



3-23-2017

Daily Fantasy Sports Go “All In”: The Demise of American Morals?

James Schwabe
james.j.schwabe.3@nd.edu

Follow this and additional works at: <http://scholarship.law.nd.edu/ndjicl>

 Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [Sports Studies Commons](#)

Recommended Citation

Schwabe, James (2017) "Daily Fantasy Sports Go “All In”: The Demise of American Morals?," *Notre Dame Journal of International & Comparative Law*: Vol. 7 : Iss. 1 , Article 8.

Available at: <http://scholarship.law.nd.edu/ndjicl/vol7/iss1/8>

This Note is brought to you for free and open access by the Law School Journals at NDLScholarship. It has been accepted for inclusion in Notre Dame Journal of International & Comparative Law by an authorized editor of NDLScholarship. For more information, please contact lawdr@nd.edu.

**DAILY FANTASY SPORTS GO “ALL IN”: THE DEMISE OF
AMERICAN MORALS?**

JAMES SCHWABE *

INTRODUCTION	138
I. DAILY FANTASY SPORTS: DRAFTKING AND FANDUEL	143
A. <i>How Do I Play?</i>	143
B. <i>Daily Fantasy Sports Under Fire</i>	144
II. HISTORY OF INTERNET GAMBLING	146
A. <i>Nations Prohibiting Internet Gambling</i>	147
B. <i>Nations Allowing Internet Gambling</i>	150
III. COMPLAINTS AGAINST THE UNITED STATES IN THE WTO	151
IV. THE DEMISE OF AMERICA’S “PUBLIC MORALS”	154
A. <i>PASPA</i>	154
B. <i>States Respond to PASPA</i>	157
C. <i>Public Outcry and League Support</i>	158
D. <i>Skill vs. Luck: Skillful Games Should Be Legal</i>	159
CONCLUSION	162

“I was always amazed at people who stayed until the end of a game. Somebody finally told me why: the point spread.”

–Louisville Head Basketball Coach Rick Pitino¹

INTRODUCTION

Who do you think will win the football game tonight? The Chicago Bears or the Green Bay Packers? Let the debate begin! Nowadays, what started as a simple question regarding a fan’s loyalty can hold serious monetary implications. Most viewers are unable to sit down for a football pre-game show, watch

* Candidate for Juris Doctor, University of Notre Dame Law School, 2017; B.A., Butler University, 2010. I would like to thank Associate Dean Ed Edmonds and Professor Mary Ellen O’Connell for their guidance, support, and inspiration throughout the research and writing process of this Note.

¹ Ante Z. Udovicic, *Special Report: Sports and Gambling a Good Mix? I Wouldn’t Bet on It.*, 8 MARQ. SPORTS L.J. 401 (1998) (quoting Tim Layden, BETTER EDUCATION-GAMBLING IN COLLEGE—PART I, SPORTS III (1995).

SportsCenter or read a newspaper without seeing the odds, the point spread,² or the over-under,³ for that day's college or professional sporting events.⁴ The ramifications of a professional sports event have moved beyond the win-loss record. The games are now threatening the well-being of fans, specifically fans that gamble. Although there have been numerous attempts to stop the spread of gambling throughout the United States, the Wire Act,⁵ the Professional and Amateur Sports Act,⁶ and the Unlawful Internet Gambling Enforcement Act⁷ (UIGEA) have not suppressed the growing attraction to gamble. With the recent proposed legislation and litigation over the legality of daily fantasy sports services, a new debate has emerged with implications that may shift America's role in the global economy. If challenged, the United States may look like a hypocrite by continuing to claim it is protecting its citizens from the dangers of gambling for morality reasons. Have Americans lost their morals or has the urge to gamble just become too great?

This Note seeks to answer those questions and how the recent divide over gambling has hindered America's public morality defense in international settings. This Note analyzes the legality and impact of Daily Fantasy Sports as of February 2016. As various states and courts begin to take a closer look at these "gambling" activities in the United States, this Note will illustrate that it is not what happens in the next few months that will decide the fate of Daily Fantasy Sports in the United States. Instead, it is the decisions as to how Daily Fantasy Sports will function in the United States that will expose the United States and its decision makers to international pressures to answer questions that have been suppressed for many years. Will a public morality defense continue to hold?

Gambling is not a new phenomenon, nor is it a hidden enterprise that only involves a small subsection of the population. On the contrary, sports gambling is a thriving business model with an extremely high risk, but an equally high reward.

² See *Point Spread*, DICTIONARY.COM, <http://www.dictionary.com/browse/point—spread> (last visited Jan. 22, 2017) (The point spread is "a betting device, established by oddsmakers and used to attract bettors for uneven competitions, indicating the estimated number of points by which a stronger team can be expected to defeat a weaker team, the point spread being added to the weaker team's actual points in the game and this new figure then compared to the stronger team's points to determine winning bets." For example, if two teams are matched up against one another, the oddsmaker will indicate that one team is favored by a specific amount of points, fluctuating based on which teams has more bets placed in their favor).

³ See *Over-Under*, COLLINSDICTIONARY.COM, <https://www.collinsdictionary.com/dictionary/english/over-under> (last visited Jan. 22, 2017) ("A type of bet whereby the better guesses whether a given statistic, usually the combined score of sport match, will be higher or lower than a bookmaker's prediction").

⁴ See generally Udovicic, *supra* note 1; see also Erick S. Lee, *Play Ball!: Substitution Current Feeral Non-Regulation of Fantasy Sports Leagues With Limited Supervision Of Hyper-Competitive Leagues*, 29 LOY. L.A. ENT. L. REV. 53 (2008) (discussing how sports gambling has become a national hobby and has infiltrated all aspects of society).

⁵ See 18 U.S.C. § 1084 (1961) (the Wire Act was designed to help states enforce their respective laws on gambling and prevent the further spread of organized gambling activities).

⁶ See 28 U.S.C. §§ 3701–04 (2006) (designed to prohibit states from authorizing sports gambling regimes).

⁷ See 120 Stat. 1884 (2006) (to be codified at 31 U.S.C. §§ 5361–67).

Recent estimates show that Americans wager over \$500 billion per year on sports with \$2–3 billion gambled legally in the state of Nevada alone.⁸ In October 2012, following an eighteen-month investigation, the state of New York issued twenty-five indictments after authorities discovered an illegal betting ring.⁹ These bets were placed on professional and collegiate sports as well as horse racing. This scheme spread over five states and it is estimated that payments totaled \$50 million.¹⁰ However, it is not just the fans that are involved in the gambling. Gambling-related incidents in professional sports can be traced back to the Black Sox Scandal of 1919, where eight Chicago White Sox baseball players were banned from baseball for life for fixing the World Series.¹¹ Baseball also saw the legendary Pete Rose use his position as a manager of the Cincinnati Reds to bet on the baseball.¹² Football saw both the Detroit Lions' Alex Karras¹³ and the Green Bay Packers' Paul Hornung¹⁴ suspended for their involvements with sports gamblers.¹⁵ If gambling has been punished since the famous Black Sox case in 1919, why is DraftKings, a \$900 million service that allows gambling on fantasy sports, legal?¹⁶ How is this possible when sports gambling is illegal in states outside of Nevada, Delaware, Montana and Oregon?¹⁷ Several states have begun to ask the same question.

The uproar surrounding fantasy sports that erupted in late 2015 has rocked the very foundation of the ban on sports gambling and has reframed the argument not only on internet gambling, but also on the illegality of gambling across a wide

⁸ Chad Millman, *Authorities Expose \$50M Betting Ring*, ESPN.COM (Oct. 25, 2012), espn.go.com/espn/story/_id/8550476/new-york-issues-25-indictments-50-million-betting-ring (discussing the complex web of individuals involved in sports gambling activities).

⁹ *Id.*

¹⁰ *Id.*

¹¹ Amanda Rykoff, *Sports Scandals from Bountygate to Black Sox: 'Black Sox' Remain Black Mark on Baseball*, ESPNW (Mar. 5, 2012), espn.go.com/espnw/commentary/7647446/bounty_gateblack-sox-scandals-mars-every-sport; see generally Jeffrey Roeske, *Doubling Down on Sports Gambling; Why PAS-PA Would Fail a Constitutional Challenge*, 24 MARQ. SPORTS L.J. 463 (2014).

¹² See generally Roeske, *supra* note 11; see also William Weinbaum & T.J. Quinn, *Notebook Obtained By Outside The Lines Shows Pete Rose Bet On Baseball As Player In 1986*, ESPN.COM (June 22, 2015), http://www.espn.com/espn/otl/story/_id/13114874/notebook-obtained-lines-shows-pete-rose-bet-baseball-player-1986 (documenting the series of events that led to the discovery of Pete Rose's illegal gambling activity in professional baseball).

¹³ *Id.* Alexander "Alex" Karras was an American football player, professional wrestler, and actor. He played football with the Detroit Lions in the National Football League in 1958–62 and 1964–70. He was accused of betting up to \$50–\$100 on at least a half dozen NFL games. He was suspended for a full season before being reinstated. See also ESPN, *Shocking Moments in NFL history*, ESPN.COM, espn.com/page2/s/list/football/shocking/moments/html (last visited, Feb. 1, 2015).

