Out of Bounds?:
A Legal Analysis of Pay-To-Play
Daily Fantasy Sports

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I. INTRODUCTION

Like many Americans, I have been involved with traditional, season-long fantasy sports for a number of years and consider myself a good player and relatively well versed in the game. However, the largest growing portion of fantasy sports remained unknown to me up until two years ago: pay-to-play daily fantasy sports. I received a crash course in the daily fantasy realm when one of my good friends from undergrad took his economics degree and pursued a career as a fantasy sports analyst at RotoGrinders, a site specializing in providing advice for daily fantasy sports players. When my friend started there, RotoGrinders was a small startup, but it has expanded exponentially with the industry and is now one of the most visited daily fantasy sports advice sites.

RotoGrinders’ growth is indicative of the daily fantasy sports industry’s growth as a whole. Due to its popularity, daily fantasy sports are growing much faster than the laws in place to monitor them. Although many articles have been written that focus on the legality of traditional fantasy sports leagues, daily leagues have been relatively unexplored. I hope to provide a framework for analyzing how daily fantasy sports will be treated under current state and federal law. Part I of this Article provides a brief history of the growth and popularity of daily fantasy sports. Part II begins to analyze the legal framework regulating fantasy sports on a federal level. Part III focuses on how state laws approach fantasy sports. Part IV contains the skill versus chance analysis that is central to the ongoing debate and is what the legality of daily fantasy sports hinges on in many states. Part V explores the public policy arguments surrounding daily fantasy sports. This Article shall focus on the laws that affect sites that host daily sports leagues.  

1. Although individual players can face prosecution under some rare circumstances, that is outside the reach of this Article. See generally Marc Edelman, A Short Treatise on Fantasy
aspects of the law are relevant and affect daily fantasy sports sites including patent law, copyright law, trademark law, and right-of-publicity issues, but those issues are outside the scope of this Article.  

This Article argues that daily pay-to-play fantasy sports sites are legal under current federal laws, and are legal in the majority of states as a game of skill. This Article also argues that many of the public policy concerns about daily fantasy sports are inapplicable and focus more on the consequences of casino gambling. Under the existing laws and regulations, daily pay-to-play fantasy sports are legal and should withstand any coming legal challenges.

II. FANTASY SPORTS IN AMERICA

Fantasy sports have become a huge part of many Americans’ lives, and this trend is likely to continue. Over 33.5 million Americans or about 10% of the U.S. population played fantasy sports in 2012, which was a historically high number. Most of these players focused on traditional season-long fantasy leagues; however, almost 25% of players participated in daily games as well. Even though season-long fantasy leagues were able to move away from being associated with gambling, because daily fantasy games “are built to last for just one day, they have to be vetted more closely.”

Daily fantasy sports leagues differentiate themselves from traditional season-long fantasy sports leagues in multiple ways, but the most apparent is that the majority of daily games last less than twenty four hours. This means every week is a fresh chance to win. Nigel Eccles, the CEO of FanDuel.com called daily fantasy sports “fantasy for the A.D.D. generation.” Eccles said that one of the main goals he had
was to create a new way to play fantasy that catered to twenty-year-olds who were not participating in traditional season-long fantasy sports because it took too long.® Eccles said:

We thought, “OK, great market, lack of innovation and also really weird that this younger group is not coming in. Why don’t we take something that people love and make it faster?” . . . That was really the genesis of the idea, which is: How do we make every day draft day? Everybody says the best day of the year is draft day. That really was the product.®

Daily fantasy sports allows players to compete against each other in real cash games enabling players to put as much or as little time into the games as they would like.® Daily fantasy games are still fighting the stigma that they are more closely related to gambling.® But public opinion is starting to shift, and the law does not support this classification.

A. The Growth of Daily Fantasy Sports

Not only are more Americans playing fantasy sports, but they are also spending more money. For example, in addition to their entry fees, fantasy players in 2012 spent $1.6 billion on extra fantasy items like fantasy magazines, draft kits, online services, and premium television channels. Adding in $1.44 billion in entry fees, the total industry value tops over $3 billion annually.®

Daily fantasy sports in particular are seeing even faster economic growth. Daily fantasy sports are now responsible for $492 million in annual spending according to a study commissioned by the Fantasy Sports Trade Association (FSTA).® Paul Charchian, the FSTA’s president, says it is possible that spending will double this year for daily fantasy sports.® Daily fantasy sports are not only growing in participation and entry fees, they are also growing in third-party support.® Last year alone, daily fantasy sites received as much third-

10. Id.
15. Cohen, supra note 5.
party support as they had in their previous history combined. This type of growth does not show any signs of stopping.

While many are going all in on daily fantasy sports, some companies are taking a wait-and-see approach due to a fear of legal issues. Although traditional season-long fantasy sports are exempted by the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA), daily fantasy sports have yet to be examined in this context. According to the largest daily fantasy sports host site, FanDuel, daily fantasy sports are a game of skill and thus protected by the UIGEA because although they usually only last one day, daily fantasy rules are very similar to their season-long counterparts. Additionally, the added economic analysis required in daily fantasy sports may make it considerably more difficult than season-long fantasy. FanDuel is confident in its stance; however, not everyone buys into its conclusion.

B. Legal Fears Inhibiting the Growth of Daily Fantasy Sports

Although many daily fantasy sports host sites would agree with FanDuel's stance, this view has only recently been tested. Langone v. Kaiser represents the first challenge to daily fantasy sports in a court. The court dismissed the case because Langone did not have standing to bring the lawsuit because he was not a “loser” under Illinois’ Loss Recovery Act. The court also specified that even if Langone qualified as a “loser” FanDuel did not qualify as a “winner” because they received

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20130712 (providing an example of third-party investing in daily fantasy sports: “Barry Diller’s IAC/InteractiveCorp has a stake in DraftStreet, a daily games website”). Paresh Dave states further:

Competitor DraftKings raised $7 million from Atlas Venture. FanDuel picked up $11 million, largely from Comcast Ventures. MGT Capital Investments took a majority stake in FanThrowdown for about $2.5 million in stock. Recently, a fledgling Los Angeles firm [TopLine Game Labs] that’s led by a big name from the fantasy sports industry received a $25-million investment.

Id. at *10-11.
their payment via commission, unlike sports bookies who “could be ‘winners’ or ‘losers’ depending on the happening of a certain [future] event.” Unfortunately, the Langone court did not address whether daily fantasy sports are games of skill or chance, which is the most important issue for determining the legality of daily fantasy sports. The court may offer an answer soon, as Langone’s lawyer has indicated that he will likely appeal the ruling to the United States Court of Appeals for the Seventh Circuit.

Executives at sites like FanDuel and StarStreet (now a property of fantasy sports site DraftKings) say they do not fear any pending litigation because their better players beat weaker players, making these companies confident that daily fantasy sports are games of skill and thus legal. Although some companies may be confident in the legality of daily fantasy sports, other companies are still a little wary. For the multibillion-dollar fantasy sports industry, securing a clear answer to the legal status of daily fantasy games is imperative. Risk-tolerant businesses such as FanDuel have taken a risk on the legal uncertainty and have profited because of it. Conversely, most established fantasy sites like ESPN and Yahoo! are waiting for further legal clarity, which is costing them the chance to make huge profits in the continually growing daily fantasy craze. Sports Illustrated is one of the first major companies to launch a daily fantasy game, Fan Nation, and this may change the daily fantasy sports landscape. Sports Illustrated’s Fan Nation may gain the attention of top executives of competitors and could cause them to enter the daily fantasy sports marketplace. Since Sports Illustrated launched Fan Nation, USA Today launched its daily fantasy

24. Id. at *18.
26. Id.
29. Id.
31. Id.
website FantasyScore, and NBC Sports purchased a large stake in FanDuel. If current trends continue, it should not be long until every provider of season-long fantasy sports gets involved with daily pay-to-play fantasy sports.

