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BETTING ON STATE EQUALITY: HOW THE EXPANDED EQUAL SOVEREIGNTY DOCTRINE APPLIES TO THE COMMERCE CLAUSE AND SIGNALS THE DEMISE OF THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT

Abstract: In recent years, the U.S. Supreme Court revived the long-dormant equal sovereignty doctrine, which states that the federal government cannot enact legislation that renders states unequal in power, dignity, and authority. Although the doctrine historically applied only in the context of states entering the Union, in the 2013 case *Shelby County v. Holder*, the Supreme Court broadened the doctrine's scope, holding that the doctrine applied to all disparate treatment of states. As such, the revived equal sovereignty doctrine leaves federal statutes—such as the Professional and Amateur Sports Protection Act (“PASPA”), which prohibits state-sanctioned casino sports gambling in all states except for Nevada—on uncertain constitutional grounds. Contrary to a recent Third Circuit holding, this Note argues that PASPA's disparate treatment of states violates the equal sovereignty doctrine. Under an approach developed by this Note, which requires Congress to demonstrate that disparate treatment of states is sufficiently related to the problem that the statute seeks to address, this Note contends that PASPA violates the equal sovereignty doctrine because the exemption of Nevada is not reasonably related to the national problem of sports gambling, which PASPA seeks to address. Importantly, adopting this approach would harmonize the Supreme Court's Commerce Clause jurisprudence with its recently expanded equal sovereignty doctrine analysis.

INTRODUCTION

On February 2, 2014, 111.5 million Americans watched the Seattle Seahawks overcome the Denver Broncos in Super Bowl XLVIII.¹ Although the game took place in East Rutherford, New Jersey, an estimated 300,000 Americans instead traveled to Nevada for Super Bowl weekend to wager a record \$119 million, yielding a \$19.7 million recorded profit for Las Vegas sports books.² In

¹ Richard Sandomir, *Super Bowl Again Proves Bigger than the Game Itself*, N.Y. TIMES, Feb. 4, 2014, at B13.

² *Fans Bet Record \$119M on Super Bowl*, ESPN, http://espn.go.com/nfl/playoffs/2013/story/_/id/10399019/super-bowl-xlvihi-fans-bet-record-119m-game-nevada-casinos, archived at <http://perma.cc/B5DK-9VJF> (last updated Feb. 4, 2014, 9:37 AM). The \$19.7 million in recorded profit broke the

addition, these visitors were projected to spend an estimated \$106.2 million in nongaming activities and accommodations.³ In contrast, New Jersey's casinos did not benefit from these record numbers because the 1992 Professional and Amateur Sports Protection Act ("PASPA") prohibits casino-operated sports books outside of Nevada.⁴

Although many states already prohibited sports gambling at the time, Congress passed PASPA because it perceived sports gambling as a national problem that could only be remedied through federal action.⁵ Congress concluded that state regulation was insufficient because the moral harm produced by sports gambling could not be limited geographically.⁶ PASPA, however, contains a grandfather clause that carves out an exception for states that allowed or operated a sports betting scheme between 1976 and 1990.⁷ In effect, this grandfather clause grants Nevada a virtual monopoly over casino sports gambling.⁸

existing record. *Id.* Note that a sports book is a betting operation that handicaps the betting odds for sporting events in order to encourage wagers. See Christopher T. Pickens, *Of Bookies and Brokers: Are Sports Futures Gambling or Investing, and Does It Even Matter?*, 14 GEO. MASON L. REV. 227, 259 & n.282 (2006). See generally *id.* (suggesting that sports books are distinguished from traditional casino games because the handicap is reliant on the skill of the operator at predicting outcomes).

³ Gillian Spear, *Think Sports Gambling Isn't Big Money? Wanna Bet?*, NBC NEWS (July 15, 2013, 4:16 AM), http://usnews.nbcnews.com/_news/2013/07/15/19439242-think-sports-gambling-isnt-big-money-wanna-bet?lite, archived at <http://perma.cc/7S6W-YXZG>; *Sports Wagering*, AM. GAMING ASS'N, <http://www.americangaming.org/industry-resources/research/fact-sheets/sports-wagering>, archived at <http://perma.cc/B3V7-QRTP> (last visited May 15, 2014).

⁴ See 28 U.S.C. § 3702(1)–(2) (2012) (prohibiting a governmental entity to sponsor or license a lottery, sweepstakes, or other wagering scheme based "on one or more competitive games in which amateur or professional athletes participate"). Compare *id.* § 3704 (2012) (stating that § 3702 shall not apply to a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a state at any time between 1976 and 1990), with Anthony G. Galasso, Jr., Note, *Betting Against the House (and Senate): The Case for Legal State-Sponsored Sports Wagering in a Post-PASPA World*, 99 KY. L.J. 163, 167 (2011) (explaining that PASPA exempted Nevada's casino-operated sports books from regulation).

⁵ S. REP. NO. 102-248, at 5 (1991) ("Without Federal legislation, sports gambling is likely to spread on a piecemeal basis and ultimately develop an irreversible momentum.").

⁶ See *id.*; cf. Steven L. Shur, Student Submission, *Police Blockade: How the Revitalization of the Tenth Amendment Could Pave the Way to Legalized Sports Betting in New Jersey*, 10 RUTGERS J.L. & PUB. POL'Y 99, 100–01 (2013) (discussing Congress's assertion that the moral wrong produced by sports gambling justified federal legislation).

⁷ 28 U.S.C. § 3704. PASPA gave New Jersey a one-year window to allow sports betting, but the state failed to pass the necessary enabling law. See § 3074(a)(3)(A) (stipulating that PASPA will not apply to New Jersey if a scheme was authorized no later than one year after the effective date of PASPA); Thomas L. Skinner III, *The Pendulum Swings: Commerce Clause and Tenth Amendment Challenges to PASPA*, 2 UNLV GAMING L.J. 311, 311–12 (2011) (explaining that New Jersey missed their one-year window for legalizing sports gambling).

⁸ Galasso, *supra* note 4, at 167 (explaining that PASPA's overall effect granted Nevada a monopoly on sports gambling). PASPA also grandfathered Oregon and Delaware's sports lotteries and Montana's sports gambling pool. See David D. Waddell & Douglas L. Minke, *Why Doesn't Every Casino Have a Sports Book?*, GLOBAL GAMING BUS., July 2008, at 34, 35–36. Although PASPA technically granted Nevada a monopoly on casino sports gambling, this priority has resulted in an effective mo-

Although PASPA has prevented the spread of state-sanctioned sports gambling, the Act has failed to stop its overall growth.⁹ For example, one 1999 study estimated that gamblers illegally wager approximately \$380 billion annually on sports, making sports betting the most widespread and popular form of gambling in the United States.¹⁰ In addition, newspapers and websites across the country publish point spreads.¹¹ Furthermore, sports gambling websites allow Americans nationwide the opportunity to gamble on sports.¹² Finally, participation in fantasy football leagues and college basketball brackets is common,¹³ with partici-

nopoly on sports betting in general, as the size of Nevada's sports gambling industry far exceeds the sports lotteries of Oregon and Delaware and the sports gambling pool of Montana. Galasso, *supra* note 4, at 166–68. Interestingly, Congress did not mention that the exception applied to Montana when it debated and enacted PASPA. See S. REP. NO. 102-248, at 10, 13 (detailing that PASPA grandfathered sports gambling laws in only three states: Oregon, Delaware, and Nevada).

⁹ See 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, 397 (2013) (noting that sports gambling has significantly increased since the enactment of PASPA); Eric Meer, *The Professional and Amateur Sports Betting Act (PASPA): A Bad Bet for the States*, 2 UNLV GAMING L.J. 281, 294 (2011) (arguing that PASPA has failed to curb the rise in the popularity of sports betting); cf. Joe Drape, *Web Site Puts Focus on the Fix in Sports Bets*, N.Y. TIMES, May 25, 2008, at A1 (estimating Internet gaming to surpass twenty billion dollars in 2008).

¹⁰ NAT'L GAMBLING IMPACT STUDY COMM'N, FINAL REPORT 2-14 (1999).

¹¹ *Id.* at 3-10. A point spread is the amount of points that one team is favored over another. Anthony Cabot, *The Absence of a Comprehensive Federal Policy Toward Internet and Sports Wagering and a Proposal for Change*, 17 VILL. SPORTS & ENT. L.J. 271, 277 n.26 (2010). Publishing point spreads contributes to the popularity of sports wagering because it sends a mixed message about the illegality of sports gambling. Ronald J. Rychlak, *A Bad Bet: Federal Criminalization of Nevada's Collegiate Sports Books*, 4 NEV. L.J. 320, 326 (2004).

¹² See, e.g., SPORTSBOOK.COM, <http://www.sportsbook.ag/welcome>, archived at <http://perma.cc/PR9V-CPTH?type=source> (last visited May 19, 2014) (providing an example of a sports gambling website); BOVADA, <http://sports.bovada.lv>, archived at <http://perma.cc/PC55-MN4M> (last visited May 19, 2014) (same); TOPBET, <http://topbet.eu/sportsbook>, archived at <http://perma.cc/N5H9-9JY3> (last visited May 19, 2014) (same). Although there is uncertainty as to the legality of these websites, recent actions by the U.S. Department of Justice (DOJ) indicate that states may authorize them as they wish. See Whether Proposals by Ill. & N.Y. to Use the Internet and out-of-State Transaction Processors to Sell Lottery Tickets to in-State Adults Violate the Wire Act, 35 Op. O.L.C. 1, 1–2 (2011), available at <http://www.justice.gov/olc/opiniondocs/state-lotteries-opinion.pdf>, archived at <http://perma.cc/WG85-LZCY>; Nelson Rose & Rebecca Bolin, *Game on for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets*, 45 CONN. L. REV. 653, 693–94 (2012) (arguing that a recent DOJ memorandum indicates that states will be given more freedom to regulate their own Internet gambling).

¹³ See Aaron Craig, *Gambling on the Internet*, 1998 COMPUTER L. REV. & TECH. J. 61, 67, 82–83 (arguing that PASPA is frequently violated by common office pools for the National Collegiate Athletic Association (NCAA) basketball tournament); Nicole Davidson, *Internet Gambling: Should Fantasy Sports Leagues Be Prohibited?*, 39 SAN DIEGO L. REV. 201, 202 (2002) (noting that an estimated 30 million people play fantasy sports). Although participation in fantasy sports leagues and college brackets may include nonpaying contestants, it is argued that contestants competing for prizes—especially cash prizes—may be in violation of federal law. See Davidson, *supra* at 206–10 (arguing that fantasy sports players are engaged in interstate gambling in violation of the Wire Act).

pants including the U.S. President¹⁴ and a former U.S. Supreme Court Chief Justice.¹⁵

In 2012, the New Jersey legislature enacted the Sports Wagering Law—which permits sports pools at New Jersey gaming casinos—in hopes of attracting a percentage of this sports gambling income to the Garden State.¹⁶ After enactment, the National Collegiate Athletic Association (NCAA) and the four major American professional sports organizations challenged the law, arguing that it was in direct conflict with PASPA.¹⁷ In response, New Jersey contended that PASPA was unconstitutional because it violated the equal sovereignty doctrine.¹⁸ Under this doctrine, federal legislation cannot discriminate among states unless Congress can show the burden is sufficiently related to the problem the legislation targets.¹⁹

¹⁴ See Andy Katz, *Presidential Pick 'em at the White House*, ESPN (Mar. 18, 2009), http://sports.espn.go.com/nbc/ncaatourney09/columns/story?columnist=katz_andy&id=3991859, archived at <http://perma.cc/U66-QGR3>. Interestingly, during his reelection campaign in 2012, President Barack Obama tapped into the popularity of NCAA tournament gambling by operating a bracket challenge on his campaign website. See Ben Cohen, *Obama Unveils Election-Year Bracket*, WALL ST. J. (Mar. 14, 2012, 11:29 AM), blogs.wsj.com/dailyfix/2012/03/14/president-obama-unveils-ncaa-tournament-bracket, archived at <http://perma.cc/7P7R-E79L>.

¹⁵ Chad Millman, *Fight For Sports Betting Rages On*, ESPN, <http://insider.espn.go.com/insider/insider/news/story?id=4841822>, archived at <http://perma.cc/TSQ5-WYHD> (last updated Jan. 21, 2010, 7:27 AM) (reporting that former Chief Justice William Rehnquist organized March Madness pools for money).

¹⁶ Cf. Act effective Jan. 17, 2012, ch. 231, § 2(a), 2011 N.J. Laws 1723, 1724–25 (codified at N.J. STAT. ANN. § 5:12A-2(a) (West 2012)); Colton Totland, *New Jersey Puts Money on Legalizing Sports Betting*, WASH. TIMES (Aug. 13, 2012), <http://www.washingtontimes.com/news/2012/aug/13/nj-makes-constitutional-case-sports-betting>, archived at <http://perma.cc/HJ85-5WHS> (reporting that according to New Jersey officials, sports betting would generate \$120 million each year and thousands of jobs for the state).

¹⁷ NCAA v. Christie, 926 F. Supp. 2d 551, 553 (D.N.J.), *aff'd* 730 F.3d 208 (3d Cir. 2013). The National Basketball Association (NBA), National Football League (NFL), National Hockey League (NHL), and Major League Baseball (MLB) each joined the NCAA as plaintiffs. *Id.*

¹⁸ *Id.* at 554 n.23.