¹⁴ Paul Vernon Hornung was a former professional football player and Hall of Fame running back for the Green Bay Packers from 1957 to 1966. He was accused of betting on NFL games and associating with gamblers. It was stated that he bet up to \$500 on NFL games and he later apologized for what he called a "terrible mistake." Hornung was later inducted into the Pro Football Hall of Fame. *Id.*

¹⁵ *Id.*

¹⁶ See Eugene Kim, *Draft Kings not illegal*, BUSINESSINSIDER.COM (Apr. 6, 2015), <http://www.businessinsider.com/draft-kings-not-illegal-2015-4>; see also Robert E. Goeller, *The Money, Man, The Money: Sports Gambling In Professional And Amateur Sports*, 12 WILLAMETTE SPORTS L.J. 1 (2015) (discussing that fantasy sports have bypassed the Professional and Amateur Sports Protection Act and created a new landscape that has reshaped the sports industry).

¹⁷ *Id.*

variety of systems. Daily Fantasy Sports (DFS) is one of the fastest growing industries in the United States. DraftKings, Inc. is expected to pay out roughly \$1 billion in prize money to its users in 2015, or roughly 230% more than the \$300 million it paid out in 2014.¹⁸ Websites such as DraftKings and FanDuel are DFS services where contestants pick a team of professional players and are awarded points based off the statistics the players on their "team" have accumulated during the length of the contest.¹⁹ The goal of fantasy sports is to have accumulated the highest point total in the allotted timeframe. Additionally, "the basic tenants [sic] of fantasy sports management—opportunity cost, consistency, game theory, and risk/reward still act as the governing principles in a successful team."²⁰ These principles and the system of DFS have been swept under the rug of illegal gambling, until now.

On October 15, 2015, the Nevada Gaming Control Board was the first to act in a series of states and cities that have taken measures to ban DFS sites.²¹ New York joined Nevada in an unprecedented decision by taking the stance that it would ban its citizens from using DFS sites.²² This radical decision forced DFS sites to act swiftly to restore order and keep their constituents engaged in their future services. FanDuel surprisingly prevented all New Yorkers from entering its games in hope to be back in the state in the following weeks.²³ DraftKings and FanDuel continue to say their services provide games of skill and are therefore protected by the UIGEA established in 2006. The games are legal in 45 states.²⁴ With these recent challenges, there is a great opportunity to alter the legal system in America. However, this clash also leaves America vulnerable to future litigation at the World Trade Organization (WTO), which may change the landscape of sports gambling in America.

Part I of this Note will discuss the intricacies of DFS and the allegations against FanDuel and DraftKings. Part I will also track the pending litigation in

¹⁸ Darren Heitner, *DraftKings Reports \$304 Million of Entry Fees in 2014*, FORBES.COM (Jan. 22, 2015), <http://www.forbes.com/sites/darrenheitner/2015/01/22/draftkings-reports-304-million-of-entry-fees-in-2014/>.

¹⁹ For examples of daily fantasy scoring systems, see generally FanDuel Promo Code and Review, ROTOGRINDERS, http://rotogrinders.com/reviews/FanDuel_Promocode-115/scoring-systems (last visited 1/12/2016); Draft Kings Promo Code and Review, ROTOGRINDERS, <http://rotogrinders.com/reviews/DraftKings-46814/scoring-systems> (last visited Jan 12, 2016); and DraftStreet Review and Promo Code, ROTOGRINDERS, <http://rotogrinders.com/reviews/DraftStreet-1151/scoring-systems> (last visited Jan. 12, 2016).

²⁰ Nathaniel J. Ehrman, *Out of Bounds?: A Legal Analysis of Pay-To-Play Daily Fantasy Sports*, 22 SPORTS L.J. 79 (2015) (quoting Jon Bales, *Similarities Between Season Long and Daily Fantasy*, ROTOGRINDERS, http://rotogrinders.com/lessons/Similarities_Between_Season_Long_and_Daily_Fantasy-174277).

²¹ Jackie Wattles, *Daily fantasy sports are banned in New York*, CNNMONEY.COM (Nov. 10, 2015), <http://money.cnn.com/2015/11/10/news/companies/fantasy-sports-ban-new-york/>.

²² Chris Isidore & Jackie Wattles, *FanDuel Stops Taking Bets in New York—For Now*, CNNMONEY.COM (Nov. 17, 2015), <http://money.cnn.com/2015/11/16/news/companies/draftkings-fantasy-sports-schneiderman/index.html?iid=hp-stack-dom>.

²³ *Id.*

²⁴ *Id.*

various states and the likelihood of success on those claims. Finally, Part I will analyze the counterarguments by DraftKings and FanDuel.

Part II will turn to a discussion regarding the current legal framework surrounding global internet gambling, including a discussion of the 2006 UIGEA²⁵ and a sampling of current regulatory system models that either permit or ban online gaming, as enacted by Australia, Canada, the United Kingdom, and the United States.

Part III will detail the World Trade Organization (WTO) requirement for compliance with the General Agreement on Trade in Services (GATS) and the complaints brought by Antigua against the United States.²⁶ In doing so, Part III focuses on the issues the WTO Appellate Body raised in its *U.S.—International Gambling* report and the questions that remain unanswered.²⁷ In that report, the appeals board highlighted its concern that the United States regulatory system may be in violation of Article XVI of the General Agreement on Trade in Services (GATS),²⁸ requiring members to treat other Members “no less favourabl[y]” under the terms set forth in the Agreement.²⁹ This part concludes by analyzing the “public morals” argument that helped America “win” on appeal.

Part IV will provide an update on how the public morals argument would be viewed today in light of the recent DFS arguments as well as the push for more states to legalize gambling. In doing so, Part IV will discuss the Professional and Amateur Sports Protection Act (PASPA) and the pending litigation in New Jersey urging the courts to allow for regulated gambling in the state to revitalize a struggling economy.³⁰ The primary issues in that case analyze (1) whether PASPA’s prohibition on state licensing of sports wagering commandeers the regulatory authority of the states and (2) whether PASPA’s discrimination in favor of Nevada violates the fundamental principle of equal sovereignty.³¹ Additionally, this section will discuss how several leaders of professional sports, including the National Basketball Association (NBA) Commissioner, have pledged their support for “regulated gambling.” To address the counterarguments, Part IV will then analyze the “skill vs. luck” defense of DFS.³² Lastly, given the changing landscape of sports gambling in America, Part IV will shed light on the two possible arguments in future litigation and will predict how future litigation at the WTO may alter the way citizens “participate” in gambling in America.

²⁵ Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361-5367 (2006).

²⁶ First Written Submission of Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285 (Oct. 1, 2003), http://www.antiguawto.com/wto/06_AB_1st_%20Submission_1Oct03.pdf.

²⁷ Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, P 1, WT/DS285/AB/R (Apr. 7, 2005) [hereinafter WTO Appellate Report].

²⁸ General Agreement on Trade in Services, 15 April 1994, 1869 U.N.T.S. 183, Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, Annex B, 33 I.L.M. 11 [hereinafter GATS].

²⁹ WTO Appellate Report, *supra* note 27, at 370–72.

³⁰ *NCAA v. Christie*, 926 F. Supp. 2d 551, 554 (D.N.J. 2013).

³¹ *Id.*

³² *United States v. DiCristina*, 726 F.3d 92 (2d Cir. N.Y. 2013).

I. DAILY FANTASY SPORTS: DRAFTKING AND FANDUEL

Fantasy sports “leagues” allow contestants to be more involved in a particular sporting event by giving them a particular set of players to cheer for, even if a fan’s favorite team or player is not participating in a game. In essence, fantasy sports’ competitors pick a team of professional players from a given sport and contestants are awarded points based on the statistics of those players during the length of a specific competition—for example National Football League (NFL) football weekend. As one can infer, DFS leagues are commonly one-day events and contestants pay and win or lose in the same day.³³ The differences between season-long fantasy sports leagues and DFS are not very stark. For the purposes of this Note, the discussion will focus on Daily Fantasy Sports.

A. *How Do I Play?*

The first step for participating in DFS is selecting a game type. There are two main types of games offered: Cash Games and Tournaments. A Cash Game is a contest that pays out at least one-third of its entrants while Tournaments vary depending on the format that a set group of players wish to compete within.³⁴ The most common form of Cash Games are 50-50³⁵ and Heads-Up³⁶ contests. Another major component of the daily fantasy leagues is how contestants select their players. Some sites use a Snake format, where contestants have a predetermined draft order while other leagues may use a Pick Em style.³⁷ Another popular daily fantasy format is picking players by using a salary cap, where each player is valued at a specific dollar amount and a contestant is asked to form a team with a set amount of money at the outset.³⁸ These leagues are very popular because players feel like real general managers.

The format of the league can often support how one views the “skill” needed to succeed as a daily fantasy team owner. The ability to manage a team and select certain players based on all known factors lays the foundation for the “skill argu-

³³ However, “daily” NFL leagues also may include Thursday and Monday Night Football games.

³⁴ See JONATHAN BALES, FANTASY BASEBALL FOR SMART PEOPLE: HOW TO PROFIT BIG DURING MLB SEASON 30 (2015); see also Nicole Davidson, Comment, *Internet Gambling: Should Fantasy Sports Leagues Be Prohibited*, 39 SAN DIEGO L. REV. 201 (2002) (discussing the various ways leagues are structured and how they have impacted the sanctity of the game).

³⁵ 50-50 Contests will distribute 90% of entry free to the top 50% of the scoring field and DraftKings will retain the remaining 10%. Blinders, *How Lower Rake Dramatically Increases the Percentage of Profitable Players*, ROTOGRINDERS, <https://rotogrinders.com/articles/daily-fantasy-sports-rake-increases-percentage-of-profitable-players-9661> (last visited Jan. 11, 2016).

³⁶ This structure is between two players instead of the larger fields in 50-50 contests. *Id.*

³⁷ Jason Spry, *Pick Em Tournaments*, DAILY FANTASY SPORTS 101, <http://www.dailyfantasysports101.com/pick-em-tournaments> (last visited Jan. 1, 2016).

