MURPHY V. NCAA & SOUTH DAKOTA V. WAYFAIR, INC.: THE COURT'S ANTICOMMANDEERING JURISPRUDENCE MAY PRECLUDE CONGRESSIONAL ACTION WITH RESPECT TO SALES TAXES ON INTERNET SALES

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ABSTRACT

The Professional and Amateur Sports Protection Act (PASPA), a federal law that prohibited states from sanctioning sports betting, was enacted in 1992 at the instigation of professional sports leagues and the National Collegiate Athletic Association in order to safeguard the integrity of their products. PASPA had been the subject of little litigation and attention until New Jersey recently challenged the constitutionality of PASPA. New Jersey's challenge culminated with the Supreme Court's May 2018 decision in Murphy v. NCAA*, which held PASPA unconstitutional. According to the Court, PASPA impermissibly commandeered the states. The Court held that federal requirements that restrain state action are to be examined similarly to federal limitations on state action. The Court's reasoning in this case calls into question the extent to which, and the circumstances under which, the federal government can order states to refrain from action.*

On June 21, 2018, the Supreme Court overturned long-standing precedent and held, in South Dakota v. Wayfair, Inc.*, that a state may impose sales-tax and use-tax obligations on a seller of goods and services despite the seller's lack of any physical presence in the state. The Court took note of the rapid growth of electronic commerce in recent decades. It found market changes wrought by such growth rendered the physical presence test a relic of a bygone commercial world that caused distortion in retail markets and significant revenue losses for states. Prior to* Wayfair, Inc.*, Congress, pursuant to its power to regulate interstate commerce, could dictate the terms under which states could impose tax obligations on remote sellers.* Wayfair, Inc. *now allows states to impose such taxes without a congressional imprimatur.*

Decisions regarding sports gambling and sales taxes would appear to have no relation to each other. However, a significant objection to state imposition of sales-tax obligations on remote sellers stems from the administrative burden

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caused by sellers' compliance with the laws of multiple taxing jurisdictions and the concomitant variations in tax bases and tax rates among those jurisdictions. The Court itself discussed this issue in Wayfair, Inc. *and noted that Congress can provide solutions if the need arises. However, the Court's decisions in both cases leave in doubt whether Congress, in fact, has the power to streamline state sales-tax and use-tax regimes.* Wayfair, Inc. *eliminates the need for states to obtain congressional permission to impose tax obligations on remote sellers.* Murphy *may prohibit Congress from conditioning the exercise of state taxing powers upon the satisfaction of federal standards.*

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On June 21, 2018, the Supreme Court held, in *South Dakota v. Wayfair, Inc.*, that a state may impose sales-tax and use-tax obligations on a seller of goods and services despite the lack of any physical presence in the state by the seller.[1] In so doing, the Court overturned long-standing precedent to the contrary.[2] The rapid growth of electronic commerce in recent decades called into question whether the physical presence test was a relic of a bygone commercial world that distorted retail markets and caused significant revenue losses for states.[3] In 1992, the Court overruled its prior holding that due process mandated sellers to maintain a physical presence in the taxing

1. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099 (2018).
2. *Id.*
3. *Id.* at 2097–98.

state.[4] Instead, the Court held that the physical presence test is applicable only for dormant Commerce Clause purposes.[5] This holding opened the door to a congressional solution to this issue. Not surprisingly, Congress failed to act, and commercial realities landed the issue back in the Court, which gave its imprimatur for the states to act.[6]

Approximately one month earlier, in *Murphy v. National Collegiate Athletic Ass'n*, the Court held the federal government could not prevent states from sanctioning sports gambling.[7] In probably the most-ever discussed Supreme Court case on ESPN, the Court held the federal statute in question impermissibly commandeered the states.[8] The Court's reasoning in this case calls into question the extent to which the federal government can order states to refrain from action. Do such orders merely preempt state law pursuant to the Supremacy Clause, or alternatively, do such orders impermissibly commandeer the states?

Decisions regarding sports gambling and sales taxes would appear to have no relation to each other. However, those who object to the state imposition of sales-tax obligations on remote sellers point to the administrative burden caused by sellers' compliance with the laws of multiple taxing jurisdictions and the concomitant variations in tax bases and tax rates among those jurisdictions.[9] The Court itself discussed this issue and noted that Congress can provide solutions if the need arises.[10] Given Congress's track record on this issue, the Court's view may be Panglossian. Moreover, its decisions in both cases leave in doubt whether Congress, in fact, has the power to streamline state sales-tax and use-tax regimes. *Wayfair, Inc.* eliminated the need for states to obtain congressional permission to impose tax obligations on remote sellers.[11] In light of *Wayfair, Inc.*, the Court's holding in *Murphy* may prohibit Congress from imposing

4. Quill Corp. v. Heitkamp *ex rel.* North Dakota, 504 U.S. 298, 301–02 (1992), *overruled by Wayfair, Inc.*, 138 S. Ct. 2080.

5. *Id.* at 312.

6. *See Wayfair, Inc.*, 138 S. Ct. at 2096.

7. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1484–85 (2018).

8. *Id.* at 1478; *see, e.g.*, David Purdum, *Supreme Court Strikes Down Federal Law Prohibiting Sports Gambling*, ESPN (May 14, 2018), http://www.espn.com/chalk/story/_/id/23501236/supreme-court-strikes-federal-law-prohibiting-sports-gambling.

9. *See Wayfair, Inc.*, 138 S. Ct. at 2088, 2098.

10. *Id.* at 2098.

11. *Id.* at 2099.

requirements on states that would allow the states to exercise the power *Wayfair, Inc.* granted them.

Part I of this Article provides a brief overview of the anticommandeering doctrine, a relatively recent addition to the Court's federalism jurisprudence. This Part then proceeds to discuss the federal sports gambling legislation and the Court's decision in *Murphy*. The Court clarified that federal laws preventing a state from taking action are as vulnerable to commandeering claims as federal laws that require a state to take action.[12] However, the Court's distinction between federal laws that permissibly preempt state law and those laws that impermissibly commandeer the states is unsatisfactory and unclear. It appears federal laws that do nothing more than order a state to do something or refrain from doing something are constitutionally infirm, but the Court did not make this point clear.[13]

Part II of this Article discusses the two landmark precedents that prohibited a state from imposing sales-tax and use-tax obligations on sellers who lacked a physical presence in the state. This Part then analyzes the Court's opinion in *Wayfair, Inc.* in which it overturned those precedents. The Court, in discarding the physical presence test, did not provide any bright-line tests with respect to the attributes required for a state's tax schemes to pass muster under the dormant Commerce Clause.[14] Consequently, challenges to state sales-tax and use-tax statutes by remote sellers will likely arise. Finally, this Part discusses whether Congress has retained the power to pass legislation that would require states to streamline their tax regimes in order to impose tax obligations on remote sellers. Congress had a quarter of a century to deal with this issue. In light of *Murphy*, it may have missed its opportunity to craft a national solution to sales-tax administrative burdens.

I. THE ANTICOMMANDEERING PRINCIPLE AFTER *MURPHY*

In recent years, the Court has resurrected the Tenth Amendment as a substantive limitation on federal power. One manifestation of this resurrection is the Court's use of the anticommandeering principle to strike down federal laws. Most recently, the Court used this principle to strike down a federal statute enacted over a quarter century ago that

12. *Murphy*, 138 S. Ct. at 1478.
13. *See id.*
14. *See generally Wayfair, Inc.*, 138 S. Ct. 2080.

prohibited states from sanctioning sports gambling.[15] In the process, the Court both brought clarity and sowed confusion into the future application of the principle.

A. *The Anticommandeering Principle—In General*

Any law that "commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program" exceeds Congress's constitutional power.[16] Consequently, Congress "lacks the power directly to compel the States to require or prohibit" acts which the federal government sees fit to require or prohibit.[17] This so-called anticommandeering principle recognizes the constitutional system of dual sovereignty and, in part, is intended to preserve political accountability on federal officials by preventing them from making policy choices and passing the proverbial buck to state officials.[18] The anticommandeering principle is of recent vintage and is the result of a shift in the Court's interpretation of the Tenth Amendment.

The Tenth Amendment provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[19] Almost two centuries ago, Chief Justice John Marshall predicted, rather presciently, that the issue of the proper allocation of power between the states and the federal government "will probably continue to arise, so long as our system shall exist."[20] In 1816, the Court held that state courts are bound by Supreme Court decisions and that the Constitution enables the federal government to act upon the states.[21] However, several decades later, the Court indicated that Congress's power over state legislatures was restrained—a view the Court echoed during the Civil War and its immediate aftermath.[22] Prior to

15. *See, e.g.*, *Murphy*, 138 S. Ct. at 1485.

16. Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 283, 288 (1981).

17. New York v. United States, 505 U.S. 144, 166, 180 (1992).

18. *Id.* at 168; *see also* Printz v. United States, 521 U.S. 898, 930 (1997) (striking down provisions requiring states to "absorb the financial burden of implementing a federal regulatory program" and "tak[e] the blame for its . . . defects").

19. U.S. CONST. amend. X.

20. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).

21. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 325–28 (1816).

22. *See* Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869); Kentucky v. Dennison, 65 U.S. (24 How.) 66, 107 (1861), *overruled by* Puerto Rico v. Branstad, 483 U.S. 219 (1987); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 616 (1842).

1900, the Court interpreted the Tenth Amendment as an admonition that the federal government may exercise only the limited powers enumerated in the Constitution.[23] From 1900 to 1937, the Court interpreted the Tenth Amendment as a substantive and enforceable limitation on federal power.[24] This nineteenth century interpretation of the Tenth Amendment found favor with the Court from 1937 until the early 1990s.[25] During that period, with one short-lived exception, the allocation of power among the federal government and the states was a political issue.[26]

Until the early 1990s, the Court did not insulate states from federal power on federalism grounds.[27] The Court did, however, invoke the Tenth Amendment in *National League of Cities v. Usery* to preclude the application of federal minimum wage and overtime pay requirements to state governments.[28] In that case, the Court held that the Tenth Amendment prevented the federal government from regulating states in their exercise of traditional government functions and that establishing wage levels for state employees fell within the sphere of traditional government functions.[29] Less than a decade later in *Garcia v. San Antonio Metropolitan Transit Authority*,

23. *See* Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1627, 1636 (2006).

24. *See id.* These years coincide with the so-called *Lochner* era in which the Court routinely struck down both state and federal legislation. *See* Hammer v. Dagenhart, 247 U.S. 251, 277 (1918) (striking down a federal law that prohibited the shipment in interstate commerce of goods produced by enterprises employing child labor); Lochner v. New York, 198 U.S. 45, 65 (1905) (holding that a New York statute regulating the hours of bakers was an unconstitutional infringement on the right and liberty to contract).The *Lochner* era is considered to have closed with the Court's decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937), a decision that upheld the constitutionality of Washington state's minimum wage law and overturned an earlier precedent to the contrary in *Adkins v. Children's Hospital of D.C.*, 261 U.S. 525 (1923).

25. Siegel, *supra* note 23, at 1636; *see also* United States v. Darby, 312 U.S. 100, 124 (1941) (terming the Tenth Amendment as merely a "truism"). For decades, the Tenth Amendment rarely found its way into the Court's jurisprudence. *See* Ara B. Gershengorn, Note, *Private Party Standing to Raise Tenth Amendment Commandeering Challenges*, 100 COLUM. L. REV. 1065, 1068–69 (2000).

26. *See* Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 507 (1995); *see also* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558 (1954).

27. *See* Siegel, *supra* note 23, at 1637.

28. Nat'l League of Cities v. Usery, 426 U.S. 833, 842–52 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

29. *Id.* at 851–52.

the Court abandoned the traditional government function test and overruled *National League of Cities*.[30] Justice Harry Blackmun, writing for the Court, stated the traditional government function test was not workable because a distinction between traditional and nontraditional government functions could not be made in a principled fashion.[31] Several years later in *Gregory v. Ashcroft*, the Court somewhat blunted the effect of *Garcia* by holding that the Age Discrimination in Employment Act of 1967 did not apply to Missouri state judges.[32] In *Gregory*, the Court stated that a federal statute would not be interpreted to intrude upon fundamental state government functions unless Congress made it clear that it intended the statute to apply directly to the states.[33]

In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, the Court upheld a federal statute establishing certain standards for coal mining operations and required states wishing to assume regulatory authority over such operations, among other requirements, to enact laws implementing the standards set forth in the federal statute.[34] If a state declined to participate, then the federal government would assume regulatory responsibilities.[35] The Court noted federal law did not compel the states to adopt the federal standards, did not require them to expend state funds, and did not otherwise coerce them into participation in the federal program.[36] The Court later stated that because Congress could have chosen to preempt the field entirely, the legislation in question "merely made compliance with federal standards a precondition to continued state regulation in an otherwise pre-

30. *Garcia*, 469 U.S. 528.

31. *Id.* at 531.

32. *See* Gregory v. Ashcroft, 501 U.S. 452, 473 (1991).

33. *Id.* at 460–61 (quoting Atascadero State Hosp. v. Scanlon 473 U.S. 234, 242 (1985), *superseded by statute*, Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 100 Stat. 1807, *as recognized in* Lane v. Pena, 518 U.S. 187 (1996)).

34. Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 271 (1981). The Court in this case reworked the traditional government function test it set forth in *National League of Cities* into a three-part test. *Id.*; *see supra* notes 28–29 and accompanying text. Under this three-part test, a federal statute is unconstitutional if it (1) regulates the states as states; (2) addresses indisputable attributes of state sovereignty; or (3) impairs states from structuring integral operations in areas of traditional government functions. *Hodel*, 452 U.S. at 287–88. Four years later the Court abandoned the traditional government function test. *See supra* notes 30–33 and accompanying text.

35. *Hodel*, 452 U.S. at 272.

36. *Id.* at 288.

empted field."[37] In *Federal Energy Regulatory Commission v. Mississippi*, the Court upheld a federal requirement imposed on state utility commissions mandating the commissions to consider enacting certain standards for energy efficiency.[38] Despite the fact that federal law commandeered state resources by requiring states to consider the energy standards, the Court upheld the law because it did not require the implementation of such standards and was "only one step beyond *Hodel*."[39]

Federal prohibitions on state actions or federal requirements placed on states to enact regulations have been upheld if such prohibitions or requirements do not implicate a state's control over its regulation of private parties or if the prohibitions or requirements merely subject a state to the same requirements applicable to private parties. Thus, a federal law prohibiting a state from issuing bonds in bearer form was upheld in *South Carolina v. Baker*,[40] as was a federal law prohibiting state motor-vehicle departments from divulging private information about its citizens in *Reno v. Condon*.[41]

In *New York v. United States*, the Court struck down a federal law designed to regulate and encourage the orderly disposal of low-level radioactive waste.[42] The law included a "take title" provision which mandated that a state take title to radioactive waste at the request of the waste generator if such state had not been able to arrange for the disposal of the waste by a certain time.[43] According to the Court, "Congress may not

37. Printz v. United States, 521 U.S. 898, 926 (1997) (citing *Hodel*, 452 U.S. at 287).

38. Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 746, 769–70 (1982).

39. *Id.* at 764.

40. South Carolina v. Baker, 485 U.S. 505, 526–27 (1988).

41. Reno v. Condon, 528 U.S. 141, 143 (2000). In *Reno*, the Court stated that federal law violates the anticommandeering principle if it seeks to control or influence the manner in which states regulate private parties. *Id.* at 150 (quoting *Baker*, 485 U.S. at 514–15). The Third Circuit interpreted *Reno* to limit the application of the anticommandeering principle to federal laws that require affirmative action from a state. *See* Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 832 F.3d 389, 400 (3d Cir. 2016) (en banc), *rev'd sub nom.* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018). The Supreme Court reversed the Third Circuit and made clear that the principle applies equally to federal commands to states to refrain from action. *Murphy*, 138 S. Ct. at 1478.

42. New York v. United States, 505 U.S. 144, 149, 188 (1992).

43. *Id*. at 153–54 (citing 42 U.S.C. § 2021e(d)(2)(C) (1991), *invalidated by* New York v. United States, 505 U.S. 144 (1992)).

simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[44] In the Court's opinion, the take title provision "crossed the line distinguishing encouragement from coercion."[45] The Constitution, unlike the Articles of Confederation, established a system of dual sovereignty pursuant to which the federal government, like its state counterparts, acted upon individuals and not the states.[46] The Court explained, "The people, through that instrument, established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States."[47]

Justice Sandra Day O'Connor, writing for the Court, reasoned that the commandeering of state legislatures by the federal government creates political accountability problems by masking the source of the policy in question to the detriment of state officials:

> If the citizens of New York . . . do not consider that making provision for the disposal of radioactive waste is in their best interest, they may elect state officials who share their view. . . . But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.[48]

Justice O'Connor noted the anticommandeering principle does not prevent the federal government from influencing state policy.[49] The federal government can exercise such influence by attaching conditions to federal funds or by threatening to preempt the states in a regulatory area if the states do not adhere to federal policy.[50] Both conditional spending and conditional

44. *Id.* at 161 (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)).

45. *Id.* at 175.

46. *Id.* at 163.

47. *Id.* at 162 (quoting Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1868)).

48. *Id.* at 168–69. For a thoughtful discussion of executive-agency preemption and whether the courts should afford any deference to agency preemption of state law, see Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 NW. U. L. REV. 695 (2008).

49. *New York*, 505 U.S. at 166.

50. *Id.* at 167–68. *Hodel* and *South Dakota* v. *Dole* provide examples of conditional preemption and conditional spending. *See supra* notes 34–35 and accompanying text;

preemption are constitutional because, unlike commandeering, states have a choice to reject federal overtures.[51]

Half a decade later, in *Printz v. United States*, the Court applied the anticommandeering principle to invalidate a federal law that imposed federal requirements on state executive branch officials.[52] The Court held that the provisions of federal gun control legislation—the Brady Act—requiring local authorities of certain states to run background checks on gun purchasers were unconstitutional because Congress "may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program."[53] Writing for the majority, Justice Antonin Scalia relied on early federal legislation and the Federalist Papers to support the Court's belief that the Constitution was not understood to empower Congress to conscript state executive branch officials.[54] He rejected the argument that *New York* limited the application of the anticommandeering doctrine to federal

infra notes 64–68 and accompanying text. Another example of conditional preemption is the requirement imposed on the states by the Patient Protection and Affordable Care Act to establish insurance marketplaces. The Patient Protection and Affordable Care Act established the American Health Benefit Exchanges, governmental or nonprofit entities that, among other functions, serve as insurance marketplaces in which individuals can comparison shop for insurance products. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1311, 124 Stat. 119, 173 (2010) (codified at 42 U.S.C. § 18031 (2012)) [hereinafter Exchanges]. Each state must create and operate an Exchange that offers insurance for purchase by individuals and employees of small employers. *Id.* A state may opt out of creating and operating an Exchange; in which case, the Exchange will be established by the federal government. *Id.* § 18041, 124 Stat. at 186 (codified at 42 U.S.C. § 18041 (2012)). A significant issue with respect to the Exchanges was whether federal income tax credits were available to low-income purchasers of health insurance on federal Exchanges. The statutory language appeared to limit the tax credits to purchasers on state Exchanges, but regulations were issued that allowed the credits for purchasers on federal Exchanges. *See* I.R.C. § 36B (2012); Treas. Reg. §§ 1.36B-1(k) (defining Exchange by reference to 45 C.F.R. § 155.20 (2018)), 1.36B-2(a) (2012) (providing eligibility for credit by enrollment in an Exchange); 45 C.F.R. § 155.20 (stating that the term Exchange refers to state Exchanges, regional Exchanges, subsidiary Exchanges, and a federally facilitated Exchange). The limitation of the tax credits for purchasers of insurance on state Exchanges would have had a coercive effect on the states because failure to establish a state Exchange would have eliminated the possibility that the residents of such states could qualify for federal tax credits. The Court upheld the regulations in *King v. Burwell*, 135 S. Ct. 2480 (2015).

51. *New York*, 505 U.S. at 168.

52. Printz v. United States, 521 U.S. 898, 935 (1997).

53. *Id.*

54. *Id.* at 905–11.

commandeering of state legislatures, asserting that the distinction between policy making and policy implementation is often opaque and that attempts to distinguish between the two would likely prove unmanageable.[55] In addition, the system of dual sovereignty established by the Constitution rejects the approach taken by the Articles of Confederation, whereby the federal government acted upon states, and, instead, requires the federal government to act upon individuals.[56] Justice Scalia also voiced the concerns regarding political accountability that were set forth in *New York* and noted that robust state governments help to prevent tyranny.[57] The Court also suggested some sort of *de minimis* test may be warranted in determining whether the federal government's imposition of minor ministerial duties on the states is permissible.[58]

The Court, in both *New York* and *Printz*, distinguished between Congress's power to commandeer state judges and its power, or lack thereof, to commandeer state legislative and executive branch officials. According to the Court, Congress's power to commandeer state judges is rooted in the Supremacy Clause.[59] The notion that the commandeering of state judicial functions is constitutionally acceptable was articulated in *Testa v. Katt*, a case in which the Court held a Rhode Island court was required to adjudicate a claim that arose under federal law.[60] The contrast between federal power

55. *Id.* at 927–28.

56. *Id.* at 919–20.

57. *Id.* at 921, 930. The Court also noted that federal commandeering of state officials shifts the cost of enforcement to the states. *Id.* at 930. Shifting costs of an activity to others—a negative externality—will result in the conduction of more than an optimal amount of the activity because the cost is not borne entirely by the person conducting the activity. *See generally* JEFFREY M. PERLOFF, MICROECONOMICS 598–601 (2d ed. 2000). It is not clear whether the anticommandeering principle applies to obligations imposed on states by treaties. *See generally* Craig Jackson, *The Anti-Commandeering Doctrine and Foreign Policy Federalism—The Missing Issue in* Medellín v. Texas, 31 SUFFOLK TRANSNAT'L L. REV. 335 (2008); Janet R. Carter, Note, *Commandeering Under the Treaty Power*, 76 N.Y.U. L. REV. 598 (2001).

58. Justice Scalia stated that the "incidental application to the States of a federal law of general applicability" would be constitutionally permissible if such law did not interfere excessively with the functioning of the state's government. *Printz*, 521 U.S. at 932.

59. *See id.* at 907; New York v. United States, 505 U.S. 144, 178–79 (1992).

60. Testa v. Katt, 330 U.S. 386, 391 (1947). The scope of Congress's power to require state courts to adjudicate federal claims is not clear. *See, e.g.*, Howlett *ex rel.* Howlett v. Rose, 496 U.S. 356, 372 (1990) (stating the Supremacy Clause does not necessarily require a state to create a court competent to hear a federal claim); *see also* Peter Jeremy Smith, *The Anticommandeering Principle and Congress's Power to Direct*

over state judiciaries and such power over the other branches of state government has drawn criticism.[61]

As Justice O'Connor noted in *New York*, Congress cannot compel state cooperation, but it can obtain cooperation through its spending power.[62] A plethora of federal programs dispense an enormous amount of funds to the states, often with strings attached.[63] However, the use of the spending power as a carrot to obtain state cooperation has its own limits both constitutionally and politically. In *South Dakota v. Dole*, the Court set forth the conditions under which such an exercise of the spending power is constitutionally permissible.[64] The federal spending in question must advance the general welfare; the conditions imposed upon the receipt of funds must be stated unambiguously and relate to the federal interests sought to be advanced; and such conditional spending cannot be prohibited by another constitutional provision.[65] Moreover, the Court held the Tenth Amendment precludes financial inducements that are so coercive they compel states to accept such inducements.[66] In that case, the Court upheld the constitutionality of the National Minimum Drinking Age Act, which caused a state that did not adopt a legal drinking age of at least 21 to lose 5

State Judicial Action: Congress's Power to Compel State Courts to Answer Certified Questions of State Law, 31 CONN. L. REV. 649, 675–78 (1999) (discussing various cases and asserting state courts, in the absence of express congressional direction to the contrary, can invoke neutral rules of jurisdiction to refuse to hear a federal claim).

61. Among the criticisms is that there is no textual basis for making such a distinction among the branches of state government. *See* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1030–42 (1995) (asserting the treatment of a state's judiciary as *sui generis* is not supported by the text of the Constitution); Martin H. Redish & Steven G. Sklaver, *Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism,* 32 IND. L. REV. 71, 78–90 (1998) (criticizing Justice Scalia's textual argument set forth in *Printz* and asserting Article I is the proper source of Congress's commandeering authority).

62. *New York*, 505 U.S. at 166–68.

63. *See* Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 B.U. L. REV. 1, 12 (2015).

64. South Dakota v. Dole, 483 U.S. 203, 207–08 (1987).

65. *Id.*

66. *Id.* at 211. Precedent is scarce regarding whether states may accept conditional funding if such acceptance would result in the violation of state law. *See* D. Cody Huffaker, Comment, *A New Type of Commandeering: The Bypass Clause of the American Recovery and Reinvestment Act of 2009 (Stimulus Package)*, 42 ARIZ. ST. L.J. 1055, 1082 (2010).

percent of federal highway funds.[67] According to the Court, the financial inducement in this case was not coercive but merely a form of "relatively mild encouragement."[68]

In *National Federation of Independent Business v. Sebelius*, the Court upheld the constitutionality of the Patient Protection and Affordable Care Act's individual health-insurance mandate pursuant to Congress's taxing power.[69] However, the Court ruled against the Government on two issues in that case. First, it held the individual health-insurance mandate was beyond Congress's power to regulate interstate commerce.[70] Second, it held the expansion of Medicaid under the statute impermissibly compelled the states to enact or administer a federal program.[71] The Court recognized that the federal government may induce states, through the spending power, to enact or administer programs.[72] However, otherwise permissible financial inducements become impermissible when a state is left with no practical choice but to comply with federal dictates—when, in the Court's words, "pressure turns into compulsion."[73] Under the statute, a state that refused to expand its Medicaid program faced a loss of all federal Medicaid funding.[74] In theory, a state had the option to refuse and lose a great deal of federal funding. Practically, given the amount of money at stake, a state had no choice but to expand its Medicaid program.[75]

67. *Dole*, 483 U.S. at 211–12.

68. *Id.* at 211.

69. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 588 (2012). This was the first case in a trilogy of cases before the Court that concerned the Patient Protection and Affordable Care Act, commonly referred to as Obamacare. In 2014, the Court held that, pursuant to the Religious Freedom Restoration Act, the statute's requirement that employer-provided health insurance include coverage for certain contraceptives could not be enforced against three closely held corporations. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 736 (2014). In 2015, the issue before the Court was whether federal tax credits made available by the statute were available to qualified individuals who purchase health insurance on either federal or state Exchanges or whether such credits are limited to qualified individuals who purchase health insurance on state Exchanges. King v. Burwell, 135 S. Ct. 2480, 2489 (2015). The Court held that the Act makes tax credits available to qualified individuals who purchase health insurance on federal Exchanges. *Id.* at 2496.

70. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 555–58.

71. *Id.* at 581–85.

72. *Id.* at 576.

73. *Id.* at 580 (quoting *Dole*, 483 U.S. at 211).

74. *Id.* at 581.

75. *Id.* at 582.

B. Murphy v. National Collegiate Athletic Association

Subject to certain exceptions, the Professional and Amateur Sports Protection Act (PASPA) prohibited states from sanctioning wagering on professional and amateur sports.[76] PASPA was atypical of federal gambling legislation because, unlike previously enacted federal legislation, it did not defer to states' policy preferences with respect to gambling.[77] Moreover, PASPA did not create an independent federal prohibition on sports gambling but merely implemented federal policy by directive to the states.[78] New Jersey twice challenged the constitutionality of PASPA, and its second challenge culminated with the Court's holding that PASPA was, in fact, unconstitutional.[79] The Court, holding that PASPA impermissibly commandeered the states, clarified that federal directives to the states to refrain from action are, for purposes of the application of the anticommandeering doctrine, indistinguishable from directives to the states to affirmatively take action.[80] However, the Court's explanation of the difference between a federal law that impermissibly commandeers the states and a federal law that permissibly preempts state action is not entirely satisfactory. *Murphy* likely will have a significant impact beyond the gambling industry. Unfortunately, the Court's reasoning in the case leaves in doubt the scope of federal power to preempt state law.

1. *PASPA*

PASPA, enacted in 1992, significantly restricted state-sanctioned sports gambling.[81] The statute was enacted in response to Congress's concern regarding the growth of state-sponsored sports gambling, the concomitant erosion of public confidence in the integrity of professional and amateur sports contests, and skepticism of the assertion that the legalization of sports gambling would have a chilling effect on illegal sports gambling.[82] Congress

76. 28 U.S.C. §§ 3701–3704 (2012), *held unconstitutional by* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).

77. *See id.*

78. *Murphy*, 138 S. Ct. at 1481–82.

79. *Id.* at 1485.

80. *Id.* at 1467.

81. Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227 (1992) (codified at 28 U.S.C. §§ 3701–3704 (2012), *held unconstitutional by Murphy*, 138 S. Ct. 1461).

82. S. REP. NO. 102-248, at 5–7 (1992), *as reprinted in* 1992 U.S.C.C.A.N. 3553, 3555, 3558. Note that a separate federal statute criminalizes sports bribery: "Whoever carries

believed that state-sanctioned games would fail to satiate the appetite of many gamblers who are initially drawn to the state-sponsored games and, therefore, that legalization would increase the incidence of illegal gambling.[83] Finally, the statute manifested Congress's belief that "[t]he moral erosion [sports gambling] produces cannot be limited geographically" due to the fact that legalization of sports gambling in one state would result in a race to the bottom among other states.[84] Despite the aforementioned concerns, the legislation exempted Nevada and other states that already had legalized some form of sports gambling.[85] PASPA represented an unusual federal intrusion into state policy preferences with respect to gambling because traditional federal gambling prohibitions buttressed state law prohibitions but did not infringe on state policy choices.[86] PASPA was not

into effect, attempts to carry into effect, or conspires with any other person to carry into effect any scheme in commerce to influence, in any way, by bribery any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery that contest, shall be fined under this title, or imprisoned not more than 5 years, or both." 18 U.S.C. § 224 (2012).

83. S. REP. NO. 102-248, at 5, 7, *as reprinted in* 1992 U.S.C.C.A.N. at 3555, 3558.

84. *Id*. at 5, *as reprinted in* 1992 U.S.C.C.A.N. at 3556.

85. *Id*. at 8, *as reprinted in* 1992 U.S.C.C.A.N. at 3559.

86. For example, the Wire Act subjects a person engaged in the business of betting or wagering, who knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, to criminal sanctions. 18 U.S.C. § 1084(a). Any transmission in interstate or foreign commerce of information that assists in the placing of bets or wagers on any sporting event or contest is exempt from the Wire Act's strictures if the transmission originates in a state or foreign country in which sports betting is legal and has its terminus in a state or foreign country in which sports betting is legal. *Id.* In 2011, the federal government, in contrast to previous practice, made clear that the Wire Act applies only to sports gambling, but the Department of Justice has recently reversed itself and now contends that the Wire Act's purview is not limited to sports gambling. *See* Reconsidering Whether the Wire Act Applies to Non-Sports Gambling, slip op. at 23 (O.L.C. Nov. 2, 2018), https://www.justice.gov/olc/file/1121531/download; Whether Proposals by Illinois and New York to Use the Internet and Out-Of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act, 35 Op. O.L.C. 1–2 (2011). The Travel Act prohibits anyone from traveling in interstate or foreign commerce or using the mail or any facility in interstate or foreign commerce with the intent to distribute the proceeds of an unlawful activity; commit any crime of violence to further any unlawful activity; or promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity. 18 U.S.C. § 1952(a)(1)–(3). For this purpose, an unlawful activity includes any business enterprise that involves gambling that either violates the law of the state in which the violation was committed or federal law. *Id.* § 1952(b). The Illegal Gambling Business Act prohibits anyone from conducting, financing, managing,

the last federal intrusion into state gambling policy. More than a decade after PASPA's enactment, the federal government carved out an exception to a federal antigambling statute for fantasy sports activities.[87]

supervising, directing, or owning all or part of an illegal gambling business. *Id.* § 1955(a). An illegal gambling business is a gambling business that involves five or more persons who conduct, manage, supervise, direct, or own such business; has been or remains in substantial continuous operation for more than thirty days; has gross revenue of at least $2,000 in any single day; and is in violation of the law of the state or political subdivision in which such business is conducted. *Id.* § 1955(b)(1). The Interstate Transportation of Wagering Paraphernalia Act (the Paraphernalia Act) prohibits anyone from knowingly carrying or sending in interstate or foreign commerce any record, paraphernalia, ticket, certificate, token, paper, writing, or other devise that is, or will be, used or adapted, devised, or designed for use in bookmaking, wagering pools with respect to sporting events, or numbers, policy, bolita, or similar games. *Id.* § 1953(a). This statute does not apply to the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a state in which such bets or wagers are legal under state law. *Id.* § 1953(b).

87. The Unlawful Internet Gambling Enforcement Act (UIGEA) was enacted in 2006 as a result of the perceived inadequacy of voluntary efforts by credit card companies to deny authorization for transactions on gambling websites in curbing the growth of online gambling. Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, §§ 801–803, 120 Stat. 1884 (codified at 31 U.S.C. §§ 5361–5367 (2012)). The statute's objective is to restrict the flow of funds to online gambling operators by prohibiting any person engaged in the business of betting or wagering from knowingly accepting, in connection with the participation of another person in unlawful Internet gambling, any credits, credit proceeds, electronic funds transfers, funds transmitted through a money transmitting business, checks, drafts, or similar instruments drawn on or payable through a financial institution, or proceeds of any other financial transaction prescribed by the Secretary of the Treasury or the Board of Governors of the Federal Reserve System. 31 U.S.C. § 5363. The statute also instructs the Department of the Treasury and the Federal Reserve to promulgate regulations that require designated payment systems, and all participants therein, to establish policies and procedures that are reasonably designed to identify, block, or otherwise prevent or prohibit the acceptance of transactions that are prohibited by the statute. *Id.* § 5364(a). Regulations issued by both the Department of the Treasury and the Federal Reserve provide a set of due diligence procedures as a safe harbor for various payment-system participants, including credit and debit card issuers, operators, merchants, third-party processors, and banks. *See generally* 12 C.F.R. §§ 233.1–.7 (2018); 31 C.F.R. §§ 132.1–.7 (2018). Unlawful Internet gambling is defined as:

> [T]o place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the [place] in which such bet or wager is initiated, received, or otherwise made.

31 U.S.C. § 5362(10)(A).

Bets or wagers that are initiated and received or otherwise made exclusively in

PASPA's operative provision made it unlawful for:

> [A] governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . 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.[88]

Similarly, it was unlawful for "a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity" the aforementioned activities.[89] Civil actions to enjoin violations of the statute could be brought by the Attorney General of the United States or by any amateur or professional sports organization whose competitive game is the basis of the statutory violation.[90]

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one state do not constitute unlawful Internet gambling if such bets are expressly authorized in the state by laws or regulations that include reasonably effective age and location verification requirements and appropriate data-security safeguards. *Id.* § 5362(10)(B)(i)–(ii). The UIGEA expressly sanctions certain fantasy sports activities regardless of whether state law prohibits such activities. A bet or wager does not include participation in any fantasy or simulation sports game in which none of the fantasy teams are based on the current membership of a professional or amateur sports organization, as defined by PASPA. *Id.* § 5362(1)(E)(ix). Moreover, the winning outcome may not be based either on the score, point spread, or performance of any single real-world team or combination of such teams or solely on the performance of an individual athlete in any single event. *Id.* § 5362(1)(E)(ix)(III)(aa)–(bb). All prizes and awards must be established and made known to participants prior to the game or contest; the value of such prizes and awards cannot be determined by the number of participants or the amount of fees paid by such participants; and all winning outcomes must reflect the relative knowledge and skill of the participants. *Id.* § 5362(1)(E)(ix)(I)–(II).

88. 28 U.S.C. § 3702(1) (2012), *held unconstitutional by* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018); *see also id.* §§ 3701–3704, *held unconstitutional by Murphy*, 138 S. Ct. 1461. A government entity is a state, including territories or possessions of the United States, or political subdivisions thereof, and entities or organizations that have governmental authority over territories of the United States, including certain Native American entities or organizations. *Id.* § 3701(2), (5).

89. *Id.* § 3702(2).

90. *Id.* § 3703. An amateur sports organization is any person or governmental entity, or league or association of such persons or governmental entities, "that sponsors, organizes, schedules, or conducts a competitive game in which one or more amateur athletes participate." *Id.* § 3701(1). A professional sports organization is similarly defined, except that such organization "sponsors, organizes, schedules, or conducts a competitive game in which one or more professional athletes participate." *Id.* § 3701(3).

The statute exempted certain activities from its reach. Parimutuel animal racing and jai-alai games were categorically exempt.[91] The legislation also exempted certain casino activities and contained two general grandfather rules.[92] An activity otherwise prohibited by the statute was permitted if such activity was not a lottery and was conducted exclusively in a casino located in a municipality, provided that such activity or similar activity was authorized to be operated in the municipality not later than one year after the effective date of the statute.[93] Moreover, any commercial casino-gaming scheme operated by a casino located in a municipality, other than a lottery, was permissible if such scheme was in operation in the municipality throughout the ten-year period preceding the effective date of the statute and is subject to comprehensive state regulation applicable solely to such municipality.[94]

Two general grandfather rules were provided in the statute. First, lotteries; sweepstakes; and betting, gambling, and wagering schemes operated in a state or other governmental entity were permitted if such schemes were conducted by the state or governmental entity at any time

91. *Id.* § 3704(a)(4). Thus, horseracing and greyhound racing activities are exempt from the statutory prohibition. *Parimutuel* is a term that describes the betting system utilized in such activities. *Parimutuel*, BLACK'S LAW DICTIONARY (5th ed. 1979). The statutory language could be interpreted to apply to fantasy sports contests. Fantasy sports activities are based on the performances of one or more amateur or professional athletes in competitive games. PASPA has not been used to challenge the legality of fantasy sports. Although the Court has now rendered this issue moot, it is likely that PASPA was never intended to apply to fantasy sports contests. PASPA was enacted during the infancy of fantasy sports industry, and one of its objectives was to protect the integrity of amateur and professional sporting events. *See supra* note 87 and accompanying text. Accordingly, it is arguable that PASPA was unconcerned with wagers whose outcomes are determined by an amalgamation of statistics generated by the performance of numerous athletes in various contests. Instead, PASPA's focus was on wagers based on the individual performances of athletes in discrete contests—performances susceptible to influence by gamblers. The UIGEA contains a fantasy sports carve-out, but this legislation expressly provides that its provisions shall not be construed to alter, limit, or extend any federal or state law that prohibits, permits, or regulates gambling and prohibits any bet or wager that violates PASPA. 31 U.S.C. §§ 5361(b), 5362(1)(c); *see also supra* note 87. Therefore, the UIGEA cannot be construed to exempt from PASPA an activity that was, prior to its enactment, prohibited by PASPA, but the UIGEA's fantasy sports carve-out does lend credence to the notion that PASPA was never intended to reach fantasy sports activities.

92. 28 U.S.C. § 3704(a)(3).

93. *Id.* § 3704(a)(3)(A).

