Season 2 Episode 3

Edward A Hartnett: If Congress had simply said, we are making it a federal crime to engage in sports gambling, there's nothing New Jersey could do about that. Whether New Jersey made it legal or not, if the federal government wanted to prosecute you for violating that version of PASPA that they didn't enact, there wouldn't be any common ground problem because that would be Congress regulating the people directly.

Sara Gras: I'm Sara Gras and this is Episode 3 of Season 2 of Hearsay from the Sidelines, a show about the place where law, sports and culture intersect brought to you by Culture in Sports and Seton Hall Law School's Gaming, Hospitality, Entertainment and Sports Law program. This season is focused on the explosive growth of the online sports betting industry as legalization sweeps across the country and how it's impacting our relationships with our favorite past times.

My spring teaching commitments required me to temporarily step back from the podcast to focus on my classroom responsibilities – but I'm back now, and hope to wrap this topic up over the summer. In many respects, it was a good time to hit pause since there have been some fascinating developments in both state legislatures and in the gaming industry that I'll be able to address in upcoming episodes.

But before I get there, I want to talk about how we got here, what motivated Congress to explicitly illegalize sports betting and why that law was found unconstitutional, opening the sports betting floodgates in 2018.

On June 26, 1991, the Senate Subcommittee on Patents, Copyrights and Trademarks held a hearing on Senate Bills 473 and 474, the latter of which would become known as PASPA, the Professional and Amateur Sports Protection Act. As introduced, existing legal sports gambling in the handful of states where it was already permitted would not be constrained – but the law would stop its spread at a moment where multiple states, New Jersey included, were considering legalization.[1] The bill's sponsors recognized and acknowledged the significant financial motivations for states to legalize sports betting, but as Senator Bradley of New Jersey said in his statement, "the message it sends and the harm it causes far outweigh the advantages."[2] Unsurprisingly, the harms cited in the 1991 hearing by speakers in favor of the bill included increased prevalence of gambling addiction, particularly in young people.

But the most thoroughly discussed concern by the bill's advocates was the issue of integrity in sports. At the time, professional sports leagues were strongly in favor of legislation to make sports

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[1] *Prohibiting State-Sanctioned Sports Gambling : Hearing Before the Subcommittee on Patents, Copyrights, and Trademarks of the Committee on the Judiciary, United States Senate, One Hundred Second Congress, First Session, on S. 473, a Bill to Amend the Lanham Trademark Act of 1946 to Protect the Service Marks of Professional and Amateur Sports Organizations from Misappropriation by State Lotteries, and S. 474, a Bill to Prohibit Sports Gambling Under State Law*, 102nd Cong. 2 (1991).
[2] *Id*. at 10.

betting largely illegal. This was partially about preserving sports as a cultural institution that then-NFL Commissioner, Paul Tagliabue, called in his prepared remarks, the embodiment of "our very finest traditions and values." He said that sports, "stand for clean, healthy competition. They stand for teamwork. And they stand for success through preparation and honest effort. With legalized sports gambling our games instead will come to represent the fast buck, the quick fix, the desire to get something for nothing. The spread of legalized sports gambling could change forever - and for the worse – what our games stand for and the way they are perceived."[3] The leagues were also concerned about allegations of cheating. Tagliabue stressed that sports gambling would impact confidence in the legitimacy of games, not just overall outcomes, but also player performance, officiating, and coaching. David Stern, then-commissioner of the NBA, wrote in his prepared statement that, "gambling, particularly sports gambling, inevitably carries with it the suspicion of 'fixing.' When large-scale gambling becomes intertwined with sports, the allegations, accusations and suspicions of game tampering do not lag far behind." There was clearly a strong sense of fear that the growth of sports betting would fundamentally harm everything sports stood for in American culture.

And that fear made sense – scandals tied to betting at the professional and college levels had popped up and rocked their respective sports many times over the years, sometimes with consequences that reverberated for decades. I talked about some of the most famous with my colleague, sports law professor, Bob Boland:

Sara Gras: Betting on sports is not, you know, new, and betting on college sports is not new. There have been, you know, some pretty huge sports betting scandals on campuses over you know, 75 years, starting with the City College of New York, NCAA basketball, point shaving scandal. So could you talk, and that was massive, right? And it has had lasting impacts on the City of New York's ability to host NCAA basketball games, right?

Bob Boland: Yeah, it's a seminal event because it affected a multitude of institutions in many ways. The dominant force of college basketball around 1950, at the turn of the century, was CCNY, City College. And they captured both the NIT and NCA championships in one of those years. They also were approached and figured heavily in an effort involving organized crime to get them to shave points. It had spread, so it was spread across the city's schools. It involved a player later came out named Jack Malinas who played at Columbia. Malinas is a really interesting figure. We'll talk a little bit more about him in a second because he was absolutely corrupt and a very talented basketball player simultaneously. But it's fascinating that this was exposed and it basically New York City College basketball was one of the dominant personas across the nation was a hotbed of it.