³⁸ See generally *How To Play: The Basics*, DRAFTKINGS, <https://www.draftkings.com/help/how-to-play> (last visited Jan. 1, 2016) (For example, each team has a \$50,000 budget, and players are valued according to their projected fantasy worth).

ment” that will be discussed in Part IV.³⁹ Executives at FanDuel have supported the notion that their better players beat weaker players, making the company confident that DFS are games of skill and thus legal.⁴⁰ In 2015, that lack of fear drastically changed.

B. Daily Fantasy Sports Under Fire

The popularity behind daily fantasy sports has not come without a price: a price to the players and a price to the future of daily fantasy sports. There have been several states that have taken sweeping and unprecedented actions to not only regulate, but to ban DFS. On the other hand, numerous states, including New Jersey, have attempted to capitalize on the popularity in order to revamp their economies. The clash between economic prosperity and moral integrity has taken center stage.

There have been many states that have hoped to open up a dialogue regarding DFS. Senator Jim Whelan, a former Atlantic City mayor, said he would introduce a bill that would oversee daily fantasy sports in New Jersey.⁴¹ In November 2015, a Pennsylvania state House committee scheduled a hearing to “discuss fantasy sports and gambling.”⁴² This comes after fantasy-sport industry representatives told a New Jersey Assembly committee that they “hoped light regulation— not strict casino-style rules—would address any crisis of confidence in the business among politicians.”⁴³ But that outcome “seemed uncertain at best.”⁴⁴ In addition, Maryland Attorney General Brian Frosh’s office wanted lawmakers to begin to assess the legality of daily fantasy sports.⁴⁵

There have also been states that have tried to shut down DFS or prevent its use within the state border. A.G. Burnett, chairman of the Nevada Gaming Control Board, said all unlicensed daily fantasy activities must cease and desist.⁴⁶

³⁹ Contestants commonly analyze a player’s past performance, his or her team’s performance and opponent, injuries, bye weeks and game location. Although it can be argued that contestants sometimes are “lucky” that a certain player played well in a particular week, that does not preclude the fact that the “best players” or team owners of a daily fantasy league advance to the playoffs.

⁴⁰ See Ehrman, *supra* note 20; see generally Joshua Brustein, *Fantasy Sports and Gambling-Line is Blurred*, N.Y. TIMES (March 13, 2013), http://www.nytimes.com/2013/03/12/sports/web-sites-blur-line-between-fantasy-sports-and-gambling.html?_r=0 (distinguishing government crackdowns on gambling and the need for a rule on fantasy sports leagues).

⁴¹ *New Jersey Lawmaker Seeks to Regulate Daily Fantasy Sports*, CBSMoneyWatch (Nov. 2, 2015), <http://www.cbsnews.com/new-jersey-lawmaker-seeks-to-regulate-daily-fantasy-sports/>.

⁴² David Sell, *Fantasy Sports to N.J. legislature: Regulate Us Lightly*, THE PHILADELPHIA INQUIRER (Nov. 11, 2015), http://articles.philly.com/2015-11-11/business/68166477_1_real-game-statistics-fanduel-fantasy-games.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Trang Do, *Maryland AG’s Office Advises a Closer Look at Legality of Daily Fantasy Sports*, WMAR BALTIMORE (Jan. 18, 2016), <http://www.abc2news.com/news/region/anne-arundel-county/maryland-ags-office-advises-a-closer-look-at-legality-of-daily-fantasy-sports>.

⁴⁶ David Purdum, *Daily Fantasy Outlawed by Nevada Gaming Control Board for Being Unlicensed Gambling*, ESPN (Oct. 16, 2015), http://espn.go.com/chalk/story/_/id/13897401/daily-fantasy-outlawed-nevada-gaming-control-board-being-unlicensed-gambling.

"We are saying that daily fantasy sports are a gambling game under the statutory definition. . . . We're also saying that these are sports pools, which is when someone is in the business of accepting wagers on sporting events. . . . DFS companies are in the business of accepting those wagers."⁴⁷

On November 19, 2015, Massachusetts Attorney General Maura Healey revealed a number of proposed regulations to alter DFS.⁴⁸ Such proposals sought to require companies like FanDuel and DraftKings to create "'tiered' contests that would separate casual or amateur players from the professionals."⁴⁹ These regulations also include banned DFS for college sports, "setting an age minimum at 21" and banning professional athletes.⁵⁰

On the other hand, Texas and Illinois both deemed the services illegal in their states. Illinois Attorney General Lisa Madigan stated illegal gambling occurs when someone "plays a game of chance or skill for money."⁵¹ The questions the court will answer in Illinois include: (1) whether these DFS services fit within the statutory exemption for bona fide contests for the determination of skill under Section 28(a)(1) of the Illinois Criminal Code; (2) whether the entry fees constitute a bet under Illinois law; and (3) whether the Illinois Attorney General "selectively enforced the law."⁵² Madigan is seeking relief that will force DraftKings to list Illinois as one of the states that prohibits their service. Texas Attorney General Ken Paxton followed a similar approach by stating, "Simply put, it is prohibited gambling in Texas if you bet on the performance of a participant in a sporting event and the house takes a cut."⁵³ Under Section 47.02 of the Penal Code,⁵⁴ Texas ruled all activity gambling as long as *chance* is part of the equation that determines results.⁵⁵

Finally, what is arguably the biggest challenge to the future of DFS involved the New York Attorney General, Eric Schneiderman, issuing a cease and desist order to DraftKings and FanDuel.⁵⁶ Schneiderman stated in his letter, "[P]articipants in traditional fantasy sports conduct a competitive draft, compete over the course of a long season, and repeatedly adjust their teams. . . . [T]he In-

⁴⁷ *Id.*

⁴⁸ Matt Stout, *AG Maura Healey Unveils Fantasy Sports Regulations*, BOSTON HERALD (Nov. 19, 2015), http://www.bostonherald.com/news/local_politics/2015/11/ag_maura_healey_unveils_fantasy_sports_regulations.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Daniel Wallach, *Everything You Need to Know About the Illinois Daily Fantasy Sports Legal Battle*, Legal Sports Report (Jan. 4, 2016), <http://www.legalsportsreport.com/7106/illinois-dfs-primer/>.

⁵² *Id.*

⁵³ Darren Heitner, *Texas Attorney General Says Daily Fantasy Sports Is Prohibited Gambling*, FORBES (Jan. 19, 2016), <http://www.forbes.com/sites/darrenheitner/2016/01/19/texas-attorney-general-says-daily-fantasy-sports-is-prohibited-gambling/#46724f4c107a>.

⁵⁴ TEX. PEN. CODE ANN. TIT. 10 § 47.02 (contains a defense to prosecution when "(1) the actor engaged in gambling in a private place; (2) no person received any economic benefit other than personal winnings; and (3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants").

⁵⁵ Heitner, *supra* note 53 [emphasis added].

⁵⁶ Wattles, *supra* note 21.

ternet sites that host traditional fantasy sports receive most of their revenue from administrative fees and advertising, rather than profiting principally from gambling.”⁵⁷ Although DraftKings and FanDuel received a permanent stay of the injunction pending the larger trial of the case, the futures of these services remain uncertain in New York.

DFS services and the executives at DraftKings have fought fiercely to support the legality of their services. Draft Kings explains on their website:

The legality of daily fantasy sports is the same as that of season long fantasy sports. In 2006, the US Federal Government passed a law called the Unlawful Internet Gaming Enforcement Act (or UIGEA), which was designed to prevent gambling over the Internet. The law included a carve out that clarified the legality of all fantasy sports. . . . Daily fantasy sports is a skill game and is not considered gambling.⁵⁸

Currently, DFS services are not offered in Arizona, Iowa, Louisiana, Montana and Washington.⁵⁹ Several additional states prohibit some form of DFS.⁶⁰ After FanDuel and DraftKings were denied a Temporary Restraining Order in the middle of the 2015–16 NFL football season by the New York courts, FanDuel responded in an unprecedented move by preventing all New Yorkers from entering its games in hope to be back in the state in the following weeks.⁶¹ FanDuel “estimates that 10% of its players are from New York.”⁶² The United States of America is anxiously awaiting how other states will respond to these unprecedented actions and what the future of these daily fantasy sports services will be.

II. HISTORY OF INTERNET GAMBLING⁶³

The rise in popularity of online gambling began on August 18, 1995 when Internet Casinos, Inc. created a virtual casino on the internet.⁶⁴ The movement into online gambling was prompted when the Caribbean island of Antigua passed the

⁵⁷ *Id.*

⁵⁸ Kim, *supra* note 16.

⁵⁹ Purdum, *supra* note 46.

⁶⁰ *Id.*

⁶¹ Isidore & Wattles, *supra* note 22.

⁶² *Id.*

⁶³ For a helpful analysis and more complete discussion on the history of internet gambling, see generally Lorraine Harrington, Note, *Loaded Dice: Do National Internet Gaming Statutes Violate World Trade Organization Fair Trade Access Standards?*, 24 ARIZ. J. INT'L & COM. L. 769 (2007).

⁶⁴ See Bunnam Srephichet, Note, *Pirates of the Caribbean: Offshore Internet Gambling Sites Cursed by the Unlawful Internet Gambling Enforcement Act*, 30 HASTINGS COMM. & ENT. L.J. 139 (2007); see generally Jenna F. Karadbil, *Casinos of the Next Millennium: A Look into the Proposed Ban on Internet Gambling*, 17 ARIZ. J. INT'L & COMP. L. 413, 415 (2000).

