

Betting on Federalism: *Murphy v. NCAA* and the Future of Sports Gambling

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“Money won is twice as sweet as money earned.”

—Eddie Felson, *The Color of Money*

I. Introduction

“Supreme Court Ruling Favors Sports Betting.”¹ So reported the *New York Times* the day the Court decided *Murphy v. National Collegiate Athletic Association*, a decision striking down a federal law that generally prohibited states from legalizing sports gambling.² The *Washington Post* and *Los Angeles Times* also focused on the sports betting implications of the decision³—and reasonably so: Sports gambling is a big business already, and it will likely grow bigger still after *Murphy*. But whether *Murphy* will actually result in the widespread legalization of sports gambling is difficult to predict. Sports betting policy will likely unfold on a state-by-state basis, amid a legal, cultural, and technological landscape that has changed in important ways in the decades since the statute at issue was enacted. More importantly, *Murphy*'s meaning extends far beyond sports gambling, with implications for a wide range of federal laws that curtail state authority. And therein may lie *Murphy*'s real significance: On a host of issues, it promises to

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¹ Adam Liptak & Kevin Draper, Supreme Court Ruling Favors Sports Betting, *N.Y. Times*, May 14, 2018, <https://nyti.ms/2lkgtyh>.

² *Murphy v. Nat'l Collegiate Athletic Ass'n [NCAA]*, 138 S. Ct. 1461 (2018).

³ Robert Barnes, Justices Rule that States Can Authorize Sports Betting, *Wash. Post*, May 15, 2018, <https://wapo.st/2uEmdKf>; David G. Savage, Supreme Court Tosses Ban on Sports Betting, *L.A. Times*, May 15, 2018, <https://lat.ms/2GrSjf2>.

produce the kind of federal-state tension on which our federal system thrives. That federalism, in turn, helps secure our liberties.

II. Factual and Legal Background

At issue in *Murphy* was the Professional and Amateur Sports Protection Act (PASPA), which generally forbids states to “authorize” sports betting.⁴ Congress enacted PASPA in 1992, after a century or so of shifting attitudes about gambling. As described in greater detail below, gambling was largely illegal throughout the United States by the late 19th century, but those prohibitions began to be relaxed by the 1930s, and state lotteries quickly mushroomed in the 1960s and 1970s. In 1988, Congress enacted the Indian Gaming Regulatory Act, spurring the development of casinos on Indian lands across the country and later the advent of legalized casino gambling by many states. But casino *sports* gambling remained illegal outside Nevada. By the early 1990s, it appeared that might change too, “and this sparked federal efforts to stem the tide.”⁵ The result was PASPA, promoted on the ground that it would “protect young people” and “safeguard the integrity of sports.”⁶

The law’s core provision forbids a state or any of its subdivisions “to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on’ competitive sporting events.”⁷ A second provision “makes it ‘unlawful’ for ‘a person to sponsor, operate, advertise, or promote’ those same gambling schemes” if “done ‘pursuant to the law or compact of a governmental entity.’”⁸ But rather than make sports gambling a federal crime, PASPA authorizes the U.S. attorney general, as well as professional and amateur sports organizations, to sue to enjoin violations.

When PASPA was adopted, Nevada allowed sports gambling in casinos, while three other states—Delaware, Montana, and Oregon—hosted sports lotteries or allowed sports pools. PASPA expressly grandfathered in these activities, while a separate provision allowed New Jersey to legalize sports gambling in Atlantic City as long as it did so by the

⁴ *Murphy*, 138 S. Ct. at 1468 (citing 28 U.S.C. § 3702(1)).

⁵ *Id.* at 1470.

⁶ *Id.*

⁷ *Id.* (quoting 28 U.S.C. § 3702(1)).

⁸ *Id.* (quoting 28 U.S.C. § 3702(2)).

beginning of 1994.⁹ It didn't, but in 2011, Garden State voters amended the state's constitution to allow the legislature to authorize sports gambling.¹⁰ The legislature enacted such a law the next year.¹¹ The major professional sports leagues and NCAA sued in federal court to enjoin the law on the ground that it violated PASPA. Relying on the doctrine that Congress may not "commandeer" a state's exercise of its lawmaking power—that the federal government can't force states to enforce federal law—New Jersey "argued . . . that PASPA unconstitutionally infringed the State's sovereign authority to end its sports gambling ban."¹²

The Supreme Court first articulated this anti-commandeering rule in *New York v. United States*, a "pioneering case" that "concerned a federal law that required a State, under certain circumstances, either to 'take title' to low-level radioactive waste or to 'regulat[e] according to the instructions of Congress.'"¹³ The Court held the law was unconstitutional because the Constitution does not authorize Congress to impose obligations on state governments to achieve federal objectives.¹⁴ The Court "traced this rule to the basic structure of government established under the Constitution," which empowers Congress "to regulate individuals, not States."¹⁵ "Where a federal interest is sufficiently strong to cause Congress to legislate," the Court in *New York* explained, "it must do so directly; it may not conscript state governments as its agents."¹⁶

Five years later, in *Printz v. United States*, "the Court applied the same principles" to strike down "a federal statute requiring state and local law enforcement officers to perform background checks and related tasks in connection with applications for handgun licenses."¹⁷ The Court held that the federal government may not "command [any of] the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."¹⁸

⁹ *Id.* at 1471 (citing 28 U.S.C. § § 3704(a)(1)-(2), 3704(a)(3)).

¹⁰ See N.J. Const. art. IV, § 7, ¶(2)(D), (F).

¹¹ 2011 N.J. Laws 1723.

