
The Need for Tailored Legislation: The Meteoric Rise of Daily Fantasy Sports Amidst Outdated Gaming Laws

*“We are left now with a public policy position that seems to assert that gambling is bad/illegal except when it is not. And what makes gambling not bad/illegal is when the Legislature authorizes a regulatory framework”*¹

I. INTRODUCTION

If you are unfamiliar with daily fantasy sports (DFS), you nevertheless may be all too familiar with DFS companies DraftKings and FanDuel, thanks to their 2015 blitz of advertisements plastered across train stations, radios, television, and trashcans.² Seemingly overnight, DraftKings and FanDuel rapidly amassed a massive customer base and carved out a multibillion dollar industry.³ Problematically, however, DFS growth greatly outpaced the existing laws purported to regulate DFS as a form of gambling.⁴ The stagnancy and

1. MASS. GAMING COMM’N, WHITE PAPER ON DAILY FANTASY SPORTS 19 (2016), <http://massgaming.com/wp-content/uploads/MGC-White-Paper-on-Daily-Fantasy-Sports-1-11-16.pdf> [<https://perma.cc/YME2-N23Y>].

2. See Don Van Natta Jr., *Welcome to the Big Time*, OUTSIDE THE LINES & ESPN MAG. (Aug. 24, 2016), http://www.espn.com/espn/feature/story/_id/17374929/otl-investigates-implosion-daily-fantasy-sports-leaders-draftkings-fanduel [<https://perma.cc/SW8T-PFFJ>] (commenting on extraordinary advertising campaigns launched by DraftKings and FanDuel). For the bulk of the 2015 summer, a DFS commercial aired on television once every ninety seconds—the product of a robust \$750 million advertising campaign launched by DraftKings and its rival FanDuel. *Id.* The two companies actually outspent the entire American beer industry on advertising leading up to the 2015 National Football League (NFL) season. *Id.* (recognizing fall of DFS industry on pace with its rapid rise due to legal issues).

3. See Garrett Greene, Comment, *When Fantasy Becomes Reality: Attempts to Regulate the Highly Unregulated Daily Fantasy Sports Industry*, 47 ST. MARY’S L.J. 821, 826 (2016) (noting DraftKings and FanDuel “consistently received [over] three million entries apiece during 2015’s NFL Sundays”); Darren Heitner, *The Hyper Growth of Daily Fantasy Sports Is Going to Change Our Culture and Our Laws*, FORBES (Sept. 16, 2015), <http://www.forbes.com/sites/darrenheitner/2015/09/16/the-hyper-growth-of-daily-fantasy-sports-is-going-to-change-our-culture-and-our-laws/#6db852675f25> [<https://perma.cc/YYW3-6PTB>] (emphasizing tremendous growth of DFS and calling it “legal goldrush” for investors). In 2016, nearly 20% of the population of the United States and Canada participated in fantasy sports, totaling 57.4 million players; up from 28.4 million players in 2009. See *Industry Demographics: Actionable Insights and Insightful Data*, FANTASY SPORTS TRADE ASS’N, <http://fsta.org/research/industry-demographics/> [<https://perma.cc/9BZN-SPDE>] [hereinafter *FSTA Industry Demographics*] (providing data on participation in DFS and in-depth analysis upon subscription). In addition, 2015’s \$2.6 billion worth of DFS entry fees could grow 41% annually to \$14.4 billion in 2020. See Heitner, *supra* (noting aggregate entry fees and projecting growth).

4. See Nathaniel J. Ehrman, Article, *Out of Bounds?: A Legal Analysis of Pay-to-Play Daily Fantasy Sports*, 22 SPORTS L.J. 79, 80 (2015) (calling DFS games growth faster “than . . . laws in place to monitor them”).

ambivalence of existing law nurtured an environment that allowed DFS operators to function unregulated.⁵

Regulators finally took notice amidst the media advertising warfare DraftKings and FanDuel launched, and questioned the offering of DFS contests in which a few expert players, so-called “sharks,” preyed on masses of “minnows”; including instances where employees from one DFS operator participated in the other operator’s contests.⁶ Nevertheless, when regulators turned to their respective state laws governing gambling, they found the same statutory ambiguity and obsolescence that emblazoned DFS operators in the first place.⁷ In turn, opponents and defenders of DFS alike have tried to quantify the unquantifiable elements of chance and skill in DFS to determine its legality under the existing state-level legal frameworks.⁸ Such analysis is misguided, because DFS presents a hybrid fusion of both skill and chance that is not amenable to examination under the existing state legal frameworks, which require weighing the degree to which chance affects a game against the level of skill the game requires.⁹ Indeed, the inquiry should be: “Do we want

5. See Van Natta Jr., *supra* note 2 (attributing longtime lobbyist with saying, “[w]e always knew there was no law on the books”). DFS operators “all but dared” authorities to consider their games illegal gambling, and this deadly mix of hubris, ignorance, and political naïveté ultimately led the industry to plummet quicker than it burst onto the scene. See *id.* (documenting DFS net losses due to massive legal and lobbying efforts). Ultimately, the looming reality of massive legal and lobbying fees contributed to the decision by FanDuel and DraftKings to join forces in a merger announced on November 18, 2016. See David Purdum, *Daily Fantasy Powerhouses DraftKings, FanDuel Agree to Merge*, ESPN (Nov. 18, 2016), http://www.espn.com/chalk/story/_/id/18078056/daily-fantasy-powerhouses-draftkings-fanduel-agree-merge [<https://perma.cc/W35K-VP36>] (noting proposed merger would cede over 80% of market to merged company). The Federal Trade Commission quickly halted the proposed merger in what it considered a “win” for consumers, whom the FTC claims benefit from the competition between DraftKings and FanDuel on product innovation and pricing. See *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> [<https://perma.cc/2G3X-WRVN>].

6. See Honorable James F. McHugh & Justin G. Stempeck, *The Tip of the Iceberg: Daily Fantasy Sports as a Harbinger of Future Regulatory Challenges*, BOS. B.J., Spring 2016, at 29, 29 (indicating one DFS employee won \$300,000 using insider information on rival platform); see also Van Natta Jr., *supra* note 2 (discussing consumer concerns regarding several expert-level players taking advantage of many casual-level players).

7. See MASS. GAMING COMM’N, *supra* note 1, at 18-19 (examining outdated nature and ambiguity of Massachusetts gambling laws when applied to DFS).

8. See Ehrman, *supra* note 4, at 107 (calling DFS game of skill warranting legality in most states); see also Jeffrey C. Meehan, *The Predominate Goliath: Why Pay-to-Play Fantasy Sports Are Games of Skill Under the Dominant Factor Test*, 26 MARQ. SPORTS L. REV. 5, 26-33 (2015) (declaring DFS legal games of skill in majority of states); Jonathan Bass, Comment, *Flushed from the Pocket: Daily Fantasy Sports Businesses Scramble Amidst Growing Legal Concerns*, 69 S.M.U. L. REV. 501, 509-21 (2016) (arguing states should consider DFS illegal gambling based on prevalence of chance element). Not surprisingly, the Fantasy Sports Trade Association argues, “Fantasy sports leagues are games of skill. Managers must take into account a myriad of statistics, facts and game theory in order to be competitive.” See *Why Fantasy Sports Is Not Gambling: Understanding a Game of Skill*, FANTASY SPORTS TRADE ASS’N, <http://fsta.org/research/why-fantasy-sports-is-not-gambling/> [<https://perma.cc/6WBY-V427>] (minimizing risk for gambling abuse and noting support of gambling-sensitive organizations).

9. See MASS. GAMING COMM’N, *supra* note 1, at 11-12 (relegating existing gambling laws to ineffectual relics of moral judgments asserted hundreds of years ago).

DFS to be legal?” not, “Is DFS legal?”¹⁰ Consequently, states should strive toward their objective of regulating the DFS industry by aborting any attempts to fit square-shaped DFS pegs into the round holes of preexisting state legal frameworks; instead, they should follow the tide of states passing tailored legislation to protect consumers while keeping DFS operable.¹¹

This Note begins by tracing the development of fantasy sports and how they are played, before turning to an overview of the existing federal and state legislation already applicable to DFS.¹² Next, the key issues surrounding DFS are explored and tied to the state regulatory trends emerging in response to these issues.¹³ This Note will then argue that DFS is not properly reviewed under the existing state law frameworks because the elements of skill and chance appear in equally unquantifiable proportions.¹⁴ Consequently, this Note suggests that the proper course of action is for states to pass new legislation tailored to the hybrid game of skill and chance that is DFS.¹⁵

II. HISTORY

A. *The Evolution of Fantasy Sports*

The advent of fantasy sports dates back to the end of World War II, but many believe that Harvard professor, William Gamson, introduced fantasy sports in the early 1960s.¹⁶ Gamson’s “Baseball Seminar” allowed participants who paid a \$10 entry fee to draft a baseball team to compete across

10. See *id.* at 4 (recommending this mode of questioning in light of nebulous tests embodied by Massachusetts gambling laws). Governor Chris Christie balked at a question centering on DFS legality during a 2016 presidential primary debate saying, “[l]et people play, who cares?” See Travis Waldron, *No, Chris Christie, How the Feds Handle Fantasy Sports Is a Big Deal*, HUFFINGTON POST (Oct. 29, 2015), http://www.huffingtonpost.com/entry/chris-christie-fantasy-sports_us_56324609e4b0631799114717 [<https://perma.cc/F2YF-TV59>] (arguing millions of Americans care about fantasy sports).