Obviously, City College with an open admissions policy was a rampant area for anybody who played college basketball at that time or wanted to and their coach Nat Holman was considered a legend. But yeah, players were involved in a significant level of scandal that really questioned

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[3] *Id*. at 24.

results of all their games over that period of time. It was ultimately exposed to some degree by an African-American who played at Manhattan College named Junius Kellogg. Kellogg is sort of spoken of with some awe and reverence as the person who blew the whistle on it and testified against them and there was crime family involvement in this. So it was a very big conspiracy, I guess. And that's one of the things at the end of day that probably exposed it because as conspiracies go or as crimes go, having been an ex-prosecutor, as crimes go, typically the more you return to it or the more you talk about it, the more vulnerable you are for discovery.

if you were able to pull off the perfect crime where no one knows something has occurred until after and no one knows why it's occurred, that's a pretty safe bet. But I think they were fixing at that point multiple schools and it rolled through that. I talked about Malinas. Malinas went on to play in the NBA where his role in the gambling scandal was exposed. He was suspended by the NBA commissioner. And as a former Columbia athlete, I take a little bit of pride and a little bit of horror in this. Molinas did not fall into disfavor immediately. Molinas went to law school and fought the NBA commissioner in antitrust. It's one of my favorite cases. Of course he went to law school to bring in antitrust law. He didn't succeed in the powers of the commissioner to control gambling or the integrity of their games was considered central to the core of sports.

But in 1961, we had another significant betting scandal. Seton Hall was featured in that. That one sort of began more in Philadelphia in the big five, LaSalle and some of the other schools down there figured into that, two Seton Hall athletes were among those arrested. Also some athletes from the University of Iowa, a famous NBA player, later NBA player, but was kept from the game for a long time named Connie Hawkins was implicated in Iowa. So that one actually was a bigger conspiracy because it spread outside a single area or single city. I think betters tended to favor certain games, and I'm certainly not an expert in this, but one of the things that they like in a bet product is they like games that tend to run to form but provide some upsets. And college basketball in a lot of ways is sort of a perfect environment for that. The favorite wins more often than not. There are some upsets and it only takes one or two players to actually effectuate a conspiracy on the court. If you did it with a football team, you have to know that it's, you have to get it to the person who has the ball in their hands at particular moments, or you have to widen the conspiracy. In college basketball, a guard and a forward can effectuate this themselves.

Sara Gras: Well, and there's also the involvement with the criminal, like outside criminal element that puts players involved in point shaving schemes at risk, right? Which was the case in the Boston College scandal where ultimately it was a small number of players that were involved for a relatively short period of time in shaving points. But it was their, I guess their co-conspirator who was a member, you know, of an organized crime syndicate.

Bob Boland: The famed Henry Hill from Goodfellows fame, Yeah, Boston College in the early 1970s was implicated in a point shaving scandal. And again, point shaving, not necessarily throwing games or fixing in the purest sense, but trying to keep the spread down, manage victories. And several famous athletes in point were involved and went to jail in this conspiracy. But this conspiracy did involve the guy who shows up much more famously in Goodfellows, played by Ray

Liotta, in that movie and those stories. It does give you that window, and along with the idea that our friend Molinas, who was involved in the '51 scandal as a participant, and then in the '61 scandal as the fixer in some measure also ended up on the wrong end of a gun, murdered, and avoided to jail, but ended up murdered because of his activities in this space. to some degree, my parents' old warning about organized crime is that you can't ever get out, that these activities are out there and that they're circulating.

I don't think they're enormously well thought out activities. They're crimes and to some degree of knowledge and opportunity. And I think that's why you see the 10 year cycle or, and they do sort of happen on about 10 year cycles. We have '51 and '61 pretty easily. Obviously '51 isn't the first fix ever. '61 isn't the last. They come back in the 1970s at Boston College and we see it again in the 1980s at Tulane which shut down their, which had their basketball program shut down over it. do believe, I do believe a player was killed in relation to that or in connection to that betting scandal. So they do get exposed, but they were exposed slowly. And many times the people who were masterminds this had made off and leave the players kind of holding the bag and accepting the blame.

