers necessarily require an ability to preclude non-federal entities from undercutting national policy. The* Murphy *majority's failure is especially evident when the form of interstate commerce addressed by federal legislation involved in that case addressed a historical vice—commercialized gambling, not mere social or charitable gambling—that provably (i) adversely impacts public health and workplace productivity, (ii) increases instances and risks of corruption in government and to historically-treasured national commerce, such as professional and amateur sports, and (iii) employs means that cannot be adequately policed in the Internet era. The* Murphy *majority opinion relied upon those Justices' personal perception of what federalism requires. In doing so, they elevated their personal opinions over the plain words of the Federal Constitution. Those Justices, like the commercialized gambling industry, may have disagreed with PASPA on a policy basis but, under the Constitution, the decision to enact such nationally-protective legislation plainly has been assigned to Congress, and PASPA was a proper exercise of that power. Nothing in the*

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1. Murphy v. NCAA, 138 S. Ct. 1461 (2018).

words nor implicit in the structure of the Constitution would, sensibly, preclude the federal government from prohibiting any entity, including states (which surrendered aspects of sovereign authority over certain commerce upon choosing to join the national government) from authorizing conduct in interstate or foreign commerce plainly adverse to federal policy. To rule otherwise brings from the grave a structural weakness long thought buried when the inefficient Articles of Confederation were replaced by the present U.S. Constitution.

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I. OVERVIEW OF ARGUMENT

Murphy set aside the en banc Third Circuit's holding,[2] which effectively affirmed the fundamental principle that the entwined Commerce and Supremacy Clauses of the U.S. Constitution afford the federal government ample power to prohibit a state from legislating in ways that shift from the legislating state to other states and to the national government the costs of state-authorized vice occurring in the legislating state, at least when that vice both necessarily impacts interstate commerce and does so by the design of the authorizing state's law.[3] This Third Circuit ruling made all the more sense given that the New Jersey statute challenged in *Murphy* made no provision to allow or provide recompense for the harms associated with the state-authorized vice.

In its obvious impact, the New Jersey statute at issue, and the state constitutional amendment upon which the statute's language was based, greedily attempted to disadvantage and shift costs to other states and to non-New Jersey interests solely in order to advance or protect New Jersey. Precluding interstate predatory behavior has long been recognized as well within the Constitution's broad grant of power to Congress to regulate non-*intra*state commerce.[4]

2. NCAA v. Governor of N.J., 832 F.3d 389 (3d. Cir. 2016) (en banc).

3. *See Murphy*, 138 S. Ct. at 1461.

4. *See* Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1477 (2007).

Unmentioned in the Tenth Amendment, the entirely judge-made anti-commandeering doctrine is not violated where a federal statute—PASPA—prohibited a legislating state from conduct, when that prohibition did not require the legislating state to affirmatively act nor to expend resources or reputation by regulating some federal program but, instead, to *not* act in ways (i) that injure and corrupt, or increase the likelihood of corruption of, channels of interstate commerce; (ii) that impair other states' commercial and quality-of-life interests; and (iii) that defy national protective policies inherent in the Constitution-assigned federal powers over interstate and foreign commerce and taxation.[5] The *Murphy* majority's adverse, kneejerk reaction to the thought of a federal legislature telling a state what it could not do failed to analyze why it makes sense for the federal government to have such power in matters of interstate and foreign commerce when it might not have such power in other spheres of behavior.

Neither did PASPA's exemptions violate the equal sovereignty doctrine in the statute's recognition of the reliance interests a few states had in their pre-existing authorization of limited sports gambling conduct. In Congress's evident judgment, that limited conduct had insufficient adverse impact on interstate commerce compared to the problems posed by foreseeably more widespread state-authorized commercial sports gambling. This fully-sufficient relationship between PASPA's limited exemptions and the problems PASPA targeted made sense, politically and otherwise, both at the time of the statute's enactment and now. The pre-existing intrastate gambling practices were not then or now a national problem. Congress plainly has constitutional authority to take action to forestall a perceived impending national problem affecting interstate commerce without prohibiting every conceivable variation of the problematic behavior.[6] Therefore, the Supreme Court erred by failing to affirm the en banc Third Circuit's ruling that PASPA is constitutional. *Murphy* loosed a virus-like spread of commercialized gambling authorization in states, all of which have failed to provide remedies for the individual, family, business, and societal harms and costs—harms and costs sure to follow, sure to impair interstate commerce and the national economy, and sure to outweigh the industry-promised boost in tax revenues which myopic or gullible state legislators hoped for but which never match the commercialized gambling lobbyists' sales pitches.

The *Murphy* Court, and others, have said the anti-commandeering doctrine flows from the Tenth Amendment and how the Constitution structures the federal-state government relationship, asserting that Congress cannot compel the states to affirmatively or directly enact or enforce a federal *regulatory* program.[7] *Murphy* expands this concept to say that Congress cannot compel states to prohibit an activity either if the activity falls within the traditional scope of states' police powers.[8] But not only does PASPA *not* impose an affirmative burden on

5. *See, e.g.*, Brooks v. United States, 267 U.S. 432, 436 (1925).

6. *See id.* at 436–37.

7. *Murphy*, 138 S. Ct. at 1476 (citing New York v. United States, 505 U.S. 144, 177 (1992); Printz v. United States, 521 U.S. 898, 919 (1997)).

8. *Id.* at 1478.

states to act in some way, PASPA does not regulate permitted conduct. It flatly prohibits conduct, rather than permitting and regulating it.[9] And, since the conduct proscribed—commercialized sports gambling—plainly implicates interstate and foreign commerce in an era when gambling, as a business (and gambling-related funds transfer), usually takes place via means of interstate and foreign commerce, commercialized sports gambling across state and national borders is *not* conduct traditionally within the scope of states' police powers. The *Murphy* majority may have been thinking of usually-intrastate social sports wagers or charitable tourney betting pools as activities admittedly within states' police powers to allow or prohibit; but, ever since the advent of the telegraph, telephone, and the internet, sports gambling businesses have not respected state boundaries.

Moreover, PASPA played a part in a series of federal laws addressing commercialized gambling which, together, seek to limit or have the effect of limiting, the use of interstate and foreign commerce as vehicles:

(i) for organized, and other, criminal activity;
(ii) for non-productive or illicit wealth transfers;
(iii) for tax evasive activities;
(iv) for thwarting state laws prohibiting, limiting, or regulating commercial gambling; and
(v) which increase wealth disparity, impose costly mental and other health burdens, and harm family cohesion.

These federal laws, in addition to PASPA, include the Johnson Act (regarding gambling machine transportation in interstate commerce);[10] the Interstate Horseracing Act of 1978;[11] the Sports Bribery Act;[12] the Gambling Ship Act;[13] the Wire Act;[14] statutes addressing activities involving lottery tickets;[15] the Travel Act;[16] the Interstate Transportation of Wagering Paraphernalia Act[17] the Illegal Gambling and Business Act;[18] the Racketeer and Corrupt Organizations (RICO) Act;[19] federal wagering excise tax, registration, and evasion laws;[20] and the Unlawful Internet Gambling Enforcement Act (UIGEA).[21] None of these other statutes do what PASPA did. PASPA did not do what these other statutes do. Some regulate permitted conduct; others, like PASPA, simply prohibit conduct. But, together, these laws serve to protect interstate and foreign commerce and national revenues while advancing the limiting goals set out at (i)-(v), above.

9. *See id.* at 1474.
10. 15 U.S.C. §§ 1171–1178.
11. *Id.* §§ 3001–3007.
12. 18 U.S.C. § 224.
13. *Id.* §§ 1081–1083.
14. *Id.* § 1084.
15. *Id.* §§ 1301–1304, 1307.
16. *Id.* § 1952.
17. *Id.* § 1953.
18. *Id.* § 1955.
19. *Id.* §§ 1961–1968.
20. *E.g.*, 26 U.S.C. §§ 4401, 4411, 4412, 4421, 7201, 7203, 7272.
21. 31 U.S.C. §§ 5361–5367.

Murphy created a yawning gap in this protective structure which, now, the monied interests of the commercialized gambling industry quickly have exploited.

II. PASPA, IN CONTEXT, AND NEW JERSEY'S RENEGADE CONDUCT

PASPA, at 28 U.S.C. § 3702 (1) and (2), basically prohibits (i) states and (ii) persons, respectively, from the same conduct (*i.e.*, from conduct to advance commercial sports gambling), with subsection (1) more broadly extending this prohibition to states' "licens[ing] or authoriz[ing]" sports gambling (which non-state persons do not do, anyway, other than as agents of the state).[22] Earlier, the Supreme Court stated that

> Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other states from the state of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce.[23]

PASPA's broad prohibition nonetheless has exclusions and limits, if narrow.[24]

As enacted, PASPA excluded from § 3702 prohibition any state's then-existing sports gambling scheme and parimutuel wagering on animal racing or jai-alai games.[25] Although New Jersey then had no existing state-licensed or -authorized sports gambling schemes, PASPA also provided that New Jersey, within one year of PASPA's enactment, could evade the prohibition *if* the state chose within that period to enact a casino-based (*i.e.*, commercial) sports gambling scheme.[26] (At that time in New Jersey, only Atlantic City had legally-operating casinos.) New Jersey then elected not to timely enact such a scheme.