¹² Murphy, 138 S. Ct. at 1471 (citing *NCAA v. Christie*, 926 F. Supp. 2d 551, 561 (D.N.J. 2013)).

¹³ Murphy, 138 S. Ct. at 1476 (quoting *New York*, 505 U.S. 144, 175 (1992)).

¹⁴ *New York*, 505 U.S. at 176.

¹⁵ Murphy, 138 S. Ct. at 1476 (quoting *New York*, 505 U.S. at 166).

¹⁶ *New York*, 505 U.S. at 178.

¹⁷ Murphy, 138 S. Ct. at 1477 (citing *Printz v. United States*, 521 U.S. 898 (1997)).

¹⁸ *Printz*, 521 U.S. at 935.

New Jersey argued that these principles also applied to PASPA's anti-authorization provision: By telling the state that it could not authorize sports gambling, Congress was attempting to "commandeer the [state's] legislative processes."¹⁹ The district court disagreed, and the U.S. Court of Appeals for the Third Circuit affirmed. "The panel thought it significant that PASPA does not impose any *affirmative* command" and "did not interpret PASPA as prohibiting the *repeal* of laws outlawing sports gambling."²⁰

New Jersey unsuccessfully sought review by the U.S. Supreme Court.²¹ Opposing the state's petition for certiorari, the federal government argued "that PASPA does not require New Jersey 'to leave in place the state-law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment. To the contrary, New Jersey is free to repeal those prohibitions in whole or in part.'"²²

In 2014, the New Jersey legislature did just that, partially repealing its sports betting laws. Specifically, the 2014 law "repeal[ed] the provisions of state law prohibiting sports gambling insofar as they concerned the 'placement and acceptance of wagers' on sporting events by persons 21 years of age or older at a horseracing track or a casino or gambling house in Atlantic City," and "specified that the repeal was effective only as to wagers on sporting events not involving a New Jersey college team or a collegiate sporting event taking place in the State."²³

The same plaintiffs filed a new suit and won before the district court and, eventually, the Third Circuit sitting en banc. Abandoning some of its prior reasoning as "facile," the en banc court found that the new law "constitutes an authorization"—and thus violates PASPA—"because it 'selectively remove[s] a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators.'"²⁴ The court did not say whether a complete repeal would have been permissible.

¹⁹ New York, 505 U.S. at 161 (quoting *Hodel v. Va. State Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)).

²⁰ Murphy, 138 S. Ct. at 1471–72 (emphases added) (citing *NCAA v. Christie*, 730 F.3d 208, 231–32 (3d Cir. 2013)).

²¹ *Id.* at 1472.

²² *Id.*

²³ *Id.*

²⁴ *Id.* (quoting *NCAA v. Governor of N.J.*, 832 F.3d 389, 401 (3d Cir. 2016) (en banc)).

The Supreme Court granted review and reversed. Writing for a 7–2 Court, Justice Samuel Alito began by analyzing what constitutes an “authorization” for PASPA purposes: whether “any state law that has the effect of permitting sports gambling . . . amounts to an authorization” (as New Jersey argued), or whether authorization instead requires some kind of “affirmative action” to “empower” entities to “conduct sports gambling operations” (as the leagues contended).²⁵ The Court sided with New Jersey’s interpretation but determined that “the competing definitions offered by the parties lead to the same conclusion”: “The repeal of a state law banning sports gambling not only ‘permits’ sports gambling . . . it also gives those now free to conduct a sports betting operation the ‘right or authority to act’; it ‘empowers’ them.”²⁶

Under either definition, the Court held, PASPA’s anti-authorization provision violates the Constitution’s anti-commandeering principle, which expresses “a fundamental structural decision incorporated into the Constitution” to “withhold from Congress the power to issue orders directly to the States.”²⁷ The Constitution both limits and preserves state sovereignty, and it does so both directly and implicitly. One such limitation is the Supremacy Clause, which “means that when federal and state law conflict, federal law prevails and state law is preempted.”²⁸ But while Congress’s enumerated legislative powers are “sizeable,” “they are not unlimited”: the Constitution confers on Congress “only certain enumerated powers,” reserving “all other legislative power . . . for the States.”²⁹ Importantly, the power the Constitution “confers upon Congress [is] the power to regulate individuals, not States.”³⁰ “In this respect, the Constitution represented a sharp break from the Articles of Confederation,” under which “Congress lacked the authority in most respects to govern the people directly.”³¹ And indeed, “conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States.”³²

²⁵ Murphy, 138 S. Ct. at 1473.

²⁶ *Id.* at 1474.

²⁷ *Id.* at 1475.

²⁸ *Id.* at 1476.

²⁹ *Id.*

³⁰ *Id.* at 1479 (quoting *New York*, 505 U.S. at 166).

³¹ *Id.* at 1476 (quoting *New York*, 505 U.S. at 163).

³² *Id.*

Here's the jurisprudential sequence in other words: In *New York*, the Court struck down "a federal law that required a State, under certain circumstances, either to 'take title' to low-level radioactive waste or to 'regulat[e] according to the instructions of Congress';³³ and in *Printz*, the Court held unconstitutional "a federal statute requiring state and local law enforcement officers to perform background checks and related tasks in connection with applications for handgun licenses."³⁴ Now, in *Murphy*, the Court extended *New York* and *Printz*'s logic to conclude the PASPA provision prohibiting states to authorize sports gambling also violates the anti-commandeering rule. "That provision unequivocally dictates what a state legislature may and may not do . . . as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals."³⁵

The Court rejected the "empty" distinction between federal laws that "command[] 'affirmative' action as opposed to imposing a prohibition," because "[t]he basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event."³⁶ Justice Alito also found no prior decision in which the Court upheld a law in which Congress "commandeered the legislative process" by "direct[ing] the States either to enact or to refrain from enacting a regulation of the conduct of activities occurring within their borders."³⁷

The Court also concluded that PASPA's anti-authorization provision wasn't a preemption provision. To preempt state law, the Court explained, the PASPA provision would have to "represent the exercise of a power conferred on Congress by the Constitution" and "must be best read as one that regulates private actors."³⁸ All three types of preemption—"conflict," "express," and "field"—"work in the same way": "Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law

³³ *Murphy*, 138 S. Ct. at 1476. (citing *New York*, 505 U.S. at 175).

