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Sports Gambling in Nebraska: A Good Bet for the Good Life

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Note*

Sports Gambling in Nebraska: A Good Bet for the Good Life

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I. INTRODUCTION

Nebraska should legalize and regulate sports gambling. In May 2018, the Supreme Court struck down the Professional and Amateur Sports Protection Act (PASPA), a federal bill designed to ban sports gambling across the United States. Consequently, sports gambling became a state issue. Each state must now decide whether to continue prohibiting or to legalize and regulate sports gambling. The Supreme Court's decision has sparked a state-by-state debate over the benefits of legalizing sports gambling. This Note examines those benefits and discusses how and why Nebraska should legalize and regulate sports gambling.

Part II provides a background on sports gambling. It examines three distinct periods of sports gambling history: the early colonization of America, the turn of the nineteenth century, and the time between the mid-1930s and the present. Part II also examines the federal government's attempt to regulate sports gambling, including the enactment of PASPA.

Part II further discusses the Supreme Court's holding that PASPA was unconstitutional. It examines the Supreme Court's analysis in *Murphy v. National Collegiate Athletic Association*¹ by discussing PASPA's "authorization" provision and how it pertains to the anticommandeering doctrine, the Supremacy Clause, and the severability doctrine. In addition, Part II examines the fallout from the Supreme Court's holding in *Murphy* and how each state must now choose prohibition or legalization and regulation.

Part III discusses why and how Nebraska should legalize and regulate sports gambling. It looks at the economic benefits of legalization, including how new streams of revenue can offset Nebraska's growing deficit. Moreover, it examines how public sentiment supports legalization efforts. In addition, legalization would increase employment opportunities. Part III also discusses key consumer protection components and why regulations should be implemented.

Finally, Part III proposes statutory language for creating the Nebraska Gaming Commission and enabling it to regulate sports gambling. The newly created commission would be directly supervised by the Nebraska Department of Revenue. In addition, Part III prescribes the regulatory power and responsibilities for the Commission, including tax and enforcement powers, and the responsibility to support the Nebraska Gamblers Assistance Program. Lastly, Part III examines the various pathways for the legalization of sports gambling in Nebraska.

1. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018).

II. BACKGROUND

It is difficult to understand the Supreme Court's holding in *Murphy*² without first understanding sports betting, its history, its subsequent federal regulation, and the grounds for which *Murphy* was challenged. This Part seeks to provide a background of these issues and their interplay with the State of Nebraska.

A. History of Sports Betting

The United States has had a long and complicated relationship with sports betting.³ Questions of legality and morality have continually been raised throughout its history.⁴ The history of sports betting in the United States can be divided into three distinct periods: the early colonization of America, the turn of the nineteenth century, and the time between the mid-1930s and the present.⁵

The first period began with the colonization of America during the seventeenth century. In New England and Pennsylvania Puritan values prevailed.⁶ Puritans believed that gambling was a sinful vice; consequently, gambling was banned in many of the New England and Pennsylvania colonies.⁷ Other colonists, like those in Jamestown, Virginia, however, did not hold the same beliefs as the Puritans.⁸ Many of these settlers maintained their English attitude toward gambling and even considered "gentleman's games" to be a symbol of the "gambling spirit" which characterized an American settler.⁹ As the English presence grew in America, gambling also became more popular.

During this time gambling was often regulated by the locality and used as a source of revenue.¹⁰ Local governments used gambling revenues to "build cities, establish universities, and even to help finance

2. *Id.*

3. Justin Fielkow et al., *Tackling PASPA: The Past, Present, and Future of Sports Gambling in America*, 66 DEPAUL L. REV. 23, 25 (2016); I. Nelson Rose, *The Rise and Fall of the Third Wave: Gambling Will Be Outlawed in Forty Years*, AM. POL'Y ROUNDTABLE (May 12, 2006), https://aproundtable.org/news.cfm?news_ID=1288&issuecode=casino [<https://perma.unl.edu/78S3-U675>].

4. Zach Schreiber, *The Time Is Now: Why the United States Should Adopt the British Model of Sports Betting Legislation*, 27 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 353, 357 (2017).

5. *Id.* at 357–62.

6. *Id.* at 358.

7. *Id.*

8. *Id.*

9. *Id.*; JOHN M. FINDLAY, PEOPLE OF CHANCE: GAMBLING IN AMERICAN SOCIETY FROM JAMESTOWN TO LAS VEGAS, 14–15 (1986).

10. Chil Woo, *All Bets Are Off: Revisiting the Professional and Amateur Sports Protection Act (PASPA)*, 31 CARDOZO ARTS & ENT. L.J. 569, 571 (2013).

the Revolutionary War.”¹¹ Revenue from American gambling helped establish or improve:

Harvard, Yale, Kings College (Columbia University), Princeton, Rutgers, Dartmouth, Rhode Island College (Brown University), the University of Pennsylvania, the University of North Carolina, and the University of Michigan, the benefit of the Masons, the fortification of New York City and Philadelphia, the construction of roads, hospitals, lighthouses and jails, the promotion of literature, the improvement of navigation on rivers, the development of industry, and even the construction of churches.¹²

Between 1746 and the mid-1800s revenue from gambling funded “47 colleges, 300 lower schools and 200 church groups.”¹³ Thus, gambling became immensely popular.

The second period coincided with the California Gold Rush and ran through the turn of the nineteenth century.¹⁴ “The frontier spirit was revitalized, along with a seemingly endless supply of gold with which to gamble.”¹⁵ Omaha, Nebraska was founded in 1854 and quickly became “an oasis for people who were traveling west.”¹⁶ It was also a “hardscrabble place” for farmers and travelers.¹⁷ It was a place where people would frequently drink and gamble before traveling across the prairie.¹⁸ Some gambling experts even noted that the definition of gambling, “to take a risk to gain some advantage,” fit Omaha and its frontier spirit.¹⁹

Gambling gained even more momentum with the rise of horse racing and baseball during the turn of the nineteenth century. Horse racing became popular with the first running of the “Belmont Stakes, Preakness Stakes, and Kentucky Derby . . . in 1867, 1873, and 1875, respectively.”²⁰ By the turn of the century horse racing had become so popular that fans could place wagers at over 300 racetracks nationwide.²¹ In Nebraska, Omaha’s Aksarben racetrack began in 1919.²² The Aksarben racetrack was “the most remarkable success story” in

11. Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 12 (1992).

12. *Id.* at 25.

13. *Id.* See HERBERT ASBURY, *SUCKER’S PROGRESS: AN INFORMAL HISTORY OF GAMBLING IN AMERICA FROM THE COLONIES TO CANFIELD 77–78* (1938).

14. Schreiber, *supra* note 4, at 359–60.

15. *Id.* at 359.

16. *Omaha’s Gambling History*, NEB. EDUC. TELECOMMS. ¶ 4 (Oct. 14, 2008), <https://web.archive.org/web/20081014040343/http://www.netnebraska.org/extras/state-wide/pers/transcripts/Omaha%20Gambling%20History.pdf> [<https://perma.unl.edu/S6NM-3TTG>] (originally aired on Nebraska ETV Program Statewide Oct. 1, 2004).

17. *Id.*

18. *Id.*

19. *Id.* at ¶ 5.

20. See Fielkow et al., *supra* note 3, at 25–26, 26 n.18.

21. *Id.* at 26 n.18.

22. *AK-SAR-BEN Horse Racing History*, AK-SAR-BEN.COM, <http://www.ak-sar-ben.com/> [<https://perma.unl.edu/54JX-C674>] (last visited July 10, 2018).

all of horse racing.²³ On any given Saturday, “the roar of the crowd reverberated like thunder over the Nebraska plains.”²⁴ Indeed, the “whole city loved its racetrack.”²⁵

At the same time, professional baseball was also on the rise. Baseball was more than a game during the Progressive Era.²⁶ It was emblematic of America’s social structure.²⁷ “Its teamwork showed democracy in action; its fans were found among all classes of society; it taught America’s traditional values to successive waves of immigrants; and it served as an annual ritual which united cities behind their teams.”²⁸

However, the popularity of horse racing and baseball was followed by a rise in corruption and scandal. Shortly after Nebraska opened its Aksarben racetrack, the most infamous sports betting scandal in American history took place just a few hours to the east in Chicago. At that time, the nation’s conscience was shocked to discover that a crime syndicate had bribed members of the Chicago White Sox to throw the 1919 World Series.²⁹ Public outcry was immense. The eight players involved were dubbed the “Black Sox” for tarnishing America’s beloved sport.³⁰ Additionally, they were banned from baseball and indicted with five other gamblers by a grand jury.³¹

Public sentiment toward gambling had reached a new low.³² Moreover, the public began associating sports betting with criminal activities, gangsters, and threats to its beloved pastimes.³³ The event immortalized a little boy’s plea—“say it ain’t so, Joe!”—to White Sox star player, “Shoeless” Joe Jackson.³⁴ The plight was heard around the world.³⁵

23. Andrew Beyer, *Commentary: The Rapid Rise and Fall of Aksarben*, WASH. POST (July 24, 1994), http://articles.latimes.com/1994-07-24/sports/sp-19356_1_aksarben-races [<https://perma.unl.edu/KHA4-B54W>].

