Can Congress grant a state a monopoly over an industry at the expense of the rest of the nation?

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Today, PLF and the Cato Institute filed this brief supporting New Jersey's cert. petition in its challenge to the Professional and Amateur Sports Protection Act (PASPA)'s grant to Nevada of a monopoly on sports-gambling. This federal statute was adopted in 1992 and forbids any state that didn't already have legalized sports-gambling from authorizing or permitting it. So states, like New Jersey, that now want to liberalize their sports-gambling laws are forbidden from doing so because of the act. New Jersey argues that this restriction on its ability to change *its own* laws is a significant departure from the principles of federalism protected by the Constitution. It also argues that the federal government can't award a monopoly to one state at the expense of the others.

PLF and Cato's brief focuses on this latter point. It explains that the Founders understood the importance of distinguishing the "great and aggregate interests" that were Congress' domain from "the local and particular [which belong] to the State legislatures." Not only does it make more sense to have Congress adopt nation-wide policies rather than state-by-state ones, but the political process also requires it. When Congress adopts laws that discriminate amongst the states, it isn't clear to voters which level of government — and more importantly, which politicians — to hold accountable. This risk is heightened by laws, like PASPA, which don't directly regulate individuals but instead control whether and how states change their own laws.

Congress is generally forbidden from discriminating amongst the states by the principle of equal sovereignty. This principle forbids disparate treatment unless the government can show it's sufficiently related to the problem that the government is trying to address. Last term, the Supreme Court invoked this principle to invalidate part of the Voting Rights Act in *Shelby County v. Holder*. The Voting Rights Act required some states to get federal approval before making any changes to their voting procedures — even moving polling places — based on the racial discrimination that occurred in the 1960s and 1970s. The Court declared that this disparate

treatment of the states could only be justified by present conditions, which didn't support the choice of states covered by the Act.

PASPA suffers the same problem. It interferes with an important aspect of state sovereignty — a state's ability to change its own laws. And it does so on the basis of what the state's laws were over 20 years ago. The federal government's argument for why it had to confer a monopoly on Nevada while restricting the other states is weak — Congress was concerned about the *geographic spread* of sports-gambling. But this justification would only be sufficient if there were some reason to think that the effects of sports-gambling were different in Nevada than they would be in Arizona. PLF and Cato's brief also asks what the implications of allowing PASPA disparate treatment of the states to stand. If a state's own laws can be frozen in place by the federal government at will, this would chill state efforts to experiment with novel policy solutions to local problems.

This unequal treatment is contrary to the Founders' vision. They were deeply concerned that:

[t]he agriculture, commerce, or employments of one State might be built up on the ruins of those of another, and a combination of a few States in Congress might secure a monopoly of certain branches of trade and business to themselves, to the injury, if not to the destruction of their less favored neighbors."

Isn't that precisely what Congress has done in PASPA?