Free Trade and Processing Zone Act.⁶⁵ The Act “created a tax-free zone where industries, including gambling profits, would be tax-free.”⁶⁶ These tax benefits lured gambling operators to set up shop in Antigua and other unregulated offshore countries.⁶⁷ By locating offshore, internet gambling companies avoided liability and jurisdiction under United States federal or state law.⁶⁸ At the time “gambling represent[ed] the largest money making business for organized crime” and allowed for the expansion of “bookmaking.”⁶⁹ This “big business” has been regulated very differently by nations across the globe.

A. Nations Prohibiting Internet Gambling

In response to the rising popularity in gambling, the United States and Australia have taken unique positions on how far they are willing to regulate or ban internet gambling.

i. United States of America

The UIGEA adopted in 2006, was established to prohibit online gambling sites from receiving funds from bettors, and to create a framework for financial institutions to prevent the flow of funds to operators of online gambling sites.⁷⁰ The prohibition is applicable only to gambling activity that is illegal under a federal or state statute in the location the bet was made or received.⁷¹

Furthermore, Section 5663 prohibits operators who are: (1) engaged in the business of betting or wagering from (2) knowingly accepting (3) proceedings from credits cards, electronic fund transfers, or checks (4) in connection with the participation of a bettor (5) in unlawful internet gambling.⁷² However, this Act also contains very explicit exceptions for fantasy sports leagues as well as horse-racing gambling activities.⁷³

The Act also has two major provisions that have drawn debate over its application. First, the UIGEA prohibits “financial transaction providers” from trans-

⁶⁵ Joseph M. Kelly, *Internet Gambling Law*, 26 WM. MITCHELL L. REV. 117, 128 (2000).

⁶⁶ *Id.*

⁶⁷ David H. Lantzer, *Internet Gaming Tax Regulation: Can Old Laws Learn New Tricks?*, 5 CHAP. L. REV. 281, 282 (2002). See also C. Jeremy Pope, *Losing the Battle but Winning the War: The Federal Government’s Attempts to Regulate Internet Gaming Through Utilization of the Wire Act and Other Means*, 74 MISS. L.J. 903, 911 (2005) (In 2004, “[t]here are an estimated 1,800 internet gambling operations in existence, and virtually all are based outside of the United States”); Pearson Liddell, Jr. et al., *Internet Gambling: On a Roll?*, 28 SETON HALL LEGIS. J. 315, 317 (2004) (In 2004, there were “an estimated 1,200 to 2,000 online gambling sites based in foreign jurisdictions”).

⁶⁸ Lantzer, *supra* note 67, at 283.

⁶⁹ Thomas James Friedrich, *Internet Casino Gambling: The Nightmare of Lawmaking, Jurisdiction, Enforcement & the Dangers of Prohibition*, 11 COMMLAW CONSPECTUS 369, 383–84 (2003).

⁷⁰ Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”), Pub. L. No. 109-347, 120 Stat. 1884 (to be codified at 31 U.S.C. §§ 5361–67).

⁷¹ *Id.* § 5362(10)(A).

⁷² *Id.* § 5363.

⁷³ *Id.*

ferring funds associated with illegal bets.⁷⁴ The next major provision relates to “simultaneous transactions.” The ensuing controversy dealt with the language of the Act and whether or not it only banned all foreign gambling, or just in the states that banned online gambling.⁷⁵ The controversy over this language and the exceptions that are carved out continue to be scrutinized throughout the new DFS debate.

a. *State vs. Federal Law*

The biggest difference in how the United States deals with online gambling is through the application of federal and state statutes. Gambling has commonly been a regulation governed by the powers reserved to the states under the Tenth Amendment of the United States Constitution.⁷⁶ Congress enacted a series of federal statutes in 1961 to fight organized crime, but it was not until 1970 that Congress passed the Racketeer Influenced and Corrupt Organizations Act (RICO) to regulate interstate commerce specifically related to online gambling.⁷⁷ The RICO Act was able to criminalize internet activity, as the internet was considered interstate commerce.⁷⁸ There has been a laundry list of federal statutes that have continued to attempt the regulation of internet gambling.⁷⁹ However, in 1978, Congress specifically used the Interstate Horse Racing Act to indicate that “the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders.”⁸⁰ Most states have moved forward with enacting a statute to regulate gambling and have even proposed leg-

⁷⁴ *Id.* § 5362(4). The UIGEA defines “financial transaction provider” as: “creditor, credit card issuer, financial institution, operator of a terminal at which an electronic fund transfer may be initiated, money transmitting business, or international, national, regional, or local payment network utilized to effect a credit transaction, electronic fund transfer, stored value product transaction, or money transmitting service, or a participant in such network, or other participant in a designated payment system.” *Id.*

⁷⁵ See Nolan Dalla, *Unlawful Internet Gambling Enforcement Act: An Insider's First Views*, GAMBLING LAW U.S., (Oct. 1, 2006), <http://www.gambling-law-us.com/Articles-Notes/dalla.htm>; see also Chuck Humphrey, *Internet Gambling Funding Ban*, GAMBLING LAW U.S., (Oct. 13, 2006) <http://www.gambling-law-us.com/Federal-Laws/internet-gambling-ban.htm>.

⁷⁶ See U.S. CONST. amend. X; see also Beau Thompson, *Internet Gambling*, 2 N.C. J.L. & TECH. 81, 90 (2001).

⁷⁷ To bypass state statutes and to evade local police, gamblers and organized criminal activity would feature a “bookie” or man that would place bets over the phone across state borders. The RICO act helps criminalize all of this activity and starts to crack down on large criminal enterprises. See Roeske, *supra* note 11.

⁷⁸ See Ari Lanin, Note, *Who Controls the Internet? States' Rights and the Reawakening of the Dormant Commerce Clause*, 73 S. CAL. L. REV. 1423, 1424 (2000).

⁷⁹ See Harrington, *supra* note 63; see generally Internet Gambling Prohibition Act, H.R. 4777, 109th Cong. (2006); Internet Gambling Prohibition and Enforcement Act, H.R. 4411, 109th Cong. (2006); Unlawful Internet Gambling Funding Prohibition Act, H.R. 2143, 108th Cong. (2003); Comprehensive Internet Gambling Prohibition Act, S.3006, 107th Cong. (2002); Combating Illegal Gambling Reform and Modernization Act, H.R. 3215, 107th Cong. (2002); Financial Anti-Terrorism Act of 2001, H.R. 3004, 107th Cong. (later incorporated in the Patriot Act); Internet Gambling Payments Prohibition Act, H.R. 2579, 107th Cong. (2001); Unlawful Internet Gambling Funding Prohibition Act, H.R. 556, 107th Cong. (2001).

⁸⁰ See Roeske, *supra* note 11 (referring to Interstate Horse Racing Act of 1978, Pub. L. No. 95-515, § 2(a)(1), 92 Stat. 1811 (current version at 15 U.S.C. §§ 3001-07) (2000)).

islation to deregulate gambling.⁸¹ For example, Illinois prohibits certain online activities while establishing an escalating criminal penalties system for anyone who "[k]nowingly establishes, maintains, or operates an Internet site that permits a person to play a game of chance or skill for money . . . by means of the Internet."⁸² On the other hand, Louisiana's online gambling statute creates secondary liability by expanding the reach of the statute to designers and creators of computer software.⁸³ These different standards are set out further in Part IV.

From a federal perspective, the interest in sports gambling prompted the legislature to implement the Wire Communications Act (WCA), which banned the use of phones to send, receive, or provide gambling information as well as illegalized all sports wagers made over wire communication.⁸⁴ In addition, the federal government extended its reach via the Transportation in Aid of Racketeering Enterprises Act and the Interstate Transportation of Wagering Paraphernalia Act.⁸⁵ These laws allowed Congress to enact the most crucial piece of legislation regarding sports gambling, PASPA, in 1992.⁸⁶ PASPA will be discussed further in Part IV.

2. Australia

Australia was one of the first countries to create legislation that regulated internet gambling through its territorial regulation of companies with existing Australian gambling licenses.⁸⁷ Most notably, Australia created the Interactive Gambling Act of 2001.⁸⁸ In response to the complaints of unbalanced regulation between the territories, Australia required new online gambling operators to meet the same standards as "brick-and-mortar" casinos.⁸⁹

In an unprecedented decision, the Australian government passed the Interactive Gambling Act (IGA) of 2001, which did not create any civil or criminal sanctions for Australian citizens participating in internet gambling.⁹⁰ Rather, the IGA focused on service providers, and barred state-licensed operators from providing online gambling services to Australian citizens or to citizens of foreign nations that (1) have legislation mirroring Section 15 of the IGA, or (2) have received designated country status from the Australian government.⁹¹ The safe harbors secured in the Act protect those services that are provided in a public location,

⁸¹ CHARLES DOYLE, INTERNET GAMBLING: OVERVIEW OF FEDERAL CRIMINAL LAW 25–26 (2006).

⁸² 720 ILL. COMP. STAT. 5/28-1(a)(12) (2007).

⁸³ LA. STAT. ANN. § 14:90.3 (2010).

⁸⁴ 18 U.S.C. § 1084(a) (2012).

⁸⁵ 18 U.S.C. § 1952(a)–(b) (2012) (extended the WCA to any form of travel or mail); 18 U.S.C. § 1953(a) (2012) (illegalized wagering pool paraphernalia).

⁸⁶ Professional and Amateur Sports Protection Act, 28 U.S.C. §§3701–04 (2012).

⁸⁷ See DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMBLING PROHIBITION AND THE INTERNET 197 (William R. Eadington ed., 2005).

⁸⁸ *Interactive Gambling Act 2001* (Cth) (Austl.).

⁸⁹ *Id.*; see also Harrington, *supra* note 63, at 774 (citing SCHWARTZ, *supra* note 87).

