THIRD CIRCUIT CONFUSION: *NCAA V. CHRISTIE* AND AN OPPORTUNITY TO DEFEND FEDERALISM

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INTRODUCTION

The Framers of the United States Constitution envisioned a system of dual-sovereignty,[1] where the state and federal governments would be independent of one another, constantly competing for power.[2] The Framers believed this system would lead to state and federal governments that were both diverse and sensitive to their citizens' needs, increase democratic participation, and also encourage innovation and experimentation in forms and methods of governance.[3] The very structure of the Constitution reflects this principle of dual sovereignty,[4] and the Framers further cemented it into American law with the Tenth Amendment to the Constitution.[5]

The anti-commandeering doctrine has been the Supreme Court's weapon of choice when seeking to enforce the Tenth Amendment's prohibition against conscripting state legislatures and officials and obliging them to carry out federal policies.[6] The Supreme Court, however, has only used this doctrine to declare an act of Congress unconstitutional twice in its history.[7] *NCAA v. Christie* provides the

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1. Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).
2. *Id*. at 458.
3. *Id*.
4. *Id*. at 457 ("As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government.").
5. U.S. CONST. amend. X. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").
6. *See, e.g.*, Printz v. United States, 521 U.S. 898, 900 (1997); New York v. United States, 505 U.S. 144, 146 (1992).
7. *See Printz*, 521 U.S. at 900 (holding that the federal government cannot force a state to administer federal programs and regulations); *New York*, 505 U.S. at 188 (holding that the

Supreme Court with an opportunity to do so again and maintain the balance between state and federal power that the Framers enshrined in the Constitution.

The Supreme Court should declare the Professional and Amateur Sports Protection Act ("PASPA")—as interpreted by both the federal government and the Third Circuit—unconstitutional for two reasons. First, PASPA violates the anti-commandeering doctrine endorsed by the Supreme Court by preventing individual states from modifying or repealing their state laws, effectively forcing them to implement federal policies. Second, PASPA frustrates the aims of federalism by restricting state legislatures' ability to experiment with novel legislation and negates the political accountability that the Tenth Amendment is meant to ensure.

I. FACTS

PASPA's key provision provides that neither states nor individuals may

> [S]ponsor, operate, advertise, or promote . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.[8]

PAPSA's prohibition on private persons is limited to gambling that is conducted "pursuant to the law or compact of a governmental entity."[9] States, on the other hand, are subject to an additional restriction under PASPA that forbids them from licensing or authorizing by "law or compact" any gambling activities related to amateur or professional athletes.[10]

There were several exceptions to PASPA's broad prohibition against gambling.[11] State-sponsored sports wagering in Nevada and sports lotteries in Oregon and Delaware were exempted from PASPA's regulation.[12] Additionally, New Jersey was given a one year

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federal government cannot force a state to administer federal programs and regulations).

8. 28 U.S.C. § 3702(1) (2012).
9. 28 U.S.C. § 3702(2).
10. 28 U.S.C. §§ 3702(1), 3701.
11. 28 U.S.C. § 3704(a).
12. *Id*. (These states were allowed to continue sponsoring sports wagering due to their already extended history of doing so).

window in which to set up a sports gambling system which would then be exempt from PASPA's prohibition.[13] When PASPA was enacted in 1992, New Jersey's constitution and state laws forbade sports gambling, and the state did not legalize the activity within the granted one year window.[14]

New Jersey has been seeking to legalize sports gambling and other forms of gambling since 2010 when they began assessing the public's desire to change the New Jersey constitution to permit legalized sports gambling.[15] In 2011, an amendment was proposed and successfully adopted into the New Jersey Constitution that allowed the state legislature to legalize sports wagering in casinos and at racetracks in Atlantic City.[16] In 2012, the New Jersey state legislature passed the Sports Wagering Act ("SWA") to bring this constitutional amendment to life.[17] The SWA allowed for sports wagering at casinos and racetracks across New Jersey.[18] Five sports leagues[19] quickly filed suit against the parties responsible for enforcing the SWA in New Jersey ("The New Jersey Parties"), claiming that the SWA violated PASPA and seeking to enjoin the state statute from being implemented.[20] The New Jersey Parties freely admitted that the SWA violated PASPA, but claimed that PASPA was unconstitutional because it violated the anti-commandeering doctrine.[21] The New Jersey District Court found PASPA constitutional,[22] and the Third Circuit Court of Appeals affirmed its decision.[23] The court of appeals held that PASPA did not violate the anti-commandeering doctrine because it merely prohibited states from affirmatively authorizing

13. *Id*.

