MURPHY V. NCAA: ANTICOMANDEERING DOCTRINE – A WIN FOR STATE AUTONOMY AND FEDERALISM

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INTRODUCTION

The anticommandeering doctrine is a relatively new principle, only adopted by the United States Supreme Court over the last thirty years. While the doctrine is relatively new, tensions between federal and state powers started with the founding of the country. The Articles of Confederation did not give Congress any direct power to regulate individuals, only to regulate states. After this proved to be an ineffective way of enacting national policy, the United States Constitution specifically gave Congress the power to legislate directly over individuals, instead of just states. To limit federal power and protect state sovereignty, the Constitution limited Congressional power to only the powers enumerated in the Constitution. And, the Tenth Amendment established that any power the Constitution did not delegate to the federal government, it reserved for the states. Missing from Congress’s list of enumerated powers was the authority to command states directly. This structure gave rise to a “dual federalism” model of government, where both states and the federal government had overlapping sovereign powers. Through this structure, the Court developed the anticommandeering doctrine which prohibits the federal government from usurping state power by commanding states or state officials to act.

In Murphy v. NCAA, the Court considered the applicability of the anticommandeering doctrine to a conflict between federal and state law arising out of New Jersey’s desire to legalize sports gambling in apparent violation of the federal Professional and Amateur Sports Protection Act (PASPA). Justice Alito, writing for the majority, stated that the Court’s duty was to determine if PASPA “[was] compatible with the system of ‘dual sovereignty’ embodied in the Constitution.” In finding PASPA incompatible with the dual sovereignty model,
the Court expanded the applicability of anticommandeering doctrine to another type of federal-state conflict.\(^{12}\)

This Case Comment will review the history of state opposition to federal policies, the Court’s key decisions surrounding the anticommandeering doctrine, and recent developments that suggest a more cooperative modern approach to power sharing between the states and federal government. Then, the Comment will provide a summary of the Court’s opinion in \textit{Murphy}. Finally, the Comment will argue that while the Court reached the incorrect decision on the severability question in \textit{Murphy}, the protections granted to state autonomy are good for federalism and democracy and will provide additional protections to current state opposition laws.

I. BACKGROUND

A. Historical State Nullification Movements

In the eighteenth and nineteenth centuries, state opposition to federal policy fell under the title of “nullification.”\(^{13}\) States that nullified a federal law, declared the law unconstitutional and rendered it inoperative within that state’s borders.\(^{14}\) The first states to assert their power to declare a federal law unconstitutional were Virginia and Kentucky when they nullified the Alien and Sedition Acts in 1789 and 1799, respectively.\(^{15}\) While the confrontation over the Alien and Sedition Acts fizzled after the Federalists lost power in 1801, states continued to nullify federal laws over the next half century.\(^{16}\) In some cases, state opposition led to significant conflict between federal and state governments, and in other cases, to the repeal or modification of the offensive provisions.\(^{17}\) The most recent applications of the nullification doctrine occurred in the 1950s and 1960s in response to federal efforts to end segregation.\(^{18}\) Several states nullified the Court’s holding in \textit{Brown v. Board of Education}.\(^{19}\) In response, the Court rejected the validity of the nullification doctrine in two cases: \textit{Cooper v. Aaron},\(^{20}\) establishing that states are bound by the Court’s decisions, and \textit{United States v. Louisiana},\(^{21}\) rejecting nullification as a defiance of constitutional authority.\(^{22}\)

\(^{12}\) \textit{Id.} at 1467.

\(^{13}\) Kight, \textit{supra} note 2, at 524–25; Raynor, \textit{supra} note 2, at 619.

\(^{14}\) Kight, \textit{supra} note 2, at 524 (citing \textit{BLACK’S LAW DICTIONARY} 1173); Raynor, \textit{supra} note 2, at 619.


\(^{16}\) Raynor, \textit{supra} note 2, at 621–22. (Massachusetts nullified the Fourth Embargo Act in 1807; South Carolina nullified the “Tariff of Abominations” in 1832 leading to the “Nullification Crisis;” Massachusetts, Wisconsin, and Vermont nullified the Fugitive Slave Act in 1850). \textit{Id.}

\(^{17}\) \textit{Id.} at 622.

\(^{18}\) Kight, \textit{supra} note 2, at 533; Raynor, \textit{supra} note 2, at 623.

\(^{19}\) Kight, \textit{supra} note 2, at 533.


\(^{21}\) 364 U.S. 500 (1960).

\(^{22}\) Raynor, \textit{supra} note 2, at 623.
B. Supremacy Clause

The Court often discusses the anticommandeering doctrine in conjunction with the Supremacy Clause. Under the Supremacy Clause, state laws that conflict with validly enacted federal laws can be found unconstitutional if federal and state laws cannot coexist. The Court identified three types of preemption under which federal law takes precedence: conflict, express, and field preemption. Under conflict preemption, state laws can be preempted when they impose a duty that is inconsistent with federal law, which makes compliance with both laws impossible. Under express preemption, Congress can explicitly bar state regulation in a field it has chosen to regulate. Finally, under field preemption, Congress can preempt state regulation when federal statutes provide such comprehensive regulation of a field as to reflect a congressional intent to bar state regulation in that field. For preemption to apply, Congress must exercise a power granted to it under the Constitution, and the law must be a regulation of private individuals.

While preemption can be a powerful tool in striking down state laws that are inconsistent with federal law, courts have long presumed state laws to be valid when Congress legislates in a field traditionally occupied by states. Similarly, if Congress leaves states with significant discretion for regulating an activity, the presumption of validity of the state law applies. Depending on the area of law, courts may apply preemption broadly or narrowly.