11. See MASS. GAMING COMM’N, *supra* note 1, at 4 (cautioning against application of existing laws and encouraging direct legislation); see also Ryan Rodenberg, *Daily Fantasy Sports State-by-State Tracker*, ESPN (July 26, 2017), http://www.espn.com/chalk/story/_/id/14799449/daily-fantasy-dfs-legalization-tracker-all-50-states [<https://perma.cc/A9P7-64N3>] (tracking legislative posture of each state toward DFS).

12. See *infra* Sections II.A-D (addressing evolution of DFS, mechanics of playing, and context of federal and state regulatory arena).

13. See *infra* Section II.E (focusing on key issues in DFS debate and select regulatory responses).

14. See *infra* Part IV (advocating for legislation in lieu of conclusory skill versus chance “analysis”).

15. See *infra* Part V (summarizing drawbacks of skill versus chance determination and endorsing tailored legislation).

16. Compare Bass, *supra* note 8, at 502 (attributing Wilfred Winkenbach with creating fantasy golf game in 1950s), and Michael Trippiedi, Note, *Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?*, 5 UNLV GAMING L.J. 201, 204 (2014) (crediting Winkenbach with creation of fantasy golf leading to advent of fantasy football), with 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, 120 (2016) (tracing origin of fantasy sports to Gamson’s “Baseball Seminar”), and McHugh & Stempeck, *supra* note 6, at 29 (suggesting original fantasy sports model derived from fantasy baseball league).

predetermined statistical categories over the course of a full baseball season.¹⁷ Gamson's brainchild garnered substantial media attention, making the game increasingly popular among sports fans who expanded its horizons to other major professional sports.¹⁸ From inception, fantasy sports steadily grew, but the advent of the Internet proved to be a major accelerator insofar as it facilitated instant access to statistical information and fostered the creation of platforms allowing for global participation.¹⁹ Notwithstanding traditional fantasy sports' widespread appeal, innovators seized the opportunity to compact the fun and entertainment of season-long fantasy sports into day-to-day online offerings—thus DFS was born.²⁰

17. See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its Newest National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 5-6 (2012) [hereinafter Edelman, *Treatise*] (indicating winning team comprised of players who accumulated most points in statistical categories); Trippiedi, *supra* note 16, at 204-05 (noting Gamson's momentous contribution to fantasy sports by "pinning fantasy team points to live . . . games").

18. See Edelman, *Treatise*, *supra* note 17, at 6-7 (crediting retired journalist, Robert Sklar, with sharing game with his mentee who developed offshoot). Apparently, former "Baseball Seminar" participant, Robert Sklar, mentioned the game to his mentee, Daniel Okrent, who nearly fifteen years later reinstated an updated version of the game for play amongst his journalist friends. *Id.* at 6-7. Okrent's adaptation of the game, affectionately called "The Rotisserie League," garnered national media attention because of the participants' media affiliations, which ultimately galvanized an array of newspaper and television reports, and even a book published by "The Rotisserie League" members to share the game with the public. *Id.* at 8; see Trippiedi, *supra* note 16, at 205 (discussing proliferation of fantasy sports through news publications during 1980s and 1990s).

19. See Edelman, *supra* note 16, at 121 (discussing transformation of fantasy sports from in-home activity to "highly publicized, commercial pursuit"); Edelman, *Treatise*, *supra* note 17, at 9-10 (discussing "Internet boom" and its role in facilitating fantasy sports participation); Bass, *supra* note 8, at 502 (emphasizing role of online statistical accessibility in propagating fantasy sports growth); Trippiedi, *supra* note 16, at 205-06 (declaring Internet biggest driver of fantasy sports popularity and magnet for professional sports leagues' attention). In 1995, ESPN launched the first Internet-based fantasy baseball platform which allowed for season-long competition. See Edelman, *Treatise*, *supra* note 17, at 10-11 (tracking evolution of fantasy sports into modern multi-billion dollar industry). By 2000, ESPN expanded its fantasy sports offering to include football, hockey, NASCAR, and even fly-fishing. See *id.*

20. See Meehan, *supra* note 8, at 13 (determining timeframe constitutes main difference between DFS and traditional fantasy offerings); Ehrman, *supra* note 4, at 81; Zachary Shapiro, Note, *Regulation, Prohibition, and Fantasy: The Case of FanDuel, DraftKings, and Daily Fantasy Sports in New York and Massachusetts*, 7 HARV. J. SPORTS & ENT. L. 289, 292 (2016) (regarding online poker and instantaneousness of play main threads of inspiration for DFS); Van Natta Jr., *supra* note 2 (considering entrepreneurial approach to uproot slowness of traditional fantasy sports and catering to millennials). But see Edelman, *supra* note 16, at 124 (recognizing DFS filled void left by illegalization of online sports books); Greene, *supra* note 3, at 826 (equating allure of DFS to "net rapid rewards for participants"). FanDuel CEO, Nigel Eccles, suggests that the genesis of DFS comes from asking, "How do we make everyday draft day? Everybody says the best day of the year is draft day. That really was the product." Erik Matuszewski, *Fantasy Sports Luring Wall Street in Its Fastest-Growing Sector*, BLOOMBERG (Jan. 5, 2014), <http://www.bloomberg.com/news/articles/2014-01-06/fantasy-sports-luring-wall-street-in-its-fastest-growing-sector> [https://perma.cc/GEY7-N63Z]. For an interesting and detailed exploration of the impetus and rationale of launching DFS sites, see Jay Caspian Kang, *How the Daily Fantasy Sports Industry Turns Fans into Suckers*, N.Y. TIMES (Jan. 6, 2016), http://www.nytimes.com/2016/01/06/magazine/how-the-daily-fantasy-sports-industry-turns-fans-into-suckers.html?_r=1 [https://perma.cc/3K4F-LNC2].

B. How to Play DFS

Major DFS operators like DraftKings and FanDuel offer fantasy drafts—a process by which participants all get an equal budget to pick uniquely priced real-life athletes (the most elite of whom tend to be the highest priced) to play for their fantasy team.²¹ DFS participants can enter their selected lineup of athletes into several different contest forms, which vary only in terms of the number of other lineups players compete against, the type or quantity of prize, and the percentage of participants who ultimately win contest prizes.²² Ultimately, irrespective of the contest form, the winners are those participants who accumulate the highest point totals based on their selected athletes' performances in set statistical categories (like touchdowns or home runs).²³ In determining which players to select, there are a multitude of factors a DFS contestant may contemplate, including: the players' historical performance, health, defensive matchup, price-value proposition, breaking news updates, the weather forecast, and the team's offensive strategy.²⁴

C. Potentially Applicable Federal Law

There are four primary federal laws with the potential to directly reach DFS as a form of gambling.²⁵ First among them is the Interstate Wire Act of 1964

21. See *Rules & Scoring*, DRAFTKINGS, <https://www.draftkings.com/help/rules/nfl> [<https://perma.cc/9ZLZ-FBPT>] [hereinafter *DraftKings Fantasy Football Rules*] (outlining draft protocol, contest rules, and scoring details for daily fantasy football offering); *How It Works*, FANDUEL, <https://www.fanduel.com/how-it-works> [<https://perma.cc/H4JZ-JHUW>] [hereinafter *FanDuel DFS Rules*] (detailing contest offerings and draft selection process). Generally, there are a set number of roster spots on the fantasy team, with positional requirements mimicking that of the professional sport. See Jonah Ottley, Note, *Fantasy Sports and Gambling: Drawing a Line in the Sand Between Pete Rose's Gambling and Daily-Play Fantasy Sports*, 42 N. KY. L. REV. 549, 557 (2015) (confirming same positions in baseball—pitcher, catcher, infield, outfield—required for daily fantasy baseball roster). A basic understanding of how DFS is played and what it entails is an essential predicate to understanding the problems of review DFS presents under very old state gambling laws, in addition to the key issues DFS presents socially and otherwise. See *infra* notes 71-72 and accompanying text (outlining issues arising from DFS gameplay and regulatory ability to effectively redress each).

22. See *FanDuel DFS Rules*, *supra* note 21 (delineating varying contest options and key differences among them). Contest offerings range from head-to-head competition and small tournament pools to contests with 50% of contestants guaranteed a prize and those where the prize itself is entry into more elite DFS competitions. See *id.* (displaying table with main distinctions of each offering).

