

BATMAN AND TWO VERY LARGE JARS OF MAYONNAISE: THE LOOMING CLASH OF DAILY FANTASY SPORTS AND TRIBAL GAMING

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I. INTRODUCTION

On April 18, 2016, the Connecticut Attorney General, George Jepsen (“Jepsen”), released a letter regarding the potential impact of daily fantasy sports (“DFS”) legislation on Connecticut’s revenue sharing agreement with two different Native American tribes. Ultimately, Jepsen concluded “there is a substantial risk that the passage of such [DFS] legislation could jeopardize the State’s revenue-sharing arrangements with the Tribes.”¹ Based on the revenue that is generated from tribal gaming in the state of Connecticut, such caution is likely prudent. The Mashantucket Pequot’s Foxwoods Casino and Resort and the Mohegan Sun in Connecticut are among the most lucrative tribal casinos in the nation and gross in excess of one billion dollars. In the quarter that ended December 31, 2015, the Mashantucket Pequot Tribal Nation casino generated \$229.3 million in net revenue.² If Connecticut passed DFS legislation and the legislation infringed on the state’s revenue sharing agreement with the tribes, the tribal gaming revenue might be lost altogether. The concern of DFS implicating a revenue sharing agreement is not limited to Connecticut. In California, two influential Southern California tribes sent letters to state senators expressing concerns about DFS legislation;³ in Oklahoma, in-

[†] This Article is dedicated to Terry Moore, Jr. who unexpectedly passed away during the drafting of this Article. Terry was a friend and iconic member of the Omaha legal community. His enthusiastic personality and congeniality to everyone he encountered will forever be missed. The author serves as Deputy General Counsel at EHPV Management and can be contacted at bwessels@ehpv.com.

1. Letter from George Jepsen, Attorney General, State of Connecticut, to Senate President Martin Looney and Senate Majority Leader Bob Duff, Senators, State of Connecticut (Apr. 18, 2016), http://www.ct.gov/ag/lib/ag/opinions/2016/2016-03_fantasy_sports_contests.pdf.

2. *Mashtucket Pequot Tribal Nation reports gains in gaming revenue*, INDIANZ.COM (Feb. 12, 2016), <http://www.indianz.com/IndianGaming/2016/02/12/mashantucket-pequot-tribal-nat-2.asp>.

3. Jim Miller, *Powerful casino tribes raise concerns with California fantasy sports bill*, THE SACRAMENTO BEE (Feb. 10, 2016), <http://www.sacbee.com/news/politics-government/capitol-alert/article59647811.html>.

fluent tribes successfully opposed a bill that would have legalized DFS.⁴

As mentioned above, Jepsen was far from confident with his conclusion that DFS legislation would infringe on the state's arrangement with the tribes. In the opening paragraph of the letter, Jepsen stated that there is a "high degree of uncertainty" if DFS legislation would infringe on the revenue sharing agreement.⁵ In the last paragraph, Jepsen again hammered home this point, reiterating, "Nonetheless, no one can predict with any level of certainty how a court, if faced with these issues, would rule."⁶ Jepsen stated his uncertainty in both the introduction and conclusion of his letter, clearly wanting to underscore that his analysis was not definitive. Irrespective of the categorical legal questions, which are plentiful, there are a lot of reasons to *not* be confident when making predictions about DFS and tribal gaming.⁷ This Article will highlight some reasons for such hesitancy; however, even briefly examining DFS and tribal gaming in the abstract shows why confident rhetoric is unwise. DFS is the product of unpredictable technology,⁸ irrationality, fear, politics, and little jurisprudential analysis covering the subject.⁹ Throw in the decentralized nature of the internet, legalization being determined in a patchwork fashion by the states, historic levels of advertising, grandstanding politicians,¹⁰ competing interests of state lotteries, and a sports obsessed culture, and you have succinctly described the circus-like atmosphere surrounding DFS. Meanwhile, tribal gaming relies heavily on political actors, is the product of shifting public policy debates, is often the subject of sweeping misconceptions, implicitly involves racial tension, is

4. Lenzy Krehbiel-Burton, *CN, OIGA officials currently oppose fantasy sports gaming*, CHEROKEE PHOENIX (July 26, 2016), <http://www.cherokeephoenix.org/Article/index/10483>.

5. See Jepsen, *supra* note 1.

6. The Connecticut Attorney General was not even overly confident that it would be a federal court that would review it. The Connecticut Attorney General stated that it was "likely" that a federal court would review it. *Id.*

7. ROBERT NERSESIAN, *THE LAW FOR GAMBLERS* 9 (2016).

8. I. NELSON ROSE & MARTIN D. OWENS, *INTERNET GAMING LAW* 68 (2005). The authors state, "although it is possible to see the general trends and cycles in gambling, it is impossible to predict how exactly it will develop, because the games are dependent on so much technology." *Id.*

9. Garrett Greene, Comment, *When Fantasy Becomes Reality: Attempts to Regulate the Highly Unregulated Daily Fantasy Sports Industry*, 47 ST. MARY'S L.J. 821, 829 (2016).

10. See Mark Cuban, *Mark Cuban to politicians: Good luck killing fantasy sports*, USA TODAY: OPINION (Feb. 23, 2016), <http://www.usatoday.com/story/opinion/2016/02/22/fantasy-sports-industry-regulation-popularity-mark-cuban-column/80707312/>. Mark Cuban noted that two politicians, Eric Schneiderman and California Assemblyman Marc Levine have "sought to make a name for themselves by promoting efforts to ban daily fantasy sports in their respective states." *Id.*

uniquely rooted in the principles of tribal sovereignty,¹¹ and is governed by a nuanced and controversial regulatory scheme.¹² Furthermore, both DFS and tribal gaming are relatively recent phenomena and both heavily rely on politics. These factors contribute to this overall uncertainty, and likely, to Jepsen's reluctance to unequivocally conclude whether DFS legislation would infringe on Connecticut's tribal compact agreement.

Based on the variables above, it is no surprise that Wikipedia labels gaming law as "enormously complex."¹³ This label is found elsewhere too, as the term "complex" has been used to describe gaming law and the various niches within the industry.¹⁴ As an aside, it has been mused that the terms "complex" and "complicated" are erroneously defined synonymously, when they are in fact much different.¹⁵ Complicated issues can be explained by examining their individual parts, while complex matters cannot be compartmentalized because they are always greater than the sum of their parts.¹⁶ For example, a jet engine would be complicated, while mayonnaise would be complex.¹⁷ Examining the potential impact that DFS will have on tribal gaming is, metaphorically speaking, a lot of mayonnaise. As highlighted above, the looming collision of DFS and tribal gaming presents enough dynamic judicial, political, and social intangibles to likely humble even the most prominent of scholars.¹⁸ Whether or not DFS

11. Steven Andrew Light & Kathryn R.L. Rand, *Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy*, 4 NEV. L.J. 262, 265 (2004).

12. *Id.* at 264.

13. *Gaming law*, WIKIPEDIA, https://en.wikipedia.org/wiki/Gaming_law (last visited Jan. 15, 2017) ("Gaming law is enormously complex.").

14. Alan E. Brown, *Ace in the Hole: Land's Key Role in Indian Gaming*, 39 SUFFOLK U. L. REV. 159, 160 (2005) ("Along with impressive numbers, Indian gaming presents complex legal, social, and economic questions to tribes, states, and the federal government."); K. Alexa Koenig, *Gambling on Proposition 1A: The California Indian Self-Reliance Amendment*, 36 U. S.F. L. REV. 1033, 1045 (2002) ("Tribal gaming law represents an intricate web of federal and state law, made even more complex by tribal government sovereignty."); Benjamin Miller, *The Regulation of Internet Gambling in the United States: It's Time for the Federal Government to Deal the Cards*, 34 J. NAT'L ASS'N ADMIN. L. JUDICIARY 527 (2014) ("One will see that an industry as large and complex as Internet gambling demands an overarching federal regulatory system, especially in light of developing state regulation and the resulting regulatory inconsistencies."); Jeffrey S. Moad, *The Pot's Right: It's Time for Congress to Go "All in" for Online Poker*, 102 KY. L.J. 757, 759 (2014) ("The federal criminal law governing the Internet gambling industry in the United States consists of a complex web of ill-equipped statutes passed over several decades.").

15. ERIC WEINER, *THE GEOGRAPHY OF GENIUS* 201-02 (2016).

16. *Id.*

17. *Id.*

18. See Michael Shapiro, *2016 could be decisive year for daily fantasy betting*, SF-GATE (Jan. 5, 2016), <http://www.sfgate.com/entertainment/article/2016-could-be-decisive-year-for-daily-fantasy-6738124.php>. In this article, Professor I. Nelson Rose states,

will implicate tribal gaming revenue sharing agreements, as Jepsen's hedged analysis implies, is fraught with uncertainty. Beyond a declaration that there indeed will be some sort of interplay between DFS and tribal gaming, confident rhetoric with such high stakes should be kept to a minimum.¹⁹

II. DAILY FANTASY SPORTS

Part II of this Article establishes a backdrop for daily fantasy sports ("DFS") and is broken into three sections. The first section discusses the historical background and eventual rise of traditional fantasy sports. The second section details the creation of DFS and the plethora of controversies surrounding the DFS industry and the major DFS operators. The third and final section is more argumentative, positing that DFS will continue to see legalization for three reasons. While the Introduction cautioned against making predictions because of the complexity of the topics, it is an essential premise that DFS move toward legalization in order for DFS and tribal gaming to clash.

A. THE RISE OF TRADITIONAL FANTASY SPORTS

Recently, our society has become crazy for fantasy sports.²⁰ Although the popularity of fantasy sports has seen recent explosive growth, traditional fantasy sports have been around since at least the 1960's. The first fantasy sports league was played in New York and began thriving when the New York Times ran an article on the league.²¹ From there, fantasy sports' popularity grew, more rules were developed, and other sports were added.²² In 2006, traditional fantasy sports received some legitimacy when Congress passed the

"[m]aking predictions is always dangerous," but that the daily fantasy sports' powerful allies will lobby New York State Legislature to legalize their operations within the state. *Id.* As the foremost authority on gaming law, I. Nelson Rose's hesitance on making a prediction is noteworthy.

19. See Dan Primack, *Sorry ESPN, But DraftKings and FanDuel Didn't Explode*, FORTUNE: FINANCE (Aug. 24, 2016), <http://fortune.com/2016/08/24/sorry-espn-but-draftkings-and-fanduel-didnt-implode/> (criticizing Outside the Lines's predictions regarding the DFS industry, noting that DFS operators are continuing to see growth); see also Don Van Natta Jr., *Welcome to the Big Time*, ESPN: OUTSIDE THE LINES (Aug. 24, 2016), http://www.espn.com/espn/feature/story/_id/17374929/otl-investigates-implosion-daily-fantasy-sports-leaders-draftkings-fanduel.

20. See John Affleck, *What's behind fantasy football's surprising popularity*, FORTUNE (Sept. 12, 2015) <http://fortune.com/2015/09/12/fantasy-football-growth/>; Gregory Bresiger, *Nearly 75M people will play fantasy football this year*, NEW YORK POST (Sept. 5, 2015), <http://nypost.com/2015/09/05/nearly-75m-people-will-play-fantasy-football-this-year/>.

21. Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 8-9 (2012).

22. *Id.* at 10-11.

Unlawful Internet Gambling Enforcement Act²³ (“UIGEA”) and exempted fantasy sports as a game of skill. In the present day, traditional fantasy sports are so widespread that they have impacted the massive gambling industry.²⁴ In 2008, nearly thirty million Americans and Canadians were playing fantasy sports, and forty-one million were playing by 2014.²⁵

The rise of fantasy sports has coincided with two developments. First, which requires a quick history lesson on gambling, is the massive shift in state government policy toward gambling. The federal government has traditionally left gambling to the states.²⁶ Twice in American history, gambling has been legalized by the states.²⁷ Invariably, widespread scandal occurs and the states then entirely outlaw gambling.²⁸ Each time gambling becomes legalized, it is labeled a “wave,”²⁹ and the historical prism through which these “waves” are viewed is commonly referred to as the Three Waves Theory.³⁰ Currently, the United States is in the third wave of legalized gambling. In the third wave, state governments are actively sponsoring gambling and using it to generate revenue.³¹ The second development that has helped spur the growth of traditional fantasy sports is technology. The developments in technology continue to have a major impact on the fantasy sports industry. For example, the mobile phone has given the masses access to fantasy sports and the ability to calculate fantasy team scores in real time. Colorful updates and highlights deliver a fantasy owner statistics, data, and projections. The number crunching, which was so despised in the early stages of fantasy sports, has been all but eradicated.³² While this has helped the popularity of fantasy sports, technology has also created problems with enforcing anti-gambling laws, as preventing gambling over the Internet is proving to be increasingly difficult.

23. 31 U.S.C. §§ 5361-5366 (2012).