C. The Court’s Development of the Anticommandeering Doctrine

A significant counterweight to preemption exists in the anticommandeering principle of the Tenth Amendment. Where Congress exceeds its power by regulating states, the Court can find a violation of the

24 U.S. CONST. art. VI, cl. 2; Young, supra note 2, at 1068.
25 Murphy v. Nat’l Collegiate Athletic Ass’n, 138 S. Ct. 1461, 1480 (2018); see also, Chemerinsky et al., supra note 20, at 104–05.
27 Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383–84 (1992); Chemerinsky et al., supra note 20, at 105 (citing several Supreme Court cases demonstrating the principle).
29 Murphy, 138 S. Ct. at 1479.
30 Chemerinsky et al., supra note 20, at 105.
31 Id. at 108.
anticommandeering principle. In *New York v. United States*, the Court held that provisions of the Low-Level Radioactive Waste Policy Act (the Act) violated the Tenth Amendment by commandeering state legislatures. The “take title” provision of the Act required states to choose between regulating pursuant to congressional instructions or taking title to the low level radioactive waste within their borders. The Court determined that both options provided to states were outside the scope of congressional power because either way, the Act commandeered the legislative processes of the states by directly compelling states to enact and enforce a federal regulatory program. The Court held that giving states a choice between two unconstitutional provisions was “no choice at all,” and found the provision to be unconstitutional under the anticommandeering doctrine of the Tenth Amendment.

In *Printz v. United States*, the Court considered the constitutionality of provisions of the Brady Handgun Violence Prevention Act which required the chief law enforcement officer of each local jurisdiction to conduct background checks for handgun sales on an interim basis. The Court determined the federal government’s power would be impermissibly augmented if it could conscript into service the police officers of the fifty states. The Court expanded its holding in *New York* by holding that under the anticommandeering doctrine, it is equally impermissible for Congress to compel state officers to enforce a federal law as it is for Congress to compel state legislatures to act. While *New York* and *Printz* limit Congress’s ability to require state legislators or officials to act in a particular way, Congress can still induce states to act so long as it avoids giving direct commands.

**D. How Congress Can Regulate States**

Congress can regulate states in a number of ways, including through the regulation of state activities, through a program of “cooperative federalism,” or through its Spending Power. In *Reno v. Condon*, the Court held that a federal law which regulated disclosure of personal driver’s license information did not violate the anticommandeering principles. The law did not require the state to enact any laws or regulations, nor did it require state officials to assist in enforcement of federal statutes; it simply regulated state activities without impermissibly controlling how states regulated private parties. *Reno* allows Congress to

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35 *New York*, 505 U.S. at 176.
36 Id. at 175.
37 Id. at 176 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass’n.*, 452 U.S. 264, 288 (1981)).
38 Id.
39 521 U.S. at 902–03.
40 Id. at 922.
41 Id. at 935.
42 528 U.S. 141, 151 (2000).
regulate state actions so long as the federal government can enforce the regulation without the aid of state legislatures or officials. In Hodel v. Virginia Surface Mining & Reclamation Association, the Court upheld a federal program of “cooperative federalism” that required states to either enact their own regulatory program that met federal minimum standards or to be subject to the federal regulatory scheme. Under Hodel, Congress can regulate certain in-state activities so long as the federal government bears the cost of enforcement if a state chooses not to enact its own conforming law. In Federal Energy Regulatory Commission v. Mississippi, the Court upheld a law that directed state utility commissions to consider, but not necessarily adopt, federal rate and regulatory standards, finding the requirement did not compel the exercise of state sovereign power. A Congressional requirement that states consider a federal standard is far less obtrusive than a command to act or help enforce a federal law.

Finally, Congress has broad ability to encourage state action through its Spending Power, which allows Congress to provide conditional federal grant money to states that meet its requirements. Programs like No Child Left Behind and state minimum drinking laws are examples of Congress’s ability to regulate beyond the scope of the Commerce Clause in areas traditionally reserved for state sovereignty. In these cases, there is no violation of the Tenth Amendment because Congress does not mandate any state action; rather, Congress relies on one of the other powers granted to it in the Constitution. Nevertheless, Congress can still exceed the Spending Power when it issues spending directives “so coercive as to pass the point at which ‘pressure turns into compulsion.’” The Court found a provision of the Patient Protection and Affordable Care Act (ACA) unconstitutionally coercive because it conditioned a state’s receipt of Medicaid funding on the state’s acceptance of a Medicaid expansion under the ACA. To date, this is the only provision of a federal statute the Court has found to exceed Congressional Spending Power.

E. State Actions Challenging Federal Supremacy

Recently, states have challenged federal power in a variety of ways. Over the last twenty years, federal and state laws have clashed on topics including: marriage equality, immigration, marijuana regulation, gun regulation,
and health care. These state measures fall short of invoking the full destructive power of the historic nullification doctrine. While these efforts aim to limit federal power and preserve state autonomy, states challenging federal laws accept judicial supremacy in litigated cases, limiting the disruptive potential of the state sovereignty movement. Some state laws have been successful in coexisting with conflicting federal law, while others have been unsuccessful.

1. State Law Regulating Marijuana

In general, states have been successful in implementing their own marijuana regulations. As of January 23, 2019, thirty-three states, the District of Columbia, Guam, and Puerto Rico have approved comprehensive medical marijuana regulations. An additional thirteen states allow the use of low THC, high cannabidiol products for medical purposes. Outside of medicinal use, ten states and the District of Columbia have legalized small amounts of marijuana for adult recreational use. Increasingly, states are considering further legalization through legislative or ballot measures. All the while, marijuana remains classified as a Schedule I drug under the Controlled Substances Act (CSA), placing state and federal cannabis regulations in conflict.