23. See *DraftKings Fantasy Football Rules*, *supra* note 21 (asserting contest results beholden to total points scored by each individual lineup); *FanDuel DFS Rules*, *supra* note 21 (suggesting “you score points when your players perform well”).

24. See *Humphrey v. Viacom, Inc.*, No. 06-2768 (DMC), 2007 WL 1797648, at *1 (D.N.J. June 20, 2007) (regarding “knowledge of players, statistics and strategy” key components in fantasy roster management); Ehrman, *supra* note 4, at 102 (enumerating considerations germane to optimal DFS performance); Shapiro, *supra* note 20, at 298-99 (reiterating difficulty of applying research and knowledge within confines of budgetary restriction).

25. See Ehrman, *supra* note 4, at 88-95 (providing in-depth treatment of applicable federal laws and risks each present to DFS operators). It is important to note that, as of the date of this writing, DFS has not been judicially scrutinized under any of these federal laws. *Id.* at 88 (noting “political pressure for legalization” in light of widespread consumer demand). On the contrary, the Unlawful Internet Gambling Enforcement Act

(IWA).²⁶ Congress enacted the IWA as part of a concerted effort to tackle organized gambling and racketeering.²⁷ The IWA allows for civil and criminal penalties where a defendant “in the business of betting or wagering knowingly uses a wire communication facility” to transmit bets or wagers across interstate commerce.²⁸ Although courts have not yet applied the IWA specifically to DFS providers, if a DFS offering were held to be a “game of chance,” the IWA would subject the DFS provider to liability.²⁹

Similarly, the Illegal Gambling Business Act of 1970 (IGBA) targets organized illegal gambling by enabling prosecutors to widely pursue “whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business.”³⁰ Nevertheless, this wide prosecutorial power is restricted to situations where the business violates the law of the state in which it is conducted, includes more than five individuals, and has operated for more than a month or generated over \$2,000 in revenue.³¹

The third applicable federal law is the Professional and Amateur Sports Protection Act (PASPA).³² PASPA creates a private right of action in professional and amateur sports leagues to bar states and individuals from sponsoring, operating, advertising, or promoting “a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on one or more competitive games in which amateur or professional athletes participate . . . or one or more performances of such athletes in such games.”³³ The professional sports industry’s lobbying efforts resulted in PASPA’s enactment, which now

(UIGEA) carved out an exception to illegalization for traditional fantasy sports. *See infra* notes 36-38 and accompanying text (expanding on UIGEA provisions).

26. Interstate Wire Act of 1964, 18 U.S.C. § 1084 (2012) (illegalizing placement of bets or wagers through knowing use of interstate wire communication).

27. *See Ehrman, supra* note 4, at 89 (maintaining congressional intent to empower both state and federal antigambling efforts).

28. Interstate Wire Act of 1964 § 1084(a). Several courts have broadly construed a “wire communication facility” to encompass the Internet. *See United States v. Lyons*, 740 F.3d 702, 716 (1st Cir. 2014) (holding IWA applicable to Internet wagering); *United States v. Cohen*, 260 F.3d 68, 76 (2d Cir. 2001) (concluding placement of bets through Internet bring bets within IWA’s purview).

29. *See Edelman, Treatise, supra* note 17, at 35 (pointing out “sports bookies” proven to violate IWA’s provisions, unlike DFS providers).

30. Illegal Gambling Business Act of 1970, 18 U.S.C. § 1955 (2012).

31. *Id.* § 1955(b)(1) (defining “illegal gambling business”). Interestingly enough, the IGBA includes a nonexhaustive list of activities considered to be gambling where lotteries or chances are sold: “pool selling, bookmaking, maintaining slot machines, roulette wheels or dice tables.” *Id.* § 1955(b)(4).

32. *See Professional and Amateur Sports Protection Act*, 28 U.S.C. §§ 3701-3704 (2012) (empowering professional and amateur sports leagues to bar states from association with sports gambling).

33. *Id.* §§ 3702-3703 (outlawing certain forms of sports gambling and limiting standing in civil actions). PASPA further restrains states from licensing or authorizing such gambling or wagering schemes, namely because it pertains to select states’ preexisting wagering operations, which PASPA “grandfathered” in. *See id.* §§ 3702, 3704 (limiting states further and providing for exceptions to applicability). Interestingly, PASPA also gives the United States Attorney General a right to enforce the Act. *See id.* § 3703 (delineating parties who may bring civil actions to enjoin violations of PASPA § 3702).

forecloses a major avenue for state lottery growth.³⁴ Nevertheless, either the United States Attorney General or the professional or amateur sports leagues would have to opt to enforce PASPA's provisions to seriously jeopardize DFS providers.³⁵

Finally, the UIGEA may also pose a threat to DFS.³⁶ The UIGEA prohibits those "engaged in the business of betting or wagering" from "knowingly accept[ing funds] . . . in connection with the participation of another person in unlawful Internet gambling."³⁷ The UIGEA's applicability to DFS is hotly contested, despite a subsection that explicitly carves out applicability to "fantasy sports."³⁸ The ambiguity of the carve-out provided the federal legislative gray area that DFS operators exploited to burst onto the scene, even though Congress did not intend for the carve-out to reach DFS so much as traditional season-long fantasy sports.³⁹ Even if the carve-out does apply to DFS, a showing that DFS contests are games of bona fide skill—an inquiry

34. See Edelman, *Treatise*, *supra* note 17, at 36 (commenting on PASPA's origins). Additionally, while the plain language of PASPA seems to endanger all modicums of traditional and daily fantasy sports, it likely does not because most professional sports leagues—the very galvanizers of PASPA—offer their own season-long fantasy sports contests. See *id.* at 36-37 (discussing irony of PASPA applicability to professional sports leagues). More likely, PASPA poses a threat to DFS operators whose contests sound more like a wagering scheme in light of their touting millions of dollars in cash prizes. See *id.* (assessing application of PASPA to DFS providers); see also Ehrman, *supra* note 4, at 92 (making case for DFS operators' vulnerability to injunctions sought under PASPA). Even without participating in the DFS market, the Massachusetts State Lottery boasts over \$5 billion in sales and a whopping \$985 million in profits that flow back to Massachusetts's cities and towns in the form of local aid. See MASS. STATE LOTTERY COMM'N, DAILY FANTASY SPORTS, A PRESENTATION FOR THE MSLC, <https://www.legalsportsreport.com/wp-content/uploads/2015/11/11-02-15-DFS-MSLC-presentation-FINAL.pdf> [<https://perma.cc/GMS5-BG36>] [hereinafter MSLC DFS PRESENTATION] (noting DFS presents new potential source of untapped state revenue).

35. See 28 U.S.C. § 3703 (limiting causes of action under PASPA).

36. 31 U.S.C. §§ 5361-5367 (2012). As it happens, Congress tacked the UIGEA onto a counterterrorism-related port safety bill in the final minutes prior to a lengthy election recess. See Ehrman, *supra* note 4, at 93 (addressing unique circumstances of bill's passage); Greene, *supra* note 3, at 830-31 (noting congressional chicanery and haste in passing UIGEA).

37. See 31 U.S.C. § 5363 (prohibiting acceptance of any financial instruments in exchange for unlawful online gambling). The UIGEA includes both civil and criminal remedial provisions. See *id.* §§ 5365-5366 (enumerating relief attainable by state, federal, and American Indian authorities and applicable terms of imprisonment).

38. See *id.* § 5362(1)(E)(ix) (outlining conditions precedent to fantasy sports' exclusion from UIGEA prohibitions). In order to circumvent the UIGEA's applicability, a fantasy sports contest must feature a fixed prize pool ascertainable upon entry; not allow selection of a single player or an entire real-world team of players; and generate "winning outcomes [that] reflect the relative knowledge and skill of the participants and are determined predominately by accumulated statistical results." See *id.* Not coincidentally, both DraftKings and FanDuel advertise fixed-prize contests and limit participants to drafting no more than four players from the same real-world team for use in any DFS contest. See *DraftKings Fantasy Football Rules*, *supra* note 21; *FanDuel DFS Rules*, *supra* note 21.

