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COMMENT

How the Rise of the Daily Fantasy Sports Industry Can Catalyze the Liberalization of Sports Betting Policies in the United States

BRENDAN F. CONLEY†

It is a crisp Sunday afternoon in the autumn of 2015, and football fanatics from all across the United States, and the world, are situated in front of their high definition television sets, anxiously awaiting the kickoff of their favorite National Football League (NFL) team's game. Hope abounds, and significant playoff implications permeate the weekend slate of games. Yet, for millions of these fans, attention quickly shifts elsewhere.

For these individuals, it is standard to find laptop computers positioned adjacent to them on the sofa, open to FanDuel's "Live" page, whereby they can continuously monitor the progress of their lineups—or "entries"—in the variety of different "contests" offered on the site, if they so choose. However, their immediate attention is still elsewhere. To be sure, the home team's game remains on in the background, and these individuals are still vaguely attuned to what is taking place on the field, but their eyes are truly fixated on their laptops and mobile devices. By now, having fully committed the players in their various fantasy lineups to memory, these devices become precious sources of the real-time information, upon which the hopes and dreams of this group of daily fantasy football participants will subsequently rise and fall.

As the third quarter of the home team's game concludes,

† Note & Comment Editor, *Buffalo Law Review*.

the national broadcast transitions to a commercial break and yet another advertisement for DraftKings, FanDuel's primary competitor, flickers onto the screen and depicts seemingly everyday people winning life-altering cash payouts. The commercial concludes with the now-familiar phrase: "This isn't fantasy as usual. This is DraftKings. Welcome to the big time."¹

At this point, while games across the country move to the fourth quarter, the daily fantasy player's attention oscillates between nervously checking the up-to-the-minute scoring status of their active lineups and intently studying the out-of-town scores, game situations, and player statistics via their preferred smartphone applications. All these individuals can do is idly watch, as their financial fortunes are determined by what is taking place in NFL stadiums located thousands of miles away. It is a helpless feeling, yet it is also utterly captivating.

In these moments, the allocation of thousands of dollars will oftentimes quite literally turn on a single yard gained or lost. One touchdown can mean the difference between winning hundreds of thousands of dollars and unceremoniously losing the entirety of an entry fee with nothing to show for the time, energy, and money spent in the process. None of this is impervious to human error either: a poorly spotted football, an improper penalty call, or a statistician's error can be the deciding factor when the margins between victory and defeat are this slim. Daily fantasy players are fully cognizant of the imperfect nature of the game, particularly on afternoons such as this one, but they also realize they are all playing under the same umbrella of uncertainty. And one of them is about to become a millionaire.

As the game clocks begin to wind down around the

1. Don Van Natta Jr., *Welcome to the Big Time*, ESPN MAG. (Aug. 24, 2016), http://www.espn.com/espn/feature/story/_id/17374929/otl-investigates-implosion-daily-fantasy-sports-leaders-draftkings-fanduel.

league, the daily fantasy player's anxiety is palpable. But, for as stressful as it can be at times, there is also a certain thrill that comes with being along for the ride on these Sunday afternoons. The adrenaline rush has an addictive quality to it, and the hope of potentially winning an enormous cash payout can be intoxicating, whereas the defeats can be bitterly disappointing.

This all feels an awful lot like gambling. But how could it be? FanDuel and DraftKings have both very publicly been permitted to grow into billion-dollar enterprises² over the course of several years,³ and they combine to feature high-profile sponsorship deals with the National Basketball Association (NBA), National Hockey League (NHL), and Major League Baseball (MLB).⁴ Two prominent NFL franchise owners—Dallas Cowboys owner Jerry Jones and New England Patriots owner Robert Kraft—even have equity stakes in DraftKings.⁵ The two companies have each spent millions of dollars on advertisements, including signage in NFL stadiums across the country⁶ and, perhaps most notably, television commercials that air every ninety seconds, on average.⁷ So, despite ostensibly displaying many of the traditional features of illegal online gambling operations, it seems unfathomable to think that these daily fantasy sports companies could get away with such a brash and public showing if there was any doubt whatsoever as to the legality of their business models. Maybe daily fantasy

2. *Id.*; Brad Tuttle, *Why Betting on Fantasy Sports is Legal but Betting on Regular Sports is Not*, MONEY (Sept. 10, 2015), <http://time.com/money/4029443/fantasy-sports-betting-legal/>.

3. Van Natta, *supra* note 1.

4. *See id.*

5. *See id.*

6. *Id.*; Brent Schrottenboer, *FanDuel Signs Deals with 15 NFL Teams, Escalating Daily Fantasy Integration*, USA TODAY (Apr. 21, 2015, 10:42 PM), <http://www.usatoday.com/story/sports/2015/04/21/daily-fantasy-sports-fanduel-draftkings-nfl-mlb-nhl-nba/26149961/>.

7. Van Natta, *supra* note 1.

sports contests really are “games of skill”⁸ after all . . .

INTRODUCTION

For several years, the daily fantasy sports industry was inexplicably permitted to operate under a veil of legal uncertainty, based largely upon the industry’s own conceptions and interpretations of existing federal and state law.⁹ To say that the foremost daily fantasy companies, FanDuel and DraftKings, had isolated some sort of legal loophole—through which they could build their companies and grow their business models—would be grossly misleading, for it implies a somewhat solid, if not remote and limited, legal footing. However, at most, these two pioneers of the daily fantasy industry had simply identified a legal gray area, a small crack in the regulatory armor targeting illegal online gambling operations, through which they could at least make an argument for the legitimacy of their operations; and they wasted little time in doing so.

By creatively and strategically marketing their services as being akin to traditional fantasy sports products, when convenient, and continuously labeling them as “games of skill” in which the most knowledgeable and talented players typically prevail, the companies were largely able to discourage and ward off public skepticism and investigative scrutiny.¹⁰ This was done while simultaneously juxtaposing that public approach with their pitches to investors behind closed doors, which would often allude to the similarities between the daily fantasy business models and those of

8. *Id.* Noting that, even in early meetings, FanDuel’s founder, Nigel Eccles, “was a passionate evangelist for daily fantasy sports as a game of skill”

9. *See id.*

10. *See id.* (noting that the companies existed in the same legislative landscape for several years, during which time they branded themselves as games of skill publicly, while privately pitching investors on their similarities to traditional online gambling products).

traditional illegal online gambling operations.¹¹ This was an extremely audacious strategy, yet it worked almost flawlessly for about half a decade,¹² during which time FanDuel and DraftKings both grew into billion-dollar enterprises.¹³

From the advent of his company, FanDuel's chief executive officer, Nigel Eccles, believed that existing law provided a "safe harbor" for daily fantasy sports,¹⁴ although he did demonstrate a certain degree of wariness concerning the lack of uniformity in the relevant state laws.¹⁵ But, as each successive year came and passed without issue, those following the industry seemed to grow increasingly less concerned with any potential legality problems facing the daily fantasy companies. Meanwhile, the progressively brazen marketing behaviors of the industry leaders certainly exuded an aura of confidence concerning their legal statuses.¹⁶ Though, as it turned out, the companies' legal footing was actually quite tenuous all along.

When the day of legal reckoning finally did come for the daily fantasy industry, the State of New York was at the forefront, with State Attorney General Eric Schneiderman serving as the proverbial leader of the charge.¹⁷ On

11. *Id.*

12. *See id.* (recognizing that FanDuel was founded in 2009, DraftKings was founded in 2011, and New York's cease and desist order ultimately came in November 2015).

13. *See id.*

14. *Id.*

15. *See id.* (quoting Eccles' advice to the daily fantasy industry in which he warned them to "avoid the use of gambling terms in the promotion and marketing of their games.").

16. *See id.*

17. Walt Bogdanich et al., *Attorney General Tells DraftKings and FanDuel to Stop Taking Entries in New York*, N.Y. TIMES (Nov. 10, 2015), <https://www.nytimes.com/2015/11/11/sports/football/draftkings-fanduel-new-york-attorney-general-tells-fantasy-sites-to-stop-taking-bets-in-new-york.html>; Drew Olanoff, *NY State Rules Daily Fantasy Illegal, Ordering FanDuel and DraftKings to Stop Taking Bets*, TECHCRUNCH (Nov. 10, 2015),

November 10, 2015, Schneiderman sent separate letters to FanDuel and DraftKings requesting that both companies cease and desist operations in New York State.¹⁸ The letters went on to explain that, upon his investigation, Schneiderman concluded the sites were in fact online gambling operations, which were thereby illegal under Article I, Section 9 of the New York State Constitution.¹⁹ One week later, on November 17, 2015, the New York State Office of the Attorney General filed a court motion seeking a preliminary injunction against the two giants of the daily fantasy sports industry.²⁰

New York was technically the second state to issue a cease and desist order against FanDuel and DraftKings, thereby banning them from operating within the state.²¹ However, the first state to do so, Nevada, did not act because of any perceived illegality with the business models of either company.²² In fact, daily fantasy sports are perfectly legal under Nevada law, provided that daily fantasy operators obtain a state-issued license.²³ Therefore, the Nevada “ban” was actually a licensure dispute, since neither FanDuel nor DraftKings had obtained operating licenses to do business

<https://techcrunch.com/2015/11/10/ny-attorney-general-rules-daily-fantasy-sports-illegal-orders-sites-to-cease-and-desist/>. Van Natta, *supra* note 1.

18. Van Natta, *supra* note 1.

19. Memorandum of Law in Support of Plaintiff’s Motion for a Preliminary Injunction at 3–4, 13–14, 19, *People v. FanDuel, Inc.*, (No. 453056/15), 2015 WL 9273711 (N.Y. Sup. Nov. 17, 2015) [hereinafter *People v. FanDuel Motion*].

20. *Id.*

21. Nigel Duara, *States Crack Down on Fantasy Sports, Calling Them Games of Chance, Not Skill*, L.A. TIMES (Jan. 2, 2016, 12:10 PM), <http://www.latimes.com/nation/la-na-ff-fantasy-sports-bans-20160102-story.html>.

22. Howard Stutz, *Year is Shaping Up a Make or Break for Daily Fantasy Sports Industry*, L.V. REV.-J. (Mar. 1, 2016, 1:37 PM), <http://www.reviewjournal.com/inside-gaming/year-shaping-make-or-break-daily-fantasy-sports-industry>.

23. *Id.* (citing the Chairman of the Nevada Gaming Control Board as saying, “No one said daily fantasy sports was illegal. . . . All we said is play by the rules.”).

within the state.²⁴ As such, Schneiderman's actions in this matter truly were unprecedented at the time. However, several other states subsequently followed New York's lead and proceeded to raise varying degrees of doubt regarding the legality of daily fantasy sports operations.²⁵

As more states subsequently took action with regard to the daily fantasy sports industry, New York remained at the epicenter of the issue. New York is extremely important from the standpoint of the daily fantasy sports companies because it is the second largest state market for daily fantasy in the country, behind only California. Just in 2015, New York users accounted for \$267 million dollars in entry fees across the industry.²⁶ Additionally, FanDuel is headquartered in New York,²⁷ and as of 2016, the company employed 160 people in its New York City offices alone.²⁸ Therefore, having to cease operations in New York was a particularly damaging, if not outright devastating, blow to the industry leaders.

In response to Schneiderman's ban, and despite their bitter rivalry, FanDuel and DraftKings decided to pool their resources together to defend the legality of their services, while simultaneously and vigorously lobbying for legislative action that would expressly legalize daily fantasy sports in

24. Duara, *supra* note 21. It is, however, noteworthy that the Nevada Attorney General did equate daily fantasy sports with "sports pools and gambling games," because, while such operations are legal in Nevada, this is not the case in other states. *Id.*

25. Stutz, *supra* note 22.

26. See, e.g., Dan Adams, *N.Y. Assembly Passes Daily Fantasy Sports Bill*, BOS. GLOBE (June 17, 2016), <https://www.bostonglobe.com/business/2016/06/17/assembly-passes-daily-fantasy-sports-bill/wMCZKZDIHhIAwnawafd96H/story.html>.

27. Paul Sawers, *How FanDuel Grew from Humble Scottish Startup into an American Fantasy Sports Giant*, VENTUREBEAT (May 22, 2016, 10:38 AM), <http://venturebeat.com/2016/05/22/how-fanduel-grew-from-humble-scottish-startup-into-an-american-fantasy-sports-giant/>.

28. *Id.*

contested states, such as New York.²⁹ Eventually, the two industry leaders won a hard-fought and monumental victory when New York Governor Andrew Cuomo signed Senate Bill 8153, “An Act to Amend the Racing, Pari-Mutuel Wagering and Breeding Law, in Relation to the Registration and Regulation of Interactive Fantasy Sports Contests,” into law.³⁰ The bill not only legalized daily fantasy sports in New York by declaring it to be a game of skill—thereby potentially saving the industry—but also introduced a number of regulations and consumer safeguards.³¹ The bill did not come without controversy though, and Eric Schneiderman’s complete reversal of opinion, with respect to the issue, invited a fair amount of criticism from anti-gambling groups and lobbyists.³²

This Comment will examine the rather precarious legal position of the daily fantasy sports industry in light of the recent state trend of initially opposing and prohibiting daily fantasy sports, and then subsequently passing legislation that expressly legalizes the activity—but with heavy regulations, consumer protection mechanisms, and state revenue generating devices built in.³³ The analysis will begin in Part I of this Comment with a closer look at the origins of fantasy sports in the United States, the development of daily fantasy sports within that existing framework, and the perceived legal “safe harbor” that helped inspire the idea for daily fantasy sports, subsequently persuaded daily fantasy investors, and paved the way for the meteoric rises of FanDuel and DraftKings.