The current détente between federal and state authorities regarding state marijuana regulation is a recent development. When California first approved medical marijuana in 1996, the U.S. Department of Justice (DOJ) and Department of Health and Human Services responded by threatening any physician who prescribed a Schedule I drug with revocation of her or his DEA registration, and exclusion from Medicare and Medicaid reimbursements. In 2005, the Court held that Congressional regulation of marijuana is within Congress’s Commerce Clause authority, even when the marijuana does not cross state lines. Despite the Court’s ruling that the CSA is constitutional, and despite no action from Congress

55 Dinan, supra note 54, at 1639–40; Raynor, supra note 2, at 655.
56 Dinan, supra note 54, at 1640; Raynor, supra note 2, at 656–57.
57 Chemerinsky et al., supra note 20, at 77 (noting that twenty-three states have legalized medical marijuana and two have legalized recreational use).
59 Id.
61 Id.
63 Kight, supra note 2, at 547.
65 Gonzales v. Raich, 545 U.S. 1, 6 (2005); Kamin, supra note 54, at 1106.
to either remove marijuana from the Schedule I list or decriminalize it, states have continued to pass local marijuana legislation.66

Marijuana’s continued classification as a Schedule I narcotic means its manufacture, distribution, and possession are prohibited at the federal level.67 After the passage of the CSA, marijuana was prohibited in all fifty states.68 While the prohibition exists at the federal level, nearly all marijuana enforcement in the country takes place at the state or local level.69 Perhaps because of this reliance on local enforcement, federal regulators began taking a more cooperative approach to state legalization efforts after more states legalized some forms of marijuana.70 The federal government has continued to allow state regulation, as evidenced by the DOJ’s decision to deemphasize enforcement of federal marijuana laws in circumstances where individuals are complying with state law.71 This decision still leaves marijuana in a tenuous position as it remains federally illegal, and a change in administration can change enforcement priorities.72 In fact, in January 2018, then-Attorney General Jeff Sessions withdrew the Cole Memorandum which outlined the DOJ’s position on state marijuana regulation.73 Despite this, additional anti-marijuana federal action did not materialize.74

2. State Laws Regulating the Affordable Care Act

In 2010, Congress enacted the ACA, regulating minimum health insurance standards and requiring nearly all individuals to purchase health insurance, or pay a fine by 2014.75 The ACA faced political and public opposition, especially with

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66 Kight, supra note 2, at 547.
67 Chemerinsky et. al., supra note 20, at 82–83; Kamin, supra note 54, at 1106.
68 Chemerinsky et. al., supra note 20, at 83.
69 Id. at 84 (noting that, in 2012, the ratio of state and local arrests to federal arrests was 109:1).
70 See, e.g., Id. at 86 (citing the memo of then-Deputy Attorney General Ogden, that “federal priorities should not focus federal resources . . . on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.” U.S. Dep’t of Justice, Office of the Deputy Attorney General, Memorandum for Selected United States Attorneys: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana 1-2 (2009)); Kight, supra note 2, at 548.
71 Chemerinsky et al., supra note 20, at 77 (citing to the 2013 Cole Memorandum).
72 Id. at 90–91.
regard to the public option and minimum coverage provisions.\footnote{Robert Claiborne, Jr., Why Virginia’s Challenges to the Patient Protection and Affordable Care Act Did Not Invoke Nullification, 46 U. Rich. L. Rev. 917, 919 (2012); Raynor, supra note 2, at 614.} After the passage of the ACA, fifteen states adopted statutes or constitutional amendments challenging the constitutionality of the individual mandate.\footnote{Dinan, supra note 54, at 1660. These states were: Arizona, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Missouri, Montana, New Hampshire, North Dakota, Oklahoma, Tennessee, Utah, and Virginia. Id.}

An example of one of these laws, the Virginia Health Care Freedom Act, provided that “[n]o resident of this Commonwealth . . . shall be required to obtain or maintain a policy of individual insurance coverage except as required by a court.”\footnote{Va. Code Ann. § 38.2-3430.1:1 (2014).} Some states’ laws went further and prohibited local and state officials from implementing or enforcing federal health care reform.\footnote{Dinan, supra note 54, at 1662.} One reason states enacted these healthcare freedom statutes was to create a conflict between state and federal law that would allow states to challenge the constitutionality of the mandate in court.\footnote{Claiborne, Jr., supra note 76, at 922.} Virginia’s lawsuit challenging the ACA was ultimately unsuccessful. The Fourth Circuit Court of Appeals dismissed the lawsuit for lack of standing, and the Supreme Court denied certiorari.\footnote{Virginia ex. Rel. Cuccinelli v. Sebelius, 656 F.3d 253, 266 (4th Cir. 2011); Claiborne, Jr., supra note 76, at 923.}

In 2012, the Supreme Court evaluated the constitutionality of the ACA under the Commerce Clause, Necessary and Proper Clause, Taxing Power, and Spending Power.\footnote{Nat’l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).} The Court held that the individual mandate exceeded Congress’s power to regulate under the Commerce Clause but upheld the law on grounds that the penalty is a tax that Congress is permitted to enact under its Taxing Power.\footnote{Id.} Additionally, the Court held that the Medicaid expansion, enacted as part of the ACA, was an unconstitutional application of Congress’s Spending Power because it was overly coercive on state governments that did not wish to participate.\footnote{Coan, supra note 23, at 11–12.} To date, tension remains between states and the federal government on implementing health insurance marketplaces and expanding Medicaid coverage, with fourteen states still not expanding Medicaid.\footnote{Louise Norris, Medicaid Coverage in Your State, HEALTHINSURANCE.ORG (Jan. 18, 2019), https://www.healthinsurance.org/medicaid/.}

3. State Laws Regulating Immigration

Immigration enforcement has caused conflict among nearly every level of government in the United States.\footnote{Amdur, supra note 43, at 88.} The power to regulate immigration is exclusively federal, finding its source in the Naturalization Clause.\footnote{Huyen Pham, The Constitutional Right not to Cooperate? Local Sovereignty and the Federal Immigration Power, 74 U. Cin. L. Rev. 1373, 1381 (2006) (also suggesting the power could}
federal, state, and local governments all play a role in enforcing immigration laws.\textsuperscript{88} This interplay between state and federal governments is necessary because states, not the federal government, have the authority to enforce general criminal laws.\textsuperscript{89} Immigrants who engage in criminal activity are a priority for deportation, but without state or local resources, the federal government lacks information on criminal activity.\textsuperscript{90} This knowledge gap has resulted in several conflicts between state and federal authorities.