³⁴ *Id.* at 1477 (citing *Printz*, 521 U.S. at 898).

³⁵ *Id.* at 1478.

³⁶ *Id.*

³⁷ *Id.* at 1479.

³⁸ *Id.*

takes precedence and the state law is preempted.”³⁹ PASPA’s anti-authorization provision doesn’t fit the bill, “because there is no way in which [it] . . . can be understood as a regulation of private actors”: it neither confers federal rights nor imposes federal restrictions on private actors wanting to conduct sports gambling operations.⁴⁰ Instead, the provision is “a direct command to the States,” which “is exactly what the anticommandeering rule does not allow.”⁴¹

The Court thus invalidated PASPA’s anti-authorization provision.⁴² But the Court did not end its analysis there. Instead, it went on to consider whether it could affirm the Third Circuit’s decision on the ground that New Jersey’s 2014 law violates PASPA’s prohibition on States’ “licens[ing]” sports gambling.⁴³ The Court held that it could not, because “that provision suffers from the same defect as the prohibition of state authorization”: “[i]t issues a direct order to the state legislature.”⁴⁴

Finally, the Court considered whether the anti-authorization provision’s invalidity “dooms the remainder of PASPA,” or whether that provision could be severed from the rest of the statute.⁴⁵ To decide the question, the Court asked whether Congress would have enacted each of PASPA’s remaining provisions without the anti-authorization in place. The Court answered *no*, and thus invalidated the statute as a whole.⁴⁶

This severability analysis divided the Court far more than the commandeering question. Justice Clarence Thomas concurred in the Court’s opinion but wrote separately to urge the Court to reconsider its severability precedents and to dispute the dissent’s assumption that “Congress can prohibit sports gambling that does not cross state lines.”⁴⁷ Justice Stephen Breyer joined the majority in all but the severability analysis, and there instead joined in part

³⁹ Murphy, 138 S. Ct. at 1480.

⁴⁰ *Id.* at 1481.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 1481–82.

⁴⁵ *Id.*

⁴⁶ *Id.* at 1482–85. The severability aspect of this case may prove to be as significant as the federalism ruling.

⁴⁷ *Id.* at 1485–87 (Thomas, J., concurring).

Justice Ruth Bader Ginsburg’s “dissent.”⁴⁸ While framed as a dissent, Justice Ginsburg’s opinion, also joined in full by Justice Sonia Sotomayor, assumes that PASPA’s anti-authorization provision violates the anti-commandeering rule.⁴⁹ Thus no justice actually disagreed with the majority’s core holding.

III. Sports Gambling Past, Present, and Future

The direct policy implications of any Supreme Court action might ordinarily be the simplest to spot. For example, if a warrantless search is struck down, we can expect similarly situated law enforcement to obtain a warrant next time. Here, curiously, the direct policy impact on permissible sports gaming is more difficult to read as a result of the nation’s yo-yoing appetite for gambling. Are we all sports gamblers now?

Murphy’s most immediate result, of course, was that it cleared the way for New Jersey to legalize sports gambling. New Jersey promptly did just that,⁵⁰ and in the first few weeks that sports betting was legal there, gamblers placed more than \$16 million in wagers.⁵¹ As for other states, more than 20, including Arizona, joined an amicus brief urging the Supreme Court to strike down PASPA as unconstitutional. Whether other states will actually join New Jersey in legalizing sports gambling is difficult to predict, but gambling is as old as America itself,⁵² and attitudes about gambling have changed dramatically over time.

Lotteries were used in the early days of the American colonies to raise funds. The first recorded “American” lottery took place in 1612, when the Virginia Company raised 29,000 pounds for the benefit of the Jamestown settlement.⁵³ Later, Ben Franklin himself ran an early

⁴⁸ *Murphy*, 138 S. Ct. at 1488–91 (Ginsburg, J., dissenting).

⁴⁹ *Id.* at 1489; see also *id.* at 1490 (“In PASPA, *shorn of the prohibition on modifying or repealing state law*, Congress permissibly exercised its authority to regulate commerce by instructing States and private parties to refrain from operating sports-gambling schemes.” (emphasis added)).

⁵⁰ N.J. P.L. 2018, ch. 33 (2018), Assembly No. 4111.

⁵¹ Samantha Marcus, N.J. Sports Betting Took \$16M in Wagers in Opening Weeks. Here’s What We Bet On, NJ.com, July 12, 2018, <https://bit.ly/2Awo7St>.

⁵² In fact, gambling is quite a bit older than America. According to ancient mythology, Zeus, Hades, and Poseidon split heaven, hell, and the sea with the throw of dice. In ancient Egypt, depictions of gambling date back to 3500 B.C., and a gaming board was found in King Tut’s tomb. Biblical scriptures describe Roman soldiers casting lots for Christ’s clothes. And Chinese playing cards have been found from the 12th century.