Nineteen years later, however, and despite the fact that commercial gambling had proved a spectacular failure for rehabilitating Atlantic City,[27] New Jersey amended its state constitution in 2011 so that its legislature could "authorize by law" sports gambling at casinos and racetracks.[28] Nothing in that amendment's language *overtly* indicated any effort by New Jersey to defy either PASPA or the U.S. Constitution's Supremacy Clause, even if that may have been the amendment's purpose. Likewise, nothing in the amendment indicates it purported to expand or contract the meaning of "authorized by law" depending upon how federal or other law might change in the future. Rather, the amendment's grant of authorizing power, by its terms, must be read, to avoid constitutional conflict, as allowing "authorizing by law" in accordance with the state of the law in 2011—which means the New Jersey legislature's post-amendment actions

22. 28 U.S.C. § 3702(1)–(2).

23. Brooks v. United States, 267 U.S. 432, 436–37 (1925).

24. S. REP. NO. 102-248, at 9–10 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 3553, 3560–61.

25. 28 U.S.C. § 3704(a).

26. *Id.* § 3704(a)(3).

27. Res ipsa loquitor. The rehabilitation failure is also memorialized in a song, "Look What They Did," by the band Low Cut Connie. Low Cut Connie, *Look What They Did*, YOUTUBE (Feb. 17, 2020), https://www.youtube.com/watch?v=DEDKC3-_J4Y [https://perma.cc/5PXH-8LHH].

28. N.J. CONST. art. IV, § 7, paras. 2(D) & (F).

must at least comport with PASPA as it then existed (which is how it existed both when *Murphy* was decided, and now). This is consistent with understanding PASPA to have drawn a line allowing a few states to continue to rely upon the commercial sports gambling schemes they then had in existence and not allowing future ones not then in existence (including ones not even imagined in 1992).[29]

The 2011 amendment to New Jersey's Constitution promised that state legislative action following the amendment's language would necessarily affect interstate commerce. This is because the amendment restricts the state legislature from authorizing gambling "on a college sport or athletic event that takes place in New Jersey or on a sport or athletic event in which any New Jersey college team participates."[30] The only rationale for these New Jersey-linked exclusions would be to avoid corruption, point-shaving, fixing, inside-information selling, and like misbehavior corrosive of college sports integrity as regards New Jersey college teams or their games; however, *this necessarily shifts the burden* of commercial sports gambling corruption (i) to out-of-New-Jersey college events (and their participants and interested parties, so long as no New Jersey colleges are playing) and (ii) to in-state games involving travelling, non-New-Jersey college teams, as well as (iii) to non-college non-New Jersey teams that happened to have events in New Jersey. Thus, the 2011 amendment guaranteed an impact on interstate or foreign commerce. The New Jersey statute at issue in *Murphy* adopted the state constitution amendment's limitations and, so, likewise would impact interstate and foreign commerce had PASPA's prohibitions not been in effect, and the federal district court's injunction issued when the NCAA and professional sports leagues challenged the New Jersey enactment. New Jersey's self-centered scheme to protect only its own colleges aims to hurt other states and the federal system. Borne of greed, it is precisely the kind of conduct the drafters of the U.S. Constitution sought to squelch by giving Congress authority over interstate and foreign commerce and by giving federal legislation supremacy over such state efforts. "The control of Congress over interstate commerce is not to be limited by state laws."[31]

The context of the problems PASPA addresses and the effect and implications of commercial sports gambling without PASPA underscores the wisdom of having a Constitution whose Commerce[32] and Supremacy[33] Clauses provide authority for the federal government to prohibit a state from enacting self-serving

29. *See* Off. of the Comm'r of Baseball v. Markell, 579 F.3d 293, 304 (3d Cir. 2009).

30. N.J. CONST. art. IV, § 7, paras. 2(D) & (F).

31. United States v. Hill, 248 U.S. 420, 425 (1919); *see* United States v. Darby, 312 U.S. 100, 114, 124–25 (1941); *see also* Fernandez v. Wiener, 326 U.S. 340, 362 (1945). As the constitutional convention drew to a close, James Madison declared he "was more and more convinced that the regulation of Commerce was in its nature indivisible and ought to be wholly under one authority." 2 Farrand, The Records of the Federal Convention of 1787 (1911), p. 625. In 2019, the Supreme Court said in Tennessee Wine and Spirits Retailers Ass'n. v. Thomas that pursuant to "history" and "established case law," the Commerce Clause by its own force restricts state protectionism. 139 S. Ct. 2449, 2459-2461 (2019). Commercially-discriminatory state laws only can be sustained if shown to be "narrowly tailored to advanc[e] a legitimate local purpose." *Id.*, at 2461. The New Jersey enabling statute at issue in Murphy was neither, especially given its shifting of harms and risks to other states.

32. U.S. CONST. art. I, § 8, cl. 3.

33. *Id.* art. VI, cl. 2.

legislation that attempts to advance one state's commercial interests at the expense of other states; that attempts to shift the costs of harmful conduct to other states and to the federal government; and that has practical effects including eventual corruption of federalism, widespread economic and social harm, and loss of individual freedom.

III. COMMERCIALIZED SPORTS GAMBLING'S BUSINESS MODEL AND EVASION OF LIABILITY FOR HARMS CONTRIBUTED AND CAUSED[34]

Legalization of commercial sports gambling is sought, chiefly, by the profit-seeking groups which comprise the corporate gambling industry, an industry which largely speaks through its' industry-funded public relations shill, the American "Gaming" Association (more properly the American Gambling Association, the name that should be used, except the industry seeks to evade the earned disrepute associated with commercial gambling and its inherent predatory nature).[35] A key component of the industry's strategy has been to use (as stalking horses or, to use a gambling term, as "beards") legislators unwilling to limit spending or to otherwise improve tax structures in revenue-strapped states, like New Jersey. State governments that partner with the commercial gambling industry are pleased, of course, when voters and judges fail to distinguish between commercial gambling and its other, less harmful forms. The distinction, however, is critical.

Commercialized sports gambling differs from social wagers on games. It differs from friendly office pools. It differs from season-long fantasy sports leagues that focus on athletic performance rather than prize. It differs from penny-ante poker and from most charitable gambling. The foregoing types of non-commercial gambling seldom pose significant harm to individuals or communities.[36] The differences between commercial sports gambling and non-commercial gambling are fundamental and significant.

34. Support for this Part rests upon the author's years of personal experience as an Assistant U.S. Attorney investigating, prosecuting, and forfeiting assets of illegal commercialized sports and non-sports gambling entities, operators, and facilitators. *See generally* John Warren Kindt, *United States International Gambling Report*, *in* RESEARCH EDS. DR. DIR., GAMBLING WITH NATIONAL SECURITY, TERRORISM, AND MILITARY READINESS, U.S. INTERNATIONAL GAMBLING REPORT, at xxxvii–xlix, cxi–cxx (J. Kindt, ed., 2009).

35. For decades now, "gaming" primarily refers to playing computer or board games that seldom, if ever, involve "gambling" with assets having real-world economic value, yet commercialized "gambling" (not gaming) is what the American "Gaming" Association seeks to advance. *See* Dustin Gouker, *Chief Justice Roberts Once Filed a Brief for the Casino Lobby, in Interesting Twist for NJ Sports Betting Case*, LEGAL SPORTS REP. (July 7, 2017), https://www.legalsportsreport.com/14581/scotus-aga-nj-sports-betting/ [https://perma.cc/RJ7N-39X5]; *Advocacy in Action*, AM. GAMBLING ASS'N, https://www.americangaming.org/advocacy/ (last visited July 26, 2021) [https://perma.cc/D8XQ-E3TZ].

36. Samantha Gluck, *Types of Gamblers: Compulsive Gamblers and More*, HEALTHYPLACE, https://www.healthyplace.com/addictions/gambling-addiction/types-of-gamblers-compulsive-gamblers-and-more (Apr. 23, 2019) [https://perma.cc/S2JC-JLR5]; Jackie Joukhador, Fiona MacCallum & Alex Blaszczynski, *Differences in Cognitive Distortions Between Problem and Social Gamblers*, PSYCHOLOGICAL REPORTS, 2003 June 1 (3 Pt 2): 1203-14; L. Lieberman, *A Social Typology of Gambling Behavior* (N.Y. State Ofc. of Mental Health, contract #C-001361) (New York 1988) National Council on Compulsive Gambling, pp. 44-49; *see also Gam-*

Like all commercial gambling (and unlike non-commercial gambling), commercial sports gambling's business model seeks:

[1] to get as many people as possible,
[2] to gamble as often as possible,
[3] for as long as possible, and
[4] to bet as much as possible.

