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MURPHY V. NCAA: THE CONSTITUTIONALITY OF STATE-AUTHORIZED SPORTS GAMBLING

*by: Shane Landers**

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I. INTRODUCTION

“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.”¹ Thus, “Congress may not simply ‘commande[e]r the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”² In *Murphy v. NCAA*, the United States Supreme Court held that a federal law that prevents States from legalizing sports gambling “violates the anticommandeering rule.”³ The Supreme Court’s decision in *Murphy* reemphasizes a fundamental principle of dual sovereignty—Congress is prohibited from “issu[ing] direct orders to the governments of the States.”⁴

This Note will demonstrate how the Supreme Court correctly precluded Congress from barring State-authorized sports gambling. Part II of this Note provides a background and explains the *Murphy* rationale. Part III analyzes the *Murphy* decision, explaining how the Supreme Court adequately justified its ruling. Part IV concludes this Note with a discussion on public policy and *Murphy*’s effect on existing laws.

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¹ U.S. CONST. amend. X.

² *New York v. United States*, 505 U.S. 144, 161 (1992) (citing *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)).

³ *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1478 (2018).

⁴ *Id.* at 1476.

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II. *MURPHY V. NCAA*

A. *Background*

In 1992, Congress enacted the Professional and Amateur Sports Protection Act (“PASPA”), which precluded governmental entities from authorizing sports gambling.⁵ PASPA contained “grandfather” provisions that allowed sports gambling activities to continue in jurisdictions where it was already permitted.⁶ PASPA also “gave New Jersey the option of legalizing sports gambling in Atlantic City—provided that it did so within one year of [PASPA’s] effective date.”⁷ However, New Jersey waited twenty years to act.

In 2012, the New Jersey legislature authorized a law permitting sports gambling.⁸ The National Collegiate Athletic Association (“NCAA”) and the major professional sports leagues brought an action in federal court, arguing that New Jersey’s 2012 sports gambling law violated PASPA.⁹ The district court agreed that the law violated PASPA and the Third Circuit affirmed the district court’s ruling.¹⁰ The Supreme Court denied certiorari because New Jersey was free to repeal prohibitions against sports gambling “that it had chosen to adopt prior to PASPA’s enactment.”¹¹

In 2014, New Jersey enacted a new law that repealed some existing prohibitions on sports gambling.¹² The NCAA and the professional sports leagues returned to federal court and challenged New Jersey’s new law.¹³ Again, the district court and the Third Circuit found that New Jersey’s new sports gambling law violated PASPA.¹⁴ This time, however, the Supreme Court granted review to decide the important constitutional question of whether PASPA violated the anticommandeering doctrine.¹⁵

B. *Holding and Reasoning*

In a 7–2 decision written by Justice Samuel Alito, the Supreme Court held that PASPA’s prohibition on the authorization of sports gambling violated the anticommandeering rule.¹⁶ The Court began by explaining that the anticommandeering doctrine “is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States.”¹⁷ The Tenth Amendment of the

⁵ 28 U.S.C. § 3702 (2012), *invalidated* by *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018).

⁶ *Murphy*, 138 S. Ct. at 1471 (citing 28 U.S.C. § 3704(a)(1)–(2)).

⁷ *Id.* (citing 28 U.S.C. § 3704(a)(3)).

⁸ *See id.* (citing 2011 N.J. Laws 1723).

⁹ *Id.*

¹⁰ *Id.* (citing *Nat’l Collegiate Athletic Ass’n v. Christie*, 730 F.3d 208 (3d Cir. 2013)).

¹¹ *See id.* at 1472 (citing *Christie v. Nat’l Collegiate Athletic Ass’n*, 134 S. Ct. 2866 (2014)).

¹² *See id.* (citing 2014 N.J. Laws 602).

¹³ *See id.*

¹⁴ *Id.* (citing *Nat’l Collegiate Athletic Ass’n v. Christie*, 832 F.3d 389 (3d Cir. 2016)), *rev’d sub nom.* *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461 (2018).

¹⁵ *Murphy*, 138 S. Ct. at 1473.

¹⁶ *Id.* at 1468, 1478.

¹⁷ *Id.* at 1475.

Constitution, as the Court explained, confirms that all legislative powers not delegated to Congress are reserved for the States.¹⁸ Accordingly, the Court reasoned that PASPA’s ban on the authorization of sports gambling achieved exactly what the anticommandeering doctrine prevents—it “unequivocally dictate[d] what a state legislature may and may not do.”¹⁹

The Court also rejected the argument that PASPA’s ban on the authorization of sports gambling constituted a valid preemption provision.²⁰ For the provision to preempt state law, “it must represent the exercise of a power conferred on Congress by the Constitution.”²¹ The provision must also “be best read as one that regulates private actors.”²² The Court reasoned that PASPA’s prohibition on the authorization of sports gambling was not a valid preemption “because there is no way in which this provision can be understood as a regulation of private actors.”²³ The provision, as the Court explained, did not confer any federal rights on private actors, nor did it impose any federal restrictions on private actors.²⁴

