



THE FEDERALIST SOCIETY

Christie v. NCAA: Anti-Commandeering or Bust

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In 1992, Congress made it illegal for any state to authorize gambling on amateur or professional sports by passing the Professional and Amateur Sports Protection Act (PASPA).[1] Two decades later, New Jersey enacted the Sports Wagering Act, authorizing regulated sports betting at casinos and racetracks within the state.[2] The National Collegiate Athletic Association (NCAA) and the four major professional sports leagues sued under PASPA and were granted a permanent injunction against the New Jersey law.[3] The Third Circuit affirmed, holding that the Sports Wagering Act violated PASPA's prohibition against a state's authorizing sports betting, but also adding that nothing in PASPA's text "requires that the states keep any law in place." [4] In accordance with this ruling, New Jersey passed another statute in 2014 providing (with limited exceptions) for the repeal of any state laws or regulations prohibiting sports betting at casinos in Atlantic City or racetracks throughout the state.[5] When this second legalization effort was challenged, the Third Circuit abandoned as dicta its prior distinction between "authorization" and "repeal," and therefore again decided in favor of the NCAA. This forced New Jersey to maintain laws that its elected officials had acted to eliminate.[6] In June 2017, the Supreme Court granted certiorari; it will hear oral argument on December 4.

The lower court rulings in *Christie v. NCAA* fundamentally misapplied Tenth Amendment and Commerce Clause jurisprudence. As the Supreme Court held in the same year that PASPA was enacted, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to [its] instructions." [7] And yet PASPA does just that by dictating what states' own sports betting laws shall be. [8] The Constitution forbids Congress from "commandeering" the states by compelling them to enact or administer federal policy; it should also be held to forbid Congress from compelling states to continue enforcing past state policy after it has proven ineffective, unpopular, or both. [9]

That the states voluntarily adopted the sports betting bans that PASPA now compels them to maintain is irrelevant. Today, New Jersey officials and voters have no say in the state's own gambling laws. Federal law commands that those laws remain what they were 25 years ago—and that state officials continue to enforce them—because any reform would "authorize" sports betting. These facts separate this case from cases that question Congress' constitutional powers to regulate interstate commerce and preempt conflicting state laws.

Allowing Congress to hijack states' law-making authority and thereby prevent reform would undermine the two primary values underlying the anti-commandeering principle: federalism and political accountability.^[10] Such a loophole in the anti-commandeering principle would frustrate federalism by allowing Congress to block state experimentation and innovation. And it would reduce political accountability by obscuring the politicians who should be held accountable if a policy proves to be ineffective or unpopular. To avoid undermining these constitutional values, the Supreme Court should extend the anti-commandeering doctrine to forbid Congress from requiring states to keep unwanted laws on the books.

I. Existing Anti-Commandeering Doctrine

The Constitution forbids Congress from “commandeering” the states, either by requiring states to adopt a policy or by compelling state officials to implement one.^[11] The Supreme Court has twice struck down federal laws under this principle. In *New York v. United States*, it declared unconstitutional a federal law requiring states to either regulate nuclear waste disposal according to federal standards or accept possession of it.^[12] And in *Printz v. United States*, the Court invalidated a federal law requiring state officials to perform background checks for prospective gun sales.^[13]

Together, these cases establish that states alone set state policy and the federal government sets federal policy; Congress can no more dictate what state policy shall be than the states can dictate policy to Congress.^[14] Absent this constitutional restraint, the federal government could enlarge its power immeasurably by pressing the states and their officers into service at no cost to itself. That would threaten federalism and undermine the political process. Furthermore, commandeering is unnecessary because Congress can implement its chosen policies without it. “As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government.”^[15] This system—federalism—provides decentralized government “sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.”^[16] Commandeering, if allowed, would threaten federalism by converting states from independent sovereigns into instrumentalities of the federal government. The Framers consciously rejected such a system, after seeing the problems it created under the Articles of Confederation.^[17] “[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.”^[18] States cannot be “reduce[d] . . . to puppets of a ventriloquist Congress.”^[19] Preserving state autonomy from federal encroachment allows states to discover better public policies through experimentation.^[20] Federal commandeering, on the other hand, threatens to impose one-size-fits-all policies on states and stifle innovation.^[21]

