PASPA SWUNG AND MISSED, BUT CONGRESS CAN STILL BE AT BAT IF IT WANTS TO: EASY FEDERAL STATUTORY RESPONSES TO *MURPHY V. NCAA*

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Murphy v. NCAA *was a hard case to understand–its result may be defensible, indeed correct, even as its explanations were confused and confusing. But one thing that is clear is that the constitutional defects the Court perceived in the federal Professional and Amateur Sports Protection Act (PASPA) have nothing to do with whether Congress possesses power to effectively regulate the sports-gambling industry throughout the nation. For this important reason, the federal government can easily reinstate PASPA's apparent policy preferences concerning sports gambling if our leaders in D.C. choose to so do. In this essay, I explain why even after* Murphy *Congress continues to have broad regulatory powers in this realm, and how Congress could (re)assert its authority to accomplish PASPA's objectives, without running afoul of anything said or suggested by the* Murphy *Court, with a new statute.*

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* Dean and Iwan Foundation Professor, University of Illinois College of Law. I thank the members of the *Illinois Law Review* for inviting me to participate in this Issue, and for their help in preparing this article. I also note that large swaths of the substantive analysis of Murphy v. NCAA are drawn from my previous article on the federalism aspects of the case, Vikram David Amar, *"Clarifying"* Murphy*'s Law: Did Something Go Wrong in Reconciling Commandeering and Conditional Preemption Doctrines?* 2018 SUP. CT. REV. 299 (2019).

I. INTRODUCTION

The biggest case in U.S. sports-gambling history was the ruling by the Supreme Court in *Murphy v. NCAA*[1] three years ago invalidating the Professional and Amateur Sports Protection Act (PASPA).[2] Crucially, though—from a sports-gambling perspective—the Court expressed no reservations about Congress's power to regulate the sports gambling industry, either directly and completely, or by use of clear, albeit partial, preemption. Such power undeniably exists under the Commerce Clause of Article I of the Constitution. The best reading of the case suggests that the Court's invalidation of PASPA (in its entirety) stemmed not from reservations about whether Congress enjoys power over this realm but from the Justices' (poorly explained but ultimately plausible) concerns about the way Congress had treated states in seeking to accomplish federal objectives that were clearly permissible under the Commerce Clause, combined with a (similarly underexplained but defensible) sense that no part of the Act could be severed given the way Congress's mistreatment of states was textually woven into PASPA's provisions.

If I am right about this—that the flaw *Murphy* found in PASPA was all about federalism and not sports gambling policy—then there are myriad easy fixes for a Congress that would like to re-regulate to accomplish (nearly) all of PASPA's substantive objectives. Indeed, as I explain below, Congress could even preserve the majority of PASPA's preexisting language, since most of PASPA really did not implicate the anticommandeering concern that led the Court to invalidate the statute.

II. WHAT PASPA SAID AND WHAT THE COURT SAID ABOUT IT

PASPA, titled by Congress as "[a]n Act [t]o prohibit sports gambling under State law" made it "unlawful" in 28 USC § 3702(1) for a State or any of its subdivisions "to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on" competitive sporting events.[3] A separate, related provision (but one not challenged as independently unconstitutional), § 3702(2), also made it "unlawful" for "a [private] person" to undertake sports gambling schemes—provided the person was doing so "pursuant to the law or compact of a governmental entity."[4] PASPA did not itself criminalize any sports gambling schemes[5] under federal law but did allow the Attorney General, as well as pro-

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

2. Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227 (1992); 28 U.S.C. § 3702(1)–(2).

3. § 3702(1).

4. § 3702(2).

