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## Reverse Line Movement: How the Third Circuit's Decision in National Collegiate Athletic Association V. Governor Of New Jersey Contravenes the Anti-Commandeering Doctrine

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# REVERSE LINE MOVEMENT: HOW THE THIRD CIRCUIT’S DECISION IN *NATIONAL COLLEGIATE ATHLETIC ASSOCIATION V. GOVERNOR OF NEW JERSEY* CONTRAVENES THE ANTI- COMMANDEERING DOCTRINE

*Tyler Valeska\**

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## INTRODUCTION

As many bettors will tell you, sports gambling is a complex endeavor. In an industry that generates more than three billion dollars annually from Nevada casinos alone,<sup>1</sup> bettors perpetually search for an evaluative edge over bookmakers. Historically, the most successful handicappers<sup>2</sup> in sports gambling have been those who consistently

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<sup>1</sup> Gillian Spear, *Think Sports Gambling Isn’t Big Money? Wanna Bet?*, NBC NEWS (July 15, 2013), [http://web.archive.org/web/20130718100409/http://usnews.nbcnews.com/\\_news/2013/07/15/19439242-think-sports-gambling-isnt-big-money-wanna-bet](http://web.archive.org/web/20130718100409/http://usnews.nbcnews.com/_news/2013/07/15/19439242-think-sports-gambling-isnt-big-money-wanna-bet).

<sup>2</sup> “Sports handicapping involves the process of determining which of two sports teams, if either, is favored in a specific event . . . . It can also pertain to sports that

apply a set of clearly defined principles.<sup>3</sup> But figuring out exactly what rules to use, and how to use them, is no easy task when gambling, or in determining the legality of sports gambling.

One recent Third Circuit ruling blocked New Jersey's attempt to legalize sports gambling by upholding the Professional and Amateur Sports Protection Act (PASPA).<sup>4</sup> The decision questions the controlling analytical framework for one of the most significant modern developments of constitutional law: the anti-commandeering doctrine.<sup>5</sup> Nonetheless, the U.S. Supreme Court denied certiorari and allowed the Third Circuit's interpretation of the anti-commandeering doctrine to stand. In doing so, the Court significantly hedged on the doctrine's utility.

This Note addresses the consequences of the Third Circuit's decision to uphold the affirmative mandate requirement in PASPA,<sup>6</sup> concluding that PASPA does not comport with the anti-commandeering doctrine. Part I begins with an analysis of the case underlying the Third Circuit's ruling and PASPA's legislative background. Part II explores the genesis and evolution of the anti-commandeering doctrine through three important Supreme Court cases.<sup>7</sup> Part III sets out an argument for why PASPA's affirmative mandate requirement is unsupported by precedent and inapposite to the anti-commandeering doctrine on textual, intentionalist, and structural grounds. Part IV examines consequences that might arise if

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feature individuals such as car racing, tennis and golf. . . ." *What is Sports Handicapping?*, LIVEBETTING.NET, <http://www.livebetting.net/sports-betting-guide/sports-handicapping/> (last visited Apr. 26, 2015).

<sup>3</sup> See Ian Thomsen, *The Story of the Computer Group*, OFFSHOREBETTOR.COM, <http://www.offshorebettor.com/images/COMPUTER.htm> (last visited Apr. 26, 2015) (featuring one example of how a successful handicapper applied clearly defined principles).

<sup>4</sup> 28 U.S.C. §§ 3701-04 (1992); *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208 (3rd Cir. 2013) (upholding PASPA).

<sup>5</sup> See *Nat'l Collegiate Athletic Ass'n*, 730 F.3d 208, 229-34 (3rd Cir. 2013).

<sup>6</sup> See 28 U.S.C. §§ 3701-04 (1992).

<sup>7</sup> This group of cases includes *Reno v. Condon*, 528 U.S. 141 (2000), *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992).

courts are asked to enforce federal bans that prevent state governments from regulating citizens' conduct. Finally, Part V concludes that the U.S. Supreme Court erred in passing on the opportunity to reject PASPA's affirmative mandate requirement.

## I. BACKGROUND

In denying certiorari, the Court declined an opportunity to define the contours of the anti-commandeering doctrine by failing to explicitly reemphasize its analytical test: whether Congress seeks to control or influence the manner in which states regulate citizens' conduct.<sup>8</sup> This test reflects the approach of scholars who urge the Court to impose a heightened level of scrutiny for congressional acts that allow Congress to control or influence state legislatures.<sup>9</sup> Heightened scrutiny in this context would add another prophylactic layer against federal commandeering to protect the underlying principles of federalism embodied in the Tenth Amendment.

### *A. New Jersey's Referendum to Legalize Sports Gambling and the Professional and Amateur Sports Protection Act*

In 2011, New Jersey citizens voted in favor of a nonbinding referendum to repeal a state law prohibiting sports gambling within state borders.<sup>10</sup> The referendum was the only measure to appear on the ballot; it passed with a commanding consensus at the polls and amended the state's constitution. "The voters beat the over-under," said New Jersey Senator Raymond Lesniak.<sup>11</sup> "It was a bigger win

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<sup>8</sup> See *Reno*, 528 U.S. at 148-50.

<sup>9</sup> See, e.g., Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2256 (1998).

<sup>10</sup> MaryAnn Spoto, *Sports Betting Backed by N.J. Voters*, NJ.COM (Nov. 9, 2011, 6:02 AM), [http://www.nj.com/news/index.ssf/2011/11/nj\\_residents\\_vote\\_on\\_legalizin.html](http://www.nj.com/news/index.ssf/2011/11/nj_residents_vote_on_legalizin.html).

<sup>11</sup> *Id.* The term "over-under" refers to a kind of betting called a "totals bet," where bettors guess in advance whether the total points scored in a particular game will exceed the number set by bookmakers. See, e.g., Allen Moody, *Sports Betting-Understanding Totals*, SPORTSGAMBLING.COM,

than we expected. There's a strong momentum to fight the federal ban in New Jersey.'"<sup>12</sup>

Senator Lesniak was referring to PASPA, which Congress passed in 1992 to ban states from regulating sports gambling.<sup>13</sup> PASPA passed because Congress wanted to prevent state legislatures from attempting to repeal their own widespread bans on sports gambling.<sup>14</sup> Before PASPA passed, however, the U.S. Department of Justice opposed the bill due to a concern that the bill implicated significant federalism issues by indirectly promulgating a federal ban on states' legalization of sports gambling.<sup>15</sup>

Notably, PASPA does not prohibit sports gambling by making it a violation of federal law.<sup>16</sup> PASPA prevents "*state governments* from changing their *state laws* to legalize sports wagering—effectively freezing in place pre-existing state-law prohibitions."<sup>17</sup> The statute also makes clear that "a governmental entity<sup>18</sup> [cannot] sponsor, operate, advertise, promote, license, or authorize by law or compact" sports gambling and its associated activities.<sup>19</sup> Thus, PASPA effectively prevents states from legalizing sports gambling despite the fact that Congress did not ban sports gambling under federal law.<sup>20</sup>

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<http://sportsgambling.about.com/od/sportsgambling101/a/intrototals.htm> (last visited Apr. 25, 2015).

<sup>12</sup> Spoto, *supra* note 10.

<sup>13</sup> See 28 U.S.C. §§ 3701-04 (1992).

<sup>14</sup> S. REP. NO. 102-248, at 4-5 (1991).

<sup>15</sup> See Brief for Appellants Christopher J. Christie, David L. ReBuck, & Frank Zanzuccki, at 9, *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208 (3rd Cir. 2013) (No. 13-1715).