People who know the daily fantasy industry also acknowledge some troubling aspects of daily fantasy. For example, many former online poker and sports betting participants are leading the charge on daily fantasy sports, and this may make government regulators uneasy. Daily fantasy sports are different from traditional season-long fantasy sports, but this does not mean that they should be presumed to be illegal. Although there may be some valid concerns over daily fantasy sports, it seems as though many big companies are being overly conservative.

C. How To Play Daily Fantasy Sports

Daily fantasy sports are similar to the season-long leagues that many people are aware of and participate in actively. Like any standard points-based fantasy sports league, contestants pick a team of professional players and are awarded points based off the stats the players on their team have during the length of the contest. 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 creating a successful team.” Although there are multiple similarities, there are also important differences. Daily fantasy games differ most in the duration of the contest, the type of competition, and how players are selected.

34. Brustein, supra note 14.
As the name implies, daily fantasy sports contests are usually only one day long. The length of the game is one of the most unique aspects of daily fantasy sports and also one of the main reasons the skill versus chance debate is so heated. Another important distinction is who you are competing against. In season-long fantasy sports, you compete against teams in your league. In some daily fantasy leagues, you may compete against a single person; in another league, you could compete against thousands. Most daily fantasy games are structured one of three ways: head-to-head, “Double-Ups,” or Guaranteed Prize Pool (GPP).

Head-to-head games are the most basic type of daily fantasy sports. Head-to-head games pit two players against each other in a one-on-one match where the player with the highest score wins the amount wagered on the game. The next common daily fantasy game are Double-Ups, which are also called a 50/50 on some sites. The way a Double-Up works is that the teams in the top half of the league will win double their buy-in amount and the bottom half of the league will lose theirs. The final contest, the GPP, is a large field event that allows contestants to submit multiple entries. GPPs are the most competitive of the daily fantasy sports leagues and only the top contestants earn a prize. While GPPs involve a higher degree of risk, the potential payouts reflect the risk involved. For example, some large GPP tournaments now have prizes of over $1,000,000 for the first-place finisher.

The next biggest difference between daily and season-long fantasy is how contestants pick their players. Season-long fantasy sports usually

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38. Sometimes “daily” NFL contests last two days to account for Monday Night Football.
39. See infra Part VI.
40. For example, if a player were in a ten-team league, that player would have a regular season schedule where they would play the teams in their league, and the best teams would advance to the playoffs.
44. “For instance, in a one-hundred-man $11 double up, the fifty players with the highest score will all “double-up” their entry fee and get paid while the bottom 50 players will lose their $11.” Id.
46. Id.
utilize a snake draft.\textsuperscript{47} There are some daily fantasy contests that utilize this approach as well.\textsuperscript{48} Another way to acquire players is a “Pick’Em” format.\textsuperscript{49} In a Pick’Em league, a person chooses one player from each grouping of players until you have filled out your roster.\textsuperscript{50} The third, and by far the most popular, way of picking players for daily fantasy sports is a league that uses a salary cap.\textsuperscript{51}

In a salary cap league, players have a set budget, and they must assemble their team without going over their allotted budget.\textsuperscript{52} Salary cap leagues are very popular because they are often tied to GPPs. In addition, some players like the fact that you get a “real” salary cap to spend just like professional general managers do.\textsuperscript{53} The salary cap aspect is a major difference because it introduces economic analysis and requires players to strategize how to value players and allocate their roster funds.\textsuperscript{54} The valuing of players in this fashion is unique to daily fantasy sports, and “whereas the value of a player in traditional fantasy comes in relation to his draft spot, the value in daily fantasy is tied to his salary. It creates an interesting dynamic that doesn’t necessarily have a season-long equivalent.”\textsuperscript{55}

Although many of the aspects of daily fantasy sports are similar to their season-long counterparts, there are multiple important differences. The most important differences between daily and season-long fantasy sports are the length of the contest, how the contest is structured, and

\textsuperscript{47} In a snake draft, the order of picks reverses from round to round. For example, if you are in a ten-team league and pick third in the first round, you would then draft seventh in the second round (eighteenth overall), you would then draft third in the third round (twenty-third overall), and so on. This takes away some of the advantages to drafting first and some of the disadvantages from drafting last. \textit{Draft Types, NFL,} http://www.nfl.com/fantasyfootball/help/drafttypes (last visited Feb. 8, 2015).


\textsuperscript{50} Id. Each tier will consist of anywhere from two to ten players, which deems to have similar fantasy value for the upcoming scoring period. Players must choose exactly one player from each tier to make their team of eight players.


\textsuperscript{52} On DraftKings, for example, each team has a $50,000 budget, and players are valued according to their projected fantasy worth. \textit{How To Play: The Basics,} DRAFTKINGS, https://www.draftkings.com/help/how-to-play (last visited Feb. 8, 2015).

\textsuperscript{53} Id.

\textsuperscript{54} Id.

how players select their team. These differences may seem minor, but they play a large role in the analysis discussed infra Part III.

III. FEDERAL LAW

A number of federal statutes, including the Wire Act, the Travel Act, and the Interstate Transportation of Wagering Paraphernalia Act, prohibit the transmission of gambling information in interstate or foreign commerce. Gambling is also generally prohibited under the Illegal Gambling Business Act. Furthermore, gambling on sporting events in particular is banned by the Professional and Amateur Sports Protection Act (PASPA). However, no court, applying these acts or otherwise, has specifically addressed the legality of fantasy sports.

The only games regulated by the gambling statutes are those classified as games of chance rather than games of skill. Wagering money on players’ performances to win prizes could reasonably be considered gambling under common law and statutory interpretation. Despite prosecutors’ apparent ability to charge fantasy sports businesses and contestants with gambling crimes, no fantasy sports company has ever been prosecuted for gambling. Some believe that prosecutors have not attempted to prosecute fantasy sports leagues for two reasons: “(1) they have not considered the application of gambling prohibitions to fantasy sports leagues, and (2) consumer demand for fantasy sports leagues creates political pressure for legalization.”

The 109th United States Congress legalized traditional fantasy sports under the UIGEA, as long as they are consistent with state laws; however, daily fantasy sports have never been examined under any of these statutes.

This Part examines the federal laws that could affect daily fantasy sports and what type of impact they may have. Subpart A of this Part focuses on the historical laws relating to gambling. None of these

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statutes expressly deal with fantasy sports, but daily fantasy sports may be subject to prosecution under these laws if it is deemed unlawful under state law. Whether the government would ever use these statutes to prosecute daily fantasy sites is another issue. Subpart B of this Part focuses on the more recent laws, most notably the UIGEA, which Congress established to address fantasy sports. The UIGEA provides for a fantasy sports carve out, but it is unclear if daily pay-to-play fantasy games are protected under this statute as well.

