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MURPHY V. NCAA: THE SUPREME COURT'S LATEST ADVANCE IN CHEMERINSKY'S "FEDERALISM REVOLUTION"

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I. INTRODUCTION

Federalism jurisprudence exists on a spectrum. As the ideological preferences of the Supreme Court have shifted with the composition of the bench, so too has the Court's position on federalism shifted between competing schools of thought. On one side of the spectrum is the centralist tradition, advocating for a broad interpretation of the federal government's constitutional powers. On the other side is the federalist tradition, preaching the virtues of state autonomy, ever-wary of the federal government's tyrannical potential.

The debate over federalism is undeniably political. Since the Civil War, the tension between federal supremacy and state autonomy has played a major role in the country's most divisive political contests.[1] Many of these contests were decided in landmark Supreme Court decisions that now define the role of federalism in our government.[2]

From 1937 to 1995, these decisions defined an era of Supreme Court centralism.[3] During this era, the Warren Court famously augmented the federal government's constitutional powers, allowing progressives to effect social change in the form of fortified civil and voting rights.[4] Frustrated by the Court's liberal tendencies, conservatives began to campaign against this progression in the 1980s,

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1. Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 7 (2001).

2. Robert K. Christensen & Charles R. Wise, *Dead or Alive? The Federalism Revolution and Its Meaning for Public Administration*, 69 PUB. ADMIN. REV. 920, 920 (2009).

3. *Id.*

4. Owen M. Fiss, *A Life Lived Twice*, 100 YALE L.J. 1117, 1117–21 (1991); Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 4–7 (2012).

advocating for a significant reduction in the federal government's power.[5]

In the early 1990s, the Warren Court's progressive reign came to an end. Following the rise of Reagan-era neoconservatism in the 1980s, the Court, led by Republican appointees, began to revert back to a federalist ideology in a movement Erwin Chemerinsky adeptly titled the "Federalism Revolution."[6]

During this time, the Court reinvigorated the Tenth Amendment to substantially curtail the federal government's power. The practice continues to this day. In *Murphy v. NCAA*,[7] the Court's application of the anticommandeering doctrine, in concert with its divergent severability analysis, serves to further undermine the federal government's power and marks a major victory for federalists at large.

II. THE HISTORY OF THE ANTICOMMANDEERING DOCTRINE

The Tenth Amendment limits Congress's powers to those enumerated in the Constitution. Missing from these powers is the power to "issue direct orders to the governments of the States."[8] The anticommandeering doctrine is a species of Tenth Amendment common law that embodies this principle, preventing Congress from compelling states or state officials to enforce federal law.

The doctrine was conceived in *New York v. United States*,[9] in which the Supreme Court held that Congress could not, by way of federal statute, require the New York state government to provide for disposal of radioactive waste created within its borders.[10] The Court held that this "take title" provision "would 'commandeer' state governments into the service of federal regulatory purposes, and would, for this reason be inconsistent with the Constitution's division of authority between federal and state governments."[11]

5. Inaugural Address, 1981 PUB. PAPERS 1, 2 (Jan. 20, 1981) ("It is my intention to curb the size and influence of the Federal establishment and to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or to the people. All of us need to be reminded that the Federal Government did not create the States; the States created the Federal Government.").

6. Chemerinsky, *supra* note 1, at 7.

7. 138 S. Ct. 1461 (2018).

8. *Id.* at 1476.

9. 505 U.S. 144 (1992).

10. *Id.* at 175–76.

11. *Id.* at 175.

Five years later, the Court elaborated on the doctrine in *Printz v. United States*.[12] In *Printz*, the Court "struck down the provisions of the Brady Handgun Violence Prevention Act . . . that required state and local law enforcement officials to conduct background checks of prospective handgun buyers."[13] In accordance with *New York v. United States*, the Court held that Congress "may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[14] Under *New York v. United States* and *Printz*, federal laws are considered unconstitutional if: 1) the law "commandeers" state officials to enforce federal law; and 2) the commandeered officials exercise legislative or executive functions.

III. THE QUESTIONABLE COGENCY OF THE ANTICOMMANDEERING DOCTRINE

Although it has become a mainstay of modern constitutional law, the anticommandeering doctrine has been subject to extensive criticism.[15] Chief among critics' objections to the doctrine is that it has no constitutional basis. Indeed, as the late Justice Scalia admitted when writing for the *Printz* majority, "there is no constitutional text speaking to the precise question whether congressional action compelling state officers to execute federal laws is unconstitutional."[16]

Having found the basis for the anticommandeering doctrine in contentious characterizations of the framers' legislative intent,[17] the

12. 521 U.S. 898 (1997).

13. Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule?*, 33 LOY. L.A. L. REV. 1309, 1309–10 (2000) (footnote omitted).

14. *Printz*, 521 U.S. at 935.

15. *See, e.g.*, Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 B.U. L. REV. 1, 5 (2015) (contending that the Court's "explanation of and justification for" the anticommandeering doctrine as expressed in *New York v. United States* and *Printz* "can neither explain nor justify the Court's commandeering . . . decisions"); Steven Schwinn, *Symposium: It's Time to Abandon Anti-commandeering (but Don't Count on This Supreme Court to Do It)*, SCOTUSBLOG (Aug. 17, 2017, 10:44 AM), http://www.scotusblog.com/2017/08/symposium-time-abandon-anti-commandeering-dont-count-supreme-court/ ("[T]his rule, which says that the federal government can't require states or state officials to adopt or enforce federal law, has no basis in the text or history of the document. It has only weak support in precedent. And it's unworkable.").

16. *Printz*, 521 U.S. at 905.

17. *See* Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1176 (2013) ("From the Founding generation's perspective . . . the Constitution does not categorically prevent the federal government from commandeering state executive and judicial

doctrine's creators have been accused of hypocrisy; having railed against similar specific intent originalism in prior cases.[18] This inexplicable hypocrisy, coupled with the doctrine's lack of textual support, appear more like the makings of a doctrinalized, ideological bias rather than those of a legitimate species of constitutional interpretation.

Dubious though it may be, the anticommendeering doctrine persists. On May 14, 2018, the Court redeployed the doctrine in *Murphy v. NCAA.*

IV. STATEMENT OF THE CASE

Congress passed the Professional and Amateur Sports Protection Act (PASPA) in 1992, which made it illegal for states that did not already permit sports gambling to pass laws legalizing it.[19] Congress considered the encroaching threat of widespread sports gambling a "national problem" and enacted PASPA to prohibit states from encouraging the practice.[20] Congress worried that state-sanctioned sports gambling would otherwise help the practice grow in popularity, as it would stamp the practice with a "label of legitimacy."[21]

Subsection 3702(1) of PASPA ("subsection (1)") applied to state-sponsored gambling, making it unlawful for "a governmental entity to sponsor, operate, advertise, promote, license, or authorize" sports gambling "by law or compact."[22] Subsection 3702(2) ("subsection (2)") applied to private actors, making it unlawful for "a person to

officers. The Founders simply didn't think that commandeering always violates federalism principles. In fact, many thought just the opposite.").

18. *See, e.g.*, Chisom v. Roemer, 501 U.S. 380, 417 (1991) (Scalia, J., dissenting) (arguing that reliance on legislative intent "poison[s] the well of future legislation, depriving legislators of the assurance that ordinary terms, used in an ordinary context, will be given a predictable meaning"); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 325 (1988) (Scalia, J., concurring in part and dissenting in part) (arguing that inquiries into legislative intent allows jurists to cherry-pick evidentiary fragments that suit their own "predelictions [sic]").

19. Murphy v. NCAA, 138 S. Ct. 1461, 1470 (2018); Lydia Wheeler, *Court Rules Against New Jersey's Sports Betting Law*, HILL (Aug. 25, 2015, 2:22 PM), https://thehill.com/regulation/court-battles/251913-court-rules-against-nj-in-sports-gambling-case.

20. NCAA v. Governor of New Jersey, 730 F.3d 208, 216 (3d Cir. 2013) *aff'g* NCAA v. Christie, 926 F. Supp. 2d 551 (D.N.J. 2013).

21. *Id.* at 237.

22. 28 U.S.C. § 3702(1) (2012), *invalidated by Murphy*, 138 S. Ct. at 1481.

sponsor, operate, advertise, or promote" sports gambling "pursuant to the law or compact of a governmental entity."[23]

Despite PASPA's enactment, the New Jersey legislature passed a law in 2012 that enabled itself to legalize sports gambling.[24] New Jersey hoped legal sports gambling would rejuvenate Atlantic City's failing casinos.[25]

In *NCAA v. Governor of New Jersey*,[26] the Third Circuit Court of Appeals struck the 2012 law down, finding PASPA to be preemptive.[27] Undeterred by their defeat in court, New Jersey promptly devised an alternative legal scheme.