Commandeering also undermines the political process by obscuring the officials who are responsible for a given policy. If it were permissible, state officials might take the fall for unpopular policies over which they have no control.^[22] Likewise, federal politicians could claim credit for addressing a serious problem while foisting the difficult questions of how to do so and at what cost onto state officials.^[23] “The resultant inability to hold either branch of the

government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power.”^[24] Because federalism violations undermine the political process, political safeguards are insufficient to protect federalism on their own. Courts must intervene when the federal government violates the Constitution’s structural protections for federalism.^[25] “[T]he federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.”^[26]

The anti-commandeering principle does not limit what the federal government can do, only how it may do it. Consequently, the Supreme Court has steadfastly refused to balance the principle against short-term political expediency.^[27] The Court should continue to adhere to that hard line. The federal government has plenty of ways to address pressing issues without eroding the Constitution’s structural protections. It can directly regulate the activity itself and preempt contrary state regulation.^[28] It can give states a choice of cooperating or ceding an area to federal regulation—so-called “conditional preemption.”^[29] Or it can use its spending power, under appropriate circumstances, to entice states to cooperate, provided that it does not cross the line between encouraging state participation and coercing it.^[30]

The Supreme Court has carefully distinguished unconstitutional commandeering from Congress’ preemption power.^[31] Preemption is constitutional because, “if a State does not wish” to participate in the enforcement of federal regulations, “the full regulatory burden will be borne by the Federal Government.”^[32] Congress can incentivize states to cooperate with it, but states must have the option to decline participation.^[33] If the state may withdraw and let “the full regulatory burden” fall on the federal government, it has not been commandeered.^[34] If the state does not retain this right, however—if it must embrace some policy chosen by Congress—it has been unconstitutionally commandeered.

II. Congress Should Not Be Allowed to Forbid States from Repealing or Amending Their Own Laws

“[P]reventing the state from repealing an existing law is no different from forcing it to pass a new one; in either case, the state is being forced to regulate conduct that it prefers to leave unregulated.”^[35] Either way, the federal government dictates what state law shall be, leaving states no right to refuse to participate in the federal policy.^[36] The Supreme Court has already rejected the argument that the anti-commandeering principle is limited to when the federal government affirmatively requires a state to enact a new policy.^[37] It should do so again in this case. A federal power to forbid states from amending or repealing their own laws poses the same federalism and political accountability problems that existing anti-commandeering doctrine was designed to address.

A. A Federal Power to Prevent States from Reforming Their Own Laws Would Undermine Federalism

Allowing the federal government to forbid states from amending or repealing their own laws would undermine federalism by blocking state experimentation and innovation. Recent state efforts to take advantage of the benefits of federalism in the realm of marijuana policy give some

indication of what might be lost in such a regime. Over the last decade, several states have experimented with decriminalizing or legalizing marijuana.[38] This has only been possible because “the federal government cannot require states to enact or maintain on the books any laws prohibiting marijuana.”[39] State-level reform does not bar the federal government from enforcing the federal marijuana prohibition, of course. However, the results of state experimentation can inform both the federal government and other states. Many states have followed their neighbors’ lead and reformed their laws.[40] And Congress has forbidden the use of appropriated funds to enforce federal laws prohibiting marijuana possession in situations where the possession is legal under state law.[41] If the federal government could forbid this reform experiment, states would not have had the breathing room to experiment, depriving other states and the federal government of the benefit of seeing the results of the experiment. Limiting the anti-commandeering principle to allow Congress to prevent states from reforming or repealing existing laws could lead federal politicians to block any state-level reform they may oppose. The federal government could force states and local governments that have participated in enforcing federal immigration laws to continue doing so forever, even if the state or local government would prefer to leave that enforcement to the federal government alone.[42] Congress could prevent the further spread of right-to-work laws or, if those laws someday prove unwise, require states to maintain them anyway.[43] It could forbid states from increasing gun control or relaxing existing gun regulations.[44] It could forbid states from modifying school curricula or testing requirements.[45] And Congress could block states from altering controversial bathroom policies in light of local debates over social norms.[46] If this loophole in the anti-commandeering principle were to be created, it would also likely affect “cooperative federalism” arrangements, in which the federal government and states cooperate to develop and implement a federal policy.[47] In environmental policy, for instance, these arrangements often involve Congress setting a federal standard that states agree to implement.[48] These arrangements can themselves be unconstitutionally coercive.[49] But even if kept within their proper scope, giving Congress free reign to forbid states from reforming their own laws would make cooperative federalism arrangements far more treacherous. Any state that voluntarily agreed to cooperate at one time could find itself coerced into enforcing a costly, ineffective, or unpopular policy forever, if Congress forbade subsequent state reform. This would discourage state participation, undermining benefits that can be derived from cooperative federalism.