Part II of this Comment will discuss some of the

29. Van Natta, *supra* note 1.

30. S.B. 8153, 2015–16 Legis. Sess. (N.Y. 2016).

31. *See id.*

32. *See* Dustin Gouker, *Anti-Gambling Group Leads Lawsuit Against New York Daily Fantasy Sports Law*, LEGAL SPORTS REP. (Oct. 5, 2016), <http://www.legalsportsreport.com/11750/new-york-dfs-lawsuit/>.

33. *See, e.g.*, S.B. 8153.

significant events and missteps that compelled the increased legal scrutiny, eventually resulting in several states taking legal action against, or expressing their opinion on the illegality of, daily fantasy sports. Furthermore, this Part will delve into the responsorial legislation passed in several states, such as New York, as well as provide a closer look at some of the more noteworthy aspects of such legislation and its influence on the overall outlook for the daily fantasy industry across America.

Finally, this Comment will conclude in Part III with a discussion of how the legislative actions in a growing number of states across the country, which clearly establish the legality of daily fantasy sports at the state level can, and should, serve as both a template and catalyst for the increased liberalization of sports gambling policies throughout the United States, at both the state and federal levels, provided that the remaining legal impediments to such liberalization are ultimately surmounted. Chief among these impediments is the applicable federal prohibition on state-sanctioned sports betting under the Professional and Amateur Sports Protection Act (PASPA), the constitutionality of which is currently being challenged by the State of New Jersey before the U.S. Supreme Court in the case of *Murphy v. NCAA*. Both PASPA and New Jersey's Tenth Amendment challenge of the statute will be discussed, at length, *infra*.

I. THE ADVENT OF DAILY FANTASY SPORTS IN AMERICA

This Part will briefly chronicle the development of fantasy sports, in the United States, and discuss the origins of *daily* fantasy sports, against this backdrop. This will necessarily include taking a closer look at the existing legislative and regulatory environment that the pioneers of the daily fantasy industry sought entry into, and in fact believed to be particularly conducive to both garnering initial acceptance and promoting the longevity of their fantasy products and services, from a legal standpoint.

A. *The Origins of Fantasy Sports*

Today, fantasy sports are a cultural institution, firmly entrenched in modern American society. In fact, in 2016, roughly fifty-seven million Americans actively participated in fantasy sports leagues.³⁴ It was not always such a popular activity, however, and the earliest forms of these contests would likely be largely unrecognizable to a twenty-first century fantasy sports aficionado.

The origins of fantasy sports can be traced all the way back to 1941, when Ethan Allen, a former professional baseball player, partnered with the Cadaco-Ellis game company to devise a board game called “All-Star Baseball.”³⁵ All-Star Baseball was the first successful attempt at incorporating the on-field game performances of real-life athletes into a game format.³⁶ The game, in its original and most basic conception, involved replicating a given player’s past statistical performances on a round disk.³⁷ Each disk would then be divided into fourteen segments or “wedges,” which were numbered one through fourteen, with each number corresponding to a different possible outcome for a given plate appearance.³⁸ The wedges would then be adjusted to reflect a player’s actual performance tendencies. For instance, a home-run hitter would have a significantly larger home-run wedge, as compared with a player who typically hits mostly singles, and vice versa.³⁹ The disks would then be placed on a spinner, which would determine

34. Van Natta, *supra* note 1.

35. *Ethan Allen, Cadaco-Ellis, and All-Star Baseball*, BASEBALL GAMES, <http://baseballgames.dreamhosters.com/CadacoASB.htm> (last visited Mar. 22, 2017).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

the outcome of each “at-bat.”⁴⁰ All-Star Baseball quickly became immensely popular amongst baseball fans, and new renditions of the game (updated to reflect changing player rosters and statistical performances) would be produced annually for fifty years thereafter.⁴¹

Later, in 1961, Hal Richman, a mathematics student at Bucknell University, conceived of a more complex—but still statistically oriented—recreational baseball game, which he called “Strat-O-Matic Baseball.”⁴² Similar to All-Star Baseball, Strat-O-Matic enabled participants to construct lineups and simulate outcomes, relying on past player statistical performances.⁴³ The primary differences between the two games were that Strat-O-Matic utilized more complicated result tables and it also incorporated dice rolls, as opposed to spins. Notwithstanding these relatively minor differences, Strat-O-Matic baseball caught on quickly and developed a fiercely loyal following, just as its predecessor had over the prior two decades.⁴⁴

The one major deficiency in both of these early renditions of fantasy sports games was that neither game enabled players to demonstrate their abilities to predict future performances.⁴⁵ Both Strat-O-Matic and All-Star Baseball were exclusively reliant on past events and player performances in order to model and estimate what would *probably* occur. However, neither game model incorporated what actually *did* occur at present or future times. In response to this perceived deficiency, Bill Gamson, a psychology professor at Harvard University and the

40. *Id.*

41. *Id.*

42. Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 4–5 (2012).

43. *See id.*

44. *See id.*

45. *See id.* at 5.

University of Michigan, devised a forward-looking baseball game in the early 1960's, which he referred to as "The Baseball Seminar."⁴⁶ This was the first known simulation game that bore a significant resemblance to the modern-day manifestations of fantasy sports.⁴⁷

Gamson's "Baseball Seminar" required participants to pay a ten-dollar entry fee, at which point they could draft a roster of Major League Baseball players.⁴⁸ The winner of the Baseball Seminar—and presumably the pool of entry fee money—was the participant whose roster of baseball players performed the best in a pre-determined set of statistical categories, over the course of the baseball season.⁴⁹ The Baseball Seminar was originally a relatively secretive pastime, confined to Gamson's inner circle of academic friends and colleagues. However, in early 1965, one of the original participants in the Baseball Seminar, a journalism and film studies professor at the University of Michigan by the name of Robert Sklar, passed the game along to one of his mentees, Daniel Okrent.⁵⁰

Nearly fifteen years later, in November of 1979, Daniel Okrent gathered a group of his friends at a New York City bistro, called "La Rotisserie Francaise," to pitch to them the idea of a fantasy baseball league.⁵¹ It was this meeting, and more specifically its location, that inspired the term "rotisserie baseball league," which is still the term used today to describe the most common format of season-long fantasy baseball.⁵² In 1980, Okrent, Sklar, and nine of their professional comrades held the inaugural auction draft for

46. *Id.* at 5–6.

47. *See id.*

48. *Id.*

49. *Id.* at 6.

50. *Id.*

51. *Id.* at 6–7.

52. *See id.* at 7.

their Rotisserie League.⁵³ Each participant posted a \$260 entry fee and used this money to bid on players in an auction draft format.⁵⁴ As per the original rules, these eleven competitors could only select players from National League rosters, and the winner was determined at the end of the Major League Baseball Season, based on the statistical performances of their respective rosters of players in eight designated categories.⁵⁵ The winner, whose roster earned the most collective points over the course of the season, would thereby win the pool of entry-fee cash and be ceremonially doused in the chocolate drink “Yoo-Hoo” for his or her efforts.⁵⁶ These eleven fantasy trailblazers could not possibly have known that what had begun as an engaging recreational outlet, if not a bit of a joke amongst friends, would eventually grow into a multi-billion dollar industry in less than three decades.⁵⁷

Since several of the original members in the Rotisserie League were themselves media members, who in turn had many acquaintances in the national media, it did not take long for word to get out about this new activity.⁵⁸ Before the inaugural 1980 season was even completed, *The New York Times* and the *CBS Morning News* had already run stories on the Rotisserie League, even going so far as to chronicle the biographies and individual performances of the eleven competitors.⁵⁹ The game quickly developed a cult-like following,⁶⁰ and new variations on the original rules were introduced soon thereafter, including head-to-head formats

53. *Id.*; see also Josh Robbins, *Geek Games: It's Been 25 Years Since 11 Fans Held First Rotisserie Auction*, ORL SENTINEL, Jun. 8, 2005, at D1.

54. Edelman, *supra* note 42, at 7.

55. *Id.*

56. *Id.* at 7–8.

57. See *id.* at 8–11; see also Van Natta, *supra* note 1.

58. Edelman, *supra* note 42, at 8.

59. *Id.*

60. *Id.*

of the game. A new moniker—“fantasy baseball”—was also widely adopted.⁶¹ Today, nearly forty years after the inaugural season, there are two primary versions of season-long fantasy baseball offered through major providers like ESPN: head-to-head leagues and rotisserie leagues.⁶²

In due time, the basic concept of Rotisserie League Baseball was expanded into other “fantasy sports,” such as football and basketball.⁶³ By the early 1990’s, fantasy sports started to gain steady traction as fantasy sports magazines, season guides, radio shows, statistical services, management groups, sportswear, and newsletters increasingly appeared on the scene.⁶⁴ Despite the escalating popularity, fantasy sports were still viewed as primarily being “an activit[y] for outcasts and engaged [in] by those presumed to be overly bookish and socially challenged” at this point in time.⁶⁵ Then, in 1994, the entire landscape of fantasy sports in America was forever changed with the advent of the Internet.⁶⁶

The Internet not only facilitated immense growth for the fantasy industry, but it also precipitated a rapid demographic shift amongst fantasy participants.⁶⁷ Fantasy sports participation was no longer disproportionately appealing to the statistically-minded, as the Internet eliminated the need for individuals to tabulate statistics and calculate results for themselves.⁶⁸ Additionally, participants were no longer in a position where their own participation

61. See *id.* at 8–9.

62. *Scoring Formats*, ESPN, <http://games.espn.com/flb/resources/help/content?name=scoring-formats> (last visited Mar. 22, 2017) (showing different fantasy baseball scoring formats).

63. See Edelman, *supra* note 42, at 9 (stating that the core rules of the original fantasy baseball games were later adopted and applied to fantasy games in other sports).

64. *Id.*

65. *Id.*

66. *Id.* at 10.

67. *Id.*

68. See *id.*

depended on the respective interests of their close friends and relatives. The Internet quite literally opened the door to a whole world of potential fantasy competitors, regardless of geographical proximity or prior relationships.⁶⁹ Companies such as ESPN quickly took advantage of the wealth of new possibilities, and by 1995, it introduced its first Internet-based fantasy game.⁷⁰ By 2000, ESPN offered fantasy contests in a wide range of sports beyond baseball including football, basketball, hockey, NASCAR, soccer, golf, and fly fishing.⁷¹ As of 2009, season-long fantasy sports was already a five-billion-dollar industry.⁷²

B. *Daily Fantasy Sports Enter the Market*

On October 13, 2006, President George W. Bush inadvertently and indirectly launched the daily fantasy sports industry when he signed the Unlawful Internet Gambling Enforcement Act (UIGEA) into law.⁷³ The law was aimed at eradicating illegal online poker and sports betting operations, and it was groundbreaking in the sense that it was the first time that Internet payment processors would be held liable for their role in facilitating illegal online gambling.⁷⁴ The logic was simple: if online gambling operations could not collect user fees, then their services could effectively be rendered obsolete. To this end, the law was largely successful, as many of the more prominent sportsbooks and online poker outfits voluntarily left the U.S. marketplace, which consequently made the task of isolating and prosecuting the remaining illegal gambling operations

69. *See id.*

70. *Id.*

71. *Id.* at 10–11.

72. *See id.* at 11.

73. *See* Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 U. ILL. L. REV. 117, 122–23 (2016); Van Natta, *supra* note 1.

74. *See* Edelman, *supra* note 73, at 122–23.

for their many violations of federal and state law a much simpler task.⁷⁵

There were other unintended consequences stemming from the passage of UIGEA, however. For instance, when all of the online sportsbooks and poker enterprises suddenly left the U.S. market, they left behind a void, as consumer demand for such products did not exit the market.⁷⁶ This was likely not surprising to lawmakers; yet, what they could not possibly have realized at the time was that UIGEA, the very law that had driven illegal online gambling from the United States and thereby created this void, had also simultaneously provided the legal gray area that ultimately inspired and facilitated the reincarnation of online sports gambling in its newest form: daily fantasy sports.⁷⁷ For, at the behest of the fantasy sports industry, and the professional sports leagues themselves, a carve-out was made in UIGEA to allow for the incredibly popular season-long fantasy sports leagues to continue to legally operate in the United States.⁷⁸ The law was completely silent on *daily* fantasy sports, as they had not yet been invented at this time. In fact, as will be discussed at length *infra*, it was this very same legal carve-out that would eventually provide a “safe harbor” for the leading daily fantasy sports enterprises to gain an initial foothold, and to subsequently grow their operations exponentially over the course of several years.⁷⁹

Daily fantasy operations, as we know them today, are relatively standard in their formats, particularly amongst the two industry giants, FanDuel and DraftKings. On both sites, users are provided with a “salary cap,” which is effectively their budget for selecting players, and then tasked with the challenge of constructing a lineup of real-life

75. *See id.*

76. *See id.* at 124.

77. *See id.* at 143; *see also* Van Natta, *supra* note 1.

78. *See* Edelman, *supra* note 73, at 143; Van Natta, *supra* note 1.