In 2014, New Jersey "enacted legislation repealing the 2012 law and other provisions of state law related to gaming" that barred sports wagering in certain contexts.[28] New Jersey believed that by eliminating the aspects of the 2012 law that directly authorized sports gambling and by repealing New Jersey's existing anti-gambling laws, it had effectively legalized certain forms of the practice.[29]

That same year, the five major American sports leagues sought an injunction against New Jersey, alleging that the new law violated PASPA.[30] In its defense, New Jersey argued that "PASPA unconstitutionally infringed the State's sovereign authority to end its sports gambling ban."[31]

A. Procedural History

Following the Third Circuit's prior constitutional analysis of PASPA in *Christie* and its own analysis of preemption doctrine, the New Jersey District Court ruled that PASPA preempted the 2014 law.[32] The Third Circuit Court of Appeals affirmed.[33]

23. 28 U.S.C. § 3702(2) (2012), *invalidated by Murphy*, 138 S. Ct. at 1484–85.
24. N.J. CONST. art. IV, § 7; NCAA v. Christie, 61 F. Supp. 3d 488, 491 (D.N.J. 2014).
25. *See Murphy*, 138 S. Ct. at 1469; Wheeler, *supra* note 19.
26. 730 F.3d 208 (3d Cir. 2013).
27. *Id.* at 235.
28. *Christie*, 61 F. Supp. 3d at 491.
29. *Id.*
30. *Murphy*, 138 S. Ct. at 1471.
31. *Id.*
32. *Christie*, 61 F. Supp. 3d at 503–04.
33. NCAA v. Governor of New Jersey, 799 F.3d 259, 268 (3d Cir. 2015).

New Jersey filed a petition for a writ of certiorari, invoking the anticommandeering doctrine to call PASPA's constitutionality directly into question.[34] The Supreme Court granted the petition.[35]

B. The Supreme Court Opinion

In an opinion penned by Justice Alito, the Court reversed the Third Circuit's decision and struck down PASPA for being unconstitutional.[36] The opinion began by interpreting the meaning of PASPA's operative text.[37]

New Jersey argued that the word "authorize" in subsection (1) was equivalent to the word "permit," and that "any state law that ha[d] the effect of permitting sports gambling, including a law totally or partially repealing a prior prohibition," thus authorized the practice.[38] The NCAA interpreted the word more narrowly, arguing that "the *primary* definition of 'authorize' requires affirmative action."[39] The NCAA contended PASPA thus "empower[ed] a defined group of entities . . . with the authority to conduct sports gambling operations."[40]

The Court adopted New Jersey's definition, holding that "[w]hen a State completely or partially repeals old laws banning sports gambling, it 'authorize[s]' that activity."[41] Having interpreted PASPA's text, the Court then delved into its anticommandeering doctrine analysis.[42]

The Court found that subsection (1) conflicted with the anticommandeering doctrine because it "unequivocally dictate[d] what a state legislature may and may not do."[43] Perhaps melodramatically, the Court suggested, under subsection (1), "[i]t [was] as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on

34. *See Murphy*, 138 S. Ct. at 1473.
35. *Id.*
36. *Id.* at 1478.
37. *Id.* at 1472–73.
38. *Id.*
39. *Id.* (citing Brief for Respondents at 39, Murphy v. NCAA, 138 S. Ct. 1461 (2018) (No. 16-476-77), 2017 WL 4684747 at *39).
40. *Id.* at 1473.
41. *Id.* at 1474 (alteration in original).
42. *Id.* at 1474–75.
43. *Id.* at 1478.

any offending proposals. A more direct affront to state sovereignty," the Court opined, was "not easy to imagine."[44]

Next, the Court rejected the NCAA's preemption argument.[45] Preemption, the Court explained, "is based on a federal law that regulates the conduct of private actors," and in the case of subsection (1), "there [was] simply no way to understand the provision prohibiting state authorization as anything other than a direct command to the States."[46] This type of prohibition, the Court reiterated, "is exactly what the anticommandeering rule does not allow."[47]

V. THE POLITICAL RAMIFICATIONS OF THE *MURPHY* ANTICOMMANDEERING RULE

In many ways, *Murphy*'s impact on the future of sports betting is less than profound. PASPA only prevented state legislatures from repealing existing anti-gambling laws, so its invalidation had no immediate effect on the legality of the practice in any state except New Jersey. As of August 21, 2018, only six states have affirmatively legalized sports betting and only fourteen others have considered taking similar action.[48] There is also little doubt that Congress could directly preempt state sports gambling laws in the future if it chooses to do so.[49] *Murphy* is more significant in that it facilitates a potentially greater divide between politically-divisive state and federal laws.

