THE DE-FEDERALIZATION GAMBLE: A WORKABLE ANTI-COMMANDEERING FRAMEWORK FOR STATES SEEKING TO LEGALIZE CERTAIN VICE AREAS

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INTRODUCTION

"The States are separate and independent sovereigns. Sometimes they have to act like it."
– John Roberts, Chief Justice of the United States Supreme Court[1]

It was likely never contemplated in 1787 that the balance of power between the states and the central government would be debated in the nature it is today. While debate was considerable as to whether we should embrace an institutional structure of either broad federalism or narrow federalism, the Framers of the Constitution likely knew that the power-sharing structure of federalism would endure because it "offers an expedient way to harmonize separate smaller governments to achieve larger goals, especially to foster more commerce and better

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[1] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 579 (2012).

military security."[2] In fact, many scholars believe that it was *only* the Constitution's grant of interstate commerce authority to the new national government that was a "significant exception to this general division of authority between the national and state governments."[3]

But what is to be done when Congress's seemingly unlimited authority to regulate commerce necessarily and functionally implicates a state to act in furtherance of federal directive? What if the field of law, however slight or incidental its effect on interstate commerce, is one that a state seeks to legalize but does not know whether that action is or is not against the federal government's prerogative to enforce? Would it matter if this was an area of law over which the state traditionally had authority?

States are subject to a paradoxically shifting and yet-to-be definitive standard of federalist power-sharing under the guise of the anti-commandeering principle. Generally speaking, the anti-commandeering principle prevents the federal government from using states as intermediaries to implement or execute federal law. It is a principle grounded in the Tenth Amendment of the U.S. Constitution. Relative to other rules of federalism espoused by the Supreme Court, it is a young doctrine, only becoming an affirmed rule of

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[2] DAVID BRIAN ROBERTSON, FEDERALISM AND THE MAKING OF AMERICA 2 (2012).

[3] John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27, 30 (1998).

precedent from the 1992 case of *New York v. United States*.[4] Aside from one other case fleshing out the principle to extend to both the legislative and executive branches of state government in 1997,[5] the doctrine has been untouched by the U.S. Supreme Court for over twenty years. It has routinely been ignored by lower federal courts or always contextualized as exceptions to general rules of order where the federal government is supreme under Congress's commerce authority, and the states must obey. While the anti-commandeering principle is just one aspect of the myriad of issues involving the balance of power between the federal government and the states, the recent advent of the attempted legalization and regulation of sports wagering in New Jersey, the proliferation of daily fantasy sports contests and the continued legalization and decriminalization of the recreational use of marijuana reveal broad criminal vice fields being targeted and upsetting the traditional balance of federalism. This work theorizes that states will be able to continue their path of legalizing these fields even in the face of express federal prohibition due to an expanded interpretation of the anti-commandeering principle which will then have an impact on a much larger constitutional rule of federalism, the interstate commerce power.

A sub-theory of anti-commandeering will buttress this eventuality: the anti-coercion principle.

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[4] 505 U.S. 144 (1992).

[5] The case was *Printz v. United States*, 521 U.S. 898 (1997). Because of the seminal nature of these two cases, they are thoroughly presented in this article.

Shifting social norms about matters like recreational drug use and gambling make legalization of these areas easier than in the past. There is also an opportunity for states to tax and therefore generate revenue off of these things. As states recognize the fiscal realities of tightening budgets and the need for new sources of revenue, decriminalization of previously prohibited conduct now seems like a possibility. In a constitutional sense, the states' reliance on revenue streams justified by their citizens' legal use of previously illegal substances may trigger an application of the anti-coercion rule. Grounded in the Spending Power of Congress,[6] the anti-coercion rule prevents the federal government from conditioning funding arrangements to the states in ways that would compel the states to adopt federal law. The principle was applied most robustly in the first major challenge to the Affordable Care Act in *National Federation of Independent Business v. Sebelius*.[7]

On December 4, 2017, the U.S. Supreme Court heard oral arguments in *Christie v. National Collegiate Athletic Association*,[8] a case which will have significant implications for federalism. The case could expand the Court's rule on anti-

[6] U.S. CONST. art. I, § 8, cl. 1.

[7] 567 U.S. 519 (2012).

[8] Since Chris Christie is no longer governor of New Jersey, the case will be decided under the name, *Murphy v. NCAA*. Phil Murphy succeeded Chris Christie as governor of New Jersey on January 16, 2018. The case will be referred to as the "*Christie*" case throughout this work.

commandeering and decide that federal laws cannot prevent states from modifying or repealing their own internal laws. In doing so, that holding would provide a gateway for states to pursue avenues of legalization previously unavailable to them. As more time passes, and states realize more revenue from these delegalized areas, the anti-coercion principle could also become a more viable argument for the states.

With the rise of wagering on both professional and amateur sporting events augmented by the popularity of daily fantasy sports contests, states are at a quixotic crossroads with respect to their authority to legalize these things and more importantly, in times of uncertain state financial conditions, regulate and monetize them.

However, the *Christie* case could rule against New Jersey and find that the federal government preempts states' attempts to modify their own laws. If that were to occur, states would be left with little constitutional recourse under the Court's line of anti-commandeering cases. In light of that possibility, a refocus on how the Commerce Clause operates within the federalism rubric needs to be evaluated. This work seeks to craft a workable test whereby the anti-commandeering principle can be reconciled in a consistent manner with Congress's ability to regulate interstate commerce. Using the *Christie* case and gambling as fulcrum points, it looks to the federal government's interest in regulating a specific field of historically state-regulated area of law – namely, vice areas, and develops a judicial test so that states may be able to circumvent presumed plenary federal

commerce authority in the face of an unclear or incomplete anti-commandeering principle. It then will justify this rationale with the assumption that states' reliance on funding from these legalized vice areas coupled with evidence of the federal government's either direct decision or practice in reality not to prosecute creates a rebuttable presumption of "funding acquiescence," and as such the anti-coercion principle would mitigate against later federal government enforcement practices in these areas.

The article will first address the federalism debates at the time of ratification of the Constitution and how those arguments morphed into tensions which played out through cases of the Supreme Court before the Court formally established the anti-commandeering principle in *New York v. United States*. The analysis will turn to the subsidiary theory of anti-commandeering that states have often times relied upon, conditional spending and anti-coercion. It will then analyze in detail the path of the *Christie* case and New Jersey's battle to legalize sports wagering due to this case's portending power to allow broader state protections for more vices than just sports wagering. Since the *Christie* case's framework involves sports wagering, gambling as a vice area will be the main focus, but an attendant discussion of other states' legalization of recreational marijuana and the controversy surrounding daily fantasy sports will round out the analysis to show how the theorized framework can apply to these areas as well. Finally, the test will be proposed, first

as to how courts can review these matters and then how it should be applied vis-à-vis a Commerce Clause basis for state action constitutional legitimacy.

I. THE ANTI-COMMANDEERING PRINCIPLE

A. Through the Historical Looking Glass of Dual Sovereignty

Federalism, as a general proposition, is the sharing of power between the central government and the states. Scholars have widely debated the meaning of it in the American legal context, arguing that its "compound" nature, as envisioned by the authors of the *Federalist Papers*, is a system that does not simply delineate powers for one side or another.[9] Rather, the Constitution's framework proposes a power sharing subject to both the strictures of the document's provisions as well as the political necessities of the two systems' vitality. With this backdrop, it is important to see the evolution of the concept broadly before specifically analyzing the precepts established by the Supreme Court that could impact modern day vice areas.

The waning days of the Constitutional Convention showed that concerns of centralized power would allow a narrow federalism interpretation to seemingly win out. In fact, the Committee of Detail's final drafts squarely "placed the onus on the national government to prove that it

[9] *See, e.g.*, Martin Diamond, *Commentaries on the Federalist*, 86 YALE. L. J. 1273, 1275 (1977).

required specific powers to pursue the national interest. States would retain prerogatives not granted to the national government."[10] The give and take resulted in several key victories on both sides, an enumeration of central power in Article I, § 8 to protect the states but two "firmly established"[11]express provisions of federal supremacy in the Supremacy Clause[12] and the Necessary and Proper Clause.[13] Early on, the Supreme Court established the primacy of these two provisions as a grounding force in an otherwise amorphous federalism balance.[14]

Diffusion of power horizontally (three separate independent branches) as well as vertically (the federalist structure) ensured that the country could flourish both economically and politically,

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[10] DAVID BRIAN ROBERTSON, FEDERALISM AND THE MAKING OF AMERICA 27 (2012).

[11] *Id.* at 28.

[12] U.S. CONST. art. VI, ¶ 2.

[13] U.S. CONST. art. I, § 8, cl. 18.

[14] *See* McCullough v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). A unanimous Supreme Court, in the context of an attempt by the U.S. government to build a national bank, established an important foundation of deference to the national government and allowed the federal government to execute enumerated powers with unstated ones. "The power being given; it is the interest of the Nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means." *Id.* at 408.

with concentrations of power difficult to achieve by simply, institutional design.

> In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.[15]

Although debated now in a historical and theoretical perspective, it was evident that the *states* would retain "independent sovereignty,"[16] a sovereignty that was pronounced in recommending original adoption of the Articles of Confederation.[17] The thought of removing powers from the states in the interest of solidifying national authority was not considered viable at the time; the delegation of powers to the central government, as espoused by James Madison, were to be "few and defined" with those "remain[ing] in the state governments, . . . numerous and indefinite."[18] This is not to say that

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[15] THE FEDERALIST NO. 51 (James Madison).
[16] RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN 26 (1987).
[17] *Id.* at 26–27.
[18] THE FEDERALIST NO. 45 (James Madison).

leading "federalist" thinkers trusted the states to perpetually promote the common good for their inhabitants; there was debate as to how flexible central power should be interpreted in the interest of protecting people from deleterious state governments.[19] A concession was that while the federal government would be one of enumerated powers, certain elasticity to the balance of power would be afforded it[20] in the Constitution's Necessary and Proper Clause.[21] Courts would keep the balance of power moderated.[22] Any further delineation of federal power seemed unnecessary to Hamilton and other federalists because of this judicial barrier, a construct reaffirmed when John Marshall indicated fifteen years later that "it is

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[19] THE FEDERALIST NO. 33 (Alexander Hamilton). "[T]he danger which most threatens our political welfare is, that the state governments will finally sap the foundations of the union; and might therefore think it necessary, in so cardinal a point, to leave nothing to construction." *Id.*

[20] *Id.* "If there be anything exceptionable, it must be sought for in the specific powers, upon which this general declaration is predicated. The declaration itself, though it may be chargeable with tautology or redundancy, is at least perfectly harmless." *Id.*

[21] U.S. CONST. art. I, § 8, cl. 18.

[22] Alexander Hamilton clearly saw that the inherent sovereignty of the states (as well as the people) would be protected by a "complete independence of the courts of justice . . . peculiarly essential in a limited constitution." THE FEDERALIST NO. 78 (Alexander Hamilton).

emphatically the province and duty of the judicial department to say what the law is."[23]

Before Marshall's landmark pronouncement, however, certain Convention delegates did not trust the rationale of Hamilton's argument and were concerned with the unchecked centralization of power in the new government. These "anti-federalists" proposed a slate of amendments shortly after ratification of the Constitution with two principal aims, first limiting "the authority of the central government over individuals" and secondly, a set of amendments aimed at the institutional structure of the new government, concerned about the "centralizing tendencies inherent in the new government."[24] While affirmative rights of the people were at the core of these amendments,[25] this Bill of Rights included two amendments that reinforced the idea that delineation of rights and liberties should not be construed in an exhaustive fashion. The Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"[26] and while not having been considered by the federal judiciary for the larger part of the country's history, it has been firmly established that individual rights not expressly

[23] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[24] BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 297 (Richard Beeman et al. eds., 1987).

[25] The first eight amendments established individual liberty interests upon which the newly created central government could not exert its power. *See* U.S. CONST. amends. I – VIII.

[26] U.S. CONST. amend. IX.

mentioned in the first eight amendments are not excluded from the calculus of contemplating other constitutionally protected rights.[27] The other one, the Tenth Amendment, reads, "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."[28] The Tenth Amendment's seemingly innocuous inclusion of the phrase, "to the States respectively" has become a call to arms by which states attempt to assert the independent sovereignty implicit in the federalist structure. To be sure, the U.S. Supreme Court, acting under the authority given long ago by Marshall, has indicated that:

> The Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine . . . whether an incident

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[27] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 491 (1965) (holding with respect to finding a constitutional privacy right in marriage: "The Ninth Amendment to the Constitution may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.").

[28] U.S. CONST. amend. X.