That's it. Anyone telling you otherwise is lying, disingenuous, or simply does not understand how commercial gambling operates. To the extent the commercial sports gambling industry can advance the above four overriding goals, it profits since it generally takes a percentage-based fee, or cut, of all wagers placed (this cut is often termed the "vig," the "vigorish," the "rake," a "commission," or other localized euphemism) and since, having usually balanced incoming funds on either side of an athletic event by adjusting odds or point spreads, it simply pays winning bettors with funds from losing bettors. Advancing the four goals drives industry revenue.

The industry uses a public relations-driven facade and sophisticated marketing techniques to obfuscate its emphasis on these four goals. Vapid claims of industry interest in promoting so-called "responsible gambling behavior," together with the industry's spending huge sums of lobbying and litigating money—money, in part, taken by design from addicted members of the gambling public—all seek to legalize ever-more commercial gambling, but *it also tends to obfuscate a shocking truth: today, the commercial gambling industry entirely avoids paying for its share of the social and individual harms it causes*.

As expanded commercial sports gambling is increasingly legalized because PASPA has been jettisoned and not replaced, the commercial sports gambling industry's wholesale evasion of paying for its contributory share of the significant and increasing harms it causes can be expected to continue. Virtually every other business in America owes a duty of reasonable care to their patrons. But, so far, legislatures and courts, blinded by the industry's generally-inflated promises of tax revenues, and misled or manipulated by lobbyists and lawyers always able to outspend opponents, have shielded the commercial gambling industry from paying its fair share for the injuries it inflicts. *None* of the recent state enactments nor proposals to legalize commercialized sports gambling offer to end this hidden immunity—an immunity that is unavailable to Americans not in this favored class.

Similarly, *none* of the recent state enactments or proposals to legalize commercialized sports gambling require or even nudge industry operators toward making some reliable pre-wagering-acceptance ascertainment that the bettor, cognitively, has a "minimal working set of executive functions."[37] Such requirements would help ensure that the commercialized bookmaker cannot take unfair

bling: Harmless Fun or a Problem with a Dangerous Addiction?, ARIZ. FOOTHILLS MAG., https://www.arizonafoothillsmagazine.com/features/features/7769-gambling-harmless-fun-or-a-problem-with-a-dangerous-addiction.html (last visited July 26, 2021) [https://perma.cc/WN5K-ZL6J].

37. Recent comprehensive work in the area of neuroscience and philosophy has posited that moral and criminal responsibility for conduct properly turns on "whether a person has the capacities to review [a] decision

advantage of the mentally-impaired—for example, individual patrons who are senile, feebleminded, developmentally challenged, disoriented, drunk, drugged, addicted, immature, mentally ill, culturally confused, financially desperate to the point of irrationality, suffering from Parkinson's Disease,[38] or a person "otherwise at a point at which it's simply unfair to take advantage of him any longer."[39] Today, especially when bets are made over the Internet (as they increasingly are), via telephone, or otherwise not made in an in-person setting (so that a visual assessment of the bettor's condition can be made), these and similar impairments may be masked.

In layperson's terms, the commercial gambling industry is made up of corporate groups who each, individually, serve as "the house" or, collectively, in sports gambling terminology, as "bookies."[40] Corruption and bad public policy choices help explain why these third parties (to what, otherwise, would be fee-free peer-to-peer betting) are shielded by law from contributory liability for the harms they encourage, cause, induce, procure, aid, and abet—harms from which they often richly profit.[41] Through public relations-driven misdirection in marketing, the commercial sports gambling industry expects the American public to continue to be unaware of this flaw in liability law. Expanding commercial gambling, whether on sports or otherwise, without ending the industry's immunity from financial responsibility for harms it causes, ought to be a non-starter. Commercial sports gambling is not a "no-harm, no foul" enterprise; every sports fan knows that harmful fouls rightly result in penalties. Federal legislation such as PASPA that has the effect of limiting the spread of an interstate industry that regularly escapes civil liability for contributing to individual, family, and societal

and inhibit it," with responsibility dependent on the person's brain having "a minimal working set of executive functions (MWS) . . . [which] played the appropriate role in generating the action—or [which] should have done so. . . ." WILLIAM HIRSTEIN, KATRINA L. SIFFERD & TYLER K. FAGAN, RESPONSIBLE BRAINS: NEUROSCIENCE, LAW, AND HUMAN CULPABILITY 54, 75–90 (2018). Mere consciousness is not enough. *Id.* at 91–114. There seems no persuasive reason why this MWS standard should not also apply to assess in advance whether a gambler is "responsible," which is the kind of patron that the commercialized gambling industry often publicly asserts is what it wants. *But see* NATASHA DOW SCHULL, ADDICTION BY DESIGN: MACHINE GAMBLING IN LAS VEGAS (2014) (deflating the industry's claims).

38. Pathological gambling is often reported as a compulsive behavior associated with Parkinson's disease. *See* Gabriella Santangelo, Paolo Barone, Luigi Trojano & Carmine Vitale, *Pathological Gambling in Parkinson's Disease. A Comprehensive Review*, 19 PARKINSONISM & RELATED DISORDERS 645, 646 (2013).

39. Written Testimony of Michael K. Fagan to the U.S. House Financial Services Committee 4 (July 21, 2010), https://archives-financialservices.house.gov/Media/file/hearings/111/Fagan%2007-21-10.pdf [https://perma.cc/9PTA-W8WL] ("Internet gambling operators not only *cannot* assess these characteristics among their clientele, in my experience *they don't care to*, preferring to prey on the weak and the strong equally.") (emphasis in original).

40. *See Bookie*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/knowledge/other/bookie/ (last visited July 26, 2021) [https://perma.cc/2MPN-KTVP].

41. *See* John Rosengren, *How Casinos Enable Gambling Addicts*, THE ATL. (Dec. 2016), https://www.theatlantic.com/magazine/archive/2016/12/losing-it-all/505814/ [https://perma.cc/SA5C-BJVQ]; Fagan, *supra* note 39, at 6; Sridhar Narayanan & Puneet Manchanda, *An Empirical Analysis of Individual Level Casino Gambling Behavior* (Stanford Graduate School of Business Research Paper Series, Working Paper No. 2003 (R1), 2011), https://www.gsb.stanford.edu/faculty-research/working-papers/empirical-analysis-individual-level-casino-gambling-behavior [https://perma.cc/2NT9-RHGJ].

harms is surely within Congress's Commerce Clause power, as well as its Necessary and Proper Clause and Taxation Clause powers.[42] *Murphy*'s conclusion that the anti-commandeering principle precludes this exercise of congressional power fails upon analysis.

IV. ANALYZING THE MURPHY MAJORITY OPINION AND ILLUMINATING WHAT IT OVERLOOKED

Dismantling PASPA, Justice Alito began his majority opinion in *Murphy* with two introductory sentences, followed by a six-part (with several subparts) exegesis.[43] The opinion's short introduction gave no hint that the entire statute would be eviscerated. Rather, Justice Alito described the case as presenting a more limited controversy: he said New Jersey wanted to legalize commercialized sports gambling at existing non-sports gambling sites, but federal law (PASPA) made it (civilly, not criminally) unlawful for a state to "authorize" sports gambling "schemes."[44] Thus, citing only 28 U.S.C. § 3702(1) as the prohibitory provision of PASPA that was at issue, the majority opinion bluffed that the Court only "must decide whether this provision is compatible with the system of 'dual sovereignty' embodied in the Constitution."[45]

As the majority played its' hand, however, the opinion's six Roman numeral-numbered segments went far beyond merely deciding the constitutional compatibility of § 3702(1). In so doing, the majority ignored its oft-stated obligation to decide only the question before it and to do so only on grounds necessary to the decision. Rather, as the majority opinion expanded, the majority engaged in wholesale speculation about what a long-past Congress would have wanted; undervalued or ignored the Constitution's express grant to the federal government of authority to regulate interstate and foreign commerce; and grossly

42. U.S. CONST. art. I, § 8, cl.3 (Commerce Clause); *id.*, at cl.1 (Taxing Clause); id., at cl.18 (Necessary and Proper Clause).

