TWO LESSONS OF ANTICOMMANDEERING: THE PREEMPTIVE SIGNIFICANCE OF THE PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT

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INTRODUCTION

Sports gambling is big business.[1] The American Gaming Association estimates the United States sports betting market to be worth as much as $380 billion.[2] Yet, full-scale sports gambling is only legal in one state, Nevada,[3] which accounts for less than 1% of the national sports gambling market.[4] As the

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[1] *See* AM. GAMING ASS'N, *State of the States: the AGA Survey of Casino Entertainment* 33 (2012) ("Sports betting is a popular activity in America.").

[2] *Sports Wagering*, AM. GAMING ASS'N, http://www.americangaming.org/industry-resources/research/fact-sheets/sports-wagering (last modified June 30, 2012) (citing NAT'L GAMBLING IMPACT STUDY COMM'N FINAL REPORT 2-16 (1999), *available at* http://govinfo.library.unt.edu/ngisc/reports/fullrpt.html).

[3] AM. GAMING ASS'N, *supra* note 1.

battered U.S. economy continues to suffer after its longest and most painful downturn since the Great Depression and as state budget deficits remain at staggeringly high levels, state-sponsored gambling represents a possible solution to help states increase revenues and close sizeable budget gaps.[5]

On January 17, 2012, New Jersey Governor Chris Christie signed a bill passed by the New Jersey State Legislature, permitting gambling on certain collegiate and professional sporting events ("Sports Gambling Law").[6] On August 7, 2012, the National Collegiate Athletic Association ("NCAA"), Major League Baseball ("MLB"), National Football League ("NFL"), National Basketball Association ("NBA"), and National Hockey League ("NHL") jointly filed suit in U.S. District Court against Christie and two other defendants, arguing that the Sports Gambling Law violates the Professional and Amateur Sports Protection Act ("PASPA").[7]

Whether or not the Sports Gambling Law will withstand the legal challenge depends largely on the constitutionality and applicability of the federal ban under PASPA. The case is unique in several respects—namely, the New Jersey government is not attempting to establish a state-sponsored sports gambling operation; it is merely permitting private casinos and racetracks to engage in the business.[8] Nevertheless, as written, PASPA explicitly precludes the New Jersey law.[9]

Examining Congress's prohibition on sports gambling vis-à-vis the Sports Gambling Law casts doubt on the legitimacy and reach of PASPA.[10] Part I examines the history and constitutionality of PASPA; specifically, the two main constitutional arguments for invalidating PASPA—challenges based on the Tenth Amendment and the Commerce Clause.[11] Part II discusses an important safeguard to the American system of dual sovereignty—the anticommandeering principle—and explains how this protection acts as a constraint on the federal regulatory power, particularly with respect to PASPA and the Sports Gambling Law.[12] Part III discusses how principles of federalism limit the practical effect of Congress's sports gambling ban—chiefly, that the federal government may not compel states to actively support or participate in enforcing federal law.[13] Part IV considers the potential implications of this restriction on enforcement in the event of uncooperative federalism.[14]

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[4] *See Sports Wagering*, *supra* note 2.

[5] *See* Chris Isidore, *Recession Officially Ended in June 2009*, CNN MONEY (Sept. 20, 2010), http://money.cnn.com/2010/09/20/news/economy/recession_over/index.htm; Danielle Kurtzleben, *10 States With the Largest Budget Shortfalls*, US NEWS & WORLD REPORT (Jan. 14, 2011), http://www.usnews.com/news/articles/2011/01/14/10-states-with-the-largest-budget-shortfalls; *Gambling Man*, ECONOMIST, June 2, 2012, *available at* http://www.economist.com/node/21556285 ("Mr. Christie faces a fiscal crunch: on May 23rd the legislature's budget officer predicted that taxes in 2012-13 would bring in $1.3 billion less than forecast. Levies on sports bets could be a rich new source of revenue.").

[6] N.J. STAT. ANN. §§ 5:12A (West 2012).

[7] Compl. for Declaratory and Inj. Relief at 2-3, NCAA v. Christie, No. 12-4947 (D.N.J. Aug. 7, 2012); 28 U.S.C. §§ 3701-3704 (2006). For his part, Christie maintains that New Jersey will not acquiesce: "We intend to go forward and allow sports gambling to happen, and if someone wants to stop us, then they'll have to take action to try to stop us." *Id.* at 7.

[8] N.J. STAT. ANN. § 5:12A-1 (West 2012).

[9] 28 U.S.C. § 3702 (2006).

[10] *See* discussion *supra* Sections II.B, III.B, IV.B.

[11] *See infra* Part I.

[12] *See infra* Part II.

[13] *See infra* Subsection III.A.1.

[14] *See infra* Part IV.

I. Sports Gambling Ban in the United States

In 1991, building on a series of previous federal laws relating to the gambling industry,[15] Congress drafted legislation specifically aimed at protecting the integrity of sports.[16] While the proposed law received widespread support, opponents voiced concern about its constitutionality.[17] In 1992, constitutional concerns notwithstanding, Presidential Bush signed the bill into law, and it remains in effect today.[18]

A. The Professional and Amateur Sports Protection Act (PASPA)

On February 22, 1991, Senator Dennis DeConcini introduced Senate Bill 474, the proposed legislation that would eventually become PASPA.[19] According to the committee report recommending PASPA, the impetus driving congressional action was that spreading state-sponsored sports gambling was a threat to the integrity of professional and amateur sports.[20] Proponents of the legislation, such as Senator Bill Bradley, maintained that "suspicions about point-shaving and game-fixing" threatened "the integrity of and public confidence in professional team sports."[21] At the time, there were at least thirteen states considering the legalization of state-sponsored sports gambling, some of which were attracted to the potential source of revenue.[22] Yet, most members of Congress shared the belief of Senator Bradley that the harm caused by state-sponsored sports betting far outweighed the financial advantages it produced,[23] and Congress passed the proposed bill to prevent the further spread of state-sponsored wagering schemes.[24]

On October 28, 1992, President Bush signed the bill into law, criminalizing sports gambling in nearly all parts of the country. The key provision of the Act read:

> It shall be unlawful for—
>
> (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or

[15] *See, e.g.*, Interstate Wire Act of 1961, 18 U.S.C. § 1084 (2006) (prohibiting the use of wire communication by gambling businesses transmitting bets, wagers, or information that assists in placing interstate or international bets or wagers—specifically mentioning "sporting events or contests"); Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprising Act of 1961, 18 U.S.C. § 1952 (2006); Racketeer Influence and Corrupt Organizations Act of 1970, 18 U.S.C. § 1961 (2006); Bribery in Sporting Contests Act of 1979, 18 U.S.C. § 224 (2006) (making it unlawful to influence a sporting contest through bribery).

[16] S. REP. NO. 102-248, at 4 (1991) ("Senate bill 474 bill serves an important public purpose, to stop the spread of State-sponsored sports gambling and to maintain the integrity of our national pastime.").

[17] *See* discussion *infra* Section I.B.

[18] Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. §§ 3701-3704 (2006).

[19] S. 474, 102d Cong. § 1 (1992); S. REP. NO. 102-248, at 3.

[20] S. REP. NO. 102-248, at 5 ("Sports gambling threatens the integrity of, and public confidence in, amateur and professional sports.").

[21] Bill Bradley, *The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORT L. 5, 7-8 (1992).

[22] *Id.* at 8 ("Initiatives to sanction wagering on sporting events have become increasingly attractive to states as legislatures perceive this activity to be a panacea to their mounting deficits.").

[23] *Id.*

[24] *See* S. REP. NO. 102-248, at 4.

> (2) a person to sponsor, operate, advertise, or promote pursuant to the law or compact of a governmental entity,
>
> 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.[25]

Though this section ostensibly prohibits any and all sports gambling, a subsequent subsection of PASPA carved out a special exemption for certain state-run and state-authorized gambling schemes in operation at any time during various specified periods between 1976 and 1991.[26] Only four states—Nevada, Oregon, Delaware, and Montana—qualified for this exception.[27] The other forty-six states, none of which had sports gambling schemes in operation during the specified time period, were prohibited from operating and authorizing sports gambling.[28]

B. Constitutionality of PASPA

Since first being considered in Congress, PASPA faced stiff opposition from detractors who questioned its constitutional pedigree.[29] Nevertheless, more than two decades have passed since PASPA became federal law, and its constitutionality has only been challenged on three occasions.[30] Although no

[25] Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. § 3702 (2006).

[26] *Id.* § 3704(a). The Act also exempted "parimutuel animal racing or jai-alai games" from section 3702. § 3704(a)(4).

[27] David D. Waddell & Douglas L. Minke, *Why Doesn't Every Casino Have a Sports Book?: An Overview of the Professional and Amateur Sports Protection Act*, GLOBAL GAMING BUS., July 2008, 34, 35-36 ("These statutory exceptions effectively served as a grandfather clause for the licensed sports books in Nevada, the sports lottery being conducted in Oregon, a sports lottery authorized under Delaware law, and certain sports pool betting previously authorized under Montana law.").

[28] 28 U.S.C. § 3702 (2006).

[29] *See* S. REP. NO. 102-248, at 12-17 (explaining the Senate minority view of the law).