> of state sovereignty is protected by a limitation on an Article I power.[29]

The balance between the federal government's presumed constitutional authority, whether express or implicit and the state's "police powers" under the Tenth Amendment represented a constant tension, often remedied by pronouncements of the Supreme Court. The self-executing presumptions of the Supremacy Clause and the Necessary and Proper Clause are only realized through these Supreme Court decisions, and in the context of federalism, it has been one that has ebbed and flowed. In the transition between the nineteenth and twentieth centuries, the Court deferred to the individual in a manner that chilled economic regulation at both the state and federal level.[30] The fallout from decisions like *Lochner* resulted in an era where states could not increase revenue and would remain in such a confused state until the entire country experienced the most significant economic depression in its history in the 1930s. Several of these decisions touched upon the tension inherent in

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[29] New York v. United States, 505 U.S. 144, 157 (1992).

[30] For example, in *Lochner v. New York*, 198 U.S. 45 (1905), the Court struck down a New York state law that placed restrictions on how many hours bakery employees could work. The five-justice majority held that the laws prevented individuals' freedom of contract and grounded the analysis as a liberty interest in the Due Process Clause of the Fourteenth Amendment. Justice Oliver Wendell Holmes' dissent warned of the danger of the majority's decision and it has been derided as one of the most controversial decisions of the Court.

one of the federal government's most expansive powers: the interstate commerce power. After the Great Depression, the Court adjusted its jurisprudence to nationwide economic realities and overturned earlier decisions that seemingly limited federal action, helping the states themselves recover from the brink of economic disaster.[31] Since the debates on expansive vs. narrow federalism began[32] with the exception of the *Lochner* decision at the turn of the twentieth century, the U.S. Supreme Court has evolved a virtually plenary Commerce Clause

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[31] It would take thirty years after the *Lochner* decision for the Court to take pragmatic steps to lift the country out of the Depression in a series of holdings that granted government rights to the detriment of individuals' economic liberty interests. Slowly, it gave states the right again to regulate certain areas (contradicting the individual freedom presumptions of *Lochner*, *see* Nebbia v. New York, 291 U.S. 502 (1934), before functionally overruling *Lochner* in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Then, it extended that denial of a perceived *Lochner* liberty in favor of national government regulation (by prohibiting individuals from regulating even the incidental, instrumentalities of local commerce when those actions have an effect on interstate commerce). *See* Wickard v. Filburn, 317 U.S. 111 (1942). Many scholars pin *Wickard* as the beginning of a consistent deference to federal power in the realm of federal-state economic arrangements.

[32] *Cf.* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). Chief Justice John Marshall indicated, on behalf of a unanimous Court, that "*among* the several states" allows the federal government absolute authority over the instrumentalities of interstate commerce. *Id.*

authority of Congress[33] and has, in evaluating that authority, sided in favor of federal authority in virtually all interstate commerce cases before it.[34]

The rigidity of "dual federalism" remained outside of the reach, however, of cases not directly involving interstate commerce, and the gray area between what economic arenas constituted "commerce" and what was a fiscal forum legitimate for the states to regulate would propel the Court into the anti-commandeering realm. Cases involving states setting labor regulations, minimum wage and hour rules, etc. seemed to not prove controversial in many litigated cases after the Depression era. However, these cases slowly crept into the jurisprudence of the Supreme Court and revealed an inconsistent reasoning on the proper division of power in the field of labor relations and state employees' rights.[35] An inability to reconcile where interstate commerce power stops and where state authority begins would lead the Court to its landmark anti-commandeering pronouncements in *New York*

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[33] Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1403 (1987).

[34] *Cf.* Nat'l League of Cities v. Usery, 426 U.S. 833, 840 (1976) ("It is established beyond peradventure that the Commerce Clause of Art. I of the Constitution is a grant of plenary authority to Congress.").

[35] *See, e.g.*, Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) involving a Tenth Amendment challenge to the Fair Labor Standards Act as to the coverage of state and local employees); Gregory v. Ashcroft, 501 U.S. 452 (1991) (involving Tenth Amendment and Equal Protection challenges to Missouri's mandatory retirement age for state judges).

and *Printz*, reiterating from the Founding Era that "the principal benefit of the federalist system is a check on abuses of government power."[36] The question of compelling the states was the key question since the national government could exercise proper authority under the Commerce Clause so long as it did not compel state action; to do so would not violate the Tenth Amendment.[37] The ability of the federal government to regulate commerce directly, while perhaps plenary, was not so unfettered that it could do so by using the states as instrumentalities of federal law. It could not "regulate state governments' regulation of interstate commerce."[38] The question was when did that occur?

It would not be until the mid-1990s, that the United States Supreme Court would create a "new jurisprudence of commandeering purport[ing] to define an area of total state (and local) immunity from federal intervention."[39] The seminal case of *New York v. United States*[40] decided in 1992, along with *Printz v. United States*[41] five years later, ushered

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[36] Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[37] *See, e.g.*, United States v. Kenney, 91 F.3d 884, 891 (7th Cir. 1996).

[38] Printz v. United States, 521 U.S. 898 (1997) (quoting New York v. United States, 505 U.S. at 166 (1992)).

[39] Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York*,* Printz*, and* Yeskey, 1998 SUPREME CT. REV. 71, 72 (1999).

[40] 505 U.S. 144 (1992).

[41] 521 U.S. 898 (1997).

in a new "'autonomy model' of federalism"[42] holding that Congress could not impose federal regulatory programs upon the states nor commandeer the states' officers into federal service. While Congress's power to regulate interstate commerce is vast, it cannot be executed using the state as an intermediary; to regulate commerce "among the Several States,"[43] however local, Congress must do so directly upon individuals. Compelling the states "to enact and enforce a federal regulatory program . . . has never been understood to lie within the authority conferred upon Congress by the Constitution."[44] The cases that the Supreme Court heard before *New York* and *Printz* are analyzed below to fully understand the historical context of the anti-commandeering principle and the struggles that the Court encountered in crafting a rule.

B. Pre-New York v. United *States Treatment*

Although the U.S. Supreme Court did not expressly establish the anti-commandeering principle in its jurisprudence before *New York*,[45] several cases seemed to be mindful of the limits of

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[42] Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1004 (1995).
[43] U.S. CONST. art. I, § 8, cl. 3.
[44] New York v. United States, 505 U.S. 144, 176 (1992).
[45] "[W]e were at last confronted squarely with a federal statute that unambiguously required the States to enact or administer a federal regulatory program[.]" Printz v. United States, 521 U.S. 898, 926 (1997) (citing New York v. United States, 505 U.S. 144 (1992)).

Congress's power and state sovereignty guarded by the Tenth Amendment. At the same time that state treasury coffers began requiring a more amiable relationship both with other states and the federal government, the idea of parity between states and equal treatment by the federal government became popular. This "equal footing" doctrine (or "equal sovereignty") provided the initial steps towards an anti-commandeering jurisprudence which would explode in the immediate aftermath of the 1980s devolutionary period of power back to the state.

As a condition of Oklahoma's admission to the Union, Congress required, in 1906, to not allow the state to move its capital city from Guthrie to another city in Oklahoma until 1913. The state legislature attempted to move the capital from Guthrie to Oklahoma City by proposed state legislation dated December 29, 1910. The Supreme Court found this condition by Congress overreaching as a violation of Oklahoma's inherent state sovereignty.

> The power to locate its own seat of government, and to determine when and how it shall be changed from one place to another, and to appropriate its own public funds for that purpose, are essentially and peculiarly state powers. That one of the original thirteen states could now be shorn of such powers by an act of Congress

> would not be for a moment entertained.[46]

Recognizing the origins of the states and the central government as dual operating sovereigns, the Supreme Court in *Coyle* strongly chastised Congress to place instructions of state governance matters as conditions to state admission. "[T]he people of each state compose a state, having its own government, and endowed with all the functions essential to *separate and independent existence*. The states disunited might continue to exist. . ." (emphasis added).[47]

Sixty-five years later, the Court struggled with how "plenary" the commerce authority could be in the context of regulating labor relations for state and local publics employees in *National League of Cities v. Usery*.[48] Amendments to the federal Fair Labor Standards Act[49] in 1974 mandated existing regulations of overtime pay and minimum wage rules applicable only to certain private employers now to apply to public state and local employers. The non-profit National League of Cities, along with many states and cities, challenged the amendments arguing that the labor market of state employees is to be left to the sovereign capacity of the states and as such is a reserved power under the Tenth Amendment. The Court, in a 5 to 4 decision, ruled in favor of the

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[46] Coyle v. Smith, 221 U.S. 559, 565 (1911).
[47] *Id.* at 580 (1911) (citing Lane Cty. v. Oregon, 74 U.S. (7 Wall.) at 76 (1869)).
[48] 426 U.S. 833 (1976).
[49] 29 U.S.C. §§ 201 *et. seq*.

National League of Cities and the states holding that the Tenth Amendment prohibits Congress from regulating states in this manner. "The challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3."[50] Only nine years later, however, in a case with almost identical facts, and also in a 5 to 4 decision, the Court overruled *National League of Cities* finding that the framework of establishing an employment relationship in the public sector as a "traditional governmental function" would prove unworkable and too subjective.[51] This distinction between what the state does in its sovereign capacity and what it does as a quasi-commercial or market actor was a critical preliminary step in the anti-commandeering cases to come.

C. The 1990s – Shift in Federal-State Relationship with New York *and* Printz

The federal judiciary was staid in an era of separate and distinct "dual federalism" for the larger part of the twentieth century. The increased intermingling of federal revenue models devolved to the states in the form of categorical and block grants, starting in the 1960s. Cases like *South Dakota v.*

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[50] 426 U.S. 833, 852 (1976).

[51] *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

Dole[52] ushered in a new, amorphous era many scholars refer to as "cooperative federalism."[53] Congress gave to the states permissive, conditional grant funding. The general principle of contract couched in terms of sovereign parties best represents this arrangement; so long as Congress was exerting its spending power under Article I to promote the "general Welfare" (the Spending Clause)[54] and the states were ready and willing to accept federal funds, the federal courts generally saw no constitutional concerns. This consideration of funding and the related offer and acceptance would become the cornerstone of cooperative federalism, allowing the federal government to tread into historically exclusive state regulatory grounds such as social welfare (as in *Dole*) and education.[55] Where the Spending Clause would not give way, Congress exerted its plenary authority under the Interstate

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[52] 483 U.S. 203 (1987).

[53] While "cooperative federalism" has come to be embraced in the political science research, the Supreme Court acknowledged the shifting sands of its federalism jurisprudence in a legal context, attempting to define it. For example, in *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981), the Court defined a state regulatory process as "establish[ing] a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." 452 U.S. 264, 289 (1981).

[54] U.S. CONST. art. I, § 8, cl. 1.

[55] *See, e.g.*, No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

Commerce Clause to regulate.[56] In short, in the latter part of the twentieth century, Congress realized that, in the interest of efficiency, the states could assist in the implementation of federal regulatory schemes for larger policy concerns, and it used either money (the Spending Clause) or authority over interstate activity (the Commerce Clause) to achieve federal goals.

1. *New York v. United States*

In an effort to curtail an increasing radioactive waste disposal problem, the Low-Level Radioactive Waste Policy Act of 1980[57] allowed states to enter into interstate compacts restricting "the use of their disposal facilities to waste generated within member States."[58] Congress believed that this would encourage a wide cross section of states across

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[56] However, the Supreme Court, in two instances during the 1990s, recognized for the first significant time, that Congress was limited in its direct-regulation commerce authority. In *United States v. Lopez*, the Court held that the 1990 Gun-Free School Zones Act, prohibiting people from knowingly carrying a firearm in a state-designated school zone, exceeded Congress's authority to regulate interstate commerce. *Lopez*, 514 U.S. 549 (1995). Five years later, the Court did not find a connection to interstate commerce to allow Congress to provide damages remedies for civil causes of action to individuals who were victims of gender-motivated violence in *United States v. Morrison*, 529 U.S. 598 (2000).

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

[58] New York v. United States, 505 U.S. at 151 (1992).

the country to formalize regional agreements to determine amongst themselves the best way to dispose of the waste. When only three approved compacts had operational disposal facilities by 1985, giving the majority of states no viable disposal alternatives to low level radioactive waste, Congress amended the 1980 law to incentivize the majority of states to provide some mechanism to dispose of waste generated within their respective state borders. The 1985 Amendment Act developed three such incentives. One was a series of surcharges on the previously sited states placed in an escrow account and awarded to new states coming to terms amenable by Congress, either directly or via a regional compact. The second "involved the denial of access to disposal sites"[59] already created by compacted states with a series of surcharges for deadlines missed preceding ultimate access denial. The third "incentive" mandated that if a state or compact would not comply by January 1, 1996, it would simply take ownership of all radioactive waste within its borders and be liable for any damages therefrom.

