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Murphy v. NCAA 138 S. Ct. 1461 (2018)

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Student Case Notes

Murphy v. NCAA
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I. INTRODUCTION

On June 11, 2018 Governor Phil Murphy of New Jersey sent out a tweet to his constituents stating, "[t]oday, we're finally making the dream of legalized sports betting a reality for New Jersey. This is the right move for our state and will strengthen our economy."[1] After years of litigation, the Supreme Court had just ruled, twenty-eight days prior, that the federal law that blocked New Jersey from legalizing sports betting, titled the Professional and Amateur Sports Protection Act (PASPA), was unconstitutional and therefore unenforceable.[2] The State of New Jersey fought for almost six years to legalize sports betting, beginning in August of 2012, when the National Collegiate Athletic Association (NCAA), the National Basketball Association (NBA), the National Football League (NFL), the National Hockey League (NHL), and the Officer of the Commissioner of Baseball doing business as Major League Baseball filed a complaint to enjoin the State of New Jersey from implementing a sports gambling law.[3]

The Professional and Amateur Sports Protection Act, enacted in 1992, made it unlawful for any governmental entity or person to "sponsor, operate, advertise, promote, license, or authorize . . . a lottery, sweepstakes, or other betting, gambling, or wagering" based on amateur or professional athletes or based on performances in amateur or professional games.[4] Although the sports gambling covered under PASPA was not a federal crime, PASPA gave the Attorney General and professional and amateur sports organizations the right to bring suit civilly to enjoin violations.[5] After the New Jersey

1. Phil Murphy (@GovMurphy), TWITTER (June 11, 2018, 12:19 PM), https://twitter.com/GovMurphy/status/1006254571868520450.
2. Murphy v. NCAA, 138 S. Ct. 1461, 1485 (2018).
3. NCAA v. Christie, 926 F. Supp. 2d 551, 553 (D.N.J. 2013), *aff'd sub nom.* NCAA v. Governor of N.J., 730 F.3d 208 (2013).
4. 28 U.S.C.S. § 3702.
5. *Murphy*, 138 S. Ct. at 1470-71.

legislature enacted a law legalizing sports gambling, the professional sports leagues and the NCAA immediately brought suit to enjoin the new law.[6]

The Supreme Court held that New Jersey had authorized sports gambling in violation of PASPA by repealing its prior prohibition on sports gambling.[7] The Supreme Court also held, however, that PASPA's provision prohibiting states from authorizing and licensing sports gambling was unconstitutional under the Tenth Amendment.[8] Further, striking down PASPA in its entirety, the majority of the Supreme Court held that no provision of PASPA was severable from the provisions of PASPA that were unconstitutional.[9] In short, the Supreme Court held that even though New Jersey was in violation of PASPA, PASPA was unconstitutional and therefore unenforceable.[10]

Murphy signals a significant shift in sports gambling law as more states will likely proceed to follow New Jersey in legalizing sports gambling.[11] Further, *Murphy* may mark a shift towards giving the states more power on a variety of controversial issues.[12] The anti-commandeering rule, which is based on the Tenth Amendment, may become a tool that states can utilize in future lawsuits concerning issues such as marijuana reforms, sanctuary cities, and gun control, or where the states do not wish to follow federal rules or guidelines dealing with these issues.[13]

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

In the 1990s, opponents of sports gambling supported legislation known as the Professional and Amateur Sports Protection Act (PASPA).[14] Supporters of this legislation argued that sports gambling is extremely addictive and could corrupt and damage the reputation of professional and

6. *Murphy*, 138 S. Ct. at 1471.
7. *Id.* at 1474.
8. *Id.* at 1478.
9. *Id.* at 1484.
10. *Id.* at 1485.
11. Brent Johnson, *Phil Murphy signs N.J. sports betting law. You can start betting on Thursday*., N.J. POL. (June 11, 2018), https://www.nj.com/politics/index.ssf/2018/06/sports_betting_to_begin_in_nj_after_phil_murphy_si.html.
12. Cory Lapin, *The Potentially Far-Reaching Implications of Murphy v. NCAA Outside of Sports Betting,* DEF. LITIG. INSIDER (May 30, 2018), https://www.defenselitigationinsider.com/2018/05/30/the-potentially-far-reaching-implications-of-murphy-v-ncaa-outside-of-sports-betting/.
13. *Id.*
14. *Murphy*, 138 S. Ct. at 1470.

amateur sports.[15] Those opposed argued that sports gambling is an effective way of increasing state revenue.[16] PASPA was enacted in 1992, despite the Department of Justice's opposition to the bill.[17] PASPA did not make sports gambling a federal crime, but it did allow the Attorney General and sports organizations to enjoin violations.[18] New Jersey had the option of being grandfathered into PASPA in order to legalize sports gambling if it did so within one year.[19] At that time, New Jersey did not take advantage of the grandfather provision.[20] In 2011, New Jersey amended its state constitution to make it lawful for the state legislature to authorize gambling.[21] In 2012, the legislature enacted a law authorizing gambling.[22] The NCAA subsequently brought suit to enjoin the new law.[23] The Federal District Court in New Jersey granted the injunction.[24]

On appeal, the U.S. Court of Appeals for the Third Circuit found that enacting the legislation violated PASPA by authorizing sports gambling.[25] The court also found no anti-commandeering violation because PASPA required no affirmative action on the part of the states.[26] The Third Circuit went on to suggest that a repeal of laws outlawing sports gambling would not amount to an authorization as contemplated in PASPA.[27] The United States confirmed this by opposing certification to the Supreme Court.[28]

Subsequently, New Jersey enacted a new law framed as a repeal to allow sports gambling in the state.[29] The same plaintiffs from the 2013 case again brought suit to enjoin the new law.[30] The district court in the new case ruled