⁵³ Nat’l Gambling Impact Study Comm’n, Lotteries (1999), <http://govinfo.library.unt.edu/ngisc/research/lotteries.html> (last visited Aug. 15, 2018).

version of the lottery in Philadelphia.⁵⁴ By the mid-18th century lotteries were used in all 13 American colonies for both community and private purposes, including to finance construction at private universities like Harvard and Yale.⁵⁵ The Continental Congress even authorized a lottery in a failed effort to fund the Continental Army during the Revolutionary War.⁵⁶

In the 19th century, however, American attitudes toward gambling began to change. In addition to ongoing concerns about the moral decadence associated with gambling, stories of corruption and cheating spread, which lead to a backlash against the pastime. One of the most famous examples of this corruption took place in 1823. In that year, Congress had authorized a Grand National Lottery to fund the beautification of Washington, D.C. But when the time came for the prize to be paid, the organizer of the contest ran off with the proceeds and the lucky winner was left to fight his way through the court system to get it back.⁵⁷ As gambling, particularly state-sponsored lotteries, fell out of favor with the American public, there was a corresponding shift in state laws about wagering. By the beginning of the 20th century, most states had eliminated state-sponsored lotteries.

Throughout the early history of the United States, the federal government and courts had left regulation of gambling to the states as part of their authority to regulate for the health, safety, and morals of their citizens. That deference was so significant that states were permitted to host lotteries across state lines. For example, Louisiana used a lottery to raise money after the devastation of the Civil War and accepted payment from individuals outside the state via the U.S. Postal Service. According to historical accounts, only seven percent of the lottery revenue came from inside the state.⁵⁸

⁵⁴ Benjamin Franklin, *Scheme of the First Philadelphia Lottery*, Pa. Gazette, December 5, 1747, reprinted in *Franklin Papers*, Nat'l Archives: Founders Online, <https://founders.archive.gov/documents/Franklin/01-03-02-0097> (last visited Aug. 15, 2018).

⁵⁵ Nat'l Gambling Impact Study Comm'n, *supra* note 53.

⁵⁶ Image 1 of United States Lottery (Nov. 18, 1776), in *Documents from the Continental Congress and the Constitutional Convention, 1774-89* (Library of Congress), <https://www.loc.gov/resource/bdsdcc.01701/?st=text>; see also William N. Thomson, *Gambling in America: An Encyclopedia of History Issues, and Society*, at x, xxvi (2001).

⁵⁷ Mark Jacob & Stephan Benzkofer, 10 Things You Might Not Know about the Lottery, *Chicago Tribune*, Aug. 22, 2014, <https://trib.in/2006SuE>.

⁵⁸ *History of Lotteries*, La. Lottery Corp., <https://louisianalottery.com/history-of-lotteries> (last visited Aug. 15, 2018).

But after the D.C. debacle, opposition to lotteries grew widespread. And in 1895, Congress enacted the Federal Lottery Act, which prohibited the transportation of lottery tickets across state lines. In 1903, the Supreme Court narrowly upheld the act by a 5-4 decision, in *Champion v. Ames*, declaring that transferring lottery tickets across state lines was subject to the Commerce Clause.⁵⁹ The Court's close vote is both a sign of the monumental change in Commerce Clause jurisprudence over the last century and the significant deference the Court traditionally afforded the states with regulation of gambling.

For several decades, legalized gambling remained out of favor with the majority of Americans. It was not until 1964 that the state of New Hampshire established the country's first modern state-run lottery.⁶⁰ And that enactment only took place after a 10-year effort on the part of lottery proponents.⁶¹ Once New Hampshire opened the gates, however, a number of states followed and instituted their own state-sponsored lotteries.

Like the rest of the rollercoaster history of gambling, American attitudes toward *sports* gambling also shifted over time—including over the 26 years that PASPA was in effect. But the basic philosophical divide over whether sports gambling should be legal remains. Advocates of legalizing sports gambling argue that wagering is already taking place and that when it is conducted in an illegal space (as it commonly is), it poses dangers for those who participate.⁶² Proponents thus argue that states should fully legalize sports gambling, so they can regulate it and profit from it.

⁵⁹ 188 U.S. 321 (1903) (also known as “Lottery Case”).

⁶⁰ Danny Lewis, Queen Elizabeth I Held England's First Official Lottery 450 Years Ago, Smithsonian.com, Jan. 13, 2016, <https://bit.ly/2M8BZ6Q>.

⁶¹ History, N.H. Lottery Comm'n, www.nhlottery.com/about-us/history.aspx (last visited Aug. 15, 2018).

⁶² According to the National Gambling Impact Study Commission, 20 years ago when Americans legally spent about \$2.8 billion in Nevada each year on sports betting, they were placing \$80–380 billion in *illegal* sports wagers. Nat'l Gambling Impact Study Comm'n, Final Report, June 18, 1999, <https://bit.ly/2Oy5Hnf>. More recently, in 2017, gamblers spent around \$4.9 billion placing legal bets with Nevada bookies. According to industry experts, this is less than four percent of the total amount wagered, which makes the amount Americans bet illegally on sports around \$123 billion per year—more than 20 times greater than the legal, regulated, sports-betting market. See Michelle Minton, Competitive Enterprise Inst., Legalizing Sports Betting in the United States, 1 (2018), <https://cei.org/content/legalizing-sports-betting-united-states>.

These advocates get it at least partially right. There is no doubt that states can profit from the legalization of sports wagering. But it's an open question how large a sports-betting profit states could turn. In 2017, customers bet \$4.9 billion in Nevada sportsbooks. However, out of every dollar bet, the books kept just over five cents.⁶³ And the books made only \$1.1 million off the 2018 Super Bowl, one of the smallest wins in the history of legal betting on the game.⁶⁴ A state's profit will also depend partly on what kind of sports gambling the state permits. Nevada allows its residents to gamble online, but not all states may be interested in opening the door that wide. For example, states may choose to restrict sports gambling to casinos or limit the sports eligible for wagers. Additionally, Nevada already has established itself as the epicenter for gambling, and it could take other states decades to match the wagers that are placed there. For this reason, the profits may be smaller than states expect and, consequently, profit may play a less significant role in a state's decision to legalize sports betting.