Two counties in the state of New York, Allegany and Cortland, challenged Congress's ability to enact the 1985 Amendments. Despite complying with measures preemptively, citizens in these two counties expressed vehement opposition to the situs of radioactive waste sites in their home counties. New York thus challenged the three-incentive structure, arguing that "the Act is inconsistent with the Tenth Amendment" of the

[59] *Id.* at 153.

Constitution.[60] The Supreme Court upheld the first two incentives. The first structure being reaffirmed by the Spending Power as elucidated in *Dole*, that however onerous conditional restrictions may be on the states, Congress "may attach conditions on the receipt of federal funds"[61] and those restrictions, once the funds are accepted by the state, may legitimately influence a state's policy choices. The second incentive structure simply provided a choice to nonsited states to:

> [E]ither regulate the disposal of radioactive waste according to federal standards by attaining local or regional self-sufficiency, or . . . be subject to federal regulation authorizing sited States and regions to deny access to their disposal sites. The affected States are not compelled by Congress to regulate, because any burden caused by a State's refusal to regulate will fall on those who generate waste and find no outlet for its disposal, rather than on the State as a sovereign.[62]

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[60] *Id.* at 154.
[61] *Id.* at 167 (referencing South Dakota v. Dole, 483 U.S. 203, 206 (1987)).
[62] *Id.* at 174.

Justice O'Connor reasoned that this was simply a conditional exercise of Congress's Commerce authority which would ultimately incentivize individuals to make conscious policy decisions concerning radioactive waste disposal. Because of this, the regulation was directly on the individual with merely an incidental impact on the state, an action legitimate under Congress's interstate commerce power.

As to the third incentive, O'Connor acknowledged that the previous Tenth Amendment jurisprudence of the Court was not consistent (particularly in the *National League of Cities v. Usery* and *Garcia* vein). She began her reasoning as to this incentive (the "take title" provision) with the observation that most of the cases "interpreting the Tenth Amendment have concerned the authority of Congress to subject state governments to generally applicable laws" and "case[s] where Congress has subjected a State to the same legislation applicable to private parties."[63] The new question of law, though, was how to handle "the circumstance under which Congress may use the States as implements of regulation."[64] Citing *Hodel* and *Coyle*, buttressed by the historical references to our federalist system, the Court indicated that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress's instructions."[65] The power in the federal system

[63] *Id.* at 160.
[64] *Id.* at 161.
[65] *Id.* at 162 (referencing Coyle v. Smith, 221 U.S. 559, 565 (1911)).

allows Congress, most notably through the Commerce Clause, to regulate interstate economic activity directly, but "it does not authorize Congress to regulate state governments' regulation of interstate commerce."[66] In the "take-title" provision, "Congress has crossed the line distinguishing encouragement from coercion."[67] The option to either take ownership of the waste or regulate according to congressional instruction was found to be illusory; either choice, standing alone, "would 'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments."[68] Recognizing the federal nature of our government, O'Connor ended with powerful words:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the

[66] *Id.* at 166.
[67] *Id.* at 175.
[68] *Id.*

> several States a residuary and inviolable sovereignty," The Federalist No. 39, p. 245 (C. Rossiter ed. 1961), reserved explicitly to the States by the Tenth Amendment.[69]

The "take-title" provision of the 1985 Amendment Act was found unconstitutional as a violation of the Tenth Amendment and outside Congress's authority, but it was severed from the first two incentive provisions which were maintained as part of the overall regulatory scheme.

While *New York* was significant in its own right to firmly establish the anti-commandeering principle in the Court's federalism jurisprudence, its holding was limited to Congress taking actions to compel state *legislatures* to be called into the service of federal regulation (*i.e.*, by being forced to pass state laws). It would take another decision of the Court, only five years later, to extend the anti-commandeering principle to state *executives*.

2. *Printz v. United States*

After Reagan Press Secretary James Brady was nearly killed during an assassination attempt on the president by John Hinckley, Jr. in 1981, he became an ardent support of stricter gun control regulation. In 1994, the Clinton Administration was successful in enacting such regulation and honored the former press secretary by giving his name to the legislation. Among other provisions, the Brady

[69] *Id.* at 188.

Handgun Violence Prevention Act[70] required "the Attorney General of the United States to establish a national background-check system by November 30, 1998."[71] The process by which these background checks were to take place before that date was what was at issue in the *Printz* case. Before the time that the U.S. Attorney General could establish a federal regulatory scheme for conducting the background checks, local (state) "chief law enforcement officers" (CLEOs) would perform these background checks. A handgun dealer would not have to subject a purchaser to a background check only in two instances: (1) if he possessed a state handgun permit issued after a background check or (2) if state law provided for an instant background check.[72] States that had neither of these two pre-existing options would have to appoint CLEOs to perform the Brady Bill mandated background checks. CLEOs from Montana and Arizona challenged the constitutionality of the interim provision. In separate district court actions in their respective states, the obligation of CLEOs to perform background checks was declared unconstitutional but deemed severable from the rest of the law.[73] A consolidated case before the United States Court of Appeals for the Ninth Circuit reversed those decisions, finding no

[70] Pub. L. 103-159 (codified at 18 U.S.C. §§ 921, 922).
[71] Printz v. United States, 521 U.S. 898, 902 (1997).
[72] *Id.* at 903.
[73] *Id.* at 904.

constitutional infirmity with the interim background check provision.[74]

When the Supreme Court heard the case, the five-justice majority began by acknowledging the federalist infirmity of the CLEO background check arrangement. "From the description set forth above, it is apparent that the Brady Act purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme."[75] Once again (as in *New York*) acknowledging the scant precedent on anti-commandeering, The Court analyzed the petitioners' claims in three purviews: "in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court."[76] The respondent national government, shared with the view from the four dissenting justices, argued that, in historical perspective, the background check arrangement is nothing new since state judges were, since the beginning of the Union, charged with enforcing federal laws. The majority distinguished this proposition indicating that these were merely judicial functions flowing logically from the Supremacy Clause and preemptive power of federal law.

> None of the early statutes directed to state judges or court clerks required the performance of functions more appropriately characterized as

[74] *Id.*
[75] *Id.*
[76] *Id.* at 905.

> executive than judicial . . . [I]t is unreasonable to maintain that the ancillary functions of recording, registering, and certifying . . . were unalterably executive rather than judicial in nature.[77]

Justice Scalia continued to distinguish a series of federal laws through the nineteenth and early twentieth centuries from the mandatory intent of the Brady Act, referencing the words such as "*enter into contracts* with such State"[78] and "in implementing the Act President Wilson did not commandeer the services of state officers, but instead requested the assistance of the States' Governors."[79] Finding no evidence of state executive officer commandeering "by almost two centuries of apparent congressional avoidance of the practice,"[80] the majority then turned to an analysis of the CLEO background check in the structural framework of the Constitution.

The majority stressed the "dual sovereignty" nature of the nation but extrapolated on the democratic principles for this emanating from the defects of the Articles of Confederation. Using the states as instruments of federal regulation proved

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[77] *Id.* at 908 n.2.

[78] *Id.* at 916 (emphasis in original) (concerning an act of Congress dated August 3, 1882 enlisting state officials to assist at its ports with immigration).

[79] *Id.* at 917 (concerning the states' role in implementing the World War I selective draft law).

[80] *Id.* at 918.

unsuccessful under the Articles, "provocative of federal-state conflict."[81] The liberty afforded individuals in the American democracy required the Framers of the Constitution to diffuse power across as many planes as possible while still maintaining the political integrity of the two sovereigns of the central government and the state. To the vertical plane of federalism, Scalia warned that "[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service — and at no cost to itself — the police officers of the 50 States."[82] To the horizontal plane of separation of powers within the central government, he stressed that Article II, §3 directs the President (and his assigns) to "take Care that the Laws be faithfully executed. . .. The Brady Act effectively transfers this responsibility to thousands of CLEOs in the 50 States, who are left to implement the program without meaningful Presidential control."[83] The argument that the Necessary and Proper clause would allow the background checks was also found to be unpersuasive; citing *New York*, the elastic clause's limits are those in the enumerated powers and since Congress's Commerce power is limited by the Tenth Amendment when it is used to regulate states, the Necessary and Proper Clause would be of no effect.

Finally, with respect to the commandeering jurisprudence of the Court, Scalia acknowledged it as

[81] *Id.* at 919.
[82] *Id.* at 922.
[83] *Id.*

a "novel phenomenon"[84] and walked the majority's analysis through *Hodel* and *FERC v. Mississippi*,[85] indicating that the Court took great care in ensuring the federal regulatory schemes at issue in those cases "did not require the States to enforce federal law."[86] The majority inevitably latched on to the decision in *New York* to find how the Brady Act violated the anti-commandeering principle. The dissent and respondents argued that the distinction was that the "take title" provision in *New York* was an impermissible commandeering of a state's legislative process because it impeded a state's ability to develop policy. The CLEOs performing background checks under the Brady Act was simply a "final directive" pursuant to a "clear legislative solution that regulates private conduct" created by Congress.[87] However, the majority was hesitant to parse such a fine line concerning policymaking, reasoning that the state's purview in its own policy could be impeded by a command to its *executive* officers to implement federal law just as easy as it could from the original standpoint of the *legislative* process. Lastly, the idea that the two cases could be distinguished based upon the idea that *Printz*'s burden to CLEOs is addressed to individuals and not "the State itself" (as the "take title" provision in *New York* was) proved to not be a "constitutionally

[84] *Id.* at 925.
[85] 456 U.S. 742 (1982).
[86] Printz v. United States, 521 U.S. 898, 925 (1997).
[87] *Id.* at 926–27.

significant" distinction.[88] "It is directed to them in their official capacities as state officers; it controls their actions, not as private citizens, but as the agents of the State."[89] Reiterating and solidifying the anti-commandeering rule as a precept of federalism jurisprudence, the Court struck down the requirement for state and local CLEOs to perform, even temporarily, the background checks, extending to the state executive what *New York* did to protect state legislatures. It did so in a categorical manner, not subject to resetting of interests for every new case. "It matters not whether policymaking is involved, and *no case-by-case weighing of the burdens or benefits is necessary*; such commands are fundamentally incompatible with our constitutional system of dual sovereignty."[90]

3. Transitioning to *Reno v. Condon* – A Shift Away from the *New York* and *Printz* Strictures on Anti-Commandeering

New York and *Printz* have been the only two instances where the United States Supreme Court has struck down a federal law under the anti-commandeering principle, but it has not been the last time the Court has heard a case argued under the theory. What we take from these two cases are the important ideas that Congress is prohibited from commandeering both state legislative and executive function when regulating the states in such a manner

[88] *Id.* at 930.
[89] *Id.*
[90] *Id.* at 935 (emphasis added).

is exclusive (*i.e.*, only the states are being regulated, not both states and individuals) and in their capacity as sovereigns. We learn also that the principle is not subject to any ad hoc balancing or case-by-case readjusting, irrespective of the relative impact (economic or otherwise) on the states or Congress's interest in asserting the command. Further, while both *New York* and *Printz* dealt with affirmative commands (as opposed to negative prohibitions) on states, the relevancy was not directly brought into discussion in either majority opinion. Lastly, both decisions presuppose that the prohibition on commandeering rests on a cost-shifting and political accountability concern, that the central government should not usurp the state governmental apparatus for free to implement a federal *regulatory* scheme. Does this logic presuppose that there must be such a scheme in place?

Anti-commandeering would be revisited by the Court three years after *Printz* in *Reno v. Condon*.[91] Congress enacted the Driver's Privacy Protection Act (DPPA) in 1994[92] to prevent states from selling their residents' personal information (such as "name, address, telephone number, vehicle description, Social Security number, medical information, and photograph")[93] culled from state department of motor vehicle databases as a condition

[91] 528 U.S. 141 (2000).
[92] Pub. L. No. 103-322, 108 Stat. 2099 (codified at 18 U.S.C. §§ 2721–25).
[93] Reno v. Condon, 528 U.S. 141, 143 (2000).

of obtaining a state-mandated driver's license or registering a motor vehicle. States were selling this information to "generate significant revenues for the States."[94] Drivers would be able to opt-out to a state DMV's sale of the information to third parties but only by affirmatively doing so; otherwise, the state would consider the data for sale. South Carolina challenged the DPPA on the grounds that it violated the state's rights under the Tenth Amendment. The United States District Court for the District of South Carolina struck down the DPPA as a violation of the anti-commandeering principle as espoused in *New York* and *Printz*. The district judge found that:

> In enacting the DPPA, Congress has chosen not to assume responsibility directly for the dissemination and use of these motor vehicle records. Instead, Congress has commanded the States to implement federal policy by requiring them to regulate the dissemination and use of these records. In order to comply with Congress's directive, the States are forced by the threat of administrative penalty to take measures to prohibit access by their citizens to the motor vehicle records. This command

[94] *Id.* at 144 (noting that, for example, the Wisconsin Department of Transportation was receiving approximately $8 million each year from the sale of motor vehicle information).