5. From now on, I, like the Court, generally refer to "sports gambling schemes," a statutory term that presumably connotes some level of size and organization of the sports-gambling enterprise, simply as "sports gambling."

fessional and amateur sports organizations, to bring civil actions to enjoin violations of § 3702(1) and § 3702(2).[6] Moreover, separate provisions of Title 18 of the U.S. Code continue to make it a federal crime to engage in a variety of interstate gambling activities (not specifically limited to sports gambling) that are unlawful under state law in the states where they occur.[7]

PASPA was challenged under the so-called anticommandeering doctrine.[8] In essence, this doctrine, most closely associated with the *New York v. United States*[9] and *Printz v. United States*[10] cases, holds that the federal government cannot simply command or order (under penalty of some negative consequence) states to enact or maintain state laws that a state wishes not to have on its books.[11] The challengers in *Murphy* argued that PASPA constituted just such a commandeering, because it prohibited states from repealing state laws regulating gambling insofar as such repeal would constitute "authorization" of gambling.[12]

The Supreme Court indicated agreement with the challengers' reading of the statute: "[i]n [the Court's] view, petitioners' interpretation is correct: When a State *completely or partially* repeals old laws banning sports gambling, it 'authorize[s]' that activity" within the meaning of PASPA.[13] That could have ended much of the matter, given the acknowledgement by all the parties that if PASPA banned complete repeals (as the Court said it thought PASPA did), PASPA was unconstitutional.[14] But then, in a pivotal passage, the Court opined that even if Congress in enacting § 3702(1) did *not* seek to prohibit complete repeals but instead sought only to prohibit *some kinds of partial* repeals by states, as the respondents and federal government urged, there would still exist a fatal commandeering problem:

> The respondents and United States argue [invoking the canon of constitutional avoidance] that even if there is some doubt about the correctness of their interpretation of the anti-authorization provision, that interpretation should be adopted in order to avoid any anticommandeering problem that would arise if the provision were construed to require States to maintain their laws prohibiting sports gambling. . . . 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 anti-commandeering principle*, as we now explain.[15]

6. § 3703 ("A civil action to enjoin a violation of section 3702 may be commenced . . . by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation.").

7. *See, e.g.*, 18 U.S.C. § 1083(a).

8. Murphy v. NCAA, 138 S. Ct. 1461, 1471 (2018).

9. New York v. United States, 505 U.S. 144, 154 (1992).

10. Printz v. United States, 521 U.S. 898, 904 (1997). In *Printz*, the Court extended the principle so as to prohibit federal directives to state officers that such officers enforce, rather than enact or maintain, particular laws. *Id.*

11. *See Murphy*, 138 S.Ct. at 1471.

12. *Id.* at 1473.

13. *Id.* at 1474 (emphasis added and final alteration in original).

14. *See id.* at 1473–75.

15. *Id.* at 1475 (emphasis added).

This conclusion on its own terms makes no sense.

To be sure, this much is clear, and was agreed upon by all the parties: a state must be free to completely repeal its prohibitions of sports gambling, or any other activity, if it chooses.[16] That is, in the unusual case where states wish to desist from exercising sovereign power altogether over something or someone, congressional directives to states to refrain from passing laws ending regulation, entitlement programs, or taxation[17] would constitute commandeering. In this regard, although the Court overstated things by calling the action/inaction distinction (that is, the distinction between requiring a state to take new action versus requiring it to simply preserve the status quo) "empty,"[18] the Court was right to find the action/inaction line inadequate, in that the distinction fails to account for a situation in which Congress commandeers not by requiring new legislative action, but by preventing a state from exiting a regulatory sphere.[19] The key question is not whether the state is being forced in formal terms to enact anything new today, but whether the state is being forced to exercise its sovereign power, in either a new or continuing fashion.

But to suggest, from this starting point, that Congress necessarily commandeered when it tried (according to the federal government's reading of PASPA) to prevent states from disallowing some kinds of sports gambling while allowing others is dubious. This is so because a partial repeal can just as easily be viewed not in terms of a repeal, but in terms of a continued (albeit partial) regulation of private activity.[20] And, of course, Congress can prevent states from regulating private individuals when such state regulation is inconsistent with federal objectives, at least where (as here) Congress enjoys the power to regulate the particular field of activity itself.[21] We call that preemption. And for these purposes it shouldn't matter that a state has chosen to deregulate to some extent, provided that it is still in fact regulating; Congress preempts less-than-comprehensive state regulation all the time. For example, in *Morales v. Trans World Airlines, Inc.*,[22] cited favorably by *Murphy*, the Court upheld Congress's decision to preempt states from regulating airline rates, even though Congress did not preempt states from regulating some other aspects of airline operations.[23] And no one would doubt that Congress, instead of prohibiting states from regulating airline rates

16. *See id.* at 1473–74.