¹⁹ See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2630 (2013) (quoting *Nw. Austin Mun. Util. Dist. v. Holder*, 557 U.S. 193, 203 (2009)); see also John M. Powers, *Statistical Evidence of Racially Polarized Voting in the Obama Elections, and Implications for Section 2 of the Voting Rights Act*, 102 GEO. L.J. 881, 918–19 (2014) (outlining the Supreme Court's holding in *Shelby County v. Holder*). This doctrine originates from Article IV, Section 4 of the U.S. Constitution. See *Coyle v. Smith*, 221 U.S. 559, 566–67 (1911) (holding that the states are equal in power and sovereignty (citing U.S. CONST. art. IV, § 4)). See generally U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government.”). The Supreme Court has noted that the equal sovereignty doctrine also derives its power from the Tenth Amendment. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (noting that the Tenth Amendment protects the sovereignty of the states, and it ensures they remain equal in power and dignity). See generally U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

In 2013, in *NCAA v. Governor of New Jersey*, however, the United States Court of Appeals for the Third Circuit upheld PASPA's constitutionality and preempted New Jersey's Sports Wagering Law.²⁰ The Third Circuit held that the equal sovereignty doctrine did not apply to economic regulations, even when they discriminate among states.²¹ In so holding, the court noted that the Commerce Clause did not require geographic uniformity.²² Accordingly, PASPA, an economic regulation passed under the Commerce Clause, did not violate the equal sovereignty doctrine.²³

This Note argues that the Supreme Court should apply the equal sovereignty doctrine to economic regulations that discriminate among states and were enacted under the Commerce Clause.²⁴ Accordingly, this Note contends that the proper way to analyze discriminatory economic regulations is to determine whether the discriminate treatment of states is sufficiently related to the legislation's targeted issues.²⁵ In order for a statute's unequal treatment of states to be upheld, Congress must establish that the issues addressed are limited geographically to the targeted states and does not appear in the exempted states.²⁶ Despite the Third Circuit's holding to the contrary, applying the equal sovereignty doctrine to economic regulations is proper because it is faithful to the Supreme Court's recent equal sovereignty jurisprudence, reinforces the Commerce Clause's principle of uniformity, and reaffirms equality among the states.²⁷ Under this Note's approach, PASPA's disparate treatment of states violates the equal sovereignty doctrine because the nation's sports gambling problem is not limited to the states affected by PASPA, and the grandfather clause contradicts Congress's intent to prohibit state-sponsored sports gambling.²⁸

²⁰ 730 F.3d at 240 (holding that PASPA is a valid exercise of Congress's power to regulate commerce and therefore preempts New Jersey's Sports Wagering Law).

²¹ *See id.* at 238.

²² *Id.* *See generally* U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes"). Congress has considerable latitude to regulate commerce. *See United States v. Morrison*, 529 U.S. 598, 608–09 (2000) (holding that Congress may regulate the use of the channels of interstate commerce, the instruments of interstate commerce, or the intrastate activities that substantially affect interstate commerce); *United States v. Lopez*, 514 U.S. 549, 617 (Breyer, J., dissenting) (1995) (noting that Congress has considerable leeway when enacting regulations pursuant to its Commerce Clause authority); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255–57 (1964) (outlining Congress's broad power to regulate under the Commerce Clause).

²³ *NCAA*, 730 F.3d at 240.

²⁴ *See infra* notes 123–198 and accompanying text.

²⁵ *See infra* notes 123–198 and accompanying text.

²⁶ *See infra* notes 159–181 and accompanying text (illustrating how the Supreme Court's expanded equal sovereignty doctrine should apply to discriminatory economic regulations).

²⁷ *See infra* notes 129–181 and accompanying text.

²⁸ *See infra* notes 182–198 and accompanying text.

Part I of this Note describes PASPA's legislative history and the Supreme Court's equal sovereignty jurisprudence.²⁹ Part II examines the Third Circuit's approach to the equal sovereignty doctrine as applied to PASPA in *NCAA*.³⁰ Finally, Part III proposes an analytical framework to be used by courts applying the equal sovereignty doctrine to economic regulations enacted under the Commerce Clause.³¹ Under this approach, this Note contends that PASPA is not sufficiently related to the problem that it targets and therefore violates the equal sovereignty doctrine.³²

I. PASPA AND THE EXPANDED EQUAL SOVEREIGNTY DOCTRINE

The equal sovereignty doctrine originates from Article IV, Section 4 of the U.S. Constitution.³³ Initially referred to as part of the equal footing principle, the equal sovereignty doctrine enforced the guaranty that new states would be admitted to the Union on equal footing with the original 13 colonies.³⁴ Recently, however, the Supreme Court has interpreted the equal sovereignty doctrine as deriving its authority from the Tenth Amendment, a shift away from the context of new statehood.³⁵ This shift in focus created inconsistency in judicial analysis of the equal sovereignty doctrine.³⁶

²⁹ See *infra* notes 33–85 and accompanying text.

³⁰ See *infra* notes 86–122 and accompanying text.

³¹ See *infra* notes 123–198 and accompanying text.

³² See *infra* notes 123–198 and accompanying text.

³³ See *Coyle*, 221 U.S. at 566–67 (holding that the states are equal in power and sovereignty (citing U.S. CONST. art. IV, § 4)). See generally U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government.”).

³⁴ See *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 228–29 (1845) (holding that Alabama entered the Union on equal footing with the original colonies and therefore was entitled to sovereignty over all of its jurisdiction to the same extent as Georgia (citing U.S. CONST. art IV, § 3, cl. 1)). See generally U.S. CONST. art IV, § 3, cl. 1 (“[N]o [newly admitted state] shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”). In defining the equal footing doctrine, the Court held that any states formed within the land of the original thirteen colonies were entitled to the same sovereign jurisdictional rights as possessed by the original thirteen colonies. *Pollard*, 44 U.S. (3 How.) at 228–29.

³⁵ See *Shelby Cnty.*, 133 S. Ct. at 2623 (outlining the equal sovereignty doctrine (citing U.S. CONST. amend. X)); *Nw. Austin*, 557 U.S. at 203 (citing *Gregory*, 501 U.S. at 460 (noting that the Tenth Amendment protects the sovereignty of the states, and it ensures they remain equal in power and dignity)). See generally U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

³⁶ Compare *Shelby Cnty.*, 133 S. Ct. at 2627–31 (relying on the Tenth Amendment and holding that an act's disparate geographic treatment must be shown to be sufficiently related to its targeted problems), with *id.* at 2649 (Ginsburg, J., dissenting) (illustrating uncertainty); *NCAA*, 730 F.3d at 216, 240 (limiting the scope of the equal sovereignty doctrine). In contrast to the *Shelby County* majority, Judge Richard Posner has argued that the equal sovereignty doctrine does not exist. Richard A. Posner, *Supreme Court 2013: The Year in Review*, SLATE (June 26, 2013, 12:16 AM), <http://www.slate.com>.

In 2013, in *Shelby County v. Holder*, the United States Supreme Court expanded the equal sovereignty doctrine to strike down section 4(b) of the Voting Rights Act of 1965 (“VRA”).³⁷ In so holding, the Court concluded that any disparate treatment of states is unconstitutional unless Congress can prove that the legislation’s discrimination is sufficiently related to its targeted problem.³⁸ Today, questions remain whether statutes such as PASPA—which treats states unequally—remain valid after *Shelby County*.³⁹

This Part outlines PASPA and the recent developments in the equal sovereignty doctrine.⁴⁰ Section A describes PASPA’s legislative history and statutory language.⁴¹ Section B then discusses the Supreme Court’s recent expansion of the equal sovereignty doctrine in *Shelby County*.⁴² Section B then concludes by discussing the dissenting opinion in *Shelby County*, which suggests that the majority’s holding renders PASPA unconstitutional.⁴³

A. The Enactment of PASPA

In 1992, Congress enacted PASPA to curb the spread of state-sponsored sports gambling.⁴⁴ PASPA prohibits states from sponsoring, licensing, or authorizing sports lotteries or any other type of sports betting based on professional or amateur games.⁴⁵ Congress determined that the morally corrosive effect of sports

slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html, archived at <http://perma.cc/4U7S-PU27>. Other scholars agree with the *Shelby County* majority, arguing that the doctrine renders PASPA unconstitutional. See Joshua Winneker et al., *Sports Gambling and the Expanded Sovereignty Doctrine*, 13 VA. SPORTS & ENT. L.J., 38, 53 (2013).

³⁷ 133 S. Ct. at 2623–24, 2630–31 (holding that although the equal sovereignty doctrine previously barred differential treatment only in the context of the admission of a new state, the doctrine in fact remains pertinent in assessing the general disparate treatment of states); see *infra* notes 63–77 and accompanying text (expounding on the VRA and the majority’s analysis of the equal sovereignty doctrine).

³⁸ *Shelby Cnty.*, 133 S. Ct. at 2627–31 (holding that an act’s disparate geographic treatment must be shown to be sufficiently related to its targeted problems).

³⁹ *Id.* at 2649 (Ginsburg, J., dissenting) (expressing concern that the expanded equal sovereignty doctrine places numerous statutes, including PASPA, on shaky constitutional ground).

⁴⁰ See *infra* notes 44–85 and accompanying text.

⁴¹ See *infra* notes 44–58 and accompanying text.

⁴² See *infra* notes 59–85 and accompanying text.

⁴³ See *infra* notes 78–85 and accompanying text.

⁴⁴ S. REP. NO. 102-248, at 5 (1991). See generally Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227 (1992) (codified at 28 U.S.C. §§ 3701–3704 (2012)).

⁴⁵ 28 U.S.C. § 3702(1)–(2). Specifically, under § 3072, a governmental entity cannot “sponsor, operate, advertise, promote, license, or authorize by law or compact,” a “lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . , on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.” *Id.*

gambling on America's youth and sports justified federal action.⁴⁶ According to Congress, state-by-state prohibitions were insufficient because the moral erosion produced could not be contained within state borders.⁴⁷ Furthermore, Congress concluded that without a federal prohibition on sports wagering, budgetary deficits could entice state officials to sanction sports gambling in order to raise revenue.⁴⁸

Although PASPA prohibits all state-operated or state-sanctioned sports gambling, it contains a grandfather clause, which carves out an exception for states that allowed or operated a sports betting scheme between 1976 and 1990.⁴⁹ This grandfather clause exempted sports lottery schemes in Oregon and Delaware and casino sports gambling in Nevada.⁵⁰ Because Congress intended only to curb the *spread* of state-sponsored sports gambling, PASPA does not apply to states retroactively.⁵¹

Because of its discriminatory application and numerous ad hoc exemptions, PASPA faced strong opposition in the U.S. Senate.⁵² According to critics, PASPA represented a substantial intrusion into states' rights, for example, by restricting states' fundamental right to raise revenue.⁵³ One senator argued that the grandfather clause effectively granted Nevada a federal monopoly over the \$1.8 billion American sports gambling industry.⁵⁴ Other states exempted under PASPA, such

⁴⁶ S. REP. NO. 102-248, at 5.

⁴⁷ *Id.*

⁴⁸ *Id.* at 7; accord Bill Bradley, *The Professional and Amateur Sports Protection Act: Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORT L. 5, 5-6 (1992) (arguing that American society cannot allow states to sanction sports gambling in order to raise revenue). Senator Bradley was one of PASPA's main supporters. See Bradley, *supra* at 5-6.

⁴⁹ 28 U.S.C. § 3704 (stating that § 3702 shall not apply to a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a state at any time between 1976 and 1990); see also Shur, *supra* note 6, at 100 (explaining that PASPA's exemption covered Oregon, Delaware, Montana, and Nevada).

⁵⁰ See Shur, *supra* note 6, at 102, 113. One Senate Report notes that this exemption was added because the Committee did not want to threaten Nevada's economy. S. REP. NO. 102-248, at 8 (1991). Many have viewed this grandfather clause skeptically, arguing that the it was implemented to promote a closed-market scheme for Nevada's gaming industry. See Jason Goldstein, *Take the Money Line: PASPA, Bureaucratic Politics, and the Integrity of the Game*, 11 VA. SPORTS & ENT. L.J. 362, 366, 367 (2012); Waddell & Minke, *supra* note 8, at 36 (arguing that protection of Nevada's gambling industry was the primary purpose behind PASPA).

⁵¹ S. REP. NO. 102-248, at 8 (noting that although the committee firmly believed that all such sports gambling was harmful, it had no wish to apply this new prohibition "retroactively"). See generally 28 U.S.C. § 3704 (codifying the grandfather clause).

⁵² S. REP. NO. 102-248, at 13 (explaining that the DOJ and several interests groups vehemently opposed PASPA); see also Bradley, *supra* note 48, at 11 n.24 (outlining the arguments of PASPA's critics).