One area in which conflicts arise is when state laws attempt to provide enhanced enforcement of federal law.\textsuperscript{91} In 2010, Arizona passed the Support Our Law Enforcement and Safe Neighborhoods Act (SB 1070), which was intended to augment federal efforts in curtailing illegal immigration.\textsuperscript{92} SB 1070 authorized state officers to make warrantless arrests of individuals if an officer had probable cause to believe the individual had committed an offense that rendered them deportable, and required officers to make a reasonable attempt to determine a detained individual’s immigration status.\textsuperscript{93} The law also made failure to comply with federal registration requirements a misdemeanor and prohibited undocumented immigrants from seeking employment in the state.\textsuperscript{94} While the Court upheld SB 1070’s provision permitting officers to make inquiries regarding an individual’s immigration status, the Court found all other provisions preempted by federal immigration law.\textsuperscript{95}

State laws that limit state or local cooperation with federal immigration authorities are on the other side of the spectrum from laws like SB 1070. In recent years, the concept of “sanctuary cities” has become a part of the national immigration debate.\textsuperscript{96} These cities and states do not help enforce federal immigration laws—a stance rooted in laws from the 1980s.\textsuperscript{97} Local objections to helping enforce immigration laws arise out of several concerns.\textsuperscript{98} First, cities are concerned that undocumented aliens will be less likely to report crime if they fear being reported to immigration officials, making the cities’ policies more difficult to enforce.\textsuperscript{99} Second, some local and state officials are concerned about advancing federal policies they deem overly harsh.\textsuperscript{100} Finally, local and state governments derive from the Foreign affairs Clauses, the Commerce Clause, and the nation’s inherent power as a sovereign).

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\textsuperscript{88} Amdur, supra note 43, at 90; Pham, supra note 87, at 1382.
\textsuperscript{89} Amdur, supra note 43, at 90.
\textsuperscript{90} Id.; Allegra McLeod, The U.S. Criminal-Immigration Convergence and its Possible Undoing, 49 AM. CRIM. L. REV. 105, 107 (2012).
\textsuperscript{91} Raynor, supra note 2, at 630.
\textsuperscript{94} Id. at §§ 13-1509, 2928(C).
\textsuperscript{95} Arizona v. United States, 567 U.S. 387 (2012).
\textsuperscript{96} Amdur, supra note 43, at 89.
\textsuperscript{97} Id.; Pham, supra note 87, at 1383.
\textsuperscript{99} Id. at 129.
\textsuperscript{100} Id.
are concerned about the cost enforcement of federal immigration policies may impose on local resources. While federal officials cannot conscript state officials to enforce immigration laws, it is unclear how far the federal government can induce states and localities to act through spending provisions and the like.

4. State Laws Regulating Gun Control

Another, mostly unsuccessful, attempt by states to make their own policies arose out of concerns about the potential for more stringent federal gun control legislation. Nine states enacted Firearms Freedom Acts (FFAs) which purport to exempt firearms and ammunition, produced, sold, and used exclusively within state borders from federal regulation. In enacting these FFAs, states relied on the Tenth Amendment, among others, to explain their belief that Congress lacked authority under the Commerce Clause to regulate strictly intrastate firearms possession, production, and sales. Some FFAs were more extreme, providing for criminal prosecution of federal officers who attempted to enforce federal gun laws in the state. The FFAs clashed with numerous federal gun laws, including the Gun Control Act of 1968. The federal government responded negatively to FFAs, with multiple federal agencies calling the laws invalid and unconstitutional under the Supremacy Clause. In 2013, the United States Court of Appeals for the Ninth Circuit held Montana’s FFA was “preempted and invalid.” The Supreme Court denied certiorari, leaving these laws invalid, but still on the books, at least for the time being.

F. Sports Betting – First Attempt at Legalization

In 2013, the courts decided NCAA v. Governor of New Jersey, a case related to Murphy, that considered whether New Jersey’s legalization of sports gambling was preempted by PASPA, or whether PASPA unconstitutionally commandeered state legislatures. New Jersey argued the provisions of PASPA amounted to commandeering because they prohibited the state from modifying or

\[\text{REFERENCES}\]

101 Id. at 128–29.
102 Amdur, supra note 43, at 88, 90.
103 Kight, supra note 2, at 551.
104 Id. (citing State By State, FIREARMS FREEDOM ACT (last updated Jan. 30, 2019), http://firearmsfreedomact .com/state-by-state); Dinan, supra note 54, at 1652.
105 Dinan, supra note 54, at 1652; Kight, supra note 2, at 551.
108 Kight, supra note 2, at 553–54.
109 Mont. Shooting Sports Ass’n v. Holder, 727 F.3d 975, 982–83 (9th Cir. 2013).
110 Kight, supra note 2, at 554 (citing Mont. Shooting Sports Ass’n v. Holder, 571 U.S. 1131 (2014)).
repealing its laws prohibiting sports gambling. The United States District Court for the District of New Jersey and the United States Court of Appeals for the Third Circuit ruled against New Jersey, holding the state law violated, and was preempted by PASPA. The Third Circuit further held that PASPA did not violate the anticommandeering principles because it required no affirmative action on behalf of the states. Arguing against certiorari, the NCAA and the United States stated that PASPA did not require New Jersey to keep its current sports betting prohibitions in place. After considering this argument, the Supreme Court denied certiorari. As a result of this decision, PASPA remained in place, but its provisions arguably did not apply to state efforts to repeal sports betting prohibitions. In response, New Jersey removed its sport betting prohibitions, setting the stage for Murphy.

II. Murphy v. National Collegiate Athletics Association

A. Facts

In 1992 Congress enacted PASPA which prohibited governmental entities from “sponsor[ing], operat[ing], advertis[ing], promot[ing], licens[ing], or authorize[ing]” sports gambling schemes. PASPA further prohibited individuals from “sponsor[ing], operat[ing], advertis[ing], or promot[ing]” sports gambling schemes pursuant to the law of a governmental entity. Finally, PASPA provided an exemption for sports gambling operations that were in place prior to the passage of PASPA, and those that were authorized within one year of the effective date of PASPA. PASPA did not make sports gambling a federal crime, but rather authorized professional or amateur sports organizations or the Attorney General to file a civil action to enjoin violations of PASPA. At the time of PASPA’s passage, four states were covered under a “grandfather” provision, and New Jersey was given one year to approve a sports gambling scheme in Atlantic City. New Jersey did not approve sports gambling until 2011. After the courts found New Jersey’s original efforts preempted by PASPA, New Jersey, in view of the arguments presented to the Court arguing against certiorari in NCAA, took a different route to legalizing sports gambling. In 2014, the New Jersey legislature repealed some of its state prohibitions on sports gambling. Specifically, the legislature removed its prohibitions on wagering on sporting

113 Id. at 240–41.
114 Id. at 232.
116 Id.
117 Id.
118 Id.
122 28 U.S.C. § 3703 (West 2018); Murphy, 138 S. Ct. at 1470–71.
123 Murphy, 138 S. Ct. at 1471.
124 Id. at 1472.
125 Id.
events by persons twenty-one years of age or older, at horseracing tracks, casinos, and gambling houses in Atlantic City. The National Collegiate Athletics Association, the National Basketball Association, the National Football League, and the Office of the Commissioner of Baseball (collectively “Sports Leagues”), sued the Governor of New Jersey and other state officials (collectively “New Jersey”) seeking to enjoin New Jersey’s law because it violated PASPA by authorizing sports betting.