17. The anticommandeering rule should apply to all three settings. *Cf.* Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York, Printz*, and* Yeskey, 1998 SUP. CT. REV. 71, 92–93 (discussing the application of the anticommandeering principle to entitlement program mandates).

18. *Murphy*, 138 S. Ct. at 1478. As Adler and Kreimer demonstrate, the distinction does have some utility in the ordinary situation. *See* Adler & Kreimer, *supra* note 17, at 92–95. But even they, who themselves propose a strong version of this action/inaction distinction, acknowledge that "[u]ndoubtedly, [ ] refinements to the basic distinction between action and inaction will emerge if the Court explicitly adopts that distinction and persists in the anticommandeering jurisprudence." *Id.* at 95 n.80.

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

20. The respondents and United States might have benefited by explicitly and repeatedly characterizing New Jersey's 2014 enactment said to run afoul of PASPA not as a partial repeal of sports-gambling prohibitions, but as a continuing, albeit narrower, exercise of regulatory authority by the State.

21. *See generally* U.S. CONST. art. I § 8.

22. Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992).

23. *Id.* at 391.

entirely, could have taken the lesser step of preventing states from imposing certain *kinds* of rate regulations. What matters, in determining whether a state law can be preempted, is not the state regulatory baseline; it is whether the state has chosen to exercise (new or continued) state regulatory power (either comprehensively or selectively) in a field over which Congress has been given the authority to make, and has in fact made, regulatory decisions that conflict with the state's choices.

To see the fundamental difference between PASPA—as the federal government sought to interpret it—and the laws struck down in *New York* and *Printz*, consider what the state desired to do in each of the three cases, and ask whether that state objective is something Congress has the power to override. In *New York*, the state apparently wanted to refrain, at least in the short term, from regulating radioactive waste within its borders.[24] The Court rightly held that New York could make that decision.[25] In *Printz*, the state's local law enforcement officials seemingly didn't want to perform any Brady Act handgun purchase background checks.[26] The Court similarly held that states had that choice.[27] In *Murphy*, New Jersey wanted to prohibit some types of sports gambling but not others.[28] We thus need to ask: does Congress have the power to prevent New Jersey from accomplishing that disparate treatment? Although Congress may not be able to require New Jersey to extend its prohibition of sports gambling to the persons or activities New Jersey seeks to leave alone,[29] certainly Congress can tell New Jersey it cannot enforce its prohibitions of the gambling it does seek to regulate, because such disparate treatment is displaced by federal law. In other words, Congress can lawfully put New Jersey to a choice between regulating in a way that is consistent with Congress's desires that there not be certain kinds of regulatory winners and losers, or not regulating at all.

If this is true, was there something unlawful about the *way* Congress put New Jersey to the choice?[30] That question, it turns out, is the heart of the controversy about the *Murphy* outcome: why, under the federal government's reading of PASPA, was the statute deemed to be commandeering rather than permissible preemption? According to the federal government, PASPA was best read (or at least best read in light of constitutional avoidance principles) to mean: (1) states can continue to prohibit sports gambling, and if they do they won't be preempted by federal law–indeed federal criminal law will continue to reinforce some of the prohibitions by making some actions that are illegal under state law criminal under federal law; (2) states can repeal their prohibitions on sports gambling entirely if they like; (3) they may not enforce a selective repeal of their prohibitions in a way that favors certain entities, such as casinos and racetracks; and (4) if

24. New York v. United States, 505 U.S. 144, 154 (1992).

25. *Id.* at 188.

26. Printz v. United States, 521 U.S. 898, 904 (1997).

27. *Id.* at 935.

28. Murphy v. NCAA, 138 S. Ct. 1461, 1471 (2018).

29. *Cf.* Linda R.S. v. Richard D., 410 U.S. 614 (1973).

