

# Time to End the Madness around March Madness

## Legalizing Sports Wagering Will Increase Consumer Safety and Protect State Sovereignty

**Michelle Minton**, Fellow at the Competitive Enterprise Institute (CEI)

**Steven Titch**, Associate fellow at the R Street Institute and policy advisor to the Heartland Institute

This March, millions of Americans will join friends, relatives, and coworkers in the annual rite of betting in pools structured around the National Collegiate Athletics Association (NCAA) Men's Basketball Tournament, known colloquially as March Madness. They may wager thousands of dollars or as little as five bucks. The one thing they will all have in common, save for those living in Nevada, is that they will be breaking the law.

Gambling prohibitions function as a form of social engineering that seeks to stamp out a certain behavior. Worse, gambling prohibitions that bar states from legalizing, and adults from voluntarily engaging in, certain wagering activities undermine state sovereignty—and thereby the Constitution's allocation of powers between the states and the federal government—and exacerbate any social ills that might arise from gambling by driving the activity underground.

To illustrate the absurdity of gambling prohibitions, take the example of tobacco and alcohol. While legal for adults to purchase, their use is prohibited in most workplaces, to varying degrees, either by law or company policy. On the other hand, gambling on sports is widely accepted and even endorsed in some workplaces, as everyone from the company CEO to the mailroom employee participates in NCAA bracket pools. Even former President Barack Obama openly discussed his bracket picks, and there likely will be pools among staffers in Congress—where elected representatives passed laws against such activity. So how did we get to this nonsensical junction?

### The Origin of the Sports Gambling Ban

By the late 1980s, at least 13 states had considered proposals to legalize sports gambling, most in the hope that legalizing and taxing the activity would fill increasingly large budget deficits. That so worried gambling opponents—such as lawmakers and sports league officials who feared gambling would compromise the integrity of sporting events—that Congress passed the Professional and Amateur Sports Protection Act of 1992 (PASPA). Once enacted, PASPA prohibited states that did not already allow sports betting from licensing, promoting, or authorizing the activity. In effect, PASPA blocked all states, save for Nevada, from legalizing and regulating bets on the outcome of individual sports contests.

The proposal, sponsored by Sen. Bill Bradley (D-N.J.), was championed by the commissioners of the four major sports leagues, who testified that such a law was necessary to prevent “a cloud of

suspicion” over athletes and games and to avoid sending “a regrettable message to our young people.” Congress 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.”

However, even as Congress debated prohibiting states from legalizing the activity, illegal sports gambling was rampant. “Not since prohibition have Americans so readily engaged in an illegal activity as they do with sports betting today,” *Washington Post* columnist Andrew Beyer wrote in 1991 when the illegal sports betting market was estimated to be around \$40 billion a year. “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 ... [e]ssentially what the states did when they created lotteries and virtually eliminated the illegal numbers game,” Beyer argued.

Since the early 1990s, perspectives have shifted. Despite the prohibition, Americans spent an estimated \$9 billion on the 2016 NCAA Men's Basketball Tournament. And it is not just March Madness. Americans wagered almost \$5 billion on Super Bowl LI, according to some estimates. We spend upwards of \$95 billion each year on professional and college football. And while it is unknown how much money Americans bet on sporting events across the board, estimates range from \$150 billion to \$400 billion a year. Some 95 to 99 percent of this economic activity takes place through illegal channels or on websites based offshore, which deprives American consumers of the protections found in a legal market. That fact, along with greater social tolerance of sports betting, poker and daily fantasy sports (DFS)—an online fantasy sports betting platform that allows players to bet on games occurring within a 24-hour period—has been building momentum for legalization.

Furthermore, state lawmakers and legal scholars have increasingly raised questions about the constitutionality of the current ban, which blocks states from legalizing sports gambling within their own borders. This is why the Supreme Court is currently considering hearing a case that might overturn the law. The case involves a suit, *Christie v. National Collegiate Athletic Association*, in which the State of New Jersey alleges that PASPA—which the NCAA and other leagues have argued forbids New Jersey from repealing its own ban on sports

gambling—violates the 10th Amendment to the Constitution, which holds that powers not delegated to the federal government are reserved for the states and individuals.