24. *Id.*

25. *Id.*

26. Allen Boyer, *The Great Gatsby, the Black Sox, High Finance, and American Law*, 88 MICH. L. REV. 328, 332 (1989).

27. *Id.*

28. *Id.*

29. *Id.*; Fielkow et al., *supra* note 3, at 26. See Douglas Linder, *The Black Sox Trial: An Account*, FAMOUS TRIALS (2010), <http://law2.umkc.edu/faculty/projects/ftrials/blacksox/blacksox.html> [<https://perma.unl.edu/A3X7-M8HM>] (last visited July 10, 2018).

30. See Fielkow et al., *supra* note 3, at 26.

31. See Michael W. Klein, *Rose Is in Red, Black Sox Are Blue: A Comparison of Rose v. Giamatti and the 1921 Black Sox Trial*, 13 HASTINGS COMM. & ENT. L.J. 551, 573, 585 (1990).

32. See Fielkow et al., *supra* note 3, at 26.

33. Woo, *supra* note 10, at 572–73.

34. Schreiber, *supra* note 4, at 361.

35. *Id.*

In response to the scandal professional baseball appointed Judge Kenesaw Mountain Landis as its first commissioner.³⁶ Judge Landis was tasked with restoring baseball's image and upholding the integrity of the sport.³⁷ Soon thereafter, many other professional sports leagues joined baseball and appointed commissioners to do the same.³⁸ Moreover, the scandal fueled groups who were opposed to gambling on moral grounds.³⁹ The combination of scandal and moral opposition led to a progressive movement to ban gambling in the United States.⁴⁰ After being celebrated during the 1800s, "by the beginning of the twentieth century, virtually all forms of gambling were illegal."⁴¹

The third period began during the 1930s, shortly after the Great Depression.⁴² Following the Great Depression the need for revenue compelled many states to legalize certain forms of gambling again.⁴³ In 1931 Massachusetts made bingo and charitable gambling legal.⁴⁴ That same year Nevada also legalized many forms of gambling.⁴⁵ In 1935 Nebraska legalized pari-mutuel betting on horse racing again.⁴⁶ Sports betting, however, was still banned throughout the country.⁴⁷ Consequently, large multi-state crime syndicates began to fill the void.⁴⁸ They organized sportsbooks and operations to meet the new surge in popularity of sports—specifically, professional baseball, professional football, collegiate football, and collegiate basketball.⁴⁹ For nearly three decades, the "syndicates openly defied state gambling laws by using the telegraph and telephone" to communicate and trans-

36. *Kenesaw Mountain Landis*, MLB, http://mlb.mlb.com/mlb/history/mlb_history_people.jsp?story=com_bio_1 [<https://perma.unl.edu/6PEL-W3KP>] (last visited July 10, 2018).

37. Woo, *supra* note 10, at 573.

38. Fielkow et al., *supra* note 3, at 26.

39. *See* Woo, *supra* note 10, at 572.

40. *Id.*

41. *Id.*

42. *Id.*; Schreiber, *supra* note 4, at 362.

43. Woo, *supra* note 10, at 572.

44. *Id.*

45. *Id.* *See Major Events in Nevada Gaming History*, THE WAGERING RESOURCE, http://www.wageringresource.com/index.php?option=com_content&view=article&id=163&Itemid=111 [<https://perma.unl.edu/5P4H-YHRP>] (last updated Apr. 3, 2016).

46. Roland J. Santoni, *An Introduction to Nebraska Gaming Law*, 29 CREIGHTON L. REV. 1123, 1130 (1996). *See generally* State *ex rel.* Sorensen v. Ak-Sar-Ben Exposition Co., 118 Neb. 851, 860–61, 226 N.W. 705, 709 (1929) (setting the foundation for a 1934 campaign to amend the Nebraska Constitution and allow for pari-mutuel wagering).

47. *See* Woo, *supra* note 10, at 573 (noting that sports betting was not legal again "until Nevada authorized sports betting in standalone locations in 1955 and hotel sportsbooks in 1975").

48. *Id.* at 573–74.

49. *Id.*

act business.⁵⁰ By the early 1960s it became clear that the states lacked the resources to investigate or prosecute the syndicates.⁵¹ Indeed, the problem of organized crime had grown so much that Congress believed it needed to intervene.⁵²

B. Federal Intervention

Congress intervened by creating a series of federal laws that included the Interstate Wire Act of 1961,⁵³ the International Travel Act of 1961,⁵⁴ the Interstate Transportation of Wagering Paraphernalia Act (1961),⁵⁵ the Sports Bribery Act of 1964,⁵⁶ and the Illegal Gambling and Business Act (1970).⁵⁷ In effect, these laws supported state-based gambling laws by making their violation a federal offense as well.⁵⁸ Consequently, these laws enabled the Federal Bureau of Investigation (FBI) and Department of Justice (DOJ) to investigate and prosecute multistate crime syndicates.⁵⁹

Even so, illegal sports gambling persisted in the United States.⁶⁰ In 1976 the Commission on the Review of the National Policy Toward Gambling (the Commission) issued a report stating that gambling laws could not be effectively enforced⁶¹ “The Commission found that over two-thirds of the population had indulged in gambling and approximately 80% of the population approved of gambling.”⁶² Moreover,

50. *Id.* at 574.

51. Schreiber, *supra* note 4, at 363.

52. *Id.*

53. Act of Sept. 13, 1961, Pub. L. No. 87-216, 75 Stat. 491 (codified as amended at 18 U.S.C. § 1084 (2012)).

54. Act of Sept. 13, 1961, Pub. L. No. 87-228, 75 Stat. 498 (codified as amended at 18 U.S.C. § 1952 (2012)).

55. Act of Sept. 13, 1961, Pub. L. No. 87-218, 75 Stat. 492 (codified as amended at 18 U.S.C. § 1953 (2012 & Supp. 2014)).

56. Act of June 6, 1964, Pub. L. No. 88-316, 78 Stat. 203 (codified as amended at 18 U.S.C. § 224 (2012)).

57. Act of Oct. 15, 1970, Pub. L. No. 91-452, § 803(a), 84 Stat. 922, 937–38 (codified as amended at 18 U.S.C. § 1955 (2012 & Supp. 2014)). The Illegal Gambling Business Act was enacted as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified as amended in scattered sections of 18 U.S.C.), which also contains the well-known Racketeer Influenced and Corrupt Organizations (RICO) Act, section 901(a) (codified as amended at 18 U.S.C. §§ 1961–1968 (2012 & Supp. 2016)).

58. Schreiber, *supra* note 4, at 364.

59. *See id.*

60. *See Fielkow et al., supra* note 3, at 28.

61. COMM’N ON THE REV. OF THE NAT’L POL’Y TOWARD GAMBLING, GAMBLING IN AMERICA, at ix–x (1976), <https://ia802205.us.archive.org/4/items/gamblinginameric00unit/gamblinginameric00unit.pdf> [<https://perma.unl.edu/2QYQ-CR78>] (noting the Commission was created by Congress as a part of the Organized Crime Control Act, and it conducted forty-three days of hearings and received testimony from approximately 275 witnesses).

62. Fielkow et al., *supra* note 3, at 28.

the Commission stated, “Gambling is inevitable. No matter what is said or done by advocates or opponents of gambling in all its various forms, it is an activity that is practiced, or tacitly endorsed, by a substantial majority of Americans.”⁶³

Following the Commission’s report, the DOJ put “a low priority on enforcement of antigambling laws.”⁶⁴ Accordingly, illegal gambling continued. In 1983 it was estimated that nearly \$8 billion was gambled illegally on sports in America.⁶⁵ By 1989 that number had quadrupled to \$50 billion.⁶⁶ Consequently, as gamblers wagered more the public became more concerned about corruption and match-fixing.⁶⁷ In 1980 it was revealed that Boston College basketball players were involved in point-shaving.⁶⁸ In 1985 three more basketball players were indicted for point-shaving at Tulane University.⁶⁹ Finally, in 1989 another sports betting scandal rocked professional baseball when it was determined that Pete Rose “bet on baseball.”⁷⁰ Like the Black Sox, Pete Rose also received a lifetime ban from the sport.⁷¹ In addition, the public’s concern and moral opposition to sports scandals and gambling had been reignited. In 1992 Congress enacted the Professional and Amateur Sports Protection Act.