Having concluded that PASPA’s ban on the authorization of sports gambling violated the anticommandeering doctrine, the Court then considered whether the rest of PASPA could be severed, and thus survive. For the remainder of PASPA to fail, it must be “evident that [Congress] would not have enacted those provisions which are within its power, independently of [those] which [are] not.”²⁵ In other words, the question is whether the law remains “fully operative” without the invalid provisions.²⁶

In a 6–3 vote, the Supreme Court held that no PASPA provisions were severable.²⁷ PASPA prohibited the spread of State-run sports lotteries.²⁸ The court reasoned that Congress would not have wanted to continue preventing States from operating sports lotteries if private sports gambling were permitted.²⁹ State-run lotteries “were thought more benign than other forms of gambling.”³⁰ As the Court explained, legalizing sports gambling in privately owned casinos while prohibiting State-run sports lotteries “would have seemed exactly backwards.”³¹

Similarly, the Court reasoned that if Congress had known that States would be free to authorize sports gambling, Congress would not have wanted to continue the restrictions on private entities.³² “Under [PASPA] § 3702(2), private conduct violates federal law only if it is

¹⁸ *Id.* at 1476.

¹⁹ *Id.* at 1478.

²⁰ *Id.* at 1479.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 1481.

²⁴ *See id.*

²⁵ *Id.* at 1482 (citing *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987)) (internal quotation marks omitted).

²⁶ *Id.* (citing *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010)).

²⁷ *See id.* at 1484.

²⁸ *See id.* at 1482.

²⁹ *See id.*

³⁰ *Murphy*, 138 S. Ct. at 1482.

³¹ *Id.* at 1483.

³² *See id.*

permitted by state law.”³³ As the Court demonstrated, if a State’s people supported the legalization of sports gambling, federal law would still make the activity illegal.³⁴ But if a State outlawed gambling, that activity would be lawful under PASPA.³⁵ The Court did not think that Congress “ever contemplated that such a weird result would come to pass.”³⁶

PASPA’s prohibition on advertising sports gambling was also deemed inseverable.³⁷ If the advertising prohibition remained, “federal law would forbid the advertising of an activity that is legal under both federal and state law, and that is something that Congress has rarely done.”³⁸ Accordingly, the Court ruled that legalizing sports gambling is not the Court’s decision to make.³⁹ “Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own.”⁴⁰

III. ANALYSIS OF THE *MURPHY* RATIONALE

A. *Does PASPA Violate the Anticommandeering Doctrine?*

PASPA violates the core tenants of dual sovereignty by forcing States to prohibit sports gambling, regardless of each State’s preferences. Such federal overreach is in direct conflict with a State’s freedom to enact, modify, and repeal its own laws as it sees fit. The anticommandeering doctrine exists to secure a fundamental concept that is incorporated into the Constitution—the autonomy of each State to wield sovereign powers. In *Murphy v. NCAA*, the Supreme Court correctly applied the anticommandeering rule and precluded Congress from issuing direct orders to State governments.

“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.”⁴¹ “Congress exercises its conferred powers subject to the limitations contained in the Constitution.”⁴² Thus, “Congress may not simply ‘commande[e]r the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”⁴³

The Constitution explicitly “confers upon Congress the power to regulate individuals, not States.”⁴⁴ For example, in *Printz v. United States*, the Supreme Court held that the Federal Government could not require local law-enforcement officers to perform background checks for

³³ *Id.*

³⁴ *Id.* at 1483–84.

³⁵ *Id.* at 1484.

³⁶ *Id.*

³⁷ *See id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 1484–85.

⁴¹ U.S. CONST. amend. X.

⁴² *New York v. United States*, 505 U.S. 144, 156 (1992).

⁴³ *Id.* at 161 (citing *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)).

⁴⁴ *Id.* at 166.

gun sales.⁴⁵ By contrast, in *South Carolina v. Baker*, the Supreme Court upheld a federal tax law that did not “seek to control or influence the manner in which States regulate private parties.”⁴⁶

Here, PASPA § 3702(1) makes it unlawful for “a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on one or more competitive games in which amateur or professional athletes participate.”⁴⁷ In other words, PASPA commands States to refrain from authorizing sports gambling laws. This provision requires State governmental entities to regulate their citizens in a certain way, which is similar to the law in *Printz v. United States* that the Court deemed unconstitutional.⁴⁸ Moreover, unlike the tax law in *South Carolina v. Baker*, PASPA’s prohibition on authorizing sports gambling was an obvious attempt to control or influence the way a State government regulates private parties.⁴⁹

As the Court explained in *Murphy*, the counterargument that PASPA imposes a prohibition rather than commands affirmative action is empty.⁵⁰ “[T]here is simply no way to understand the provision prohibiting state authorization as anything other than a direct command to the States,”⁵¹ which is exactly what the anticommandeering doctrine prohibits.⁵² Put simply, PASPA commands State governments, rather than private individuals, to act—or not act—in a certain way. Accordingly, the Supreme Court in *Murphy* correctly precluded Congress from commandeering State processes, and PASPA does not preempt state law.

