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Sports Betting Case May Show Change of Heart on Federalism Doctrine

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The more liberal justices' silence in the court's embrace of a strong federalism doctrine in the blockbuster sports betting case has some court watchers raising their eyebrows.

There was no dissent written about the Supreme Court's understanding of the federalism doctrine known as anticommandeering in its May 14 decision on sports betting. Anticommandeering is the idea that the federal government can't command the states to do its bidding.

The court has only examined the doctrine twice before—its 1992 decision in *New York v. United States* and *Printz v. United States*, which followed five years later.

Both times the doctrine divided the court along ideological lines and spawned vigorous dissents. Many of the court's more liberal justices decried the doctrine as simply made up, and described the majority's attempt to highlight the doctrine's constitutional underpinnings as merely "elaborate window dressing."

The lack of dissent in the sports betting case is surprising, former Tenth Circuit judge Michael W. McConnell, now a professor at Stanford Law School, told Bloomberg Law in an email.

Some court watchers speculate that the election of President Donald Trump has renewed interest in federalism—the idea that the federal government must share power with state governments.

"The apparent acceptance of the anti-commandeering rule by the Court's liberal wing may reflect that" renewed interest, Michael C. Dorf, of Cornell Law School, Ithaca, N.Y., said in a May 16 blog post.

"My best guess is that the liberal Justices have realized the anticommandeering doctrine provides protections across the political spectrum," McConnell said. Both he and Dorf pointed specifically to "sanctuary cities."

But Ilya Shapiro, of the Cato Institute, Washington, warned against viewing the justices' apparent change of heart in merely political terms. Perhaps they've simply changed their minds in the 20-plus years since the doctrine was first examined, Shapiro said.

Recent, But Fundamental

The Supreme Court May 14 struck down a federal law that prohibited New Jersey from repealing its ban on sports betting in *Murphy v. Nat'l Collegiate Athletic Ass'n*.

The law is an "affront to state sovereignty" because it commandeers the state's legislative process, Justice Samuel A. Alito Jr. wrote for the court.

Though the doctrine was only "relatively recently" announced by the court—in 1992—"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," Alito wrote.

Made Up Doctrine

Not all U.S. Supreme Court justices have seen it that way, though.

The principal critique in both *New York* and *Printz* was that the doctrine was simply made up, Dorf wrote. The justices rejecting the doctrine "accused the majority of hypocrisy for finding an anti-commandeering rule in the structure and history (but not the text) of the Constitution, when those same majority justices rail against such moves in cases involving various individual rights," he wrote.

Both Justices Ruth Bader Ginsburg and Stephen G. Breyer joined Justice John Paul Stevens's 1997 dissent in *Printz* that said that no "clause, sentence, or paragraph in the entire text of the Constitution of the United States" supports the idea that a local official can ignore a statute lawfully passed by Congress.

But though Ginsburg and Breyer dissented, at least in part, in *Murphy*, neither did so on the basis of the court's anticommandeering analysis.

Breyer specifically joined the portion of the majority opinion detailing the contours of the doctrine. And while Ginsburg—joined by Breyer and Sotomayor—merely assumed the doctrine was correct, she focused her dissent solely on the issue of severability—the determination whether a constitutionally infirm portion of a statute dooms the whole thing or if it can be separated from the overall scheme—without engaging in the kind of lengthy rebuttal of the doctrine that was present in the two previous cases.

Justice Elena Kagan, who most often sides with her more liberal colleagues, joined the majority opinion in full.

Sanctuary Cities

One possible explanation for the apparent change or shift in focus may be the implications for the doctrine on sanctuary cities—communities that refuse to cooperate with federal authorities on the enforcement of federal immigration law.

The Department of Justice has taken aim at sanctuary cities, conditioning large law enforcement grants to localities on compliance with federal information-sharing laws.

Those challenging those conditions are likely to point to *Murphy* for support for their argument that the government's conditioning of needed grants effectively commandeers the state's legislative process.

The implications of the anticommandeering doctrine for sanctuary cities, then, could be the reason behind the more liberal justices support for—or at least not explicit rejection of—the doctrine, both Dorf and McConnell suggested.

The U.S. Court of Appeals for the Seventh Circuit prohibited the Department of Justice from carrying out its funding threat on April 19—at least temporarily. The government has asked the full Seventh Circuit to reconsider that decision.

Politically Expedient

But Shapiro warned against viewing the apparent change of heart in results-oriented terms.

It would go too far to claim that Ginsburg and Breyer have turned a blind eye to their previous concerns simply because it is politically expedient, he said.

It has been 20 years since the court decided its last anticommandeering case, he noted.

Maybe Ginsburg and Breyer have come to find that the negative consequences that they predicted from the doctrine just haven't come to fruition, Shapiro said.