

# Passing the Ball: The United States Supreme Court Strikes Down PASPA and Throws Sports Gambling Back to State Legislatures

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## Comment

### PASSING THE BALL: THE UNITED STATES SUPREME COURT STRIKES DOWN PASPA AND THROWS SPORTS GAMBLING BACK TO STATE LEGISLATURES

HUNTER M. HAINES\*

Though largely banned throughout the early 1900s, gambling experienced a rebirth in the second half of the twentieth century.<sup>1</sup> Shortly after the 1988 Indian Gaming Regulatory Act,<sup>2</sup> however, federal legislators were worried that gambling would extend beyond traditional casino gambling and into the realm of sports, a possibility legislators unanimously opposed.<sup>3</sup> Sports gambling had long been opposed by many legislators fearing it would corrupt amateur and professional sports organizations.<sup>4</sup> Validating

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1. See *Murphy v. NCAA*, 138 S. Ct. 1461, 1469 (2018) (explaining the history of gambling in America) (first citing NAT. GAMBLING IMPACT STUDY COMM'N, FINAL REPORT 2-1 (1999)); then citing KATHRYN HASHIMOTO & STEVE DURHAM, *THE HISTORY OF GAMBLING IN AMERICA: BALANCING COST AND BENEFITS OF LEGALIZED GAMING* 34–35 (2010)).

2. 25 U.S.C. §§ 2701–2721 (2012) (allowing casinos to open on Indian land throughout the country).

3. S. REP. NO. 102-248, at 5, 8 (1991); see also Bill Brubaker, *Gambling and Sports a Growing Concern*, WASH. POST (July 15, 1990), [https://www.washingtonpost.com/archive/sports/1990/07/15/gambling-and-sports-a-growing-concern/a4039224-a501-49d6-8537-04ccf1a3e066/?utm\\_term=.b8d1906e3381](https://www.washingtonpost.com/archive/sports/1990/07/15/gambling-and-sports-a-growing-concern/a4039224-a501-49d6-8537-04ccf1a3e066/?utm_term=.b8d1906e3381) (discussing the growing concerns of legalized sports gambling in the 1990s).

4. S. REP. NO. 102-248, at 5. Sports betting scandals have long tested the integrity of professional and amateur sports leagues. See Ira Berkow, *Final Four: A Look Back; Scandal, the Unwanted Scar of Triumph*, N.Y. TIMES (Mar. 29, 1996), <https://www.nytimes.com/1996/03/29/sports/final-four-a-look-back-scandal-the-unwanted-scar-of-triumph.html?pagewanted=all&src=pm> (explaining how basketball players from City College of New York and at least six other collegiate institutions were suspected, and some convicted, of accepting bribes from gamblers not to throw games, but to keep them under the point spreads).

legislators' opposition and fear, several sports gambling scandals in the 1900s utilized bribery and extortion to compromise athletes.<sup>5</sup> For example, in 1919, eight Chicago White Sox players arranged with the nation's leading gamblers to manipulate the outcome of the World Series of Major League Baseball ("MLB") to guarantee and collect a lucrative payout—infamously becoming known as "The Black Sox."<sup>6</sup> Thus, in 1992, with the support of those opposing sports gambling, Congress passed the Professional and Amateur Sports Protection Act ("PASPA"),<sup>7</sup> a statute that prohibited wagering on amateur and professional sports.<sup>8</sup>

Section 3702 of PASPA made it "unlawful for a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact" any type of sports gambling scheme relating to amateur and professional sports leagues and for "a person to sponsor, operate, advertise, or promote" any such scheme "pursuant to the law or compact of a governmental entity."<sup>9</sup> While PASPA did not impose criminal penalties, the law gave professional and amateur sports organizations and the United States Attorney General standing to file civil actions to enjoin violators of Section 3702.<sup>10</sup>

The New Jersey legislature was the first to express opposition to PASPA. In 2012, the legislature explicitly authorized a sports gambling regime;<sup>11</sup> and in 2014, the legislature adopted a partial repeal of prohibitory sports gambling laws that were enacted prior to PASPA.<sup>12</sup> In response to these actions, professional and amateur sports leagues brought civil actions to enjoin New Jersey and prevailed.<sup>13</sup> In defense to both suits, New Jersey claimed that PASPA commanded the State to take an affirmative action, a violation of the Tenth Amendment's Anticommandeering Clause.<sup>14</sup> After

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5. *Id.*

6. See generally ELIOT ASINOF, *EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES* (1963) (telling the true story of eight Chicago White Sox players who rigged the World Series); see also Fred Mitchell, *Flashback: Story of 1919 Black Sox Scandal Still Resonates*, CHI. TRIB. (July 5, 2015), <http://www.chicagotribune.com/sports/baseball/whitesox/ct-flashback-buckweaver-black-sox-spt-0705-20150703-story.html> (explaining how eight Chicago White Sox "players had been charged with statutory conspiracy and common-law conspiracy to fix the outcome of the 1919 World Series").

7. 28 U.S.C. §§ 3701–3721 (2012).

8. *Id.*

9. *Id.* § 3702.

10. *Id.* § 3703.

11. Act of Jan. 17, 2012, ch. 231, § 5, 2011 N.J. Laws 1723 (repealed 2013).

12. *Id.*; see also Act of Oct. 17, 2014, ch. 62, § 5, 2014 N.J. Laws 602.

13. *NCAA v. Christie*, 926 F. Supp. 2d 551, 561–62 (D.N.J. 2013), *aff'd sub nom. NCAA v. Governor of N.J.*, 730 F.3d 208 (3d Cir. 2013); *NCAA v. Christie*, 61 F. Supp. 3d 488 (D.N.J. 2014), *aff'd sub nom. NCAA v. Governor of N.J.*, 832 F.3d 389 (2016).

14. *Christie*, 926 F. Supp. 2d at 561–62; *Christie*, 61 F. Supp. 3d at 499–501. In *New York v. United States*, 505 U.S. 144 (1992), the Court stated, "Congress may not simply 'commande[e]r

several attempts by New Jersey to challenge PASPA as a violation of the Tenth Amendment, the Supreme Court granted certiorari to New Jersey petitioners.<sup>15</sup>

In *Murphy v. NCAA*,<sup>16</sup> the Supreme Court of the United States ultimately ruled that PASPA violated the Anticommandeering Clause of the Tenth Amendment because it illegally empowered the federal government to order certain states to take specific actions to prohibit sports gambling.<sup>17</sup> The Court's ruling did not change the per se legality of sports gambling, but rather left legalization of sports gambling to the individual states.<sup>18</sup>

With sparse literature on the advantages and disadvantages of sports gambling from a state's perspective, this Comment will argue that states should assess the desirability of sports gambling by utilizing "race to the bottom" and "race to the top" state competition theories.<sup>19</sup> Applying these theories will uncover the particular advantages and disadvantages of sports gambling, thus giving rise to the necessary questions states should consider when deciding whether to legalize a sports gambling scheme.<sup>20</sup> Some

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the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 161 (alteration in original) (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981)); see *Printz v. United States*, 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."); Amy Howe, *The 10th Amendment, Anti-Commandeering and Sports Betting: In Plain English*, SCOTUSBLOG (Aug. 14, 2017, 12:19 PM), <http://www.scotusblog.com/2017/08/10th-amendment-anti-commandeering-sports-betting-plain-english/> ("[T]he Supreme Court has interpreted [the Anticommandeering Clause] to prohibit the federal government from 'commandeering' the states to enforce federal law."); see also *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018). *Murphy* explained that although the anticommandeering doctrine may sound arcane,

it is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States. When the original States declared their independence, they claimed the powers inherent in sovereignty—in the words of the Declaration of Independence, the authority "to do all . . . Acts and Things which Independent States may of right do." The Constitution limited but did not abolish the sovereign powers of the States, which retained "a residuary and inviolable sovereignty." Thus, both the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of "dual sovereignty."

*Murphy*, 138 S. Ct. at 1475 (quoting THE DECLARATION OF INDEPENDENCE para 32 (U.S. 1776); then quoting THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed. 1961); and then quoting *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)).

15. *Christie v. NCAA*, 138 S. Ct. 464 (2017) (granting certiorari to the Governor of New Jersey and the New Jersey Thoroughbred Horsemen's Association, Inc.).

16. 138 S. Ct. 1461, 1469 (2018).

17. *Id.* at 1484–85; see *infra* text accompanying notes 96–106.

18. See *infra* Section I.C.

19. See *infra* Section II.A (defining state competition theories as race to the bottom and race to the top).

20. See *infra* Sections II.A, II.C.

states, such as Delaware, New Jersey, West Virginia, and Pennsylvania, have already taken steps to legalize and regulate sports gambling.<sup>21</sup> This Comment, will focus on the State of Maryland, however, these competition principles can apply to all states.

In the assessment of whether to legalize sports gambling, Maryland is in a different position than most states because regardless of what side of the race to the bottom or race to the top theories one views Maryland falling into, Maryland is in a *prisoner's dilemma*.<sup>22</sup> Much like the classic example where one prisoner refrains from confessing while his accomplice does not, Maryland is positioning itself in what would be considered the harshest of sentences by not legalizing sports gambling because all but one of Maryland's border states have legalized sports gambling.<sup>23</sup> By failing to coordinate, or in this case compete, with neighboring states, Maryland is receiving suboptimal results when it comes to maximizing state revenue and general welfare.<sup>24</sup> To remedy the problem, Maryland should pass a bill legalizing sports gambling with a sunset provision and integrity fee.<sup>25</sup>

First, this Comment will examine the legal history of PASPA and its ultimate demise in the United States Supreme Court.<sup>26</sup> This Comment will

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21. *See infra* Section II.B.1.

22. *See Prisoner's Dilemma*, BLACK'S LAW DICTIONARY (10th ed. 2014). The prisoner's dilemma refers to:

A logic problem—often used by law-and-economic scholars to illustrate the effect of cooperative behavior—involving two prisoners who are being separately questioned about their participation in a crime, so that something like the following situation arises (1) if both confess, they will each receive a 5-year sentence; (2) if neither confesses, they will each receive a 3-year sentence; and (3) if one confesses but the other does not, the confessing prisoner will receive a 1-year sentence while the silent prisoner will receive a 10-year sentence. Each prisoner, reasoning only for himself, will thus find it in his interest to confess, though this causes both of them to receive longer sentences that they would have received if neither had talked.

*Id.*; *see also infra* Section II.D.

23. *But see infra* text accompanying notes 225–226.

24. *See infra* Section II.D.

25. *See Sunset Law*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“A statute under which a governmental agency or program automatically terminates at the end of a fixed period unless it is formally renewed.”). An integrity fee is similar to a tax that is paid by operators of sportsbooks to professional and amateur sports leagues for bearing the “risk and expense created by betting and [for] the commercial value [the] product creates for betting operators . . . . The money generated from such fees . . . would be used for bet monitoring and investigations along with education.” Matt Bonesteel, *Sports Gambling “Integrity Fee” Supporters Are Not Doing Themselves any Favors*, WASH. POST (May 22, 2018), [https://www.washingtonpost.com/news/early-lead/wp/2018/05/22/sports-gambling-integrity-fee-supporters-are-not-doing-themselves-any-favors/?utm\\_term=.ea442d338874](https://www.washingtonpost.com/news/early-lead/wp/2018/05/22/sports-gambling-integrity-fee-supporters-are-not-doing-themselves-any-favors/?utm_term=.ea442d338874) (quoting Dan Spillane, NBA Senior Vice-President and Assistant General Counsel); *see also Sportsbook*, OXFORD DICTIONARIES, <https://en.oxforddictionaries.com/definition/sportsbook> (last visited Dec. 21, 2018) (“An establishment that takes bets on sporting events and pays out winnings.”). An *operator* is synonymous with one who operates a casino, racetrack, or sportsbook. *See infra* Section II.D.