A. Historical Gambling Laws

1. The Wire Act

In 1961, Congress enacted the Wire Act to enable states to enforce gambling laws.\textsuperscript{65} The Wire Act was part of a series of antiracketeering laws aimed at suppressing organized gambling and bookmaking. The Wire Act not only sought to enable states to stop gambling, Congress also enacted it to stop gambling through interstate commerce on a federal level.\textsuperscript{66} The Wire Act prohibits activity if three elements are satisfied: (1) there is a “wire communication facility,”\textsuperscript{67} (2) the transmitted information “assists in the placing of bets or wagers,” and (3) the defendant “[engages] in the business of wagering or betting.”\textsuperscript{68} Multiple cases have extended the Wire Act to include the Internet, thus satisfying the first requirement.\textsuperscript{69} Thus, the question of whether fantasy sports participation violates the Wire Act hinges on whether participating in fantasy sports is considered “betting” or “wagering.”\textsuperscript{70}

Daily fantasy sports may violate this statute, considering there are people who consider daily fantasy sports much closer to gambling than traditional, season-long contests.\textsuperscript{71} However, any fantasy sports site, including season-long sites, could face prosecution under the Wire Act if it is a commercial website and the contests it hosts are classified as

\textsuperscript{65} Id. at 204.
\textsuperscript{66} Levy, supra note 61, at 333.
\textsuperscript{67} The Wire Act defines a “wire communication facility” as “any and all instrumentalities, personnel, and services . . . used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission.” 18 U.S.C. § 1081.
\textsuperscript{68} Id § 1084(a).
\textsuperscript{69} See generally United States v. Cohen, 260 F.3d 68 (2d Cir. 2001); United States v. Lyons, 740 F.3d 702 (1st Cir. 2014).
\textsuperscript{70} A “bet” is commonly defined as “something (esp. money) staked or pledged as a wager,” while a “wager” may be defined as “money or other consideration risked on an uncertain event.” Davidson, supra note 64, at 206 (citing BLACK’S LAW DICTIONARY 153, 1573 (7th ed. 1999)).
\textsuperscript{71} DiFino, supra note 6.
games of chance, rather than games of skill. Even though daily fantasy sports host sites may be more likely to be found in violation of this statute than traditional leagues, they are just as unlikely to face prosecution.

2. The Travel Act

The Travel Act’s broad language could be extremely effective in prohibiting fantasy sports leagues. The Act applies to “any business enterprise involving gambling.” If daily fantasy sports were ever found to be unlawful, the Travel Act would empower the government to hold not only host sites but also individual players liable. This act may give the government some authority to act under limited circumstances; however, nothing in this act would make daily fantasy sports illegal. Without any further developments, this statute is essentially harmless to those involved with daily pay-to-play fantasy sports.

3. The Interstate Transportation of Wagering Paraphernalia Act

The Paraphernalia Act is designed to eradicate illegal gambling by “erecting a substantial barrier to the distribution of certain materials used in the conduct of various forms of illegal gambling.” Although a ban on Internet fantasy sports sites, computer software, and specialty magazines would not lead to the demise of fantasy sports leagues, such a ban would present a substantial barrier and impede the operation of fantasy sports leagues.

Courts have applied the Paraphernalia Act to Internet gambling; however, the ability to prosecute participants remained limited even with this statute. The Paraphernalia Act can only be used for prosecution if a state rules that fantasy sports are illegal gambling under state law; however, if this does occur, the Paraphernalia Act has a long reach that could impact many businesses that provide fantasy sports stats and information. It may seem like this act should give those involved with

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72. Edelman, supra note 1, at 35.
73. See infra Part IV (discussing whether daily fantasy sports are games of skill or chance (a wager)).
74. Davidson, supra note 64, at 210.
76. Davidson, supra note 64, at 212.
77. Id.
78. Id.
79. Levy, supra note 61, at 335-38.
fantasy sports pause; however, Congress has excluded newspapers and other publications. Therefore the magazines and websites that are now devoted entirely to providing fantasy sports information are protected.\footnote{Id.} As this act currently stands, it seems to have little effect on pay-to-play daily fantasy sports sites.

4. The Illegal Gambling Business Act

The Illegal Gambling Business Act seeks to prosecute “whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business.”\footnote{18 U.S.C. § 1955.} This statute arguably includes Internet activity and sport-related betting in its definition of “gambling.”\footnote{“Gambling” includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein. Id. § 1955(b)(2).} This act can only lead to prosecution if three conditions are satisfied: (1) it is illegal under state law, (2) involves five or more people in the business, and (3) is in continuous operation for thirty days or has a gross revenue of $2,000 in any single day.\footnote{Id. § 1955 (b)(1)(i)-(iii).}

Internet-based fantasy sports leagues typically satisfy the second and third requirements. Due to the complexity involved in daily fantasy leagues, most are operated by at least five people.\footnote{Levy, supra note 61, at 337-38.} The Illegal Gambling Business Act targets high stakes illegal gambling activities, and it is highly unlikely that season-long fantasy sports leagues would meet the threshold to liability.\footnote{Edelman, supra note 1, at 36.} Daily fantasy sports sites are much different because they are highly profitable ventures.\footnote{For example, FanDuel takes a 10% rake from most of its contests. See generally FanDuel Promo Code and Review, ROTOGRINDERS, http://rotogrinders.com/reviews/FanDuel_Promocode-115 (last visited Jan. 28, 2015).} The issue, as with most statutes, hinges on how daily fantasy sports are treated within a given state. This statute is particularly dangerous because it would destroy the fantasy sports industry if it was applicable.\footnote{Levy, supra note 61, at 337-38.}

5. PASPA

PASPA makes it illegal for a governmental entity or person to “sponsor, operate, advertise, [or] promote” any gambling operation “based, directly or indirectly . . . 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.\textsuperscript{88} PASPA does have a grandfather clause that protects “previously authorized government sponsored games as well as casino-style wagering from liability.”\textsuperscript{89}

PASPA was partially a result of lobbying by the professional sports industry, and because most sports leagues host, as well as endorse, season-long fantasy sports they would be protected;\textsuperscript{90} however, daily fantasy sports may be vulnerable under PASPA. First, daily fantasy sports have never been formally endorsed by the professional sports industry.\textsuperscript{91} Second, “the substantial emphasis on buy-ins and payouts in daily fantasy sports games make it more probable that such games could be viewed as wagering schemes.”\textsuperscript{92} Third, because daily fantasy games consist of a much smaller sample size of games than season-long contests, they may be much more dependent on a single game or the performance of athletes in a single game. These factors may be worrisome for daily fantasy sports participants; however, they have yet to be prosecuted under this statute.


The above-referenced laws all seem to have the potential to reach daily fantasy sports, even though they do not specifically address fantasy sports and have not been successfully used to prosecute fantasy sports sites. However, due to some of the more unique aspects of daily pay-to-play content, they may be more vulnerable. Due to the potential risks, these statutes are still important to consider, but will likely be of little use without further developments.

B. Current Laws and the Fantasy Carve Out

As previously discussed, historic antigambling laws in place in the United States did not specifically address fantasy sports. Due to the rapid growth of the industry, it is logical that the government should provide clarity on the legality of fantasy sports. The following Subpart introduces the actions the government took to achieve that end.

\textsuperscript{89} Edelman, \textit{supra} note 1, at 36.
\textsuperscript{90} \textit{Id.} at 36-37.
\textsuperscript{91} \textit{Id.} at 37.
\textsuperscript{92} \textit{Id.}
1. The Internet Gambling Prohibition Act

The Internet Gambling Prohibition Act of 1999 (IGPA) was drafted to limit the appeal of sports gambling to young people. The act was not meant to target sports gambling, but its content gave it the potential to impact not only traditional sports betting but fantasy sports websites as well. Fantasy sports were later protected when the bill included an exemption for fantasy sports leagues in its final draft. The IGPA ultimately did not get the approval needed to pass into law; however, the bill was not a complete failure. Many of the initial ideas and policies found in the IGPA were ultimately resurrected under the UIGEA.

2. UIGEA

The UIGEA was forced through Congress in the remaining minutes before an election recess. The bill contained an express exception for fantasy sports and received substantial backing from America’s professional sports leagues, especially the National Football League (NFL). Professional sports had two interests in making sure fantasy sports received some protection. “The first was preserving increasing revenues. The future of fantasy sports would have been placed in jeopardy if Congress passed internet gaming legislation that could have been read to prohibit fantasy sports. The second was maintaining increased viewership by individuals who played fantasy sports.”

The UIGEA outlaws Internet gambling, mainly poker, but specifically carves out an exception for fantasy sports. The law considers fantasy games legal if the “winning outcomes reflect the relative knowledge and skill of the participants.” The act also provides

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94. Id. at 26.
95. Davidson, supra note 64, at 214.
97. The National Football League used a big bucks lobbyist to ram through Internet gambling-curbing legislation in the final minutes of the legislative session, sources revealed. But opponents of the bill charge that the NFL broke the rules when it fast-tracked legislation that never even got a vote in the Senate—a trick play that provided a big exemption for fantasy football.
that “bet or wager” does not include a number of things. Among the things not included as a “bet or wager” are the following:100

The participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization (as those terms are defined in section 3701 of title 28) and that meets the following conditions:

(I) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.