24. Garrett Greene, Comment, *When Fantasy Becomes Reality: Attempts to Regulate the Highly Unregulated Daily Fantasy Sports Industry*, 47 ST. MARY'S L.J. 821, 825 (2016).

25. Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1 (2012).

26. Jamisen Etsel, *The House of Cards Is Falling: Why States Should Cooperate on Legal Gambling*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 199, 210 (2012).

27. I. Nelson Rose, *Gambling and the Law: The Third Wave of Legal Gambling*, 17 VILL. SPORTS & ENT. L.J. 361 (2010).

28. *Id.*

29. *Id.*

30. ROSE & OWENS, *supra* note 8, at 101.

31. *Id.*

32. Edelman, *supra* note 25, at 10. Fantasy sports users no longer need calculators, increasing its widespread appeal.

One unexpected reason why traditional fantasy sports have experienced recent growth is their inherent social value. According to the Fantasy Sports Trade Association, women represent the fastest growing demographic of fantasy sports, at least in part due to the social component.³³ There is anecdotal evidence showing fantasy leagues are comprised of friends, where keeping in touch creates an incentive to play in the league.³⁴ There are also stories of fantasy sports bringing social value at the very highest levels of competition. For example, Shane Battier, a former professional basketball player, said he organized the Miami Heat's fantasy sports league while playing for the team. Battier believed having such a league helped created a type of intangible, unquantifiable value.³⁵

B. THE CREATION OF DAILY FANTASY SPORTS AND SUBSEQUENT CONTROVERSY

In a quintessential example of American innovation, traditional fantasy sports spawned the birth of DFS. This created an important dichotomy in the availability and type of fantasy sports: daily fantasy sports and traditional fantasy sports. Traditional fantasy sports correlate in length with the sports season, requiring a fantasy manager to make a sustained series of strategic and calculated decisions over a longer course of time in order to have a greater chance at winning. The required long-term strategic planning has generally led to the conclusion that traditional fantasy sports are a skill game. Conversely, DFS is played during a much shorter window of time, with most of the contests lasting less than a day.³⁶ The emergence of DFS was a confluence of market forces and impatience. There was a desire on the part of gamblers to win money in a shorter time, and the ban of online poker fortuitously aligned with the creation of DFS.³⁷ The meteoric rise of DFS now arguably threatens to swallow the fantasy

33. Edelman, *supra* note 25, at 18.

34. Erick S. Lee, *Play Ball!: Substituting Current Federal Non-Regulation of Fantasy Sports Leagues with Limited Supervision of Hyper-Competitive Leagues*, 29 *LOY. L.A. ENT. L. REV.* 53, 68 (2009).

35. The Nantucket Project, Shane Battier: The Art of the Intangible, *YOUTUBE* (Oct. 16, 2014), <https://www.youtube.com/watch?v=wOgNqSi17oQ>.

36. Jon Bales, *Here's What It Takes To Make a Living Playing Fantasy Sports*, *BUS. INSIDER: SPORTS* (Nov. 6, 2013), <http://www.businessinsider.com/how-pros-play-fantasy-sports-2013-11#ixzz2kU0ZUwd1>; see also I. Nelson Rose, *Gambling and the Law: Casinos at the End of the World*, 42 *N. KY. L. REV.* 475, 492 (2015) (stating that gamblers now have shorter attention spans and strive for convenience).

37. Garrett Greene, Comment, *When Fantasy Becomes Reality: Attempts to Regulate the Highly Unregulated Daily Fantasy Sports Industry*, 47 *ST. MARY'S L.J.* 821, 827-28 (2016).

sports industry itself,³⁸ the topic being among the most discussed at gaming conferences.³⁹ In 2014, the Fantasy Sports Trade Association President stated that there was more investment in DFS over the past two and half years than the entire history of fantasy sports.⁴⁰

The emergence of DFS has not been without controversy.⁴¹ One mainstream controversy has been whether DFS is a game of skill or a game of chance.⁴² When gambling is on the Internet, the easiest way to run a game of skill is to have chance equalize out over time.⁴³ With DFS, the window of time is much shorter than traditional fantasy sports, arguably making DFS more closely resemble a game of chance. The time component is a strong reason why DFS operators might eventually have to limit the scoring to events taking place over the course of two days.⁴⁴ Another controversy is whether the UIGEA⁴⁵ covers DFS. The UIGEA exempted traditional fantasy sports, but there is still lingering controversy over whether that exemption includes DFS. Therefore, whether DFS is actually entitled to federal protection from the UIGEA has been a topic of discussion. There is no evidence that legislators considered DFS when drafting the UIGEA, but that has not prevented DFS operators from claiming the legislation legalizes DFS.⁴⁶

The most public DFS controversy occurred in 2015, which involved the two major DFS operators, DraftKings and FanDuel. An employee of DraftKings accidentally released DraftKings's data showing information regarding which players were chosen in NFL lineups, something normally released after fantasy lineups are finalized.⁴⁷ That same week, the same DraftKings's employee who accidentally

38. Patrick Cannon, *Daily Fantasy Sports are taking over the world*, CBS DC (Sept. 9, 2015), <http://washington.cbslocal.com/2015/09/09/daily-fantasy-sports-are-taking-over-the-world/>.

39. I. Nelson Rose, *Law, Politics, and Daily Fantasy Sports*, 58-MAR ORANGE COUNTY LAW. 38, 39-40 (2016).

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

41. See Ryan Rodenberg, *Daily fantasy sports state-by-state tracker*, ESPN (Aug. 27, 2016), http://www.espn.com/chalk/story/_id/14799449/daily-fantasy-dfs-legalization-tracker-all-50-states (stating that "the setbacks have been headline-grabbing").

42. Zachary Shapiro, Comment, *Regulation, Prohibition, and Fantasy: The Case of Fanduel, Draftkings, and Daily Fantasy Sports in New York and Massachusetts*, 7 HARV. J. SPORTS & ENT. L. 289, 297-301 (2016).

43. ROSE & OWENS, *supra* note 8, at 21.

44. Rose, *supra* note 39, at 40-41.

45. Prohibition on Funding of Unlawful Internet Gambling, 31 U.S.C. §§ 5361-5367 (2012).

46. Shapiro, *supra* note 42, at 297.

47. Susanna Kim, *FanDuel, DraftKings 'Insider Trading' Allegations: An Explainer*, ABC NEWS (Oct. 6, 2015), <http://abcnews.go.com/Business/fanduel-draftkings-insider-trading-allegations-explainer/story?id=34286629>.

released the data won \$350,000 on FanDuel.⁴⁸ The issue is if the DraftKings's employee had access to ownership information prior to lineups being locked, this information could be wielded advantageously on FanDuel.⁴⁹ Although the employee was never formally charged with wrongdoing, the DraftKings's employee was villainized and even received death threats on social media.⁵⁰ In an Entertainment and Sports Programming Network ("ESPN") article examining the deep-seated hatred for DFS, the DraftKings's employee was mentioned by name ten times.⁵¹ Whether or not there was wrongdoing involved in that particular incident, the optics alone are problematic: DraftKings is an operator of a top-heavy duopoly in an industry where integrity is paramount, with their business already operating under a metaphorical microscope, and their employees can play on each other's platform.⁵² The incident received national headlines and it was even stated that the scandal "almost pushed Donald Trump off the front page . . ."⁵³ There is even rumored to be a book written on the incident, with the apparent movie rights already being optioned off.⁵⁴

C. THE (LIKELY) LEGALIZATION OF DFS

"Today we have sent a clear message: [n]ot in New York,
and not on my watch."

—Eric Schneiderman, November 11, 2015.⁵⁵

48. *Id.*

49. See Daniel Roberts, *Everything you need to know about the DraftKings and FanDuel data scandal*, FORTUNE: TECH (Oct. 5, 2015), <http://fortune.com/2015/10/05/draftkings-fanduel-data-scandal/>.

50. David Purdum, *Public's biggest issues with the DFS industry*, ESPN (Aug. 24, 2016), http://www.espn.com/chalk/story/_id/14791813/daily-fantasy-origin-hatred-daily-fantasy-sports.

51. *Id.*

52. *Id.* DraftKings employees could play on FanDuel, and FanDuel employees could play on DraftKings. *Id.*

53. Rose, *supra* note 39, at 38.

54. Anita Busch, *TriStar Bets On DraftKings-FanDuel Saga As A Movie*, DEADLINE: HOLLYWOOD (Aug. 25, 2016), <http://deadline.com/2016/08/draftkings-fanduel-movie-daily-fantasy-sports-scandal-tristar-1201808481/>.

55. Walt Bogdanich et al., *Attorney General Tells DraftKings and FanDuel to Stop Taking Entries in New York*, NEW YORK TIMES: PRO FOOTBALL (Nov. 10, 2015), http://www.nytimes.com/2015/11/11/sports/football/draftkings-fanduel-new-york-attorney-general-tells-fantasy-sites-to-stop-taking-bets-in-new-york.html?_r=0.

“I’m thrilled. Now if you’ll excuse me, I have to go work on my lineup.”

—New York Assemblyman Dean Murray, upon the passing of the New York Daily Fantasy Sports Bill.⁵⁶

There has been no shortage of opposition to DFS. The vehement hostility toward DFS led ESPN to write an article titled, *Public’s Biggest Issues With the DFS Industry*, outlining the reasons for the extreme vitriol toward the industry.⁵⁷ In the ESPN article, Washington state Representative Christopher Hurst compared the Chief Executive Officers (“CEOs”) of DraftKings and FanDuel to the drug lord El Chapo advertising heroin.⁵⁸ Although less contentious, there has also been scholarly work analyzing the legal status of DFS.⁵⁹ In order for DFS and tribal gaming to interact, DFS would need to be legalized. Therefore, as a preliminary matter, this Article will establish why DFS will likely be legalized. The reasons examined in this Article are threefold: psychological, practical, and financial.

1. *The Psychological Forces*

As the first reason that DFS will likely be legalized, psychological forces have almost no basis in legal doctrine: unfamiliarity manifests itself in fear, particularly in older generations. A relevant cinematic reference argues this proposition. In the award winning film *Batman Begins*, a naïve Bruce Wayne goes to a local Gotham City mobster hangout to confront a particularly powerful mobster and his henchmen. The mobster, appalled that the young and spoiled Bruce Wayne would come on his turf and threaten him, angrily yells at Bruce that Bruce’s elite position in life has shielded Bruce from a different world that he is incapable of understanding. Before his henchmen remove Bruce, the mobster sums this up by saying, “[t]his is a world you don’t understand, and you always fear what you don’t understand.”⁶⁰ While lifted from a fictitious movie where a man dresses up in a cos-

56. David Purdum, *FanDuel, DraftKings get OK to operate again in New York*, ABC NEWS (Aug. 3, 2016), <http://abcnews.go.com/Sports/fanduel-draftkings-operate-york/story?id=41103498>.

57. David Purdum, *Public’s biggest issues with the DFS industry*, ESPN (Aug. 24, 2016), http://www.espn.com/chalk/story/_/id/14791813/daily-fantasy-origin-hatred-daily-fantasy-sports.

58. *Id.*

59. Richard Pandorf, *A Billion Dollar Industry’s Billion Dollar Question: Are Fantasy Sports Actually Legal?*, 42 N. KY. L. REV. 519 (2015); Erica M. Boos, *Fraudduel and Draftkrooks: Chance or Skill?*, 12 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 83 (2016); Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 1 U. ILL. L. REV. 117 (2016).

60. *BATMAN BEGINS* (Warner Bros. Pictures 2005).

tume as a bat, this proposition rings true in our society, particularly when technology is involved. For example, social media experienced a similar arc, with older generations initially showing resistance, but they are now wholeheartedly embracing it.⁶¹

DFS, despite all of the publicity and popularity, is likely not understood by a large number of people.⁶² Scholarly work on DFS invariably takes the time to establish what DFS even is.⁶³ DFS is new, targets younger audiences, is predicated on the use of technology, and involves numbers. It will likely take time for state and federal legislatures to fully understand what DFS is. For example, the average age of the members of the House of Representatives of the 113th Congress is 57 years old and the average age of the Senators is 62 years old.⁶⁴ Given this demographic, unsurprisingly the first Congressional hearing on DFS was a display of incoherent questioning and unfamiliarity.⁶⁵ The rise of DFS was abrupt and sudden, which forced state officials into a defensive position when examining DFS.⁶⁶ The unfamiliarity will subside and, ultimately, legislators will likely embrace the popularity of daily fantasy sports.

61. Eugene Kim, *Old people are finally going crazy for social media*, BUSINESS INSIDER: TECH INSIDER (Nov. 8, 2015), <http://www.businessinsider.com/social-media-usage-among-people-over-65-has-tripled-2015-11>.

62. See Will Green, *Why This Daily Fantasy Sports Hearing Raised More Questions Than Answers*, FORTUNE: SPORTS (May 11, 2016), <http://fortune.com/2016/05/11/fantasy-sports-hearing/> (noting that representatives' questions during the Congressional hearing showed a lack of understanding of DFS).

63. Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 1 U. ILL. L. REV. 117 (2016) (explaining the different formats of what daily fantasy sports are); Zachary Shapiro, *Regulation, Prohibition, and Fantasy: The Case of Fanduel, Draftkings, and Daily Fantasy Sports in New York and Massachusetts*, 7 HARV. J. SPORTS & ENT. L. 289 (2016) (devoting an entire section to, "What is DFS?"); Jonathan Bass, *Flushed from the Pocket: Daily Fantasy Sports Businesses Scramble Amidst Growing Legal Concerns*, 69 SMU L. REV. 501 (2016) (juxtaposing traditional fantasy sports with daily fantasy sports); Michael Trippiedi, *Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?*, 5 UNLV GAMING L.J. 201 (2014) (allocating a section to explain, "How to Play Daily Fantasy Sports").

64. JENNIFER E. MANNING, CONG. RESEARCH SERV., R42964, MEMBERSHIP OF THE 113TH CONGRESS: A PROFILE 2 (2014), <http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%260BL%2BR%5CC%3F%0A>.

65. See Will Green, *Why This Daily Fantasy Sports Hearing Raised More Questions Than Answers*, FORTUNE: SPORTS (May 11, 2016), <http://fortune.com/2016/05/11/fantasy-sports-hearing/>. At one point, an Oklahoma representative asked if there was a regulatory body for the industry, with the lack of such a regulatory body being the reason for the hearing itself. *Id.*

66. This sort of reaction is likely one of the reasons so many state attorneys general decried DFS as illegal gambling within their state. Letter from George Jepsen, Attorney General, State of Connecticut, to Senate President Martin Looney and Senate Majority Leader Bob Duff, Senators, State of Connecticut (Apr. 18, 2016), http://www.ct.gov/ag/lib/ag/opinions/2016/2016-03_fantasy_sports_contests.pdf.

2. *The Practical Forces*

Generally speaking, problems abound when attempting to enforce anti-gambling laws, and DFS is no exception. As I. Nelson Rose stated, “Ban it as you will, people are just plain going to gamble, at either social games or underground commercial lotteries, race books, and casinos.”⁶⁷ Given the millions of people playing DFS and the widespread access to technology, effectively preventing people from playing DFS is difficult.⁶⁸ This is why sports gambling, which is for the most part legally restricted, is not only rampant but a “widespread” and “thriving” business.⁶⁹ Outlawing DFS would immediately create a black market for the game, and enforcing criminalization would be prosecutorially irresponsible,⁷⁰ if not a practical impossibility, given the required resources for such a feat.⁷¹

Furthermore, since DFS permeated so quickly and penetrated the market so deeply, trying to effectively outlaw DFS is seemingly becoming more unrealistic, if not comical in certain locations. For example, DFS prohibition in New York would have created a highly peculiar set of circumstances. DraftKings, as well as FanDuel, has a massive satellite office in Manhattan.⁷² DraftKings has a deal with

67. ROSE & OWENS, *supra* note 8, at 54.

68. Even NBA Commissioner Adam Silver has acknowledged that despite being illegal, “sports betting is widespread.” Silver even went so far to call it a “thriving underground business that operates free from regulation or oversight.” Adam Silver, *Legalize and Regulate Sports Betting*, THE NEW YORK TIMES (Nov. 13, 2014), https://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?_r=0.

69. *Id.* It should be noted that Adam Silver does not directly attribute technology to the reason that sports gambling is widespread and a thriving underground business. However, Silver specifically states that, “Times have changed since PASPA was enacted.” *Id.* The implication here is that technology has come a long way since 1992, when PASPA was enacted. Additionally, Silver also goes on to point to how technology is used in England: “In England, for example, a sports bet can be placed on a smartphone, at a stadium kiosk[,] or even using a television remote control.” *Id.*

70. See Anthony Cabot, *The Absence of A Comprehensive Federal Policy Toward Internet and Sports Wagering and A Proposal for Change*, 17 VILL. SPORTS & ENT. L.J. 271, 273 (2010) (stating that prosecutorial policies and federal laws are confusing and contradictory).

71. See ROSE & OWENS, *supra* note 8, at 54 (stating that people are going to gamble, regardless of the legality, and that in light of the tens of millions who play DFS, there inevitably will be gambling whether or not legalization exists). To make a statement that it would be irresponsible for a prosecutor to vehemently enforce gambling laws is not a facetious comment, deliberate overstatement for attention, or meaning to be disrespectful to prosecutors. Anti-gambling laws are very difficult to enforce as a practical matter. The arrests resulting from a gambling game that is illegal make “poor use of police resources generally.” The result is corruption of police, corruption of the judiciary, and, therefore, disrespect for the legal system. *Id.*

72. Darren Revell & David Purdum, *New York Supreme Court judge rules against DraftKings, FanDuel*, ESPN (Dec. 11, 2015), http://www.espn.com/chalk/story/_id/14342458/new-york-supreme-court-judge-bars-draftkings-fanduel-operating-state (“FanDuel, which has its main headquarters in New York, and DraftKings, which has a satel-

Madison Square Garden, which means DraftKings has marketing interests in the New York Knicks, New York Rangers, and on the jerseys of the New York Liberty.⁷³ DraftKings also has marketing deals with the New York Giants and New York Yankees, and FanDuel with the New York Jets and Brooklyn Nets.⁷⁴ This makes for an amusing, yet realistic, visual that could have taken place if New York had hypothetically outlawed DFS: a sports fan could have been sipping a cocktail in the Madison Square Garden DraftKings Fantasy Lounge,⁷⁵ watching the New York Liberty play with a “DraftKings” advertisement on the players’ jerseys,⁷⁶ with a DraftKings office physically located a mere two miles away from where the patron is sitting, yet DraftKings would not have been allowed to do business with anyone in the state of New York.⁷⁷ The irony in this hypothetical illustrates the prevalence and entrenchment of DFS.

3. *The Financial Support Behind Daily Fantasy Sports*

The last and perhaps most persuasive factor supporting DFS legalization is the financial component. The economics of DFS are advantageous and “the laws of economics are as real as the laws of nature.”⁷⁸ The financial contributors of DFS include professional sports leagues, which represent an economy in and of themselves.⁷⁹

lite office in New York but is based in Boston, can still operate their national businesses out of those Manhattan offices but cannot do businesses with anyone in the state.”).

73. David Prudum & Darren Rovell, *N.Y. AG declares DraftKings, FanDuel are illegal gambling, not fantasy*, ESPN: CHALK (Nov. 11, 2015), http://www.espn.com/chalk/story/_/id/14100780/new-york-attorney-general-declares-daily-fantasy-sports-gambling.

74. *Id.*

75. Scott Soshnick & Mason Levinson, *MSG Signs Marketing Partnership With Fantasy Site DraftKings*, BLOOMBERG (June 4, 2015), <https://www.bloomberg.com/news/articles/2015-06-04/madison-square-garden-inks-marketing-partnership-with-draftkings>. As a part of the DraftKings’s marketing agreement with Madison Square Garden Co., DraftKings became a title partner of the DraftKings Fantasy Lounge inside of Madison Square Garden. DraftKings also announced its intentions of opening up a Fantasy Lounge. *Id.*

76. *Draft Kings Becomes Marquee Partner of the New York Liberty*, WNBA (June 4, 2015), <http://liberty.wnba.com/news/draftkings-becomes-marquee-partner-of-the-new-york-liberty/>. Since DraftKings became a sponsor of the New York Liberty, the DraftKings logo will appear on the team’s home and away uniform. *Id.*

77. Darren Revell & David Purdum, *New York Supreme Court judge rules against DraftKings, FanDuel*, ESPN (Dec. 11, 2015), http://www.espn.com/chalk/story/_/id/14342458/new-york-supreme-court-judge-bars-draftkings-fanduel-operating-state (“FanDuel, which has its main headquarters in New York, and DraftKings, which has a satellite office in New York but is based in Boston, can still operate their national businesses out of those Manhattan offices but cannot do businesses with anyone in the state.”).

78. I. NELSON ROSE & ROBERT A. LOEB, *BLACKJACK AND THE LAW* 219 (1998).

79. See Symposium, *A Changing Game: Challenging the Status Quo in Sports Law*, 23 JEFFREY S. MOORAD SPORTS L.J. 363, 385-86 (2016) (discussing the NFL’s licensing deals with FanDuel and DraftKings).

While the leagues clearly have a financial interest in DFS, they have traditionally remained an arms length away from gambling.⁸⁰ Sports leagues have traditionally distanced themselves from anything gambling related.⁸¹ Not long ago, the commissioners of the major professional sports leagues were railing against sports gambling, resulting in the passage of the Professional Amateur Sports Protection Act⁸² (“PASPA”), a federal statute outlawing most states from sponsoring sports gambling.⁸³

But to be sure, the professional sports leagues and DFS operations have consummated a very peculiar relationship. The professional sports leagues appear to embrace and support DFS. This newfound support has been labeled as hypocrisy,⁸⁴ but likely just illustrates the peculiar role that gambling has played throughout history. History has shown that people view some of the effects of gambling as bad, but weigh them against pleasure and revenue. Furthermore, since its inception, gambling has seemingly epitomized cognitive dissonance.⁸⁵ George Washington labeled gambling the “father of mischief” and said “few gain from this abominable practice, while thousands are injured.”⁸⁶ Yet Washington purchased the first lottery ticket and signed the country’s first lottery documents, and from 1772 to 1775, Washington kept meticulous records of his card

80. See Will Green, *Why This Daily Fantasy Sports Hearing Raised More Questions Than Answers*, FORTUNE: SPORTS (May 11, 2016), <http://fortune.com/2016/05/11/fantasy-sports-hearing/> (stating that the professional sports leagues did not show up for the U.S. House committee meeting on DFS). See also A.J. Perez, *Congressional hearing on daily fantasy sports focuses on sports gambling*, USA TODAY: SPORTS (May 12, 2016), <http://www.usatoday.com/story/sports/fantasy/2016/05/11/daily-fantasy-sports-congress-sports-gambling/84234696/> (noting how the professional sports leagues traditionally opposed gambling but now find themselves supporting DFS).

81. Adam Silver, *Legalize and Regulate Sports Betting*, THE NEW YORK TIMES (Nov. 13, 2014), https://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?_r=0 (noting, “[f]or more than two decades, the National Basketball Association has opposed the expansion of legal sports betting, as have the other professional sports leagues in the United States.”).

82. 26 U.S.C. §§ 3701-3704 (2012).

83. Chil Woo, *All Bets Are Off: Revisiting the Professional and Amateur Sports Protection Act (PASPA)*, 31 CARDOZO ARTS & ENT. L.J. 569, 574-76 (2013).

84. See Green, *supra* note 80 (stating a Congressional representative called sports leagues hypocrites for partnering with DFS operators but also condemning sports wagering). Also, in Senator Grassley’s dissent of the legislation that eventually became PASPA, he stated, “The hypocrisy of the professional sports leagues in seeking this legislation is also troubling. The leagues claim they are concerned about the integrity of their games . . .” S. REP. 102-248, at 14 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 3553, 3564.

85. See I. Nelson Rose, *Gambling and the Law: The Future of Internet Gambling*, 7 VILL. SPORTS & ENT. L.J. 29, 44 (2000) (calling gambling a morally suspect industry, along with alcohol, drugs, and abortion).

86. CHARLES DUHIGG, THE POWER OF HABIT 247 (2014).

playing.⁸⁷ The Puritan settlers, notorious for their high moral standards, had a penchant for cards.⁸⁸ Circling back to the issue at hand, the professional sports leagues know the inherent evils of intertwining sports and gambling, but they also know there are a lot of reasons why they will benefit from DFS expanding.

The professional sports leagues' new position also reflects the importance of televised sports. The television product of sports is a highly valuable asset, one which professional sports leagues treasure.⁸⁹ This is not a recent development; as far back as the early 1990's, the billion dollar product of televised sports was at least noted as a factor in sports gambling.⁹⁰ The beauty of fantasy sports, at least in the eyes of the professional sports leagues, is that fantasy sports give fans incentives to watch televised games to the end, even if the game is not close.⁹¹ As a USA Today article on daily fantasy sports so pointedly stated, "[i]f the deals work the way the leagues hope, daily fantasy sports consumption will have a steroid effect on television revenue, because nobody watches live sports on television quite as intensely as fans with money at stake."⁹² This is perhaps why major media outlets are interested in DFS, with Fox Sports investing around \$150 million for an estimated eleven percent ownership in DraftKings⁹³ and reports of ESPN investing \$250 million.⁹⁴ Mark Cuban

87. DAVID G. SCHWARTZ, *ROLL THE BONES: THE HISTORY OF GAMBLING: CASINO EDITION* 118-19 (2013) (explaining that George Washington publicly stated that gambling was not good, yet he apparently was a gambler himself, as he kept records of how he did).

