

Walter T. Champion*

INTRODUCTION

Markus Kypreos addressed the state of gambling law in Texas: “While every state bordering Texas as well as Mexico, has casinos within 50 miles of the Texas border, such establishments are illegal here.”¹ There *is* gambling in Texas but it is very limited to eight-liners,² casino style coin-operated machines, that cannot pay out cash to players but instead are limited to rewarding players with “fuzzy animals”—the useless prizes won at carnivals and such. Texas Penal Code §47.01(4) defines “gambling device” to exclude electromechanical contrivances designed solely for bona fide amusement purposes if it “rewards the player exclusively with noncash merchandise prizes, toys, or novelties. . . [which have a] wholesale value. . . of not more than 10 times the amount of charged to play the game or. . . \$5, whichever is less.”³ This is the so-called “fuzzy animal” exception,⁴ which is ambiguous and is both loved and hated. It is, at best, a badly written statute.

* Walter Champion is a Professor of Law at Thurgood Marshall School of Law, Texas Southern University, an adjunct professor at South Texas College of Law Houston, and author of *Gaming Law in a Nutshell* and *Sports Law in a Nutshell*. Professor Champion gratefully acknowledges the assistance of TMSL in the form of a 2019 summer research stipend. He also acknowledges “cogitation points” from Michael Warner, B.A., University of Texas – Austin, and a recent graduate of Texas Southern University, Thurgood Marshall School of Law. Michael is an Austin-based lobbyist and principal of Warner Seale Public Affairs. The author also acknowledges the assistance of Tara N. Long, Esq., faculty research librarian and instructor at Thurgood Marshall School of Law, and second-year students Paola Garcia and Christopher Velasquez in the research, preparation, and writing of this article.

¹ Markus Kypreos, *The State of Gambling Law in Texas*, Tex. Prosecutor J. (July-Aug. 2008), <https://www.tdcaa.com/journal/the-state-of-gambling-law-in-texas/>.

² Michael Marks, *Eight Liners Operate on the Edge of State Law. A New Bill Would Give Communities Regulatory Options.*, TEX. STANDARD (Feb. 8, 2019, 9:31 AM), <https://www.texasstandard.org/stories/eight-liners-operate-on-the-edge-of-state-law-a-new-bill-would-give-communities-the-option-to-regulate-them/>.

³ TEX. PENAL CODE ANN. § 47.01(4) (West 1995).

⁴ Elliott O’ Day, *21st Century Casinos: How the Digital Era Changed the Face of Gambling and What Texas Should Do to Combat it*, 19 TEX. TECH ADMIN. L.J. 365, 370 (2018).

As Galadriel said in *The Lord of the Rings*, “I feel it in the earth, I smell it in the air.”⁵ There is a strong state’ rights wind that promotes gambling. In Champion and Rose’s *Gaming Law in a Nutshell*, it is asserted that gaming was reinvigorated with betting on horses, state lotteries, and eventually casinos.⁶ Gaming makes money for the states!⁷

Daily Fantasy Sports allows winning in fantasy sports on a daily basis. Sports betting has been reinvigorated by *Murphy v. NCAA*, where the Supreme Court held that the Professional and Amateur Sports Protection Act (PASPA)⁸ was unconstitutional.⁹ The *Murphy* court held that the prohibition under PASPA¹⁰ of states’ authorizing sports betting violates the anti-commandeering rule because it “unequivocally dictates what state legislature might or might not do.”¹¹ The Supreme Court, in *Epic Systems Corp v. Lewis*, has strongly urged other courts to reinterpret ambiguous statutes,¹² such as the “fuzzy animal” exception.

The *Murphy* victory was interrupted as unlikely to segue into a movement that would change gambling in Texas. Texas Governor Greg Abbott offered no public reaction to *Murphy* but was clear that he did not change his views since writing a letter to Texas Lottery Officials in 2015, making it clear that he doesn’t support any expansion of gambling.”¹³ Commentator Mike Finger asserted that *Murphy*’s influence is a “sea change across every major sports league and all of college athletics is upon us and it is spreading fast. But will it spread to Texas? Don’t bet on it.”¹⁴ He said that when “sports books open just across the border [in Louisiana], that will give Texans even more incentive to make the drive.”¹⁵ Republican conservatives like Texas Lt. Governor Dan Patrick believe opposition to gambling is a “matter of principle, not of dollars.”¹⁶ Their view is that “allowing sports gambling would be ‘the camel’s

⁵ LORD OF THE RINGS: THE FELLOWSHIP OF THE RING (New Line Cinema, 2001).

⁶ WALTER T. CHAMPION, JR. & I. NELSON ROSE, GAMING LAW IN A NUTSHELL 28, 53–56 (2d ed. 2018).

⁷ *Id.* at 483–86.

⁸ See generally Professional and Amateur Sports Protection Act, 28 USC §§ 3701–3704 (1992). See Walter T. Champion, *Using State v. Rosenthal to Trump PASPA and Save Atlantic City*, 7 MISS. SPORTS L. REV. 1 (forthcoming).

⁹ *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1478, 1484–85 (2018).

¹⁰ Professional and Amateur Sports Protection Act, 28 U.S.C. § 3702 (1992).

¹¹ *Murphy*, 138 S. Ct. at 1478.

¹² *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1619, 1629–30 (2018).

¹³ Brandi Grissom, *Gov. Greg Abbott Orders Lottery Staff to Stop Pursuing Gambling Expansion*, DALL. MORNING NEWS (Nov. 9, 2015, 4:13 PM), <https://www.dallasnews.com/news/politics/2015/11/10/gov-greg-abbott-orders-lottery-staff-to-stop-pursuing-gambling-expansion/>.

¹⁴ Mike Finger, *In Texas, Legal Sports Betting is Still a Long Shot*, SAN ANTONIO EXPRESS-NEWS, May 15, 2018, at C001.

¹⁵ *Id.*

¹⁶ *Id.*

nose’ that leads to an influx of casinos.”¹⁷ Mark Jones, a political scientist fellow at William Marsh Rice University understood that “[i]f Dan Patrick and Republicans yield on one thing, they know it’s going to be harder to stop the rest of it,” but *Murphy* gives Texas politicians something to think about, and without a federal ban against sports gambling, the entire political landscape is (potentially) different.¹⁸

Texas Penal Code §47.01(4) has a “hypertechnical definition of ‘gambling device’ that has been the subject of litigation. . .for over a decade.”¹⁹ The key to the problem is the “fuzzy animal” exception: the Texas District and County Attorney’s Association assert that “[e]ight liner manufacturers and electronic gaming companies are pushing the limit in Texas. . .hundreds of thousands of dollars are spent on lobbying and personal meetings with state and county officials to convince them otherwise.”²⁰

The “fuzzy animal” exception has been described as a “loophole” carved out in 1995 “for arcades that reward game players with carnival-style prizes, such as stuffed animals and little toys.”²¹ The exception, approved by the Texas Legislature in 1995, “has spawned an industry of poor man’s casinos called game rooms. . .stuffed with machines called eight liners, because a player has eight chances to win, by matching up three icons—such as cherries, oranges, 7s, or gold bars—three down, three across or two diagonally.”²² The problem is that the “Texas law that spells out the difference between an illegal gambling device and an amusement redemption machine is rather vague, and essentially prolix.”²³ Although Texas police and district attorneys say that “game rooms are not supposed to pay winners in cash—period.”²⁴ But in practice, small cash payments are allowed because of the ambiguity of the exception.²⁵ The line between fuzzy animal toys and hard-core gambling is at best blurred.²⁶ In *State v. \$1,760.00 in United States Currency*, the Supreme Court of Texas in 2013 held that the non-immediate right of replay is not a “novelty.”²⁷ Replay tickets do not fall within the exception because they are not *exclusively* redeemable for noncash merchandise prizes, toys, or novelties.²⁸ Another layer of uncertainty comes to the understanding of the “fuzzy animal” exception with the Daily

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Kypreos, *supra* note 1.