⁹⁰ See generally *Interactive Gambling Act 2001* (Cth) (Austl.); Harrington, *supra* note 63, at 1 n.7.

⁹¹ See Harrington, *supra* note 63, at 775.

such as a gambling hall or casino.⁹² The same is true for those operators if, after performing due diligence,⁹³ they could not determine that the service was designed for a person currently in Australia.⁹⁴

Finally, the IGA comments on the debate between games of chance and games of skill. “Interactive versions of games of chance—such as cards, slots, or table games—are banned.”⁹⁵ However, horse racing and scratch lotteries have been designated as excluded “wager services.”⁹⁶ The approach to cautiously regulate was quite different than the approach the United States took.

B. Nations Allowing Internet Gambling

On the other hand, Canada and the United Kingdom were not nearly as concerned about the popularity of internet gambling and took different measures to handle the growing phenomenon.

1. Canada

Gambling activity within Canada has been allowed much more latitude as evidenced by the allowances within its federal and provincial governments.⁹⁷ In 1985, the Canadian Criminal Code was amended to address the rising need to regulate online gambling or otherwise deem it illegal.⁹⁸ The Code distinguishes an operator⁹⁹ and a player¹⁰⁰ when assigning criminal liability. By assigning criminal liability to operators and players, it appeared that all online gambling would be deemed illegal. However, the exception has allowed provincial governments to have sole control over criminal liability associated with the gambling activity “operated on or through a computer, device or slot machine.”¹⁰¹ Although the Supreme Court of Canada had banned some internet gambling services,¹⁰² internet gambling is not dead thanks to the efforts of the Saskatchewan

⁹² *Id.*

⁹³ Such as requesting personal data or performing Internet Service Provider (ISP) lookups. *Id.*, at 769 n.10 (citing *Introduction to INTERNET GAMBLING REPORT IX 1* (Mark Balestra & Anthony Cabot, eds., 9th ed. 2006)).

⁹⁴ *Id.*

⁹⁵ See Harrington, *supra* note 63, at 775 (citing *Interactive Gambling Act 2001* (Cth) (Austl.)).

⁹⁶ *Interactive Gambling Act 2001* (Cth) (Austl.).

⁹⁷ See generally *INTERNET GAMBLING REPORT IX 1* (Mark Balestra & Anthony Cabot, eds., 9th ed. 2006).

⁹⁸ Criminal Code, R.S.C. ch. C-46, sec. 202; see also Roeske, *supra* note 11.

⁹⁹ An operator is one who “sells, barter, exchanges or otherwise disposes of . . . any lot, card, ticket or other means or device for advancing, lending, giving, selling or otherwise disposing of any property by lots, tickets or any mode of chance whatever” faces a two-year prison sentence. Criminal Code, R.S.C. 1985 c. C-46 § 206(1)(b).

¹⁰⁰ A player is one who “buys, takes or receives a lot, ticket or other device mentioned in subsection (1) is guilty of an offence punishable on summary conviction.” *Id.* § 206(4).

¹⁰¹ *Id.* § 207(4)(c).

¹⁰² Reference re Earth Future Lottery, [2003] 1 S.C.R. 123, 2003 SCC 10 (Can.).

Indian Gaming Authority as they remain in negotiations with provincial governments to keep its internet casinos open.¹⁰³

2. United Kingdom

The United Kingdom (U.K.) responded in its own particular way to the wave of internet gambling by enacting the Gambling Act of 2005.¹⁰⁴ The Act established a Gaming Commission that would deliver two types of gambling licenses (1) a general Gambling License for "brick-and-mortar" gambling operators,¹⁰⁵ and (2) a Remote Gambling License overseeing "any other kind of electronic or other technology for facilitating communication."¹⁰⁶ However, the Act does not seek to regulate or control foreign internet gambling providers unless a piece of gambling equipment is present within the jurisdiction of the nation.¹⁰⁷ On the other hand, if a person in the U.K. uses remote gambling equipment for the purpose of "inviting or enabling a person in a prohibited territory to participate in remote gambling," then that person would be held criminally liable.¹⁰⁸ In the same respect, the Act banned all advertisements for remote gambling in non-European Economic Area countries.¹⁰⁹ The Act also permitted the Secretary of State to designate which countries are prohibited territories.¹¹⁰ Although there are regulations in place to prevent abuse of this current system, online lottery sales remain legal to U.K. residents as well as the operating of gambling activities with the proper licenses.¹¹¹ The United Kingdom's system of legalized gambling has wavered through the transition to the new system of licensing, however, with the continued popularity of gambling, it is likely the U.K will continue to adjust to the new demand and enjoy heavy profits as a result of gambling activities in the State.

III. COMPLAINTS AGAINST THE UNITED STATES IN THE WTO

In March of 2013, the United States saw its first international clash between its promotion of public morals through government regulation and the economic interest in capitalizing on the popularity of sports gambling. After a continuous debate between Antigua and the United States over the cross-border supply of

¹⁰³ See I. Nelson Rose, *Gambling and the Law: The Future of Internet Gambling*, 7 VILL. SPORTS & ENT. L.J. 1, 27 (2000).

¹⁰⁴ Gambling Act, 2005, c. 19 (U.K.)

¹⁰⁵ *Id.* § 65.

¹⁰⁶ *Id.* § 67.

¹⁰⁷ Balestra & Cabot, *supra* note 97.

¹⁰⁸ Gambling Act, 2005, c.19, § 44(1) (U.K.).

¹⁰⁹ *Id.* § 333.

¹¹⁰ *Id.* § 333.

¹¹¹ *Id.* § 33.

gambling activity under the General Agreement on Trade in Services (GATS),¹¹² Antigua looked to the WTO Dispute Settlement Body for a solution.¹¹³ Antigua claimed that the United States violated its commitment to GATS by allowing operators of domestic origin to offer regulated services throughout its territory while prohibiting all cross-border supply of gambling and betting services.¹¹⁴

Antigua's claim was not only based on an issue with the ban the United States imposed on foreign-based gambling services, but also the United States' refusal to allow regulated growth in that particular industry. For example, Antiguan operators were required to obtain a license from the Gaming Directorate, perform identity checks on new players, prohibit cash payments, and accept loans only from verified accounts in regulated financial institutions.¹¹⁵ America's most shocking response to Antigua's claims was not its denial of its obligations to GATS, but rather its defense that its actions were necessary to protect and advocate American public morals.¹¹⁶ The issue with the public morals claim was the feud over what such morals could mean. How could the United States be protecting public morals when it had not placed an all-out ban on gambling services when adopting the Schedule of Specific Commitments?¹¹⁷ The difference in the case against Antigua was that Antigua had a major focus on gambling on sports, while the United States had allowed for recreational gambling services, with the exception being sports gambling.¹¹⁸ The United States was in the midst of a dangerous period of high crime and attempted to rally behind a public morals campaign against compulsive gambling, organized crime, and fraud. This was a key argument that the United States was unable to successfully litigate in its *first* attempt against Antigua. However, moral principles became the focus of future disputes.

In 2004, the Panel held that gambling activities generally were not a subset of sporting activities,¹¹⁹ and attacked several state laws that were in contradiction with what the United States claimed it banned under GATS.¹²⁰ The Panel found

¹¹² GATS, *supra* note 28. GATS is an international trade agreement that came into effect in 1995 and operates under the umbrella of the World Trade Organization. GATS aims to remove all barriers to trade in services and to open up these services to international competition. GATSWATCH, <http://gatswatch.org> (last visited Jan. 22, 2017).

¹¹³ Request for the Establishment of a Panel by Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/2 (Jun. 13, 2003).

¹¹⁴ First Written Submission of Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285 (Oct. 1, 2003), http://www.antiguawto.com/wto/06_AB_1st_%20Submission_1Oct03.pdf.

¹¹⁵ Request for the Establishment of a Panel by Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/2 (Jun. 13, 2003).

¹¹⁶ See generally Balestra & Cabot, *supra* note 97.

¹¹⁷ Harrington, *supra* note 63 (citing Nelson Rose, *U.S. Ignores Deadline in WTO Fight with Antigua*, (Sept. 2006), <http://rose.casinocitytimes.com/article/u-s-ignores-deadline-in-w-t-o-fight-with-antigua-29077> (“[T]he U.S. agreed to let in every recreational service, ‘except sporting.’”).

¹¹⁸ *Id.*

¹¹⁹ Request for the Establishment of a Panel by Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/2 (Jun. 13, 2003).

¹²⁰ U.S. Schedule of Specific Commitments, WTO Doc. GATS/SC/90 (1994).

the Wire Act was inconsistent with GATS¹²¹ and the Travel Act as well as the Illegal Gambling Business Act read in conjunction with state laws.¹²² In its concluding remarks, the Panel recommended that the United States correct all inconsistent laws discriminating against foreign services providers, including Antiguan services, and amend the Interstate Horseracing Act¹²³ that contained "disguised restrictions on trade."¹²⁴

After the disappointing ruling that dismissed the American public morals claim, the United States appealed the decision and the case was ultimately brought before the WTO Appellate Body in 2005.¹²⁵ The Appellate Body made multiple rulings, including: (1) the United States' prohibition on remote gambling services was inconsistent with its market access obligations under GATS, (2) its actions limit the number of gambling service suppliers, and (3) that internet gambling is supplied from Antigua into U.S. territory as opposed to a service provided by Antigua to a specific U.S. consumer.¹²⁶ This trio of rulings seemed to support the position Antigua took against the United States from the very beginning. However, the Appellate Body made a substantially different ruling on the United States' public morals defense, which ultimately allowed the United States to claim victory.¹²⁷ The Appellate Body held that the Wire Act, the Travel Act, and the Illegal Gambling Business Act are *necessary* to protect public morals.¹²⁸ This groundbreaking ruling did not apply to the Interstate Horseracing Act, but it was a major victory for the United States because the WTO recognized the specific concerns of the remote supply of gambling, including "the volume, speed, and international reach of gambling transactions, the virtual anonymity of such transactions, and the low barriers to entry."¹²⁹

Upon the conclusion of the Appellate Body ruling, the United States and Antigua continued to square off on the issues of amending the Interstate Horseracing Act and a reasonable time for doing so.¹³⁰ Although the Arbitrator ultimately awarded Antigua \$21 million in annual sanctions against the US for failure to comply with the Appellate Body's decision,¹³¹ the United States now had a precedent that allowed the United States to rely on a public morals defense against foreign gambling suppliers.