14. *See* N.J. CONST. Art. IV § VII ¶ 2; N.J. STAT. ANN. § 2C:37-2 (West 2017); N.J. STAT. ANN. § 2A:40-1 (West 2017).

15. Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 832 F.3d 389, 392 (3d Cir. 2016).

16. N.J. CONST. Art. IV, § VII, ¶2(D)

17. *Nat'l Collegiate Athletic Ass'n*, 832 F.3d at 393.

18. *Id*.

19. The five sports leagues were the National Collegiate Athletic Association, National Football League, National Basketball Association, National Hockey League, and the Office of the Commissioner of Baseball, doing business as Major League Baseball. *Id.* at 393 n.1.

20. *Nat'l Collegiate Athletic Ass'n*, 832 F.3d at 393.

21. *Id*.

22. Nat'l Collegiate Athletic Ass'n v. Christie, 926 F. Supp. 2d 551, 579 (D.N.J. 2013) ("After careful consideration of the Parties' submissions, the Court has determined that PASPA is a constitutional exercise of Congress' powers . . . .").

23. Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208, 240 (3d Cir. 2013) ("Having examined the difficult legal issues raised by the parties, we hold that nothing in PASPA violates the U.S. Constitution.").

sports wagering by law, and states could still repeal their existing anti-gambling laws.[24]

In 2014, the New Jersey state legislature tried legalizing gambling once again with the passage of SB 2460.[25] SB 2460 did not purport to legalize gambling, but rather to merely repeal any existing prohibitions on sports betting as they applied to New Jersey casinos and racetracks in apparent compliance with the Third Circuits' previous ruling.[26] SB 2460 left in place existing prohibitions forbidding betting on New Jersey college team competitions and any collegiate competition that occurred in New Jersey.[27] The law additionally prohibited sports betting at the newly deregulated casinos and racetracks for individuals younger than 21 years of age.[28]

The same five sports leagues that sued to enjoin the SWA in 2012 sued to enjoin the New Jersey Parties from giving effect to SB 2460.[29] The District Court ruled in favor of the sports leagues, and the Third Circuit affirmed their decision.[30] On June 27, 2017, the United States Supreme Court granted certiorari to hear the case.[31]

II. LEGAL BACKGROUND

Although the Supreme Court has only struck down acts of Congress as violations of the anti-commandeering doctrine twice in its long history,[32] the doctrine itself has deep roots in American jurisprudence.[33] Functionally, the anti-commandeering doctrine prevents the federal government from using state legislatures and officials as mere tools for the implementation of federal policies and regulations.[34] Congress can provide incentives to states to try to encourage them to assist the federal government in enforcing regulations and policies, but Congress cannot coerce the states into

24. Brief for Petitioner at 3, Christie v. Nat'l Collegiate Athletic Ass'n, NO. 16-476 (U.S. June 27, 2017) [hereinafter Brief for Petitioner].

25. N.J. STAT. ANN. §5:12A-7 (West 2017).

26. *Id*.

27. *Id*.

28. *Id*.

29. Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208, 394 (3d Cir. 2013).

30. *Id*.

31. Christie v. Nat'l Collegiate Athletic Ass'n, NO. 16-476 (U.S. June 27, 2017).

32. *See* Printz v. United States, 521 U.S. 898, 900 (1997); New York v. United States, 505 U.S. 144, 146 (1992).

33. *See New York*, 505 U.S. at 161–66 (summarizing the historical background of the anti-commandeering doctrine).

34. *Printz*, 521 U.S. at 935 ("Congress cannot compel the States to enact or enforce a federal regulatory program.").

providing that assistance; such coercion would violate the Tenth Amendment and run afoul of the anti-commandeering doctrine.[35] The Supreme Court has addressed the problem of anti-commandeering separately for the judicial, executive, and legislative branches of state governments.