²⁰ *Id.*

²¹ Cameron Langford, *Is it Crime, or Is It The Fuzzy Animal Exception?*, COURTHOUSE NEWS SERV. (July 10, 2017), <https://www.courthousenews.com/crime-fuzzy-animal-exception/>.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *State v. \$1,760.00 in U.S. Currency*, 406 S.W. 3d 177, 179 (Tex. 2013).

²⁸ *Id.* at 181.

Fantasy Sports phenomenon.

I. DAILY FANTASY SPORTS AND GAMBLING DEBATE

Fantasy Sports is the “act of building and competing with imaginary sports teams comprised of real-life athletes.”²⁹

Fantasy Sports is played by fans who pay a fee to enter and compete against each other for valuable prizes. . . . [T]he fantasy sports teams consists of athletes from different real-world teams. . . . The only thing that is real is the statistics generated by the individual athletes. Computers combine the information about real-world performances to determine which fantasy team has won.

Until recently, fantasy sports was season-long. [But now]. . . a fantasy league could be started and finished on the same day. . . [which] led to an explosion of interest in fantasy sports.³⁰

As recently as 2014, the two major Daily Fantasy Sports (DFS) enterprises, FanDuel and DraftKings, “were making money and could brush off with impunity the scattered questions that might arise about the games’ alleged legality.”³¹ In 2015, DFS exploded with “unprecedented massive advertising campaigns.”³² But, in September 2015 a scandal brought unexpected scrutiny to the industry, including threats from government officials to arrest DFS operators unless they stopped taking players from Nevada and New York.³³ The scandal developed when a DraftKings employee accidentally released confidential information about the real-world athletes that DraftKings were selecting; however, coincidentally, that same DraftKings employee won \$350,000 at rival FanDuel.³⁴ The scandal amounted to allegations of insider trading. The two companies “have set up online daily and weekly games in which fans pay an entry fee to a website – anywhere from 25 cents to \$1,000 – to play dozens if not hundreds of opponents, with prize pools that can pay \$2

²⁹ David O. Klein, *Fantasy Sports: The Rapidly Developing Legal Framework*, LAW 360 (Sept. 20, 2015, 10:27 PM), <https://www.law360.com/articles/704275/fantasy-sports-the-rapidly-developing-legal-framework>.

³⁰ I. Nelson Rose, *Are Daily Fantasy Sports Legal?*, 19 GAMING L. REV. & ECON. 346, 347 (2015).

³¹ I. Nelson Rose, *What Should Daily Fantasy Sports Do Now?*, 19 GAMING L. REV. & ECON. 683, 683 (2015).

³² *Id.*

³³ *Id.*

³⁴ *Id.*

million to the winner.”³⁵ The Attorney General of New York, Eric Schneiderman, concluded that DFS operations constituted illegal gambling.³⁶

We believe there is a critical distinction between DFS and *traditional* fantasy sports, which, since their rise to popularity in the 1980s, have been enjoyed and legally played by millions of New York residents. Typically, participants in traditional fantasy sports conduct a competitive draft, compete over the course of a long season, and repeatedly adjust their teams. They play for bragging rights or side wagers, and the Internet sites that host traditional fantasy sports receive most of their revenue from administrative fees and advertising, rather than profiting principally from gambling. . . .

[T]he sites hosting DFS are in active and full control of the wagering: DraftKings and similar sites set the prizes, control relevant variables (such as athlete “salaries”), and profit directly from wagering. DraftKings has clear knowledge and ongoing active supervision of the DFS wagering it offers. Moreover. . . DFS is designed from instant gratification, stressing easy game play and no long-term strategy.³⁷

The New York Attorney General says that DFS wagers meet the definition of gambling as bettors make bets masquerading as “fees” that depend on real-world performances of athletes and on elements of chance. Those bettors receive large cash prizes, and the companies take a “rake” or a cut of the wager.³⁸

However, in Maryland, fantasy sports are legal³⁹ and in Texas, the governor specifically stated that Texas will place no curbs on fantasy sports.⁴⁰

³⁵ Joe Drape & Jacqueline Williams, *Fantasy Sports Businesses Have to Defend Practices as Integrity Called into Question*, HOUS. CHRON., Oct. 6, 2015, at C9.

³⁶ Compare Notice to Cease and Desist and Notice of Proposed Litigation Pursuant to N. Y. Exec. L. § 63(12); with Gen. Bus. L. § 349 from N.Y. Attorney General Eric T. Schneiderman to Draft Kings and FanDuel (Nov. 10, 2015) (essentially the same letters).

³⁷ *Id.* (emphasis in original); see also Walter T. Champion, *The NCAA 'Doth Protest Too Much, Methinks' About DFS*, 15 CARDOZO PUB. L. POL'Y & ETHICS J. 117, 118, 129, 131–33 (2016/2017); see also Walter T. Champion & I. Nelson Rose, *Daily Fantasy Sports and the Presidential Debate*, 27 MARQUETTE SPORTS L. REV. 301, 303–4, 323 (2017).

³⁸ See Complaint at 39, 54–55, *New York v. DraftKings, Inc.*, No. 453054/2015 (N.Y. Sup. Ct. Nov. 17, 2015).

³⁹ MD. CODE ANN., STATE GOV'T, § 9–1D–01 (West 2018).

⁴⁰ Peggy Fikac, *Abbott: No Curbs on Fantasy Sports*, HOUS. CHRON., Oct. 23, 2015, at A1.

And, even after the cease and desist letters, FanDuel maintained its visibility as a marketing presence in New York arenas.⁴¹ Traditional fantasy sports leagues (TFS) consists of fans who “own” teams and draft players.⁴² The question is whether the Unlawful Internet Gambling Enforcement Act (UIGEA) carve-out for TFS⁴³ also applies to DFS.⁴⁴ In DFS, every single team may own the same players; although there is skill in manipulating the salary cap, there is less strategy in the drafting of players (as opposed to TFS).⁴⁵ TFS is seasonal and legal; DFS is daily (or weekly) which to some critics is the sea change that transforms it into illegal betting.⁴⁶ DFS, like typical fantasy sports games, allow participants to choose “professional players in a given sport” who will then “compete against other [TFS] participants based upon the actual performance of those players in key statistical categories.”⁴⁷ However, “[u]nlike typical fantasy sports games, which are based on a sport’s entire season, FanDuel’s games are based on only one day’s worth of performances.”⁴⁸

A New Jersey court said the following:

Fantasy sports have been extremely popular in recent years. They have earned a place in modern popular culture and are the subject of countless newspaper and magazine articles, books, internet message boards and water-cooler conversations. The enormous popularity of fantasy sports can be attributed in part to the services offered on internet websites. . . . The websites provide a platform for real-time statistical updates and tracking, message boards and expert analysis.

Fantasy sports leagues allow fans to use their knowledge of players, statistics and strategy to manage their own virtual realm based upon the actual performance of professional

⁴¹ Tim Casey, *FanDuel, Facing Opposition, Maintains Its Visibility in New York*, N.Y. TIMES (Nov. 23, 2015), <https://www.nytimes.com/2015/11/24/sports/daily-fantasy-sports-site-facing-opposition-maintains-its-visibility-in-city-arenas.html?partner=bloomberg>.

⁴² Michael Trippiedi, *Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?*, 5 UNLV GAMING L.J. 201, 207 (2014).

⁴³ Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361–5362 (2006) (“carve-out” at 31 U.S.C. § 5362(1)(E)(ix)(I)-(III) (2006)).

⁴⁴ Trippiedi, *supra* note 42, at 219.

⁴⁵ *Id.* at 220.

⁴⁶ Langone v. Kaiser, No. 12 C 2073, 2013 WL 5567587, at *1 (N.D. Ill. Oct. 9, 2013).