30. *Cf. Murphy*, 138 S. Ct. at 1488 (Breyer, J., concurring in part and dissenting in part) ("[T]he only problem with the challenged part of § 3702(1) lies in its means, not its end.").

they do selectively repeal and discriminate in favor of some entities, state law will be preempted by federal law, and federal law will kick in to prohibit sports gambling by those favored entities.[31]

Is there a problem with this structure? Each of the listed components is rational and permissible standing alone, and also in connection with the others.[32] For starters, under current doctrine Congress enjoys power to regulate interstate—or intrastate—sports gambling; such gambling is an economic activity with profound effects on the national economy.[33] Thus Congress can regulate sports gambling comprehensively, allow states to regulate it, or direct that the field stay unregulated, either partially or altogether. Nor is Congress's decision to piggyback on (and essentially incorporate by reference) certain state prohibitions of various gambling activities in some criminal provisions of Title 18 problematic; federal statutes in many settings permissibly reinforce state prohibitions by providing that if state law makes something illegal, then federal law will too.[34] Similarly unremarkable is Congress's prohibition of state discrimination that favors certain market participants; since Congress could have ousted states altogether, Congress can allow states to regulate but place limits on the kind of selective regulation allowed.[35]

All of that brings us to the last key feature, the provision by which federal regulatory authority—heretofore unexercised—applies to impose civil prohibitions on sports-gambling activities that someone might seek to undertake pursuant to a state law that impermissibly confers favorable treatment. This last aspect—by which federal law applies when state law seeks not to—may be less common in federal statutes, but it is also grounded firmly in preemption caselaw, and indeed is fundamentally similar to the statutory devices challenged and upheld in *Virginia Surface Mining and Reclamation Ass'n v. Hodel*[36] and *Federal Energy Regulatory Comm'n v. Mississippi*[37] ("*FERC*"), two cases in which the Court explicitly rejected commandeering challenges,[38] and that were expressly

31. *See id.* at 1475.

32. With or without the kind of helpful statutory summary outline in the preceding paragraph, when a court reviews Congress's actions in regulating, or conditionally regulating, economic activity under the Commerce Clause, the court applies rational basis review, under which it should seek to understand how the statute might be rational and coherent even in the absence of explicit explanation.

33. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995); Gonzales v. Raich, 545 U.S. 1 (2005). But see *Raich*, 545 U.S. at 57–75 (Thomas, J., dissenting) and *Murphy*, 138 S. Ct. at 1485–87 (Thomas, J, concurring), which harken back to pre-New Deal understandings of federal commerce clause authority.

34. *See, e.g.*, United States v. Sharpnack, 355 U.S. 286, 292–94 (1958); 18 U.S.C. § 13; 18 U.S.C. § 43(e)(3); 27 U.S.C. § 122; *see also* Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1366–72 (1996) (discussing incorporation of state law into federal law).

35. *See* Brief for the United States as Amicus Curiae Supporting Respondents at 25 n.7, Christie v. NCAA, 137 S. Ct. 2327 (2017), *sub nom.* Murphy v. NCAA, 138 S. Ct. 1461 (2018) (Nos. 16-476, 16-477) (citing statutes that do not oust states from regulating an activity but that prevent states from discriminating in various respects in their regulation).

36. Hodel v. Virginia Surface Mining, 452 U.S. 264 (1981).

37. FERC v. Mississippi, 456 U.S. 742, 769–71 (1982).

38. *Hodel*, 452 U.S. at 288 ("[T]here can be no suggestion that the Act commandeers the legislative processes of the States."); *FERC*, 456 U.S. at 769 ("In short, Titles I and II do not involve the compelled exercise of Mississippi's sovereign powers.").

reaffirmed in *New York*,[39] and then in *Murphy* itself.[40] In *Hodel* and *FERC* Congress adopted some policy parameters and gave states a right in the first instance to regulate according to them.[41] Because the states were not required to do anything, and if they chose *not* to regulate pursuant to federal desires the federal government would undertake the regulatory burden itself, the Court characterized Congress's invitations to states as "cooperative federalism," and rejected any claim of impermissible commandeering.[42]