26. *See infra* Sections I.A–C.

then survey the Court's holding in *Murphy* and explain its effects on sports gambling.<sup>27</sup> Next, this Comment will lay the theoretical ground for why states should or should not legalize sports gambling.<sup>28</sup> Then, this Comment will analyze how states with legalized sports gambling, integrity fees, and the leagues' standpoint on integrity have an effect on the legalization of other states' sports gambling schemes.<sup>29</sup> Finally, this Comment will discuss how and why Maryland should be at the leading edge of sports gambling legislation instead of falling further behind in a race to the bottom or race to the top.<sup>30</sup>

## I. BACKGROUND

In general, sports gambling functions by a player (that is, a patron at a casino) betting against the sportsbook (that is, the casino operator) on a specific game or event.<sup>31</sup> One common sports bet involves betting against a "point spread."<sup>32</sup> This is where a player makes a bet against the point spread and in order to win the score must "cover the spread."<sup>33</sup> For example, if a player bets the Baltimore Ravens will win against the Pittsburgh Steelers, and the Ravens are a six point favorite to win, the Ravens must win by seven or more points in order for the score to "cover the spread" and for the player to win their bet. In this scenario the player is betting against the sportsbook to win.<sup>34</sup> Therefore, if the Steelers lose by exactly six points, the sports bet will result in what is called a "push," meaning neither the sportsbook nor the player wins or loses money.<sup>35</sup> If the Steelers lose by less than six points, or win, however, the sportsbook will win the money the player bet against it.<sup>36</sup>

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27. *See infra* Section I.C.

28. *See infra* Section II.A.

29. *See infra* Section II.B.

30. *See infra* Sections II.C–D.

31. *See generally Sports Betting*, VEGAS.COM, <https://www.vegas.com/gaming/gaming-tips/sports-betting/#football.html> (last visited Dec. 26, 2018) (explaining how to make various bets on sports).

32. *Point Spread*, DICTIONARY.COM, <https://www.dictionary.com/browse/point—spread> (last visited Dec. 21, 2018) ("[A] betting device, established by oddsmakers and used to attract bettors for uneven competitions, indicating the estimated number of points by which a stronger team can be expected to defeat a weaker team, the point spread being added to the weaker team's actual points in the game and this new figure then compared to the stronger team's points to determine winning bets.").

33. *See Sports Betting*, *supra* note 31 ("When betting on football, the team you bet on must 'cover the spread.' This means the team must win or not lose by a predetermined margin of points.").

34. *Id.*

35. *Id.*

36. *Id.*

This Section analyzes the provisions of PASPA, how they came to be, and what led to their ultimate demise. Section I.A discusses the legislative history of PASPA, its major limitations on sports gambling,<sup>37</sup> and the injunctive remedies it established.<sup>38</sup> Section I.B analyzes the New Jersey cases that eventually led to PASPA's downfall.<sup>39</sup> Finally, Section I.C examines the *Murphy v. NCAA* Court's reasoning in striking down PASPA.<sup>40</sup>

A. *PASPA: The Legislative Action to Stop the Spread of Gambling to Sports*

On January 1, 1993, PASPA went into effect.<sup>41</sup> The statute allowed the Attorney General of the United States, or a professional or amateur sports organization whose game was the alleged basis of the violation, to bring a civil action enjoining an infringer in the appropriate federal district court.<sup>42</sup> PASPA's applicability was vast.<sup>43</sup> It prohibited Indian lands and every state except Nevada from enacting certain sports gambling laws.<sup>44</sup> New Jersey, however, benefitted from the following exception:

(a) Section 3702 shall not apply to—

. . .

(3) a betting, gambling, or wagering scheme . . . conducted exclusively in casinos *located in a municipality*, but only to the extent

37. See 28 U.S.C. § 3702(1)–(2) (2012) (prohibiting most state government entities and persons from operating a sports wagering scheme).

38. *Id.* § 3703; see also *infra* Section I.A.

39. See *infra* Section I.B.

40. See *infra* Section I.C.

41. 28 U.S.C. § 3701.

42. *Id.* § 3703. “A civil action to enjoin a violation of section 3702 may be commenced in an appropriate district court of the United States by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation.” *Id.* In order to be enjoined, a government entity or person would have needed to violate the following provision:

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.

*Id.* § 3702.

43. *Id.* § 3704.

44. *Id.*; see also A.J. Perez, *What It Means: Supreme Court Strikes Down PASPA Law That Limited Sports Betting*, USA TODAY (May 14, 2018), <https://www.usatoday.com/story/sports/2018/05/14/supreme-court-sports-betting-paspa-law-new-jersey/440710002/> (“Nevada[,] the only state at the time the bill became law that had widespread state-sponsored sports bettors . . . [was] grandfathered in.”).

that . . . [such] commercial casino gaming scheme was in *operation in such municipality throughout the 10-year period* ending on such effective date pursuant to a comprehensive system of State regulation authorized by that State's constitution and applicable solely to such municipality . . . .<sup>45</sup>

Though the exception “did not specifically mention New Jersey or Atlantic City, its requirements—permitting legalization only ‘in a municipality’ with an uninterrupted 10-year history of legal casino gambling—did not fit anyplace else.”<sup>46</sup> New Jersey legalized gambling in the Atlantic City municipality in November 1976, and had been running an uninterrupted casino operation in the municipality for sixteen-years when PASPA went into effect.<sup>47</sup> New Jersey, however, slept on its rights to take advantage of this exception, and the State did not legalize sports gambling in Atlantic City within one year of PASPA's effective date.<sup>48</sup> PASPA remained relatively unchallenged for seventeen years, when in 2011 New Jersey attempted to take advantage of PASPA's option to legalize sports betting—even though the exception had lapsed.<sup>49</sup>

### *B. The Beginning of the Game: PASPA's Rise to the Supreme Court*

New Jersey has attempted to legalize sports gambling within the State twice.<sup>50</sup> First, this Section analyzes the Act of Jan. 17, 2012,<sup>51</sup> (“2012 Act”), followed by the Act of Oct. 17, 2014,<sup>52</sup> (“2014 Act”), which became the subject of the Court's decision in *Murphy*.<sup>53</sup>

#### *1. The 2012 Act: New Jersey's Legislature Expressly Authorizes Sports Gambling*

In 2013, the United States District Court for the District of New Jersey issued an opinion in *NCAA v. Christie* (“*Christie I*”)<sup>54</sup> striking down New

45. 28 U.S.C. § 3701 (emphasis added).

46. *Murphy v. NCAA*, 138 S. Ct. 1461, 1471, n.27 (2018).

47. *The Complete History of Gambling in Atlantic City*, NJ ONLINE GAMBLING, <https://www.njonlinegambling.com/atlantic-city-history/> (last visited Dec. 21, 2018) (explaining how New Jersey passed a casino gambling bill in 1976).

48. *Murphy*, 138 S. Ct. at 1471.

49. *See infra* Section I.B.1.

50. Act of Jan. 17, 2012, ch. 231, § 5, 2011 N.J. Laws 1723 (repealed 2013); Act of Oct. 17, 2014, ch. 62, § 5, 2014 N.J. Laws 602.

51. Act of Jan. 17, 2012, ch. 231, § 5, 2011 N.J. Laws 1723 (repealed 2013).

52. Act of Oct. 17, 2014, ch. 62, § 5, 2014 N.J. Laws 602.

53. *See infra* Section I.B.1–2.

54. 926 F. Supp. 2d 551 (D.N.J. 2013), *aff'd sub nom.* *NCAA v. Governor of N.J.*, 730 F.3d 208 (3d Cir. 2013). *Christie I* collectively refers to the district court's opinion and the Third Circuit's opinion.



Jersey's 2012 Act that attempted to legalize sports gambling.<sup>55</sup> The National Collegiate Athletic Association ("NCAA") and professional sports leagues brought an action against the Governor of New Jersey and various other state officials (collectively "New Jersey") to enjoin the sports gambling law "on the ground that it violated PASPA."<sup>56</sup> The 2012 Act, allowed the New Jersey Division of Gaming Enforcement to establish licensed sportsbooks at its state's casinos and racetracks.<sup>57</sup> Effectively, the intentions of the 2012 Act were "to sponsor, operate, advertise, promote, license and/or authorize sports gambling."<sup>58</sup> The 2012 Act, however, ran afoul of Section 3702(1) of PASPA by *expressly authorizing* a sports gambling scheme.<sup>59</sup>

In defending against the suit, New Jersey argued that PASPA violated the Anticommandeering Clause of the Tenth Amendment<sup>60</sup> by commanding or compelling the State to refrain from acting.<sup>61</sup> Generally, even where Congress has the authority to pass laws requiring or prohibiting certain acts, under the Anticommandeering Clause it lacks the power to directly compel states—officers and political subdivisions—to adopt a federal regulatory program.<sup>62</sup> New Jersey grounded its argument in the foundational Anticommandeering Clause cases, *New York v. United States*<sup>63</sup> and *Printz v. United States*,<sup>64</sup> because in both *New York* and *Printz* the Supreme Court struck down a federal law based on the law's effect of commanding the states to administer or enforce a federal regulatory program.<sup>65</sup>

New Jersey argued that "PASPA violates principles of federalism through 1) a 'negative command prohibiting [New Jersey] from enacting

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55. *Id.*

56. *Murphy v. NCAA*, 138 S. Ct. 1461, 1471 (2018).

57. *See Governor of N.J.*, 730 F.3d at 217 ("permit[ing] State authorities to license sports gambling in casinos and racetracks and casinos to operate 'sports pools'" (quoting Act of Jan. 17, 2012, ch. 231, § 5, 2011 N.J. Laws 1723 (repealed 2013))).

58. *Christie*, 926 F. Supp. 2d at 556.

59. 28 U.S.C. § 3702(1) (2012).

60. The Tenth Amendment provides "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X; *see also* sources cited *supra* note 14.

61. *Christie*, 926 F. Supp. 2d at 554, 561 (presenting issues that PASPA violated the Commerce Clause, Tenth Amendment, Due Process and Equal Protection Principles, and the Equal Footing Doctrine).

62. *Murphy v. NCAA*, 138 S. Ct. 1461, 1476–77 (2018); *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 161 (1992).

63. 505 U.S. 144 (1992).

64. 521 U.S. 898 (1997).