<sup>16</sup> See 28 U.S.C. §§ 3701-04.

<sup>17</sup> Brief for Appellants, *supra* note 15, at 9 (emphasis in original).

<sup>18</sup> This language in PASPA implicates anti-commandeering jurisprudence, which centers on the crucial distinction between the federal government directly regulating citizens' behavior and the federal government requiring state governments to regulate citizens' behavior. *See id.*

<sup>19</sup> 28 U.S.C. § 3702(1).

<sup>20</sup> *Id.*

*B. New Jersey's Sports Wagering Law and National Collegiate Athletic Association v. Governor of New Jersey*

Following the referendum, and acting on the mandate of its constituency, the New Jersey state legislature passed the Sports Wagering Law<sup>21</sup> to repeal its ban on sports gambling. The National Collegiate Athletic Association (NCAA), along with Major League Baseball, the National Football League, the National Basketball Association, and the National Hockey League,<sup>22</sup> subsequently filed suit in New Jersey District Court to prevent New Jersey from executing the Sports Wagering Law.<sup>23</sup> The District Court found in favor of the NCAA and other sports leagues, ordering that New Jersey refrain from executing the Sports Wagering Law and maintain its prohibition on sports gambling.<sup>24</sup> On appeal, in a 2-1 panel decision, the Third Circuit ruled that PASPA was constitutional

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<sup>21</sup> N.J. Stat. Ann. § 5:12A-1 (2011).

<sup>22</sup> Major League Baseball, the National Football League, the National Basketball Association, and the National Hockey League are the four primary sports leagues in the United States based on total revenue, television revenue, attendance, and television viewership. See Soven Berry, *NFL: Is the Most Popular Sports League in the U.S. Really Too Big to Fail?*, BLEACHER REP. (July 17, 2013), <http://bleacherreport.com/articles/1707663-nfl-is-the-most-popular-sports-league-in-the-usa-really-too-big-to-fail>.

<sup>23</sup> See Nat'l Collegiate Athletic Ass'n v. Christie, 926 F.Supp.2d 551, 553-55 (D.N.J. 2013). As Congress noted when it passed PASPA, the four primary sports leagues' opposition to legalized sports gambling stems from the belief that it "threatens to change the nature of sporting events from wholesome entertainment for all ages to devices for gambling [and] undermines public confidence in the character of professional and amateur sports." S. Rep. No. 102-248, at 5 (1991). These concerns were amplified by the 2007 arrest and subsequent jailing of rogue NBA referee Tim Donaghy for fixing games and sharing inside information with illegal bookies. See Pat Jordan, *After the Buzzer*, N.Y. TIMES (Jan. 7, 2011), [http://www.nytimes.com/2011/01/09/magazine/09FOB-Encounter-t.html?\\_r=0](http://www.nytimes.com/2011/01/09/magazine/09FOB-Encounter-t.html?_r=0). However, given the recent proliferation of offshore sports gambling websites, it is not clear that such threats remain as palpable today as when Congress addressed them more than twenty years ago.

<sup>24</sup> See *Christie*, 926 F.Supp.2d at 553-55.

and upheld the District Court's decision.<sup>25</sup> However, Judge Thomas Vanaskie wrote in his dissenting opinion that PASPA is patently unconstitutional because it violates anti-commandeering principles inherent in the Tenth Amendment of the U.S. Constitution.<sup>26</sup>

*C. The Third Circuit Ruling in National Collegiate Athletic Association v. Governor of New Jersey and its Impact on the Anti-Commandeering Doctrine*

The Third Circuit's ruling in *National Collegiate Athletic Association v. Governor of New Jersey (NCAA)*<sup>27</sup> threatens the vitality of the anti-commandeering doctrine by reading into case law an affirmative mandate requirement that makes banning sports gambling little more than a phraseology problem for Congress to overcome. Imposing an affirmative mandate requirement in this context means that courts will find that a law violates the anti-commandeering doctrine only if it requires a state legislature to take affirmative legislative action. In other words, a law would not violate the anti-commandeering doctrine under this view if it only requires a state legislature to *refrain* from taking legislative action. In fields such as gambling, where the conduct in question typically is prohibited unless state regulations provide otherwise,<sup>28</sup> a prohibition by the federal government against state regulation of that conduct exerts direct control over how states regulate private parties.

New Jersey faces no tenable or reasonable choice when confronted with its options under PASPA: the state legislature can either choose to keep on its books a state law that citizens expressly rejected, or allow all sports gambling within New Jersey's borders to go wholly unregulated.<sup>29</sup> Such a result implicates the very federalism concerns the U.S. Supreme Court sought to address when it animated

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<sup>25</sup> Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey, 730 F.3d 208, 226-30 (3rd Cir. 2013).

<sup>26</sup> *Id.* at 241 (Vanaskie, J., concurring in part and dissenting in part).

<sup>27</sup> *Id.* at 226-30.

<sup>28</sup> Brief for Appellants, *supra* note 15 at 46.

<sup>29</sup> *Nat'l Collegiate Athletic Ass'n*, 730 F.3d. at 233.



the anti-commandeering doctrine: the federal government achieved its goal of banning sports gambling nationwide without passing federal legislation that did so directly, and thus without first finding support for such a ban in the U.S. Constitution.<sup>30</sup> Meanwhile, the New Jersey legislature was left to bear the political liability of taking actions that did not respond to the will of its constituency.

Specific pragmatic and normative problems with this view of the anti-commandeering doctrine loom on the horizon. First, the Third Circuit's ruling forces states to choose between bearing the cost of the federal mandate imposed on them—which would involve expensive and exhaustive efforts to enforce anti-sports wagering laws—or opening the Pandora's box of problems that would flow from states' non-enforcement of those laws.<sup>31</sup> The New Jersey legislature could also follow the mandate of its citizens by regulating sports gambling despite the Third Circuit's ruling, but such action likely would cause systematic upheaval due to insufficient recourse mechanisms.<sup>32</sup> Second, and even more concerning, the Third Circuit's ruling puts the future viability of the anti-commandeering doctrine in doubt because Congress can simply rephrase an affirmative mandate to read as a negative prohibition whenever it wishes to control or influence the manner by which states regulate their citizens.<sup>33</sup>

The majority opinion addressed this possibility directly, though its reasoning and result contradict the Third Circuit's purported concern:

To be sure, we take seriously the argument that many affirmative commands can be recast as prohibitions. . . . [But,] [t]he anti-commandeering principle may not be circumvented so easily. . . . PASPA does not say to states “you may only license sports gambling if you conscript your

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<sup>30</sup> *Id.* at 245 (Vanaskie, J., concurring in part and dissenting in part).

<sup>31</sup> Brief for Appellants, *supra* note 15, at 48.

<sup>32</sup> See Jackson, *supra* note 9, at 2253.

<sup>33</sup> *Nat'l Collegiate Athletic Ass'n*, 730 F.3d. at 245 (Vanaskie, J., concurring in part and dissenting in part).

officials into policing federal regulations” or otherwise impose any condition that the states carry out an affirmative act or implement a federal scheme before they may regulate or issue a license. It simply bars certain acts under any and all circumstances.<sup>34</sup>

In grounding its decision in the false dichotomy between an affirmative mandate and a negative prohibition, the Third Circuit merely sidestepped fundamental concerns underlying the Supreme Court’s development of the anti-commandeering doctrine.