[30] *See* Flagler v. U.S. Attorney, No. 06-3699 (JAG), 2007 WL 2814657 (D.N.J. Sept. 25, 2007); Comm'r of Baseball v. Markell, 579 F.3d 293, 293 (3d Cir. 2009); Interactive Media Entm't & Gaming Ass'n v. Holder, No. 09-1301 (GEB), 2011 WL 802106 (D.N.J. Mar. 7, 2011). In *Flagler*, the court dismissed a private citizen's complaint against the United States Attorney General, in which he argued that PASPA violated the Tenth Amendment because the power to outlaw sports wagering was not expressly granted to the federal government by the Constitution. 2007 WL 2814657, at *1. Without reaching the merits, the court concluded that the plaintiff lacked standing under the three-prong test announced in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-63 (1991). In *Markell*, the NFL, NBA, NHL, the Office of the Commissioner of Baseball, and the NCAA, filed a motion for preliminary injunction seeking to enjoin Delaware state officials from implementing certain parts of a proposed sports betting scheme. 579 F.3d at 295-97. Delaware's proposed sports betting scheme included both single-game and multi-game (parlay) betting. *Id.* at 296. The leagues argued that because single-game betting was not conducted by Delaware between 1976 and 1990, the proposed scheme violated PASPA. *Id.* at 304. The Third Circuit agreed, holding that because it included single-game betting, the Delaware plan went beyond the extent of gambling activities conducted between 1976 and 1990 since no single-game betting was conducted by Delaware during this time. *Id.* at 302-04. In *Holder*, iMEGA and two other plaintiffs filed suit against United States Attorney General Eric Holder, claiming that PASPA was unconstitutional. 2011 WL 802106, at *1-2. U.S. District Judge Garret Brown of the District of New Jersey said Lesniak and other defendants lacked standing to challenge the law because they failed to allege an actual or imminent injury concerning their own gambling activities. *Id.* at *1.

federal court has weighed in on the constitutionality of the Act, the possibility that PASPA might be deemed unconstitutional is certainly not out of the question. To be sure, questions regarding PASPA's constitutionality remain today. Although different issues have been raised,[31] critics taking aim at PASPA's constitutionality generally offer two main arguments: (1) PASPA violates the Tenth Amendment by infringing on the states' reserved right to raise revenue,[32] and (2) PASPA is an abuse of Commerce Clause power because it unfairly discriminates among the states.[33]

1. Tenth Amendment

The federal government is one of enumerated (or listed) powers, meaning that acts by the federal government, including Congress, must be authorized by the Constitution.[34] Accordingly, every act that Congress takes—every piece of legislation that it passes—has to be traced back to, and find its authority in, the Constitution.[35] As a further limitation, the Tenth Amendment instructs that "[t]he 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."[36] As such, the Tenth Amendment serves as a general restraint that prevents Congress from legislating in certain areas that—because they are not reserved for Congress in the Constitution—fall within the authority of the states.

The basic argument for overturning PASPA as a violation of the Tenth Amendment is that it infringes on a fundamental right reserved for the states—namely, that PASPA impedes states' right to raise revenue.[37] Some members of Congress expressed this concern when initially considering the legislation.[38] Included with the Senate report recommending PASPA was a minority views section, in which Senator Grassley denounced PASPA as "a substantial intrusion into States' rights [that] would restrict the fundamental right of States to raise revenue to fund critical State programs."[39] Calling the legislation a "dangerous precedent," Grassley contended that PASPA interfered with issues that were traditionally resolved by the states.[40]

While plaintiffs in *Flagler* and *Holder* made this argument, both times the court failed to consider the merits before determining that the plaintiffs lacked standing.[41] The standing requirement is certainly a significant barrier to challenging PASPA under the Tenth Amendment,[42] but even assuming it is not an

[31] *See, e.g.*, Compl. and Demand for Declaratory Relief at 18-29, 31-35, Interactive Media Entm't & Gaming Ass'n v. Holder, No. 3:09-cv-01301-GEB-TJB (D.N.J. Mar. 23, 2009), 2009 WL 4890878 (alleging PASPA violated the Fourth, Fifth, Tenth, Eleventh, and Fourteenth Amendments).

[32] *See, e.g.*, S. REP. NO. 102-248, at 12.

[33] *See, e.g.*, Compl. and Demand for Declaratory Relief, *supra* note 31, at 18-21.

[34] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all, to be one of enumerated powers."); United States v. Morrison, 529 U.S. 598, 607 (2000). Those powers are defined in Article 1, Section 8 of the Constitution. U.S. CONST. art. I, § 8.

[35] *Id.*

[36] U.S. CONST. amend. X.

[37] *See, e.g.*, Compl. and Demand for Declaratory Relief, *supra* note 31, at 26.

[38] S. REP. NO. 102-248, at 12 (1991).

[39] *Id.*

[40] *Id.* ("Congress should not be telling the States how they can or cannot raise revenue.").

[41] *See* cases cited *supra* note 30.

[42] *See* Anthony G. Galasso, Jr., note, *Betting Against the House (and Senate): The Case for Legal, State-Sponsored Sports Wagering in a Post-PASPA World*, 99 KY. L.J. 163, 165-66 (2010) ("The difficulty in demonstrating that one has standing to bring an action seeking to overturn PASPA may explain why it has been attempted only twice before, despite the overwhelming concerns of Tenth Amendment violations since the hearing in 1992."). Galasso

issue, this type of Tenth Amendment challenge finds little support in existing Supreme Court jurisprudence. As the Court explained in *New York v. United States*, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress."[43] Thus, regardless of whether revenue-raising decisions have traditionally been left to the states, Congress may exercise the legislative powers granted to it by the Constitution. The so-called "reserved (or police) powers" of the states are only those that have not been specifically granted to Congress by the Constitution.[44] As such, so long as PASPA is connected to, or associated with, one of Congress's enumerated powers, there can be no violation of the Tenth Amendment simply because revenue-raising has traditionally been left to the states.[45] Based on modern Supreme Court interpretation, Congress almost certainly derives such authority by way of the Commerce Clause.[46]

2. Commerce Clause

The Commerce Clause gives Congress the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[47] In enacting PASPA, Congress invoked this power to solve "a problem of legitimate Federal concern for which a Federal solution is warranted."[48] Despite the legitimate concern about sports gambling and the harms it inflicts, however, PASPA bans state-sponsored gambling in forty-six states, while permitting in Nevada, Delaware, Oregon, and Montana.[49] This seemingly unequal treatment among states has spurred debate over whether PASPA

provides an in-depth discussion of this challenge, concluding that "[i]n light of the high evidentiary standard for standing outlined in *Lujan* and applied by the court in *Flagler*, it seems that any Tenth Amendment claim may be predicated on harms too indirect or remote to succeed." *Id.* at 171-72.

[43] 505 U.S. 144, 156 (1992).

[44] *Id.* at 156-57 ("The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power."). Opponents invoking the Tenth Amendment, such as the plaintiffs in *Holder*, erroneously argue that "[r]aising revenue by means of state laws authorizing Sports Betting is a right reserved to the individual states." Compl. and Demand for Declaratory Relief, *supra* note 31, at 26.

[45] *See supra* notes 37-40 and accompanying text.

[46] The Court has upheld congressional regulation of "virtually anything that potentially can travel across state lines." ERWIN CHEMERINSKY ET AL., CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 260-61 (3d ed. 2006). The Court has gone so far as to endorse federal regulation of intrastate activities, "if there is any rational basis" for Congress to believe there is an interstate effect or that legislation is necessary to protect its regulation of interstate activities. United States v. Lopez, 514 U.S. 549, 604 (1995) (citing Hodel v. Va. Surface Mining & Reclamation Ass'n, 454 U.S. 264, 276 (1981); Preseault v. ICC, 494 U.S. 1, 17 (1990)). Therefore, Congress's determinations that "[s]ports gambling threatens the integrity of, and public confidence in, amateur and professional sports," and that "[w]ithout Federal legislation, [it] is likely to spread on a piecemeal basis and ultimately develop an irreversible momentum," would likely satisfy the Court's rational basis test for determining whether a regulated activity substantially affects interstate commerce. S. REP. NO. 102-248, at 6 (1991).

[47] U.S. CONST. art. I, § 8, cl. 3.

[48] S. REP. NO. 102-248, at 7. *See also* discussion of Congress's rationale *supra* note 46.

[49] *See supra* notes 27-28 and accompanying text.

should be overturned because it unfairly discriminates among the states.[50] As PASPA made its way through Congress, critics argued that because "there [was] no rational basis" for allowing sports gambling in some states while prohibiting it in others, the Act would be unconstitutional.[51] Opponents of the legislation reasoned that the grandfathering provision would "create a virtual monopoly" for a few states.[52] The plaintiffs in *Holder* furthered this argument, maintaining that "[u]nder the Commerce Clause, Congress is required to legislate uniformly amongst the several states."[53]

Unfair and unequal though it might seem, the Court has repeatedly said, "the power given to Congress to regulate interstate and foreign commerce is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.'"[54] Thus, the Commerce Clause does not require uniformity[55]—Congress need only have a rational basis for regulating unevenly.[56] Indeed, in *Hodel v. Indiana*, the Court explained, "social and economic legislation is valid unless 'the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature's actions were irrational.'"[57] In this case, Congress's justification for exempting some states—that "it has no wish to apply this new prohibition retroactively"[58]—almost certainly satisfies the exceedingly deferential rational basis test.[59] Therefore, like the Tenth Amendment argument,[60] the Commerce Clause argument is unlikely strong enough to overturn the PASPA on constitutional grounds.

II. Federalism: A System of Dual Sovereignty

Fundamental to the American federalist system is the separation and independence of the state and federal governments.[61] The federal government may act only if it finds authority—express or

[50] *See, e.g.*, cases cited *supra* note 30; S. REP. NO. 102-248, at 12 ("[T]his legislation would blatantly discriminate between the States.").

[51] S. REP. NO. 102-248, at 12.

[52] *Id.*

[53] Compl. and Demand for Declaratory Relief, *supra* note 31, at 18 (dismissing the case for lack of standing).

[54] Currin v. Wallace, 306 U.S. 1, 13-14 (1939) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824)).

[55] *See id.* at 14 ("To hold that Congress in establishing its regulation is restricted to the making of uniform rules would be to impose a limitation which the Constitution does not prescribe. There is no requirement of uniformity in connection with the commerce power such as there is with respect to the power to lay duties, imposts and excises.").

[56] *See supra* note 46.

[57] 452 U.S. 314, 333 (1981) (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)).

[58] S. REP. NO. 102-248, at 8 ("Although the committee firmly believes that all such sports gambling is harmful, it has no wish to apply this new prohibition retroactively to Oregon or Delaware, which instituted sports lotteries prior to the introduction of our legislation. Neither has the committee any desire to threaten the economy of Nevada, which over many decades has come to depend on legalized private gambling, including sports gambling, as an essential industry, or to prohibit lawful sports gambling schemes in other States that were in operation when the legislation was introduced. Therefore, it provides an exemption for those sports gambling operations which already are permitted under State law.").

[59] *See supra* note 46.

[60] *See* discussion *supra* Subsection I.B.1.