¹²¹ Because it created a ban on the use of one, several or all means of delivery of services to an elected sector by barring gambling communications through wired technologies. *Id.*

¹²² WTO Appellate Report, *supra* note 27.

¹²³ 15 U.S.C. § 3001-07.

¹²⁴ WTO Appellate Report, *supra* note 27.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See generally Balestra & Cabot, *supra* note 97.

¹³¹ Decision by the Arbitrator, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services: Recourse to Arbitration by the United States Under Article 22.6 of the DSU*, WT/DS285/ARB P 6.1 (Dec. 21, 2007) [hereinafter Arbitrator Decision].

With respect to future attacks against the United States, there has been speculation that other WTO members may enter the market of online gambling services and pose a threat to the United States.¹³² However, the WTO Appellate Body ruling has been a strong deterrent against such actions. In addition, the only way the European Union (EU) could confront the United States would be through a fair trade claim brought by the EU as a whole because the EU has explicitly excluded gambling and betting services in its Schedule of Commitments.¹³³ Although there has been anticipation that another party may present a claim against the United States at the WTO with respect to online gambling, the last few years has heightened that anticipation and it appears that the United States is now vulnerable. Would the same “public morals” defense still hold up at the WTO today? With New Jersey’s recent litigation attempting to legalize gambling in the state, with the expansion of the gaming industry in Las Vegas and the popularity of DraftKings and FanDuel, can the United States stand strong behind its public morals defense? One by one, states have begun to take actions against DFS. Though there is no current evidence at this point that the actions by the United States is linked to the Antigua case, it is interesting to note that as the United States struggled with the conclusion of the WTO case, a new conversation has presented itself in the United States. Should DFS be banned for the sake of public morals? The final section of this Note will analyze the strengths and weaknesses of those arguments in the era of DraftKings and FanDuel.

IV. THE DEMISE OF AMERICA’S “PUBLIC MORALS”

The enthusiasm behind sports gambling has rapidly become an addiction some have equated to the “crack cocaine of gambling.”¹³⁴ Although there were a series of federal acts that attempted to outlaw sports gambling in support of the “American public morals” argument, several States and individuals have not been able to resist the urge to monetize the obsession to gamble. This section will analyze the effectiveness of America’s public morals defense in light of recent federal statutes in the modern era of DFS.

A. PASPA

The Professional and Amateurs Sports Protection Act makes it unlawful for:

¹³² See Michael Kanellos, *Is Online Gambling Coming to Mainland China?*, CNET NEWS, (Sept. 14, 2006), <https://www.cnet.com/news/is-online-gambling-coming-to-mainland-china/>.

¹³³ Balestra & Cabot, *supra* note 97.

¹³⁴ Ryan D. Hammer, *Does Internet Gambling Strengthen the U.S. Economy? Don't Bet on It*, 54 FED. COMM. L.J. 103, 104 (2001) (quoting Sen. Jon Kyl).

a governmental entity¹³⁵ to sponsor, operate, advertise, promote, license or authorize by law or compact . . . a lottery, sweepstakes, or other betting gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate or on one or more performances of such athletes in such games.¹³⁶

As of 1992, it appeared that state and governmental organizations alike lost the chance to capitalize on the popularity of sports gambling. That claim did not go unchallenged.

One of the first challenges to PASPA's validity under the United States Constitution was in the case *Interactive Med. Entertainment & Gaming Ass'n v. Holder*.¹³⁷ The claim stated that PASPA violated the Commerce Clause, the First Amendment, the Due Process Clause and the Equal Protection Clause. After the initial complaint, the plaintiffs responded with a supplemental brief to show that pending legislation would amend the New Jersey Constitution to allow sports wagering within the state. The Court found in favor of the government because New Jersey law at the time prohibited sports gambling and no action could be brought against PASPA's constitutionality until pending legislation was settled.

In response to the ruling in *Interactive Media Entertainment*, Governor Chris Christie pushed the New Jersey legislature to take action to solve the struggling casino industry problems within the state, specifically in Atlantic City. Motivated by his endorsement, the New Jersey legislature enacted legislation in 2012 allowing New Jersey to implement wagering schemes involving single-game bets in Atlantic City casinos and state horse racing tracks.¹³⁸ Upon approval of the legislation, the NCAA, the professional sports leagues, and the United States Department of Justice sued.¹³⁹ Governor Christie claimed that PASPA was illegal, and the parties went to District Court.¹⁴⁰

In *NCAA v. Christie*, the court held that PASPA was a "rational expression of Congress's power under the Commerce Clause" and that Congress's actions were justified, thereby ruling against the state of New Jersey.¹⁴¹ However, New Jersey latched onto the claim the court made, which stated that although not typically the

¹³⁵ A State, a political subdivision of a State, or an entity or organization that has governmental authority within the territorial boundaries of the United States. 28 U.S.C. § 3701(2).

¹³⁶ *Id.* § 3702 (citation added).

¹³⁷ No. 3:09-cv-01301-GEB-TJB, 2011 WL 802106, at *1 (D.N.J. Mar. 7, 2011); see James Goodall, Note, *Bringing Down the House: An Examination of the Law and Policy Underpinning The Professional and Amateur Sports Projection Act of 1992*, 67 RUTGERS U. L. REV. 1097 (2015).

¹³⁸ N.J. CONST. art. IV, § 7, P 2(D).

¹³⁹ Associated Press, Justice Dept. Joining Betting Lawsuit, ESPN.COM, http://espn.go.com/espn/story/_/id/8869506/us-department-justice-join-suit-new-jersey-sports-betting-law (last visited Jan. 22, 2013).

¹⁴⁰ *NCAA v. Christie*, 926 F. Supp. 2d 551, 554 (D.N.J. 2013).

¹⁴¹ *Id.* at 554–55.

case, a court may deem a legislative policy unconstitutional if it felt it to be unwise.¹⁴² This case could be seen as one of the many stark examples of how Americans and their leaders see gambling as an advantageous activity on multiple levels as opposed to an activity that must be banned for “moral reasons.”

Additionally, this claim is further supported by the fact that New Jersey appealed the case to the Third Circuit, where although PASPA was upheld again, a dissenting judge claimed that PASPA violated federalism principles articulated in Court precedent.¹⁴³ Judge Vanaskie stated, “PASPA is no ordinary federal statute that directly regulates interstate commerce or activities substantially affecting such commerce. Instead, PASPA prohibits states from authorizing sports gambling and thereby directs how states must treat such activity.”¹⁴⁴ New Jersey asked for a rehearing in 2013¹⁴⁵ and was denied, and then asked for a rehearing once again in 2015.¹⁴⁶ “The people of New Jersey have spoken on this issue, and we will continue to fight to protect the will of our voters from the fickle and unfair application of outdated and unconstitutional federal law,” Brian Murray, a spokesman for Christie’s office, stated.¹⁴⁷ “At the end of the day, this isn’t just about New Jersey being treated fairly under federal law, but about the common sense reality of bringing a sports wagering industry that is already taking place every day in our state out of the shadows.”¹⁴⁸ The two sides met in the Third Circuit Court of Appeals on February 17, 2016 in a hearing that could shape the future of sports betting in the United States.¹⁴⁹ Governor Christie has made it perfectly clear that sports wagering is a major part of the New Jersey economic plan as well as the social life of New Jersey citizens. If the citizens and the legislature of New Jersey push for this legislation, does this mean that America no longer wants to protect its “public morals” against gambling? The same question can be posed to other states.

¹⁴² *Id.* at 555.

¹⁴³ *NCAA v. Governor of N.J.*, 730 F.3d 208, 251 (3d Cir. 2013) (Vanaskie, T., concurring in part and dissenting in part).

¹⁴⁴ *Id.* at 241.

¹⁴⁵ See Chris Sieroty, *U.S. Supreme Court Is Last Option in New Jersey Sports Betting Case*, LAS VEGAS REV. J. (Nov. 18, 2013), <http://www.reviewjournal.com/business/us-supreme-court-last-option-new-jersey-sports-betting-case>.

¹⁴⁶ Brent Johnson, *Christie Asks for Re-Hearing in N.J.’s Sports Betting Battle*, NEW JERSEY NEWS (Sept. 8, 2015), http://www.nj.com/politics/index.ssf/2015/09/christie_asks_for_re-hearing_in_njs_sports_betting_battle.html.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ David Purdum, *Poll: Football Fans Support Changes in Gambling Laws*, ESPN (Feb. 3, 2016), http://espn.go.com/chalk/story/_id/14703770/football-fans-support-changes-gambling-laws. As this note goes to print, the Third Circuit Court of Appeals upheld PASPA’s prohibition on sports gambling in New Jersey, ultimately siding with the NCAA and the professional sports leagues. Matt Bonesteel, *New Jersey’s Attempts At Legalized Sports Betting Suffers Another Big Setback in Court*, WASHINGTON POST (Aug. 9, 2016), https://www.washingtonpost.com/news/early-lead/wp/2016/08/09/new-jerseys-attempt-at-legalized-sports-betting-suffers-another-big-setback-in-court/?utm_term=.b4e4dc008776.