C. Professional and Amateur Sports Protection Act (PASPA)

The enactment of the Professional and Amateur Sports Protection Act (PASPA) federalized the regulation of sports betting.⁷² Prior to PASPA state laws governed sports betting.⁷³ The federal government simply supported those laws by the aforementioned means.⁷⁴ These federal laws were meant to prevent interstate sports betting.⁷⁵ They were not supposed to affect intrastate sports betting.⁷⁶ That issue was left to the states. However, that all changed with the enactment of PASPA.

63. COMM’N ON THE REV. OF THE NAT’L POL’Y TOWARD GAMBLING, *supra* note 61, at 1.

64. Fielkow et al., *supra* note 3, at 28 (quoting Bart Barnes, *Friendly Wagers to Big Bookmaking*, WASH. POST (Jan. 18, 1982), <https://www.washingtonpost.com/archive/sports/1982/01/18/friendly-wagers-to-big-bookmaking/73abae5a-3ce8-47f0-9740-b1bb83328ec1> [<https://perma.unl.edu/EK83-P4XR>]).

65. *Id.* at 29.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *See id.* at 30.

73. *Id.*

74. *See supra* notes 53–59 and accompanying text; Woo, *supra* note 10, at 574.

75. Woo, *supra* note 10, at 574.

76. *Id.*

The enactment of PASPA took the regulatory authority from the states and placed it in the hands of the federal government.⁷⁷ Its purpose was “to stop the spread of State-sponsored sports gambling” and maintain the integrity of sports.⁷⁸ Indeed, § 3702 provides:

It shall be unlawful for (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.⁷⁹

The enactment of PASPA was also at a critical moment during the debate over sports betting.⁸⁰ During that time, thirteen “[s]tates [were] considering a wide variety of [s]tate-sponsored gambling schemes, including allow[ing] sports gambling on river boats . . . [sports betting] at off-track betting parlors . . . casino-style sports books,’ and ‘sports theme[s] for [state] lotteries.’”⁸¹ The professional sports leagues opposed gambling and were concerned with upholding the integrity of sports and preventing another Pete Rose-type incident.⁸² On their side was Senator Bill Bradley, a former professional basketball player and leading advocate for PASPA, which was commonly coined the “Bradley Bill.”⁸³

Consequently, a compromise was struck. To enact PASPA Congress exempted states with legalized sports-wagering schemes already in operation.⁸⁴ Of the fifty states only Delaware,⁸⁵ Montana,⁸⁶ Ne-

77. *Id.*

78. S. REP. NO. 102-248, at 4 (1991), as reprinted in 1991 U.S.C.C.A.N. 3553, 3555.

79. 28 U.S.C. § 3702 (2006). A “governmental entity” is defined to include “a State, a political subdivision of a State, or an entity or organization . . . that has governmental authority within the territorial boundaries of the United States . . .” 28 U.S.C. § 3701 (2006).

80. See SEN. REP. NO. 102-248, at 8. Bradley also stated that “[s]ports betting threatens the integrity of and public confidence in professional and amateur team sports, converting sports from wholesome athletic entertainment into a vehicle for gambling. Sports gambling raises people’s suspicions about point-shaving and game-fixing . . . If sports betting spreads, more and more fans will question every coaching decision and official’s call.” 138 CONG. REC. S17434-01 (daily ed. Oct. 7, 1992) (statement of Sen. Bradley).

81. Woo, *supra* note 10, at 575 (quoting SEN. REP. NO. 102-248, at 4); 28 U.S.C. § 3702 (2006).

82. Woo, *supra* note 10, at 575.

83. Schreiber, *supra* note 4, at 367.

84. Caitlin D. Buckstaff, Note, *Covering the Spread: An Assessment of Amateurism and Vulnerability of Student-Athletes in an Emerging Culture of Sports Wagering*, 16 VAND. J. ENT. & TECH. L. 133, 140 (2013).

85. See generally Joshua Winneker et al., *Sports Gambling and the Expanded Sovereignty Doctrine*, 13 VA. SPORTS & ENT. L.J. 38, 41 (2013) (“In 1976, Delaware had a sports lottery, which allowed for multi-game parlay betting for one football season without any success. However, for years the Delaware legislature had been

vada,⁸⁷ and Oregon⁸⁸ satisfied the exemption.⁸⁹ Congress, however, also created a one-year window for additional states to enact sports-wagering schemes to meet the exemption.⁹⁰ The concept was created with New Jersey's Atlantic City in mind.⁹¹ Neither New Jersey nor any other state took advantage of the one-year provision.⁹² Consequently, only four states had exemptions to PASPA.

Nevertheless, illegal sports betting persisted, leading many states to question the effectiveness and constitutionality of PASPA.⁹³ The states voiced their concerns over PASPA's violations of federalism and the Commerce Clause.⁹⁴ They also questioned how standards could exist for a ban in states that had exemptions.⁹⁵ Furthermore, they argued the bill was not even accomplishing what it intended—stopping the spread of illegal sports gambling.⁹⁶ Accordingly, these states ar-

trying to bring back the sports lottery in order to profit off of the growing popularity of gambling along mid-Atlantic seaboard.”).

86. *See generally id.* at 42 (“Montana legalized a sports lottery in 1973. In 2007, the Montana Legislature passed Mont. Code Ann § 23-4-201, a law designed to help the Board of Horse Racing increase purses in Montana. In August 2008, under the authority of Mont. Code Ann § 23-4-201, the Montana Lottery began what is called Montana Sports Action. The Board of Horse Racing may also use the funds raised in other ways to stimulate horse racing in Montana. The State of Montana allows a variety of sports gambling, including the popular fantasy sports leagues, sports tab games, sports pools, and Calcutta pools. In the fourth quarter of 2012 alone, the Montana Department of Justice reported that they collected over \$14 million in taxes solely from video gambling machines.”).
87. *See generally id.* at 40–41 (Nevada legalized sports betting in 1975. The goal was to create “thousands” of jobs and bring “millions” of tourists to the state. “This new law became the standard for Nevada casinos, as nearly every casino in Las Vegas contains a sports book. After the new law was passed, sports betting boomed and by 2004, sports books were nearly everywhere. In 2012, gross revenue for Nevada’s sports books was \$170 million.”).
88. *See generally id.* at 42–43 (“An amendment to the Oregon Constitution, approved by 66% of the voters in the 1984 election, created the Oregon Lottery. In 1989, the lottery began Sports Action and began allowing participants to bet on NFL football games. When Congress banned sports gambling under PASPA, Oregon was privileged to continue the game because they were grandfathered in. game. [sic] Oregon lawmakers ended Sports Action after the 2006–07 NFL season, in hopes of hosting the NCAA Men’s Division I Basketball Championship games. Thus, Oregon was forced to forgo its revenue producing activity in order to maintain the good graces of the NCAA.”).
89. *See* Ronald J. Rychlak, *A Bad Bet: Federal Criminalization of Nevada’s Collegiate Sports Books*, 4 NEV. L.J. 320, 323 (2004).
90. Buckstaff, *supra* note 84, at 141.
91. *Id.*
92. *Id.*
93. *See, e.g.*, Michael Levinson, *A Sure Bet: Why New Jersey Would Benefit from Legalized Sports Wagering*, 13 SPORTS L.J. 143, 169 (2006).
94. Buckstaff, *supra* note 84, at 142.
95. *Id.*
96. *Id.*

gued that a repeal of PASPA was necessary.⁹⁷ In *Murphy*,⁹⁸ the Supreme Court ruled that PASPA was unconstitutional.

D. *Murphy v. National Collegiate Athletic Association*

On December 4, 2017, the Supreme Court heard New Jersey's challenge to PASPA.⁹⁹ The question presented to the Supreme Court was whether the federal government had commandeered the regulatory power of the states by prohibiting the modification or repeal of certain state statutes.¹⁰⁰ Specifically, whether PASPA can indirectly prohibit the States from modifying or repealing their sports wagering laws.¹⁰¹ In support of New Jersey's constitutional challenge, Nebraska and seventeen other states filed briefs of amici curiae.¹⁰²

The Supreme Court held that the intent of PASPA was to prohibit the states from modifying or repealing their sports wagering laws.¹⁰³ In addition, the Court stated that PASPA commandeered the states' regulatory powers¹⁰⁴ and did not qualify for preemption under the Supremacy Clause.¹⁰⁵ Consequently, Congress overstepped its constitutional powers, thus rendering PASPA, in its entirety, unconstitutional.¹⁰⁶

1. *The Meaning of PASPA's Authorization Provision*

Before determining constitutionality, the Supreme Court had to determine the meaning of the word "authorize" in the context of PASPA.¹⁰⁷ PASPA provides no state can "authorize" sports "betting, gambling, or wagering."¹⁰⁸ Therefore, the meaning of "authorize" plays a key role in determining whether PASPA is constitutional.¹⁰⁹

The states argued that "authorize" had a broad meaning and was synonymous with the word "permit."¹¹⁰ The states contended that "any state law that ha[d] the effect of permitting sports gambling, in-

97. *Id.*

98. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1466 (2018).