A. Marijuana

One of the most immediately identifiable consequences of *Murphy* is that states now have greater latitude to legalize marijuana under state law.[50] Until *Murphy*, it was uncertain whether federal law,

44. *Id.*
45. *Id.* at 1481.
46. *Id.*
47. *Id.*
48. Phil Helsel, *Sports Betting Is Now Legal in Several States. Many Others Are Watching from the Sidelines.*, NBC NEWS (Aug. 13, 2018, 2:13 AM), https://www.nbcnews.com/news/us-news/sports-betting-now-legal-several-states-many-others-are-watching-n894211.
49. Michael C. Dorf, *The Political Stakes of Commandeering in* Murphy v. NCAA, DORF L. (May 16, 2018, 12:01 AM), http://www.dorfonlaw.org/2018/05/the-political-stakes-of-commandeering.html.
50. Robert A. Mikos, *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/.

which unequivocally prohibits marijuana use, preempted any state government's legalization efforts.[51] State courts, state governments, and notable commentators on the matter disagreed about whether legalization was an affirmative authorization that could be preempted by Congress.[52]

State marijuana legalization efforts, however, often operate by repealing existing anti-marijuana laws.[53] By restoring "the state of nature that existed until the early 1900s when marijuana bans were first adopted," states can adopt the same approach New Jersey used when it repealed New Jersey's anti-gambling laws.[54] In *Murphy*, the Court concluded that Congress could not prohibit state governments from making such a choice, presumptively authorizing states to legalize marijuana in this fashion.[55]

While there is no question that federal marijuana law can preempt state legalization efforts in some respects,[56] *Murphy* dictates that federal jurisdiction over marijuana use can extend only as far as the federal resources allotted to enforce it. As more states legalize marijuana, whether directly or by repealing existing laws, the federal government's preemptive anti-marijuana laws appear increasingly impractical.

B. Immigration

Murphy's prohibition on "authorizing" gambling may also have profound consequences for the current legal skirmish being fought over sanctuary cities. "Most 'sanctuary' policies are directions by state and local governments to their own officials, ordering them *not* to do certain things—turn over information about immigration and release status, for example, or hold prisoners not charged with crimes solely for the convenience of federal immigration authorities."[57] Recently,

51. *See* Brianne J. Gorod, *Marijuana Legalization and Horizontal Federalism*, 50 U.C. DAVIS L. REV. 595, 601 (2016).

52. *Id.*

53. *See* Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1453 (2009).

54. *Id.*

55. Murphy v. NCAA, 138 S. Ct. 1461, 1478 (2018).

56. Erwin Chemerinsky et. al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 103 (2015).

57. Garrett Epps, *The Supreme Court Says Congress Can't Make States Dance to Its Tune*, ATLANTIC (May 14, 2018), https://www.theatlantic.com/politics/archive/2018/05/paspa-sanctuary-cities/560369/.

the Trump administration has claimed that these policies violate 8 U.S.C. § 1373(a),[58] which provides in relevant part:

> Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or 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.[59]

By "prohibit[ing]" and "restrict[ing]" government entities from *not* enforcing federal immigration policies however, section 1373(a) makes the type of negative command to state governments deemed unconstitutional in *Murphy*.[60] A recent district court opinion, coming only two months after *Murphy*, made this very observation.

In *United States v. California*,[61] a federal district court in the Eastern District of California considered the constitutionality of section 1373(a) to be "highly suspect," holding "that a Congressional mandate prohibiting states from restricting their law enforcement agencies' involvement in immigration enforcement activities—apart from, perhaps, a narrowly drawn information sharing provision—would likely violate the Tenth Amendment."[62] The court found *Murphy* supportive of its conclusion, citing *Murphy* for the proposition that "a prohibition on state legislation violates the anticommandeering rule."[63]

While *Murphy* may have empowered left-leaning states to adopt liberal marijuana and immigration policies to the chagrin of President Trump's administration, these progressive outcomes are likely to prove anomalous. Because principles of federalism are usually invoked to produce conservative outcomes,[64] *Murphy* will likely mark a decisive victory for the right wing. The Court's increasing

58. *Experts Elucidate Trump Executive Order Targeting "Sanctuary Cities"*, N.Y.U. L. (Feb. 6, 2017), http://www.law.nyu.edu/news/experts-trump-executive-order-immigration-targeting-sanctuary-cities.