⁴⁷ *Id.*

⁴⁸ *Id.*

athletes through a full season of competition. . . .⁴⁹

The court explained that through the website, participants can purchase a fantasy sports team after paying a fee, then the participant has access to real time statistical information.⁵⁰

The purchase price also covers the data-management services necessary to run a fantasy sports team. . . . [T]he participants “draft” a slate of players and track the[ir] performance. . . .in key statistical categories throughout the season. Participants are grouped into “leagues” of as many as twelve teams and compete not only against the members of their own leagues, but can also compete against the winners of the other leagues.⁵¹

DFS accelerated the process and transformed nerd-games to a gambler’s edge. To digress, what is gambling and what is illegal? For one, contests of skill are almost never illegal.⁵² “Gambling requires prize, consideration, and chance. If any one of those elements are absent the activity can still be regulated, but not under anti-gambling laws.”⁵³ A game determined by skill is not gambling even though the prize might still be cash; “[b]ut the consideration is no longer considered as a bet.”⁵⁴ “Paying to play a contest of skill is an entry fee, not a wager.”⁵⁵ The crux of the issue is whether a daily fantasy game has enough skill elements to keep it out of the realm of sports betting.⁵⁶ “The question will be determined entirely by state law.”⁵⁷

Each state is different. For example in the state of Washington, legislation was proposed to legalize DFS.⁵⁸ To determine between games of chance and skill, most states use the “dominant factor test.”⁵⁹ In Washington, a game of chance is when the outcome depends in “material degree” on chance even if

⁴⁹ Humphrey v. Viacom, Inc. No. 06-2768, 2007 WL 1797648, *1 (D.N.J. June 20, 2007).

⁵⁰ *Id.*

⁵¹ *Id.* (quotations in original).

⁵² Rose, *supra* note 30, at 348.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Kirk A. Soderquist et al., *No Game-Changer for Fantasy Sports in Washington State*, LAW 360 (Mar. 23, 2015, 2:44 PM), <https://www.law360.com/articles/634703/no-game-changer-for-fantasy-sports-in-washington-state>.

⁵⁹ *Id.*

skill is still a factor.⁶⁰ Proponents will argue that DFS is simply fantasy sports played over a shorter period; whereas, critics of DFS argue that the shorter period allows for less time to exercise skill and thus increases the possibility that the outcome will be (more) determined by mere chance.⁶¹ DFS appears to be legal under current federal laws and should be legal in the majority of states since it will be categorized as a game of skill (just like season-long fantasy sports).⁶² When Congress passed the UIGEA in 2006, it did not expect that less than ten years later DFS would be the multi-billion dollar industry it is now.⁶³ Those “who embraced the UIGEA carve-out, never anticipated that it could be used for daily fantasy sports.”⁶⁴ Nor, did they anticipate that DFS in 2015 would be the “fastest growing segment of online gambling.”⁶⁵ As usual, in determining if the game is illegal gambling or not, the question is the role of chance versus skill in the outcome of these fantasy sports contests.⁶⁶

In its complaint against DraftKings and FanDuel, the State of New York, through Attorney General Eric Schneiderman, sought to “enjoin DraftKings from continuing to operate an unlawful gambling business in New York.”⁶⁷ The complaint takes exception to DFS’s advertisements and accuses it of offering “a way to bet on existing sporting events.”⁶⁸ The major allegation is that the “speed of DraftKings’ games, the size of their jackpots, and the degree to which the games are sold as winnable have ensnared compulsive gamblers and threaten to trap populations at greater risk for gambling addiction, particularly male college students.”⁶⁹ The complaint alleges that DFS created a new business model for online sports gambling.⁷⁰ It also argues that “DFS represents a clear departure from season-long fantasy sports[.]”⁷¹ Furthermore, the complaint summarizes that “an increasing number of states” have apparently answered “no” to the question of whether DFS is a legal business (e.g., Washington State, Michigan, Georgia, and New York).⁷²

California’s DFS bill passed through the Assembly Governmental Organization Committee in a 17-to-1 vote.⁷³ Assembly Bill 1437 would

⁶⁰ *Id.*; see also WASH. REV. CODE § 9.46.0225 (1987).

⁶¹ Soderquist et al., *supra* note 58.

⁶² Nathaniel J. Ehrman, *Out of Bounds?: A Legal Analysis of Pay-To-Play Daily Fantasy Sports*, 22 SPORTS LAW. J. 79, 81 (2015).

⁶³ I. Nelson Rose, *The UIGEA and the Law of Unintended Consequences*, 19 GAMING L. REV. & ECON. 504, 505 (2015).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *See id.*

⁶⁷ Complaint, *supra* note 38, at 13.

⁶⁸ *Id.* at 6.

⁶⁹ *Id.* at 8.

⁷⁰ *Id.* at 39.

⁷¹ *Id.* at 40.

⁷² *Id.* at 112–13, 116–17.

⁷³ Jeremy B. White, *Daily Fantasy Sports Regulation Bill Passes California*

authorize California companies to offer Internet daily fantasy sports after obtaining various California Department of Justice licenses.⁷⁴ The summary of the Assembly Committee on Governmental Organization's Hearing on the proposed Internet Fantasy Sports Game Protection Act stated that the Act "would require a person or entity to apply for, and receive a license from the [California] Department of Justice (DOJ) prior to offering an Internet fantasy sports game in California."⁷⁵ Furthermore, the bill required "the department to issue a license to a person or entity that applies for a license if the person or entity satisfies specified requirements, including, among others, that the applicant is of good character, honesty, and integrity."⁷⁶

The bill also requires "a person to register with a 'licensed operator' prior to participating in an 'Internet fantasy sports game' on an 'authorized Internet Web site.'⁷⁷ The licensed operator must ensure that the "registered player is eligible to play on an authorized internet website, and to implement appropriate data security standards to prevent access by a person whose age and location have yet to be verified."⁷⁸ So, as usual, it is up to the states to decide. New York says it is legal; Utah disallows all gaming;⁷⁹ California states that it is legal and had proposed regulations; and Texas, through its Governor Greg Abbott, is apprehensive to new regulations when laws prohibiting fraud would suffice.⁸⁰ It is true that current Texas Attorney General Ken Paxton has declared DFS illegal, but he has his own problems.⁸¹

DraftKings sued Ken Paxton on March 4, 2016,⁸² and FanDuel strategically exited the Texas market (at least for the time being).⁸³ DraftKing alleges that the Attorney General's opinion letter is "the opening volley in [his] . . . campaign. . . to distort Texas law and drive lawful DFS operators out of

Committees, SACRAMENTO BEE (Jan. 10, 2016, 11:00 AM), <http://www.sacbee.com/news/po;otocs-government/capital-alert/article53375325html>.

⁷⁴ *Id.*

⁷⁵ *Internet Fantasy Sports Game Protection Act: Hearing on AB 1437 Before the Assemb. Comm. on Governmental Org.*, 2015-16 Cal. Leg. 1 (Jan. 6, 2016) (summary of hearing on Internet Fantasy Sports Game Protection Act).

⁷⁶ AB 1437, 2015-16 Cal. Leg. Assemb. Reg. Sess. (Cal. 2016), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB1437.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Ryan Rodenberg, *Daily Fantasy Sports State-by-State Tracker*, ESPN (Feb. 18, 2016), https://www.espn.com/chalk/story/_/id/14799449/daily-fantasy-dfs-legal-yo-ur-state-state-state-look.

⁸⁰ *Id.*; Fikac, *supra* note 40.

⁸¹ Plaintiff's Original Petition for Declaratory Judgment at 4, *DraftKings, Inc. v. Paxton*, No. DC-16-02593 (Dallas Cty. Dist. Ct. 2016).

⁸² *Id.*, Exhibit B at 1, 4, 12, "Settlement Agreement and Release" [between Texas A.G. and FanDuel] (which stipulates that no later than May 2, 2016, FanDuel will include Texas on the list of states where contestants may not deposit funds while physically located in that state).