43. Murphy v. NCAA, 138 S. Ct. 1461, 1468 (2018). Justice Alito, generally regarded as conservative, wrote the majority opinion joined in full by Justices Thomas, Gorsuch, Chief Justice Roberts (all also generally regarded as conservative), Justice Kennedy (frequently labelled a moderate), and Justice Kagan (generally thought of as liberal). *See id.* Justice Thomas added an approximately three-page concurring opinion largely devoted to a critique of the Court's severability doctrine, urging a re-examination of modern severability precedents which he perceived as exceeding "longstanding limits on the judicial power." *Id.* at 1487 (Thomas, J., concurring). Justice Breyer (also regarded as liberal) filed an opinion concurring in part and dissenting in part. *See id.* at 1488 (Breyer, J., concurring). Given Justice Breyer's fence-sitting, one could claim the Court decided *Murphy* by a 6-3, 7-2, or 6 ½ to 2 ½ vote. Justices Ginsburg and Sotomayor (generally regarded as liberals, and joined in part by Justice Breyer) dissented in a two-page opinion. *Id.* at 1488–89 (Ginsburg, J., dissenting). Whether Chief Justice Roberts might have recused himself (he did not) remains a matter of controversy among some as, prior to his appointment to the Court, while working at the law firm Hogan & Hartson, he represented the American Gaming Association ("AGA"). *See* Gouker, *supra* note 35. According to Frank Fahrenkopf, then-CEO and President of the AGA, Roberts "ate lunch every day" and "was always there" at the table with Fahrenkopf. Transcript, p.3, of Aug. 1, 2005, Interview with Frank Fahrenkopf, on "Face-to-Face with Jon Ralston," KLAS-TV, Las Vegas, NV (on file with author). Fahrenkopf, while heading the casino lobbying group, campaigned for the confirmation of (now-Chief) Justice Roberts. Ann McFeatters, "President pleased by response to nominee; Spokesman: Senate likely to move ahead," Toledo Blade, July 22, 2005 (article on file with author).

44. *Murphy*, 138 S. Ct. at 1468.

45. *Id.*

understated the proven social, economic, and medical harms flowing from commercialized gambling (whether on sports or on non-sports contingencies, and whether the commercial gambling is or is not state-authorized).[46]

By organizing his opinion as he did, Justice Alito gave it a veneer of logic. One may doubt that purposeful deceit was his aim, yet that is what results from an opinion that overlooks or discounts aspects both of commercialized gambling businesses and of the Federal Constitution. This Article illuminates those features which, properly weighted, produce a different result than that reached by the *Murphy* majority.

Part I of the *Murphy* majority opinion provides a two-subpart historical overview of gambling and its legal status in the United States and, particularly, in New Jersey.[47] Subpart A covers older history leading to Congress's enactment in 1992 of PASPA.[48] The subpart references, *inter alia*, then-New Jersey Senator Bill Bradley's 1992 law review article[49] explaining the policy concerns leading to PASPA, as well as the *amici curiae* brief[50] of Stop Predatory Gambling, et al.

Subpart B then describes how, at about the same time PASPA was enacted to limit commercialized sports gambling, a trend in many states had allowed for increasing legalization of non-sports gambling.[51] By this point in the *Murphy* majority opinion, it is evident that the Court was failing, explicitly, anyway, to distinguish between commercialized gambling and social gambling. Most of the opinion's Subpart B recounts the basics of PASPA's prohibitions and how, from 2011 on, New Jersey legislators and litigators sought to evade how PASPA precluded most states[52] facilitating or authorizing "by law or compact" any sports gambling scheme.[53]

46. *See id.* at 1476, 1482–84.

47. *Id.* at 1468–73.

48. *Id.* at 1468–70.

49. *Id.* at 1469–70 n.16; Bill Bradley, *The Professional and Amateur Sports Protection Act – Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORT. L. 5, 7 (1992).

50. This brief spoke on behalf of a wide array of civil policy, family, and religious organizations. *See* Brief for Stop Predatory Gambling et al. as Amici Curiae Supporting Respondents, Murphy v. NCAA, 138 S. Ct. 1461 (2018) (Nos. 16-476 & 16-477), https://www.scotusblog.com/wp-content/uploads/2017/10/2017-SUBMITTED-BRIEF-16-476-477-bsac-SPG.pdf [https://perma.cc/P5BK-2L6M]. Stop Predatory Gambling also has, on its website, a comprehensive whitepaper analyzing reasonably-expected harms stemming from expanded commercialized sports gambling. STOP PREDATORY GAMBLING, REALISTICALLY-UNRESOLVABLE FORESEEABLE PROBLEMS WHICH WILL ARISE FROM EXPANDED LEGALIZED COMMERCIALIZED SPORTS BETTING (2018), https://www.stoppredatorygambling.org/wp-content/uploads/2018/06/Realistically-Unresolvable-Foreseeable-Problems-Which-Will-Arise-from-Expanded-Legalized-Commercialized-Sports-Betting.docx.pdf [https://perma.cc/N8GC-AK82].

51. *See Murphy*, 138 S. Ct. at 1470–73.

52. *See id.* at 1471. A few states' pre-existing authorized commercialized sports gambling activities were "grandfathered" in by PASPA, and one state, New Jersey, was given a year after PASPA's effective date to choose whether or not to add sports gambling to its already-existing authorized non-sports commercialized gambling. 28 U.S.C. § 3704(a)(1)–(3). New Jersey did not timely add sports gambling, a position entirely consistent with its Senator's sponsorship of PASPA. *See Murphy*, 138 S. Ct. at 1471.

53. Section 3702(1) of PASPA made it unlawful for a state or its subdivisions "to sponsor, operate, advertise, promote, license, or authorize" a sports gambling scheme. 28 U.S.C. § 3702(1), *declared unconstitutional by* Murphy v. NCAA, 138 S. Ct. 1461 (2018). Section 3702(2) made it unlawful for "a person to sponsor, operate, advertise, or promote" such a sports gambling scheme operated pursuant to the law or compact of a governmental entity. 28 U.S.C. § 3702(2). Thus, the statute aimed at persons' schemes that made a business of sports gambling

Subpart B of Part I also describes the series of federal district and appellate court opinions which, eventually, led to the Supreme Court's granting review so that it could decide "the important constitutional question presented" of whether PASPA's prohibition of state authorization of sports gambling schemes violated the anticommandeering principle,[54] a principle unmentioned in the text of the U.S. Constitution and not discerned by the Court until 1992, over two hundred years after the adoption of the Constitution.[55]

Part II, in three subparts, considered the litigants' arguments and that of the United States, whose input was sought because the constitutionality of one of its statutes was at issue.[56] To the likely chagrin of the NCAA and sports leagues defending PASPA, the "United States expressly concede[d] that the provision is unconstitutional if it means what petitioners claim."[57] The respondents, too, did not contend PASPA was constitutional if its prohibition of state "authorization" of sports gambling prohibited repealing state laws banning sports gambling. The Supreme Court's majority adopted this functional definition of "authorization," saying that whether "a State completely or partially repeals old laws banning sports gambling, it 'authorizes' that activity."[58] Thus viewed, the PASPA prohibition violated the anticommandeering principle, said the majority.

In Part III, the majority explained its view that the anticommandeering principle articulated in *New York v. United States*[59] was important for several reasons, including that (1) it balanced power in a way to reduce risks of abuse from federal and state governments against one another; (2) it promoted political accountability by clarifying which government bore responsibility for regulations; and (3) it protected states from bearing federal regulatory program costs that Congress might, otherwise, shift to states.[60] As will be seen, whatever their merit in the contexts of the *New York* and *Printz* cases, none of these three reasons carry persuasive weight in the PASPA context.[61] By merely stating the reasons, the Court failed to analyze the *Murphy* case's facts to determine what weight the stated reasons did or did not have in the commercialized sports gambling context. This lack of analysis seems common when persons fail to closely examine how commercialized gambling's business model differs from fee-free social peer-to-peer gambling.

The majority opinion's Part IV flatly claims that PASPA's prohibiting state authorization of sports gambling violated the anticommandeering rule, asserting that "Congress cannot issue direct orders to state legislatures" whether the orders

in part by prohibiting states from facilitating or authorizing such businesses. Conduct of persons operating sports gambling business schemes not authorized by state law typically could be reached and sanctioned by other laws, depending upon the interstate or intrastate nature of the conduct.

54. *Murphy*, 138 S. Ct. at 1471–73.

55. *See* New York v. United States, 505 U.S. 144, 162–70 (1992); *see also* Printz v. United States, 521 U.S. 898, 935 (1997).

56. *Murphy*, 138 S. Ct. at 1473–75.

57. *Id.* at 1473.

58. *Id.* at 1474.

59. 505 U.S. 144, 149 (1992).

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

61. *See infra* notes 65–77 and accompanying text.

affirmatively command or preclude state action.[62] Part IV distinguishes prior decisions that, according to the sports leagues, supported PASPA's constitutionality. Said the majority, "none of the prior decisions . . . concerned laws that directed the States either to enact or to refrain from enacting a regulation of the conduct of activities occurring within their borders."[63] Of course, that observation overlooks entirely that the sports gambling New Jersey proposed to enable would (and, now, does) involve and affect conduct both within and without New Jersey's borders.

In what Justice Alito must have thought was a rhetorical flourish, he concluded that PASPA's prohibition amounted to "state legislatures [being] put under the direct control of Congress" in a way such that "[a] more direct affront to state sovereignty is not easy to imagine."[64] This rhetoric, seemingly meant to emphasize that federalism requires this result, entirely overlooks important distinguishing features of the Federal Constitution.