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15. *Id.* at 1469-70.
16. *Id.* at 1484.
17. *Id.* at 1470.
18. *Id.* at 1470-71.
19. *Murphy*, 138 S. Ct. at 1471.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Christie*, 926 F. Supp. at 553.
24. *Id.* at 579.
25. NCAA v. Governor of N.J., 730 F.3d 208, 227 (3d Cir. 2013), *rev'd sub nom.* Murphy v. NCAA, 138 S. Ct. 1461 (2018).
26. *Id.* at 231.
27. *Id.* at 233.
28. *See* Christie v. NCAA, 134 S. Ct. 2866 (2014), *cert. denied;* N.J. Thoroughbred Horsemen's Ass'n v. NCAA, 134 S. Ct. 2866 (2014), *cert. denied;* Sweeney v. NCAA, 134 S. Ct. 2866 (2014), *cert. denied*.
29. *Murphy*, 138 S. Ct. at 1472.
30. NCAA v. Christie, 61 F. Supp. 3d 488, 490 (D.N.J. 2014), *aff'd sub nom.* NCAA v. Governor of N.J., 832 F.3d 389 (3d Cir. 2016), *rev'd sub nom.* Murphy v. NCAA, 138 S. Ct. 1461 (2018).

in favor of the NCAA.[31] The U.S. Court of Appeals for the Third Circuit affirmed the district court's decision, stating this law authorized sports gambling, notwithstanding its contrary statements in the previous case.[32] The Third Circuit indicated that a de minimis repeal would not have authorized sports gambling, in an effort to reconcile with its prior statement.[33] The Third Circuit also found no violation of the anti-commandeering rule.[34] The Supreme Court granted certification to determine whether PASPA fit within the constitutional doctrine of dual sovereignty.[35]

III. COURT'S DECISION AND RATIONALE

A. Plurality Opinion by Justice Alito, in which Chief Justice Roberts, Justice Kennedy, Justice Thomas, Justice Kagan, and Justice Gorsuch joined, and in which Justice Breyer joined as to all but Part VI-B

In part II of the opinion, the Court decided what the meaning of "authorizing" sports gambling was.[36] The justices decided that authorization of an activity can be a partial or complete repeal of an old law.[37] The plurality reasoned that at the time of PASPA's passage, sports gambling was largely illegal within the states.[38] Therefore, authorizing an activity that is largely illegal would typically take place in the form of repealing the laws that make the activity illegal.[39] After the respondents argued that this definition of "authorize" did not make sense in the context of the parallel provision applying to conduct done "pursuant to the law . . . of a governmental entity," the Court was still not convinced.[40] The Court gave the example, "[n]ow that the State has legalized the sale of marijuana, Joe is able to sell the drug pursuant to state law"[41] to demonstrate how one could use the phrase to refer to an activity that was previously prohibited. Further, the plurality reasoned

31. *Id.* at 508.
32. NCAA v. Governor of N.J., 832 F.3d 389, 402 (3d Cir. 2016).
33. *Id.*
34. *Id.*
35. Christie v. NCAA, 137 S. Ct. 2327, 2328 (2017), *cert. granted;* N.J. Thoroughbred Horsemen's Ass'n v. NCAA, 137 S. Ct. 2326 (2017), *cert. granted*.
36. *Murphy*, 138 S. Ct. at 1474.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Murphy*, 138 S. Ct. at 1474.

that Congress would not have meant to have an unclear line for determining when a repeal constitutes an authorization.[42] Finally, the justices stated that respondents could not use the canon of constitutionality to justify their meaning, because even if the Court accepted respondent's meaning, it would still be unconstitutional.[43]

In part III of the opinion, the Court discussed the anti-commandeering doctrine.[44] The anti-commandeering doctrine is based on the Tenth Amendment.[45] The powers that Congress has are enumerated, and the Tenth Amendment states that all powers not specifically given to Congress are reserved for the states.[46] The Tenth Amendment can give rise to tension with the Supremacy Clause, which states that federal law is the supreme law of the land and that when federal and state law conflict, the state law is preempted.[47]

A leading case in this area is *New York v. United States*.[48] In *New York*, Congress had recently passed the Low-Level Radioactive Waste Policy Amendments Act of 1985.[49] One provision of the Act required states to either take title to low-level radioactive waste or to regulate radioactive waste according to Congress's instructions.[50] Because this portion of the Act either made states take ownership of the waste or made them legislate as Congress directed, this was considered unconstitutional under a principle that has come to be known as the anti-commandeering doctrine.[51] The Court in *New York* stated that the Constitution did not give Congress the power to direct the state legislatures in this manner.[52] Even though the states had a choice between the two alternatives, the option to take title commandeered states into the service of federal regulatory purposes, and the second option required states to regulate according to Congress's standards, neither of which, according to the *New York* Court, were constitutional.[53]

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42. *Id.* at 1475.
43. *Id.*
44. *Id.*
45. *Id.* at 1476.
46. *Murphy*, 138 S. Ct. at 1476.
47. *Id.*
48. 505 U.S. 144, 167 (1992).
49. *Id.* at 149.
50. *Murphy*, 138 S. Ct. at 1476 (quoting *New York*, 505 U.S. at 175).
51. *Id.* (quoting *New York*, 505 U.S. at 176).
52. *Id.* (quoting *New York*, 505 U.S. at 166).
53. *Id.* (quoting *New York*, 505 U.S. at 175).