⁵³ S. REP. NO. 102-248, at 12-13. Senator Charles Grassley took issue with PASPA's grandfather clause, as he found there to be no rational basis for allowing sports wagering in three states, while prohibiting the activity in the forty-seven other states. *Id.*

⁵⁴ *Id.* at 12.

as Oregon, enjoyed similar financial benefits in their respective gambling schemes.⁵⁵ Nevertheless, numerous states that expressed interest in developing similar programs were prohibited from enacting legislation identical to Oregon's sports lottery.⁵⁶ In contrast, Delaware received an exemption from PASPA's prohibition even though it had not conducted any form of sports wagering in twenty-five years.⁵⁷ Finally, PASPA's disparate coverage raised federalism concerns, which led the U.S. Department of Justice, the National Conference of State Legislatures, and the Counsel of State Governments to oppose the legislation vigorously.⁵⁸

*B. Shelby County v. Holder: The Supreme Court Expands
the Equal Sovereignty Doctrine*

In the 2013 case *Shelby County*, the Supreme Court—in a 5–4 opinion—expanded the scope of the equal sovereignty doctrine to cover all disparate treatment of states.⁵⁹ In striking down a provision of the VRA,⁶⁰ the Supreme Court held that a departure from the equal sovereignty doctrine can only be justified by a demonstration that the statute's unequal treatment of states is sufficiently related to the problem that the legislation seeks to remedy.⁶¹ In her dissent, Justice Ruth Bader Ginsburg contended that the majority's holding contradicted the Court's equal sovereignty doctrine precedent and suggested that the expanded doctrine would render statutes such as PASPA unconstitutional.⁶²

⁵⁵ See Waddell & Minke, *supra* note 8, at 35–36 (observing that Oregon, Delaware, and Montana each benefitted from PASPA exemptions); *cf.* Galasso, *supra* note 4, at 168–69 (noting that Oregon's sports betting lottery generated \$12.7 million in 2007). In 2007, this revenue provided \$2.9 million in funding to Oregon schools. *Id.* at 169.

⁵⁶ See Meer, *supra* note 9, at 290 (observing that since 2009, the states of New Jersey, Rhode Island, Missouri, and Iowa—each prohibited from legalizing sports gambling—have taken measures to legalize sports gambling or have called upon Congress to repeal PASPA).

⁵⁷ See *id.* at 289. Delaware was able to capitalize on PASPA's grandfather clause because although the state had not engaged in sports gambling for twenty-five years, Delaware had nevertheless enacted a sports lottery that predated PASPA. See *MLB v. Markell*, 579 F.3d 293, 295–96 (3d Cir. 2009) (noting that in 2009, Delaware legalized the sports gambling scheme that was last active in 1976).

⁵⁸ S. REP. NO. 102-248, at 12–13 (1991). The DOJ stated that PASPA raised federalism issues because it permitted private sports organizations to enforce the legislation's provisions, intruded into the traditional state right of determining how to raise revenue, and facially discriminated between states. See *id.* Despite these concerns, PASPA passed the Senate. See Bradley, *supra* note 48, at 5–6.

⁵⁹ 133 S. Ct. at 2627–31 (holding requirement portion of the VRA unconstitutional because it violated the equal sovereignty doctrine).

⁶⁰ See generally Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.), *invalidated in part by* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2620 (2013).

⁶¹ *Shelby Cnty.*, 133 S. Ct. at 2630 (quoting *Nw. Austin*, 557 U.S. at 203).

⁶² See *id.* at 2649 (Ginsburg, J., dissenting). Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan joined in this dissent. *Id.* at 2632.

1. The Majority Opinion: Expanding the Equal Sovereignty Doctrine

According to the *Shelby County* majority, the equal sovereignty doctrine applies to all disparate treatment of states, not only to the terms on which states are admitted to the Union.⁶³ Although the Court acknowledged that it previously rejected the notion that the equal sovereignty doctrine operated as a bar on the discriminate treatment of states,⁶⁴ the Court nonetheless held that the equal sovereignty doctrine remains highly pertinent in subsequent disparate treatment of states.⁶⁵ This is because the equal sovereignty doctrine ensures equality among the states, which is essential to the harmonious operation of the republic.⁶⁶ Accordingly, the majority concluded that a departure from the equal sovereignty doctrine can only be justified in exceptional cases by showing that a statute's disparate treatment is sufficiently related to the problem that it targets.⁶⁷

Under the equal sovereignty doctrine, the *Shelby County* Court held that the VRA section 4(b)'s disparate treatment of states was not justified because the VRA's coverage formula—namely, the imposition of increased restrictions on certain states—failed to address the current conditions of voter discrimination.⁶⁸ In enacting the VRA, Congress sought primarily to forbid discriminatory procedures that denied any citizen the right to vote on account of race.⁶⁹ In addition to this nationwide prohibition,⁷⁰ Congress enacted further requirements for specific

⁶³ *Id.* at 2624 (majority opinion) (noting that the 2009 U.S. Supreme Court case *Northwest Austin Municipal Utility District v. Holder* clarifies that the equal sovereignty doctrine remains highly pertinent in assessing any disparate treatment of states). *See generally* *Nw. Austin*, 557 U.S. at 203 (holding that “a departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem it targets”).

⁶⁴ *Shelby Cnty.*, 133 S. Ct. at 2623–24 (noting that the Court has previously rejected the notion that the equal sovereignty doctrine “operated as a *bar* on differential treatment” outside the context of the admission of a new state (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966)); *accord Katzenbach*, 383 U.S. at 328–29 (finding that “[t]he doctrine of equality of States . . . applies only to the terms upon which States are admitted, and not to the remedies for local evils which have subsequently appeared.”), *abrogated by Shelby Cnty.*, 133 S. Ct. 2612.

⁶⁵ *Shelby Cnty.*, 133 S. Ct. at 2624; *accord Nw. Austin*, 557 U.S. at 203 (holding that although the equal sovereignty doctrine remains highly pertinent in assessing disparate treatment of states, the doctrine of constitutional avoidance required the court to hold on other grounds).

⁶⁶ *See Shelby Cnty.*, 133 S. Ct. at 2623 (quoting *Coyle*, 221 U.S. at 567).

⁶⁷ *Id.* at 2630.

⁶⁸ *See id.* at 2631–32 (concluding that the conditions that originally justified the VRA no longer characterized the states targeted under the VRA’s coverage formula). *See generally* 42 U.S.C. § 1973b(b) (2006 & Supp. V 2011) (imposing heightened VRA requirements on a specific subset of states).

⁶⁹ *Cf.* The Voting Rights Act of 1965, Pub. L. No. 89-110, § 3, 79 Stat. 437, 437–38 (codified as amended at 42 U.S.C. 1973a (2006)) (prohibiting voting qualifications that may deny or abridge an individual’s right to vote on account of race or color).

⁷⁰ 42 U.S.C. § 1973a (authorizing the appointment of federal observers to enforce voting rights in any state if a court determines that the challenged voting procedures denied an aggrieved individual’s right to vote).

states that historically implemented discriminatory voting procedures.⁷¹ Intended as temporary measures to address areas with the most flagrant history of voter discrimination,⁷² section 5 forbid changes to voting procedures in the states identified by section 4(b)'s coverage formula until such changes were approved by specified federal authorities (the "preclearance requirement").⁷³

The majority opinion reemphasized the Court's long-held view that the VRA represented a drastic departure from basic federalism principles.⁷⁴ For example, in 1966, in *South Carolina v. Katzenbach*, the Supreme Court held that although section 4(b)'s disparate treatment and section 5's preclearance requirement represented an uncommon exercise of congressional power, the legislation was justified under the Fifteenth Amendment to address exceptional conditions of voter discrimination.⁷⁵ The majority in *Shelby County* concluded that these examples of voter discrimination were no longer present exclusively in the states targeted by VRA 4(b)'s coverage formula.⁷⁶ Therefore, the disparate treatment of these states under section 5's preclearance requirements no longer remained justified.⁷⁷

⁷¹ Compare § 4(a), 79 Stat. at 438 (imposing certain additional stringent requirements to areas covered by section 4(b)), with *id.* § 4(b), 79 Stat. at 438 (confining these stringent requirements to areas that implemented discriminatory testing prior to the enactment), and *Nw. Austin*, 557 U.S. at 222–23 (observing that the most stringent requirements of the VRA only applied to certain states and counties). Specifically, section 4 abolished all literacy tests and similar voter-qualification tests. *Id.* § 4(c), 79 Stat. at 438. In addition, the Act empowered federal authorities to override state determinations on voter eligibility. *Id.* § 4(a), 79 Stat. at 438; *Nw. Austin*, 557 U.S. at 198. Furthermore, these provisions were strengthened by section 5, which suspended all new voting regulations until they were reviewed by the federal government to determine whether their use would perpetuate voting discrimination. *Id.* § 5, 79 Stat. at 439; *Shelby Cnty.*, 133 S. Ct. at 2620. Finally, the Act confined these stringent requirements to areas of rampant disenfranchisement. *Nw. Austin*, 557 U.S. at 222 (describing the coverage formula of section 4(b)). As a result, Sections 4 and 5 only applied to certain states and counties. *Id.* at 222–23. In 1965, these states included South Carolina, Alabama, Alaska, Georgia, Louisiana, Mississippi, and Virginia. *Id.*; *Katzenbach*, 383 U.S. at 318.

⁷² *Shelby Cnty.*, 133 S. Ct. at 2620.

⁷³ *Id.* (noting that section 5 "provided that no change in voting procedures could take effect" in states covered by section 4 "until it was approved by federal authorities"); see § 5, 79 Stat. at 439.

⁷⁴ *Shelby Cnty.*, 133 S. Ct. at 2624. See generally *Nw. Austin*, 557 U.S. at 202 (emphasizing that the VRA is extraordinary legislation and raises significant federalism concerns); *Lopez v. Monterey Cnty.*, 525 U.S. 266, 294 (1999) (Thomas, J., dissenting) (noting that the VRA's interference with state sovereignty is "quite drastic"), *abrogated by Shelby Cnty.*, 133 S. Ct. 2612; *Presley v. Etowah Cnty. Comm'n*, 502 U.S. 491, 500–01 (1991) (noting that the VRA represents an extraordinary departure from the traditional course of relations among the states and the federal government).

⁷⁵ 383 U.S. at 328–29. The Court read the Fifteenth Amendment as giving Congress substantial deference to create targeted legislation to remedy discriminatory voting procedures. See *id.* at 324. See generally U.S. CONST. amend. XV (providing that "[t]he Right of citizens in the United States to vote shall not be denied or abridged by . . . any State on account of race, color, or previous condition of servitude," and granting Congress "the power to enforce this article by appropriate legislation").

⁷⁶ See *Shelby Cnty.*, 133 S. Ct. at 2631 (concluding that Congress failed to update the coverage formula to address the current conditions of voter discrimination).

⁷⁷ See *id.* at 2623 (holding that the VRA violates the equal sovereignty doctrine).

2. The Dissenting Opinion: Justice Ginsburg Predicts PASPA's Demise

Justice Ginsburg's dissenting opinion contended that the application of the equal sovereignty doctrine is limited to the context of states joining the Union.⁷⁸ Justice Ginsburg accused the majority of ignoring the Court's precedent and extending the equal sovereignty doctrine outside of its proper domain.⁷⁹ According to the *Shelby County* dissent, the *Katzenbach* Court expressly held that the equal sovereignty doctrine applied only to the admission of new states and not to subsequent unequal treatment.⁸⁰ Therefore, the dissent contended that the VRA remained an appropriate congressional action under the Fifteenth Amendment, despite the disparate treatment of states.⁸¹

The dissent disagreed with the majority that a statute's disparate treatment of states must be sufficiently related to the legislation's targeted problems.⁸² Under the test outlined by the majority, the Court will only uphold discriminatory legislation upon a showing that the act sufficiently addresses a continuing problem found exclusively within the targeted states.⁸³ As a result, the dissent explained that this expanded test may render other legislation beyond the VRA unconstitutional.⁸⁴ The dissent reasoned that Congress's choice to enact legis-

⁷⁸ *Id.* at 2649 (Ginsburg, J., dissenting). Compare *Katzenbach*, 383 U.S. at 328–29 (holding that the equal sovereignty doctrine applies only to the terms upon which a state is admitted to the Union—not to remedy local evils which have subsequently appeared), and *Coyle*, 221 U.S. at 567 (noting that the equal sovereignty doctrine applies only to the terms upon which a state is admitted to the Union), with *Shelby Cty.*, 133 S. Ct. at 2624 (noting that the equal sovereignty doctrine remains highly pertinent in assessing subsequent disparate treatment of states).

⁷⁹ See *Shelby Cty.*, 133 S. Ct. at 2644 (Ginsburg, J., dissenting) (explaining that the majority “veer[ed] away from controlling precedent”).

⁸⁰ *Id.* at 2649 (citing *Katzenbach*, 383 U.S. at 328–29).

⁸¹ See *id.* at 2651–52.

⁸² *Id.* at 2649 (contending that the equal sovereignty doctrine is limited to the context of newly formed states and does not apply to subsequent disparate treatment of states). Although the majority relied on language from *Northwest Austin*—an opinion joined by two *Shelby County* dissenters—stating that the disparate treatment of states requires must be sufficiently related to a legislation's targeted problems, the dissent dismissed this as dictum and argued that the majority's reliance upon it was untenable. See *id.* (opining “[i]f the Court is suggesting that dictum in *Northwest Austin* silently overruled *Katzenbach*'s limitation of the equal sovereignty doctrine to ‘the admission of new states,’ the suggestion is untenable”). See generally Michael James Burns, Note, *Shelby County v. Holder and the Voting Rights Act: Getting the Right Answer with the Wrong Standard*, 62 CATH. U. L. REV. 227, 241 (2012) (explaining that the Supreme Court did not reach the constitutional challenge in *Northwest Austin*). Instead, the dissent contended that stare decisis required the Court to adhere to *Katzenbach*'s ruling on the limited significance of the equal sovereignty doctrine. *Shelby Cty.*, 133 S. Ct. at 2649 (Ginsburg, J., dissenting). See generally *Katzenbach*, 383 U.S. at 328–29 (holding that the equal sovereignty doctrine does not apply to legislation that is intentionally confined to a small number of states).