## II. HISTORY OF THE ANTI-COMMANDEERING DOCTRINE

The U.S. Supreme Court introduced the anti-commandeering doctrine to further a constitutional interest in federalism by protecting the sovereignty of the various states.<sup>35</sup> The doctrine’s fundamental suppositions stem from the notion that the federal government should not employ the various states as mechanisms to institute laws and policies at the whim of Congress.<sup>36</sup> The doctrine supports this notion by maintaining the separate sphere of state sovereignty deliberately carved out for states by framers of the U.S. Constitution.<sup>37</sup>

During the Constitutional Convention, the framers sought to maintain the dignity of states by insulating their autonomy as governing bodies. The framers also sought to ensure the federal government could only institute its preferred legislative agenda through channels expressly articulated in the Constitution.<sup>38</sup> In addition, the framers considered how to ensure the general electorate would not be confused about whether legislation derived from state

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<sup>34</sup> *Id.* at 233.

<sup>35</sup> *See* *New York v. United States*, 505 U.S. 144, 188 (1992).

<sup>36</sup> *See id.*

<sup>37</sup> *See id.*; *see also* *Printz v. United States*, 521 U.S. 898, 918-20 (1997).

<sup>38</sup> *See New York*, 505 U.S. at 180 (citing JAMES MADISON, THE FEDERALIST NO. 20 138 (Clinton Rossiter ed., 1961)(“a sovereignty over sovereigns, a government over governments, a legislation for communities, as contradistinguished from individuals, as it is a solecism in theory, so in practice it is subversive of the order and ends of civil polity.”)).

institutions with independent, law-making authority, or from a federal legislative puppeteer.<sup>39</sup> Furthermore, the Supreme Court introduced the anti-commandeering doctrine with these same concerns in mind.<sup>40</sup> The doctrine sets out a clearly defined prohibition against the proscription of state autonomy by federal auxiliaries through any command requiring states to regulate private parties according to federal orders.<sup>41</sup>

### A. *New York v. United States*

The Court first breathed life into the anti-commandeering doctrine in 1992 when it decided *New York v. United States*.<sup>42</sup> At issue was the Low-Level Radioactive Waste Policy Amendments Act of 1985 (LLRWPA)<sup>43</sup>—a federal statute passed by Congress to improve the monitoring and handling of radioactive waste.<sup>44</sup> LLRWPA required states to provide a safe means for disposing of radioactive waste generated on states' land,<sup>45</sup> and created a financial incentive for states to comply with its provisions by allowing states to issue a surcharge against any neighboring state that transmitted radioactive waste across state lines.<sup>46</sup> Conversely, LRWPA forced any state government that did not comply with the Act to take title of all radioactive waste within its borders that had not been properly disposed of by a certain date.<sup>47</sup> The latter provision left state treasuries footing the bill for all damages incurred directly or indirectly by them in disposing of such waste after that date.<sup>48</sup>

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<sup>39</sup> See *id.* at 168.

<sup>40</sup> See *id.*

<sup>41</sup> See *id.*; see also *Printz*, 521 U.S. at 925-27.

<sup>42</sup> See *New York*, 505 U.S. at 145.

<sup>43</sup> 42 U.S.C.A. § 2021e(d)(2)(c) (1985) (*declared unconstitutional in part by New York*, 505 U.S. 144).

<sup>44</sup> See *New York*, 505 U.S. at 150-51.

<sup>45</sup> 42 U.S.C.A. at § 2021.

<sup>46</sup> See *id.*; *New York*, 505 U.S. at 152-53.

<sup>47</sup> See 42 U.S.C.A. at § 2021; *New York*, 505 U.S. at 153-54.

<sup>48</sup> See *New York*, 505 U.S. at 153-54.

The Court in *New York* struck down LLRWPA's take-title provision because it forced the New York government to choose between either accepting ownership over the radioactive waste, or "regulating according to the instructions of Congress."<sup>49</sup> The Court found this menu constitutionally deficient: if Congress forced New York to take title of the radioactive waste, it would have unconstitutionally commandeered a state government to act legislatively at the behest of Capitol Hill.<sup>50</sup> But, the only alternative under the Act would have forced the New York legislature to adopt federal legislation as its own, which the Court found equally unconstitutional.<sup>51</sup>

Specifically, the *New York* Court found that both options failed under the constraints of the Tenth Amendment and Article I of the Constitution because "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."<sup>52</sup> Throughout its reasoning, the Court raised the policy consideration of governmental accountability.<sup>53</sup> Its concern stemmed from the inherent risk in allowing the federal government to enact its preferred legislation through the medium of state legislatures. Such conduct would erect a buffer between state-level voters and the decision-makers elected on their behalf.<sup>54</sup>

Simply put, state-level voters would see their elected officials making laws according to the prescriptions of federal government representatives without regard to whether such laws are antithetical to the expressed will of voters.<sup>55</sup> Meanwhile, federal officials could simply watch their preferred policies become law without fear of political blowback from an unhappy electorate.<sup>56</sup> Such a course not

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<sup>49</sup> *Id.* at 175.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 175-76.

<sup>52</sup> *Id.* at 188.

<sup>53</sup> *See id.* at 165-70.

<sup>54</sup> *See id.* at 169.

<sup>55</sup> *See id.* ("Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.").

<sup>56</sup> *Id.*

only exposes state government officials to political discontent and other ramifications, but impermissibly allows federal government officials to have their cake and eat it too.

Writing for the majority, Justice O'Connor made an intentionalist argument as well—positing that framers of the Constitution intended the federal government to act upon the people, rather than the states, in light of the failed Articles of Confederation.<sup>57</sup> Justice O'Connor explained further that the Framers specifically adopted the Virginia Plan over alternative accords, and that the Virginia Plan only authorized the federal government to govern citizens directly.<sup>58</sup> In that way, the Court's decision in *New York v. United States* clearly and emphatically denounced the proposition that Congress could act constitutionally in attempting to force state legislatures to implement federal laws, policies, and regulations.

### B. *Printz v. United States*

A few years after it decided *New York*, the Supreme Court expanded the anti-commandeering doctrine in *Printz v. United States*.<sup>59</sup> In *Printz*, the Court held that a piece of federal legislation called the Brady Handgun Violence Prevention Act (the Brady Act)<sup>60</sup>

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<sup>57</sup> *Id.* at 163.

<sup>58</sup> *Id.* at 164. According to the *New York* Court:

Under the Virginia Plan. . . Congress would exercise legislative authority directly upon individuals, without employing the States as intermediaries. . . Under the New Jersey Plan. . . Congress would continue to require the approval of the States before legislating, as it had under the Articles of Confederation. . . In the end, the Convention opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States; . . . it rejected the New Jersey Plan in favor of the Virginia Plan.

*Id.* at 164-65 (citations omitted).

<sup>59</sup> 521 U.S. 898 (1997).

<sup>60</sup> 18 U.S.C.A § 922(s)(6)(b)(i), (iii), (iv) (2006).

violated the Tenth Amendment.<sup>61</sup> The Brady Act required law enforcement officers at the state and local level to conduct background checks on people attempting to purchase handguns, pursuant to certain procedures.<sup>62</sup>

In writing for the majority, Justice Scalia echoed Justice O’Conner’s intentionalist argument in *New York*<sup>63</sup>—noting that no historical basis existed to show Congress could force state governments to implement its preferred policies because Congress did not have any such authority during the nation’s formative post-convention years.<sup>64</sup> Justice Scalia also offered a textual argument, pointing out that the Constitution’s text does not provide for the enlistment of state legislatures or executives in federal programs.<sup>65</sup> Ultimately, the Court held that the Brady Act violated the anti-commandeering doctrine specifically because Congress had offended the Tenth Amendment by conscripting state governments.<sup>66</sup> Moreover, the Court acknowledged that one of the essential attributes of state sovereignty protected by the anti-commandeering doctrine is the right of all state governments to “remain independent and autonomous within their proper sphere of authority,” rather than become “puppets of a ventriloquist Congress.”<sup>67</sup>

### C. *Reno v. Condon*

The Court’s most recent clarification of the anti-commandeering doctrine came in *Reno v. Condon*<sup>68</sup>—a 2000 decision reached by the Court in which it broke from both *New York* and *Printz* to uphold a

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<sup>61</sup> 521 U.S. at 933-34.