99. See SUPREME COURT OF THE U.S. GRANTED & NOTED LIST OCTOBER TERM 2017 CASES FOR ARGUMENT (June 28, 2018), <https://www.supremecourt.gov/orders/17grantednotedlist.pdf> [<https://perma.unl.edu/ZZS7-288D>].

100. Brief of Amici Curiae States of W. Va., 17 Other States, and the Governors of Ky., Md., and N.D. in Support of Petitioners at i, *Christie v. Nat'l Collegiate Athletic Ass'n*, 137 S. Ct. 2327 (2017) (No. 16-476).

101. *Id.*

102. *See id.*

103. *See Murphy*, 138 S. Ct. at 1466.

104. *See id.* at 1466-67.

105. *See id.* at 1467.

106. *Id.*

107. *See id.* at 1473.

108. *See* 28 U.S.C. § 3702 (1992).

109. *Murphy*, 138 S. Ct. at 1473.

110. *Id.*

cluding a law totally or partially repealing a prior prohibition, amount[ed] to an authorization.”¹¹¹ This interpretation, the states argued, would amount to PASPA’s violation of the Constitution, by commandeering the states’ regulatory powers.¹¹² In response, the sports leagues argued the word should be interpreted more narrowly.¹¹³ They argued it required an affirmative act.¹¹⁴ “To authorize, they maintain[ed], means ‘[t]o empower; to give a right or authority to act; to endow with authority.’”¹¹⁵ Thus, PASPA’s anti-authorization provision allowed the states to fully repeal sports betting laws but did not allow the states to partially repeal them.¹¹⁶ Partial repeal, the sports leagues contended, gave preferred treatment to certain entities over others which empowered those certain entities.¹¹⁷ Consequently, a partial repeal that empowered certain entities amounted to an affirmative action.¹¹⁸ Therefore, an affirmative action in the form of a partial repeal was a violation of PASPA.¹¹⁹

The Supreme Court agreed with the states’ interpretation of the word authorize. In reaching its conclusion the Court took an originalist approach,¹²⁰ focusing on the states’ legal landscape at the time of PASPA’s adoption.¹²¹ At that time, sports wagering was illegal in the great majority of states.¹²² Therefore, any type of repeal, partial or full, would lead one to believe that sports wagering had been “permitted.”¹²³ In drawing this conclusion the Court noted the interplay between authorization and prohibition:

The concept of state “authorization” makes sense only against a backdrop of prohibition or regulation. A State is not regarded as authorizing everything that it does not prohibit or regulate. No one would use the term in that way. For example, no one would say that a State “authorizes” its residents to brush their teeth or eat apples or sing in the shower. We commonly speak of state authorization only if the activity in question would otherwise be restricted.¹²⁴

111. *Id.*

112. *See id.* at 1478.

113. *Id.* at 1473.

114. *Id.*

115. *Id.*

116. *See id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 VAND. J. TRANSNAT’L L. 1239, 1248 (2011). Originalism refers to a method of interpretation whereby one seeks to uncover the meaning of a provision at the time it was enacted.

121. *Murphy*, 138 S. Ct. at 1474.

122. *Id.*

123. *See id.*

124. *Id.*

Additionally, the Court concluded that Congress intended to prohibit sports wagering at the time of PASPA's enactment.¹²⁵ In the spirit of originalism, Congress's intent plays an important role in interpreting the word "authorize." Although the sports leagues contended a more complex interpretation was needed, the Court concluded that it was "improbable that Congress meant to enact such a nebulous regime."¹²⁶ Furthermore, the interpretation of the word "authorize" by the sports leagues "not only ignores the situation that Congress faced when it enacted PASPA but also leads to results that Congress is most unlikely to have wanted."¹²⁷

2. *The Anticommandeering Doctrine*

The Court held PASPA violated the anticommandeering doctrine implicit in the United States Constitution by prohibiting the states from authorizing sports wagering.¹²⁸ The anticommandeering doctrine prevents the Federal Government from commandeering the states' legislative processes to enact, enforce, or prohibit certain acts.¹²⁹ The doctrine is important for three reasons. First, it serves as a protection of liberty implicit to the Constitution.¹³⁰ Second, the doctrine promotes political accountability by making clear the responsibility of state and federal governments.¹³¹ Finally, it prevents Congress from shifting the costs of its programs and regulations onto the states.¹³² Ultimately, the doctrine makes clear "Congress may not simply commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."¹³³

Accordingly, Justice Alito's opinion for the majority was a scorching rebuke of PASPA and its prohibition on sports wagering:

The PASPA provision at issue here—prohibiting state authorization of sports gambling—violates the anticommandeering rule. That provision unequivocally dictates what a state legislature may and may not do. And this is true under either our interpretation or that advocated by respondents and the United States. In either event, state legislatures are put under the direct control of Congress. It is as if federal officers were installed in state legislative

125. *See id.* at 1474–75.

126. *Id.* at 1475.

127. *Id.*

128. *Id.* at 1478.

129. *See id.* at 1477. *See also* *New York v. United States*, 505 U.S. 144, 166 (1992) ("We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.").

130. *See Murphy*, 138 S. Ct. at 1477.

131. *Id.*

132. *Id.*

133. *Id.* at 1477 (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)).

chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine.¹³⁴

In reaching this conclusion, the Court held that the federal government could not commandeer a state's legislative process by requiring action or *inaction*.¹³⁵ Ultimately, Justice Alito made clear that no federal regulatory scheme—including one that prohibits sports wagering—can be used to commandeer the states' legislative process. As a result, PASPA's provision prohibiting the states from authorizing sports wagering was held unconstitutional.

3. *The Supremacy Clause and Preemption*

Moreover, the Court held in *Murphy* that PASPA cannot preempt state law via the Supremacy Clause because PASPA does not meet the preemption requirements of the Constitution.¹³⁶ The Supremacy Clause of the Constitution is a rule that requires federal law preempt state law in matters of conflict.¹³⁷

To qualify for preemption, a federal law must meet two requirements: (1) it must be within Congress's constitutional power, and (2) it must govern private actors, since the Constitution does not confer upon Congress the power to regulate states.¹³⁸ Furthermore, the Supreme Court has identified three types of preemption based on these requirements.¹³⁹ Each works in a similar manner, whereby "Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted."¹⁴⁰ The three types of preemption are: conflict preemption, express preemption, and field preemption.¹⁴¹ Regardless of the various types of preemption, a provision must first meet the original two requirements of the Supremacy Clause.

134. *Id.* at 1478.

135. *See id.* at 1479 ("In sum, none of the prior decisions on which respondents and the United States rely involved federal laws that commandeered the state legislative process. None concerned laws that directed the States either to enact or to refrain from enacting a regulation of the conduct of activities occurring within their borders. Therefore, none of these precedents supports the constitutionality of the PASPA provision at issue here.")

136. *See id.*

137. *Id.*

138. *Id.*

139. *Id.* at 1480. *See also* *English v. Gen. Elec. Co.*, 496 U.S. 72, 78–79 (1990) (explaining that federal law preempts state law when (1) Congress intends the federal law to preempt state law, (2) state law attempts to preside in a field that Congress intended federal law to solely occupy, and (3) state and federal law are actually in conflict).

140. *Murphy*, 138 S. Ct. at 1480.

141. *See id.*

PASPA's provision prohibiting the states from authorizing sports wagering does not meet the two Supremacy Clause requirements, and thus, cannot preempt state law.¹⁴² The Court illustrated this principle by explaining that if a private citizen or company began a sports wagering operation PASPA would not provide the Attorney General with grounds for a civil action.¹⁴³ "[T]here is simply no way to understand the provision prohibiting state authorization as anything other than a direct command to the States. And that is exactly what the anticommandeering rule does not allow."¹⁴⁴

4. *The Severability Doctrine*

The unconstitutional provision of PASPA is not severable from any other provision in its statute.¹⁴⁵ The provision violates the anticommandeering doctrine and fails to meet the requirements of preemption.¹⁴⁶ After determining a statutory provision is unconstitutional, it is necessary for the Court to consider if other provisions of the statute may still be salvaged to save the law.¹⁴⁷

"Severability is usually an afterthought, a sifting through the statutory rubble to salvage whatever survives a ruling that part of the law is unconstitutional."¹⁴⁸ In this respect, the Court must decide what to do with the remainder of a statute when one or more provisions are found to be unconstitutional.¹⁴⁹ The Court may find an unconstitutional provision could be eliminated while leaving the remainder of the statute in effect or it may strike down the statute in its entirety.¹⁵⁰

Justice Alito, writing for the majority, stated that PASPA must be struck down in its entirety for three reasons. First, "[i]f the provisions prohibiting state authorization and licensing are stricken but the prohibition on state 'operat[ion]' is left standing, the result would be a scheme sharply different from what Congress contemplated when PASPA was enacted."¹⁵¹ According to Justice Alito, it would be "most unlikely" that Congress would have wanted PASPA to legalize sports wagering amongst private enterprise.¹⁵² This would be counterintui-

142. *Id.* at 1481 (noting that it is impossible to read PASPA's anti-authorization provision as a preemption "because there is no way in which this provision can be understood as a regulation of private actors.").