B. Procedural History

The United States District Court for the District of New Jersey entered summary judgement in favor of the Sports Leagues and granted a permanent injunction, finding the 2014 law violated PASPA. The United States Court of Appeals for the Third Circuit affirmed the decision and reaffirmed it upon a rehearing en banc, holding further that PASPA’s prohibition on state authorization did not commandeer states in violation of the Constitution. The United States Supreme Court granted New Jersey’s petition for certiorari.

C. Majority Opinion

Justice Alito authored the opinion of the Court. Chief Justice Roberts and Justices Kennedy, Thomas, Kagan, and Gorsuch joined him in full, and Justice Breyer joined him except as to Part VI-B of the opinion. The Court reversed the Third Circuit’s holding, finding that PASPA’s provisions prohibiting state authorization and licensing of sports gambling schemes violated the anticommandeering doctrine of the Tenth Amendment, making the provisions unconstitutional. Further, the Court found that no PASPA provisions were severable from the unconstitutional provisions, and the Court struck the law in full.

Justice Alito opened his opinion by considering whether New Jersey’s selective repeal of its gambling laws—specifically the lifting of prohibitions on sports gambling—qualified as an “authorization” under PASPA. While conceding that a state’s decision not to prohibit a particular activity did not automatically “authorize” that activity, he determined that where a state previously prohibited a particular activity, a repeal of the prohibition, whether full or partial, was tantamount to state authorization of that activity.

127 Murphy, 138 S. Ct. at 1472.
128 Id.
129 Id. at 1473.
130 Id.
131 Id. at 1468.
132 Id.
133 Id. at 1465–67.
134 Id. at 1467.
135 Id. at 1474.
136 Id.
After determining that PASPA’s prohibition applied to New Jersey’s actions, Justice Alito went on to consider the history of the anticommandeering doctrine and the Supreme Court’s decisions surrounding the principle.\(^{137}\) Justice Alito noted that in our system of dual sovereignty, both the states and the federal government wield sovereign powers.\(^{138}\) However, while congressional legislative power is vast, it is limited to only certain enumerated powers.\(^{139}\) Justice Alito stated that all other legislative power is reserved for the states by the Tenth Amendment.\(^{140}\) Absent from Congress’s enumerated powers is the power to issue direct orders to state governments.\(^{141}\) Justice Alito explained that given this fact and the fundamental structure of the Constitution, the anticommandeering doctrine was a recognition of this limitation on congressional authority.\(^{142}\)

The Court next reviewed the cases it had decided relating to the anticommandeering doctrine, primarily *New York* and *Printz*.\(^{143}\) Quoting Justice O’Connor’s opinion in *New York*, the Court noted that the Constitution “confers upon Congress the power to regulate individuals, not [s]tates.”\(^{144}\) Further, the Court stated that “where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.”\(^{145}\) Finally, the Court listed three reasons why adherence to the anticommandeering principle continues to be important.\(^{146}\) First, the doctrine’s division of powers between federal and state governments was one of the Constitution’s structural protections of individual liberty.\(^{147}\) Second, the doctrine promotes political accountability because voters know who to credit or blame for a policy when Congress regulates directly—something voters may be aware of when Congress shifts the responsibility for enacting a policy to the states.\(^{148}\) Third, the doctrine prevents Congress from shifting the costs of a regulation to the states.\(^{149}\)

The Court then determined that PASPA’s prohibition on state authorization of sports gambling “unequivocally dictate[d]” to state legislatures what actions were permitted.\(^{150}\) The Court could not imagine “a more direct affront to state sovereignty” than the PASPA provisions at issue.\(^{151}\) The Court further stated that the anticommandeering prohibition applied equally to laws that required “affirmative action” by the states, like the laws in *New York* and *Printz*,

\(^{137}\) *Id.*

\(^{138}\) *Id.* at 1475–77.

\(^{139}\) *Id.* at 1475.

\(^{140}\) *Id.* at 1476.

\(^{141}\) *Id.*

\(^{142}\) *Id.*

\(^{143}\) *Id.* at 1476–77.

\(^{144}\) *Id.* at 1476. (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)).

\(^{145}\) *Id.* (quoting *New York*, 505 U.S. at 178).

\(^{146}\) *Id.* at 1477.

\(^{147}\) *Id.* (quoting *Printz v. United States*, 521 U.S. 898, 921 (1997)).

\(^{148}\) *Id.*

\(^{149}\) *Id.*

\(^{150}\) *Id.* at 1478.
and to laws that prohibited state action, like PASPA. Finally, the Court rejected the Sports Leagues’ argument that prior cases supported the finding that the anti-authorization provision was constitutional. The Court determined that none of the cases cited by the Sports Leagues involved a federal law that required states to enact or refrain from enacting a regulation of activities occurring exclusively within a state’s borders.

The Court next considered the Sports Leagues’ argument that PASPA represented a valid preemption provision. The Court reviewed the three types of preemption—conflict, express, and field—and determined that all forms of preemption were based on a federal law that regulated the conduct of private parties, rather than states. Therefore, for PASPA to preempt state law, Congress must have exercised a power conferred to it by the Constitution, and the provision must have regulated the conduct of private parties. The Court found the prohibition on state authorization was a direct command to states, rather than a regulation of private parties. Because of this determination, the Court concluded the provision could not preempt state law.