Sara Gras: In addition to these college cheating stories, there were the big professional scandals, including the White Sox players who conspired to fix the World Series in 1919[4] and of course, the discovery in 1989 that Pete Rose had bet on baseball while manager of the Cincinnati Reds.[5] And I can't help but wonder how much of a role the timing of this particular event had on the legislative push to bar additional states from legalizing sports betting. I was only in elementary school at the time, but I still remember hearing about Pete Rose on the evening news. A letter to the subcommittee in support of PASPA from the International Association of Chiefs of Police describes it as, "the painful Pete Rose saga,"[6] which illustrates how deeply Rose's actions impacted fans. At the time, and for years afterwards, Rose refused to admit to any wrongdoing, despite Commissioner Bart Giamatti's public declaration that, "one of the game's greatest players has engaged in a variety of acts which has stained the game," as he announced Rose's lifetime ban from game.[7] It's easy to forget that there was no evidence that Rose had actually engaged in any behavior that could be considered cheating – he didn't throw any games, he didn't bet on his own team using inside information – he just gambled. A lot. But this wasn't really the objection. As former baseball Commissioner Bowie Kuhn explained in an interview, "if you begin to let the gate stand and let people bet on games, then it's just a matter of time before you're going to have games

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[4] Evan Andrews, *What Was the 1919 'Black Sox' Baseball Scandal?,* HISTORY.COM, (Oct. 9, 2014, updated May 28, 2025),
https://www.history.com/news/black-sox-baseball-scandal-1919-world-series-chicago.
[5] Ronald Blum, *Betting on the Truth; Pete Rose Admits He Bet on Baseball While Manager of Reds,* THE SPECTATOR (Jan. 6, 2004), available at https://www.proquest.com/newspapers/betting-on-truth-pete-rose-admits-he-bet-baseball/docview/270176859/se-2.
[6] *Supra* note 1 at 207.
[7] *You're Out; Close Encounter*, THE MACNEIL/LEHER NEWSHOUR (Aug. 24, 1989).

thrown and there goes the public confidence in the game," describing gambling as "a more direct threat to the integrity of the game,"[8] than drug use.

I'll be getting into the impact of betting on the culture and yes, the integrity, of sports in the next episode, but before I move on, a sidebar on Pete Rose – you may or may not have caught the news that Pete Rose passed away in September of 2024 at the age of 83. Just a few weeks ago in May of 2025, baseball Commissioner Rob Manfred reinstated Rose, changing a league policy on permanent ineligibility to make bans expire upon death.[9] This means that Rose is now eligible to be inducted into the Hall of Fame, news that has displeased many, including Commissioner Giamatti's son, Marcus, who issued a statement that read in part, "My father's mission by banning Rose was to uphold the integrity of the game. Therefore, reinstating Rose in this manner puts that integrity, Rule 21 and everything that my father fought to uphold in peril. My father believed that no one person is above the game, and were he here today, he would maintain that the institution of baseball must stand up to outside influences, political influences, and influences that are not in the best interest of baseball. Without integrity, the game of baseball will cease to exist."[10]

So back to the bill that would become PASPA – a parallel bill, H.R. 74, was introduced in the House and a hearing in the House Subcommittee on Economic and Commercial Law in September of 1991 had a similar slate of supporters and detractors. And their perspectives were echoed in the Senate Judiciary Committee's report in November of 1991. To the extent that the Committee's report reflects the views of Congress, it's safe to say that at the time, the majority agreed that, first and foremost, "Sports gambling threatens to change the nature of sporting events from wholesome entertainment for all ages to devices for gambling. It undermines public confidence in the character of professional and amateur sports. Furthermore, State-sanctioned sports gambling will promote gambling among our Nation's young people."[11] Given that the cited harms cannot be contained within a single state's boundaries, the majority expressed the position that sports betting "is a problem of legitimate Federal concern for which a Federal solution is warranted."[12] While the Committee acknowledged the potential for states to raise revenue through the legalization of sports betting, "the risk to the reputation of one of our Nation's most popular pastimes, professional and amateur sporting events, is not worth it."[13]

Now, I intentionally mention the majority here because there was one Senator who publicly took the opposing view – Iowa Senator Chuck Grassley. His first objection had little to do with the harms of sports betting and instead focused on whether federal government had the authority to restrict

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[8] *Id*.
[9] Ronald Blum, *MLB Reinstates Pete Rose and Shoeless Joe Jackson, Making Them Hall of Fame Eligible*, ASSOCIATED PRESS, May 13, 2025, https://apnews.com/article/pete-rose-shoeless-joe-jackson-reinstated-f95afff53006426f3ea44e34d5f56a24
[10] *Reaction to Pete Rose Being Reinstated by Baseball Commissioner Rob Manfred*, ASSOCIATED PRESS, May 13, 2025, https://apnews.com/article/pete-rose-hall-of-fame-befdc9f15fdf465baa1aa26281ab4e21.
[11] S. REP. No. 102-248, at 4 (1991).
[12] *Id*. at 7.
[13] *Id*.

an intrastate revenue raising program.[14] As he described it, "this legislation would set the dangerous precedent that the Federal Government can prohibit any State revenue raising program, under the guise of 'interstate commerce,' at the behest of any special interest."[15] His second concern, addressed only briefly in the committee report, was that allowing the states with existing sports betting to continue the practice would "blatantly discriminate" between the states. Finally, he objected to the legislation on the merits, pooling together a series of arguments, including the impossibility of fixing a sports pool lottery and the hypocrisy of sports leagues objecting to further legalization of sports betting while condoning other types of activities dependent on the outcome of games and taking little action to combat illegal sports betting.[16] Blocking legal sports betting, he argued, would only benefit backroom bookies and organized crime syndicates.

