

The Most Important Case of this Century

In December, the U.S. Supreme Court will hold its hearing. It will release its decision by next June. The ruling could be one of the most important ever issued by the High Court – on whether New Jersey can have legal sports betting?!?

First, it is important to understand that the Supreme Court does not care about gambling at all, let alone sports betting.

But it cares very much about our system of government and the relationship between the power of the federal government and the states.

The Justices took this case to decide where to draw the lines. What are the limits on the power of the federal government, especially Congress and administrative agencies, to tell the states what they can and cannot do?

The voters of New Jersey amended their State Constitution to expressly allow legal wagers on sports events. Lower courts ruled that the federal Professional and Amateur Protection Act (“PASPA”) not only prevents a state from legalizing a new form of sports betting, but that New Jersey could not even repeal its anti-sports betting laws. In other words, the federal government requires the state to keep something a crime, even when the voters and state legislature want to make it legal.

On the surface, this is a case about interpreting a federal statute, PASPA, and whether that statute is constitutional. So, this may look like – and, of course, really is – a case about sports betting.

But what is really at stake is medical marijuana.

Today, 44 states have passed laws allowing patients to use medical cannabis. Yet, under the federal Controlled Substances Act, the Food and Drug Administration has determined marijuana has no possible medical use.

But, this case involves much more: Dig a little deeper and you get to the question of when can the federal government ever overrule state laws.

None of the original drafters of the Constitution in 1789 would have thought that the federal government could interfere in areas like gambling and pot, legal or not. Although federal law is supreme, everyone knew that states had inherent police powers, the fundamental right to protect the health, safety, welfare and morality of their residents. Except in extreme situations, where other states were endangered, there simply was no reason, let alone power, for the federal government to get involved.

Think fire departments – we don’t want Congress to be in charge of fighting fires.

Prior to the Civil War, some states, especially in the South, took the position that they could ignore decisions of the U.S. Supreme Court. Today, only the lunatic fringe, like Alabama Republican Senate Candidate and accused child molester Roy Moore, believe they have the right to decide which rulings of the nation’s highest court they will respect.

When the original 13 colonies won their independence from England, they were

essentially little nations. They realized that they were too weak to survive alone, so they created a federation, voluntarily giving up their power to declare war and make treaties. Sure, the U.S. Constitution had a Supremacy Clause; but everyone knew the new federal government had very limited power. If it wasn't in the Constitution, then the power resided with the people and the states. The United States was exactly that: a federation of states united for common defense.

The Confederate states actually believed they could leave this federation. The Civil War was mostly about slavery, but it was also about states' rights. One of the reasons Abraham Lincoln's Gettysburg Address is so important is that it was the first time a President spoke of the United States in the singular, not the plural: Lincoln made it clear that the United States IS a country, not the United States ARE merely in a federation.

But still, even after the federal government won the Civil War, no one thought the states had given up their inherent police powers.

In fact, even today, there are areas of the law that are so clearly within the power of states alone that they are not even mentioned in the Constitution or federal statutes. Federal courts, for example, clearly have the power to decide big money cases where the plaintiff and defendant are from different states. But no federal court will hear a divorce case. Marital status is exclusively a state issue.

In the 20th century, federal courts, Congress and the President began to think that states had sometimes gone too far. At first, state laws allowing young children to work 14-hour-shifts in mines and factories were upheld. Police power means the states decide for themselves how they want to protect the health, safety, welfare and morality of their residents. People in other states and the federal government might disagree, but the voters of the state have the final say.

The American enlightenment following World War II forced the federal government to look again at limiting states' rights. Perhaps it was the horrors of seeing what racist authoritarian regimes are capable of doing. Or maybe it was the spread of television, with people across the country seeing how some states were discriminating against their own residents.

The U.S. Supreme Court reversed its 19th Century decision and declared that states could not separate schools based on race. States could not ban advertisements for abortions that were legal in other states, and eventually states could not ban the actual abortions.