88. *Id.* at 114. The Puritans did not categorically believe that gambling was bad. They believed that gambling was bad only because there were other productive things one could be doing, like preparing to enter heaven's kingdom. *Id.*

89. Richard Sandomir, *NBC Retains Rights to Premier League in Six-Year Deal*, *THE NEW YORK TIMES: SOCCER* (Aug. 10, 2015), http://www.nytimes.com/2015/08/11/sports/soccer/nbc-retains-rights-to-premier-league-in-six-year-deal.html?_r=0. For example, the Premier League and NBC recently signed a six-year agreement for television rights, which was valued at one billion dollars, doubling their previous contract for three years at \$250 million. *Id.*

90. S. REP. 102-248, at 14 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 3553, 3564. Senator Grassley stated, "It has been suggested by the professional sports leagues that this is an insignificant and unreliable source of new revenue" and goes on to state the importance of the television sports deal. *Id.*

91. Rose, *supra* note 39, at 38.

92. Brent Schrottenboer, *Leagues see real benefits in daily fantasy sports*, *USA TODAY* (Jan. 1, 2015), <http://www.usatoday.com/story/sports/2015/01/01/daily-fantasy-sports-gambling-fanduel-draftkings-nba-nfl-mlb-nhl/21165279/>.

93. Richard Sandomir, *Fantasy Sports Website DraftKings Adds \$300 Million in New Investment*, *THE NEW YORK TIMES* (July 26, 2015), http://www.nytimes.com/2015/07/27/sports/fantasy-sports-website-draftkings-adds-dollar300-million-in-new-investment.html?_r=2.

94. Matthew Rocco, *MLB, ESPN Bank on Daily Fantasy Sports*, *FOX BUS.* (Apr. 16, 2015), <http://www.foxbusiness.com/industries/2015/04/16/mlb-espn-bank-on-daily-fantasy-sports/>.

echoed this statement. Cuban, billionaire businessman and owner of the Dallas Mavericks National Basketball Association (“NBA”) franchise, wrote a pro-fantasy sports editorial and highlighted the value of DFS by pointing out that the stronger relationship between the fans and the game translates to a more valuable television product.⁹⁵

The specific reasons that the major professional sports leagues support DFS are worth examining. The National Football League (“NFL”), which is the revenue goliath of the sports world, is a great sport to start with because of its enormous influence and since the league has been labeled as “fanatically anti-gambling.”⁹⁶ NFL Commissioner Roger Goodell, who is paid \$34.1 million dollars to run the NFL like a business,⁹⁷ does not view DFS as gambling,⁹⁸ and he allows franchise owners to invest in DFS.⁹⁹ Incredibly, twenty-eight out of the thirty-two teams in the NFL have or had some type of relationship with fantasy sports sites.¹⁰⁰ The future of the NFL seems oriented toward gambling too, as the NFL is now considering putting a team in gambling havens Las Vegas¹⁰¹ and London.¹⁰² The NFL’s support also comes from recent public perception problems due to the possible harmful effects of concussions. The legitimate health concerns aside, the concussion controversy has been a historically bad public perception problem for the NFL, one which the long-term financial ramifications on the league are still unclear. The NFL wants to

95. See Mark Cuban, *Mark Cuban to politicians: Good luck killing fantasy sports*, USA TODAY: OPINION (Feb. 23, 2016), <http://www.usatoday.com/story/opinion/2016/02/22/fantasy-sports-industry-regulation-popularity-mark-cuban-column/80707312/>.

96. Rose, *supra* note 39, at 41.

97. Mina Kimes, *Why on earth does Roger Goodell make so much money?*, ESPN: NFL (Jan. 12, 2016), http://www.espn.com/nfl/story/_/id/14802447/roger-goodell-high-salary-explained.

98. Paul Gutierrez, *Las Vegas Raiders? Owner Mark Davis Serious About Move to Sin City*, ESPN: NFL (May 5, 2016), http://espn.go.com/blog/oakland-raiders/post/_/id/14572/las-vegas-raiders-owner-mark-davis-serious-about-move-to-sin-city. NFL Commissioner Roger Goodell said:

I think all of us have evolved a little bit on the gambling To me, where I cross the line is anything that can impact the integrity of the game. If people feel like it’s going to have an influence on the outcome of the game, we are absolutely opposed to that. And that’s why we’re opposed to team-sports gambling.

Id.

99. Rose, *supra* note 39, at 41.

100. Gutierrez, *supra* note 98.

101. Gutierrez, *supra* note 98.

102. See Mike Coppinger, *Goodell: London Team ‘Could be Five or 10 Years Away’*, NFL (July 18, 2014, 2:46 PM), <http://www.nfl.com/news/story/0ap2000000366012/article/goodell-london-team-could-be-five-or-10-years-away/>; see Frank Koegh & Gary Rose, *Football betting - the global gambling industry worth billions*, BBC SPORT (Oct. 3, 2013), <http://www.bbc.com/sport/football/24354124> (estimating the entire global market for sports betting valued between \$700 billion and \$1 trillion).

avoid the public asking themselves what a Washington Post columnist stated: “Should we still be playing football? Should we still be *watching* football?”¹⁰³

The NBA, which has opposed the expansion of legal sports betting for over two decades,¹⁰⁴ is also a big financial supporter of DFS. The new NBA Commissioner Adam Silver, a former attorney, wrote an editorial supporting the legalization of gambling¹⁰⁵ around the same time the NBA invested in FanDuel. The NBA is now equity partners in FanDuel and DraftKings and partnered with a tech company that offers sophisticated analysis for DFS and sports wagering.¹⁰⁶ Similar to the NFL concussion issues, the NBA has dealt with public attacks on its product. In particular, there has been criticism of teams “tanking” to get a higher draft pick,¹⁰⁷ as well as player image problems.¹⁰⁸ The NBA, similar to the NFL, has plenty of reasons to concern itself with remaining connected to its fans through fantasy sports.

Major League Baseball (“MLB”) also stands to profit from DFS expansion, perhaps even more than the other professional sports leagues. Recently, attention has focused on how the MLB can attract younger audiences. Some of the ideas on how to bridge the generation gap that exists border on the radical,¹⁰⁹ but the more realistic strat-

103. Norman Chad, *The NFL's concussion problem deserves another look*, WASHINGTON POST (Jan. 17, 2016), https://www.washingtonpost.com/sports/redskins/the-nfls-concussion-problem-deserves-another-look/2016/01/17/f4ddc304-bd39-11e5-bcda-62a36b394160_story.html?utm_term=.c3833ca6166c; Andrew Brand, *The NFL's Concussion conundrum*, ESPN (Oct. 17, 2012), http://www.espn.com/nfl/story/_/id/8513300/the-issue-concussions-nfl-not-going-away; Gary Mihoces, *Documentary: For years, NFL ignored concussion evidence*, USA TODAY (Oct. 7, 2013), <http://www.usatoday.com/story/sports/nfl/2013/10/07/frontline-documentary-nfl-concussions/2939747/>.

104. Adam Silver, *Legalize and Regulate Sports Betting*, THE NEW YORK TIMES (Nov. 13, 2014), https://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?_r=0.

105. *Id.*

106. Steve Fainaru, Paula Lavigne & David Purdum, *Betting on the Come: Leagues Strike Deals with Gambling Related Firms*, ESPN (Jan. 28, 2016), http://espn.go.com/espn/otl/story/_/id/14660326/nba-nfl-mlb-nhl-striking-various-business-deals-gambling-related-firms.

107. Kelly Dwyer, *The NBA has a tanking problem because the NBA used to employ a lot of problems*, YAHOO SPORTS (Mar. 31, 2015), <http://sports.yahoo.com/blogs/nba-ball-dont-lie/the-nba-has-a-tanking-problem-because-the-nba-used-to-employ-a-lot-of-problems-202819470.html>; Chris Ballard, *After the Process: Meet Sam Hinkie 2.0*, SPORTS ILLUSTRATED (Nov. 30, 2016), <http://www.si.com/nba/2016/11/30/sam-hinkie-after-the-process-philadelphia-76ers>.

108. Michael Lee, *NBA Fights to Regain Image*, WASHINGTON POST (Nov. 19, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/18/AR2005111802752.html>; Kelly Dwyer, *The NBA has a tanking problem because the NBA used to employ a lot of problems*, YAHOO SPORTS (Mar. 31, 2015), <http://sports.yahoo.com/blogs/nba-ball-dont-lie/the-nba-has-a-tanking-problem-because-the-nba-used-to-employ-a-lot-of-problems-202819470.html>.

109. Bob Nightengale, *MLB won't fear going extreme to attract a new generation*, USA TODAY SPORTS (Feb. 16, 2016), <http://www.usatoday.com/story/sports/mlb/2016/02/>

egy is likely using technology.¹¹⁰ The MLB is desperate to find ways to attract younger audiences¹¹¹ and develop a connection with younger fans.¹¹² While the revenue generated by the sport seems to suffice for now, the average television viewer for baseball is over 55 years old¹¹³ and the statistical data show that younger people are less enamored with baseball.¹¹⁴ While the popularity of televised baseball is an ongoing debate,¹¹⁵ televised baseball appears more reliant on regional, rather than national, viewership.¹¹⁶ While the traditionalist mindset of the MLB seems diametrically opposed with DFS,¹¹⁷ the generational disconnect and fragmented market base is a cause for concern. A technology-oriented product like DFS may just be what the MLB needs to regain a foothold on younger audiences.

16/mlb-youth-outreach-play-ball-cal-ripken-jr-rob-manfred/80468196/. The article floated several ideas, including starting every inning with a runner on first base, starting every inning with a different count, replacing the three out rule with a five batter rule, and requiring runners to steal. *Id.*

110. Tim Baysinger, *Can Social Media Help Major League Baseball Get Younger*, ADWEEK (Mar. 27, 2016), <http://www.adweek.com/news/technology/can-social-media-help-major-league-baseball-get-younger-170432>.

111. See Marc Fischer, *Baseball is struggling to hook kids – and risks losing fans to other sports*, WASHINGTON POST: MLB (Apr. 5, 2015), https://www.washingtonpost.com/sports/nationals/baseballs-trouble-with-the-youth-curve—and-what-that-means-for-the-game/2015/04/05/2da36dca-d7e8-11e4-8103-fa84725dbf9d_story.html. (noting that the MLB is losing young audiences).

112. *Id.* (stating that the sport of baseball must address the lack of connection it has with younger fans).

113. Treng Gillies, *Baseball thrives, but struggles to overcome its age*, CNBC (July 12, 2015), <http://www.cnbc.com/2015/07/12/baseballs-advertising-worries-linger.html> (citing the statistic of the average age of a viewer being over 55).

114. Marc Fisher, *Baseball is struggling to hook kids – and risks losing fans to other sports*, WASHINGTON POST (Apr. 5, 2015), https://www.washingtonpost.com/sports/nationals/baseballs-trouble-with-the-youth-curve—and-what-that-means-for-the-game/2015/04/05/2da36dca-d7e8-11e4-8103-fa84725dbf9d_story.html?utm_term=.2a12d13926e1 (citing the ESPN Sports Poll annual survey of young Americans, which states that the 30 favorite sports figures has no baseball players, and that adults 55 and older are 11% more likely than the overall population to say they have a strong interest in baseball).

115. *But see* Maury Brown, *Baseball Is Dying? Don't be Stupid*, FORBES (Oct. 8, 2014), <http://www.forbes.com/sites/maurybrown/2014/10/08/baseball-is-dying-dont-be-stupid/#57344f283076>.

116. Maury Brown, *With 2016 Season Half Over, TV Ratings For MLB Shows RSN's Ruling In Prime Time*, FORBES (July 19, 2016), <http://www.forbes.com/sites/maurybrown/2016/07/19/with-2016-season-half-over-tv-ratings-for-mlb-shows-rsns-ruling-in-prime-time/#7a46d9da46a2> (explaining that games on regional sports networks do really well in the rankings system, with the ratings of the regional sports games outperforming ESPN).

117. Bob Nightengale, *MLB won't fear going extreme to attract a new generation*, USA TODAY SPORTS (Feb. 16, 2016), <http://www.usatoday.com/story/sports/mlb/2016/02/16/mlb-youth-outreach-play-ball-cal-ripken-jr-rob-manfred/80468196/> (noting a statement by legendary baseball player Cal Ripken Jr. that baseball needs to “forget the traditional mindset.”).

However, much like Connecticut Attorney General Jepsen hedged his analysis, this author will do the same: the legalization and profitability of DFS in the long term is not a home run. In a critical and controversial *Outside the Lines* article, the DFS model was vehemently attacked.¹¹⁸ Indeed, the profitability of DFS remains in question. It remains to be seen whether DFS can continue to attract small stakes players, maintain a wide enough demographic, sustain public interest, and bring the same social value as traditional fantasy sports. However, while it is uncertain whether the industry can continue to generate large amounts of revenue, DFS will likely find legalization among a majority of the states. There is tremendous financial value for the professional sports leagues and there are many practical problems with enforcement. Additionally, it appears unlikely that the demand and interest in DFS will vanish.¹¹⁹ Consequently, this means that DFS will likely move forward and impact another burgeoning area of legal gambling: tribal gaming.