The next case to apply the anti-commandeering doctrine was *Printz v. United States*.[54] In *Printz*, the Brady Act directed state law enforcement to assist with background checks related to the sale of firearms.[55] The Supreme Court found that this Act was also unconstitutional as it dragooned states law enforcement in violation of the anti-commandeering doctrine.[56] The Court in *Printz* held that Congress has no power to "command the states' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[57]

The Court has provided several policy reasons for the anti-commandeering doctrine.[58] First, the Court stated it serves as a safeguard for protecting the sovereignty of the states.[59] Second, the Court stated that a balance between state and federal governments reduces the risk of tyranny and abuses of power.[60] Third, the Court stated the doctrine promotes accountability for both the states and Congress.[61] If Congress forced a state to adopt or enforce federal regulations, the public might not know whether Congress or the state is to blame.[62] Fourth, the Court stated the doctrine prevents Congress from making the states bear the cost of federal regulations.[63]

In part IV of the *Murphy* opinion, the Court discussed the Tenth Amendment implications of PASPA.[64] The Court found PASPA violated the anti-commandeering doctrine.[65] The plurality reasoned that even though PASPA was not a directive for the states to commit an affirmative act, PASPA was still directing the states to behave in a certain way by their modifying existing laws.[66] The justices found there was no distinction between these forms of federal control over state legislative processes.[67]

54. 521 U.S. 898, 935 (1997).
55. *Id.* at 902.
56. *Murphy*, 138 S. Ct. at 1477 (quoting *Printz*, 521 U.S. at 935).
57. *Id.* (quoting *Printz*, 521 U.S. at 935).
58. *Id.*
59. *Id.*
60. *Id.*
61. *Murphy*, 138 S. Ct. at 1477.
62. *Id.*
63. *Id.*
64. *Id.* at 1478.
65. *Id.* at 1479.
66. *Murphy*, 138 S. Ct. at 1478.
67. *Id.*

Further, the Court found that even though there were prior decisions where the Court found federal laws constitutional and not in violation of the anti-commandeering doctrine, those decisions were distinguishable from the case at bar.[68]

In *South Carolina v. Baker*[69], Congress had passed the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA). This Act removed a federal tax exemption from bearer bonds and only allowed the exemption for registered bonds in order to avoid tax evasion.[70] The Court in *Murphy* found that this situation was distinguishable, however, because the law did not order the states to enact or to refrain from enacting any laws.[71] Therefore, the Court held that regulating state activities in which private actors and states both engage, rather than forcing the states to regulate activities and shifting the burden of regulation onto them, is constitutional.[72]

Similarly, in *Reno v. Condon*[73], the Driver's Privacy Protection Act of 1994 (DPPA) regulated the disclosure of personal information that motor vehicle departments obtained. The Court found this Act constitutional as well because the Act did not require the states to regulate their citizens in a specific way.[74] Further, in this case, Congress was again regulating a state activity that private actors and states both engaged in.[75] Conversely, in *Murphy*, Congress mandated that the states refrain from enacting certain laws, and gave a cause of action to enjoin the states from enacting those laws.[76]

In *Hodel v. Virginia Surface Mining and Reclamation Association*[77], the Surface Mining and Reclamation Act of 1977 allowed states to choose whether or not to implement a regulatory scheme that complied with the Act. If the states did not choose to implement a regulatory scheme, the Federal Government would regulate the states directly.[78] The Court in *Murphy* again decided that this case was distinguishable because the Act did not require the

68. *Id.* at 1478.
69. 485 U.S. 505, 507 (1988).
70. *Id.* at 507-08.
71. *Murphy*, 138 S. Ct. at 1478.
72. *Id.*
73. 528 U.S. 141, 143 (2000).
74. *Murphy*, 138 S. Ct. at 1479.
75. *Id.* at 1479.
76. *Id.* at 1478.
77. 452 U.S. 264, 269 (1981).
78. *Id.* at 271.

states to take any affirmative action, nor did it require them to regulate for Congress.[79] Congress would regulate if the states wanted Congress to do so.[80]

Lastly, in *FERC v. Mississippi*[81], the Public Utility Regulatory Policies Act of 1978 (PURPA) required state utility commissions to consider FERC proposals. The Court in *Murphy* found this law distinguishable from PASPA because PASPA required states to do more than just consider not legalizing sports gambling, while PURPA merely asked states to consider federal regulatory standards.[82]

In part V of the opinion, the Court discussed whether preemption based on the Supremacy Clause was applicable in *Murphy*.[83] The Court held that PASPA was not a preemption provision.[84] The Court found that PASPA was not a valid example of preemption because preemption is based on a federal law that regulates the conduct of private actors, and PASPA is not directed towards regulate private actors, it is directed towards state activity.[85] The Court reasoned that section one of PASPA had no direct regulatory effect on private actors.[86] This provision only regulated the states.[87] The Court went on to find that section two of PASPA did not regulate the states and did regulate private actors.[88] The Court stated, however, that this section was not challenged by petitioners.[89] The Court then went on to describe three types of preemption that are recognized: conflict preemption, express preemption, and field preemption.[90]

First, the Court explained conflict preemption by using the case *Mutual Pharmaceutical Co. v. Bartlett*.[91] In this case, a federal law that prohibited

79. *Murphy*, 138 S. Ct. at 1479.
80. *Id.*
81. 456 U.S. 742, 746 (1982).
82. *Murphy*, 138 S. Ct. at 1479; Although the *Murphy* Court states that all PURPA did was ask states to consider the federal regulations, in reality, the states were also required to follow specific procedures while considering each of the regulations. For example, public hearings were required to be held and if the regulation was not adopted, the state was required to have a written statement of reasons for the public. *See FERC,* 456 U.S. at 748.
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 1481.
87. *Murphy*, 138 S. Ct. at 1479.
88. *Id.* at 1481.
89. *Id.*
90. *Id.* at 1480.
91. *Id.* (citing Mutual Pharmaceutical Co. v. Bartlett, 570 U.S. 472 (2013)).