39. See, e.g., Edelman, *supra* note 16, at 143 (suggesting DFS had not even entered public's vernacular in 2006); Greene, *supra* note 3, at 832 (reiterating UIGEA author's belief DFS would not become large-scale activity when acquiescing to carve-out provision).

typical to an assessment of legality under state law—would place DFS in compliance with the UIGEA.⁴⁰

D. State Law Approaches

Despite ample moral-based challenges, gambling survives as an age-old American enterprise, stretching as far back as the first European settlers.⁴¹ Generally, there are three categories of illegal gambling: bets, lotteries, and gambling devices.⁴² Under the Tenth Amendment of the United States Constitution, gambling is an area that is generally left to the states for regulation, thus making state law perspectives the crux of the analysis when it comes to determining DFS legality.⁴³ DFS are reviewed as illegal lotteries under the common law, which requires: a distributable prize pool, based on chance, for consideration.⁴⁴ The DFS entry fee and the fact that the top players win prizes satisfy the first and third elements respectively, therefore the legality of DFS under state law hinges specifically on the chance element.⁴⁵

1. The Dominant Element Test

To determine whether a game is based on chance, a majority of states employ the dominant element test, which requires chance to be a dominating, determinative element in the scrutinized activity.⁴⁶ On the one hand, this test

40. See 31 U.S.C. § 5362(10)(A) (defining “unlawful Internet gambling” by reference to unlawfulness under other federal and state laws); see also Edelman, *supra* note 16, at 143-44 (addressing potential for DFS compliance with UIGEA by labeling it game of skill); Shapiro, *supra* note 20, at 296 (affirming UIGEA exclusion of “skill-based games”).

41. See, e.g., R. Randall Bridwell & Dr. Frank L. Quinn, *From Mad Joy to Misfortune: The Merger of Law and Politics in the World of Gambling*, 72 MISS. L.J. 565, 632 (2002) (claiming “original European settlers in America brought . . . tradition of public lotteries with them”); Ed Crews, *Gambling: Apple-Pie American and Older than the Mayflower*, COLONIAL WILLIAMSBURG J. (2008), <http://www.history.org/foundation/journal/autumn08/gamble.cfm> [<https://perma.cc/J2ZJ-8AS2>] (suggesting Native Americans wagered all they owned on games of chance, perhaps before settlers arrived); *A History of American Gaming Laws*, HG.ORG., <https://www.hg.org/article.asp?id=31222> (last visited Nov. 3, 2017) (indicating first settlers brought games of chance to America).

42. See 38 AM. JUR. 2D *Gambling* § 1 (2d ed. 2017) (providing general overview of gambling and gaming).

43. See U.S. CONST. amend. X (reserving power to states where not prohibited or delegated to federal government by Constitution); Ehrman, *supra* note 4, at 95 (commenting on delegation of regulatory power over gambling to state governments).

44. See Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. MARSHALL L. REV. 1195, 1203 (2007) (describing common law approach to gambling prohibitions); Jon Boswell, Note, *Fantasy Sports: A Game of Skill That Is Implicitly Legal Under State Law, and Now Explicitly Legal Under Federal Law*, 25 CARDOZO ARTS & ENT. L.J. 1257, 1263 (2008) (addressing three core elements of illegal lottery under state law); Ehrman, *supra* note 4, at 96 (comparing elements to those present in DFS).

45. See Ehrman, *supra* note 4, at 96 (designating chance “controlling” in outcome of DFS legality review).

46. See 54 C.J.S. *Lotteries* § 5 (2016) (suggesting labeling activity lottery depends on whether skill or chance constitutes dominant element); Meehan, *supra* note 8, at 15-16 (considering games comprised 51% of

asks whether an activity's outcome is divisible from chance so that skill can be dispositive in some cases, and on the other hand, inquires whether the result is "always sufficiently affected by the operation of chance [such] that chance could always account for the result."⁴⁷ In essence, the test seeks to quantify the otherwise nebulous attributes of an activity by calling to mind a sliding scale featuring pure chance on one side and pure skill on the other.⁴⁸ Utilizing this conceptual scale, judges applying Massachusetts law have held that video poker and a game combining darts and bingo are unlawful forms of gambling, due to the predominate element of chance.⁴⁹ In contrast, "certain card games such as gin rummy, pool, darts, and season-long fantasy sports" are often considered games of skill.⁵⁰

2. *The Material Element Test*

A minority of states embrace the material element test, which employs a higher level of scrutiny to determine whether a gambling activity is sufficiently based on chance to mandate illegalization.⁵¹ The material element test is ill-equipped to adjudge games of both skill and chance, because it does not weigh the two; instead, the test assesses the degree to which chance is present, and then determines if that level of chance rises to the level of "material."⁵² As a result, the degree to which skill defines a game is nearly irrelevant for purposes

skill not games of chance under test); Ehrman, *supra* note 4, at 96 (reviewing dominant element test's parameters). The Massachusetts Gaming Commission calls the assessment of skill versus chance a "tortured distinction." See MASS. GAMING COMM'N, *supra* note 1, at 11 (tracking development of perspectives on skill versus chance). The Massachusetts Gaming Commission suggests that dislike for gambling started early in American history: "The underlying premise of this distinction is the notion that for some reason 'games' of 'chance' are bad, while 'games' of 'skill' are not . . ." *Id.* (attributing disapproval of winning games of chance to Puritan rejection of earning something for nothing); *cf.* *Champion v. Ames*, 188 U.S. 321, 357-58 (1903) (considering lottery distributions "evil[s] . . . of appalling character").

47. See Bridwell & Quinn, *supra* note 41, at 645-46 (tracing abrogation of English gaming jurisprudence to adoption of "American Rule," or dominant element test).

48. See Anthony N. Cabot et al., *Alex Rodriguez, a Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance*, 57 DRAKE L. REV. 383, 390 (2009) (noting dominant element test calls to mind continuum).

49. See *United States v. Marder*, 48 F.3d 564, 569 (1st Cir. 1995) (holding elements of chance predominate skill in video poker); *Commonwealth v. Theatre Advert. Co.*, 190 N.E. 518, 520 (Mass. 1934) (determining darts-bingo game, "Beano," features less skill than chance). In determining a video poker game to be one of chance, and therefore an illegal lottery, the *Marder* court looked at the time permitted to play a hand, the number of losers relative to winners, and the overall lack of skills in play. See 48 F.3d at 569 (rejecting argument video poker predominated by skill).

50. See Shapiro, *supra* note 20, at 298 (criticizing assessment of skill versus chance because of subjectivity which tends towards divergent conclusions). The cornerstone of skill-based games "include[s] learned or developed ability, identifiable strategy or tactics that result in positive outcomes, and technical expertise." *Id.* (suggesting interplay of several factors creates sufficiently skill-based game).

51. See Meehan, *supra* note 8, at 16-17 (describing heightened scrutiny imposed by material element test). At least nine states utilize the material element test: Alabama, Alaska, Hawaii, Missouri, New Jersey, New York, Oklahoma, Oregon, and Washington. Cabot et al., *supra* note 48, at 392 n.64.

52. See Meehan, *supra* note 8, at 17 (rejecting arbitrariness involved in determining point of materiality and ambiguity surrounding term's definition).

of determining its ultimate legality, while the materiality of chance alone suffices entirely.⁵³

3. *The Any Chance Test*

Applying an even higher standard of scrutiny, a few states view games requiring any chance at all as games of chance altogether.⁵⁴ The any chance test is so demanding that even multiple choice trivia games have failed to qualify as games of skill.⁵⁵ Even games of chess—though commonly regarded as requiring high levels of skill—begin with a 56% likelihood that the player with white pieces will win, thereby clouding the otherwise conventional wisdom that chess is a skill-based game.⁵⁶ As a result, the any chance test is apt to view even the most complex and demanding game as one of chance.⁵⁷

53. *See id.* (maintaining irrelevance of skill even when it predominates). For example, New York law defines a contest of chance as, “any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.” N.Y. PENAL LAW § 225.00 (McKinney 2016) (defining terms relevant to state gambling offenses).

54. *See Ehrman, supra* note 4, at 98-99 (asserting any chance test inherently makes all fantasy sports games of chance). For example, Tennessee utilizes the any chance test, as its pertinent statute reads: “Gambling is contrary to the public policy of this state and means risking anything of value for a profit whose return is to *any degree contingent on chance*, or any games of chance associated with casinos, including, but not limited to, slot machines, roulette wheels and the like.” TENN. CODE ANN. § 39-17-501(1) (2016) (emphasis added). For this reason, DFS operators originally avoided operating in Tennessee, though the state has since carved out an exception for fantasy sports. *See id.* § 39-17-501(1)(D) (excluding fantasy sports contests from gambling definition); *see also* Fantasy Sports Act, TENN. CODE ANN. §§ 47-18-1602 to -1612 (2016) (regulating DFS proactively through new legislation).

55. *See Cabot et al., supra* note 48, at 393 (suggesting almost every game contains some element of chance irrespective of whether random events present). Even a wholly unskilled, unintelligent person who participates in multiple-choice trivia with five available answers stands a 20% chance of picking right. *Id.* (observing presence of any unknown elements—in games where contestant must guess—means chance lingers). Few would dispute the skill of a professional golfer; however, the variability of wind and the unpredictable roll or bounce that a ball might take injects a degree of chance into the game that would likely be fatal under “any chance” review. *See Meehan, supra* note 8, at 18 n.77 (conveying disparity between any chance test and common conception).