Opponents of legalized sports wagering continue to raise the same concerns they have outlined for years—that it serves as a regressive tax, that it legalizes bad behavior, and that it threatens the integrity of sporting events. And there may be some truth to their concerns. If America's history of gambling is any gauge, it is clear that legalizing gambling doesn't eliminate fraud or corruption associated with the pastime. The reality is that where gambling exists, associated social costs will likely follow, including criminal activity and negative impacts on families.⁶⁵ It is estimated that two million Americans suffer from a compulsive gambling disorder, and anyone who wagers may run the risk of falling into debt, which can lead to a host of other problems.⁶⁶

At the same time, well-regulated gambling may offer a way to mitigate many of these concerns and provide a fairly safe arena for individual gamblers. These concerns apply to all forms of gambling,

⁶³ UNLV Center for Gaming Research (2018), Nevada Sports Betting Totals: 1984–2017, http://gaming.unlv.edu/reports/NV_sportsbetting.pdf.

⁶⁴ Matt Bonesteel, Las Vegas Sportsbooks Post Smallest Super Bowl Win Since 2011, Thanks to Eagles Win, Wash. Post, Feb. 6, 2018, <https://wapo.st/2Lkki89>.

⁶⁵ Mark Brnovich & Tom Gede, Internet Gaming: Is It Too Late to Reboot?, 12 *Engage* 34 (2011), <https://bit.ly/2M9FIRo>. *Engage* has since been renamed the *Federalist Society Review*.

⁶⁶ Daniel Bortz, Gambling Addicts Seduced by Growing Casino Accessibility, U.S. News & World Rep., Mar. 28, 2013, <https://bit.ly/2LR9TQC>.

much of which is already legal in states and on Indian lands. And important as it is to safeguard the integrity of professional and amateur sports, the truth is that sports betting already happens every day, some of it legally in Nevada casinos. As of today, we haven't seen these activities have a significant impact on the integrity of sports.

While the basic philosophical arguments over sports gambling have not changed since 1992, gambling itself has changed drastically in the 26 years since PASPA was enacted. Many of those changes are the result of significant technological advances. When Congress enacted PASPA, sportsbooks were operated telephonically or in person. Since then, sports wagering has become possible online and now through mobile smartphones. As a result, some of the practical complications that might have limited participation in sports betting during the 1990s have been completely eliminated. Individuals interested in sports gambling can place wagers from their own couches with daily fantasy sports providers such as DraftKings or FanDuel. Further, with the explosion of social leagues like Fantasy Football, interest in sports betting has increased dramatically in recent years. According to polls cited recently in a comprehensive Competitive Enterprise Institute report, in 2008, one in six Americans admitted to gambling on professional sports each year; by 2016, that number had increased to one in three.⁶⁷

And it's not just the technology that has evolved; public opinion is evolving as well. In late 2017, a poll was released showing that for the first time in history, a majority of Americans approved of legalizing sports betting.⁶⁸ At the time, 55 percent of respondents approved of legalizing professional sports betting. This was a complete flip from a 1993 sampling taken shortly after PASPA was enacted, when 56 percent of Americans disapproved of legalizing professional-sports betting.⁶⁹

History has shown us that a change in American attitudes toward gambling often results in a change in American laws regarding gambling, so it is unsurprising that there has also been a drastic change in the state regulation of gambling over the last two decades.

⁶⁷ Minton, *supra* note 62, at 6.

⁶⁸ Rick Maese & Emily Guskin, Poll: For the First Time, Majority of Americans Approve of Legalizing Sports Betting, Wash. Post, July 17, 2018, <https://wapo.st/2n1IOvX>.

⁶⁹ *Id.*

Today, all states but Hawaii and Utah have legalized gambling in some form. Although just over 30 states had a state-sponsored lottery when PAPSA went into effect, lotteries now exist in 44 states as well as several territories.⁷⁰ Nearly the same number of states allow some form of casino-style gambling. The spread of tribal gaming, now permitted in 30 states or territories, has also contributed avenues for legalized gambling. Where tribal gaming is permitted, a specific compact with the state controls the type of gambling that is allowed on tribal lands. With the Supreme Court's decision in *Murphy*, sports betting is now eligible to be added to each compact if the state and tribe agree to its inclusion.

What does all of this mean? It means that it is still anyone's guess what is going to happen now that the Supreme Court has invalidated the law that effectively banned legal sports wagering anywhere outside Nevada. As noted, New Jersey legalized sports betting within weeks after *Murphy* was decided. Delaware actually beat New Jersey to the punch, becoming the first state to start accepting bets outside Nevada.⁷¹ Approximately two dozen other states have pending legislation or proposals to begin building a regulatory structure for sports wagering within their borders. This, combined with the legal and cultural shifts in favor of gambling, suggests that Nevada's monopoly over sports wagering may be coming to an end. On the other hand, opposition to legalized sports betting remains deep for both moral and practical reasons. Additionally, history has taught us that sports wagering requires an effective regulatory structure to ensure the integrity of the games, protect the players, and keep criminal elements from infiltrating the industry. But erecting an effective regulatory structure, especially in today's fractured political environment, is no easy feat.