(II) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.

(III) No winning outcome is based—

(aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or

(bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.101

The UIGEA marks the first time that Congress has included an explicit fantasy sports exemption in any federal antigambling statute. This bill helps to ease concerns over fantasy sports while the government is still cracking down on websites that offer gambling.102 The UIGEA puts [the] fantasy sports industry overall in a far safer legal position than online poker, sports books, and many other types of online contests that involve both chance and skill. Nevertheless, this federal carve-out does not necessarily insulate all forms of fantasy sports games that currently appear on the Internet. Each fantasy game must be reviewed separately under the carve-out.103


The UIGEA exception for fantasy sports does not make fantasy sports legal because they may still violate other state or federal laws; it merely guarantees that the government will not prosecute fantasy sports under the act.® Because this bill was passed well before daily fantasy sports entered the equation, it is unclear what kind of protection daily pay-to-play fantasy sports would enjoy under the UIGEA.

IV. State Laws

The Tenth Amendment of the United States Constitution permits individual states to regulate gambling. Gambling-related activities are regulated in all fifty states as well as the District of Columbia.® Because multiple federal laws do not apply to fantasy sports, state gambling law will be the most important for fantasy sports sites to consider.® Scholars have suggested that an analysis of state law is more important for determining the legality of fantasy sports for two reasons, “First, most federal gambling laws were enacted to help states enforce their own gambling laws.”® Second, “given the complimentary or supplemental nature of federal gambling laws to state gambling laws, those that first look to the federal laws can sometimes miss the larger theoretical framework underlying these federal laws.”®

Most states maintain explicit carve-outs that protect activities that would otherwise be illegal under gambling laws, such as stock and other securities trading.® Daily fantasy sites believe they are offering a legal product and believe that this type of carve-out protects them.® Even though daily fantasy sites may believe that they are legal, they have refrained from making pay-to-play daily fantasy available to citizens in certain states. For example, FanDuel stated that “the states where our lawyers believe the law is unclear or questionable about the legality of fantasy sports are Arizona, Iowa, Louisiana, or Montana. Therefore we do not offer paid entry games to residents of those states.”® This

104. Cabot & Csoka, supra note 98, at 1201.
105. Thompson, supra note 93, at 33.
108. Id.
110. FanDuel states: “Fantasy sports is considered a game of skill and received a specific exemption from the [UIGEA]. FanDuel uses exactly the same rules as any other season long fantasy sports game, the only difference is that our games last only a day or one week.” The Daily Fantasy Sports Industry, supra note 21.
111. Id. Additionally, DraftKings states, “The US Government and 45 of the 50 states consider fantasy sports a game of skill.” See also Frequently Asked Questions, DRAFTKINGS, https://www.draftkings.com/help/faq (last visited Jan. 28, 2015) (“We do not allow residents of
suggests that the key to determining whether or not daily pay-to-play fantasy is legal requires examining the laws of the states.

A. Gambling Generally

There are three elements of an illegal lottery under common law: “(1) the distribution of prizes, (2) according to chance, (3) for a consideration.”112 In most fantasy sports contests there is an entrance fee, and the top players win prizes, satisfying the first and third requirement; therefore, the second factor, chance, controls the outcome of legality in most states.113 The predominant state test is the dominant element test; however, other states have their own unique tests as well. An analysis of multiple state tests follows below.

B. The Majority View—The Dominant Element Test

In the majority of states “the test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game.”114 This test is often called the dominant element test. In order to determine whether an activity constitutes gambling depends on the answer to two questions: “Is the result of an activity separable from the element of chance, so that skill can be determinative, at least in some cases? Or is the result always sufficiently affected by the operation of chance that chance could always account for the result?”115

On first glance, the chance versus skill distinction required for the dominant element test seems easy; however, these ideas are very hard to apply, especially in the context of something as complex as daily fantasy sports.116 For example, even courts that have attempted to apply this analysis have reached vastly different conclusions on whether games like poker and backgammon are games of skill or chance.117 The approach being used by most courts applying the dominant element test is to try and subjectively determine if the outcome of a given game is controlled by mere chance or factors that the participant is able to control.118

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112. Bowell, supra note 102, at 1263.
113. Id.
114. Holleman, supra note 62, at 70.
115. Id.
116. Bowell, supra note 102, at 1265.
117. Id.
118. Id.
Although no court has ever examined fantasy sports under the dominant element test, “several courts have held that chance was the dominant factor in determining the outcome of contests in which participants predicted the outcome of a pool of football games.”\textsuperscript{119} In Seattle Times v. Tielsch, the Washington Supreme Court found that chance factors such as the “weather, the physical condition of the players and the psychological attitude of the players” were an integral part of the game and thus dominated the outcome of the pool.\textsuperscript{120} Accordingly, the court held that the football pools were chance-dominated, making them illegal lotteries under state law.\textsuperscript{121}

A court ruling that football pools are games of chance may seem problematic for daily fantasy sports sites; however, there are important differences between daily fantasy sports and game picking pools. One of the first issues is that the pool utilized a predetermined point spread.\textsuperscript{122} This “designated point spread or ‘line’ [was] designed to equalize the odds on the two teams involved, which injected a further factor of chance.”\textsuperscript{123} Daily fantasy sports provide no such equalizer. Additionally, these pools require participants to submit predictions by an early deadline, whereas daily fantasy sports allow players to make changes to their roster up until the game starts.\textsuperscript{124} The ability to make changes helps daily players adjust to breaking news, weather conditions, or last minute injuries, thus injecting the skill of monitoring what is happening before the game begins and adjusting accordingly.

C. Minority Views—A Review of Different State Policies

Although the dominant element test may give fantasy sports more protection, daily fantasy sports may face a far greater risk of liability in states that have adopted a different test.\textsuperscript{125} This Part will examine some of

\textsuperscript{119} Id.
\textsuperscript{121} Bowell, supra note 102, at 1265-66.
\textsuperscript{122} Id. at 1266. Bowell explains how a point spread works, stating, “[F]or example, if a stronger team were favored to beat a weaker team by a point spread of seven points, the contestants would have to decide not only whether the stronger team would win, but also whether it would win by more than seven points.” Id.
\textsuperscript{123} Id.
\textsuperscript{124} Id. at 1267.
\textsuperscript{125} Edelman, supra note 1, at 30.
the minority views and how they would affect daily fantasy sports host sites.

1. Contract Law Consideration

One minority approach used in some states applies the true contract-law meaning of consideration. States that have taken this approach include Delaware, Kansas, Michigan, Ohio, Wisconsin, Washington, and Vermont. Under this approach, “the gambling—law element of ‘consideration’ is met, even absent an entry fee, so long as the contest participant expends substantial time or effort that benefits the contest’s host in some way.” Under this approach even free fantasy sports leagues could face prosecution. This approach is especially problematic for daily pay-to-play leagues, because an entry fee would certainly constitute legal consideration.

2. The Any Chance Test

Another minority approach is called the “Any Chance Test.” States that follow this approach include Arkansas, Iowa, and Tennessee.