56. Meehan, *supra* note 8, at 18 (noting whoever makes first move yields statistical advantage). *But see* Ed Miller & Daniel Singer, *For Daily Fantasy-Sports Operators, the Curse of Too Much Skill*, MCKINSEY & CO. (Sept. 2015), <http://www.mckinsey.com/industries/media-and-entertainment/our-insights/for-daily-fantasy-sports-operators-the-curse-of-too-much-skill> [<https://perma.cc/E8LW-SYZ5>] (arguing DFS constitute games of skill demonstrated by statistics on contest outcomes).

57. *See Edelman, Treatise, supra* note 17, at 31-32 (noting Arkansas, Iowa, and Tennessee state laws pose heightened risk of liability to DFS). Of the three, Tennessee and Arkansas have passed legislation mooted the any chance inquiry. *See supra* note 54 and accompanying text (referring to Tennessee’s Fantasy Sports Act); *see also* ARK. CODE ANN. §§ 23-116-101 to -104 (2011) (taxing and legalizing paid fantasy sports contests); Dustin Gouker, *Legislative Tracker: Daily Fantasy Sports*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/dfs-bill-tracker/> [<https://perma.cc/24MZ-JQRH>] (tracking DFS legislative changes following fantasy sports lobbying efforts across United States); Rodenberg, *supra* note 11 (aggregating legislative developments state by state to monitor DFS legality).

4. *The Gambling Instinct Test*

Relatively few courts espouse the gambling instinct test to determine the legality of an activity purported to involve gambling.⁵⁸ The courts that do use this test determine a game's legality by analyzing whether the activity "appeals" to an individual's gambling instinct.⁵⁹ In this way, the gambling instinct approach entirely circumvents the often blurry distinction between skill and chance.⁶⁰ Nevertheless, like tests that aim to quantify and distinguish the elements of skill and chance, the gambling instinct test invites subjectivity and injects a great deal of arbitrariness into a court's legal reasoning.⁶¹

E. Survey of the State Legislative Landscape

At present, there are three iterations of the status quo regarding DFS legality within a state.⁶² States that have addressed DFS have either passed legislation recognizing and regulating DFS as legal, attempted to pass legislation that would legalize DFS, or historically banned DFS altogether.⁶³ Analyzing these three iterations will draw into focus the key issues in the debate over legalizing DFS.⁶⁴

1. *States with Legislation in Place*

As of the date of this writing, there are twelve states that have enacted legislation regulating DFS as a legal in-state activity.⁶⁵ In a few cases, the legislation followed vehement opposition to DFS operation from state attorney

58. See Cabot et al., *supra* note 48, at 393-94 (providing brief overview of gambling instinct test).

59. See *id.* (discussing gambling instinct test).

60. See *id.* (underscoring gambling instinct test's concern with activity's appeal to gambler's instincts).

61. See *id.* (calling gambling instinct test "highly subjective" and amenable to major variance in court decisions).

62. See Rodenberg, *supra* note 11 (enumerating states and categories they fall under).

63. See *id.* (listing states which fall into each category); see also Gouker, *supra* note 57 (providing state-by-state coverage of legislation and hyperlinking relevant legislative materials and news coverage). In DraftKings's own words:

In some states, the legality of DFS contests has never been questioned. In states where politicians or other officials (and not the legislature) have made statements about the legality of DFS contests, DraftKings may ask a state's courts to clarify its right to operate. Some state legislatures have already passed laws confirming the legality of DFS contests. Still other legislatures are actively debating and considering laws and regulations.

Legality, DRAFTKINGS, <https://www.draftkings.com/legality> [<https://perma.cc/7DTK-R9YP>] (providing federal- and state-level perspectives on legality of DraftKings's DFS offering).

64. See *infra* Sections II.E.2-3 (reviewing key DFS concerns relating to DFS bill passage).

65. See Rodenberg, *supra* note 11 (documenting circumstances under which DFS bills passed in each state). The states that have passed legislation to-date are as follows: Arkansas, Colorado, Indiana, Kansas, Massachusetts, Mississippi, Missouri, New Hampshire, New York, Tennessee, Virginia, and Vermont. *Id.*

generals.⁶⁶ Most notably, New York Attorney General Eric Schneiderman sent cease-and-desist letters to DraftKings and FanDuel, which he eventually followed with litigation.⁶⁷ On the other hand, several states passed bills to regulate DFS after positive—albeit qualified—state attorney general advisory opinions.⁶⁸ For instance, Massachusetts Attorney General Maura Healey once said, “[j]ust because it’s gambling doesn’t make it illegal.”⁶⁹ While Healey’s regulations allow for DFS operation in Massachusetts, they explicitly address the most prominent concerns surrounding the legalization of DFS.⁷⁰ Healey’s regulations handily deal with the core issues that necessitate DFS regulation in the first place: they prevent gameplay by minors, protect consumer funds upon deposit, limit DFS players to one account per person, provide protection for “problem gamblers,” and take strides to ensure the fairness of DFS games for Massachusetts consumers.⁷¹ Moreover, Healey’s guidelines fairly represent

66. See *id.* (noting states where legislation mooted otherwise DFS-hostile state attorney general opinions). At the federal level, the House Energy and Commerce Committee ranking Democrat, Frank Pallone Jr., commented on the “obsolete” and outdated nature of federal sports gambling law. See Matt Bonesteel, *U.S. Congress to Take First Concrete Step Toward Legalizing Sports Gambling*, WASH. POST (Oct. 21, 2016), https://www.washingtonpost.com/news/early-lead/wp/2016/10/21/u-s-congress-to-take-first-concrete-step-toward-legalizing-sports-gambling/?utm_term=.fbc0e80784y5b [https://perma.cc/5V3P-ASM2] (reporting on Pallone’s announcement his congressional committee intends to introduce DFS legislation). Pallone said, “The laws need a wholesale review to see how they can actually work together and create a fairer playing field for all types of gambling At the same time, we must ensure the laws are actually creating an environment of integrity and accountability, and include strong consumer protections.” *Id.* (revealing intent to engage stakeholders to come up with new, comprehensive legislation).

67. See Letter from Eric Schneiderman, Attorney Gen., N.Y., to Jason Robins, Chief Exec. Officer, DraftKings (Nov. 10, 2015), https://ag.ny.gov/pdfs/Final_NYAG_DraftKings_Letter_11_10_2015.pdf [https://perma.cc/G6QU-7DMJ]; Letter from Eric Schneiderman, Attorney Gen., N.Y., to Nigel Eccles, Chief Exec. Officer, FanDuel (Nov. 10, 2015), https://ag.ny.gov/pdfs/Final_NYAG_FanDuel_Letter_11_10_2015_signed.pdf [https://perma.cc/C22L-6VQH]; Complaint at 1-4, *New York v. DraftKings, Inc.*, No. 453054/2015 (N.Y. Sup. Ct. Nov. 17, 2015).

68. See Rodenberg, *supra* note 11 (suggesting state attorney generals from Massachusetts, Rhode Island, and West Virginia issued positive opinions).

69. Curt Woodward & Dan Adams, *Baker Sees Fantasy Sports as Games of Skill, Legal in Mass.*, BOS. GLOBE (Nov. 12, 2015), <https://www.bostonglobe.com/business/2015/11/12/gov-baker-fantasy-sports-legal-game-skill-not-gambling/YvPO1eIGPxfvIdmXoMXTbl/story.html> [https://perma.cc/QB25-4TMR] (reporting on Attorney General Healey’s sentiments toward DFS under existing legal framework).

70. See 940 MASS. CODE REGS. §§ 34.00-34.12 (2016) (protecting Massachusetts consumers by mandating DFS operators’ compliance with enumerated provisions).

71. See *id.* § 34.04 (prohibiting DFS operators from enrolling minors into DFS contests irrespective of potential to win prizes); *id.* § 34.05 (expanding on DFS operators’ duties upon receipt of funds and requiring publication of procedures); *id.* § 34.06 (addressing deceitful practices employed by DFS players by imposing duties on DFS operators); *id.* § 34.10 (mandating players’ ability to self-exclude from contests, employee training, and \$1,000 maximum deposit per month); *id.* § 34.12 (establishing most robust regulations on DFS operators in Healey’s guidelines). To ensure the fairness of DFS contests, Healey’s regulations state, “No [Daily Fantasy Sports Operator] employee, DFSO principal, DFSO officer, DFSO director, or DFSO Contractor may play on any DFS Contest Platform of any DFSO. Nor may such person play through another person as a proxy.” *Id.* § 34.12(1) (addressing “insider trading” issue, but excluding ban from private contests where players’ DFS affiliation clear). The regulations further prohibit DFS employees and affiliates from disclosing proprietary information. *Id.* § 34.12(3). Furthermore, any “professional or amateur athlete, or a sports agent, team employee, referee or a league official associated with any competition which is the subject of

the concerns addressed by those states that have chosen to positively regulate DFS through new legislation.⁷²

2. Failed Legislative Efforts

Several states have tried and failed to pass legislation that intended to regulate DFS as a legal in-state activity.⁷³ As of the date of this writing, the states that have failed to pass legislation are Arizona, California, Hawaii, Maryland, and New Mexico.⁷⁴ For example, legislators in Hawaii introduced a pair of bills seeking to authorize and regulate DFS as a game of skill around the same time that two other bills in circulation sought to outlaw DFS and categorize it as a game of chance under the state's gambling law.⁷⁵

The reasons underlying resistance to DFS legalization are mixed, but one source of the problem is that state lottery commissions fear competing against major DFS operators like DraftKings and FanDuel.⁷⁶ Additionally, as the

DFS contests" is expressly prohibited from entering into DFS contests. *Id.* § 34.12(4). Interestingly, Healey's regulations require DFS operators to develop beginner-only contests (to protect beginners from falling prey to much more experienced DFS "sharks"); contests that strictly exclude "[h]ighly-experienced players"; and onboarding procedures for new players which educate players on contest play and identification of "[h]ighly-experienced players." *Id.* §§ 34.12(6)-(8).