65. *Murphy*, 138 S. Ct. at 1471. "In *New York*, [the Supreme Court] held that a federal law unconstitutionally ordered the State to regulate in accordance with federal standards, and in *Printz*, [the Supreme Court] found that another federal statute unconstitutionally compelled State officers to enforce federal law." *Id.*; *see also infra* text accompanying notes 103–105 (discussing *New York* and *Printz* in detail).

any law legalizing or licensing Sports Betting,’ and 2) an ‘affirmative command requiring [New Jersey] to maintain state laws criminalizing sports betting.’”<sup>66</sup> The NCAA rebutted, arguing PASPA only prohibits the authorization of sports gambling, and claimed PASPA does not command or compel a state to take an affirmative action.<sup>67</sup> The district court agreed with the NCAA.<sup>68</sup>

The United States Court of Appeals for the Third Circuit affirmed the decision of the district court.<sup>69</sup> The Third Circuit agreed with the district court that PASPA did not place an affirmative command on the State and found New Jersey’s “efforts to analogize PASPA to the provisions struck down in *New York* and *Printz*” unavailing because PASPA does not “require or coerce the states to lift a finger.”<sup>70</sup> Moreover, the Third Circuit found it “hard to see how Congress can ‘commandeer’ a state, or how it can be found to regulate how a state regulates, if it does not require it to do anything at all.”<sup>71</sup> The Third Circuit agreed that “statutes prohibiting the states from taking certain actions have never been struck down even if they require the expenditure of some time and effort or the modification or invalidation of contrary state laws.”<sup>72</sup> The Third Circuit, however, did not read PASPA as a prohibition that precluded New Jersey from lifting its ban on sports gambling.<sup>73</sup> Instead, the Third Circuit agreed with the language articulated by the United States in its Brief in Opposition and stated New Jersey was “free to repeal those prohibitions in whole or in part” because nothing in the doctrinal language of PASPA required states to keep state laws enacted prior to PASPA criminalizing sports gambling in place.<sup>74</sup> Although the Supreme Court denied certiorari,<sup>75</sup> New Jersey took the Third Circuit’s

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66. *Christie*, 926 F. Supp. 2d at 561–62 (alteration in original) (quoting Memorandum of Law Submitted on Behalf of New Jersey Thoroughbred Horsemen’s Ass’n in Opposition to Plaintiffs’ Motion for Summary Judgement at 3–4, *Christie*, 926 F. Supp. 2d 551 (No. 12-cv-04947-MAS-LHG)).

67. *Id.* at 562.

68. *Id.* at 569–70.

69. *NCAA v. Governor of N.J.*, 730 F.3d 208, 215 (3d Cir. 2013).

70. *Id.* at 231 (emphasis omitted).

71. *Id.*

72. *Id.* at 231; see *South Carolina v. Baker*, 485 U.S. 505 (1988) (pressuring states to increase the rate paid on their bearer bonds); *Reno v. Condon*, 528 U.S. 141 (2000) (basing decision on the principals set out in *Baker*); see also *FERC v. Mississippi*, 456 U.S. 742 (1982) (requiring that states consider the preferences of Congress).

73. *Governor of N.J.*, 730 F.3d at 232; see also *Murphy v. NCAA*, 138 S. Ct. 145, 1472 (2018).

74. *Murphy*, 138 S. Ct. at 1472 (quoting Brief for United States in Opposition at 11, *Christie v. NCAA*, 134 S. Ct. 2866 (2014) (Nos. 13-967, 13-979, & 13-980)); *Governor of N.J.*, 730 F.3d 208.

75. *Christie*, 134 S. Ct. 2866.

suggestion that it was free to repeal its own prohibitions on existing sports gambling laws.<sup>76</sup>

2. *The 2014 Act: How New Jersey Authorized Sports Gambling Through a Repealer*

Following the Third Circuit's decision in *Christie I*, New Jersey ratified the 2014 Act.<sup>77</sup> The 2014 Act acted as a *repealer*, rescinding "the provisions of state law prohibiting sports gambling insofar as they concerned the 'placement and acceptance of wagers' on sporting events by persons [twenty-one] years of age or older at a horseracing track or a casino or gambling house in Atlantic City."<sup>78</sup> Unlike the 2012 Act, which expressly authorized a sports gambling scheme, the 2014 Act "partially repeal[ed] the prohibitions, permits, licenses, and authorizations concerning wagers on professional, collegiate, or amateur sport contests or athletic events," but did not expressly authorize sports gambling.<sup>79</sup> Furthermore, in an attempt to please looming critics and to protect the integrity of the bill, New Jersey excluded state collegiate teams and state-based collegiate events from wagers.<sup>80</sup>

Without hesitation, the same plaintiffs in *Christie I* filed a new action, *NCAA v. Christie* ("*Christie II*"),<sup>81</sup> under PASPA in federal court.<sup>82</sup> Once again, the district court sided with the plaintiffs, and the Third Circuit affirmed.<sup>83</sup> The Third Circuit was "unmoved by the New Jersey Legislature's 'artful[ ]' attempt to frame the 2014 Act as a repealer" as opposed to an express authorization.<sup>84</sup> The Third Circuit explained that "selectively remov[ing] a prohibition on sports wagering in a manner that permissively channels wagering activity to particular locations or operators," essentially

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76. *Murphy*, 138 S. Ct. at 1472.

77. Act of Oct. 17, 2014, ch. 62, § 5, 2014 N.J. Laws 602.

78. *Murphy*, 138 S. Ct. at 1472 (quoting Act of Oct. 17, 2014, ch. 62, § 5, 2014 N.J. Laws 602); see *Repealer*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A legislative act abrogating an earlier law").

79. Act of Oct. 17, 2014, ch. 62, § 5, 2014 N.J. Laws 602.

80. See *id.* ("As used in this act . . . 'collegiate sport contest or athletic event' shall not include a collegiate sport contest or collegiate athletic event that takes place in New Jersey or a sport contest or athletic event in which any New Jersey college team participates regardless of where the event takes place.").

81. 61 F. Supp. 3d 488 (D.N.J. 2014), *aff'd sub nom.* *NCAA v. Governor of N.J.*, 832 F. 3d 389 (2016). *Christie II* collectively refers to the district court's opinion and the Third Circuit's opinion.

82. *Id.*

83. *Id.*

84. *Murphy*, 138 S. Ct. at 1472 (alteration in original) (quoting *Governor of N.J.*, 832 F. 3d at 397).

constitutes an “*authorization*” of sports gambling.<sup>85</sup> While in *Christie I* the Third Circuit rejected the reasoning that a repeal could constitute an authorization, in *Christie II*, the Third Circuit rejected its own reasoning and took the position that a repeal *can* constitute an authorization.<sup>86</sup> The Third Circuit held the 2014 Act violated “PASPA because it authorize[d] by law sports gambling.”<sup>87</sup>

Additionally, the district court and the Third Circuit in *Christie II* held that “PASPA’s prohibition [is] more akin to those laws upheld in *Hodel*, *F.E.R.C.*, *Baker*, and *Reno*, and distinguishable from those struck down by the Supreme Court in *New York* and *Printz*.”<sup>88</sup> In *Hodel v. Virginia Surface Mining & Reclamation Ass’n*,<sup>89</sup> *FERC v. Mississippi*,<sup>90</sup> *South Carolina v. Baker*,<sup>91</sup> and *Reno v. Condon*,<sup>92</sup> the Court refused to use the Anticommandeering Clause to invalidate federal law because Congress regulated the activities directly, rather than commanding the states to take any affirmative steps.<sup>93</sup> Thus, when reviewing the 2014 Act, the Third Circuit rejected the notion that PASPA was unconstitutional because it did not give an affirmative command to the states to act a certain way.<sup>94</sup> In 2017, however, the Supreme Court granted certiorari to *Christie II* to resolve the PASPA debate once and for all.<sup>95</sup>

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85. *Governor of N.J.*, 832 F.3d at 401 (emphasis added). The court explained that the 2014 Act was outside the limited scope of what PASPA authorizes. *Id.* For example, if the State partially repealed its existing sports wagering laws to allow household wagering between friends and family, the repeal would not have “nearly the type of authorizing effect” that the court found in the 2014 Act. *Id.* at 402.

86. *Id.* at 396–97.

87. *Id.* at 402.

88. *Id.* at 400–01; see *Reno v. Condon*, 528 U.S. 141, 150–51 (2000) (upholding “the law, [because the law] ‘regulated state activities,’ rather than ‘seeking to control or influence the manner in which states regulate private parties’” (alterations omitted) (quoting *South Carolina v. Baker*, 485 U.S. 505, 514–15 (1988)); *Baker*, 485 U.S. at 527 (upholding the law pressuring states to increase the rate paid on their bearer bonds); *FERC v. Mississippi*, 456 U.S. 742 (1982) (requiring that states consider the preferences of Congress); *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 289 (1981) (offering states the choice to “either implement [the federal program] itself or else yield to a federally administered regulatory program.”); see also *Murphy*, 138 S. Ct. at 1479 (explaining how the federal law in *Hodel* “by no means commandeered the state legislative process”).

89. 452 U.S. 264 (1981).

90. 456 U.S. 742 (1982).

91. 485 U.S. 505 (1988).

92. 528 U.S. 141 (2000).

93. *Hodel*, 452 U.S. at 289; *FERC*, 456 U.S. at 746; *Baker*, 485 U.S. at 527; *Condon*, 528 U.S. at 151.

94. See *Governor of N.J.*, 832 F.3d at 224–37 (refusing to hold PASPA unconstitutional under the Tenth Amendment).

95. *Christie v. NCAA*, 138 S. Ct. 464 (2017).

C. *Striking Out: How Murphy v. NCAA Ended PASPA's Legacy*

In *Murphy*, the Supreme Court held that PASPA was not aligned with the Constitution and that “Congress can regulate sports gambling directly, but if it elects not to do so, each state is free to act on its own.”<sup>96</sup> The Court found that “PASPA ‘regulate[d] state governments’ regulation’ of their citizens.”<sup>97</sup> Thus, PASPA infringed upon the Tenth Amendment by giving a direct command to the states, a direct violation of the Anticommandeering Clause.<sup>98</sup>

The leagues argued that PASPA did not “compel a State to enact legislation,” and because the states were not commanded to act, the statute should be upheld.<sup>99</sup> The Court rejected this proposition through illustration:

PASPA include[d] an exemption for States that permitted sports betting at the time of enactment, [28 U.S.C.] § 3704, but suppose Congress did not adopt such an exemption. Suppose Congress ordered States with legalized sports betting to take the affirmative step of criminalizing that activity and ordered the remaining States to retain their laws prohibiting sports betting. There is no good reason why the former would intrude more deeply on state sovereignty than the latter.<sup>100</sup>

Furthermore, the Court clarified that the prior decisions on which the lower courts relied did not deal with laws that directed states to either “enact or to refrain from enacting a regulation of the conduct of activities occurring within their borders.”<sup>101</sup> Instead, the lower courts’ decisions should have been grounded in *New York* and *Printz*, regardless of whether PASPA imposed a prohibition as opposed to commanding an affirmative action.<sup>102</sup> In *New York*, Justice O’Connor traced the legal history of the Tenth Amendment and how the Anticommandeering Clause came to be, concluding “Congress may not simply ‘commande[e]r the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.”<sup>103</sup> Five years later in *Printz*, the Supreme Court held, “The

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96. *Murphy*, 138 S. Ct. at 1484–85. The case name changes due to Philip D. Murphy becoming the Governor of New Jersey prior to the time the case reaches the Supreme Court of the United States. See Matthew Bloch & Jasmine Lee, *Election Results: Murphy Wins New Jersey Governor Race*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/elections/results/new-jersey-general-elections> (discussing how Philip D. Murphy won the 2017 election and replaced Chris Christie as Governor of New Jersey).

97. *Id.* (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)).

98. *Id.* at 1481.

99. *Id.* at 1478.

100. *Id.*

101. *Id.* at 1479; see *supra* notes 72, 88–93 and accompanying text.

102. *Murphy*, 138 S. Ct. at 1478.

103. *Id.* at 1477 (alterations in original) (quoting *New York*, 505 U.S. at 161).