⁸³ *Id.*, Exhibit B at 4.

state.”⁸⁴ Governor Abbot, in October 2015, gave a “cold shoulder to the idea of state regulations targeting” DFS.⁸⁵ He did not agree that they were targeting DFS as he stated that there are already existing laws which would allow for the persecuting of fraud in this area.⁸⁶ Regardless, Texas Attorney General Ken Paxton issued an opinion indicating that DFS is illegal under Texas Law.⁸⁷ Ken Paxton, however, is currently under indictment for securities fraud (which can be construed to be a form of gambling).⁸⁸ DFS supporters call his opinion overreaching and a misinterpretation of Texas Law.⁸⁹

Gaming is the most regulated industry in America: “No industry in America is as heavily regulated as legalized gambling.”⁹⁰ However, regulations across the country is uniform—“startling differences exist between regions of the country or even between various games played within a single state.”⁹¹ An issue arises when states use legal gambling as a source of revenue.⁹² “The federal government has a hand in regulating gambling, but mainly to assist states in enforcing their public policies. Thus, it is state laws and local ordinances that have the most impact on gaming.”⁹³ In Texas, there is a morality play between making money through gambling and so-called piety.⁹⁴ This conflict is seen through the “fuzzy animal” exception to the ban on the eight-liner gambling devices. Texas’s divergent reactions to DFS appears to be a continuation of its “fuzzy animal” mentality. Texas has a state lottery,⁹⁵ and some allowance for eight-liners.⁹⁶

II. MURPHY V. NCAA AND THE DEMISE OF PASPA

⁸⁴ *Id.*, Exhibit B at 5, 12.

⁸⁵ Peggy Fikac, *Attorney General Asked Whether Daily Fantasy Sports Games Are Legal in Texas*, MY SAN ANTONIO (Nov. 13, 2015, 5:07 PM), <https://www.my.sanantonio.com/news/local/texas/article/Attorney-general-asked-whether-daily-fantasy-6630787.php>.

⁸⁶ *Id.*

⁸⁷ *See* The Legality Fantasy Sports Leagues Under Tex. Law, Op. Att’y Gen. KP-0057 (2016).

⁸⁸ Emma Platoff, *Ken Paxton’s Criminal Trial Has Been Pending for Nearly Four Years. Here’s a Timeline of His Legal Drama*, The Tex. Trib. (June 19, 2019), <https://www.texastribune.org/2019/06/19/ken-paxton-criminal-case-timeline-texas-attorney-general-fraud/>.

⁸⁹ Peggy Fikac, *Paxton Declares Sports Fantasy Leagues Illegal Gambling Under Texas Law*, HOUS. CHRON. (Jan. 19, 2016 11:28 PM).

⁹⁰ CHAMPION & ROSE, *supra* note 6, at 42.

⁹¹ *Id.*

⁹² *See id.* at 41.

⁹³ *Id.*

⁹⁴ John Gravois, *Odds Still Against Expanding Gambling in Texas Despite Supreme Court Ruling*, HOUS. CHRON. (May 15, 2018, 3:09 PM), <https://www.chron.com/news/politics/texas/article/Odds-still-against-expanding-gambling-in-Texas-12913101.php>.

⁹⁵ *See generally* Jason Johns, *Win, Lose, or Draw: The Rise of Eight-Liner Video Devices in Texas*, 34 TEX. TECH L. REV. 263, 268–70 (2003).

⁹⁶ *Id.* at 272–74, 286–87.

The U.S. Supreme Court in *Murphy v. NCAA*, on May 14, 2018, held that PASPA was unconstitutional in a 6-3 decision.⁹⁷ *Murphy* is the first time the Court expressly held that the federal government cannot order states, or even state officials, to *do anything*.⁹⁸ The question before the Court was whether PASPA's provision that makes it unlawful for a state to "authorize" sports gambling schemes "is compatible with the system of 'dual sovereignty' embodied in the Constitution."⁹⁹

The doctrine of commandeering states that the federal government cannot command the states to become mere agents of the national authority.¹⁰⁰ The Court explained that the anti-commandeering doctrine "is simply the expression of a fundamental structural decision to incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the States."¹⁰¹ Congress' legislative powers are limited because the Constitution confers on Congress only certain enumerated powers, and thus, all other legislative authority is reserved for the states.¹⁰² "And conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the government of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority."¹⁰³

The Court continued stating that the PASPA provision that prohibits "state authorization of sports gambling [] violates the anti-commandeering rule. That provision unequivocally dictates what a state legislature may and may not do."¹⁰⁴ "It is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine."¹⁰⁵

The second edition of *Gaming Law in a Nutshell* (Jan. 2018) correctly predicted that a Supreme Court majority will likely "declare PASPA an

⁹⁷ *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 U.S. 1461, 1468, 1485 (2018) ("Alito, J., delivered the opinion of the Court, in which Roberts, C.J., and Kennedy, Thomas, Kagan, and Gorsuch, JJ., joined, and in which Breyer, J., joined as to all but Part VI-B. Thomas J., filed a concurring opinion. Breyer, J., filed an opinion concurring in part and dissenting in part. Ginsburg, J., filed a dissenting opinion, in which Sotomayor, J., joined, and in which Breyer, J., joined in part.").

⁹⁸ I. Nelson Rose, *The Supreme Court Changes Everything*, GAMBLING & LAW (June 4, 2018), www.gamblingandthelaw.com/the-supreme-court-changes-everything/.

⁹⁹ *Murphy*, 138 U.S. at 1468.

¹⁰⁰ See CHAMPION & ROSE, *supra* note 6, at 175.

¹⁰¹ *Murphy*, 138 U.S. at 1475.

¹⁰² *Id.* at 1476.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1478.

¹⁰⁵ *Id.*

unconstitutional intrusion on states' police powers, but only because it requires states keep sports betting illegal."¹⁰⁶ But, the Court in *Murphy* went far beyond that prediction. Albeit, the Third Circuit's decision that PASPA prevents New Jersey from changing its gaming laws¹⁰⁷ is patently absurd. Furthermore, this absurdity is heightened by the fact that the New Jersey legislature and New Jersey voters desperately want to legalize sports betting. After *Murphy*, New Jersey, which has been preparing for PASPA's dismantlement, said it was ready to open betting windows by the end of June 2018¹⁰⁸ (which has occurred). Momentum! *Murphy* is the John the Baptist spreading the good news of gambling's potential financial bounty to conservative Texas.

III. TEXAS' PECULIAR "FUZZY ANIMAL" EXCEPTION

The purposely ambiguous "fuzzy animal" exception is memorialized in Texas Penal Code 47.04:

- (a) A person commits an offense if he knowingly uses or permits another to use as a gambling place any real estate, building, room, tent, vehicle, boat, or other property whatsoever owned by him or under his control, or rents or lets any such property with a view or expectation that it be so used.
- (b) It is an affirmative defense to prosecution under this section that:

¹⁰⁶ CHAMPION & ROSE, *supra* note 6, at 176.

¹⁰⁷ Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 832 F.3d 389, 392 (3d Cir. 2016).

¹⁰⁸ See I Nelson Rose, *Supreme Court Oral Arguments in NJ Sportsbetting Case Analyzed*, GAMING & LAW (March 4, 2018), <http://www.gamblingandthelaw.com/supreme-court-oral-arguments-in-nj-sportsbetting-case-analyzed/> ("I believe that at least five and perhaps six or more of the Justices will rule that Congress does have the power, under the Interstate Commerce Clause, to regulate and even outlaw sports betting. But in the absence of a coherent federal policy, let alone a comprehensive regulatory system, the states are free to deal with sports betting as they wish. Which means we will have a dozen states with legal, regulated sports betting by next year."); Chris Kirkham & Rachel Bachman, *Leagues, States Make Sports-Betting Play*, WALL ST. J. (May 16, 2018), at A3; Adam Liptak & Kevin Draper, *Supreme Court Ruling Favors Sports Betting*, N.Y. TIMES (May 14, 2018), <https://www.nytimes.com/2018/05/14/us/politics/supreme-court-sports-betting-new-jersey.html>; Andrew Beaton, *NFL Sees a Gambling Windfall—The League Has Shifted Its Focus to How Sports Betting Could Help Grow Football*, WALL ST. J. (MAY 16, 2018), at A14; Rick Maese, *With Sports Betting Legal, New Jersey's Monmouth Park Aims to Take Wagers Soon*, WASH. POST (May 14, 2018, 8:49 AM), https://www.washingtonpost.com/sports/with-sports-betting-legal-new-jerseys-monmouth-park-aims-to-take-wagers-soon/2018/05/14/8c58c4e4-5782-11e8-858f-12becb4d6067_story.html; Nick Corasaniti, *Game On! Legislature Approves Sports Betting in New Jersey*, N.Y. TIMES (June 7, 2018), <https://www.nytimes.com/2018/06/07/nyregion/sports-betting-new-jersey.html>; and *Murphy*, 138 S. Ct. at 1485.