72. See Fantasy Contests Act, COLO. REV. STAT. §§ 12-15.5-101 to -112 (2017) (addressing consumer protection issues and creating division of professions and occupations to oversee regulation); IND. CODE §§ 4-33-24-1 to -24 (2016) (demanding age restrictions, beginner contests, other consumer protections, and regulation by "paid fantasy sports division"); N.Y. RAC. PARI-MUT. WAG. & BREED. LAW §§ 1400-1412 (McKinney 2016) (declaring DFS game of skill and imposing safeguards and minimum standards); VA. CODE ANN. §§ 59.1-556 to -570 (West 2016) (providing prerequisites to DFS registration in Virginia centering on consumer protection). It is also important to note that DFS operators, in response to public outcry, now self-regulate to a great extent. See *DraftKings Community Guidelines*, DRAFTKINGS, <https://www.draftkings.com/lp/community-guidelines> (last visited Nov. 6, 2017) [<https://perma.cc/RDF4-EVTU>]; *FanDuel Bill of Rights*, FANDUEL, <https://www.fanduel.com/bill-of-rights> (last visited Nov. 6, 2017) [<https://perma.cc/STSU-R2M8>]; *Responsible Gaming*, DRAFTKINGS, <https://www.draftkings.com/help/responsible-gaming> (last visited Nov. 6, 2017) [<https://perma.cc/9MTG-J73W>]; *Responsible Play*, FANDUEL, <https://www.fanduel.com/responsibleplay> (last visited Nov. 6, 2017) [<https://perma.cc/SK3G-TYN4>]. For example, FanDuel explicitly addresses the following issues: fair gameplay; funds retention; transparency in rules, fees, and payouts; transparency in players' skill levels; designated contests for beginners only; restrictions on employee gameplay; and self-help and restriction settings for problem gamblers. *FanDuel Bill of Rights*, *supra*.

73. See Gouker, *supra* note 57 (presenting legislative status of DFS and sports betting state by state).

74. See *id.* (depicting United States map indicating which states fall into which category of DFS regulation). Specifically, the map shows which states legalized DFS in 2016 or earlier, failed to pass legislation in 2016, and maintain active bills yet to be finally voted on. *Id.* (categorizing bills by status and providing references to each bill).

75. See S.B. 2722, 28th Leg., Reg. Sess. (Haw. 2016) (providing "authorization and regulation of fantasy contests" with added consumer protection); H.B. 2111, 28th Leg. Reg. Sess., (Haw. 2016) (making fantasy competition illegal under existing gambling laws); S.B. 2429 SD1, 28th Leg., Reg. Sess. (Haw. 2016) (defining "fantasy competition" and bringing within purview of "contest of chance" definition); H.B. 1838, 28th Leg., Reg. Sess. (Haw. 2016) (attempting to authorize and regulate fantasy sports and implement consumer protections).

76. See MSLC DFS PRESENTATION, *supra* note 34 (calling DFS "biggest current challenge facing . . . Lottery"). The Massachusetts State Lottery Commission follows its remark about the DFS challenge by stating: "The immediate protection and responsible growth of the Lottery is a must . . ." *Id.* (focusing on "lottery today"). The Commission's presentation appears to conclude by recommending that the Massachusetts

Massachusetts Gaming Commission noted, the disapproval of gambling in the United States bespeaks a moral qualm lamenting the idea that one can earn a fortune for nothing; really, that there lingers this element of chance that makes gambling inherently bad.⁷⁷ The Commission further attributes the objection to DFS as “a residue of moral judgments initially asserted hundreds of years ago, and carried forward in many religious and ethical constructs.”⁷⁸

3. *Historically Banned States*

Arizona, Iowa, Louisiana, Montana, and Washington are among those states that have historically banned fantasy sports, and are thus less apt to introduce and pass legislation.⁷⁹ In particular, Montana is unlikely to roll out the welcome mat for DraftKings and FanDuel, as it is one of four states able to offer sports wagering under an exclusion in PASPA.⁸⁰ Arizona has faltered in its efforts to legalize DFS due to clashing tribal interests and existing state-tribal gaming compacts—key issues that several other states must confront as well.⁸¹ Particular to Louisiana, former Attorney General William J. Guste, Jr. concluded in a 1991 memorandum “that a 1-900 number fantasy football contest constituted illegal gambling,” though it did not address DFS specifically.⁸²

State Lottery pursue an entryway into the DFS offering itself—citing its ability to protect the consumer and preserve game integrity. *Id.* (addressing “Path Forward”).

77. MASS. GAMING COMM’N, *supra* note 1, at 11, 19 (commenting on moral disapproval of gambling generally).

78. *Id.* at 19 (dismissing existing definition of gambling in light of “changes in public values and public policy”).

79. See Rodenberg, *supra* note 11 (summarizing status of each state where DFS historically banned).

80. See 28 U.S.C. § 3704 (2012) (excluding Montana, Nevada, Oregon, and Delaware from statutory applicability); see also Anthony G. Galasso, Jr., Note, *Betting Against the House (and Senate): The Case for Legal, State-Sponsored Sports Wagering in a Post-PASPA World*, 99 KY. L.J. 163, 167 (2011) (calling exclusion “most controversial” for stymying majority of states from offering sports wagering); *supra* notes 32-35 and accompanying text (dealing with PASPA in depth).

81. See Dustin Gouker, *Tribal Gaming Interests Waking up on Fantasy Sports: Oklahoma Coalition Quashes Bill*, LEGAL SPORTS REP. (Mar. 21, 2016), <http://www.legalsportsreport.com/9116/tribes-and-fantasy-sports/> [<https://perma.cc/VSW6-KG56>] (expounding prevalence of tribal interests across United States); see also Rodenberg, *supra* note 11 (noting Arizona’s inability to pass fantasy sports legislation). California, Florida, and Wisconsin are also states featuring vocal tribal interests that serve as an additional impediment to legalizing DFS. See Gouker, *supra* (describing most prominent tribal activism in these states, though others exist).

82. Rodenberg, *supra* note 11 (noting Louisiana considered DFS bill in 2016); see Gouker, *supra* note 57 (noting legislative attempt to legalize DFS failed to pass in 2016). All or almost all DFS operators do not take customers in Alabama, Arizona, Delaware, Hawaii, Idaho, Iowa, Nevada, Montana, and Washington either because of adverse state attorney general opinions or a negative perception of existing law. See Chris Grove, *What Are the States Where You Can Play Daily Fantasy Sports?*, LEGAL SPORTS REP., <http://www.legalsportsreport.com/daily-fantasy-sports-blocked-allowed-states/> [<https://perma.cc/4G6D-TKJ8>] (showing color-coded map denoting DFS operation state by state). Showing a map of where it operates, FanDuel concedes:

III. ANALYSIS

While courts have utilized the traditional “skill versus chance” analysis under varying levels of scrutiny to determine the legality of certain activities, such analysis is markedly subjective, inaccurate, and cumbersome.⁸³ Analysis of DFS under the existing state-level frameworks invites an arbitrary assignment of weight to each factor tending to highlight either skill or chance.⁸⁴ Ultimately, the tests that states employ to determine a game’s legality demonstrate their very arbitrariness: The tests categorize the element of chance as “material” or “predominate”—a classification that assigns a conclusory label, instead of one that actually requires meaningful analysis.⁸⁵ The act of assigning a weight to the level of skill or chance inherent to a game itself seeks to quantify the unquantifiable, thus making the skill versus chance distinction

[A]t FanDuel, we believe that state regulations that increase transparency and ensure contests are fair will benefit the entire fantasy industry, most importantly players. That’s why we are in discussions with lawmakers anywhere there is legal ambiguity to ensure fans continue to have access to FanDuel contests and the fantasy games they love.

