

AN EDUCATIONAL UPDATE FROM
THE SOUTHEAST LAW INSTITUTE™, INC.

To: Interested Persons
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From: A. Eric Johnston
Re: Will Sports Gambling Now Be Legal?

The world of gambling was recently turned upside down when the U.S. Supreme Court (“SCOTUS”) decided the case of *Murphy v. NCAA*, 2018 WL2186168. SCOTUS struck down a federal law, the “Professional and Amateur Sports Protection Act” (“PASPA”), which prohibited states from passing laws to permit sports gambling. Following the Court opinion, there have been all sorts of informal opinions on what this means. The purpose of this Update is to explain the court’s reasoning and address the possibilities of sports gambling in Alabama.

First, it may be helpful to understand the basis of the case. PASPA was passed at a time when there was significant opposition to sports gambling. There was a concern that it would be attractive to young people. Collegiate and professional sports opposed legalized gambling. In an effort to avoid gambling expansion, Congress passed PASPA. However, over time, the prohibitions and inhibitions surrounding gambling have been diminishing. Persons became more accepting of it and states began looking to it as a source of revenue. Lawsuits were brought contesting the restrictions of PASPA. Finally, this case reached SCOTUS, which understood the importance of PASPA:

“PASPA’s most important provision . . . makes it ‘unlawful’ for 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.”

While there were other provisions in PASPA, this one most clearly articulates the purposes of the law. A clear and uncontrovertible reading is simply that the federal government is telling the states that they cannot pass laws permitting sports gambling. That is something that most of us felt was the right thing to do, it protected the family, and was a very good law. In fact, we still support those objectives. However, SCOTUS has determined the law to be unconstitutional, not because it relates to gambling, but because it relates to the 10th Amendment rights reserved to the states.

Justice Samuel Alito wrote the opinion and was joined by Chief Justice Roberts and Justices Kennedy, Thomas, Kagan and Gorsuch. These are mostly good players whose opinions we generally respect. However, from reading the opinion, we can only agree their judgment is correct, though we do not like the net effect of it. Rather than be disagreeable with the Court, it is helpful to understand why it ruled the way it did and then what will be expected of us to deal with the gambling expansion potential.

Summarizing Justice Alito’s comments, the Court based its opinion on what is called the “anti-commandeering principle.” This means that a federal law cannot constitutionally compel states to do or not do anything:

“The anti-commandeering doctrine . . . 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. . . . Congress does not have plenary legislative power, but only certain enumerated powers. Therefore, legislative power is reserved for the states as the 10th 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.”

“Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.” The Court gave three reasons for this: it serves as a structural protection of liberty; it promotes political accountability; and it prevents Congress from shifting the costs of regulation to the states.

This does not conflict with the doctrine of federal sovereignty. Sovereignty is generally when Congress decides to regulate a certain activity and states may not pass laws that conflict with that. The Supremacy Clause of the U.S. Constitution guarantees those federal rights. The doctrine of preemption is that “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 takes precedence and the state law is preempted.” That is not, however, what PASPA did. It simply prohibited states from acting. It did not criminalize sports betting. It sought to tell states what to do and that is unconstitutional. The majority recognized the consternation this would cause us and concluded the opinion by saying:

“The legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gaming directly, but if it elects not to do so, each state is free to act on its own. Our job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution. PASPA is not. PASPA ‘regulate[s] state governments’ regulation’ of their citizens. The Constitution gives Congress no such power.”

Certainly, we do not like the prospects of increased gambling. However, we must recognize the correctness of the ruling. We often complain about courts “legislating from the bench.” This is an excellent example of a court recognizing its limited authority. It is also an excellent example of SCOTUS interpreting the U.S. Constitution as it should.

Congress has not prohibited or permitted sports gambling for individuals or entities. Now that PASPA is no longer in a position to prohibit states from acting, “each state is free to act on its own.” Alabama is now free to address the sports gambling issue. Congress may also act.