⁸³ *Shelby Cty.*, 133 S. Ct. at 2630 (quoting *Nw. Austin*, 557 U.S. at 203); see also *id.* at 2649–50 (Ginsburg, J., dissenting) (noting that the majority's holding creates a dual burden on proponents of the challenged legislation).

⁸⁴ *Id.* at 2649 (Ginsburg, J., dissenting).

lation that treats states differently, including PASPA, is common and reflects the notion that such actions do not violate the equal sovereignty doctrine.⁸⁵

II. NEW JERSEY CHALLENGES PASPA UNDER EXPANDED EQUAL SOVEREIGNTY DOCTRINE

In September 2013, in *NCAA v Governor of New Jersey*, the U.S. Court of Appeals for the Third Circuit became the first circuit court to address the constitutionality of PASPA.⁸⁶ In upholding PASPA's constitutionality under the Commerce Clause, the Third Circuit determined that gambling on professional and amateur sporting events is an economic activity that substantially affects interstate commerce.⁸⁷ The court held that because Congress had a rational basis to prohibit state licensing of this activity, PASPA was within Congress's Commerce Clause power.⁸⁸

In *NCAA*, the Third Circuit was the first court to apply the Supreme Court's recently expanded interpretation of the equal sovereignty doctrine.⁸⁹ The court acknowledged that PASPA discriminated among states, but ultimately held that it did not violate the equal sovereignty doctrine.⁹⁰ Although the Supreme Court's 2013 holding in *Shelby County v. Holder* stated that the equal sovereignty doctrine applies to all disparate treatment of states, the Third Circuit concluded that the Supreme Court did not intend the doctrine to apply outside sensitive areas of state and local policymaking.⁹¹

⁸⁵ *Id.*

⁸⁶ 730 F.3d 208, 216 (3d Cir. 2013).

⁸⁷ *Id.* at 224 (holding that Congress may regulate state-licensed wagering on sports consistent with the Commerce Clause). See generally U.S. CONST. art. I, § 8, cl. 3 (granting Congress the authority to regulate commerce among the states); *Perez v. United States*, 402 U.S. 146, 151–55 (1971) (noting that Congress's broad power under the Commerce Clause extends to the regulation of intrastate economic activities if they exert a substantial economic effect on interstate commerce).

⁸⁸ *NCAA*, 730 F.3d at 225 (holding that prohibiting state licensing of gambling is a rational means of regulating an economic activity).

⁸⁹ See *id.* at 238 (determining PASPA's constitutionality in light of the 2013 Supreme Court case *Shelby County v. Holder*). Whereas the Third Circuit addressed and narrowed *Shelby County*'s equal sovereignty analysis, *id.* at 216, 240, the district court declined to apply the equal sovereignty doctrine on separate grounds. See *NCAA v. Christie*, 926 F. Supp. 2d 551, 571 n.23 (D.N.J. 2013), *aff'd*, 730 F.3d 208. First, the district court dismissed the 2009 Supreme Court case *Northwest Austin Municipal Utility District v. Holder* as dicta. *Id.* Second, the court held that the 1911 Supreme Court case *Coyle v. Smith* limited the doctrine to the context of newly-admitted states. *Id.*

⁹⁰ *NCAA*, 730 F.3d at 239.

⁹¹ Compare *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2622 (2013) (noting that an act's disparate geographic treatment must be sufficiently related to its targeted problems (quoting *Nw. Austin Mun. Util. Dist. v. Holder*, 557 U.S. 193, 203 (2009))), with *NCAA*, 730 F.3d at 216, 240 (noting that although PASPA permits Nevada to license widespread sports gambling while banning other states from doing so, the law does not violate the equal sovereignty doctrine because gambling is not a sensitive area of local policymaking).

This Part examines the Third Circuit's analysis of the equal sovereignty doctrine in *NCAA*.⁹² Section A discusses the court's narrow interpretation of *Shelby County* and analyzes the court's holding that the equal sovereignty doctrine does not apply outside sensitive areas of local policymaking.⁹³ Section B then discusses the Third Circuit's conclusion that PASPA does not violate the equal sovereignty doctrine.⁹⁴ Section B then analyzes the court's conclusion that even if applied, PASPA's disparate treatment of states is sufficiently related to the problem it targets.⁹⁵

*A. The Third Circuit's Narrow Interpretation of Shelby County
and the Equal Sovereignty Doctrine*

The Third Circuit in *NCAA* concluded that the equal sovereignty doctrine was a narrow principle limited to intrusive federal regulation of elections.⁹⁶ Unlike the VRA, the Third Circuit noted, PASPA represented a straightforward economic regulation enacted pursuant to Congress's Commerce Clause power.⁹⁷ The court started its analysis of the equal sovereignty doctrine by framing the Supreme Court's recent holdings in *Shelby County* and the 2009 case *Northwest Austin Municipal Utility District v. Holder* as limited in scope.⁹⁸ Both cases addressed the VRA, which, the Third Circuit noted, was extraordinary legislation.⁹⁹ Although the Third Circuit acknowledged that the Supreme Court in *Shelby County* struck down section 4(b) of the VRA under the equal sovereignty doctrine, the court declined to extend the Supreme Court's holding further.¹⁰⁰

Furthermore, according to the Third Circuit, the fact that section 5 of the VRA has survived the equal sovereignty doctrine on multiple occasions indicates that the equal sovereignty doctrine only bars differential treatment of states in exceptional cases.¹⁰¹ The Third Circuit noted that the Supreme Court has twice

⁹² See *infra* notes 96–122 and accompanying text.

⁹³ See *infra* notes 96–104 and accompanying text.

⁹⁴ See *infra* notes 105–122 and accompanying text.

⁹⁵ See *infra* notes 105–122 and accompanying text.

⁹⁶ See 730 F.3d at 238.

⁹⁷ *Id.*

⁹⁸ *Id.* at 237–38 (outlining the Supreme Court's recent analysis of the equal sovereignty doctrine).

⁹⁹ Compare *Shelby Cnty.*, 133 S. Ct. at 2624 (noting that the VRA sharply departed from the basic principles of equal sovereignty), and *Nw. Austin*, 557 U.S. at 203 (concluding that the VRA's disparate treatment of states creates federalism concerns), with *NCAA*, 730 F.3d at 238 (noting that the Supreme Court concluded that the VRA is an uncommon exercise of congressional power).

¹⁰⁰ See *NCAA*, 730 F.3d at 216, 240 (noting that although PASPA permits Nevada to license widespread sports gambling while banning other states from doing so, the law does not violate the equal sovereignty doctrine).

¹⁰¹ See *id.* at 238–39 (concluding that the equal sovereignty doctrine's narrow scope is demonstrated by the Supreme Court's refusal to strike down section 5 of the VRA). See generally *Shelby Cnty.*, 133 S. Ct. at 2631 (declining to hold section 5 of the VRA unconstitutional despite its disparate

in recent years raised federalism concerns with section 5 of the VRA, but declined to hold that the provision violates the equal sovereignty doctrine.¹⁰² Although *Shelby County* marked a shift in equal sovereignty jurisprudence, the Third Circuit concluded that the fact that the doctrine has never been applied to federal legislation other than the VRA is evidence of the equal sovereignty doctrine's narrow scope.¹⁰³ Therefore, the Third Circuit concluded that the *Shelby County* Court intended the expanded equal sovereignty doctrine to apply only to the narrow context of local policymaking that the Framers intended to reserve to the states.¹⁰⁴

B. The Third Circuit Finds PASPA's Disparate Treatment of States Justified

In holding that the equal sovereignty doctrine does not apply to economic regulations, the Third Circuit concluded that Congress could treat states unequally through legislation passed under the Commerce Clause.¹⁰⁵ The court noted that unlike Congress's other enumerated powers, the Commerce Clause does not require uniformity in its application.¹⁰⁶ The Third Circuit reasoned that the

treatment of states); *Nw. Austin*, 557 U.S. at 203–04 (noting that section 5 raises serious constitutional questions, but holding on other grounds). Recall that section 5 of the VRA requires states and municipalities subject to section 4(b)'s coverage formula to preclear "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 42 U.S.C. § 1973c (2006); see also Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174, 176 & n.10 (2007) (outlining the VRA preclearance requirements).

¹⁰² *NCAA*, 730 F.3d at 237–38; see *Shelby Cnty.*, 133 S. Ct. at 2627, 2631; *Nw. Austin*, 557 U.S. at 203, 211.

¹⁰³ See *NCAA*, 730 F.3d at 238, 240. See generally *Shelby Cnty.*, 133 S. Ct. at 240 (noting that the equal sovereignty doctrine has only been applied in two modern Supreme Court cases, *Shelby County* and *Northwest Austin*, both of which addressed the VRA). Although the Court in *Shelby County* cited its 1911 decision in *Coyle*, the Third Circuit interpreted *Coyle* as a separate doctrine. Compare *Shelby Cnty.*, 133 S. Ct. at 2623–24 (noting that *Coyle* first outlined the equal sovereignty doctrine), with *NCAA*, 730 F.3d at 240 n.19 (noting that *Coyle* relied on the equal footing principle, not the equal sovereignty doctrine). Recall that the equal footing principle required newly admitted states to be entitled to the same sovereign jurisdictional rights as possessed by the original thirteen colonies. See *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 228–29 (1845) (holding that Alabama entered the union on equal footing with the original colonies and therefore was entitled to sovereignty over all of its jurisdiction to the same extent as Georgia).

¹⁰⁴ See *NCAA*, 730 F.3d at 238–39 (holding that there is "nothing in *Shelby County* to indicate that the equal sovereignty principle is meant to apply with the same force outside the context of sensitive areas of state and local policymaking," such as an area the Framers intended to reserve for the states (internal quotation marks omitted)). But see *Shelby Cnty.*, 133 S. Ct. at 2649 (Ginsburg, J., dissenting) (contending that the majority extended the equal sovereignty doctrine outside its precedent).

¹⁰⁵ *NCAA*, 730 F.3d at 238.

¹⁰⁶ *Id.* Compare U.S. CONST. art. I, § 8, cl. 1 (requiring uniformity in duties and imports), and U.S. CONST. art. I, § 9, cl. 6 (requiring uniformity in regulation of state ports), with U.S. CONST. art. I, § 8, cl. 3 (granting Congress the authority to regulate commerce among the states without an explicit requirement of uniformity), and *Morgan v. Virginia*, 328 U.S. 373, 389 (1946) (Frankfurter, J., concurring) (noting that the Commerce Clause does not require uniformity).

Founders did not require uniformity because Congress exercises its powers under the Commerce Clause to address matters of national concern.¹⁰⁷ According to the court, solutions to national concerns inevitably affect states differently.¹⁰⁸

Although the Supreme Court's decision in *Shelby County* held that disparate treatment of states required equal sovereignty analysis, the Third Circuit's removal of economic regulations from this realm renders all such regulations constitutional so long as Congress has a rational basis to conclude that the economic legislation addresses the targeted problem.¹⁰⁹ Although limited by constitutional requirements, Congress possesses extensive authority to regulate economic activity under the Commerce Clause.¹¹⁰ That courts review economic legislation under a rational basis standard further augments Congress's dominance in the Commerce Clause arena.¹¹¹

In addition to finding that the expanded equal sovereignty doctrine implicitly applied only to legislation akin to the VRA—and therefore not economic legislation—the Third Circuit further noted that the Supreme Court's holding in *Northwest Austin* explicitly left room for exceptions to the equal sovereignty analysis.¹¹² In *Northwest Austin*, the Supreme Court stated that disparate treatment of states may at times be justified, as the equal sovereignty doctrine does not bar remedies for local evils that have appeared subsequent to a state's admis-

¹⁰⁷ *NCAA*, 730 F.3d at 238 (noting that regulations enacted pursuant to the Commerce Clause are national in scope). Other examples of how the U.S. government has relied on the Commerce Clause to target areas of national concern include the Americans with Disabilities Act of 1990 (ADA) and the Comprehensive Drug Abuse Prevention and Control Act of 1970. *See* Comprehensive Drug Abuse Prevention and Control Act of 1970 § 101, 21 U.S.C. § 801 (2012) (declaring that the production and distribution of illicit drugs have a substantial detrimental impact on the welfare of the American people, and regulation of intrastate traffic is essential for effective control over interstate traffic); ADA § 2, 42 U.S.C. § 12101 (2006 & Supp. V 2011) (finding that discrimination against individuals with disabilities persists on a national level, which costs the U.S. government billions of dollars resulting from dependency).

¹⁰⁸ *NCAA*, 730 F.3d at 239.

¹⁰⁹ *See id.* at 224, 240 (holding that economic regulations enacted pursuant to the Commerce Clause are constitutional as long as they have a rational basis).