After finding the prohibition of state authorization unconstitutional, the Court considered the fate of the remaining PASPA provisions. First, the Court found the prohibition on state licensing of sports gambling to be unconstitutional for the same reasons as the prohibition on state authorization: it directed states to act instead of regulating individuals. Second, the Court considered the provision prohibiting states from operating sports gambling schemes. Finding it unlikely that Congress would permit private individuals to engage in sports gambling while preventing states from running their own “more benign” sports lotteries, the Court found that the prohibition on state operation of sports gambling schemes was not severable from the unconstitutional provisions of PASPA. Third, the Court found that state sponsorship and promotion of sports gambling were ill-defined categories of conduct, and thus not severable from the unconstitutional provision. Fourth, the Court determined the prohibitions on private party actions in PASPA were meant to work in concert with the provisions on state authorization. The Court noted that leaving the private party prohibitions in place, while allowing state authorization or licensing, would place the private party prohibitions counter to the general federal approach to regulating gambling because federal laws regulating gambling would apply only to activities

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152 Id.
153 Id. at 1478–79.
154 Id.
155 Id. at 1479.
156 Id. at 1480.
157 Id. at 1479.
158 Id. at 1481.
159 Id.
160 Id.
161 Id.
162 Id. at 1482–83.
163 Id.
164 Id. at 1483.
165 Id.
illegal under state law.\textsuperscript{166} Thus, the Court found the private party provisions were not severable from the unconstitutional state authorization and licensing provisions.\textsuperscript{167} Finally, after striking all other parts of PASPA, the Court determined that the provision prohibiting state advertising of sports gambling was not severable because it was improper to prohibit a state from advertising an activity that is legal under both state and federal law.\textsuperscript{168} Finding none of the prohibitions of PASPA severable from § 3702(1), the Court struck the law in full as being inconsistent with the Constitution.\textsuperscript{169} In concluding, the Court stated that if Congress wished to regulate sports gambling, it could do so directly, but barring such regulation, each state was free to determine its own policy with regard to the activity.\textsuperscript{170}

\textbf{D. Justice Thomas’ Concurring Opinion}

Justice Thomas agreed with the majority in full, but wrote separately to emphasize his increasing discomfort with the Court’s severability precedents.\textsuperscript{171} Justice Thomas argued that the Court did not have the power to excise or strike down statutes, only the power to decline to enforce them if they found them unconstitutional.\textsuperscript{172} Additionally, he argued that the severability doctrine goes against the basic principles of statutory interpretation by requiring courts to make a “nebulous inquiry into hypothetical congressional intent.”\textsuperscript{173} Finally, he argued that the severability doctrine brought courts very close to offering advisory opinions because it required them to weigh in on statutory provisions that no party had standing to challenge.\textsuperscript{174} Since no party asked the Court to review its severability precedents in the instant case, Justice Thomas suggested the Court revisit his concerns in the future.\textsuperscript{175}

\textbf{E. Justice Breyer’s Opinion Concurring in Part and Dissenting in Part}

Justice Breyer wrote to agree with the majority regarding the unconstitutionally of the state authorization and licensing provisions and to agree with the dissent with regard to the severability of the private party prohibitions.\textsuperscript{176} He argued that since the private party prohibitions are properly addressed to private parties, they can achieve Congress’s objective of preventing the spread of sports gambling through the direct regulation of interstate commerce; therefore, the provisions should be severable from the unconstitutional provisions of

\begin{itemize}
\item \textsuperscript{166} \textit{Id.}
\item \textsuperscript{167} \textit{Id.} at 1484.
\item \textsuperscript{168} \textit{Id.}
\item \textsuperscript{169} \textit{Id.}
\item \textsuperscript{170} \textit{Id.} at 1484–85.
\item \textsuperscript{171} \textit{Id.} at 1485 (Thomas, J., concurring).
\item \textsuperscript{172} \textit{Id.}
\item \textsuperscript{173} \textit{Id.} at 1486.
\item \textsuperscript{174} \textit{Id.} at 1487.
\item \textsuperscript{175} \textit{Id.} at 1485
\item \textsuperscript{176} \textit{Id.} at 1488 (Breyer, J., concurring in part and dissenting in part).
\end{itemize}
PASPA.\textsuperscript{177} He concluded by stating that his interpretation would give New Jersey a Pyrrhic victory because the real problem with the state authorization and licensing provisions was in their means rather than ends as Congress was within its power to regulate sports gambling by regulating individuals.\textsuperscript{178}

F. Dissenting Opinion

The dissenting opinion, authored by Justice Ginsburg and joined by Justice Sotomayor in full and Justice Breyer in part, focused solely on the severability of the private party prohibitions.\textsuperscript{179} To begin, Justice Ginsburg assumed, \textit{arguendo}, that the state authorization and licensing provisions of PASPA were unconstitutional.\textsuperscript{180} She went on to argue that the unconstitutionality of two provisions of PASPA was no reason to “deploy a wrecking ball destroying [PASPA] in its entirety.”\textsuperscript{181}

Justice Ginsburg wrote that Congress was within its powers to regulate gambling on a nationwide basis, and the remaining provisions of PASPA, banning state-run or privately-operated sports gambling schemes, were also within congressional power.\textsuperscript{182} She argued that the remaining PASPA provisions allowed the statute to achieve Congress’s goals of stopping sports gambling schemes while attributing the prohibitions to federal, not state action.\textsuperscript{183} Further, she argued that given Congress’s concerns about the spread of sports gambling, she could see no reason for Congress to prefer no gambling law, instead of a law that prohibits the operation of sports gambling schemes by individuals and states.\textsuperscript{184} For these reasons, she argued that the Court should continue its practice of salvaging unconstitutional statutes by using a “scalpel to trim” the statute rather than “an ax to cut it down.”\textsuperscript{185}

II. Analysis

While the Court’s decision was proper with regard to the constitutionality of PASPA’s state authorization and licensing provisions, the Court should have found the remaining provisions of PASPA severable from the unconstitutional provisions. Despite the Court’s overbroad holding on severability, its holding is in line with what has occurred in other state-federal conflicts. Since the federal government has not fully regulated in this area, state laws are not preempted. The analysis that follows will first critique the Court’s severability decision. Then, this Comment will argue that maintaining state autonomy is vital to our

\begin{itemize}
\item \textsuperscript{177} \textit{Id.}
\item \textsuperscript{178} \textit{Id.}
\item \textsuperscript{179} \textit{Id.} (Ginsburg, J., dissenting).
\item \textsuperscript{180} \textit{Id.} at 1489.
\item \textsuperscript{181} \textit{Id.}
\item \textsuperscript{182} \textit{Id.}
\item \textsuperscript{183} \textit{Id.}
\item \textsuperscript{184} \textit{Id.} at 1490.
\item \textsuperscript{185} \textit{Id.}
\end{itemize}
democracy, and that recent state opposition movements will be strengthened by the extension of the anticommandeering doctrine in *Murphy*.