But when the bill actually came up for debate on the floor in June of 1992, Grassley's objections had narrowed. He proposed an amendment to allow states a period of two years to pass legislation exempting themselves from the law's coverage.[17] This would, he argued, address the unfairness of grandfathering in Nevada, Montana, Oregon, and Delaware's sports betting laws by offering all the other states the same opportunity – a grand compromise, but one that the Senate did not approve. Still, this argument must have had some effect because the final version of the bill was amended to give all states a year from the date of enactment to authorize sports betting. The law would not apply to "a betting, gambling, or wagering scheme…conducted exclusively in casinos located in a municipality, but only to the extent that-- such scheme or a similar scheme was authorized, not later than one year after the effective date of this chapter, to be operated in that municipality."[18] On October 7, 1992, the Senate agreed to the House-amended version of the bill by voice vote and October 28, it was signed into law.[19]

And so the dragon was lulled to sleep, but it wouldn't stay that way for long.

Less than 10 years later, the beast began to stir again as New Jersey, who had not taken advantage of the one year window to authorize gaming after PASPA passed, began exploring ways to save its struggling casino and racing industries. I discovered that as a professor at Seton Hall Law, I had a direct connection to some of the lawyers and academics who played an integral role in PASPA's eventual demise: Dennis Drazin, president of the firm of Drazin and Warshaw and a member of our adjunct faculty, Professor Ed Harnett, who has been teaching at Seton Hall since 1992, and Seton Hall Law's former dean, Ron Riccio, who is currently Of Counsel at McElroy Deutsch. I sat down with all three of them and got to hear how these historic events unfolded from their perspectives. Here's Dennis, giving an overview of how they became involved in the litigation that would result in the Supreme Court's decision invalidating PASPA.

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[14] *Id*. at 12.
[15] *Id*.
[16] *Id*. at 13-14.
[17] 138 CONG. REC. 12,974 (1992).
[18] Professional and Amateur Sports Protection Act, S. 474, 102nd Cong. (1992), https://www.congress.gov/bill/102nd-congress/senate-bill/474/text/enr.
[19] *Id*.

Dennis Drazin: So I'm going to start a little earlier because I think it's important for the picture. In 1992, when PASPA was enacted, New Jersey was given a one year window to opt into sports betting. Without getting into a long discussion about politics, it was a political decision at the time not to proceed to try and get sports betting. So then fast forward to the years 2000 to 2010. The casino industry and the racing industry had fallen on hard times. A commission was established by Governor Christie known as the Hanson Commission. The Hanson Commission recommended that the governor either close the racetracks or privatize them and let someone else take it. The state who ran the racetracks at that time was losing 17 and a half million a year. The subsidies that were issued at that time by the government and the casino industry was trying to pump up some purses at the racetracks in exchange for not trying to expand gaming out of Atlantic City because the political decisions at the time was to protect Atlantic City.

Governor Christie decided to be all in on Atlantic City. So I found myself as the chairman of the New Jersey Racing Commission in 2011 trying to assist the state and the governor in making a deal to privatize Monmouth Park and the Meadowlands. Jeff Garral up at the Meadowlands entering into a lease with the state. So the Meadowlands was going to continue under his leadership. There were discussions about Monmouth Park, which fell apart in late 2011. The governor decided that either Monmouth Park would have to find someone to take over the racetrack or it would be closed. So the governor and the attorney general asked me to come off the racing commission as the chairman and to help the New Jersey Thoroughbred Horseman's Association take over the racetrack and find a way to become self -sufficient. So in that effort, Governor Christie had cut out all subsidies and I'm not making this political, I'm just trying to be factual. And the governor decided that he would let us control our own destiny. And he offered us the opportunity to move forward with sports betting.

Sports betting had the history as follows at that time. There was a constitutional referendum that was passed in New Jersey overwhelmingly by about two thirds. Senator Lesniak, as well as leadership in both the Senate and the assembly, supported the issue of enacting a law that would permit sports betting in New Jersey. We recognized that that would be contrary with federal law. And we started to brace ourselves for the challenge. I reached out to Ron Riccio, who was Dean of Seton Hall Law School and the McElroy Deutsch firm to seek advice because I recognized and Ron quickly confirmed that if I were to open a sports book at Monmouth Park, notwithstanding the fact that New Jersey had passed a law and enacted legislation to permit it, that I would risk going to jail. So we reached out for Congressman Pallone, who had the federal government analyze the issue. sent me a letter describing the six ways that I could be arrested. And Ron decided, rightfully so that we needed to find a path to get a court decision. And the rest of it will flow as this conversation goes on. But I think that's the history of political climate and the reality of economics. Horse racing at the time supported thousands of jobs, hundreds and hundreds of acres of open space, a breeding industry in New Jersey that was thriving. And all of this was about to fall apart if we were unsuccessful. And as it turned out, sports betting, the legalization of sports betting saved the racetrack. Without sports betting, would be closed. There would be no more horse racing in the state of New Jersey.