alterations to labels on drugs approved by the FDA was in conflict with a state law that required drug warnings to be strengthened as new information was gathered.[92] The Court found that a patient's cause of action against the drug company for not warning of a disease was preempted because the federal law prohibited the company from doing so.[93] This federal law preempted the state law because the two laws were in direct conflict.[94]

Second, the Court explained express preemption by using the case *Morales v. Trans World Airlines, Inc.*[95] In *Morales*, the Airline Deregulation Act of 1978 expressly stated: "no State or political subdivision . . . shall enact or enforce any law, rule, regulation, standard, or other provisions having the force and effect of law relating to rates, routes, or services of any air carrier."[96] The *Murphy* Court explained that this language, although it looked to be commandeering at first glance, was put into place to allow private parties a federal right to operate in accordance with solely federal regulation.[97] This type of language is illustrative of express preemption.[98]

Lastly, the Court used *Arizona v. United States*[99] to explain field preemption. In *Arizona*, the federal government sought to enjoin the State of Arizona after the state enacted a law concerning immigration.[100] The federal government, however, had already instituted extensive federal regulations on this topic.[101] The *Arizona* Court stated when the Federal Government institutes a "framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it'" [102] state law is preempted on the grounds of field preemption.

Again, the Court states that PASPA is not a preemption provision.[103] The Court reiterates that PASPA does not regulate private actors in any way and therefore cannot preempt New Jersey's regulation of private actors.[104] The Court recognizes that the second provision of PASPA is a direct order to

92. *Murphy*, 138 S. Ct. at 1480.
93. *Murphy*, 138 S. Ct. at 1480 (citing *Mutual Pharmaceutical Co.*, 570 U.S. at 480-86).
94. *Murphy*, 138 S. Ct. at 1480 (citing *Mutual Pharmaceutical Co*. 570 U.S. at 493).
95. *Murphy*, 138 S. Ct. at 1480 (citing Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992)).
96. *Murphy*, 138 S. Ct. at 1480 (citing *Morales*, 504 U.S. at 420).
97. *Murphy*, 138 S. Ct. at 1480.
98. *Id.*
99. *Id.* at 1481 (citing Arizona v. United States, 567 U.S. 387 (2012)).
100. Arizona v. United States, 567 U.S. 387, 393 (2012).
101. *Murphy*, 138 St. Ct. at 1481.
102. *Arizona*, 567 U.S. at 399.
103. *Murphy*, 138 S. Ct. at 1481.
104. *Id*.

citizens, but the Court chooses to instead decide that this case is not a preemption case.[105] The Court does so because they say the first provision can only be understood as a direct order to the states.[106]

In part VI of the opinion, the Court inquired as to whether the unconstitutional portions of PASPA were severable from the remainder of the Act.[107] First, the Court stated that the prohibition of state licensing of sports gambling is unconstitutional on the same ground that the prohibition of state authorization was.[108] This was still a direct command to the states in violation of the anti-commandeering doctrine.[109]

Second, the Court decided whether the provisions in PASPA that declared it unlawful for states to operate, sponsor, or promote sports gambling were severable.[110] The Court stated that in order to find constitutional provisions in PASPA severable from the unconstitutional provisions, the Court must find that Congress would have enacted the constitutional provisions independently from the unconstitutional provisions.[111] The Court found that these provisions were not severable from the unconstitutional provisions.[112] The Court reasoned that Congress did not intend for sports gambling to be legal for private parties only.[113] Further, the line between sponsoring or promoting and authorizing, licensing, and operating is unclear and this lack of clarity would create a large amount of litigation.[114]

Third, the Court considered whether the second section of PASPA which prohibited private actors to engage in sports gambling was severable from the first unconstitutional provision concerning the states.[115] The same test still applied to this provision: in order to find the provision severable, the Court must find that Congress would have enacted the constitutional provisions independently from the unconstitutional provisions.[116] The Court found that

105. *Id*.
106. *Id*.
107. *Id*.
108. *Murphy*, 138 S. Ct. at 1481-82.
109. *Id.*
110. *Id.* at 1482.
111. *Id.*
112. *Id.* at 1483.
113. *Murphy*, 138 S. Ct. at 1482.
114. *Id.* at 1483.
115. *Id.*
116. *Id.*

these provisions were not severable from each other.[117] The Court reasoned that the two provisions were meant to be utilized in tandem to prevent sports gambling from occurring.[118] Further, because of the way the statute is written, an individual would be acting unlawfully if he or she was engaging in sports gambling that is legal in that state, and then logically the opposite would also have to be true.[119] A person can only act lawfully under section 2 if sports gambling is illegal in that state.[120] The Court found that this result would make no sense and therefore was not severable from section 1 of the statute.[121]

Lastly, the Court decided whether the provisions of PASPA that prohibited advertising of sports gambling were severable.[122] Again, the Court found that these provisions were not severable.[123] The Court found that in 1975, Congress passed a statute to exempt advertisements regarding lotteries conducted by states and it would not make sense to prevent advertising of sports gambling if sports gambling, like lotteries, was legal to conduct in the states.[124]

In closing, the Court stated that although sports gambling is controversial and requires important policy choices, it is now up to the states to decide whether sports gambling should be permitted or not.[125] The Court reiterated that Congress had no power to regulate the state governments in the manner that they did and reversed the Third Circuit Court of Appeals.[126]

B. Concurring Opinion by Justice Thomas

In his concurring opinion, Justice Thomas agreed with the Court's opinion, however, he was concerned with the current state of the severability doctrine.[127] Justice Thomas was concerned with two main issues.[128] First, Justice Thomas found that the severability doctrine does not follow the