[61] *See* THE FEDERALIST NO. 46 (James Madison), NO. 51 (James Madison) (Clinton Rossiter ed. 1961) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."); New York v. United States, 505 U.S. 144, 182 (1992) ("[T]he Constitution divides authority between federal and state governments for the protection of individuals."); Gregory v. Ashcroft,

implied—in the Constitution.[62] This constraint, coupled with the Tenth Amendment protection,[63] serves as the foundation for the American system of dual sovereignty.[64] Although federal law remains "the supreme Law of the Land,"[65] Congress does not have the power to regulate through the states,[66] but instead must exercise its authority concurrently with state governments, as two separate spheres.[67] The Court praised the genius of the federalist system in *Printz v. United States*:

> The great innovation of this design was that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other"—"a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."[68]

In order to preserve this governmental balance, the Constitution precludes the federal government from acting "upon and through the States."[69] This distinction is at the heart of what is sometimes referred to as the "anticommandeering principle," which serves as a valuable safeguard against unconstitutional intrusions into state sovereignty.[70]

A. The Anticommandeering Principle

If, in the course of regulating private activities, Congress enacts legislation contrary to state law, the Supremacy Clause supplies the power to preempt the state regulation.[71] That said, as the Court explained in *New York*, "even where Congress has the authority under the Constitution to pass laws

501 U.S. 452, 458 (1991) ("[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government.").

[62] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819) ("This government is acknowledged by all, to be one of enumerated powers."); *Gregory*, 501 U.S. at 458 ("The Constitution created a Federal Government of limited powers."); THE FEDERALIST NO. 46 (James Madison), NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed. 1961) ("The powers delegated by the proposed Constitution to the federal government are few and defined.").

[63] 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.").

[64] *See* Tafflin v. Levitt, 493 U.S. 455, 458 (1990) ("We begin with the axiom that under our federal system, the State possesses sovereignty concurrent with that of the Federal government, subject only to limitations imposed by the Supremacy Clause.").

[65] U.S. CONST. art. VI, cl. 2.

[66] By regulating the states as regulators, or in other words, by directing the states' regulatory systems.

[67] *See* Printz v. United States, 521 U.S. 898, 919-20 (1997) ("The Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people.").

[68] *Id.* at 921 (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

[69] *Printz*, 521 U.S. at 900; *see also* New York v. United States, 505 U.S. 144, 167 (1992) ("The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.").

[70] *See infra* Section II.A.

[71] U.S. CONST. art. VI, cl. 2. ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *see* Gregory v. Ashcroft, 501 U.S. 452, 461 (1991) ("As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States.").

requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."[72] Although this principle finds support in historical accounts surrounding the Constitutional Convention,[73] the Constitution itself does not reference the anticommandeering rule;[74] rather, it is a court-created rule that developed as a necessary corollary to the federalist system.[75] Specifically, the Court established this principle to protect an essential feature of dual sovereignty—namely, political accountability.[76] In *United States v. Lopez*, the Court explained the importance of preserving this function:

> The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States. . . . [C]itizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function. . . . Were the Federal Government to take over the regulation of entire areas of traditional state concern . . . the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.[77]

By preventing Congress from directly controlling state regulatory regimes, the anticommandeering rule helps keep the two spheres of government separate and independent—an essential precursor to political accountability.[78] In the case of PASPA, however, Congress appears to have compromised this separation by directly regulating the states as regulators.[79]

Traditionally, constitutional concerns surrounding PASPA have focused on the federal prohibition of state-sponsored sports gambling schemes.[80] Because Congress may regulate the activities of states just as it may regulate the activities of individuals, these arguments are largely without merit.[81]

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[72] 505 U.S at 167; *see also Printz*, 521 U.S. at 926 ("[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.").

[73] *See, e.g.*, THE FEDERALIST NO. 28 (Alexander Hamilton), NOS. 46, 51 (James Madison); *New York*, 504 U.S. at 163-67 ("In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not states.").

[74] *See generally* U.S. CONST.

[75] *See New York*, 505 U.S. at 167 (citing FERC v. Mississippi, 456 U.S. 742, 762-66 (1982) ("We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288-89 (1981); Lane Cnty. v. Oregon 74 U.S. (7 Wall.) 71, 76 (1868)); *Printz*, 521 U.S. at 926 ("[O]pinions of ours have made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.").

[76] *See Printz*, 521 U.S. at 920 ("The Constitution thus contemplates that a State's government will represent and remain accountable to its own citizens."); Fed. Trade Comm'n v. Ticor Title Ins. Co., 504 U.S. 621, 636 (1992) ("Federalism serves to assign political responsibility, not to obscure it.").

[77] 514 U.S. 549, 577-78 (1995) (Kennedy, J., concurring).

[78] *New York*, 505 U.S. at 168-69.

[79] *See infra* Section II.B.

[80] *See* cases cited *supra* note 30. In *Markell*, for example, the Third Circuit determined that the Delaware statute, which contemplated a state-operated sports lottery, was preempted by federal law. Comm'r of Baseball v. Markell, 579 F.3d 293, 304 (3d Cir. 2009).

[81] *See* Reno v. Condon, 528 U.S. 141, 150-51 (2000) (explaining that the crucial distinction has to do with whether "the law 'regulate[d] state activities,' rather than 'seek[ing] to control or influence the manner in which States regulate private parties.'" (quoting South Carolina v. Baker, 485 U.S. 505, 514 (1988))).

The New Jersey law, however, does not provide for a state-sponsored operation; instead, it simply allows private businesses to operate sports betting pools.[82]

B. PASPA and State Sovereignty

Supreme Court precedent is clear: Congress has the ability to prohibit states from regulating sports gambling.[83] In such a case, a state may subsequently choose to adopt or help enforce the federal ban, though Congress may not compel it do so.[84] Under PASPA, Congress has made it unlawful for states to "authorize" sports gambling.[85] If, prior to the enactment of PASPA, states did not have laws banning sports betting, the activity would only be illegal under federal law. Barring new state legislation to the contrary, states would continue to tolerate sports gambling, and the onus would be on the federal government to unilaterally administer its prohibition.[86] When Congress enacted PASPA, however, forty-six states did have laws prohibiting sports gambling.[87] As a result, given the language of PASPA, these states have no choice but to keep their prohibitions in place.

1. Distinction Between Enacting and Repealing Laws

Before PASPA became federal law, the New Jersey Constitution banned sports-related gambling.[88] With the enactment of the Sports Gambling Law, New Jersey amended its Constitution to allow for the private operation of a sports pool in a sports-wagering lounge located at a casino or racetrack.[89] To be sure, New Jersey has not completely repealed its ban on sports betting, but instead has exempted certain private sports-gambling activities from criminalization.[90] In so doing, the Sports Gambling Law designated certain circumstances where sports-related gambling operations are acceptable (or at least immune from state prosecution).[91]

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[82] N.J. STAT. ANN. §§ 5:12A-2 (West 2012) (permitting the lawful operation of sports pools at casinos and racetracks).

[83] *See* Gregory v. Ashcraft, 501 U.S. 452, 476 (1991) ("Preemption therefore is automatic, since 'state law is preempted to the extent that it actually conflicts with federal law.'" (quoting Pac. Gas & Elec. Co. v. State Energy Res. & Conservation and Dev. Comm'n, 461 U.S. 190, 204 (1983))); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 290 (1981) ("A wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with federal law.").

[84] Printz v. United States, 521 U.S. 898, 924 (1997) (explaining that the Constitution "does not authorize Congress to regulate state governments' regulation of interstate commerce"). In other words, while Congress may prevent state regulation of sports gambling, in general, "it lacks the power directly to compel the States to require or prohibit those acts." New York v. United States, 505 U.S. 144, 166 (1992).

[85] Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. § 3702 (2006) ("[I]t shall be unlawful for . . . a governmental entity to . . . authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme.").

[86] Hodel v. Va. Surface Mining & Reclamation Ass'n, 454 U.S. 264, 288 (1981) ("If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government.").

[87] *See* Waddell & Minke, *supra* note 27 and accompanying text.

[88] N.J. CONST. art. 4, § 7, ¶ 2 (prior to amendment).

[89] N.J. STAT. ANN. §§ 5:12A-2 (West 2012).

[90] *See id.*

[91] *See id.*

Arguing that the Sports Gambling Law violates PASPA, the complainants cite language in PASPA that says a government entity may not authorize sports gambling activities by law.[92] Although the significance and extent of congressional authority to preempt state laws that legalize (or permit) an activity prohibited under federal law are not entirely clear,[93] it is fairly well-established that Congress has the power to prevent states from regulating at all in a certain area.[94] That said, in terms of regulation, there is a distinct difference between enacting a law that expressly authorizes an activity and repealing a law that bans an activity.

Even if PASPA does validly prevent states from explicitly legalizing sports gambling activities, it does not necessarily follow that New Jersey could not simply repeal its state ban on sports betting. Central to this supposition is the distinction between *legalizing* an activity by enacting a new law and *allowing* an activity by repealing an existing law. In other words, PASPA might preclude New Jersey from enacting laws that authorize sports gambling, but not from repealing existing laws that criminalize sports gambling. Because Congress can prevent states from regulating an activity, New Jersey could not merely exempt certain types of sports gambling. Instead, to avoid conflict with PASPA, New Jersey would need to completely decriminalize the activity, making it impossible to have any sort of middle ground—allowing but regulating sports-related gambling activities. As such, New Jersey could not implement specific regulations designating who, what, where, when, why, or how sports gambling activities could permissibly be carried out. This is somewhat counterintuitive considering that Congress would seemingly prefer the current New Jersey law, which still prohibits most forms of sports-related gambling, to no regulation whatsoever, which would not prohibit sports gambling in any form.[95] Logically, if the ultimate goal is to reduce the negative impacts of sports gambling, then certainly state exemption laws,[96] such as the Sports Gambling Law, make more sense than complete deregulation.[97] Additionally, given the potential effects of eliminating all state oversight,[98] a state is less likely to repeal its ban when faced with an all-or-nothing decision than if it could exempt certain, specific forms of sports-related gambling while retaining control over others.[99] Nevertheless, if repeal is an option, states do have a choice: Either refrain from regulating or regulate in accordance with PASPA.