Governance: We’re All on the Same Team, FANDUEL, <https://www.fanduel.com/legal> [<https://perma.cc/EQL3-L3JY>] [hereinafter *FanDuel Governance*] (tackling unavailability of DFS contests in certain states). Likewise, DraftKings posits: “State law regarding DFS contests varies by state, and is currently dynamic, with some states expressly regulating DFS contests while others continue to evaluate the legality of DFS contests and potential regulation of the industry. In some states, the legality of DFS contests has never been questioned.” *Legality*, DRAFTKINGS, <https://www.draftkings.com/legal> (last visited Nov. 6, 2017) [<https://perma.cc/F6EF-MWAZ>] (reporting some states passed legislation while still others debate legality).

83. See Meehan, *supra* note 8, at 21 (positing determination of skill versus chance presents question for factfinder); Shapiro, *supra* note 20, at 300-01 (rejecting skill versus chance distinction for lack of clarity and objectivity). As questions of fact rather than law, a finding on skill or chance is “influenced by the quality of presented evidence, the experience and qualifications of counsel, and the biases of the trier of fact.” Meehan, *supra* note 8, at 21-22 (adding proof of skill derived from expert testimony, books, and other media assessing skill level).

84. See Shapiro, *supra* note 20, at 298 (criticizing subjective nature of tipping scales toward skill or chance when both linger in mix).

85. See 54 C.J.S. *Lotteries* § 5 (2016) (addressing influence of skill and judgment in determining activity tantamount to illegal lottery). Indeed, some writers’ discussion of skill versus chance reveals the flaws in this mode of analysis as a subjective, conclusory endeavor:

[G]enerally, where elements of both skill and of chance enter into a contest, the determination of its character as a lottery generally depends on which is the dominating element. In such instances, the mere presence of some element of chance does not necessarily constitute the contest a lottery. Chance, as distinguished from skill, must generally predominate over skill in the results of the game, or the element of chance must be present in such manner as to thwart the exercise of skill or judgment in a game in order for the scheme to be characterized as a lottery. . . . Competitions in which skill or judgment is the predominant factor in determining the winners are not lotteries. The mere fact that some skill is involved in the game is, however, insufficient to save it from being a lottery. It is generally for the courts to determine, on a case-by-case basis, whether skill or chance dominates in an activity and, therefore, whether the activity is prohibited as being in the nature of a lottery.

Id. (footnotes omitted).

all the more tortured and fruitless.⁸⁶ For instance, state law approaches say little, if anything, about how a court might go about weighing the skill attendant to choosing players for a DFS contest in light of historical performance, weather conditions, and matchup; as opposed to countervailing elements of chance such as injury probability and touches (how many times an offensive player actually receives the ball).⁸⁷ Furthermore, the arbitrary nature of the skill versus chance determination allows a court sitting in one state to find poker illegal by utilizing the same test another state employs to conclude that poker is a legal game of skill.⁸⁸ Courts are ill-equipped to conduct the same method of analysis that DFS operators utilize when they designate a price for a particular player in a given week, and accordingly, courts are ill-fitted to determine a contest's legality on imprecise methods that invite personal views and biases to reign free.⁸⁹ Innovative offerings like DFS demand concomitant change in the legal arena to continue supplying meaningful analysis for otherwise publicly popular games.⁹⁰

On the one hand, there are ample factors tending to show that skill is an essential component of DFS; however, courts do not adhere to a process of extrapolating each factor and meaningfully valuing its relevance to a game or contest as one of skill.⁹¹ Proponents of DFS cite an array of skills and

86. See MASS. GAMING COMM'N, *supra* note 1, at v (positing terms "gambling," "skill," and "chance" unclear by definition and invite moral and ethical biases); Shapiro, *supra* note 20, at 298 (noting skill versus chance analysis amenable to divergent conclusions because of subjectivity). Confronting Massachusetts's own obsolescent gaming statutes, the Massachusetts Gaming Commission specifically endorsed a more targeted analytical approach, saying: "If the proposed economic activity has these defining features, it will be considered gambling, and then the checkered history of gambling, the continuing public ambivalence about gambling activities, and long established public policy, suggest a number of key topic areas that may require regulatory consideration." MASS. GAMING COMM'N, *supra* note 1, at v-vi (isolating specific gaming features and problems warranting regulation in lieu of preexisting modes of analysis).

87. See Meehan, *supra* note 8, at 22 (identifying methodologies to assist in analyzing games comprised of both skill and chance). Theoretically, courts could adopt the approaches suggested by gambling law experts and review skill as an effect rather than a cause (by comparing losers' experience to that of winners' "to determine the skill levels of the game"); treat games in their context rather than in isolation (think of a tournament in poker rather than a single "hand"); and assess the statistical dominance of those who are skilled over those who are not. See Cabot et al., *supra* note 48, at 412 (emphasizing continued subjective, illogical analysis likely to "blur[] into obscurity" games of skill versus chance). If courts analyzing games under existing state law developed a more precise methodology to quantify skill and chance—such as one elevating the probative value of mathematical evidence—the approaches would appear far less arbitrary at first glance. See *id.* (providing concrete, alternative methodologies employed in other nations like Canada). Nevertheless, placing a premium on mathematical evidence would tend to cast DFS as games of skill, given that in the 2015 Major League Baseball season, 1.3% of DFS players raked in a whopping 91% of contest profits. See Miller & Singer, *supra* note 56 (indicating top eleven DFS players accounted for 17% of *all* entry fees).

88. See *supra* note 83 and accompanying text (discussing subjectivity inherent in determining proportionality of skill and chance).

89. See Cabot et al., *supra* note 48, at 402-04 (arguing mathematical evidence most compelling in quantifying levels of skill and chance).

90. See *id.* at 412 (advocating for meaningful legal tests drawing on mathematical evidence to avoid subjectivity and imprecision).

91. See *id.* (recognizing courts' imprecision in applying nebulous skill versus chance tests).

strategies employed by DFS contestants to produce winning outcomes, but how can one meaningfully quantify these elements and counterweigh them against factors showing marked elements of chance?⁹²

In choosing a lineup, DFS contestants exhibit skill in managing their allotted salary cap, utilizing the advertised scoring system, and attempting to forecast players' performances.⁹³ DFS contestants may also review a great deal of compiled data, including the favorability of player matchups, players' past statistical performances, and a team's historical coaching style and offensive strategy.⁹⁴ In addition, DFS contestants are apt to monitor the sports landscape for which they have submitted a DFS lineup in order to adjust to breaking news concerning injuries, weather, a player's likelihood to start, or even a team's potential game plan.⁹⁵ Demonstrating an even higher level of strategic thinking, DFS participants may also aim to produce extreme outcomes in their lineup (known as "boom or bust") to separate themselves from the pack of other contestants by exploiting inefficient player pricing and entering contests with more beginner-level participants.⁹⁶ Moreover, in setting their lineups, at some level, DFS participants consider "opportunity cost, consistency, game theory, and risk and reward analysis."⁹⁷ By their very nature, these actions and considerations on the part of DFS participants do not readily lend themselves to quantification—precisely the problem with existing state-level legal frameworks that attempt to reach definite conclusions on indefinite analyses.⁹⁸

The arguments for DFS as games of skill are forcefully met by arguments relegating DFS to games of chance.⁹⁹ These arguments, though, are equally irreducible to quantification in any meaningful way.¹⁰⁰ Proponents of DFS as games of chance argue that DFS participants have no control over their designated players' *actual* performances, which are left to chance—in the same way that an individual betting on horse races is locked into the fate of his or her

92. See *infra* notes 93-98 (expounding factors considered to show DFS distinctly skill-based).

93. See Bass, *supra* note 8, at 504-06 (reciting actions and considerations of skilled DFS players).

94. See Ehrman, *supra* note 4, at 102, 107 (enumerating skills and considerations employed by tactical DFS participants); Ottley, *supra* note 21, at 555 (addressing skills employed by DFS participants in world of imperfect information).

95. See Ehrman, *supra* note 4, at 97 (differentiating DFS from traditional game-picking pools with predetermined point spread).

96. See Miller & Singer, *supra* note 56 (discussing factors instrumental in shaping DFS evolution).

97. See Meehan, *supra* note 8, at 26 (conveying evidence in support of skill classification for daily fantasy baseball). In fact, there is a large market for literature providing fantasy sports strategies and tips, which tends to show DFS is a game of skill. See *id.* at 32-33 (arguing skilled DFS players win consistently). On average, fantasy sports players over eighteen years old spend "\$46 annually on fantasy sports materials." See *FSTA Industry Demographics*, *supra* note 3 (breaking down average DFS player expenditures by type of material purchased).

