AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Federalism/Non-Commandeering

**Murphy v. National Collegiate Athletic Association, \_\_\_ U.S. \_\_\_** (2018)

*The New Jersey State Legislature in 2014 repealed state laws prohibiting sports gambling in the state. The National Collegiate Athletic Association immediately filed a law suit in federal court against Philip Murphy, the Governor of New Jersey, claiming that the New Jersey law violated the federal Professional and Amateur Sports Protection Act (PASPA). That measure forbids states from “authorizing by law” any sports gambling scheme and forbids persons from operating a sports gambling scheme when done “pursuant to the law . . . of a government entity.” Murphy claimed that the PASPA unconstitutionally commandeered the state legislature in ways not authorized by federal powers under Article I. The federal district court rejected New Jersey’s claim and that decision was affirmed by the Court of Appeals for the Third Circuit. Murphy and New Jersey appealed to the Supreme Court.*

*The Supreme Court by a 6-3 vote reversed the decision of the lower federal court. Justice Samuel Alito’s majority decision held that unconstitutional commandeering takes place when Congress requires state legislatures from passing laws and when Congress forbids state legislatures from passing laws. Alito then claimed that because federal laws prohibiting states from sponsoring gambling activities and prohibiting persons from engaging in state sponsored gambling activities were inseverable from the prohibition on state authorization of gambling activities, the entire PASPA was unconstitutional. What is the source of the anti-commandeering doctrine? What values does that doctrine serve? How does this decision serve those values? Is Justice Ginsburg correct when her dissenting opinion claims that, even if Congress may not forbid New Jersey from passing particular laws, Congress may outlaw state sponsored sports gambling?*

JUSTICE [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=Id451c039574411e8a2e69b122173a65f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) delivered the opinion of the Court.

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The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.,* the decision to withhold from Congress the power to issue orders directly to the States. When 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.” The Constitution limited but did not abolish the sovereign powers of the States, which retained “a residuary and inviolable sovereignty.” Thus, both the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of “dual sovereignty.” *Gregory v. Ashcroft* (1991).

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The legislative powers granted to Congress are sizable, but they are not unlimited. The Constitution confers on Congress not plenary legislative power but only certain enumerated powers. Therefore, all other legislative power is reserved for the States, as the Tenth Amendment confirms. And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority.

. . . . Justice O'Connor's opinion for the Court [in *New York v. United States* (1991)] traced [the anticommandeering doctrine] to the basic structure of government established under the Constitution. The Constitution, she noted, “confers upon Congress the power to regulate individuals, not States.” . . . As to what this structure means with regard to Congress's authority to control state legislatures, *New York* was clear and emphatic. The opinion recalled that “no Member of the Court ha[d] ever suggested” that even “a particularly strong federal interest” “would enable Congress to command a state government to enact *state* regulation.” . . . “Congress may not simply ‘commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’“ . . .

Five years after *New York,* the Court applied the same principles to a federal statute requiring state and local law enforcement officers to perform background checks and related tasks in connection with applications for handgun licenses. Holding this provision unconstitutional, the Court put the point succinctly: “The Federal Government” may not “command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.” . . .

Our opinions in *New York* and *Printz* explained why adherence to the anticommandeering principle is important. . . . First, the rule serves as “one of the Constitution's structural protections of liberty.”  “The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities.” . . .  “‘[A] healthy balance of power between the States and the Federal Government [reduces] the risk of tyranny and abuse from either front.’”

Second, the anticommandeering rule promotes political accountability. When Congress itself regulates, the responsibility for the benefits and burdens of the regulation is apparent. Voters who like or dislike the effects of the regulation know who to credit or blame. By contrast, if a State imposes regulations only because it has been commanded to do so by Congress, responsibility is blurred.

Third, the anticommandeering principle prevents Congress from shifting the costs of regulation to the States. If Congress enacts a law and requires enforcement by the Executive Branch, it must appropriate the funds needed to administer the program. It is pressured to weigh the expected benefits of the program against its costs. But if Congress can compel the States to enact and enforce its program, Congress need not engage in any such analysis.

The PASPA provision at issue here—prohibiting state authorization of sports gambling—violates the anticommandeering rule. That provision unequivocally dictates what a state legislature may and may not do. . . . A more direct affront to state sovereignty is not easy to imagine.