First, the Constitution expressly gives Congress the power to regulate interstate and foreign commerce.[65] Thus, provided that Congress acts in matters inarguably involving interstate and foreign commerce—as does Internet-era commercialized gambling, typically—nothing in the text or structure of the Constitution precludes or limits Congress from regulating any person or entity, including state and local governments, as to their conduct relating to that interstate or foreign commerce. To conclude that some unwritten aspect of governmental structure keeps Congress from exercising its explicit powers to prevent a state legislature's purposeful frustration of federal policy elevates justices' personal opinions over the plain and unlimited language of the law. States can allow, regulate, or prohibit entirely intrastate commercialized gambling, and Congress lacks power to compel any person or entity (including nonfederal governmental entities) regarding that entirely intrastate activity, unless the activity has a more than de minimus impact on interstate or foreign commerce. If this latter principle did not exist, the federal Civil Rights Act of 1964[66] or the Americans with Disabilities Act of 1990[67] seemingly would not validly prohibit racially discriminatory or disability-based discriminatory enactments by state legislatures, for example.

Second, the *Murphy* majority's supposed shock at Congress's "direct affront," via PASPA, to state sovereignty ignores that the third branch of federal government—the U.S. Supreme Court and its subordinate courts—with some frequency issues various orders telling state and local legislatures what they may and may not do, and does so based upon federal law.[68] For the *Murphy* opinion

62. *Murphy*, 138 S. Ct. at 1478.
63. *Id.* at 1479.
64. *Id.* at 1478.
65. U.S. CONST. art. I, § 8, cl. 3.
66. 42 U.S.C. § 2000e; *see* Heart of Atlanta Motel v. United States, 379 U.S. 241, 243 (1964); Katzenbach v. McClung, 379 U.S. 294, 295 (1964).
67. 42 U.S.C. § 12101.
68. *See Murphy*, 138 S. Ct. at 1478.

to say Congress cannot do this but federal courts can, without the Court's providing some convincing explanation of the difference, undercuts the opinion's persuasiveness. Yes, the judiciary's role is to interpret the Constitution,[69] but Congress has no less important a role in doing so when it enacts laws in accord with the express language of the Constitution. Both of these branches of the federal government must have the power, in their appropriate contexts, to direct non-federal governments to not frustrate lawful federal policy just because a non-federal government disagrees with that lawful policy.[70]

Third, the *Murphy* majority completely avoids discussion of the Commerce Clause,[71] and then misapprehends commercialized gambling's structure and impact. This latter flaw is seen when Justice Alito writes that prior decisions that did not find wrongful commandeering of state legislatures by federal statutes did not involve laws directing regulation of "the conduct of activities occurring within their borders."[72] That may be true of those prior decisions, but the commercialized sports gambling activity New Jersey proposed in its repealing legislation did not solely involve "activities occurring within [its] borders."[73] Sports gambling enterprises do not limit themselves to intrastate wagering, nor do their financial transactions or communications occur within a single state, nor do they accept wagers only on sporting activities occurring within a single state. The conduct and impact of commercialized sports gambling extends beyond a single state's borders. Congress's power to direct a state governmental entity, as with any individual or private entity, whether and how such interstate and foreign commerce may be conducted falls squarely within the plain meaning of the Commerce Clause.[74]

The *Murphy* majority's discussion, in Part V, of the Supremacy Clause is thus somewhat misdirected. That clause has a role to play, of course, when federal and state laws conflict and were enacted within each sovereign's appropriate power.[75] But recall that while federalism provides a means for two sovereigns to coexist and function as one nation, the Federal Constitution specifically delineates that the two sovereigns, federal and state, are *not* equal in every theater of governmental activity. States retain much sovereign power but, upon choosing to join the Union, necessarily have given up that authority which the Federal Constitution expressly gives to our national government.[76] Where the Federal Constitution has not given, or not clearly given, authority to govern on a subject to the federal government, the states retain that sovereign power—but with respect to matters of interstate and foreign commerce, regulation thereof belongs

69. Marbury v. Madison, 5 U.S. 137, 177 (1803).

70. The executive branch also has constitutional power to compel state compliance with lawful federal policy, as shown by obvious examples such as the Civil War and, much later, the presence of federal troops ensuring admission of minorities to state-segregated universities. U.S. CONST. art. VI, cl. 2.

71. *Id.* art. I, § 8, cl. 3.

72. *Murphy*, 138 S. Ct. at 1479.

73. *Id.*

74. Champion v. Ames (The Lottery Case), 188 U.S. 321, 363–64 (1903).

75. U.S. CONST. art. VI, cl. 2.

76. *Id.*; *see* New York v. United States, 505 U.S. 144, 156–57 (1992).

to the federal government by virtue of Article I, section 8, clause 3.[77] Whatever residual power states may retain to regulate interstate and foreign commerce when the federal government has *not* done so is of no consequence when the federal government *has* enacted laws expressly setting out when, where, how, and whether interstate and foreign commerce are or are not to be conducted. Plainly, PASPA is such a law.

Of course, state sovereignty is "inviolable" where it properly exists; but, where the supreme law of the Federal Constitution has assigned a responsibility of governance to the national government, that state sovereignty is also "limited."[78] Justice Alito mentions this fact of limitation in passing and never explains or recognizes the importance of limitation in matters plainly assigned to the federal government. While it is true that the Federal Constitution does not expressly say that Congress can order state legislatures what they may not authorize, that same Constitution does expressly assign governance of interstate and foreign commerce to the national government.[79] It did so for good cause, the nation having experienced under the Articles of Confederation years of internecine commercial warfare, taxing and customs duties competition and confusion, and business-harming inefficiency.[80] The only sensible construction of any constitution's clauses is that they grant power adequate to the measures allocated. Hence, Congress must have adequate power to restrict renegade state legislatures from eroding the expressly-allocated power of the federal government over matters, such as commercialized sports gambling, unquestionably involving and affecting interstate and foreign commerce.

The wisdom of recognizing that federal legislative powers do, and must, permit Congress to limit state legislatures from authorizing conduct that contravenes properly-enacted federal policy seems to have escaped the *Murphy* majority. This can be seen upon consideration of a minor variation on how New Jersey sought to enact its repeal of laws banning commercialized sports gambling. The Court considered only that the New Jersey repealer law authorized private individuals and entities to operate commercialized sports gambling businesses.[81] *Murphy*'s majority concluded that Congress could directly regulate and prohibit commercialized sports gambling schemes operated by individuals but could not "'regulate state governments' regulation' of their citizens."[82] But if New Jersey's repealer law ("authorization") also allowed for the state, itself, to operate commercialized sports gambling schemes (rather than, or in competition with, private individuals and entities—and, in fact, New Jersey's repealer may allow the state to so act), the state would be acting, functionally, in the same role as a private

77. *See* U.S. CONST. art. I, § 8, cl. 3; *New York*, 505 U.S. at 157–58.

78. *Murphy*, 138 S. Ct. at 1475.

79. *See* U.S. CONST. art. I, § 8, cl. 3.

80. *See generally Economic and the Articles of Confederation*, HIST. CENT., https://www.historycentral.com/NN/economic/articleofconfed.html (last visited July 26, 2021) [https://perma.cc/6GNL-VR5E]; Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941) (discussing the history of the Commerce Clause's adoption).

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

82. *Id.* at 1485 (quoting *New York*, 505 U.S. at 166).

individual or entity and just as much in derogation of lawful federal policy.[83] This being so, it is unsurprising that Congress must have the constitutional power to protect federal sovereignty by making it civilly unlawful for a state to authorize conduct by anyone—the state itself or private individuals and entities—to engage in conduct designed to defeat lawfully-enacted federal policy on matters of interstate or foreign commerce, whether the policy pertains to commercialized sports gambling schemes; or, for further example, to dealing in addictive narcotics or presumably less-harmful controlled substances such as marijuana or psilocybin mushrooms; or to production, shipment, storage, and use of environmentally-hazardous substances and chemicals (and resultant pollution); or to administration of immigration laws, or of tax and tariff laws; or to the protection of minorities from discrimination in housing, voting, employment; or to myriad other federal policies that involve and affect interstate and foreign commerce. For the Supreme Court not to understand the necessity for the federal branches of government to act within their respective spheres to preclude, when necessary, state and local governments from authorizing themselves and/or others from engaging in state-authorized frustration of federal policy is hardly some novel or unimaginable idea. For Justice Alito to assert otherwise is not his finest hour.