<sup>62</sup> *Id.* at 902.

<sup>63</sup> *See New York*, 505 U.S. at 163.

<sup>64</sup> *Printz*, 521 U.S. at 909 (discussing early Congressional enactments and determining that they weighed against the assumption that Congress could commandeer state governmental machinery).

<sup>65</sup> *Id.* at 907.

<sup>66</sup> *Id.* at 909, 933-94.

<sup>67</sup> Brief for Appellants, *supra* note 15, at 47 (citing *Printz*, 521 U.S. at 928).

<sup>68</sup> 528 U.S. 141 (2000).

federal law in the face of a Tenth Amendment challenge.<sup>69</sup> The law in question was the Driver's Privacy Protection Act (DPPA),<sup>70</sup> which prohibited state departments of motor vehicles from disclosing personal information obtained by the departments in connection with motor vehicle records.<sup>71</sup> The Court found that no commandeering concern existed because DPPA did not dictate how states regulated their citizens.<sup>72</sup> Rather, the Court upheld DPPA on grounds that it governed states' activities only to the extent that state officials were acting in a private market of information distribution, and not executing sovereign functions.<sup>73</sup>

Particularly notable in the *Reno* opinion was a distinction the Court made between objective and subjective action.<sup>74</sup> Chief Justice Rehnquist explained it as the difference between the prohibition of conduct at issue in *Reno*, and the affirmative requirements struck down in *New York*<sup>75</sup> and *Printz*.<sup>76</sup> “[DPPA] does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals[.]”<sup>77</sup> Nonetheless, while factually distinguishing *Reno* from previous cases did facilitate the Court's departure from preceding trends, the distinction did not carry determinative weight in the Court's interpretive analysis.<sup>78</sup> Rather, the Court plainly identified the relevant standard for applying the anti-commandeering doctrine:

This case is instead governed by *South Carolina v. Baker*,<sup>79</sup> in which a statute prohibiting States from

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<sup>69</sup> *See id.* at 150-51.

<sup>70</sup> 18 U.S.C.A §§ 2721-25 (1994).

<sup>71</sup> *See id.*

<sup>72</sup> *Reno*, 528 U.S. at 150-51..

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 151.

<sup>75</sup> *See New York v. United States*, 505 U.S. 144 (1992).

<sup>76</sup> *See Printz v. United States*, 521 U.S. 898 (1997).

<sup>77</sup> *Reno*, 528 U.S. at 151.

<sup>78</sup> *See id.* at 142.

<sup>79</sup> *South Carolina v. Baker*, 485 U.S. 505 (1988).

issuing regulated bonds was upheld because it regulated state activities, rather than seeking to control or influence the manner in which States regulated private parties.<sup>80</sup>

Thus, the controlling standard for whether a federal law violates the anti-commandeering doctrine is whether the law “seek[ing] to control or influence the manner in which States regulate[] private parties.”<sup>81</sup> Some have read *Reno* to restrict the application of the anti-commandeering doctrine to laws that require affirmative action from state governments,<sup>82</sup> but that reading misinterprets or misapplies *Reno*’s holding. Nonetheless, the Third Circuit relied on this incorrect interpretation when it upheld PASPA. In doing so, the Third Circuit reduced the anti-commandeering doctrine’s utility to the point of triviality, contravened otherwise correct interpretations of the Constitution’s history and text, and flouted the valuable policies of federalism upon which *New York* and *Printz* relied.

### III. ARGUMENTS AGAINST THE AFFIRMATIVE MANDATE REQUIREMENT

The anti-commandeering doctrine applies beyond the narrow scope of cases in which an act of Congress affirmatively requires a state legislature to enact legislation, as is evident from the Court’s foundational decisions in *New York*,<sup>83</sup> *Printz*,<sup>84</sup> and *Reno*,<sup>85</sup> and from subsequent decisions relying on that triumvirate.<sup>86</sup> Writing in dissent

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<sup>80</sup> *Reno*, 528 U.S. at 142.

<sup>81</sup> *Id.*

<sup>82</sup> *See, e.g.*, Nat’l Collegiate Athletic Ass’n v. Governor of New Jersey, 730 F.3d 208, 233 (3rd Cir. 2013).

<sup>83</sup> *New York v. United States*, 505 U.S. 144 (1992).

<sup>84</sup> *Printz v. United States*, 521 U.S. 898 (1997).

<sup>85</sup> 528 U.S. at 141.

<sup>86</sup> *See, e.g.*, Nat’l Fed’n. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602 (2012) (striking down Congress’s attempt to expand Medicaid through the Affordable Care Act on grounds that, when state governments are unconstitutionally commandeered, “the two-government system established by the Framers would give



of the Third Circuit's decision to uphold PASPA, Judge Vanaskie noted that regardless whether Congress seeks to "command[] the use of state machinery to regulate or command[] the nonuse of state machinery to regulate," the Supreme Court has made clear that the Constitution does not "confer upon Congress the ability to require States to govern according to Congress' instructions."<sup>87</sup> Further, no justification for an affirmative mandate requirement exists in the textual and historical arguments that form the basis of the anti-commandeering doctrine.<sup>88</sup> Similarly, no such requirement should be read into the case law through which the doctrine developed. The principles and policies underlying the doctrine also militate against adding an affirmative mandate requirement.

The affirmative mandate requirement lacks support at every level of constitutional interpretation, making its application in cases such as *NCAA* fundamentally flawed. Moreover, the requirement represents a palpable problem in modern constitutional jurisprudence. The Third Circuit's reading of an affirmative mandate requirement into the anti-commandeering doctrine exemplifies this problem.<sup>89</sup> In its interpretation, the Third Circuit all but condoned Congress's hijacking of New Jersey's legislature under the guise of a purported difference between "you must regulate" and "you cannot not regulate." As a result, the Third Circuit's holding left a damningly narrow approach to anti-commandeering cases that all but obviated the doctrine's future efficacy.

#### *A. The Textual Basis for the Anti-Commandeering Doctrine Does Not Support an Affirmative Mandate Requirement.*

The anti-commandeering doctrine does not appear in express language of the Constitution, but its principles are embedded in

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way to a system that vests power in one central government, and individual liberty would suffer.").

<sup>87</sup> *Nat'l Collegiate Athletic Ass'n*, 730 F.3d at 249 (Vanaskie, J., concurring in part and dissenting in part) (citing *New York*, 505 U.S. at 162).

<sup>88</sup> *See id.* at 241-51 (Vanaskie, J., concurring in part and dissenting in part).