> clearly runs afoul of the holdings of *New York* and *Printz*.[95]

The district court judge rejected the proposition by the United States that the states were not being regulated in the sovereign capacity but rather as economic actors in that determining what could or could not be done with driver information was not a function of state government. The United States Court of Appeals for the Fourth Circuit affirmed.[96] A strongly worded dissent by Judge Phillips argued that the DPPA, "considered in light of the harm generated by the States' own actions at which it is aimed, distinguish this case from [*New York* and *Printz*] and compels the conclusion that the Act is consistent with both substantive and structural limitations on the exercise of federal power."[97] He reasoned that federal law which regulates the states directly and not the states as conduits of regulation of third parties was permissible; when a federal law does not seek to determine the manner by which states can regulate its citizens, there is no commandeering. "In fact, the DPPA does not require that states act at all. Its provisions only apply once a State makes the voluntary choice to enter the interstate market created by the release of personal information in its files."[98] The Supreme Court gave

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95 Condon v. Reno, 972 F. Supp. 977, 984–85 (D.S.C. 1997).
96 Condon v. Reno, 155 F.3d. 453 (4th Cir. 1998).
97 *Id.* at 465 (4th Cir. 1998).
98 *Id.* at 468 (4th Cir. 1998).

weight to Judge Phillips's arguments and unanimously reversed[99] the appellate court, reasoning that the DPPA did not commandeer states as sovereign actors but rather as owners of a commodity (here the databases of drivers' information) seeking to place that commodity into the market. As such, federal regulation of the state, as market participants when regulating private individuals to the same degree, was permissible.

D. *Anti-Commandeering vs. Anti-Coercion:* Dole *and the Recently Discovered Modification of "Conditional Spending" in* NFIB v. Sebelius

The legal question yet to be addressed by any of the above cases was what to do when the federal government attached money to its prohibitions. Would the same rule from *New York* and *Printz* hold when states refused federal commands if funding was conditioned on the state's adherence? This question was addressed in *South Dakota v. Dole*.[100] In the context of expenditure restriction and pursuant to its authority under the Spending Clause,[101] Congress opted to withhold a certain amount of federal transportation funds for those states that did not have a minimum drinking age of 21. The state of South Dakota argued that the restriction impermissibly impeded the states' sovereign authority to regulate drinking age, a historical area reserved to the states under the Tenth Amendment.

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[99] Reno v. Condon, 528 U.S. 141 (2000).
[100] 483 U.S. 203 (1987).
[101] U.S. CONST. art. I, § 8, cl. 1.

Chief Justice Rehnquist, writing for the 7 to 2 majority, indicated that "Congress may attach conditions on the receipt of federal funds."[102] However, he prefaced that the conditional spending must not be coercive when considering the amount of funds at issue. Further, the area of state-law restricted by the conditional grant of federal funds should be related to that restriction. "[T]he condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended – safe interstate travel."[103] Justice O'Connor disagreed on the relationship between the federal withholding of funds and the state's historical area of regulating drinking age in her dissent by stating, "establishment of a minimum drinking age of 21 is not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose."[104]

The debate between Rehnquist and O'Connor in *Dole* was significant in the larger debate of federalism. On the heels of the lack of a legal standard from the *National League of Cities* and *Garcia* cases, the majority opinion in *Dole* seemed to allow the federal government some latitude in making a connection between federal grants to states and the two sovereigns' relative spheres of authority. Where Congress would not reasonably foresee an express grant of authority from most likely the

[102] South Dakota v. Dole, 483 U.S. 203, 206 (1987).
[103] *Id.* at 208.
[104] *Id.* at 213–14 (O'Connor, J., dissenting).

Commerce Clause, it would use the Spending Power to "promote the General Welfare" and use money with an expansive *Dole* reasoning to blur the lines of federalism that was left unclear with *National League of Cities* and *Garcia*.

It seemed that *South Dakota v. Dole* imbued Congress with broad discretion under its Spending Power in Article I, § 8. This idea was supported by the Court, in *New York*, consciously indicating that financial incentives of virtually any sort in encouraging states to effectively handle their own radioactive waste problems were upheld. Regulations outside the scope of Congress's enumerated powers, into the traditional purview of the states, "may nevertheless be attained through the use of the spending power and the conditional grant of federal funds."[105] *Dole* allowed only minimal restrictions on Congress's conditional grant spending leverage over the states: general welfare, unambiguous expression of conditional funding and a relatedness to some "federal interest." To perhaps foreshadow a federalism arrangement based on a dissonant bargaining position between a well-funded central government and a state starving for federal funds, the Court in *Dole* provided an "opt-out" by stating that "other constitutional provisions may provide an independent bar to the conditional grant of federal funds"[106] significantly "less exacting than those on [Congress's] authority to regulate directly."[107] Congress would be given great latitude

[105] *Id.* at 207 (1987).
[106] *Id.* at 208.
[107] *Id.* at 209.

in the use of its conditional spending power, with the Court intuiting that nothing short of inducing the "States to engage in activities that would themselves be unconstitutional."[108] Only in the rarest of circumstances (and losing 5% of federal highway funds was considered not such) would financial inducement be considered "so coercive as to pass the point at which 'pressure turns into compulsion.'"[109] The opportunity to revisit this variant of the anti-commandeering principle in this context of spending, known as "anti-coercion," would come in the legal challenges to the Affordable Care Act (ACA).[110]

The ACA, enacted in 2010 and well over 850 pages, impacted hundreds of parts of the United States Code. The potential impact it had on federalism was directly through the requirements of states to set up health exchanges and accept changes in Medicaid funding structures called for by the law. Health care reform was to be a joint operation, with the states being "critical players in implementing reform and in establishing state-based health care exchanges."[111] The perceived mandate to set up a healthcare exchange was challenged as violating anti-commandeering in an action filed in the United States District Court for the Western District of Virginia, almost immediately after the act was signed

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[108] *Id.* at 210.
[109] *Id.* at 211.
[110] Pub. L. 111-148 (2010).
[111] MICHAEL DOONAN, AMERICAN FEDERALISM IN PRACTICE: THE FORMULATION AND IMPLEMENTATION OF CONTEMPORARY HEALTH POLICY 2 (2013).

by the president.[112] However, the district judge ruled (and the appellate court affirmed in an unpublished opinion) that states were given the choice of either adopting the federal standards for healthcare exchanges or pass a state law to implement the standards. While the latter would have certainly run afoul of anti-commandeering, the option of allowing the federal government to operate the exchange within the state estopped a Tenth Amendment argument. In essence, the states' option to be preempted saved the ACA's constitutionality on this ground.

Notwithstanding the multi-fronted challenges to the ACA,[113] the Court has rendered an important decision in the realm of this study with respect to Medicaid funding to the states but has not clearly formed a framework for anti-coercion claims. The ACA provides "significant funding to expand Medicaid for qualified [state] residents . . . [and] is expected to cover 17 million newly insured people. . . ."[114] Medicaid was originally enacted in 1965 and:

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[112] Liberty Univ., Inc. v. Geithner, 753 F. Supp. 2d 611 (W.D. Va. 2010).

[113] Legal challenges to various provisions of the ACA continued well after the initial decision addressed here. For example, in the 2013 Term, the Court struck down, 5 to 4, mandating health coverage for contraception as a violation of an organization's religious freedom under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.*, and the Free Exercise Clause of the First Amendment. *See* Sebelius v. Hobby Lobby Stores, Inc., 573 U.S. ____ (2014).

[114] MICHAEL DOONAN, AMERICAN FEDERALISM IN PRACTICE: THE FORMULATION AND IMPLEMENTATION OF CONTEMPORARY HEALTH POLICY 123 (2013).

> [O]ffers federal funding to States to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care. In order to receive that funding, States must comply with federal criteria governing matters such as who receives care and what services are provided at what cost. By 1982 *every State* had chosen to participate in Medicaid. Federal funds received through the Medicaid program have become a *substantial part* of state budgets, now constituting over 10 percent of most States' total revenue.[115]

The ACA expansion of Medicaid required current "state programs to provide Medicaid coverage to adults with incomes up to 133 percent of the federal poverty level."[116] The pre-ACA funding levels were much lower for some states. Although the federal government would cover most of these increased costs under the ACA, states would have had to bear some of the additional costs. If a state refused to comply with the ACA's Medicaid coverage expansions, "it may lose not only the federal funding for those requirements, but *all* of its federal Medicaid

[115] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 541–542 (2012) (emphasis added).
[116] *Id.* at 542.

funds" even those funds pre-dating the passage of the ACA.[117]

The Court found that the ACA "dramatically increase[d] state obligations under Medicaid."[118] The Court acknowledged its jurisprudence, particularly *Dole*, in considering Congress's wide latitude in the conditional granting of federal funds for state acquiescence in federal policy. However, it also recognized a limitation. "Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as *independent sovereigns* in our federal system."[119] The Court ultimately found that the threat of withdrawing all existing Medicaid funding for a state in the ACA's Medicaid expansion scheme was tantamount to "a power akin to undue influence"[120] because of the history and comprehensiveness of past state reliance on the Medicaid structure. To withdraw all of that structure, as it has developed as an integral part of state budgets, would move from conditioning to coercing under *Dole*. The threat to withdraw the level of Medicaid funding that has become an obligatory part of state budgets[121] coupled with the uncertainty in how states would fund the

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[117] *Id.* (emphasis added).
[118] *Id.* at 575.
[119] *Id.* at 577.
[120] *Id.* (quoting Steward Mach. Co. v. Davis, 301 U.S. 548 (1937)).
[121] The Court stated that, "Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs." *National Federation of Independent Business*, 567 U.S. at 581 (2012).

expanded version of it under the Act, the Court reasoned, could not be considered a simple condition. "When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes."[122] Mere bargaining leverage in financial inducement turns to impermissible coercion when the States have "no choice" but to adopt the federal regulatory scheme. In the case of Medicaid expansion, the five-justice majority equated the threat to take all existing funding as a "gun to the head" of the States.[123] "The threatened loss of over 10 percent of a State's overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."[124] In striking down the Medicaid expansion provision as unconstitutional, the Court did not establish a new test in the context of *Dole* to determine what facts such level of funding, particular policy area, or state historical reliance on federal funds were relevant. The Court did not determine definitively when conditions become coercive. "We have no need to fix a line either. It is enough for today that wherever that line may be, this statute is surely beyond it. Congress may not simply 'conscript state [agencies] into the national bureaucratic army."[125]

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[122] *Id.* at 580.
[123] *Id.* at 581.
[124] *Id*. at 582.
[125] *Id*. at 585.

NFIB v. Sebelius is significant, from an anti-commandeering perspective, not so much for its holding but for the analysis the Court employed in reaching its conclusion. While *Dole* and *NFIB* have claims that emanate from a different constitutional source than that of *New York*, *Printz* and *Reno* (*i.e.*, the Spending Clause as opposed to the Commerce Clause), the reasoning the Court used in all of these cases can be plugged in as analytical components in a workable framework for states seeking to gain revenue by legalizing traditional vice prohibitions. The decision by the majority in *NFIB* seemed to find that conditional spending coaxing became something more because of the states' *reliance* on federal funds, more so, for our purposes, on the importance of state revenue and budgets. Further, the connection between that budgetary importance and the ability of such to influence state policy seems to be mindful of states' economic conditions – that state governments should not be penalized in determining their own policy initiatives, and what is best for their residents, to an extent such penalties would deleteriously impact a state's fiscal health. Whether or not that premise turns upon pre-existing reliance on a federal program or the federal government's disproportionate spending ability vis-à-vis the states is what the new era of anti-commandeering jurisprudence should be mindful of, particularly in the field of regulating vice, an historically state-centric purview.

E. Contemporary Treatment in the Federal Judiciary – Anti-Commandeering Claims in the Federal Intermediate Appellate Courts

Of the approximately 100 cases in the federal appellate courts that have addressed a direct claim of anti-commandeering since the decision in *New York v. United States* twenty-five years ago, courts have not struck down a federal act under the anti-commandeering principle.[126] The issues in these cases focus on a host of disputes between federal law and state action, but three common areas arise from the cases: state and local government employment practices under the Fair Labor Standards Act (FLSA),[127] mandated registration as a sex offender required by the Sex Offender Registration and

[126] The only exception to this is the decision of the United States Court of Appeals for the Fourth Circuit in *Reno v. Condon* which was overturned by the U.S. Supreme Court. *See* Condon v. Reno, 155 F.3d 453 (4th Cir. 1998).