79. Van Natta, *supra* note 1.

players—each having previously been assigned a “salary” by the respective site—under the limitations of the aforementioned salary cap.⁸⁰ Players can then pay entry fees ranging from a single dollar all the way up to \$10,600 in order to enter these lineups into a variety of different contests, including one-on-one matchups, fifty-fifty contests (where the top-scoring fifty percent of players win cash prizes), and tournaments featuring hundreds of thousands of competitors and cash prizes that oftentimes reach seven figure dollar amounts.⁸¹ However, the first companies branding themselves as “daily fantasy sports” operations that entered the market in the wake of UIGEA really did not resemble daily fantasy sports as we know them today.⁸² These companies, such as Fantasy Day Sports Corp., were primarily just sportsbooks couching themselves as fantasy games.⁸³ Yet, as Fantasy Day Sports Corp. and similar entities inexplicably got away with their continued operation, other variations began to pop up, some of which more closely resembled the products that the legions of daily fantasy participants are accustomed to today.⁸⁴ Beginning in 2008, companies such as Snapdraft, Fantasy Factor, Fantazzle, FanDuel, DraftStreet, DraftDay, and DraftKings appeared on the daily fantasy scene.⁸⁵ But, eventually, FanDuel and DraftKings emerged to establish their market dominance.

FanDuel originated in Edinburgh, Scotland, in 2008, as “HubDub,” a web-based prediction market site that allowed users to bet virtual money on the outcome of significant

80. See Edelman, *supra* note 73, at 127.

81. Memorandum of Law in Support of Plaintiff’s Motion for a Preliminary Injunction at 3–4, 13–14, 19, *People v. FanDuel, Inc.*, (No. 453056/15), 2015 WL 9273711 (N.Y. Sup. Nov. 17, 2015).

82. See Edelman, *supra* note 73, at 124.

83. *Id.*

84. See *id.* at 125.

85. *Id.*

events, such as the 2008 U.S. presidential election.⁸⁶ According to Nigel Eccles, the founder and CEO of FanDuel, HubDub actually proved to be very popular and engaging. However, it had one major flaw—it was not conducive to generating revenue in its original format.⁸⁷ Recognizing that sports was one of the most popular categories on HubDub, and realizing the need to incorporate real money into the existing business model, Eccles looked across the Atlantic at the booming fantasy sports industry in the United States and saw room for improvement.⁸⁸ Specifically, Eccles believed that there were two significant deficiencies in the existing season-long renditions of fantasy sports in America: they were not particularly mobile-friendly in an era where people increasingly owned smartphones, and, perhaps most notably, they were not nearly fast-paced enough for a millennial generation that seemed to have an affinity for instant gratification.⁸⁹ Additionally, it was evident to the founders of FanDuel, some of whom were veterans of the online poker industry, that the passage of UIGEA had left a void in the U.S. marketplace, and they were enticed by the untapped potential that existed for a fantasy sports product that bore many of the same characteristics of a traditional online gambling operation.⁹⁰ Finally, after diligently reviewing the text of UIGEA, Eccles concluded that his newly conceived daily fantasy sports product would enjoy “safe harbor” under the new law, and FanDuel was launched.⁹¹

As FanDuel began to grow, the three men who eventually founded DraftKings, Jason Robins, Matt Kalish,

86. Paul Sawers, *How FanDuel Grew from Humble Scottish Startup into an American Fantasy Sports Giant*, VENTUREBEAT (May 22, 2016, 10:38 AM), <https://venturebeat.com/2016/05/22/how-fanduel-grew-from-humble-scottish-startup-into-an-american-fantasy-sports-giant/>.

87. See *id.*

88. See *id.*

89. See *id.*

90. See *id.*

91. Van Natta, *supra* note 1.

and Paul Liberman, were all still working at the printing company, Vistaprint, near Boston, Massachusetts.⁹² In January 2011, Kalish first proposed to Robins the idea of taking the basic premise of season-long fantasy sports, and condensing it into a single day of action.⁹³ Mere days later, undeterred by the discovery that FanDuel was already gaining a good amount of traction in the market, the three men set to work.⁹⁴ By November 2011, the young CEO Robins was able to secure his first investor, Ryan Moore.⁹⁵ Although Moore invested one million dollars in the fledgling company, the three co-founders still struggled to gain more investors, and the capital that they desperately needed.⁹⁶ Finally, Moore challenged the young men to quit their jobs at Vistaprint and fully invest in the company themselves if they wanted to convince others to do the same. They did so and quickly attracted more investors.⁹⁷ On April 27, 2012, DraftKings hosted its inaugural fantasy contest,⁹⁸ and, within three short years, they were vying with FanDuel for industry supremacy.⁹⁹

C. The Legality of Daily Fantasy Sports in the United States

From its inception, the legal position of daily fantasy sports in the United States has always been rather tenuous, at both the state and federal levels. This Section provides a look at the relevant federal laws as well as the three distinct state approaches to determining the legality of fantasy

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

sports. In considering these state and federal statutes, there are two important considerations to bear in mind. The first of these is quite simple: the definition of the word “gamble.” The two primary definitions provided for “gamble” in the Merriam-Webster dictionary are: “to play a game for money or property” and “to bet on an uncertain outcome.”¹⁰⁰ The second important consideration to keep in mind is the basic business models of fantasy sports. Players pay “entry fees” to fantasy sports contests, which generally begin and end within a single day’s time, and the players who score the highest will win real money, based on how high they finish and the contest format.¹⁰¹ Meanwhile, similar to an online poker venture, the daily fantasy companies derive their profits from taking a percentage “rake” or “vig” from the total entry fees collected for a given contest.¹⁰² With these factual considerations in mind, it is time to juxtapose them with an examination of the existing legal framework at the time of the daily fantasy industry’s inception.

1. Federal Laws Pertaining to Fantasy Sports

There are four federal laws that are currently relevant to the legality of the daily fantasy sports industry: the Interstate Wire Act of 1964 (Wire Act), the Illegal Gambling Business Act of 1970 (Gambling Act), the Professional and Amateur Sports Protection Act of 1992 (PASPA), and the aforementioned Unlawful Internet Gambling Enforcement Act (UIGEA).¹⁰³ To date, no legal action has been taken against the daily fantasy sports industry on the basis of these federal laws; however, a closer examination of the text of

100. *Gamble*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/gamble> (last updated Apr. 8, 2018).

101. *See generally* Shoshanna Delventhal, *How FanDuel and DraftKings Work*, INVESTOPEDIA (Dec. 24, 2015, 10:40 AM), <http://www.investopedia.com/articles/investing/122415/how-fanduel-and-draftkings-work.asp> (explaining the general business model for FanDuel and DraftKings).

102. *See* Van Natta, *supra* note 1.

103. *See* Edelman, *supra* note 73, at 136–44.

these laws demonstrates that companies like FanDuel and DraftKings are not exactly in a comfortable legal position at the federal level either.¹⁰⁴ Significantly, these are federal laws, and thus individuals or entities that engage in illegal gambling, as defined by *state* or *local* laws, still may be subject to federal prosecution.¹⁰⁵

The first of these federal laws, the Wire Act, was passed in 1964 and prohibits individuals and entities from engaging in gambling activities through the knowing use of “a wire communication facility for the transmission in interstate or foreign commerce”¹⁰⁶ The law was initially designed to inhibit the abilities of organized crime gambling rings by preventing criminals from obtaining the results of horse races via telegraph communications.¹⁰⁷ Notably, Internet communications have subsequently been deemed within the scope of the Wire Act, in both state¹⁰⁸ and federal courts.¹⁰⁹ Therefore, in light of these decisions, daily fantasy companies that function exclusively via the Internet, and continuously cross state lines in so doing, are most likely in constant violation of the Wire Act if they are in fact gambling operations.

Similarly, under the federal Gambling Act, anyone who “conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business” could face hefty fines and up to five years in prison.¹¹⁰ Any potential illegality will

104. *See id.*

105. *See id.* at 135–36.

106. 18 U.S.C. § 1084 (2012); *id.* at 136.

107. *See* Edelman, *supra* note 73, at 136.

108. *See, e.g.,* *Vacco v. World Interactive Gaming Corp.*, 185 Misc.2d 852, 860 (N.Y. Sup. 1999) (applying the Wire Act in a case where betting instructions were transmitted via the Internet).

109. *See, e.g.,* *United States v. Lyons*, 740 F.3d 702, 716 (1st Cir. 2014) (acknowledging the “Wire Act’s evident applicability to the internet.”).

110. 18 U.S.C. § 1955 (2012); Edelman, *supra* note 73, at 138.

again likely come down to the laws of a given state.¹¹¹ The three primary approaches to defining what constitutes illegal gambling at the state level will be discussed, at length, *infra*.

In 1992, the Professional and Amateur Sports Protection Act was signed into law, largely at the behest of the four major professional sports leagues in the United States—the NFL, NBA, NHL, and MLB—in addition to the National Collegiate Athletic Association (NCAA).¹¹² These leagues wanted to discourage both private and state-sponsored sports gambling in an effort to both reaffirm and maintain the integrity of their collective leagues and minimize the potential for unscrupulous or dishonest behavior to influence the outcome of sporting events.¹¹³ In relevant part, PASPA prohibits any person *or state* from conducting “a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . on one or more competitive games in which amateur or professional athletes participate . . .”¹¹⁴ Importantly, this law also grants automatic standing for any of these five athletic leagues to directly bring suit against any person or entity deemed to be in violation of this law; in doing so, it also prohibits any state from legalizing certain forms of sports gambling.¹¹⁵ For this reason, only four states have any form of legalized sports betting today: Delaware, Montana, Nevada, and Oregon.¹¹⁶ All four of these states had already legalized sports betting at the time PASPA was signed into law, and even they had to vigorously fight to be grandfathered in under the new law.¹¹⁷

111. See Edelman, *supra* note 73, at 138.

112. See *id.* at 139–40.

113. See *id.*

114. Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701–3704 (2012); *id.*

115. See Edelman, *supra* note 73, at 140.

116. See *id.*

117. See *id.*

Therefore, the legality of daily fantasy sports at the federal level, at least with respect to PASPA, is primarily dependent on the whims of the professional sports leagues and their management and ownership, since the leagues hold much of the prosecutorial power.¹¹⁸ As such, it is no surprise that both FanDuel and DraftKings have actively sought, and received, the endorsements of several of these professional sports leagues, including a couple of high-profile NFL franchise owners, such as Jerry Jones and Robert Kraft.¹¹⁹ With this in mind, FanDuel and DraftKings do not appear to be in any immediate jeopardy under PASPA, since it would be counterintuitive for the major professional leagues and owners to simultaneously invest in, and bring suit against, these daily fantasy sports enterprises.

The fourth pertinent federal law, and the one that FanDuel and DraftKings ostensibly tailored their respective business models to exude a perceived conformity with, is the aforementioned Unlawful Internet Gambling Enforcement Act of 2006. While UIGEA has been largely successful in eradicating online poker operations and sportsbooks, it contains a carve-out for season-long fantasy sports, and it was this carve-out that would become critically important to Nigel Eccles and Jason Robins as they launched their fledgling daily fantasy sports enterprises.¹²⁰ This carve-out provides safe harbor to “any fantasy or simulation sports game . . . or contest,” as long as three additional criteria are met: (1) any prizes and awards offered must be established prior to the commencement of the contest and cannot be solely dependent on the number of competitors or the total amount of fees paid by competitors; (2) the outcome of the contests must be reflective of the relative knowledge and skill of the competitors and must be based predominantly on the statistical performances of real-life athletes in multiple

118. *Id.* at 141.

119. *See id.* at 127; Van Natta, *supra* note 1.

120. *See* Edelman, *supra* note 73, at 143; Van Natta, *supra* note 1.

real-world sporting events; and (3) no winning outcome can be based solely on the performance of any single real-world team or the performance of a single real-world athlete in any event.¹²¹

It was primarily this set of criteria that encouraged Eccles to design FanDuel so that the site (1) offers pre-determined prizes and guaranteed prize pools, (2) most often rewards the most skilled and experienced participants, and (3) limits the number of players from a single real-world team that a participant can utilize in a given FanDuel lineup.¹²² DraftKings subscribes to largely the same business model, however it has been known to push the legal envelope by offering contests in individual sports such as golf and NASCAR, which raises the question as to whether it violated UIGEA's requirement that winning outcomes be based on *multiple* real-world events.¹²³

2. State Approaches to Fantasy Sports Legality

As discussed above, state laws have a significant bearing on fantasy sports legality, not only in each individual state, but also on the federal legal status of daily fantasy sports. With that in mind, it is important to understand the three distinct state level approaches to analyzing whether or not daily fantasy sports constitutes illegal gambling in a given state.

Generally speaking, a *prima facie* claim of illegal gambling can only be established at the state level when

121. See Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361–5366 (2012); Edelman, *supra* note 73, at 143.

122. See generally Van Natta, *supra* note 1 (discussing Eccles' initial studies of UIGEA, his conclusion that the law would provide "safe harbor" for his model of fantasy sports and branding daily fantasy as a game of skill in which higher skill levels purportedly translate into better results).