94. *Id.* § 3704(a)(3)(B).

between January 1, 1976, and August 31, 1990.[95] Second, lotteries; sweepstakes; and betting, gambling, and wagering schemes operated in a state or other governmental entity were permitted if such schemes were authorized by statute in effect on October 2, 1991, and such schemes were actually conducted in the state or other governmental entity at any time between September 1, 1989, and October 2, 1991.[96] The first described grandfather rule appeared to apply to activities conducted by the state or governmental authority itself during the statutory reference period.[97] The second described grandfather rule appeared to allow activities operated by private enterprises pursuant to statute if such activity were conducted in the jurisdiction during the statutory reference period.[98]

The Third Circuit interpreted the first grandfather rule described above narrowly in a case involving Delaware's plan to institute a sports betting scheme in 2009.[99] During the 1976 National Football League season, Delaware operated a sports betting scheme known as "Scoreboard" under which three types of games were offered.[100] The games required a player to pick a winner in multiple games.[101] The games differed from each other in several respects—games were selected with or without a point spread and the minimum number of games whose winner had to be correctly selected varied—but a player participating in Scoreboard had to select a winner in at least three games.[102] Delaware intended to commence, on September 1, 2009, a sports-betting scheme that would allow single game wagers in professional and amateur sports except for sporting events that involved a Delaware college or university or a Delaware amateur or professional sports team.[103] The leagues representing the four major professional team sports—baseball,

95. *Id.* § 3704(a)(1).
96. *Id.* § 3704(a)(2).
97. *See id.* § 3704(a)(1).
98. *See id.* § 3704(a)(2).
99. Office of the Comm'r of Baseball v. Markell, 579 F.3d 293, 296 (3d Cir. 2009).
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*

football, basketball, and hockey—and the National Collegiate Athletic Association filed for a preliminary injunction in federal district court asserting that the state's proposed scheme violated PASPA.[104] The district court denied the preliminary injunction.[105]

The Third Circuit reversed the district court, decided the case on the merits, and held that Delaware's scheme violated PASPA.[106] The court rejected the state's assertion that the grandfather rule should be applied broadly to allow any sports lottery because the state had conducted a sports lottery in 1976.[107] Instead, the court believed the statutory language was clear, and the grandfather rule applied only to schemes that the state had actually conducted in 1976.[108] According to the court, whether state law allowed Delaware to offer a broader range of games in 1976 was irrelevant.[109] The court conceded that the grandfather rule did not limit games to those identical in every respect to the games offered in the past, but it held that any differences between the present and past games must be *de minimis* and not substantial.[110] For example, permissible distinctions include differences in the location at which tickets may be purchased or differences in the teams that exist and, therefore, may be bet upon.[111] However, Delaware's plan to allow wagers to be placed on single football games and to allow wagers to be placed on sporting events that did not involve the National Football League teams were substantive changes from the 1976 scheme.[112] Accordingly, PASPA limited Delaware to the provision of three or more game parley bets on National Football League games.[113]

2. *New Jersey's Legal Challenges*

The voters of New Jersey approved, by referendum, an amendment to the state's constitution that permitted the state legislature to enact legislation authorizing sports gambling.[114] Subsequent legislation was

104. *Id.* at 295, 297.
105. *Id.* at 297.
106. *Id.* at 304.
107. *Id.* at 301–02.
108. *Id.*
109. *Id.* at 301.
110. *Id.* at 303–04.
111. *Id.* at 304.
112. *See id.*
113. *Id.*
114. MaryAnn Spoto, *Sports Betting Backed by N.J. Voters*, NJ ADVANCE MEDIA

enacted, but it failed to meet the deadline set forth in the PASPA grandfather provision.[115] Various professional sports leagues and the National Collegiate Athletic Association brought suit to enjoin the state from licensing sports betting, and the district court held the plaintiffs had standing to assert their claims and that PASPA was constitutional.[116] The Third Circuit affirmed the district court's decision.[117]

(Nov. 9, 2011), https://www.nj.com/news/2011/11/nj_residents_vote_on_legalizin.html.

115. Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208, 217 (3d Cir. 2013), *abrogated by* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018). *See supra* notes 95–98 and accompanying text for a discussion of PASPA's grandfather rules. Note that in 2015 the New Jersey Betting and Equal Treatment Act of 2015 and the Sports Gaming Opportunity Act of 2015 were introduced. The former bill would have allowed New Jersey to legalize sports betting, and the latter bill would have granted all states the opportunity to legalize sports gambling during a four-year window ending on January 1, 2019. New Jersey Betting and Equal Treatment Act of 2015, H.R. 457, 114th Cong. (2015); Sports Gaming Opportunity Act of 2015, H.R. 416, 114th Cong (2015).

116. *Nat'l Collegiate Athletic Ass'n*, 730 F.3d at 214–15.

117. *Id.* at 215. Based largely on an expert witness report and league internal surveys, the court held that the sports leagues and the National Collegiate Athletic Association had standing to bring suit to enforce PASPA due to the threat of reputational harm posed by sports gambling. *See id.* at 218–24. The requirement of standing is rooted in Article III of the Constitution which provides that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and . . . to Controversies to which the United States shall be party." U.S. CONST. art. III, § 2. The standing requirement also has a prudential dimension:

> The Article III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court's judgment may benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action . . . ."
>
> Apart from this minimum constitutional mandate, this Court has recognized other limits on the class of persons who may invoke the courts' decisional and remedial powers. First, the Court has held that when the asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction. Second, even when the plaintiff has alleged injury sufficient to meet the "case or controversy" requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. Without such limitations—closely related to Article III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental

On appeal, the State raised three constitutional claims. First, the State asserted that PASPA was beyond Congress's power to regulate interstate commerce.[118] The court, quoting *United States v. Lopez*, held, "Congress may regulate an activity that 'substantially affects interstate commerce' if it 'arise[s] out of or [is] connected with a commercial transaction.'"[119] Both wagering and national sports are economic activities, and both activities substantially affect interstate commerce.[120]

Second, the State asserted that PASPA impermissibly commandeers the states to enforce a federal regulatory program.[121] The court held that the anticommandeering principle is inapplicable to federal laws that merely prohibit a state from acting in a manner that would violate federal law.[122] PASPA, according to the court, did not require a state to do anything;

> institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.
>
> . . . .
>
> . . . Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Article III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants.

Warth v. Seldin, 422 U.S. 490, 499–501 (1975) (citations omitted).

A discussion of standing jurisprudence, oftentimes bewildering and subject to criticism, is beyond the scope of this work. For a cogent analysis and critique of the Supreme Court's holdings in this respect, see generally Richard A. Epstein, *Standing and Spending—The Role of Legal* and *Equitable Principles*, 4 CHAP. L. REV. 1 (2001); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961); Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992); Note, *Taxpayers' Suits: A Survey and Summary*, 69 YALE L.J. 895 (1960).

118. *Nat'l Collegiate Athletic Ass'n*, 730 F.3d at 224.

119. *Id.* (quoting United States v. Lopez, 514 U.S. 549, 559 (1995)).

120. *Id.* at 224–25. Moreover, assuming arguendo that PASPA also reaches purely local activities, such as casual bets among family members, Congress had a rational basis for concluding that purely intrastate activity, when combined with like conduct by other similarly situated people, affects interstate commerce. *Id.* at 225–26 (citing Wickard v. Filburn, 317 U.S. 111 (1942) (other citations omitted)). The Third Circuit, in a footnote, acknowledged *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), the case that granted professional baseball an exemption from the Sherman Antitrust Act on the ground that professional baseball is not in interstate commerce. *See Nat'l Collegiate Athletic Ass'n*, 730 F.3d at 225 n.7.

121. *Id.* at 227.

122. *Id.* at 229–30.

instead, PASPA merely asserted the authority of the Supremacy Clause to prevent a state from taking certain prohibited action.[123] A state is not precluded under PASPA from repealing an antigambling law so long as the state does not affirmatively authorize or license sports gambling.[124]

Finally, the court rejected the State's assertion that PASPA violated the equal sovereignty of the states by singling out Nevada for favorable treatment.[125] In the court's opinion, the State had misplaced its reliance on two Supreme Court cases that dealt with the Voting Rights Act of 1965.[126] The scope of the equal sovereignty principle is not clear. On the one hand, the Court has held that the principle is applicable to the terms upon which states are admitted to the United States.[127] On the other hand, the Court has signaled that the doctrine may, in fact, have broader application.[128] According to the Third Circuit, the equal sovereignty principle does not prohibit Congress from differentiating among states in the exercise of its commerce power.[129] Moreover, assuming the disparate treatment of a state or states has to be justified by unique conditions or facts present in the disfavored state or states, PASPA's grandfather rule still passed constitutional muster because the objective of PASPA was not to eliminate

123. *Id.* at 230–31.

124. *Id.* at 232.

125. *Id.* at 237–40. The equal sovereignty doctrine is rooted in Article IV, section 4 of the U.S. Constitution and the Tenth Amendment thereto. *See* Shelby County v. Holder, 570 U.S. 529, 542–43 (2013); Coyle v. Smith, 221 U.S. 559, 566–67 (1911).

126. *Nat'l Collegiate Athletic Ass'n*, 730 F.3d at 240 (citations omitted).

127. *See* South Carolina v. Katzenbach, 383 U.S. 301, 328–29 (1966).

128. In a 2009 decision involving the Voting Rights Act of 1965, the Court stated, "'The doctrine of the equality of States . . . does not bar . . . remedies for *local* evils which have subsequently appeared.' But a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem it targets." Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009) (quoting *Katzenbach*, 383 U.S. at 328–29). More recently, in another case involving the Voting Rights Act of 1965, the Court noted:

> *Coyle* concerned the admission of new States, and *Katzenbach* rejected the notion that the principle operated as a *bar* on differential treatment outside that context. At the same time, as we made clear in *Northwest Austin*, the fundamental principle of equal sovereignty remains highly pertinent in assessing subsequent disparate treatment of States.

Shelby County., 570 U.S. at 544 (citations omitted).

129. *Nat'l Collegiate Athletic Ass'n*, 730 F.3d at 238.

sports gambling but to prevent its spread.[130] Finally, if Congress, in fact, was prohibited from favoring Nevada, then the appropriate corrective measure would be the invalidation of the grandfather rule favoring Nevada rather than the invalidation of the entire statute.[131] Unfortunately, the scope of the equal sovereignty principle remains unclear because this issue was not addressed by the Supreme Court in *Murphy*.[132]

Due to New Jersey's resilience, the Third Circuit was not through with PASPA. In 2014, New Jersey enacted legislation repealing certain existing prohibitions and, in effect, permitting casinos and racetracks to engage in sports wagering without an express state authorization.[133] The Third Circuit had occasion to opine on whether this law violated PASPA and, if so, whether PASPA's application in this case violated the anticommandeering principle.[134] The court held the law, in essence, channeled sports gambling to particular venues and that the allowance of casino sports gambling in the

130. *Id.* at 239.

131. *Id.* For a critique of the Third Circuit's decision with respect to the equal sovereignty issue, see Michael Welsh, Note, *Betting on State Equality: How the Expanded Equal Sovereignty Doctrine Applies to the Commerce Clause and Signals the Demise of the Professional and Amateur Sports Protection Act*, 55 B.C. L. REV. 1009, 1021–26 (2014).

132. Federal laws often have disparate impact among the states due to demographic, geographical, economic, and other differences among states. *See* Hodel v. Indiana, 452 U.S. 314, 332–33 (1981). Such disparities do not raise constitutional issues. *See id.*; James Clark Distilling Co. v. W. Md. Ry. Co., 242 U.S. 311, 326–27 (1917). Recently, several states have sued the federal government, alleging the $10,000 cap on the federal tax deductibility of state and local income and property taxes enacted as part of the Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11042, 131 Stat. 2054, 2086 (2017) (codified at I.R.C. § 164) (Supp. V 2017), is unconstitutional. Pete Scott, *4 States Sue U.S. Federal Government Over State & Local Tax Deduction Limit*, WORLDWIDE ERC (July 23, 2018), https://www.worldwideerc.org/article/4-states-sue-us-federal-government-over-state-local-tax-deduction-limit/. The cap will disfavor taxpayers who reside, or who are subject to, tax in high tax states. *See* Jesse McKinley, *4 States File Lawsuit Against Trump's 'Economic Missile' Tax Plan,* N.Y. TIMES, July 18, 2018, at A21. The final version of the tax legislation is unwieldly titled "An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018" but is commonly referred to as the "Tax Cuts and Jobs Act." *See* Pub. L. No. 115-97, 131 Stat. 2054.

133. *See* Brent Johnson, *Christie Signs Law Allowing Sports Betting in N.J.*, NJ ADVANCE MEDIA (Oct. 17, 2014), https://www.nj.com/politics/2014/10/chris_christie_signs_law_allowing_for_sports_betting_in_nj.html.

134. Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 832 F.3d 389, 391 (3d Cir. 2016) (en banc), *rev'd sub nom.* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).

midst of several prohibitions of sports gambling amounted to state authorization, thereby causing the state law to violate PASPA.[135] The court did not categorically state that a partial repeal of a prohibition, as opposed to a total repeal, amounts to state authorization of the activity, but in this particular case, the partial repeal did amount to state authorization.[136] For this reason and the reasons set forth in the earlier case, the court held the anticommandeering principle was not violated.[137] The state petitioned the Supreme Court, and on June 27, 2017, the Court granted certiorari.[138]

3. Murphy v. National Collegiate Athletic Association

On May 14, 2018, the Supreme Court, in a 6–3 decision, held PASPA unconstitutional.[139] The Court held New Jersey's legislative action fell within the confines of PASPA because the repeal, in whole or in part, of an existing statutory prohibition amounts to state authorization of the activity that, prior to repeal, had been prohibited.[140] The Court then held the PASPA provision at issue in the case was unconstitutional because it violated the anticommandeering principle.[141] In contrast to the Third Circuit, the Court held no distinction should be made between federal legislation that commands a state to act and federal legislation that prohibits a state from taking action.[142] The Court distinguished federal preemption of state law pursuant to the Supremacy Clause and the impermissible commandeering of state authorities.[143] Finally, the Court held PASPA unconstitutional in its entirety because the Court believed the statutory provision at issue in the

135. *Id.* at 396–98.