III. TRIBAL GAMING

Part III lays a foundation for tribal gaming by establishing the environment and legislative developments of tribal gaming with two sections. First, Part III examines *California v. Cabazon Band of Mission Indians*¹²⁰ and the environment prior to the Indian Gaming Regulatory Act (“IGRA”). Second, Part III will analyze the IGRA and the negative impact that *Seminole Tribe of Florida v. Florida*¹²¹ had on the IGRA.

A. THE CABAZON DECISION AND THE PRE-IGRA ENVIRONMENT

“[The tribes] owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies.”¹²²

118. See Don Van Natta Jr., *Welcome to the Big Time*, ESPN: OUTSIDE THE LINES (Aug. 24, 2016), http://www.espn.com/espn/feature/story/_id/17374929/otl-investigates-implosion-daily-fantasy-sports-leaders-draftkings-fanduel (stating that as quickly as the industry boomed, it somewhat busted). See also Dan Primack, *Sorry ESPN, But DraftKings and FanDuel Didn't Explode*, FORTUNE: FINANCE (Aug. 24, 2016), <http://fortune.com/2016/08/24/sorry-espn-but-draftkings-and-fanduel-didnt-implode/> (criticizing Outside the Lines's predictions regarding the DFS industry and noting that DFS operators are continuing to see growth).

119. I. Nelson Rose, *Gambling and the Law; Casinos at the End of the World*, 42 N. KY. L. REV. 475, 490 (2015). Once demand has been created, technology will find ways around those legal barriers. “Technology creates its own demand.” *Id.* at 490-92; NERSESIAN, *supra* note 7, at 10.

120. 480 U.S. 202 (1987).

121. 517 U.S. 44 (1996).

122. *United States v. Kagama*, 118 U.S. 375, 384 (1886).

While DraftKings and FanDuel occasionally did not have the best relationship, this pales in comparison to the historically rocky relationship between the United States and Native American tribes. There is, and perhaps always will be, a contingency of United States citizens that rebukes the idea of existing parallel nations.¹²³ The United States has tried to figure out how to accommodate Native American tribes as sovereign nations. Early on, the solution was through armed conflict, treaties, and forced relocation of tribal members to reservations.¹²⁴ This solved little, as extreme poverty and high unemployment rates continued.¹²⁵ The insufferable poverty caused the tribes to eventually turn to a centuries old activity to generate revenue—gambling.¹²⁶ Surprisingly, gambling proved somewhat economically beneficial, particularly to tribes near large cities.¹²⁷ Although tribal gaming has garnered a lot of attention, like DFS, tribal gaming is still a relatively new concept. It started in the early 1980s as a way to generate revenue, with Indian tribes in mostly Florida and California opening up high stakes bingo halls.¹²⁸ High stakes bingo developed as a potentially sound investment with a low initial investment, the potential for high returns, and a clear market advantage over the state run system.¹²⁹ Additionally, the tribes could offer games with higher stakes, longer hours, and larger payouts.¹³⁰

As tribal political and judicial structures have become more progressive, states are becoming more confrontational about tribal jurisdiction.¹³¹ The success of tribal gaming, however overstated at

123. Timothy Egan, *Backlash Growing as Indians Make a Stand for Sovereignty*, NEW YORK TIMES: U.S. (Mar. 9, 1998), <http://www.nytimes.com/1998/03/09/us/backlash-growing-as-indians-make-a-stand-for-sovereignty.html?pagewanted=all>.

124. KATHRYN R.L. RAND & STEVEN ANDREW LIGHT, *INDIAN GAMING LAW AND POLICY* 20 (1st ed. 2006).

125. *Id.*

126. See Nicholas S. Goldin, Comment, *Casting A New Light on Tribal Casino Gaming: Why Congress Should Curtail the Scope of High Stakes Indian Gaming*, 84 CORNELL L. REV. 798, 810 (1999) (stating “as the 1980s approached, both the federal government and the tribes still needed to identify a viable means of tribal economic development. The answer was Indian gaming.”).

127. *Dispelling the Myths About Indian Gaming*, NATIVE AMERICAN RIGHTS FUND, <http://www.narf.org/indian-gaming/> (last visited Jan. 21, 2017) (noting that while not all tribes have experienced success, “[a]s small tribes located near major urban areas, these successful gaming operations have benefited the most from the gaming boom generating 40% of all Indian gaming revenue.”).

128. STEVEN ANDREW LIGHT & KATHRYN R.L. RAND, *INDIAN GAMING AND TRIBAL SOVEREIGNTY: THE CASINO COMPROMISE* 39 (2005).

129. RAND & LIGHT, *supra* note 124, at 21.

130. Kevin K. Washburn, *Federal Law, State Policy, and Indian Gaming*, 4 NEV. L.J. 285, 294-95 (2004).

131. Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 32-33 (1997).

times,¹³² has created some public apprehension. As tribal bingo halls popped up, the states wanted to regulate these bingo halls and attempted to shut them down for violations of state law.¹³³ The first jurisdictional conflict between the tribes and states occurred in Florida, when a sheriff tried to enforce the state's bingo laws on a tribal reservation.¹³⁴ Ultimately, the court determined that Florida's bingo laws were regulatory and, thus, unenforceable against the tribe. This, along with another favorable pro-Indian ruling, led a number of tribes to explore tribal gaming more seriously.¹³⁵

The pro-tribal rulings played an important role in starting the animosity between the states and tribes in the field of gaming.¹³⁶ This resentment ultimately culminated in *California v. Cabazon Band of Mission Indians*.¹³⁷ In *Cabazon*, two tribes in California operated high stakes bingo halls and a card club on their reservation.¹³⁸ California law permitted charitable bingo games, but restricted the jackpot amount and the use of gaming profits to charitable purposes.¹³⁹ Violations of this law were punishable by state misdemeanors.¹⁴⁰ The tribes challenged the enforcement of these regulations in federal court to try to prevent the county from applying ordinances inside the reservation.¹⁴¹ The United States District Court for the Central District of California granted the tribe's motion for summary judgment and the United States Court of Appeals for the Ninth Circuit affirmed.¹⁴² The State appealed to the United States Supreme Court.¹⁴³

Cabazon was significant because of the establishment and analytical reliance on the federal policy toward tribes. For the first time, the Supreme Court labeled Native American sovereignty and economic

132. *Dispelling the Myths About Indian Gaming*, NATIVE AMERICAN RIGHTS FUND, <http://www.narf.org/indian-gaming/> (last visited Jan. 21, 2017). On the Native American Rights Fund, there is a section titled "Dispelling The Myths About Indian Gaming." In it, there is a statement that it is a mythical perception that tribal gaming has been a spectacular success. It even specifically mentions the tribes in Connecticut for a reason why people think tribal gaming has been very successful for the tribes. The reality is that there are only a number of small tribes that have experienced this type of success.

133. RAND & LIGHT, *supra* note 124, at 21.

134. *Seminole Tribe of Fla. v. Butterworth*, 658 F.2d 310, 311 (5th Cir. 1981).

135. RAND & LIGHT, *supra* note 124, at 23. *See also* *Barona Grp. v. Duffy*, 694 F.2d 1185 (9th Cir. 1982) (stating that state laws governing bingo were regulatory and did not apply to the tribes).

136. Brian P. Dimmer, Comment, *How Tribe and State Cooperative Agreements Can Save the Adam Walsh Act from Encroaching Upon Tribal Sovereignty*, 92 MARQ. L. REV. 385, 405-06 (2008).

137. 480 U.S. 202 (1987).

138. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 205 (1987).

139. *Cabazon*, 480 U.S. at 208-09.

140. *Id.* at 209.

141. *Id.* at 206.

142. *Id.*

143. *Id.*

development as important federal interests.¹⁴⁴ The Supreme Court noted that California did not prohibit all forms of gambling and that the state encouraged its citizens to participate in the state lottery.¹⁴⁵ Therefore, California did not prohibit gambling, but merely regulated it.¹⁴⁶ This proved to be a critical question. Since Congress had not so expressly provided, California could not enforce certain anti-gambling laws against an Indian tribe.¹⁴⁷ This was an unexpected judicial victory for the tribes and had a number of important effects.¹⁴⁸ The *Cabazon* decision formalized the conflict between the states and the tribes, solidified the sovereignty of the tribes, and created a palpable power gap.¹⁴⁹

Historically speaking, the tribes' advantages do not last long.¹⁵⁰ Predictably, the judicial success in *Cabazon* was followed by legislative backlash, as both sides heavily lobbied Congress.¹⁵¹ The states wanted to curtail tribal gaming, fearing uncontrolled gambling would increase organized crime.¹⁵² The tribes contended state regulation would infringe their tribal sovereignty and wanted Congress to codify exclusive tribal regulation to protect Indian gaming as an economic development strategy.¹⁵³ The tribes categorically opposed state regulation, but concerned that if regulation was necessary, the regulation should come from the federal government.¹⁵⁴ Congress was put in the

144. *Id.* at 216-17. See also Amy Head, Comment, *The Death of the New Buffalo: The Fifth Circuit Slays Indian Gaming in Texas*, 34 TEX. TECH L. REV. 377, 389 (2003) (explaining that the goal of *Cabazon* was to establish federal policy regarding Indian gaming).

145. *Cabazon*, 480 U.S. at 210.

146. *Id.* at 211.

147. *Id.* at 214.

148. See William Bennett Cooper, III, Comment, *What's in the Cards for the Future of Indian Gaming Law?*, 5 VILL. SPORTS & ENT. L.J. 129, 141 (1998) ("Following the Seminole decision, Indian tribes filed numerous suits attempting to increase their ability to participate in gaming. As evidenced in the following cases, the result has been virtually a unanimous move, at both the district and circuit court levels, to further limit the ability of tribes to engage in gambling or expand existing casinos."). See also Steven Andrew Light & Kathryn R.L. Rand, *Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy*, 4 NEV. L.J. 262, 271 (2004).

149. See Head, *supra* note 144 (detailing the several reasons that *Cabazon* was a landmark decision). See also Matthew A. King, Comment, *Indian Gaming and Native Identity*, 30 CHICANA/O-LATINA/O L. REV. 1, 5 (2011).

150. Robert N. Clinton, *Enactment of the Indian Gaming Regulatory Act of 1988: The Return of the Buffalo to Indian Country or Another Federal Usurpation of Tribal Sovereignty?*, 42 ARIZ. ST. L.J. 17, 17-18 (2010).

151. RAND & LIGHT, *supra* note 124, at 29. See also Egan, *supra* note 123.

152. RAND & LIGHT, *supra* note 124, at 30. See also Egan, *supra* note 123.

153. *Id.* See also *Cabazon*, 480 U.S. at 207 (noting that tribal sovereignty is "dependent on, and subordinate to, only the Federal Government, not the States . . .").

154. RAND & LIGHT, *supra* note 124, at 31.

precarious position of reconciling these differences and finding a balance.¹⁵⁵ Legislative compromise, however contrived, was looming.

B. THE IGRA AND *SEMINOLE TRIBE OF FLORIDA V. FLORIDA*

The legislative compromise between the states and tribes arrived with the Indian Gaming Regulatory Act¹⁵⁶ (“IGRA”), a complex and comprehensive federal statutory scheme designed to govern tribal regulation.¹⁵⁷ The unrealistic goal, however admirable, was to strike a balance between tribal and state interests.¹⁵⁸

The IGRA created three jurisdictional categories: Classes I, II, and III. Class I includes social or traditional tribal games and is within the exclusive jurisdiction of the Indian tribes.¹⁵⁹ Class II is more explicitly defined to include bingo, cards, and lottery games.¹⁶⁰ However, Class III is the most important and controversial because it encompasses casino style gambling.¹⁶¹ Class III gaming can only be offered on Indian lands if a state permits that particular game.¹⁶² If a state does not permit that type of gaming, then the state has no obligation to negotiate in good faith.¹⁶³ Therefore, the interpretation of the IGRA language “permits such gaming” is an essential judicial determination. Courts have interpreted the phrase both restrictively and expansively.¹⁶⁴ In the thoroughly researched *Indian Gaming Law and Policy*, Professor Kathryn Rand and Steven Andrew Light examine the “permits such gaming” language on a spectrum.¹⁶⁵ The dichotomy of the expansive and restrictive interpretations are described as such:

Under an expansive interpretation, a tribe operating Class II games in a state that allows some bingo likely will be entitled to operate all Class II games, regardless of whether state law, for example, allows pull-tabs. A state that permits some Class III games will have to negotiate at least all games simi-

155. *Id.*

156. 25 U.S.C. §§ 2701-2721 (2012).

157. Steven Andrew Light & Kathryn R.L. Rand, *Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy*, 4 NEV. L.J. 262, 264 (2004).