- (1) the gambling occurred in a private place;
 - (2) no person received any economic benefit other than personal winnings; and
 - (3) Except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants.
- (c) An offense under this section is a Class A misdemeanor.¹⁰⁹

In *Hardy v. State*, the so-called “fuzzy animal” exception is explained.¹¹⁰ The court held that an eight-liner, a gambling device which provides either gift certificates to retail stores or tickets that are redeemable for use in another machine, was not within the statutory exclusion and, accordingly, was subject to seizure and forfeiture.¹¹¹ The court wrote the following:

At the show cause hearing, Lovell Hardy testified that the eight-liners are electronic devices that operate at least partially by chance. The object is to win tickets redeemable for cash or prizes. Winnings on the eight-liners are determined by matching symbols in one of eight lines. . . . When a player inserts money in one of these eight-liners, the machine records the number of credits. . . .

At the conclusion of the show cause hearing, the trial court found that the eight-liners were gambling devices and that the currency, gift certificates, and [other awards violated the statute]. Accordingly, the trial court ordered the seized items, including eight-liners, slot machines, currency, and gift certificates, forfeited to the State.

. . .

Historically, gambling in Texas has been proscribed. As early as 1861, the Texas Constitution prohibited most types of gambling. TEX. CONST. art VII, § 17 (1861). . . . *see also* TEX. CONST. art III, § 47 (1876) (requiring “[t]he Legislature [to] pass laws prohibiting the establishment of lotteries and gift enterprises in this State, as well as the sale of tickets in lotteries, gift enterprises or other evasions involving the lottery principle. . . . Since 1980, the constitution has been

¹⁰⁹ TEX. PENAL CODE § 47.04 (1994).

¹¹⁰ *Hardy v. State*, 102 S.W. 3d 123, 132 (Tex. 2003).

¹¹¹ *Id.* at 132.

amended several times to allow bingo charitable raffles, and a state lottery under specified circumstances. *See* TEX. CONST. art. III, § 47(b), (c), (d), (e). Our current constitution requires that the Legislature prohibit all lotteries or gift enterprises other than those the constitution expressly authorizes.

...

Thus, because the eight-liners at issue here rewarded the players with “cash” or its equivalent in merchandise and prizes. . . Thus, as a matter of law, the eight liners at issue do not meet the section 47.01(4)(B) exclusion.¹¹²

Tex. Penal Code 47.02’s prohibition includes betting money on “games played with cards, dice, balls, or other gambling devices. . .[which] defines a gambling device as any electronic, electromechanical, or mechanical contrivance not excluded under Paragraph (b). . .for a consideration affords the player an opportunity to obtain anything of value, the aware of which is determined solely or partially by chance.”¹¹³

Texas was a hard sell for any gambling, and in fact, the possession and operation of all gambling devices was illegal.¹¹⁴ However, in 1993, the state legislature modified the “gambling device” definition to exclude “contrivance[s] designed, made, and adapted solely for bona fide amusement purposes if the contrivance rewards the player exclusively with noncash merchandise prizes, toys, or novelties. . .that have a wholesale value. . .of not more than 10 times the amount charged to play the game or device once or \$5, whichever is less.”¹¹⁵

The court stated the following about the plaintiffs:

[T]he Hardys do not contend that the seized eight-liners are not gambling devices under the general definition in 47.01(4). Instead, they contend that their eight-liners fall within the exclusion provided in section 47.01(4)(B). Eight-liners fall within the statutory exclusion only if they reward players ‘exclusively with non-cash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items.’ . . . While we recognize that, in some cases, whether a machine falls within the statutory exclusion may involve a factual inquiry into the nature of the reward conferred, in this

¹¹² *Id.* at 125, 126, 130, 132.

¹¹³ *Id.* at 130.

¹¹⁴ *See* Act of May 1993, S.B. 522, 73rd Leg., Reg. Sess. (Tex. 1993).

¹¹⁵ *Id.* at 131.

case, the pertinent facts are undisputed. The eight-liners at issue did not award prizes, toys, or novelties. They awarded tickets that could be exchanged either for gift certificates or cash to play other machines. Thus, we must decide whether the tickets issued by the eight-liners in this case are representations of value that are redeemable solely for noncash merchandise prizes, toys, or novelties. We conclude they are not.¹¹⁶

The *Hardy* court first addressed gift certificates that fit within the statutory exclusion. The parties agreed “that a gift certificate is not a toy or a novelty.”¹¹⁷ The issue the court had to analyze was whether or not a gift certificate constitutes a “noncash merchandise prize.”¹¹⁸ The court continued by defining the word “non-cash” as simply not cash whereas “Cash” was defined either as “‘ready money (as coin, specie, paper money, an instrument, token, or anything else being used as a medium of exchange)’ or ‘money or its equivalent paid immediately or promptly after purchasing.’”¹¹⁹ That court stated that gift certificates were used as “a medium of exchange at various retail outlets” and are equivalent of money because “five dollar gift certificates, redeemable for merchandise at Wal Mart, may be used in precisely the same manner as five-dollar bills.”¹²⁰ The court explained that these Game Time certificates are different from five-dollar stuffed animals, without marketable value, because they can be converted to cash.¹²¹ The *Hardy* court held that “the reward operates in the same manner as legal tender in a retail establishment [therefore] it does not qualify as a noncash merchandise prize, toy or novelty item.”¹²²

Similar to a slot machine, eight-liner machines are coin-operated electronic gaming machines. In these machines, “a player ‘wins’ if a horizontal, vertical, or diagonal row shows up.”¹²³ The machines can be video reel, video keno, and video bingo games, but the cost to play and the prize for winning varies.¹²⁴ Gaming parlors across Texas have increased the number of eight-liner machines for their customers.¹²⁵

Historically, Texas prohibited any game of chance “that for consideration

¹¹⁶ *Id.* (internal citations omitted).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*, citing WEBSTER’S THIRD NEW INT’L DICTIONARY 346 (1961).

¹²⁰ *Id.* at 131.

¹²¹ *Id.* at 132.

¹²² *Id.*

¹²³ Christy Drake-Adams, *Legal Q&A* (TEXAS MUNICIPAL LEAGUE), <https://www.tml.org/DocumentCenter/View/192/Eight-Liners—2016-12-PDF>.

¹²⁴ *Id.*

¹²⁵ *Id.*

affords the player an opportunity to obtain *anything of value*.”¹²⁶ In 1993, the Texas Legislature amended its Penal Code added Section 47.01(4)(B), which relaxed the previous standard by excluding from the definition of “gambling device”:

any electronic, electromechanical, or mechanical contrivance designed, made, and adapted solely for bona fide amusement purposes if the contrivance rewards the player exclusively with *noncash merchandise prizes, toys, or novelties, or a representation of value redeemable for those items*, that have a wholesale value available from a *single* play if the game or device of *not more than 10 times the amount charged to play the game or device once or \$5, whichever is less*.¹²⁷

This statute section, sometimes referred to as the “fuzzy animal” exception, appears to allow the operation of coin-operated amusement machines where a claw grabs children’s prizes, such as stuffed animals.¹²⁸

In 2011, the Texas legislature introduced two bills. First, House Bill 1154 would (1) authorization to a comptroller to “assess a penalty of not less than \$50 or more than \$2,000 against” an owner or operator who is convicted of keeping a gambling place or possessing a gambling device, equipment, or paraphernalia that is related to owning or operating the machines; and (2) authorize a city to assess a civil penalty against the convicted owner or operator identified in the first part.¹²⁹

And on the other hand, H.B. 1183 would have (1) authorized a commissioner’s court and, in some instances a city, to order, on proper petition, a local option election to legalize or prohibit the operation of eight-liners; and (2) authorized the imposition of a fee on eight-liner owners and provide for the allocation of the fee revenue as follows: (a) thirty percent to the state’s general revenue fund; and (b) seventy percent to a city in which the eight-liner is located.¹³⁰ However, neither bill passed.¹³¹

Currently, a city can impose an additional occupation tax, cannot exceed one-fourth of the state tax, on coin-operated machines.¹³² The current state tax

¹²⁶ TEX. PENAL CODE § 47.01 (1973).

