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Legalizing Sports Betting in the United States A Playbook for State Liberalization and Regulation

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Every March, millions of Americans join friends, relatives, and coworkers in “March Madness” betting pools, centered on the National Collegiate Athletics Association (NCAA) Men’s Basketball Tournament. Some may wager hundreds of dollars or as little as five bucks. The one thing they all have in common is they will be running afoul of an obscure federal law that for 25 years has prohibited states from legalizing sports gambling.

For 25 years, the Professional and Amateur Sports Protection Act of 1992 (PASPA), which prohibits any state that had not already legalized sports gambling at the time of the law’s enactment from ever authorizing the activity, has given Nevada a practical monopoly on legal sports wagering. Yet, PASPA has done little to stop people around the nation from gambling on sports.

The National Gambling Impact Study Commission—a body appointed by Congress in 1999 “to conduct a comprehensive legal and factual study on the social and economic implications of gambling in the United States”—estimated that while legal wagering in Nevada amounted to around \$2.8 billion per year, Americans were spending between \$80 and \$380 billion illegally betting on sports each year, making illegal sports gambling “the most widespread and popular form of gambling in America.”¹

More recently, in 2017 gamblers spent around \$4.9 billion legally gambling with Nevada bookies. According to industry experts, this represents less than 4 percent of the total amount wagered on the activity in the U.S., which puts the amount Americans bet illegally on sports around \$123 billion per year—more than 20 times greater than the legal, regulated, sports betting market.² Instead of eliminating sports gambling, PASPA has driven the market underground, where consumers have little protection against unscrupulous operators and gambling sites have little incentive to block underage players, discourage problem gambling, or protect player data. All the while, it has done nothing to prevent corrupt practices in sports like match-fixing.

Perhaps worst of all, PASPA has been interpreted to allow Congress to dictate what forms of intrastate commerce states may regulate, potentially hampering their ability to decide on a host of controversial matters that would impact the health and safety of the public and the allocation of state resources, and for which the ultimate decision should rely on each state’s voters.

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Now the national prohibition that has driven sports betting underground may finally be nearing its end. As of January 2018, 15 states have enacted regulations for sports gambling within their borders in anticipation of when the federal government steps out of the way. That day could come as soon as this spring, when the United States Supreme Court issues its ruling in *Christie v. NCAA et al.*, which is widely expected to result in partial or even full invalidation of the federal statute.

With political momentum in favor of legalization of sports betting, it is in the interest of all stakeholders to consider how to work together to best regulate this economic activity, both within states and on the global market.

This paper discusses the aspects of regulating sports betting and provides suggestions for how state lawmakers can best serve and protect consumers, generate the greatest amount of taxable revenue, preserve the integrity of sports, and chip away at the illegal sports gambling market.

A Brief History of Gambling Regulation. Games of chance seem to part of human DNA, with evidence of gambling documented as far back as 50,000 BCE.³ Since the beginning, our passion for betting has been attended by controversy and attempts to control its effects on society. Under the U.S. federal system, which affords states control over gambling laws, regulation of gambling directly reflects our nation's heterogeneous and evolving perspectives on morality. Throughout the nation's history, states have experimented with prohibition and liberalization in attempts to develop the mix of gambling opportunities that best reflects local values, financial needs, and enforcement priorities.

The nation's first bans on gambling occurred among our Puritan settlements, such as the Massachusetts Bay Colony, which in 1638 outlawed the possession of cards, dice, or gambling devices.⁴ Other territories, like the Jamestown colony, did not view gambling as a necessarily immoral activity and even implemented a lottery to defray the costs of establishing the settlement.⁵

As we moved away from our puritanical past, concerns about the moral implications of gambling have generally given way to the more practical regulations concerned with raising revenue for civic projects, conforming to popular opinion, and offering citizens a safe market in which to engage in the gambling activities that outright prohibition never succeeded in eliminating.

As a result, today all states but one—Hawaii—allow some form of legalized gambling, with most states allowing a variety of games of chance. Currently, lotteries exist in 44 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. At least 43 states have casino-style gambling, more than 20 authorize card games (poker and blackjack), and most allow betting on horse and dog races.^{6,7}

The U.S. government has long deferred to the states on gambling matters, but sports betting is the notable exception to this rule. The federal government has essentially prohibited state-based legalization of sports betting in most states since 1992, when Congress enacted the

Professional and Amateur Sports Protection Act, which barred states that did not already allow sports betting from doing so in the future. At the time, Nevada was the only state to offer legal wagering on single-event sports, with three others—Delaware, Montana, and Oregon—offering parlay betting on sports, in which players place bets on multiple games at once. This created the *de facto* monopoly on legal sports betting for Nevada that has persisted since PASPA’s enactment against the will of the rest of the states and despite major shifts in cultural attitudes in the intervening 25 years.

PASPA’s Origins. The impetus for PASPA stemmed from a flurry of state activity in the 1980s, with at least 13 legislatures considering proposals to legalize gambling on sports, most hoping that the increased tax revenue would alleviate budget deficits. The prospect of legal sports betting suddenly sweeping across a large portion of the nation worried gambling opponents. In particular, the nation’s major sports leagues feared that visible sports betting would raise concerns about the integrity of sporting events, reducing fan engagement, and with it their profits. Thus, the leagues pushed Congress to put a stop to state legalization of the activity.