A. Wielding an Ax Instead of a Scalpel

The majority opined that Congress would not have wanted to enact the remaining provisions of PASPA—prohibiting state and private party operations, sponsorship or promotion of sports gambling, or state advertising of sports gambling—if it had known the provisions regarding state licensing and authorization would be found unconstitutional. The majority’s opinion flies in the face of the concerns Congress had when it enacted PASPA. Furthermore, the decision to find the whole law unconstitutional, when a more narrow holding was appropriate, departs from the Court’s prior practice on severability.

Congress had two main concerns in enacting PASPA: stop the “spread of state-sponsored gambling and the promotion of gambling among [American] youth.” At the time of PASPA’s passage, many states were considering legalizing various forms of sports gambling to raise state revenues. Congress was concerned that once one state legalized sports gambling, others would be sure to follow. Further, Congress was especially concerned with the impact sports gambling would have on American youth and the integrity of amateur and professional sports. In explaining the policy concerns behind PASPA, Senator Bill Bradley, one of the bill’s sponsors, stated that the “development of state sponsored sports lotteries would exacerbate the problem of teenage gambling.”

Given Congressional concerns, it is highly unlikely that Congress would have passed on any opportunity to keep sports betting from spreading. Congress would not have wanted “no statute at all” instead of a “mere” prohibition on operation, sponsorship, and promotion of sports gambling by states and individuals. Further, as Senator Bradley’s statement demonstrates, Congress did not believe that state-run lotteries were “more benign” than other types of gambling, as the majority argued. Thus, the majority’s decision to find the remaining PASPA provisions inseverable from the unconstitutional provisions goes against congressional intent.

Further, the majority’s decision to find the whole law unconstitutional goes against the Court’s usual practice of salvaging a statute that contains a constitutional flaw. In *New York*, when faced with the issue of severability,

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186 Id. at 1482–84.
191 Id.
192 Id. at 5–6.
193 Bradley, supra note 187, at 7.
195 Id. at 1482.
196 Id. at 1489 (Ginsburg, J., dissenting).
Justice O’Connor stated that “[c]ommon sense suggests that where Congress has enacted a statutory scheme for an obvious purpose, and where Congress has included a series of provisions operating as incentives to achieve that purpose, the invalidation of one of the incentives should not ordinarily cause Congress’s overall intent to be frustrated.” Here, Congress passed a series of prohibitions on state and individual involvement in sports gambling. The provisions regulating individuals are well within Congress’s Commerce Clause power. The provisions regulating state actions are outside of Congressional power due to the Tenth Amendment and anticommandeering doctrine. The invalidation of two provisions that regulate states as violations of the anticommandeering principle should not frustrate Congress’s intent with regard to the provisions that were within its power to enact.

As Justice Ginsburg recognized, the majority should have used “a scalpel to trim the statute” rather than “wielding an ax to cut it down.” Leaving the individual prohibitions in place would have better satisfied congressional intent. Additionally, such a result would better respect the division of powers created in the Constitution between the judicial and legislative branches. The judiciary can interpret the law and determine a law’s constitutionality. But, it is Congress who must make the law. In interpreting a statute, the Court must be guided by statutory purpose and legislative history. The Court’s invalidation of provisions that were within Congress’s power to enact, moves the Court toward making law instead of interpreting it.

While leaving the individual prohibitions in PASPA in place would have resulted in a Pyrrhic victory for New Jersey, it would have been the correct decision; both because regulation of sports gambling is within Congress’s power under the Commerce Clause and because it keeps the court from encroaching on legislative powers. In concluding his opinion, Justice Alito stated that “Congress can regulate sport gambling directly.” The remaining provisions of PASPA, that the majority discarded, were just the type of direct regulation Justice Alito referred to in his opinion. The Court should not have discarded PASPA provisions it admits Congress has the power to enact.

B. Preserving State Autonomy to Protect Federalism and Individual Liberty

198 Id. at 1490; S. REP. No. 102-248, at 6–7 (1991); Bradley, supra note 187, at 12–17.
199 Murphy, 138 S. Ct. at 1467.
200 Id. at 1489 (Ginsburg, J., dissenting).
201 Commonwealth of Massachusetts v. Mellon, 262 U.S. 447, 488 (1923) (“To the legislative department has been committed the duty of making laws, to the executive the duty of executing them, and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts”).
203 Mellon, 262 U.S. at 448 (1923).
205 Murphy, 138 S. Ct. at 1484 (majority opinion).
The Founding Fathers believed that federalism was critical to protecting liberty.206 To reduce the risk of tyranny and abuse, the “Constitution divide[d] authority between federal and state governments for the protection of individuals.”207 Preserving state autonomy is crucial for preserving federalism.208 The Court’s decision to uphold the anticommandeering doctrine and to construe preemption narrowly is crucial to protecting state autonomy and protecting federalism. While states’ ability to act autonomously can bring a number of benefits to our democracy, it can also cause disruption if taken too far.