IV. Other Federalism Implications

Murphy's impact beyond sports gambling is potentially very broad, implicating a wide range of issues where Congress and the states are at odds. One of those issues is immigration and the possibility, as some commentators have suggested, that *Murphy* may “confer on

⁷⁰ Minton, *supra* note 62, at 2.

⁷¹ Rick Maese, Delaware Is the First New State to Bet on Sports Gambling, But It Might Not Pay Off, Wash. Post, June 5, 2018, <https://wapo.st/2Jc2Lxz>.

states a new immunity from federal laws that try to prohibit states from conferring benefits like university seats and drivers' licenses on state residents."⁷² Federal law provides that "an alien who is not [otherwise qualified by the statute] is not eligible for any State or local public benefit [as defined in the statute]."⁷³ "This federal law not only looks like a 'direct' regulation of state and local governments," according to one commentator, "but also does not contain any defense that any private party could easily raise in litigation."⁷⁴ As *Murphy* makes clear, the power the Constitution "confers upon Congress [is] the power to regulate individuals, not States."⁷⁵

Murphy may have additional immigration-related implications for so-called sanctuary cities.⁷⁶ The statute "at the heart of the current federal effort to enjoin and penalize"⁷⁷ those cities, 8 U.S.C. § 1373, provides that, a "local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual."⁷⁸ As some commentators have suggested, this arguably "qualifies as an 'order' to state and local officials, and—like PASPA," may "undermine[] states' control over their governmental machinery and partially transfer[] it to the federal government."⁷⁹

Applying this logic, a Pennsylvania federal district court recently held that Section 1373 violates the Tenth Amendment.⁸⁰ The court's opinion begins with *Hamlet* and *Coriolanus*, sails on toward Scylla and Charybdis, and 30 pages later gets to Philadelphia's claim for a declaratory judgment that it was complying with Section 1373

⁷² Rick Hills, *Murphy v. NCAA's Escape from Baseline Hell*, PrawfsBlog, May 16, 2018, <https://bit.ly/2McsNy7>.

⁷³ *Id.* (quoting 8 U.S.C. § 1621(a)).

⁷⁴ *Id.*

⁷⁵ *Murphy*, 138 S. Ct. at 1479 (quoting *New York*, 505 U.S. at 166).

⁷⁶ See, e.g., Ilya Somin, *Broader Implications of the Supreme Court's Sports Gambling Decision*, *The Volokh Conspiracy*, May 16, 2018, <https://bit.ly/2Oy7Y1L>.

⁷⁷ Garrett Epps, *The Supreme Court Says Congress Can't Make States Dance to Its Tune*, *The Atlantic*, May 14, 2018, <https://bit.ly/2LIS7zU>.

⁷⁸ 8 U.S.C. § 1373(a).

⁷⁹ Somin, *supra* note 76.

⁸⁰ *City of Phila. v. Sessions*, 309 F. Supp. 3d 289 (E.D. Pa. 2018).

“as constitutionally construed.”⁸¹ The court found that the two paragraphs of Section 1373 that applied to the city “by their plain terms prevent ‘Federal, State, or local government entit[ies] or official[s] from’ engaging in certain activities,” and thus “closely parallel the anti-authorization condition in PASPA.”⁸² Just as the PASPA provision “‘dictates what a state legislature may and may not do,’” the court reasoned, the pertinent provisions of Section 1373 “do the same, by prohibiting certain conduct of government entities or officials.”⁸³ The court therefore held that those provisions were unconstitutional, and that Philadelphia did not need to comply with them.⁸⁴

Similarly, in the lawsuit brought by the Trump administration against California in *United States v. California*, a federal district court held that Section 1373 did not preempt a California law that prohibits state law enforcement agencies from sharing certain information for immigration enforcement purposes.⁸⁵ Although the district court ultimately concluded that the California law and Section 1373 did not conflict—and, therefore, the state law was not preempted—it agreed with the analysis of the district court in Pennsylvania that, in light of *Murphy*, “the constitutionality of Section 1373 [is] highly suspect.”⁸⁶

On the other hand, as one Ninth Circuit judge recently noted in dissent, “none of [the principles behind the anticommandeering rule] supports attempts to frustrate the carrying out of national programs and policies (like immigration) by prohibiting communications between national and state or local officials.”⁸⁷

⁸¹ *Id.* at 329.

⁸² *Id.*

⁸³ *Id.* (quoting *Murphy*, 138 S. Ct. at 1478).

⁸⁴ *Id.* at *344.

⁸⁵ No. 18-264, 2018 WL 3301414, at *13–*17 (E.D. Cal. July 5, 2018) (analyzing, among other laws, Cal. Gov’t Code § 7284.6(a)(1)(C) & (D)). Similar to the court in the Philadelphia case, the court here noted (in dictum) that “Section 1373 does just what *Murphy* proscribes: it tells States they may not prohibit (i.e., through legislation) the sharing of information regarding immigration status with the INS or other government entities.” *Id.* at *13.

⁸⁶ *Id.* at *14.

⁸⁷ *City of San Francisco v. Trump*, No. 17-17478, 2018 WL 3637911, at *14n.7 (9th Cir. Aug. 1, 2018) (Fernandez, J., dissenting) (citing *New York*, 179 F.3d at 35). The majority of the panel case concluded, under separation-of-powers principles and the Constitution’s Spending Clause, that the executive branch may not withhold all federal grants from sanctuary jurisdictions in the absence of congressional authorization. The court did not discuss the constitutionality of Section 1373.