136. *Id.* at 401–02.

137. *Id.* The dissenting judges believed that the repeal of a preexisting prohibition is not tantamount to state authorization and took exception to the majority's assertion that partial repeal of prohibitions may, in some cases, amount to authorization, while in other cases, it may not. *Id.* at 405 (Fuentes, J., dissenting); *id.* at 408 (Vanaskie, J., dissenting).

138. Christie v. Nat'l Collegiate Athletic Ass'n, 137 S. Ct. 2327, 2328 (2017) (mem.) (per curiam).

139. *Murphy*, 138 S. Ct. at 1485. Governor Chris Christie's name was replaced with that of his successor, Philip D. Murphy. Justices Ruth Bader Ginsburg and Sonia Sotomayor dissented, and Justice Stephen Breyer dissented in part. *Id.* at 1488 (Ginsburg, J., dissenting).

140. *Id.* at 1474.

141. *Id.* at 1485.

142. *Id.* at 1481–82; Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208, 230–31 (3d Cir. 2013), *abrogated by Murphy*, 138 S. Ct. 1461.

143. *See Murphy*, 138 S. Ct. at 1479–81.

case was not severable from the other operative provisions of the statute.[144]

144. *Id.* at 1484–85. The issue before the Court was whether a state may be prohibited from authorizing or licensing sports gambling. *Id.* at 1468. The statute also prohibited a state from operating, sponsoring, or promoting sports gambling. *See* 28 U.S.C. § 3702 (2012), *held unconstitutional by Murphy*, 138 S. Ct. 1461. The Court held that the prohibitions on these state activities were not severable from the provision at issue in the case and, accordingly, were also constitutionally infirm. *Murphy*, 138 S. Ct. at 1484. In order for these provisions to fail, "it must be 'evident that [Congress] would not have enacted those provisions which are within its power, independently of [those] which [are] not.'" *Id.* at 1482 (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987)). According to the Court, Congress would not have barred states from operating state-run sports lotteries if such states could authorize or license private casino operators to engage in sports gambling. *Id.* Casino gambling was considered a more pernicious form of gambling than state-lottery schemes. *Id.* at 1482–83. The Court rejected the argument that state-operated schemes can be interpreted by the public as a tacit endorsement of the activity, thereby justifying the prohibition on state-operated sports betting arrangements. *Id.* at 1483. Moreover, the Constitution has never been interpreted to permit the federal government to deny a state the right to express its views on matters of public importance, and the Court declined to do so in this case. *Id.* With respect to the prohibition on state sponsorship and promotion activities, the Court believed that the distinction between these activities and state authorization, licensing, and operation is too uncertain and that Congress would not have sought to bar such an ill-defined category of conduct. *Id.* As a result, the entire operative provision that prohibited various types of state action with respect to sports gambling was struck down. *Id.* at 1484.

In addition to the prohibitions the statute imposed on the states, a second operative provision in the statute made it "unlawful for . . . a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity" the aforementioned activities. *Id.*; 28 U.S.C. § 3702(2). This provision was not at issue in the case, but the Court proceeded to examine whether this provision was severable from the provision at issue or whether the entire statute should fail to pass constitutional muster. *Murphy*, 138 S. Ct. at 1484. The Court noted that PASPA deviated from the general federal framework with respect to gambling; generally, violation of state gambling laws was a predicate to a federal offense. *Id.* In contrast, a violation of PASPA by a private actor required that such actor's behavior be in accordance with state law. *Id.* This counterintuitive result would make sense if the prohibitions on state governments were operative because they would serve a coherent federal policy—to prevent states from legalizing sports gambling. *Id.* at 1483–84. If, however, the restrictions imposed directly on the states were not operative, then the prohibitions on private actors would cease to serve any coherent policy and would undermine the policy choices of the people of a state. *Id.* In effect, a private actor would violate federal law only if such actor complied with state law. *Id.* Therefore, a sports gambling operation in violation of state law would be permissible under PASPA—"a weird result" in the Court's words. *Id.* at 1484. Moreover, Congress contemplated that PASPA would impose no enforcement costs on the federal government. *Id.* Since states can now broadly decriminalize sports gambling, it is likely that federal-enforcement costs would ensue as a result of civil suits and

The statutory provision at issue in *Murphy* makes it unlawful for:

> [A] governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . 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.[145]

The petitioners asserted that PASPA "require[d] States to maintain their existing laws against sports gambling" because a total or partial repeal of such laws would amount to the authorization of previously prohibited activities.[146] The petitioners' assertion followed from their belief that the term *authorize* is synonymous with *permit*.[147] The respondents countered that state authorization requires some affirmative action that empowers someone with the right or authority to act and that a state's failure to

contempt applications against a multiplicity of private parties. *Id.* Consequently, the Court held that no provision of PASPA was severable from the operative provision at issue in the case, and accordingly, the entire statute is unconstitutional. *Id.* The Court also struck down the statute's prohibitions on both states and private actors from advertising sports gambling operations. *Id.* The Court relied heavily on First Amendment principles as set forth in several of its precedents with respect to the advertisement of legal activities. *See id.* Justice Clarence Thomas's concurrence invited the Court to revisit its jurisprudence with respect to severability. *Id.* at 1485–88 (Thomas, J., concurring). Justice Thomas concurred in the judgment because no alternative rule was proposed. *See id.* at 1485. Justice Thomas pointed out that this jurisprudence is a relatively recent phenomenon, and severability analysis suffers from two significant infirmities. *Id.* at 1486–87. First, it requires courts to turn their focus from a statute's language to legislative intent. *Id.* at 1486. Because Congress does not pass statutes with the notion that a portion of such statutes are unconstitutional, an inquiry into legislative intent invariably devolves into the advancement of judicial policy preferences. *Id.* at 1486–87. Second, in many cases the parties before the courts lack standing to challenge the provisions to which severability analysis is applied, thereby inviting the courts to issue advisory opinions. *Id.* at 1487. Justices Ginsburg and Sotomayor dissented because they believed the statute's various prohibitions on states, other than those that prohibited states from authorizing and licensing sports gambling, were severable from the prohibitions in question, as were the statute's prohibitions on private actors. *Id.* at 1489–90 (Ginsburg, J., dissenting). Justice Breyer also believed the provisions applicable to private parties were severable from those operative on the states. *Id.* at 1488 (Breyer, J., concurring in part, dissenting in part).

145. 28 U.S.C. § 3702(1).

146. *Murphy*, 138 S. Ct. at 1473.

147. *Id.*

prohibit an action does not amount to state authorization of such action.[148]

The Court noted, and the respondents conceded, that the petitioners' interpretation would render the statutory prohibition unconstitutional.[149] The Court held the petitioners' interpretation was the correct one, although it also believed that repeal of a prohibition, whether total or partial, would fall within the respondents' interpretation of the term *authorize*.[150] According to the Court, the repeal of sports gambling prohibitions not only permits sports gambling but also empowers persons with the right or authority to act, and "[w]hen a State completely or partially repeals old laws banning sports gambling, it 'authorize[s]' that activity."[151]

As noted above, PASPA also prohibits private actors from undertaking certain activities when such activities are conducted "pursuant to the law."[152] The United States argued that in order for this prohibition on actions by private parties to apply, an affirmative grant of authority by the state is required and that the statute is inapplicable to actions by private parties in an area unregulated by the state.[153] Therefore, the repeal by a state of existing prohibitions on an activity is not authorization of that activity by the state.[154] The Court disagreed.[155] Finally, the Court rejected the respondents' argument that the Court should adopt a reasonable interpretation of the statute that avoids constitutional infirmity because the statute, regardless of the interpretation adopted, violates the anticommandeering principle.[156]

The anticommandeering principle is "the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States."[157] Both the federal government and the states wield sovereign powers, but state sovereignty is limited in several ways. First, certain grants of power to the

148. *Id.*

149. The United States, as amicus in support of respondents, also conceded this point. *Id.* at 1474.

150. *Id.*

151. *Id.*

152. *See* 28 U.S.C. § 3702 (2012), *held unconstitutional by Murphy*, 138 S. Ct. 1461.

153. *Murphy*, 138 S. Ct. at 1474.

154. *Id.*

155. *Id.*

156. *Id.* at 1475.

157. *Id.*

federal government impose implicit restrictions on state governments.[158] Second, the Supremacy Clause preempts state law when such law conflicts with federal law that is within the scope of the authority granted to Congress by the Constitution.[159] The federal government is constrained by its authority to act only within the enumerated powers conferred upon it. and all other legislative power is reserved to the states.[160] The anticommandeering principle "simply represents the recognition of this limit on congressional authority."[161]

Justice Samuel Alito noted the relatively recent—and infrequent—emergence of the anticommandeering principle. Citing to *New York v. United States*, Justice Alito stated that the Constitution, unlike the Articles of Confederation, grants Congress legislative authority over individuals and not the states and that "even 'a particularly strong federal interest'" would not enable Congress to command a state to enact regulation.[162] He explained, "Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents."[163] The anticommandeering principle serves several important purposes, including the promotion of political accountability, the reduction of the risk of tyranny by maintenance of a balance of power between the states and the federal government, and the prevention of enforcement-cost shifting to the states.[164]

According to the Court, the legislative prohibition on state authorization of sports gambling—regardless of whether the term *authorize* is interpreted according to manner posited by either the petitioners or the respondents—dictates to a state legislature what it may or may not do and, in effect, puts such legislature under the direct control of Congress.[165] The Court proceeded to dispel the notion that a distinction should be made between a congressional command to act and a congressional command to refrain from action:

158. *Id.* at 1475–76.
159. *Id.* at 1476.
160. *Id.*
161. *Id.*
162. *Id.* (quoting New York v. United States, 505 U.S. 144, 178 (1992)).
163. *Id.* at 1477 (quoting *New York*, 505 U.S. at 178).
164. *Id.* (citing Printz v. United States, 521 U.S. 898, 929–30 (1997); *New York*, 505 U.S. at 168–69, 181–82).
165. *Id.* at 1478.

> This distinction is empty. It was a matter of happenstance that the laws challenged in *New York* and *Printz* commanded "affirmative" action as opposed to imposing a prohibition. The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event. . . . Suppose Congress ordered States with legalized sports betting to take the affirmative step of criminalizing that activity and ordered the remaining States to retain their laws prohibiting sports betting. There is no good reason why the former would intrude more deeply on state sovereignty than the latter.[166]

The Court then proceeded to distinguish the statute in question from congressional actions the Court had previously upheld.[167] In those cases, Congress either exerted pressure on states to act in accordance with congressional objectives, regulated states similarly to private actors in an activity in which both engage, provided states with a choice to act or not act, or merely required states to consider—but not necessarily adopt—a federal regulatory scheme.[168]

The Court's clarification that the federal government can no more order a state to do nothing than it can order a state to do something begs the question of how the anticommandeering principle coexists with preemption. In certain areas Congress has prohibited states from the exercise of any regulatory role pursuant to the Supremacy Clause. However, the Supremacy Clause is a "rule of decision" and not an independent grant of legislative power.[169]

The Court noted that federal preemption of state law, regardless of the type of preemption at issue, is warranted when federal law confers rights or imposes restrictions on private actors and when state law confers conflicting rights or imposes conflicting restrictions.[170] The Court referred to *Mutual*

166. *Id.*

167. *See id.*

168. *Id.* at 1478–79. The Court discussed *Reno v. Condon*, 528 U.S. 141 (2000), *South Carolina v. Baker*, 485 U.S. 505 (1988), *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742 (1982), and *Hodel v. Indiana*, 452 U.S. 314 (1981). For a discussion of several of these cases, see *supra* notes 34–41 and accompanying text. Note that federal laws that incentivize states to act in a certain manner are susceptible to challenge if the incentive structure embedded in the legislation is coercive. *See supra* notes 34–41 and accompanying text.

169. *Murphy*, 138 S. Ct. at 1479 (quoting Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378, 1383 (2015)).

170. *Id.* at 1480.