¹¹⁰ *See* *Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (Scalia, J., concurring) (noting that the Commerce Clause authority is broad); *United States v. Lopez*, 514 U.S. 549, 556–57 (1995) (noting that although it is subject to constitutional limitations, the Commerce Clause is interpreted broadly); *see also* *Gregory v. Ashcroft*, 501 U.S. 452, 460–64 (1991) (noting that the Commerce Clause gives Congress broad powers to impose its will on states, but does not give Congress the power to limit states' sovereignty).

¹¹¹ *See* *Hodel v. Va. Surface Mining & Reclamation Assoc.*, 452 U.S. 264, 276 (1981) (observing that rational basis is a weak test and noting that Congress has expansive powers under the Commerce Clause). The rational basis test calls for a low level of judicial scrutiny. *Id.* Under this test, legislation possesses a presumption of constitutionality if the court finds *any* rational basis for Congress to conclude that the legislation will address the identified issue. *Id.*

¹¹² *Id.* at 238–39; *see supra* notes 96–104 and accompanying text (illustrating the Third Circuit's argument that because the recent Supreme Court cases dealing with the expanded equal sovereignty doctrine dealt exclusively with the VRA, the doctrine was impliedly limited to that narrow context).

sion to the Union.¹¹³ The Third Circuit viewed this exception as one of many instances that justified a departure from the equal sovereignty doctrine.¹¹⁴ Therefore, the Third Circuit concluded that *Northwest Austin* explicitly left room for the court to hold economic regulations as a justified departure from equal sovereignty doctrine.¹¹⁵

Moreover, the Third Circuit held that even if the equal sovereignty doctrine applied to legislation passed under the Commerce Clause, PASPA's disparate treatment of states *is* sufficiently related to the targeted problem.¹¹⁶ The court reasoned that PASPA's purpose was not to eliminate sports gambling altogether, but to stop the spread of state-sanctioned sports gambling.¹¹⁷ As a result, PASPA targeted only those states without state-sanctioned sports gambling legislation.¹¹⁸ Therefore, the court concluded, PASPA is precisely tailored to address the problem it targets.¹¹⁹

Finally, the Third Circuit also disagreed with New Jersey's contention that PASPA's preferential treatment of Nevada creates the kind of disparate treatment that would violate the equal sovereignty doctrine.¹²⁰ The court read the equal sovereignty doctrine to apply only to legislation that singled out a handful of states for *disfavored* treatment.¹²¹ Although *Shelby County* expanded the equal sovereignty doctrine, the Third Circuit maintained that the doctrine does not prevent Congress from treating a few states more favorably than the rest.¹²²

¹¹³ 557 U.S. at 203.

¹¹⁴ *NCAA*, 730 F.3d at 238–39 (concluding that the Supreme Court intended to create several exceptions to the equal sovereignty doctrine).

¹¹⁵ *Id.* The Court in *Northwest Austin*, however, arguably did not leave any room for distinctions among types of legislation. *Nw. Austin*, 557 U.S. at 203 (“[A] departure from the fundamental principle of equal sovereignty requires a showing that a statute’s disparate geographic coverage is sufficiently related to the problem that it targets.”).

¹¹⁶ *NCAA*, 730 F.3d at 238–39 (holding that PASPA is precisely tailored to address the spread of sports gambling).

¹¹⁷ *Id.* *But see* Bradley, *supra* note 48, at 9 (explaining that the legislative purpose behind PASPA is to stop the spread of sports gambling *and* the promotion of sports gambling among the nation’s youth).

¹¹⁸ *NCAA*, 730 F.3d at 239 (holding that PASPA is sufficiently related to the problem it targets).

¹¹⁹ *Id.*

¹²⁰ *Id.* (distinguishing PASPA’s *preferential* treatment of states from the VRA’s *disfavorable* treatment of states).

¹²¹ *See id.*

¹²² *Id.* at 240. It is this Note’s position, however, that the Supreme Court did not distinguish between negative and preferential treatment of targeted states. *See Nw. Austin*, 557 U.S. at 203 (holding that all disparate treatment of states requires application of the equal sovereignty doctrine).

III. SOVEREIGNTY, EQUALLY APPLIED: THE PROPER APPLICATION OF THE EQUAL SOVEREIGNTY DOCTRINE TO COMMERCE CLAUSE LEGISLATION

In upholding the constitutionality of PASPA, the Third Circuit misinterpreted Supreme Court jurisprudence and missed an opportunity to clarify the equal sovereignty doctrine's application to economic regulations.¹²³ This Part contends that the expanded equal sovereignty doctrine should apply to Commerce Clause analyses if the contested legislation facially discriminates among states.¹²⁴ Under this new standard of review, PASPA violates the equal sovereignty doctrine because the burdens imposed are not sufficiently related to the current spread of sports gambling.¹²⁵ Section A details how Supreme Court precedent instructs courts to apply the equal sovereignty doctrine analysis to all disparate treatment of states, including economic regulations.¹²⁶ Section B proposes a mode of analysis courts should apply when analyzing the equal sovereignty doctrine in the context of Congress's Commerce Clause authority.¹²⁷ Finally, Section C argues that when the equal sovereignty doctrine is applied properly, PASPA is not sufficiently related to the problem it targets and therefore violates the equal sovereignty doctrine.¹²⁸

A. Focus on the Treatment: The Supreme Court's Equal Sovereignty Jurisprudence Requires Courts to Broadly Apply the Doctrine

In expanding the equal sovereignty doctrine, the Supreme Court in 2013 in *Shelby County v. Holder* expressly stated that disparate treatment of states *required* review under the equal sovereignty doctrine.¹²⁹ The Court character-

¹²³ Compare *NCAA v. Governor of N.J.*, 730 F.3d 208, 238 (3d Cir. 2013) (holding that the equal sovereignty doctrine does not apply to statutes enacted under the Commerce Clause), with *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2630 (2013) (holding that a departure from the equal sovereignty doctrine requires a showing that the statute's disparate geographic coverage is sufficiently related to the problem it targets (quoting *Nw. Austin Mun. Util. Dist. v. Holder*, 557 U.S. 193, 203 (2009))), *Id.* at 2649 (Ginsburg, J., dissenting) (expressing concern that the majority's expanded interpretation of the equal sovereignty doctrine might strike down other federal legislation enacted under the Commerce Clause that treats states separately), and Winneker et al., *supra* note 36, at 52 (arguing that the Supreme Court outlined the equal sovereignty doctrine in a broad fashion and was not directing it to be applied only to the specific situation of the VRA).

¹²⁴ See *infra* notes 129–198 and accompanying text.

¹²⁵ See *infra* notes 129–198 and accompanying text.

¹²⁶ See *infra* notes 129–158 and accompanying text.

¹²⁷ See *infra* notes 159–181 and accompanying text.

¹²⁸ See *infra* notes 182–198 and accompanying text.

¹²⁹ *Shelby Cnty.*, 133 S. Ct. at 2630 (emphasizing that the equal sovereignty doctrine “requires an Act’s disparate geographical coverage to be sufficiently related to its targeted problems” (emphasis added) (quoting *Nw. Austin*, 557 U.S. at 203) (internal quotation marks omitted)); see also Winneker et al., *supra* note 36, at 52 (arguing that the Supreme Court outlined the equal sovereignty doctrine in a broad fashion and was not directing it to be applied only to the specific situation of the VRA).

ized the equal sovereignty doctrine as fundamental and noted that exceptions to the doctrine are only justified in certain limited cases—namely, when a statute’s disparate treatment is sufficiently related to the problem that it addresses.¹³⁰ Therefore, under the Supreme Court’s recent equal sovereignty doctrine jurisprudence, courts should apply the equal sovereignty doctrine to all legislation that discriminates among states, including economic legislation passed under the Commerce Clause.¹³¹ This approach is faithful to the Supreme Court’s 2013 holding in *Shelby County v. Holder* and preserves economic uniformity among the states.¹³²

In addition, the U.S. Court of Appeals for the Third Circuit’s 2013 *NCAA v. Governor of New Jersey* opinion incorrectly concluded that the Supreme Court applied equal sovereignty doctrine to the VRA solely because it was an extraordinary congressional action and that the court’s analysis should only be applied in similar cases.¹³³ Although the Supreme Court in *Shelby County* repeatedly characterized the VRA as extraordinary legislation,¹³⁴ this description

¹³⁰ *Shelby Cnty.*, 133 S. Ct. at 2630.

¹³¹ See *id.* (adopting an explicitly general application of the equal sovereignty doctrine (quoting *Nw. Austin*, 557 U.S. at 203)); cf. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (illustrating that, even in the case of the highly discretionary rational basis test, Congress must still act within the bounds of the constitution); Winneker et al., *supra* note 36, at 52 (arguing that the Supreme Court intended the equal sovereignty doctrine to be applied broadly). See generally Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249, 342 (2005) (arguing that PASPA’s disparate treatment of states is constitutionally suspect due to its disparate treatment of states).

¹³² See *Shelby Cnty.*, 133 S. Ct. at 2622 (noting that the equal sovereignty doctrine is “fundamental” in assessment of disparate treatment of states); Colby, *supra* note 131, at 346 (arguing that the courts should revitalize a uniformity constraint on Commerce Clause analysis). Importantly, economic uniformity among the states was the original purpose of the Commerce Clause. See *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 227 (1899) (finding “the object of vesting in Congress the power to regulate interstate commerce was to insure uniformity of regulation against conflicting and discriminating state legislation”); cf. Colby, *supra* note 131, at 314 (arguing that a main purpose for drafting the Constitution was to give Congress the power to adopt uniform trade policies). See generally *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 431 (1870) (holding that Congress is forbidden from enacting discriminatory commercial or revenue regulations). In addition, the Supreme Court itself has commented on the importance of economic uniformity. Cf. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987) (holding that “[t]his Court’s recent Commerce Clause cases . . . have invalidated statutes that may adversely affect interstate commerce by subjecting activities to inconsistent regulations”); *Morgan v. Virginia*, 328 U.S. 373, 385 (1946) (holding a local law unconstitutional because it interfered with the need for national uniformity in the regulations for interstate travel).

¹³³ Compare *NCAA*, 730 F.3d at 239 (concluding that *Shelby County* instructs courts to apply the equal sovereignty doctrine only in the context of local policymaking), with Winneker et al., *supra* note 36, at 52 (arguing that the Supreme Court outlined the equal sovereignty doctrine in a broad fashion and was not directing it to be applied only to the specific situation of the VRA).

¹³⁴ See *Shelby Cnty.*, 133 S. Ct. at 2630 (noting the VRA’s extraordinary nature); accord *Nw. Austin*, 557 U.S. at 211 (characterizing the VRA as extraordinary legislation otherwise unfamiliar to the federal system).

refers to the VRA's significant federalism concerns.¹³⁵ Economic regulations enacted under the Commerce Clause may create similar federalism concerns—i.e., may be just as extraordinary—by intruding into areas the Framers intended to reserve for the states.¹³⁶

Moreover, the Commerce Clause gives Congress less latitude than the Fifteenth Amendment—which was the basis for the VRA—because the Tenth Amendment prohibition on federal overreaching poses a greater restraint to laws passed pursuant to the Commerce Clause power than those passed under the Reconstruction Amendments.¹³⁷ Of course, the Commerce Clause *does* grant Congress wide latitude to enact legislation.¹³⁸ Nevertheless, by transfusing the Necessary and Proper Clause into the Reconstruction Amendments,¹³⁹

¹³⁵ See *Shelby Cnty.*, 133 S. Ct. at 2624 (noting that the VRA represents a drastic departure from basic principles of federalism); see also *Nw. Austin*, 557 U.S. at 202 (emphasizing that the VRA is extraordinary legislation and raises significant federalism concerns); *Lopez v. Monterey Cnty.*, 525 U.S. 266, 294 (1999) (Thomas, J., dissenting) (noting that the VRA's interference with state sovereignty is "quite drastic"), *abrogated by Shelby Cnty.*, 133 S. Ct. 2612; *Presley v. Etowah Cnty. Comm'n*, 502 U.S. 491, 500–01 (1991) (noting that the VRA represents an extraordinary departure from the traditional course of relations among the states and the federal government).

¹³⁶ Cf. *United States v. Lopez*, 514 U.S. 549, 556–57 (1995) (concluding that the Court must ensure that a regulation enacted under the Commerce Clause does not blur "the boundaries between the spheres of federal and state authority"); *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that an economic regulation of nuclear waste enacted pursuant to the Commerce Clause was unconstitutional because it impermissibly intruded on state sovereignty).

¹³⁷ See *Gregory v. Ashcroft*, 501 U.S. 452, 468 (1991) (noting that "the principles of federalism" that constrain the Commerce Clause "are attenuated" with acts enacted pursuant to the Fifteenth Amendment); *City of Rome v. United States*, 446 U.S. 156, 179–80 (1980) (holding that principles of federalism and state sovereignty that otherwise restrain Congress are necessarily overridden by the power to enforce the Civil War Amendments), *abrogated by Shelby Cnty.*, 133 S. Ct. 2612; Katherine A. Connolly, Note, *Who's Left Standing for State Sovereignty?: Private Party Standing to Raise Tenth Amendment Claims*, 51 B.C.L. REV. 1539, 1545–46, 1546 & n.50 (2010) (arguing that although the Tenth Amendment has been held to have limited substantive effect on the Reconstruction Amendments, recent Supreme Court jurisprudence has bolstered the Tenth Amendment's restraint on the Commerce Clause). See generally U.S. CONST. amend. X (stating that "[t]he 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"); Luis Fuentes-Rohwer, *Understanding the Paradoxical Case of the Voting Rights Act*, 36 FLA. ST. U. L. REV. 697, 744 (2009) (observing that the VRA was supported by the Fifteenth Amendment).