B. *Are the Unconstitutional PASPA Provisions Severable?*

Congress likely would not have wanted to retain the remaining PASPA provisions if it was aware that a State could authorize its own sports gambling laws. Without rewriting the law altogether, PASPA fails to remain fully operative without its prohibition against State-authorized sports gambling. Thus, the Supreme Court correctly ruled that no PASPA provisions should survive.

The Court will sever provisions if it is “evident that the Legislature would not have enacted those provisions which are within its power, independently of [those] which [are] not.”⁵³ In other words, the question is whether the surviving provisions remain “fully operative” after severing the invalid provisions.⁵⁴

To be severable, provisions must be capable of “functioning independently.”⁵⁵ For example, in *Free Enterprise Fund*, the Supreme Court held that part of the Sarbanes-Oxley Act

⁴⁵ *Printz v. United States*, 521 U.S. 898, 933 (1997).

⁴⁶ *South Carolina v. Baker*, 485 U.S. 505, 514 (1988).

⁴⁷ 28 U.S.C. § 3702(1) (2012).

⁴⁸ *See Printz*, 521 U.S. at 933.

⁴⁹ *See South Carolina*, 485 U.S. at 514.

⁵⁰ *See Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1478 (2018).

⁵¹ *Id.* at 1481.

⁵² *Id.*

⁵³ *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987).

⁵⁴ *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2012).

⁵⁵ *See id.*

was unconstitutional.⁵⁶ However, the Court severed and upheld the remaining provisions of the Sarbanes-Oxley Act because the “remaining provisions [were] not ‘incapable of functioning independently.’”⁵⁷ By contrast, in *Railroad Retirement Board*, the Supreme Court held that certain provisions of the Railroad Retirement Act were inseverable because it was “unthinkable” and “impossible” that Congress would have created the act without its unenforceable provisions.⁵⁸

PASPA prohibited the spread of private sports gambling and State-run sports lotteries.⁵⁹ If States were free to authorize sports gambling in privately owned establishments, it is hard to imagine that Congress would have wanted to continue prohibiting State-operated sports lotteries. Prohibiting the States from reaping the economic benefits of a commercial activity seems against the best interests of the States, especially if that activity is already permitted between private parties.

Further, Congress intended every PASPA provision to work in tandem. Under § 3702(2), private conduct violates PASPA only if the party acted pursuant to state law.⁶⁰ If the Court severed § 3702(2) from § 3701(1), States would have legal authority to authorize private sports gambling, yet PASPA would still prohibit private actors from gambling. Although § 3702(2) may be capable of functioning independently, such functioning would be in direct conflict with the voters’ wishes. Congress would have never enacted PASPA without its unenforceable provisions, just as Congress would have never passed the Railroad Retirement Act without the provisions that the Court found unconstitutional in *Railroad Retirement Board*.⁶¹

PASPA is simply incapable of fully operating without its prohibition on State-authorized sports gambling. Elected officials would have never intended to belittle the democratic process by enacting policy that directly contradicts public opinion. Accordingly, the Supreme Court in *Murphy* correctly ruled that no PASPA provisions should survive.

IV. CONCLUSION: EXISTING LAWS AND PUBLIC POLICY

The anticommandeering doctrine promotes political and economic accountability.⁶² Congress must conduct an economic cost analysis when it regulates activities directly.⁶³ However, such an economic analysis is needless at the federal level when Congress can simply force States to regulate on its behalf.⁶⁴ Forcing States to regulate shifts the economic burdens of regulation to the States, regardless of the State’s individual economic conditions.⁶⁵ Despite being largely prohibited, sports gambling remains a massive black-market industry. Regulating such an industry requires tremendous economic contributions. Absent the anticommandeering doctrine,

⁵⁶ *Id.* at 492.

⁵⁷ *Id.* at 509.

⁵⁸ *See R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 362 (1935).

⁵⁹ *See* 28 U.S.C. § 3702 (2012).

⁶⁰ *Id.* § 3702(2).

⁶¹ *See R.R. Ret. Bd.*, 295 U.S. at 362.

⁶² *See Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1477 (2018).

⁶³ *See id.*

⁶⁴ *See id.*

⁶⁵ *See id.*

Congress could freely use the States as its economic pawns. The decision to legalize—or not legalize—sports gambling is best left to each individual State.

Many federal laws governing marijuana, gun ownership, and immigration arguably commandeer State processes. Thus, the Supreme Court’s decision in *Murphy* will likely have profound effects on these cases that involve a struggle between state and federal law. The *Murphy* ruling stands as a correct decision in favor of political accountability, dual sovereignty, and sound economic policy.