
May 15, 2018

Murphy v. NCAA: Supreme Court Permits States to Legalize Sports Gambling Based on the Anticommandeering Doctrine

Until yesterday, sports gambling was legal in only four states: in Nevada, which permits almost unlimited types of betting, and in Delaware, Montana and Oregon, to a much lesser extent. The landscape changed dramatically, however, when the United States Supreme Court issued its ruling in *Murphy v. NCAA*. In this long-awaited decision, the Court struck down a Federal statute – the Professional and Amateur Sports Protection Act (“PASPA”) – and upheld a New Jersey statute legalizing sports gambling in that state. The court’s ruling paves the way for other states to immediately legalize sports betting. We expect several states to do so swiftly and we expect the sports gambling landscape to change significantly.

Background

Congress passed PASPA in 1992, and it prohibited most states from “authoriz[ing] by law” sports-based gambling. It also allowed specified athletic leagues, including the NCAA, the NFL, the NBA and Major League Baseball (“the Leagues”), to enforce the law by suing any state that sought to legalize sports betting. The law grandfathered in whatever types of sports betting states previously had authorized. Only four states had done so as of that time, and New Jersey was not among them.

In 2012, New Jersey decided it wanted in on the action. It passed a law allowing sports gambling at casinos and racetracks. The Leagues sued to prevent this law from going into effect. Although New Jersey conceded that its law violated PASPA, the state argued that PASPA was unconstitutional. The Third Circuit rejected New Jersey’s argument and invalidated its law. The court implied, however, that the mere repeal of a prohibition would not constitute “authorization” of the formerly prohibited conduct, and that PASPA therefore would not prevent New Jersey from repealing its preexisting gambling laws.

In 2014, New Jersey tried again, styling its law as a partial repeal of its restrictions on sports betting. The Third Circuit, despite its previous suggestion that PASPA would allow such a repeal, found that the new law also violated PASPA. It reasoned that although New Jersey’s law was styled as a repeal, it was a *selective* repeal that funneled gambling to casinos and racetracks, implicitly authorizing that gambling. New Jersey sought review of that decision from the Supreme Court, which agreed to hear the case.

Discussion

The Supreme Court's decision is significant in two ways. It has the potential to revolutionize sports in this country. It is also an important decision clarifying the anticommandeering doctrine, which prevents Congress from directing state law.

The Court's ruling was announced in an opinion by Justice Alito, joined by Chief Justice Roberts and Justices Kennedy, Thomas, Kagan and Gorsuch, and joined in part by Justice Breyer. Justice Thomas wrote a concurrence and Justice Ginsburg wrote a dissent, joined by Justice Sotomayor and joined in part by Justice Breyer. Justice Breyer also wrote his own opinion, concurring in part and dissenting in part.

The focus of the opinion is on technical analysis of the anticommandeering doctrine, but societal impact of the decision is much broader.

PASPA Did Not Allow Repeals

The Supreme Court majority, after summarizing the background of the litigation, began by interpreting the language of PASPA. Slip Op. at 10. The Leagues had argued that PASPA would allow states to *completely* repeal sports betting regulations, and that it would allow some but not all *partial* repeals, but they did not provide a clear means of determining whether a given partial repeal was permissible. New Jersey had argued that this distinction was not supported by the text of the statute and that PASPA required states to maintain their preexisting laws against sports betting.

The Court agreed with New Jersey on this issue, holding that, when a state completely or partially repeals old laws banning sports gambling, it "authorizes" that conduct in violation of PASPA. *Id.* at 11. The Court recognized that a repeal of a preexisting restriction is naturally understood as an "authorization" and that that the alternative formulation was unwieldy in practice. *Id.* at 12-13.

Preventing States from Authorizing Sports Gambling Violates the Constitution's Anticommandeering Doctrine

The Court then held that, regardless of whether PASPA had allowed states to repeal their laws, it would have been unconstitutional based on the anticommandeering doctrine. *Id.* at 14. This doctrine, the Court explained, reflects the core constitutional principle that Congress cannot issue orders to the States. *Id.* The prohibition on this "commandeering" helps to promote political accountability and prevents Congress from passing regulatory costs along to the states. *Id.* at 17-18.