Federal Government’ may not ‘command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.’”<sup>104</sup> Applying the principles of *New York* and *Printz*, the Court concluded PASPA “unequivocally dictates what a state legislature may and may not do. . . . It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals.”<sup>105</sup> In closing, the Supreme Court chose to rule only on the constitutional merits of PASPA, recognizing that it lacks legislative authority.<sup>106</sup>

## II. ANALYSIS

Now that PASPA’s reign is over, sports gambling will require important policy choices. Those choices, however, should be left to individual states and not the Court. Section II.A discusses the effects of applying race to the bottom and the race to the top state competition phenomena to sports gambling.<sup>107</sup> Section II.B analyzes states with sports gambling, integrity fees, and the leagues’ standpoint on integrity.<sup>108</sup> Section II.C evaluates Maryland’s failed attempts at legalizing sports gambling and offers questions Maryland should ask regarding legalization of sports gambling moving forward.<sup>109</sup> Finally, Section II.D proposes a solution in the form of a state bill to remedy Maryland’s sports gambling prisoner’s dilemma.<sup>110</sup>

### A. *Is Sports Gambling a Race to the Bottom or a Race to the Top Phenomenon?*

With *Murphy v. NCAA* leading to the demise of PASPA, states may now legalize sports gambling at their own discretion. Some states have remained silent on the topic, even in the aftermath of *Murphy*.<sup>111</sup> Other states, however, have quickly legalized sports gambling—with several more in the process—and are beginning to surround states with no legalized scheme,<sup>112</sup> thus creating a classic race to the bottom or race to the top state

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104. *Id.* (quoting *Printz*, 521 U.S. at 935).

105. *Id.* at 1478.

106. *Id.* at 1484.

107. *See infra* Section II.A.

108. *See infra* Section II.B.

109. *See infra* Section II.C.

110. *See infra* Section II.D.

111. Ryan Rodenberg, *State-by-State Sports Betting Bill Tracker*, ESPN, [http://www.espn.com/chalk/story/\\_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states](http://www.espn.com/chalk/story/_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states) (last visited Dec. 18, 2018) (discussing how Delaware, New Jersey, West Virginia, Rhode Island, and Pennsylvania have legalized sports gambling schemes).

112. *Id.*

competition phenomena.<sup>113</sup> Race to the bottom is “the competition between geopolitical units to make themselves more attractive to investors and businesses, coupled *with adverse* economic consequences” such that “competition between businesses that results in risky business behaviors and destabilization of an industry.”<sup>114</sup> Race to the top is the competition between geopolitical units to make themselves more attractive to investors and business, coupled *with minimal adverse* economic consequences such that each geopolitical unit looks to have the best scheme available in order to attract investors and business.<sup>115</sup> Reviewing sports gambling under a race to the bottom and a race to the top state competition theory is one way that legislatures can decide whether a legalized scheme would best benefit their state constituents.<sup>116</sup>

State legislatures should view two scenarios before determining which side of the race to the bottom or race to the top sports gambling falls into.<sup>117</sup> On the one hand, a state, like Maryland, could decide to engage in a new toll collection system other than the commonly known E-ZPass.<sup>118</sup> The State could decide to adopt a hypothetical *E-ZPass Maryland* that gives its State constituents a drastically reduced fee, but charges out of state residents an exorbitant fee.<sup>119</sup> The rate charged to out of state residents would not only offset the revenue lost from Maryland constituents, but actually increase Maryland’s revenue. Thus, almost all external harms would be pushed off on to the surrounding states that use the traditional E-ZPass, while Maryland sees a spike in state revenue, and its constituents experience negligible adverse consequences.<sup>120</sup> Presumably, other states would then suddenly be in a race to the bottom competition in order to reverse the

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113. *See generally* ROBERTA ROMERO, *THE GENIUS OF AMERICAN CORPORATE LAW* (1993) (explaining jurisdictional competition theories).

114. *Race to the bottom*, BLACK’S LAW DICTIONARY (10th ed. 2014) (emphasis added) (“[Another] example is the use of subprime mortgages to attract more borrowers who paid higher origination fees but ultimately could not manage to repay the loans.”). *See generally* William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 *YALE L.J.* 663 (1974) (discussing race to the bottom in American corporate law).

115. *See infra* notes 123–128 and accompanying text. *See generally* Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 *J. LEGAL STUD.* 251 (1977) (discussing an alternative corporate law theory, juxtaposed the more formal race to the bottom theory).

116. *See infra* Section II.D.

117. *See infra* Sections II.C–D.

118. *About E-ZPass*, E-ZPASS, <https://www.ezpassmd.com/en/about/about.shtml> (last visited Mar. 7, 2019) (defining E-ZPass as an “electronic toll collection (ETC) system that allows you to prepay your tolls”).

119. *See id.* (explaining toll rates).

120. *Externality*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A consequence or side effect of one’s economic activity, causing another to benefit without paying or to suffer without compensation.”); *see also Negative Externality*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“An externality that is detrimental to another, such as water pollution created by a nearby factory.”).

harm to their own constituents.<sup>121</sup> Those other states likely would then legalize a similar *E-ZPass State Edition* to protect their own constituents and maximize state revenue. The race suddenly results in risky business behaviors and the destabilization of the transportation industry.<sup>122</sup>

On the other hand, a state, like Maryland, could decide to offer a free Wi-Fi network to everyone in the State, corporations included.<sup>123</sup> Suddenly, businesses will likely move to the State; new businesses will decide to incorporate in the State; and current constituents will remain in the State all because of the generous benefit they are receiving.<sup>124</sup> Maryland would be generating revenue from having new business in the State, while indirectly the State would be creating little to no harmful externalities—only positive externalities.<sup>125</sup> Presumably, surrounding states would be racing to the top to enact an even better free Wi-Fi package in an attempt to drive business to their states.<sup>126</sup>

The question then becomes on which end of the state competition theory does sports gambling fall: race to the bottom or race to the top?<sup>127</sup> Does sports gambling maximize the generation of state revenue, or do the negative externalities created by sports gambling outweigh the revenue generated?<sup>128</sup> In the event of both a race to the bottom and race to the top scenario, are states more interested in maximizing revenue or in limiting the negative externalities sports gambling creates?<sup>129</sup> The answers to these questions, and circumstances specific to individual states, will determine whether a state decides to legalize a sports gambling scheme, or whether it stays on the sidelines because it stands to neither gain nor lose.<sup>130</sup>

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121. For example, Delaware would suddenly enact a law similar to Maryland's that establishes an *E-ZPass Delaware* under the same conditions Maryland established its system.

122. See *supra* note 114.

123. *Wi-Fi*, DICTIONARY.COM, <https://www.dictionary.com/browse/wifi> (last visited Dec. 21, 2018) (“[A] brand name certifying that a device or other product is compatible with a set of broadband wireless networking standards.”).

124. See text accompanying *supra* note 115.

125. *Positive Externality*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“An externality that benefits another, such as the advantage received by a neighborhood when a homeowner attractively landscapes the property.”). Compare *id.*, with *supra* note 120 and accompanying text (defining a *negative externality*). While the state will assume the cost of supporting a state wide Wi-Fi network, the influx in new business revenue—a positive externality—should outweigh the negative externality of cost.

126. See *supra* note 115 and accompanying text.

127. See *infra* Section II.D.

128. See *infra* Section II.D.

129. See *infra* Sections II.C–D.

130. See *infra* Section II.D.



*B. An Inside Look at How States, Integrity Fees, and Leagues are Influencing the Legalization of Sports Gambling*

With many of Maryland's bordering states legalizing sports gambling, Maryland is becoming boxed in by states with sportsbooks.<sup>131</sup> Maryland should not only take those other states' decisions into consideration, but should also give weight to the current state of professional and amateur sports leagues.<sup>132</sup> Since the legalization of sports gambling, leagues have taken an aggressive stance on the subject matter, as the flood gates to wager on their products have been unleashed.<sup>133</sup> This Section analyzes states with sports gambling, integrity fees, and the leagues' standpoint on integrity and integrity fees in light of the recent *Murphy* decision.<sup>134</sup>

*1. Delaware: The First State to Legalize Sports Gambling Post-PASPA*

Since 2009, Delaware has permitted alternative forms of sports gambling, allowing the State to be the first in a post-PASPA world to establish legalized sports gambling.<sup>135</sup> Delaware took an aggressive stance on taxation when it came to its racetracks and three casinos running sportsbooks, taxing them at a rate of fifty percent.<sup>136</sup> Delaware has generated \$2,822,669 in state revenue since the inception of legalized sports gambling on June 5, 2018.<sup>137</sup> However, this only includes one full month of betting since the 2018–2019 National Football League (“NFL”) season commenced.<sup>138</sup> Ac-

131. Rodenberg, *supra* note 111.

132. *See infra* Section II.C.2.

133. *See infra* Section II.B.3–4.

134. *See infra* Section II.B.1–4.

135. *See* Tyler Lauletta, *Delaware Becomes First New State to Legalize Sports Betting and Will Be Ready to Go in Days*, BUS. INSIDER (May 31, 2018), <https://www.businessinsider.com/delaware-sports-betting-2018-5> (“The state’s existing laws regarding gambling was one of the factors that made the quick turnaround possible.”); *see also* Adam Candee, *Delaware Sports Betting Goes Live June 5; Will Be First to Launch Outside of Nevada*, LEGAL SPORTS REP. (May 31, 2018), <https://www.legalsportsreport.com/20827/delaware-to-start-sports-betting-on-june-5/> (“Delaware officials signaled earlier this month that they saw no legal hurdles preventing them from starting full sports betting. The State passed a law in 2009 allowing sports wagering except on Delaware-based teams.”).

136. Ryan Prete, *States Cash in on Sports Betting Taxes, More Expected to Play*, BLOOMBERG BNA (Aug. 1, 2018), <https://www.bna.com/states-cash-sports-n73014481301/#> (“Delaware’s law allows the state to keep [fifty] percent of the proceeds from the activity . . .”).

137. *See* DEL. SPORTS LOTTERY, DISTRIBUTION OF 2018 SPORTSBOOKS NET PROCEEDS (2018), <https://www.delottery.com/Sports-Lottery/Sportsbooks/Monthly-Distribution/2018> (showing \$2,822,669 of state revenue as of October 28, 2018, before operating expenses for the Lottery and Division of Gaming Enforcement—calculated by adding *state shares* from June 5, 2018, July 29, 2018, August 26, 2018, September 30, 2018, and October 28, 2018). Rhode Island is the only state with a more aggressive state tax scheme than Delaware at fifty-one percent. *See* Prete, *supra* note 136.

138. September is the first full month of the regular NFL season.

ording to the Delaware State Lottery, \$1,576,765 of the year-to-date (“YTD”) of total state revenue came in the month of September alone—the first full month of the NFL season.<sup>139</sup> Additional factors to consider when comparing the amount of revenue Delaware has generated since June 2018 with other states include a state’s population, per capita income in the past twelve months, and median household income.<sup>140</sup>

Furthermore, Delaware does not include an integrity fee in its revenue splitting scheme with casinos.<sup>141</sup> Although Delaware’s legislation was in place before any effort by leagues to add an integrity fee, hypothetically, the integrity fee as first proposed by the National Basketball Association (“NBA”) would have cut Delaware’s Casino Operators YTD revenue by \$397,703.51, or approximately 5.3%.<sup>142</sup>

Several states quickly followed Delaware and legalized sports gambling.<sup>143</sup> Notably, none of the states included an integrity fee provision in

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139. See DEL. SPORTS LOTTERY, *supra* note 137 (showing \$1,576,765 of state revenue before operating expenses for the Lottery and Division of Gaming Enforcement in the month of September); see also Dustin Gouker, *Delaware Sees \$17 Million in Sports Bets for First Month of Football Season*, LEGAL SPORTS REP. (Oct. 3, 2018), <https://www.legalsportsreport.com/24710/delaware-sports-betting-for-football/> (“The state saw \$16,830,010 in wagers for the period from Aug. 27 through Sept. 30 . . .”).