143. *Id.*

144. *Id.*

145. *Id.* at 1484.

146. *Id.* at 1481.

147. *See id.*

148. John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 204 (1993).

149. *See Murphy*, 138 S. Ct. at 1482.

150. *Id.*

151. *Id.*

152. *Id.*

tive to PASPA's purpose, which regarded private gambling enterprises, like casinos, as more harmful than their state sponsored counterparts.¹⁵³ Second, Congress would not have wanted to sever the provisions that prohibited private enterprise "from 'sponsor[ing],' 'operat[ing],' or 'promot[ing]'" sports wagering either.¹⁵⁴ Third, the provision prohibiting the "advertis[ing]" of sports wagering must also fall because it is unlikely that Congress would have wanted it to remain without the rest of the statute.¹⁵⁵

The majority determined that no provision of PASPA was severable without defeating the purpose of the statute. Consequently, the Court struck down PASPA in its entirety. Nevertheless, the legalization of sports gambling is still controversial.¹⁵⁶

III. SPORTS GAMBLING IN NEBRASKA

Nebraska should legalize and regulate sports gambling. The Nebraska Constitution generally bans gambling throughout the state.¹⁵⁷ However, there are exceptions for charitable gaming,¹⁵⁸ state lotteries,¹⁵⁹ and pari-mutuel betting on horse racing.¹⁶⁰ Sports gambling should be added to the state's constitutional exceptions. First, this Part examines the various ways the Nebraska Constitution can be amended to add sports gambling to its exceptions. Next, it discusses interstate pressure and the reasons why sports gambling should be added as a constitutional exception. Finally, this Part proposes the creation of the Nebraska Gaming Commission—a regulatory body under the Nebraska Department of Revenue that also supports the Nebraska Gamblers Assistance Program.

A. Constitutional Referendum

There are three ways to change the Nebraska Constitution to legalize sports gambling: (1) a constitutional amendment proposed by the

153. *Id.*

154. *Id.* at 1483.

155. *Id.* at 1484.

156. *Id.* at 1484–85 ("The legalization of sports gambling requires an important policy choice, but the choice is not ours to make. Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own. Our job is to interpret the law Congress has enacted and decide whether it is consistent with the Constitution. PASPA is not. PASPA 'regulate[s] state governments' regulation' of their citizens. The Constitution gives Congress no such power.") (citation omitted).

157. NEB. CONST. art. III, § 24.

158. See NEB. REV. STAT. §§ 9-201 to 9-266; 9-301 to 9-356; 9-401 to 9-437; 9-601 to 9-653 (Reissue 2012) (authorizing certain charitable gaming, such as bingo, pickle cards, and keno).

159. See NEB. REV. STAT. §§ 9-801 to 9-842 (Reissue 2012).

160. See NEB. REV. STAT. §§ 2-1201 to 2-1247 (Reissue 2012).

legislature, (2) a constitutional amendment proposed by the state citizens, or (3) a constitutional convention where a revision, amendment, or change is made to the Constitution.

First, Nebraska can legalize sports gambling if the legislature proposes a constitutional amendment. This is the customary method for amending the Nebraska Constitution as laid out in Article XVI, § 1.¹⁶¹ It provides that legislative amendments can be adopted if 60% of the state legislature votes in favor of the amendment.¹⁶² The legislature can then call for a special statewide election to present the proposed amendment to the voters.¹⁶³ If they do not call for a special election, the proposed amendment must go on the next general election ballot.¹⁶⁴ The amendment becomes part of the constitution if it wins by a majority and receives at least 35% of votes from those voting in an election for any office.¹⁶⁵

Second, Nebraska can legalize sports gambling with a proposed constitutional amendment from the public. Known as the petition method, the rules require signatures from at least 10% of the state's registered voters for the proposed amendment to be placed on the ballot.¹⁶⁶ Groups in Nebraska have already begun the process of gathering signatures.¹⁶⁷ ABC News Channel 8 estimates that a proposal would need 110,000 signatures to be placed on the ballot.¹⁶⁸ If the required number of signatures is gathered, the ballot would be provided in the Nebraska 2020 general election.

Third, Nebraska can legalize sports gambling through a constitutional convention whereby a revision, amendment, or change is made to the constitution. A constitutional convention is difficult to convene because 60% of the legislators are required to approve of the proposed convention.¹⁶⁹ The question then goes to the public, where it must win by a majority and receive at least 35% of those voting in an election for

161. NEB. CONST. art. XVI, § 1.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. NEB. CONST. art. III, §§ 2, 4.

167. *See, e.g.,* Paul Hammel, *Ho-Chunk, Horsemen Launch Another Petition Drive to Allow Casinos, Possibly Sports Betting, in Nebraska*, BH NEWS SERV. (Aug. 17, 2018), https://www.nonpareilonline.com/news/region/ho-chunk-horsemen-launch-another-petition-drive-to-allow-casinos/article_777af6d6-678e-55a5-91c3-885dc93de376.html [<https://perma.unl.edu/ZZS7-288D>] (explaining that Nebraska horsemen will partner with Ho-Chunk Inc. to “seek to place [sports gambling] on the 2020 ballot and would involve gathering tens of thousands of signatures beginning next year.”).

168. *See* Joe Harris, *Nebraska Sees Push to Legalize Sports Betting: Nebraskans May Soon Be Able to Bet on Sports*, ABC 8 KLKN-TV (May 18, 2018, 8:47 PM), <http://www.klkntv.com/story/38227934/nebraska-sees-push-to-legalize-sports-betting> [<https://perma.unl.edu/RQC6-DGPA>].

169. NEB. CONST. art. XVI, § 2.

any office.¹⁷⁰ After the convention is approved and initiated, voters must still ratify any and all amendments proposed to the constitution.¹⁷¹

Ultimately, the people of Nebraska will get to decide if sports gambling becomes legal—all three pathways require their approval. In this respect, it only makes sense that a constitution for the people, must be made, approved, and ratified by the people.

B. Interstate Pressure

The legalization of sports gambling in nearby states like Iowa will create economic pressure for Nebraska to do the same. As noted by Nebraska State Senator Tyson Larson, “We are surrounded by states that have legalized gambling. Over 90 percent of Nebraskans live within 70 miles of a casino. We have all the social problems, but none of the economic benefit, and that’s a problem.”¹⁷² Union Gaming Analytics determined that “Nebraskans generated nearly \$327 million in gross revenue for Iowa casinos” in 2014.¹⁷³ They also accounted for nearly 25% of all customers at those casinos.¹⁷⁴ “It’s a tremendous loss that we experience, in terms of taxes,” said Senator Paul Schumacher.¹⁷⁵ Recognizing the revenue potential, many state lawmakers have moved to legalize and regulate sports gambling.¹⁷⁶

However, the sports betting landscape may change as more states introduce, debate, and pass legislation to permit sports gambling. According to Chris Grove, a gaming-industry expert, “you’re looking at a few distinct waves’ in how states will proceed” with legislation.¹⁷⁷ The first wave comprises those states that already had bills drafted, and were just waiting for a favorable Supreme Court decision.¹⁷⁸ The second wave is “a slightly larger set of states whose legislatures are still

170. *Id.*

171. *Id.*

172. Carly Jensen, *Small Possibility of Sports Betting Coming to Nebraska*, 1011 NOW (May 14, 2018, 10:32 PM), <https://www.1011now.com/content/news/Small-possibility-of-sports-betting-coming-to-Nebraska-482616131.html> [https://perma.unl.edu/2YF2-LP7D].

173. Associated Press, *Report: Nearly a Quarter of Iowa’s Casino Revenue Last Year Came from Nebraska Residents*, FOX BUS. (June 23, 2014), <https://www.foxbusiness.com/markets/report-nearly-a-quarter-of-iowas-casino-revenue-last-year-came-from-nebraska-residents> [https://perma.unl.edu/3ELX-3K56].

174. *Id.*

175. *Id.*

176. See Steve Berkowitz & Tom Schad, *Your State-By-State Guide to Sports Betting in Light of Supreme Court Ruling*, USA TODAY (May 14, 2018, 7:47 PM), <https://www.usatoday.com/story/sports/2018/05/14/sports-gambling-status-every-state-after-supreme-court-ruling/607334002/> [https://perma.unl.edu/5V2U-3PCM].