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126. Id. at 31.
127. Id.
128. See, e.g., Affiliated Enters., Inc. v. Waller, 5 A.2d 257, 261 (Del. Super. 1939) (finding that registering and appearing at a drawing is sufficient to constitute consideration because the attendance was bargained for).
130. See Sproat-Temple Theater Corp. v. Colonial Theatrical Enters., 267 N.W 602, 603 (Mich. 1936) (finding that even though entrance to the contest was free, there is no consideration because the contest attracted people to attend an event who might not have otherwise attended).
131. See Kroger Co. v. Cook, 244 N.E.2d 790, 797 (Ohio Ct. App. 1968). The court found that the element of “consideration” may be met even when entering a free contest merely based on the advertising benefits derived by the contest’s host.
132. See ex rel. Regez. v. Blumer, 294 N.W. 491, 492 (Wis. 1940) (defining “consideration” as “the disadvantage to the one party or the advantage to the other” and holding that traveling to a location in order to fill out a free entry form for a prize satisfied this definition).
134. See, e.g., State v. Wilson, 196 A. 757, 758–59 (Vt. 1938) (noting that in Vermont, even if all participants do not pay an entry fee, the element of consideration is met as long as some participants do).
135. Id. at 31.
136. See id.
137. Id.
139. See Parker-Gordon Importing Co. v. Benakis, 238 N.W. 611, 613 (Iowa 1931) (noting that Iowa gambling law finds it irrelevant whether a particular game is predominantly based on chance or skill). But cf. H.B. 2383, 85th Gen. Assem., 2d Sess. (Iowa 2013) (pending legislation
Under this test, fantasy sports sites face great risks because states that follow this approach “interpret the element of ‘chance’ as outlawing games that require any chance.” Commenters have suggested that under this test any form of fantasy sports would involve some aspect of chance. As discussed previously, Iowa is often one of the states whose residents daily fantasy sports sites do not allow to play; however, it is interesting that individuals from some of these other states are not prohibited by daily fantasy sports host sites as well.

3. Attorney General Advisory Opinions

Another grouping involves states where the respective attorneys general have examined fantasy sports and already issued advisory opinions that deter individuals from participating in certain games. Two such states include Florida and Louisiana. These decisions certainly call into question the legality of fantasy sports in these states. Recall that Louisiana is one of the states whose residents are not allowed to participate in daily sports leagues. Although it may seem to be illegal in Florida as well, larger fantasy providers, like CBS and Yahoo!, have

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140. See TENN. CODE ANN. § 39-17-501 (2014) (defining “gambling,” subject to a number of exceptions, as “risking anything of value for a profit whose return is to any degree contingent on chance”).

141. Edelman, supra note 1, at 31.

142. Id. at 31-32 (“[E]ven the most intricate fantasy sports game involves at least some level of chance with respect to weather conditions and player injuries.”).

143. See Frequently Asked Questions, supra note 111. But see Edelman, supra note 30 (“Sports Illustrated has disallowed participants from entering its contests in eight states—Arizona, Arkansas, Florida, Louisiana, Montana, Oklahoma, South Carolina and Washington. Nevertheless, Sports Illustrated game does not currently block users in Iowa.”).

144. Edelman, supra note 1, at 32.


146. In Louisiana, an Assistant Attorney General issued a statement, which stated that a commercial fantasy sports game with prizes, which was entered into by the participants dialing a 1-900 telephone number that charged a fee of $2.00 per minute, violated Louisiana’s state gambling law. See La. Op. Att’y Gen. 91-14 (1991), available at 1991 WL 575105; LA. REV. STAT ANN. § 14:90(A)(1)(a) (2014) (“Gambling is the intentional conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit.”); Jan Moller, Bill To Legalize Online ‘Fantasy’ Sports Games Dies in House, TIMES-PICAYUNE (May 10, 2010), http://www.nola.com/politics/in dex.ssf/2010/05/bill_to_legalize_online_fantas.html.
offered season-long pay leagues for a long time without any issues.\textsuperscript{147} At this point, daily pay-to-play sites should continue to avoid Louisiana and allow players to play in Florida unless there are any changes in the way each state enforces its laws.

4. States with Adverse Laws

Another grouping of minority states that put fantasy sports at a greater risk of liability include Arizona and Kansas, “because these states call into doubt the legality of certain fantasy sports games on their state websites.”\textsuperscript{148} In Arizona, the Department of Gaming Guide to Off-Reservation Gambling states, “[F]antasy sports team games are illegal if the host of the event receives a fee for services provided or if all the pooled money doesn’t go back to the participants.”\textsuperscript{149} The main takeaway from this proclamation is that any fantasy sports contest where the host collects a rake, a percentage of the pooled money or entry fees, then the fantasy contest would violate state law.\textsuperscript{150} In Kansas, the Racing and Gaming Commission website states that “as with any other illegal gambling matters, if a fantasy sports league involves the elements of (1) prize, (2) chance, and (3) consideration, then it is an illegal ‘lottery’ prohibited by Kansas criminal law.”\textsuperscript{151} The Commission believes that in any fantasy sports league with a buy-in offering players a prize, chance is the dominant factor, and the game is illegal.\textsuperscript{152} Thus, in both Arizona and Kansas, most fantasy games, especially those played for money, are illegal.\textsuperscript{153} This same analysis would likely apply to pay-to-play daily fantasy sports as well.

5. The Montana Approach

The state of Montana has a much different approach, and some scholars suggest that it is a potentially more insightful way to analyze the legality of fantasy sports games.\textsuperscript{154} Under Montana law, “it is lawful to conduct or participate in a fantasy sports league as long as no wagers

\textsuperscript{147} Marc Edelman, \textit{Is It Legal To Play Fantasy Football for Money?}, FORBES (Sept. 3, 2013, 9:32 AM), \url{http://www.forbes.com/sites/marcedelman/2013/09/03/is-it-legal-to-play-fantasy-football-for-money/}.

\textsuperscript{148} Edelman, \textit{supra} note 1, at 32.

\textsuperscript{149} Id. (citing AZ. DEP’T OF GAMING, GUIDE TO OFF-RESERVATION GAMING (n.d.)).

\textsuperscript{150} Id.


\textsuperscript{152} Id.

\textsuperscript{153} Id. at 33.

\textsuperscript{154} Id.
take place by either the telephone or Internet.”

Although season-long fantasy leagues amongst friends could potentially be legal, pay-to-play daily leagues that occur over the Internet would not stand up under this law. This clear violation of state law is why both FanDuel and DraftKings prohibit Montana residents from participating in their pay-to-play daily fantasy leagues.

V. Skill versus Chance

Although some state laws explicitly block daily pay-to-play fantasy games, the skill versus chance analysis is still crucial to determining the validity of daily fantasy games in states where the issue is less clear. Daily fantasy sports host websites contend that they are legal games of skill rather than illegal games of chance. The analysis that follows will provide support to that belief.

Many of daily fantasy’s top players also emphasize the skill aspect involved in playing daily fantasy sports. For example, consider Drew Dinkmeyer, who before playing fantasy sports professionally worked as a senior investment analyst for seven years. Dinkmeyer’s move has drawn scrutiny from some who began to question his decision. Dinkmeyer states, “The first question is, ‘Oh, so you’re a professional gambler?’” Dinkmeyer went on to say that he tries to draw the distinction because the fantasy industry is sensitive about daily fantasy sports “being completely legal where online poker right now isn’t in most places. It’s very similar to anybody doing day-trading in that any single day can be really bad, but over the long term you enhance the sample sizes and if you do have skill, it usually will show up.”

As discussed above, most courts distinguish between legal and illegal gambling by determining if skill or chance is the dominant factor in the outcome of the contest. “Skill” has been defined as the exercise of “sagacity upon known rules and fixed probabilities where sagacity includes keenness of discernment or penetration with soundness of
Daily fantasy sports players must utilize good judgment and be able to appreciate the significance of a great deal of data including player statistics, weather conditions, offensive strategies, matchups, and valuation of players in order to be successful. Being able to make sense of the multiple variables involved is truly an act of skill.

One of the biggest issues for daily fantasy sports is trying to judge the amount of skill involved. Even if a court could quantify the level of skill in any particular fantasy sports game, states require varying amounts of skill to prevent a game from being considered illegal gambling. This lack of clear guidance makes it difficult for some daily fantasy sites to act with confidence.