Addressing Parts V and VI of *Murphy*'s majority opinion seems a bit anticlimactic upon recognition that the majority's infatuation with theoretical federalism led it to an impractical result that will impair lawfully-enacted national policies. Whatever residual sovereignty individual states retained upon joining the union, the national constitution's framers could hardly have intended for individual state's legislatures to have, functionally, a veto power over national policies enacted by a Congress consisting of those same states' elected senators and representatives. To paraphrase Justice Alito, "[a] more direct affront to [federal] sovereignty is not easy to imagine."[84] New Jersey may be proud of prevailing in *Murphy*, which involved commercial sports gambling—an activity which is, in truth, a relatively minor vice in the larger pantheon of national responsibilities—but many more important national stances are now at risk, given the *Murphy* majority's short-sighted embrace of a state sovereignty that empowers renegade individual state legislators to cripple the national government.[85]

83. That a government might itself operate a commercial gambling business is not a fanciful notion. Indeed, France's biggest gambling company (which is also the biggest in all of Europe, excluding the U.K., and is one of the ten largest gambling companies in the world in terms of total revenue) is both owned and operated by the French government. Ty Haqqi, *10 Largest Gambling Companies in the World*, INSIDER MONKEY (Dec. 16, 2020, 9:09 AM), https://www.insidermonkey.com/blog/10-largest-gambling-companies-in-the-world-905515/10/ [https://perma.cc/DZ45-MDTF]. State governments in the U.S., instead of owning and operating the businesses themselves, farm out the operation of the commercialized gambling, seemingly to favored corporations, campaign contributors, and the politically-connected. AM. GAMING ASS'N, STATE OF THE STATES 2020, at 1 (2020), https://www.americangaming.org/wp-content/uploads/2020/06/AGA-2020-State_of_the_States.pdf [https://perma.cc/TZ7Q-QN7R]. Unlike France, these states deprive themselves of revenue and undercut their (sometimes through gritted-teeth; sometimes with a wink) explanation that they would have preferred not to legalize gambling but "had to" because of budgetary deficits.

84. *See Murphy*, 138 S. Ct. at 1478.

85. Some, of course, favor crippling the federal government, no matter the costs. *See* Ilya Somin, *Federalism Comes Out as the Winner in* Murphy v. NCAA, THE REGUL. REV. (July 10, 2018), https://www.theregreview.org/2018/07/10/somin-federalism-comes-out-winner-murphy-v-ncaa/ [https://perma.cc/QUR8-L5T3]. But

Briefly then, Part V of *Murphy* discusses why the majority did not view PASPA as a preemption provision.[86] Basically, the majority determined that because the statute was not a regulation of private actors, it could not fall within cases describing the three types of preemption (conflict, express, and field preemption[87]). Rather, PASPA's direct command to the states enabled the anti-commandeering rule to preempt application of preemption precedents, according to the majority's two-factor test for federal preemption: "[f]irst, [the federal law] must represent the exercise of a power conferred on Congress by the Constitution . . . . [and] [s]econd, since the Constitution 'confers upon Congress the power to regulate individuals, not states' [the federal law] must be best read as one that regulates private actors."[88] But, as shown above, the Constitution plainly confers upon Congress the power to regulate interstate and foreign commerce and, while the Constitution does not overtly mention Congress's power to prohibit a state from authorizing, or itself conducting, behavior that violates federal law, that power is necessarily implicit in the Constitution's grant to the federal government of authority over matters explicitly assigned to Congress. That federal power may not extend to forcing affirmative duties upon states in a way that could make states pay for federal policies but, if federal policies are to have meaning, federal power must include an ability to preclude state corrosion of national policy. The Constitution, by providing for legislative participation of all states in a national Congress, provides ample means for dissatisfied states to auger together for change in national policy and, sensibly construed, limits a state from seceding from or undermining national policy properly enacted according to the Constitution's delegation of powers.

That Congress can direct a state to not authorize frustration of national policy is no more an improper affront to state sovereignty than it is for a federal court to direct a state to not engage in acts that, in derogation of federal law, would authorize the state's own or others' racial discrimination, mistreatment of undocumented aliens, police brutality, or unfair housing, employment, or pension practices, for example. At times, federal law *must* regulate the conduct of the states, as well as of private actors. If the protection of professional and amateur sports, and of persons who may be injured by commercial wagering schemes upon these contests, is not an important enough national policy to be granted the same protections (as the above examples) from state impairment, the Supreme Court needs to find some basis in the Constitution for saying that. It failed to do so in *Murphy*.

This Article does not aim to plumb the depths of Part VI of the *Murphy* majority opinion. That part, too, goes off-track when it engages in wholesale speculation as to whether the Congress that enacted PASPA would have enacted

libertarians who reflexively take this extreme stance seem surprisingly unconcerned that big issues, such as interstate and foreign commerce, are best met by a national government both bounded by the express language of the Constitution and big enough to address such issues comprehensively, coordinating what otherwise often would be a wasteful and kaleidoscopic array of varying state policies.

86. *Murphy*, 138 S. Ct. at 1479.

87. *Id.* at 1480–81.

88. *Id.* at 1479 (internal citation omitted).

§ 3702(2), which prohibits persons from facilitating private commercialized sports gambling schemes authorized by state law, if Congress knew that the Court would strike § 3702(1) as a violation of the anticommandeering principle.[89] In Part VI, the *Murphy* majority felt the two provisions were not severable; separately, three dissenters said they were (Justices Ginsburg, Sotomayor, and Breyer).[90] Here, it suffices to repeat Justice Ginsburg's dissenting but accurate observation that "[o]n no rational ground can it be concluded that Congress would have preferred no statute at all if it could not prohibit States from authorizing or licensing" the operation of sports gambling schemes.[91]

Perhaps today's Congress would prefer no statute at all, and perhaps the *Murphy* majority read some tea leaves, polls, corporate lobbyists' entreaties, or sports pages to conclude what today's Congress might prefer, but in no sense did the *Murphy* majority provide substantive reason to think that the Congress that passed PASPA by an overwhelming majority (95% to 5% in the Senate[92]) and which expressly included provisions in the statutory text to limit private conduct of commercialized sports gambling schemes, would prefer the results that the *Murphy* majority inflicted upon the nation: PASPA being entirely eviscerated; a total absence of national guidance as to what the vast number of non-federal governments may do in authorizing, prohibiting, operating, or facilitating commercialized sports gambling; and no semblance of federal legislative protection of interstate or foreign commerce, or coordination thereof, with respect to commercialized sports gambling schemes, nor of protection of the national assets which are professional and amateur sports. No federal or state enforcement, investigative, or regulatory body exists with resources sufficient to ensure integrity in these sports and in the multiple millions of Internet-based and other gambling-related transactions that will increasingly take place, and at light speed, in a PASPA-less America.[93]

89. *Id.* at 1481.

90. *Id.* at 1484; *id.* at 1489–90 (Ginsburg, J., dissenting). Indeed, the Court's most recent statement on severability is that a tailored approach is appropriate rather than striking an entire statute. United States v. Arthrex, Inc., no. 19-1434, slip op. at 19–20 (June 21, 2021).

91. *Murphy*, 138 S. Ct. at 1490 (Ginsburg, J., dissenting).

92. *See S. 474 (102nd): Professional and Amateur Sports Protection Act*, GOVTRACK (June 2, 1992, 3:01 PM), https://www.govtrack.us/congress/votes/102-1992/s111 [https://perma.cc/K5K3-N7NT].

93. *Cf.* Steve Bittenbender, *One Year After PASPA Overturn, Is US Sports Betting State-by-State Growth Living Up to the Hype?*, CASINO.ORG (Aug. 15, 2019, 10:56 AM), https://www.casino.org/news/a-year-after-paspa-u-s-sports-betting-growing-but-with-mixed-results/ [https://perma.cc/CR4Q-QGS6]. Even when gambling regulatory bodies do act to rein in or punish alleged corporate violators (who, for example, may use concealment techniques such as pass-through funding arrangements to evade legal requirements, or exploit personal connections to clandestinely obtain internal government documents useful to gain competitive advantages), the ready cash available to the commercialized gambling industry enables, *inter alia*, enforcement-delaying litigation and public relations campaigns. *See, e.g.*, Robert Wildeboer & Dan Mihalopoulos, *Illinois Gaming Board Seeks $5 Million Fine Against Major Video Gambling Company Accel Entertainment*, WBEZ CHI. (Dec. 20, 2020, 6:39 PM), https://www.wbez.org/stories/illinois-gaming-board-seeks-5-million-fine-against-major-video-gambling-company-accel-entertainment/f21abcda-4c51-49a6-9343-942a41eabf22 [https://perma.cc/62GX-CY6T]. Regulators' limited budgets and the breadth of their responsibilities can make impossible a response comparable to the efforts of the industry accused.

