

## Federalism Fights (Part 2): Is It “Commandeering”?

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another “five-minute bite of background about the Court and Constitution.”

The first Part of this month’s podcast explained the ongoing challenge posed by the Framers’ decision to make “federalism” a key pillar of the constitutional system they pioneered almost 240 years ago. That podcast noted that, as in many recent-past years, the current Supreme Court Term features a federalism issue prominently on its docket.

The two cases from New Jersey – whose parties are Governor Chris Christie and advocates of state sports-related betting versus the National Collegiate Athletic Association and major-league sports organizations – challenge the constitutionality of a 1992 federal law. The Professional and Amateur Sports Protection Act (PASPA), bans sports gambling in any state that did not already allow such betting when the Act

As with many constitutional-law doctrines, the one governing the PASPA controversy is easy to state, but difficult to apply. In a 1992 decision involving the neighboring state of New York, the Court debuted an “anti-commandeering” principle designed to protect state sovereignty and empower voters to hold the correct unit of government accountable. The *New York v. United States* majority held that, although Congress could attempt to *persuade* states to adopt federally desired policies (through, for example, offering federal grants contingent on state-law changes), national officials could not *coerce* states to exercise their legislative/regulatory powers in federally dictated ways.

The key to this anti-commandeering principle is whether state officials have a meaningful choice to reject federal overtures. The justices reason that, if states can (to borrow a famous phrase from an anti-drug campaign) “Just Say No,” they are being treated as valued sovereign partners whose choices are honored. And political accountability is preserved because residents not happy with their state’s choice appropriately may retaliate against state officials at the ballot box. On the other hand, if federal officials act like pirates and use the federal ship of state to “commandeer” (capture) a state sovereign vessel, state-government authority is disrespected; political accountability is also undercut, as voters falsely blame state officials for a policy decision imposed on them by the feds.

Although easy to state, the choice-versus-coercion distinction is difficult in practice to apply. One uncertainty arises in the area of conditions on federal spending. The Court held in a 1987 case that requiring states to raise their drinking ages to 21 or lose 5% of their interstate-highway construction funds was only a “mild encouragement” that preserved state choice. To the contrary, seven justices held in the 2012 challenge to the Affordable Care Act that requiring states to dramatically expand programs to fund

healthcare for low-income residents or lose 100% of existing billions in federal Medicaid dollars was “a gun to the head” the states couldn’t meaningfully refuse. The Court declined to fix the precise point at which financial “encouragement” crosses into “coercion.” This remains an open question, which dissenting Justice Ginsburg saw as “involve[ing] political judgments that defy judicial calculation.”

The New Jersey PASPA cases point to a different kind of uncertainty. New Jersey argues that, by preventing its state legislature from repealing existing anti-gambling laws, PASPA issues a forbidden constitutional “command” about how to use state legislative powers. The NCAA and the sports leagues (joined by the Trump Administration) argue that there is no unconstitutional commandeering because PASPA doesn’t require states such as New Jersey to affirmatively legislate in any new way.

So, the issue in the PASPA case comes down to whether the law affirmatively interferes with state legislative autonomy or just passively preserves the legal status quo.

I know...I can hear your eyes roll...

But sometimes policing the proper line between federal and state power comes down – as it often does in constitutional-law disputes -- to drawing fine yet important distinctions!