<sup>89</sup> *See id.*

language concerning dual sovereignty that appears through the document.<sup>90</sup> Further, the textual mooring of the anti-commandeering doctrine begins with the Tenth Amendment.<sup>91</sup> As a rule of construction, the Tenth Amendment must be read to exclude from Congress all powers except those specific enumerated and set forth in Article I, § 8.<sup>92</sup> Thus, Congress has no power to conscript the regulatory processes of state legislatures because no such power is expressly granted to Congress in the text of Article I, § 8.<sup>93</sup>

Furthermore, other sections of text *do* provide express authorization for the federal government to employ state governmental entities directly. As noted by Justice Scalia in *Printz*, Article III, § 1 and Article VI, cl. 2 of the Constitution combine to “permit imposition of an obligation on state *judges* to enforce federal prescriptions.”<sup>94</sup> In turn, this textual analysis leads to an *expressio unius* argument: Because the Constitution outlines specific circumstances under which the federal government may commandeer state courts, but does not do so for Congress with regard to state legislatures, the Constitution does not allow Congress to commandeer state legislatures.<sup>95</sup>

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<sup>90</sup> See, e.g., U.S. CONST. art. III, § 2; art. IV, § 3; art. IV, § 4; art. V; see also *Printz*, 521 U.S. at 919 (“Although the States surrendered many of their powers to the new Federal government, they retained a residuary and inviolable sovereignty[.]’ This is reflected throughout the Constitution’s text.” (citing JAMES MADISON, *THE FEDERALIST* NO. 39 245 (Clinton Rossiter ed., 1961))).

<sup>91</sup> For additional analysis on this point see *New York v. United States*, 505 U.S. 144, 157 (1992).

<sup>92</sup> *Id.*

<sup>93</sup> See U.S. CONST. art. I, § 8.

<sup>94</sup> *Printz*, 521 U.S. at 907 (emphasis in original).

<sup>95</sup> As an alternative to the interpretive approach, a “functionalist” scholar might argue that the Constitution should serve as a hierarchical mechanism for subjecting states to the power of the federal government, and that the federal government’s power to commandeer state governments should extend to all state branches. That approach differs from the interpretive approach demonstrated here because it is not grounded in the text specifying Congress’s authority over such matters. See Erwin Chemerinsky, *Formalism and Functionalism in Federalism Analysis*, 13 Ga. St. U. L. Rev. 959, 1-25 (1997).

These kinds of implied limitations are what form the basis of the anti-commandeering doctrine's textual support.<sup>96</sup> But, reading an affirmative mandate requirement into the anti-commandeering doctrine would unnecessarily abridge important limitations inherent in the Constitution's text. For example, because the Tenth Amendment reserves all powers not expressly granted to Congress,<sup>97</sup> allowing Congress to commandeer state legislatures through negative prohibitions would erode the strength of the Tenth Amendment's textual limitations. Moreover, because the Constitution grants Congress limited powers,<sup>98</sup> and because only the federal government has the power to commandeer state courts, an affirmative mandate requirement would be antithetical to the Constitution's textual framework.

*B. The Constitution's History and the Framers' Intent do Not Support an Affirmative Mandate Requirement.*

The intentionalist arguments relied on by the Court in *New York*<sup>99</sup> and *Printz*<sup>100</sup> point to historical justifications for the anti-commandeering doctrine. As Justice O'Connor posited when writing for the *New York* Court, the Framers rejected the notion that Congress should have authority to commandeer state legislatures.<sup>101</sup> Justice O'Connor pointed out that the Framers' chose the Virginia Plan over the New Jersey plan as evidence of their intent to institute a system of governance in which "Congress would exercise its legislative authority directly over individuals rather than over States."<sup>102</sup> For that

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<sup>96</sup> See U.S. CONST. art. III, § 1; art. VI, cl. 2.

<sup>97</sup> U.S. CONST. amend. X.

<sup>98</sup> See, e.g., U.S. Const. art. III, § 1; art. VI, cl. 2.

<sup>99</sup> *New York v. United States*, 505 U.S. 144, 163-64 (1992).

<sup>100</sup> 521 U.S. at 928.

<sup>101</sup> 505 U.S. at 180.

<sup>102</sup> *Id.* at 165.

reason, “the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.”<sup>103</sup>

Moreover, as Justice Scalia articulated in *Printz*, the driving reasoning behind the *New York* Court’s decision centered on the concept of dual sovereignty, and the structural protections it provides.<sup>104</sup> The Framers chose to provide two distinct levels of government, state and federal, to prevent either level of government from accumulating excessive power.<sup>105</sup> Moreover, in rejecting the New Jersey plan, the Framers expressly denied choosing a system in which the federal government could regulate through the states.<sup>106</sup>

Allowing Congress to prohibit state legislatures from regulating their citizens would offend the Framers in the same vein as allowing Congress to require state legislatures to enact legislation; in both instances, Congress would be exercising legislative authority over states rather than people.<sup>107</sup> Moreover, reading an affirmative mandate requirement into the anti-commandeering doctrine cannot be justified in light of the history and intent of the Framers to provide a system of dual sovereignty. Thus, no form of Congressional commandeering of state legislatures—whether by affirmative mandate, or negative prohibition—can comport with the intent of the Framers in adopting the Constitution.

Furthermore, drawing a distinction between affirmative mandates and negative prohibitions in the context of Congressional commandeering of state legislatures nullifies important structural protections inherent in the concept of dual sovereignty. Certainly Congress’s power would be “augmented immeasurably” if Congress

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<sup>103</sup> *Id.* at 166.

<sup>104</sup> *See Printz*, 521 U.S. at 928.

<sup>105</sup> *See id.* at 921. “This separation of the two spheres is one of the Constitution’s structural protections of liberty. ‘Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal government will reduce the risk of tyranny and abuse from either front.’” (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)). *Id.*

<sup>106</sup> *See New York*, 505 U.S. at 164.

<sup>107</sup> *See id.*

could regulate any activity typically requiring state authorization simply by prohibiting states from authorizing that activity<sup>108</sup> — Congress would have the ability to proscribe individual conduct without first passing legislation that makes the conduct illegal. For that reason, tipping the balance of power so far in favor of the federal government would directly contravene the very notions of federalism the Supreme Court sought to protect with the anti-commandeering doctrine.<sup>109</sup>

### *C. Anti-Commandeering Case Law Does Not Establish an Affirmative Mandate Requirement*

Judge Vanaskie’s dissenting opinion in *NCAA* highlights the problems with gleaning an affirmative mandate requirement from the case law.<sup>110</sup> First, as previously noted, the distinction Justice Rehnquist drew in *Reno* between affirmative requirements and negative proscriptions was not determinative in that case.<sup>111</sup> Moreover, in context, Justice Rehnquist’s factual distinction did not harm the anti-commandeering doctrine or its underlying principles of federalism:

First, the Court recognized that “the DPPA d[id] not require the States in their sovereign capacity to regulate their own citizens . . . .” Second, the Court explained . . . that “the DPPA regulates the States as *owners* of data bases” of personal information in motor vehicle records.<sup>112</sup>

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<sup>108</sup> See *Printz*, 521 U.S. at 922.

<sup>109</sup> See *id.*

<sup>110</sup> See *Nat’l Collegiate Athletic Ass’n v. Governor of New Jersey*, 730 F.3d 208, 241-51 (3rd Cir. 2013) (Vanaskie, J., concurring in part and dissenting in part).

<sup>111</sup> See *id.*; *Reno v. Condon*, 528 U.S. 141, 142 (2000).

<sup>112</sup> *Nat’l Collegiate Athletic Ass’n*, 730 F.3d at 249 (Vanaskie, J., concurring in part and dissenting in part) (quoting *Reno v. Condon*, 528 U.S. 141, 151 (2000)).

