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Sports betting, federalism and the Constitution

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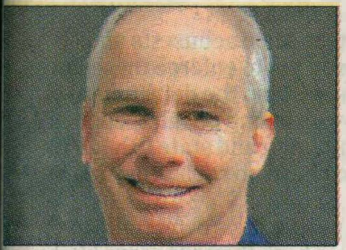

JOHN GREABE
Constitutional Connections

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The suit was filed after the New Jersey Legislature partially repealed a provision of state law that had prohibited "the placement and acceptance of wagers" on sporting events.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

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'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-of-state sporting events not involving New Jersey college teams.

If a lawsuit by sports organizations against a state for repealing an anti-gambling law strikes you as 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 the practice – and permitted professional and amateur sports organizations to bring civil lawsuits to halt such state "authorizations." In this way, the PAPSA effectively offloaded the enforcement of federal law to private organizations.

Thus, the premise of the lawsuit was that New Jersey's partial repeal of its law banning sports gambling was an "authorization" of sports gambling made unlawful by the PAPSA. Got that?

In any event, what matters for present purposes is to understand how New Jersey relied on the Constitution to defend itself. New Jersey argued that the PASPA was unconstitutional insofar as it commanded the state not to legalize sports gambling.

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 Constitution, 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 PAPSA's command that states refrain from authorizing sports betting to two other federal laws that the court has struck down for unconstitutional "commandeering" of state personnel: a 1985 statute that had ordered states to deal with the problem of disposing low-level radioactive waste in a specified manner, and a 1993 statute that required state and local law enforcement officials to perform background checks on firearms purchasers.

The court said that the PAPSA's command *not to* legislate was every bit as much an insult to state sovereignty as these prior congressional 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 refrain from acting? In *Murphy*, the court provided three reasons for its conclusion that, in this context, the Constitution "confers upon Congress the power to regulate individuals, not States."

First, the court sees the anti-commandeering principle as essential to the protection of individual liberty. As the court put it in *Murphy*: "A healthy balance of power between the States and the Federal 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 PAPSA, Congress had simply banned individuals from sponsoring or engaging in sports betting, New Jersey voters would know that *Congress itself* (and not the New Jersey Legislature) was the source of the ban. The anti-commandeering principle prevents Congress from shifting responsibility for controversial policies to state officials.

Third, and relatedly, the court says 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. The anti-commandeering principle prevents Congress from avoiding this cost-benefit analysis by burdening the states with unfunded mandates.

The anti-commandeering principle also has its critics. Principally, these critics argue 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 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 battles are, according to these critics, 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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