[127] Fair Labor Standards Act, 29 U.S.C. §§ 201–19. The close decisions in both *National League of Cities v. Usery* and *Garcia v. San Antonio Metropolitan Transit Authority* (both 5 to 4) reveal how lower courts continued to struggle well after *Garcia* with federalism principles involving the Fair Labor Standards Act. *Cf.* West et al. v. Anne Arundel Cty., Maryland, 137 F.3d 752 (4th Cir. 1998). However, time and again, lower courts find that FLSA is a law of "general applicability" applicable incidentally to states as well as private actors and does not regulate states as "separate and distinct sovereign entities." *See, e.g.*, Robertson v. Morgan Cty., 1999 U.S. App. LEXIS 95 (10th Cir. 1999).

Notification Act (SORNA),[128] and certain civil liberty protections of prisoners under the Religious Land Use and Institutionalized Persons Act (RLUIPA).[129] Lower federal courts seem to be readily distinguishing the facts of both *New York* and *Printz* from these cases by focusing on the degree to which an affirmative burden (if any) is placed on states in their respective sovereign capacities. If a law equally and generally applied to both states and individuals (labor and employment laws), it would not commandeer. Further, to the extent a "burden" would be simply administrative (prison regulations) or of a reporting nature (sex offender registry), it could impose a slight burden on the state but not one so much that would bend away from the federal mandate. What these appellate cases seemed to have narrowed (and could shape for the U.S. Supreme Court) is the question as to what federal law would constitute commandeering: It would take a federal

[128] Sex Offender Registration and Notification Act, 42 U.S.C. §§ 16911 *et seq*. *See, e.g.*, United States v. White, 782 F.3d. 1118 (10th Cir. 2015); United States v. Johnson, 632 F.3d 912 (5th Cir. 2011).

[129] Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq*. State and local prison officials repeatedly pressed that prisoners' civil liberty protections required by this Act impermissibly commandeered their ability to administer prison policy. However, intermediate appellate courts have never held so. "*New York* and *Printz* are simply not applicable . . . because RLUIPA does not require the states to enact or administer a federal program. The Act does not demand that states take any affirmative action at all. To the contrary, RLUIPA requires states to refrain from acting in a way that interferes with inmates' exercise of religion…." Cutter v. Wilkinson, 423 F.3d 579 (6th Cir. 2005).

law that (1) regulates *only* a state, (2) in its sovereign capacity, (3) burdening it with significant affirmative obligations imposed by that federal law (4) not of merely a reporting or administrative nature (5) without consent to preemption, financial subsidy or option to opt out. It is only in the very recent past, in the context of immigration debates and the Trump administration's policies towards so-called "sanctuary cities," that federal district courts have found some credence of an anti-commandeering remedy.[130] Even this field, however, does not show a consistent line of reasoning in the context of the area of law vis-à-vis anti-commandeering nor have appeals on the merits been taken from these cases.[131]

[130] *See, e.g.*, Cty. of Santa Clara v. Trump, 250 F. Supp. 3d 497 (N.D. Cal. 2017) (finding anti-commandeering against an Executive Order that sought to make immigration detainers mandatory and oblige local law enforcement to execute these federal laws without discretion).

[131] Although the *County of Santa Clara* case found a direct violation of the anti-commandeering principle, other federal districts, even while striking down the application of the same "Sanctuary Cities" Executive Order, have found plaintiffs' anti-commandeering claims inapplicable. *See, e.g.*, City of El Cenizo v. Texas, 264 F. Supp. 3d 744 (W.D. Tex. 2017) and City of Chicago v. Sessions, 264 F. Supp. 3d 933 (N.D. Ill. 2017).

II. REGULATION OF GAMBLING AS VICE WITHIN THE U.S. FEDERALIST SYSTEM

A. Vice: States' Prerogatives over Criminal Laws

When the Constitution was ratified, certain areas of law were considered to always remain with the realm of the states, particularly those areas not involving national security, interstate commerce or foreign relations. As scholars of the country's history agree, the Constitution was not an abdication of state sovereignty *ab initio*, regardless of how the federal judiciary would come to interpret the balance of power after ratification. Matters of "everyday governing, that is, to retain most of the policy tools for governing everyday American life"[132] were to be retained by the states. These policy areas included authority over "taxes, militias, *criminal law*, property, and contracts, 'corporations civil and religious,' and the creation of cities, counties, courts, schools, [etc.]."[133] Included in the power to regulate the criminal law was the power to "regulate *vice*,"[134] that behavior which was considered socially unacceptable and punishable by generally applicable laws with the threat of enforcement. "Vice" is defined, according to the Oxford English Dictionary, as "[d]epravity or corruption of morals; evil, immoral, or wicked habits or conduct; indulgence in

[132] DAVID BRIAN ROBERTSON, FEDERALISM AND THE MAKING OF AMERICA 30 (2012).
[133] *Id.* (emphasis added).
[134] *Id.* (emphasis added).

degrading pleasures or practices."[135] States, as the guardians of individuals' safety, health, welfare and morals, were charged with developing criminal codes to determine the parameters of abhorrent behavior which would justify punishment by the sovereign in the interest of protecting all. This proved to be a very amorphous endeavor, with states' criminal laws varying dramatically. Of course, there was consensus on major offenses against the person such as murder, rape, battery, theft, etc. as well as many major offenses against property including burglary, arson, and the like. However, the federal divide devised by the Constitution and substantiated by the Tenth Amendment left the states with broad discretion to determine what conduct could be defined as criminal; in such realm, it was presumed the federal government could not intervene.[136]

Variations among the states across social and economic lines would justify how some states proceeded to regulate moral habit, how it regulated the vice crime. As such, criminalizing vice would very much depend on a state's economic condition, on the macro level of balancing the consequences of legalizing an activity as opposed to the benefits of making it legal. States would also assess the individualistic determination of regulating vice: is

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[135] *Vice*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

[136] The Supreme Court said as much in *United States v. Lopez* indicating that state criminal statutes that have nothing to do with interstate commerce are outside the regulatory authority of Congress. 514 U.S. 549, 561 (1995).

this a rational choice that vice-afflicted individuals are making? If so, is the more proper remedy retribution or rehabilitation? As micro-level social problems exacerbated the macro-level concerns, states started exploring the idea of the relative benefits of legalizing or decriminalizing vice. How this exploration will fare in this face of some of the categorical rules of U.S./state relations (*e.g.,* anti-commandeering) and the preemptive role of the central government is proving to be a driving force in federalism as states struggle with budgeting concerns and continue to seek non-traditional yet consistent streams of revenue.

B. Regulating Gambling as a "Vice"

From the moralistic ideal of regulating gambling as "vice," states have faced a dilemma — a "moral confusion [that] has plagued the whole long history of gambling in the United States."[137] The game of chance, the betting of money for the opportunity to win something more, was ambiguous in the American moral consciousness and hence difficult to regulate and more difficult to enforce. "The many ambiguities that have barred gambling from the pantheon of great social vices have made it both difficult to suppress and difficult to study."[138] Regulating gambling was, at some level, disingenuous when taken in conjunction with America's burgeoning aggressive capitalistic

[137] ANN FABIAN, CARD SHARPS, DREAM BOOKS, & BUCKET SHOPS 7 (1990).
[138] *Id.* at 5.

economy, making it difficult for some state legislatures "to assert a moral difference between stock markets and gambling casinos."[139] It would be this legality disparity – between prohibited games of chance and permitted "investing," – that would define many of the early securities laws of the United States and would justify a strong interest in regulation so as not to lose Americans' hard earned money to the underground world of gambling. As Ann Fabian, the renowned historian wrote (from an economic theory perspective):

> [T]he economists' model of human nature meant that "homo faber, man the doer, took precedence over man the believer, man the thinker, man the contemplator – even man the sinner. It was man the *speculator*, however, who preserved something of man the thinker, man the contemplator, and, in an economic universe geared to actual production, something of man the sinner. The gambling evil that clung to speculation came, not only from flirtation with risk, a flirtation finally celebrated in the folklore of capitalism, but from a refusal to

[139] *Id.* at 7.

> "launder" money by passing it through a productive economy.[140]

It is important to have this theoretical background in mind and the dilemma over gambling at the forefront when discussing the history of federal regulation of gambling. As economically attractive as the regulation of gambling is for states, there are a handful of federal laws, still in force, that presumably operate within Congress's legitimate Commerce power that have not been challenged or at least, as described below, challenged only recently. With respect to interstate transportation of state lottery tickets, for example, the Supreme Court established that only the connection to interstate commerce of such items could be regulated by Congress (as opposed to the rules of play and winnings allowed by state law). In doing so, Congress

> has not assumed to interfere with the completely internal affairs of any State, and has only legislated in respect of a matter which concerns *the people of the United States*. As a State may, for the purpose of

[140] ANN FABIAN, CARD SHARPS, DREAM BOOKS, & BUCKET SHOPS 167 (1990). Fabian partially quoted Joyce Appleby in this passage from the work, CAPITALISM AND A NEW SOCIAL ORDER (1984). Interestingly, Fabian also acknowledges that Max Weber's social theory of economic rationality is at the heart of many state legislatures' battles over legalizing gambling. She goes so far, also, as to infuse the still relevant argument with notions of Protestantism and that religion's basis for vice versus virtue.

> guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the purpose of guarding the people of the United States against the 'widespread pestilence of lotteries' and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another.[141]

The history on the subject, through the nineteenth and twentieth centuries, is rich indicating at many times how regulation of gambling and other games of chance schemes have been intrinsically tied to a state's economic condition. The economic progress of the state of Nevada would be a bellwether in that regard as it has the most open state laws to allow the most types of gambling – casino table games of chance, machine games of chance (*e.g.,* slot machines, video poker), horse betting and sports wagering. This does not include the several random areas of state regulation that have allowed isolated forms of gambling such as horse racing in New York (and the early origins of the Saratoga Springs track), Indian reservation casinos, various state lotteries

[141] Champion v. Ames, 188 U.S. 321, 357 (1903) (emphasis added to stress the idea that Congress, when it legislates, presumably on the borders of its commerce authority, does so in its capacity as a separate sovereign than the states, to protect the interests of all Americans, regardless of state residency).

(and ensuing compact agreements involving those – such as Powerball and MegaMillions), riverboat casino gaming in Mississippi and Louisiana and land-based casino exceptions to the general norm in places like Biloxi, Mississippi; New Orleans, Louisiana; and Atlantic City, New Jersey.

Statutes regulating gambling at the federal level are few. They include general criminal prohibitions of gambling involved in interstate commerce,[142] regulations on interstate horseracing,[143] a comprehensive regulatory framework to protect Indian reservations that wish to engage in gambling activities,[144] prohibitions on states' creating sports wagering schemes,[145] and a smattering of criminal statutes in Title 18 of the United States Code that prohibit illegal gambling businesses[146] and the interstate transportation of wagering paraphernalia.[147] It has been the rise in offshore internet gambling that has caused Congress to revisit federal gambling restrictions in the last decade. It has also been some states' call for deregulation in the field to explore the possibility of legalizing gambling that is restricted by the federal government. The conflict arises in the commercial nature of the vice regulation. Gambling is an inherently financial activity, and because cash or other promissory methods of paying are backed by

[142] The Wire Act, 18 U.S.C. §§ 1081 *et seq*.
[143] 15 U.S.C. §§ 3001 *et seq*.
[144] Indian Gaming Regulation, 25 U.S.C. §§ 2701 *et seq*.
[145] The Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701 *et seq*.
[146] 18 U.S.C. § 1955.
[147] 18 U.S.C. § 1953.

the federal government, transactions involved with gambling involve themselves (arguably intrinsically) in interstate commerce.

Whether federal authority to regulate in this area (much like that of regulating drugs) should be premised upon enforcement remains somewhat of an open question. The Supreme Court has held that in areas with *express* federal authority, evidenced by substantial and consistent federal enforcement, a state must give way to that authority, even if the state also has a substantial interest in that field of law.[148] With respect to vice domains based in the criminal law, it is, in part, however, a lack of enforcement that could potentially strengthen a state's argument that existing federal prohibitions violate state sovereignty under the Tenth Amendment. Whether states will choose to pursue that strength to replenish their state coffers through the courts by possibly using the anti-commandeering principle and confirming specific contours of the federal commerce power can be analyzed through two gambling area case studies: sports wagering and daily fantasy sports.

[148] *See, e.g.*, Arizona v. United States, 567 U.S. 387 (2012) (holding, in part, that the federal government has exclusive authority to enforce its immigration laws and states cannot enact contradictory laws to that authority).

C. Sports Wagering, the New Jersey Case Study

Congress passed the Professional and Amateur Sports Protection Act (PASPA) in 1992[149] to "curtail the growth of teenage gambling and to protect the integrity of our national pastimes by suppressing the development of sports gambling."[150] The law "made it illegal for any government entity to participate in or sponsor sports betting. . .."[151] When PASPA was enacted, it allowed all states with existing sports wagering to retain their schemes (but not be able to augment them); these four states were Nevada, Montana, Oregon and Delaware. All other states had one year from the enactment of the legislation to essentially "opt-in" if they wanted to entertain a permissible sports wagering scheme. New Jersey did not do so. As revenues from Atlantic City declined dramatically around the time of the Great Recession, the state began to explore other options to increase gambling revenue. In a popular statewide referendum on November 8, 2011, voters approved the following language by a vote of 63.9% in favor and 36.1% against:[152]

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[149] Pub. L. 102-559, 106 Stat. 4227 (1992).