158. See S. REP. NO. 100-446, at 3084 (1988). “This section is the result of the Committee balancing the interests and rights of tribes to engage in gaming against the interests of States in regulating such gaming.” *Id.*

159. See 25 U.S.C. § 2703(6) (2012) (defining Class I gaming). See also 25 U.S.C. § 2710(a)(1) (2012) (requiring tribes to have exclusive jurisdiction over Class I gaming).

160. 25 U.S.C. § 2703(7)(A).

161. RAND & LIGHT, *supra* note 124, at 53.

162. 25 U.S.C. § 2710(d)(1)(B).

163. RAND & LIGHT, *supra* note 124, at 76.

164. *Id.* at 70.

165. *Id.*

lar to those permitted under state law and perhaps all Class III games. The expansive interpretation envisions the games allowed under state law as a “floor” for compact negotiations; a state may agree to games that are not specifically allowed under state law.¹⁶⁶

There must be a tribal compact for Class III gaming to take place within a state, a mechanism that has been labeled as the centerpiece of the IGRA.¹⁶⁷ A tribal compact details the games that the state will permit and the conditions under which the games may be played.¹⁶⁸ The tribal compact requirement was implemented to create a cooperative role for the states to help determine how gambling would occur within their state. Per the IGRA, a state must “permit . . . such gaming” in order for a Class III tribal compact to be implemented. If the state “permits such gaming” and the tribe formally requests a tribal compact, the state must enter into good faith negotiations to enter into a tribal compact.¹⁶⁹ The good faith requirement was designed to give the tribes some much needed leverage when negotiating the tribal compact.¹⁷⁰ The parameters of this requirement have never been well defined, but the rationale was to encourage states to deal fairly with tribes as sovereign governments.¹⁷¹ If the good faith requirement was breached, the tribes could sue in federal court, with the burden of proof on the state to prove the compact was negotiated in good faith.¹⁷² If lack of good faith was proven, the statute instructed the court to order a tribal compact be reached within sixty days.¹⁷³ If no tribal compact was reached within sixty days, the parties must submit their offers to a mediator, who then selected the compact.¹⁷⁴ The good faith requirement was a critical part of creating accountability for the states to negotiate with the tribes reasonably and fairly.

The IGRA did not pacify the tribes and the states.¹⁷⁵ The tension between the states and tribes remained and instead of resolving disputes, the IGRA created new rules governing them.¹⁷⁶ In 1991, the

166. *Id.* at 77.

167. *See, e.g.*, Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1031 (2d Cir. 1990); Courtney J. A. DaCosta, *When “Turnabout” Is Not “Fair Play”*: Tribal Immunity Under the Indian Gaming Regulatory Act, 97 GEO. L.J. 515 (2009).

168. 25 U.S.C. § 2710(d)(3)(A).

169. RAND & LIGHT, *supra* note 124, at 55.

170. United States v. Spokane Tribe of Indians, 139 F.3d 1297, 1299-1300 (9th Cir. 1998).

171. S. REP. NO. 100-446, at 3084 (1988).

172. 25 U.S.C. § 2710(d)(3)(A)(i)-(d)(7)(B)(ii).

173. 25 U.S.C. § 2710(d)(7)(B)(iii).

174. 25 U.S.C. § 2710(d)(7)(B)(iv).

175. RAND & LIGHT, *supra* note 124, at 69.

176. Mark H. Reeves, *A Rejection of State Efforts to Enforce Gaming Laws on Indian Lands in the Absence of A Tribal-State Compact*, 9 FIU L. REV. 331, 337-38 (2014).

animosity boiled over and resulted in the *Seminole Tribe of Florida v. Florida*¹⁷⁷ case.¹⁷⁸ The Seminole Tribe of Florida sued the state of Florida and its Governor, alleging that Florida refused to enter into a tribal-state compact.¹⁷⁹ The United States Court of Appeals for the Eleventh Circuit held that an Indian tribe cannot force good-faith negotiations by suing the Governor of the State.¹⁸⁰ The United States Supreme Court granted certiorari to address whether Congress could abrogate state sovereign authority by giving tribes a cause of action against the states.¹⁸¹ The Supreme Court held that Congress cannot create a cause of action against the states under the Indian Commerce Clause¹⁸² and stated that Congress did not have the power to abrogate this immunity.¹⁸³ The practical result was that the states could now avoid dealing with the tribes in good faith. Given that the tribal compact was the central component of the legislative compromise, some have labeled *Seminole Tribe* as the “death knell for the IGRA.”¹⁸⁴ Given some states’ reluctance to negotiate, this was a major victory for the states.¹⁸⁵ Consequently, no tribe was able to finalize a compact for over two years immediately following the *Seminole Tribe* decision.¹⁸⁶

The federal government tried again to manufacture a cooperative environment through the Secretary of Interior’s promulgation of “Secretarial Procedures.”¹⁸⁷ Under the Secretarial Procedures, an eligible tribe could submit a Class III gaming proposal to the Secretary of Interior.¹⁸⁸ The only way the Secretarial Procedures would not result in a compact was if the Secretary of Interior did not accept the tribe’s Class III gaming proposal.¹⁸⁹ However, the Secretarial Procedures

177. 517 U.S. 44 (1996).

178. William Bennett Cooper, III, *What’s in the Cards for the Future of Indian Gaming Law?*, 5 VILL. SPORTS & ENT. L.J. 129, 130 (1998).

179. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 52 (1996).

180. *Seminole Tribe*, 517 U.S. at 52.

181. *Id.* at 53.

182. RAND & LIGHT, *supra* note 124, at 94.

183. See Cooper, *supra* note 178. “Thus, despite Congress’ specific intent under IGRA to subject state Indian suits to federal court, Congress simply lacked the authority to abrogate the states’ immunity.” *Id.* at 139-40.

184. Amy Head, *The Death of the New Buffalo: The Fifth Circuit Slays Indian Gaming in Texas*, 34 TEX. TECH L. REV. 377, 395 (2003).

185. G. William Rice, *Some Thoughts on the Future of Indian Gaming*, 42 ARIZ. ST. L.J. 219, 237-38 (2010).

186. RAND & LIGHT, *supra* note 124, at 50.

187. When may an Indian tribe ask the Secretary to issue Class III gaming procedures?, 25 C.F.R. § 291.3 (2016).

188. What must the Secretary do if it has been determined that the Indian tribe is eligible to request Class III gaming procedures?, 25 C.F.R. § 291.7(a) (2016).

189. What must the Secretary do at the expiration of the 60-day comment period if the State has not submitted an alternate proposal?, 25 C.F.R. § 291.8 (2016); see also *Texas v. United States*, 497 F.3d 491, 495 (5th Cir. 2007).

have rarely been employed and were even judicially rebuked in the *Texas v. United States*¹⁹⁰ case. In the United States Court of Appeals for the Fifth Circuit ruling, the court invalidated the Secretarial Procedures, deciding that the plain language of the IGRA foreclosed the Secretary's interpretation to allow the workaround mechanism.¹⁹¹ Once again, another potential avenue for the tribes to pursue tribal gaming was shut down.

One last important effect of *Seminole Tribe* was that the case gave significant traction to revenue sharing agreements within tribal compacts.¹⁹² Revenue sharing, which first emerged in Connecticut in 1992,¹⁹³ requires a tribe to give a portion of its gaming revenues to the state for the right to conduct Class III gaming within the state.¹⁹⁴ Such an agreement can come in various forms, including payments based on percentage, fixed amounts, and specific contributions to a community fund.¹⁹⁵ Revenue sharing agreements have become so popular that their existence is sometimes even presumed in tribal compact negotiations.¹⁹⁶ Wisconsin, New Mexico, New York, and California have pursued revenue sharing of tribal casino profits.¹⁹⁷ Furthermore, tribes in Arizona, California, Louisiana, Michigan, and Washington have payments going to local governments.¹⁹⁸ The revenue sharing mechanism has been employed so frequently because it is a very profitable feature for the states and local governments.¹⁹⁹

The origins and trajectory of tribal gaming is illustrated above by highlighting some of the key events and cases. *California v. Cabazon Band of Mission Indians*²⁰⁰ formalized the conflict between the states and tribes, the IGRA has set in place the rules, and *Seminole Tribe* has seemingly undermined the spirit of the IGRA's tribal compact. The IGRA had a melting pot of tasks, which included balancing state interests, tribal sovereignty, and federal policy. However, the attempted legislative juggling act of the IGRA did not, and could not, have anticipated the game changing industry that has emerged: DFS.

190. 497 F.3d 491 (5th Cir. 2007).

191. *Texas*, 497 F.3d at 511.

192. RAND & LIGHT, *supra* note 124, at 109.

193. Steven Andrew Light & Kathryn R.L. Rand, *The Hand That's Been Dealt: The Indian Gaming Regulatory Act*, 57 DRAKE L. REV. 413, 434 (2009).

194. Steven Andrew Light et al., *Spreading the Wealth: Indian Gaming and Revenue-Sharing Agreements*, 80 N.D. L. REV. 657, 665 (2004).

195. RAND & LIGHT, *supra* note 124, at 152.

196. Ezekiel J.N. Fletcher, *Negotiating Meaningful Concessions from States in Gaming Compacts to Further Tribal Economic Development: Satisfying the "Economic Benefits" Test*, 54 S.D. L. REV. 419, 422-23 (2009).

197. Light et al., *supra* note 194, at 665.

198. *Id.* at 668.

199. RAND & LIGHT, *supra* note 124, at 152.

200. 480 U.S. 202 (1987).

IV. THE CLASH OF DAILY FANTASY SPORTS AND TRIBAL GAMING

Part II established the rise of Daily Fantasy Sports (“DFS”) and Part III outlined the origin and subsequent rise of tribal gaming. While this Article has stated how difficult predictions about DFS and tribal gaming are to make, the final section of this Article will conclude by doing just that. The final section will examine three potential ramifications of DFS and tribal gaming coexisting. First, the political process for both DFS and tribal gaming will become more important. Second, politics will likely work against tribal gaming interests. Lastly, exclusivity provisions that are found in the Indian Gaming Regulation Act’s (“IGRA”) revenue sharing agreements might be implicated by DFS legislation.

A. THE IMPORTANCE OF THE POLITICAL PROCESS IN TRIBAL GAMING AND DFS WILL BE MAGNIFIED

The politics involved in tribal gaming is becoming more important.²⁰¹ The idea of “playing politics” is not a novel concept to the tribes, who have lived in a world where agendas often overshadow sound legal doctrine.²⁰² Consequently, even before tribal gaming existed, the tribes understood the necessity of aggressively campaigning.²⁰³ Unsurprisingly, tribes continually work on improving their governmental relations, employing professional lobbying firms, working with members of Congress, and formalizing relationships with governments.²⁰⁴

The emergence of tribal gaming as an important source of revenue has made tribal gaming more political, both at the state and local levels. One reason for this is because the revenue from tribal gaming, which continues to show growth,²⁰⁵ has increased states’ reliance in order to avoid politically unpopular strategies, such as raising property taxes.²⁰⁶ As Delaware state representative Wayne A. Smith somewhat facetiously stated, “[w]e’re drunk on gambling revenue.”²⁰⁷

201. Kathryn R.L. Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence over Indian Gaming*, 90 MARQ. L. REV. 971, 982 (2007).

202. RAND & LIGHT, *supra* note 124, at 9.

203. Mary Beth Maloney, *Native American Federal Campaign Contributions: Rules, Risks, and Remedies*, 16 S. CAL. INTERDISC. L.J. 523, 527-28 (2007).

204. Charles Wilkinson, “Peoples Distinct from Others”: *The Making of Modern Indian Law*, 2006 UTAH L. REV. 379 (2006).

205. Rand, *supra* note 201, at 973.

206. RAND & LIGHT, *supra* note 124, at 164.

207. Fox Butterfield, *As Gambling Grows, States Depend on Their Cut*, NEW YORK TIMES (Mar. 31, 2005), <http://www.nytimes.com/2005/03/31/us/as-gambling-grows-states-depend-on-their-cut.html>.

Despite tribal gaming being largely exempt from state and local gambling laws,²⁰⁸ state legislatures and state courts have become increasingly influential over state policy toward Indian gaming.²⁰⁹ Local politics, which inherently impact statewide politics,²¹⁰ do not play a direct role under the IGRA, but can still indirectly shape the terms of the tribal compact.²¹¹ Local politicians will angle for more state revenue by arguing such revenue is necessary to offset the potential negative consequences associated with increased gambling.²¹² Local officials may even apply pressure on state officials to have the tribal compact explicitly address such costs.²¹³

The pressure for politicians to acquire more revenue from tribes, particularly in the post-*Seminole Tribe of Florida v. Florida*²¹⁴ environment,²¹⁵ continues to grow. While the IGRA does not explicitly state which branch of state government is in charge of tribal compact negotiations, it is often the governor doing the negotiating.²¹⁶ Since the IGRA's good faith requirement has been invalidated, practically speaking, the standard of "good faith" might simply be whatever the governor decides it to be.²¹⁷ An unenforceable good faith standard is problematic for tribal interests, as a governor may feel pressure from legislators to renegotiate existing compacts or from lawmakers using tribal gaming as a political platform.²¹⁸ Such political pressure is possibly why governors have encouraged tribes to pursue the acquisition of trust land on which to open casinos.²¹⁹ Additionally, the fact that the IGRA requires both a tribal compact and Class III gaming to be legal in that state makes state politics a critical element.²²⁰ Last, *Seminole Tribe* created legal uncertainty surrounding the good faith mechanism and the secretarial procedures, which increases the likelihood that disputes will be resolved politically.²²¹

DFS also relies heavily on state politics. Traditionally, gambling is subject to the police power of state governments.²²² Since gambling is considered a vice, it has been left up to the states on how to handle

208. RAND & LIGHT, *supra* note 124, at 13.

209. *Id.* at 120.