We might describe the notion that federal law applies only when states choose not to accept Congress's invitation to regulate pursuant to federal objectives as "inverse incorporation" of state law. In such situations, it is the absence, rather than the presence, of state regulation that triggers the applicability of federal law. While this feature might strike some observers as unconventional, *inverse incorporation is the heart of conditional preemption*. States are given an option, but if they decline to take regulatory charge pursuant to federal standards, then federal law and enforcement is a backstop. In basic terms, conditional preemption (which perhaps more accurately should be called conditional non-preemption) is very similar to its sibling, conditional federal spending. In both settings, states are offered a deal in which they are given something (latitude to operate without federal preemption and dollars, respectively) in exchange for regulating in ways that are consistent with federal policy objectives. Together, these two doctrines make up a large part of the "cooperative federalism" the Supreme Court embraced in *Hodel*, *FERC* and many other decisions.[43]

Like the statutes at issue in *Hodel* and *FERC*, PASPA (under the federal government's reading) articulated Congress's basic policy preferences—namely that sports gambling operations be prohibited under state law and that in no event shall they be permitted on a selective basis. PASPA reflected a federal view that if states embody these federal preferences in state law, states are well situated, utilizing their enforcement resources and exercising permissible enforcement discretion tailored to their local conditions, to discharge federal objectives. But if states turn down the federal deal and decide not to undertake this role, but instead attempt to favor certain actors in contravention of congressional policy, then federal law—and federal enforcement—should step in and ensure entities favored under state law do not benefit from their favored status. States can act

39. New York v. United States, 505 U.S. 144, 167 (1992) ("[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.") (citing *Hodel*, 452 U.S. at 288); *FERC*, 456 U.S. at 764–65.

40. *Murphy*, 138 S. Ct. at 1479 ("In *Hodel* . . . the federal law, which involved what has been called 'cooperative federalism,' by no means commandeered the state legislative process. . . . [I]n *FERC* . . . the federal law in question issued no command to a state legislature.") (internal citations omitted).

41. *See Hodel*, 452 U.S. at 288–91; *FERC*, 456 U.S. at 767–71.

42. *See Murphy*, 138 S. Ct. at 1479, 1485.

43. *See, e.g.*, *Hodel*, 452 U.S. at 288–89; *FERC*, 456 U.S. at 769–71.

consistently with federal objectives, the reward for which is the federal government will stay its hand; if states decide otherwise, their law is displaced by federal regulation.[44]

When things are framed this way, we can see that the *Murphy* Court did not convincingly articulate a reason for viewing § 3702(1) as commandeering rather than preemption. Justice Alito's opinion rejected preemption as a defense of the provision because, he said, the statute "certainly does not confer any federal rights on private actors interested in conducting sports gambling operations . . . [n]or does it impose any federal restrictions on private actors."[45] But under the federal government's reading of PASPA, the statute created conditional federal rights for and conditional federal duties on private actors: § 3702(1) of PASPA conferred a federal right to be free from disparate treatment ("authorization") by states with respect to sports gambling, and § 3702(2) of PASPA imposed a federal duty not to take advantage of favorable disparate treatment in which states might attempt to engage.[46]

In light of the foregoing discussion, how can *Murphy*'s outcome be explained, much less defended? As noted earlier, conditional preemption power is analytically quite similar to the conditional funding power also enjoyed by Congress.[47] In both settings, Congress offers a deal that avoids the commandeering problem because states are free to accept or reject.[48] But one of the key teachings of conditional funding doctrine is that, in order for a deal not to be coercive, the terms of the bargain offered to the states must be laid out "unambiguously, [so that] States [are able] to exercise their choice knowingly, cognizant of the consequences of their participation."[49] Could and should this concept carry over from conditional spending to its close relative in the cooperative federalism family—conditional preemption? And is this the key respect in which PASPA was constitutionally problematic (even if Congress was trying to accomplish what the federal government said it was)? I believe so.