Neither respondents nor the United States contends that Congress can compel a State to enact legislation, but they say that prohibiting a State from enacting new laws is another matter. . . . This distinction is empty. It was a matter of happenstance that the laws challenged in *New York* and *Printz* commanded “affirmative” action as opposed to imposing a prohibition. The basic principle—that Congress cannot issue direct orders to state legislatures—applies in either event.

Here is an illustration. PASPA includes an exemption for States that permitted sports betting at the time of enactment, [§ 3704](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=28USCAS3704&originatingDoc=Id451c039574411e8a2e69b122173a65f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), but suppose Congress did not adopt such an exemption. Suppose Congress ordered States with legalized sports betting to take the affirmative step of criminalizing that activity and ordered the remaining States to retain their laws prohibiting sports betting. There is no good reason why the former would intrude more deeply on state sovereignty than the latter.

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Respondents and the United States defend the anti-authorization prohibition on the ground that it constitutes a valid preemption provision, but it is no such thing. Preemption is based on the Supremacy Clause, and that Clause is not an independent grant of legislative power to Congress. Instead, it simply provides “a rule of decision.” It specifies that federal law is supreme in case of a conflict with state law. Therefore, in order for the PASPA provision to preempt state law, it must satisfy two requirements. First, it must represent the exercise of a power conferred on Congress by the Constitution; pointing to the Supremacy Clause will not do. Second, since the Constitution “confers upon Congress the power to regulate individuals, not States,” the PASPA provision at issue must be best read as one that regulates private actors. . . . [E]very form of preemption is based on a federal law that regulates the conduct of private actors, not the States.

Once this is understood, it is clear that the PASPA provision prohibiting state authorization of sports gambling is not a preemption provision because there is no way in which this provision can be understood as a regulation of private actors. It certainly does not confer any federal rights on private actors interested in conducting sports gambling operations. . . . If a private citizen or company started a sports gambling operation, either with or without state authorization, [§ 3702(1)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=28USCAS3702&originatingDoc=Id451c039574411e8a2e69b122173a65f&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_f1c50000821b0) would not be violated and would not provide any ground for a civil action by the Attorney General or any other party. Thus, there is simply no way to understand the provision prohibiting state authorization as anything other than a direct command to the States. And that is exactly what the anticommandeering rule does not allow.

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JUSTICE [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Id451c039574411e8a2e69b122173a65f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), concurring.

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I agree with the Court that the Professional and Amateur Sports Protection Act (PASPA) exceeds Congress' Article I authority to the extent it prohibits New Jersey from “authoriz[ing]” or “licens[ing]” sports gambling. Unlike the dissent, I do “doubt” that Congress can prohibit sports gambling that does not cross state lines.  But even assuming the Commerce Clause allows Congress to prohibit intrastate sports gambling “directly,” it “does not authorize Congress to regulate state governments' regulation of interstate commerce.”  The Necessary and Proper Clause does not give Congress this power either, as a law is not “proper” if it “subvert[s] basic principles of federalism and dual sovereignty.”

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JUSTICE [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Id451c039574411e8a2e69b122173a65f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), concurring in part and dissenting in part.

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JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, and with whom JUSTICE BREYER joins in part, dissenting.

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. . . . Leaving out the alleged infirmity, *i.e.,* “commandeering” state regulatory action by prohibiting the States from “authoriz[ing]” and “licens[ing]” sports-gambling schemes, two federal edicts should remain intact. First, PASPA bans States themselves (or their agencies) from “sponsor[ing], operat[ing], advertis[ing], [or] promot[ing]” sports-gambling schemes.  Second, PASPA stops private parties from “sponsor[ing], operat[ing], advertis [ing], or promot[ing]” sports-gambling schemes if state law authorizes them to do so.  Nothing in these prohibitions commands States to do anything other than desist from conduct federal law proscribes. Nor is there any doubt that Congress has power to regulate gambling on a nationwide basis, authority Congress exercised in PASPA.

Surely, the accountability concern that gave birth to the anticommandeering doctrine is not implicated in any federal proscription other than the bans on States' authorizing and licensing sports-gambling schemes. The concern triggering the doctrine arises only “where the Federal Government compels States to regulate” or to enforce federal law, thereby creating the appearance that state officials are responsible for policies Congress forced them to enact.  If States themselves and private parties may not operate sports-gambling schemes, responsibility for the proscriptions is hardly blurred. It cannot be maintained credibly that state officials have anything to do with the restraints. Unmistakably, the foreclosure of sports-gambling schemes, whether state run or privately operated, is chargeable to congressional, not state, legislative action.