The Supreme Court first dealt with the commandeering of state judicial branches in *Testa v. Katt*.[36] At issue in *Testa* was the federal Emergency Price Control Act of 1942, which allowed any person who bought goods for more than the prescribed ceiling price to sue the seller in any court of competent jurisdiction, state or federal.[37] Testa successfully sued Katt in Rhode Island state court for selling him a car in excess of the price ceiling.[38] On appeal, the Rhode Island State Supreme Court reversed, holding that state courts need not enforce the penal laws of the federal government.[39] The U.S. Supreme Court disagreed and ultimately held that the Supremacy Clause of the Constitution binds state courts to hear cases that Congress gives them jurisdiction over if comparable claims under state law would be heard in the same venue. This has effectively allowed Congress to commandeer state judicial branches to enforce federal regulations and policies.[40]

The same cannot be said of state executive branches. In *Printz v. United States*,[41] the federal government attempted to use states as an instrument to enforce federal policy, an attempt that the Supreme Court ultimately found to be unconstitutional.[42] The federal statute at issue in *Printz* was the Brady Act, which established national instant background checks for all handgun sales.[43] While the background check system was being developed and implemented, the Brady Act required local chief law enforcement officers ("CLEOs") to perform the background checks themselves.[44] Several of these CLEOs filed suit against the federal government, saying that forcing them to implement background checks to effectuate a federal law was an

35. *See, e.g.*, Nat'l Fed'n. of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); South Dakota v. Dole, 483 U.S. 203 (1987).
36. 330 U.S. 386 (1947).
37. *Id*. at 387.
38. *Id*. at 388.
39. Testa v. Katt, 47 A.2d 312, 314 (R.I. 1946).
40. *Testa*, 330 U.S. at 392–94.
41. 521 U.S. 898 (1997).
42. *Id*. at 935.
43. *Id*. at 898.
44. *Id*.

unconstitutional commandeering of state executive branches.[45] The District Courts of both Montana and Arizona agreed that the background check requirements for the CLEOs were unconstitutional, but the Ninth Circuit Court of Appeals reversed, finding the entirety of the Brady Act constitutional.[46] The Supreme Court granted certiorari and ultimately held that the federal government cannot command executive branch officials to administer or enforce federal regulatory programs.[47]

Finally, in *New York v. United States*,[48] the Supreme Court grappled with whether the federal government could "commandeer the States' legislative processes by directly compelling them to enact and enforce a federal regulatory program."[49] At issue in *New York* was the Low-Level Radioactive Waste Policy Amendments Act of 1985, which was an attempt by the federal government to get states to provide for the disposal of waste created inside their borders.[50] The Act provided monetary incentives for the states to create waste disposal plans and provided access incentives in the form of disposal facility access to the states that met their Act imposed deadlines.[51] The Act also imposed a "take title" requirement on any state that did not legislate to create a waste disposal plan.[52] This requirement forced states to take title to and possession of any waste created by a waste generator as well as paying those generators any and all damages caused by the state's failure to take possession.[53]

When a waste generator attempted to enforce the take title requirement against New York, the state filed suit, arguing it was unconstitutional to force states to either legislate as the federal government desired or be severely penalized by the take title requirement of the Act.[54] The New York District Court dismissed the state's case, and the Second Circuit Court of Appeals affirmed their

45. *Id*.
46. *Id*.
47. *Id*. at 935 ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. . . . [S]uch commands are fundamentally incompatible with our constitutional system of dual sovereignty.").
48. 505 U.S. 144 (1992).
49. *Id*. at 145.
50. *Id*. at 144.
51. *Id*.
52. *Id*.
53. *Id*.
54. *Id.*

decision.[55] The Supreme Court granted certiorari and held that although the incentives provided in the Act were constitutional, the take title requirement was not.[56] The Court reasoned that the take title requirement intruded into the state sovereignty protected by the Tenth Amendment by offering "two unconstitutionally coercive alternatives—either accepting ownership of waste or regulating according to Congress' instructions."[57] The Court ruled that Congress could not "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[58]

Printz, decided in 1997, was the last time the Supreme Court struck down an Act of Congress for violating the anti-commandeering doctrine.[59] The doctrine has never been overruled, and *Testa*, *Printz*, and *New York* are still controlling law when determining whether Congress has unconstitutionally commandeered a branch of state government.[60]