Sara Gras: The chain of litigation that led to the decision that Dennis describes is pretty tangled, but I've linked to the court decisions in chronological order on the show page. The fight began in earnest in 2011 when the citizens of New Jersey voted by an overwhelming majority to amend the state constitution to permit sports betting.[20] The state legislature followed by enacting legislation in 2012 that legalized the establishment of sports books within New Jersey casinos and racetracks.[21] The NCAA, along with the NFL, NBA, NHL, and major league baseball quickly joined in a suit against then-Governor Christie, then-Director of the state Division of Gaming Enforcement, David Rebuck, who testified in the Congressional committee hearing I covered in Episode 1, and the director of the state racing commission.[22] This case, dubbed Christie I, resulted in a grant of summary judgment for the leagues and an injunction against the implementation of sports betting in the federal trial court,[23] a decision that was then affirmed by the 3rd Circuit.[24] Rather than accept defeat, the New Jersey legislature passed a repeal of some of the state's existing sports betting bans, citing the 3rd Circuit's opinion in Christie I as the basis for this action.[25] In a case known as Christie II, the leagues sued the state again, and again, the district and Circuit courts found the state's action to be a violation of PASPA.[26] The New Jersey Thoroughbred Horsemen's Association, with Ron Riccio as named counsel, had intervened in both Christie I and Christie II.

I asked Dean Riccio whether he anticipated that first conversation with Dennis would kick off nearly a decade of litigation and take them all the way to the U.S. Supreme Court.

Ronald J. Riccio: No, I did not anticipate the twists and turns that the case took. I don't think anybody did. I did anticipate the ultimate result. But let me let me step back and pick up from the chronology that Dennis just gave. Once New Jersey enacted a law authorizing sports betting, that's when Dennis contacted me and our discussions began about what steps to take, whether or not Monmouth Park could just open a sports book or whether because of PASPA there would be risks of civil criminal penalties if Monmouth Park opened because it would be in violation of PASPA. So I was asked to look into whether or not I thought PASPA was constitutional, which, I did some research, frankly, did not need to do a whole lot of research because I thought there were two US Supreme Court cases that certainly gave strong indications that PASPA could be declared unconstitutional. Those cases were New York versus the United States[27] and Printz.[28] And there were cases that followed that, but basically those two cases established the proposition that the federal government couldn't command the states to make laws or not make laws. And the

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[20] N.J. CONST., art. IV,§ VII, para. 2.
[21] S1323, 215th Leg., 2012-2013 Reg. Sess. (N.J. 2012), https://www.njleg.state.nj.us/bill-search/2012/S1323.
[22] Complaint, NCAA et al v. Christie et al, No. 3:12-cv-04947 (D.N.J. Aug. 7, 2012).
[23] NCAA v. Christie, 926 F. Supp. 2d 551 (D.N.J. 2013).
[24] NCAA v. Governor of New Jersey, 730 F.3d 208 (3rd Cir. 2013).
[25] S2460, 216th Leg., 2014-2015 Reg. Sess. (N.J. 2014), https://pub.njleg.state.nj.us/Bills/2014/AL14/62_.PDF.
[26] 61 F. Supp. 3d 488 (D.N.J. 2014); 799 F.3d 259 (3rd Cir. 2015).
[27] New York v. United States, 505 U.S. 144 (1992), https://www.oyez.org/cases/1991/91-543.
[28] Printz v. United States, 521 U.S. 898 (1997), https://www.oyez.org/cases/1996/95-1478.

interesting thing about PASPA, at least to me, was that it didn't prohibit sports betting and it didn't preempt the states from legalizing it, but it commanded the states not to authorize sports betting by law. So I said to Dennis that, you know, in my opinion, I thought PASPA was potentially unconstitutional. Of course, you never know about those things, but I thought it was potentially unconstitutional. And he and I discussed the potential of filing a declaratory judgment action, because at that time there was no case pending. And while we were discussing the potential of a declaratory judgment action, that's when the sports leagues jumped in and claimed that the New Jersey law was unconstitutional and that if sports betting was legalized, it would jeopardize the integrity of their games, their players, would cause serious and irreparable injury, etc. So when the sports leagues filed their lawsuit, we intervened. Now let me say this about the ultimate outcome. I never thought that the issue of constitutional law was particularly complicated. I know Ed may shed some light on his thoughts there. But the interesting thing to me was, in the Supreme Court opinion, there's two excerpts that really summarized the way the court got to where it got.