117. *Id.* at 1484.
118. *Murphy*, 138 S. Ct. at 1484.
119. *Id.* at 1483-84.
120. *Id.*
121. *Id.* at 1484.
122. *Id.*
123. *Murphy*, 138 S. Ct. at 1484.
124. *Id.*
125. *Id.* at 1484-85.
126. *Id.* at 1485.
127. *Id.* at 1484 (Thomas, J., concurring).
128. *Murphy*, 138 S. Ct. at 1484 (Thomas, J., concurring).

principles of statutory interpretation.[129] He believed that determining whether Congress would have enacted the other parts of the statute had they known one portion would be unconstitutional asks the Court to try to determine a legislative intent that likely does not exist.[130] Second, Justice Thomas argued that making determinations on portions of statutes that have not been called into question is too similar to issuing advisory opinions.[131] He was concerned that the Court was bringing up issues concerning questions that had not been raised.[132] In sum, Justice Thomas raised significant issues regarding the current contours of the severability doctrine.[133]

C. Opinion by Justice Breyer concurring in part and dissenting in part

Justice Breyer dissented and wrote a separate opinion, while also joining Justice Ginsburg's dissenting opinion in part and joining the majority opinion in part.[134] Justice Breyer believed that section two of PASPA was severable from section one, and therefore section two, which prohibits individuals from engaging in sports gambling, could have remained in effect.[135] Justice Breyer called into question the majority's conclusion that Congress would not have intended to enact section two of PASPA had they known section one was unconstitutional.[136] Justice Breyer considered other reasons Congress might have enacted section two of PASPA.[137] First, Congress could have enacted section two to prevent sports gambling from spreading.[138] Second, Congress could have enacted section two as a backup provision in case section one turned out to be unconstitutional.[139] Justice Breyer criticized the majority for not severing the two sections of the statute.[140]

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129. *Id.* at 1486.
130. *Id.* at 1486-87.
131. *Id.* at 1487.
132. *Id.*
133. *Murphy*, 138 S. Ct. at 1487.
134. *Id.* at 1488 (Breyer, J., dissenting).
135. *Id.*
136. *Id.* at 1488
137. *Id.*
138. *Murphy*, 138 S. Ct. at 1488.
139. *Id.*
140. *Id.*

D. Dissenting Opinion by Justice Ginsburg, in which Justice Sotomayor joined, and in which Justice Breyer joined in part

Justice Ginsburg also dissented, joined by Justice Sotomayor, and joined in part by Justice Breyer.[141] Justice Ginsburg disagreed with the majority on the severability issue.[142] Justice Ginsburg criticized the majority for destroying PASPA in its entirety instead of severing the unconstitutional portions from the remainder of the statute.[143] Justice Ginsburg would have kept the portions of the statute which prohibited "sponsoring, operating, advertising, or promoting" sports gambling schemes and prohibited private parties from "sponsoring, operating, advertising, or promoting" sports-gambling schemes if state law authorized them to do so.[144] Justice Ginsburg argued that the federal government is permitted to regulate local activities and therefore all provisions that did not directly commandeer the states should have remained valid because they were severable from the unconstitutional portions of the statute.[145]

IV. ANALYSIS

A. Introduction

The Tenth Amendment states, "[t]he 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."[146] This statement has been taken to mean that any power not explicitly given to the federal government is a power that is left to the states, and therefore the Federal Government has no authority to use that power.[147] This Amendment is the basis for the anti-commandeering doctrine and states who refuse to comply with federal regulation often invoke this doctrine to justify their decisions.[148]

In *Murphy*, the Court made important decisions regarding the anti-commandeering doctrine which directly speak to the balance of powers

141. *Id.* at 1488 (Ginsburg, J., dissenting).
142. *Id.* at 1489.
143. *Murphy*, 138 S. Ct. at 1490.
144. *Id.*
145. *Id.*
146. U.S. CONST. amend. X.
147. *New York*, 505 U.S. at 155.
148. Brief for Petitioner at 4, Murphy v. NCAA, 138 S. Ct. 1461 (2018) (No. 16-476).

between the states and federal government.[149] The Court went on to make a controversial decision regarding the current state of the severability doctrine.[150] Lastly, the Court's decision in *Murphy* will likely have implications in a variety of fields where the legal debate between state and federal law continues.[151]

B. Discussion

1. The Anti-Commandeering Doctrine Receives a Better Definition

The anti-commandeering doctrine first arose in *Hodel*, where the Court stated that in order for a piece of legislation to be invalid under the Tenth Amendment, it must meet a three-part test.[152] First, the statute must regulate the "states as states."[153] Second, the regulation must address matters that are attributes of state sovereignty.[154] Third, the states' compliance with the regulation would affect their ability to operate in areas where they were traditionally regulating the same activity.[155] Also, even if all three of these requirements are met, a Tenth Amendment violation is not certain to occur.[156] *Hodel* also stated that if the Federal Government has preempted a specific area affecting interstate commerce, the states have no right to regulate that area themselves.[157] This ruling paved the way for other states to challenge statutes and regulations and this rule has developed since the holding in *Hodel*.[158]

The next main case to discuss the scope of Congress's powers was *FERC v. Mississippi*.[159] In *FERC*, the Court found that legislation enacted under the Commerce Clause can only be found unconstitutional if there was no rational basis for finding that the activity affects interstate commerce.[160] This gave

149. *Murphy*, 138 S. Ct. 1461, 1485.
150. *Id.*at 1484.
151. Lapin, *supra* note 12.
152. *Hodel*, 452 U.S. at 287.
153. *Id.*
154. *Id.* at 287-88.
155. *Id.* at 288.
156. *Id.* at 288 n.29.
157. *Hodel*, 452 U.S. at 286.
158. *FERC*, 456 U.S. at 745.
159. *Id.* at 752.
160. *Id.* at 754.