59. 8 U.S.C. § 1373(a) (2012).

60. Epps, *supra* note 57.

61. 314 F. Supp. 3d 1077 (E.D. Cal. 2018).

62. *Id.* at 1101, 1109.

63. *Id.* at 1109 (citing Murphy v. NCAA, 138 S. Ct. 1461, 1478 (2018)).

64. *See* Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741 (2000).

willingness to cut away at the federal government's power and potentially interfere with future, progressive legislation can also be observed in the *Murphy* Court's severability analysis.

VI. THE SEVERABILITY DOCTRINE

When part of a law is deemed unconstitutional, the severability doctrine determines whether other, constitutionally valid parts of the law remain in effect.[65] Before *Murphy*, multifaceted laws were only struck in their entirety when it was "evident that [Congress] would not have enacted those provisions which [were] within its power, independently of [those] which [were] not."[66] Severability was thus *presumed* unless evidence of contrary legislative intent was compelling enough to overcome this presumption.[67]

In discerning legislative intent, courts have considered a broad spectrum of evidence, ranging from statutory phrasing and structure to more nebulous interpretations of a statute's purpose.[68] The Supreme Court has almost always made an effort to tether its severability analyses to these types of evidence.[69]

By refusing to sever subsection (2) from subsection (1) without meaningful evidence of Congress's theoretical approval, the Court departed from this precedent in *Murphy*.

A. Severability in Murphy

1. The Majority Opinion

The *Murphy* Court decided that the somewhat unintuitive results of severing the two PASPA subsections would have deterred Congress from passing subsection (2) in isolation.[70] First, the Court reasoned that Congress would not have wanted to legalize sports gambling in private casinos while simultaneously prohibiting state-run sports

65. Brian C. Lea, *Situational Severability*, 103 VA. L. REV. 735, 737 (2017).

66. Murphy v. NCAA, 138 S. Ct. 1461, 1482 (2018) (alterations in original) (quoting Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987)).

67. *See id.* at 1489–90 (Ginsburg, J., dissenting).

68. Lea, *supra* note 65, at 746–47.

69. *See, e.g.*, Denver Area Educ. Telcomm. Consortium, Inc. v. FCC, 518 U.S. 727, 810 (1996) (Kennedy, J., concurring in part and dissenting in part) ("The congressional findings in the statute and the conclusions of the Senate Committee on Commerce, Science, and Transportation after more than two years of hearings on the cable market are instructive."); *Alaska Airlines, Inc.*, 480 U.S. at 691–96 (analyzing Senate reports).

70. *Murphy*, 138 S. Ct. at 1482–83 (majority opinion).

lotteries.[71] Because private gambling is considered more pernicious to society than state-operated lotteries, legalizing sports gambling in casinos while prohibiting state-sponsored sports lotteries seemed to the Court, "exactly backwards."[72]

Second, the Court addressed the supposedly incoherent results of enforcing subsection (2) on its own. Under subsection (2), private sports gambling would have been illegal if state law made it legal.[73] Conversely, if state law did make private sports gambling illegal, subsection (2) would not have applied.[74]

The Court characterized this functional quirk as "perverse," as it undermined "whatever policy is favored by the people of a State."[75] The Court intuited that Congress would not have endorsed this "weird result."[76]

2. The Breyer Concurrence

While Justice Breyer agreed that subsection (1) was unconstitutional, in his concurrence, he took issue with the majority's characterization of Congress's legislative intent. Contrary to the majority's presumptions, Justice Breyer contended that the "weird" manner in which subsection (2) operated could have been intentional.[77] Justice Breyer argued that Congress may have wanted subsection (2) to apply only when state law would not otherwise have made sports gambling illegal because Congress "may have preferred that state authorities enforce state law forbidding sports gambling than require federal authorities to bring civil suits to enforce federal law forbidding about the same thing.[78] Alternatively, Justice Breyer contended that Congress may have included subsection (2) as a constitutional "backup" if subsection (1) was deemed unconstitutional, specifically contemplating the issue at bar.[79]

71. *Id.*
72. *Id.*
73. *Id.* at 1483.
74. *Id.*
75. *Id.*
76. *Id.* at 1484.
77. *Id.* at 1488 (Breyer, J., concurring in part and dissenting in part).
78. *Id.*
79. *Id.*

3. The Ginsburg Dissent

In her dissent, Justice Ginsburg focused almost all of her attention on her vehement disagreement with the Court's decision not to sever subsection (2),[80] accusing the Court of "wield[ing] an ax to cut down" the subsection "instead of using a scalpel."[81] Justice Ginsburg argued that even if subsection (1) was unconstitutional (a point she refused to concede), the severability doctrine should have preserved its constitutionally sound counterpart.[82]