And I just like to read it, I think it would help the listeners to see this. "The anti -commandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, namely the decision to withhold from Congress the power to issue orders directly to the states" which of course is exactly what PASPA did. Now, as far as did I predict six or seven years of litigation, I didn't see that coming because the case took so many twists and turns and we went down what I would call a rabbit hole of whether or not there's a distinction between affirmative commands and negative commands and whether a repeal of a law is not a violation of PASPA whereas an actual law authorizing sports betting would be. And the Supreme Court, after six years of litigation and countless appearances in the district court, three or four arguments in the court of appeals, three petitions for certiorari, the Supreme Court in its opinion essentially said that the leagues and the United States had misread the Supreme Court's precedents, which is a remarkable thing when you think about it, that you could have so many judges, competent judges on the federal level, review the same cases that everybody else was looking at and come to a conclusion that the Supreme Court said was a misreading of their cases, which we always felt it was. And ultimately we were vindicated, thankfully.

Sara Gras: Dean Riccio and Prof. Hartnett, on behalf of the Horsemen's Association, had filed a separate petition for writ of cert to the U.S. Supreme Court, and their claim was combined with the state's when the Court agreed to hear Murphy v. NCAA. There was one question to decide: does a federal statute that prohibits adjustment or repeal of state-law prohibitions on private conduct impermissibly commandeer the regulatory power of States in contravention of existing Supreme Court precedent?[29]

The Court's decision in *Murphy* required the justices to consider how to interpret and apply the infrequently invoked anticommandeering doctrine. Prof. Hartnett published an outstanding article that delves into the constitutional prohibition of commandeering and how the Court in this case

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[29] Murphy v. NCAA, 584 U.S. 453 (2018), https://www.supremecourt.gov/opinions/17pdf/584us2r36_9ol1.pdf.

both challenged and changed our conventional understanding of the doctrine.[30] Given his subject-matter expertise and his stellar reputation as a teacher, I told him I could think of no one better to distill the doctrine and explain its relationship to the more familiar doctrine of preemption.

Edward A Hartnett: Let me try. We spent years and years going round and round on this. let me see if I can put it in a way that would make sense to people who haven't been going round and round on it for years. And I agree with Ron's bottom line. I think we just had a tougher battle than he describes. And I think that makes the win that much more significant. Why is that? Why was this such a hard case? Well, it sort of starts with the Supremacy Clause. The Supremacy Clause, Article 6 of the Constitution, tells us that federal law is the supreme law of the land, not withstanding anything to the contrary in state law. That might seem sort of obvious today, but it's sort of a crucial piece of the Constitution. Why is that? Because the usual rule of priority is whichever legislation is last. If you're in New Jersey and the New Jersey legislature says something in 2010 and something different in 2015, well, 2015 trumps what happened in 2010. In order to make sure that didn't happen between the federal Congress and the state legislatures, and because constitutional invention rejected the idea of letting the federal Congress have a veto over state legislation, you needed a rule like this that said, who cares what time it was enacted, federal law wins, trumps state law gave rise early on to what's become known as the preemption doctrine. That is if federal and state law conflict in a given case, federal law wins, federal law preempts state law.

Sort of the great grandfather of that doctrine is another New Jersey case, Gibbons versus Sondland case, a rising out of ferry service between New York and what was then called Elizabeth Town, New Jersey, now Elizabeth, New Jersey. Ogden had a monopoly from the New York state legislature. Gibbons had a federal license. Ogden got a court order telling Gibbons, hey, you can't run a ferry because I've got a state monopoly. And the Supreme Court said, well, no, Gibbons has a federal license to do what he's doing. And a federal license trumps the New York state monopoly law. This doctrine of preemption is just crucial to making the nation work. Now, everything from labels on generic drugs to employee benefit plans, Congress makes laws that state laws. There's then a separate doctrine. this, know, the preemption doctrine goes back nearly to the founding, certainly to the early, early 19th century. has already mentioned the anti-commandeering doctrine. Its roots go back prior to the Civil War, but we usually sort of ignore those because they're tied to slavery. Its modern manifestation, as Ron noted, are two cases, one involving radioactive waste where Congress said Congress can't tell state legislators to enact laws. And a case involving gun control, where the Supreme Court said Congress can't tell the state executives, state police, local police, sheriffs, to enforce federal laws.

But there's a real tension between those two doctrines, right? There's a real risk that one could swallow up the other, right? One is saying, when Congress speaks, states have to bow down, state law gets preempted. And the other is saying, well, Congress can't tell the states what to do. Either

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[30] Edward A. Hartnett, *Distinguishing Permissible Preemption from Unconstitutional Commandeering*, 96 NOTRE DAME L. REV. 351 (2020), https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4931&context=ndlr.

one of those doctrines, if expanded too far, would swallow up the other. So courts had to figure out, what's the difference between the two? What's permissible preemption and what's unconstitutional anti -commandeering? And for a long time, the best anybody came up with was, or at least what was generally accepted was this distinction between affirmative and negative commands. Congress can tell the states, you can't do this. That's what preemption is all about. States you can't do this. But what Congress can't do is tell the states what they must do. You must pass a law to regulate radioactive waste. You must enforce gun control laws. Now that's a pretty unsatisfying distinction because it's easy to reframe a positive command into a negative command and vice versa. Think about the commandment, you know, do not commit adultery. Well, you can reframe that as well, you must be faithful to your spouse. Almost anything can be reframed one way or another. Very unsatisfying, but it's sort of the best that courts had come up with, or at least what most courts had lived with, in order to not have one doctrine swallow the other.