¹³⁸ See *Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (Scalia, J., concurring) (noting that the Commerce Clause authority is broad); *Lopez*, 514 U.S. at 565–66 (noting that Congress has considerable leeway when enacting regulations pursuant to its Commerce Clause authority); David G. Wille, *The Commerce Clause: A Time for Reevaluation*, 70 TUL. L. REV. 1069, 1088 (1996) (arguing that the modern interpretation of the Commerce Clause is expansive).

¹³⁹ See *Terry v. Adams*, 345 U.S. 461, 467–68 (1953) (noting that the Fifteenth Amendment was written with the express intent of encompassing the power of the Necessary and Proper Clause); cf. Erin Rosen, Note, *An Occasion for a More Thorough Analysis: The New Findings Requirement and Congressional Power Under Section 5 of the Fourteenth Amendment After United States v. Morrison*, 90 CALIF. L. REV. 573, 591 (2002) (arguing that the Supreme Court utilizes the broad scope of the Necessary and Proper Clause when reviewing the VRA). See generally U.S. CONST. art. I, § 8, cl. 18

Supreme Court jurisprudence grants Congress this same deference when reviewing legislation enacted pursuant to the Fifteenth Amendment.¹⁴⁰ In addition, the Tenth Amendment places much greater restraint on the Commerce Clause's scope than it does the Fifteenth Amendment.¹⁴¹ This is because the Reconstruction Amendments were enacted after the Tenth Amendment with the specific purpose of limiting state autonomy.¹⁴² This is noteworthy because the Supreme Court has cited the Tenth Amendment as one of the equal sovereignty doctrine's sources of authority.¹⁴³ Therefore, it is reasonable to conclude that economic regulations enacted under the Commerce Clause are more susceptible to the equal sovereignty doctrine than legislation enacted under the Fifteenth Amendment, such as the VRA.¹⁴⁴

Furthermore, *Shelby County* requires that all departures from the principle of equal sovereignty demonstrate that the burden sufficiently relates to the

(granting Congress the power “[t]o make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers vested by the Constitution in the Government of the United States”).

¹⁴⁰ See *South Carolina v. Katzenbach*, 383 U.S. 301, 318 (1966) (holding that against the reserved powers of the state, Congress may use *any rational means* to effectuate the Fifteenth Amendment), *abrogated by Shelby Cnty.*, 133 S. Ct. 2612; Sudeep Paul, Comment, *The Voting Rights Act's Fight to Stay Rational: Shelby County v. Holder*, 8 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 271, 292 (2013), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1102&context=djclpp_sidebar, archived at <http://perma.cc/XLR6-P2T4> (explaining that the Supreme Court reviews legislation enacted under the Reconstruction Amendments, such as the VRA, under the rational basis test); see also *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) (noting that the Necessary and Proper Clause gives “Congress great latitude in exercising its powers”).

¹⁴¹ Compare *City of Rome*, 446 U.S. at 179–80 (holding that principles of federalism and state sovereignty that otherwise restrain Congress are necessarily overridden by the power to enforce the Civil War Amendments), with Connolly, *supra* note 137, at 1545–46, 1546 & n.50 (arguing that although the Tenth Amendment has been held to have limited substantive effect on the Reconstruction Amendments, recent Supreme Court jurisprudence has bolstered the Tenth Amendment's restraint on the Commerce Clause), and Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 155 (2001) (arguing that the Supreme Court's modern Commerce Clause analysis disfavors statutory interpretations that intrude on state sovereignty).

¹⁴² See *City of Rome*, 446 U.S. at 179–80 (noting that the Reconstruction Amendments “were specifically designed as an expansion of federal power and an intrusion on state sovereignty”).

¹⁴³ *Nw. Austin*, 557 U.S. at 203 (relying on cases interpreting the Tenth Amendment and the Guarantee Clause in outlining equal sovereignty doctrine).

¹⁴⁴ Compare Paul, *supra* note 140, at 292 (suggesting that Congress is entitled to similar deference under the Commerce Clause and the Fifteenth Amendment), with *City of Rome*, 446 U.S. at 179–80 (holding that principles of federalism and state sovereignty that otherwise restrain Congress are necessarily overridden by the power to enforce the Civil War Amendments), *United States v. Morrison*, 529 U.S. 598, 648 (2000) (Souter, J., dissenting) (suggesting that the Tenth Amendment places greater restraints on the Commerce Clause than the Reconstruction Amendments), and Connolly, *supra* note 137, at 1545–46, 1546 & n.50 (suggesting that recent Supreme Court jurisprudence has bolstered the Tenth Amendment's restraint on the Commerce Clause).

problem it targets.¹⁴⁵ The Third Circuit concluded that the Supreme Court's 2009 decision in *Northwest Austin Municipal Utility District v. Holder* illustrated that "remedying local evils" is one of several exceptions to the equal sovereignty doctrine.¹⁴⁶ The holding in *Shelby County*, however, does not leave room for such a broad justification for the unequal treatment of states.¹⁴⁷ Although *Shelby County* noted that disparate treatment may be justified in *some* cases,¹⁴⁸ this exception was narrowly framed to explain why the VRA was initially justified under the equal sovereignty doctrine.¹⁴⁹ The Court made clear that such a justification for disparate treatment required "exceptional conditions."¹⁵⁰ Even if these exceptional conditions exist, the equal sovereignty doctrine still requires Congress to justify unequal treatment of states.¹⁵¹ Remedying local evil, therefore, serves merely as an example of appropriate measures

¹⁴⁵ See *Shelby Cnty.*, 133 S. Ct. at 2622; see also Winneker et al., *supra* note 36, at 52 (arguing that the Supreme Court intended the equal sovereignty doctrine to be applied broadly).

¹⁴⁶ *NCAA*, 730 F.3d at 239 ("[L]ocal evils appear to be but *one* of the types of cases in which a departure from the equal sovereignty principle is permitted.").

¹⁴⁷ See *Shelby Cnty.*, 133 S. Ct. at 2622 (emphasizing that the equal sovereignty doctrine is fundamental, and holding that an act's disparate geographic treatment must be sufficiently related to its targeted problem); see also Winneker et al., *supra* note 36, at 52 (arguing that the Supreme Court intended the equal sovereignty doctrine to be broadly applied).

¹⁴⁸ See *Shelby Cnty.*, 133 S. Ct. at 2630 (observing that a statute's disparate treatment is justified when sufficiently related to the problem that the legislation targets (quoting *Nw. Austin*, 557 U.S. at 203)).

¹⁴⁹ *Id.* at 2624 (noting that the VRA's unequal treatment of states was initially justified by exceptional conditions of voter discrimination that "had infected the electoral process in certain parts of our country" (internal quotations omitted)); see also Winneker et al., *supra* note 36, at 52 (arguing that the expanded equal sovereignty doctrine, as outlined in *Shelby County*, clearly extends to economic regulations such as PASPA).

¹⁵⁰ *Shelby Cnty.*, 133 S. Ct. at 2624 (describing the exceptional conditions of widespread voter discrimination that prompted passage of the VRA).

¹⁵¹ *Cf. id.* at 2630 (emphasizing that the equal sovereignty doctrine "requires an Act's disparate geographical coverage to be sufficiently related to its targeted problems" (emphasis added) (internal quotation marks omitted) (quoting *Nw. Austin*, 557 U.S. at 203)). Although the *Shelby County* majority does not explicitly reference the Commerce Clause, the dissenting justices read the majority's expansion of the equal sovereignty doctrine as potentially affecting statutes enacted under the Commerce Clause if they discriminate among states. *Id.* at 2649 (Ginsburg, J., dissenting) (expressing concern that the expanded equal sovereignty doctrine places numerous statutes on shaky constitutional grounds). For example, two statutes cited by the dissent as examples of statutes that may not remain constitutional were passed under the Commerce Clause. *Id.*; see Nuclear Waste Policy Amendments Act of 1987, Pub. L. No. 100-203, § 160, 101 Stat. 1330-227, 1330-228 (current version at 42 U.S.C. § 10172a (2006)) (stating that only Nevada will be eligible to enter into a benefits agreement with the Secretary of Health and Human Services); Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227 (1992) (codified at 28 U.S.C. §§ 3701-3704 (2012)).

that Congress may take to remedy certain exceptional conditions—not a general exception to the equal sovereignty doctrine.¹⁵²

Finally, application of the equal sovereignty doctrine to the Commerce Clause also furthers the Clause's intended purpose of ensuring the uniformity of economic regulations.¹⁵³ Although the Supreme Court has held that the Commerce Clause does not require geographic uniformity,¹⁵⁴ its underlying purpose is to authorize Congress to establish uniform commercial regulations.¹⁵⁵ When drafting the Constitution, the Framers intended for the Commerce Clause to ensure that Congress could enact a uniform trade policy among foreign nations and among the several states.¹⁵⁶ The equal sovereignty doctrine does not impose a uniformity requirement on the Commerce Clause, but rather heightens judicial scrutiny for statutes that treat states disparately.¹⁵⁷ This provides Congress flexi-

¹⁵² *Shelby Cty.*, 133 S. Ct. at 2624 (emphasizing that the VRA was initially upheld because the additional restrictions applied only to the targeted states sufficiently related to Congress's intended goal).

¹⁵³ See generally *Morgan*, 328 U.S. at 385 (noting the need for national uniformity in the regulations for interstate travel as a desirable goal of the Commerce Clause); *Addyston Pipe & Steel Co.*, 175 U.S. at 227 (concluding that the primary goal behind the Commerce Clause was "to insure uniformity of regulation against conflicting and discriminating state legislation"); Colby, *supra* note 131, at 314 (arguing that a main purpose for drafting the Constitution was to give Congress the power to adopt uniform trade policies); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1454 (1987) (arguing that the Commerce Clause was intended to facilitate national markets and prevent state balkanization).

¹⁵⁴ See, e.g., *Currin v. Wallace*, 306 U.S. 1, 14 (1939) (concluding that Congress is not required to establish uniform rules under the Commerce Clause); *Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311, 326–27 (1917) (holding that the Commerce Clause does not require uniform regulations).

¹⁵⁵ See *Hodel v. Va. Surface Mining & Reclamation Assoc.*, 452 U.S. 264, 265 (1981) (noting that Congress's interest in national uniform standards is a valid concern for enacting legislation under the Commerce Clause); Grant S. Nelson, *A Commerce Clause Standard for the New Millennium: "Yes" to Broad Congressional Control over Commercial Transactions; "No" to Federal Legislation on Social and Cultural Issues*, 55 ARK. L. REV. 1213, 1238 (2003) (arguing that the Framers believed that uniformity was beneficial for commerce).

¹⁵⁶ See THE FEDERALIST NO. 53, at 297 (Alexander Hamilton) (E.H. Scott ed., 1898) (noting that the Constitution will allow foreign trade to be regulated by uniform laws); see also Colby, *supra* note 131, at 314 (arguing that a main purpose for drafting the Constitution was to give Congress the power to adopt uniform trade policies). Some scholars contend that part of the purpose behind federal preemption is to ensure uniform economic regulations. See Colby, *supra* note 131, at 314; Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 29 (2007) (noting that pro-preemption groups tend to be businesses that seek uniformity in regulation).

¹⁵⁷ *Shelby Cty.*, 133 S. Ct. at 2624, 2630 (illustrating that the equal sovereignty doctrine did not invalidate the VRA when exceptional conditions justified its disparate treatment and noting that the doctrine only later invalidated this treatment when the burdens were no longer reasonably related to the targeted problem of voter discrimination). See generally Colby, *supra* note 131, at 339 (arguing that congressional acts should be subject to heightened scrutiny if they regulate along state lines and should be upheld only if enacted to solve a localized problem that does not exist elsewhere in the nation).

bility in enacting national regulation, but requires any unequal treatment of states to be reasonably related to the national policy.¹⁵⁸

B. Sufficiently Related to the Targeted Problem: Applying Equal Sovereignty Doctrine to the Commerce Clause

The expanded equal sovereignty doctrine places a check on laws passed under the Commerce Clause that treat states disparately.¹⁵⁹ This restraint requires Congress to justify the disparate treatment of states through findings that show the legislation targets a localized problem that does not exist in the unaffected states.¹⁶⁰ Applying the equal sovereignty doctrine to economic regulations that treat states unequally harmonizes the language of *Shelby County* with Commerce Clause jurisprudence.¹⁶¹

As the Supreme Court has held in other circumstances, statutes passed under the Commerce Clause are subject to additional scrutiny when federalism concerns are at play.¹⁶² Traditionally, judicial review of legislation enacted pur-

¹⁵⁸ Compare *Perez v. United States*, 402 U.S. 146, 151–55 (1971) (illustrating that Congress has wide discretion in legislating under the Commerce Clause), with *Shelby Cnty.*, 133 S. Ct. at 2623, 30–31 (illustrating—by applying the equal sovereignty doctrine to the VRA—that inserting the doctrine into Commerce Clause analyses would not impose a uniformity requirement, but *would* require disparate treatment to be reasonably related to the legislation’s targeted problem).