Ginsburg found the majority's characterization of the legislative intent meritless.[83] "On no rational ground," Ginsburg contended, "[could] it be concluded that Congress would have preferred no statute at all if it could not prohibit States from authorizing or licensing such schemes."[84]

B. Murphy *Departs from Severability Precedent*

When the Court characterized Congress's hypothetical preferences in its severability analyses, it failed to cite any meaningful evidence indicating Congress would have thought alike. Tellingly, the Court cited a Senate report only once, referencing a Congressional Budget Office estimate that calculated the price of enforcing PASPA as a whole.[85] The Court suggested that this report indicated that Congress would never have wanted PASPA enforced piecemeal.[86] This suggestion is illogical.

While the estimate undeniably calculated the cost of PASPA as a whole, it did not shed light on Congress's hypothetical intent *had Congress known* PASPA was enforceable only in part. The estimate's contemplation of one particular scenario, total enforcement, cannot be logically interpreted as evidence that Congress wished to foreclose all other possible enforcement scenarios. Despite the Court's token use of documentary evidence, the conclusion that Congress would have disfavored preserving subsection (2) remained completely unsubstantiated.[87]

80. *Id.* at 1488–90 (Ginsburg, J., dissenting).
81. *Id.* at 1490.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.* at 1484 (majority opinion).
86. *Id.*
87. *Id.* at 1490.

In fact, the available evidence supports the opposite conclusion. The Senate reports reflect Congress's *unqualified* desire to discourage sports gambling, irrespective of whether its means of doing so were ultimately weakened or made "weird" by judicial review.[88] Despite the intuitive meaning of the evidence and the compelling counterarguments levied by the dissenting Justices, the Court elected to fabricate its own rationale for declining severability, couching its most significant analysis in counterfactual supposition. By doing so, the Court ignored the presumption of severability and judicial restraint that had previously defined severability precedent.

C. The Political Ramifications of Murphy *Severability Analysis*

The *Murphy* Court's increased willingness to decline severability has significant political consequences. Some of the most historic liberal legislation passed in the last century has survived judicial review only because the Court was willing to apply the severability doctrine.[89] For example, the Patient Protection and Affordable Care Act survived judicial review in *National Federation of Independent Business v. Sebelius*[90] only because five out of nine Justices were willing to preserve what remained of the act after the majority struck its Medicaid expansion provision for being unconstitutional.[91] After *Murphy*, liberal legislators will be wary of the Court's more threatening severability standard when drafting similarly comprehensive legislation.

VII. CONCLUSION

By augmenting the anticommandeering doctrine and by relaxing the evidentiary standard for declining severability, *Murphy* made clear that challenged federal statutes that conflict with federalist tenets, even if only in part, will likely be stricken in their entirety. Should the Court's decidedly conservative majority outlast the Republicans' control of Congress, the anticommandeering doctrine, in combination with this new severability standard, could very well frustrate future

88. *See* S. REP. NO. 102-248, at 4–7 (1991) ("The purpose of S. 474 is to prohibit sports gambling conducted by, or authorized under the law of, any State or other governmental entity.").

89. *See* Lea, *supra* note 65, at 737–38 (2017) ("[S]everability doctrine has determined the fates of many landmark laws, including the Federal Employers' Liability Act, the Federal Election Campaign Act . . . and the Social Security Act.").

90. 567 U.S. 519 (2012).

91. *Id.* at 586–87; Lea, *supra* note 65, at 737.

liberal legislation. Given that Justice Kavanaugh, a staunch conservative[92] and federalist[93] in his own right, has recently been appointed to the Supreme Court, this era of Supreme Court federalism is likely to last into the foreseeable future.

92. *See* Alvin Chang, *Brett Kavanaugh and the Supreme Court's Drastic Shift to the Right, Cartoonsplained*, VOX, https://www.vox.com/policy-and-politics/2018/7/9/17537808/supreme-court-brett-kavanaugh-right-cartoon (last updated Sept. 14, 2018).

93. Jess Bravin & Brent Kendall, *Brett Kavanaugh's Record Shows Push to Restrain the Regulatory State*, WALL STREET J. (Aug. 31, 2018, 1:43 PM), https://www.wsj.com/articles/brett-kavanaughs-record-shows-push-to-restrain-the-regulatory-state-1535737394.