That's what left us in trouble, because PASPA was framed as prohibition. It prohibited states from authorizing sports betting. That sounds like it's telling the states what they can't do. Now, of course, it effectively meant that states must prohibit sports gambling. again, if you, courts were worried that if you treated that kind of prohibition as a violation of the anti-commandeering doctrine, you'd lose the preemption doctrine. The preemption doctrine would be gone and courts were, I think, deathly afraid of going down that path because the preemption doctrine is so crucial, again, going back all the way to Gibbons versus Ogden.

So what did we need? We needed a different view of the distinction between preemption and commandeering. And for that, we said, well, let's go back to basic principles. Why do we have a supremacy clause? We have a supremacy clause because our constitution has two different governments operating on the same people in the same territory at the same time. So we needed a rule of priority between those two. That was a giant change from the Articles of Confederation to give the federal government the power to act directly on the people instead of acting through the state governments on the people. Now, some said, well, the point was only to make the national government more efficient, to give them more power. So they still had the power to operate through the states. But the point in Commandeering Doctrine was no, Congress, under our constitution, doesn't have the power to regulate the people through the states. If Congress wants to regulate the people, it's got to do so itself, directly. And that there's a good reason to do that because if you have a government that's enforcing the law against people, how do you do that? Well, you have people with badges and guns show up if necessary and enforce it. You know, usually it doesn't come to that, but at the end of the day, if you need a judgment and force, you have somebody with a badge and a gun take your property away or put you in jail for contempt. That doesn't work for a state. How do you enforce a law against a state, a body politic? Well, if push comes to shove, you go to war.

So the decision of the Constitutional Convention was let's not have the Federal Government Act through the states, compel the states to govern the people. Let's give the Federal Government the power to act directly on the people. And that's the distinction. So Congress can regulate the people directly. It doesn't matter whether talking positive or negative. Congress can regulate the people

directly, give them certain rights, prohibit certain conduct. And if that happens, state law gets superseded. gets preempted. State law notwithstanding, federal law applies. But what Congress can't do is regulate the people through the states, can't sort of force the states to regulate the people, whether they phrase that as an affirmative command or a negative command or what they can repeal or what they can't repeal. However they phrase it, that's what's going on.

And as Ron has noted, the Supreme Court majority agreed with us, you know, that we avoided, I think, successfully getting into the weeds of preemption doctrine, implied preemption, express preemption, conflict preemption, field preemption. It's all about Congress regulating the people directly and causing state law to be superseded. And the Supreme Court agreed, saying, our cases have identified three different types of preemption, conflict, express, and field, but all of them work the same way. Congress enacts a law that imposes restrictions or confers rights on private actors. A state law confers rights or imposes restrictions that conflict with the federal law and the federal law takes precedence, the state law is preempted. That's the heart of the distinction.

If Congress had simply said, we are making it a federal crime to engage in sports gambling, there's nothing New Jersey could do about that. Whether New Jersey made it legal or not, if the federal government wanted to prosecute you for violating that version of PASPA that they didn't enact, there wouldn't be any common ground problem because that would be Congress regulating the people directly. Now, and why this distinction, part of it is about accountability. Everybody would know, okay, it's Congress that's enacted the law, it's federal agents who are doing the investigation, it's federal prosecutors who bringing the prosecution, it's federal judges who are hearing the cases, it's federal prisons that people are ending up in. Everybody knows who's accountable for it. If on the other hand, it's Congress telling the states what they've got to do, at least the argument runs, it's hard to tell who

Yeah, if you look behind it, you can tell who's insisting that it be done. But if it's state legislators, police, local police, state prosecutors doing the enforcement, it's harder to be confident about, wait a second, who's actually responsible here, who's actually in control here to prohibit sports gambling. If it wanted to do so directly, take the political heat for doing it, hire the executive agents to enforce it and actually go about enforcing it. But that's not what Congress did in PASPA.