¹⁵⁹ See *supra* notes 129–158 (discussing how the equal sovereignty doctrine should apply to the Commerce Clause); cf. Colby, *supra* note 131, at 346 (arguing that courts should revive the Commerce Clause’s uniformity restraint in order to prevent disparate treatment of states); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 78 (1988) (arguing that the Guarantee Clause should be utilized by the Supreme Court to shield state autonomy from federal regulation); Winneker et al., *supra* note 36, at 52 (arguing that the Supreme Court intended the equal sovereignty doctrine to be applied broadly).

¹⁶⁰ See *Shelby Cnty.*, 133 S. Ct. at 2630 (quoting *Nw. Austin*, 557 U.S. at 203). See generally Colby, *supra* note 131, at 346 (arguing that imposing a more stringent standard of review on legislation that discriminates among the states is faithful to the Founders intent).

¹⁶¹ Compare *Shelby Cnty.*, 133 S. Ct. at 2630 (concluding that a departure from the equal sovereignty doctrine requires a showing that the statute’s disparate geographic coverage is sufficiently related to the problem it targets (quoting *Nw. Austin*, 557 U.S. at 203)), with *Gregory*, 501 U.S. at 460–64 (noting that the Commerce Clause does not give Congress the power to limit the sovereignty of the states), *Hodel*, 452 U.S. at 265 (noting that Congress’s interest in national uniform standards is a valid concern for enacting legislation under the Commerce Clause), and *Morgan*, 328 U.S. at 389 (Frankfurter, J., concurring) (stating “[t]he States cannot impose diversity of treatment when such diverse treatment would result in unreasonable burdens on Commerce”).

¹⁶² See *Lopez*, 514 U.S. at 556–57 (observing that the act at issue upset the balance of federalism and that even the broad modern interpretation of the Commerce Clause is subject to constitutional limitations); see also *Gregory*, 501 U.S. at 460–64 (noting that the Commerce Clause does not give Congress the power to limit the sovereignty of the states). See generally Merritt, *supra* note 159, at 78 (arguing that the Guarantee Clause should be utilized by the Supreme Court to shield state autonomy from federal regulation).

suant to the Commerce Clause is limited to a rational basis standard.¹⁶³ Therefore, courts typically uphold economic regulations as long as Congress has demonstrated a rational basis.¹⁶⁴ From the language of *Shelby County*, however, the equal sovereignty doctrine should also apply when the legislation treats states disparately.¹⁶⁵ Furthermore, other doctrinal limitations, such as the anti-commandeering principle, are utilized in a similar fashion to constrain the Commerce Clause.¹⁶⁶ This demonstrates that more stringent standards may be imposed on the Commerce Clause if the economic regulation creates federalism concerns.¹⁶⁷ Commerce Clause jurisprudence thus supports the notion that the equal sovereignty doctrine should apply to the Commerce Clause.¹⁶⁸

As a result, rather than using the rational basis test, courts should review federal legislation that produces disparate treatment and was enacted pursuant to the Commerce Clause under the more stringent equal sovereignty doctrine.¹⁶⁹

¹⁶³ See *Hodel*, 452 U.S. at 276. Recall that this involves a minimal level of judicial scrutiny and that legislation subject to a rational basis review benefits from a presumption of constitutionality. *Id.*; see also *United States v. Caroline Prods. Co.*, 304 U.S. 144, 148 (1938) (concluding that there is a presumption of constitutionality in rational basis review under the Fifth Amendment).

¹⁶⁴ See *Hodel*, 452 U.S. at 276; *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 358–59 (1964) (noting that courts will uphold congressional actions passed under the Commerce Clause if Congress had any rational basis to conclude the activity impacted commerce). The rational basis standard has been criticized for insulating Congress from meaningful review. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 579 (1985) (Powell, J., dissenting) (contending that a more searching judicial review of legislation enacted under the Commerce Clause is required in order to prevent significant diminution of state sovereignty); Wille, *supra* note 138, at 1088 (arguing that the rational basis standard is too lenient for congressional actions that potentially overreach).

¹⁶⁵ See *Shelby Cnty.*, 133 S. Ct. at 2630 (concluding that a departure from the equal sovereignty doctrine requires a showing that the statute’s disparate geographic coverage is sufficiently related to the problem it targets (quoting *Nw. Austin*, 557 U.S. at 203)); Winneker et al., *supra* note 36, at 52 (arguing that the Supreme Court intended the equal sovereignty doctrine to be applied broadly).

¹⁶⁶ See *Printz v. United States*, 521 U.S. 898, 934 (1997) (holding that Congress cannot compel state agents to implement a federal regulatory program enacted pursuant to the Commerce Clause); *New York*, 505 U.S. at 188 (holding that an economic regulation of nuclear waste enacted pursuant to the Commerce Clause was unconstitutional because it impermissibly compelled state officials to administer the regulatory program). The “anti-commandeering principle” prohibits Congress from commanding state officials to enact a federal regulation. See *Printz*, 521 U.S. at 934.

¹⁶⁷ See *Printz*, 521 U.S. at 898; *New York*, 505 U.S. at 188; see also *Gregory*, 501 U.S. at 460–64 (noting that the Commerce Clause does not give Congress the power to limit the sovereignty of the states); *Hodel*, 452 U.S. at 310 (Rehnquist, J., concurring) (opining that “[i]t would be a mistake to conclude that Congress’s power to regulate pursuant to the Commerce Clause is unlimited”).

¹⁶⁸ See *supra* notes 162–167 and accompanying text; see also Wille, *supra* note 138, at 1090–91, 1094 (arguing that the Supreme Court applies a more stringent standard of review when reviewing congressional actions that encroach on state sovereignty).

¹⁶⁹ See *Shelby Cnty.*, 133 S. Ct. at 2630 (holding that the equal sovereignty doctrine requires a showing that the statute’s disparate geographic coverage is sufficiently related to the problem it targets (quoting *Nw. Austin*, 557 U.S. at 203)); *supra* notes 162–168 and accompanying text (illustrating that Commerce Clause jurisprudence supports the imposition of increased restrictions in cases that raise federalism concerns); cf. Colby, *supra* note 131, at 339 (arguing that congressional acts enacted pursuant to the commerce power should be subjected to some form of heightened scrutiny if they regulate

This approach requires courts to inquire as to whether an act's disparate geographic coverage is sufficiently related to its targeted problems.¹⁷⁰ Applying the equal sovereignty doctrine to federal economic regulations would force Congress to justify current burdens with a record demonstrating the current targeted needs.¹⁷¹

Statutes that require equal sovereignty analysis can be identified by determining whether the statute prohibits state actions in one state that remain permissible in another.¹⁷² For such legislation to survive equal sovereignty analysis, Congress must prove that the problem exists in the states targeted and does not exist or is substantially less burdensome in the areas exempted.¹⁷³ To determine whether the legislation is justified, the court should review the congressional findings and determine whether the unequal treatment of states reasonably addresses the targeted issue.¹⁷⁴ Federal legislation that shows a continuing need for targeted regulation would survive review under the equal sovereignty doctrine.¹⁷⁵ By contrast, a law that facially discriminates among states will not sur-

in geographic terms, and, in particular, should be viewed with significant skepticism if their regulatory scope is explicitly drawn along state lines); Paul, *supra* note 140, at 293 (explaining that *Northwest Austin* emphasized that the VRA should be reviewed under a stricter standard of review, rather than a rational basis test).

¹⁷⁰ See *Shelby Cnty.*, 133 S. Ct. at 2630 (quoting *Nw. Austin*, 557 U.S. at 203).

¹⁷¹ *Cf. id.* (concluding that Congress failed to justify the VRA's burdens by showing that the act remedies current conditions).

¹⁷² See *id.* at 2627 (emphasizing that the VRA's preclearance requirements create burdens on some states that would be unconstitutional if applied to uncovered states, underscoring the VRA's violation of the equal sovereignty doctrine). See generally Nelson Lund, *Congressional Power over Taxation and Commerce: The Supreme Court's Lost Chance to Devise a Consistent Doctrine*, 18 TEX. TECH L. REV. 729, 754 (1987) (arguing that legislation enacted under the Commerce Clause that seeks a purpose other than facilitating free trade poses a great threat to federalism).

¹⁷³ See *Shelby Cnty.*, 133 S. Ct. at 2649–50 (Ginsburg, J., dissenting) (outlining the majority's expansion of the equal sovereignty doctrine); Colby, *supra* note 131, at 346 (arguing that Congress must justify disparate treatment of states).

¹⁷⁴ See Colby, *supra* note 131, at 346 (arguing that the courts should scrutinize laws targeting particular state and determine whether Congress was responding to a problem unique to that region); cf. Jeffrey Kessler, Note, *The Clean Air Act Amendments of 1970: A Threat to Federalism?*, 76 COLUM. L. REV. 990, 1026–28 (1976) (arguing that when addressing federal statutes that impede on state sovereignty, courts should balance state and federal interests and determine whether the statute appropriately addresses an issue of national concern).

¹⁷⁵ See *Shelby Cnty.*, 133 S. Ct. at 2630 (indicating that disparate treatment that is sufficiently related to the problem it targets will survive the equal sovereignty doctrine (quoting *Nw. Austin*, 557 U.S. at 203)); cf. Colby, *supra* note 131, at 346 (arguing that the courts should scrutinize laws targeting particular geographic regions closely to make sure Congress was responding to a problem unique to the regulated region). For example, the 1987 amendments to the Nuclear Waste Policy Act of 1982 (NWP) differentiates among states. See Nuclear Waste Policy Amendments Act of 1987, Pub. L. No. 100-203, § 160, 101 Stat. 1330-227, 1330-228 (current version at 42 U.S.C. § 10172a (2006)) (stating that only Nevada will be eligible to enter into a benefits agreement with the Secretary of Health and Human Services); *Cnty. of Esmeralda v. Dep't of Energy*, 925 F.2d 1216, 1217 (9th Cir. 1991) (noting that the NWP provides funds exclusively available for the counties surrounding Yucca

vive equal sovereignty analysis if Congress cannot justify why the legislation regulates certain states and not others.¹⁷⁶ It does not matter whether the legislation's disparate treatment of states is preferential or disadvantageous to a limited number of states.¹⁷⁷ The purpose of the equal sovereignty doctrine is to uphold the notion that the United States is, and will remain, a union of states equal in sovereignty.¹⁷⁸

Furthermore, such an approach implements the equal sovereignty doctrine without disturbing Commerce Clause jurisprudence.¹⁷⁹ Application of the equal sovereignty doctrine to the Commerce Clause does not impose a requirement of uniformity because disparate treatment of states can still be justified.¹⁸⁰ Instead,

Mountain). But the NWPA would likely survive equal sovereignty doctrine analysis because the disparate treatment is sufficiently related to the remedying of a local evil. *See Cty. of Esmeralda*, 925 F.2d at 1220 (noting that the NWPA provides funds exclusively available for the counties surrounding Yucca Mountain to remedy environmental and socioeconomic impacts created by the Yucca Mountain nuclear waste storage facility).

¹⁷⁶ *See Shelby Cty.*, 133 S. Ct. at 2630. For example, the 1998 Internet Tax Freedom Act is a law that likely would be struck down under equal sovereignty analysis. *See Colby, supra* note 131, at 342 (arguing that the Internet Tax Freedom Act should be held unconstitutional because it impermissibly discriminates among states); Michael T. Fatale, *Common Sense: Implicit Constitutional Limitations on Congressional Preemptions of State Tax*, 2012 MICH. ST. L. REV. 41, 93–94 (2012) (arguing that the Internet Tax Freedom Act is unconstitutional because the grandfather clause prevents a uniform internet sales tax and is particularly intrusive with respect to the states' sovereignty). *See generally* Internet Tax Freedom Act Amendments Act of 2007, Pub. L. No. 110-108, secs. 2–6, §§ 1101(a), 1104–1106, 121 Stat. 1024, 1024–26 (codified as amended at 47 U.S.C. § 151 note (Supp. V 2011) (Internet Tax Freedom Act)) (providing that the moratorium on state internet taxes does not apply to state taxes already in effect). The Internet Tax Freedom Act exempts nine states from the federal prohibition of Internet taxes. *See Colby, supra* note 133, at 342; secs. 2–6, §§ 1101(a), 1104–1106, 121 Stat. at 1024–26.

¹⁷⁷ *See Colby, supra* note 131, at 255, 322, 345–46 (arguing that statutes that grant preferential treatment to a limited number of states at the expense of others are unconstitutional).

¹⁷⁸ *Coyle v. Smith*, 221 U.S. 559, 567 (1911) (“‘This Union’ was and is a union of States, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself.”).

¹⁷⁹ *Compare Shelby Cty.*, 133 S. Ct. at 2630 (concluding that a departure from the equal sovereignty doctrine requires a showing that the statute's disparate geographic coverage is sufficiently related to the problem it targets (quoting *Nw. Austin*, 557 U.S. at 203)), *with Gregory*, 501 U.S. at 460–64 (noting that the Commerce Clause does not give Congress the power to limit the sovereignty of the states), *Hodel*, 452 U.S. at 265 (noting that Congress's interest in national uniform standards is a valid concern for enacting legislation under the Commerce Clause), *Morgan*, 328 U.S. at 389 (Frankfurter, J., concurring) (stating that “[t]he States cannot impose diversity of treatment when such diverse treatment would result in unreasonable burdens on Commerce.”), *and Wille, supra* note 138, at 1090–91 (arguing that the Supreme Court applies a more stringent standard of review to legislation enacted under the Commerce Clause when reviewing congressional actions that encroach on state sovereignty).