Alabama is not in the vanguard of sports gambling. It is estimated that as many as 32 states in the next five years could enact legislation to permit it. Nevada, Mississippi, Tennessee, Georgia, New Jersey and others already have it or are considering it. We have no doubt, however, that there will be legislation introduced in the 2019 regular session of the Alabama Legislature to legalize it. Already, FanDuel and DraftKings have said they want to participate. One or both have introduced daily fantasy sports gambling legislation in Alabama for the last several years, none of which has passed. Both Indian and non-Indian gambling interests will be seeking to protect their gambling enterprises. There will be others who are interested in passing the legislation, both Republicans and Democrats.

Collegiate and professional sports have changed their views on sports gambling. They no longer see it as having the potential to corrupt sports. Poor ole Pete Rose just came along at the wrong time. Entrepreneurs for both sporting interests, as well as the gambling interests, will be seeking to cash in on the new bonanza of gambling money. Professional sports teams do not have the inhibitions of the past. They are enthusiastic about the new sources of income. This leads states to see it as a source of revenue. We have heard that argument time and again in the Alabama Legislature for the purpose of passing a lottery or some other form of gambling. The idea now is to regulate, not prohibit.

Sports gambling will have many dimensions. It will become worldwide and is already legal in Europe. Gambling enterprises like Paddy Power Betfair, PLC, an Irish gambling company, are in talks to merge with the American FanDuel. Churchill Downs and Caesars Entertainment, American companies, are planning to expand their sports betting business. It will not simply be gambling on the outcome of contests, but making wagers on individual plays in games, whether someone will strike out, make a touchdown, *etcetera*. It will be as easy to do as sitting down at your computer or picking up your cell phone. This suggests a great deal of harm to the family and those who can least afford to be involved in this activity. It will feed the addiction of compulsive gamblers.

There have recently been some misinformed news reports explaining Alabama law. Some seem to think a simple Alabama statute will permit sports gambling. Sports gambling is another form of a game of chance which is prohibited by the “anti-lottery” provision of the Alabama Constitution, Article IV, § 65, saying, “The Legislature shall have no power to authorize lotteries or gift enterprises for any other purposes” As we have testified many times in legislative committees, “lottery” is any game of chance, not simply buying chances at a convenience store in what we commonly call a lottery. The Alabama law is that if chance predominates, regardless of how much other skill is involved, it is still a lottery, i.e., a prohibited game of chance. See *Ex Parte Ted’s Game Enterprises*, 893 So. 2d 376 (Ala. 2004). Therefore, an amendment to the Alabama Constitution would be necessary to permit sports gambling in Alabama.

There are those who believe sports betting is like pari-mutuel betting on dogs and horses. They reason that skill trumps chance and therefore only a statute passed by the Alabama Legislature is necessary. We think that is flawed reasoning. Gamblers should not bet on a statute but should put their money on a constitutional amendment. There are simply too many things left to chance when choosing a winner. The precedents and reasoning of the Alabama Supreme Court on gambling are too strong to allow a mere statute to stand.

To be safe, this means that any bill to authorize sports gambling must be passed by both chambers of the Alabama Legislature and then be voted on by Alabama voters at the time of a general election. The incentive for lawmakers will be great, because of the prospects of revenue. This same incentive will exist in Congress. Senator Orrin Hatch (R-UT) has already said he expects to introduce regulatory legislation. It will not be voted on by the people, as an Alabama law must be.

Lawmakers must be aware of the pitfalls and dangers of gambling and the harm it will do to the state and country, as a regressive tax, and to its citizens because of its damage to the family. In Alabama, if a bill makes it out of the legislature and goes to the people, the gambling financial interests will be so great that they will spend whatever it takes to convince the electorate that it is a good thing. Ordinary citizens, churches and others that oppose gambling will not have the resources to oppose this.

It, therefore, becomes important that voters know for whom they are voting and the general election on November 6, 2018. Candidates must clearly articulate their positions on sports gambling. The elected men and women will be making the decision about whether Alabama or the United States joins in the sports gambling enthusiasm. We will look forward, not with enthusiasm, but with trepidation, to the next legislative session.