As the Supreme Court has consistently asserted, so long as Congress offers states a "choice" in determining their regulatory program, Congress cannot be said to have directly compelled states to administer a legislative scheme.[100] If complete deregulation is an option, New Jersey could apparently

[92] *See* Compl. and Demand for Injunctive Relief, *supra* note 31, at 2.

[93] *See* discussion *infra* Section III.A.

[94] *See supra* notes 83-84 and accompanying text.

[95] Logically, if preventing sports gambling is Congress's objective, it would prefer a state law that prohibits some but not all gambling over one that allows all betting.

[96] "Exemption laws" refer to those laws that merely make certain activities immune from prosecution of a larger ban.

[97] To be sure, at least some sports gambling activities would be subject to state prosecution, as opposed to none at all.

[98] "Potential risks" is used loosely to refer to those consequences that the government considers to be associated with the forms of gambling that it does ban.

[99] For instance, perhaps New Jersey would decide not to go through with sports gambling deregulation if it were not able to constrain the activity in certain aspects. *See* F.E.R.C. v. Mississippi, 456 U.S. 742, 767 (1982) ("We recognize, of course, that the choice put to the States—that of either abandoning regulation of the field altogether or considering the federal standards—may be a difficult one.")

[100] *See* New York v. United States, 505 U.S. 144, 167 (1992) ("[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." (citing

elect to permit sports gambling by entirely repealing its ban.[101] Yet, under PASPA, Congress stipulated that "it shall be unlawful for . . . a governmental entity to . . . authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme."[102] Arguably, by repealing its ban on sports gambling, New Jersey would be authorizing the activity by law. Since PASPA makes it unlawful for states to authorize sports gambling by law, it would seemingly block any New Jersey repeal effort.[103] In this case, by precluding states from repealing their bans on sports gambling, Congress would effectively be forcing states to criminalize sports gambling.[104] In which case, PASPA would be altogether indistinguishable from "a federal command to the states to promulgate and enforce laws and regulations," which would make it an unconstitutional incursion on state sovereignty.[105] The anticommandeering

Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981))); *see, e.g.*, F.E.R.C. v. Mississippi, 456 U.S. at 766-67 ("It cannot be constitutionally determinative that the federal regulation is likely to move the States to act in a given way, or even to 'coerc[e] the States' into assuming a regulatory role by affecting their 'freedom to make decisions in areas of integral governmental functions'" (quoting *Hodel*, 452 U.S. at 289)); *New York*, 505 U.S. at 175-77 (holding that Congress infringed on state sovereignty when it included a take title provision in its low-level radioactive waste disposal act, reasoning that "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all").

[101] As opposed to enacting a law that positively legalizes the activity. If this were the case—meaning, that a state could entirely decriminalize sports gambling and entirely refrain from regulating the activity—the question then becomes how that state would be allowed to move forward in the future. That is, supposing a state completely repealed its ban on sports gambling and supposing that at some point in the future, the state wanted to prevent certain—but not all—aspects of the activity, would it be able to do so? How would the federal government react? Presumably, Congress would welcome the increased regulation. Yet, if this were allowed, to get around the limitation on state exemption laws, a state could simply wipe its slate clean and then prohibit the undesirable aspects of sports gambling. In other words, instead of starting with a blanket ban on sports gambling and then exempting certain forms of the activity, the state would start with complete deregulation and then ban certain forms of the activity. Such a policy could undoubtedly be described as circular, if not entirely nonsensical.

[102] Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. § 3702 (2006).

[103] Gregory v. Ashcraft, 501 U.S. 452, 476 (1991) ("Preemption therefore is automatic, since 'state law is preempted to the extent that it actually conflicts with federal law.'" (quoting Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1983))).

[104] Forcing states to keep their existing laws in force is no different than forcing states to enact certain laws. *See* Conant v. Walters, 309 F.3d 629, 645-46 (9th Cir. 2002). In *Conant*, the court found that by precluding doctors, on pain of losing their DEA registration, from making a recommendation that would legalize the patients' medicinal use of marijuana under state law, Congress made it impossible for the state to exempt the use of medical marijuana from the operation of its drug laws, and therefore, the federal law "r[an] afoul of the 'commandeering' doctrine announced by the Supreme Court." *Id.* ("In effect, the federal government is forcing the state to keep medical marijuana illegal. But 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. . . . If the federal government could make it illegal under federal law to remove a state-law penalty, it could then accomplish exactly what the commandeering doctrine prohibits: The federal government could force the state to criminalize behavior it has chosen to make legal.").

[105] *New York*, 505 U.S. at 161, 166 ("We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." (citing *F.E.R.C. v. Mississippi*, 456 U.S. at 762-66; Hodel v. Va. Surface Mining & Reclamation Ass'n., 452 U.S., 264, 288-89 (1981); Lane Cnty. v. Oregon, 74 U.S. (7 Wall.) 74, 76 (1968))). Again, in this situation, the question worth asking is: What is the alternative? That is, would New Jersey have any other choice but to regulate? By all appearances, Congress has locked states into their pre-PASPA sports gambling regulations and, therefore, into both implementing and enforcing the sports gambling ban.

principle was established to prevent such federal usurpation of power from compromising political accountability.[106]

2. Diminished Political Accountability

The fundamental purpose served by the constitutional division of power between federal and state governments is the protection of individual freedom.[107] As the Court explained in *Gregory v. Ashcraft*, "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[108] Where a state government is precluded from repealing its own law mirroring a federal ban, however, because the state is unable to respond to the preferences of its electorate, citizens cannot properly determine which government to hold accountable.[109] Robert Mikos, one of the nation's top emerging scholars of federalism,[110] provides a helpful example:

> To illustrate, suppose California currently has a law on the books imposing a minimum one-year prison term for simple possession of marijuana. . . . Congress could not, of course, compel California to enact this law. But suppose California is now considering repealing the law. If positive action entails any physical movement by state officials, then repealing an old law is indistinguishable from passing a new one; after all, both require positive action by state officials. Legislators must say "aye" to pass the measure, the Governor must sign the bill, and so on. It follows that if Congress can block any positive action, it could seemingly bar California from repealing its law even though it could not

[106] *See New York*, 505 U.S. at 169 ("[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."); THE FEDERALIST NO. 46 (James Madison) (Clinton Rossiter ed. 1961) ("Either the mode in which the federal government is to be constructed will render it sufficiently dependent on the people, or it will not. On the first supposition, it will be restrained by that dependence from forming schemes obnoxious to their constituents. On the other supposition, it will not possess the confidence of the people, and its schemes of usurpation will be easily defeated by the State governments, who will be supported by the people."), NO. 51 (James Madison) (Clinton Rossiter ed. 1961) ("In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments.").

[107] United States v. Lopez, 514 U.S. 549, 576 (1995) ("[I]t was the insight of the Framers that freedom was enhanced by the creation of two governments, not one.") (Kennedy, J., concurring); *New York*, 505 U.S. at 182 ("The Constitution does not protect the sovereignty of States for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.").

[108] 501 U.S. 452, 458 (1991); *see also New York*, 505 U.S. at 183-84 (explaining that it is generally in the political interest of state officials to avoid being held accountable by voters).

[109] *See Lopez*, 514 U.S. at 578 ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. . . . The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power.").

[110] *Media Contacts*, VAND. L. SCH., http://law.vanderbilt.edu/faculty/media-contacts/index.aspx (last visited Feb. 18, 2013).

> compel California to adopt the law in the first instance. The result is arbitrary, and I doubt anyone . . . thinks it accurately predicts how the Court would actually rule.[111]

This same analytical framework can be applied to the federal sports gambling legislation. If it was intended to operate as a barrier to states repealing their own laws, PASPA is fundamentally no different than legislation forcing a state to enact a new law.

By preventing a state from repealing its ban, the federal government would be dictating the regulatory program of that state. Surely, this action would be tantamount to commandeering because it would leave citizens unable to properly identify which government to hold accountable.[112] Hence, barring repeal of a state law would keep state governments from remaining responsive to the preferences of their electorates and would shield members of Congress from being held fully responsible by voters.[113] Such a barrier would eliminate citizens' fundamental means for political redress,[114] ignoring the Framers' expectation that people would be "entirely masters of their own fate," ultimately leaving the people defenseless against "attempts of the government to establish tyranny."[115] Accordingly, if PASPA does prevent states from repealing their own laws criminalizing sports gambling, it is an unconstitutional intrusion on state sovereignty, in violation of the anticommandeering principle.

Nevertheless, although the significance of this conclusion is important for analyzing the long-term viability of PASPA, it provides little refuge for the Sports Gambling Law, which is not an attempt at repeal.[116] Therefore, because Congress has the authority to prevent states from regulating whatsoever in certain areas, PASPA would appear to preempt, and thus render inoperative, the Sports Gambling Law. A

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[111] Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. Rev. 1421, 1447 (2009).

[112] *See supra* notes 105-106 and accompanying text.

[113] *See supra* note 109.

[114] *See New York*, 505 U.S. at 168 ("Where Congress encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people."); *Lopez*, at 577-78 (Kennedy, J., concurring) ("To be sure, one conclusion that could be drawn from The Federalist Papers is that the balance between national and state power is entrusted in its entirety to the political process. . . . [T]he essence of responsibility for a shift in power from the State to the Federal Government rests upon a political judgment, though he added assurance that 'the State governments could have little to apprehend, because it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered.'" (quoting THE FEDERALIST NO. 46, at 295 (James Madison) (Clinton Rossiter ed. 1961))); *New York*, 505 U.S. at 183-84 (explaining that political actors have a vested interest in avoiding political responsibility).

[115] THE FEDERALIST NO. 28 (Alexander Hamilton) (Clinton Rossiter ed. 1961) ("But in a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate."), NO. 46 (James Madison) ("[S]hould an unwarrantable measure of the federal government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people; their repugnance and, perhaps, refusal to co-operate with the officers of the Union; the frowns of the executive magistracy of the State; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any State, difficulties not to be despised; would form, in a large State, very serious impediments; and where the sentiments of several adjoining States happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter."); Gregory v. Ashcraft, 501 U.S. 452, 459-60. The logic here is that without the ability to distinguish which government is affecting a certain regulatory policy, citizens cannot know which elected officials keep or remove via elections.