In particular, the suit argues that PASPA violates the 10th Amendment by preventing states from modifying their own laws in violation of the “anti-commandeering” doctrine. This doctrine, created and upheld by previous Supreme Court rulings, holds that the 10th Amendment also protects states from being compelled to cooperate with the enforcement or implementation of federal law. While states may not expressly legalize something made illegal by federal law, they may decriminalize certain activities, as they have done with marijuana possession and sales. The case filed by New Jersey argues that PASPA, by prohibiting the state from amending its own laws in order to decriminalize, but not legalize, sports gambling, is in violation of the anti-commandeering doctrine. Then in January 2017, the U.S. Supreme Court requested a brief on the matter from the U.S. Solicitor General, which indicates the nation’s highest court is considering hearing New Jersey’s appeal. When a statute is arguably in violation of the Constitution, unquestionably a violation of individual rights, widely and openly flouted by the population, and counter-productive to its goals, it is time to repeal the law.

Rather than seek to enforce a futile and counterproductive ban based on subjective moral qualms, it is long past time that government policy recognize that gambling—whether it be buying a lottery ticket, betting on the big game, or playing poker online—is a legitimate means of recreation. Good federal policy would treat citizens like adults, respect individual choice, and preserve the right of states to regulate and profit from the gambling activities conducted within their borders.

## Opposition to Legal Sports Betting Breaks Down

Today, with the illegal sports gambling market somewhere between \$150 and \$400 billion a year despite the passage of PASPA, professional sports leagues are also softening their long-term opposition to legalization.

In a 2014 New York Times op-ed, National Basketball Association Commissioner Adam Silver was the first major professional sports executive to come out in favor of legalizing sports wagering, saying: “[D]espite legal restrictions, sports betting is widespread. It is a thriving underground business that operates free from regulation or oversight. Because there are few legal options available, those who wish to bet resort to illicit bookmaking operations and shady offshore websites.” He concluded: “I believe that sports betting should be brought out of the underground and into the sunlight where it can be appropriately monitored and regulated.”

Just a few months later, Major League Baseball Commissioner Rob Manfred said it was time to give “fresh consideration” to legalizing sports betting.



Only the National Collegiate Athletic Association and the National Football League (NFL) remain adamant in their stand against legalization. However, it appears the NFL has made some official concessions to reality. The league’s policy requiring teams to disclose player injuries and their likelihood of playing is designed to prevent gamblers from gaining an advantage from inside information. DFS strategies are discussed on programming on the NFL Network, the NFL-operated cable channel. Two team owners, the Dallas Cowboys’ Jerry Jones and the New England Patriots’ Robert Kraft, own stakes in DFS companies. Network commentators, who are approved by the NFL, regularly offer game predictions. While they generally avoid mention of the point spread—the number of points by which a team must lose in order for bettors to make money—commentators often offer forecasts of specific final scores, which all but telegraphs their opinion on the actual betting line.

## Popular Support for Legalized Sports Betting Grows

Changing public attitudes also lend support for a change in policy. In a September 2016 poll of 1,019 adults, 48 percent favored changing federal laws to allow states to legalize sports betting (39 percent opposed), up from 39 percent who supported legalization in a similar 2010 poll. Support for legalization is strongest among young adults, with 60 percent of respondents aged 35 and under in favor of a change to federal law.

In a January 2016 poll by the market research firm the Mellman Group, 80 percent of respondents said that sports betting should either be legal nationwide or left up to the states, while just 17 percent said sports betting should be illegal nationwide. In the same poll, 72 percent of respondents said they thought legalization would make consumers safer to some extent. Fifty-four percent said that legalization would either very likely or somewhat likely make sports betting safer for consumers, while an additional 18 percent said it almost certainly would.