177. Berkowitz & Schad, *supra* note 176.

178. *Id.*

in session and have sports-betting bills pending.”¹⁷⁹ The third wave will likely be the largest, according to Grove, waiting until 2019 to begin their legislative process.¹⁸⁰ However, “[h]ow, and when, states move on this ‘will be heavily influenced by the actions of neighboring states,’” he added.¹⁸¹

Thus, the national regulatory landscape for sports betting may be uncertain and evolving, but it is clearly trending toward legalization.¹⁸² For states like Nebraska that prohibit full-blown sports betting,¹⁸³ old laws would need to be repealed or amended before sports betting would be allowed.¹⁸⁴ If states choose to permit sports betting they must carefully draft legislation and regulation to reflect their constituents’ values.¹⁸⁵ States must also weigh prohibition against the financial benefits from revenues derived from regulation.¹⁸⁶ These are difficult decisions. Indeed, as the gaming industry’s prediction suggests, these decisions may take some time.¹⁸⁷ Nevertheless, because of *Murphy*, Nebraska must confront this new reality.

C. Reasons for Legalization

Many states and lawmakers are now discussing the benefits of legalizing sports betting. For Nebraska, the legalization of sports betting has numerous economic incentives and public support. Potential concerns can also be offset with strong integrity standards and regulations. On balance, the legalization of sports betting in Nebraska would be a good bet for the good life.

179. *Id.*; Tribune News Serv., *Show Me The Money: Sports Betting Off And Running*, FOSTERS.COM (Sept. 15, 2018), <http://www.fosters.com/zz/news/20180915/show-me-money-sports-betting-off-and-running> [https://perma.unl.edu/HKR5-R5QZ] (including New York, Pennsylvania, Rhode Island, and Montana).

180. Berkowitz & Schad, *supra* note 176.

181. *Id.*

182. *See id.*

183. NEB. CONST. art. III, § 24.

184. Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every State Stands*, ESPN (Dec. 30, 2019) http://www.espn.com/chalk/story/_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states [https://perma.unl.edu/8RCD-Y36U].

185. *See generally* Cindy Lange-Kubick, *What Are the Odds of Sports Gambling Becoming Legal in Nebraska?*, LINCOLN J. STAR (May 14, 2018), https://journalstar.com/news/state-and-regional/govt-and-politics/what-are-the-odds-of-sports-gambling-becoming-legal-in/article_49d5e1c7-c523-5f41-a698-d96aec2d31ee.html [https://perma.unl.edu/2WTN-C2GP].

186. *Id.*

187. Rodenberg, *supra* note 184.

1. *Economic Incentives*

There are major economic incentives for Nebraska to legalize sports gambling. Most importantly, sports gambling represents a new stream of revenue that can be used to offset the state's growing deficit.

A growing state deficit demands the legalization of an existing market to raise revenues. During the last five years, Nebraska's revenues have remained consistent while its expenditures have continued to grow.¹⁸⁸ Consequently, the state continues to have budget deficits.¹⁸⁹ In 2017, expenditures outpaced revenues by \$120 million.¹⁹⁰ That number was expected to grow to \$173 million by the end of 2018.¹⁹¹ As a result, lawmakers believe their choices are to make spending cuts or draw from the state's cash reserve.¹⁹² However, Nebraska's lawmakers actually have another option—they can create a new stream of revenue.¹⁹³ More specifically, lawmakers can create a new stream of revenue by legalizing sports gambling.¹⁹⁴ Sports gambling allows the state to take advantage of an already-existing market through reasonable taxation and license availability.¹⁹⁵ Therefore, the legalization of sports gambling creates a new stream of revenue that lawmakers could use to offset growing deficits.¹⁹⁶

At the time PASPA was enacted it was estimated that the U.S. sports gambling market produced \$40 billion annually.¹⁹⁷ Today, that same market is estimated to produce \$140 billion to \$400 billion annu-

188. STATE OF NEB. DEPT. OF ADMIN. SERVS., ANNUAL BUDGETARY REPORT: FOR THE YEAR ENDED JUNE 30, 2017, at 4–5, <http://das.nebraska.gov/accounting/budrep/buddoc17.pdf> [<https://perma.unl.edu/65AY-8L6K>].

189. See Emily Nitcher, *Nebraska Legislature Faces Smaller Budget Gap than Last Year, but Decisions Will Be Tougher*, OMAHA WORLD-HERALD (Jan. 1, 2018), https://www.omaha.com/news/legislature/nebraska-legislature-faces-smaller-budget-gap-than-last-year-but/article_7502d40e-cf97-5578-bb67-ca4b8ef69b73.html [<https://perma.unl.edu/6QFB-RWFR>].

190. STATE OF NEB. DEP'T OF ADMIN. SERVS., *supra* note 188, at 4–5.

191. Nitcher, *supra* note 189.

192. See *id.*

193. See Lange-Kubick, *supra* note 185.

194. *Id.* (“Global Market Advisors . . . estimates Nebraska could see as much as \$47 million in revenue if sports gambling were legalized here.”).

195. See generally Michelle Minton, *Legalizing Sports Betting in the United States: A Playbook for State Liberalization and Regulation*, COMPETITIVE ENTER. INST. (Mar. 15, 2018), <https://cei.org/content/legalizing-sports-betting-united-states> [<https://perma.unl.edu/BD2Z-QAL7>] (explaining the benefits of sports gambling to state legislatures and their constituents).

196. *Id.*

197. Michelle Minton, *Let States Regulate Sports Gambling Within Their Borders: Constitutional Principles at Stake in Supreme Court Case Christie v. NCAA*, COMPETITIVE ENTER. INST. (Oct. 17, 2017), <https://cei.org/content/let-states-regulate-sports-gambling> [<https://perma.unl.edu/5NMY-JTEP>].

ally.¹⁹⁸ Nebraska has 0.6% of the U.S. population, which translates to a conservative market size of over \$900 million annually.¹⁹⁹ In addition, Global Market Advisors suggest that Nebraska could bring in close to \$50 million of revenue annually from that market.²⁰⁰

However, some worry that the economic incentives may be outweighed by their social costs. On these grounds, Governor Pete Ricketts opposes the legalization of sports gambling.²⁰¹ According to Ricketts, any revenue derived from sports gambling is outstripped by its social costs, by a ratio of at least 3-to-1.²⁰² However, critics note that Nebraskans will continue to gamble regardless of Ricketts's opinion and that legalization could provide better funding to existing social programs.²⁰³ Consequently, if Nebraskans continue to gamble, all parties are likely best served through legalization.²⁰⁴

2. Public Support

Public support for ending the prohibition on sports gambling is strong for three principal reasons: (1) public sentiment supports sports gambling, (2) sports gambling would create employment opportunities, and (3) it provides a safer alternative to the black market.

First, public sentiment supports the legalization of sports gambling. In fact, 60% of Americans approve of sports gambling.²⁰⁵ Furthermore, a 2017 University of Massachusetts Lowell poll found that only 33% of Americans oppose sports gambling.²⁰⁶ This is in sharp contrast to PASPA's enactment, when 56% of Americans were op-

198. *Id.*; see also *Other Voices: Nebraska Should Legalize Sports Betting Following Court Decision*, SIOUX CITY J. (May 29, 2018), https://siouxcityjournal.com/other-voices-nebraska-should-legalize-sports-betting-following-court-decision/article_c79cc39e-df40-5266-a2a5-40712e218e5f.html [<https://perma.unl.edu/M9BL-4FCF>] [hereinafter *Other Voices*] (“The American Gaming Association estimates that Americans illegally wager \$150 billion a year.”).

199. *Id.*

200. *Id.*

201. Lange-Kubick, *supra* note 185.

202. *Other Voices*, *supra* note 198. *But see* Associated Press, *supra* note 173 (explaining that state senators, such as Senator Russ Karpisek, have challenged Governor Ricketts by pointing to the state deficit) (“[W]e sit here [in Nebraska] and complain about property taxes, and this is something that we can do about it. But no, we’re not even going to look at it. It makes no sense . . .”).

203. *Other Voices*, *supra* note 198.

204. See Lange-Kubick, *supra* note 185.

205. National Research Group, *National Research Group (NRG) Releases Polling Data on Attitudes Towards Sports Gambling in the Wake of Supreme Court Decision and on the Eve of Game 4 of NBA Finals*, CISION: PR NEWSWIRE (June 8, 2018), <https://www.prnewswire.com/news-releases/national-research-group-nrg-releases-polling-data-on-attitudes-towards-sports-gambling-in-the-wake-of-supreme-court-decision-and-on-the-eve-of-game-4-of-nba-finals-300662457.html> [<https://perma.unl.edu/9RJZ-8PDR>].

206. Minton, *supra* note 195.

posed.²⁰⁷ Indeed, roughly 60% of Nebraskans also approve of sports gambling.²⁰⁸ This rise in popularity is likely correlated to a rise of user activity. For example, a 2008 Gallup poll suggested that one in six Americans gamble on professional sports every year.²⁰⁹ By 2016, that number doubled to one in three.²¹⁰ As a result, sports gambling has become a popular, accepted activity that could provide a new stream of revenue for Nebraska.