[116] Instead, the New Jersey law is a type of exemption law. *See* discussion *infra* Section III.B.

review of similar state laws that legalize federally-banned conduct, however, suggests a possible constraint on Congress's preemption power.

III. Constraint on Congress's Preemption Power

Article VI, Clause 2 of the United States Constitution, commonly referred to as the Supremacy Clause, states that the "Constitution and the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[117] From this language, the Court developed the preemption doctrine, which stands for the notion that valid federal law trumps conflicting state law.[118] In most cases, application of the Supremacy Clause is relatively straightforward.[119] For example, if a federal law legalizes an activity that a state law prohibits, the state law is preempted.[120] Here, if a state attempts to criminalize some private activity that federal law authorizes—such as free speech—affected individuals have both an incentive and avenue to challenge application of the conflicting state law.[121] Where a federal law prohibits an activity that a state law permits, however, the outcome is less clear.[122] Unlike a situation in which a person has his or her rights limited by a state ban, when a state legalizes a federally-banned activity, the affected person is not the individual performing the activity. Instead, the affected person is someone experiencing the resultant negative externality that arises when someone else engages in the activity.

A. States' Overlooked Power to Authorize Federal Crime

The Court has unequivocally declared that so long as the Constitution prescribes the federal regulatory power, Congress makes the supreme law of the land.[123] At the same time, the Court has been careful to qualify this assertion by stressing that while Congress retains the authority to preempt state law, it may not command states to regulate one way or another or compel states to enforce or administer

[117] U.S. CONST. art. VI, cl. 2.

[118] *See* Hodel v. Va. Surface Mining & Reclamation Ass'n, 454 U.S. 264, 289-91 (1981) ("A wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity affecting interstate commerce when these laws conflict with federal law."). The preemption doctrine is commonly separated into three categories—express, field, and conflict preemption. Caleb Nelson, *Preemption*, 86 VAND. L. Rev. 225, 226 (2000). As far as this analysis is concerned, however, these distinctions do little to advance the definition of preemption—only the most basic explanation is important: If Congress legislates on an issue, and if it is constitutionally authorized to do so, federal law preempts any contrary state law. *Hodel*, 454 U.S. at 289-91.

[119] Mikos, *supra* note 111, at 1422 ("It is taken for granted in federalism discourse that if Congress possesses the authority to regulate an activity, its laws reign supreme and trump conflicting state regulations on the same subject. When Congress legalizes a private activity that has been banned by the states, the application of the Supremacy Clause is relatively straightforward: barring contrary congressional intent, such state laws are unenforceable and, hence, largely immaterial in the sense they do not affect private decisions regarding whether to engage in the activity.").

[120] *See id.*; Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (holding a New York state law granting exclusive monopoly rights to navigate all state waters was in conflict with a federal law and, therefore, void); Gregory v. Ashcraft, 501 U.S. 452, 476 (1991) ("Preemption therefore is automatic, since 'state law is preempted to the extent that it actually conflicts with federal law.'" (quoting Pac. Gas & Elec. Co. v. State Energy Res. & Conservation and Dev. Comm'n, 461 U.S. 190, 204 (1983))).

[121] That avenue, of course, is through the legal appeal process. The incentive to do so arises because individuals do not want to be subject to undesirable laws—*e.g.*, have their freedom of speech restricted.

[122] Mikos, *supra* note 111, at 1422.

[123] *See* cases cited *supra* note 118.

federal regulations.[124] Though not typically emphasized, the implication of this constraint is powerful—in certain situations, it allows states to completely ignore federal law.

1. Preempting State Marijuana Laws

In *Gonzales v. Raich*, the Supreme Court considered the constitutionality of a congressional exercise of Commerce Clause authority.[125] At issue was whether the enforcement of the federal Controlled Substances Act ("CSA"),[126] to the extent that it prevented "the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law," was a valid exercise of federal power.[127] When California voters passed the Compassionate Use Act of 1996, the state exempted from criminal prosecution certain limited uses of marijuana for medical purposes.[128] Finding the CSA regulation squarely within Congress's Commerce Power, the Court found that "limiting the activity to marijuana possession and cultivation 'in accordance with state law' cannot serve to place respondents' activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail."[129] Accordingly, the Court considered the California law to be subordinate to federal law and upheld enforcement of the CSA prohibition.[130]

On its face, the *Raich* decision represented the final chapter for such state medical marijuana exemption laws.[131] In reality, however, the result was quite the contrary.[132] When the *Raich* decision came down, ten states had laws decriminalizing marijuana.[133] Nearly eight years later, instead of seeing that number decrease, the number of states permitting marijuana use has almost doubled, with twenty states and the District of Columbia having laws that allow marijuana use in one form or another.[134] At first blush, this result appears to fly in the face of the preemption doctrine.[135] Under the CSA, Congress specified that if there is "a positive conflict" between the state law and the federal law, the state law is

[124] *See* cases cited *supra* notes 118-120.

[125] 545 U.S. 1, 8 (2005).

[126] Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801-971 (1970).

[127] *Raich*, 545 U.S. at 9-10 (internal quotations omitted).

[128] Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996); *see also Raich*, 545 U.S. at 5-6 ("The Act creates an exemption from criminal prosecution for physicians, as well as for patients and primary caregivers who possess or cultivate marijuana for medicinal purposes with the recommendation or approval of a physician.").

[129] *Raich*, 545 U.S. at 22, 29.

[130] *Id.* at 5.

[131] Mikos, *supra* note 111, at 1423 ("The decision caused some commentators to declare that the war over medical marijuana was over, and that the states had clearly lost.").

[132] More states than ever are allowing medical or recreational use of the drug. *House Members Propose to Amend CSA to Preempt Federal 'Punitive Steps' on State Marijuana Laws*, 41 No. 3 CONTROLLED SUBSTANCES HANDBOOK NEWSLETTER 2 (Jan. 2013).

[133] Mikos, *supra* note 111, at 1423.

[134] *18 Legal Medical Marijuana States and DC*, PROCON.ORG, http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881#DC (last updated Sept. 16, 2013). Three other states have legislation pending. *3 States with Pending Legislation to Legalize Medical Marijuana*, PROCON.ORG, http://medicalmarijuana.procon.org/view.resource.php?resourceID=002481 (last updated Dec. 10, 2012). For a description of the wide variety of state marijuana laws, see TODD GARVEY, CONG. RESEARCH SERV., R42398, MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM AND THE INTERPLAY BETWEEN STATE AND FEDERAL LAWS 4 (2012).

[135] *See supra* notes 118-119 and accompanying text.

preempted.[136] If preempted, state laws are null and void.[137] Because, by all appearances, a state law permitting the use of marijuana positively conflicts with the federal marijuana ban, such laws should be rendered null and void. State medical marijuana laws, however, remain in effect.[138] Resolving this apparent contradiction demands a careful review of the anticommandeering rule.

2. Practical Significance of Federal Preemption

In its abridged form, the anticommandeering rule includes two main instructions. The federal government may neither (1) force states to implement nor (2) force states to enforce federal law.[139] Fittingly, applying the rule to post-*Raich* state marijuana laws arouses two corresponding theories that could explain the limited preemptive effect. The first argument corresponds to the first prong of the anticommandeering rule, which prevents Congress from forcing states to implement a particular regulatory scheme. In the context of state exemption laws, this restriction appears to indicate that state laws simply legalizing conduct that Congress has prohibited may not be preempted.[140] The logic being that if Congress cannot force a state to ban an activity, it stands to reason that Congress also cannot prevent a state from exempting certain aspects of the activity from prosecution. Specifically, because a state is merely authorizing conduct that, absent regulation of any kind (state or federal), would otherwise be permitted, the federal government may not preclude the state law exemptions.[141] To do so, would be

[136] 21 U.S.C. § 903 (1970) ("No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together."). "Positive conflict" typically refers to a situation where state and federal law are so inconsistent that they cannot be reconciled. *See* GARVEY, *supra* note 134, at 9 ("States remain free to pass laws relating to marijuana, or other controlled substances, so long as they do not create a 'positive conflict' with federal law. In interpreting this provision, courts have generally established that a state medical marijuana law is in 'positive conflict' with the CSA if it is 'physically impossible' to comply with both the state and federal law, or where the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"); Kelly v. Washington, 302 U.S. 1, 10 (1937).

[137] *See* Mikos, *supra* note 111, at 1440 (explaining that when state laws are preempted, they remain on the books but are unenforceable); *e.g.*, Wickard v. Filburn, 317 U.S. 111, 124 (1942).

[138] Mikos, *supra* note 111, at 1482.

[139] *See* discussion of anticommandeering principle; *supra* Section II.A.

[140] *See* Mikos, *supra* note 111, at 1423 ("States may continue to legalize marijuana because Congress has not preempted—and more importantly, may not preempt—state laws that merely permit (*i.e.*, refuse to punish) private conduct the federal government deems objectionable.").

[141] *See id.* at 1448-49 ("[T]he Court has never held that Congress could block states from merely allowing some private behavior to occur, even if that behavior is forbidden by Congress. . . . To be sure, the Court has found myriad state laws preempted, but only when the states have punished or subsidized (broadly defined) behavior Congress sought to foster or deter."). Professor Mikos develops what he calls the "state-of-nature benchmark," which stands for the idea that "to distinguish the actions that are preemptable from the ones that are not . . . [the appropriate question is] whether the state action in question constitutes a departure from, or a return to, the proverbial *state of nature*." *Id.* at 1448. *But cf.* Mathew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism:* New York*,* Printz*, and* Yeskey, 1998 SUP. CT. REV. 71, 92-93 ("[T]o say that the status quo cannot involve federal commandeering would be viciously circular."). Mikos also notes that there is one important exception to the state-of-nature benchmark: "Congress may require states to depart from the state of nature and to take positive action if it imposes a similar duty on private citizens—*i.e.*, as long as that duty is generally applicable." Mikos, *supra* note 111,

the equivalent of forcing states to criminalize an activity and would therefore violate the anticommandeering rule.[142] Despite the reasonableness of this theory, the Court has consistently acknowledged Congress's authority to subrogate any state regulation not in accordance with federal law.[143] Thus, while it might be difficult to reconcile with the anticommandeering principle, following the Court's well-established interpretation of the federal preemption power, Congress likely has the authority to preempt incongruous state marijuana laws. Accepting this conclusion as true, the relevant consideration then turns to the significance of this preemption power.