The predominant view, although somewhat controversial, is that season-long fantasy sports are games of skill. This makes the case for daily fantasy sports stronger because there are some important similarities between daily and traditional season-long fantasy sports. Even with the similarities, some commentators worry that daily fantasy sports contests will not as easily fit into the same classification as traditional fantasy sports and may face higher hurdles.

Season-long fantasy sports are legal even though it is unquestionable that there is some luck involved. The dominant factor for success in season-long fantasy sports is the skill required to draft and manage a winning team. There may be certain chance elements involved, but part of a player’s skill is “recognizing and adjusting to those chance occurrences.” For example, “a fantasy football player can study offensive coordinators’ techniques, evaluate who gets the ball more often—wide receivers or running backs—or study a quarterback’s performance.” These are all illustrations of how a fantasy player can use his/her skill to give him/her a better probability of winning. This type of analysis and planning is common in daily fantasy sports as well.

Supporters of season-long fantasy sports argue that “the skill elements are found primarily in three separate aspects of the game:

163. Thompson, supra note 93, at 34 (citing 38 AM. JUR. 2D Gambling § 4 (2015)).
164. Levy, supra note 61, at 34.1
166. Bowell, supra note 102, at 1270.
167. Id.
168. Id.
drafting, playing, and trading players.”

Those arguing in favor of fantasy sports believe that the display of skill starts at the draft—this is where the season begins, and often a player’s success is based off the success of his or her draft. Most fantasy leagues have multiple teams, but once a player is drafted to a team, no other team can pick that same player. Players must be careful to select quality starters and back-ups to fill each fantasy position. This requires fantasy players to assess the value of each player and even come up with a strategy for putting together their team. This process requires a great deal of time and effort and “is not unlike the process that general managers of major league teams must undertake in accessing player talent and constructing a team that maximizes the talent within a given payroll.”

There are some who argue that forming a new team each week is more difficult and thus adds more skill to the daily fantasy sports context. Season-long fantasy leagues often utilize a snake draft, which forces players to create a balanced team. Even if you decide to load your roster with a certain position, “the overall quality of your players in relation to other teams will be pretty even. There won’t be a major deviation there; you’ll have elite players, mid-tier guys, and sleepers.” This effectively eliminates some of the strategy involved for the draft. Daily fantasy sports and its use of a salary cap provides players with much more flexibility in how they choose to assemble their team and also introduces economic analysis including the ability to implement a high-low theory.

Daily fantasy sports players can choose to draft a team full of average players or can pick multiple elite talents—the equivalent of multiple first-round quality picks—with low-priced players or any combination of player values they would like in order to reach their budget. Daily fantasy sports create options for players that just are not available for season-long players. This extra flexibility in creating a team “drastically changes how you approach your research and strategy,” making preparing for a daily fantasy game a laborious process.

In order to have a competitive team, a season-long player must continue to monitor players even after the draft and must be able to take into account factors such as injuries, match-ups, trades, or other

170. Cabot & Csoka, supra note 98, at 1208.
171. Cabot & Csoka, supra note 98, at 1208.
172. Bowell, supra note 102, at 1270.
174. Bales, supra note 55.
175. Id.
176. Id.
177. Id.
occurrences that may impact the value of any given player and how they will perform in the games. The process of managing a team is time-consuming and often involves a great deal of research from multiple different sources. Proponents argue that “the existence of significant literature on fantasy sports, the valuation of players, and strategies for playing, attest to at least the assertion by those that participate that skill is a critical element to the game.”

If something happens that decreases the player’s value on the team, like a player getting injured or benched, the participant may respond by benching, dropping, or trading that player. Trades are one of the things that make season-long fantasy leagues unique. There are multiple skills required of a trade negotiator, including “understanding the other team owner’s needs, overall strategies, the impact of the trade on both teams, and simply good trading skills (including bluffing).” Just like in the real world, a good deal is often the result of skillful negotiations and not random chance.

Although daily fantasy sports do not include trades, they do include the same team management and research principles that are found in season-long fantasy sports. In fact, managing a team for a daily fantasy game is often more time consuming and difficult than it is for season-long leagues. In season-long leagues, your starting lineup choices are often relatively easy to make because “you really need to make just a decision or two per week because your available player pool is confined to your particular team.” Daily fantasy sports players do not have this luxury, and because you can select any player in the league, they are essentially starting from scratch. This is very important because it “dramatically alters: 1. How you approach building your lineup [and] 2. How much research you need to do.” Because of the continuous work involved to be a successful player, there is a strong argument that daily fantasy requires more research, planning, and thought than traditional season-long leagues.

Additionally, some argue that the skill required to play in a season-long league may have been overstated. Consider that the average fantasy sports player may do very little. A disinterested player could pay the league fee, utilize an automatic draft feature, and not monitor their team.

178. Bowell, supra note 102, at 1270.
179. Cabot & Csoka, supra note 98, at 1209.
180. Bowell, supra note 102, at 1270.
182. Bales, supra note 55.
183. Id.
184. Id.
or make the required roster moves and just wish for the best.\textsuperscript{185} This argument, however, is not applicable for daily fantasy sports, because players cannot auto-draft their teams. At the very least, daily leagues require players to go online and choose their teams before each contest. As discussed above, this is a laborious process that requires a great deal of time and effort. This display of skill is required every time an individual wants to participate in a daily fantasy sports contest.

Daily fantasy sports also create another way for players to show their skill through managing their bankroll.\textsuperscript{186} Managing bankroll is about assessing risks and deciding what kind of games to play and when to play them. Most basic players focus on Double-Ups and head-to-head games because players have a 50\% chance of winning in each game.\textsuperscript{187} It is important to note that even amongst these games there is some degree of variance, and Double-Ups are slightly more risky.\textsuperscript{188} More advanced players will often play in more GPPs, but most of them still mix all the different game types.\textsuperscript{189} GPPs usually only give payouts to the top 10\%-25\%, but instead of just getting back what a player puts in, GPPs allow players to earn multiple times their buy-in.\textsuperscript{190} Once players have a large enough sample size, they can then calculate their expected earnings and form a comprehensive strategy.\textsuperscript{191}

It has been said that one of the main things that separates recreational players from more serious daily fantasy players is learning to manage funds adequately.\textsuperscript{192} For most successful players, managing their bankroll is a mathematically driven event. Players often include the

\begin{itemize}
\item \textsuperscript{185} Levy, supra note 61, at 342.
\item \textsuperscript{186} stlcardinals84, Getting Your Bankroll Started, ROTOGRINDERS, http://rotogrinders.com/lessons/Getting_Your_Bankroll_Started-174289 (last visited Jan. 28, 2015) (defining bankroll “as the money an individual player can afford to lose before they are forced to stop playing for a period of time”).
\item \textsuperscript{189} Notorious, supra note 187.
\item \textsuperscript{190} bripc23, supra note 188.
\item \textsuperscript{191} Jon Bales, Overlay and +EV, ROTOGRINDERS, http://rotogrinders.com/lessons/Overlay_and_EV-209096 (last visited Feb. 8, 2015) (“If you’ve demonstrated a long-term 60 percent winning percentage in heads-up matches, for example, you expectation for any head-to-head league could be calculated with this simple formula: Expected Win Percentage = [Payout x .6]—[Buyin x .4]. If the site on which you’re playing” pays out $10 for every $11 entered, your expectation—or expected value, to borrow a term from probability theory—would be $1.60. That’s a 14.5% return ($1.60/$11.00).”).
\item \textsuperscript{192} Notorious, supra note 187.
\end{itemize}
following calculations in their bankrolls: “Profit Margins at Each Buy-In Level; Profit Margins for Each Sport; Profit Margins for Each League Size; and Average Scores, Buy-Ins and Winnings for Each Sport.” These statistics enable players to see what games they are successful in and how to maximize their daily fantasy playing experience. This level of analysis is not required in season-long fantasy sports where players pay one entry fee at the start of the season. The act of effectively managing your bankroll is a complex, skill-driven activity that is unique to daily fantasy sports.