The Court then held that PASPA violated the anticommandeering doctrine because it dictated what a state legislature may do. *Id.* at 18. The Court rejected the distinction, proposed by the Leagues, that Congress

did not engage in commandeering when it prohibited states from enacting new laws, as opposed to when it required them to do so. *Id.* at 19. The Court called this proposed distinction “empty.” *Id.*

The Court also distinguished these anticommandeering rules from the doctrine of preemption. For a federal statute to preempt state law, the Court explained, the federal law must represent an exercise of Congressional power that is best read as regulating private actors. *Id.* at 22. Because the challenged portion of PASPA does not regulate private actors, the Court held that it could not be understood as a preemption provision. *Id.* at 24.

The Other Portions of PASPA Are Not Severable from the Commandeering Portion

Finally, the Court addressed the question of whether it should also strike the other sections of PASPA, which prevented individuals from participating in state-authorized gambling programs. The Court ruled that these other provisions were not severable from the challenged section, finding it unlikely that Congress wanted to allow gambling in private casinos but not in ones authorized by the states. *Id.* at 26-27.

The question of severability was central to all of the separate opinions in this case. Justices Breyer and Ginsburg, in their opinions, both argued that Congress should be understood as having sought to limit gambling through two means, one targeted at the states and one at private citizens. Thus, even if the restriction on states was unconstitutional, these justices felt there was no constitutional issue with the restriction on private individuals. Justice Thomas, meanwhile, agreed with the Court’s decision but suggested in his concurrence that the standards for severability should be reevaluated in a future case.

Analysis

The Court’s decision is significant and has the potential to transform American sports. As the decision notes, unless Congress decides to regulate sports directly (which seems unlikely) “each State is free to act on its own.” Thus, all states are now free to permit any type of sports gambling, which is generally understood to mean betting or wagering on “competitive sports in which amateur or professional athletes participate.” This has significant implications for all athletes, schools, coaches, teams, leagues and fans, as well as for investors, financial institutions, and state legislatures. There will be significant efforts by many to capture (now legally) part of the multi-billion dollar sports gambling market. There will also be concerns about threats to the integrity of competition.

The immediate consequence of the Supreme Court’s decision in *Murphy* ruling is that sports gambling will now be legal in state-authorized casinos and racetracks in New Jersey. It is virtually certain that it will also lead to legalization of sports betting elsewhere. Four states — Connecticut, Pennsylvania, West Virginia, and Mississippi — have already passed bills to legalize sports gambling, and fourteen other states have had such bills introduced in their legislatures. A significant issue to watch as state legislation is

passed is the extent to which states attempt to tax wagers or winnings, and the extent to which leagues, teams or competitors attempt to capture part of the revenue.

One consequence of the state-by-state legalization process is that the regulations governing sports gambling will now be different in every state. The diversity in these regulations may impose costs for entities that need to comply with these different state regimes. It may also create lobbying incentives as states decide whether and how they will legalize sports gambling. It is possible that Congress could react to this ruling by taking action, either to ban sports gambling everywhere or to legalize it nationally under uniform standards but, unless and until it does so, the states will forge their own paths.

Finally, for the legal scholar, regardless of the subject matter, the Court's holding represents a decisive statement of the continued strength of the anticommandeering doctrine. As the Court noted, the doctrine "may sound arcane, but it is simply the expression of a fundamental decision incorporated into the Constitution, *i.e.* the decision to withhold from Congress the power to issue orders directly to the States." Based on this opinion, Congress has little ability to directly control the actions of state legislatures except by preemption, which requires Congress to create its own statutory scheme. This opinion will be valuable precedent for any states seeking to overturn laws similar to PASPA. It will also likely deter Congress from relying on similar statutory structures in the future.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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