140. *QuickFacts: Delaware*, U.S. CENSUS BUREAU (July 1, 2018), <https://www.census.gov/quickfacts/de>. According to the United States Census Bureau, Delaware had an estimated population of 961,171 as of July 1, 2018, with an estimated 21.3% of the population below the age of eighteen. *Id.* The legal betting age in Delaware is twenty-one, so the percentage of the population precluded from placing bets in Delaware is slightly higher. *Id.* Additionally, according to the Census that concluded in 2017, Delaware had a median household income of \$63,036 and a per capita income of \$32,625 during 2013 to 2017. *Id.*

141. Adam Candee, *Is It ‘Revenue Sharing’ or High Taxes for Sports Betting? Ask Rhode Island, Delaware How They Slice the Pie*, LEGAL SPORTS REP. (July 3, 2018, 5:46 PM), <https://www.legalsportsreport.com/21663/sports-betting-revenue-sharing/> (“For sports betting at the casinos, after winners are paid, Scientific Games (central system, terminals, risk management) receives 12.5[%]. From the remainder, the State share is [fifty] percent, the casinos get [forty] percent, and ten percent goes to supplement horse racing purses.” (quoting Vernon Kirk, Delaware’s lottery director)).

142. Professional sports leagues first proposed an integrity fee to collect one percent of the handle from all sports betting. MODEL SPORTS WAGERING ACT (GAMING STATES), <https://sportshandle.com/wp-content/uploads/2018/02/Model-Sports-Wagering-Legislation-SportsHandle.pdf> (last visited Apr. 9, 2019); Rui Kaneya, *The NBA and MLB Quietly Hustle for a Cut of the Sports Betting Jackpot*, CTR. FOR PUB. INTEGRITY (June 7, 2018), <https://publicintegrity.org/state-politics/the-nba-and-mlb-quietly-hustle-for-a-cut-of-the-sports-betting-jackpot/> (last updated June 8, 2018, 1:07 PM); see DEL. SPORTS LOTTERY, 2018 MONTHLY SPORTSBOOKS DATA SUMMARY (UNAUDITED) (2018), <https://www.delottery.com/Sports-Lottery/Sportsbooks/Track-Data/2018> (taking one percent of \$39,770,351—the total handle through September 30, 2018—for \$397,703.51, or approximately 5.3% of operators income during the same period); see also S. 405, 120th Gen. Assemb., Reg. Sess. (Ind. 2018) (including an integrity fee); H.R. 1325, 120th Gen. Assemb., Reg. Sess. (Ind. 2018) (same).

143. See *supra* text accompanying note 21.

their sports gambling legislation.<sup>144</sup> Furthermore, no state has implemented the same tax regime as Delaware—an issue that federal legislation could address.<sup>145</sup>

## 2. *The Implications of Integrity Fees*

Not only should states be concerned about whether neighboring states endorse sports gambling, but they should also be concerned with whether those states approved an integrity fee because of the implications it could have on revenue maximization.<sup>146</sup> The Indiana Senate was the first legislature to introduce an integrity fee in the early drafts of its sports gambling legislation.<sup>147</sup> The legislature, however, ultimately struck the provisions from the bill.<sup>148</sup>

In addition to Indiana, New York also plays an interesting role in the integrity fee debate.<sup>149</sup> Shortly after the decision in *Murphy*, New York Senator and Senate Democratic Minority Leader Charles E. Schumer released *Protecting the Games We Love After Murphy v. NCAA: A Federal Framework for Consumer Protection and Sports Integrity*.<sup>150</sup> This three-part statement summarized Senator Schumer's goals of "creat[ing] . . . a strong national integrity standard for sports gambling that will protect con-

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144. Kaneya, *supra* note 142 (discussing how some states have introduced integrity fee language in their bills, but no state has passed any legislation with an integrity fee).

145. New Jersey's sports gambling tax scheme is as follows: 8.5% tax for casino sports pool betting revenue; "an investment alternative tax of 1.25% will be used exclusively for tourism and marketing programs for the City of Atlantic City"; 13% tax for online wagering run by casinos; and 14.25% tax for online wagering run by racetracks. N.J. DEP'T. OF L. AND PUB. SAFETY, DIVISION OF GAMING ENFORCEMENT, SPORTS WAGERING: FREQUENTLY ASKED QUESTIONS (2018), <https://www.nj.gov/lps/ge/docs/SportsBetting/FAQs.pdf>. While West Virginia has a ten percent tax, Pennsylvania charges a thirty-six percent tax and a \$10 million per operator licensing fee. See Candee, *supra* note 141.

146. See *infra* Section II.C.2.

147. See *supra* note 142 (discussing Indiana's introduced house and senate bills).

148. S. 552, 121th Gen. Assemb., Reg. Sess. (Ind. 2019).

149. The NFL, NBA, MLB, National Hockey League ("NHL"), and Major League Soccer ("MLS") are all headquartered in New York. See *NFL Company Overview*, NFL, <http://www.nfl.com/careers/about> (last visited Apr. 24, 2019) ("[T]he League's headquarters [is] in New York City . . ."); *Locations*, NBA, <https://careers.nba.com/locations/> (last visited Apr. 24, 2019) ("[T]he league is headquartered in New York, NY and Secaucus, NJ . . ."); *About MLB*, MLB, <https://www.mlb.com/official-information/about-mlb> (last visited Apr. 24, 2019) (providing an address for the Office of the Commissioner of Baseball in New York, NY); *Terms of Service*, NHL.COM, <https://www.nhl.com/info/terms-of-service> (last visited June 2, 2019) (providing an address for NHL Enterprises, L.P. in New York, NY); *About MLS*, MLS, <http://jobs.mlssoccer.com/about-careers/> (last visited Apr. 24, 2019) (providing a location address in New York, NY).

150. Press Release, Charles E. Schumer, Protecting the Games We Love After *Murphy v. NCAA: A Federal Framework for Consumer Protection and Sports Integrity* (Aug. 29, 2018), [https://www.democrats.senate.gov/imo/media/doc/Consumer\\_Protection\\_Sports\\_Integrity\\_Framework.pdf](https://www.democrats.senate.gov/imo/media/doc/Consumer_Protection_Sports_Integrity_Framework.pdf) (last visited Apr. 9, 2019).

sumers and the sports games themselves from corruption.”<sup>151</sup> Incidentally, the second prong of Senator Schumer’s statement widens the considerations of including integrity fees in sports betting legislation. Senator Schumer’s goal of “[p]rotecting the integrity of the game” was centered solely on information sharing between states and leagues.<sup>152</sup> However, sharing information does not come without a cost.<sup>153</sup> Because states are not currently including integrity fees in their legislation, leagues have started to create contractual agreements for information with operators of casinos in lieu of states.<sup>154</sup> Under these arrangements, the exact opposite of Senator Schumer’s suggestions for sports gambling integrity are happening: Leagues are cutting out the middle man because, unlike states, operators are willing to pay leagues for their information.<sup>155</sup> Thus, there is little-to-no information sharing happening between states and leagues.

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151. *Id.*

152. *Id.* Part two of Senator Schumer’s press release focused on creating “a strong national integrity standard for sports gambling,” his plan to accomplish this goal is as follows:

2. Protecting the integrity of the game. In order to protect the integrity of professional and collegiate sports we must provide a strong framework for coordination and enforcement. Therefore, I propose the following:

a. Require that any entity accepting bets share appropriate information in a timely fashion with the league or governing body of the sport in question as well as relevant state, federal, and tribal law enforcement, or other appropriate oversight bodies. This data should be scrubbed so that personal and sensitive information has been removed but must be sufficiently detailed so as to provide the league or governing body with a basis by which to identify problematic trends.

b. Require that all parties involved, including sports leagues, entities accepting bets, and state and tribal law oversight agencies where appropriate coordinate enforcement actions and notify each other of suspicious or abnormal activity or any other conduct that corrupts a betting outcome of a sporting event.

c. All leagues and sports should have effective tools to protect their own game and that includes strong limitations and prohibitions on any athlete, coach, official, team, or league representative from taking a financial stake in any wager.

*Id.*

153. Letter from NBA Properties, Inc. to Prospective Licensee (2018), [https://ak-static.cms.nba.com/wp-content/uploads/sites/45/2018/09/NBAP\\_Licensee\\_Application.pdf](https://ak-static.cms.nba.com/wp-content/uploads/sites/45/2018/09/NBAP_Licensee_Application.pdf) (last visited Apr. 9, 2019).

154. See Official Release, NBA, MGM Resorts International Becomes Official Gaming Partner of NBA (July 31, 2018), <http://www.nba.com/article/2018/07/31/mgm-resorts-international-becomes-official-gaming-partner-nba-official-release> (“MGM Resorts International . . . and the National Basketball Association . . . announced today a new multi-year partnership . . .”); see also *NHL Partners with MGM to Share Data for Sports Betting*, USA TODAY (Oct. 29, 2018), <https://www.usatoday.com/story/sports/nhl/2018/10/29/nhl-partners-with-mgm-to-share-data-for-sports-betting/38318917/> (“NHL announced a multiyear agreement Monday to provide MGM Resorts International with data for use in betting . . .”).

155. See sources cited *supra* note 154.

### 3. *How Do Professional Sports Leagues Rationalize an Integrity Fee?*

Although professional sports leagues have heavily opposed legalized sports gambling, leagues have lost the game and now have to find another way to win the series.<sup>156</sup> While the NCAA has remained in the shadows regarding integrity fees, the NBA and MLB have not.<sup>157</sup> Shortly after the holding in *Murphy*, the NBA released model legislation for sports gambling.<sup>158</sup> While the NBA would prefer federal regulation as it benefits the most from a uniform policy, the model legislation can be adopted by all fifty states.<sup>159</sup> Of all the proposed clauses in the NBA's model legislation, the integrity provision drew the most controversy.<sup>160</sup>

The initial NBA model legislation called for a one percent integrity fee on the total sports gambling handle, but after talking with legislators the NBA is currently lobbying for a 0.25% fee.<sup>161</sup> States believe the league integrity fee is more akin to a royalty, a fee states must pay the league for allowing the states to use the league's product.<sup>162</sup> The NBA and other leagues, however, do not see the fee as a royalty and instead ground their reasoning for the fee in three areas: (1) intellectual property, (2) integrity, and (3) risk.<sup>163</sup> Rick Buchanan, the NBA General Counsel, first argued the value of sports gambling comes from the product—the game—that the

156. See generally *Murphy v. NCAA*, 138 S. Ct. 1461 (2018) (holding in favor of *Murphy*).

157. Kaneya, *supra* note 142.

158. MODEL SPORTS WAGERING ACT (GAMING STATES), *supra* note 142.

159. Kaneya, *supra* note 142. The NBA—and other leagues—would benefit the most from a uniform policy that includes an integrity fee provision. The model legislation would “help get the [integrity] fees codified into law in each state,” therefore alleviating the need to lobby individual states. A similar model legislation, however, would need to be enacted or the NBA's plan may work against them. *Id.* For example, if the federal bill does not contain an integrity provision, the leagues will not be able to lobby individual states for the integrity fee provision as the federal law would control.