Ronald J. Riccio: You know, Sara, one of the interesting points about what Ed just so eloquently explained was really explained by Justice O 'Connor in New York versus the United States and then followed up in Printz and then cases after that. And what was puzzling to all of us is why what seemed a clear articulation of the anti -commandeering doctrine, how it could be interpreted any differently than the way in which we were interpreting it. And in Christie 1, after the district court ruled against us, Christie 1 was a two-to-one decision. And if you read the dissent in Christie 1, was Judge Vanaski wrote, he, he agreed with us and frankly, if he was able to get one other judges on the panel to agree with him, there would have, would not have been a Christie II. And maybe not even a Supreme court decision, but it was because of the Christie I distinction, the affirmative negative command that Ed talked about, the invitation to promulgate a repeal, that's what took us into Christie II, and ultimately up to the United States Supreme Court. But had we been able to

convince one of the other two judges in Christie Iin the third circuit to go along with Judge Van Aske, the case would have ended several years sooner and frankly would have saved Monmouth Park significant lost revenue because during that time Monmouth Park was under an injunction prohibiting it from conducting sports betting. Which, by the way, just as a footnote, after the Supreme Court victory we went back to court and sought damages on the injunction for having been wrongfully enjoined. And that also went up to the Third Circuit. We prevailed in the Third Circuit. The court held that Monmouth Park, the New Jersey thoroughbred horsemen were wrongfully enjoined. The sports leagues petitioned that case to the Supreme Court. Petition was denied. The case was remanded back to the district court where we settled on the bond.

So that's a kind of a subset to the overall victory, but an important one nonetheless. Because a lot of damage was done. A lot of damage was done to Monmouth Park as a result of the injunction. There was a lot of anxiety that was created among a lot of sort of ordinary folks working at the track, whether or not their jobs were in jeopardy. The New Jersey equine industry was teetering. Because if Monmouth Park goes, so goes the New Jersey equine industry. And Dennis can speak to that far better than I can, but it was a reality that this wasn't just a case about a fundamental constitutional issue. This was a case that affected people, places, things, open spaces, and so forth.

Sara Gras: The decision in *Murphy v. NCAA* invalidated PASPA and cleared the way for sports betting to be legalized, not just in New Jersey, but across the country. I'll be getting into something that Ron starts to address here in the next episode which is how sports betting benefits particular groups and could even be seen as benefitting all of us. And related to that idea of broader impact, I want to close this chapter by highlighting something that I'll let Ed explain – it's important to remember that litigation about sports betting laws and regulations impacts far more than a single industry. The legal issues addressed and decided ripple out and impact us in ways most non-lawyers would never anticipate.

Edward A Hartnett: I think the two big ones are marijuana and immigration. And frankly, we sort of teed this up in the late 80s because we're basically making states' rights arguments. States' rights arguments in our country have largely been associated with, if not racist causes, So, know, southern intransigence to civil rights. That's sort of, the epitome of what people thought about as states' rights for many years. We wanted to convince the Supreme Court that the anti-commandeering is not just, is not sort of rooted in those kinds of concerns. So we made a point of how anti-commandeering doctrine matters to things like marijuana and immigration. We made a point of citing academics that the Supreme Court would know were left of center academics who supported the anti -commandeering doctrine. And again, I'm really happy that we didn't get a single dissent on the merits of the anti -commandeering doctrine. So, you know, think about marijuana - the reason so many people feel comfortable buying, selling, and smoking marijuana today is basically sort of because of anti -commandeering doctrine. That is, it's still illegal as a matter of federal law to possess and sell marijuana. And state law can't insulate you from that. On the other hand, because of the anti-commandeering doctrine, Congress can't make the states prohibit marijuana, can't make the Jersey City police arrest people for violating the federal law against possession of marijuana.

And can't sort of get around that by saying, no, we're not telling New Jersey or any state that they have to prohibit possession of sale of marijuana. We're just telling them that they can't authorize it. They can't sort get around it the way it but would seem to get around it. Similar sort of things with regard to immigration. Now, as with any legal issue, there are close questions at the margin. But the reason why states can say, we're not going to participate in immigration raids is because of the anti-commandeering doctrine. If the federal government wants to enforce prohibitions against marijuana, wants to enforce immigration laws, and states don't want to help them, then the federal government can't make the states help them. Can't make the state executive, can't make the state legislator help them. They've got to their own DEA agents, hire their own ICE agents, pay for them and take the political heat and the dollar cost for bringing those enforcement

Sara Gras: We aren't totally done with the history lesson yet. In the next episode I'll get into what else was happening in the background after PASPA was enacted and how that precipitated what would otherwise seem to be an inexplicable about-face in both sports league and public perception of sports betting. The realized benefits, it seems, have changed the conversation.

Hearsay from the Sidelines is a collaboration of Seton Hall Law School and Culture in Sports; research and writing by Sara Gras with the help of my amazing research assistants, Emily Raedisch and Lauren Vuolo; music by my son, Robert; produced by Sara Gras and Dr. Jeremy Piasecki, Executive Director of Culture in Sports. Links to all available academic and primary legal sources, media, music, transcription, and other materials mentioned in this episode are available on the Hearsay from the Sidelines show page, hearsayfromthesidelines.com. And if you like this show, check out cultureinsports.com where you'll find more articles, shows, webinars, summits, and courses for sports leaders of all levels.