The leagues found their champion in Sen. Bill Bradley (D-N.J.), a former forward for the New York Knicks, who introduced PASPA. The commissioners of the four major professional sports leagues—the National Football League (NFL), National Basketball Association (NBA), Major League Baseball (MLB), and National Hockey League (NHL)—supported the proposal, testifying that the law was necessary to prevent “a cloud of suspicion” over athletes and games and to avoid sending “a regrettable message to our young people.”⁸ In a report on the legislation, Senate Judiciary Committee staff justified intervening in what had traditionally been viewed as a matter for state regulation by declaring sports gambling “a national problem. The harms it inflicts are felt beyond the borders of those states that sanction it. The moral erosion it produces cannot be limited geographically. ... Without federal legislation, sports gambling is likely to spread on a piecemeal basis and ultimately develop an irreversible momentum.”⁹ Yet, contrary to that gloomy-sounding prediction, sports betting continued to spread even with federal regulation—illegally.

At the time, the illegal sports wagering market in the U.S. was already around \$40 billion per year, according to industry observers like *Washington Post* columnist Andrew Beyer. “Not since prohibition have Americans so readily engaged in an illegal activity as they do with sports betting today,” Beyer wrote in 1991, as Congress debated its ban. “Under the circumstances, it would seem inescapably logical for cash-strapped state governments to legalize sports betting and let the revenue from it flow to legitimate purposes instead of criminals. ... essentially what the states did when they created lotteries and virtually eliminated the illegal numbers game.”¹⁰ But the intent behind PASPA was neither to stop the spread of illegal sports betting nor to protect the integrity of sporting events.

As explained in Congressional reports, PASPA’s purpose “is to prohibit sports gambling conducted by, or authorized under the law of, any state or other governments.”¹¹ As the Third Circuit Court described it, “PASPA’s text and legislative history reflect that its goal is ... to ban gambling pursuant to a state scheme—because Congress was concerned that state-

sponsored gambling carried with it a label of legitimacy that would make the activity appealing.”¹² In other words, PASPA was not designed to stop sports gambling, but rather to eliminate *legal* wagering and keep the activity underground and relatively unseen by the public so as to allow the leagues to protect their image. In this one respect, PASPA did succeed, but in all other aspects it has been an abject failure.

The Case against PASPA. Throughout the congressional hearings on PASPA, participants raised concerns about the constitutionality of such a proposal, including representatives from the U.S. Department of Justice and Sen. Chuck Grassley (R-IA), who referred to the law as a “substantial intrusion into States’ rights.” Grassley noted that PASPA would “blatantly discriminate between the states,” creating favorable and liberal federal laws regarding sports betting for some, while prohibiting the activity for all others. He also worried that not only would the law “restrict the fundamental right of States to raise revenue,” but also “create a virtual monopoly for organized crime over a multi-billion dollar industry.”¹³

Grassley was particularly concerned that PASPA, as written, unconstitutionally delegates Congress’ regulatory authority to private interests, in this case the sports leagues, because it allows either the U.S. Attorney General *or* the leagues to sue states attempting to legalize sports betting. To date, the sports leagues are the only entity to raise PASPA violations in court. While the law’s text seems to limit this power only to leagues “whose competitive game is alleged to be the basis of such violation,” courts have issued sweeping injunctions in response to the leagues’ petitions. Worse, those injunctions empower the leagues to sue on behalf of third parties.¹⁴ “The Federal government ... has never authorized private parties to enforce such restrictions against the States,” Grassley noted. “This legislation would do so.”¹⁵

These concerns about PASPA’s unconstitutional aspects are at the heart of the lawsuit filed by the state of New Jersey against the U.S. government in 2012. It began that year with a referendum vote, in which voters overwhelmingly approved an amendment to the state constitution to allow the legislature to legalize betting on the results of professional, college, and amateur sporting events.¹⁶ When the legislature attempted to enact the Sports Wagering Act, which would permit state authorities to license sports wagering in casinos and racetracks, later that year in accordance with the voters’ will, the nation’s six largest sports governing bodies, led by the NFL and the NCAA, sued the state.

New Jersey argued that, while Congress may regulate individual behavior, for example prohibiting *individuals* from gambling on sports, it “lacks the power to directly compel the States to require or prohibit [certain] acts.” In other words, the federal government may enact and enforce laws on individuals but may not commandeer state authorities to enforce Congress’s will.¹⁷

In response, the U.S. Solicitor General’s Office argued that PASPA was aimed at individuals, in order to prohibit “private parties from conducting state-authorized sports gambling schemes.” PASPA does not constitute commandeering of the state legislature, they argued, because it does not directly tell the states what to do. In their brief to the

Supreme Court, attorneys for the Solicitor General's office wrote that "PASPA does not even obligate New Jersey to leave in place state-law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment. To the contrary, New Jersey is free to repeal those prohibitions *in whole or in part*."¹⁸ [Emphasis added]

New Jersey responded that this was merely a roundabout way of restraining the state legislature, as the law reaches private gambling behavior "*only to the extent* that it is 'pursuant to State law.'" [Emphasis in original] In other words, PASPA only banned sports gambling expressly authorized by state law.¹⁹ However, the Third Circuit Court agreed with the Solicitor General's Office that the law did not constitute commandeering as "PASPA does not restrict states from removing their prohibitions on sports betting" and ruled in favor of the leagues.²⁰

The Supreme Court declined to hear New Jersey's appeal. So, in 2014, the state's legislature took a different approach to circumventing PASPA. Taking the advice of the Third Circuit Court and the Solicitor General's Office, the state enacted a law that did not authorize sports betting, but instead repealed the state's prohibition against sports betting at Atlantic City casinos and race tracks around the state. Despite the previous claims that PASPA did not bar states from repealing their own gambling prohibitions in whole or in part, the leagues, with the federal government's support, took the Garden State to court again. This time, however, when the state lost and appealed, the Supreme Court agreed to hear the case.