V. INCREASING MATERIAL INEQUALITY VIA EXPANSION OF COMMERCIALIZED GAMBLING: PASPA-LESS AMERICA AND BOILING FROGS

Wholly apart from the need to end the unwarranted, unjust windfall of civil immunity provided to commercial gambling enterprises, expansion in the United States of legal commercialized sports gambling should have been a non-starter, for multiple reasons, including those set out below. PASPA, sound and plainly constitutional federal legislation, was built upon those multiple reasons.[94] It fell squarely within the Constitution's assignment to the federal government of responsibility to regulate and protect the nation's interstate and foreign commerce. The commercialized gambling industry, and those states beholden to it, seek to corrode or destroy how the Constitution structured this responsibility. They do so despite this Court's scores of decisions emphasizing the proper extent of this federal power (see Appendix, below), especially as concerns vice and activities resulting in social harms, in adverse effects on social determinants of public health,[95] and in long-term negative economic impacts.

Government-sponsored commercial sports gambling will contribute to rising economic inequality. Of course, some economic inequality will always exist[96] and, where rooted in earned reward and just deserts, few would argue against it. But a government policy that fosters inequality rooted in mere chance and driven by commercial marketing ploys drives an increase in inequality, and a recent study shows that such inequality leads to quite serious adverse health and social consequences.[97] Given these findings, Congress was prescient to enact PASPA.

The biological bases of problem and addictive gambling behaviors are increasingly well-known.[98] It seems irresponsible that the Supreme Court would jettison PASPA despite the science supporting limitation of commercialized

94. *Compare* Bradley, *supra* note 49, *with* Eric Meer, *The Professional and Amateur Sports Protection Act (PASPA): A Bad Bet for the States*, 2 UNIV. NEV. LAS VEGAS GAMING L.J. 281, 287 (2011).

95. Nir Eyal, *Tech Companies: If You Create Addicts, You Need to Help Them*, NIR EYAL (May 29, 2017), https://nireyal.medium.com/tech-companies-have-to-help-the-addicts-they-create-bf570c685d30 [https://perma.cc/TQ33-NHRA].

96. The truism that "some economic inequality will always exist" tends to hide the more relevant issues of the size and rate of growth of the income and wealth gaps separating Americans. Recent research reveals that the total wealth of all U.S. billionaires today (approx. $4 trillion held by <1%) practically doubles the total wealth of the lower half of the U.S. population (approx. $2.1 trillion held by the bottom ~50%). *See Distribution of Household Wealth in the U.S. Since 1989*, FED. RSRV. (Dec. 18, 2020), https://www.federalreserve.gov/releases/z1/dataviz/dfa/distribute/chart/ [https://perma.cc/66SG-CHQF]. Moreover, the total net worth of the nation's 651 billionaires rose by $1.06 trillion between March 18 and December 7, 2020, according to a recent report by the Institute for Policy Studies and Americans for Tax Fairness. *See Net Worth of U.S. Billionaires has Soared by $1 Trillion – to Total of $4 Trillion–Since Pandemic Began*, AMS. FOR TAX FAIRNESS (Dec. 8, 2020), https://americansfortaxfairness.org/issue/net-worth-u-s-billionaires-soared-1-trillion-total-4-trillion-since-pandemic-began/ [https://perma.cc/PCS6-G38Y].

97. *See* Keith Payne, *How Inequality Shortens Lifespans*, LITERARY HUB (May 5, 2017), https://lithub.com/how-inequality-shortens-lifespans/ [https://perma.cc/6NWN-6DFY]; THOMAS M. SHAPIRO, TOXIC INEQUALITY: HOW AMERICA'S WEALTH GAP DESTROYS MOBILITY, DEEPENS THE RACIAL DIVIDE, AND THREATENS OUR FUTURE (2017).

98. *See* ROBERT M. SAPOLSKY, BEHAVE: THE BIOLOGY OF HUMANS AT OUR BEST AND WORST 73, 130–31, 161 (2017).

gambling, and seems equally irresponsible for Congress not to have quickly reacted to *Murphy* by replacing the wrongly eviscerated PASPA with new federal legislation limiting commercialized sports gambling in ways the *Murphy* majority suggested would be acceptable.[99]

Apart from the adverse physical and mental health impacts resulting from gambling industry-designed and marketing-driven behavioral excesses,[100] the economic inequality stemming from widespread commercialized gambling adversely impacts other important quality of life components. In contrast to "economic capital" (the collective quantity of goods, services, and financial resources), Sapolsky defines "social capital" as "the collective quantity of resources such as trust, reciprocity, and cooperation."[101] He observes that "[p]ut simply, cultures with more income inequality have less social capital . . . [so that] marked inequality makes people crummier to one another.[102] "Thus, unequal cultures make people less kind. Inequality also makes people less healthy."[103] "[I]nequality also makes for more crime and violence . . . . Poverty is not a predictor of crime as much as poverty amid plenty is. For example, extent of income inequality is a major predictor of rates of violent crime across American states and across industrialized nations."[104]

Apart from increased violent crime, Sopolsky summarizes the results of numerous studies which establish that:

> [L]ife expectancy and the incidence and morbidity of numerous diseases are worse in poor people . . . . Independent of absolute levels of income, the more income inequality in a community—meaning the more frequently the poor have their nose rubbed in their low status—the steeper the health gradient . . . . Collectively, these studies show that the psychological stress of low SES [socioeconomic status] is what decreases health. Consistent

99. Murphy v. NCAA, 138 S. Ct. 1461, 1484 (2018).

100. *See* SCHULL, *supra* note 37, at 316 n.57 ("[T]he majority of studies show a link between the expansion of legal gambling opportunities and the prevalence of problem gambling."); Helen Clark, et al., *A Future for the World's Children? A WHO-UNICEF-Lancet Commission*, LANCET (Feb. 18, 2020), https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(19)32540-1/fulltext [https://perma.cc/WCF9-J2M3] ("Children are enormously exposed to harmful commercial marketing."). A major public health-oriented study of commercialized gambling's growing impact is underway. *See* Comment, *The Lancet Public Health Commission on Gambling*, LANCET (Jan. 2021), https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(20)30289-9/fulltext [https://perma.cc/UU2P-JNPM]. "The Commission will focus on the political and corporate determinants of harm, the epidemiology of gambling harms, including examining inequalities, interventions to reduce harms, and critical appraisal of regulatory, political, and public health responses to gambling." *Id.*

101. *See* SAPOLSKY, *supra* note 98.

102. *Id.* at 292–295 (citing RICHARD G. WILKINSON, MIND THE GAP: HIERARCHIES, HEALTH, AND HUMAN EVOLUTION (2001)).

103. *Id.* (citing ROBERT G. EVANS, MORRIS L. BARER & THEODORE R. MARMOR, WHY ARE SOME PEOPLE HEALTHY AND OTHERS NOT? (1st ed.1994)).

104. *Id.* (citing Don Soo Chon, *The Impact of Population Heterogeneity and Income Inequality on Homicide Rates: A Cross-National Assessment*, 56 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 730 (2012)); *see also* Frank J. Elgar & Nicole Aitken, *Income Inequality, Trust and Homicide in 33 Countries*, 21 EUR. J. PUB. HEALTH 241 (2010); Ching-Chi Hsieh & M. D. Pugh, *Poverty, Income Inequality, and Violent Crime: A Meta-Analysis of Recent Aggregate Data Studies*, 18 CRIM. JUST. REV. 182 (1993); Martin Daly, Margo Wilson & Shawn Vasdev, *Income Inequality and Homicide Rates in Canada and the United States*, 32 CANADIAN J. CRIMINOLOGY 219 (2001).

> with that, it is diseases that are the most sensitive to stress (cardiovascular, gastrointestinal, and psychological disorders) that show the steepest SES/health gradients.[105]
>
> The SES/health gradient is ubiquitous. Regardless of gender, age, or race. With or without universal health care. In societies that are ethnically homogenous and those rife with ethnic tensions.[106]

Human-designed means of fostering material inequality subjugates those who comprise "the low ranking like nothing ever before seen in the primate world,"[107] and few methods of increasing material inequality can compare with commercialized gambling, since the structure of the industry necessarily impoverishes the vast majority of its customers if they can be convinced to play long enough. Given the gross imbalance in ready resources and sophisticated means available to do the convincing,[108] the outcome of expanded commercialized sports and non-sports gambling is readily foreseeable. This broader societal impact is apart from the expected decrease in the integrity of sports that will flow from expanded commercialized sports gambling.[109]

105. *See* SAPOLSKY, *supra* note 98.

106. *Id.* at 441–42 (citing Nancy E. Adler & Joan M. Ostrove, *Socioeconomic Status and Health: What We Know and What We Don't*, 896 ANNALS N.Y. ACAD. SCIS. 3 (1999)). *See generally* RICHARD G. WILKINSON, MIND THE GAP: HIERARCHIES, HEALTH, AND HUMAN EVOLUTION (2001); BRUCE P. KENNEDY & ICHIRO KAWACHI, THE HEALTH OF NATIONS: WHY INEQUALITY IS HARMFUL TO YOUR HEALTH (2002); MICHAEL MARMOT, THE STATUS SYNDROME: HOW SOCIAL STANDING AFFECTS OUR HEALTH AND LONGEVITY (2004).