Pharmaceutical Co. v. Bartlett to demonstrate "conflict preemption," the preemption of a state law that imposes a duty or confers a right that is in conflict with federal law.[171] In that case, the Court struck down a state law that required a generic-drug manufacturer to provide information on a generic-drug label in addition to the information required by the FDA.[172] The state law in question conflicted with federal law and, thus, was preempted because federal law prohibited generic-drug manufacturers from altering the composition of an FDA-approved drug or the FDA-approved label.[173]

"Express preemption" implicates federal laws that preclude state action, and such laws appear strikingly similar to PASPA.[174] For example, a provision of the Airline Deregulation Act of 1978 prohibited states, or their political subdivisions, from enacting or enforcing "any law, rule, regulation, standard, or other provision having the force and effect of law relating to [air carriers'] rates, routes, or services."[175] The Court distinguished this provision from the PASPA provision at issue despite the fact that this provision operated directly on the states.[176] According to the Court, the Airline Deregulation Act of 1978 conferred on private actors, in this case airlines, a federal right to engage in certain conduct free of state law constraints.[177] Therefore, this provision operated similarly to any other federal law with preemptive effect notwithstanding its linguistic similarity to the PASPA provision in question.[178]

Finally, "field preemption" occurs when federal law occupies an area of regulation "so comprehensively that it has left no room for supplementary state legislation."[179] The federal law that governs the registration of aliens offers an example of such preemption.[180] Federal law provides aliens with a right to be free of any registration obligation other than those required

171. *Id.*
172. *Id.*
173. *Id.*
174. *See id.*
175. *Id.* (quoting 49 U.S.C. § 1305(a)(1) (1988)).
176. *See id.*
177. *Id.*
178. *Id.*
179. *Id.* (quoting R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 140 (1986)).
180. *Id.* (citing Arizona v. United States, 567 U.S. 387 (2012)).

by federal law.[181] Consequently, field preemption, despite the fact that it directly precludes state governments from acting, operates similarly to conflict and express preemption—it is predicated on federal law that regulates private actors and not states.[182]

According to the Court, PASPA's prohibition on state authorization of sports gambling cannot be interpreted as a regulation of private actors and, consequently, is not a preemption provision.[183] Because the provision in question neither confers federal rights on anyone who desires to conduct sports gambling operations nor imposes any restrictions on private actors, it can only be interpreted as a direct command to the states in violation of the anticommandeering doctrine.[184]

C. *Analysis and Critique*

A variety of criticisms have been directed toward the anticommandeering principle. Some detractors of the principle assert that political accountability, a value that the principle supports, has no textual support in the Constitution.[185] Moreover, the notion that political accountability is buttressed by the cooperative federalism that the anticommandeering principle helps make possible is devoid of empirical support and is premised on quixotic notions of voter competence.[186] Critics have also posited that the framers intended the federal government to enlist state officials in carrying out federal policies.[187] Further criticism of the

181. *Id.* at 1481.

182. *Id.*

183. *Id.*

184. *Id.* The Court rejected the respondents' argument that the prohibition on licensing sports gambling should be upheld. The federal government's power to restrict a state from licensing an operation is subject to the same constraints as its power to restrict a state from authorizing an activity. *Id.* at 1481–82.

185. *See* Coan, *supra* note 63, at 13; Siegel, *supra* note 23, at 1632. Professor Coan believes that the anticommandeering principle can be supported by the fact that commandeering disturbs the constituency relations model established by the Constitution. In essence, commandeering allows Congress to take control of state governments, thereby altering the relations of such governments with their local constituencies. *See* Coan, *supra* note 63, at 18–23. Another commentator believes the principle is supported by expressivism—the message the doctrine communicates about the vitality of states in our federal system and their role as a check on federal power. *See generally* Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule?*, 33 LOY. L.A. L. REV. 1309 (2000).

186. *See* Caminker, *supra* note 61, at 1061–65; Coan, *supra* note 63, at 15.

187. *See* Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE

doctrine is based on the belief that conditional spending and preemption, permissible alternatives to commandeering, either function similarly to commandeering or are more damaging to federalism principles because they eliminate any role for states in policy making or foster inefficiencies.[188] That said, unless and until the Court is swayed by its critics, the anticommandeering principle is firmly in place as an implement available in the enforcement of the Tenth Amendment.

Two significant principles emerged from the Court's decision in *Murphy*. First, the distinction between permissible preemption of state action and impermissible commandeering of state authorities is premised on whether the federal law at issue confers rights or imposes restrictions on private actors.[189] If such rights are conferred or such restrictions imposed, then state action may be preempted by federal law.[190] Otherwise, preemption will not provide constitutional cover against state claims of impermissible commandeering by the federal government.[191] Second, the Court held that the anticommandeering principle applies with equal force to federal laws prohibiting state action as it does to federal laws compelling state action.[192] Based on the Court's reasoning in support of the doctrine, it would make little sense if the federal government could order a state to stand down but not to take action.[193] Consequently, the Court rightly refused to sanction a constitutional distinction between federal commands to act and federal commands not to act. However, the Court's rather opaque reasoning with respect to the preemption versus anticommandeering issue casts doubt on the federal government's ability to prohibit state action in a number of circumstances.

L.J. 1104, 1169 (2013).

188. For example, federal commandeering can ameliorate the negative effects of a race to the bottom among states in competition with each other and provide states with latitude in the implementation of federal policy, thereby providing states with a voice in policy that preemption would otherwise silence. *See* Caminker, *supra* note 61, at 1084–85; Coan, *supra* note 63, at 15–16; Siegel, *supra* note 23, at 1646–57. However, the commandeering of state officials to carry out federal policies without concomitant federal funding creates its own inefficiencies due to the externalities such situations create. *See* Caminker, *supra* note 61, at 1079–81.

189. *See supra* notes 170–82 and accompanying text.

190. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1480 (2018).

191. *See supra* notes 170–82 and accompanying text.

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

193. *See id.*

According to the Court, federal statutes that preempt state law pursuant to the Supremacy Clause, regardless of the nature of the preemption, impose restrictions on, or confer rights to, private actors and do not operate directly upon states.[194] In the Court's opinion, the operative provision of PASPA at issue in the case directly regulated states and did not regulate private conduct.[195] The Court's reasoning is unpersuasive for several reasons.

First, private parties indisputably are regulated by a second operative provision of PASPA, a provision that makes it unlawful for a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, certain sports gambling activities.[196] Although the Court noted the existence of this provision, it did not discuss the provision in the context of preemption, but instead, it discussed this provision only in the context of its severability from the operative provision at issue.[197] Second, the Court distinguished *Murphy* from cases in which it previously upheld federal legislation that preempted states from regulating airline fares and immigration documentation.[198] In both of those cases, the Court believed the preemptive effect of federal law was justified. Although the law in question told the states what they could not do, those same laws provided rights to private actors—providing airlines with the right to be free of state and local regulation and immigrants with the right to register with one level of government only.[199] However, the PASPA provision in question conferred on the professional sports leagues and the National Collegiate Athletic Association the right to conduct their affairs free of any state-sanctioned activity they opposed[200]—a right plausibly as cognizable as the right to set airfares free of state interference or the right to register one's immigration status with a single government agency.

Unlike the airline and immigration statutes, PASPA did not create an independent federal legal framework for the activity it sought to regulate, and any restrictions imposed on private actors under PASPA were predicated solely on state authorization of sports wagering.[201] Therefore, a

194. *See id.* at 1480–81.
195. *See id.*
196. *See* 28 U.S.C. § 3702 (2012), *held unconstitutional by Murphy*, 138 S. Ct. 1461.
197. *See Murphy*, 138 S. Ct. at 1484.
198. *See id.* at 1480–81.
199. *See id.*
200. *See id.* at 1480.
201. *See* 28 U.S.C. § 3702.

case can be made that, absent a separate and distinct federal legal framework, federal preemption claims cannot be supported because there is no federal legal framework for state action to disturb. Moreover, any private right that may have been conferred upon the National Collegiate Athletic Association and the professional sports leagues was based entirely on commandeering the states because federal law conferred no such right independently of the mandated state prohibitions.[202] If, in fact, PASPA is distinguishable from the permissible federal statutes discussed by the Court on this ground, then the Court should have said as much. If not, it is difficult to ascertain why PASPA conferred no rights to private actors.

In contrast to the Third Circuit, the Court held the anticommandeering principle is applicable to federal commands that prohibit state action in addition to commands that compel state action.[203] The Court's holding leaves in doubt whether a federal statute can preempt a state from legislating in certain areas. For example, it is not clear whether the federal government can prohibit states from legalizing certain activities.[204] Moreover, based on

202. *See id.*

203. *See Murphy*, 138 S. Ct. at 1481–82; Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208, 230–31 (3d Cir. 2013), *abrogated by Murphy*, 138 S. Ct. 1461.

204. For example, it is unclear whether the federal government could prevent a state from legalizing marijuana. The Controlled Substances Act sets forth five schedules of drugs—Schedules I–V—with the most severe restrictions imposed on Schedule I drugs, which are drugs or substances that have a high potential for abuse, have no medically accepted use, and lack safe use under medical supervision. *See generally* 21 U.S.C. § 812 (2012). Marijuana is listed as a Schedule I narcotic and, as such, cannot be manufactured, distributed, dispensed, or possessed with the intent to manufacture, distribute, or dispense. *See id.* § 841(a). Moreover, marijuana, unlike Schedule II-V controlled substances, cannot be prescribed by a physician. *See id.* § 829(a)–(c). The constitutionality of the statute's application to state-legalized marijuana was upheld by the Supreme Court in *Gonzales v. Raich*, 545 U.S. 1, 33 (2005). The Court has also held that the Controlled Substances Act does not provide, nor is it required to provide, a medical-necessity exception to its prohibitions. *See* United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 486 (2001).

At the time of the enactment of the Controlled Substances Act, every state maintained prohibitions on marijuana, but public support for the medical use of marijuana, the seeming futility of the enforcement of legal prohibitions, and the belief that such prohibitions disproportionately burdened minority groups led to changes in public attitudes toward marijuana. *See* Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 84–85 (2015) (citations omitted). In 1996 California became the first state to permit the medical use of marijuana and as of November 7, 2018, 33 states and the District of Columbia have enacted medical marijuana laws. *See Legal Recreational Marijuana States and DC*, PROCON.ORG, https://marijuana.procon.org/view.resource.php?resourceID=006868 (last visited Dec.

Murphy, it is unclear whether the federal government can compel states to enact measures that states are otherwise entitled to enact in the absence of federal legislation that operates directly on the matter at issue.

Specifically, *Murphy* leaves in doubt the extent to which Congress can force states to ameliorate the administrative burdens that the Court's *Wayfair, Inc.* decision may create. *Wayfair, Inc.* represents the Court's long overdue visitation of an issue it last visited over 25 years ago—the ability of a state to impose sales-tax obligations on sellers without a physical presence in the state.

12, 2018). Ten states and the District of Columbia have legalized, to varying degrees, recreational use of marijuana. *See id.*

The Controlled Substances Act does not occupy the field with respect to drug regulation. To the contrary, the statute states:

> No provision of this subchapter shall be construed as indicating an intent on the part of Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903.

Courts have interpreted the preemptive effect of the Controlled Substances Act very narrowly. State law is deemed to cause a positive conflict with the Act only if compliance with state and federal law is a physical impossibility. *See* Chemerinsky et al., *supra*, at 105–06 (citing Gonzales v. Oregon, 546 U.S. 243, 290 (2006) (Scalia, J., dissenting); S. Blasting Servs., Inc. v. Wilkes County, 288 F.3d 584, 591 (4th Cir. 2002); Solorzano v. Superior Court, 13 Cal. Rptr. 2d 161, 169–70 (Ct. App. 1992)). The first case cited by the authors concerned legislation dealing with explosives that contained preemption language similar to that used in the Controlled Substances Act. Under such a narrow interpretation of the law's preemptive effect, only state laws that require its citizens or its officials to violate the Controlled Substances Act would be preempted.

It is not clear by the Court's reasoning with respect to PASPA whether Congress could prohibit a state from legalizing marijuana. On the one hand, it is arguable that such a statute would preempt any state law to the contrary because the Controlled Substances Act clearly operates as a prohibition on private conduct, and therefore, such a prohibition imposed on the states would not violate the anticommandeering principle but, instead, would preempt state law pursuant to the Supremacy Clause. On the other hand, if state legalization statutes do not present an obstacle to federal law enforcement, then perhaps preemption is inapplicable, and such a statute does nothing more than operate as a gratuitous federal command on state legislatures.

II. CONGRESS'S POWER TO DICTATE ADMINISTRATIVE RELIEF PROVISIONS AFTER *WAYFAIR, INC.* IN LIGHT OF *MURPHY*

One surprising element of the Court's *Wayfair, Inc.* decision is that it took the Court so long to discard its prior precedents. The last time the Court heard this issue the Internet was a nascent development that eventually altered the retail industry in ways that were unimaginable a quarter of a century ago.[205] Prior to the *Wayfair, Inc.* decision, the dormant Commerce Clause precluded a state from excising its sales and using taxing authority over a business that had no physical presence in the state.[206] The Court took judicial notice of the sea of change in commercial practices since it last decided this issue and discarded the physical presence test.[207] However, the Court failed to specify the necessary attributes of state legislation that assure such legislation does not violate the dormant Commerce Clause.[208] Moreover, the Court did not believe the compliance burdens imposed on businesses subject to multiple state and local sales-tax regimes were too problematic; in any event, Congress could step in and ameliorate such burdens.[209] In light of Congress's track record over the past two and a half decades, perhaps the Court has a Panglossian view of our national legislature.[210] Moreover, politics aside, *Murphy* very well may have rendered Congress powerless to dictate terms to the states with respect to their sales-tax and use-tax regimes.

A. *Physical Presence Test*

In 1967, the Court held the Due Process Clause of the Fourteenth Amendment and the dormant Commerce Clause precluded a state from requiring a business with no physical presence in the state to collect and pay state sales tax on sales made to persons within the state.[211] In that

205. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2097 (2018).

206. *See* Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753, 756 (1967), *overruled by Wayfair, Inc.*, 138 S. Ct. 2080.