210. *Id.* at 124.

211. *Id.*

212. *Id.*

213. *Id.*

214. 517 U.S. 44 (1996).

215. RAND & LIGHT, *supra* note 124, at 121.

216. Rand, *supra* note 201.

217. RAND & LIGHT, *supra* note 124, at 121.

218. *Id.* at 122.

219. *Id.* at 164.

220. Light & Rand, *supra* note 193, at 421.

221. RAND & LIGHT, *supra* note 124, at 103.

222. ROSE & OWENS, *supra* note 8, at 87.

it.²²³ Currently, the federal government's hands-off approach remains the status quo. This means, at least for the time being, DFS operators find themselves fighting a political battle in each individual state.²²⁴ The status of these legal battles have been so dynamic that Entertainment and Sports Programming Networks ("ESPN") has been tracking each state using a map eerily resembling a national presidential election.²²⁵ In stark contrast to the flying-under-the-radar approach by the tribes, DFS operators employed a historic lobbying blitz across the United States in 2016, utilizing at least seventy-eight lobbyists in thirty-four states.²²⁶ The ability for DFS operators and supporters to cover such an impressive amount of terrain, both physically and politically, is largely thanks to the professional sports leagues, which have a multi-layered financial war chest and experience in political gaming.²²⁷

B. POLITICS WILL WORK AGAINST TRIBAL GAMING

The heavy-handed role of politics in tribal gaming and DFS is not difficult to establish. The nature of democracy dictates that any group impacted by legislation must participate in politics.²²⁸ There is underlying legislation in each area, as tribal gaming is controlled by the IGRA and DFS relies on state legislation. In some ways, the collision of DFS and tribal gaming represents the essence of politics: two businesses occupying the same competitive space that are going after the same type of consumer.²²⁹ Another modern day example of this is Uber and the cab companies squaring off over legislation within the transportation industry. The reliance on politics pits one against the other, meaning tribal gaming and DFS are two titans of industry playing in the same political sandbox.

Simply identifying the underlying politics of DFS and tribal gaming is straightforward; the more difficult task is figuring out how the politics will impact the tribes. One major, albeit unlikely, scenario is

223. *Id.* at 87-88.

224. Rose, *supra* note 39, at 41.

225. Ryan Rodenberg, *Daily fantasy sports state-by-state tracker*, ESPN (Aug. 27, 2016), http://www.espn.com/chalk/story/_id/14799449/daily-fantasy-dfs-legalization-tracker-all-50-states.

226. Alexandra Berzon, *Fantasy Sports Industry Mounts Lobbying Blitz*, WALL STREET JOURNAL (Feb. 15, 2016), <http://www.wsj.com/articles/fantasy-sports-industry-mounts-lobbying-blitz-1455585446>.

227. Nathaniel J. Ehrman, *Out of Bounds?: A Legal Analysis of Pay-to-Play Daily Fantasy Sports*, 22 SPORTS L.J. 79, 93 (2015).

228. Charles Wilkinson, "Peoples Distinct from Others": *The Making of Modern Indian Law*, 2006 UTAH L. REV. 379, 392 (2006).

229. Steven Walters, *Steven Walters: Future Capitol cage match: Fantasy sports firms vs. tribes*, GAZETTE XTRA (Nov. 7, 2016), http://www.gazettextra.com/20151221/steven_walters_future_capitol_cage_match_fantasy_sports_firms_vs_tribes.

that a state might entirely rethink whether the state should even offer tribal gaming. Instead of playing hardball when negotiating, a state may simply decide not to negotiate at all and assert its immunity pursuant to *Seminole Tribe of Florida v. Florida*.²³⁰ The politicians most likely to support this course of action are local politicians, who arguably experience more of the soft costs of increased gambling.²³¹ For a state offering tribal gaming, this would be a complete reversal in policy. While such a dramatic shift in policy is probably unrealistic, it is worth noting that historically, the United States has been whimsical when it comes to gambling policy.²³²

A state might also reconsider its position on gambling if a state starts to perceive that gambling has become too prevalent within its borders. In other words, the appearance of too much gambling could be problematic. As one Arizona columnist wrote, “[Indian gaming] isn’t just a reservation issue. We need to take a good look at our state’s future. I, for one, don’t want gambling to be a part of that.”²³³ Traditionally, gambling issues generate considerable public discussion.²³⁴ Consequently, a perception problem could cause more public discourse about whether the state needs so much gambling.²³⁵ A perception problem of DFS is not ridiculous, and possibly even an accurate description, thanks to the unprecedented marketing campaign of DFS operators. The marketing tactics of the major DFS operators have been historically loud, aggressive, and overbearing.²³⁶ The advertisements are relentless, with reports of DFS commercials airing every ninety seconds and marketing expenditures surpassing \$750 million.²³⁷ The display was a classic example of gambling operators pushing the limits,²³⁸ and the DFS advertising tactics created nothing short of public outrage, if not outright enemies.

230. 517 U.S. 44 (1996).

231. RAND & LIGHT, *supra* note 124, at 124.

232. I. NELSON ROSE & ROBERT A. LOEB, BLACKJACK AND THE LAW 208 (1998).

233. Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 43 (1997) (quoting Lisa Schnebly-Heidinger, *Getting Their Ultimate Revenge: Arizona Tribes Can Profit From Our Vices and Addictions*, ARIZ. REPUBLIC (July 4, 1993)).

234. Symposium, *A Changing Game: Challenging the Status Quo in Sports Law*, 23 JEFFREY S. MOORAD SPORTS L.J. 363, 414 (2016).

235. ROSE & LOEB, *supra* note 232, at 213 (stating that the next crash will occur when the general population is turned off by all of this gambling).

236. See *DraftKings TV Commercials*, ISPOT.TV, <https://www.ispot.tv/brands/IEY/draftkings> (last visited Nov. 7, 2016) (displaying various commercials used by Draft Kings to market DFS).

237. Don Van Natta, *The implosion of the daily fantasy industry is a bro-classic tale of hubris, recklessness, political naiveté and a kill-or-be-killed culture*, ESPN (Aug. 24, 2016), http://www.espn.com/espn/feature/story/_id/17374929/otl-investigates-implosion-daily-fantasy-sports-leaders-draftkings-fanduel.

238. I. NELSON ROSE & ROBERT A. LOEB, BLACKJACK AND THE LAW 213 (1998).

The massive amounts of revenue at stake render a complete removal of tribal gaming unrealistic. A more likely scenario is that the demands made by the state during tribal compact negotiations will become more unreasonable and the politics surrounding the tribal compact negotiations²³⁹ more contentious. The state politicians could threaten to limit the nature of the games offered or reduce the number of gaming devices allowed under the tribal compact if certain demands are not met.²⁴⁰ Additionally, state legislators could rationalize unreasonable demands by saying it is necessary to mitigate fees for traffic congestion, road maintenance, and higher crime.²⁴¹ Sitting governors could use hardball negotiation tactics or simply refuse to negotiate at all.²⁴² The unreasonableness of their demands would be moot, as the state would be able to threaten to use *Seminole Tribe* immunity if the tribes do not make the concessions the state asks for.²⁴³ Beyond a state's ability to threaten *Seminole Tribe* immunity, the tribes are also at a disadvantage from a negotiating standpoint. The tribal gaming revenue is more important to the tribes,²⁴⁴ the states outnumber the tribes, state-taxed property exceeds tribal lands,²⁴⁵ and the tribes lack representation in the state government.²⁴⁶ These factors give the states leverage during the tribal compact negotiation process. The lack of meaningful recourse on the part of the tribes puts them in a precarious position of having to potentially agree to unreasonable demands made by the state.

The politics involved could also influence the state judiciary, which could be problematic for the tribes because the judiciary could limit the scope of games that tribal gaming operators could offer. The judiciary could influence the scope of tribal gaming based on their interpretation of the controversial "permits such gaming" phrase.²⁴⁷ The IGRA has a catch-all definition for Class III gaming, stating that "all forms of gambling" that do *not* fall in Classes I or II are considered

239. Kathryn R.L. Rand, *Caught in the Middle: How State Politics, State Law, and State Courts Constrain Tribal Influence over Indian Gaming*, 90 MARQ. L. REV. 971 (2007) (stating that "[g]aming compact negotiations are highly politicized").

240. RAND & LIGHT, *supra* note 124, at 121.

241. *Id.* at 122.

242. *Id.* at 121; *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1098 (9th Cir. 2003) (explaining the governor in that case refused to negotiate with the tribes over the interpretation of "permits such gaming").

243. 517 U.S. 44 (1996).

244. Rebecca Tsosie, *Negotiating Economic Survival: The Consent Principle and Tribal-State Compacts Under the Indian Gaming Regulatory Act*, 29 ARIZ. ST. L.J. 25, 27 (1997) (stating how the Indians are "still fighting for survival" these days).

245. Kathryn R.L. Rand & Steven Andrew Light, *How Congress Can and Should "Fix" the Indian Gaming Regulatory Act: Recommendations for Law and Policy Reform*, 13 VA. J. SOC. POL'Y & L. 396, 446 (2006).

246. Rand, *supra* note 239, at 971.

247. RAND & LIGHT, *supra* note 124, at 70.

Class III.²⁴⁸ This catch-all definition makes whether a state “permits such gaming” a very important determination because a state must offer that particular type of casino game in order for the tribes to offer it. The term could be interpreted expansively or restrictively and the interpretation guides the analysis to very different results.²⁴⁹ An expansive determination would build off the dichotomy of regulation-prohibition established by the Supreme Court in *California v. Cabazon Band of Mission Indians*.²⁵⁰ Theoretically, if a state employs an expansive determination, the tribes would be more likely to offer DFS because the state is regulating gambling, as opposed to prohibiting gambling.²⁵¹ In other words, the prohibition-regulation distinction supports the proposition that if a state allows one Class III game, the state must negotiate Class III games in general.²⁵² This interpretation would be favorable for tribes interested in potentially offering DFS. Additionally, an expansive interpretation would provide the strongest argument for tribes to include DFS in a duly negotiated tribal compact even if *DFS is illegal under state law*.²⁵³ This would be highly advantageous for the tribes because not only could they potentially circumvent the DFS controversy existing at the state level, but the tribes would also have the opportunity to offer an entirely unique contest within the gambling market.

The alternative interpretation is a restrictive approach, in which “permits such gaming” would be read very narrowly.²⁵⁴ This interpretation could be viewed as a strict application of *Cabazon*, which means dichotomizing regulation and prohibition as mutually exclusive. Negotiations would be limited to games only expressly authorized by state law. Accordingly, if a state did not expressly allow fantasy sports, the tribal compact could not include fantasy sports. Consequently, the interpretation of “permits such gaming” greatly impacts the tribes, but not DFS operators. Thus, generally speaking, the more that politics are involved, the worse it is for the tribes. If the political environment comes into play in this judicial interpretation, it is more likely that there would be a narrow interpretation of “permits such gaming.” However, note that such a clear, bright-lined dichotomy of either being expansive or restrictive is likely over simplifying the

248. *Id.* at 70; 25 U.S.C. § 2703(8).

249. RAND & LIGHT, *supra* note 124, at 77 (stating “plainly, the two general interpretations—expansive and restrictive—reach very different results.”).

250. 480 U.S. 202 (1987).

251. RAND & LIGHT, *supra* note 124, at 70.

252. *Id.* at 73.

253. *Id.* at 71.

254. *Id.* at 74.

analysis, but is an important illustration nonetheless.²⁵⁵ A state likely would not simply exist at one end of the spectrum, but such an illustration conceptually depicts how important such a simple interpretation is. Those three words are, for the purposes of the interaction between DFS and tribal gaming, a mighty sword that is held by the state judiciary.