The clear implication from *Reno* is that a federal law may impermissibly commandeer state legislatures if it either requires states to regulate their own citizens, or if Congress is establishing a regulatory scheme, regardless of whether the federal law mandates or prohibits state legislative conduct. Rather, the controlling test from *Reno* asks whether a federal law forces states to regulate their constituents in a certain manner—be it through forcing states to enact prescribed legislation, or forcing states to regulate absolutely by prohibiting them from authorizing specific conduct.<sup>113</sup> The Court’s 2012 decision in *National Federation of Independent Business v. Sebelius*<sup>114</sup> bolsters this interpretation. Seven justices (three in plurality, and four in dissent) struck down a provision of the Affordable Care Act that withheld funding to the point of coercion from states that did not expand Medicaid eligibility requirements pursuant to certain federal regulations.<sup>115</sup> As Judge Vanaskie pointed out, the decision relied on federalism principles espoused in *New York*, and gave “a clear signal from the Court that those principles enunciated in *New York* are not limited to a narrow class of cases in which Congress specifically directs a state legislature to affirmatively enact legislation.”<sup>116</sup>

#### *D. The Need for Governmental Accountability Counsels Against an Affirmative Mandate Requirement*

One of the primary policy concerns underlying the anti-commandeering doctrine is the notion of governmental accountability. The need for governmental accountability arises out of the democratic interaction between state and federal governments, and harkens back to notions of dual sovereignty in the text and structure of the Constitution.<sup>117</sup> The crux of the concern centers on accountability

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<sup>113</sup> See 528 U.S. at 142.

<sup>114</sup> 132 S. Ct. 2566 (2012).

<sup>115</sup> *Id.* at 2585.

<sup>116</sup> *Nat’l Collegiate Athletic Ass’n*, 730 F.3d at 244 (Vanaskie, J., concurring in part and dissenting in part).

<sup>117</sup> See *New York v. United States*, 505 U.S. 144, 169 (1992).

mechanisms that necessarily exist between legislators and the citizens who elect them. For example, when a constituency elects someone to a legislative body, voters generally expect that person to work on their behalf.<sup>118</sup> In turn, citizens must preserve their right to revoke through election the representative capabilities of legislators who do not act according to their constituency's interests.<sup>119</sup>

Another fundamental tenet of government accountability involves maintaining an adequately empowered voting block of citizens who each have access to information regarding policies supported and opposed by their representatives.<sup>120</sup> Simply put, voters must know who is responsible for policies that affect them so they can make informed choices when voting for representatives. When the federal government bans a given activity, for example, voters should be aware that the ban resulted from the federal government's democratic legislative process. Similarly, voters should know when a state government bans an activity based on that state's democratic will so they can determine with confidence who is responsible for the policy.

However, problems with governmental accountability arise when the lines of transparency between a policy and those charged with its implementation become blurred.<sup>121</sup> When the federal government legislates through the apparatus of a state legislature, for example, the balance of decisional accountability is thrown askew.<sup>122</sup> Federal representatives can escape potential political blowback while seeing their policies implemented regardless.<sup>123</sup> Meanwhile, Congress can claim credit for solving problems despite budgetary constraints by

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<sup>118</sup> *See id.*

<sup>119</sup> *See id.*

<sup>120</sup> *See id.*

<sup>121</sup> *See id.*

<sup>122</sup> *See id.* A cynic's response might call into question the actual knowledge and participation of the general electorate, particularly with respect to the procedural legislative background of a given law. But, because legislative deception often shields informed and engaged citizens from ulterior governmental motives, the cynic's argument becomes self-perpetuating when applied to decisional accountability.

<sup>123</sup> *See id.*

not spending the federal tax dollars needed for the federal government to institute Congressional legislation. Conversely, voters would see their own state legislature as the operational force behind the policy and act accordingly, unaware that the political agency for the law actually lies with Congress.<sup>124</sup> As a result, state legislators would face direct political ramifications for policies over which they have no actual control, and may not even support. This *is* the concern the Court had in mind when it animated the anti-commandeering doctrine.<sup>125</sup>

Additional problems with government accountability arise in light of the affirmative mandate requirement, which does not comport with the anti-commandeering doctrine. Governmental accountability erodes anytime state legislatures carry out the policy determinations of Congress because such actions amount to the federal government imposing its will on the people without actually passing laws.<sup>126</sup> And, as Justice O'Connor reiterated in *New York*, "[w]here the federal government directs the States to regulate, . . . the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."<sup>127</sup> Accordingly, and as a leading scholar pointed out:

[T]he distinction between affirmative duties and negative prohibitions makes little sense in terms of the underlying goals of the Court's Tenth Amendment Jurisprudence . . . . [If] the Court's concern is that federal mandates frustrate accountability because voters do not know who is responsible for governmental action, that is as true with prohibitions as affirmative duties.<sup>128</sup>

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<sup>124</sup> *See id.*

<sup>125</sup> *See id.*

<sup>126</sup> *See id.*

<sup>127</sup> *Id.*

<sup>128</sup> Erwin Chemerinsky, *Right Result, Wrong Reasons: Reno v. Condon*, 25 OKLA. CITY U.L. REV. 823, 827-28 (2000).



An affirmative mandate requirement threatens governmental accountability because it provides a way for the federal government to install its policies through state legislative regulation while avoiding democratic consequences. Moreover, governmental accountability is one of the foundational justifications of the anti-commandeering doctrine. Thus, an affirmative mandate requirement cannot be read into the anti-commandeering doctrine.

#### IV. CONSEQUENCES OF AN AFFIRMATIVE MANDATE REQUIREMENT

As laid out by the majority in *NCAA*,<sup>129</sup> the options under PASPA for the state legislature of New Jersey can hardly be described as such. By allowing Congress to prohibit states like New Jersey from regulating sports gambling,<sup>130</sup> the Third Circuit pigeonholed states into either bearing the cost of investigations, prosecutions, and incarcerations that stem from illegal gambling arrests, or neglecting to enforce state laws prohibiting sports gambling. Or, state legislatures might simply refuse to abide by PASPA because of its intrusive and impractical nature. In any case—and as these so-called options highlight—Congressional action that seeks to influence or determine how states regulate their own citizens presents a unique set of problems. Nonetheless, these problems could be avoided by requiring Congress to pass and execute its own regulatory legislation, consistent with current anti-commandeering jurisprudence.

##### *A. Enforcement of Sports Gambling Laws Burdens State Law Enforcement Departments*

States that choose to enforce the sports gambling laws on their books often face a daunting and unproductive task. As journalist Tim Layden noted, “Busting gambling rings is labor-intensive work for law enforcement agencies, and there’s little chance that those

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<sup>129</sup> *Nat’l Collegiate Athletic Ass’n v. Governor of New Jersey*, 730 F.3d 208, 213-41 (3rd Cir. 2013).

<sup>130</sup> *See id.*

apprehended and found guilty will receive heavy penalties since much of the public considers gambling a victimless crime.”<sup>131</sup> In other words, because perpetrators rarely receive extended jail sentences (if they receive jail time at all),<sup>132</sup> state law enforcement agencies have little incentive to bear these costs. Accordingly, law enforcement agencies often choose to forego enforcement of the governing sports wagering prohibitions in their states.<sup>133</sup> In 2011, for example, New Jersey officers reported making only 103 arrests for illegal gambling, of which a significant portion likely were attributable to underage gambling convictions—not illegal gambling ring busts.<sup>134</sup> Moreover, eight of New Jersey’s twenty-one counties did not report making a single arrest for gambling that year.<sup>135</sup>

Thus, real fiscal and practical pressures are leading states to decline enforcement of state gambling laws rather than spend even

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<sup>131</sup> Tim Layden, *Bettor Education*, SPORTS ILLUSTRATED (Apr. 3, 1995), <http://si.com/vault/article/magazine/MAG1006405/2/index.htm>. Arguments against the view of sports gambling as a victimless crime often hinge on gambling’s funding and, thus, the facilitation of organized crime. See Justin Engel, *Saginaw Police Say Illegal Gambling “Not a Victimless Crime”*, MLIVE.COM (Sept. 30, 2011), [http://www.mlive.com/news/saginaw/index.ssf/2011/09/more\\_than\\_just\\_a\\_game\\_sa\\_ginaw.html](http://www.mlive.com/news/saginaw/index.ssf/2011/09/more_than_just_a_game_sa_ginaw.html). These arguments serve as policy justifications for the legalization of state-sponsored sports gambling, which would likely ameliorate instances of gambling-funded crime and gambling-related violence.