207. *Wayfair, Inc.*, 138 S. Ct. at 2099.

208. *See id.* at 2094–99.

209. *Id.* at 2098.

210. *See id.* at 2097.

211. *See Nat'l Bellas Hess, Inc.*, 386 U.S. at 756. The dormant Commerce Clause, a doctrine developed by the Court in the nineteenth century, precludes a state from interfering with interstate commerce and arises by implication from Congress's power to regulate interstate commerce. *See* Reading R.R. v. Pennsylvania, 82 U.S. (15 Wall.) 232, 249–50 (1872). A law motivated by economic protectionism that facially discriminates against out-of-state interests or that favors in-state economic interests over out-of-state

case, the Court noted the similarity between the due process requirements imposed by the Fourteenth Amendment and the prohibition from unduly burdening interstate commerce imposed on states by the Commerce Clause.[212] Accordingly, neither the Fourteenth Amendment nor the Commerce Clause was found to permit a state to impose sales-tax collection and payment responsibilities on a mail order seller with no physical presence in the state.[213]

Twenty-five years later, the Court had occasion to revisit this issue in *Quill Corp. v. North Dakota*.[214] The Court decoupled the Due Process Clause from the Commerce Clause with respect to a state's power to tax.[215] Despite the close relation between the limitations imposed by these two constitutional provisions, they "pose distinct limits on the taxing powers of the States."[216] The Due Process Clause is concerned with fundamental fairness and the extent to which a person's connection with a state legitimizes the state's exercise of authority over such person.[217] Its touchstones are notice and fair warning.[218] The Court noted its due process jurisprudence had evolved in the years after its *National Bellas Hess, Inc. v. Department of Revenue* decision and that modern commercial life obviates the need for a physical presence within a state "[s]o long as a commercial actor's efforts are 'purposefully directed' toward residents of another State."[219] Accordingly,

interests violates the Commerce Clause unless the state can show the law in question is the only means by which it can advance a legitimate state purpose. However, if a law is not motivated by economic protectionism but does affect interstate commerce incidentally, the Court has applied a balancing test to determine whether such law is permissible. *See generally* Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573 (1986); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333 (1977); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

212. *See Nat'l Bellas Hess, Inc.*, 386 U.S. at 756–58.

213. *See id.* at 760. The dissent believed the petitioner's large-scale, systematic, and continuous solicitation of the respondent state's consumer market and its reliance on the state's credit market facilities created sufficient nexus for the respondent to impose tax responsibilities on the petitioner. *See id.* at 761–62 (Fortas, J., dissenting).

214. Quill Corp. v. Heitkamp *ex rel.* North Dakota, 504 U.S. 298, 301–02 (1992), *overruled by Wayfair, Inc.*, 138 S. Ct. 2080.

215. *See id.* at 305.

216. *See id.*

217. *Id.* at 312.

218. *Id.*

219. *Id.* at 306–08 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985)).

the widespread solicitation of business within the state by the petitioner created sufficient contacts for the state to impose tax responsibilities on the petitioner under the Fourteenth Amendment.[220]

However, the Court refused to scuttle the physical presence test for Commerce Clause purposes.[221] Unlike the Due Process Clause, the Commerce Clause is not concerned with fairness but with "structural concerns about the effects of state regulation on the national economy."[222] With respect to a state's taxing power, the Court applied the four-part test it established in *Complete Auto Transit, Inc. v. Brady* and concluded, for Commerce Clause purposes, a person must have a physical presence in the state in order for a state to impose tax burdens on that person.[223]

The Court acknowledged that such a bright-line rule may, in certain circumstances, be anachronistic, but it believed the benefits of a clear rule outweigh its drawbacks.[224] Moreover, the retention of a bright-line rule is made easier by the fact that Congress is free to overrule the physical presence test.[225] The elimination of the physical presence requirement for due process purposes opened the door for congressional action with respect to sales taxes on sales by remote sellers, whether mail-order sellers or online merchants. As the Court pointedly noted, Congress can authorize states to undertake actions that would otherwise violate the dormant Commerce Clause, but it has no such power with respect to the Due Process Clause.[226] Therefore, *Quill Corp.* gave Congress the ability to craft a national solution to a growing problem.

Not surprisingly, Congress failed to act on this issue despite the remarkable growth of online commerce and the disruptive effect that such growth has had on state sales-tax collections.[227] In light of congressional inaction and the increasing importance of online commerce, this issue

220. *Id.* at 308.

221. *Id.* at 312.

222. *Id.*

223. *Id.* at 313–18. Pursuant to the *Complete Auto* test, a state tax will be upheld if it is applied to an activity with a substantial nexus with the taxing state; is fairly apportioned; does not discriminate against interstate commerce; and is fairly related to the services provided by the state. *Id.* at 311 (quoting Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977)).

224. *Id.* at 315.

225. *Id.* at 318.

226. *Id.* at 305.

227. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2089–90, 2097 (2018).

inevitably found its way back to the Court. This time the Court bowed to commercial realities and discarded the physical presence test in its entirety.[228] Unfortunately, the Court found it unnecessary to expound on the precise contours of the dormant Commerce Clause with respect to state sales and use taxes.

B. South Dakota v. Wayfair, Inc.

In 2016, South Dakota enacted legislation that required remote sellers to collect and remit sales taxes "as if the seller had a physical presence in the state."[229] The statute applied to remote sellers who delivered more than $100,000 of goods or services into the state or engaged in 200 or more separate transactions for the delivery of goods or services into the state on an annual basis.[230] South Dakota sought a declaratory judgment in state court against the respondents Wayfair, Inc., Overstock.com, Inc., and Newegg—three retailers with no physical presence in South Dakota.[231] The South Dakota Supreme Court affirmed the trial court's grant of summary judgment in favor of the respondents on the ground that *Quill Corp.* remained the controlling precedent.[232] On January 12, 2018, the Supreme Court granted certiorari.[233]

The Court set forth a brief history of its dormant Commerce Clause jurisprudence and noted that two principles determine the limits of a state's authority to regulate interstate commerce.[234] First, states may not discriminate against interstate commerce; such discrimination will succumb to a virtual per se rule of invalidity.[235] Second, states may not unduly burden interstate commerce.[236] Whether state measures unduly burden interstate commerce is determined by the burdens imposed by the measures in relation to the putative benefits generated by those measures.[237] The Court then

228. *Id.* at 2099–2100.
229. *Id.* at 2088–89.
230. *Id.* at 2089.
231. *Id.*
232. *Id.*
233. South Dakota v. Wayfair, Inc., 138 S. Ct. 735, 735 (2018) (mem.) (per curiam).
234. *Wayfair, Inc.*, 138 S. Ct. at 2090.
235. *Id.* at 2091.
236. *Id.*
237. *Id.*

proceeded to discuss the test for determining the validity of state taxes, describing the four-part test it set forth in *Complete Auto Transit, Inc.*[238]

According to the Court, "*Quill* is flawed on its own terms" for three reasons.[239] First, physical presence is not a necessary attribute of a business that has a substantial nexus with a taxing state.[240] The Court took notice of modern commercial practices and stated that, although not identical, the nexus requirements for Due Process Clause and Commerce Clause purposes contain significant parallels.[241] The reasons given by the *Quill* Court for rejecting the physical presence test for Due Process Clause purposes apply equally for Commerce Clause purposes.[242] Moreover, advances in software technology have significantly ameliorated the potential administrative burden of sales-tax compliance with multiple jurisdictions.[243]

Second, the physical presence test does not mitigate market distortions but rather creates such distortions.[244] The test places brick-and-mortar businesses at a competitive disadvantage vis-a-vis remote sellers due to the fact that the latter can offer lower prices because they do not charge sales taxes.[245] Moreover, the physical presence test creates a disincentive for businesses to establish a physical presence in a state.[246]

Finally, the physical presence test is the sort of arbitrary, formalistic distinction that the Court has eschewed in its recent Commerce Clause decisions.[247] By way of example, the Court illustrated how the physical presence test treats economically similar businesses differently for arbitrary reasons.[248] In addition, modern technology has blurred the effectiveness of the text: "What may have seemed like a 'clear,' 'bright-line tes[t]' when *Quill*

238. *Id.*; *see also* Complete Auto Transit, Inc. v. Brady, 430 U.S. 247, 279 (1977).
239. *Wayfair, Inc.*, 138 S. Ct. at 2092.
240. *Id.*
241. *Id.* at 2093.
242. *Id.*
243. *Id.*
244. *Id.* at 2092.
245. *Id.* at 2094. Most states have a use tax that requires consumers to pay an amount equal to the sales tax on taxable purchases for which the seller has not charged sales tax. However, consumer compliance with use-tax rules is notoriously poor. *See id.* at 2088 (relying on a November 2017 GAO report to Congress and a 2013 California State Board of Equalization Revenue Estimate).
246. *Id.*
247. *Id.* at 2092.
248. *Id.* at 2094–95.

was written now threatens to compound the arbitrary consequences that should have been apparent from the outset."[249]

The Court also expressed concerns that *Quill Corp.* undermined federalism principles, given the importance of the taxing power to the sovereignty of a state.[250] The Court noted stare decisis is not lightly discarded:

> If it becomes apparent that the Court's Commerce Clause decisions prohibit the States from exercising their lawful sovereign powers in our federal system, the Court should be vigilant in correcting the error. While it can be conceded that Congress has the authority to change the physical presence rule, Congress cannot change the constitutional default rule. It is inconsistent with the Court's proper role to ask Congress to address a false constitutional premise of this Court's own creation.[251]

With the demise of the physical presence test, the respondents were found to have a substantial nexus with South Dakota by virtue of its economic and virtual contacts with the state, particularly in light of the fact that all three respondents exceeded the statutory-activity thresholds for the imposition of sales-tax responsibilities.[252] The question of whether other dormant Commerce Clause principles might invalidate the South Dakota statute was not before the Court, but it did note that the statutory safe harbors, the statute's lack of retroactivity, and the fact that South Dakota had adopted measures to reduce compliance burdens appeared to immunize the statute from other dormant Commerce Clause challenges.[253]

249. *Id.* at 2095 (quoting Quill v. Heitkamp *ex rel.* North Dakota, 504 U.S. 298, 315 (1992), *overruled by Wayfair, Inc.*, 138 S. Ct. 2080).

250. *Id.* at 2096.

251. *Id.* The Court noted the changes in the retail landscape that have occurred since it decided *Quill Corp.* and the difficulties encountered by states in implementing the physical presence test in the current environment. *See id.* at 2097–98. The dissenting Justices agreed that *National Bellas Hess, Inc.* was wrongly decided but believed that the Court should not have overruled it or *Quill Corp.* and that Congress is the appropriate party to discard the physical presence test. *See id.* at 2101–05 (Roberts, J., dissenting).

252. *Id.* at 2099 (majority opinion).

253. *Id.* at 2099–2100. South Dakota adopted the Streamlined Sales and Use Tax Agreement. See *infra* notes 261–63 and accompanying text for a description of this agreement.

C. *Federal Power to Compel Administrative Relief*

In discussing the compliance difficulties that small businesses could face if they are subject to multiple sales-tax regimes, the Court noted that software will eventually ease such burdens. The Court went on to state "in all events, Congress may legislate to address these problems if it deems necessary and fit to do so."[254] The Court may have overestimated Congress's power in this area. Congress has the constitutional authority to dictate the terms pursuant to which states may act in a matter in which state action, absent congressional imprimatur, would violate the dormant Commerce Clause.[255] The *Wayfair, Inc.* decision has established that a state has the constitutional authority to impose sales-tax responsibilities on sellers with no physical presence in the state.[256] As a result, a state's imposition of sales-tax collection and remittance responsibilities on remote sellers does not necessarily violate the dormant Commerce Clause.

The Court did not articulate any bright-line tests for determining whether a state's sales-tax regime with respect to remote sellers unduly burdens interstate commerce.[257] The Court did, however, take notice that the South Dakota statute at issue in *Wayfair, Inc.* contained safe harbors for small sellers, did not impose obligations retroactively, and conformed to the Streamlined Sales and Use Tax Agreement.[258] Unfortunately, the Court did not indicate whether small-seller safe harbors and lack of retroactivity are required attributes of a state sales-tax scheme that passes constitutional muster.[259] Moreover, if such statutory attributes are, in fact, constitutional necessities, the Court gave no hint as to the sufficiency of any safe harbors for small sellers or the extent to which compliance burdens must be relieved.[260]

As previously noted, South Dakota adopted the Streamlined Sales and Use Tax Agreement—an agreement among member states, the purpose of which is to reduce the burdens of sales-tax compliance on businesses by, among other measures, requiring state-level administration of such taxes;

254. *Wayfair, Inc.*, 138 S. Ct. at 2098.

255. *See* Quill Corp. v. Heitkamp *ex rel.* North Dakota, 504 U.S. 298, 305 (1992), *overruled by Wayfair, Inc.*, 138 S. Ct. 2080.

256. *See Wayfair, Inc.*, 138 S. Ct. at 2099–2100.

257. *See id.* at 2099.