[150] Dylan Oliver Malagrino, *Off the Board:* NCAA v. Christie *Challenges Congress to "Move the Line" on the Professional and Amateur Sports Protection Act*, 118 PENN. ST. L. REV. 375, 378 (2013).

[151] Thomas L. Skinner, III, *The Pendulum Swings: Commerce Clause and Tenth Amendment Challenges to PASPA*, 2 UNLV GAMING L.J. 311 (2011).

[152] *2011 Election Information*, STATE OF N.J. DEP'T OF STATE, http://www.state.nj.us/state/elections/2011-

> Shall the amendment to Article IV, Section VII, paragraph 2 of the Constitution of the State of New Jersey, agreed to by the Legislature, providing that it shall be lawful for the Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City and at current or former running and harness horse racetracks on the results of professional, certain college, or amateur sport or athletic events, be approved?[153]

The amendment was promptly placed into the laws of New Jersey as the New Jersey Sports Wagering Law, effective January 17, 2012.[154] Various athletic associations, including the NCAA, NFL and representatives of Major League Baseball sued to enjoin the state's sports wagering law for fear that gambling on sporting events would substantially impact the integrity of athletics, both professional and collegiate, in the state and would lead to corruption, interests originally put forth by Congress in enacting PASPA twenty years prior. After finding that the sports associations had standing to sue, the district court judge ruled in favor of them and against

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results/2011-official-gen-elect-public-question-results.pdf (last visited June 21, 2017).

[153] *Id.*

[154] N.J.S.A. §§ 5:12A-1 *et seq.*

the state, holding that, among other things, PASPA did not violate the anti-commandeering principle and was therefore constitutional. The district court stressed the rule that "Congress cannot, via the Commerce Clause, force States to engage in *affirmative* activity."[155] Since there was not an affirmative command on a state here, the district court found that the prohibitions on PASPA were simply a necessary function of Congress's authority under the Commerce Clause. The displacement of New Jersey's traditional realms of legislation (*e.g.,* making certain vice activity legal) was also not impeded.

> Congress has chosen through PASPA to limit the geographic localities in which sports wagering is lawful. It does no more or less. . . The fact that gambling might be considered an area subject to the States' traditional police powers does not change this conclusion.[156]

Citing *Ames*, and dismissing New Jersey's argument that the "equal footing" doctrine in *Coyle* as cited in *New York* should hold here, the district court went on to say that

> Congress has the power to regulate gambling. . .. State authorized sports

[155] Nat'l Collegiate Athletic Ass'n v. Christie, 926 F. Supp. 2d 551, 570 (D.N.J. 2013).
[156] *Id.* at 571.

> wagering cannot reasonably be described as purely pertaining to the internal policies of a state. Because sports wagering's effects are felt outside the state, and the ability to regulate gambling is within the purview of Congress, Congress's restriction of such does not violate or constrain any attributes essential to [New Jersey's] equality in dignity and power with the other states.[157]

New Jersey's Sports Wagering Law was found to violate PASPA and therefore also violated the Supremacy Clause.

The Christie Administration appealed the decision to the U.S. Court of Appeals for the Third Circuit. On September 17, 2013, a divided three-judge panel affirmed the decision of the district court.[158] The appeals court majority made it clear in analyzing both *New York* and *Printz* that the subject matter of those cases dealt with affirmative burdens, forcing states to expend their own funds and take overt actions in furtherance of federal regulatory objectives. It was the subtle difference between telling a state to take an action versus prohibiting it from changing its own laws to allow an action that was enough for the two-judge majority. "[W]e see much daylight between the exceedingly intrusive

[157] *Id.* at 572.
[158] NCAA v. Christie, 730 F.3d 208 (3d Cir. 2013).

statutes invalidated in the anti-commandeering cases and PASPA's much more straightforward mechanism of stopping the states from lending their imprimatur to gambling on sports."[159] The majority buttressed this distinction with the *Reno* decision from 2000 which held in favor of federal government action. Judge Vanaskie gave a carefully worded concurrence and dissent and upheld the majority's (and the district court's) equal footing analysis but questioned the anti-commandeering argument, seeing matters of first impression in the case. "PASPA is no ordinary federal statute that directly regulates interstate commerce. . .. Instead, PASPA prohibits states from authorizing sports gambling and thereby directs how *states* must treat such activity."[160] The U.S. Supreme Court denied the writ of certiorari on June 23, 2014. [161]

Once the United States Supreme Court denied review, New Jersey amended its sports wagering law to do what it believed the Third Circuit decision allowed it to do – allow sports wagering by repealing laws in part that sought to regulate it. In October of 2014, four months after the U.S. Supreme Court denied review, New Jersey enacted SB 2460 which sought to repeal certain specific regulatory guidelines on sports gambling "to the extent they apply or may be construed to apply at a casino or gambling house operating in this State in Atlantic

[159] *Id.* at 240.
[160] *Id.* at 241 (Vanaskie, J., dissenting).
[161] 573 U.S. ____ (2014), *cert. denied* on 13-967 (*Christie v. NCAA*), 13-979 (*NJ Thoroughbred Horsemen's Assn. v. NCAA*) and 13-980 (*Sweeney v. NCAA*).

City or a running or harness horse racetrack in this State."[162]

In almost identical procedural fashion to the first time PASPA's authority was challenged, the athletic leagues filed suit to enjoin enforcement of SB 2460 arguing that a partial repeal effectively is regulation. The district court agreed, reasoning that it "necessarily results in sports wagering with the State's imprimatur."[163] Both the initial three-judge panel of the Third Circuit, on appeal, as well as the *en banc* circuit decision reaffirmed this central point, that the 2014 state law, by selectively choosing where to prohibit sports wagering expressly by statute, implicitly allows it in other places, effectively regulating it – authorizing it by law. The state seemed to redouble efforts on the commandeering claim this second time around, but the same result was reaffirmed by the *en banc* Third Circuit: "Our prior conclusion that PASPA does not run afoul of anti-commandeering principles remains sound despite Appellants' attempt to call it into question using the 2014 Law as an exemplar."[164] While the Third Circuit wanted to make it abundantly clear to New Jersey that the 2014 partial repeal is not valid under PASPA, the majority opinion did not really give the state further drafting guidance when it stated:

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[162] N.J. Pub. L. No. 2015, c. 62, codified at N.J. Stat. Ann. §§ 5:12A-7 to -9.

[163] NCAA v. Christie, 832 F.3d 389, 395 (3d Cir. 2016).

[164] *Id.* at 399.

> To be clear, a state's decision to *selectively* remove a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators is, in essence, "authorization" under PASPA. *However*, our determination that such a selective repeal of certain prohibitions amounts to authorization under PASPA does not mean that states are not afforded sufficient room under PASPA to craft their own policies.[165]

In dissent, Judge Fuentes argued that semantically it was too much to infer that the language of the partial repeal constituted an authorization. "It is merely a repeal – it does not, and cannot, authorize by law anything . . . There is no explicit grant of permission in the 2014 Repeal for any person or entity to engage in sports gambling."[166] He argued that the partial repeal was simply a self-executing deregulation and to infer anything more would be to improperly assume the states could not take an otherwise allowed action. Judge Vanaskie, once again dissenting (as he did in the first time the case went to his court), took the semantic argument of Judge Fuentes even further saying that the option given to the state in both lines of these cases was too narrow,

[165] *Id.* at 401 (emphasis added).
[166] *Id.* at 405 (Fuentes, J., dissenting).

revealing an inherent anti-commandeering problem with PASPA as interpreted by the majority opinion. "PASPA is a statute that directs States to maintain gambling laws by dictating the manner in which States must enforce a federal law. The Supreme Court has never considered Congress's legislative power to be so expansive."[167] He reaffirmed his concern in the closing paragraph of his opinion by stating:

> I dissented in *Christie I* because the distinction between repeal and authorization is unworkable. Today's majority opinion validates my position: PASPA leaves the States with no choice. . . The anti-commandeering doctrine, essential to protect State sovereignty, prohibits Congress from compelling States to prohibit such private activity.[168]

Applying federal law (here, PASPA) to the absence of state regulation, not by direct permission *via* state regulation, but by implication of negative omission could be construed as a form of commandeering worse than the affirmative action requirement in *New York* and *Printz*. Emboldened by the dissent's anti-commandeering framing, New Jersey once again petitioned for certiorari before the U.S. Supreme

[167] *Id.* at 411 (Vanaskie, J., dissenting).
[168] *Id.* (Vanaskie, J., dissenting).

Court; that petition was granted[169]and will be decided in the Court's 2017 Term.[170] The oral arguments, held on December 4, 2017, revealed an interest by some of the justices on how a ruling in favor of New Jersey would impact the federal government's commerce power and the extent of a federal regulatory scheme required to prevent commandeering. To the former point, recognizing that finding an anti-commandeering violation here would necessarily implicate the federal government's authority over interstate commerce, Justice Breyer posited to Paul Clement, representing the NCAA, "[T]here is no interstate policy [in this instance] other than the interstate policy of telling the states what to do."[171] To the latter point, Justice Kagan posed the question to Ted Olson, representing the state of New Jersey, "When do we know that [the federal government has] enacted a sufficiently comprehensive regulatory scheme in order to allow preemption of state rules?"[172]

Legislatively, Frank Pallone of the Sixth Congressional District of New Jersey has advocated

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[169] Christie v. Nat'l Collegiate Athletic Ass'n, *cert. granted*, 582 U.S. ___ (U.S. June 27, 2017) (No. 16-476, *vide* 16-477).

[170] The question presented before the Supreme Court is whether a federal statute that prohibits modification or repeal of state-law prohibitions on private conduct impermissibly commanders the regulatory power of States in contravention of *New York v. United States*, 505 U.S. 144 (1992).

[171] Transcript of Oral Argument at 48, Christie v. NCAA, No. 16-476, *vide* 16-477 (U.S. Dec. 4, 2017).

[172] Transcript of Oral Argument at 9, Christie v. NCAA, No. 16-476, *vide* 16-477 (U.S. Dec. 4, 2017).

for the repeal of PASPA[173] and has introduced legislation seeking to allow states to operate legal schemes under it (by extending the time period to file for an exception) in the event it is not repealed.[174] Alternatively, Representative Pallone has also introduced a bill immunizing states and individuals from federal liability and outright repealing PASPA.[175]There are media reports that, despite their appearance as parties in the *Christie v. NCAA* case, many of the major professional sports association support the path to allowing states to legalize and regulate sports wagering.[176]

D. The Regulation of Daily Fantasy Sports

In recent years, most specifically from late 2012 to 2016, states have examined the possibility of regulating daily fantasy sports (DFS). Grounded in the old-style "rotisserie" leagues, DFS involves an arrangement whereby participants select a roster of

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[173] Will Hobson, *New Jersey Congressman Aims to Legalize Sports Betting*, WASH. POST (May 25, 2017), https://www.washingtonpost.com/news/sports/wp/2017/05/25/new-jersey-congressman-aims-to-legalize-sports-betting/?utm_term=.43d65c2f7c22.

[174] Sports Gaming Opportunity Act, H.R. 783, 115th Cong. (2017).

[175] Gaming Accountability and Modernization Enhancement Act of 2017, H.R. 4530, 115th Cong. (2017).

[176] Daniel Roberts, *NBA Lawyer: Legal Sports Betting in America 'Is the Best Place to End Up*,*'* YAHOO FINANCE (Nov. 17, 2017), https://finance.yahoo.com/news/nba-lawyer-legal-sports-betting-america-best-place-end-134208447.html.

athletes from various real-world professional teams in a given sports league to compete in virtual competitions based on the athletes' playing statistics of a participant's selected roster. Participants win when the stats for their combined virtual team total higher than other participants' teams. Early iterations of online fantasy sports competitions were tracked parallel to a season-long real-world sport schedule. However, when online speed of updating player performance after every game began to become easy, intermediary companies shortened the time frame of these contests to essentially the weekly or few days' schedule that took place in the professional real world.[177] Two companies, DraftKings and FanDuel, became the foremost provider of an online platform to facilitate daily fantasy sports, providing individuals who paid an entry fee to select their fantasy teams and compete against others for a large sum of money at the end of each game. During the fall of 2014, television advertisements for these two companies could hardly be escaped, often playing at each commercial intersession of Sunday NFL games. As a point of reference, and with no substantive discussion of regulation, both organizations spent $107 million on advertising revenue in the month of September 2015 alone.[178]

[177] Although these contests are collectively referred to as "daily fantasy sports," the payout periods realistically center around the real-world teams' schedule of individual games – no longer season long, but not every exact 24 hours either.