In December 2017, the Supreme Court Justices listened to oral arguments from lawyers representing New Jersey, the sports leagues, and the Solicitor General's Office. The attorney for New Jersey, Ted Olson, reiterated the state's case that PASPA, regardless of interpretation, was unconstitutional because it allows Congress to commandeer state legislatures, in violation of the 10th Amendment's reserved powers clause.

Again, the Solicitor General sided with the leagues. Though it had stated in the previous case that PASPA did not prevent states from repealing their sports betting prohibition in whole or in part, the Solicitor General's office argued that New Jersey's partial repeal amounted to "*de facto* authorization." The office's written opinion advised that while the state could either "repeal its prohibition on sports gambling altogether" or remove "state penalties on informal or social wagering," the partial repeal attempted by New Jersey was "specifically tailored to facilitate sports gambling at state-licensed casinos and racetracks," making it "no different from a positive enactment authorizing such gambling."²¹

The vagueness of the Solicitor General's office position was clearly a point of concern throughout oral arguments. More importantly, a majority of the justices seemed sympathetic toward New Jersey's argument. Throughout the discussion, it also became clear that leaving PASPA in place under the interpretation put forth by the Solicitor General's Office would leave the states with only two undesirable options: maintain and enforce a total ban on sports betting or create an entirely unregulated market by totally decriminalizing the activity without instituting a licensing scheme. In the meantime, four states have enacted legislation to legalize and regulate sports betting if the Supreme Court rules in favor of New Jersey, with 14 others deliberating over legislation in the last year.²²

Given the constitutional principles at stake in the case, including states' ability to decide upon a host of other controversial matters, the states' general preparedness for legalized sports betting, the impracticability of decriminalized and unregulated sports betting, and the fact that at least one state—New Jersey—has signaled it would accept decriminalization over nothing, many observers expect the justices to invalidate the federal law in total.²³

Whether or not the U.S. Supreme Court chooses to invalidate PASPA, merely accepting the case has stimulated renewed interest in the law's constitutionality and its effects on the states. State lawmakers are particularly interested in the size and scope of the illegal sports gambling market that has grown around the law and the potentially hundreds of millions of dollars in tax revenue they have been prevented from collecting. Even states uninterested in legalizing sports betting should recognize the threat PASPA's current interpretation poses to their voters' ability to decide on a host of other controversial matters, such as cannabis legalization, gun and ammunition sales, and assisted suicide laws.

Changing Attitudes toward Sports Betting. Estimates of the economic boon legalizing sports betting might generate has prompted renewed interest in the issue. Moreover, upon revisiting the issue, many of those who participated in the original discussions surrounding PASPA now found that the nation's perspective on the issue is vastly different than it was in 1992.

In the 25 years since PASPA's enactment, attitudes toward sports betting have dramatically shifted, Americans becoming more positive toward the idea of legalizing sports betting in recent years. Polls show a trend toward favoring legal gambling that has gained strength. While in 1974²⁴ 69 percent of respondents opposed legalization, by 1993 that number had fallen to 56 percent.²⁵ In recent years those numbers have flipped with more Americans favoring legalization. In 2016, Fairleigh Dickenson University's annual poll on sports betting found 48 percent of those polled in favor allowing states to legalize and 39 percent opposed.²⁶ Then, a 2017 University of Massachusetts Lowell nationwide poll found a majority, 55 percent in favor of legalization of sports betting, with only 33 percent opposed.²⁷

The increasing popularity of legalizing sports betting may, in part, relate to an increasing number of Americans engaging in the activity. A 2008 Gallup poll found that one in six Americans gamble on professional sports each year.²⁸ By 2016, the number had risen to greater than one in three Americans, according to a study by Oxford Economics.²⁹

Among sports fans, the numbers are even higher. According to a Greenberg Quinlan Rosner Research survey, 45 percent of avid sports fans reported having bet on sports in the past year.³⁰ Furthermore, research indicates that fans who bet are more engaged with sports. According to a 2016 report by Nielsen Sports, a subsidiary of the television ratings provider, gamblers watched an average of 19 more football games and more minutes of any given game than non-bettors.³¹ Furthermore, fans are even more supportive than the general population of proposals to legalize sports betting. According to Greenberg's survey, 60 to 73 percent of avid sports fans think sports betting should be legalized.³²

Driving the Black Market. Worst of all, the prohibition creates criminals out of otherwise law-abiding citizens, many of who do not even realize what they are doing might be illegal. According to surveys only 38 percent of American adults (and 26 percent of millennials) can accurately say whether sports betting is legal where they live.³³

This illegality makes sports gambling in the U.S. a lucrative business for criminal enterprises of all sizes. In 2016 alone, authorities busted at least 11 different sports betting rings operating in the U.S., many of which had connections to larger criminal outfits engaged in a variety of other illicit activities like drug trafficking and money laundering.³⁴ For the largest operations, authorities reported that the betting ring was operated by just four U.S. individuals and brought in \$1 billion during a single football season through cash and online wagers.³⁵

Though the authorities have been able to prosecute a handful of these illegal sports betting rings, they represent a small portion of the existing black market. Furthermore, removing one or even a dozen of these criminal outfits only seems to make room for a growing number of entrepreneurial criminals waiting to take their place and meet America's ceaseless demand for sports betting.