Even though traditional fantasy sports are likely legal in a majority of states, unusual formats of fantasy sports that stray from the traditional skill-to-chance ratios present a greater risk. The most significant chance element is injury or other circumstances that would prevent a player from performing. For example, if a person’s best player gets injured early in the year, he or she is at a competitive disadvantage against other teams in the league. It is important to note that over the course of a season, there are multiple injuries, and many times the teams end up balancing out. The smaller the roster size or the shorter, the closer a fantasy sports contest comes to being considered a game of chance, because the smaller sample size could be greatly impacted by just one occurrence of chance, such as an injury. Additionally, Ryan Rodenberg, a sports law professor from Florida State University stated: “[A]n injury, a hailstorm or a ball bouncing strangely could affect a result. In this regard, playing daily fantasy seems very similar to placing a bet with a bookmaker. . . . On the spectrum of legality to illegality, they’re getting pretty close to the line.”

As discussed previously in this Part, daily fantasy sports require a great deal of skill and research, arguably more than season-long leagues. It is impossible to eliminate all chance or luck from almost anything, especially fantasy sports. But this fact alone does not render daily fantasy sports illegal. In fact, there is a great deal of skill involved, as a successful daily fantasy player “must know more than simple depth charts and statistics to win; they also must take into account injuries,

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194. Id.
196. Cabot & Csoka, supra note 98, at 1210.
197. Edelman, supra note 147.
coaching styles, weather patterns, prospects, home and away statistics, and many other pieces of information.”

Due to the predominant skill required, daily fantasy sports should receive protection under the UIGEA and most state laws. Rodenberg raises multiple issues, but they seem to be overstated. For example, “injuries are such a random, low-frequency event that they’re difficult to predict even on a season-long scale.” Additionally, as previously mentioned, daily fantasy players have the ability to make changes right until game time, giving them the chance to adjust to changes in weather conditions and last minute injuries that someone placing a bet may not be able to do. Lastly, it is possible that a strange bounce could change the result of a single game, but in daily fantasy you pick players from multiple teams and do not depend on the outcome of any game, just player statistics. There is no debate that a freak injury, an unexpected change of the weather, or an unbelievably unlikely event may occur during any given game, but that does not negate the skill involved in building a successful daily fantasy team. Part of the skill element is trying to gauge uncertainty and use it to your advantage. Additionally, Rodenberg’s comparison of playing daily fantasy sports to betting with a bookmaker is misguided. Just like in the football betting pools discussed previously, the lack of an equalizer, like a spread, in daily fantasy is a huge difference from betting with a bookmaker.

Some argue that the odds of winning, and not how the game is played, are what make daily fantasy sports a game of chance. The most popular type of daily fantasy game is the GPP. As discussed above, GPPs are large field, multientry events, with only a few players winning a prize. Commentators have suggested that when you compete in the large-stake, multientry events against thousands of participants, the outcome of the contest is partially dictated by luck. There is arguably some luck involved, however.

The highest level competition of fantasy sports games routinely sees top players win games more frequently than if the contests were random or highly based on chance. It is a pattern that has been repeated with many fantasy sports contests and competitions: the highly skilled fantasy player wins more frequently.

200. Bales, supra note 55.
201. See supra note Part III (B).
202. See supra note Part I (C).
203. Bales, supra note 7.
204. Why Fantasy Sports Is Not Gambling, supra note 63.
In fact, some people are so successful that daily fantasy has become their main source of income. DraftStreet CEO Brian Schwartz argued that playing daily fantasy sports is a skill job and people are willing to quit their jobs because, “the more time you can spend doing your research and coming up with the best strategy the better you can do.” There seems to be plenty of evidence to suggest that daily fantasy sports are a game of skill, but ultimately the Court or Congress will need to provide more guidance.

VI. PUBLIC POLICY ARGUMENTS

Daily fantasy games are still fighting the stigma that they are closely related to gambling. This is important because there are many public policy concerns with gambling. When passing laws that create both criminal and civil consequences for participating in illegal gambling, most legislators argue that gambling is a detrimental activity with many negative consequences. The negative consequences cited by most gambling opponents generally include: increased crime rates, economic loss, and erosion of morality. This Part will show how many of the public policy concerns raised against gambling are inapplicable to daily fantasy sports as well as offer some examples of the positive benefits of playing daily fantasy sports.

A. Arguments for Prohibition

1. Economic Impact

For traditional season-long fantasy sports, supporters argue that fantasy sports do not negatively impact the economy or result in higher crime rates due to gambling debt. Many leagues offer players the chance to join for a nominal fee, and some even offer free games. Unlike traditional bettors, fantasy sports players are normal fans who treat fantasy football as a hobby rather than to make money.

Many fantasy players play for nonmonetary reasons; however, this may no longer be the case for some daily fantasy players. As discussed

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206. DiFino, supra note 6.
208. Davidson, supra note 64, at 221.
209. Thompson, supra note 93, at 40.
210. Id.
211. Holleman, supra note 62, at 76.
above, some people are quitting their jobs to focus on daily fantasy sports full-time.\footnote{212. Bales, supra note 7.} Daily fantasy payouts are growing exponentially larger. For example, there are multiple players who have grossed over $1,000,000 in daily games. Additionally, at the end of 2013, three players won million-dollar prizes from the daily fantasy sports sites FanDuel, DraftKings, and DraftStreet.\footnote{213. Id.} This is up from the first million-dollar payout that occurred in 2012. As the industry continues to grow, it seems logical that the payouts will grow as well. Daily fantasy sports at their highest echelon are not the same low-stake leagues as a group of old college friends playing together. But at the same time, it seems unlikely that daily fantasy sports would ever reach the levels of traditional betting, and there are only a small group of players who are consistently playing in high-level games. Daily fantasy sites continue to offer free games, and there are always multiple games for as low as $1 to $10. For the majority of people who play fantasy sports, even of the daily variety, the game remains a way of engaging with their favorite sports and competing with friends.\footnote{214. Why Fantasy Sports Is Not Gambling, supra note 63.}

Another way daily fantasy sports influence the economy is through workplace productivity. Employers fear increased access to fantasy sports will lead to employees devoting more time to their fantasy teams and thus cause potential losses in workplace productivity.\footnote{215. Vecchione, supra note 100, at 1698.} Researchers have estimated that employees playing fantasy sports have cost employers $6.5 billion per year based on each player devoting an hour a week managing their teams.\footnote{216. Drew Guarini, Fantasy Football Costs Employers Upwards of $6.5 Billion, HUFFINGTON POST (Sept. 4, 2012, 5:58 PM), http://www.huffingtonpost.com/2012/09/04/fantasy- football-costs-employers_n_1855492.html (“After taking unemployment into account, Challenger, Gray & Christmas estimates that 22.3 million employed fantasy football owners spend at least an hour a week managing or tweaking their rosters—a conservative estimate. According to the U.S. Bureau of Labor Statistics, $19.33 is the average hourly wage, so that comes out to $430.9 million per week lost, or $6.5 billion across a 15-week fantasy season.”).} This lack of workplace productivity leads to fantasy sports participants’ “potentially heightened risk of unemployment and bankruptcy.”\footnote{217. Edelman, supra note 1, at 53.} These statistics may seem alarming; however, it is important to realize that people waste time at work in many different ways. “Whether it’s web surfing, engaging in personal phone calls, searching for new job opportunities, gossiping by the water cooler, shopping online, exploring social networks or checking personal email, a great deal of working time
slips away. Of all workplace distractions, the Internet is the greatest productivity drain. It is impossible for employers to completely ban employees from being unproductive during the workday, especially when one considers that 64% of employees visit a non-work-related website in the course of the workday. Out of these employees, over 60% of them spend over an hour on non-work-related sites per day, with 11% spending a whopping six-plus hours a day on non-work-related sites. Employee unproductivity at work is a problem, but to blame it entirely on employees playing fantasy sports is not accurate.