But how, exactly, was the deal offered by PASPA problematically unclear? Under the respondents' and federal government's reading, PASPA tells states that they can repeal their sports gambling prohibitions in whole and sometimes

44. A question arises under PASPA: why would Congress seek both to block states from discriminating and also to undo any such discrimination using federal enforcement? As the NCAA's brief and Justice Breyer's separate writing suggest, such an approach might have been adopted out of an abundance of caution and a desire to make sure that beneficiaries of state discrimination understood they would not be allowed to benefit by it. *See* Brief for Respondents at 56, Christie v. NCAA, 137 S. Ct. 2327 (2017), *sub nom.* Murphy v. NCAA, 138 S. Ct. 1461 (2018) (Nos. 16-476 & 16-477); *Murphy*, 138 S. Ct. at 1488 (Breyer, J., concurring in part and dissenting in part).

45. *Murphy*, 138 S. Ct. at 1481.

46. The *Murphy* Court acknowledged that § 3702(2) in PASPA itself contained federal duties but suggested that since this was not the challenged provision of PASPA it didn't matter whether this section could be understood as permissible preemption. *Id.* But, of course, it should be of no relevance how Congress breaks up the sections in an Act, and the appropriate constitutional question the Court should ask is whether the statute operating as a whole should properly be understood as preempting, rather than commandeering, state regulatory power.

47. *See supra* note 43 and accompanying text.

48. *See supra* note 43 and accompanying text.

49. South Dakota v. Dole, 483 U.S. 203, 207 (1987).

in part, *but does not tell them what kinds of partial repeals are disallowed.*[50] The Court was clearly frustrated by the imprecision in this regard and returned to this aspect of the statute more often than any other.[51] Oral argument time was devoted to it[52] and the opinion itself mentions either the inscrutability of the partial repeal option, or the way in which New Jersey relied on federal (mis)representations concerning that option, more than a half dozen separate times throughout.[53] For example, as to vagueness, the Court itself added the following emphasis when quoting from the lower court: "[The Third Circuit felt it] need not . . . articulate a line whereby a partial repeal of a sports wagering ban amounts to an authorization under PASPA, *if indeed such a line could be drawn*."[54] In characterizing the briefs, the Court said that under respondents' reading of the statute it is "not clear" "how far [a state] could go" in modifying preexisting state law.[55] The Court similarly remarked that "[the United States] does not set out any clear rule for distinguishing between partial repeals that constitute the 'authorization' of sports gambling and those that are permissible. [All it says is] that a State could 'eliminat[e] prohibitions on sports gambling involving wagers by adults or wagers below a certain dollar threshold.'"[56] To the same effect: "Respondents and the United States tell us that the PASPA ban on state authorization allows complete repeals, but beyond that they identify no clear line[s]."[57] And at the end of its statutory meaning discussion, the Court characterized the level of unclarity present under the respondents'/federal government's interpretation as a "nebulous regime."[58]

As to the (unfair) position in which this put states, the Court leaned on the representation the federal government made in an earlier phase in the litigation over New Jersey's sports-gambling-regulatory regime, saying that the United States "told this Court that PASPA does not require New Jersey 'to leave in place the state-law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment. To the contrary, New Jersey is free to repeal those prohibitions in whole or in part.'"[59] At the oral argument in *Murphy*, Justice Ginsburg even asked the federal government whether this representation in the first brief in opposition to certiorari was inaccurate.[60] Further reinforcing the idea that New Jersey was unfairly treated, *Murphy* described New Jersey's 2014 Act

50. *See Murphy*, 138 S. Ct. at 1473–74.

51. *See, e.g.*, Transcript of Oral Argument at 58–59, Christie v. NCAA, 137 S. Ct. 2327 (2017), *sub nom.* Murphy v. NCAA, 138 S. Ct. 1461 (2018) (Nos. 16-476, 16-477).

52. *See id.* (Question of Justice Gorsuch) ("But where is the line? The Third Circuit said *de minimis* private gambling isn't covered. On page 30 of your brief, you indicate maybe the state could have a certain dollar threshold, and that wouldn't be authorizing. . . . [W]here does the government draw the line?") (emphasis added).