160. See Adam Kilgore, *With States Free to Legalize Sports Betting, Do the Pro Leagues Deserve a Cut?*, WASH. POST (May 17, 2018), [https://www.washingtonpost.com/sports/with-states-free-to-legalize-sports-betting-do-the-pro-leagues-deserve-a-cut/2018/05/17/d6c9cc9e-59dd-11e8-858f-12becb4d6067\\_story.html?utm\\_term=.16b591e59708](https://www.washingtonpost.com/sports/with-states-free-to-legalize-sports-betting-do-the-pro-leagues-deserve-a-cut/2018/05/17/d6c9cc9e-59dd-11e8-858f-12becb4d6067_story.html?utm_term=.16b591e59708) (discussing whether leagues deserve an integrity fee); see also Bonesteel, *supra* note 25 (“So-called ‘integrity fees’ were a topic of conversation even before the Supreme Court ruled . . .”).

161. NYU School of Law, *Legalized Sports Gambling: Leagues and States Roll the Dice*, YOUTUBE (Oct. 24, 2018), <https://www.youtube.com/watch?v=yNZ7TR75EuM> (referring to statement of Rick Buchanan, General Counsel and Chief Compliance Officer of the NBA); *Handling*, DICTIONARY.COM, <https://www.dictionary.com/browse/handling> (last visited Dec. 22, 2018) (“[T]he total amount wagered on an event, series of events, or for an entire season or seasons, as at a gambling casino or in horse racing: *The track handle for the day was over a million dollars.* [T]he total amount of money taken in by a business concern on one transaction, sale, event, or series of transactions, or during a specific period, especially by a theater, nightclub, sports arena, resort hotel, or the like.”).

162. See sources cited *supra* note 160.

163. NYU School of Law, *supra* note 161.

NBA and other leagues produce themselves,<sup>164</sup> and that product costs the NBA in excess of \$7 billion a year to produce.<sup>165</sup> Without the leagues production of these products, states do not have a product for their constituents to gamble upon.<sup>166</sup> These products, however, should not go without compensation as the products are the intellectual property, effort, and expense of the leagues.<sup>167</sup> Second, Buchanan argued that the NBA wants to increase the integrity of the game by providing additional monitoring, investigations, and educational opportunities related to sports gambling, but expanding the integrity department is going to be costly.<sup>168</sup> Finally, Buchanan argued there is a risk of gambling scandals against which the NBA and other leagues want to insure themselves against, as leagues are at the center of bearing the risk for these liabilities.<sup>169</sup>

#### 4. *The NCAA's Take: Silent on Integrity Fees, but Not Silent on Integrity*

While the NCAA has remained silent on integrity fees, they have not remained silent on integrity itself.<sup>170</sup> The NCAA continues to “oppose[] all forms of legal and illegal sports wagering, which has the potential to undermine the integrity of sports contests and jeopardizes the welfare of student-athletes and the intercollegiate athletics community.”<sup>171</sup> Regardless of what states choose to do, the NCAA may still regulate all of its constituents through the NCAA Bylaws.<sup>172</sup>

164. *Id.*

165. *Id.*; see also Kaneya, *supra* note 142 (“In the case of the NBA, we’ll spend roughly \$7.5 billion creating NBA basketball this season. And to the extent that product is then used for casinos, betting parlors to make money on, we feel . . . that we should receive some sort of royalty,” said NBA Commissioner, Adam Silver.).

166. NYU School of Law, *supra* note 161.

167. *Id.*

168. *Id.*; see *supra* note 25 (discussing the purpose of the integrity fee).

169. NYU School of Law, *supra* note 161.

170. *Id.* (referring to Derrick Crawford, NCAA Managing Director of Enforcement).

171. *Sports Wagering*, NCAA, <https://www.ncaa.org/enforcement/sports-wagering> (last visited Nov. 25, 2018).

172. *Sports Wagering FAQ*, NCAA (Aug. 2018), [https://www.ncaa.org/sites/default/files/2018ENF\\_SportsWageringFAQs\\_20180907.pdf](https://www.ncaa.org/sites/default/files/2018ENF_SportsWageringFAQs_20180907.pdf). While sports gambling may be legal, the NCAA:

continues to prohibit sports wagering. NCAA rules, common to all three divisions, currently prohibit student-athletes, coaches, conference office staff members, institutional athletics staff members, and nonathletics department institutional staff members who have responsibilities within or over the athletics department (e.g., chancellor or president, faculty athletics representative, individual to whom athletics reports) from betting on amateur, collegiate, and professional sports in which the NCAA conducts a championship.

Derrick Crawford, Managing Director of Enforcement for the NCAA, called for a federal framework of sports gambling, like professional leagues.<sup>173</sup> Crawford thinks federal legislation is the most effective way to address sports gambling rather than the possibility of fifty different state laws.<sup>174</sup> The NCAA has particular concerns that federal legislation may address by ensuring a standardized level of integrity amongst sports gambling.<sup>175</sup> There is a concern, for example, with “injury reports” in the NCAA, as these records are governed by the Family Educational Rights and Privacy Act of 1974 (“FERPA”).<sup>176</sup> Unlike professional leagues in which injury reports are released almost immediately, injury reports in the NCAA are not immediately released.<sup>177</sup> This brings about the question of “what information can [be] divulge[d]” to the public “without violating FERPA” and protecting the well-being of the student-athlete?<sup>178</sup> For example, if Duke Basketball is a fifteen-point favorite to win on Saturday but their starting point guard breaks his leg in practice on Thursday, and that information is not released to the public, how does this affect the sportsbooks?<sup>179</sup>

Not only do injury reports create a concern for the NCAA, but they could be the starting domino for other issues not in the best interest of the NCAA or the welfare of student-athletes.<sup>180</sup> Student-athletes are unpaid,<sup>181</sup> however, NCAA athletics were among the most gambled upon sports in Nevada during 2017.<sup>182</sup> While there is a low risk of highly paid athletes be-

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*Id.*; see also NCAA, 2018–19 NCAA DIVISION I MANUAL § 10.3, at 46–47 (2018), <https://web3.ncaa.org/lstdbi/reports/getReport/90008> (explaining that individuals associated with the NCAA may not engage in sports wagering).

173. NYU School of Law, *supra* note 161 (statement by Derrick Crawford, NCAA Managing Director of Enforcement).

174. *Id.*

175. *Id.*

176. *Id.*; Family Educational and Privacy Rights Act, 20 U.S.C. § 1232g (2012).

177. NYU School of Law, *supra* note 161 (statement by Derrick Crawford, NCAA Managing Director of Enforcement).

178. *Id.*

179. *Id.*

180. *Id.*; see generally Jeffery L. Derevensky & Tom Paskus, *Mind, Body and Sport: Gambling Among Student-Athletes*, in MIND, BODY AND SPORT: UNDERSTAND AND SUPPORTING STUDENT-ATHLETE MENTAL WELLNESS 46 (Gary T. Brown ed., 2014), <http://www.ncaapublications.com/productdownloads/MindBodySport.pdf> (“Unlike other more publicized addictive behaviors . . . gambling problems often go undetected. It is important that student-athletes and athletics personnel understand that a gambling problem parallels other addictive behaviors.”).

181. See generally NCAA, *supra* note 172 (discussing the payment prohibitions and guidelines for student-athletes).

182. See Dustin Gouker, *Nevada Sportsbooks Set Record with a Quarter Billion Dollars of Revenue in 2017*, LEGAL SPORTS REP. (Jan. 31, 2018), <https://www.legalsportsreport.com/18130/nevada-sportsbooks-2017/> (“The total amount wagered in the state came out to \$4.87 billion . . .”); see also NYU School of Law, *supra* note 161 (statement by David Rebeck, Director, Division of Gaming Enforcement, State of New Jersey) (stating

ing bribed, blackmailed, or extorted, student-athletes may be incentivized to provide *insider knowledge* or to *throw* games based on sports bets made against them or their team for a relatively small amount of money.<sup>183</sup> For example, in the former Duke Basketball hypothetical, a teammate could use insider knowledge of the injury and give this information away to the highest bidder.<sup>184</sup> While black market sportsbooks have been operating for years, states still need to consider the repercussions with having legalized sportsbooks in the spotlight.<sup>185</sup>

After analyzing how states with legalized sports gambling have generated additional revenue; how information sharing is at the crux of legalized sports gambling; and how the leagues' standpoint on integrity and integrity fees may influence sports gambling, the question becomes how Maryland can maximize revenue while maintaining integrity in a sports gambling scheme.<sup>186</sup> The following Section explores both revenue maximization and how the inclusion of an integrity fee helps maximize revenue generation.<sup>187</sup>

### *C. Revenue Maximization and Integrity: The Questions Maryland Needs to Consider Before Legalizing Sports Gambling*

During the 2017 and 2018 legislative sessions, Maryland made strides to legalize sports gambling by proposing legislation in the event that PASPA was struck down.<sup>188</sup> Although PASPA was ultimately found unconstitutional by the Supreme Court,<sup>189</sup> bills generated by both sides of the aisle failed to pass.<sup>190</sup> Maryland House Bill 1014<sup>191</sup> went the furthest, passing the first committee and the first chamber, but failing one month before the decision in *Murphy*.<sup>192</sup> Because Maryland lawmakers now must wait

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the sports wagered on the most in Nevada were the NCAA football and basketball teams last year).

183. NYU School of Law, *supra* note 161.

184. *See supra* note 181 and accompanying text.

185. Brief of the American Gaming Ass'n as *Amicus Curiae* in Support of Petitioners at 1, *Murphy v. NCAA*, 138 S. Ct. 1461 (2018) (Nos. 16-746 & 16-477) ("The AGA estimates that Americans illegally bet over \$150 billion *per year* on U.S. sporting events. Earlier this year, Americans bet an estimated \$15 billion on the Super Bowl and NCAA Men's Basketball Tournament alone . . ."); *Black Market*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("An illegal market for goods that are controlled or prohibited by the government, such as the underground market for prescription drugs.").

186. *See infra* Section II.C.

187. *See infra* Section II.C.1–2.

188. *See* H.D. 1346, 2018 Leg., 438th Sess. (Md. 2018); *see also* H.D. 1014, 2018 Leg., 438th Sess. (Md. 2018); S. 836, 2018 Leg., 438th Sess. (Md. 2018); H.D. 989, 2017 Leg., 437th Sess. (Md. 2017).

189. *See supra* Section I.C.

190. *See sources supra* note 188.

191. H.D. 1014, 2018 Leg., 438th Sess. (Md. 2018).

192. *Id.*



until the next legislative cycle followed by a voter referendum, they have an ample amount of time to discuss the legalization of sports gambling.<sup>193</sup>

The answers to the questions that are presented to lawmakers will very much define whether the State of Maryland is in a race to the top or race to the bottom scenario, and whether the inclusion of an integrity fee is beneficial to the State's sports gambling regime.<sup>194</sup> Abstractly, the questions can be broken down into two categories: revenue maximization and integrity.<sup>195</sup>

1. *Cost Benefit: Does Sports Gambling Actually Maximize State Revenue and General Welfare?*

Under the revenue maximization category Maryland should ask: (1) will sports gambling maximize state revenue;<sup>196</sup> and (2) will sports gambling maximize general welfare overall, or will it cause more harm than good?<sup>197</sup>

The 2016 Blinken Report on state revenue generated from gambling asked, "If the benefits of gambling are not clear, and if the costs of gambling are too high, why do state legislators legalize gambling?"<sup>198</sup> The Blinken Report found its answer in Baylor's Distinguished Professor of Economics, Dr. Earl L. Grinols, who stated:

The answer is partly that the costs do not appear instantaneously, partly that those who make money from gambling do not bear the costs they impose on others, and partly that gambling creates a classic regional Prisoner's Dilemma problem: Everyone is best off if no one has gambling, but one region can sometimes gain at another's expense if it deviates from the agreement to prohibit gambling everywhere.<sup>199</sup>

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193. Ron Matz, *Maryland Still Doesn't Have Legalized Sports Betting, Will That Change?*, CBS BALT. (Aug. 31, 2018), <https://baltimore.cbslocal.com/2018/08/31/maryland-still-doesnt-have-legalized-sports-betting-will-that-change/> ("A bill to legalize sports betting in Maryland failed in the last session of state legislature, but it is likely to be reintroduced next year. If it's okayed by Maryland, voters would have their say in a referendum in 2020.").