123. See Edelman, *supra* note 73, at 143; *id.* But cf. Dustin Gouker, *FanDuel is Joining DraftKings with a Daily Fantasy Golf Offering*, LEGAL SPORTS REP. (Jan. 17, 2017), <https://www.legalsportsreport.com/12695/fanduel-fantasy-golf/> (indicating that FanDuel has very recently entered the daily fantasy golf market).

three elements are present: consideration, reward, and chance.¹²⁴ Since daily fantasy sports contests indisputably meet the elements of consideration and reward, the legal question primarily centers on the element of chance.¹²⁵ This is the reason that FanDuel and DraftKings have historically gone to great lengths to brand their products as “games of skill,” for a game based on “skill” is legal, whereas a game based on “chance” may or may not be, depending on a state’s individual approach.¹²⁶ The requisite skill-to-chance ratio, which is so pivotal in determining the legality of this entire industry, varies between states; however, there are three primary approaches to this centrally important issue.¹²⁷ These three approaches are: the “predominant purpose test,” the “material element test,” and the “modicum of chance” standard.¹²⁸

The majority approach amongst states is to employ the “predominant purpose test,” which is an analysis of whether a contest involves more skill than chance.¹²⁹ Put simply, if the contest is deemed to be based more on skill (or knowledge), than it is on chance, then the contest is legal in a state employing the predominant purpose test. Conversely, if the game were determined to be predominantly chance-based, then the contest would be considered illegal gambling (having also satisfied the consideration and reward elements). Daily fantasy sports certainly involve notable elements of chance, including both “imperfect information” chance (manifesting itself in the unpredictability of player injuries, weather conditions, game cancellations, etc.) and “lucky shot” chance (which occurs when a relatively inexperienced and less knowledgeable player simply gets

124. Edelman, *supra* note 73, at 30.

125. *Id.*

126. *See id.*

127. *Id.* at 130–35.

128. *See id.*

129. *Id.* at 130.

lucky and selects players that perform unexpectedly well).¹³⁰ On the other hand, since player performance can be largely dependent on more predictable analytical considerations, such as past statistical performance, team matchups, and past player usage rates, there is a degree of knowledge and skill that can be somewhat determinative in daily fantasy contests. Some courts have ostensibly acknowledged the presence of skill in fantasy games, too.¹³¹ Therefore, it is largely unclear how a given state court will interpret daily fantasy sports under the predominant purpose test, but the analysis would certainly have to be a fact intensive exercise, as some scholars have noted.¹³²

A stricter approach to the question of daily fantasy sports legality, taken in a minority of states, involves analyzing whether or not chance is a “material element” in a given contest.¹³³ This “material element test,” employed in states like Missouri and New York, does not require that chance be the *dominant* or *majority* determinant in a contest; it merely requires a “material” degree of significance, with respect to determining the outcome of such contests.¹³⁴ It is therefore possible for skill to be the predominant factor in a contest, yet still have that contest deemed illegal under the material element test.¹³⁵

The third state approach in determining what constitutes a game of chance is the “modicum of chance” standard.¹³⁶ This standard, used by states like Arizona, Arkansas, Iowa, Louisiana, and Tennessee, outlaws games

130. *See id.* at 131–32.

131. *See* *Humphrey v. Viacom*, No. 06-2768(DMC), 2007 WL 1797648, at *2–6 (D.N.J. June 20, 2007).

132. Edelman, *supra* note 73, at 132.

133. *Id.* at 134.

134. *Id.*

135. *Id.*

136. *Id.*

that feature “even a modicum of chance.”¹³⁷ Therefore, in the absence of specific legislation to the contrary, daily fantasy sports are patently illegal in all of these states, since it is incontrovertible that daily fantasy involves at least *some* degree of chance.

Finally, there are two outlier states, Hawaii and Montana, that take distinctly unique approaches.¹³⁸ Montana has a blanket prohibition on all forms of commercial online gambling, thereby maintaining a monopoly on gambling within the state,¹³⁹ whereas Hawaii prohibits contests that “encourage a gambling instinct.”¹⁴⁰ FanDuel and DraftKings recognized the problematic climate in Montana from the outset of their enterprises, and subsequently never operated within the state; furthermore, the leading daily fantasy providers both ceased operations in Hawaii, following an unfavorable opinion issued by the state Attorney General, Doug Chin, which concluded that daily fantasy sports did in fact constitute illegal gambling under state law.¹⁴¹

II. STATE RESPONSES TO THE DAILY FANTASY SPORTS INDUSTRY

For a number of years, the daily fantasy industry was able to operate relatively inconspicuously; however, that began to change as FanDuel and DraftKings grew and garnered increasing national attention. Some of this attention was negative, and much of it can be directly

137. *See id.* at 134–35.

138. *Id.* at 135.

139. Dustin Gouker, *Will All 50 States Allow Daily Fantasy Sports 'Very Soon? No Chance in Hell*, LEGAL SPORTS REP., (Jan. 17, 2017), <https://www.legalsportsreport.com/13285/50-states-fantasy-sports/>.

140. Edelman, *supra* note 73, at 135.

141. *See id.* at 144; Ryan Rodenberg, *Daily Fantasy Sports State-by-State Tracker*, ABC NEWS (June 19, 2017), <http://abcnews.go.com/Sports/daily-fantasy-sports-state-state-tracker/story?id=48138210>.

attributed to lapses in judgment on the part of management at the two companies, the increased confidence that oftentimes accompanies success, and perhaps even a false sense of legal security.¹⁴² Irrespective of the exact causes, the resulting consequences are undisputed: one by one, states began to challenge the legality of daily fantasy sports, and they did so in a very public and damaging way.¹⁴³

New York Attorney General Eric Schneiderman led this charge, and although New York's prohibition on daily fantasy sports was relatively short-lived, Schneiderman set the template for challenging the legality of daily fantasy sports, and thereby paved the way for other states to do the same.¹⁴⁴ But New York was also instrumental in establishing another important precedent pertaining to daily fantasy sports: by passing legislation that both legalized and regulated daily fantasy contests in New York, the state effectively saved the daily fantasy sports industry, while introducing much-needed consumer safeguards.¹⁴⁵ These initial hard-won legislative affirmations afforded the daily fantasy leaders an opportunity to recover, and while they still face a multitude of legal hurdles in states across the country, there is a growing momentum for states to legalize and regulate the activity.

A. *How the Daily Fantasy Sports Industry Attracted Increased Scrutiny*

As of 2013, having already experienced rampant growth, FanDuel and DraftKings were poised to take their operations to another level altogether. On December 8, 2013, FanDuel crowned the first-ever one-day fantasy sports millionaire, a sales manager from Sioux City, Iowa, named

142. See Van Natta, *supra* note 1.

143. See Gouker, *supra* note 139; Olanoff, *supra* note 17; Stutz, *supra* note 22.

144. Rodenberg, *supra* note 141.

145. S.B. 8153, 2015–16 Legis. Sess. (N.Y. 2016).

Travis Spieth.¹⁴⁶ Spieth had turned a mere ten dollars into one million dollars in the FanDuel Fantasy Football Championship.¹⁴⁷ A year later, Scott Hansen, a personal trainer from Pasadena, California, became the first one-day *multi*-millionaire, having taken home two million dollars in the very same contest.¹⁴⁸ The fact that the first place prize money had quite literally doubled in a year's time can be accurately viewed as a microcosm of the growth experienced in the industry as a whole. In 2011, daily fantasy entry fees totaled \$20 million; by 2014, annual entry fees had hit \$1 billion.¹⁴⁹

By the end of 2014, DraftKings had clearly established itself as FanDuel's prime competitor, a move that was solidified when DraftKings purchased the third-largest daily fantasy site, DraftStreet, earlier that summer.¹⁵⁰ Meanwhile, perhaps motivated by concerns stemming from their precarious legal positions under PASPA, the two companies moved quickly to solidify the approval of the professional sports leagues. After all, in March 2013, the chief executive of Major League Baseball Advanced Media, Robert Bowman, publicly stated that he viewed daily fantasy sports contests as "akin to a flip of the coin, which is the definition of gambling."¹⁵¹ Yet, by the end of 2014, Major League Baseball and the National Hockey League had advertising partnerships and investments with DraftKings, whereas the National Basketball Association had established an exclusive partnership, in exchange for an equity stake, with FanDuel.¹⁵² These leagues were largely enamored with the role the daily fantasy sites were playing

146. Van Natta, *supra* note 1.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. Edelman, *supra* note 73, at 117.

152. *See id.*; Van Natta, *supra* note 1.

in boosting their respective television ratings.¹⁵³

As all of this growth was occurring, the Fantasy Sports Trade Association's president, Paul Charchian, strongly urged the two industry leaders to tread lightly.¹⁵⁴ At a meeting in January 2013, he advised the companies to deemphasize the monetary aspects of their contests, remove all gambling-related language from their websites, and refrain from marketing the notion that daily fantasy participants could potentially win big money.¹⁵⁵ In fact, Nigel Eccles echoed this sentiment himself in an April 2014 better-business consumer protection charter that he drafted.¹⁵⁶ But, ultimately, the two companies simply could not resist.

The Fantasy Sports Trade Association had also strongly recommended that the companies proactively campaign in states and work with lawmakers to establish the legality of their enterprises.¹⁵⁷ The establishment of a self-regulatory board, which would monitor customer complaints and maintain the integrity and transparency of daily fantasy contests, was also suggested.¹⁵⁸ However, both of the aforementioned recommendations were mostly dismissed by the companies, as they deemed them to be unnecessary and expensive endeavors.¹⁵⁹

The calls for a regulatory board were largely in response to complaints from everyday players who cited predatory tactics by the big-money, high-volume players colloquially referred to as "sharks."¹⁶⁰ Approximately fifty of these high-volume sharks wager at least \$1 million each year on

153. *See* Van Natta, *supra* note 1.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *See id.*

FanDuel and DraftKings; they have been known to enter upwards of one hundred lineups in a single, big-money contest.¹⁶¹ Aside from sheer volume, another frequent tactic of sharks is to use a computerized script (oftentimes undetectable to the sites) to target inexperienced players in the site's "lobbies," as the scripts enable them to instantaneously crunch performance data and seek out competitors that give them a better chance of victory.¹⁶² Other scripts have been employed to enable participants to make last-second changes to multiple lineups at once.¹⁶³ The sites always policed this behavior, sometimes even suspending players, but they never did so with the regulatory teeth or vigor that they could have.¹⁶⁴ After all, sixty percent of all revenue in the daily fantasy industry was estimated to come from the roughly 15,000 high-volume players who wagered at least \$10,000 annually.¹⁶⁵ Yet, this should have been immensely alarming to FanDuel and DraftKings because it threatened the very foundation of their industry's legality: the idea that daily fantasy sports were in fact "games of skill." As one former FanDuel consultant, John Sullivan, put it: "It's only a skill game if you have the biggest bankroll and the best technology . . . [t]hat's the dirty little secret."¹⁶⁶

Instead, entering the 2015 NFL season, the two industry leaders primarily focused on their escalating marketing arms race, as they vied for a larger portion of the fifty-seven million Americans who played fantasy sports, attempting to lure them away from the season-long format with the enticing selling points of fast-paced action, thrilling competition, instant gratification, and, most prominently,

161. *See id.*

162. *Id.*

163. *Id.*

164. *See id.*

165. *Id.*

166. *Id.*

immensely lucrative paydays.¹⁶⁷ Having just consummated funding rounds of \$275 million and \$300 million, respectively, FanDuel and DraftKings prepared to levy a marketing onslaught.¹⁶⁸

Following the 2014 NFL season, in which FanDuel spent more money on advertising than DraftKings did, DraftKings pledged to never be outspent by their rival again, and they delivered on this promise.¹⁶⁹ During the first week of September 2015, DraftKings actually spent more money on advertising than any other U.S. company, with an incredible \$24,067,328 spent on 6,749 national commercial airings, over the course of *seven days*.¹⁷⁰ To put this in perspective, in the weeks leading up to the 2015 NFL season, the two companies spent more on advertising than the entire U.S. beer industry combined.¹⁷¹ By year's end, the two companies had sunk \$750 million into advertising; at one point, a FanDuel or DraftKings commercial was appearing onscreen every ninety seconds, on average.¹⁷² FanDuel had initially planned to scale-back its advertising expenditures in 2015, likely sensing that it might be a good time to keep a lower profile; however, after DraftKings surpassed them over the summer by establishing sixty percent of the market share, FanDuel reversed course and tried to keep pace with DraftKings.¹⁷³

As if the exorbitant television spending was not already sufficient, the two companies also struck deals for advertising and signage with entities like the Walt Disney Corporation (the parent company of both ABC and ESPN)

167. *Id.*

168. *Id.*

169. *Id.*

170. Dustin Gouker, *King of Commercials: DraftKings Rises to No. 1 in TV Spending with \$24 Million This Week*, LEGAL SPORTS REP. (Sept. 7, 2015), <http://www.legalsportsreport.com/3611/draftkings-no-1-in-tv-commercials/>.