Moreover, increasingly sophisticated technology is making it easier for illegal operators to circumvent the law and evade the police, so a few isolated cases of illegal betting operations getting caught seem to be an inadequate deterrent. For instance, a single data center operating out of Piscataway, New Jersey, hosted more than 100 unlicensed gambling sites, according to a 2015 *New York Times* series of reports.³⁶ The *Times* noted that many more similar servers were found around the nation, including in New York, Miami, Chicago, and Dallas—each capable of hosting many hundreds of individual sites to transmit illegal sports betting data to and from U.S. consumers.³⁷ “Illegal operators, have one thing in mind: make money at all costs. They don't pay taxes, they have no consumer protections, they aren't regulated and they have no qualms about resorting to violence,” Bill Young, the former sheriff of the Las Vegas Metro Police Department, recently commented.³⁸

In fact, these challenges seem to have convinced many within the law enforcement community that existing federal law has only made crime worse and that the only way to combat black market gambling is to offer consumers legal gambling options.

“Let's face it, demand is only rising,” Ed Davis, former Boston police commissioner commented at a 2016 policy summit on illegal sports betting. “Consumers would rather do this in a regulated market that provides consumer protections, integrity of the game, and I would rather have certainty and transparency. It's easier to maintain public safety in that type of environment.”³⁹ Michael Bouchard who represents the Major County Sheriffs of America credited the “failed ban on sports wagering” for fostering an enormous illegal market. “We should bring sports betting out of the shadows and regulate it.”⁴⁰

Even some lawmakers who originally supported PASPA now acknowledge that the law may not have had its intended effect. In a 2017 interview conducted by the Reason Foundation, former Sen. Dennis DeConcini (D-Ariz.), who introduced PASPA in the Senate, commented that “any law that's been on the books for as long as PASPA has to be

reviewed, particularly something dealing with gambling and other sports safety provisions.” Federal oversight of sports betting seemed needed at the time, DeConcini noted, but he now thinks that “states can handle that for the most part.” While stopping short of advocating for PASPA’s repeal, he noted that “states should have some leeway if they want to permit [sports betting].”⁴¹

The Benefits of Legal Sports Betting. Many lawmakers now recognize the potential economic benefit of legal sports betting. It can increase state revenue, safeguard the integrity of sports, bolster existing gambling businesses and the jobs they support, and increase fan engagement.⁴²

Increase State Revenue. PASPA has prevented states from enacting robust consumer protections and cost them hundreds of millions of dollars in potential tax revenue that could be used to pay for public services.⁴³ According to a recent report by Eilers & Krejcik, a gaming industry research firm, the United Kingdom collected \$6.5 billion in tax revenue from regulated sports betting. According to a recent study by economist David Forrest and the founding CEO of the FA Premier League, Rick Parry, the proportion of U.S. adults betting on sports illegally is roughly the same as the proportion of British adults engaged in the activity legally.⁴⁴ Thus, it is likely that if the U.S. legalized sports betting the tax revenue generated would be proportionately high.

A number of factors will determine how much money the industry will invest and how many consumers currently operating on the illegal sports betting market will migrate to the legal one. According to Eilers & Krejcik’s analysis, if states legalized sports betting they would collectively generate up to \$16 billion in new tax revenue from the activity each year.⁴⁵ However, this depends on how many states choose to legalize sports betting (they estimate 32 by 2023), the tax rate on the activity, the number of licenses available, and the attractiveness of the products available to consumers.

A recent Oxford Economics study estimated that if most states legalized sports gambling with a moderate tax rate (10 percent) and convenient product offerings, they would generate nearly \$20 billion in new tax revenue from sports betting directly and more than \$40 billion in new economic output, including revenue generated by increased spending in related industries. They also estimate that the new industry would support \$7 billion in direct labor income and \$11 billion in total and related income.⁴⁶

Support Integrity in Sports. The current prohibition on sports betting not only deprives states of tax revenue, it also leaves consumers without legal protections and encourages corruption. While the stated intent of prohibiting legal sports betting throughout most of the nation was to preserve sports integrity, by creating an enormous and largely unobserved black market, the regulatory regime has actually had the opposite effect, with match-fixing more likely. If states can successfully regulate sports betting in a way that offers consumers the products they desire and the payout rates they are used to, much of this new economic yield would come from current bettors on the illegal market migrating to the newly available legal options.

The integrity of sports depends on the outcome of any given match being the result of fair play on the field. Apart from players' use of performance-enhancing drugs, the greatest threat to sports integrity comes from the willful manipulation of in-game play by players and officials, which enables "fixers" (either the players and officials themselves or outside parties) to win by gambling on fixed matches. While fixers sometimes employ coercion to manipulate in-game play, far more often players and officials are convinced to participate in a fix through financial inducement.⁴⁷ The environment most likely to foster this form of corruption is that created by prohibiting sports betting.

While match-fixing certainly still occurs within legal betting markets, evidence indicates that it is far more prevalent in illicit betting markets. Corrupt operators seem to focus much of their activity within Asian betting markets while avoiding the regulated markets of Europe. While corruption still occurs in European markets, European nations' embracing of the activity and the attendant regulation have limited their vulnerability and allowed them to address match-fixing successfully, the International Center for Sports Security recently found.⁴⁸ Integrity measures in regulated markets, like closing games and voiding bets when suspicious betting is spotted, limit corrupt actors' ability to earn large-scale profits on fixed games, significantly reducing the attractiveness of regulated markets.⁴⁹

In addition, cooperation agreements between industry, government, and non-governmental entities across national borders makes it fairly easy to identify match-fixing. For example, many gambling operations formally share data through trade groups, like the European Gaming and Betting Association and its sister organization, the European Sports Security Association. By having access to all the data from their member sports books around the world, these associations can use software and analysis tools that allow them to quickly spot patterns of behavior that might signal a variety of crimes, including match-fixing, fraud, and money-laundering. When they spot such behavior, they are required by many nation's betting laws to alert and inform enforcement authorities and sports governing bodies.⁵⁰