194. *See supra* notes 114–115 and accompanying text (discussing race to the bottom and race to the top).

195. *See infra* Section II.C.1–2.

196. *See infra* notes 220–223 and accompanying text.

197. *See infra* Section II.D.

198. LUCY DADAYAN, NELSON A. ROCKEFELLER INST. OF GOV'T, *THE BLINKEN REPORT: STATE REVENUES FROM GAMBLING: SHORT-TERM RELIEF, LONG-TERM DISAPPOINTMENT* 18 (2016), [https://rockinst.org/wp-content/uploads/2017/11/2016-04-12-Blinken\\_Report\\_Three-min.pdf](https://rockinst.org/wp-content/uploads/2017/11/2016-04-12-Blinken_Report_Three-min.pdf).

199. Earl J. Grinols, *The Impact of Casino Gambling on Income and Jobs*, in *CASINO DEVELOPMENT: HOW WOULD CASINOS AFFECT NEW ENGLAND'S ECONOMY?* 3, 7 (Robert Tannenwald ed., 1995).

While critics may say that sports gambling will bring in a relatively small amount of revenue for the state, sports gambling is not just about revenue.<sup>200</sup> Much like small-value, closely held corporations that bring only a minute amount of revenue to states via franchise taxes, sports gambling is also about the extra benefits created by having a presence in the state.<sup>201</sup> For example, jobs will be created for the regulation, management, and enforcement of all things related to sportsbooks.<sup>202</sup> Thus, not only does Maryland stand to gain what at this moment is an uncapped revenue earning potential, the State will also see a magnitude of other benefits.<sup>203</sup>

There have been numerous scholarly works disseminated on the theory of regressive taxation.<sup>204</sup> A regressive tax, broadly defined, requires the lower-income class to pay more of their income, compared to higher-income classes, on a taxed activity.<sup>205</sup> While gambling is usually associated with a repressive tax, applying a *regressive* tax-like policy to sports gambling may give Maryland additional insight on whether sports gambling meets the State's goal of revenue maximization.<sup>206</sup> For example, if sports gambling is found to increase in frequency as one goes down the socioeconomic spectrum, states may be maintaining a short-term benefit in taxation from the immediate "gamble" but will later have to take care of their constituents—those who lose their money for basic needs by sports gambling—through state-sponsored programs whose costs often outweigh the initial taxation gains.<sup>207</sup> Therefore, sports gambling would place a greater cost on

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200. OXFORD ECON., ECONOMIC IMPACT OF LEGALIZED SPORTS BETTING 4–5 (2017), <https://www.americangaming.org/sites/default/files/AGA-Oxford%20-%20Sports%20Betting%20Economic%20Impact%20Report1.pdf> (“[E]mployment in sports betting operations[] is expected to total 86,819 jobs. Additionally, 129,852 indirect and induced jobs are expected to be supported, resulting in a total employment impact of 216,671 jobs.”).

201. See generally ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 25 (1993) (explaining that closely held companies, although having a small impact on revenue, help increase the reputation of a state to attract larger companies).

202. See OXFORD ECON., *supra* note 200, at 4–5 (discussing how legalized sports gambling schemes create jobs directly and indirectly).

203. *Id.*

204. Eric Kades, *Giving Credit Where Credit Is Due: Reducing Inequality with a Progressive State Tax Credit*, 77 LA. L. REV. 359, 360 (2016) (“Just as income inequality has exploded, so too has the scholarly literature [on regressive taxation].”).

205. *Regressive Tax*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“A tax structured so that the effective tax rate decreases as the tax base increases. With this type of tax, the percentage of income paid in taxes decreases as the taxpayer's income increases. A flat tax . . . is usu[ally] considered . . . more burdensome for low-income taxpayers than high-income taxpayers. A growing exemption also produces a regressive tax effect.”).

206. *Repressive Tax*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining *repressive tax* as *sin tax*—“An excise tax imposed on goods or activities that are considered harmful or immoral (such as cigarettes, liquor, or gambling)”).

207. For example, Maryland's Supplemental Nutrition Assistance Program (“SNAP”) provided \$987.12 million in benefits to recipients during 2017. Catlin Nchako & Lexin Cai, *A Closer Look at Who Benefits from SNAP: State-by-State Fact Sheets*, CTR. ON BUDGET AND POL'Y

the state than it is generating in tax revenue. Thus, if a state abstains from legalizing sports gambling, because the negatives of the regressive policy outweigh the positives, then the state indeed will be meeting its goal of revenue maximization.<sup>208</sup> By abstaining, the state will no longer need to take care of constituents at the lowest end of the economic spectrum for causes related to sports gambling. The question to be answered then becomes whether sports gambling generates more taxation revenue than cost.<sup>209</sup>

## 2. *How Integrity Fees Help Maximize State Revenue Generation*

After a state chooses to enact sports gambling laws because it maximizes state revenue, it should evaluate the secondary consideration of whether to include an integrity fee provision in its legislation.<sup>210</sup> A non-exhaustive list of questions states should address before making its decision include: (1) How does partnering with leagues hurt or help a revenue maximization scheme?;<sup>211</sup> (2) Does partnering with leagues increase overall integrity?;<sup>212</sup> (3) If a state does not partner with leagues, does the state run the risk of a powerful league entity running its own agenda against the state's agenda?;<sup>213</sup> and (4) What is the most cost-efficient measure—states contracting with leagues through integrity fees or leagues contracting directly with operators?<sup>214</sup> Ultimately, the regime that generates the most revenue while maintaining an acceptable level of integrity will be adopted, and that regime may or may not be sports gambling.<sup>215</sup>

Given no state with a sports gambling scheme has implemented an integrity fee, scholarship on the effects of integrity fees is limited.<sup>216</sup> On one hand, David Rebuck, the New Jersey Director of the Division of Gaming Enforcement, argues that leagues do not need integrity fees because they

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PRIORITIES (Dec. 3, 2018), <https://www.cbpp.org/research/food-assistance/a-closer-look-at-who-benefits-from-snap-state-by-state-fact-sheets#Maryland>. A recent report by the Gambling Research Exchange Ontario found that Canadian citizens in low-income brackets spent 2.8% of their household income on games of chance, versus 0.5% of people in higher income brackets. TARA E. HAHMANN & DR. FLORA I. MATHESON, GAMBLING RESEARCH EXCHANGE ONTARIO, PROBLEM GAMBLING AND POVERTY 1 (2017), [https://www.greo.ca/Modules/EvidenceCentre/files/Hahmann\\_and\\_Matheson\\_\(2017\)\\_Problem\\_gambling\\_and\\_poverty.pdf](https://www.greo.ca/Modules/EvidenceCentre/files/Hahmann_and_Matheson_(2017)_Problem_gambling_and_poverty.pdf). The study also found “the risk of gambling related harm increases significantly when more than [one percent] of gross family income is spent on gambling activities.” *Id.*

208. *Id.*

209. *See infra* Section II.D.

210. *See infra* notes 216–223 and accompanying text.

211. *See infra* note 220.

212. *See infra* note 221.

213. *See* sources cited *supra* note 154.

214. *See infra* Section II.D.

215. *See infra* Section II.D (discussing a proposed solution).

216. Kaneya, *supra* note 142.

have multiple forms of monetization coming in from legalized sportsbooks.<sup>217</sup> Mark Cuban even joked after *Murphy*, “I think everyone who owns a top four professional sports team just basically saw the value of their team double.”<sup>218</sup> Additionally, the Executive Director at the University of Nevada, Las Vegas International Center for Gaming Regulation, André Wilsenach, concluded, “[S]o-called ‘integrity fee[s],’ increase the costs of legal sports betting, siphon much needed tax revenues away from state coffers, and increase state regulatory burdens.”<sup>219</sup>

On the other hand, partnering with leagues may increase state revenue and the integrity of sports gambling.<sup>220</sup> Currently, an open line of communication does not exist between leagues and states that have legalized sports gambling schemes.<sup>221</sup> Opening a clear channel of communication with leagues by including an integrity fee will not only protect the integrity of the game through enhancements made by the leagues, but will allow for a mutually beneficial partnership.<sup>222</sup> Both leagues and states have an interest in revenue maximization, and neither party would have an interest in losing revenue.<sup>223</sup> Therefore, having a partnership that strives to promote both revenue and integrity will be inherently beneficial for both parties.

#### *D. Solution: What Maryland Should Do About Sports Gambling*

The existing flaw in Maryland’s legislation is that it has no legislation.<sup>224</sup> Even though it remains apparent that state legislators do not know whether sports gambling will maximize state revenue, unless Maryland at-

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217. NYU School of Law, *supra* note 161 (referring to David Rebeck discussing how leagues will receive secondary benefits from sports betting).

218. Berkeley Lovelace Jr., *Mark Cuban: Top Sports Team Just Saw Their Value Double on Supreme Court Betting Decision*, CNBC (May 14, 2018), <https://www.cnbc.com/2018/05/14/mark-cuban-sports-team-saw-their-value-double-on-betting-decision.html>. Mark Cuban is the “[c]o-founder of the successful startup Broadcast.com, [and] is [also] known as the zealous owner of the NBA’s Dallas Mavericks.” *Mark Cuban Biography*, BIOGRAPHY, <https://www.biography.com/people/mark-cuban-562656> (last visited Jan. 10, 2019).

219. André Wilsenach, *State Gambling Regulators Equipped and Ready to Take Charge on Legal Sports Betting Industry*, LINKEDIN (May 23, 2018), <https://www.linkedin.com/pulse/state-gambling-regulators-equipped-ready-take-charge-legal-wilsenach/>.

220. *See supra* Section II.B.2–3; *see also* NYU School of Law, *supra* note 161 (referring to Rick Buchanan); *infra* Section II.D.

221. *See, e.g.*, NYU School of Law, *supra* note 161.

222. Press Release, Charles E. Schumer, *supra* note 150.

223. Professional leagues are operated as for-profit corporations, “[a] corporation organized for the purpose of making a profit.” *For-Profit Corporation*, BLACK’S LAW DICTIONARY (10th ed. 2014). Furthermore, although states operate as public corporations, each would not survive without revenue maximization. *See Public Corporation*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“A government-owned corporation that engages in activities that benefit the general public, usu[ally] while remaining financially independent.”).