171. Van Natta, *supra* note 1.

172. *Id.*

173. *Id.*

and in professional sports stadiums and arenas, across the country.¹⁷⁴ By September 2015, the Wall Street Journal estimated FanDuel and DraftKings to be worth \$1.3 billion and \$1.2 billion, respectively.¹⁷⁵

Then, on October 5, 2015, scandal struck when *The New York Times* broke the story of Ethan Haskell, a DraftKings employee who had allegedly used inside information to win \$350,000 in a FanDuel NFL contest.¹⁷⁶ As soon as the story came off the press, irreversible damage was done, as Haskell had apparently utilized protected player usage data—a statistic that would likely remain relatively consistent between the two sites—in order to choose his winning lineup on FanDuel.¹⁷⁷ Part of what makes succeeding in daily fantasy sports challenging is the fact that it is not enough to merely select the best players, because the salary cap largely prevents this, and even if it did not, it is intuitively not beneficial to only select players that the majority of other competitors have also selected. Therefore, it is strategically vital to pick a few cheaper, less-utilized players, whom most other people have not selected, because if and when those players have good statistical outputs, a participant has thereby gained a large advantage over the rest of the field. Therefore, the accusations against Haskell were gravely concerning to the daily fantasy industry leaders, both of whom already forbade their employees from playing on their employers' sites, and discouraged high-profile participation on their competitors' sites, because it was the kind of incident that would attract intense regulatory and legal scrutiny; and, the very next day, it did.¹⁷⁸

174. Schrottenboer, *supra* note 6; *id.*

175. Tuttle, *supra* note 2.

176. Van Natta, *supra* note 1.

177. *See id.*

178. *Id.*

B. *New York State's Response*

The morning after *The New York Times* story broke, New York Attorney General Eric Schneiderman called a two-hour meeting to analyze the situation and consider the State's legal response.¹⁷⁹ While *The New York Times* article was the impetus for the meeting, the topic of conversation quickly turned to the barrage of advertisements, which promised instant wealth.¹⁸⁰ As Kathleen McGee, Chief of the Bureau of Internet & Technology of the New York Attorney General's Office put it, "Their ads are everywhere . . . You couldn't escape them."¹⁸¹

Word of Schneiderman's investigation soon leaked, and by October 6, 2015, companies like ESPN began removing the companies' advertising elements from their broadcasts.¹⁸² Less than two weeks later, on October 16, Nevada became the first state to prohibit FanDuel and DraftKings from continuing to operate within the state.¹⁸³ This move, however, was primarily motivated by Nevada's desire to protect its domestic gaming industry; in fact, daily fantasy sports are patently legal in Nevada, provided that operators first obtain a license, which neither FanDuel nor DraftKings bothered to do.¹⁸⁴ Finally, on November 10, Schneiderman sent individual letters to FanDuel and DraftKings, ordering both companies to cease and desist operations in New York.¹⁸⁵ This was a huge blow to the two companies, particularly so for FanDuel, which was headquartered in New York City, and had also recently struck marketing deals with two of the NFL franchises

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. Duara, *supra* note 21.

184. *See id.*

185. *See* Bogdanich, *supra* note 17; *id.*; Olanoff, *supra* note 17.

affiliated with the State, in the Buffalo Bills and the New York Jets.¹⁸⁶ In a powerful press release that day, Schneiderman stated: “It is clear that DraftKings and FanDuel are the leaders of a massive, multibillion-dollar scheme intended to evade the law and fleece sports fans across the country. Today we have sent a clear message: not in New York, and not on my watch.”¹⁸⁷

One week later, Schneiderman filed a scathing memorandum of law in support of the preliminary injunction he was seeking against the two companies.¹⁸⁸ In this memorandum, Schneiderman began by applying the relevant New York standard: the “material element test.”¹⁸⁹ In proffering his conclusion that daily fantasy did in fact depend significantly on chance, he cited the fact that such random occurrences as player injuries, bad bounces, and weather events could “irrevocably alter the outcome of a [daily fantasy contest].”¹⁹⁰ But Schneiderman was only getting warmed up.

New York’s Attorney General then took the two industry leaders to task for providing a “plainly illegal” product that was “nothing more than a rebranding of sports betting.”¹⁹¹ He then targeted the companies’ excessive advertising campaigns for misleading people into truly believing that the fantasy contests were merely “games of skill,” in saying “no better—no matter how shrewd or sophisticated—can *control* or *influence* whether . . . athletes will succeed.”¹⁹² Notably, Schneiderman also seemed to take issue with the very practice that the Fantasy Sports Trade Association, and Nigel Eccles, had cautioned the fledgling industry against, in

186. Schrottenboer, *supra* note 6.

187. Olanoff, *supra* note 17.

188. *See People v. FanDuel Motion*, *supra* note 19.

189. *See id.* at 2.

190. *Id.*

191. *Id.* at 1.

192. *Id.*

observing that the companies' "unrelenting barrage of advertisements that depict FanDuel and DraftKings as a new form of lottery," and that the companies lured unsuspecting people into predatory gambling operations through their advertised depictions of "cash falling from the ceiling," "oversized novelty checks," and promises of "life-changing piles of cash."¹⁹³

However, in New York, the prohibition was relatively short-lived; on August 3, 2016, New York Governor Andrew Cuomo signed "An Act to Amend the Racing, Pari-Mutuel Wagering and Breeding Law, in Relation to the Registration and Regulation of Interactive Fantasy Sports Contests" into law, thereby declaring daily fantasy contests legal "games of skill."¹⁹⁴

Importantly, the legislation contained several key regulatory elements, as well as financial incentives for other states to take similar legislative action, with respect to the daily fantasy industry. First and foremost, the new law requires operators to register with the state once every three years, and in so doing, enhances transparency by requiring that registered operators agree to periodic audits of their books and records.¹⁹⁵ Additionally, a series of procedural safeguards were introduced, including: limiting players to one active account with a site, prohibiting participants under the age of eighteen, requiring that advertisements accurately represent the odds of winning, limiting a player's allotted number of entries into a given contest, and introducing information and assistance for compulsive gambling.¹⁹⁶ Moreover, the law features revenue-generating aspects, including a fifteen percent tax on gross revenue, along with an additional secondary tax that is not to exceed \$50,000 per

193. *Id.* at 2–3.

194. *See* S.B. 8153, 2015–16 Legis. Sess. (N.Y. 2016).

195. *Id.*

196. *Id.*

year.¹⁹⁷ The tax is estimated to generate at least \$4 million in annual state revenue,¹⁹⁸ all of which is slated to go directly toward education funding.¹⁹⁹

Somewhat surprisingly, Schneiderman reversed course, and defended the new law asserting the legality of daily fantasy sports.²⁰⁰ This complete change of opinion garnered negative attention from anti-gambling organizations,²⁰¹ but Schneiderman was not ready to completely absolve the industry he had previously staunchly opposed, as he opted to maintain his false advertising suit against FanDuel and DraftKings, a suit that has subsequently been settled, with both companies agreeing to pay \$6 million in damages.²⁰²

C. Other States Follow New York's Lead

In the wake of the prohibitions in New York and Nevada, seven other states followed suit,²⁰³ and several of these states' attorneys generals even went so far as to directly cite New York's actions in the matter.²⁰⁴ Within months, Alabama, Delaware, Hawaii, Idaho, Mississippi, Tennessee, and Texas similarly forced FanDuel and DraftKings to cease

197. *Id.*

198. Tom Precious, *Daily Fantasy Sports Now Legal in New York State*, BUFFALO NEWS (Aug. 3, 2016), <http://buffalonews.com/2016/08/03/daily-fantasy-sports-now-legal-in-new-york-state/>.

199. S.B. 8153, 2015–16 Legis. Sess. (N.Y. 2016); *id.*

200. *See* Gouker, *supra* note 32.

201. *See id.*

202. Dustin Gouker, *DraftKings, FanDuel Pay \$6 Million Each to Settle New York Daily Fantasy Sports Case*, LEGAL SPORTS REP. (Oct. 25, 2016), <https://www.legalsportsreport.com/11901/draftkings-fanduel-pay-6-million-in-new-york-case/>.

203. Stutz, *supra* note 22.

204. Dustin Gouker, *If DraftKings and FanDuel Settle False Advertising Claims In New York, Could Other States Follow Suit?*, LEGAL SPORTS REP. (Oct. 24, 2016), <https://www.legalsportsreport.com/11887/draftkings-fanduel-settle-ment-new-york/>.

and desist operations in their states.²⁰⁵ Other states, such as Illinois, have issued negative opinions on the legality of daily fantasy sports, but have nonetheless permitted operations to continue.²⁰⁶ In that sense, it is fair to credit Schneiderman, and New York, with setting a precedent for examining the legality of daily fantasy, and also, perhaps more importantly, for providing the impetus for the daily fantasy industry to actively seek legal clarification and initiate dialogue with legislators, in states across the country.

In March 2016, Virginia became the first state to unequivocally assert the legality of daily fantasy sports, while simultaneously regulating the industry, when Governor Terry McAuliffe signed “The Fantasy Contests Act” into law.²⁰⁷ Within four months, five additional states—Colorado, Indiana, Massachusetts, New York, and Tennessee—introduced legislation of their own, thereby declaring daily fantasy sports legal, and subjecting them to state regulation.²⁰⁸ Interestingly, the majority of these states all seemed to recognize the value in daily fantasy as a means to generate revenue within their respective states.²⁰⁹ To date, state legislatures have expressly legalized daily fantasy sports in seventeen states, with Arkansas, Delaware, Kansas, Maine, Mississippi, Missouri, New Hampshire, New Jersey, Ohio, Pennsylvania, and Vermont also joining the ranks.²¹⁰

205. See Gouker, *supra* note 139.

206. See *id.*

207. Fitz Tepper, *Virginia’s Governor Just Signed the Nation’s First Daily Fantasy Sports Law*, TECHCRUNCH (Mar. 7, 2016), <https://techcrunch.com/2016/03/07/virginias-governor-just-signed-the-nations-first-daily-fantasy-sports-law/>.

208. Marvin A. Kirsner, *States Looking at Legalized Fantasy Sports as Revenue Source*, NAT’L L. REV. (Feb. 8, 2017), <https://www.natlawreview.com/article/states-looking-legalized-fantasy-sports-revenue-source>.

209. *Id.*

210. See Gouker, *supra* note 139; Dustin Gouker, *Legislative Tracker: Daily Fantasy Sports*, LEGAL SPORTS REP., <http://www.legalsportsreport.com/dfs-bill-tracker/> (last visited Apr. 16, 2018) [hereinafter Gouker, *Legislative Tracker: Daily Fantasy Sports*]; see also Rodenberg, *supra* note 141.

While sports law experts disagree over how expeditiously it will occur,²¹¹ it is difficult to deny the growing momentum for legalizing, regulating, and taxing daily fantasy sports in states around the country. As of the time of this writing, there are twelve additional states where legislation to legalize daily fantasy is pending: Connecticut, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Maryland, Michigan, Nebraska, Washington, and Wisconsin.²¹² Particularly noteworthy among these, are a pair of “modicum of chance” states, Iowa and Washington, as well as Hawaii, a state where gambling has traditionally been prohibited. On the other hand, the introduction of legislation is only the first step in the process, so the daily fantasy industry is not yet in a comfortable position. In states like Alabama, Arizona, California, Louisiana, Minnesota, New Mexico, Oklahoma, Oregon, Rhode Island, North Carolina, South Carolina, Texas, and West Virginia, legislative efforts have been introduced, but ultimately were stopped short of being signed into law.²¹³

III. THE IMPLICATIONS OF THE DAILY FANTASY SPORTS CONTROVERSY ON SPORTS BETTING POLICIES IN THE UNITED STATES

The brief, yet rather tumultuous, history of the daily fantasy sports industry’s early years, complete with the legal challenges advanced in states like New York, the ultimate legislative successes in several of these states, and the growing momentum for similar legal validation in additional states, is likely illustrative of both the present status, and future direction, of sports gambling policy in the United States. The trials and tribulations of the daily fantasy sports industry, and its hard-earned triumphs in several states, are, in all likelihood, a microcosm for the imminent

211. See Gouker, *supra* note 139.

212. Gouker, *Legislative Tracker: Daily Fantasy Sports*, *supra* note 210.

213. See *id.*

liberalization of sports betting in America. At the present time, the State of New Jersey is actively challenging the constitutionality of the aforementioned Professional and Amateur Sports Protection Act (PASPA), before the U.S. Supreme Court.²¹⁴ PASPA is the piece of legislation responsible for twice stymieing the New Jersey legislature's attempts to legalize and regulate sports betting, within the State.²¹⁵ A legislative and judicial victory for New Jersey in this matter would represent a monumental step in the right direction, as it would enable states to tap into immense revenue potential, render the sports betting black market obsolete and inutile, impose regulations on gambling activities that have gone largely unchecked, and introduce new consumer protection mechanisms.

A. *New Jersey's Ongoing Fight Against PASPA*

When Congress initially enacted PASPA in 1992, it effectively banned sports betting in every state, with the exceptions of Nevada, Delaware, Oregon, and Montana, which had all previously adopted various forms of legal,

214. See Mary K. Braza, *Gambling with SCOTUS: Christie v. NCAA*, NAT'L L. REV. (Jan. 9, 2018), <https://www.natlawreview.com/article/gambling-scotus-christie-v-ncaa>; *Christie v. National Collegiate Athletic Association*, BALLOTPEDIA, https://ballotpedia.org/Christie_v._NCAA (last visited Apr. 16, 2018) [hereinafter BALLOTPEDIA]; *December 2017 Preview: Christie v. National Collegiate Athletic Association*, GEO. WASH. L. REV.: DOCKET, <https://www.gwlr.org/december-2017-preview-christie-v-national-collegiate-athletic-association/> [hereinafter *Preview*]; Dustin Gouker, *Everything You Need To Know About The NJ Sports Betting Supreme Court Case*, LEGAL SPORTS REP. (Dec. 4, 2017), <https://www.legalsportsreport.com/16737/nj-sports-betting-scotus-preview/> (hereinafter Gouker, *Sports Betting Supreme Court Case*); Michelle Minton, *The Importance of an Under-the-Radar Supreme Court Case on Sports Betting*, COMPETITIVE ENTERPRISE INST. (Oct. 16, 2017), <https://cei.org/blog/importance-under-radar-supreme-court-case-sports-betting>; Axel Schamis & Katherine Van Bramer, *Christie v. National Collegiate Athletic Association*, CORNELL L. SCH., <https://www.law.cornell.edu/supct/cert/16-476> (last visited Apr. 16, 2018).