## Objections to Sports Betting Expansion

Traditionally, concerns about expanding legalized gambling center on its possible effects on morality and on vulnerable individuals such as those with compulsive gambling disorders. However, proponents of the current national sports betting ban were primarily motivated by protecting the integrity of the games from corruption such as match fixing and point shaving. Twenty-five years later, it is clear that PASPA has failed on all accounts. It does not protect the vulnerable. It has turned millions of otherwise lawful Americans into criminals. And it has made the market more susceptible to corruption.

By criminalizing sports betting, PASPA actually increases the risks of match-fixing and corruption. In Europe and much of the world where sports betting is legal, bookies are incentivized to share with authorities odd betting patterns that might signal corruption. This is not the case in the U.S., where this information remains inaccessible to and unexamined by sports authorities. This, along with the billions wagered illegally, leaves sports in the U.S. more exposed to corruption than those in other nations that have embraced bookmakers as their early warning system. By contrast, in the U.S., the law disincentivizes gamblers from alerting authorities to suspicious betting that might indicate match fixing, lest they open themselves up to investigation.

## Gambling Disorders

In addition to failing to stop or even spot instances of match fixing, creating a black market for gambling does nothing to protect vulnerable individuals with compulsive or disordered gambling behaviors.

Opponents of legalized gambling often overstate the percentage of the population susceptible to gambling disorders. In reality, national estimates put the prevalence of clinical-level gambling disorders at about 1 percent of the population. Addiction experts believe as much as 3.5 percent of the population have trouble controlling themselves while gambling, but their behavior falls short of being classified an actual disorder. And, despite an “unprecedented increase in opportunities and access to gambling,” Howard Shaffer, a psychology professor at Harvard and one of the nation’s leading addiction specialists, found the rate of pathological gambling has remained remarkably stable in the U.S.

Though a serious health problem, gambling disorders are too rare to justify a ban. For comparison, the prevalence of alcohol abuse disorders is at about 7 percent of the adult population, yet states do not ban the majority of adults from purchasing a product the vast majority can imbibe responsibly. States should treat their citizens as adults, and allow them to take responsibility for their own behavior, just as they do with alcohol, tobacco and in a growing number of states, marijuana.

Furthermore, legalizing gambling activities—far from encouraging abuse—affords authorities the opportunity to spot and address disordered behavior, while black markets sweep such problems under the rug. For example, in the states that have recently legalized

online gambling, laws require the sites to recognize “self-exclusion lists,” as many land-based casinos are now required to do. Consumers who know they have a gambling problem can voluntarily add their name to a list that blocks their access to gambling sites and ensures they will not receive enticements to play. States may also choose to set aside a portion of gambling taxes to address associated health issues. Researchers have noted that players who sign up for these lifetime exclusion bans had significantly reduced gambling-related problems. Further, states that license sports gambling can require authorized bookmakers to track player behavior to spot and address problematic behavior.

The tools to address problem gambling and spot suspicious betting activity already exist, as countries with legal gambling have demonstrate. But, without a legal market where operators are incentivized to work with authorities and protect vulnerable consumers, there is little opportunity to employ them.

Given the billions of dollars being wagered illegally on sports contests, it is difficult to argue that prohibition has worked. Quite the opposite, when millions disregard the law without a second thought, it undermines the rule of law.

## Arguments for Legalized Sports Betting

Arguments for Legalized Sports Betting. The question of the “morality” of gambling has been largely answered in the U.S., with all but one state permitting—and profiting from—some form of legalized gambling. Quite simply, governments, either federal or state, should not seek to prohibit adults from voluntarily spending their money as they see fit.

Furthermore, the case continues to build that maintaining a federal prohibition on gambling violates not only individual rights, but also critical constitutional principles, by depriving states of their right to object to federal dictates and thwarting their ability to benefit from commerce occurring within their borders.

## State Autonomy and Revenue

State Autonomy and Revenue. Pennsylvania, Michigan, and Maryland have introduced legislation to legalize sports betting this year while New York, California, Oregon, Minnesota, Hawaii, North Carolina, and Mississippi have all expressed an interest in similar legislation.

