Sports betting, federalism and the Constitution

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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The suit was filed after the New Jersey Legislature partially repealed a provision of state law that had prohibited "the placement and acceptance of wagers" on sporting events.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-makers.

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A Little Perspective

As a former sportswriter, I'm well aware of sports betting and gambling's appeal to fans. But the idea of legalizing sports betting in the United States has always seemed like a risky proposition.

The Murphy decision now opens the door for states to authorize sports betting, which could have significant implications for both the sports industry and the broader economy. It remains to be seen how this new regulatory landscape will play out, but one thing is certain: the Murphy decision will be remembered as a landmark in the history of American federalism.
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makers to make such betting legal at certain establish-
ments in Atlantic City. The re-
peal was effective only as to
wagers by adults on out-of-
state sports events not in-
volving New Jersey college teams.

If a lawsuit by sports or-ganiza-
tions against a state for
repealing an anti-gambling
law strikes even a little
weird, it should. Nonetheless,
a 1992 federal statute known
as the Professional and Ama-
teur 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 al-
ready allowed some form of
the practice -- and permitted
professional and amateur
sports organizations to bring
lawsuits to halt such reg-
deration.

In any event, what matters
for present purposes is to un-
derstand how New Jersey re-
lied on the Constitution to
defend itself. New Jersey ar-
gued that the PASPA was un-
constitutional insofar as it
commanded the state not to
legalize sports betting.

Such a command from
Congress to a sovereign state,
New Jersey asserted, violates
our federalist structure, as
memorialized in the 10th
Amendment. The 10th
Amendment states: "The
powers not delegated to the
United States by the Constitu-
tion, nor prohibited by it to
the States, are reserved to
the States respectively, or to
the people."

New Jersey lost in the
lower courts but prevailed at
the Supreme Court by a 6-3
vote.

The court likened the
PASPA's command that states
refrain from authorizing
sports betting to two other
federal laws that the court has
trucked for constitu-
tional "commandeering" of
state personnel: a 1965
statute that had ordered
states to deal with the prob-
lem of disposing low-level ra-
dioactive waste in a specified
manner, and a 1993 statute that
required state and local
law enforcement officials to per-
form background checks on
firearms purchasers.

The court said that the
PASPA's command not to
legislate was every bit as much
an insult to state sovereignty
as a direct and unconstitutional
commands that state officials
undertake certain specified
actions.

So why does it violate the
Constitution for Congress to
issue commands directing
state officials to act or to re-
frain from acting? In Murphy,
the court provided three rea-
sons for its conclusion that, in
this context, the Constitution
"commands" that the states
perform certain actions.

First, the court sees the
anti-commandeering prin-
цип as essential to the protec-
tion of individual liberty. As
the court put it in Murphy: "A
healthy balance of power be-
 tween the States and the Fed-
eral Government reduces the
risk of tyranny and abuse
from either front."

Second, the court believes
that the anti-commandeering
principle promotes political
accountability. If instead of
enacting the PASPA,
Congress had simply banned
individuals from sponsoring
or engaging in sports betting,
New Jersey would have had
to know that Congress itself
(and not the New Jersey Leg-
islature) was the source of
the ban. The anti-command-
eering principle prevents
Congress from shifting respon-
sibility for controversial
policies to state officials.

Third, and relatedly, the
court says that the anti-com-
mandeering principle pre-
vents Congress from shifting
the costs of regulation to the
states. If Congress enacts a
law and tells the federal exec-
utive branch to enforce it,
Congress must also appro-
priate the funds it will need
to enforce the law. Congress
thus is forced to weigh the
benefits of regulation against its
costs. The anti-commandeer-
ing principle prevents Congress
from avoiding this cost-bene-
fit analysis by burdening the
states with unfunded man-
dates.

The anti-commandeering
principle also has its critics.
Principal y, these critics ar-
gue that nothing in the text,
structure or history of the
Constitution supports the
idea that Congress may only
regulate individuals (and not
the states). Indeed, these cri-
tics say, history is full of exam-
pies where Congress has di-
rectly regulated individuals to
to refrain from acting.

Congress has long been un-
derstood, for example, to have
the power to enlist state judges
to enforce federal laws and
regulations by threatening to
from engaging in certain
costs of taxation.

More generally, these crit-
ics oppose the Supreme
Court's practice of using the
power of judicial review to en-
force federalism limits on
Congress. They contest the
practice on a number of
grounds.

Historically, they say, the
congress most frequently
harming its claim to be an in-
tstitution of law, rather than
of politics, when it has invoked
federalism to strike down
federal laws, and to bar the states
of the Constitution and have often
been used in politically con-
tentious cases. Think here of
the Affordable Care Act, a.k.a. "Oba-
mare."

Moreover, the critics ar-
ke, the very structure of the
federal government -- where
states have equal representation
in the Senate and un-
usual powers in the Electoral
College -- is designed to pro-
tect state interests without ju-
dicial involvement. Federal-
ism battles are, according to
these critics, better left to po-
tical processes than to
judges in the nation's court-
rooms.

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 fed-
eralism 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 de-
tision drives this point home.

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