258. *See id.*

259. *See id.*

260. *See id.*

severely limiting the ability of states and localities to impose multiple tax rates on taxable items; mandating simplified rates, exemptions, and tax returns; and adopting uniform sourcing rules.[261] The agreement was adopted in 2002 and has been amended numerous times.[262] Twenty-four states are in full or substantial compliance with the agreement.[263] The Court acknowledged the state's adoption of the agreement in its discussion of the compliance burdens faced by remote sellers subject to sales-tax collection and remittance obligations.[264] Unfortunately, the Court did not signal which of the many provisions of the agreement were significant to the Court's decision. Consequently, in the absence of a state's adoption of the agreement, it is unclear what provisions designed to ease administrative burdens are necessary or sufficient.

If Congress chooses to impose some sort of national uniformity on sales taxes that are imposed on e-commerce, then the extent to which Congress can achieve such uniformity has been called into question by *Murphy*.[265] Arguably, in the absence of the enactment of a federal sales tax on Internet sales, Congress cannot dictate the terms pursuant to which a state can tax Internet sales if such state taxes do not violate the Commerce Clause.[266]

261. *See* STREAMLINED SALES TAX GOVERNING BD., INC., STREAMLINED SALES AND USE TAX AGREEMENT § 102 (2018), https://www.streamlinedsalestax.org/docs/default-source/agreement/ssuta/ssuta-as-amended-2018-12-14.pdf?sfvrsn=8a83c020_6.

262. *See generally id.*

263. *See State Information*, STREAMLINED SALES TAX GOVERNING BD., INC., https://www.streamlinedsalestax.org/index.php?page=state-info (last visited Mar. 30, 2019).

264. *See Wayfair, Inc.*, 138 S. Ct. at 2099–2100.

265. *See generally* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).

266. There is no constitutional barrier to the imposition of a federal sales tax. Congress's power to tax is not unlimited due to the constitutional limitations applicable to the exercise of any federal power as well as constitutional limitations specific to the taxing power. First, certain taxes must be uniform. U.S. CONST. art I, § 8, cl. 1. The precise contours of the uniformity requirement was subject to some debate during the first century of the republic, but it now refers simply to geographic uniformity: federal tax rates must be the same throughout the United States. *See* Knowlton v. Moore, 178 U.S. 41, 83–106 (1900). The uniformity requirement rarely surfaces as a point of contention, but on occasion, the issue does arise. *See, e.g.*, United States v. Ptasynski, 462 U.S. 74, 86 (1983) (holding an exemption from an oil-profits tax for certain Alaskan oil did not provide Alaska with an undue preference over other states). Second, Congress is expressly prohibited from imposing any taxes on exports or any duties on ships that depart from a port in one state and arrive at a port in another state. U.S. CONST. art I, § 9, cls. 5–6. Finally, a capitation, or other direct tax, must be apportioned among the states according to population. U.S. CONST. art I, § 2, cl. 3; U.S. CONST. art I, § 9, cl. 4. Taxes

Therefore, the federal government could not dictate terms to South Dakota or any state that has adopted a similar taxing scheme nor to any state whose sales-tax obligations on remote sellers does not unduly burden interstate commerce.[267]

For example, in 2015 Representative Jason Chaffetz introduced the Remote Transactions Parity Act of 2015 in the House of Representatives.[268] The bill authorizes each member state to require remote sellers to collect and remit sales taxes for remote sales sourced to that state pursuant to the Streamlined Sales and Use Tax Agreement.[269] The bill provides a small remote-seller exception for three calendar years based on gross receipts.[270] A remote seller is a "person that makes remote sales in the State without a physical presence."[271] A remote sale is a "sale that originates in one State and is sourced to another State" and which the seller would not be legally required to pay, collect, or remit sales and use taxes without the authority provided by the bill.[272]

on incomes may be imposed without apportionment among the states and without regard to population, but they must be imposed uniformly. U.S. CONST. amend. XVI. The Sixteenth Amendment did not create a separate classification for income tax that was subject neither to apportionment nor to the uniformity requirement. *See* Brushaber v. Union Pac. R.R., 240 U.S. 1, 18–19 (1916). Income taxes are subject to the uniformity requirement. *See id.* Therefore, certain taxes—duties, imposts, excises, and income taxes—must be uniform and direct taxes must be apportioned. *See generally id.* With the exception of a capitation, also known as a head tax, a tax cannot be both uniform and apportioned according to population. *See generally id.* As a result, depending on the type of tax in question, it must be either uniform or apportioned. Direct taxes have been confined to capitation taxes, taxes on real property, and taxes on personal property. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 570 (2012). As a result Congress may enact a national sales tax provided that the tax rate is uniform throughout the United States.

267. *See Wayfair, Inc.*, 138 S. Ct. at 2090.

268. Remote Transactions Parity Act of 2015, H.R. 2775, 114th Cong.

269. *Id.* § 2(a). Another bill, The Marketplace Fairness Act of 2015, contained similar provisions. *See* S. 698, 114th Cong. (2015).

270. The gross receipts thresholds for application of the small remote seller exception are $10,000,000, $5,000,000, and $1,000,000 for the years preceding the first, second, and third years after enactment, respectively. These thresholds are inapplicable to sellers that utilize an electronic marketplace (or digital marketplace with certain attributes) to make their products or services available to the public. *See* Remote Transactions Parity Act of 2015, H.R. 2775 §§ 2(c)(1)(A)(i), 2(c)(1)(B)(i), 2(c)(1)(C)(i).

271. *Id.* § 4(9).

272. *Id.* § 4(8). In general, a sale is sourced to the location where the product or service is received by the purchaser. *Id.* § 4(10).

Alternatively, subject to the same small remote-seller exception, the bill authorizes a state that is not a member of the Streamlined Sales and Use Tax Agreement to collect and remit sales taxes with respect to remote sales sourced to that state, provided that the state adopts and implements minimum simplification requirements to require remote sellers.[273] Pursuant to the minimum simplification requirements, a single entity must be responsible for all state and local sales-tax and use-tax administration, return processing, and audits; a single tax return is to be filed by remote sellers; single audits of remote sellers are to be conducted;[274] a uniform state and local tax base within the state must be established; and free access to national certified software providers must be provided to remote sellers.[275] In addition to these requirements, the bill prohibits a state from exercising its authority under the bill unless it provides certification procedures for persons to be approved as certified software providers, has certified multiple national software providers, and compensates certified software providers.[276]

Note that the Remote Transactions Parity Act of 2015 would have passed constitutional muster had it been enacted in 2015 and challenged at that time. Because *National Bellas Hess, Inc.* and *Quill Corp.* were controlling precedent, the federal government had the authority to dictate terms to states in order for states to take action that would otherwise have violated the dormant Commerce Clause.[277] After *Wayfair, Inc.*, the Remote Transactions Parity Act of 2015 resembles PASPA to a significant degree. PASPA prohibited states from sanctioning an activity for which they normally had regulatory authority.[278] The Remote Transactions Parity Act of 2015 prohibits states from exercising their otherwise permissible taxing power unless they adhere to certain federal commands.[279] Moreover,

273. *See id.* § 2(b).

274. The bill prohibits a state from auditing certain remote sellers that have annual gross receipts of less than $5,000,000. *Id.* § 3(i).

275. *See id.* § 2(b)(2). In addition, the minimum simplification requirements contain provisions that relieve remote sellers and certified software providers of liability in certain circumstances and provide procedural safeguards for remote sellers and certified software providers in the case of third-party actions against them for over-collection or under-collection of tax. *See id.* § 2(b)(2)(E)–(K).

276. *Id.* § 3(g).

277. *See* Quill Corp. v. Heitkamp *ex rel.* North Dakota, 504 U.S. 298, 305 (1992), *overruled by* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).

278. *See* 28 U.S.C. § 3702 (2012), *held unconstitutional by* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018).

279. Remote Transactions Parity Act of 2015, H.R. 2775 § 3(g).

pursuant to the Court's reasoning in *Murphy*, an assertion of federal preemption with respect to the Remote Transactions Parity Act of 2015 would fail because the Act does not confer rights or impose obligations on private actors.[280] Similar to PASPA, the Act contains no independent federal requirements and merely implements federal policy by dictating such policy to the states for implementation by them.[281]

Similarly, federal legislation intended to simplify sales-tax and use-tax administration by authorizing states to impose sales-tax and use-tax obligations on remote sellers only if such states are in compliance with the strictures of federal legislation likely would be held invalid because such legislation would impermissibly commandeer the states.[282] *Wayfair, Inc.* failed to set forth, with any precision, what features of state sales-tax legislation would be required to ensure that such legislation does not unduly burden interstate commerce.[283] Federal legislation could require states to meet such requirements because states would otherwise be prohibited from enacting legislation that does not meet such requirements. Unfortunately, the Court provided little guidance on this issue, and it is likely that any federal legislation providing such requirements would be overbroad and subject to constitutional challenges as applied, and perhaps facially.

Legislation that institutes a national tax on remote sellers perhaps could expressly preempt state sales taxes that do not comply with the parameters of the federal sales tax. Such a federal tax, based on the Court's reasoning in *Murphy*, could preempt state legislation. Such legislation would clearly impose an obligation on private parties and, correspondingly, would provide them with the right to collect and remit certain sales taxes to one—and only one—taxing jurisdiction. However, I am not so sure *Murphy* provides, or should provide, such broad constitutional cover to the federal government. The fact that federal law operates on private actors should not be sufficient to trigger preemption and preclude a finding that federal law impermissibly commandeers the states.

State law is preempted if such law presents an obstacle to enforcement of federal law, is expressly preempted, or deals with a field of law occupied exclusively by the federal government.[284] Assume the federal government does in fact enact a national sales tax that imposes tax-collection obligations

280. *See supra* notes 170–82 and accompanying text.
281. *See Murphy*, 138 S. Ct. at 1480.
282. *See id.* at 1467, 1485.
283. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099–100 (2018).
284. *See Murphy*, 138 S. Ct. at 1480–81.

on remote sellers and that this legislation prohibits states from imposing their own sales-tax obligations on such sellers. It is not clear whether such a law should have preemptive effect on state legislation to the contrary because state sales taxes on such sales present no obstacle to enforcement of the federal law. Such a law would infringe on a right that is inherent in a sovereign—the power to tax—and the assertion that the federal government can expressly preempt state law or exclusively occupy such a field of law is dubious. The *Hodel* Court indicated federal regulations that address indisputable attributes of state sovereignty are on precarious legal ground.[285] In *Printz*, Justice Scalia conceded that federal laws of general applicability that incidentally apply to the states are only permissible if they do not interfere excessively with the functioning of the state government.[286] Federal preemption of a state's taxing power surely addresses an indisputable attribute of state sovereignty and would interfere excessively with the functioning of state government.[287] For example, it would be remarkable if the federal government could pass legislation preempting all state income taxes despite the fact that federal income tax laws impose obligations on private parties.[288]

After *Wayfair, Inc.*, states will not violate the dormant Commerce Clause through their imposition of sales-tax and use-tax obligations on remote sellers if those states are parties to the Streamlined Sales and Use Tax Agreement, do not retroactively impose their tax obligations on remote sellers, and provide at least the modest level of small seller relief that South Dakota provided in its legislation.[289] For other states, *Wayfair, Inc.* failed to provide bright-line rules for them to follow to ensure their tax schemes do not unduly burden interstate commerce.[290] Lack of retroactivity and adequate small seller exceptions appear to be relatively straightforward attributes to put in place.[291] Most likely, for states that are not parties to the Streamlined Sales and Use Tax Agreement, challenges will focus on the sufficiency of the administrative relief provisions the states provide.[292] The

285. *See* Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 287 (1981).

286. *See* Printz v. United States, 521 U.S. 898, 932–33 (1997).

287. *See id.*; *Hodel*, 452 U.S. at 287.

288. *See Printz*, 521 U.S. at 932–33; *Hodel*, 452 U.S. at 287.

289. *See supra* Part II.

290. *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099–2100 (2018).

291. The small-seller exception in the South Dakota statute was modest and should not, one would think, cause states much concern about revenue loss. *Id.*

292. *See id.*

agreement contains a number of provisions designed to ease compliance burdens for remote sellers, but the Court provided no indication which provisions it found important in upholding the constitutionality of the South Dakota statute.[293] Businesses will have to live with many state and local sales-tax and use-tax obligations. Fortunately, software has and will continue to ease the burdens of compliance with multiple taxing jurisdictions because, after *Murphy* and Wayfai*r, Inc.*, federal action to simplify compliance most likely would be unconstitutional.[294]

III. CONCLUSION

The Court invalidated a federal antigambling law that, unlike traditional federal gambling legislation, did not defer to state policy preferences and dictated policy to state legislatures.[295] One month later, taking judicial notice of the commercial changes wrought by the Internet, it upheld the right of a state to impose sales-tax and use-tax obligations on sellers of goods and services lacking a physical presence in the state.[296] Regardless of whether one favors legalized sports gambling, the import of the Court's decision in *Murphy* is much broader. The Court's employment and refinement of the anticommandeering doctrine in that case raised significant issues concerning Congress's authority to dictate policy to the states. The *Murphy* decision likely leaves Congress powerless to rectify any administrative burdens that *Wayfair, Inc.* now allows states to impose on remote sellers and that Congress believes need rectifying. This result may be fitting. Over 25 years ago the Court provided Congress with the opportunity to address the taxation of remote sales.[297] Congress failed to do so, and now the Court very well may have removed that opportunity.

293. *See id.*
294. *Id.* at 2097.
295. Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1464–85 (2018).
296. *Wayfair, Inc.*, 138 S. Ct. at 2099–2100.
297. *See id.* at 2097.