¹²⁷ TEX. PENAL CODE § 47.01(4)(B) (1973) (emphasis added).

¹²⁸ Drake-Adams, *supra* note 123.

¹²⁹ Tex. H.B. 1154, 82d Leg., Reg. Sess. (2011).

¹³⁰ Tex. H.B. 1183, 82d Leg., Reg. Sess. (2011).

¹³¹ See *82(R) Bill Stages for HB 1154*, TEX. LEGIS. ONLINE, <https://capitol.texas.gov/billlookup/BillStages.aspx?LegSess=82R&Bill=HB1154> (last visited Nov. 17, 2019); see also *82(R) Bill Stages for HB 1183*, TEX. LEGIS. ONLINE, <https://capitol.texas.gov/billlookup/BillStages.aspx?LegSess=82R&Bill=HB1183> (last visited Nov. 17, 2019).

¹³² TEX. OCC. CODE ANN. § 2153.451 (West 2019).

is sixty dollars per machine,¹³³ so the occupation tax can be up to fifteen dollars per year. But, “[a]ny regulatory fees imposed by a city must be related to the cost of enforcing related regulations.”¹³⁴ However, this is the maximum of the city’s authority; it cannot impose any other “tax” or a “permit fee” on machines.¹³⁵

A Texas court can determine if a fee is a “regulatory measure” or a “tax measure” using the Texas Supreme Court’s test set forth in *Hurt v. Cooper*¹³⁶ In *Hurt v. Cooper*, the court stated the rule as the following:

It is sometimes difficult to determine whether a given statute should be classed as a regulatory measure or as a tax measure. The principle of distinction generally recognized is that when, from a consideration of the statute as a whole, the primary purpose of the fees provided therein is the raising of revenue, then such fees are in fact occupation taxes. . . . On the other hand, if its primary purpose appears to be that of regulation, then the fees levied are license fees and not taxes.¹³⁷

Courts have clarified that revenue from eight-liner machines should not be used to fund city-related entities, such as a volunteer fire department.¹³⁸ This advice is the exact reason why Texans are confused on whether the machines violate the Penal Code.

Under current law, an eight-liner machine is legal only when used for “bona fide amusement purposes, awards the player with noncash merchandise or vouchers redeemable for novelty items, and the value of the prize or certificate is not more than ten times the cost of a single play or five dollars. . . .”¹³⁹ On the other hand, if the machine pays out in cash or exceeds the statutory minimum prize amount, it is illegal.¹⁴⁰

The Texas Attorney General opined that Section 47.01(4)(B) is unconstitutional under Article III, Section 47(a) of the Texas Constitution.¹⁴¹ Article III states that the “Legislature shall pass laws prohibiting lotteries and gift enterprises in this State other than [charitable bingos, raffles, and the state

¹³³ TEX. OCC. CODE ANN. § 2153.401 (West 2019).

¹³⁴ Drake-Adams, *supra* note 123.

¹³⁵ *Id.*

¹³⁶ *Hurt v. Cooper*, 110 S.W. 2d 896, 899 (Tex. 1937).

¹³⁷ *Id.*

¹³⁸ See e.g., *Brian Voluntary Fire Dep’t v. Anderson*, No. 2-04-258-CV, 2005 WL 1475409 (Tex. App. 2005, no pet.).

¹³⁹ Drake-Adams, *supra* note 123.

¹⁴⁰ See *Texas v. Del Sur Pueblo*, 220 F. Supp. 2d 668, 704 (2001).

¹⁴¹ Tex. Att’y Gen. Op. No. DM-466 (1998).

lottery].”¹⁴² Yet, Texas appeals courts have held that the “fuzzy animal” exception is constitutional and that the Attorney General’s interpretation is incorrect.¹⁴³ Two Texan courts held that law enforcement officials may not rely solely on the Attorney General’s Opinion No. DM-466 to seize machines as illegal gambling devices.¹⁴⁴ Several Texas Appeals Courts have held that Section 47.01(4)(B) of the Penal Code is constitutional.¹⁴⁵ “Thus, any eight-liner [machine] that fits within the definition contained in Section 47.01(4)(B) are legal to operate in Texas.”¹⁴⁶

However, as the Texas Municipal League wrote, “it is not quite that simple” because eight-liner operators try to “skirt” the law.¹⁴⁷ For example, the Texas Supreme Court held that gift certificates redeemable at retail stores are the equivalent of cash, and eight-liner machines that dispense these certificates will be considered illegal gambling devices.¹⁴⁸ In addition, if an eight-liner machine gives cash to a player, even if that cash is used only to play on another machine, the eight-liner is deemed an illegal gambling device.¹⁴⁹ Moreover, a separate opinion from the Texas Attorney General issued in 2007 stated that a “machine that issues a stored-value card enabling the purchase of merchandise does not fall within the exception of section 47.01(4)(B) and is a gambling device.”¹⁵⁰ In other words, depending on the amount, a payout system like this is considered illegal. However, a federal court later concluded that the Attorney General’s opinion is not persuasive, and a Texas court would likely not adhere to it.¹⁵¹ The court stated the following:

Rather, the sum and substance of the Attorney General’s opinion is that stored-value cards are equivalent to cash (and, therefore, the amusement game is prohibited) because “the stored-value cards. . .are used as a medium of exchange. . .that can be exchanged for merchandise.” Yet the Act specifically

¹⁴² *Id.*, citing TEX. CONST., art. III, § 47(a).

¹⁴³ See e.g., *Legere v. State*, 82 S.W.3d 105, 111–12 (Tex. App. 2002); *State v. Wofford*, 34 S.W.3d 671, 680 (Tex. App. 2000); *Owens v. State*, 19 S.W.3d 480, 481 (Tex. App. 2000); *State v. Hancock*, 35 S.W.3d 199, 200–01 (Tex. App. 2000).

¹⁴⁴ *Weaver v. Head*, 984 S.W.2d 744, 747 (Tex. App. 1999); see also *Tex. Alcoholic Beverage Comm’n. v. Amusement and Music Operators of Texas, Inc.*, 997 S.W.2d 651, 653–54, 656 (Tex. App. 1999).

¹⁴⁵ See e.g., *Owens*, 19 S.W.3d at 481; *State v. Hancock*, 35 S.W.3d at 201.

¹⁴⁶ *Drake-Adams*, *supra* note 123; see e.g., *Taing v. State*, No. 14-13-00677-CR, 2015 WL 3524233, at *18 (Tex. App. 2015); *Legere*, 82 S.W.3d at 112.

¹⁴⁷ *Drake-Adams*, *supra* note 123.

¹⁴⁸ See *Hardy v. State*, 102 S.W.3d 123, 132 (Tex. 2003); *State v. One Super Cherry Master Video 8-Liner Machine*, 102 S.W.3d 132, 133 (Tex. 2003).

¹⁴⁹ *Hardy*, 102 S.W.3d at 132.

¹⁵⁰ *Tex. Att’y Gen. Op. No. GA-0527* (2007).