215. Dustin Gouker, *New Jersey Sports Betting*, LEGAL SPORTS REP. (Mar. 22, 2017), <http://www.legalsportsreport.com/nj/>.

state-sanctioned sports betting or lotteries.²¹⁶ Additionally, PASPA provided New Jersey with a special one-year window, during which time the state could enact its own sports betting regime; however, the New Jersey legislature was unable to pass any such authorization for state-sponsored sports betting within that permissible time period prior to PASPA taking effect.²¹⁷ Nineteen years later, in 2011, New Jersey publicly reopened their considerations of a state-sponsored sports betting program by holding a referendum on the issue, asking voters whether the state constitution should be amended to allow for legalized gambling on sporting events.²¹⁸ Voters overwhelmingly voiced their support for legalized sports betting in New Jersey: sixty-four percent of voters supported the constitutional amendment, and the state legislature subsequently moved forward by enacting the Sports Wagering Act in 2012.²¹⁹

The Sports Wagering Act legalized and regulated sports betting, but restricted such activity to a limited number of designated casinos and racetracks throughout the state.²²⁰ However, the Act was short-lived, as the NCAA, NBA, NFL, NHL, and MLB filed a lawsuit seeking to invalidate the New Jersey law as a violation of PASPA.²²¹ For its part, the State of New Jersey, led by Governor Chris Christie, admitted that the law was a facial violation of PASPA, but argued that PASPA itself was unconstitutional under the Tenth Amendment—the law sought to utilize the several states, and their respective legislatures, as vehicles to implement and enforce federal gambling policy interests.²²² This,

216. *Preview*, *supra* note 214; Schamis & Van Bramer, *supra* note 214.

217. *See* Schamis & Van Bramer, *supra* note 214.

218. *See id.*

219. *Id.*; *see* Minton, *supra* note 214.

220. *See* BALLOTPEDIA, *supra* note 214; Schamis & Van Bramer, *supra* note 214.

221. *See* BALLOTPEDIA, *supra* note 214.

222. *See id.*

Christie argued, contravened the fundamental principles of federalism, and more specifically the “anti-commandeering doctrine,” which prevents the federal government from simply dictating state law.²²³ Furthermore, this is particularly true in cases, such as this one, where Congress itself arguably had the authority to pass a federal gambling regulatory and enforcement scheme pursuant to the Commerce Clause, which likely would have lawfully preempted any contrary state legislative actions thereafter, but elected not to do so and to instead rely on the states to implement and carry out a federal policy initiative.²²⁴

Ultimately, both the district court and the Third Circuit ruled in favor of the leagues, in what became known as the *Christie I* cases, and upheld the constitutionality of PASPA, stating that New Jersey could not affirmatively *authorize* sports betting, and thereby disregard the terms of PASPA; however, the Third Circuit indicated that the federal law would not prohibit a potential *repeal* of existing state gambling prohibitions.²²⁵ Due to the fact that PASPA, a federal law, was structured so as to rely on the maintenance and enforcement of *state* laws prohibiting gambling, a repeal of the state sports betting ban would effectively render PASPA obsolete within the state.

In accordance with the Third Circuit’s holding in *Christie I*, New Jersey changed course and tried a different approach in 2014, when the state legislature passed Senate Bill 2460.²²⁶ This new law did not affirmatively *authorize* sports betting anywhere in the state; instead, Senate Bill 2460 partially *repealed* existing state bans on sports betting at

223. See *id.*; Braza, *supra* note 214; Minton, *supra* note 214; Schamis & Van Bramer, *supra* note 214.

224. Michelle Minton, *Supreme Court Could Hand Down Game-Changing Ruling for Sports Betting*, COMPETITIVE ENTERPRISE INST. (Dec. 7, 2017), <https://cei.org/blog/supreme-court-could-hand-down-game-changing-ruling-sports-betting>.

225. See Schamis & Van Bramer, *supra* note 214.

226. *Id.*; see BALLOTPEDIA, *supra* note 214.

casinos and racetracks throughout the state, for individuals who are at least twenty-one-years-old.²²⁷ However, the NCAA and four major professional sports leagues again filed suit, and the district court once more struck down the state law, this time holding that the state had two options: either keep their existing state prohibitions on sports gambling entirely in place, or completely repeal them.²²⁸ On appeal, the Third Circuit affirmed the district court's overall holding; but that is where New Jersey's luck ostensibly began to change, because, unlike *Christie I*, this time the Third Circuit agreed to re-hear the case *en banc*.²²⁹ Yet, once again, the Third Circuit affirmed the ruling in favor of the sports leagues, essentially stating PASPA was not unconstitutional commandeering of state legislative authority, and that the 2014 law was a violation of PASPA because it acted as an affirmative authorization to gamble at specific locations and on specific sports, even if it was artfully couched as a repeal.²³⁰

Perhaps sensing inherent danger in striking down this partial repeal attempt on the basis that it was actually an affirmative authorization, particularly in light of its holding in *Christie I*, the Court of Appeals then attempted to distance itself somewhat from that prior decision, which, at the time, attempted to draw a formal distinction between affirmative authorizations and repeals.²³¹ Nonetheless, Circuit Judge Julio Fuentes wrote a passionate dissent centering on this very jurisprudential inconsistency, opining that the 2014 repeal contained "no explicit grant of permission" and that the law simply acted as "a self-executing deregulatory measure," and furthermore, that the majority *inferred* an

227. Schamis & Van Bramer, *supra* note 214.

228. BALLOTPEDIA, *supra* note 214.

229. Gouker, *Sports Betting Supreme Court Case*, *supra* note 214.

230. *See* Schamis & Van Bramer, *supra* note 214.

231. *See id.* ("disclaiming the formal distinction in *Christie I* between repeals and affirmative authorizations as dicta").

authorization where one did not exist.²³² Additionally, Judge Fuentes lamented the fact that the majority opinion “[failed] to explain why a partial repeal is equivalent to a [legal] grant of permission to engage in sports betting,” which would prove to be a critical point in the case moving forward.²³³ The danger in viewing a partial repeal of existing state law as an affirmative authorization is that it implies that only a *total* repeal of all state gambling laws will suffice under the requirements of PASPA, and, in fact, this is exactly what the District Court held in *Christie II*, likely based on the distinction between affirmative authorizations and repeals that the Court of Appeals had previously drawn in *Christie I*. However, if this interpretation of PASPA is accurate, and a partial repeal does amount to an affirmative authorization, then it puts states in a terrible position where their proverbial hands are essentially tied to their existing gambling prohibitions, unless they were to completely deregulate *all* sports gambling within their states, thereby necessarily allowing gambling on all sports, at all locations, by people of all ages, and without any ability for the state to license, regulate, introduce consumer protection mechanisms, or generate revenue from the activity.

Following their latest Third Circuit Court of Appeals loss, the State of New Jersey once again petitioned the Supreme Court of the United States for certiorari, which seemed extremely unlikely, after the state had previously been denied certiorari in *Christie I*.²³⁴ Furthermore, after the Supreme Court requested an opinion from the U.S. Solicitor General as to whether or not the Court should hear the case, and the Solicitor General recommended that the Court not take up New Jersey’s appeal, it finally seemed like the end

232. *NCAA v. Christie*, 832 F.3d 389, 404–05 (3d Cir. 2016) (Fuentes, J., dissenting); *BALLOTPEDIA*, *supra* note 214.

233. *Christie*, 832 F.3d at 405.

234. *See* Gouker, *Sports Betting Supreme Court Case*, *supra* note 214.

of the line for sports betting in New Jersey.²³⁵ Yet, in a rather stunning turn of events, the Supreme Court granted New Jersey's petition for certiorari, meaning that at least four Supreme Court Justices felt that the case was worth hearing.²³⁶

Although the rationale for the Supreme Court Justices' collective change of heart with respect to its interest in the constitutionality of PASPA remains unknown, it is entirely possible that the State of West Virginia factored heavily into their decision. At the time of the certiorari petition, West Virginia, which submitted an amicus brief in support of New Jersey's position, had pending legislation that would have legalized sports betting within the state, irrespective of PASPA's ongoing existence.²³⁷ Furthermore, when the inevitable legal challenge from the sports leagues came in opposition to West Virginia's law, that case would have gone through the more conservative, federalist-minded Fourth Circuit.²³⁸ Therefore, it is quite conceivable that the Supreme Court would have been confronted with deciding the constitutionality of PASPA in the face of a looming circuit split, within a matter of a few years anyway.

B. *The Supreme Court Considers the Constitutionality of PASPA*

The central issue for the Supreme Court to decide in *Murphy v. NCAA* is whether PASPA violates the Tenth Amendment and the overarching principles of constitutional

235. *Id.*

236. *See id.*

237. Dustin Gouker, *Five States Join New Jersey in Sports Betting Case with Supreme Court Filing*, LEGAL SPORTS REP. (Nov. 14, 2016), <https://www.legalsportsreport.com/12101/five-states-join-new-jersey-sports-betting-case-in-favor/>; Dustin Gouker, *Another Sports Betting Legalization Bill Joins the Chorus This Time in West Virginia*, LEGAL SPORTS REP. (March 2, 2017), <https://www.legalsportsreport.com/13227/west-virginia-sports-betting/>.

238. *Id.*

federalism.²³⁹ In particular, the argument centers around the “anti-commandeering doctrine,” which stands for the idea that the federal government, acting through Congress, cannot compel states to implement federal legislative or policy initiatives, such as requiring states to prohibit gambling on sports, when Congress itself could have implemented such a prohibition.²⁴⁰ New Jersey argues that PASPA does in fact commandeer state legislatures, whereas the NCAA and professional sports leagues contend that PASPA is a wholly constitutional federal preemption of conflicting state law.²⁴¹

The origins of the anti-commandeering doctrine can be traced all the way back to the nineteenth century and, more specifically, the era of slavery in the United States.²⁴² In response to the “Extradition Clause” and the “Fugitive Slave Clause” of the U.S. Constitution, in addition to the 1793 “Fugitive Slave Act,” the Commonwealth of Pennsylvania passed a law prohibiting individuals from forcibly removing slaves from the commonwealth with the intention of returning them to slavery, in direct contravention of the aforementioned federal laws which generally provided for the return of escaped slaves to their owners.²⁴³ This conflict eventually led to the case of *Prigg v. Pennsylvania*, in which the Supreme Court struck down the Pennsylvania law on the basis of the Supremacy Clause, and held that the Pennsylvania law was preempted by the Fugitive Slave Act

239. See Minton, *supra* note 214. The reader should note that this case was formerly stylized, “Christie v. NCAA,” but was appropriately changed upon Phil Murphy’s assumption of the New Jersey governorship on January 16, 2018. References to “Christie v. NCAA” in article titles and otherwise refer to *Murphy v. NCAA*, 584 U.S. ___, Nos. 16-476, 16-477, 2017 WL 684747 (2018).

240. *Id.*; BALLOTPEDIA, *supra* note 214.

241. Brief for Respondents at 19, *Murphy v. NCAA*, Nos. 16-476, 16-477, 2017 WL 684747 at *7.

242. Minton, *supra* note 214.

243. See *Prigg v. Pennsylvania*, 41 U.S. 539, 539 (1842).

and the Constitution.²⁴⁴ However, in the majority opinion, Justice Joseph Story wrote that, while the states could not interfere or prohibit people from returning escaped slaves in accordance with the Fugitive Slave Act, Congress could not force states to implement corresponding laws or to assist individuals or the federal government in carrying out the Fugitive Slave Act.²⁴⁵ In relevant part, Story stated:

The states cannot, therefore, be compelled to enforce [federal laws]; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist, that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted [sic] to them by the Constitution.²⁴⁶

In other words, the *federal* Fugitive Slave Act was the exclusive province of the *federal* government to enforce, and it could not compel the states to participate in the execution of the law.

The impact of Justice Story's interpretations of federalism in *Prigg* would be lasting, even if seemingly dormant for a number of years thereafter. Additionally, although the ignominious holding in *Prigg* lands the case firmly in the Supreme Court "anti-canon" of cases, the parallel between Justice Story's interpretation of dual sovereignty, and the modern "anti-commandeering" jurisprudence, is plainly apparent. Moreover, the rationales and constitutional interpretations behind some anti-canon holdings have seemingly stood the test of time, though the socially and morally repugnant institutions and ends that these interpretations were once employed to buoy, have fortunately long since died off.²⁴⁷

244. See *Prigg*, 41 U.S. at 541–42.

245. *Id.* at 615.

246. *Id.* at 615–16.

247. See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 380, 475 (2011) (noting the "reality that constitutional interpretation is often . . . susceptible to otherwise appropriate use for tragic ends"); See also Jeffrey M. Schmitt,

Following *Prigg*, the first modern appearance of the “anti-commandeering doctrine,” and the first time the court phrased it as “commandeering,” came over a century later, in the 1992 case of *New York v. United States*, in which a federal policy for the disposal of low-level radioactive waste was at issue.²⁴⁸ In striking down the federal act’s “take title provision,” the Court, in a decision authored by Justice Sandra Day O’Connor, noted that “Congress may not simply ‘commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”²⁴⁹ Furthermore, the opinion pointed out that “[w]hile Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”²⁵⁰ Then, in the 1997 case of *Printz v. United States*, a portion of the Brady Gun Bill was struck down because it required the states and local municipalities to administer a federal background check program.²⁵¹ Writing for the majority, Justice Antonin Scalia cited the Court’s earlier holding in *New York*, and observed that Congress

may neither issue directives requiring the States to address particular problems, nor command the States’ officers . . . to administer or enforce a federal regulatory program. It matters not whether

Immigration Enforcement Reform: Learning from the History of Fugitive Slave Rendition, 103 GEO. L.J. 1, 5 (2013) (Citing the nineteenth century ruling in *Prigg*, with respect to the Fugitive Slave Act, as a parallel between states employing ostensibly legal noncooperation tactics, in furtherance of the anti-commandeering doctrine, in the face of modern federal attempts to dictate certain immigration policies to states and their officials).

