The REALITY of Fantasy:
Addressing the Viability of a Substantive Due Process Attack on Florida’s Purported Stance Against Participation in Fantasy Sports Leagues that Involve the Exchange of Money
- By Neville Firdaus Dastoor*

“This author participated in fantasy sports while attending the University of Florida as an undergraduate student. A more apt description, factoring in actual time commitments and levels of interest, is that the author attended the University of Florida while managing fantasy sports teams. The author was the sole proprietor, coach, spokesman, cheerleader, and critic of three fantasy teams, spanning two sports. He is happy to report that after he and his friends discovered the intoxicating world of fantasy sports, society has not suffered. Neither mob boss Al Capone nor Tony Soprano moved into town. The local convenience store was never held up for funds that would supply the typical $100 prize funds for season champions. In fact, local crime rates fluctuated along the same trend as the rest of the country. Furthermore, the author’s family life is just fine, thank you.

The author is not the only one to be caught in the fantasy sports movement hitting mainstream America. More than eleven million people have joined the ranks of fantasy sports enthusiasts, and the number is growing. Every major sport is covered including football, basketball, baseball, hockey, golf, NASCAR, and fishing.

The author and his friends were involved in typical fantasy sports leagues. First, they chose a proper Internet site from among the standard offerings; Yahoo.com, ESPN.com, Sportingews.com all provide services. At the start of every football and basketball season, they would congregate at someone’s apartment stocked with chips and beer, or connect via the Internet, and conduct a “draft,” where players from actual teams of the particular sport were selected to fill out a ten to fifteen man roster. Success of the participant teams was determined by the actual performance of the...
selected players which translated into points tallied either at the end of each game, or the end of each season. The winner of each league received as a prize the sum of the entry fees that were submitted at the beginning of the season. The typical prize never exceeded $100. Magazines, flow charts, and valuable master lists were common as the author and his friends realized (through years of repeated failure) that consistent success usually came to the

The Attorney General opinion acts as a signal from the state that it probably would employ its police powers should the fantasy sports issue come to the state legislature or before the courts. The Attorney General’s opinion is not binding law and the state courts have not yet decided this particular issue. However, the Florida judiciary has been deferential to Attorney General opinions, especially when they deal with a specific question before the court. A telling fact is three of the largest fantasy Internet providers explicitly state in their rules that Florida residents are not eligible for prize money. Therefore, it is quite likely that a state prosecution against a fantasy sports provider or individual participant would result in a criminal sanction. While the likelihood of a prosecution of an intimate fantasy sports group may seem unlikely now, the mere possibility of such a state action against an innocent expression of friendship should be a troubling proposition for the Floridian fantasy sports participant.

What should be more disturbing is the stark arbitrariness with which the Florida legislature and courts have carved out exceptions to its anti-gambling statutes. Exceptions have been allowed by the legislature for “pari-mutuel” activities including horse and dog track betting and for games of skill including bowling tournaments and hole-in-one golf tournaments. Furthermore, certain “penny-ante” games like poker and bingo receive protection. These exceptions have been justified under the general notion that the Legislature has the supreme ability to utilize its police powers to determine and regulate certain activities that serve as a detriment to societal welfare.

Admittedly, the state has the power, duty and legitimate interest in regulating gambling activities via its police powers because of the readily apparent public policy considerations. However, when the exercise of police power enters the realm of arbitrariness and there is no rational basis for the regulation of a particular activity, courts have upheld
Fourteenth Amendment substantive due process claims brought by individuals and entities interested in participating in the regulated activity. One way to demonstrate arbitrariness is to show a particular regulated activity is indistinguishable, or less harmful to society, than certain similarly situated activities which are exempted from regulation.

The participation in fantasy sports is comparable to those activities the Florida legislature and courts exempted from regulation. In fact, when compared to its protected counterparts, participation in fantasy sports leagues does not lead to any additional negative effects typically associated with gambling activities. For example, there is no evidence of a correlation between participation in fantasy sports and a rise in crime, a decline in the economy, or a fundamental breakdown in the family structure. This realization is even more apparent when the kind of fantasy sports leagues with which the author and his friends are involved are analyzed—intimate leagues comprised primarily of close friends and family members who are more interested in maintaining friendships and camaraderie than in the money.

Under the Due Process Clause, an attack could be mounted against an anti-gambling statute that targets fantasy sports leagues (especially the kind of intimate leagues participated in by the author) while exempting similar activities for seemingly arbitrary reasons. The argument could be made that regulation of participation in the more intimate forms of fantasy leagues comprises an infringement on an individual's fundamental liberty of social association that may receive heightened judicial protection. However, recent decisions by the Supreme Court indicate its unwillingness to recognize many fundamental liberties beyond those that involve the most intimate of personal decisions.

The more persuasive argument to bring before the Court is that the regulation of participation in or the providing of fantasy sports leagues poses an unreasonable infringement on economic liberties. While the Court has not protected economic liberties with a high standard of judicial scrutiny since the early twentieth century, the blatant arbitrariness with which Florida may deal with fantasy sports could provide enough reason for the Court to uphold a substantive due process claim.