One of these associations, the multinational data company SportRadar, has access to data from more than 550 gambling operators throughout the world. It monitors 300,000 matches a year and maintains a database on the behavior of a quarter million sports-participants (players, referees, coaches, and even agents). This allows SportRadar not only to set accurate odds on matches for its member sports books, but also to identify corruption in sports long before anyone else might notice. Some of the world's largest sports governing bodies, including the International Federation of Association Football, the Union of European Football Associations, and the International Tennis Federation, have established official partnerships with gambling associations, relying on them as their early warning system to spot corruption in sport.⁵¹

In the U.S. and other nations where sports betting is criminalized, this sort of cooperation is impossible. While some U.S. sports leagues, like the NFL, NBA, and NHL, have utilized the gambling industry for integrity monitoring, the only data available to them comes from licensed bookies in Nevada and those overseas. For illegal bookies in the multi-billion-dollar illegal betting market in the rest of the U.S., even if they wanted to alert the authorities about potential instances of match-fixing, they could not do so for fear of prosecution.

In addition, sports books, like the leagues, have a strong financial incentive to stop match-fixing. Bookies earn money by charging a small fee on each bet (known as the “vig” or “the juice”). The rest of the money they receive from bets, if they set the odds correctly, is normally paid out to winners. However, if they set the odds wrong, the bookies could end up having to pay out more money to winners than they took in through the vig. To spread their risk, bookies encourage bettors to spread their bets evenly among the potential outcomes in a match.

For example, in point-spread betting where the team expected to win might be an eight-point favorite, bettors who wagered on the winning team only get a payout if the team won by eight or more points. In this way, a bet on the expected loser is a more attractive option because bettors win not only if the underdog beats the favorite, but also if the favorite wins by anything less than eight points. In matches that are fixed, however, bookies cannot accurately forecast the odds of a given outcome, costing them a portion of their profit.

Furthermore, fixing also threatens sports books’ financial health by discouraging bettors from wagering on games they believe might be fixed.

Enhance the Existing Gambling Industry. While some may fear that legalizing sports betting will cannibalize the profits of legacy gambling providers, research indicates that this would not be the case. In fact, legal sports betting is likely to *increase* interest and participation at traditional gambling outlets by familiarizing consumers with sports betting in a lower-pressure scenario and through complementing existing products.

While it is possible that the introduction of sports books in the rest of the nation (particularly online) could eliminate certain customers from Nevada sports books, the negative effect will most likely be negligible and outweighed by the benefits of expanding the overall size of the customer base. As new sports bettors become familiar and comfortable with the product, they will also be more likely to seek out the in-person, destination experience offered by Las Vegas casinos.

For commercial and tribal casinos, legal sports betting on their properties could increase foot traffic, attract a new customer base, and afford casinos the opportunity to cross-sell other games to customers. The impact might be similar for online gambling platforms, when they are allowed to offer sports betting. Even among those businesses that might seem most threatened by the new competition, such as existing sports books in Nevada and Daily Fantasy Sports betting, the impact of expanding legal sports betting appears to be neutral, if not positive.

The most direct competitor for traditional single-game sports gambling would seem to be Daily Fantasy Sports (DFS). Unlike traditional sports wagering, where gamblers can place bets on the outcome of a single match, fantasy sports bettors instead create a roster of players selected from various teams. While it might seem intuitive that DFS owes some of its popularity to the fact that it is the closest legal option for U.S. bettors, research indicates that legal sports betting would be more complimentary to DFS than competitive. Survey data indicate that DFS bettors are unlikely to significantly reduce their spending on that

product if sports betting were legalized—with only 13 percent responding that they would cut DFS spending by more than half in favor of traditional sports betting.⁵²

Rather than cannibalizing DFS, legal sports betting would likely create a crossover effect, introducing DFS players to traditional sports betting and vice versa, resulting in more spending on both products overall.⁵³

Boost Fan Engagement. While it was the sports leagues who originally pushed Congress to enact a national ban on sports betting, it is the leagues, perhaps, that stand to gain the most financially from legalization. In fact, representatives of some of these formerly opposed leagues have since changed their tune. In fact, the leagues might turn out to be among the biggest beneficiaries of legalization. The commissioners of Major League Baseball (MLB) and Major League Soccer have called for examinations into what a regulated sports betting market would look like.⁵⁴ NBA Commissioner Adam Silver has advocated for full legalization, arguing that “sports betting should be brought out of the underground and into the sunlight where it can be appropriately monitored and regulated.”⁵⁵

It is possible that these organizations recognize that PASPA has not improved the safety of their games and, in fact, has made integrity more of a challenge. More likely, however, the leagues now recognize that fans who bet on games are more engaged. Increased fan engagement enhances the profitability of sports, by increasing viewership of televised games which raises the price rights-holders can charge for broadcasting rights, thanks to increased advertising revenue.

This has been made abundantly clear by the highly lucrative relationship that has developed in recent years between sports leagues and Daily Fantasy Sports (DFS). Despite their outspoken opposition to traditional sports betting, the nation’s major professional sports leagues have embraced this form of betting on their games as a boon to their bottom line. Within the last five years, the NFL, NHL, NBA, and MLB—all of which signed onto the most recent lawsuit against New Jersey’s efforts to decriminalize sports gambling—have formed lucrative sponsorship and advertising agreements with DFS companies. (The NCAA remains opposed.)