Second, the legalization of sports gambling would create jobs in Nebraska. In fact, with favorable tax and licensing conditions, Oxford Economics predicts Nebraska would gain 1,248 jobs.²¹¹ Those jobs would create over \$55 million dollars of labor income.²¹² In addition, the economic impact from those jobs would result in over \$212 million in sales and \$118 million in state GDP.²¹³ The result is approximately \$50 million dollars of direct revenue to the state.²¹⁴ Moreover, legalized sports gambling would lead to indirect job growth. These jobs would not just be in the sports gambling industry.²¹⁵ By legalizing sports gambling, ancillary jobs would be needed to support the industry, which may include, for example, graphic designers, web specialists, telephone operators, accountants, and lawyers.²¹⁶ This demand could lead to hundreds, or even thousands of jobs, depending on the market,²¹⁷ directly contributing to Governor Pete Ricketts's declaration that "[o]ur mission is to grow Nebraska and create more and better paying jobs."²¹⁸

207. *Id.*

208. See Joe Harris, *Nebraska Sees Push to Legalize Sports Betting: Nebraskans May Soon Be Able to Bet on Sports*, ABC 8 KLKN-TV (May 14, 2018), <http://www.klkn.tv.com/story/38227934/nebraska-sees-push-to-legalize-sports-betting> [https://perma.unl.edu/5L9R-K76R] (statement of Senator Paul Schumacher) ("I have seen a good statistical analysis of the mentality of the voters towards expanded gambling in general and it's pushing 60 percent.").

209. Minton, *supra* note 195.

210. *Id.*

211. ECONOMIC IMPACT OF LEGALIZED SPORTS BETTING, OXFORD ECONOMICS 50 (May 2017), <https://www.americangaming.org/sites/default/files/AGA-Oxford%20-%20Sports%20Betting%20Economic%20Impact%20Report1.pdf> [https://perma.unl.edu/D56M-T8B6].

212. *Id.*

213. *Id.*

214. *See id.*

215. Andrew Vacca, *Sports Betting: Why the United States Should Go All in*, 11 WIL-LAMETTE SPORTS L.J. 1, 10 (2014).

216. *Id.* at 11.

217. *See id.* at 10.

218. Jerry Purvis, *Gov. Pete Ricketts: 'When We're Known as a State Where People Can Do Business, Companies Will Invest in Us'*, STAR-HERALD (Sept. 21, 2018), https://www.starherald.com/news/local_news/gov-pete-ricketts-when-we-re-known-as-a-state/article_024b2415-510d-5e12-a89f-1935a9a982b1.html [https://perma.unl.edu/83UM-XYX4].

Third, the legalization of sports gambling would provide a safer alternative to the black market. Indeed, the prohibition on sports gambling created a vast underground black market.²¹⁹ This market continued to grow in spite of PASPA.²²⁰ The black market's growth is almost certainly a reflection of public sentiment.²²¹ That sentiment is verified by the market's size, where \$150 billion is wagered annually.²²² Absent proper regulation, organized crime syndicates will continue to thrive, especially as public sentiment continues to favor and fund illegal sports gambling.²²³ However, the legalization of sports gambling would offer Nebraskans a safer alternative where operators adhere to regulations, consumer protections, and other safeguards.²²⁴ Thus, legalizing sports gambling would allow Nebraska lawmakers to capture the black market, regulate it properly, and better align with public sentiment.²²⁵

3. *Consumer Protection*

Integrity standards can minimize concerns over legalizing sports gambling by protecting (1) young people and those suffering from addiction, (2) the public's confidence that games are free of corruption, and (3) consumers and individuals placing bets.

First, integrity standards must include regulation and protection for young people and those suffering from addiction. This was a primary reason for the enactment of PASPA.²²⁶ A gambling commission study verified this concern, finding that "the percentages of pathological and problem adolescent gamblers consistently doubled those of the adult population."²²⁷ Furthermore, sports gambling serves as a gateway to other forms of gambling.²²⁸ Accordingly, Nebraska should include a prohibition of gambling by persons under the age of 21,²²⁹ a prohibition on advertising that targets those under the age of 21, and a requirement that gambling entities provide information about the

219. Vacca, *supra* note 215, at 11.

220. *Id.* at 11.

221. *See id.* at 12.

222. *Other Voices, supra* note 198.

223. *Id.*

224. Minton, *supra* note 195.

225. *Id.*

226. S. REP. NO. 102-248, at 5 (1991).

227. John Warren Kindt & Thomas Asmar, *College and Amateur Sports Gambling: Gambling Away Our Youth?*, 8 VILL. SPORTS & ENT. L.J. 221, 234 (2002).

228. *Id.*

229. Senate Democratic Leader Charles E. Schumer, *Protecting the Games We Love After Murphy v. NCAA: A Federal Framework for Consumer Protection and Sports Integrity*, SENATE DEMOCRATS, https://www.democrats.senate.gov/imo/media/doc/Consumer_Protection_Sports_Integrity_Framework.pdf [https://perma.unl.edu/Y3ZZ-G5CB] (last visited Sept. 3, 2018).

dangers of addiction to those placing bets.²³⁰ Prominent members of the United States Senate have already endorsed this regulatory framework.²³¹

Second, integrity standards must protect the public's confidence that games are free of corruption. This was also a chief concern against which PASPA was meant to guard.²³² Indeed, sports and sports gambling have had an illustrious history together.²³³ Consequently, a strong state regulatory framework must require entities that accept bets to "share appropriate information in a timely fashion with the league or governing body of sport" and "[state] law enforcement or other appropriate oversight bodies."²³⁴ In addition, a strong state regulatory framework should require all leagues and sports to have "strong limitations and prohibitions on any athlete, coach, official, team, or league representative from taking a financial stake in any wager."²³⁵ Thus, a strong state regulatory framework supports the integrity of sports while alleviating the chief concerns of PASPA.

Third, integrity standards must be implemented to protect the individuals who place bets. In this respect, regulation should "lay out the administrative limits on sports wagering and the rights and limitations applicable to both the individual placing a wager on a sporting event and any [entity] that chooses to offer sports wagering."²³⁶ Administrative limits should include agreements between state and governing sports bodies detailing the types of bets allowed, how official league data is used, mechanisms for redressing consumers who are unfairly harmed by betting activities or fraudulent schemes, and restrictions for online and mobile betting to prevent unfair competitive advantages.²³⁷ Regulations should also include limits that prohibit betting on specific events, such as high school sports.²³⁸ By adding these restrictions, Nebraska can legalize sports gambling, protect consumers, and limit corruption.²³⁹

D. Proposed Oversight

A regulatory scheme for sports gambling would require (1) the creation of a state gaming commission, (2) the expansion of the Nebraska

230. *Id.*

231. *See id.*

232. Fielkow et al., *supra* note 3, at 30.

233. *See generally id.* (discussing the history of sports gambling and discussing various examples where sports gambling has corrupted the outcome of sport).

234. Schumer, *supra* note 229.

235. *Id.*

236. Levinson, *supra* note 93, at 157.

237. Schumer, *supra* note 229.

238. Levinson, *supra* note 93, at 168.

239. *See id.*

Department of Revenue, and (3) the support of the Nebraska Gamblers Assistance Program.

1. *Nebraska Gaming Commission*

Nebraska should create a gaming commission to manage and regulate the sports gambling industry. The primary purpose of the commission would be twofold: to protect consumers by enforcing regulations and to collect revenues. In this respect, Nebraska's gaming commission would be very similar to those of other states.²⁴⁰ However, to create a gaming commission, Nebraska's unicameral would have to authorize the commission through an act of legislation.²⁴¹ The proposed Act could read as follows:

The [Nebraska Gaming Commission] is created within the [Nebraska Department of Revenue]. The [Commission] shall have the powers and duties specified in this act and all other powers necessary and proper to fully and effectively execute and administer this act for the purpose of licensing, regulating, and enforcing the system of [sports gambling] established under this act.²⁴²

Furthermore, the commission should have the authority to enforce standards and regulations. An example would be the power to:

[I]nspect, examine, audit, impound, seize, or assume physical control of, or summarily remove from the premises all books, ledgers, documents, writings, photocopies, correspondence, records, videotapes, including electronically stored records, money receptacles, other containers and their contents, equipment in which the records are stored, or other gaming related equipment and supplies on or around the premises, including counting rooms.²⁴³

240. *See Nev. Gaming Control Bd.: New Legislator Training*, NEV. GAMING COMM'N STATE GAMING CONTROL BD. (Dec. 5, 2016), <https://www.leg.state.nv.us/Division/Research/LegInfo/Orientation/2016-17/Handouts/NGCB.pdf> [<https://perma.unl.edu/F3JN-WKJR>].