53. *See Murphy*, 138 S. Ct. at 1471–75.

54. *Id.* at 1472–73 (emphasis and ellipses in original) (internal citations omitted).

55. *Id.* at 1473.

56. *Id.* at 1474 (alteration in original) (internal citations omitted).

57. *Id.* at 1475. The Court even seemed to belittle the NCAA's statutory reading by saying it offered a "*primary*" meaning of the word "authorize." *Id.* at 1473 (emphasis in original).

58. *Id.* at 1475.

59. *Id.* at 1472.

60. *See* Transcript of Oral Argument, *supra* note 51, at 63.

as having "*[p]ick[ed] up on the suggestion* [by the federal government] that a partial repeal would be allowed."[61]

The Court's concern here was understandable. Neither the respondents nor the federal government offered a clear line differentiating permissible from impermissible partial repeals, much less a line that could be teased from the word "authorize" in PASPA. There was no thorough explanation—by reference to PASPA's text, structure or even legislative history—of why age or dollars-at-risk classifications are permitted, but classifications concerning different types of institutions are not. This imprecision made it hard if not impossible for New Jersey to know what the federal deal permitted and disallowed. The State was left to guess in adopting its laws, and if it guessed wrong, it would have wasted its time and energy.[62]

III. WHERE CONGRESS CAN GO FROM HERE: ONE TEMPLATE STATUTORY FIX

All of this demonstrates that the Court's ruling in *Murphy*—whatever can be said in its defense—had nothing to do with Congress' power to regulate sports gambling itself, or to conditionally preempt state regulation of the field, provided Congress makes clear precisely what kind of selective state regulations/selective state repeals are permitted under federal law. For example, Congress could simply make clear that selective regulation/repeal cannot confer preferential treatment on casinos and racetracks, if those entities are particularly untrustworthy in the eyes of the federal government—as I posited above.[63]

Or another way to go differs from PASPA in that it doesn't really give states a chance to keep federal law out of the picture, but of course federal enforcement by the federal Department of Justice can be sensitive to whether particular states are already doing a good job dealing with the problem.

With this as background, I offer the following statutory rehabilitation of PASPA if Congress wants to, if you'll forgive the pun, get back in the game:

THE SPORTS INTEGRITY RESTORATION ACT (SIRA) OF 2021

Whereas sports gambling poses risks to the economic well-being of individuals and the nation, as well as to the integrity of organized sports;

Whereas the Supreme Court in Murphy v. NCAA found parts of PASPA unconstitutional violations of the anticommandeering principle of federalism;

Whereas the Supreme Court found inseverable all other parts of PASPA, including the provisions that regulated private and public actors in ways that do not implicate the anticommandeering doctrine;

61. *Murphy*, 138 S. Ct. 1461, 1472 (2018) (emphasis added).

62. *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 25 (1981) ("The crucial inquiry, however, is not whether a State would [ever] knowingly undertake [a particular] obligation, but whether Congress spoke so clearly that we can fairly say that the State could make an informed choice.").

63. *See* discussion *supra* notes 43–46 and accompanying text.

Whereas Congress would prefer to maintain the regulatory aspects of PASPA that do not implicate the anticommandeering doctrine in any way;

The following is hereby enacted:

It shall be unlawful for—

a governmental entity to sponsor or operate 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.

a person, regardless of what applicable state law permits, to sponsor, operate, advertise, or promote 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.

A civil action to enjoin a violation of this section may be commenced in an appropriate district court of the United States by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation.

For purposes of this chapter—

(1) the term "amateur sports organization" means—

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more amateur athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(2) the term "governmental entity" means a State, a political subdivision of a State, or an entity or organization, including an entity or organization described in section 4(5) of the Indian Gaming Regulatory Act (25 U.S.C. § 2703(5)), that has governmental authority within the territorial boundaries of the United States, including on lands described in section 4(4) of such Act (25 U.S.C. § 2703(4)),

(3) the term "professional sports organization" means—

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more professional athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(4) the term "person" has the meaning given such term in section 1 of title 1, and

(5) the term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Palau, or any territory or possession of the United States.