224. *See supra* text accompanying notes 193–198.

tempts to legalize sports gambling, the State will never know.<sup>225</sup> While recognizing legalization could lead to the negatives outweighing the positives, unforeseen problems, or only a marginal increase in state revenue, Maryland is currently in a prisoner's dilemma in regards to sports gambling.<sup>226</sup> It appears that if Maryland elects not to legalize a regime, the State will lose on both sides of the race to the bottom and race to the top state competition theory, failing to maximize state revenue.<sup>227</sup> While Maryland continues to go without a sports gambling regime, surrounding states have passed or are swiftly approving legislation to legalize sports gambling.<sup>228</sup>

On one side of the competition theory, Maryland is at the center of a race to the bottom scenario. Maryland is suffering harms caused by the race because its constituents can travel to nearby sportsbooks to gamble, generating positive externalities—revenue and job creation—for those states and bringing back negative externalities—gambling addictions, morality issues, and regressive taxation like problems—to Maryland.<sup>229</sup> Although these negative externalities may still exist if Maryland legalizes sports gambling, they exist without it as well.<sup>230</sup> By legalizing a sports gambling scheme, however, Maryland can: (1) maximize state revenue; (2) gain control and regulate how its constituents sports gamble; (3) cost spread against the cost of those negative externalities through an increase in taxation revenue; and (4) help dismantle the black market sportsbooks within the State.<sup>231</sup> Moreover, if Maryland chooses not to legalize sports gambling, the State will continue to fall further behind in a race to the bottom competition while only feeling the effects of the listed negative externalities.<sup>232</sup>

On the other side of the state competition theory, Maryland is also losing a race to the top competition.<sup>233</sup> Surrounding states have generated hundreds of millions of dollars in sports gambling handle in the first few

225. See OXFORD ECON., *supra* note 200, at 4–5 (discussing how sports gambling schemes will boast economic development). *But see* Grinols, *supra* note 199, at 11 (“[E]conomic development does not appear to be the primary economic consideration relating to the introduction of a casino.”).

226. See *supra* text accompanying notes 22–24.

227. See *supra* Section II.A (discussing the context of state competition).

228. Rodenberg, *supra* note 111.

229. See *infra* text accompanying notes 240–241.

230. See generally David Brunori, *Regressive, Addictive, and Immoral—What’s Not to Like About Gambling?*, FORBES (Apr. 28, 2016), <https://www.forbes.com/sites/taxanalysts/2016/04/28/regressive-addictive-and-immoral-whats-not-to-like-about-gambling/#3dab8c2d54a3> (“Politicians in Maryland repeatedly pointed out that their citizens were taking buses to West Virginia and Delaware to gamble.”).

231. See NYU School of Law, *supra* note 161 (referring to Ari Borod discussing the remedies legalized sports betting provides to players).

232. See *supra* text accompanying note 229.

233. See *supra* Section II.A (explaining race to the top).

months since *Murphy* allowed states to legalize sports gambling schemes, which in turn has produced millions of dollars in state revenue.<sup>234</sup> While it is still too early to tell exactly what the cost may be if sports gambling acts as a regressive policy, it is hard to argue that millions of dollars in monthly revenue is harmful to a state's budget.<sup>235</sup> Again, by failing to have a legalized regime, Maryland's constituents are likely to travel to nearby states to sports gamble or, worse, continue to use black market sportsbooks.<sup>236</sup> Therefore, without a legalized scheme, Maryland's constituents are funneling revenue to other states or to illegal marketplaces.<sup>237</sup> Thus, Maryland is losing the race to potentially millions of dollars in state revenue generated by operating a legal sportsbook in addition to losing out on other positive externalities, such as job creation and revenue to fund new and existing state-sponsored programs.<sup>238</sup> Finally, should Maryland choose not to regulate, the federal government may adopt standardized legislation, like PASPA, that grandfathers in only existing schemes, possibly restricting the amount of revenue Maryland can receive.<sup>239</sup>

By losing on both sides of the race to the bottom and race to the top state competition theory, Maryland is positioning itself in what would be considered the harshest sentence of a prisoner's dilemma by not legalizing

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234. See David Purdum, *\$184 Million Bet on Sports in September in New Jersey*, ESPN (Oct. 12, 2018), [http://www.espn.com/chalk/story/\\_id/24967983/184-million-bet-sports-september-new-jersey](http://www.espn.com/chalk/story/_id/24967983/184-million-bet-sports-september-new-jersey) (“[New Jersey] has generated \$4.1 million in tax revenue in the first four months.”).

235. See DEL. SPORTS LOTTERY, *supra* note 142 (showing \$2,822,669 of state revenue as of October 28, 2018, before operating expenses for the Lottery and Division of Gaming Enforcement—calculated by adding *state shares* from June 5, 2018, July 29, 2018, August 26, 2018, September 30, 2018, and October 28, 2018).

236. AM. GAMING ASS'N., LAW ENFORCEMENT SUMMIT ON ILLEGAL SPORTS BETTING: AFTER-ACTION REPORT 12 (2016), [https://www.americangaming.org/sites/default/files/After%20Action%20Report\\_PDF-Web.pdf](https://www.americangaming.org/sites/default/files/After%20Action%20Report_PDF-Web.pdf); see also Brunori, *supra* note 230 (discussing how Maryland residents travel to nearby states to gamble).

237. *Id.*

238. NYU School of Law, *supra* note 161 (referring to David Rebeck discussing how New Jersey and other states receive revenue from sports gambling).

239. Darren Rovell, *Senate Minority Leader Chuck Schumer Suggests Federal Framework for Sports Betting*, ESPN (Aug. 29, 2018), [http://www.espn.com/chalk/story/\\_id/24511871/chuck-schumer-suggests-federal-framework-sports-betting](http://www.espn.com/chalk/story/_id/24511871/chuck-schumer-suggests-federal-framework-sports-betting); see also *Sports Wagering*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/sports-wagering> (last visited Dec. 26, 2018) (noting sports wagering is currently subject to a 0.25% federal excise tax); *Grandfather*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“To cover (a person) with the benefits of a grandfather clause . . . the statute sets the drinking age at 21 but grandfathers those who are 18 or older on the statute's effective date.”); *Grandfather Clause*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“A provision that creates an exemption from the law's effect for something that existed before the law's effective date; specif[ically], a statutory or regulatory clause that exempts a class of persons or transactions because of circumstances existing before the new rule or regulation takes effect.”).

sports gambling.<sup>240</sup> To remedy the problem, Maryland should pass a bill legalizing sports gambling.<sup>241</sup>

Maryland's bill must include an integrity fee provision, a mandatory review provision, and a sunset provision. First, as Senator Schumer discussed in his report, information sharing is at the crux of operating a sportsbook with the highest levels of integrity.<sup>242</sup> Maryland's revenue will not be affected by an integrity fee if operators are tasked with paying this fee from their funds.<sup>243</sup> In addition, if the State has a positive relationship with the organizations whose intellectual property its constituents are using to operate their sportsbooks, there will be a better regime of general-welfare across the board.<sup>244</sup> States will be generating revenue, leagues will be generating revenue from product licensing, and a clear channel of communication will exist between the State and the leagues to ensure the utmost level of integrity amongst sports gambling.

Second, Maryland's bill must include a mandatory annual review by a neutral third-party committee to determine if Maryland is in fact maximizing state revenue. The review committee should determine whether sports gambling is actually generating revenue for Maryland or if the costs are outweighing revenue generation.<sup>245</sup> Furthermore, the review committee should value the harm caused to Maryland by not having sports gambling, and if any such harm has been corrected since the start of the race.<sup>246</sup> An analysis on previous harm may determine whether the cost of not having sports gambling actually outweighs the amount of revenue the State is losing from state-sponsored programs. For example, say sports gambling cost Maryland ten million dollars per year, but without a legalized scheme sports gambling cost the State twenty million dollars per year. Maryland, therefore, is better off with sports gambling to offset the cost of its neighboring states' legalized sports gambling schemes. Finally, the committee should analyze whether the integrity fee provision is indeed supporting the goal of

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240. See *supra* text accompanying notes 229–239 (explaining why Maryland is losing both a race to the bottom and race to the top competition).

241. See *infra* text accompanying notes 242–251.

242. See *supra* notes 150–152 and accompanying text.

243. MODEL SPORTS WAGERING ACT (GAMING STATES), *supra* note 142 (showing operators pay the integrity fee).

244. See Adam Bryant, *How to Build a Successful Team*, N.Y. TIMES (Dec. 1, 2017), <https://www.nytimes.com/guides/business/manage-a-successful-team> (stating that “create[ing] a shared goal . . . will offset the tendency of people to identify themselves as part of smaller groups”); see also Shimon Brathwaite, *The Importance of Healthy Business Relationships*, BUS. NEWS DAILY: SMALL BUS. SOLUTIONS & INSPIRATION (Oct. 20, 2017), <https://www.businessnewsdaily.com/10297-healthy-business-relationships.html> (“Healthy business relationships are the foundation of any successful business . . .”).

245. See *supra* note 207 and accompanying text.

246. See *supra* text accompanying notes 229–239.

Maryland's sports gambling operation.<sup>247</sup> Failing to review the legislation and both the positive and negative externalities created by legalized sports gambling may result in the negatives outweighing the positives, thus hurting state revenue.<sup>248</sup>

Finally, to further safeguard against a failure of the annual review, Maryland's sports gambling legislation should come with a "sunset provision."<sup>249</sup> If the law fails a mandatory review, either for lack of revenue maximization or because other negative externalities outweigh the positives, the legislation will not renew.<sup>250</sup> Additionally, this provision will allow lawmakers to effectuate any changes necessary before ratifying the bill to be used for continued legislation.<sup>251</sup>

### III. CONCLUSION

In *Murphy v. NCAA*, the Supreme Court of the United States struck down PASPA for violating the Anticommandeering Clause of the Tenth Amendment because it illegally empowered the federal government to order certain states to take specific actions to prohibit sports gambling.<sup>252</sup> In the aftermath of PASPA, several states quickly capitalized on the opportunity to legalize sports gambling in order to generate—and maximize—state revenue.<sup>253</sup> Maryland has not taken advantage of this new opportunity, however, while almost all of its bordering states have.<sup>254</sup> Thus, Maryland has placed itself in the harshest position of a prisoner's dilemma by not legaliz-

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247. See *supra* text accompanying notes 242–244.

248. See sources cited *supra* notes 198–200.

249. BRIAN BAUGUS & FELER BOSE, MERCATUS CTR. AT GEO. MASON UNIV., SUNSET LEGISLATION IN THE STATES: BALANCING THE LEGISLATURE AND THE EXECUTIVE 2 (2015), <https://www.mercatus.org/system/files/Baugus-Sunset-Legislation.pdf>. The authors state:

Sunset provisions are clauses embedded in legislation that allow a piece of legislation or a regulatory board to expire on a certain date unless the legislature takes affirmative action to renew the legislation or board. The time between enactment (or renewal) and the next sunset date varies from state to state but typically runs from four to twelve years. The sunset provision typically requires that the legislation or board undergo a review, usually conducted by legislative staff or by state auditors. The reviewers will recommend allowing the law or board to sunset, allowing it to continue but with changes, or leaving it unchanged. Sunset provisions also frequently allow or even require a preliminary review before the final review. Sunset laws are a key tool the legislature uses in asserting itself against an executive branch that often dominates state government.

*Id.*

250. *Id.*

251. *Id.*

252. *Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

253. See *supra* Section II.B.1.

254. See *supra* Section II.A.



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ing sports gambling.<sup>255</sup> While it is unclear whether Maryland would be better off without sports gambling, due to the actions of its neighbors, Maryland should pass a sports gambling law remedying the current problem.<sup>256</sup> This remedy, however, should not come without limitations.<sup>257</sup> Maryland's bill should include an integrity fee provision, mandatory review provision, and sunset provision in order to maximize state revenue.<sup>258</sup>

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255. *See supra* Sections II.A and II.D.

256. *See supra* Section II.D.

257. *See supra* Section II.D.

258. *See supra* Section II.D.