Congress more power because this rational basis standard was highly deferential.[161] So long as the regulated activity was related to interstate commerce in one way or another, Congress retained power that supersedes the states' powers to regulate that activity.[162] This case expanded the range of statutes and regulations Congress could enact in order to control state activities.[163]

South Carolina v. Baker[164] evaluated whether a section of the Tax Equity and Fiscal Responsibility Act of 1982, which required states to issue bonds in registered form was unconstitutional under the Tenth Amendment. In this case, the Court stated that the statute only regulated state activities, it did not influence the way that the states regulated private parties.[165] This rule again gave Congress more power to control the states' activities.[166] This holding gave Congress the power to regulate all private parties within the states and found that even if the new legislation required the states to take action by enacting or repealing their current laws, this was still constitutional.[167]

Next, in *New York v. United States* the Court sharply departed from *South Carolina v. Baker*.[168] The Court in *New York* found that Congress was not regulating only private parties as they had in *Baker*.[169] The Court found that a federal law was unconstitutional because it required states to take title to radioactive waste or to regulate in the manner Congress directed.[170] The Court stated that Congress did not have the power to instruct the states in this manner, and this was the first major ruling in favor of state's rights, which recognized the Tenth Amendment anti-commandeering doctrine.[171] This case signaled a shift towards state's rights.[172] *Printz*, which was decided just five years after *New York*, reiterated this same principle.[173] *Printz* again

161. Erwin Chemerinsky, *The Rational Basis Test is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 401 (2016).
162. *FERC*, 456 U.S. at 754.
163. *Id.* at 758.
164. 485 U.S. 505, 508.
165. *Id.* at 514.
166. *Id.* at 514-15.
167. *Id.*
168. 505 U.S. at 188.
169. *Id.* at 160.
170. *Id.* at 176.
171. *Id.*
172. *Id.* at 188.
173. *Printz*, 521 U.S. at 935.

stated that the Federal Government cannot command the states to administer or enforce a regulatory program.[174]

Reno again went back to the principle that the Federal Government can regulate state activities rather than forcing the states to enact regulations.[175] This principle seems to be left over from *Hodel* and *Baker*, even after *New York* and *Printz* were decided.[176] This case also reiterated the principle leading up to the decision in *Murphy* that a federal statute cannot require a state to enact specific laws or regulations, nor can it require the state to regulate private individuals.[177]

All of these cases lead up to the current definition of anti-commandeering that was presented in *Murphy*.[178] The majority opinion went through all of these cases and explained the current rule regarding violations of the Tenth Amendment.[179] After *Murphy*, it appears that the Federal Government cannot order a state's officials to enforce federal regulations.[180] Neither can a state be forced to enact or repeal a particular statute.[181] The court tells us in *Murphy* that the Tenth Amendment stands for the idea that Congress cannot send a direct order the state's legislature to either take action or not take action when it comes to running their sovereign governments.[182] What Congress can still do, however, is regulate the states itself.[183] Congress can also evenhandedly regulate an activity itself when both states and private actors engage in that activity.[184]

The rule in *Murphy* seems to be different from the original rule in *Hodel*.[185] States are no longer required to prove a three-part test to determine a statute is unconstitutional.[186] States need only show now a direct order to the legislature to regulate an activity at the hands of the Federal

174. *Id.*
175. *Reno*, 528 U.S. at 151.
176. *Id.*
177. *Id.*
178. *Murphy*, 138 S. Ct. at 1477.
179. *Id.* at 1476-77.
180. *Id.* at 1477. Although the Court says this referring to the *Printz* case, this is not exactly true. There are federal regulations that require state officials to act in order to meet federal regulations. For example, national fingerprint databases and other criminal databases require state officials to act.
181. *Id.* at 1478.
182. *Id.*
183. *Murphy*, 138 S. Ct. at 1476.
184. *Id.* at 1478.
185. *Id.* at 1476.
186. *Id.*

Government.[187] This new rule appears to give states a much better chance at having the Supreme Court find a statute unconstitutional.[188]

2. Looking to Congressional Intent When Severing Unconstitutional Statutes

One thing the majority, concurring, and dissenting opinions could not agree on was whether to look to congressional intent when severing unconstitutional statutes.[189] The rule the majority relied on when determining whether to sever the PASPA provisions states, "it must be 'evident that [Congress] would not have enacted those provisions which are within its power, independently of [those] which [are] not."[190] When applying this rule, it was then necessary to try to find what Congress would have wanted the law to be had they known one portion of the Act was unconstitutional.[191] This is where the majority opinion diverged from the dissenting opinions.[192]

Justice Thomas expressed his concern with this severability principle because he believed this doctrine does not align with basic principles of statutory interpretation.[193] Although the Supreme Court has gone back and forth over the years whether to use congressional intent when interpreting statutes, since the Justice Scalia era, justices have argued that looking for congressional intent is not a reliable or plausible way to interpret statutes.[194] Justice Thomas raised a valid issue here, and demonstrated this point when he observed that it is unlikely Congress would have had specific intent on this question because it does not pass statutes with the expectation that they will be found unconstitutional in the future.[195] Justice Thomas believed that by trying to find a congressional intent that is not likely to exist, the judicial

187. *Id.* at 1477.

188. Ilya Somin, *Federalism Comes Out as the Winner in Murphy v. NCAA,* REG. REV. (July 10, 2018), https://www.theregreview.org/2018/07/10/somin-federalism-comes-out-winner-murphy-v-ncaa/.

189. *Murphy*, 138 S. Ct. at 1484, 1485 (Thomas, J., concurring); *Id.* at 1488 (Breyer, J. dissenting); *Id.* at 1488 (Ginsburg, J. dissenting).

190. *Id.* at 1482 (citing Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987)).