¹⁵¹ *Aces Wired Inc. v. Gametronics, Inc.*, No. A-07-CA768-LY, 2007 WL 5124986, *4 (W.D. Tex 2007).

authorizes an award of “a representation of value redeemable for [noncash merchandise].”¹⁵²

The court concluded, “[c]onsequently, Opinion No. GA-0527 is not helpful.”¹⁵³

In *Aces Wired v. Gametronics*, customers could transfer cash onto their cards, then use the card to play Aces Wired’s machines and win prize points.¹⁵⁴ These prize points lacked cash value, and could not be converted to cash, but customers could redeem the points for non-cash merchandise.¹⁵⁵ When a customer wanted to redeem his or her points, Aces Wired sends the retailer money to pay for the merchandise, then the customer can receive his or her prize.¹⁵⁶ If customers attempt to receive cash back, the transaction is denied.¹⁵⁷ The court held that, “[a]ccordingly, a ‘Prize Point’ is no more than a representation of value as contemplated by the [“fuzzy animal” exception].”¹⁵⁸ The court distinguished the case from the Texas Supreme Court’s opinion: “In *Hardy*, the Court analyzed whether an eight-liner that dispensed tickets *redeemable for gift certificates* satisfied the statutory exclusion” which violated the Penal Code because the certificates could be used exactly the same as cash.¹⁵⁹

Other Texas courts have discussed whether eight-liners are legal.¹⁶⁰ In *Warren v. Aldridge*, the Texas Appellate court stated that eight-liner machine operators are not entitled to a declaratory judgment on whether their machines are operating legally.¹⁶¹ In *Warren*, the owner of an eight-liner establishment sought a two-prong decision: a declaration that the machines in the establishment were not illegal gambling devices and injunctive relief to avoid criminal prosecution and forfeiture of machines.¹⁶² However, the Texas appeals court disagreed, holding that a court cannot render a declaratory judgment by interpreting the penal statute nor can a court enjoin the enforcement of the statute.¹⁶³ There are many other Texas appellate court *criminal* case opinion’s which discuss the criminal forfeiture of the machines.¹⁶⁴

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at *2 (W.D. Tex. 2007).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Aces Wired Inc. v. Gametronics, Inc.*, No. A-07-CA768-LY, 2007 WL 5124986, *2 (W.D. Tex 2007).

¹⁵⁸ *Id.* at *4.

¹⁵⁹ *Id.* at *5, analyzing *Hardy v. State*, 102 S.W.3d 123, 131 (Tex. 2003) (emphasis in original).

¹⁶⁰ See e.g., *Jester v. State*, 64 S.W.3d 553, 554, 559 (Tex. App. 2001, no pet.); *Allstar Amusement v. State*, 50 S.W.3d 705, 706 (Tex. App. 2001, no pet.).

¹⁶¹ *Warren v. Aldridge*, 992 S.W.2d 689, 690 (Tex. Ct. App. 1999, no pet.).

¹⁶² *Id.*

¹⁶³ *Id.* at 691.

¹⁶⁴ *Drake-Adams, supra* note 123; see e.g., *Pardue v. State*, 252 S.W.3d 690, 694–

It is difficult to enforce Section 47.01(B) for two reasons: first, the law is unclear as to when the eight-liner machines' payouts are legal; and second, it is hard to enforce because of the costs and logistics of both the investigation and prosecution of these types of cases.¹⁶⁵ But ultimately, if the machine is operating legally, and considering the doctrine of preemption, a city is arguably prohibited from banning these eight-liner machines.¹⁶⁶ However, a law enforcement officials can seize a machine if it is being operated illegally.¹⁶⁷

Section 2153.452 of the Texas Occupations Code expressly authorizes a city to regulate eight-liners through zoning.¹⁶⁸ However, the section provides that a city "shall treat the exhibition of a music or skill or pleasure coin-operated machine in the same manner as a political subdivision treats the principal use of the property where the machine is exhibited."¹⁶⁹ In addition, Section 2153.452(b) expressly authorizes a city to "restrict[] the exhibition of a coin operated amusement machine within 300 feet of a church, school or hospital."¹⁷⁰

Thus, within certain limitations, a city can regulate eight-liner machines.¹⁷¹

CONCLUSION

The contrast between the Texas Lottery and the omnipresent scratch-offs, and the absolute animosity towards slot machines, tribal casinos, and daily fantasy sports is most illuminating. Lotteries and scratch-offs are pure chance and thus illegal, unless the state determines otherwise. Casinos include poker and blackjack which are skill games. The same with Daily Fantasy Sports, which is more akin to chess than slot machines. This dichotomy between making money and atavistic moral paternalism is exemplified by the Texas Attorney General, Ken Paxton, who has singlehandedly led the fight against Daily Fantasy Sports.

Working knowledge of contracts and salary caps is necessary for success in Daily Fantasy Sports which proves that it assuredly is not a game of chance. The "fuzzy animal" exception for eight-liners also shows Texas's typical moral

95 (Tex. Ct. App. 2008), pet. denied).

¹⁶⁵ *Legere v. State*, 82 S.W.3d 105, 109–11 (Tex. Ct. App. 2002).

¹⁶⁶ *Drake-Adams*, *supra* note 123.

¹⁶⁷ *See* Kiah Collier, *State Game Room Regulations Taking Effect Friday*, HOUS. POL. (May 28, 2014, 2:46 PM), <https://blog.chron.com/houstonpolitics/2014/05/strict-game-room-regulations-taking-effect-friday/>; *see also* Jeremy Rogalski & Tina Macias, *Local Cops are Cashing in on Illegal Game Rooms*, KHOU 11 (May 23, 2019 10:38PM), https://www.khou.com/article/news/investigations/local-cops-are-cashing-in-on-illegal-game-rooms/285-0a199500-96c3-4a78-a26b-3517409134f8_

¹⁶⁸ TEX. OCC. CODE ANN. § 2153.452(a) (West 1999).

¹⁶⁹ *Id.*

¹⁷⁰ TEX. OCC. CODE ANN. § 2153.452(b) (West 1999).

¹⁷¹ TEX. OCC. CODE ANN. § 2153.452 (West 2019).

dilemma when it comes to gambling.¹⁷² This exception is fuzzy on purpose; the legislators will not allow the repeal or clarification of this ambiguous exception, but since the state has at least acquiesced to its continuation, then it is hypocritical and illogical for the Attorney General to fight against Daily Fantasy Sports. As Texans say, the cows are out of the barn.

As a result of action in New York and Nevada concerning fantasy sports operations FanDuel and DraftKings, Texas state representative Myra Crownover requested the legal opinion from Attorney General Paxton to determine whether Daily Fantasy Sports leagues were permissible under Texas law.¹⁷³ When it became known that Paxton was considering whether Daily Fantasy Sports was illegal under Texas law, Daily Fantasy Sports fans were mobilized with the result that his office was “flooded with thousands of emails supporting the games.”¹⁷⁴ “Despite the deluge of emails,” he replied that an attorney general’s opinions are “simply objective interpretations of existing law[]” and that Paxton would respond according to applicable laws.¹⁷⁵ The daily fantasy sports industry is a “multibillion-dollar national enterprise” that was under scrutiny in several states.¹⁷⁶ The supporters of fantasy sports said that it involved skill, thereby making it distinct from “pure gambling.”¹⁷⁷ Unlike traditional fantasy sports, where players choose a dream team for a season, players in daily fantasy sports can choose a different team every “day or week using sports sites that advertise big payoffs.”¹⁷⁸

Attorney General opinions are nonbinding but courts regard them as “persuasive and entitled to careful consideration.”¹⁷⁹ Texas Governor Greg Abbott “gave a cold shoulder to the idea of new state regulations targeting the fantasy sports industry” and said that “fraud should be prosecuted but laws already exist to deal with wrongdoing.”¹⁸⁰ Governor Abbott’s spokesman confirmed he had nothing to add to that position.¹⁸¹ But Governor Abbott later said that he wanted to provide direction about “prohibiting all such expansions without express authorization and direction by the Texas Legislature—and in some cases consent of the citizens through constitutional amendment.”¹⁸² The Governor’s stance did not deter Ken Paxton, who filed his Attorney General

¹⁷² See generally Collier, *supra* note 167.