[178] Anthony Crupi, *Fantasy Sports Sites DraftKings, FanDuel September Spend Tops $100 Million*, ADVERTISING AGE (Sept.

State regulators began to take notice around this time. DFS was operating on a virtually unregulated platform, but opponents argued that the action of taking entry fees for a combined award was gambling wherein an "entry fee" was a wager and the "award" was a jackpot. Thus began the months-long debate in several states on whether DFS was gambling and subject to prohibition or a particular state's excepted level of gaming regulation[179]or whether it was an activity based in skill that fell outside the purview of state gambling laws. In a flurry of political debates in late 2015, some states outright forbade the activity classifying it as gambling, while others took action through their executive to have DFS entities self-regulate and acquiesce to the practical reality of facilitating gambling.[180] New Jersey, already an epicenter of

30, 2015), http://adage.com/article/media/draftkings-fanduel-spe/300658/.

[179] Nevada initially indicated it would allow DFS in early 2015, but then indicated in October of 2015 that it was a form of gambling and no operators applied for a state gaming license. A smaller DFS outfit, USFantasy, was approved for a license in June of 2016. *See* Matt Youmans, *Fantasy Sports Again A Reality in Nevada*, LAS VEGAS REVIEW-JOURNAL (June 23, 2016), https://www.reviewjournal.com/sports/sports-columns/matt-youmans/fantasy-sports-again-a-reality-in-nevada/.

[180] After the widely publicized decision by the New York state Attorney General to prosecute DFS providers for false advertising which resulted in a six-million-dollar settlement imposed on each DraftKings and FanDuel, New York eventually passed a state law regulating DFS. *See* Dustin

modern gaming law activity with the ongoing sports wagering court battle, held hearings in November of 2015 to examine what a regulatory framework of DFS would look like. The direct legal question was not whether what level of government could regulate DFS, it was first whether DFS was gambling at all, the battle of skill versus chance resonating through the early part of 2016. New Jersey would ultimately sign legislation legalizing and regulating DFS in July of 2017, becoming the sixteenth state to do so.[181]

So the threshold question remains for DFS: is it gambling? The federal law which makes illegal internet gambling specifically excepts DFS[182] but does not opine as to whether it is skill or chance. The anti-commandeering conundrum with respect to DFS comes to the fore, ironically, if there is a consensus that DFS is, in fact, chance and not skill. Since the basis of the games in DFS are sports, if the states allowed it by law, it would then be considered sports wagering and could fall within the prohibitions of PASPA. Taken in the context of the tension in the *Christie v. NCAA* line of cases and how to interpret

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Gouker, *Once A Daily Fantasy Sports Opponent, New York AG Schneiderman Defends Law in New Filing*, LEGAL SPORTS REP. (Jan. 13, 2017), https://www.legalsportsreport.com/12650/schneiderman-and-fantasy-sports/.

[181] Dustin Gouker, *New Jersey Gov. Christie Signs Fantasy Sports Bill; 16th State to Enact Law for DFS*, LEGAL SPORTS REP. (Aug. 24, 2017), https://www.legalsportsreport.com/15238/new-jersey-fantasy-sports-law/.

[182] 31 U.S.C. § 5362(1)(E)(ix). Unlawful Internet Gambling Enforcement Act (UIGEA) (2006), Pub. L. No. 109-347, 120 Stat. 1884 (codified at 31 U.S.C. §§ 5361 *et seq*.).

the interaction between PASPA and the states, "state efforts with respect to daily fantasy sports leagues are likely in a binary state – they can be banned, but not legalized or regulated."[183] If the Court rules in favor of New Jersey when *Christie v. NCAA* is decided, not only will traditional sports wagering likely proliferate but DFS will as well.[184] By the end of 2017, nineteen states have approved by law some form of DFS, another ten states have pending legislation, thirteen states have legislation that failed, and eight states have no laws on the books or are currently considering regulating DFS.[185]

III. THE ANTI-COMMANDEERING PRINCIPLE AND REGULATING VICE

What we can learn from the lessons of sports wagering and DFS is that states are taking aggressive

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[183] Richik Sarkar, *Daily Fantasy Sports: A Regulatory Dilemma Worth Resolving*, Consumer Financial Services Committee Newsletter; ABA BUS. LAW SECTION (March 2016).

[184] The federal government would seemingly have less of an argument against DFS from a purely statutory interpretation standpoint. Since the law excepting DFS from unlawful internet gambling was enacted 14 years after PASPA, it is assumed that Congress knew of the existing prohibitions of PASPA when it passed the UIGEA and intended it to be exempt, therefore allowing states to regulate it as they see fit.

[185] Dustin Gouker, *Legislative Tracker: Daily Fantasy Sports*, LEGAL SPORTS REP. (Jan. 1, 2018), https://www.legalsportsreport.com/daily-fantasy-sports-blocked-allowed-states/.

steps to remedy their budget concerns, steps that are either an affront to the preemptive authority of the national government or are being implemented on very shaky federalist ground. The argument will be made that the combination of the anti-commandeering rules, as thus far defined by Supreme Court jurisprudence, along with acquiescence by the federal government in enforcing federal law on the matter will converge to usher in a new era of federalism by eroding traditional adherence to the national government's interstate commerce plenary power, mindful of allowing the states to regulate certain areas historically prohibited as vice crimes to have discretion in determining state revenue streams. Analogies to the legalization of recreational marijuana use can be made as a sister-vice category.

The possession, use, and sale of marijuana remain illegal under federal law for any purpose.[186] The Supreme Court has held that when the federal government does choose to enforce its authority in the arena of drug laws, that authority preempts contrary state law.[187] However, eight states (and the District of Columbia) have legalized recreational marijuana use by popular referendum,[188] and

[186] 21 U.S.C. § 812.

[187] Gonzales v. Raich, 545 U.S. 1 (2005) (ruling that federal drug prohibitions trump California's allowance of medicinal marijuana).

[188] Eight states (at the time of this writing) have approved the recreational use of marijuana (subject to a wide variety of state regulations on amount, location of sale and consumption, etc.). Those states are: Alaska, California, Colorado, the District of Columbia, Maine, Massachusetts, Nevada, Oregon and

authorities in another fourteen states have decriminalized the possession of small amounts of marijuana.[189] Vermont became the first state to legalize possession of small amounts of recreational marijuana by legislative vote on January 23, 2018.[190] The executive branch of the federal government has sent mixed signals to the states on its decision to enforce federal drug laws.[191] The Trump administration took a bold step by directing the Attorney General to revert back to enforcement guidelines in place before the Obama

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Washington. No less than twenty more states are considering similar measures. *Marijuana Overview*, NAT'L CONFERENCE OF STATE LEGISLATURES (Aug. 30, 2017), http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx.

[189] *Id.*

[190] Katie Zezima, *Vermont Is the First State to Legalize Marijuana through Legislature*, WASH. POST (Jan. 24, 2018), https://www.washingtonpost.com/news/post-nation/wp/2018/01/23/vermont-is-the-first-state-to-legalize-marijuana-through-legislature/?utm_term=.5e10d96676ce.

[191] For example, the Obama administration consistently communicated federal policy acquiescence to those states with legalized marijuana use. *See* David G. Savage, *Obama Considers Easing Up Federal Marijuana Regulation*, LOS ANGELES TIMES (Dec. 14, 2012), http://articles.latimes.com/2012/dec/14/nation/la-na-obama-legal-marijuana-20121215. However, the Trump administration has signaled to the contrary. *See* Evan Halper and Patrick McGreevy, *Trump Administration Signals A Possible Crackdown on States Over Marijuana*, LOS ANGELES TIMES (Feb. 23, 2017), http://www.latimes.com/politics/la-na-pol-trump-marijuana-20170223-story.html.

administration.[192] In response, fifty-four members of Congress sent a letter to President Trump encouraging him to reinstate the policy of the Obama administration.[193] Could the federal government be running the risk of losing the ability to effectively enforce its authority in this field? Without active cooperation of state law enforcement, the majority of offenses go unprosecuted across the country because the federal government simply "lacks the resources to undertake such an effort on its own."[194] On the judicial front, no court has yet ruled directly that these states do not have a right to legalize recreational marijuana. In fact, the few cases that have come before federal courts have been dismissed without getting to the merits of a federalism issue,[195]

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[192] U.S. DEP'T OF JUSTICE, OFF. OF PUB. AFFAIRS, JUSTICE DEPARTMENT ISSUES MEMO ON MARIJUANA ENFORCEMENT (Jan. 4, 2018).

[193] Dan Adams, *Led by Warren, Lawmakers Urge Trump to Overrule Sessions on Pot*, BOSTON GLOBE (Jan. 25, 2018), https://www.bostonglobe.com/metro/2018/01/24/led-warren-lawmakers-urge-trump-overrule-sessions-pot/2kts0xCwqtG69TkSCkpyTN/story.html?p1=Article_Recommended_ReadMore_Pos6.

[194] Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 BOSTON U. L. REV. 1, 3 (2015).

[195] *See, e.g.*, Safe Streets Alliance, et al. v. Hickenlooper, et al., 859 F.3d 865 (10th Cir. 2017) (dismissing claims by Colorado, Kansas and Nebraska sheriffs and county attorneys ruling that Colorado's legalization of recreational marijuana is preempted by federal law on the grounds that the parties' federal substantive rights were not violated).

even one filed under the original jurisdiction of the Supreme Court.[196]

A 2010 comprehensive study by the CATO institute revealed that total government expenditures would be cut by approximately $41.3 billion per year if drugs were legalized, $25.7 billion of this going to state governments; approximately $8.7 billion of these savings would be from legalization of marijuana.[197] Revenue from taxation of sports wagering in New Jersey is estimated to bring in millions of dollars.[198] Sports wagering could significantly increase revenue for New Jersey's already in place online gambling arrangement. While online gambling in New Jersey did not initially yield the high revenues that the state anticipated when reporting began by the state Division of Gaming Enforcement in November of

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[196] *See* Nebraska and Oklahoma v. Colorado, 577 U.S. ___ (2016), where the relevant question to this analysis was: Whether the Court will grant Nebraska and Oklahoma leave to file an original action to seek a declaratory judgment stating that Sections 16(4) and (5) of Article XVIII of the Colorado Constitution are preempted by federal law, and therefore unconstitutional and unenforceable under the Supremacy Clause, Article VI of the U.S. Constitution. The Court dismissed the motion for leave to file a bill of complaint.

[197] Jeffrey A. Miron & Katherine Waldock, *The Budgetary Impact of Ending Drug Prohibition*, CATO INSTITUTE, 2010.

[198] Michael McCann, *All Bets Are Off: Supreme Court to Review Sports Betting Ban*, SPORTS ILLUSTRATED (June 27, 2017), https://www.si.com/nfl/2017/06/27/supreme-court-review-sports-betting-gambling-ban-new-jersey-chris-christie.

2013, mandated revenue reports estimate a continuous albeit slight upward trend.[199]

A. Judicial Review of the Matter to Develop the Constitutional Principle – Policy Considerations for the Benefit of States

New York and *Printz* dealt with the federal government's relationship to state legislatures and state executives, respectively. The logistical matter of what type of obligations arise in *state* judiciaries is not the direct study of this paper; however, it is well settled that by the simple statement of the Supremacy Clause and the inherent function of all courts, state courts could be charged with having to decide these weighty matters of federal relations just as much as federal courts may decide them.[200] This special duty of the judiciary, an extrapolation of

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[199] At the time of this writing, five entities are authorized to facilitate online gambling in the state of New Jersey: Borgata, Caesar's, Golden Nugget, Tropicana and ResortsDigital (which was approved a casino license on August 12, 2015). All of these except ResortsDigital facilitated online gambling sites for the full calendar years of 2014, 2015 and 2016. The year over year total revenue increase from these four entities was approximately 28.5% from 2014 to 2015 and 16% from 2015 to 2016. *Monthly Internet Gross Revenue Reports*, DIVISION OF GAMING ENFORCEMENT, OFFICE OF THE ATTORNEY GENERAL, STATE OF NEW JERSEY, http://www.nj.gov/lps/ge/igrtaxreturns.html (last visited July 25, 2018).

[200] U.S. CONST. art. VI, ¶ 2. *See also* Testa v. Katt, 330 U.S. 386 (1947); Tonya M. Gray, *Separate but Not Sovereign: Reconciling Federal Commandeering of State Courts*, 52 VAND. L. REV. 143 (1999).