Perhaps the leagues’ continued opposition to sports betting stems more from their concerns about how the new betting market might impact their existing financial investment in DFS. However, as previously noted, single-game betting would not undercut DFS participation and more likely, would actually boost participation and revenue for that form of betting, boosting revenue for the DFS industry, advertisers, broadcasters, and sports leagues.

State-Based Regulation of Legal Sports Betting. The extent to which stakeholders like industry, states, and law enforcement profit from legalization depends heavily on *how* governments choose to regulate the new market. Fundamentally, for a legal sports betting market to be successful in the U.S., it must be more attractive than the illicit market. This means offering the products consumer want at an affordable price. State regulation could achieve a viable legal market by ensuring that regulation promotes compliance, a competitive market, and regulatory cooperation.

While the United States is only now beginning to understand the folly of prohibition, nations across the Atlantic recognized decades ago that public policy goals could be more readily achieved through effective regulation. This European experience, in particular that of the United Kingdom, provides an instructive model. Unlike the U.S., where 97 percent of the sports betting market is currently illegal, 99 percent of the British sports betting market is legal, with less than an estimated one percent occurring on the illicit market.⁵⁶ This, however, was not always the case.

Great Britain officially legalized “betting shops” in 1960, in the hopes that doing so would eliminate the large illicit bookmaking industry that had taken root.⁵⁷ The law allowed anyone with a permit for racecourse betting to begin offering bets on sports immediately. It was hailed by the authorities as “welcomed legislation which removes from the police a distasteful duty which tended to strain relations with the general public.”⁵⁸ However, the regulations were restrictive, permitting only 53 betting areas where legal gambling could take place. The capital investment required to obtain licenses and set up betting shops was beyond most of the illegal operators and the laws seemed intent on making betting shops “as sad as possible, in order not to deprave the young that they ended up more like undertakers’ premises.”⁵⁹ As a result, nearly a decade post-legalization, 1,200 illegal bookies remained in operation.

While Parliament enacted smaller liberalization measures in the intervening years, true liberalization of sports betting in the UK would not come until the passage of the Gambling Act of 2005. The new law hoped to prevent gambling from being a source of crime, ensure the activity was conducted in a fair and open way, and protect vulnerable individuals. The Act established a centralized Gambling Commission to oversee the industry, increased the number of legal gambling establishments allowed to operate, and streamlined the licensing process.

This was followed in 2014 by the Gambling (Licensing and Advertising) Act. The 2005 Act applied only to those bookmakers with equipment based in Great Britain proper, which prompted many operators to move their operations to Gibraltar, a British overseas territory with a more favorable tax regime, and from there continue offering online sports betting to British consumers. The 2014 Act extended laws to any operator—no matter from where they operated—requiring them to obtain a British license and comply with British gambling laws in order to take bets from or advertise to UK bettors.

Because the regime prevents few barriers for operators, either on- or off-line, domestic or foreign, to comply with British law, the regime incentivizes compliance. As a result, Britain now has a highly competitive gambling market, high levels of compliance, and cooperation between the industry and the authorities. In addition, match-fixing scandals in the UK are relatively rare compared to nations where sports betting is mostly restricted to the black market.⁶⁰

Great Britain’s model for sports betting regulation is also instructive by viewing the UK in the context of the overall European market, similar to an individual state operating within

the United States. The gambling laws of Great Britain and other European nations differ significantly, reflecting each nation's economic priorities, regulatory flexibility, and ability to update laws in accordance with changing views and technology. Yet, European Union member states and members of the European Economic Area (of which Great Britain is still part) participate in certain cooperative agreements.

For example, in 2010 the Council of the European Union established a framework for cross-border sports betting issues that required member states of the European Economic Area to engage in a certain level of administrative cooperation regarding online gambling. The cooperation agreement required individual state authorities to assess and share information regarding gambling operators, consumer protections, game integrity, and best practices.⁶¹

As U.S. states begin to develop their own regulatory regimes they can look to the regulatory scheme adopted by the United Kingdom and the cooperative arrangements among European nations for reform ideas. The best and most secure of Europe's betting regulatory regimes focus on supporting a legal betting market that encourages compliance and information sharing between governmental and non-governmental regulatory bodies. To achieve those ends in U.S. state regulation, state authorities should develop sports betting regulations to promote markets with the following features:

- Adequate license availability;
- Reasonable tax rates;
- Diverse product offerings;
- Robust consumer protections; and
- Regulatory cooperation

Adequate Availability of Licensing. Reducing regulatory burdens for operators to offering gambling within each state's legal framework is essential to attract operators and players away from the current illegal market. If the number of licenses available to potential operators is too limited for the demand in any given market, many operators will continue to operate outside of the legal regulatory scheme, thwarting oversight.

Reasonable Tax Rates. As with license availability, convincing operators to participate in the legal market depends on the tax rates states choose to charge. Licensing fees and taxes set too high would dissuade operators from pursuing legal pathways, diminishing both oversight and the revenue states would generate through legalization.

For example, Pennsylvania recently passed legislation to legalize on- and off-line sports betting when the federal prohibition is repealed. However, the legislation set fees for licensure higher than the market will likely be willing to bear. While Nevada bookies currently pay a fee of under 7 percent of gross gaming revenues, the Pennsylvania legislature set the tax rate at 34 percent of gross gaming revenues, on top of the \$10 million one-time licensing fee. These costs represent an enormous barrier to entry that significantly increases licensed bookies' operating costs. As a result, few operators will be able to enter Pennsylvania's legal market and those that do will not be able to offer rates as competitive as those of their illegal counterparts. This makes it likely that the legal sports betting market

in Pennsylvania will fail to thrive, causing consumers to either cross the state line seeking friendlier regulatory environments or continue patronizing illegal operators.