<sup>132</sup> Layden, *supra* note 131. While it is true that other so-called victimless crimes like prostitution can lead to stiff criminal sentences for convicts running extensive rings, such crimes typically are distinguishable because they are uniformly prohibited across the country. Instead, because sports gambling is permitted in some states but not others, a more appropriate analog might be found in future prosecutions for the sale and distribution of marijuana, which recently became legal in Colorado and Washington. See Star-Ledger Editorial Board, *Legalize Sports Gambling? NJ Follows States with Legal Pot*, NJ.COM (June 26, 2014, 9:14 AM), [http://www.nj.com/opinion/index.ssf/2014/06/legalize\\_sports\\_gambling\\_nj\\_follows\\_states\\_with\\_legal\\_pot\\_editorial.html](http://www.nj.com/opinion/index.ssf/2014/06/legalize_sports_gambling_nj_follows_states_with_legal_pot_editorial.html).

<sup>133</sup> Layden, *supra* note 131.

<sup>134</sup> N.J. ST. POLICE, ST. & CNTY. ARREST SUMMARY 74 (2011), available at [http://www.njsp.org/info/ucr2011/pdf/2011\\_sect\\_3.pdf](http://www.njsp.org/info/ucr2011/pdf/2011_sect_3.pdf).

<sup>135</sup> *Id.* at 54-55.

more time and money trying to enforce them. This election to non-enforcement may save state law enforcement agencies both time and money. Still, non-enforcement of state gambling laws presents several practical and legal problems of its own in the context of Congressional commandeering.

*B. Non-Enforcement is Not a Suitable Alternative to Direct Congressional Regulation of Sports Gambling*

In *NCAA*, the Third Circuit found that non-enforcement of a state ban on sports gambling did not constitute an “authoriz[ation] by law” of sports gambling.<sup>136</sup> The finding ran counter to appellants’ argument that a state’s declaration of non-enforcement would automatically violate PASPA because, in effect, such a declaration would authorize sports gambling.<sup>137</sup> However, the Third Circuit justified its finding on grounds that the New Jersey legislature would need to take additional action before the state’s non-enforcement of sports gambling constituted an authorization by law of sports gambling.<sup>138</sup>

First, the Third Circuit’s interpretation of the statutory language “authorization by law”<sup>139</sup> is not reasonable. Under the plain language of PASPA, any state official who announced that a particular law would no longer be enforced would, for all intents and purposes, authorize by law the conduct in question because, such an announcement would allow citizens to engage in the conduct without fear of legal repercussion.<sup>140</sup> In contrast, the Third Circuit’s self-triggering interpretation of the express authorization language in PASPA effectively requires enforcement.<sup>141</sup> As such, state law

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<sup>136</sup> *Nat’l Collegiate Athletic Ass’n v. Governor of New Jersey*, 730 F.3d 208, 232 (3rd Cir. 2013).

<sup>137</sup> *See id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 227.

<sup>140</sup> 28 U.S.C. §§ 3701-04 (1992).

<sup>141</sup> Brief for Appellants, *supra* note 15, at 48.

enforcement agencies have no choice but to bear the various burdens of enforcing their states' existing sports gambling laws.

Alternatively, and assuming non-enforcement is still a viable option under the Third Circuit's interpretation, states pursuing that option would still face several problems. First, Congressional acts that coerce states into non-enforcement of state laws necessarily engender state–constitutional conflicts. As the appellants in *NCAA* noted, “*as a matter of state law*, state officials have a responsibility to enforce their own laws.”<sup>142</sup>

State officials also must practically consider how citizens might respond to a promise of non-enforcement. For example, some citizens might be deterred from engaging in the conduct because, despite a promise of non-enforcement, the conduct would still be illegal. Distrust also could result between state governments and their constituents if citizens are prone to suspect they are being set up to violate a law that remains on the books.<sup>143</sup> Congressional acts also might carry legislation-specific problems that cause citizens to remain impacted by a law, despite a state or local non-enforcement policy.<sup>144</sup> In New Jersey, for example, citizens might hesitate to violate the sports gambling ban if they considered the related infractions under federal wiretapping statutes and other federal laws that piggyback off New Jersey's gambling laws.<sup>145</sup>

Another option proposed by the Third Circuit was that states could completely retreat from regulating the field in question.<sup>146</sup> That means New Jersey could simply decline to regulate any sports gambling whatsoever within its borders by repealing the state ban and

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<sup>142</sup> *Id.* (citing N.J. CONST. art. V, § 1, cl. 11 (providing that the New Jersey governor must “take care that the laws be faithfully executed.”) (emphasis in original)).

<sup>143</sup> *See id.*

<sup>144</sup> *See id.*

<sup>145</sup> *Id.* Also, New Jersey law does not provide for the enforcement of a gambling debt incurred through non-sanctioned sports gambling, so it is unclear whether successful bettors would be able to collect from strong-arming bookies in a New Jersey court. *Id.*

<sup>146</sup> *See Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208, 235 (3rd Cir. 2013).

enacting no further legislation in its place. Because there is no federal legislation regulating the activity, however, pursuing this option would leave citizens completely uninhibited in fields of conduct that typically require licensing by states.<sup>147</sup> It would also leave broad swaths of citizen activity beyond the reach of governmental regulation.

This last option would be particularly problematic for an activity such as gambling, which implicates longstanding connections between New Jersey citizens and the organized crime syndicates who have been illegally sponsoring and booking bets for years.<sup>148</sup> Politically speaking, allowing these illicit gambling operations to proceed unfettered would be akin to lining the pockets of organizations that engage in detrimental behavior ranging from “sex [and heroin] trafficking” to “extort[ing] businesses and [murder].”<sup>149</sup> Therefore, short of effective anarchy, the states essentially are stuck—they must leave the sports gambling laws already on the books unenforced by executives or law enforcement departments in that state.

### *C. Federal Enforcement of Prohibitions Against State Regulation of Citizens Might Prove Difficult*

Prohibitions like that in PASPA are so antithetical to core constitutional values, and carry such vivid political consequences for state legislators, one can easily imagine a scenario in which a state legislature attempts to use legislation to override an injunction like

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<sup>147</sup> Brief for Appellants, *supra* note 15, at 48.

<sup>148</sup> See Stayton Bonner, *Modern Mafiosi*, SLATE (Jan. 21, 2011), [www.slate.com/articles/news\\_and\\_politics/explainer/2011/01/modern\\_mafiosi.html](http://www.slate.com/articles/news_and_politics/explainer/2011/01/modern_mafiosi.html).