B. A Federal Power to Forbid State Reform Would Frustrate Political Accountability

A federal prohibition against states’ amending their own laws poses the same political accountability concerns as a federal requirement that states affirmatively enact a policy. In either case, political accountability is frustrated at both the federal and state level. These incentive effects are the same whether a state’s initial adoption of the policy was voluntary or not. By forcing states to maintain laws favored by Congress, federal politicians could ensure the continued enforcement of their preferred policies while avoiding political consequences.[50] They would be shielded from the backlash if the policy proves wrongheaded, unpopular, or too expensive because voters will mistake it for a state policy.[51] A federal bar against state reform would also undermine accountability at the state level by inducing state voters to cast their ballots based on policies that the state politicians have no say in. State officials should be held accountable for the policies they enact, including when they choose to

participate in cooperative federalism arrangements that prove unpopular or unwise.^[52] But where federal law dictates that a policy must be maintained, any votes cast against state incumbents in disapproval of that policy are pointless; although it is really federal policy, voters will reasonably mistake the policy written into state law and enforced by state officials as state policy and vote accordingly. This case furnishes an example: New Jersey voters approved a referendum by an overwhelming 2-to-1 margin calling for the reform of the state's sports gambling laws, acting on the mistaken belief that the state had a say in its own laws.^[53] Although it is easy to presume that voters will recognize when the federal government is dictating policy to states, that presumption rests on a too cheery view of politics. In reality, politics is characterized by widespread political ignorance.^[54] This ignorance extends to basic civics. A 2006 poll found that only 42 percent of Americans can name all three branches of government established by the Constitution.^[55] Most Americans cannot name a single member of the Supreme Court of the United States, even though surveys show that an overwhelming majority (more than 90 percent) believe that its decisions affect their daily lives.^[56] Pervasive political ignorance is a rational response to incentives and the incomprehensible size of modern government.^[57] The chances that any one person's vote will impact an election, much less a particular policy issue, are statistically insignificant, roughly the same as being struck by lightning.^[58] In a world where attention is at a premium, anything that blurs which government officials are responsible for a policy reduces voters' ability to hold the responsible officials accountable. Forbidding the federal government from depriving states of the ability to change their own laws would make the responsibility clearer and improve accountability. If the federal government wishes to see a policy maintained, it must either induce states to participate or enforce the policy itself and face the political consequences directly.

By preserving political accountability, the anti-commandeering principle aligns government with the preferences of the governed and creates incentives for states to find better, smarter ways to promote the public interest, without necessarily favoring more or less government. Like federalism generally, the anti-commandeering principle favors neither conservative nor liberal results, and should enjoy bipartisan support.^[59] Consequently, all should be concerned about the risks of creating an easily manipulated loophole in this core constitutional protection.

III. Conclusion

By forbidding states from amending their own sports-betting laws, PASPA dictates to states what their own laws must be and, therefore, violates the anti-commandeering principle. This undermines the important constitutional values of federalism and political accountability. PASPA deprives states of their sovereign power to define their own laws according to their voters' wishes, as is their prerogative in our federalist system. Instead of announcing a federal standard, and facing the political consequences that would come with it, Congress chose to shield its role in the policy from voters and circumvent the democratic process.

This is different from preemption; the defining characteristic of preemption is that states retain the option to refuse to participate, at which point enforcement falls to the federal government. But laws like PASPA remove that discretion. The Third Circuit's decision does not preempt New Jersey's role in regulating sports betting and shift "the full regulatory burden" to the federal government.^[60] Instead, it nullifies the state's partial repeal of those regulations, putting them

back into effect and reimposing the regulatory burden on the state. The only thing that distinguishes this case from New York is that, more than a quarter-century ago, state politicians approved of the sports-betting bans that PASPA now compels the states to maintain. From the perspective of present politicians and voters, the impact of PASPA and the law at issue in New York is precisely the same. A state's past endorsement of a policy should not change a court's analysis under the anti-commandeering principle.^[61] The anti-commandeering doctrine should therefore be extended to prohibit the federal government from requiring states to maintain existing laws.

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