191. *Id.*

192. *Id.* at 1484, 1485 (Thomas, J., concurring); *Id*. at 1488 (Breyer, J., dissenting); *Id*. at 1489 (Ginsburg, J., dissenting).

193. *Id.* at 1486 (Thomas, J., concurring).

194. *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring) (citing United States v. Booker, 543 U.S. 220, 320, n.7 (2005)).

195. *Id.* at 1486-87.

branch is exceeding its power.[196] This is the main point of division between the majority and separately written opinions.

Will this rule regarding severability be a lasting one? It is likely it will not be. The precedent shows that the Supreme Court typically tries to sever unconstitutional portions of statutes from constitutional portions.[197] As the concurring and dissenting opinions in *Murphy* point out, there is no reason not to enforce a portion of a statute that is constitutional.[198] This is seen as potentially giving the judiciary too much power to "make" laws as it sees fit.[199]

If the courts should not determine congressional intent for severability issues though, this leaves the problem of what the courts should do when determining whether unconstitutional portions of laws are severable from constitutional portions.[200] In *Murphy*, the Court looked to congressional intent to determine whether the remainder of the Act was severable.[201] However, in *Alaska Airlines,*[202] the rule was applied differently. Even though the *Murphy* Court cited *Alaska Airlines* in its opinion, it did not seem to follow the rule from *Alaska Airlines*.[203]

In *Alaska Airlines*, after the Airline Deregulation Act of 1978 was found unconstitutional, the Court decided that the Act could be severed.[204] In doing so, the Court stated "' [a] Court should refrain from invalidating more of the statute than is necessary . . . it is the duty of this court to . . . maintain the act in so far as it is valid.'"[205] The *Murphy* Court, however, conspicuously left this language out when stating the rule for severability in its opinion.[206] This previous rule seems to be more restrictive and more deferential towards the

196. *Id.* at 1487.
197. Ayotte v. Planned Parenthood, 546 U.S. 320, 328-29 (2006), (citing United States v. Booker, 543 U.S. 220, 227-229).
198. *Murphy*, 138 S. Ct. at 1490 (Ginsburg, J., dissenting).
199. *Id.* at 1487 (Thomas J., concurring) (citing Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U.L. REV. 738, 752-53 (2010).
200. *Id.* at 1487.
201. *Id.* at 1482.
202. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987).
203. *Murphy*, 138 S. Ct. at 1482 (citing *Alaska Airlines*, 480 U.S. at 684).
204. *Alaska Airlines*, 480 U.S. at 697.
205. *Id.* at 684 (citing Regan v. Time, Inc., 468 U.S. 641, 652 (1984)).
206. *Murphy*, 138 S. Ct. at 1482.

Act itself.[207] Although the *Alaska Airlines* Court did look to legislative history and congressional intent, the Court also stated that it is more relevant to look to whether the statute will function in a manner consistent with congressional intent, rather than if Congress would have enacted it at all.[208] This seems to imply that instead of looking to whether Congress would have wanted the constitutional portions to remain in effect, courts should look to whether the remainder of the statute is operable in accordance with Congress's intent when it enacted the statute.[209]

In *Murphy*, Justice Ginsburg argued that PASPA was operable in accordance with Congress's intent when it enacted the statute.[210] Justice Ginsburg recognized that the rule used in previous cases tried to salvage statutes rather than find the entire Act unenforceable.[211] Justice Ginsburg even stated that with PASPA, "it is scarcely arguable that Congress 'would have preferred no statute at all.'"[212] Here, Justice Ginsburg is arguing that the theory of looking to Congress's intent on the remainder of the statute is unreliable and it would make more sense to look to whether the rest of the statute can operate in a logical and constitutional manner.[213] Justice Ginsburg's argument would also be more in line with the ruling from *Alaska Airlines* in that regard.[214]

The severability doctrine will likely not continue to operate in the manner the *Murphy* Court utilized it.[215] As Justice Thomas and Justice Ginsburg both pointed out, it does not make sense to look to whether Congress would have anticipated the situation of having a portion of a statute ruled unconstitutional, because it is not its goal to enact unconstitutional statutes.[216] The rule that *Alaska Airlines* cited makes more sense to apply when determining severability.[217] By according more deference to Congress, and

207. *Id.* at 1489 (Ginsburg, J., dissenting). Justice Ginsburg explains that the Court would not ordinarily find the entire statute unconstitutional, but that is not what the majority did here with their interpretation of the severability doctrine.

208. *Alaska Airlines*, 480 U.S. at 685.

209. *Id.*

210. *Murphy*, 138 S. Ct. at 1490 (Ginsburg, J., dissenting).

211. *Id.*

212. *Id.* (citing Exec. Bens. Ins. Agency v. Arkison, 134 S. Ct. 2165 (2014)).

213. *Id.* at 1489-90.

214. *Alaska Airlines*, 480 U.S. at 684, (citing Buckley v. Valeo, 424 U.S. 1, 108 (1976) (*per curiam*), quoting Champlin Refining Co. v. Corporation Comm'n of Oklahoma, 286 U.S. 210, 234 (1932)).

215. *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring). Justice Thomas suggests the Court should reconsider its severability precedents.

216. *Id.* at 1487.