B. States Respond to PASPA

PASPA exempted sports gambling policies in Nevada, Delaware, Montana and several other states while prohibiting those states that attempted to legalize or expand grandfathered operations.¹⁵⁰ With these haphazard exceptions, PASPA is vulnerable to constitutional challenges based on its procedural mechanisms, its unequal treatments of states under the Commerce Clause, and its "trampling on an area traditionally governed by states."¹⁵¹ If the issue of the moral values of the American youth is so important and necessary for Congress to pass an Act that federally regulates sports gambling, why is there an exception for Nevada, Delaware, Montana, and Oregon?¹⁵²

In Delaware, the legislature has taken advantage of the opportunity to expand its gambling operations onto the internet. Delaware's gambling services account for its fourth largest income source or seven percent of the state budget.¹⁵³ In 2012, Delaware began to compete with land-based gambling sites in Maryland, New Jersey and Pennsylvania by legalizing video lottery and games like poker and blackjack.¹⁵⁴ Although Nevada and the U.S. Virgin Islands were the first to pass enabling legislation, Delaware was the first state to implement a functioning casino online in 2012.¹⁵⁵ Although regulations over the online gambling industry in Delaware are immense and the licensing fee is a strong deterrent to operators, Delaware has worked its way into becoming a major player in the industry.

Several other states have continued to debate the topic of gambling through their vicious attempts to legalize and license operators under the umbrella of online gambling. In Massachusetts, Norfolk Representative Daniel Winslow stood behind the argument that "[i]nternet poker is a game of skill that fits our high tech job profile perfectly."¹⁵⁶ Representative Winslow's proposal in 2012, which would effectively allow licenses for internet poker, received endorsement

¹⁵⁰ For Alaska, see ALASKA STAT. § 05.15.180(h) (2010) (discussing Calcutta pools on amateur and professional sports, which may not be grandfathered). For Delaware, see DEL. CODE ANN. tit. 29 § 4805(b)(4) (2003) (discussing state lottery games based on sporting events). For Montana, see MONT. CODE ANN. § 23-7-103(4)(a) (2011) (considering state lottery games based on sporting events). For Nevada, see NEV. REV. STAT. ANN. §§ 463.0136, 463.0193, 463.1600 (2007) (discussing use of "associated equipment" for licensed sportsbooks). For North Dakota, see N.D. CENT. CODE ANN. §§ 53-06.1-03(1)(a) to 06.1-09 (2007) (suggesting nonprofit organizations may run sports pools on professional sports events). For Washington, see WASH. REV. CODE § 9.46.0335 (2005) (suggesting that anyone can conduct low-limit sports pools). For Wyoming, see WYO. STAT. ANN. §§ 6-7-101(a)(i) to 101(a)(iii)(F) (2011).

¹⁵¹ Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249 (2005) (arguing that the Commerce Clause includes a uniformity constraint that precludes discrimination between states under PASPA).

¹⁵² See generally 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 (2010-11).

¹⁵³ Michael Cooper, *States Up the Ante in Bid to Lure Other States' Bettors*, N.Y. TIMES (Aug. 3, 2012), <http://www.nytimes.com/2012/08/03/us/gambling-boom-leaves-states-struggling-to-catch-up.html>.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*; see also Galasso, *supra* note 152.

¹⁵⁶ *State Rep: Online Poker Fits Bay State Tech Profile*, BOS. HERALD (Apr. 19, 2012), http://www.bostonherald.com/business/business_markets/2012/04/state_rep_online_poker_fits_bay_state_tech_profile.

by Harvard Law School Professor Charles Nessori.¹⁵⁷ In addition, Iowa's legislation that pushed for the legalization of internet poker was defeated in 2012.¹⁵⁸ This was the third time the Legislature considered the issues and pushed forward a plan to continue to research the legality and the moral underpinnings of the proposal.¹⁵⁹ On the other hand, Utah has supported the notion of "public morals" by passing a bill that explicitly stated that online gambling would remain illegal in the state of Utah for bettors and providers.¹⁶⁰ Finally, although Hawaii and Mississippi proposed bills for gambling services, those bills quickly failed in 2012.¹⁶¹ With these splits in the policies being put forth in front of state legislatures, it appears that the states are conflicted as to their view on the need to protect "public morals" from gambling.

C. Public Outcry and League Support

It is no surprise that during the week of Super Bowl 50, the American Gaming Association found that "80 percent of people polled who said they expect to watch Super Bowl 50 want to change the current sports betting laws in the United States, and 66 percent believe states should have the choice of whether to offer sports betting."¹⁶² The American Gaming Association estimates that \$4.2 billion will be wagered on Super Bowl 50 between the Denver Broncos and the Carolina Panthers with only 3 percent of that money being wagered legally.¹⁶³ This position is drastically different from what the United States argued in 2013 at the WTO.

The most shocking crack in the public morals defense came from the leaders of the professional sports world. Although NFL Commissioner Roger Goodell attempted to distance the NFL from daily fantasy sports games,¹⁶⁴ NBA Commis-

¹⁵⁷ Charles Nesson, *Massachusetts Should Embrace Online Poker*, BOS. GLOBE (Sept. 16, 2011), http://www.boston.com/bostonglobe/editorial_opinion/blogs/the_angle/2011/09/state_senate_sh.html.

¹⁵⁸ Jason Clayworth, *Iowa Lawmakers Considering Online Gambling*, DES MOINES REGISTER, (Feb. 26, 2010), <http://blogs.desmoinesregister.com/dmr/index.php/2010/02/26/iowa-lawmakers-considering-online-gambling>; Jennifer Jacobs, *Internet Gambling Bill Takes a Step Forward in the Iowa Senate*, DES MOINES REGISTER, (Mar. 2, 2011), <http://blogs.desmoinesregister.com/dmr/index.php/2011/03/02/internet-gambling-bill-takes-a-step-forward-in-the-iowa-senate>.

¹⁵⁹ *Id.*

¹⁶⁰ Matt Canham, *Herbert to Congress: Don't Legalize Online Gambling*, SALT LAKE TRIB. (Apr. 12, 2012), <http://archive.sltrib.com/story.php?ref=/sltrib/politics/53901468-90/allowing-ban-chance-gambling.html.csp>. The bill would have created a state lottery, but the only one in the nation with sales restricted to the internet.

¹⁶¹ H.B. 1373, 2012 Leg., Reg. Sess. (Miss. 2012), <http://billstatus.ls.state.ms.us/documents/2012/pdf/HB/1300-1399/HB1373IN.pdf>; H.B. 2422, 26th Leg. (Haw. 2012).

¹⁶² The research, conducted by the Mellman Group, consisted of 800 interviews completed in late January. Sixty-five percent of respondents believe transparent, regulated sports betting will either strengthen the integrity of game or have no impact on game outcomes. Seventy-two percent believe allowing states to regulate sports betting will make it safer for consumer. Purdum, *supra* note 149.

¹⁶³ *Id.*

¹⁶⁴ Peter Barzilai, *Roger Goodell Doesn't Want to Talk About Daily Fantasy Sports*, USA TODAY (Nov. 22, 2015), <http://www.usatoday.com/story/sports/nfl/2015/11/22/roger-goodell-daily-fantasy-fanduel-draftkings-lawsuit/76223476/>.

sioner Adam Silver is the first major professional sports league commissioner in the United States to publicly support legalized sports betting outside of Nevada.¹⁶⁵ Commissioner Goodell stated, "Season-long fantasy is (what) many people probably play in this room and it's fun, it's social, it's an opportunity to enjoy the game. Daily fantasy has taken a little different approach, and it's one that we have not been as active in that."¹⁶⁶ Interestingly, Peter Barzilai noted that the NFL "does not have a league-wide sponsorship or investment in the companies, though most teams and several team owners do."¹⁶⁷ Major League Baseball's Commissioner, Robert Manfred, stayed neutral on the position when interviewed by Outside the Lines. He said, "I think it's important for there to be a conversation between me and the owners about what our institutional position will be."¹⁶⁸ With the Commissioners of the three largest sports institutions in the United States conflicted on the issues and not unanimously supporting the argument defending public morals, the United States is incredibly vulnerable to future attacks about its contradictory policies and values.

D. *Skill vs. Luck: Skillful Games Should Be Legal*

Insofar as much the United States is subject to a future dispute at the WTO with respect to foreign internet gambling services' rights, it is very likely the United States will continue to use its public morals defense paired with a skill versus luck secondary argument. As indicated throughout this Note, the United States is divided with respect to the need to protect citizens from the dangers of internet gambling. As has been made evident, there are numerous states that are looking to internet gamblers to help rejuvenate state economies as well as several professional league officials who see this as a way to bolster their league popularity. This implies that some individuals do not see DFS as a plague to the American society that needs to be prevented. On the other hand, what if DFS is not considered gambling? To succeed at DFS, does a competitor rely on luck, skill, both or neither? If DFS requires skill, the United States may be able to convince the WTO that they are still protecting public morals.

In general, illegal gambling has been characterized as a person who pays consideration (usually cash) for the opportunity to win a prize in a game of *chance*.¹⁶⁹ States have developed three primary tests to distinguish games of skill and games of chance. First, the Predominance Test analyzes whether the outcome of the activity is determined more by a participant's skill or by an uncontrollable

¹⁶⁵ David Purdum, *MLB Commissioner Rob Manfred Says Legalized Sports Betting Needs 'Fresh Consideration'*, ESPN.COM (Feb. 5, 2015), http://espn.go.com/chalk/story/_/id/12286521/mlb-commissioner-rob-manfred-says-legalized-sports-betting-needs-fresh-consideration.