Murphy may also have implications for federal limits on state taxation. A professor who calls *Murphy* “the most important federalism decision since *NFIB v. Sebelius*”⁸⁸—the 2012 decision upholding most of the Affordable Care Act—has argued that *Murphy* may doom not only Section 1373 but also “a whole host of federal statutes [that] limit the tax authorities of states and their subdivisions” by directly forbidding states to tax certain persons or things.⁸⁹ This may actually “undersell[]” the point.⁹⁰ Roughly 110 federal laws limit state taxing authority—some with “major economic impact”—that might be “jeopardized if we take seriously the claim in *Murphy* that Congress ‘may not order a state legislature to refrain from enacting a law.’”⁹¹

Some of those laws are indeed framed in the same kinds of prohibitory terms as PASPA’s anti-authorization provision. One statute, for example, provides that “[n]o State . . . may impose or assess a tax on or with respect to the generation or transmission of electricity which . . . results, either directly or indirectly in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.”⁹² Is this so different from Congress forbidding a state to authorize sports betting? Another law says that “[n]o State may impose an income tax on any retirement income of an individual who is not a resident or domiciliary of such State.”⁹³ Does this confer rights on such “an individual” or is that framing just a subterfuge to evade the anti-commandeering doctrine? A third statute says, “[s]tocks and obligations of the United States government are exempt from taxation by a State or a political subdivision of a State.”⁹⁴ As one commentator notes, this is “phrased as an exemption rather than a prohibition, but per Justice Alito [in *Murphy*], ‘it is a mistake to be confused by the way in which a preemption provision is phrased.’”⁹⁵

⁸⁸ Daniel Hemel, *Murphy’s Law and Economics*, Medium.com, May 15, 2018, <https://bit.ly/2v9iTae>.

⁸⁹ Daniel Hemel, *Justice Alito, State Tax Hero?*, Medium.com, May 15, 2018, <https://bit.ly/2MdWz5P>.

⁹⁰ Brian Galle, *Murphy’s (Misguided) Law*, Medium.com, May 15, 2018, <https://bit.ly/2AvYtNM> (emphasis added).

⁹¹ *Id.*

⁹² Hemel, *Justice Alito, State Tax Hero?*, *supra* note 89 (citing 15 U.S.C. § 391).

⁹³ *Id.* (citing 4 U.S.C. § 114).

⁹⁴ *Id.* (citing 31 U.S.C. § 3124).

⁹⁵ Hemel, *Justice Alito, State Tax Hero?*, *supra* note 89.

These laws and others may well be vulnerable after *Murphy*. But where such a challenge might emerge—and whether a political constituency could coalesce to sustain it—is hard to say. Although possible, it is difficult in any event to imagine courts’ invalidating scores of congressional limits on state taxation. Perhaps *Murphy* “could have far-reaching consequences” but won’t, because “those consequences are largely unintended,”⁹⁶ or maybe the Supreme Court will “eventually disavow[] most of *Murphy* or limit[] it to its facts.”⁹⁷ Time will tell.

V. Why Federalism Matters

What seems clear already is that *Murphy* will add to the dynamic tension at the heart of our federal system, and “[i]n the tension between federal and state power lies the promise of liberty” for all Americans.⁹⁸ “[F]ederalism was the unique contribution of the Framers to political science and political theory.”⁹⁹ As the Court in *Murphy* explained, “[w]hen the original States declared their independence, they claimed the powers inherent in sovereignty—in the words of the Declaration of Independence, the authority ‘to do all . . . Acts and Things which Independent States may of right do.’”¹⁰⁰ The states surrendered some but not all of these powers to the new federal government, retaining “a residuary and inviolable sovereignty,” which “our Constitution preserves . . . in two ways.”¹⁰¹ First, the text and structure of the Constitution reserve to the states “a substantial portion of the Nation’s primary sovereignty, together with the dignity and essential attributes inhering in that status.”¹⁰² Second, and particularly relevant in *Murphy*, “the constitutional design secures the founding generation’s rejection of the concept of a central government that would act upon and through the States in favor of a

⁹⁶ Michael Dorf, *The Political Stakes of Commandeering in Murphy v. NCAA*, Dorf on Law, May 16, 2018, <https://bit.ly/2OBQAJt> (emphasis added).

⁹⁷ Galle, *supra* note 86.

⁹⁸ *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991).

⁹⁹ *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring).

¹⁰⁰ *Murphy*, 138 S. Ct. at 1475 (quoting The Declaration of Independence para. 32 (U.S. 1776)).

¹⁰¹ *Alden v. Maine*, 527 U.S. 706, 714–15 (1999) (quoting The Federalist No. 39 (James Madison)).

¹⁰² *Id.* at 714.

system in which the State and Federal Governments would exercise concurrent authority over the people.”¹⁰³

This choice was in part a product of the Framers’ experience under the Articles of Confederation. Under that system, “Congress lacked the authority in most respects to govern the people directly.”¹⁰⁴ Instead, it “acted with powers, greatly restricted, only upon the States.”¹⁰⁵ That experience “persuaded . . . [the Framers] that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict.”¹⁰⁶

At the Constitutional Convention, two competing proposals for the new government emerged—the Virginia Plan, under which “Congress would exercise legislative authority directly upon the individuals, without employing the States as intermediaries,” and the New Jersey Plan, under which “Congress would continue to require the approval of the States before legislating, as it had under the Articles of Confederation.”¹⁰⁷ Edmund Randolph objected to the New Jersey Plan on the grounds that it might require the federal government to coerce the states, and “[c]oercion [is] *impracticable, expensive, cruel to individuals*.”¹⁰⁸ James Madison raised similar practical concerns. In the end, “the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.”¹⁰⁹

In this, as Chief Justice Salmon P. Chase explained a century and a half ago, “the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.”¹¹⁰ This “[d]ual sovereignty is a defining feature of our Nation’s constitutional blueprint.”¹¹¹

¹⁰³ *Id.* (quoting *Printz*, 521 U.S. at 919–20) (internal quotation marks omitted).