In 2011, New Jersey voters overwhelmingly approved a constitutional amendment to allow sports betting in the state, which the legislature followed up by enacting a law to regulate the activity. That law, however, was struck down by a district court and the Third Circuit Court of Appeals, which held that PASPA was constitutional and that New Jersey’s laws violated the federal law. In a renewed bid to circumvent PASPA, the Garden State legislature opted instead to repeal all of its laws that prohibited sports gambling. The hope was that by merely decriminalizing sports betting without expressly authorizing it, the activity could be monitored and taxed under existing state gam-

bling laws. PASPA, which prohibits states from “sanctioning” sports gambling, has been used—once again—as the basis to challenge New Jersey’s decriminalization bill.

The leagues, joined by the U.S. Department of Justice, argued that even this would be a violation of PASPA. The Third Circuit Court of Appeals agreed with the leagues twice, first 2-1 in a three-judge hearing, and then again in an en banc hearing before the entire court. As noted, New Jersey has since appealed the ruling to the U.S. Supreme Court, which has expressed some interest in the case as indicated by its request for an opinion from the U.S. Solicitor General. As sports gambling legal scholar Daniel Wallach has noted, the Court almost always hears cases on which it requests a Solicitor General opinion.

Key to New Jersey’s argument is the contention that PASPA violates the 10th Amendment to the Constitution, which protects the states from unwarranted federal interference in state matters. It was the potential violation of this Amendment that prompted the Department of Justice to testify against PASPA when it was first considered by Congress. As noted, the case involves the integrity of the anti-commandeering doctrine. This principle was established in 1842 in *Prigg v. Pennsylvania*, in which the Supreme Court ruled that the Fugitive Slave Act did not require enforcement by the State of Pennsylvania because it precluded Pennsylvania state law, which prohibited taking people out of Pennsylvania and into slavery. In subsequent cases, the Court has upheld the anti-commandeering doctrine, which concludes that while the federal government may directly regulate interstate commerce and even require or prohibit certain acts, it “lacks the power directly to compel the States to require or prohibit those acts.” If New Jersey prevails its appeal, it would be a validation of federalist principles from the Supreme Court, and would restore states’ ability to decide for themselves what their laws should be concerning sports gambling.

PASPA is part of a legal morass that bogs down any legislative movement on sports betting. If the courts do not clarify the issue, Congress should repeal—or at least amend—three harmful gambling laws currently on the books: PASPA, the 1961 Wire Act, and the Unlawful Internet Gaming Enforcement Act (UIGEA). These outdated, ambiguous, and constitutionally dubious statutes have created legal and regulatory headaches for both state and federal authorities, as states continue to assert their constitutionally guaranteed powers to regulate in-state commerce. Repealing all three would allow Congress and the states to institute rational and effective measures to regulate gambling activities, both on and offline.

The Wire Act prohibits the use of telecommunications to transmit interstate wagering information related to sporting events or contests. For decades, this made the most common method of sport betting, via the phone or telegraph, illegal. Even so, during the 1990s and

early 2000s, Internet gambling flourished as U.S. citizens placed bets on websites that operated legally in foreign countries.

While it remains legal to place bets on offshore sites, UIGEA, passed in 2006, prohibits U.S. banks from knowingly transferring funds to these sites or their agents. As it is currently worded, the Act prohibits banks and credit processors from processing payments related to unlawful Internet gambling, but it does not specify what types of gambling qualify as “unlawful,” leaving that up to the states and other federal statutes to determine. Thus, so long as it is authorized or not specifically prohibited by state or federal law, online gambling activities are considered lawful under UIGEA. However, this ambiguous language has created confusion for banks and payment processors—most of whom have chosen to err on the side of safety by not handling payments related to any form of gambling. UIGEA also gives federal prosecutors the power to prosecute and seize funds from anyone who accepts or transfer wagers that have passed through any U.S. financial institution.

However, in December 2011, the Office of Legal Counsel within the Department of Justice, issued a memo clarifying that the Wire Act applies only to interstate wagering. Thus, states like Nevada, New Jersey, and Delaware moved ahead with proposals to legalize and license intrastate online gambling. The DOJ memo, plus the general willingness of states to permit DFS contests (nine have legalized the activity with 12 more considering legalization proposals in 2017), have set the stage for greater liberalization of sports betting.