C. EXCLUSIVITY PROVISIONS IN REVENUE SHARING AGREEMENTS
MIGHT BE VULNERABLE WITH DFS LEGISLATION

The IGRA explicitly prohibits state taxation in a tribal compact. A successful workaround to this prohibition of state taxation, albeit a controversial one, is a state providing substantial exclusivity to receive such payment.²⁵⁶ If the payment is a valuable economic benefit that is providing substantial exclusivity, it circumvents the IGRA prohibition on state taxation.²⁵⁷ The Department of Interior has interpreted this to mean that the tribes can make payments for additional benefits.²⁵⁸ A typical exclusivity payment usually entails the tribes paying a percentage of casino revenues in order to have exclusivity in a state without commercial casinos.²⁵⁹ This mechanism has become the “surest—perhaps only—way” for the states to receive more than reimbursement, beyond regulatory costs.²⁶⁰ As stated above, the revenue sharing mechanism has its critics. For example, critics point out that states can stonewall tribes by continually demanding more of the revenue.²⁶¹ A revenue sharing arrangement has also been dubbed a short-term solution, likely because while revenue sharing percentages increase, exclusivity is shrinking.²⁶² In summation, the above means that the negotiation of this provision is worth hundreds of millions of dollars, if not billions, to the states.²⁶³

255. *Id.* at 77 (noting that “[n]either approach, perhaps, is completely satisfactory in its extreme form in the context of casino-style games . . .”).

256. Gatsby Contreras, Comment, *Exclusivity Agreements in Tribal-State Compacts: Mutual Benefit Revenue-Sharing or Illegal State Taxation?*, 5 J. GENDER RACE & JUST. 487, 497 (2002). See also RAND & LIGHT, *supra* note 124, at 152-53.

257. *Id.* at 151.

258. *Id.* at 152.

259. *Id.*

260. *Id.*

261. Eric S. Lent, Comment, *Are States Beating the House?: The Validity of Tribal-State Revenue Sharing Under the Indian Gaming Regulatory Act*, 91 GEO. L.J. 451, 452 (2003) (citing Press Release, Bruce Babbitt, Secretary of the Interior, Department of the Interior (Aug. 23, 1997), <http://www.doi.gov/news/archives/indnmcom.html>).

262. Matthew L. M. Fletcher, *Bringing Balance to Indian Gaming*, 44 HARV. J. ON LEGIS. 39, 60 (2007).

263. RAND & LIGHT, *supra* note 124, at 152.

1. *Does the Legalization of DFS Infringe on Tribal Exclusivity?*

The Connecticut Attorney General Letter was prudent for emphasizing the uncertainty of whether DFS legislation would infringe on tribal exclusivity because an analysis hinges on the definition of several terms and the stakes are very, very high. The Department of Interior stated that if a state can offer “meaningful concessions” to a tribe for a valuable economic benefit, the revenue sharing agreement does not constitute taxation.²⁶⁴ A meaningful concession would come in the form of substantial exclusivity. Under the IGRA, if substantial exclusivity is not available or becomes unavailable, revenue sharing payments to the state must stop.²⁶⁵ Therefore, the critical question is whether DFS legislation undermines the tribal compact’s substantial exclusivity to the point that the revenue sharing mechanism is destroyed. If DFS infringes this invisible threshold, then under the IGRA, revenue sharing payments must stop.²⁶⁶

Hypothetically, and very simplistically, this means that if Connecticut passes a DFS bill that successfully undermines the tribe’s substantial exclusivity, Connecticut’s very large tribal gaming checks would stop. An abrupt loss of such a massive revenue source would be catastrophic for the state’s economy.²⁶⁷ Therefore, maintaining the requisite degree of exclusivity, which successfully holds together a revenue sharing provision, is of the utmost importance. There is at least one court that has defined the term exclusive:

[T]he Tribes enjoy the exclusive “right to operate” so long as the Tribes are the only persons or entities who have and can exercise the “right to operate” electronic games of chance in the State or, in other words, as long as all others are prohibited or shut out from the “right to operate” such games.²⁶⁸

In this instance, the tribes’s exclusivity argument appears relatively straightforward: DFS legislation expands the gambling market and reduces exclusivity.²⁶⁹ According to the definition of exclusivity as defined in case law above, such an infringement would need to be

264. Ezekiel J.N. Fletcher, *Negotiating Meaningful Concessions from States in Gaming Compacts to Further Tribal Economic Development: Satisfying the “Economic Benefits” Test*, 54 S.D. L. REV. 419, 424 (2009).

265. *Id.*

266. *Id.*

267. See Harlan McKosato, *The Fantasy Bet: Is Fantasy Sports a Game of Skill or Gambling?*, INDIAN COUNTRY MEDIA NETWORK (Apr. 14, 2016), <http://indiancountrytodaymedianetwork.com/2016/04/14/fantasy-bet-fantasy-sports-game-skill-or-gambling-164072> (discussing how much revenue is generated through tribal gaming).

268. Sault Ste. Marie Tribe of Chippewa Indians v. Engler, 93 F. Supp. 2d 850, 852 (W.D. Mich. 2000), *aff’d*, 271 F.3d 235 (6th Cir. 2001).

269. McKosato, *supra* note 267.

done by *a game of chance*.²⁷⁰ If a game of chance can undermine exclusivity, the analysis then turns on the language of the DFS legislation. While there is clearly some element of chance in DFS, legislation may categorize DFS a game of skill. The result being that a game of skill conceivably dodges an infringement of the exclusivity requirement.²⁷¹ However, absent such express legislative language, confusion runs amuck.²⁷² A judicial determination of whether DFS is a game of skill or chance creates yet another layer of complexity, and perhaps fear, because the determination might be made by the federal courts.²⁷³ The language used in the Connecticut Attorney General's letter suggests that it is uncertain as to whether it would be the federal or state courts making this determination.²⁷⁴

Assuming the federal government is making the determination of whether DFS is a game of luck or skill, this is problematic to the states for several reasons. First, the revenue sharing agreement is filling the pockets of the state and local governments, not the federal government.²⁷⁵ This means a tribe could file an action in federal court to stop casino-style gaming that violates the tribal compact.²⁷⁶ Second, it is unclear where a federal court would look when defining crucial terms.²⁷⁷ Third, even if the source of the definitions were known, those definitions might not be applied consistently by different courts. Lastly, the degree of reliance a federal court would have on federal policy is unknown. If a federal court supports tribal development con-

270. Per the Connecticut Attorney General Opinion, it would also need to be an electronic game of chance. Letter from George Jepsen, Attorney General, State of Connecticut, to Senate President Martin Looney and Senate Majority Leader Bob Duff, Senators, State of Connecticut (Apr. 18, 2016), http://www.ct.gov/ag/lib/ag/opinions/2016/2016-03_fantasy_sports_contests.pdf. That also opens up a series of questions regarding what is electronic and how fantasy sports are played. However, this Article does not focus on the electronic aspect as much as the game of chance aspect.

271. Dustin Gouker, *DraftKings, FanDuel Beat The Clock in New York: Legislature Passes Fantasy Sports Bill*, LEGAL SPORTS REPORT (June 17, 2016, 11:15 PM), <http://www.legalsportsreport.com/10514/new-york-passes-fantasy-sports-bill/> (noting that New York labeled fantasy sports a skill game).

272. See Jepsen, *supra* note 270.

273. *Id.* Federal law governs the compacts and "federal courts have exclusive jurisdiction over disputes arising out of the Compacts." This means that the decision would be taken away from the state courts and placed in the hands of the federal government to make such an important determination. *Id.*

274. See Jepsen, *supra* note 270 (lacking certainty when saying they thought a federal court would make such determination).

275. RAND & LIGHT, *supra* note 124, at 152 ("Revenue sharing agreements with state and local governments include percentage payments, fixed compact payments, fees and taxes, contributions to community funds, and redistribution to non-gaming tribes.").

276. *Id.* at 126.

277. *Id.* "In making that determination, a federal court *very likely* would not be bound by a state legislature's—or any other state official's—characterization of daily fantasy sports contests as not constituting 'contests of chance.'" *Id.* (emphasis added).

sistent with federal policy, a la *California v. Cabazon Band of Mission Indians*,²⁷⁸ such deference plausibly supports a conclusion that there has been an infringement of exclusivity. In *Cabazon*, the Court's heavy reliance on federal policy was virtually outcome determinative and a similar judicial approach in the context of DFS would likely have the same result.²⁷⁹ Arguably, a court's rationale might be that not only does DFS *not* enhance tribal economic development, but as another competitive gambling game, it potentially contributes to the demise of tribal development. The IGRA is thought to generally be protective of tribal interests and this was even noted in the Connecticut Attorney General's letter.²⁸⁰

The tribes might have an additional argument, rooted in traditional contract law. The tribal compact between the state and tribe is a contract between two sovereigns. The Department of Interior must ensure that the bargained for exchange between the state and the tribe is appropriate.²⁸¹ Hypothetically, the tribes could argue that DFS legislation is retroactively eliminating, or at least materially reducing, the bargained for exchange in the original tribal compact. If the tribal compact was made prior to DFS legislation, then subsequent DFS legislation could materially alter the gambling landscape. The increase in competition among the gambling entities in such a competitive field is arguably a substantial disruption to the gambling market in the state. A holding in the United States Court of Appeals for the Ninth Circuit potentially supports this; in *In Re Gaming Related Cases*²⁸² the court stated that as long as the interpretation of the IGRA strengthens the tribal economy, the IGRA is not violated.²⁸³ Since DFS legislation would legitimize another form of gambling, the tribal economy would suffer because of the increase in competition.

278. 480 U.S. 202 (1987).

279. See *supra* notes 145-147 and accompanying text.

280. See *id.* (stating that courts typically have been protective of tribes under the IGRA).

281. See, e.g., *Oversight Hearing on Indian Gaming Regulatory Act: Role and Funding of the National Indian Gaming Commission Before the S. Comm. On Indian Affairs*, 108th Cong. (2003); Press Release, Bruce Babbitt, Secretary of the Interior, Department of the Interior (Aug. 23, 1997), <http://www.scienceblog.com/community/older/archives/N/int0938.shtml> (stating that the Department of Interior has an obligation to ensure that the benefit received by the state is equal or appropriate in light of the benefit conferred on the tribe). See also Ezekiel J.N. Fletcher, *Negotiating Meaningful Concessions from States in Gaming Compacts to Further Tribal Economic Development: Satisfying the "Economic Benefits" Test*, 54 S.D. L. REV. 419 (2009); Steven Andrew Light, et al., *Spreading the Wealth: Indian Gaming and Revenue-Sharing Agreements*, 80 N.D. L. REV. 657 (2004) (citing *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1115 (9th Cir. 2003)).

282. 331 F.3d 1094 (9th Cir. 2003).

283. *In re Gaming Related Cases*, 331 F.3d at 1111.

V. CONCLUSION

The purpose of this Article was to analyze the looming collision of Daily Fantasy Sports (“DFS”) and tribal gaming. This Article honed in on three potential effects. First, state politics will continue to grow in importance because of the states’ increasing reliance on tribal gaming revenue, the mounting political pressure to secure tribal gaming revenue, and the fact that DFS is currently being legalized at the state level. Second, which essentially builds off the first effect, is that the increasing importance of politics will be disadvantageous to tribal gaming interests. For example, the states will continue to have leverage during the mandatory Indian Gaming Regulation Act (“IGRA”) tribal compact negotiation process for Class III gaming. Lastly, exclusivity provisions holding together the valuable revenue sharing agreement might be infringed by DFS legislation.

Relatively speaking, the first two predictions—or perhaps even merely observations—are more risk-averse because politics already plays such an important role in these industries. Since the IGRA dictates that the tribal compact is negotiated at the state level and DFS is legalized at the state level, state politics is already paramount in each. Therefore, if DFS and tribal gaming continue to grow, the political component will likely grow proportionally. Similarly, politics being a disadvantage to the tribes is also not a novel prediction. History has shown, and scholarly work has noted, that politics typically plays against the interests of the Native American tribes. The third potential effect—that the revenue sharing agreement might be vulnerable with DFS legislation—is the most potentially impactful effect, yet the most difficult to predict. It is a very unscholarly statement, particularly for a conclusion, but the lack of judicial guidance and the variables involved²⁸⁴ make it difficult to predict how DFS legislation will impact tribal gaming. One major uncertainty is what constitutes “substantial exclusivity” and the judicial approach when analyzing whether DFS infringes tribal gaming exclusivity. The staggering amount of revenue at stake, coupled with the judicial uncertainty, compounded by the inherent unpredictability of each industry, means states should be cautious and cognizant about an underlying tribal compact. The financial stakes are so high that measures should be taken to ensure DFS legislation does not infringe tribal exclusivity. A state with an underlying tribal compact should even consider renegotiating its tribal compact if there is potential uncertainty about how DFS legislation would impact the exclusivity held by the tribes. At a minimum, a state should at least contemplate how DFS legislation

284. See *supra* notes 9-10 and accompanying text.

could impact tribal gaming on a large scale because these two industries are simply too large to avoid each other. Building on the “complex” metaphor presented in the Introduction, the collision of DFS legislation and tribal gaming could be symbolized by the smashing of two very large jars of mayonnaise—two highly complex, political industries that will clash *somehow* in the near future.