241. *See* NEB. REV. STAT. § 2-1201 (Reissue 2010).

242. MICH. COMP. LAWS § 432.204 (1997) (The Michigan Gaming Control Board was created under the oversight of the Michigan Department of Treasury. The creation of a Nebraska Gaming Commission would require similar structuring under its own Department of Revenue in order to maintain consistency with other authorized state gambling oversight. In addition, inherent to the creation of Michigan's Gaming Control Board is the power to oversee sports gambling activities. *Michigan Sports Betting*, THE LINES, <https://www.thelines.com/michigan/> [<https://perma.unl.edu/R6GC-XBZH>] (last visited Jan. 8, 2019)). *See also* NEV. REV. STAT. ANN. § 463 (1959) (detailing the purpose, scope, and powers of the Nevada Gaming Commission. Nevada's Gaming Commission has regulated sports gambling since 1955 and represents a historically proven approach to sports gambling regulation.). Thus, Michigan and Nevada provide excellent examples of legislative templates for Nebraska to follow.

243. MICH. COMP. LAWS § 432.204a (1997) (building on the 1955 statutory language granting power to the Nevada Gaming Commission). NEV. REV. STAT. ANN. § 463.140 (1955).

These types of powers would help the commission enforce standards and regulations to protect consumers.²⁴⁴ In addition, the commission should be responsible for implementing reasonable tax rates and licensing to maximize revenue.

Reasonable tax rates and licensing would allow operators to more easily adjust to legalization.²⁴⁵ If tax rates and licensing fees are too high, operators may choose not to do business in Nebraska.²⁴⁶ Also, if the number of licenses is too limited, operators may not have the ability to do business in Nebraska.²⁴⁷ Thus, the ideal tax rate, “in order to maximize tax revenue . . . is between 10 and 15 percent.”²⁴⁸ As tax rates rise above that threshold, tax revenue begins to fall sharply.²⁴⁹ In this respect, tax rates appear to be inelastic.²⁵⁰ In contrast, licensing fees appear to be very elastic and can vary substantially from state to state.²⁵¹ Thus, a proposed statutory language should provide:

[F]or the licensing, regulation, and control of [sports gambling] operations, manufacturers and distributors of gaming devices and gaming related equipment and supplies, and persons who participate in gaming; to provide the distribution of revenue for public education, public safety and economic development; authorizing limited [sports gambling] operations within the state of [Nebraska]; to vest authority for the licensing, regulation, and control of [sports gambling] in the [Nebraska Gaming Commission]; to restrict certain

244. See MICH. COMP. LAWS § 432.204a.

245. Minton, *supra* note 195.

246. See *id.* (“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.”).

247. *Id.*

248. *Id.*

249. *Id.*

250. See *id.*

251. See, e.g., Minton, *supra* note 195 (New Jersey: \$400,000 licensing fee, 17.5% tax on gross gaming revenue. New York: 10% tax on gross gaming revenue. Michigan: \$200,000 licensing fee, 10% tax on gross gaming revenue. Kentucky: \$250,000 licensing fee, taxes equal to 20% of handle. West Virginia: \$250,000 licensing fee, 10% tax on gross gaming revenue. Nevada: 1% licensing fee (on gross gaming revenue), 6.75% tax on gross gaming revenue above \$134,000 per month); Megan Stewart, *SCOTUS Gambling Ruling Doesn’t Change Sports Betting in Nebraska, Iowa*, 3 NEWS NOW (May 14, 2018), <https://www.3newsnow.com/news/local-news/gambling-commission-scotus-ruling-doesnt-change-sports-betting-in-iowa> [https://perma.unl.edu/MUN7-JMUE] (Iowa House Study Bill 592 proposed an 8% tax and \$25,000 licensing fee).

political contributions; to establish a code of ethics for certain persons involved in gaming; to create certain funds; to impose and authorize certain taxes and fees; to impose penalties; to authorize conservators under certain circumstances; and to make an appropriation.²⁵²

This language creates a regulatory body (the Nebraska Gaming Commission) that has the authority to enforce standards and regulations while also collecting revenues for the State.

2. *Nebraska Department of Revenue*

The Nebraska Department of Revenue would need to provide oversight for the newly formed Nebraska Gaming Commission. Oversight for the Nebraska Gaming Commission would be necessary to assist in collecting revenues. In addition, oversight of the Gaming Commission would be similar to the oversight of other gambling agencies, such as the Nebraska Lottery Division, Charitable Gaming Division, and Nebraska Racing Commission. All of these agencies are responsible for niche gaming markets such as charitable gaming,²⁵³ state lotteries,²⁵⁴ and pari-mutuel betting on horse racing.²⁵⁵ Ultimately, the Nebraska Department of Revenue provides oversight for these entities and their collection of revenue.²⁵⁶ For example:

The Nebraska Bingo Act, the Nebraska County and City Lottery Act, the Nebraska Lottery and Raffle Act, the Nebraska Pickle Card Lottery Act, the Nebraska Small Lottery and Raffle Act, and section 9-701 shall be administered and enforced by the Charitable Gaming Division of the Department of Revenue, which division is hereby created. The Department of Revenue shall make annual reports to the Governor, Legislature, Auditor of Public Accounts, and Attorney General on all tax revenue received, expenses incurred, and other activities relating to the administration and enforcement of such acts.²⁵⁷

In this respect, similar language should be proposed to allow the Department of Revenue to have oversight over the proposed Nebraska Gaming Commission.²⁵⁸ This oversight would allow the Department

252. MICH. COMP. LAWS §§ 432.1 to 432.278 (2017). Michigan enacted its Gaming Control Board to regulate casino gaming activities. Prior to its enactment, Michigan, like Nebraska, limited its gaming activities to pari-mutuel horseracing, state lottery, and charitable gaming. *See Michigan Gaming Summary*, UNIVERSITY OF NEVADA LAS VEGAS CENTER FOR GAMING RESEARCH, https://gaming.unlv.edu/abstract/mi_main.html [<https://perma.unl.edu/K939-4XGV>] (last visited Jan. 1, 2019). Thus, Nebraska should look to Michigan's statutory language as a model to follow when creating its own regulatory body.

253. *See* NEB. REV. STAT. §§ 9-201–9-266; §§ 9-301–9-356; §§ 9-401–9-437; §§ 9-601–9-653 (Reissue 2012). Charitable gaming consists mostly of bingo, pickle cards, and keno. *Id.*

254. *See* NEB. REV. STAT. §§ 9-801–9-842 (Reissue 2012).

255. *See* NEB. REV. STAT. §§ 2-1203–2-1246 (Reissue 2012).

256. NEB. REV. STAT. § 9-1,101 (2013).

257. *Id.*

258. *See id.*

of Revenue to provide direct assistance in revenue collection²⁵⁹ and would be similar to its oversight of other state gambling agencies.²⁶⁰

3. *Nebraska Gamblers Assistance Program*

The creation of the Nebraska Gaming Commission should include financial support for the Nebraska Gamblers Assistance Program. The Nebraska Gamblers Assistance Program was created to “counter the negative impact of gambling addiction with effective, evidence-based prevention and treatment services for Nebraskans and their families.”²⁶¹ Indeed, this effort has been codified, stating:

The Legislature finds that the main sources of funding for assistance to problem gamblers are the Charitable Gaming Operations Fund as provided in section 9-1,101 and the State Lottery Operation Trust Fund as provided in section 9-812. It is the intent of the Legislature that such funding be used primarily for counseling and treatment services for problem gamblers and their families who are residents of Nebraska.²⁶²

Therefore, under the Department of Revenue, the Charitable Gaming Division, and the State Lottery Division, revenues are collected to subsidize the Gamblers Assistance Program.²⁶³ Accordingly, the Nebraska Gaming Commission should do the same. In this respect, the legislature should adopt similar language to include the Nebraska Gaming Division as an agency that supports the Nebraska Gamblers Assistance Program.

IV. CONCLUSION

Nebraska should legalize and regulate sports gambling. The Supreme Court’s holding in *Murphy* makes clear that sports gambling is a state matter. Many states have already legalized sports gambling and are recognizing the benefits. For Nebraska, sports betting has economic incentives and public support. Potential concerns are offset by strong integrity standards and regulations. The creation of a gaming commission would help these efforts. Nevertheless, legalization and regulation can only occur with a state referendum. Thus, the people of Nebraska must decide. On balance, the legalization of sports gambling in Nebraska is a good bet for the good life.

259. *See id.*

260. *Id.*

261. *About Us*, NEB. GAMBLERS ASSISTANCE PROGRAM, <https://problemgambling.nebraska.gov/about-us> [<https://perma.unl.edu/H2KW-JEQ7>] (last visited Oct. 11, 2018).

262. NEB. REV. STAT. § 9-1001 (2013).

263. *See id.*