¹⁰⁴ *New York*, 505 U.S. at 163.

¹⁰⁵ *Lane Cty. v. Oregon*, 7 Wall. 71, 76 (1869).

¹⁰⁶ *Printz*, 521 U.S. at 919 (citing *The Federalist* No. 15 (Hamilton)).

¹⁰⁷ *New York*, 505 U.S. at 164.

¹⁰⁸ *Id.* (quoting 1 *Records of the Federal Convention of 1787*, at 255–56 (Max Farrand, ed., 1911)).

¹⁰⁹ *Id.* at 166.

¹¹⁰ *Texas v. White*, 74 U.S. 700, 725 (1869).

¹¹¹ *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002).

And it has both practical and philosophic dimensions. Yes, the federal structure helps keep the federal and state governments in their lanes and serves “to ensure that States function as political entities in their own right.”¹¹² Moreover, “[s]tate sovereignty is not just an end in itself,”¹¹³ and “[f]ederalism is more than an exercise in setting the boundary between different institutions of government for their own integrity.”¹¹⁴ Instead—and this was the Framers’ key insight—“federalism secures to citizens the liberties that derive from the diffusion of sovereign power.”¹¹⁵

As Justice Anthony Kennedy put it, the Framers understood that “freedom was enhanced by the creation of two governments, not one.”¹¹⁶ As Justice Antonin Scalia wrote in *Printz* quoting Kennedy:

The great innovation of this design was that “our citizens would have two political capacities, one state and one federal, each protected from incursion by the other”—“a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.”¹¹⁷

Or, as Madison explained it, America’s “compound republic” creates a “double security [for] the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”¹¹⁸

This federalist system protects political liberties.¹¹⁹ It “assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government

¹¹² *Bond v. United States*, 564 U.S. 211, 221 (2011).

¹¹³ *New York*, 505 U.S. at 181.

¹¹⁴ *Bond*, 564 U.S. at 221.

¹¹⁵ *New York*, 505 U.S. at 181 (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

¹¹⁶ *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring).

¹¹⁷ *Printz*, 521 U.S. at 920 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

¹¹⁸ *The Federalist* No. 51 (James Madison).

¹¹⁹ *Bond*, 564 U.S. at 221.

more responsive by putting the States in competition for a mobile citizenry.”¹²⁰

Federalism also protects individual liberty. “It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power.”¹²¹ To borrow Justice Louis Brandeis’s memorable (if misunderstood) phrase, it allows states to act as laboratories of democracy.¹²² “By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.”¹²³ “Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.”¹²⁴

The anti-commandeering rule implicit in the Constitution and reaffirmed in *Murphy* is one of these “structural protections of liberty.”¹²⁵ And it has still other advantages, as the Court in *Murphy*, *Printz*, and *New York* noted. It promotes political accountability for one, by showing voters who deserves credit or blame for a given regulation—the states or the federal government. It also “prevents Congress from shifting the costs of regulation to the States”; it requires Congress to weigh the benefits and costs of a given program and then, if Congress chooses to enact the program, to fund it.¹²⁶ And *Murphy* makes explicit what *Printz* and *New York* implied: the

¹²⁰ Gregory, 501 U.S. at 458.

¹²¹ Bond, 564 U.S. at 221.

¹²² *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Professor Michael Greve notes that “Brandeis’s famous dictum had almost nothing to do with federalism and everything to do with his commitment to scientific socialism,” a “substantive view” that “continues to inhibit a truly experimental federalist politics.” Michael S. Greve, *Laboratories of Democracy: Anatomy of a Metaphor*, Am. Enterprise Inst. Federalist Outlook, Mar. 31, 2001, <http://www.aei.org/publication/laboratories-of-democracy>.

¹²³ Bond, 564 U.S. at 222.

¹²⁴ Gregory, 501 U.S. at 458.

¹²⁵ *Murphy*, 138 S. Ct. at 1477 (quoting *Printz*, 521 U.S. at 921).

¹²⁶ *Id.*

anti-commandeering rule applies with equal force whether Congress affirmatively directs a state to act or prohibits a state from doing so.

Exactly what *Murphy* portends for one federal law or another is, as noted, difficult to predict. What seems clearer is that as that question plays out in Congress, state legislatures, and the courts, the healthy tensions it produces will only add to the vitality of our federal structure and, along with it, help secure the people's liberty. That such conflict could inure to citizens' benefit might seem counterintuitive. But that, after all, is the Newtonian logic of our constitutional structure, which divides power among "opposite and rival interests" so that "each may be a check on the other," and individual interests "may be a sentinel over the public rights."¹²⁷ *Murphy* may well help stoke rivalries between the states and the federal government on a whole host of issues, from sanctuary cities and taxation (as discussed earlier), to medical marijuana, guns, environmental mandates, and a wide swath of other matters where state and federal interests often diverge. Those rivalries will help ensure that the states and the federal government remain effective checks on one another, and that neither will usurp the rights of the people.

VI. Conclusion

Murphy reaffirms a principle at the foundation of our constitutional structure—that Congress may not issue direct orders to states or otherwise operate the machinery of state government. At least in the near term, the decision allows each state to decide for itself whether to legalize sports gambling, and the states will decide that question in different ways. More broadly, *Murphy* will likely introduce new questions about the balance of power between Congress and the states. All of this is good for federalism—and a healthy federalism is a win for all Americans.

¹²⁷ The Federalist No. 51 (James Madison).