2. Criminal Activity

One of the biggest problems associated with gambling and the introduction of a casino into an area is the increase of criminal activity that accompanies it. Daily fantasy may not lead to new casinos, but it can, at its highest levels, lead to a lot of money being wagered, which can in turn cause a rise in crime rates. Traditional season-long fantasy sports contests tend not to involve great amounts of money and arguably would not have any effect on crime rates. Although the Internet’s abundance of fantasy sports leagues could arguably present a troublesome atmosphere for compulsive gamblers, fantasy sports leagues do not fit the profile of dangerous activity.

Some have argued that fantasy sports do not entice players into wagering a lot of money in hopes of a quick payout and, therefore, do not cause the social problems that have historically been cited when Congress passes antigambling laws. This argument may fail for daily games though. A compulsive gambler can play nightly depending on the sport and the time of year. Unlike season-long sports that require a long wait, the instant nature of daily fantasy sports leads to a much larger issue for compulsive gamblers; however, due to the work required to produce a competitive daily fantasy team, it can hardly be called a “quick buck.” There is a lot more involved in picking a team for fantasy than calling a bookie to place a bet on a game.

219. Id.
220. Id. The amount of time wasted per week on non-work-related websites is as follows: Time Wasted (Pct of Employees); <1 hour,(39%); 1-2 hours, (29%); 2-5 hours, (21%); 6-10 hours, (8%); 10+ hours, (3%). Id.
221. Davidson, supra note 64, at 222.
222. Id.
223. Holleman, supra note 62, at 79.
Another reason that betting on sports has been frowned upon is the effect of fixing games and point spreading through organized crime. Many argue that “fantasy sports contests do not involve the type of gambling operation that appeals to organized crime.” Additionally, because season-long fantasy runs during a long season made up of many games, there is no logical incentive to utilize bribes because it would likely have little impact on the league.

These arguments may work for season-long fantasy where “[p]rizes often involve merchandise, not cash. Furthermore, criminals would probably choose a gambling operation that gives quick payouts, rather than wait until the end of the sports season.” Daily fantasy sports, however, become much more appealing now with its larger payouts and instant gratification. At this point, however, there is no evidence that daily fantasy players have participated in match fixing. Additionally, match fixing is typically used to impact the outcome of a single game that is being bet on. In daily fantasy sports, the outcomes are based on multiple players’ performance over different games rather than the outcome of one specific game. It would be extremely difficult to be able to influence enough players to change their performance enough to ensure the required outcome. Therefore, even though daily fantasy sports involve great deals of money, it seems like an unlikely target for match fixing.

3. Erosion of Morality

Gambling opponents also argue that gambling erodes the morality of a society because it “is an inappropriate use of welfare funds, leads to higher suicide rates, and causes anxiety.” These concerns are not applicable to fantasy sports leagues; however, some individuals still want to keep minors out of fantasy sports fearing it may lead them into illegal gambling. It seems that offering access to a legal activity like daily fantasy sports may discourage young people from getting involved in illegal gambling in the first place.

Compulsive gambling can have multiple effects on the lives of families. Gambling hurts families in many ways including: money

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224. Davidson, supra note 64, at 221.
225. Thompson, supra note 93, at 30.
226. Davidson, supra note 64, at 221.
228. Davidson, supra note 64, at 224.
229. Id.
problems that may result if the gambler finances his or her habit with family savings or property, emotional problems and isolation due to the stigma of being a gambler, and physical and mental issues caused by stress and anxiety.\footnote{230} Gambling also leads to the physical and emotional abuse of others, and domestic violence is more common in families with a compulsive gambler.\footnote{231} Gambling can also impact the children of the family; for example, the child may feel forgotten, angry, or depressed and may act out to try to draw attention away from the gambling problem.\footnote{232}

Gambling obviously creates many moral and societal problems, but nothing indicates that playing daily fantasy sports will lead to the same negative outcomes as traditional forms of gambling. As previously discussed, the typical fantasy sports player plays for reasons not related to money. Even though more and more people are beginning to put money into fantasy football, there is no evidence that they suffer a harmful and destructive addiction like gambling.

\textbf{B. Arguments Against Prohibition}

In addition to not causing the societal ills that are associated with gambling, participation in daily fantasy sports actually has some positive benefits. First of all, playing fantasy sports may deter people from participating in illegal sports gambling. It is only logical that when faced with an illegal activity or a legal alternative, people will overwhelmingly opt for the legal one. As discussed above, fantasy sports vary in many ways from betting on the outcome of a specific game, but they may appeal to some who would otherwise be engaged in illegal gambling.

Fantasy sports also have positive economic outcomes. As a large and growing business, fantasy sports leagues provide revenue for the private sector. Therefore, the government could tax the profits made by private businesses and use the funds for desirable programs.\footnote{233} Data also suggests that playing fantasy sports can help people advance their careers. Certain traits gained through playing fantasy sports, like scouring through data, looking for players with upsides, and playing the game without fear can actually help people be better in the business

\begin{footnotesize}
\footnote{230}{The Effects of Gambling, PROBLEM GAMBLING INST. ONT., http://www.problemgambling.ca/EN/AboutGamblingandProblemGambling/Pages/TheEffectsOPGambling.aspx (last visited Feb. 8, 2015).}
\footnote{231}{Id.}
\footnote{232}{Id.}
\footnote{233}{Davidson, supra note 64, at 225-26.}
\end{footnotesize}
world. Not only does playing fantasy sports help those who play, but it also helps the professional sports leagues. For example, NFL viewership has risen alongside fantasy sports by getting more fans to watch games that they would not have watched before. Playing fantasy sports are a fun activity that do not contain the negative traits of gambling and are actually beneficial to those who play as well as to third parties who benefit.

VII. CONCLUSION

This Article has set out to provide a framework for analyzing pay-to-play daily fantasy sports under the context of current federal and state laws. Although this would be an area of first impression for many courts, some inferences can be drawn from this review. Most of the historic federal laws that combat gambling are of little consequence to daily fantasy sports sites. Under the UIGEA, season-long fantasy sports are given legal protection, and there is no reason to believe that this protection would not extend to daily fantasy sports.

Under the various state laws, the answer is less concrete and does vary; however, in the majority of states daily fantasy sports are protected as games of skill. Some may contend that luck is still heavily involved with success in daily games, but long-term statistics validate the fact that more skilled players who devote more time to research and other planning consistently outperform other players, thus showing their skill. Compare this to the stock market, where even the best analysts are unable to beat the market, and the skill of these fantasy players becomes more evident.

The public policy concerns levied against fantasy sports are also overstated. Many of the concerns are more applicable to tradition gambling and sports betting than they are to daily fantasy games. There is no evidence that suggests that playing daily fantasy sports has any of

236. “[P]rofessionals, who are supposed to have the skills, staff and connections necessary to beat the relevant stock indexes against which they are compared. While about half of fund managers best their indexes (before fees) in any given year, very few do so consistently.” Jill Schlesinger, You Can’t Beat the Market, so Stop Trying, CBS NEWS (July 5, 2012, 4:53 PM), http://www.cbsnews.com/news/you-cant-beat-the-market-so-stop-trying/.
the negative effects associated with illegal gambling. Lastly, there can be positives derived from daily fantasy sports, especially economically.

As daily fantasy sports continue to grow and the general public becomes more informed, most of the negative stigmas will begin to wear off. Daily fantasy sports offer a new, legal, and exciting way to participate in one of America’s growing pastimes. Soon consumers can expect even more sites to fully join the daily fantasy craze and offer daily fantasy contests. Although they have yet to face a direct legal challenge, pay-to-play daily fantasy sports should be presumed to be legal, and signs indicate that courts would uphold their legality.