¹⁶⁶ Barzilai, *supra* note 164.

¹⁶⁷ *Id.*

¹⁶⁸ David Purdum, *MLB to talk betting with owners*, ESPN.COM (Feb. 5, 2015) <http://espn.go.com/espn/print?id=12286521>.

¹⁶⁹ *Morrow v. Alaska*, 511 P.2d 127, 128 (Alaska 1973).

chance.¹⁷⁰ Under this test, in order for an activity to be considered a game of skill, a player's own ability must control at least 51% of a contest's outcome.¹⁷¹ Second, the Material Element test evokes two phases of subjective analysis: (1) determining the level of chance in a given game; and (2) determining if that level of chance is high enough to be considered material in the outcome of a game.¹⁷² This analysis indicates that it has a much higher level of scrutiny than the Predominance test because games of skill may be classified as games of chance even when skill is predominating in the determination of the outcome.¹⁷³ Third, the Any Chance test mixes the classifications of the other tests by determining whether chance plays any role in influencing the outcome of a game.¹⁷⁴ Given the fact that this test has such a high level of scrutiny, the test has not been utilized often.

After determining the categories of tests used to classify a game as skill or chance, it is important to analyze how courts and states have defined skill versus chance. Skill has been defined as "the exercise of sagacity upon known rules and fixed probabilities where sagacity includes keenness of discernment of penetration with soundness of judgment; shrewdness; or the ability to see what is relevant and significant."¹⁷⁵ Chance on the other hand, is understood to be the unforeseen and completely uncontrollable aspect of gaming.¹⁷⁶ There are three forms chance often takes in gaming. First, Systematic Chance exists when a game itself has elements created by a random event, such as throwing dice.¹⁷⁷ Second, Imperfect Information occurs in mixed games where skill is not the sole determinate, but is influenced by not having complete information of all the factors, such as rock-paper-scissors because you do not know the mindset of the opponent.¹⁷⁸ Third, the Lucky Shot references games where the odds of success remain remote.¹⁷⁹ The common example is making a hole-in-one in golf. Although the game of golf is widely recognized as a game of skill, "[m]aking a hole-in-one . . . is such a fortuitous event that skill is almost an irrelevant factor."¹⁸⁰ Several of

¹⁷⁰ See Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. MARSHALL L. REV. 1195, 1204 (2007).

¹⁷¹ *Id.*

¹⁷² Boardwalk Regency Corp. v. Att'y Gen. of N.J., 457 A.2d 847, 850 (N.J. Super. Ct. Law Div. 1982) (stating "this recognition of the skill factor is not determinative on the issue of whether chance plays a material or immaterial role in the outcome of the activity.").

¹⁷³ Jeffrey Meehan, *The Predominate Goliath: Why Pay-To-Play Daily Fantasy Sports Are Games of Skill Under The Dominant Factor Test*, 26 MARQ. SPORTS L. REV. 5 (2015).

¹⁷⁴ Ehrman, *supra* note 20. ("States that follow this approach include Arkansas, Iowa, and Tennessee.").

¹⁷⁵ Michael J. Thompson, *Give Me \$25 on Red and Derek Jeter for \$26: Do Fantasy Sports Leagues Constitute Gambling?*, 8 SPORTS LAW J. 21, 34 (2001) (quoting 38 AM. JUR. 2D *Gambling* § 4 (1999)).

¹⁷⁶ 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, 394–95 (2009).

¹⁷⁷ *Id.* at 395.

¹⁷⁸ *Id.*

¹⁷⁹ See Cobaugh v. Klick-Lewis, Inc., 561 A.2d 1248, 1251–52 (Pa. Super. Ct. 1989) (Popovich, J., dissenting).

¹⁸⁰ *Id.* at 1251.

these factors and tests reference activities other than sports, however; in *United States v. DiCristina*, the Court indicated that sports betting falls under this umbrella. "Sports betting . . . involves substantial [not slight] skill. Sports bettors can employ superior knowledge of the games, teams and players in order to exploit odds that do not reflect the true likelihoods of the possible outcomes."¹⁸¹ Whether or not the WTO will be persuaded by the tests laid out is a separate issue that will not be discussed for the purposes of this Note.

After taking all of the above information into consideration, it is not necessary to make the brief claim for how DFS can prove it is a game of skill rather than luck or chance. DraftKings has created its daily fantasy platform as a game of "Imperfect Information."¹⁸² Players set their lineups or enter contests without the knowledge of their competitor's lineup or strategy prior to game day. The reasons for this gameplay style are: (1) lineups are allowed to be changed right up until the start of the players' game(s); and (2) it prevents players from poaching lineups from more experienced or successful players.¹⁸³ The belief that some players require skill to be successful is apparent in the presentation DraftKings highlighted in 2014 that indicated only ten percent of its players were profitable the year before.¹⁸⁴ FanDuel's research shows that a "superior player—think [Peter] Jennings and his spreadsheets against a newbie picking on feeling and the fact that maybe he likes a certain player—will win 90 percent of the time."¹⁸⁵

If skill is truly a major factor in DFS, what skill is required? For example, daily fantasy baseball players must be able to understand player statistics, batting orders, team matchups, market valuations, and how to employ advanced games theory tactics to succeed.¹⁸⁶ Unlike a season-long competition, the goal for daily fantasy baseball competitors is to maximize win probability rather than always maximize projected points.¹⁸⁷ Daily fantasy players can also demonstrate skill in the manner they manage their bankroll and form their risk assessment in what contests to enter or what lineup to submit.¹⁸⁸ Showing this data would be a great piece of evidence if the United States was challenged on the services of DFS in the United States in the future.

¹⁸¹ *United States v. DiCristina*, 726 F.3d 92 (2d Cir. 2013).

¹⁸² Meehan, *supra* note 173, at 24.

¹⁸³ For example, one of the successful daily fantasy baseball players in the industry is Peter Jennings, who runs all of his daily fantasy entries under the name CSURAM88. He routinely wins big tournaments and is one of the most profitable daily fantasy pros in the business. If I could log in and see his lineups, I would not have to do any research at all, and DraftKings would have effectively negated a good portion of skill from the game. *See generally* headChopper, *The Man. The Myth. The Legend. CSURAM/Peter Jennings*, ROTOGRINDERS, <https://rotogrinders.com/blog-posts/the-man-the-myth-the-legend-csuram-peter-jennings-356547> (last visited Dec. 14, 2015).

¹⁸⁴ Jason Robins, *The Analytics Behind Winning at Daily Fantasy Sports*, MIT SLOAN SPORTS ANALYTICS CONF., <http://www.sloansportsconference.com/?p=13545> (last visited Dec. 14, 2015).

¹⁸⁵ Noah Davis, *The Daily Fantasy Sports Takeover*, VICE SPORTS (Oct. 29, 2014), https://sports.vice.com/en_us/article/the-daily-fantasy-sports-takeover.

¹⁸⁶ Ehrman, *supra* note 20, at 102.

¹⁸⁷ *See* BALES, *supra* note 34.

¹⁸⁸ Ehrman, *supra* note 20, at 105.

Even though all of the recent information shows how DFS can be classified as a game other than gambling, a final wrench to throw into that argument can be found in the international expansion of DFS through gambling licenses. While DFS has continued to battle US policymakers, daily fantasy sports brand DraftKings made its long-anticipated international push with a launch in the United Kingdom in January 2016.¹⁸⁹ “DraftKings’ launch in the United Kingdom last week, and FanDuel’s pending plans to expand there, could complicate the fundamental *skill* argument.”¹⁹⁰ DraftKings applied and received a gambling license in the United Kingdom while FanDuel is waiting on the evaluation of its application.¹⁹¹ “‘It undercuts the DFS operators’ contention that they’re offering purely an entertainment product and not gambling product,’ said Daniel Wallach, a sports and gaming attorney at Becker & Polliakoff.”¹⁹² If DFS was truly a game of skill that did not involve chance, namely gambling, why would DraftKings and FanDuel need a gambling license in the international sphere? This question will be the basis for the demise of the American public morals claim if a party challenges the United States in the future.

CONCLUSION

As the popularity for Daily Fantasy Sports continues to grow throughout the United States and the international community, the questions surrounding the legality of these services will inevitably grow louder. It is very coincidental that upon the conclusion of the claim brought against the United States in the WTO, DFS was under fire within the United States. With New Jersey attempting to legalize “gambling,” the argument that the United States has an inherent duty to protect “public morals” grows weaker. Upon the conclusion of the Note, it appeared the fate of DFS in the United States had been sealed when DraftKings applied and received a gambling license in the United Kingdom and FanDuel awaited its approval. With this culminating factor and the rising popularity of Daily Fantasy Sports, the United States may have to officially go “all in” to shut down DFS with the hope of keeping its public morals defense alive.

¹⁸⁹ Curt Woodward, *DraftKings Launches in UK After Delays*, BOS. GLOBE (Feb. 5, 2016), <https://www.bostonglobe.com/business/2016/02/05/draftkings-launches-after-delays-sees-broader-international-footprint-ahead/yybOAhWcTKWVzkU2CGMMK/story.html>.

¹⁹⁰ Jacob Pramuk, *UK Launch Gives DraftKings a ‘Gambling’ Problem*, CNBC (Feb. 8, 2016, 1:56 PM), <http://www.cnbc.com/2016/02/08/uk-launch-gives-draftkings-a-gambling-problem.html> (emphasis added).

¹⁹¹ *Id.*

¹⁹² *Id.*