It is more likely that as legal sports betting develops in other states, Pennsylvania will amend its tax and fee structure in order to remain competitive. Below are the current tax structures proposed or already enacted by other states. The ideal rate states should charge in order to maximize tax revenue from the sports betting market is between 10 and 15 percent. According to Eilers & Krejcik's analysis, as taxes rise above this threshold, there is a direct negative impact on the tax revenue they can make from the sports betting industry.⁶²

- **New Jersey:** \$400,000 licensing fee, 17.5 percent tax on gross gaming revenue
- **New York:** 10 percent tax on gross gaming revenue
- **Michigan:** \$200,000 licensing fee, 10 percent tax on gross gaming revenue
- **Kentucky:** \$250,000 licensing fee, taxes equal to 20 percent of handle
- **West Virginia:** \$250,000 licensing fee, 10 percent tax on gross gaming revenue
- **Nevada:** 1 percent licensing fee (on gross gaming revenue), 6.75 percent tax on gross gaming revenue above \$134,000 per month⁶³

The licensing and taxing schemes of Pennsylvania, and to a lesser extent New Jersey and Kentucky, will likely deter most operators from entering the legal sports betting market, making it ineffective both as a means of raising revenue and combatting the black market.

Diverse Product Offerings: Mobile and Land-Based Sports Betting. In the U.S., lawmakers tend to view the online marketplace as something of a “Wild West,” where law enforcement faces unique challenges in monitoring and prosecuting illegal behavior. But in reality, technology can actually make enforcing the law easier and more efficient.

Like other financial institutions, online gambling platforms go to great lengths to comply with state and federal laws that require consumer identity verification. Companies like GeoComply which operates in 42 states, utilize data like Social Security numbers, utility bills, state-issued IDs, or credit history information to verify users' identities. Using identification of IP, GPS, and carrier data, as well as Wi-Fi triangulation, these verification companies can also pinpoint users' locations down to a city block. While savvy online gamblers might attempt to use certain software to “spoof” their location, data tracking companies like GeoComply search devices for such location-concealing technology, such as remote servers and virtual private networks, and can block access for those devices. Thus far, there has not been a single reported case in which a user has been able to circumvent these blocks to unlawfully access online betting in the states where it is licensed and regulated.⁶⁴

More importantly, if the goal of legalizing sports is to move consumers into the legal and regulated market, states should not ignore consumers' desire for online betting. According to Eilers & Krejcik's survey of current illegal sports bettors in the U.S., more than half indicated that they would move between two-thirds and all of their activity to the legal market if the legal market offered “a reasonably competitive product.” However, this migration depends heavily on the availability of online sports betting. For example, when

asked what they would do if only in-person sports betting were legal, 70 percent of current illegal bettors indicated that they would continue operating within the illegal market.⁶⁵

Thus, it is clear that if states choose to limit legal sports betting to land-based casinos, the size of the illegal market will remain substantial and a large number of players and businesses will continue to operate outside of the law and beyond the oversight of law enforcement. Furthermore, vulnerable individuals in the illegal market would be deprived of the consumer protections that states which have already legalized non-sports betting online have employed with great success.

Consumer Protections. In the three, soon to be four, U.S. states where online non-sports gambling is already legal, laws require operators to comply with a variety of requirements in order to preserve their license to operate. These include:

- Verification of consumer's age, identity, and location;
- Limits on stakes;
- Self-exclusion lists; and
- Availability of assistance resources for problem gamblers.

Licensed online casinos in Delaware, New Jersey, and Nevada are required by law to recognize "self-exclusion lists," which enable consumers to voluntarily block their own access to gambling sites and ensure they do not receive enticements to play. Researchers have found that players who signed up for lifetime exclusion bans had significantly reduced gambling-related problems.⁶⁶ While not legally required, online casinos can also utilize behavioral tracking tools, such as PlayScan and Observer, that track player behavior and alert operators or customers when they identify patterns of play that may signal problem gambling.

Regulatory Cooperation. As noted, the greatest deterrent European countries have employed to defeat crime and corruption on their gambling markets is the information-sharing by both industry and regulatory authorities. Throughout Europe, the largest gambling operators combine formally through voluntary participation in associations that provide member-companies with valuable reputational and compliance services, such as player identification (know your customer processes), anti-money laundering mechanisms, and integrity monitoring. By working with these associations, gaming companies are able to forecast odds for bets with a high degree of reliability and spot patterns of fraudulent or illegal behavior.

In addition to information-sharing among gambling businesses, state regulation should encourage cooperation between the gambling industry and the sports industry.

As among European nations, U.S. states will likely institute divergent regulations for sports betting, including total prohibition in some. A patchwork of 50 different regulatory schemes could reduce the size of the legal sports betting market and the benefits states might derive from the market. Fortunately, as in Europe, states that choose to legalize sports betting could forge agreements that encourage standardization, cooperation, and regulatory efficiencies.

Gambling nations throughout Europe engage in regulatory cooperation agreements that support a competitive market, as well as aiding law enforcement in the pursuit of international criminals. While private associations will greatly aid law enforcement and sports governing bodies in combating corruption and identifying crime, U.S. states could form similar agreements to formally cooperate, share information, and investigate and prosecute crime on the legal sports betting market.

Cooperative agreements between the states could be as simple as agreements regarding codes of conduct and data reporting, similar to the European Economic Area Cooperation Arrangement. This agreement authorizes investigations and directs state authorities to share information, best practices, and standardize consumer protections.