217. *Alaska Airlines*, 480 U.S. at 684.

assuming that the rest of the statute is valid so long as it is operable, the concerns for the judicial branch exceeding its powers are alleviated.[218]

Going forward, Congress could reenact the portion of the statute that the Supreme Court found to be not severable, although there appears to be no pending legislation at this time.[219] This would make it clear that it was Congress's intent to retain that portion of the statute, and it is unlikely the Supreme Court could find other grounds on which to find it unenforceable.[220] This would return the states to the position where private actors cannot engage in sports gambling, which would be a significant limitation compared to the state of the law after *Murphy*.[221]

3. Potential Impact on States' Rights After Murphy v. NCAA

The *Murphy* decision appears to enlarge states' rights. The idea that Congress cannot force states to enact or repeal laws or force states to regulate its citizens in a particular way has been reinforced by the Supreme Court.[222] *Murphy* does not simply allow New Jersey to enact legislation to legalize sports gambling.[223] The *Murphy* decision will likely have important implications in a variety of fields.[224] First, states may point to this decision as the debate on legalization of marijuana continues.[225] Second, states may invoke *Murphy* when passing legislation regarding gun control.[226] Third, sanctuary cities might be impacted by the *Murphy* decision as the immigration debate continues to unfold.[227]

First, state and federal marijuana laws are in direct conflict with each other in some states.[228] For example, in a state where marijuana is legal under

218. *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring).
219. United States v. Booker, 543 U.S. 220, 274 (Stevens, J., dissenting).
220. *Id.*
221. *Murphy*, 138 S. Ct. at 1484-85.
222. *Id.* at 1476-77.
223. Sam Kamin, *Murphy v. NCAA: It's about much more the gambling on sports,* HILL (May 15, 2018), http://thehill.com/opinion/judiciary/387653-murphy-v-ncaa-its-about-much-more-than-gambling-on-sports.
224. *Id.*
225. Mikosra, *The Implications of Murphy v. NCAA for State Marijuana Reforms*, VAND. U. L. SCH. MARIJUANA L., POL'Y, & AUTHORITY (May 17, 2018), https://my.vanderbilt.edu/marijuanalaw/2018/05/the-implications-of-murphy-v-ncaa-for-state-marijuana-reforms/.
226. Lapin, *supra* note 12.
227. *Id.*
228. Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 77 (2015).

the state laws but it is still considered a controlled substance and is illegal under federal law, the state might now be able to make a compelling argument that Congress cannot force the states to modify their laws and they must make their own choices about regulation, per the decision in *Murphy*.[229] Further, the states might argue that they have the power to enact any laws or repeal any laws that they see fit to legalize marijuana, just as New Jersey did with sports gambling in *Murphy*.[230] Therefore, if the Federal Government tries to force states to repeal laws legalizing marijuana use or enact laws prohibiting marijuana use, the Federal Government cannot compel them to.[231]

Second, *Murphy* might influence future decisions on gun control.[232] At a time where a large portion of the public is demanding regulation at a federal level for guns, the states might not have to go along with Congress's decision in this area either.[233] For example, if Congress were to pass a law forcing the states to enact legislation to regulate guns in a particular manner, this law would be similar to the PASPA provision in *Murphy* and could be found unconstitutional on the ground that the federal government cannot force states to enact laws or regulate activities simply because Congress tells them to.[234] It appears Congress would have to step in and enact an entire statutory scheme for regulating gun use in the states if it wanted to do so in a constitutional manner.[235]

Lastly, the same issue arises as cities are refusing to follow the Federal Government's orders when it comes to immigration.[236] Cities that are refusing to cooperate with immigration departments are becoming known as sanctuary cities, and it would appear these cities could use the same arguments that were raised in *Murphy* as well.[237] If a state wanted to make the decision not to prosecute an illegal immigrant, after the *Murphy* decision, it appears that Congress cannot force a city to pass legislation criminalizing the immigrant's status.[238] The Federal Government must step in and regulate

229. Mikosra, *supra* note 221.
230. *Id.*
231. *Id.*
232. Lapin, *supra* note 12.
233. *Id.*
234. *Id.*
235. *Id.*
236. Amy Howe, *Opinion analysis: Justices strike down federal sports gambling law*, SCOTUS BLOG (May 14, 2018), http://www.scotusblog.com/2018/05/opinion-analysis-justices-strike-down-federal-sports-gambling-law/.
237. *Id.*
238. *Id.*

themselves and again, an argument could be made that they cannot force the states to do anything in the situation.[239]

After the *Murphy* decision, the states have more ammunition to be able to tell the Federal Government that they will not regulate activities on behalf Congress.[240] Congress is not allowed to tell the states they must enact, refrain from enacting, or repeal laws.[241] On the other hand, Congress is still open to regulate private actors within the states as it sees fit on its own. Should Congress go forward with spending the money to regulate these activities itself, the states would not be able to fight against the Federal Government.[242] However, as the war between state and federal powers continues, *Murphy* seems to say that the federal government should defer to the states more often, and holding true to the Tenth Amendment, if the power was not explicitly given to the Federal Government, the power belongs to the states.[243]

V. CONCLUSION

The Supreme Court's decision in *Murphy* serves as an important expansion on the anti-commandeering and severability doctrines.[244] Further, this decision will likely impact other controversial issues that are currently of interest,[245] namely, states' rights when deciding whether to enforce the federal government's policies.[246] As a result, the Supreme Court left the state of the law with an anti-commandeering doctrine that enlarges state powers and a rule regarding severability that does not appear to be sustainable.[247] The states are left with ammunition for the legalization of marijuana, passage or refusal to pass gun control laws, and refusal to comply with immigration policies.[248] Although the Supreme Court's current position on severability is concerning, overall, this decision will likely have a substantial impact.[249]

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239. *Id.*; Although the Federal Government would need to step in and regulate by themselves in theory, some people argue that the Federal Government usually just ties its political goals to its funding for the states in order to incentivize the states to conform.

240. Kamin, *supra* note 219.

241. *Id.*

242. *Id.*

243. *Murphy*, 138 S. Ct. at 1476.

244. *Id.* at 1479.

245. Lapin, *supra* note 12.

246. *Id.*

247. *Id.*; *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring).

248. Lapin, *supra* note 12.

249. *Id.*