It wasn't until 1967 that the Court ruled that states could not make it a crime for blacks and whites to marry. There are still county clerks who feel it is against their religion to issue marriage licenses to a black man and a white woman. But that issue has been settled.

Once the Court got into deciding questions of marriage, a right that had been reserved exclusively to the states, all state police power issues were subject to challenge. The Supreme Court read the U.S. Constitution broadly, especially the provisions dealing with equal protection, interstate commerce, and due process. There seemed to be no limit on the power of the federal government to overrule areas of the law that had been

exclusively the states’.

For many conservatives, the decision to require states to allow gay marriages was a step too far. Part of it might be the speed of change. The prior civil rights decisions came after decades of fights, and only after a majority of states had already eliminated the worst of their state laws.

So, we know how the conservatives on the Court will vote on whether New Jersey can have sports betting. States’ rights. Where in the U.S. Constitution does it say that Congress can refuse to let voters amend their State Constitution, and can overrule both houses of the State Legislature and its Governor, to require the state to keep an activity a crime? Especially when that activity is gambling, which, except for PASPA, has always been exclusively a state issue.

Conservatives have almost always been in favor of states’ rights, with, of course exceptions when the religious right wants to impose its morality on the rest of the country. But with the rise of the Republican majorities in Congress and the election of Donald Trump, it is now liberals who are demanding states’ rights. It is the liberal Justices on the Supreme Court who will argue that the states can decide for themselves whether they want to legalize marijuana, protect the environment, expand civil rights, and, yes, decide whether they want to legalize sports betting.

The New Jersey sports-betting case raises the question of moral pluralism. States are not only allowed, but encouraged to experiment, to create their own public policies toward moral issues. Utah and Nevada share a border.

But, if you believe in states’ rights, you might want to go back to the days when Virginia made miscegenation a crime, but you then have to allow Massachusetts to issue marriage licenses, respected by all other states, for gay couples. And if you think the federal government can overrule states’ police powers, so that states cannot prohibit abortion, how can you argue that Congress cannot outlaw marijuana?

For our purposes, I believe there is a good chance New Jersey will win all nine votes on the Supreme Court, but with wildly differing opinions.

Some of the Justices may take the easy way out and rule that New Jersey was denied equal sovereignty. Why should Nevada, and almost a dozen other states, have some form of grandfathered-in sports betting, but New Jersey is forever barred?

PASPA says that a state cannot legalize and regulate any form of sports betting it did not have in 1992. One issue, which has been ignored so far by all of the courts hearing this case, is that New Jersey did not just eliminate its criminal laws against sports betting. It did regulate, in limiting sports betting to casinos and racetracks, and putting other restrictions on it. Does anybody think the New Jersey Casino Control Commission would allow the Mob to open up a sports book in an Atlantic City casino?

The worst outcome is the one that is legally the most sound: PASPA is constitutional, but it does not prevent a state from repealing all of its criminal laws against sports betting. This means New Jersey can do what it says it is doing: decriminalizing but not regulating. Allowing every state to make sports betting legal without regulation would be disastrous. And expecting this Congress to fix the mess is wishful thinking.

Some of the Justices will try to draw a distinction between the federal government overruling a state law which makes an activity illegal, like anti-abortion laws, on the one hand, and, on the other, the federal government requiring a state to continue to make an activity a crime, like PASPA did with sports betting. But most of the conflicts are not so clear-cut. The federal prohibition on medical marijuana does not require states to keep their anti-pot laws in place. Yet surely there is a problem when virtually every state has expressly made something legal that the federal government says is illegal. What is a state-licensed casino supposed to do?

Of course, the NFL and NCAA might win. The Court might simply rule that PASPA is constitutional, that it prohibits a state from decriminalizing as well as regulating sports betting.

But my bet is that the Court will not be able to avoid the ultimate question: When, if ever, should Congress be allowed to tell states that they have to keep any private conduct illegal?

The answer will probably be: When the issue comes within the traditional police powers of a state, Congress cannot require the state to keep an activity criminal.

If I am right, a dozen states will have some form of sports betting within four years.

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