107. SAPOLSKY, *supra* note 98, at 441–42.

108. Undisclosed to consumers, persuasive marketing technologies promise behavioral changes favoring the commercialized gambling industry. *See, e.g.*, Bruce Schneier & Alicia Wanless, *The Peril of Persuasion in the Big Tech Age*, FOREIGN POL'Y (Dec. 11, 2020, 1:24 PM), https://foreignpolicy.com/2020/12/11/big-tech-data-personal-information-persuasion/ [https://perma.cc/6WQ4-458Y]. This expected outcome complicates the already adverse outcomes resulting from increased use by governments, financial rating services, and businesses of "hidden algorithms that trap people in poverty." Karen Hao, *The Coming War on the Hidden Algorithms that Trap People in Poverty*, MIT TECH. REV. (Dec. 4, 2020), https://www.technologyreview.com/2020/12/04/1013068/algorithms-create-a-poverty-trap-lawyers-fight-back/ [https://perma.cc/9H6L-KTJ2]; *see also* Angela Chen, *Why Companies Want to Mine the Secrets in Your Voice*, VERGE (Mar. 14, 2019), https://www.theverge.com/2019/3/14/18264458/voice-technology-speech-analysis-mental-health-risk-privacy [https://perma.cc/7K7H-EZLF].

109. This expected increase in cheating, too, is reliably forecast by studies. Experiments show that "stressed subjects make more egoistic, rationalizing judgments regarding emotional moral dilemmas and are less likely to make utilitarian judgments . . . when the latter involve a personal moral issue." SAPOLSKY, *supra* note 98, at 493. Participation in commercialized gambling involves a personal moral issue, at some level, especially when the funds placed at risk are not discretionary but are needed for life's essentials. As the moral tensions increase along with the stressors, the temptation to cheat nears irresistibility. "Overall cheating is not limited by risk; it is limited by our ability to rationalize the cheating to ourselves." DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2010). Thus, in addition to the expected cheating by athletes and bettors, the operators of commercialized sports gambling businesses can succumb to similar temptations to cheat, defraud, and commit crime, rationalizing their misbehavior as necessary in a highly-competitive market serving often-desperate customers in an on-going mutual battle to gain an edge, one way or the other. "There is a long history of guys looking for an edge[.]" Ben Strauss, *As Legal Betting Booms, Journalists Jump from Sports Page to Sportsbook*, WASH. POST (Dec. 19, 2020, 6:00 AM), https://www.washingtonpost.com/sports/2020/12/19/sports-media-legal-gambling/ [https://perma.cc/P4CG-38FE].

"The human capacity for deception is enormous." SAPOLSKY, *supra* note 97, at 514–15. "Humans excel at lying because our cognitive skills allow us to . . . finesse the truth." *Id.* Thus, modern marketing, multi-faceted public relations campaigns, advertising onslaughts, and well-financed legislative lobbying (with no comparatively-fi-

In states sponsoring other forms of commercial gambling, all taxpayers—including the non-gamblers—end up paying higher taxes for less services, and their states end up with a worse budget problem over the long term.[110] There is no reason to believe commercialized sports gambling will produce some different result. Expansion of commercial gambling invariably leads to more social cost, which in turn leads to more economic costs—costs paid by all taxpayers and not just by gamblers. Ultimately, PASPA protected the public fisc, interstate commerce, public health and security, and local and individual freedoms. Without PASPA or a suitable replacement, "[w]e are all the boiling frogs, barely noticing how regular things are slowly changing."[111]

VI. CONCLUDING OBSERVATIONS

Making government a partner with, or enabler of, the commercialized sports gambling industry simply makes government a tool in the further financial exploitation of its citizens. This inverts the traditional relationship between citizen and government. A government should exist to protect, rather than exploit, its people. As faith and trust in government to do the "right" thing wane, the last thing government—which includes the Supreme Court—needs to do is to cast its lot with an industry that profits from exploitation. At its core, sport is fun and inspiring and even beautiful. At its core, long-term chasing money through commercialized gambling is none of these things. Bringing sport down to the level of mere commerce will pollute daily life, a loss for which no amount of money can compensate.

Justice Robert H. Jackson long ago praised institutions that "were unashamed to uphold ideals that were above materialism, gain, and money-making."[112] If only today's Court and state legislatures had that sense of shame. The

nanced opposition) employ language in this manipulative fashion. It is no overstatement to characterize the commercial gambling industry as engaged in "strategic social deception" via creation of "neural circuit[s] of deception" in which "insight grinds to a halt." *Id.* (citing Kirsten G. Volz, Kai Vogeley, Marc Tittgemeyer, D. Yves von Cramon & Matthias Sutter, *The Neural Basis of Deception in Strategic Interactions*, 9 FRONTIERS BEHAV. NEUROSCIENCE 27 (2015)).

110. *See Fight for Compassion and Fairness for All Citizens: Why Rejecting Commercialized Sports Gambling Helps Break America's Big Losing Streak*, STOP PREDATORY GAMBLING, https://www.stoppredatorygambling.org/wp-content/uploads/2019/02/2019-Fact-Sheet-on-Commercialized-Sports-Gambling-1.pdf (last visited July 26, 2021) [https://perma.cc/FA8D-VN9U].

111. Will Leitch, *Volume 2, Issue 95: Shrug and Destroy*, WILLIAM F. LEITCH (Jan. 25, 2020), https://williamfleitch.substack.com/p/volume-2-issue-95-shrug-and-destroy [https://perma.cc/AP9Z-525Y].

112. Robert H. Jackson, *The Faith of My Fathers*, 168 U. PA. L. REV. 1, 12–13 (2019). Might we expect the owners of the gambling industry to have sufficient capacity for shame to uphold these ideals? Because commercialized gambling operators of any size are invariably corporations, and despite whatever laudatory aspects one assigns to the corporate form, a harsh truth is that a corporation "is psychopathic in the sense of having no conscience and being solely interested in profits . . . . [W]hen the corporation does something legal yet immoral," perhaps a shaming campaign could produce a change in corporate behavior; but this assumes the commercialized gambling corporation and its management have the capacity for shame—and, given the choice at the outset to engage in a necessarily exploitive business their capacity for shame may be quite limited, if not altogether absent. SOPOLSKY, *supra* note 98, at 503. *See generally* JENNIFER JACQUET, IS SHAME NECESSARY? NEW USES FOR AN OLD TOOL (2015); JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER (2005).

Supreme Court should have affirmed the en banc Third Circuit's ruling that PASPA is constitutional and provided a proper basis for the injunction issued by the district court. Because of the *Murphy* majority's error, Americans now have to rely upon Congress's sense of shame to prompt enactment of federal law to uphold the ideals referenced by Justice Jackson—ideals which PASPA once protected. But, these days, who wants to bet on Congress having a sufficient sense of shame?

APPENDIX:

Lottery Case (Champion v. Ames), 188 U.S. 321 (1903) (upholding federal laws penalizing the interstate transportation of lottery tickets).

Hoke v. United States, 227 U.S. 308 (1913) (upholding federal laws prohibiting interstate transportation of women for immoral purposes).

Brooks v. United States, 267 U.S. 432 (1925) (upholding federal laws prohibiting interstate transportation of stolen automobiles).

Thornton v. United States, 271 U.S. 414 (1926) (upholding federal laws prohibiting interstate transportation of tick-infected cattle).

Roth v. United States, 354 U.S. 476 (1957) (upholding federal statute prohibiting the mailing of obscene matter).

United States v. Ferger, 250 U.S. 199 (1919) (upholding federal law punishing those who forge bills of lading purporting to cover interstate shipments of merchandise).

Kentucky Whip & Collar Co. v. Ill. Cent. R.R., 299 U.S. 334 (1937) (upholding Congress's power to subject prison-made goods moved from one state to another to the laws of the receiving state).

Everard's Breweries v. Day, 265 U.S. 545 (1924) (upholding Congress's power to regulate prescriptions for the medicinal use of liquor, as also advancing federal Eighteenth Amendment interests).

Perez v. United States, 402 U.S. 146 (1971) (holding Congress has power to control extortionate means of collecting and attempting to collect payments on loans, even when all aspects of the credit transaction took place within one state's boundaries).

Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264 (1981) (upholding federal surface mining law provisions that could be characterized as "land use regulation") .

United States v. Kahriger, 345 U.S. 22, 25–26 (1953) and Lewis v. United States, 348 U.S. 419 (1955) (holding Congress does not violate state police powers when it imposes an occupation tax on all those engaged in the business of accepting wagers, regardless of whether those persons are violating state law, and levies harsh penalties for failure to register and pay the tax).

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) (claiming impingements on state sovereignty of federal commerce power legislation are mostly political questions).

Reno v. Condon, 528 U.S. 141 (2000) (upholding federal law prohibiting state conduct regarding disclosure and resale of personal information contained in the records of state motor vehicles departments).