Such an arrangement could take form through the establishment of a voluntary interstate association of state sports gambling authorities, similar to the Multistate Tax Commission—an enforcement body comprised of and operated by representatives of member states—or the Multi-State Lottery Association—a nonprofit comprised of member-states’ lotteries, which collects and distributes earnings from multistate lottery games (Powerball and MegaMillions). Whether as a “commission” or “association,” this form of interstate agreement could aid in setting minimum standards for consumer protections, standardization of taxes, data handling, player-pool sharing, and license-reciprocity agreements, and foster cooperation between the industry, the states, and federal authorities.

Another concern that regulatory cooperation could address is the investment required to set up a new licensing and regulatory scheme for sports betting. Some states could enter into reciprocity agreements that afford operators licensed in one state the ability to operate in other states. This could function in similar fashion as the Cruise Ship Competitiveness Act, which requires U.S. flagged ships that wish to offer gambling aboard to have devices and operations licensed by a state regulatory authority in the U.S., usually Nevada.⁶⁷

While state authorities can and should cooperate to share data related to potential crimes on the sports gambling market, the ultimate responsibility for managing the integrity of sports rests with the sports governing bodies. As in Europe, U.S. sports governing bodies should—as some have already done—form the mutually beneficial partnership agreements with industry that give gambling operators access to vital information for odds setting and give sports authorities to the data that will help them identify instances of corruption.

Wrong Approaches. Certain proposals already raised within the states currently considering regulations for sports betting present a threat to this cooperative spirit and to the ability of authorities and governing bodies to access information that would aid in reducing criminality on the black market.

Specifically, some sports bodies have asserted that they should have the statutory authority to decide on what games sports books may take bets (“right to bet” power) and a right to receive 1 percent of sports books’ handle, the total sum of bets placed on their games. The NBA and MLB argue that businesses offering legal betting should be forced to pay this 1 percent handle tax because of the value their games create for gambling businesses and for

the cost of new integrity initiatives that legal sports betting would require sports governing bodies to undertake.⁶⁸

If the purpose of regulating sports betting is to reduce illegal betting, states should reject proposals for such an “integrity fee.” While 1 percent may seem small, it actually represents a 30 percent take of the bookies’ total revenue. This is because sports books generally only retain about 5 percent of the handle as profit, distributing the rest to winners. The sports books, not the sports leagues, would pay state taxes on the fee, on top of other state fees and federal taxes. Such a reduction in profits would likely mean that sports books have to offer consumers worse odds and payouts. Meanwhile, illegal bookies will not pay this integrity fee and not pass in on to consumers, thereby reducing the attractiveness of the legal market.

The integrity fee also would reduce the benefit of regulating sports betting for states. It would limit the profitability of obtaining a license to operate legally within states, which would reduce the attractiveness of the legal options that can help attract consumers away from the illegal market. This would shrink the size of the legal market and reduce the overall revenue that states might tax.⁶⁹

Despite the leagues’ claims that their demands for this type of regulatory control are based on the issue of integrity, it appears more based on their wanting a favored position in the market at the expense of other market players—legal gambling businesses—and state revenue authorities. In Europe, such proposals, for the most part, have been rejected as anticompetitive and for the increased transaction costs and regulatory burdens they would impose.⁷⁰ In the U.S., rent-seeking of this nature would severely limit the market’s growth.

Instead, by working with the gambling industry in a fair and competitive way, the leagues stand to gain significant financial benefits. In addition to the increased engagement that gambling stimulates for the sports industry, rights holders could earn additional revenue through selling real-time data on games to the bookies to aid in accurate odds making for in-play betting. These private arrangements already exist in European markets.

Similarly, sports bodies could strike broadcasting and sponsorship deals with betting operators, as they have already done with daily fantasy sports businesses. In 2013, the European Sponsorship Association found that sponsorship of sports by gambling companies had “become a significant source of...funding for sports organisations,” with gambling companies ranking seventh worldwide among all sports-sponsoring business sectors.⁷¹ In the U.S., sports bodies already generate millions each year from sponsorship deals with traditional gambling institutions and daily fantasy sports businesses. Nielsen Sports estimated that these sponsorship arrangements netted the NFL around \$165 million in revenue in 2015.⁷²

The increased revenue sports organizers will reap as a result of legalized sports betting should more than make up for the increased costs of educating and monitoring their players to maintain integrity, eliminating the need for “integrity fees” that have the potential to hamper the entire industry.

Conclusion. Whatever the intentions of the Professional and Amateur Sports Protection Act, the federal prohibition on sports betting it imposed has failed by every relevant measure. Instead of preventing the spread of sports gambling, it has stimulated the growth of a large, illicit sports gambling market. Instead of protecting consumers, it has driven them into an underground market, where operators have little incentive to block underage players, discourage problem gambling, and protect player data. Instead of discouraging corruption in sports, it has created a scenario where match-fixing is more likely due to lack of oversight by authorities.

More importantly, as currently interpreted, PASPA represents a significant erosion of state sovereignty that impacts numerous other regulatory issues including marijuana legalization, firearms regulation, assisted suicide laws, and many others.

For the last 25 years, the states have lost out on millions in tax revenue they could have collected from sports betting, thanks to a ban pushed by and maintained by sports leagues. The federal government made a grave error in 1992, when it put the interest of these multi-million dollar businesses over those of the states and their voters. Now that this failed law appears to be nearing its end, states should not repeat Congress' mistake. Instead, state legislatures should begin developing robust regulatory regimes for legal sports betting that emphasize compliance, market competitiveness, and cooperation among all stakeholders.

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