III. HOLDING

The Third Circuit Court of Appeals upheld the District Court of New Jersey's ruling that PASPA did not unconstitutionally commandeer the New Jersey state legislature.[61] The court focused on the fact that New Jersey's "selective repeal" of its anti-wagering regulations did in fact violate PASPA because it amounted to an authorization of said wagering "by selectively dictating where sports gambling may occur, who may place bets in such gambling, and which athletic contests are permissible subjects for such gambling."[62] The court also held that PASPA does not run afoul of the anti-commandeering doctrine because it does not "command states to take affirmative actions, and it does not present a coercive binary choice."[63]

55. *Id*.
56. *Id*. at 145.
57. *Id*. at 146.
58. *Id*. at 161 (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n., Inc., 452 U.S. 264, 288 (1981)).
59. Elbert Lin and Thomas M. Johnson Jr., *Symposium: High Stakes for Federalism in Heavyweight Clash over the Anti-Commandeering Doctrine*, SCOTUSBLOG (Aug. 17, 2017, 2:44 PM), http://www.scotusblog.com/2017/08/symposium-high-stakes-federalism-heavyweight-clash-anti-commandeering-doctrine/.
60. *Id*.
61. Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 832 F.3d at 402.
62. *Id*. at 396.
63. *Id*. at 401.

IV. ARGUMENTS

Petitioner's arguments primarily assert that PASPA violates the Tenth Amendment and the Court's anti-commandeering doctrine by requiring states to maintain laws they would otherwise repeal. Petitioner also argues that PASPA diminishes the accountability of the federal officials who are truly responsible for PASPA by forcing states to maintain the legislation that furthers PASPA's policy goals.

A. Does PASPA Violate the Tenth Amendment and the Court's Anti-Commandeering Doctrine?

Petitioner argues that PASPA, as interpreted by the Third Circuit, violates the anti-commandeering doctrine.[64] Congress cannot determine the content of states' laws because the determination of those laws is an attribute of state sovereignty protected by the Tenth Amendment.[65] PASPA, the Petitioner argues, does exactly that by forbidding New Jersey to make changes to its sports wagering laws.[66] New Jersey is effectively forced to govern as Congress wills when it comes to the matter of sports wagering, which violates the Tenth Amendment and the anti-commandeering doctrine.[67] Petitioner also argues that PASPA is not saved from unconstitutionality by the Third Circuit's assertion that the state need not take any affirmative action for two main reasons.[68] First, forcing New Jersey to reinstate laws against sports wagering is affirmative action in and of itself,[69] and second, because the affirmative action distinction makes no difference; preventing a state from repealing a law is functionally equivalent to forcing it to pass a new one.[70]

Petitioner distinguishes PASPA from other legislation challenged for commandeering state branches but ultimately declared constitutional by the Court in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*[71], *F.E.R.C. v. Mississippi*.[72] *Reno v.*

64. Brief for Petitioner, *supra* note 24, at 21.
65. *Id*.
66. *Id*. at 22.
67. *Id*.
68. *Id.* at 24–25.
69. *Id*. at 25.
70. *Id*.
71. 452 U.S. 264 (1981) (The Surface Mining Act is challenged by the state of Virginia for allegedly violating the Tenth Amendment and found to be a constitutional use of Congress' commerce clause powers to preempt conflicting state regulation).
72. Fed. Energy Regulation Comm'n v. Mississippi, 456 U.S. 742 (1982) (The Public Utility Regulatory Policies Act is challenged by the state of Mississippi as a violation of the

Condon,[73] and *South Carolina v. Baker*.[74] Petitioner asserts that PASPA is neither a federally administered regulatory program states are choosing to defer to nor legislation regulating states as individuals as the Supreme Court found in these cases.[75] PASPA cannot be opted out of by states as they could in *F.E.R.C.* and *Hodel*; states are required to maintain their state law prohibitions;[76] and they are not being directly regulated themselves as they were in *Reno* and *Baker*, but rather they are being forced to regulate their own citizens in their sovereign capacities as states.[77]