The second possible explanation for the *Raich* aftermath is a product of the anticommandeering rule's second instruction—namely, its protection against compulsory enforcement and administration.[144] Unlike the first theory, which focused on the legal significance of Congress's preemption power, the second theory considers the practical import of federal preemption. As the Court explained in *New York*, "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."[145] Assuming the CSA preempts the California exemption laws, the appropriate question becomes: What if California simply continues to act in accordance with those preempted laws? Unlike a situation in which a state law prevents an activity that federal law protects,[146] when a state allows private conduct that Congress has, the federal government's only recourse is to enforce the ban itself; it may not compel the state to enforce the prohibition, regardless of whether or not the state law is preempted.[147] Because Congress has no authority to oblige state cooperation, even if a state law is technically "preempted," the state can, for all practical purposes, act as though its law is not preempted. What mechanism does the federal government have at its disposal to affect a different result? There is simply nothing the federal government can do to force a state to abide by its own prohibition. After all, when an offender goes one way, a state can *always* look the other. Such is the logical upshot of a remarkably simple foundation: A law only has as much value as its enacting body chooses to give it. As a result, preemption of state law has very limited practical significance without contemporaneous cooperation of the state.[148]

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at 1449-50. This exception would include such things as PASPA's ban on government-sponsored sports gambling operations, where Congress is regulating states as individuals, not as states.

[142] *See id.* at 1448.

[143] *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States.").

[144] *See* discussion and cases cited *supra* Section II.A.

[145] New York v. United States, 505 U.S. 144, 167 (1992).

[146] In which case, a state's failure to permit the activity could trigger some type of federal response. For an example, see *supra* note 122.

[147] *See New York*, 505 U.S. at 178 ("Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents."); Hodel v. Va. Surface Mining & Reclamation Ass'n, 454 U.S. 264, 288 (1981) (holding that Congress may not simply "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program"); Printz v. United States, 521 U.S. 898, 935 (1997) ("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. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.").

[148] *See* Mikos, *supra* note 111, at 1424 ("The federal ban may be strict—and its penalties severe—but without the wholehearted cooperation of state law enforcement authorities, its impact on private behavior will remain limited.").

B. Extent of PASPA's Preemptive Function

To be sure, New Jersey is not attempting to repeal its state ban on sports-related gambling.[149] Instead, much like California's medical marijuana exemptions,[150] New Jersey is effectively creating an exception for certain types of sports gambling.[151] Because New Jersey is doing more than repealing an old law, the constitutionality of PASPA is not immediately relevant to the Sports Gambling Law.[152] Instead, the appropriate consideration is of Congress's preemption power with respect to the Sports Gambling Law—namely, whether the anticommandeering principle acts as a practical, rather than legal, constraint on congressional authority.

Although the Sports Gambling Law is not logically consistent with PASPA, New Jersey's authorization of certain forms of sports gambling does nothing to affect the legality of sports gambling under federal law.[153] Nevertheless, assuming the New Jersey law is preempted by PASPA, it would still become null and void.[154] To the extent that applying a state law would involve ignoring a valid federal law, the Supremacy Clause requires courts to disregard the state law.[155] Thus, insofar as state judges are required to enforce federal law, the Constitution does grant the federal government the power to compel state action.[156]

Any further attempts to direct a state regulatory program, however, are precluded by the anticommandeering rule.[157] Therefore, even though PASPA would compel New Jersey courts to administer federal law, Congress would have no power to order New Jersey officials to enforce the pre-existing state ban or administer the federal ban.[158] As such, the practical significance of preempting the Sports Gambling Law would depend entirely on whether the offenders were before a state court—or, in other words, whether the state decided to prosecute offenders.[159] Given that Congress cannot force state

[149] N.J. STAT. ANN. §§ 5:12A-2 (West 2012).

[150] Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West 1996).

[151] N.J. STAT. ANN. §§ 5:12A-2 (West 2012). Specifically, private operation of sports pools in sports wagering lounges located at a casinos or racetracks.

[152] *See supra* Section II.B. That said, the analysis is certainly important in assessing the constitutionality of PASPA and its long-term viability.

[153] *See* GARVEY, *supra* note 134, at 8.

[154] As a result, the law remains on the books but is unenforceable. *Id.* at 7-8 ("Under the Supremacy Clause, state laws that conflict with federal law are generally preempted and therefore void."); *see also* Mikos, *supra* note 111, at 1440 (explaining that when state laws are preempted, they remain on the books but are unenforceable).

[155] Nelson, *supra* note 118, at 234, 246 ("At least as far as the courts are concerned . . . federal statutes take effect automatically within each state and form part of the same body of jurisprudence as state statutes.") (footnotes omitted).

[156] New York v. United States, 505 U.S. 144, 179-80 (1992) ("Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause. No comparable constitutional provision authorizes Congress to command state legislatures to legislate.").

[157] *See supra* Section II.A.

[158] *See New York*, 505 U.S. at 188; Printz v. United States, 521 U.S. 898, 935 (1997).

[159] After all, a legal system is composed of multiple, interdependent parts; without support from law enforcement, the judicial mechanism is essentially meaningless. For a comparison, think about the three branches of the national government: Without the Legislative (and, technically, the Executive) branch, there are no laws; without the Executive branch there is no execution of the laws; and without the Judicial branch, there is no interpretation of the laws. State governments operate in the same basic system; therefore, before state courts even have occasion to disregard state law in favor of federal law, other state officials must choose to administer the federal (or

law enforcement officials to administer any laws prohibiting sports gambling, if New Jersey decided to act as though the Sports Gambling Law was not preempted,[160] the responsibility for enforcing the ban would fall entirely with the federal government.[161]

The anticommandeering rule represents a substantial limitation on the practical significance of PASPA's preemptive function.[162] Just as Congress may not compel a state to regulate a certain way, it also may not compel a state to enforce a federal regulatory program.[163] Even if the anticommandeering rule falls short of officially preventing preemption where a state law legalizes a federally-banned activity, it nevertheless allows a state to act as if its law remains in force.[164] The implication is significant—without state cooperation, Congress's preemption power is rendered essentially meaningless, forcing the federal government to bear all enforcement responsibility for its laws.[165] As a result, in such a situation, the federal government's ability to influence behavior depends on its own independent law enforcement mechanisms.[166]

IV. Enforceability Implications

The power to influence private behavior is directly correlated with the ability to generate adequate incentives and disincentives.[167] Accordingly, in order to prevent a certain private behavior, government must be able to make it either: (1) beneficial for an individual to avoid the activity, by providing him or her with some positive reward to encourage behavior;[168] or (2) undesirable for an individual to engage in the activity, by administering some form of punishment to discourage the behavior.[169] While the government does have some limited ability to curtail behavior through positive

unsuccessfully-repealed state) ban—this action, however, is one that falls outside the scope of the federal authority to oblige.

[160] Assuming that it is for the sake of argument.

[161] *See* Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981) ("If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government."); *see* discussion and text accompanying *supra* note 84.

[162] *See* discussion *supra* Section III.A.

[163] *Printz*, 521 U.S. 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. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.").

[164] *See supra* Subsection III.A.2.

[165] *See* Mikos, *supra* note 111, at 1425-26 ("The ultimate outcome on such issues may hinge more on Congress's capacity to enforce its own laws and its ability to manage the non-legal forces that shape our behavior than on the Supreme Court's proclamations demarcating Congress's substantive powers vis-à-vis the states.").

[166] *See* discussion *infra* Part IV.

[167] JOHN A. WAGNER III & JOHN R. HOLLENBECK, ORGANIZATIONAL BEHAVIOR: SECURING COMPETITIVE ADVANTAGE, 89-92 (2010) ("[Reinforcement theory] proposes that a person engages in a specific behavior because that behavior has been reinforced by a specific outcome."); Mikos, *supra* note 111, at 1463-64 ("According to neoclassical economic theory, laws need the backing of incentives (*i.e.*, carrots or sticks) to change human behavior.").

[168] WAGNER & HOLLENBECK, *supra* note 167, at 89-90 (explaining "positive reinforcement").

[169] *Id.* at 90 ("In punishment, the likelihood of a given behavior decreases because it is followed by something that the person dislikes."). Also, note that the federal government does not have the resources to use positive reinforcement to encourage individuals to avoid activities.

rewards,[170] most of the time it uses its law enforcement resources to discourage behavior through punishment.[171] Thus, generally speaking, the federal government's ability to prevent a certain behavior depends on its ability to enforce and administer its laws banning the activity.

On its own, the federal government has limited law enforcement resources.[172] In 2008, according to the Bureau of Justice Statistics, the federal government employed 120,000 full-time federal law enforcement officers,[173] representing less than 10% of all full-time law enforcement personnel in the United States.[174] The other 90% came from state and local law enforcement agencies, which employed over 1.1 million full-time law enforcement officers.[175] Given the disparity in resources, the federal government invariably relies, to a certain extent, on state and local law enforcement to help administer its laws.[176] As such, without the aid of state and local law enforcement, the federal government is considerably limited in its ability to enforce its laws.[177] Often, whether it is able to do so seemingly depends on the nature of the banned activity and the characteristics of the individual or entity engaging in the banned activity.[178]

A. Enforcing the Federal Marijuana Ban

Since the *Raich* decision,[179] the federal government has stood idly by and watched as the number of states with laws legalizing marijuana has nearly doubled.[180] With each new state that permits marijuana use, the federal government loses a partnership with the corresponding state and local law enforcement agencies, which no longer contribute to enforcement of the marijuana ban.[181] Thus, given the federal government's reliance on state and local resources, the increased number of states legalizing marijuana

[170] *See* Mikos, *supra* note 111, at 1463 ("If the government wants to promote a certain type of behavior, it must reward that behavior (with a subsidy)."). For example, the government offers certain tax breaks or tax incentives for certain business practices or charitable donations.

[171] *See id.* at 1464-65 ("[I]f the government wants to curtail the behavior, it must punish the behavior (with fines or jail time).").