Hamilton's exultation of that branch in Federalist No. 78,[201] raises courts above the fray of the political institutions and arguably places them in a better position to articulate a constitutional standard for states attempting to legalize vice. State courts, in addition to lower federal courts will look to precedent to determine how to apply a rule when an anti-commandeering case comes before them. It is difficult to determine what that rule, even from *Christie v. NCAA*, would be. If PASPA is ruled unconstitutional under the anti-commandeering principle because the Court decides to flesh out what a "regulatory program" is, it will severely limit how federal policy is shaped and the calculation of federal resources to further such regulatory programs. If, under a theory of political accountability, the concern is that voters would not be able to determine "who to blame" for a law that does not end up raising revenue and instead increases crime, poverty and a disproportionate burden of the state social welfare resources, the rule should defer to the states as they are in the best proximity to those voters to justify the cost-benefit of such laws. The national constituency on matters of what constitutes a vice revealed trouble in the federalist model historically as alluded to at the time of the Convention and in the *Federalist Papers* and those same concerns of centralization are present now. Even under an expansive reading of Congress's underlying Commerce Clause power, the anti-commandeering principle seeks to acknowledge

[201] *See supra* p. 5.

that in the dual sovereign system, Congress cannot have the states shoulder the burden of federal policy. This intuitive design of the government is not only viable from a fair reading of the Constitution and the Tenth Amendment, but it is supported by *New York* and *Printz* and should be expressly stated by the Supreme Court in light of how the principle was fleshed out in the unanimous decision in *Reno*. *NCAA v. Christie* is the perfect opportunity to do so, to say that when the federal government seeks to prohibit a state (and the state alone, not individuals), in its capacity as a political actor accountable to its people (and not as a market participant), from enacting laws that the state believes are in the best interest of its people and does so without calling for a federal regulatory scheme to justify the prohibition, the action runs afoul of the Tenth Amendment. While the Commerce Clause allows the federal government to directly regulate individuals, the dual sovereignty system acknowledges such a presumably intrusive action (as the expansive manner in which the Court has interpreted Congress's Commerce power) because it is assumed that Congress will expound its *own* resources to effectuate the policy.

When a field of regulation, such as the field of legalizing drug use, becomes so pervasive that the federal government and local law enforcement agencies spend billions of dollars in investigation, trial and incarceration, it would be disingenuous to later foist that cost onto the states *qua* states. The longer time passes with states allowing legalized recreational drug use or gambling, the less likely it is that a court will see the federal government's

prohibitions as legitimate. What *NFIB v. Sebelius* adds, albeit in a quite murky way, is the idea that with state referenda determining the will of individuals who want these vices legalized, with continuous lack of federal executive enforcement, and with states getting their fiscal house in order due to yields from (and regulation of) legalized vices, even federal financial incentives may not prove enough in whatever amount as they once did under the *Dole* line of conditional spending cases. If states want an alternative source of revenue, of their own making, neither the anti-commandeering principle as currently inscribed nor the danger of developing state policy with entrenched federal funding should be a concern which would later not be available to the states. Fleshing this out, though, will take an action of the U.S. Supreme Court since the federal intermediate appellate courts and lower federal district courts seem, post *New York*, disinclined to find commandeering violations in most federal/state relationships. Inconsistent application throughout the nation of a principle under which states justify law making and revenue raising would be precarious.

What are states to do in the wake of the relatively young and not-well-developed anti-commandeering and anti-coercion doctrines from the jurisprudence of the Supreme Court? Will an eventual rule of law emerge from *Christie v. NCAA* that can be used broadly, one that could be applied to other traditional areas of state criminal vice regulation, like legalizing marijuana or making other forms of gambling legal? A broad rule from such a

case would be helpful to states seeking to maximize revenue in the wake of broad-based economic pressures on state treasuries. States would be able to justify such expansive initiatives by arguing that their relative political proximity to individuals places them in the better position to bear the brunt of any democratic push-back on these matters. This is the crux of the political accountability theory that found its origins in *New York* and that underlies the few cases that find in favor of state authority. "It is those relations [with constituents] that better enable state governments collectively to respond to heterogeneous national preference."[202] Such decentralization from federal policy will likely represent more accurately constituent preference and "end up with fewer dissatisfied citizens."[203] For that reason, political accountability actually incentivizes federal deregulation of marijuana, because if power is shifted to the states, "that is assumed to empower local constituencies, with whatever risks and benefits that poses, because the relation between those constituencies and state governments is taken as given."[204]

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[202] Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 BOSTON U. L. REV. 1, 21 (2015).

[203] Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

[204] Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 BOSTON U. L. REV. 1, 23 (2015).

B. Reconciling Anti-Commandeering and the Federal Commerce Power to Allow States Discretion in Regulating Vice

Whether operating as laboratories for possible future federal policy or in their own immediate best interests, the revenue impact of legalizing vice should be included in the calculus of anti-commandeering cases. Modifying the standard to be less categorical (and perhaps revisiting "integral operations in areas of traditional government functions" elements of *National League of Cities*)[205] would be in the best interest of states as they continue to struggle with annual budgeting woes. It would not be the state as a "market participant" but as a sovereign actor charged with generating public revenue for state services; thus, the problem in *Dole* would not present itself.

The anti-commandeering principle should, at a minimum, include an express statement from the Supreme Court as to: (1) whether an affirmative action requirement is implicit in the analysis of *New York* and *Printz*, or whether preventing a state from making something legal is also prohibited (*i.e.*, a duty *not* to act) (2) to what extent (and what is the definition of) a federal "regulatory scheme" needs to be in place to have a bearing on an anti-commandeering analysis (*i.e.*, does it need to appear to at least justify the ability to enforce), and lastly (3) what are the definitive limits by which Congress can

[205] *See supra* p. 10.

condition funds in the context of an anti-coercion matter.[206] The confluence of economic events in states' tenuous expansion of regulating sports wagering should place a significant impetus on the Court to interpret the anti-commandeering principle in *Christie v. NCAA* in such a way that fills in some of these gaps and provides states with a clear path to regulating vice in a measured, systematic method to support state legislative approaches to new public revenue streams.

This innovation in the Court's anti-commandeering statement could inevitably carve a substantial piece out of the expansive authority of the federal government under the Commerce Clause,[207] an exception that may be subject to political attack if the calculus is not carefully and consistently applied. The framework above therefore, when specifically dealing with a state's express attempt at legalization of a traditionally defined vice area, should be this: When considering whether federal law commandeers states in the context of the latter regulating an area of historically criminalized vice for the stated purpose of state revenue increase, courts should consider a balance of interests. *Any* connection to commerce should be analyzed secondarily to whether the state's

[206] *NFIB v. Sebelius* did not really address what the test should be when federal funding pressures move from mere coaxing to impressible coercion but found that it was violated by the Medicaid expansion provision in that particular case. In a case such as this where federal action stops state revenue flowing from a previously legalized state vice domain, a court can include in its calculus a measure of revenue lost as a result of the federal enforcement.

[207] U.S. Const. Art. I, § 8, cl. 3.

justification for the action, in measured and predetermined express enforcement and active attempts to confine regulation of the vice activity within state lines, outweighs the relationship of the regulated activity to any incidental contact to interstate commerce. This variable is then further balanced with evidence of the federal government's willingness to enforce a particular field of vice. If evidence shows (whether through statement of executive actors, executive orders indicating a willingness not to enforce or even statements to the media indicating a preference not to enforce federal law) a desire not to enforce, courts should bend towards the state's position and allow the legalization to proceed without constitutional infirmity.

Generally speaking, sovereign actors are allowed to operate with some discretion in enforcing their own laws based on available resources. This resource-allocation argument allows political actors in the respective spheres of government in our federal system to prioritize prosecutions relative to societal need through the expression of democratic will. However, the unique American federal system, in its compound, power sharing structure with a default of reserve power to the states, should not be staid to a point where state lawmakers are chilled in action waiting for federal lawmakers to decide whether or not to act. Implementation and enforcement have impacts on the federalist balance of power. The federal government, whether directly, through mixed signals or by continuous disregard of

enforcing federal law, could be giving the courts a justification for shaping a new federal balance of power and then buttressing a resource allocation argument for states to say that random or isolated prosecution of certain federal vice proscriptions (like PASPA) is not only arguably unfair (with perhaps attendant Due Process concerns) but commandeering. If states are unsure when (and if) federal law touching on historical state purview will be enforced, states could argue that *any* enforcement is a violation of the state's right because it commandeers the state's legitimate assumption about enforcing its own laws. If there is a state law on the books that (1) legalizes a vice that was presumably illegal under federal law and (2) the federal government knew or had reason to know of the passage of this law and took no steps (at least informally) to make statements of constitutional merit against this law during its passage, courts should consider that under a Tenth Amendment challenge if the federal government later asserts a preemption claim. The longer enforcement of the federal law is non-existent and the longer the state comes to rely on the revenue from legalized vices as a result of lack of federal enforcement of a contradictory national law, the less likely it would be for a court to find a federalism concern. Diagram 1 (in the Appendix to this article) represents a timeline of how these activities would play out.

The Commerce Clause authority argument is secondary to that theory but necessary. Since the federal government's interstate commerce authority has been decreed virtually plenary by the Court,

states are somewhat chilled here too in lawmaking in the face of the federal government's decision not to prosecute federal law. They do not know whether they can or cannot proceed, an artificial existence not conducive to the reserve, police powers of the states. Thus, courts should consider that (1) if a state passes a law that although facially violates the existing valid constitutional legitimacy of the federal government's commerce authority and (2) it is a law with (a) the stated purpose of raising state revenue, (b) includes a comprehensive enforcement framework that seeks to prevent or, within the state's due diligence, mitigate impact[208] on the interstate stream of commerce, and (c) involves an opportunity in the law-making process for thorough vetting on the federalism and Commerce Clause principles discussed herein, then taken with an eye towards the resources required to enforce that law and an evidence-based observation over time of the federal government's decision not to enforce its own laws on

[208] History reveals that states can invest the resources to monitor and thus prevent the interstate nature of these commercial activities. For example, legal online gambling in New Jersey has created several safeguards to not run afoul of the UIGEA, and more states are looking to it as a model for their own state-based online gambling arrangements. Massachusetts, New York and Pennsylvania have all expressed interest in state-based online gambling arrangements. *See, e.g.*, Steve Ruddock, *Analysts Predict up to Three States Could Legalize Online Gambling in 2017*, ONLINE POKER REP. (Feb. 6, 2017), https://www.onlinepokerreport.com/23763/eilers-krejcik-states-legalization-online-gambling/.

the subject matter, the state law legalizing vice should be allowed to stand. To do otherwise would violate the anti-commandeering principle even with an impact on interstate commerce. For those states that have been realizing revenue the longest on certain facially illegal vice activities (*e.g.,* Colorado's tax revenue[209] from legalized, regulated recreational marijuana sales) under federal law but legal under state law, the courts may include a factor of reliance on that revenue, one where later, subsequent enforcement of the federal law could be construed as *compelling* or *coercing* the states to give up a revenue stream and therefore, also an anti-coercion concern.

IV. CONCLUSION

If the judiciary does not articulate a more workable framework for states in *Christie* to regulate vice areas, the inevitable calls by states for congressional action to either repeal or modify federal laws prohibiting either more forms of gambling or marijuana will increase. The judicial test espoused above, of course, does not apply to *legislative* action on the matter, but it presupposes

[209] Since recreational marijuana was legalized in Colorado in 2014, the state has realized $506 million in revenue and put a substantial part of that money back into the state's public education system. *See, e.g.*, Katelyn Neman, *Milestoned: Colorado Pot Tax Revenue Surpasses $500M*, U.S. NEWS AND WORLD REP. (July 20, 2017), https://www.usnews.com/news/best-states/colorado/articles/2017-07-20/colorado-pot-tax-revenue-surpasses-500-million.

that effective judicial interpretation of the matter, either in federal courts or state courts, defers to action in the political arena. Both the district court judge and the appellate majority in both rounds of *NCAA v. Christie* referred to this possibility in ruling against the state, that the best way to allow states to legalize the state regimes of which they seek to take benefit is through the political process; effectively, they stated that the courts were limited by the categorical constructs of the federalism jurisprudence on the books, especially in the confluence of anti-commandeering and commerce. But is the matter safer in the legislative arena than in the judicial arena? Some scholars have alluded to the fact that legislative action on the matter, if not clear in the form of a pure repeal of the preemptive statutes, will only cause further confusion and either chill actions of states or delay the progress of vice legalization and place the states in a holding pattern waiting for ultimate resolution of litigation. This is more the reason for the Court to decide these important, unanswered questions on anti-commandeering in *Christie*. It would be not only to grant satisfaction on the merits directly for New Jersey, its sports wagering laws and the future of its other options for legalized gambling, it is also to determine a framework by which states *should* proceed when contemplating the legalization of any traditional vice areas for purposes of raising state revenue.

APPENDIX – DIAGRAM 1