



Supreme Court's Sports Betting Case Could Redefine Relationship Between Feds And States

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While everyone's focused on the Colorado baker who chose not to make a cake for a same-sex wedding, whose case the Supreme Court hears Tuesday, an equally colorful case to be argued the day before will likely have broader impact on American governance. *Chris Christie v. National Collegiate Athletic Association* involves sports betting in New Jersey, of all things, and it could have ramifications for the regulation of everything from marijuana and guns to immigration and health care.

Anyone who knows anything about the American system of government knows that Congress can't force states to do its bidding. If the Drug Enforcement Agency wants local sheriffs to enforce federal drug laws, it has to sign cooperation agreements with them. If U.S. Immigration and Customs Enforcement wants state troopers to implement new immigration priorities, it's welcome to bribe them offer financial incentives, but can't order them to do so.

States are separate sovereigns that deserve as much respect as the federal government. They work with the federal sovereign all the time on various matters, but they can't be compelled to do so. The technical legal term for this principle is that the Constitution forbids Congress from "commandeering" the states, as the Supreme Court explained in *New York v. United States* (1992) and *Printz v. United States* (1997).

What the Supreme Court Says about Commandeering

New York involved a federal law purporting to require states to either regulate nuclear waste according to federal standards or take possession of it. *Printz* concerned a federal law that would've required state officials to perform background checks on gun buyers. These precedents are so clear that the Supreme Court hasn't taken any follow-up cases in the two decades since.

Indeed, the closest case was probably the constitutional challenge to Obamacare, *National Federation of Independent Business v. Sebelius*—not the individual-mandate part, but the 7-2 ruling that the Affordable Care Act can't force states to expand Medicaid or lose all federal health funding. But that aspect of *NFIB* concerned coercive conditions on federal funds, which Chief Justice John Roberts likened to "a gun to the head," not out-and-out congressional commands.

That brings us to the Professional and Amateur Sports Protection Act (PASPA). Congress enacted PASPA in 1992 to effectively outlaw sports gambling. The law has exceptions for the sports lotteries in Delaware, Montana, and Oregon, the licensed pools in Nevada—Las Vegas sports books—as well as pari-mutuel betting on horses, dogs, and jai alai. It also had a one-year window for states with long-time casino gambling to legalize sports betting, a carve-out clearly designed for the Garden State.

New Jersey's boat missed that safe harbor, however, as the state legislature didn't get around to passing its Sports Wagering Act until 2011—after a referendum showed that a large majority of residents wanted to get in on the action. This state law authorized regulated sports betting at casinos and racetracks.

The NCAA and the four major professional sports leagues sued and were granted an injunction against the New Jersey law. The U.S. Court of Appeals for 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."

Accordingly, New Jersey passed a new law in 2014 that repealed essentially all state bans on sports betting at casinos in Atlantic City and racetracks throughout the state. When this second legalization effort was also challenged, the Third Circuit abandoned its previous distinction between "authorization" and "repeal," again deciding in the NCAA's favor.

But how can this be? According to the lower courts, New Jersey is forced to maintain laws that its elected officials had acted to eliminate. This appears to be an obvious violation of the Tenth Amendment, which says that states and the people retain all powers not delegated to the federal government, and the anti-commandeering principle.

This Is a Catch-22 Against States' Citizens

Indeed, as the Supreme Court held in *New York* (the same year 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." Yet PASPA does just that by dictating what states' own sports-betting laws shall be. If the Constitution forbids Congress from compelling states to enact or enforce federal laws, it can hardly countenance congressional compulsions to continue administering old state laws after they have proven ineffective, unpopular, or both.

In effect, the feds are saying that New Jersey officials and voters have no say in the state's own gambling laws, because any reform would "authorize" actions that violate federal law. This argument goes beyond even the federal government's approach to marijuana; while Congress maintains the federal ban through the Controlled Substances Act, the Justice Department has never sued states to prevent them from legalizing medical or recreational marijuana as a matter of state law.

In *Christie v. NCAA*, the Supreme Court can clear all of this up. That'll be a big deal for sports gambling, which a bipartisan majority of Americans support legalizing. Seventy percent support allowing the people of each state to decide the issue. But it'll be an even bigger deal for our entire conception of the relationship between governments in this era of increased pushback by both red and blue states against the dictates of the Washington swamp.

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