248. Mike Maharrey, *States Don’t Have to Comply: The Anti-Commandeering Doctrine*, TENTH AMENDMENT CTR. (Dec. 28, 2013), <http://tenthamendmentcenter.com/2013/12/28/states-dont-have-to-comply-the-anti-comandeering-doctrine/>.

249. *Id.*; *New York v. United States*, 505 U.S. 144, 161 (1992).

250. *New York v. United States*, 505 U.S. 144, 162 (1992).

251. *See* *Printz v. United States*, 521 U.S. 898, 899 (1997); Maharrey, *supra* note 248.

policymaking is involved . . . such commands are fundamentally incompatible with our constitutional system of dual sovereignty.²⁵²

Finally, in the 2012 case of *National Federation of Independent Business v. Sebelius*, Chief Justice John Roberts, writing for the majority, again cited the holding in *New York* as standing for the principle that Congress may not “require the States to govern according to Congress’ instructions” and further noted that “[o]therwise the two-government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer.”²⁵³

This lineage of anti-commandeering doctrine Supreme Court cases is the cornerstone of New Jersey’s current argument before the Court, concerning the constitutionality—or lack thereof—of PASPA.²⁵⁴ First, New Jersey emphasizes the importance of maintaining the prohibition on Congress’ ability to “commandeer” state legislatures to our overall federalist system and the division of federal and state authority.²⁵⁵ If Congress were allowed to dictate the substance of state laws, New Jersey argues, the lines of political accountability would be blurred, and state legislatures, which, relative to Congress, are better positioned to address and answer to the concerns of state residents—would be handcuffed and unable to respond to their electorates, thereby treading upon individual liberties.²⁵⁶ Furthermore, New Jersey contends that preventing a state from repealing an existing legal prohibition, particularly where the state constituents have already democratically expressed their disfavor for that prohibition, is just as repugnant to the principles of

252. *Printz*, 521 U.S. at 935.

253. *Nat’l Fed’n Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012).

254. Brief for Petitioners at 16, *Murphy v. NCAA*, No. 16-476, 2017 WL 3774486 at *4.

255. *See id.* at 16–17.

256. *Id.* at 17.

federalism as a federal directive to enact such a prohibition.²⁵⁷ In other words, forcing a state to leave an unpopular state law on the books is essentially equivalent to ordering the state to pass such a law in the first place. In both cases, the state's constitutionally protected police powers are being overridden, even in an area where Congress itself has not implemented any sort of *federal* regulatory measure or legislative prohibition.²⁵⁸

Moreover, New Jersey has made a powerful case that, not only does PASPA force the state to leave an unpopular law in place, but since much of the state's original gambling prohibition was repealed under the 2014 bill, the federal government, operating through PASPA, is actually commandeering the state legislature and directing it to implement a new law that prohibits gambling within the state.²⁵⁹ Therefore, while the Court of Appeals did not feel as though PASPA could be deemed commandeering because the Court did not view the federal law as requiring any affirmative action on the part of the states, in New Jersey's case, it actually *would* require the affirmative implementation of a state law. Additionally, the Court of Appeals did not find PASPA to be coercive, and therefore constitutional; yet, by invalidating the partial repeal attempt, it really leaves the state with no legitimate alternative, and certainly not a realistic option, other than re-implementing and then maintaining the state law prohibition on gambling.²⁶⁰ The only other, seemingly legal, alternative would be to eliminate *all* gambling prohibitions within the state, which would be demonstrably reprehensible for a multitude of public policy reasons, and therefore really not a legitimate choice at all. This public policy rationale, alone, indicates the inherent coercion in PASPA, and those

257. *Id.* at 17–18.

258. *See id.* at 19.

259. *See id.* at 18.

260. *See id.* at 19.

underlying policy considerations, coupled with the inability to regulate or license gambling within the state, leaves no conceivable incentives for the state to move forward with an unchecked liberalization of the activity.

On the other hand, the NCAA and the professional sports leagues maintain that PASPA cannot be an example of federal commandeering because the law does not command New Jersey to take any affirmative legislative or enforcement action, and only tells the state what it cannot do.²⁶¹ However, as was previously discussed, the contention that PASPA does not direct any state legislative acts is rather dubious, particularly in the wake of the 2014 partial repeal of the state gambling prohibition. Furthermore, the NCAA roots the core of its PASPA defense in the Supremacy Clause, and the notion that PASPA is a wholly constitutional preemption of conflicting state law, in an area of interstate commerce where Congress has the authority to legislate.²⁶² Yet, this argument is also somewhat questionable, since PASPA itself does not implement any federal regulatory or enforcement program, nor does it ban gambling; instead, the law relies entirely on *state* gambling prohibitions and *state* enforcement, in order to give it effect.

As of this writing, the Supreme Court has yet to issue a ruling in *Murphy*; however, based on how both parties' arguments were ostensibly received during oral arguments, early indications are that the Court is likely to reverse the Court of Appeals' decision and render a verdict in favor of New Jersey.²⁶³ In deciding this case, the Court has several

261. Brief for Respondents at 19–20, *Murphy v. NCAA*, Nos. 16-476, 16-477, 2017 WL 684747 at *7–8.

262. *Id.* at 18, 20–21.

263. Amy Howe, *Argument Analysis: Justices Seem to Side with State on Sports Betting*, SCOTUSBLOG (Dec. 4, 2017, 2:51 PM), <http://www.scotusblog.com/2017/12/argument-analysis-justices-seem-side-state-sports-betting/>; Minton, *supra* note 224; Ilya Somin, *Place Your Bets on Federalism—Thoughts on Today's Oral Argument in Christie v. NCAA*, WASH. POST (Dec. 4, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/12/04/place-your-bets-on-federalism-thoughts-on-todays-oral-argument-in-christie-v-ncaa/?u>

options, but given the strong case that New Jersey has presented, the likeliest outcomes are that the Court will either invalidate PASPA altogether by declaring it to be unconstitutional, or, in the alternative, keep the law in place while also allowing New Jersey to implement its partial repeal.²⁶⁴ Given the conservative majority on the Court, and the inherent juxtaposition between the social concerns presented by gambling, and the competing fundamental federalist interest of allowing states to exercise their sovereignty in governance, it is perhaps more likely that the Court will hedge to some extent and go with the latter approach, thereby allowing PASPA to exist indefinitely, while granting states like New Jersey the discretion to legislate out from under the law, should they elect to do so. However, the momentum behind striking down PASPA altogether has certainly never been stronger; as such, a Supreme Court determination that the law is wholly unconstitutional certainly remains a distinct possibility.

Such an outcome seems especially conceivable in light of the Supreme Court Justices' apparent receptiveness toward New Jersey's claims with respect to the Tenth Amendment.²⁶⁵ To be sure, during oral arguments, Justices Ginsburg, Sotomayor, and Kagan all seemed to entertain the idea that PASPA *was* in fact simply a lawful federal preemption under the Supremacy Clause.²⁶⁶ However, Justice Kagan also seemed to be genuinely concerned that there really is no distinction between telling a state they must pass a certain law, and telling them they must keep a certain law in place.²⁶⁷ Moreover, Justice Kennedy and, perhaps most crucially for New Jersey, Justice Breyer, both seemed to find the law to be a violation of the anti-

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264. Gouker, *Sports Betting Supreme Court Case*, *supra* note 214.

265. Howe, *supra* note 263.

266. Somin, *supra* note 263.

267. *Id.*

commandeering doctrine.²⁶⁸ Kennedy, who once famously advocated for the import of states' roles as "laboratories for experimentation" under the federalist system,²⁶⁹ unequivocally expressed his view of New Jersey's plight under PASPA when he stated that the federal law "leaves in place a state law that the state does not want, so the citizens of the State of New Jersey are bound to obey a law that the state doesn't want but that the federal government compels the state to have. That seems commandeering."²⁷⁰ Kennedy also pointed out that laws such as PASPA "blur[] political accountability" between the states and federal government, and that such an outcome is "precisely what federalism is designed to prevent."²⁷¹ Breyer seemed to agree in matter-of-factly stating: "the subject matter of this law is the state. That's what this is about, telling states what to do, and therefore, it falls within commandeering."²⁷² Moreover, Chief Justice Roberts and Justice Alito both seemed to take issue with the fact that the federal government could have prohibited gambling itself if it wanted to do so, therefore implying that the NCAA's interpretation of PASPA was either incorrect, or that the law itself was overreaching.²⁷³ The Chief Justice was also not at all receptive to the NCAA's suggestion that the State of New Jersey could legalize all sports betting if it wanted to, but that it could not partially legalize it or regulate it in any way, as that would amount to an affirmative authorization; in fact, Roberts incredulously asked the Solicitor General, who was arguing on behalf of the NCAA, if he had "no problem at all [with] anyone [engaging] in any kind of gambling they want, including a twelve-year-

268. *Id.*

269. *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

270. Somin, *supra* note 263.

271. Howe, *supra* note 263.

272. Somin, *supra* note 263.

273. Howe, *supra* note 263.

old going to a casino?”²⁷⁴ Moreover, Justice Gorsuch did not seem comfortable with the idea of the federal government passing laws that pawned off regulation and enforcement responsibilities, and the inherent expenses thereof, onto the states.²⁷⁵ Meanwhile, as is typically the case, Justice Thomas remained silent during oral arguments, but since he generally places great value on the legislative sovereignty of states and limitations on the power of the federal government, he seems to be a safe bet to also side with New Jersey on this issue.²⁷⁶

Taken together, it certainly seems as though the Supreme Court is primed for a landmark decision, in favor of both New Jersey and the institution of federalism itself.²⁷⁷ Even if the Court were to conclude that PASPA is not technically a textbook example of *commandeering* or conscripting the state legislature, it is still a facial regulation of what the state legislature can and cannot do in the absence of a federal regulatory or enforcement program, and therefore seemingly an infringement on state sovereignty under the Tenth Amendment. Further fueling this momentum for leaving states to their legislative devices is the current social and political landscape throughout the United States. The implications of the looming Supreme Court decision will be monumental and extremely broad in scope, as a number of other current issues, such as marijuana liberalization and the existence of, and federal policies toward, sanctuary cities, will greatly depend on the decision in *Murphy*.²⁷⁸

274. *Id.*

275. *Id.*

276. Somin, *supra* note 263.

277. Adam Edelman, *Cash-Hungry States Betting Supreme Court Will Legalize Sports Gambling*, NBC NEWS (Feb. 12, 2018), <https://www.nbcnews.com/politics/politics-news/cash-hungry-states-betting-supreme-court-will-legalize-sports-gambling-n846676>; Howe, *supra* note 263; *id.*

278. BALLOTPEDIA, *supra* note 214; Howe, *supra* note 263; Minton, *supra* note 214.

In the case of marijuana policy, Attorney General Jeff Sessions seems primed to wage war on the states that have already decriminalized or overtly legalized marijuana usage, to varying degrees.²⁷⁹ A ruling against New Jersey, and in favor of PASPA's constitutionality and legislative reach, in *Murphy*, will bolster Sessions' authority to dictate state marijuana policies and the enforcement thereof, and thereby present a tremendous threat to state sovereignty.²⁸⁰ Moreover, the Trump administration's current policies aimed at punishing "sanctuary cities" that refuse to comply with federal immigration laws and enforcement standards, by withholding federal funds otherwise earmarked for those cities, also seem to be facially coercive practices and flagrant violations of the anti-commandeering doctrine.²⁸¹ However, a ruling against New Jersey in *Murphy* could have huge ramifications in terms of reinforcing and validating the federal government's utilization of such practices. The Supreme Court Justices are almost certainly aware of the implications that would stem from a ruling in favor of the NCAA and PASPA, namely that such a verdict would be viewed as an implicit endorsement of these other contemporaneous federal attempts to exercise influence and control within the states, and the inherent dangers thereof. Therefore, viewing New Jersey's anti-commandeering argument in light of these other concurrent social and political issues seems to further tip the proverbial scales of justice in favor of New Jersey's position.

Still though, it remains entirely possible that the Supreme Court will once again surprise those closely

279. Paul Seaborn, *Jeff Sessions Isn't Hurting the Marijuana Legalization Campaign—He's Helping It*, BUSINESS INSIDER (Feb. 11, 2018), <http://www.businessinsider.com/attorney-general-jeff-sessions-is-helping-marijuana-legalization-2018-2>.