## **Legalized Sports Betting Will Spark U.S. Business**

Legalized sports betting would create a value chain that would present opportunities to U.S. technology entrepreneurs. While MGM Resorts and William Hill are recognized as major players in sports wagering, legalization may create opportunities for other companies in the technology sector. Microsoft, Sony, Reuters, and Wall Street financial firm Cantor Fitzgerald, along with various individual entrepreneurs, all either hold or have applied for patents for ways to integrate wagering systems, payment systems, and other such tools onto handheld devices, remote terminals, and social media platforms.

Some analysts speculate that U.S. companies would eventually dominate the global sports betting market were Congress to give sports betting the green light. “In 10 years’ time, I expect sports betting to be part of major telecommunications companies and data companies,” Chris Eaton, an integrity monitor and former investigator for Interpol, told ESPN. “I see the large international conglomerates—Bloomberg, Google, the massive data companies—swallowing up most of the sports betting operations around the world and operating an international platform, with all of sports betting being essentially offered on the mobile device, the mobile platform.”

Beyond the business of taking bets, a secondary market is likely to emerge for software and algorithms that crunch statistical data to assist bettors. This has already occurred with DFS, which is now a \$3 billion industry in the U.S., and online gambling, which has reached \$200 million in revenue in New Jersey, where it is legal.

## Source of Tax Revenue

The current federal sports betting ban, though it clearly does not stop the activity, prevents states from collecting tax revenue on this billion-dollar industry. Instead, those funds are funneled into foreign sportsbooks. Since offshore websites pay taxes to their respective governments, money from Americans that could be invested in their home states ends up funding government projects and programs in other countries.

If this economic activity were brought into the daylight, it would mean millions of dollars for cash-strapped states. In New Jersey, for example, illegal sportsbook makers prosecuted in the late 1990s had an annual volume of around \$200 million. Global gaming research firm GamblingCompliance projects that a fully developed legal American market—where bets are placed at casinos, online, and at retail bookmaking shops—would produce \$12.4 billion in annual revenue, five times bigger than the U.K.'s sports betting market and 11 times bigger than Italy's. All of which would be subject to tax. Tapping into this new source of revenue would not even require new laws for most states, as the federal government already requires people to report earnings from gambling and even allows them to write off gambling losses up to the amount that allows them to offset their winnings.

An example can be found in legalized online gambling, which did not exist prior to 2013. Since legalizing Internet gaming, New Jersey, one of three states that licenses casino-style online games, has seen tax revenue from its previously faltering casino industry increase for the first time in a decade. According to New Jersey Division of Gaming Enforcement, online gambling generated \$196.7 million in revenue for casinos and nearly \$30 million in tax revenue in 2016—money that had previously vanished into the ether of the black market.

Given the opportunity, most people would prefer doing business with legal bookmakers. Consumers would be protected by existing legal and regulatory structures, and less money would flow to criminal enterprises. Like casinos, legal sports books would be re-

quired to report big payoffs to the Internal Revenue Service (via W-2G forms). In this way, the state and even the federal government could draw revenue from legalized sports betting that would otherwise go unreported while citizens can lawfully engage in the voluntary act of betting their own money on sports without running afoul of the law.

## Conclusion

Legalizing sports betting would produce substantial social and political benefits by exposing billions of dollars in economic activity to the sunshine of legitimacy. Decriminalization would renew respect for the law by individuals who see gambling on sports as a valid form of entertainment for adults. Allowing bookies and authorities to work together to stop match fixing—which is in both of their interests—would bolster the integrity of sports.

Like any other form of gambling, sports betting can be regulated and taxed, but first the law must treat consumers like adults. By legalizing the activity, states can institute safeguards to protect consumers and the vulnerable and sports authorities can have access to the information that will help them spot and deal with corruption.

From a constitutional perspective, Washington lawmakers should treat sports betting as a federalism issue, like other forms of legal gambling. PASPA should be repealed or revised to allow states the discretion to legalize and regulate sports betting on their own terms. ■

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