¹⁷³ Peggy Fikac, *Paxton Deluged with Sports Support Attorney General to Opine Whether Daily Fantasy Sports is Illegal Gambling*, HOUS. CHRON. (Jan. 2, 2016), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Paxton-deluged-by-fantasy-sports-supporters-6733312.php>.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

opinion about two weeks after the initial public response to his deliberations which were almost unanimously pro Daily Fantasy Sports. In his Attorney General opinion, he declared that they were illegal because they depended on chance.¹⁸³ His Attorney General opinion positioned the following:

[T]he Lone Star State [is] to become the newest battleground in a national fight over the multibillion-dollar enterprise. “Simply put, it is prohibited gambling in Texas if you bet on the performance of a participant in a sporting event and the house takes a cut,” Paxton said in a statement accompanying his nonbinding legal opinion. Paxton said a court, if confronting the issue, likely would find that participation in daily fantasy sports is illegal. Daily fantasy sports site DraftKings said it intended to keep operating in Texas, disagreeing with Paxton’s interpretation of the law and his description of how the games work. “The Texas Legislature has expressly authorized games of skill, and daily fantasy sports are a game of skill,” said a statement by Randy Mastro, counsel to DraftKings. “The Attorney General’s prediction is predicated on a fundamental misunderstanding of [daily fantasy sports]. We intend to continue to operate openly and transparently in Texas, so that the millions of Texans who are fantasy sports fans can continue to enjoy the contests they love,” said Mastro, who disputed the description of an entry fee as a cut.¹⁸⁴

It does not seem to impress Ken Paxton that everyone is against his Attorney General opinion and that the Texas Legislature has expressly authorized gaming based on skill which is the case with Daily Fantasy Sports. Even “America’s Team,” the Dallas Cowboys, support Daily Fantasy Sports, as they, along with the Washington Redskins, have DraftKing branded lounges.¹⁸⁵ Additionally, Jerry Jones, owner of the Cowboys, and Robert Kraft, owner of the New England Patriots, both have reportedly invested in DraftKings.¹⁸⁶ Mark Cuban, the owner of the Dallas Mavericks and an investor in a daily fantasy sports data company, slammed Paxton’s Attorney General Opinion and even called it a disappointment.¹⁸⁷

Daily Fantasy Sports critics see it as just another “gambling enterprise” which in order to be present in the state, needs to be either regulated or

¹⁸³ Peggy Fikac, *supra* note 89.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

prohibited just like any other such enterprise.¹⁸⁸ Fantasy Sports for All, an effort supported by the Fantasy Sports Trade Association, whose members include both DraftKings and FanDuel, has engaged lobbyists in Texas.¹⁸⁹ Fantasy Sports for All, who has said that there are over two million fantasy sports player in Texas, provided a form letter that Texans could send to politicians that said the following:

As your constituent and a proud Texan, I urge you to support keeping daily fantasy sports legal and accessible in our state. . . . I am a mature adult and I am fully capable of deciding from myself how I want to enjoy sports. I believe this is a matter of personal choice, and that the government has no business telling me I can't play fantasy sports.¹⁹⁰

“Peter Schoenke, chairman of the Fantasy Sports Trade Association, criticized Paxton’s opinion saying his ‘deliberate misinterpretation of existing Texas law represents the type of governmental overreach that he himself professes to reject.’”¹⁹¹ Again, his anti-DFS stance is contrary to the Governor’s cold shoulder to new state regulations targeting the fantasy sports industry. Remember, the Texas State Legislature purposefully refused to repeal its “fuzzy animal” exception to eight-liner slot machines.¹⁹² This etches the purposefully ambiguous language in stone. It wanted a legislatively created loophole to allow *some form* of gambling in Texas in the future and but for Ken Paxton, it would have allowed the obviously skill-based Daily Fantasy Sports to sail through governmental review.

The New York Attorney General, in a much more reasoned opinion and lawsuit, was trumped by the governor and the legislature which passed a bill on June 14, 2016 that formally legalized and regulated Daily Fantasy Sports.¹⁹³ From January to August 2016, eight states (Colorado, Indiana, Massachusetts, Mississippi, Missouri, Tennessee, Virginia, and New York) passed laws clarifying Daily Fantasy Sports’ legality while simultaneously creating strong protection regulations.¹⁹⁴

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Shannon Edmonds, *Gaming, Gambling, and Eight-liners: Separating Fact from Fiction*, TEX. DIST. & CTY. ATT’Y ASS’N (May 14, 2004), <http://s3.amazonaws.com/texasbaptists/clc/TDCCA-Gaming-Gambling-and-Eight-Liners.pdf>.

¹⁹³ S.B. 8153 20152016 Leg. Sess. (N.Y. 2016).

¹⁹⁴ Dustin Gouker, *Daily Fantasy Sports is Back in Business in New York: Gov. Cuomo Signs Bill*, LEGAL SPORTS REP. (Aug. 4, 2016, 10:38 AM), <https://www.legalsportsreport.com/10890/ny-enacts-dfs-law/>.

Murphy v. NCAA cleared the way for states to legalize sports betting.¹⁹⁵ But Texas lawmakers do not appear ready to make a similar move.¹⁹⁶ “Expanding gambling in Texas has been a non-starter for years. . . . Religious leaders, conservative groups and Republican legislative leaders have all worked to keep the lid on expansion.”¹⁹⁷ Brandon Rottinghans, a political science professor at the University of Houston, speculated that it is more likely that tofu will replace chili as the state’s official dish before there’s a major expansion of gambling, that is, as long as the Republicans control state government.¹⁹⁸

Although *Murphy* allows betting on professional sports in most states,¹⁹⁹ Texas does not have legalized casino gambling except on select tribal reservations, and even then table games are generally excluded.²⁰⁰ Although “pari-mutuel wagering is allowed at licensed horse and dog race tracks,” and Texas lawmakers “have long believed that the next expansion of gambling. . . will come at these tracks.”²⁰¹ Democratic Governor runoff candidate in 2017, Andrew White, proposed a nine billion dollars education improvement package that would largely be funded “by allowing slots and possibly table games at the race tracks.”²⁰²

With the demise of PASPA and the success of DFS, the discussion of gambling in Texas will undoubtedly be reinvigorated. The “fuzzy animal” exception will not bear heightened scrutiny. It is an untenable compromise created by shifty legislatures and purposeful lobbyists. It was written to be an ambiguous stop-gap measure but should be re-envisioned after the DFS legal explosion. *Murphy* reinforces the sanctity of states’ rights decisions on in-state gambling and will be an impetus for expanding Texas gambling to include legal slot machines; this is an incremental increase in Texas’ gaming that will not upset conservative legislators too much while giving Texas another economic windfall to offset the vagaries of the Oil Patch.

¹⁹⁵ *Murphy*, 138 S. Ct. at 1484–85.

¹⁹⁶ John Gravois, *Texas Lawmakers Seem Unlikely to Double Down on Sports Betting, GOP-Dominated Legislature no Fan of Gambling*, HOUS. CHRON. (May 15, 2018), http://nl.newsbank.com/nlsearch/we/Archives?p_action=doc&p_docid=16BEF391817156C8&p_docnum=2&s_dlid=DL0119112105430631016&s_ecproduct=SUBFREE&s_ecprodtype=INSTANT&s_trackval=&s_siteloc=&s_referrer=&s_subterm=Subscription%20until%3A%2012%2F15%2F2030&s_docsbal=%20&s_subexpires=12%2F15%2F2030&s_docstart=&s_docsleft=&s_docsread=&s_username=refuser&s_accountid=AC0114051215184003759&s_upgradeable=no.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Murphy*, 138 S. Ct. at 1484–85.

²⁰⁰ Gravois, *supra* note 196.

²⁰¹ *Id.*

²⁰² *Id.*