[172] *Id.* at 1465 ("The federal law enforcement apparatus is small."); GARVEY, *supra* note 134, at 1 ("The federal government has limited resources to draw upon in investigating and enforcing federal drug laws.") (citing Memorandum for selected U.S. Attorneys from David W. Ogden, Deputy Attorney General, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, Oct. 19, 2009, *available at* http://www.justice.gov/opa/documents/medical-marijuana.pdf.

[173] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 238250, FED. LAW ENFORCEMENT OFFICERS, 2008, 1 (2012).

[174] *Id.*; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 233982, CENSUS OF STATE AND LOCAL ENFORCEMENT AGENCIES, 2008, 1 (2012).

[175] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 233982, CENSES OF STATE AND LOCAL ENFORCEMENT AGENCIES, 2008, 1 (2012).

[176] *See* Mikos, *supra* note 111, at 1463-65 (explaining that without cooperation between state and federal law enforcement, medical marijuana offenders are substantially less likely to be discovered). To be clear, in this situation, the state would be enforcing its own laws, but since the state law and the federal law match, the state is also enforcing the federal ban. By "relies on," this assertion means that because there is, often times, a parallel state law and state enforcement of that law, the federal government is not required to expend resources enforcing its law.

[177] *Id.* at 1463.

[178] *See* discussion *infra* Section IV.A.

[179] 545 U.S. 1, 8 (2005) (concluding that the federal marijuana ban under CSA trumped California's own state medical marijuana exemptions); *see* discussion of *Raich* decision *supra* Subsection III.A.1.

[180] *See* discussion *supra* note 134.

[181] Mikos, *supra* note 111, at 1424.

has caused a reduction in the enforcement effort directed towards the ban and, therefore, has diminished the effectiveness of enforcement.[182] In the case of the CSA, the federal government's enforcement limitation appears particularly amplified by the nature of marijuana use. In fact, of 800,000 marijuana cases arising every year, the federal government handles only 1%.[183]

Given the federal government's capacity to autonomously administer and enforce other laws,[184] effectively gauging its ability to enforce its laws without state cooperation presumably requires consideration of the particular prohibited activity.[185] The degree to which activities lend themselves to federal enforcement may vary more or less depending on the specific nature of each individual activity. Given the limited resources of the federal law enforcement apparatus, certain factors, which uniquely characterize each and every individual activity, seem particularly likely to have an impact on the federal government's ability to deter behavior. Each factor relates to the nature of the particular activity: (1) type and number of offenders;[186] (2) frequency and number of offenses;[187] (3) public nature of the activity;[188] (4) level of infrastructure dependency;[189] and (5) barriers to entry and exit.[190]

Considering the individualized, widespread, and often private use of marijuana, which has relatively low infrastructure dependency and few entry and exit barriers, the federal government faces an exceedingly difficult task in enforcing its marijuana ban without state assistance.[191] As a result, in states with marijuana use exemptions, the Department of Justice ("DOJ") has essentially abandoned criminal

[182] *See* discussion and sources cited *infra* notes 192-193.

[183] Mikos, *supra* note 111, at 1424 ("Assuming no cooperation between the sovereigns, only 0.05 percent—or roughly 1 in 2,000—of medical marijuana users would be uncovered by federal authorities following current practices.").

[184] Consider, for instance, the federal enforcement of federal tax law. *See generally* EPHRAIM P. SMITH, PHILIP J. HARMELINK & JAMES R. HASSELBACK, CCH FEDERAL TAXATION: COMPREHENSIVE TOPICS (David L. Gibberman ed. 2008).

[185] Being the only readily identifiable variable, this appears to be the logical conclusion.

[186] It is reasonable to assume that with more offenders comes an increase in enforcement difficulty because government is forced to spread its enforcement resources thinner and thinner with each additional offender. Further, certain types of offenders could conceivably be more conducive to law enforcement than others. Finally, large groups of violators (which violate law together) would also presumably be more susceptible to law enforcement than would individual violators.

[187] Similar to the rationale *supra* note 186, it is reasonable to assume that with higher amounts and frequency of a particular violation comes increased enforcement difficulty because government is forced to spread its enforcement resources thinner and thinner with each additional offense.

[188] In essence, this simply asks whether the violation is observable to law enforcement (public vs. private).

[189] Infrastructure is not necessarily meant in a physical sense but as it is generally defined—"the underlying foundation or basic framework (as of an organization or a system)." WEBSTER'S INTERNATIONAL DICTIONARY 1161 (3d ed. 1986).

[190] *See generally* MICHAEL PORTER, ON COMPETITION (updated and expanded ed. 2008). The word "barriers" is used interchangeably with the term "barriers to entry and exit."

[191] Mikos, *supra* note 111, at 1465-66 (footnotes omitted) ("Compared to the number of federal law enforcement agents, the number of potential targets in the war on marijuana is enormous. More than 14.4 million people regularly use marijuana in the United States every year, including 4 million who live in states that legalize medical use. . . . [T]here is no easy way for the federal government to focus its scarce resources on them alone."). Further, as the number of states legalizing marijuana increases, the federal task becomes more difficult because its few resources must be spread out even further. This factor is unquestionably relevant to the federal sports gambling ban under PASPA. *See* discussion *infra* Section IV.B.

prosecution efforts of individuals who use medical marijuana in compliance with state law.[192] Indeed, the DOJ formally announced that federal prosecutors "should not focus federal resources . . . on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[193] This result is consistent with the notion that federal enforcement ability varies depending on the nature of the activity.[194] Although the federal government limited enforcement efforts toward its marijuana ban, other activities, which exhibit different factors, are completely within the realm of the federal enforcement capacity.[195]

Consider the federal enforcement capacity in relation to any of the countless other possible banned activities aside from marijuana use. For example, imagine a situation where Congress makes it unlawful for any individual to fly an airplane. The federal government, of course, could not force states to implement and administer this regulatory policy.[196] Suppose, also, that only some states enact legislation in accordance with the federal ban.[197] In uncooperative states, the federal government's ability to enforce the ban would depend on the various factors relating to the nature of this particular activity.[198] Compared to marijuana use, a ban on flying an airplane seems relatively disposed to federal enforcement. Whereas marijuana use is a generally private activity that has few barriers to entry and requires little infrastructure, flying a plane is a public activity[199] that requires somewhat significant infrastructure[200] and involves

[192] Mikos, *supra* note 111, at 1465 ("[E]ven if nominal federal sanctions are set very high (as they currently are), the expected legal sanction remains quite low."); GARVEY, *supra* note 134, at 1 ("As a consequence, the Obama Administration has formally suggested it will not prosecute individuals who use medical marijuana in a manner consistent with state laws."). But, the DOJ has maintained that individuals who operate, or facilitate operation of, large-scale, commercial dispensaries remain targets for federal prosecution, state law notwithstanding. Memorandum for U.S. Attorneys from James Cole, Deputy Attorney General, *Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use*, Jan. 29, 2011, *available at* http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf. *But see* Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L & POL'Y REV. 633, 633-34 (2011) (implying that the DOJ's actual approach has been to leave states and their dispensaries to their own devices).

[193] *Ogden Memo*, *supra* note 192, at 1-2. *See also* GARVEY, *supra* note 134, at 16 ("[T]he decision to limit prosecutions appears to be based on enforcement priorities and the allocation of resources.").

[194] *See* discussion *supra* notes 186-190.

[195] *See* example *supra* note 184.

[196] *See supra* Section II.A.

[197] Assume the states that choose not to ban airplane aviation refused to help enforce the federal law.

[198] For discussions of the general characteristics of cooperative federalism, see Daniel J. Elazar, *Cooperative Federalism*, *in* COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM 75 (Daphne A. Kenyon & John Kincaid eds., 1991); Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL'Y 181, 190 (1998); John Kincaid, *The Competitive Challenge to Cooperative Federalism: A Theory of Federal Democracy*, *in* COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM 87 (Daphne A Kenyon & John Kincaid eds., 1991); Joseph F. Zimmerman, *National-State Relations: Cooperative Federalism in the Twentieth Century*, PUBLIUS, Spring 2001, at 15, 18.

[199] Although it is feasible that someone could fly an airplane outside the general view of the public (such as on a large tract of private property), for the most part, it seems reasonable to say that aviation occurs in public.

[200] For example, required infrastructure would include an airport—if not an airport, then at least some form of landing strip—and some form of aircraft storage area.

substantial barriers to entry.[201] Certainly, an individual flying a plane in public would be more exposed to federal law enforcement than someone using marijuana in the privacy of his or her home. Furthermore, federal agencies would be able to make efficient use their officers by targeting the necessary sources of infrastructure, such as airports or other landing strips.[202] Finally, unlike marijuana use, which faces relatively insignificant entry and exit barriers, flying involves rather substantial barriers—in particular, acquiring and learning how to fly an airplane.[203]

Comparing the unique characteristics of these two activities demonstrates that the federal government's ability to enforce a ban on flying a plane would be considerably greater than its ability to enforce its marijuana ban. Of course, this is just one example of the many possible banned activities that could be evaluated with respect to federal law enforcement capabilities. Where flying is an example of an activity that, by its nature, lends itself to successful federal enforcement, the nature of a different activity might make it uniquely impervious to federal law enforcement efforts.[204] The important takeaway, though, is not whether or not the federal government could unilaterally enforce a ban on flying airplanes, but rather, that successful federal law enforcement is a function of the unique factors that distinguish each individual activity. Therefore, returning to the enforceability of PASPA, the question becomes whether the unique factors associated with sports gambling, which together make up the nature of the activity, make it predisposed to federal enforcement.[205]

B. Enforcing PASPA

Asking whether the federal government could independently enforce its sports gambling ban is not a question that inspires just one answer. Initially, the analysis must separate the activity itself into different forms because sports gambling activities vary widely in form and degree—ranging anywhere from a seemingly innocuous $5 bet on the Super Bowl among close friends to the considerably less innocuous fortunes wagered on sporting events with commercial sports books. Despite both being violations of PASPA, federal law enforcement's ability to prevent the former behavior is scarcely comparable with its ability to prevent the latter. Even with state cooperation, the federal government would almost certainly be unsuccessful in preventing the first situation, and, more than likely, it has no genuine aspiration to do so. The more pertinent inquiry focuses on its ability to prevent institutional gambling operations, such as those permitted under the Sports Gambling Law.[206] Considering those basic

[201] For an individual to fly an airplane, he or she must not only *be able* to fly an airplane but must also *have* access to an airplane, which, generally speaking, disqualifies most people.