<sup>149</sup> See *id.* As a policy matter, the funding of mafia activity through gambling bolsters New Jersey’s argument in favor of legalizing state-sponsored betting. *Id.* Mobs currently turn massive profits because of an explosive proliferation of online gambling. The argument that legalization of state-sponsored gambling would constrict mafia treasure chests is notable because it hinges on the premise that gamblers would prefer the stability and security of placing bets with a local government institution rather than with a shadowy offshore satellite operation. See *id.*

that granted against New Jersey. As scholar Vicki Jackson noted, however, the complications such a scenario might generate are murky—particularly given the equitable nature of injunctions and the composition of the parties likely to be involved.<sup>150</sup> Nonetheless, the fact that state legislatures as collective bodies might violate an injunction issued by the state courts presents one clear problem with regard to the pursuit of recourse.<sup>151</sup> Responding to this concern, Jackson wrote that some “features of legislative action may justify treating it as peculiarly protected from ‘outside’ mandates for action. . . . [T]he front-line enforcement mechanisms for ‘law’ in our legal system and culture are courts, and judicial enforcement of judgments against collective bodies like legislatures poses difficulties...”<sup>152</sup> Thus, the logistical and legal problems that would arise if courts tried to hold state legislatures in contempt for violating an injunction demonstrate that state legislative bodies were uniquely structured to preclude commandeering by Congress.

#### V. NCAA AND THE ANTI-COMMANDEERING DOCTRINE

The Supreme Court could have reversed the Third Circuit’s decision in *NCAA* insofar as it relied on an affirmative mandate requirement to find that PASPA does not violate the anti-commandeering doctrine. Moreover, while the Third Circuit paid lip service to a potential for manipulation via phraseology,<sup>153</sup> the majority opinion failed to protect adequately against the linguistic abuse of constitutional federalism. As a result, PASPA dictates how states such as New Jersey must regulate sports gambling,<sup>154</sup> and is therefore not constitutional. Instead, the Court could have struck down the Third Circuit’s decision, and could have clarified further the contours of the frequently-debated anti-commandeering doctrine.

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<sup>150</sup> See Jackson, *supra* note 9 at 2253.

<sup>151</sup> See *id.*

<sup>152</sup> *Id.* at 2251.

<sup>153</sup> See *Nat’l Collegiate Athletic Ass’n v. Governor of New Jersey*, 730 F.3d 208, 232 (3rd Cir. 2013).

<sup>154</sup> 28 U.S.C. §§ 3701-04 (1992).

Specifically, the Court missed an opportunity to emphasize that the more precise controlling test for the doctrine, which was set forth in *Baker* and applied in *Reno*, is whether Congress seeks to control or influence the manner in which states regulate citizens' conduct.<sup>155</sup> This test is preferable to the affirmative mandate requirement because it is easily applied and comports with the constitutional justifications of the anti-commandeering doctrine.<sup>156</sup> Furthermore, the *Reno* test captures the policies of federalism that illuminate the anti-commandeering doctrine—particularly dual sovereignty and governmental accountability.

In advocating for an alternative to a bright-line rule against legislative commandeering, one scholar suggested a “presumption that federal directives to state legislatures are not ‘Necessary and Proper’ if the same goal can be accomplished through other means, such as direct federal regulation.”<sup>157</sup> Such a presumption would be most effective in complementing the very bright-line rule advocated for here: because of the unique concerns regarding accountability and judicial recourse that accompany legislative commandeering,<sup>158</sup> any acts of Congress that present a risk of legislative commandeering should trigger an automatic increase in the level of scrutiny applied. Adding this analytical step would not only provide an extra layer of protection to what is currently the most vulnerable aspect of the anti-commandeering doctrine, but would also shore up both the doctrine's jurisprudence and its federalism-based values. Moreover, in reasserting a commitment to the anti-commandeering doctrine, the Court could also enhance lower courts' reliance on its rulings by making more explicit its operational components.

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<sup>155</sup> See *Reno v. Condon*, 528 U.S. 141, 142 (2000); *South Carolina v. Baker*, 485 U.S. 505 (1988).

<sup>156</sup> See *Reno*, 528 U.S. 150-51.

<sup>157</sup> See *Jackson*, *supra* note 9 at 2253.

<sup>158</sup> See *id.*

## CONCLUSION

The anti-commandeering doctrine plays an important role in modern constitutional thought. The Court's recent revitalization of federalism values and the structural significance of those values to the Constitution signal a deliberate shift in the prevailing intellectual prism of constitutional interpretation.<sup>159</sup> However, the anti-commandeering doctrine is only viable as a mechanism to protect dual sovereignty and governmental accountability if it applies in all situations where Congress attempts to control how states regulate their citizens.<sup>160</sup> The inclusion of an affirmative mandate requirement would contravene the textual, historical, and structural foundations of the anti-commandeering doctrine found in the Constitution, and would run counter to the recent case law through which the doctrine has developed.<sup>161</sup>

Allowing a dilution of the anti-commandeering doctrine through inclusion of an affirmative mandate requirement would lead to negative consequences similar to those seen in *NCAA*:<sup>162</sup> states would face the unacceptable choice between complete deregulation of a suspect field of conduct, or complete non-enforcement of state laws (if they have a choice at all). Beyond the practical and theoretical problems in these so-called choices, other uneasy questions loom about the efficacy of legal recourse in the event a state legislature breaks an injunction such as that handed down by the Third Circuit in *NCAA*.<sup>163</sup> Ultimately, the Court erred by not overruling *NCAA*, and by failing to hold that the proper standard for evaluating anti-commandeering cases is whether Congress seeks to control or influence the manner in which states regulate citizens' conduct.<sup>164</sup>

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<sup>159</sup> See *Reno*, 528 U.S. 141; *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

<sup>160</sup> See *Reno*, 528 U.S. 141; *Printz*, 521 U.S. at 898; *New York*, 505 U.S. at 144.

<sup>161</sup> See *Reno*, 528 U.S. at 141; *Printz*, 521 U.S. at 898; *New York*, 505 U.S. at 144.

<sup>162</sup> See *Nat'l Collegiate Athletic Ass'n v. Governor of New Jersey*, 730 F.3d 208, 223 (3rd Cir. 2013).

<sup>163</sup> See *id.*

<sup>164</sup> See *Reno*, 528 U.S. at 142.



This is the preferable standard; it is grounded in the same constitutional bases as the anti-commandeering doctrine itself and it provides an easily applicable framework that protects the policies underlying the doctrine.

The values protected by the anti-commandeering doctrine are those of federalism, dual sovereignty, and political accountability.<sup>165</sup> A test that evaluates whether Congress is attempting through legal manipulation to coerce states into regulating citizens in a certain manner properly channels these values by ensuring that Congress will act directly on the people rather than the states. This test would also ensure that state governments continue to play their valuable role as the parallel protectors of individual rights. And, by requiring that all laws be generated directly by the people instead of by Congress, the test would help preserve direct lines of accountability between state governments and citizens. Moreover, imposing a presumption of invalidity in cases involving any act of Congress that seeks to commandeer state legislatures would erect an additional prophylactic measure against all forms of commandeering.

Like sports gambling itself, the key to maintaining the anti-commandeering doctrine's vitality is the consistent application of correctly formulated principles. The Supreme Court erred when it condoned an interpretation of the anti-commandeering doctrine that is antithetical both to the doctrine's policy goals, and to its constitutional and precedential groundings. Instead, the Supreme Court should have seized the opportunity to clarify the contours of the anti-commandeering doctrine and to emphasize the doctrine's correct evaluative framework.

Finally, the Third Circuit's interpretation that anti-commandeering precedent requires an affirmative mandate to render unconstitutional the conscription by Congress of state legislatures threatens to destroy the anti-commandeering doctrine altogether.

But, hindsight is 20/20 in both gambling and constitutional jurisprudence, of course. Advocates of federalism and dual

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<sup>165</sup> See *New York v. United States*, 505 U.S. 144, 144-88 (1992).

sovereignty now see with unfortunate clarity: *NCAA*<sup>166</sup> was a bet on the wrong horse.

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<sup>166</sup> *Nat'l Collegiate Athletic Ass'n*, 730 F.3d at 223.