280. See Minton, *supra* note 214; Somin, *supra* note 263.

281. Natalie Delgadillo, *Trump's 'Sanctuary Cities' Policy Is Likely to Lose in Court*, GOVERNING (Sept. 25, 2017), <http://www.governing.com/topics/public-justice-safety/gov-sanctuary-cities-sessions-chicago-lawsuit-trump-funding.html>; see also BALLOTPEdia, *supra* note 214.

monitoring New Jersey's ongoing endeavor to surmount the obstacles presented by PASPA and somewhat inexplicably issue a verdict in favor of the NCAA. Should this occur, it would be a huge blow to every state looking to introduce their own regulated and licensed state-sponsored sports betting regime. Yet, as discouraging as such an outcome would seem for the future of liberalized gambling policies, it remains very unlikely that the momentum behind relaxing gambling restrictions would grind to a halt altogether. An act of Congress could still eliminate the impediments presented by PASPA once and for all, and the political and social climate may be just right for such legislation to pass. Additionally, as is seemingly the case with the marijuana liberalization saga, when federal officials begin to push back against the momentum for loosening restrictions on individual liberty, it can actually provide the necessary impetus to put the legislative gears in motion, particularly when such policies are already gaining wide support at the state level.²⁸²

*C. The Landscape for Increased Liberalization, Beyond
Murphy*

Based on the foregoing discussion and analysis of the dispute surrounding the daily fantasy sports industry in the earlier portions of this Comment, it seems safe to conclude that daily fantasy sports themselves are, in fact, a form of online gambling. This is abundantly evident based on the contingencies that are laced throughout the contests, including the performance of players, game-time weather conditions, and unforeseeable nature of player injuries. Furthermore, the companies themselves privately branded their products as being akin to traditional gambling

282. See Ryan Rodenberg, *How The DOJ Revision of Marijuana Policy Could Impact The Supreme Court Sports Betting Case*, LEGAL SPORTS REP. (Jan. 4, 2018, 10:26 AM), <https://www.legalsportsreport.com/17313/doj-marijuana-policy-and-sports-betting/>.

operations in their pitches to investors.²⁸³ Moreover, at its inception, FanDuel (and later DraftKings) admittedly sought to replace online poker companies and sportsbooks that were indisputably gambling operations, after UIGEA eradicated them from the U.S. market, and to this end, the daily fantasy model was carefully tailored to UIGEA in order to give the initial semblance of legal compliance.²⁸⁴ This confluence of facts and events makes it abundantly clear that daily fantasy sports is a form of gambling, irrespective of the legislative actions that states have taken to the contrary.

As is the case in New Jersey, PASPA currently prohibits the legalization of sports gambling in a total of forty-six states; therefore, while defining daily fantasy sports as legal “games of skill” is a relatively inventive and convenient way to circumvent a legal conflict with PASPA, the reality of the situation remains unchanged. To be sure, there is a “knowledge” or “skill” element to fantasy sports, which manifests itself in the act of selecting players, but once these selections are made, a participant’s fate is inextricably intertwined with the real-life performance of the selected players, something that no daily fantasy participant could ever purport to have control over, regardless of their relative levels of knowledge and skill. This is similar to the position a blackjack player is in at a casino: a certain degree of knowledge can help a player to some extent, but only to a point. For example, a blackjack player could wisely decide to not “hit on 18,” but at that point, the player’s fate is wholly removed from his or her control, to be determined only by whatever the dealer’s cards end up showing. As such, daily fantasy sports would undoubtedly fail to meet an honest application of either the “material element test” or the “modicum of chance” standard at the state level. Ultimately, based on the nature of the contests and aforementioned contingencies, daily fantasy sports would almost certainly

283. See Van Natta, *supra* note 1.

284. See *id.*

fail under the “predominant purpose test” as well, though an argument to the contrary could at least be invoked under that standard.

Yet, as we have seen, states have increasingly demonstrated an encouraging willingness to legalize, regulate, and tax daily fantasy sports.²⁸⁵ This provides a truly advantageous scenario, under which all parties stand to benefit: the daily fantasy industry can endure, if not thrive, while the consumer gets much-needed regulatory protections, competitive safeguards, and transparency, and the states reap the benefits of increased revenue. The fact that states are recognizing the benefits of such arrangements certainly bodes well for the future of legalized sports betting. Equally important in this analysis is the support from the professional sports leagues for daily fantasy sports, as these leagues will likely have a pivotal role in shaping the landscape of a legalized and regulated sports betting environment, irrespective of the future impact of PASPA, a legislative act which they are primarily responsible for.²⁸⁶

As has been previously discussed, the judicial outcome in New Jersey’s most recent attempt to legalize sports betting will largely determine the fate of PASPA, which will in turn have ramifications in states throughout the country. As of the time of this writing, the states of California, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Missouri, New York, Oklahoma, Rhode Island, South Carolina, and West Virginia have pending legislation to introduce legalized sports betting in their respective states.²⁸⁷ The current holdup on most of those bills, and the reason why none of these states have yet brought a PASPA challenge of their own, is that most of the bills are “stand-by

285. Kirsner, *supra* note 208.

286. See Edelman, *supra* note 73, at 139; Van Natta, *supra* note 1.

287. Gouker, *Legislative Tracker: Daily Fantasy Sports*, *supra* note 210; Ryan Rodenberg, *Sports Betting Bill Tracker*, ESPN (Apr. 1, 2018), http://www.espn.com/chalk/story/_/id/19740480/gambling-sports-betting-bill-tracker-all-50-states.

bills” that are tied to a future contingency, such as an amendment or repeal of PASPA.²⁸⁸ Furthermore, in addition to New Jersey, the states of Connecticut, Mississippi, and Pennsylvania have already enacted legislation to implement legal and regulated sports betting programs.²⁸⁹

In any event, regardless of the eventual outcome of the New Jersey case, federal lawmakers should strongly consider the multitude of policy reasons for repealing PASPA, not the least of which are the billions of dollars that change hands annually, as the direct result of illegal sports betting operations. In both 2017 and 2018, the Super Bowl generated \$4.7 billion in bets, by itself; and an estimated ninety-seven percent of these bets were illegally placed, as per the American Gaming Association.²⁹⁰ Senator John McCain, once a staunch opponent of sports betting, has recently gone on record stating that he believes that Congress should reconsider the idea of legalizing and regulating sports betting.²⁹¹

Even the professional sports leagues themselves seem to be increasingly supportive of the idea. NBA Commissioner Adam Silver surprised many when he voiced his support for a legalized, regulated sports betting market. Moreover, the NBA and MLB, seemingly in preparation for a gambling-friendly verdict in *Murphy*, are actively lobbying at the state level for one-percent of state-sponsored sports betting revenue to go to the leagues, in the form of an “integrity

288. Gouker, *Sports Betting Supreme Court Case*, *supra* note 214.

289. Gouker, *Legislative Tracker: Daily Fantasy Sports*, *supra* note 210; Rodenberg, *supra* note 287.

290. Thomas Barrabi, *Super Bowl Betting Total to Top \$4.7B, with 97% Bet Illegally*, FOX BUSINESS (Jan. 30, 2018), <https://www.foxbusiness.com/features/super-bowl-betting-total-to-top-4-7b-with-97-bet-illegally>; David Purdum, *AGA Estimates Super Bowl LI to Generate \$4.7B in Bets, Most of it Illegally Wagered*, ESPN (Jan. 31, 2017), http://www.espn.com/chalk/story/_id/18590533/american-gaming-association-estimates-super-bowl-li-generate-47b-bets-most-illegally-wagered.

291. Purdum, *supra* note 290.

fee.”²⁹² Such a fee, the leagues argue, would help to regulate and enforce transparent, legal gambling operations, and also offset any threats to the leagues’ respective images and public perceptions.²⁹³ Meanwhile, the NHL recently cast gambling concerns aside when it introduced the first professional sports franchise in Las Vegas, Nevada.²⁹⁴ Additionally, the NFL has approved the Oakland Raiders’ impending move to Las Vegas, with the thirty-two team owners overwhelmingly lending their support, as evidenced by the 31-1 vote on the proposed relocation.²⁹⁵

Furthering this momentum for repealing or modifying PASPA was the 2016 election of President Donald J. Trump, once a casino owner, himself.²⁹⁶ As the president of the American Gaming Association, Geoff Freeman, phrased it: “[there is] a perfect storm coming together . . . everyone is acknowledging that we are better off having a regulated environment.”²⁹⁷ Furthermore, the ongoing constitutional questions surrounding PASPA, in conjunction with the Republican Party’s traditional beliefs in state’s rights and empowering state legislatures, and the fact that Republicans now control both Congress and the Executive Branch at minimum until 2019, makes the legislative environment very conducive to passing legislation to legalize sports

292. Dustin Gouker, *Why NBA, MLB Apparently Think They’re Going to Lose the New Jersey Sports Betting Case*, LEGAL SPORTS REP. (Jan. 12, 2018), <https://www.legalsportsreport.com/17751/nba-mlb-lose-christie-vs-ncaa/>.

293. *Id.*; Terry Lefton & John Lombardo, *NBA Plans for Future Gambling*, N.Y. BUS. J. (Feb. 28, 2018, 2:56 PM), <https://www.bizjournals.com/newyork/news/2018/02/28/nba-plans-for-future-gambling.html>.

294. Cutler Klein, *From Six Teams to 31: History of NHL Expansion*, NHL.COM (June 22, 2016), <https://www.nhl.com/news/nhl-expansion-history/c-281005106>.

295. Ken Belson & Victor Mather, *Raiders Leaving Oakland Again, This Time for Las Vegas*, N.Y. TIMES (Mar. 27, 2017), <https://www.nytimes.com/2017/03/27/sports/football/nfl-oakland-raiders-las-vegas.html>.

296. Daniel Roberts, *A ‘Perfect Storm’ is Brewing for Legalized Sports Betting*, YAHOO FINANCE (Feb. 23, 2017), <https://finance.yahoo.com/news/a-perfect-storm-is-brewing-for-legalized-sports-gambling-180959248.html>.

297. *Id.*

betting.²⁹⁸ For his part, Trump stated in 2015 that he is “OK with [sports betting and daily fantasy sports] because it’s happening anyway. Whether you have [legalized sports betting] or you don’t have it, you have it.”²⁹⁹ As such, notwithstanding the still unknown outcome of *Murphy v. NCAA*, it is entirely possible, if not altogether likely, that significant steps will be taken toward legalized sports betting in the United States, over the next several years.

CONCLUSION

Today, the two leading daily fantasy sports companies are still reeling as they attempt to recover from the stunning events that catapulted their industry into legal turmoil and pushed the two billion-dollar companies to the brink of dissolution; however, the future suddenly looks bright for the daily fantasy industry, once again. It will likely never be what it once was, as it is almost inconceivable to envision FanDuel and DraftKings ever engaging in marketing wars in which they air commercials every ninety seconds and openly boast of the millions of dollars they planned to give away during a given week. In fact, the once bitter rivals were at one point actively negotiating a humbling merger deal designed to help the two companies recover and thrive again, prior to federal regulators blocking the proposed merger plan, due to monopolistic and market share concerns.³⁰⁰ However, while the recovery process may be slow, especially with the merger option now off the table, FanDuel and DraftKings seem primed to lead the industry into the future, using their growing legal foothold to regain lost prominence and expand their operations. Recently, in an effort to keep

298. Thomas Barrabi, *How Donald Trump Could Help Legalize Sports Betting*, FOX BUSINESS (Jan. 13, 2018), <https://www.foxbusiness.com/features/how-donald-trump-could-help-legalize-sports-betting/>.

299. *Id.*

300. The Associated Press, *DraftKings and FanDuel Call Off Merger*, N.Y. TIMES (July 13, 2017), <https://www.nytimes.com/2017/07/13/sports/draftkings-and-fanduel-call-off-merger.html>.

pace with market evolution and innovation, FanDuel even introduced contests in which winners were paid in the cryptocurrencies “Bitcoin” and “Dash.”³⁰¹

Though it seems clear that daily fantasy sports products are simply the latest variation of gambling, legalizing and regulating the activity is the prudent move. This proposition is plainly reflected and reinforced by the history of gambling laws in the United States, over the course of the last half-century. First, the Wire Act sought to eradicate illegal horse racing operations that relied on telegraph, and later, telephone communications.³⁰² However, other forms of gambling subsequently increased in popularity, before the advent of the Internet eventually gave rise to online sportsbooks and poker sites. In response, the UIGEA effectively eliminated these illicit activities, only to be thwarted for several more years by the inception of the daily fantasy sports industry, which developed to fill the void. The trend is ostensibly well-established by now: with each subsequent piece of legislation seeking to end black market gambling, technological advancements and human ingenuity devise a way to circumvent the law, and the cycle continues.

Therefore, it seems to be the logical option to simply allow daily fantasy participants to continue enjoying daily fantasy sports, with the protections that state and government regulatory agencies can provide. It remains to be seen which states will become the next to affirm the legality of the daily fantasy companies’ operations, but given the strong momentum for legalization, the growing number of states who have already passed legalizing bills, and the incentives for simultaneously enhancing consumer safeguards, while increasing state revenues, it should not take long for the next state to take an affirmative stance,

301. Daniel Roberts, *Exclusive: FanDuel Launching NBA Contest with Cryptocurrency Prizes*, YAHOO FINANCE (Feb. 16, 2018), <https://finance.yahoo.com/news/exclusive-fanduel-launching-nba-contest-cryptocurrency-prizes-151529753.html>.

302. 18 U.S.C. § 1084 (2012).

with respect to daily fantasy sports.

Meanwhile, there is a growing impetus for following a similar path of legalization and regulation on the concomitant issue of sports betting in the United States. With political leaders, professional sports leagues, and state governments showing historic and amalgamated support for eradicating the black market for sports betting, an ongoing challenge to the constitutionality of the Professional and Amateur Sports Protection Act before the U.S. Supreme Court, and the developing legality of daily fantasy sports serving as both a catalyst and guidepost, a significant step toward liberalizing the current prohibitions on professional sports wagering appears to be imminent.

*Editor's Note: This Comment was selected from our 2016–17 Note & Comment competition. Simultaneous with its publishing, the Supreme Court released its decision in *Murphy v. NCAA*. As expected, the Court ultimately did rule in favor of New Jersey on May 14, 2018, striking down the Professional and Amateur Sports Protection Act in *Murphy v. NCAA*, 584 U.S. ___, Nos. 16-476, 16-477, 2017 WL 684747 (2018).*