¹⁸⁰ *Shelby Cty.*, 133 S. Ct. at 2624, 2630 (illustrating that the equal sovereignty doctrine did not invalidate the VRA when exceptional conditions justified its disparate treatment and noting that the doctrine only later invalidated this treatment when the burdens were no longer reasonably related to the targeted problem of voter discrimination); *Nw. Austin*, 557 U.S. at 203 (holding that departure from the equal sovereignty doctrine could be justified by exceptional conditions).

the equal sovereignty doctrine will prevent Congress from enacting economic regulations that empower certain states in a specified industry at the expense of others.¹⁸¹

C. PASPA Fails to Remedy the Current Conditions of Sports Betting

Under the proposed standard of review, PASPA violates the equal sovereignty doctrine because the burdens PASPA imposes do not sufficiently relate to the problems Congress intended to address.¹⁸² Because PASPA facially discriminates against states, a court must review its underlying logic to determine whether it adequately addresses sports gambling.¹⁸³ A court must further take into account the legislation's current impact on states and whether congressional findings justify the current burdens.¹⁸⁴

Congressional findings supporting PASPA fail to justify the current burdens it imposes.¹⁸⁵ In enacting PASPA, Congress sought to stop the spread of sports gambling, which the Senate Report characterized as a national problem because its harm could not be contained within state borders.¹⁸⁶ These findings fail to justify PASPA's disparate coverage, as exempting four states undermines Congress's stated purpose and demonstrates its naked attempt to limit the legislation's effects on particular states.¹⁸⁷ The rational approach by Congress would be to outlaw sports gambling completely, but instead, Congress allowed sports gambling to continue in four states.¹⁸⁸

¹⁸¹ Cf. *Shelby Cnty.*, 133 S. Ct. at 2630 (concluding that Congress failed to justify the VRA's burdens by showing that the act remedies current conditions); Colby, *supra* note 131, at 342 (arguing that PASPA is constitutionally suspect because the problem it addresses is not isolated to the areas covered).

¹⁸² See Colby, *supra* note 131, at 342 (arguing that PASPA's purpose does not sufficiently support its discriminate treatment of states); cf. *Shelby Cnty.*, 133 S. Ct. at 2631.

¹⁸³ See *Shelby Cnty.*, 133 S. Ct. at 2630–31 (quoting *Nw. Austin*, 557 U.S. at 203 (concluding that a departure from the equal sovereignty doctrine requires a showing that the statute's disparate geographic coverage is sufficiently related to the problem it targets)).

¹⁸⁴ See *Shelby Cnty.*, 133 S. Ct. at 2632 (Thomas, J., concurring) (emphasizing that courts must review the Congressional findings associated with a statute in relation to the current burdens it imposes).

¹⁸⁵ See S. REP. NO. 102-248, at 8 (1991) (noting that although gambling is a national concern that cannot be limited geographically, Nevada will be exempt from PASPA's prohibition); see also Colby, *supra* note 131, at 342 (arguing that PASPA's congressional findings fail to justify regulating along state lines because gambling is a national problem, yet Nevada's gambling industry is allowed to flourish).

¹⁸⁶ S. REP. NO. 102-248, at 4.

¹⁸⁷ See Colby, *supra* note 131, at 342 (arguing that PASPA's congressional findings demonstrate that Nevada's exemption undermines the regulatory scheme); cf. *Raich*, 545 U.S. at 30 (noting that allowing variations in state laws within a national federal regulatory scheme is a dubious proposition). See generally Lund, *supra* note 172, at 754 (arguing that legislation enacted under the Commerce Clause that seeks a purpose other than facilitating free trade poses a great threat to federalism).

¹⁸⁸ Compare S. REP. NO. 102-248, at 8 (noting that gambling is a national concern that cannot be limited geographically), with 28 U.S.C. § 3704 (2012) (exempting states that allowed or operated a

It comes as little surprise then that in the twenty-two years since its enactment, with Internet access increasing Americans' access to Nevada's sports gambling monopoly, PASPA fails to reasonably address the spread of sports gambling.¹⁸⁹ For example, PASPA's exemption encouraged Delaware to re-introduce and expand its preexisting sports lottery.¹⁹⁰ Furthermore, the proliferation of Internet access and the increased popularity of fantasy sports prompted the DOJ to state its intention to allow states to regulate Internet gambling within their own state.¹⁹¹ With ten states, including New Jersey, set to legalize Internet gambling, PASPA has become obsolete.¹⁹² With the rise in sports gambling's popularity and the proliferation of Internet access, Americans nationwide have access to Nevada sports books, which has drastically increased the number of Nevada sports books and the sums being wagered.¹⁹³ PASPA has thus failed to

sports betting scheme between 1976 and 1990 from PASPA), Waddell & Minke, *supra* note 8, at 35–36 (observing that PASPA grandfathered Oregon and Delaware's sports lotteries and Montana's sports gambling pool), and Galasso, *supra* note 4, at 167 (explaining that PASPA's overall effect granted Nevada a monopoly on sports gambling).

¹⁸⁹ See Chil Woo, Note, *All Bets Are Off: Revisiting the Professional and Amateur Sports Protection Act (PASPA)*, 31 CARDOZO ARTS & ENT. L.J. 569, 588 (2013) (noting that technological advances and the e-commerce industry has contributed to the significant increase in sports gambling); see also NCAA, 730 F.3d at 225 (noting that since PASPA was enacted, sports gambling has grown to a five hundred billion dollar per year industry). One 1999 report by the National Gambling Impact Study Commission concluded that many Americans do not even know sports gambling is illegal. See NAT'L GAMBLING IMPACT STUDY COMM'N, *supra* note 10, at 2-14. See generally Craig, *supra* note 13, at 67 (arguing that PASPA is one of the most frequently broken laws in the United States Code). One often cited reason for this issue is the publication of Las Vegas points spreads in states where sports gambling is illegal. NAT'L GAMBLING IMPACT STUDY COMM'N, *supra* note 10, at 2-14.

¹⁹⁰ See Shur, *supra* note 6, at 109 (arguing that Delaware reauthorized sports gambling because of its preferential status under PASPA). The NCAA, MLB, NFL, and NBA challenged Delaware's sports wagering scheme, but the reintroduction of the sports lottery was upheld. See *MLB v. Markell*, 579 F.3d 293, 301 (3d Cir. 2009) (holding that PASPA's grandfather clause allows Delaware to implement a sports gambling scheme, but only to the extent that the scheme was conducted at the time). Delaware, however, did not challenge PASPA's constitutionality. See *id.* It has been argued that Delaware purposefully avoided constitutional issues because it enjoyed its preferential status. See Goldstein, *supra* note 50, at 366 (noting that Delaware had an interest in not challenging PASPA because it stood to benefit from the closed market scheme).

¹⁹¹ See Rose & Bolin, *supra* note 12, at 693–94 (arguing that a recent DOJ memorandum indicates that states will be given more freedom to regulate their own Internet gambling); cf. Whether Proposals by Ill. & N.Y. to Use the Internet and out-of-State Transaction Processors to Sell Lottery Tickets to in-State Adults Violate the Wire Act, 35 Op. O.L.C. 1, 13 (2011), available at <http://www.justice.gov/olc/opiniondocs/state-lotteries-opinion.pdf>, archived at <http://perma.cc/WG85-LZCY> (expressing the opinion that Illinois and New York proposals to use the Internet and out-of-state transaction processors to sell lottery tickets to in-state adults does not violate the Wire Act).

¹⁹² See Kate Zernike, *New Jersey Now Allows Gambling via the Internet*, N.Y. TIMES, Nov. 27, 2013, at A19; *At Least 10 States Considering Internet Gambling Bills*, CBSNEWS (Feb. 5, 2014, 1:53 PM) <http://www.cbsnews.com/news/at-least-10-states-considering-internet-gambling-bills>, archived at <http://perma.cc/Z8M6-6KEV>.

¹⁹³ See Brent J. Goodfellow, *Betting on the Future of Sports: Why Gambling Should Be Left off the Field of Play*, 2 WILLAMETTE SPORTS L.J. 21, 39 (2005) (noting that the popularity of Internet

curb state-sponsored sports gambling or protect the nation's youth from gambling, and has instead positioned Nevada to hold a monopoly on an enormously profitable industry.¹⁹⁴

The current burdens PASPA imposes, therefore, do not meet the current needs it targets.¹⁹⁵ Indeed, PASPA applies equally to forty-six states, but the exemption allows sports gambling to flourish in Nevada, prohibiting this potential source of revenue in other states.¹⁹⁶ This is particularly true in states with a history of legalized gambling, such as New Jersey.¹⁹⁷ PASPA places these states' gaming industries at a disadvantage against Nevada because PASPA prohibits the former's casinos from offering competing services.¹⁹⁸

sports betting has increased the success of Nevada's sports betting scheme); *see also* Shur, *supra* note 6, at 113 (explaining that the number of Las Vegas sports books has increased to handle an increased number of sports bets).

¹⁹⁴ Compare *supra* notes 189–193 and accompanying text (observing the spread of sports gambling subsequent to PASPA's passage), with Galasso, *supra* note 4, at 182 (arguing that PASPA effectively granted Nevada a monopoly on sports gambling).

¹⁹⁵ Compare S. REP. NO. 102-248, at 8 (1991) (noting that gambling is a national concern that cannot be limited geographically), with 28 U.S.C. § 3704 (2012) (exempting states that allowed or operated a sports betting scheme between 1976 and 1990 from PASPA), Waddell & Minke, *supra* note 8, at 35–36 (observing that PASPA grandfathered Oregon and Delaware's sports lotteries and Montana's sports gambling pool), Colby, *supra* note 131, at 341–43 (arguing that Congress is not justified in exempting Nevada from PASPA because sports gambling “is surely a bigger problem in Nevada,” where the sports gambling industry continues to grow, “than it is in Utah”), Galasso, *supra* note 4, at 167 (explaining that PASPA's overall effect granted Nevada a monopoly on sports gambling), and *supra* notes 189–193 and accompanying text (observing the spread of sports gambling subsequent to PASPA's passage).

¹⁹⁶ Compare 28 U.S.C. § 3704 (exempting states that allowed or operated a sports betting scheme between 1976 and 1990 from PASPA), with Waddell & Minke, *supra* note 8, at 35–36 (observing that PASPA grandfathered Oregon and Delaware's sports lotteries and Montana's sports gambling pool), and Galasso, *supra* note 4, at 167 (explaining that PASPA's overall effect granted Nevada a monopoly on sports gambling). *See generally* Michael Levinson, Note, *A Sure Bet: Why New Jersey Would Benefit from Legalized Sports Wagering*, 13 SPORTS LAW. J. 143, 178 (2006) (arguing that by legalizing sport wagering, New Jersey can harness a valuable source of revenue for the state and allow the casinos in Atlantic City to remain competitive within the industry); Galasso, *supra* note 4, at 180 (noting that sports gambling generates billions of dollars in government revenue for Nevada).

¹⁹⁷ Cf. Levinson, *supra* note 196, at 151 (noting that Atlantic City casinos would benefit significantly from the legalization of sports wagering). Moreover, under the Indian Gaming Regulatory Act, Indian tribes may conduct gaming activities by entering into a compact between the tribe and the state where the activities are located. *See* 25 U.S.C. § 2710(d)(1)(c) (2012). Even within grandfathered states, however, Indian tribes may not operate sports books. *See Seminole Tribe v. Florida*, 517 U.S. 44, 44–45 (1996) (outlining the permissible Indian gaming activities); A. Gregory Gibbs, *Anchorage: Gaming Capital of the Pacific Rim*, 17 ALASKA L. REV. 343, 367 (2000) (noting that sports betting is not available at the various Indian casinos nationwide).

¹⁹⁸ *See* Levinson, *supra* note 196, at 178.

CONCLUSION

In 2013, in *Shelby County v. Holder*, the U.S. Supreme Court concluded that the equal sovereignty doctrine requires a federal legislation's disparate impact among states to have a sufficient relationship to its targeted problems. In emphasizing the importance of this heightened standard, the Court breathed new life into this long dormant body of law. Following *Shelby County*, it is unclear how the equal sovereignty doctrine applies to economic regulations that discriminate among states, such as the Professional and Amateur Sports Protection Act ("PASPA").

This Note argues that the equal sovereignty doctrine applies to *all* regulations that treat states differently. Under this test, an economic regulation will be upheld only if its disparate burdens are sufficiently related to the problem that it seeks to address. This approach best effectuates the Supreme Court's recent revival of the equal sovereignty doctrine and reinforces uniformity as a constraint on the Commerce Clause power. Under this test, PASPA fails to meet the equal sovereignty standard because allowing a select number of states to retain sports gambling schemes is not sufficiently related to Congress's purported goal of curbing the spread of sports gambling. The demise of PASPA as unconstitutional, therefore, is a safe bet.

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