Respondent argues that, since PASPA does not compel states to take affirmative action and instead only prohibits them from authorizing sports wagering, it cannot be in violation of the anti-commandeering doctrine.[78] New Jersey can repeal all of their sports gambling prohibitions if they so choose; they simply cannot carry out a targeted repeal that funnels gambling to Atlantic City.[79] Respondent asserts that the anti-commandeering doctrine only prohibits Congress from imposing affirmative duties on states that force them to do Congress's bidding and that Congress can withdraw powers from states via the Supremacy Clause at will.[80]

B. Does PASPA Diminish the Accountability of State or Federal Elected Officials?

Petitioner also argues that the Third Circuit's interpretation of PASPA diminishes the accountability of state and federal elected officials.[81] When state officials are unable to legislate as their citizens

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Tenth Amendment and found to not compel the exercise of state sovereign powers, but rather to simply establish requirements for state action if the state wished to remain involved in regulating an otherwise pre-emptible field).

73. 528 U.S. 141 (2000) (The Drivers Privacy Protection Act is challenged by the state of South Carolina as a violation of the Tenth Amendment and found to be constitutional because it does not require states to use their sovereign powers to regulate their own citizens, but rather regulates the states themselves).

74. 485 U.S. 505 (1988) (Section 310(b)(1) of the Tax Equity and Fiscal Responsibility Act is challenged by the state of South Carolina for violating the Tenth Amendment and found to be constitutional because it does not compel states to use their sovereign powers to enact and regulate a Congressional scheme, but rather directly regulates the states).

75. Brief for Petitioner, *supra* note 24, at 27–28.

76. *Id*. at 27.

77. *Id*. at 29.

78. Brief for Respondent at 22, Christie v. National Collegiate Athletic Association, NO. 16-476 (U.S. June 27, 2017) [hereinafter Brief for Respondent].

79. *Id*.

80. *Id*. at 25–26.

81. Brief for Petitioner, *supra* note 24, at 29.

wish them to because of federal regulation, it diminishes their accountability to the electorate.[82] PASPA, as interpreted by the Third Circuit, prevents states from legislating freely and requires them to maintain unpopular state laws.[83] Citizens will potentially hold state officials responsible for laws that the federal government is forcing upon them instead of the federal officials truly responsible.[84] This method of legislating is bad for accountability because citizens are unable to easily determine who is responsible for what legislation.[85]

Respondent argues in response that the federal government is clearly responsible for PASPA and that there is no diminished accountability for federal officials enforcing it.[86] Respondent points out the statute operates by directly regulating states, as only a federal statute could, while also directly regulating the activities of private citizens.[87] Respondent further argues that the states are not required to actively enforce PASPA and that federal officials do so, not state officials, so there can be no confusion about the prohibition against gambling being a federal regulation.[88] Finally, Respondent points out that the four years of litigation between the state of New Jersey and the federal government over PASPA will have removed any remaining doubt that PASPA, and its prohibition against sports wagering, is a federal statute.[89]

V. ANALYSIS

PASPA, as interpreted by the Third Circuit, violates the anti-commandeering doctrine. In 2014, the state of New Jersey repealed one of their own laws, passed by their own state legislature years prior. Remarkably, the federal government stepped in and told New Jersey that they could not repeal their own laws and commanded the state legislature to reinstate it. The federal government did not offer New Jersey funding if they chose to reinstate the law, nor did it inform New Jersey that the federal government would be enforcing the laws provisions as a federal matter. Instead, Congress told New Jersey they had to keep that particular law on the books. The Supreme Court held

82. *Id*. at 30.
83. *Id*.
84. *Id*.
85. *Id.* at 31.
86. Brief for Respondent, *supra* note 78, at 33.
87. *Id*.
88. *Id.* at 35.
89. *Id*.

in *New York* that Congress cannot compel states to "regulate pursuant to Congress's direction."[90] Dictating state laws either by forcing their enactment or forcing their continued existence amounts to functionally the same thing. Accordingly, PASPA's restriction on states' abilities to repeal their own laws, in part or in whole, cannot be constitutional in light of the anti-commandeering doctrine as laid out in *New York*.[91]