98. See Cabot et al., *supra* note 48, at 404 (advocating for math-based analysis because objective and more concrete).

99. See Trippiedi, *supra* note 16, at 219-21 (arguing chance dominant factor in outcome of DFS games).

100. See Cabot et al., *supra* note 48, at 404 (criticizing inaccuracy of weighing skill versus chance).

selection even after researching the horse and jockey.¹⁰¹ Most notably, the DFS participant leaves to chance the prospect of injury, changing weather conditions, and the other quirks of live sports gameplay, like the weird bounce of the ball, or a poor spiral pass.¹⁰² Unlike traditional fantasy leagues, the limited duration of DFS contests signals a greater proportionate impact of risk (or chance), as DFS contestants cannot change their lineup in the same way that a season-long player might be able to account for an injury to his team over an up-to-seventeen-week season.¹⁰³ Of course, those viewing DFS as skill-based games retort that the real skill in the endeavor lies in accounting for the impact of chance.¹⁰⁴ Yet, both proponents and opponents of legalizing DFS are as misguided as the analyses under which their arguments hinge; they are answering the wrong question: “Is DFS legal?” instead of, “Should DFS be legal?”¹⁰⁵

Rather than review DFS under obsolescent state laws ill-suited to reach games with arguably balanced elements of skill and chance, states should acknowledge DFS as the hybrid games that they are.¹⁰⁶ In doing so, state legislatures can engage key stakeholders to tailor regulations to the concerns that DFS present—as opposed to the outdated concerns and moral stigma embodied in arcane state gambling laws focusing on the interplay of skill and chance.¹⁰⁷ Tailored legislation allows states to winnow the legal gray area DFS operators otherwise confront, addresses the key issues DFS critics present, and lets DFS participants play with confidence and security.¹⁰⁸ Moreover, tailored

101. See Bass, *supra* note 8, at 517-18 (reviewing arguments of both DFS proponents and adversaries); see also Ottley, *supra* note 21, at 555, 564-65 (stressing impact of uncontrollable factors on outcome of DFS events).

102. See Ottley, *supra* note 21, at 564-65 (indicating uncontrollable, unpredictable factors capable of totally undermining skill used to select optimal lineup). “Although a fantasy sports participant might make all the right plays from a statistical standpoint, an unforeseen injury could render all of his or her skill completely useless, making chance an extremely large factor in [DFS].” *Id.* at 565 (noting despite similarities to traditional fantasy sports, DFS not exempt under UIGEA).

103. See Trippiedi, *supra* note 16, at 220-21 (concluding DFS resembles sports betting more closely than traditional fantasy leagues).

104. See Ehrman, *supra* note 4, at 107 (supporting application of UIGEA exemption to DFS on basis of “predominant skill required”).

105. See MASS. GAMING COMM’N, *supra* note 1, at i (aiding Massachusetts legislature in addressing DFS by framing key questions to be answered).

106. See *id.* at 41 (urging legislative action in face of unsettled law and piecemeal Massachusetts regulation).

107. See *id.* at 19 (suggesting Massachusetts legislature craft new, unambiguous definition of “gambling” given changing public values). Indeed, the states that passed legislation regulating DFS have smoothed the “rough around the edges” aspects of DFS by clearly addressing the concerns of key stakeholders—from gambling addiction problems, to minimum age requirements, to fair gameplay, and everything in between. See *supra* note 70-72 and accompanying text (detailing key concerns addressed by legislation passed and highlighting select exemplary statutes).

108. See MASS. GAMING COMM’N, *supra* note 1, at 22-24 (enumerating DFS issues of concern and proposing potential remedies for comprehensive regulatory schema). Specifically, the Massachusetts Gaming Commission designated the following as key topics for the regulations to address: “[k]now your [c]ustomer;”

legislation is dually appropriate considering state governments can generate additional revenue vis-à-vis taxation and licensure, while also creating new jobs and further developing the economy.¹⁰⁹

Aside from the particularized concerns of a few states able to offer sports betting under PASPA's exclusion and those dealing with tribal interests, there is little reason for the remaining bulk of states not to embrace DFS within regulatory constraints.¹¹⁰ Although it is true that the early practices of DFS operators proved questionable at best, they have since imposed a degree of self-regulation that mitigates concerns over DFS—even in the absence of new legislation.¹¹¹ In reality, DFS operators miscalculated their burst onto the scene; they should have done what they are doing now—lobby for new laws state by state—rather than take advantage of outdated and ambivalent state laws.¹¹² In concert with DFS operators' own self-regulation, the added protections of regulations codified by law suffice to make DFS a safe and attractive in-state activity irrespective of whether the game can be accurately labeled “gambling.”¹¹³ For this reason, states should succumb to the tide of successful legislative efforts and appease the large following of DFS adherents who support DFS legality in their state.¹¹⁴

In the end, the rampant popularity of DFS demands that state governments actually understand what DFS is and then legislate accordingly.¹¹⁵ It is time to shed the moral and ethical stigma codified in ages-old state gambling laws in order to greet modern innovations like DFS with agile and appropriate

player protection, technical security, suitability and licensure, and minimal impact on actual sporting events. *Id.* at 21 (discussing issues and potential remedies for legislatively enacted regulatory framework).

109. See MASS. GAMING COMM'N, *supra* note 1, at viii (endorsing legislative creation of “gaming regulatory body” and discussing benefits of positive DFS legislation). Recognizing DFS as a whopping source of potential revenue, the Massachusetts Lottery Commission actually endorses the state entering the “emerging [DFS] market.” See MSLC DFS PRESENTATION, *supra* note 34 (discussing possible crossroads between DFS and Lottery Commission).

110. See *supra* notes 79-82 and accompanying text (addressing reasons underlying select states' vehement opposition to DFS legalization); *supra* notes 70-72 and accompanying text (showing recent state DFS legislation mitigating key concerns over DFS gameplay).

111. See *supra* note 72 and accompanying text (developing FanDuel's player protections embodied in company's “Bill of Rights”); see also *DraftKings Community Guidelines*, *supra* note 72 (elaborating appropriate versus inappropriate DFS behaviors).

112. See Van Natta Jr., *supra* note 2 (criticizing DFS operators' hubris in bringing product to state markets while cognizant of legal uncertainty).

113. See *supra* notes 70-72 and accompanying text.

114. See *supra* notes 70-72 and accompanying text; see also *supra* note 3 and accompanying text (asserting popularity and growth of DFS across North America). As of this writing, there are ten states where FanDuel does not offer paid contests due to the legal uncertainty—or more precisely, hostility—in those states. See *FanDuel Governance*, *supra* note 82 (showing map of where FanDuel does and does not offer paid fantasy contests).

115. See MASS. GAMING COMM'N, *supra* note 1, at 28 (declaring “regulatory approach must begin with . . . understanding of . . . issues and risks at hand”).

regulatory responses.¹¹⁶ In a 2016 presidential primary debate, Governor Chris Christie echoed the sentiments of many Americans on the subject of DFS legality when he said, “Can we stop? . . . How about we get the government to do what they’re supposed to be doing, secure our borders, protect our people and support American values and American families. Enough on fantasy football. *Let people play, who cares?*”¹¹⁷ Yes, let people play, but in so doing, make sure DFS is safe and fair; address DFS once and for all with legislation tailored to the game that it is.¹¹⁸

IV. CONCLUSION

In conclusion, preexisting state laws that codify moral-ethical disdain for gambling are not the proper means to regulate DFS. Public values have changed, as evidenced by the sheer volume of DFS gameplay and popularity. By the same token, these statutes provide conclusory labels for an activity rather than real modes of analysis. Rather than meaningfully parse out the differences between legal and illegal games, existing state laws invite whimsical conclusions drawn from imprecise methodologies. The shortcomings of existing state law become even clearer when they are applied to DFS, where the flurry of skill- and chance-centric game attributes appear equally unquantifiable, but yet, impactful.

The equally nebulous—albeit prevalent—elements of skill and chance in DFS belie realistic review under existing state laws and therefore demand legislative action. Instead of applying misfit statutes to DFS, states should tailor regulations to the game that DFS is: a hybrid game of skill and chance. DFS should no longer be feared as an “evil,” but embraced as an innovative way for states to produce major revenue through the licensure and taxation of DFS operators. In addition to attaining new public funds, states can impose restraints beyond those instituted by DFS operators to reflect the values of their particular states—perhaps those same values read into existing state laws governing gambling. Moreover, legislators can allay concerns over gambling abuse and minimum age restrictions without altogether keeping DFS operators out of their states. This is a disservice to the millions of DFS proponents and adherents who can just as well enjoy DFS within constraints imposed by state legislators. DFS should be legal, but DFS should also be regulated. States should embrace the economic prosperity and popular support DFS operators yield by welcoming them to operate in their states within specified regulatory

116. See *supra* notes 77-78 and accompanying text (maintaining moral and ethical underpinnings of state gambling laws breed distaste for seemingly chance-based games).

117. See Waldron, *supra* note 10 (emphasis added) (arguing “millions of Americans” care about resolving unsettled legal territory encompassing DFS).

118. See *supra* notes 70-72 and accompanying text (highlighting key areas of concern easily addressable through DFS legislation).

constraints. Now is the time for states to rethink their gambling laws and welcome DFS within thoughtfully constructed, appropriate boundaries.

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