Sports betting, federalism and the Constitution

John M. Greabe

University of New Hampshire School of Law, john.greabe@law.unh.edu

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chasing down every scrap of the story of the fabulous romance and wedding of Prince Harry and his beautiful commoner bride, Meghan Markle.

And why shouldn't we go gaga? Thanks to the House of Windsor, we can get all the pomp we can possibly handle. We can follow every twist and turn of glamorous lives – or so we imagine them – with absolutely no cost to ourselves.

Coronations! Weddings! Births! Tragic funeral processions! Royal soap operas, complete with tuxes and tails, lush formal gowns, top hats and fanciful chapeaux dripping with ribbons and feathers, gem-studded crowns and tiaras, gold carriages and colorful soldiers who princess, Diana. Until it ceased to be a fairy tale, whereupon Diana enjoyed her own glamorous, jet-setting and sadly short life and Charles went on to his second princess, Camilla, stodgy and middle-aged. Much like Charles himself.

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Sports betting, federalism and the Constitution

Justice Sandra Day O'Connor has described federalism – how the Constitution divides powers between the federal government and the states – as “perhaps our oldest question of constitutional law.”

This past week, the United States Supreme Court returned to this oldest of constitutional questions to strike down a federal law that had prohibited states from authorizing betting on competitive sporting events.

As my UNH Law colleague Mike McCann explains (on.si.com/2L8vLUx), the sports and gaming industries will never be the same.

The case that led the Supreme Court to issue its ruling, Murphy v. NCAA, is complicated, but well worth understanding. For it illuminates the modern court's strong commitment to using the power of judicial review to enforce boundaries between federal and state authority.

The Murphy decision arose from a lawsuit initiated by the NCAA and other sports organizations against the State of New Jersey. Philip Murphy is New Jersey's governor and thus was named as a defendant.

The suit was filed after the New Jersey Legislature partially repealed a provision of state law that had prohibited “the placement and acceptance of wagers” on sporting events. This partial repeal was the result of successful efforts by New Jersey law-
'Court's federalism doctrines lack a firm basis in the text of the Constitution'

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makers to make such betting legal at certain establish­ments in Atlantic City. The re­peal was effective only as to wagers by adults on out-of­state sporting events not in­volving New Jersey college teams.

If a lawsuit by sports or­ganizations against a state for repealing an anti-gambling law striking even a little weird, it should. Nonetheless, a 1992 federal statute known as the Professional and Amateur Sports Protection Act (PASPA) invited precisely such legal action.

The PASPA did not make sports gambling a federal crime. Rather, it prohibited states from "authorizing" sports gambling -- exceptions were made for Nevada and three other states that al­ready allowed some form of sports betting. New Jersey asserted, violates the Constitution and have often used in politically con­structed state interests without ju­dicial review to enforce federalism limits on Congress. The court said that the anti-com­mandeering principle prevents Congress from shifting the costs of regulation to the states. If Congress enacts a law and tells the federal execu­tive branch to enforce it, Congress must also appropri­ate the funds needed to enforce the law. Congress thus is forced to weigh the benefits of regulation against its costs.

For now, suffice it to say that we are in an era where the court is quite comfortable in telling Congress that it has gone too far. The Murphy de­cision drives this point home.

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In any event, what matters in this context, the Constitution supports the idea that Congress may only regulate individuals (and not the states). Indeed, these crit­ics say, history is full of exam­ples where Congress has di­rected state officials to act or to refrain from acting. Congress has long been un­derstood, for example, to have the power to enlist state judges to enforce federal laws, and to bar the states from engaging in certain forms of taxation.

More generally, these crit­ics oppose the Supreme Court's practice of using the power of judicial review to en­force federalism limits on Congress. They contest the practice on a number of grounds.

Historically, they say, the court has most frequently harmed its claim to be an in­stitution of law, rather than of politics, when it has invoked federalism to strike down duly-enacted federal statutes. That's because the court's federalism doctrines lack a firm basis in the text of the Constitution and have often been used in politically con­tentious cases. Think here of National Federation of Inde­pendent Business v. Sebelius, the 2012 case involving the constitutionality of the Affordable Care Act, a.k.a. "Obamacare."

Moreover, the critics ar­gue, the very structure of the federal government -- where states have equal representa­tion in the Senate and un­usual powers in the Electoral College -- is designed to pro­tect state interests without ju­dicial involvement. Federalism, these critics say, better left to po­litical processes than to judges in the nation's court­rooms.

In my next column, I will discuss the Supreme Court's history of using, and refrain­ing from using, the power of judicial review to enforce fed­eralism limits on Congress. For now, suffice it to say that we are in an era where the court is quite comfortable in telling Congress that it has gone too far. The Murphy de­cision drives this point home.

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(John Greabe teaches con­stitutional law and related subjects at the University of New Hampshire School of Law. He also serves on the board of trustees of the New Hampshire Institute for Civics Education.)