A. PASPA Violates the Anti-Commandeering Doctrine.

The anti-commandeering doctrine established in *New York* strictly prohibits Congress from commandeering state legislatures.[92] In *New York*, Congress was not directly ordering the states to legislate in a particular way, but was instead threatening them with severe penalties if states did not do as Congress wished.[93] The Court found this form of coercion to violate the anti-commandeering doctrine by not giving states a meaningful choice as to whether or not they wished to adopt legislation requested by the federal government.[94] The mere fact that states did not have a meaningful choice between adopting or not adopting federal legislation was enough for the Court to find that Congress had overstepped its bounds, violated the Tenth Amendment, and infringed on state sovereignty.[95]

To respect the precedent established in *New York*, PASPA must be found to violate the anti-commandeering doctrine. PASPA does not merely coerce states into passing certain laws—as interpreted by the Third Circuit, PASPA actually forbids a state from repealing their own laws should they so choose.[96] There is no meaningful difference between forcing a state to pass a law and forcing them to retain one.[97] In both instances, the state's legislative branch is being commandeered by Congress to advance Congressional policies and purposes. PASPA, by forbidding the repeal of state laws, has the same

90. New York v. United States, 505 U.S. 144, 174 (1992).
91. *See id.* at 188.
92. *Id*.
93. *See id.* at 175–76.
94. *Id*.
95. *Id*. at 188.
96. Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 832 F.3d 389, 394 (3d Cir. 2016).
97. *See* Brief for Amici Curiae Constitutional Law Scholars in Support of Petitioners at 4, Christie v. Nat'l Collegiate Athletic Ass'n, NO. 16-476 (U.S. June 27, 2017) ("Preventing 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.") (quoting Conant v. Walters, 309 F.3d 629, 646 (9th Cir. 2002)).

effect on state sovereignty that the Supreme Court decried as an unacceptable violation of the Tenth Amendment in *New York* in 1992.[98] When Congress tells a state legislature what laws it can and cannot repeal, Congress effectively takes control of that legislative branch and uses it as a tool for implementing federal policy, a practice the Supreme Court has declared unconstitutional.[99] At the heart of state sovereignty is the state's power to repeal or create its own laws; therefore, this power must have been reserved to the states by the Tenth Amendment.[100] Any invasion of that power is a violation of the Tenth Amendment and must be struck down by the Court.

B. PASPA Frustrates the Aims of Federalism.

By restricting the ability of states to repeal their own laws, PASPA frustrates the aims of federalism and nullifies the numerous benefits that can be derived from a system of dual sovereignty. These benefits include increased political accountability for officials and the potential for states to serve as laboratories of democracy.[101]

The political accountability of state and federal officials is damaged by PASPA, as interpreted by the Third Circuit. Congress, via PASPA, is forcing New Jersey to help implement a federal prohibition against gambling while hiding its influence behind a screen of state laws it requires to remain in place. Practically, this means that when the citizens of New Jersey look for who is responsible for their inability to gamble, they will point the finger at state officials instead of where the blame really belongs—the federal government. This allows the federal government to achieve its objectives without fear of political repercussions.[102]

PASPA also severely curtails the ability of the states to serve as laboratories of democracy. One of the main benefits of the separate federal and state systems is the ability to have states try out ideas on a smaller scale.[103] For example, several states across the country are

98. *Id.* at 2.

99. *New York*, 505 U.S. at 188.

100. U.S. CONST. amend X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").

101. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

102. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 578, 578 (2012) ("[W]hen the State has no choice, the Federal Government can achieve its objectives without accountability.") (Scalia, J., dissenting).

103. *Liebmann*, 285 U.S. at 311.

currently experimenting with marijuana legalization, despite its illegality at the federal level. These states provide a relatively low risk arena in which to judge the positive and negative effects of legalizing the drug. PASPA's vice grip on the ability of New Jersey to legalize sports wagering denies New Jersey an opportunity to experiment with sports wagering legislation and to learn from its success or failure in a similar fashion.

CONCLUSION

The Framers established a dual system of government meant to protect state sovereignty from encroachment by a powerful federal government. The Tenth Amendment was the Framers' solution, and the anti-commandeering doctrine is the Supreme Courts' way of giving that amendment teeth in a world where state power is in decline. The doctrine, however, is not self-executing, and it is up to the Supreme Court to see that it is used to protect traditional areas of state sovereignty from federal invasion. Thus, the Supreme Court should use the anti-commandeering doctrine to prevent PASPA from infringing on the New Jersey legislature's right to determine when to repeal their own state laws.