State autonomy helps create a number of avenues for determining the best approach to a particular problem. First, state opposition can provide a haven for those opposed to federal policies that are perceived to threaten individual rights, as demonstrated by the Firearms Freedoms Acts or ACA opposition.209 Additionally, opposition statutes can create standing for a lawsuit to challenge the federal law by providing an actual controversy between state and federal policies, as they did in the challenges to the ACA.210 Finally, states can provide a vehicle for those not in power at the federal level to implement their policies at a local level, like with marijuana or immigration regulation.211 This not only allows minorities to show that the world will not end if their policies are implemented, it fosters political circulation, allowing those in power at the state level to run for national office based on their state achievements.212 When states have autonomy, the interplay between state and federal power protects individual rights by “empowering and motivating competing sovereigns to thwart the development of excessive concentrations of power.”213

Too much state autonomy can lead to disruptions in national unity and be detrimental to the rule of law, as historical nullification movements have demonstrated.214 However, the modern state opposition movements tend to be less divisive than historical nullification movements.215 One reason for this is, as Claiborne argues in describing Virginia’s Health Care Freedom Act, is that Virginia “respected the Constitution,” and filed suit in court when it was concerned about the unconstitutionality of parts of the ACA.216 Another reason is Congress’s willingness, in some cases, to allow states to serve as laboratories in trying out new social or economic experiments with more limited risk than if these ideas were implemented at the federal level.217 As these new ideas gain support at the local level and grow in support nationally, adoption at the federal

206 Young, supra note 2, at 1059.
208 Young, supra note 2, at 1071 (quoting Egelhoff v. Egelhoff, 532 U.S. 64, 160 (2001) (Breyer, J., dissenting)).
209 Young, supra note 2, at 1060.
210 Raynor, supra note 2, at 639.
211 Young, supra note 2, at 1060.
212 Id.
213 Raynor, supra note 2, at 650 (quoting THE FEDERALIST NO. 51 (James Madison)).
214 Id. at 651–52.
215 Id. at 653.
216 Claiborne, Jr., supra note 76, 939–40.
217 Chemerinsky et al., supra note 20, at 107 n. 125.
level becomes more feasible.  

Recent years, states have tested out various ideas that lack support at the federal level. While the Court found some of these policies to be preempted by federal law, some policies have found a way to coexist with federal law.

C. Present and Future State Opposition Movements

The decision in Murphy shows that the Court will interpret preemption narrowly to allow states to develop their own policies where federal law has not engulfed the space. Unlike immigration policy, which has a pervasive federal presence, Congress has not, to date, passed comprehensive regulation of sport gambling. The Court’s unnecessarily broad finding in Murphy suggests the Court favors state autonomy, especially in circumstances where federal interests are less significant. State laws that have a more narrow focus, like the legalization of sports betting or legalization of marijuana, may be more successful in getting federal cooperation or judicial approval. Whereas laws like the Firearms Freedom Acts, which seek to exempt guns from all relevant and numerous federal regulations, are less likely to gain federal tolerance.

The Court’s decision will have a significant impact on current and future state opposition movements. The decision affirms and extends protections for states’ rights under the Tenth Amendment, providing more protection from federal interference when states pursue local policies that are in conflict with federal law. The movement to legalize marijuana at the state level is likely to benefit most from the Murphy decision. Even though the Court concluded, in Gonzales v. Raich, that the CSA preempted more permissive state marijuana laws, the Court’s decisions on the anticommandeering doctrine—as outlined in Murphy, New York, and Printz—lead to the conclusion that the federal government cannot oblige states to criminalize or preclude them from decriminalizing marijuana use. Further, without cooperation from state and local law enforcement, the federal government’s ability to enforce federal marijuana laws is significantly limited. The inability of the federal government to enforce its laws, allows more permissive state laws to operate. As a result, proponents of local marijuana decriminalization or regulation should feel more confident that the federal government will be unable to force states to re-criminalize marijuana.

State laws that prevent local officials from assisting with enforcement of federal laws also benefit from the Murphy decision. These laws are equally

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218 Id. at 81.
219 Id. at 658.
220 See infra Part C.
221 Id.
222 Kight, supra note 2, at 554–55.
223 Id.
224 Id. at 626; Kamin, supra note 54, at 1107.
225 Young, supra note 2, at 1063.
226 Raynor, supra note 2, at 626.
protected by the anticommandeering doctrine.\textsuperscript{227} These laws include recent efforts by states and localities to reduce cooperation with federal officials in the enforcement of federal immigration laws. The \textit{Murphy} decision makes it clear that the federal government cannot prohibit states from passing laws that allow its officials to decline to enforce federal law.\textsuperscript{228} However, a big unknown for laws that provide for non-cooperation with federal authorities is the extent to which the federal government can exercise its Spending Power to induce particular state actions.\textsuperscript{229} While the Spending Power is very broad, it has been found to be unconstitutionally coercive on at least one occasion.\textsuperscript{230} Determining where Congress crosses the line in grants of conditional spending is particularly relevant in immigration policy since the federal government is so reliant on localities to enforce federal immigration laws.\textsuperscript{231} While state autonomy and states’ rights get a boost under the decision in \textit{Murphy}, Congress still holds a lot of power in getting states to comply with its preferred policies. Congress can regulate sports gambling directly, or it can use its Spending Power to encourage states to adopt its preferred policies.\textsuperscript{232} In either of those cases, the anticommandeering doctrine would not be implicated.

\textbf{CONCLUSION}

The Court in \textit{Murphy} went too far in finding all of PASPA unconstitutional simply because it found two provisions that violated the anticommandeering doctrine. The Court should have found the remaining provisions severable to preserve congressional intent. Despite the Court’s incorrect holding on severability, its decision strengthens individual states rights and maintains a balance between state and federal powers. The decision allows states to continue to be more assertive in developing policies that may be contrary to federal law, which will be impactful in areas such as immigration and marijuana regulation.

\textsuperscript{227} \textit{Id.} at 628–29.
\textsuperscript{228} \textit{Murphy v. Nat’l Collegiate Athletic Ass’n}, 138 S. Ct. 1461, 1477 (2018) (“Even when Congress has the authority under the constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel States to require or prohibit those acts” (quoting \textit{New York v. United States}, 505 U.S. 144, 166 (1992))).
\textsuperscript{229} Amdur, \textit{supra} note 43, at 88, 90.
\textsuperscript{231} Amdur, \textit{supra} note 43, at 90.