[202] This is similar to the federal government's targeting of dispensaries and marijuana farms following the Ogden Memo. *See* GARVEY, *supra* note 134, at 3 ("As a result, the last two years have seen a reported increase in the number of federal DEA raids on dispensaries and marijuana farms and the subsequent prosecutions of those who own and operate marijuana distribution facilities.") (citing William Yardley, *New Federal Crackdown Confounds States that Allow Medical Marijuana*, N.Y. TIMES, May 7, 2011, A13)).

[203] *See* text accompanying *supra* note 201.

[204] Consider, for instance, the infamous inability of both federal and state governments to enforce the federal alcohol prohibition under the 18th Amendment. *See generally* UNITED STATES BUREAU OF PROHIBITION, STATE COOPERATION: FEDERAL AND STATE RESPONSIBILITY UNDER THE CONCURRENT POWER 10-26 (1930); EVERETT SOMERVILLE BROWN, RATIFICATION OF THE TWENTY-FIRST AMENDMENT TO THE UNITED STATES (1938).

[205] *See infra* Section IV.B.

[206] The phrase "federal sports gambling ban" will hereinafter refer to this form of institutional sports gambling.

factors that make up the nature of an activity,[207] the federal government could probably be effective if it were required to independently administer and enforce its sports gambling ban under PASPA.[208]

For the sake of argument, assume these institutional sports gambling operations would resemble those run in Nevada.[209] In this form, sports gambling activities generally involve transactions between individuals and business entities; take place in public areas; require a substantial degree of infrastructure, typically involving physical resources; and, with respect to the business entity, face significant barriers to entry and exit, such as state licensing,[210] advertising, few actors in a highly competitive market, and start-up costs.[211] Because this form of operation takes place, more or less, in the public arena, the activity is exposed to law enforcement surveillance. Public gambling differs from marijuana use, which, because it is mostly a private activity, is more difficult to enforce because officers are unable to observe the illegal activity or identify those engaging in the activity. Furthermore, commercial gambling operations generally involve extensive underlying foundations or frameworks, meaning there are many pieces that come together to form the organization.[212] Marijuana use, while involving different types of suppliers, requires considerably less infrastructure support than commercial sports gambling.[213] Sports gambling operations, if operated in existing casinos,[214] would be easy targets for federal law enforcement agencies.[215] In terms of barriers, though similar in some respects to marijuana use, sports gambling

[207] *See* discussion and text accompanying *supra* notes 189-190.

[208] Again, in this context, "sports gambling" means those large-scale, institutional gambling operations. *See* explanation and instruction *supra* note 206.

[209] For descriptions of commercial gambling, see generally Vicki Abt, *The Role of the State in the Expansion and Growth of Commercial Gambling in the United States*, *in* GAMBLING CULTURES: STUDIES IN HISTORY AND INTERPRETATION 164-81 (Jan McMillen ed. 2006); THOMAS R. MIRKOVICH & ALLISON A. COWGILL, CASINO GAMING IN THE UNITED STATES: A RESEARCH GUIDE (1997).

[210] For a look at the licensing requirements in the New Jersey Sports Gambling Law, see N.J. STAT. ANN. § 5:12A-2 (West 2012).

[211] For a description of state licensing requirements other than the Sports Gambling Law, see generally Darren A. Prum & Shannon Bybee, *Commercial Casino Gaming in the United States: A Jurisdictional Analysis of Gaming Taxes, Licenses, and Fees*, 4 GAMING RES. & REV. J. 17 (1999); UNITED STATES GAMING INDUSTRY LAWS AND REGULATIONS HANDBOOK (5th ed. 2010). Further, to see how advertising serves as a barrier to market entry, see generally Kyle Bagwell, *The Economics Analysis of Advertising*, *in* HANDBOOK OF INDUSTRIAL ORGANIZATION 1701-1844 (Mark Armstrong & Robert H. Porter eds., vol. 3 2007).

[212] *See* discussion *supra* note 209 and accompanying text.

[213] Types of marijuana suppliers range anywhere from commercial dispensaries and farms, which involve somewhat significant amounts of physical assets and organizational coordination, to less formal supplier networkers, which could be as subtle as an innocuous neighbor operating out of his garage.

[214] Of course, it is also possible that institutional sports gambling networks would operate outside the confines of the traditional casino-style gambling industry, in a type of underground market, involving individualized interactions between gamblers and "bookies," that takes form away from the normal gaming houses. Given the $380 billion illegal market already in existence, it is relatively clear that the federal government could not prevent such activity. *See Sports Wagering*, *supra* note 2. This, however, is not the type of scheme permitted under the New Jersey law. N.J. STAT. ANN. § 5:12A-2 (West 2012). Indeed, under the Sports Gambling Law, casinos and racetracks are the designated areas for legal sports betting and seem to be relatively easy targets for enforcement. *Id.*

[215] Similar to dispensaries and prescribing doctors associated with marijuana use, which at least initially, were vigorously targeted by federal law enforcement. *See* Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L & POL'Y REV. 633, 638 (2011) ("U.S. Attorneys prosecuted several high-profile medical marijuana suppliers. The DEA employed an arsenal of weapons against medical marijuana dispensaries, which had begun to proliferate in California (and elsewhere). For example, the

operations also face unique entry and exit obstacles. For instance, if the sports gambling operations were connected to the major casinos, there would be relatively few competitors in the industry, which would make it easier for federal enforcement officers to target the operations.[216] Moreover, given the immense cost associated with building a commercial gaming operation, owners would likely hesitate to put the business at the risk of federal prosecution. In the event that these businesses did and if the federal government were able to prosecute them, the immense start-up costs required to enter this type of market would most likely prevent new entrants from rushing in to supply the unmet demand. Given these factors, it appears as though the nature of institutional sports gambling operation makes it fairly conducive to federal enforcement.

As the relationship between the CSA and state marijuana laws demonstrates, the practical constraint on Congress's preemption power is not mere nomenclature—depending on the federal enforcement capacity, this limitation can result in a federal crime being rendered obsolete in the case of uncooperative federalism. In the event of a state law permitting activity banned by Congress, the federal government's ability to independently enforce its ban is ostensibly a function of the unique factors associated with each individual, banned activity. Although this conclusion does little to help New Jersey, given the nature of the commercial betting activities permitted under the Sports Gambling Law, its implication is potentially far-reaching.

CONCLUSION

Examining the applicability of PASPA to the Sports Gambling Law exposes some truly fascinating apertures in the Supreme Court's federalism jurisprudence, specifically with respect to the interplay between the preemption doctrine and the anticommandeering principle. In the aftermath of the *Raich* decision, where seemingly preempted state marijuana laws have grown more potent than ever, much attention has been directed towards the federal preemption power. Indeed, the survival of state marijuana exemptions has led some to call into question Congress's ability to preempt state laws that merely legalize conduct that federal law bans.[217] Though compelling, this argument is inconsistent with the Court's unambiguous interpretation of the federal preemption power—Congress has the absolute authority to preempt state regulation, so long as it is authorized to do so under the Constitution.

Nevertheless, although PASPA is similar in many respects to the CSA, the federal sports gambling ban is atypical in one important respect—it includes language making it unlawful for a state to "authorize by law" sports gambling. For forty-six states, all of which had state bans on sports gambling at the time PASPA was enacted, this could bar any attempts to repeal existing state laws that ban marijuana. Because this would be fundamentally no different from forcing a state to enact a new law, to the extent that it prevents states from repealing their bans on sports gambling, PASPA violates the

DEA conducted nearly two hundred raids on medical marijuana dispensaries in California alone, and it warned landlords that it would seize their property if they did not immediately evict marijuana-dispensing tenants.") (footnotes omitted).

[216] In this respect, commercial gambling operations are somewhat similar to the dispensaries and marijuana farms targeted by the DOJ. *See* GARVEY, *supra* note 134, at 3 ("As a result, the last two years have seen a reported increase in the number of federal DEA raids on dispensaries and marijuana farms and the subsequent prosecutions of those who own and operate marijuana distribution facilities.") (citing William Yardley, *New Federal Crackdown Confounds States that Allow Medical Marijuana*, N.Y. TIMES, May 7, 2011, A13).

[217] *See, e.g.*, Mikos, *supra* note 111, at 1424-25 ("States may continue to legalize marijuana because Congress has not preempted—and more importantly, may not preempt—state laws that merely permit (*i.e.*, refuse to punish) private conduct the federal government deems objectionable.").

anticommandeering rule, making it an unconstitutional incursion into state sovereignty. As it pertains to the Sports Gambling Law, however, this conclusion does little to advance the state cause.

Nevertheless, in what legitimately amounts to an *if not A, then B* situation, even if PASPA is not deemed to be an unconstitutional invasion of state sovereignty, PASPA's preemptive effect is undermined by a commonly overlooked constraint on the federal preemption power, which is also grounded in the anticommandeering rule—Congress may not compel states to enforce or administer federal regulation. Therefore, even if a state law is technically preempted, the state can simply choose to act as though the law remains in effect. No other account is acceptable when considering a foundational principal of laws and lawmaking: A law only has as much value as its enacting body chooses to give it. Since Congress may not force states to administer and enforce any law, the anticommandeering principle serves as a practical constraint on Congress's preemption power. Notwithstanding the unsettled questions about preemption and the anticommandeering rule, the unique situation that arises when a state, for all practical purposes, disregards the federal preemption power represents a legal anomaly. The potential enforcement implications of this result cannot be overstated.

In such a situation, given the limited federal law enforcement resources, the federal government's ability to independently enforce its ban depends on the unique characteristics that make up the nature of each individual activity. Although this score provides little sanctuary for commercial gambling operations authorized under the Sports Gambling Law, the inability of the federal government to autonomously enforce its marijuana prohibition illustrates the potentially far-reaching impact that this practical constraint on the federal preemption power could have. Regardless of whether the Sports Gambling Law survives its challenge under PASPA, the Court will almost certainly be facing some issues of first impression in the near future.