This comment will examine the viability of a substantive due process claim brought by an individual participant or fantasy sports provider seeking an injunction against the state for an exception to the gambling statutes should the state accept the Attorney General's opinion. Part I briefly examines why it is important to seek such an injunction against a seemingly obscure and unlikely application of Florida law. Part II examines the Court's substantive due process jurisprudence and the likelihood that it could be used to defend a prosecution against participation in fantasy sports leagues. Finally, Part III proposes that Florida amend its gambling statutes to allow for activities akin to intimate fantasy sports leagues.

If history is an appropriate indicator, Florida fantasy sports participants are in no imminent danger. Since Attorney General Butterworth issued his advisory opinion in 1991, Florida has not prosecuted anyone for participating in fantasy sports leagues. Every year since 1991 the numbers of Florida citizens playing in fantasy sports leagues increases. However, Florida authorities have shown a propensity in the past to cite citizens for breaking obscure laws, regardless of how absurd the application of the law may seem to the average citizen.

For example, in 1981 it was illegal to participate in any game of poker, no matter where there is no evidence of a correlation between participation in fantasy sports and a rise in crime, a decline in the economy, or a fundamental breakdown in the family structure.
the game was played or how minimal the stakes.\textsuperscript{31} Under the application of this law, eight senior citizens (known as the “Largo Eight”) were cited for playing nickel and dime poker in their mobile home community and were each fined $75 and 30 days probation\textsuperscript{32} (in response to the absurdities that resulted from the regulatory scheme, Florida eventually allowed for some penny-ante games). This application of the gambling laws led to a community outcry and the situation received national media attention.\textsuperscript{33} Again in 1991, police officers laughed in the face of reasonableness by first spending an hour of the taxpayers’ money staking out a seven-man 20-cent-per-hand pinochle game on Hudson Beach and then arresting the senior citizen participants known as the “Hudson Seven.” The implication is that Florida authorities will take action against its citizens even when armed with what seems to be a truly absurd and meaningless application of the laws.\textsuperscript{34}

Assuming that a particular fantasy sports league fits within the parameters of Florida’s anti-gambling statute, an enforcement of that statute against the participation in, or the providing of, the league could be nullified by a court if the statute was unconstitutional or was being unconstitutionally applied. The most viable option within the catalog of constitutional challenges is the Due Process Clause of the Fourteenth Amendment.\textsuperscript{35} The amendment enforces, in pertinent part, a restriction on state rights, reading “nor shall any State deprive any person of life, liberty, or property, without due process of law....”\textsuperscript{36} It applies the same restrictions to state governments that the Fifth Amendment applies to the federal government.\textsuperscript{37} Although there is much debate as to whether this clause pertains only to procedural matters,\textsuperscript{38} the Supreme Court has nevertheless interpreted the Fourteenth Amendment’s Due Process Clause as imposing substantive restrictions on governmental actions.\textsuperscript{39}

Part II of this note traces the probable evolution and outcome of a substantive due process claim brought against the state of Florida should it act upon the Attorney General’s suggestion that fantasy sports leagues violate the state’s gambling statutes. Note again that Florida has not affirmatively prohibited, by statute, participation in or the providing of fantasy sports leagues. This section provides a roadmap for how a potential lawsuit against the state could be argued.

A. Standing and Remedy Sought

Assuming Florida adopted the attorney general’s opinion as law, standing requirements would limit the pool of potential plaintiffs that could bring a substantive due process claim against the state of Florida.\textsuperscript{40} The likely candidates who would meet the standing requirement include an individual or group of fantasy sports participants engaged in an intimate league who could be prosecuted under the statute for participating in a league. Another possibility is an individual or group of potential fantasy sports participants who would take part in fantasy sports league but for the statute. Fantasy sports leagues providers, for example ESPN.com, would also have proper standing because the state action would infringe upon their ability to do business with Florida residents. In any case, the remedy sought would be an injunction issued by the Court prohibiting the enforcement of Section 849.19 against participation in, or the providing of, fantasy sports.
B. Fundamental Liberty at Stake?

The first step in bringing a substantive due process challenge is to identify the liberty that the state action is infringing.\(^\text{41}\) Only then will the Court scrutinize the state action.\(^\text{42}\) Typically, state prohibitions do infringe upon a liberty and the substantive due process interference is, therefore, easy to identify.\(^\text{43}\) Even the most traditionally unchallenged laws, like the speed limit, do involve infringements on personal liberty—in that case, the liberty to speed.

For individual or group fantasy participants, the infringement could be classified as an intrusion upon the liberty to contract (if there was an existing contract with a fantasy sports provider or if there would be but for the statute) or an infringement upon the liberty to freely associate with one’s friends in a recreational activity. For the fantasy sports providers, the infringement could be characterized as an intrusion upon the provider’s liberty to contract (for example, a new fantasy provider could contract with a Florida resident for services and not include the typical ESPN-type caveat that the provider will not disburse prize winnings) and operate a business in a manner it sees fit.

After identifying the liberty, the key question becomes whether the interference hinders a liberty which is “fundamental” enough to warrant a standard of judicial scrutiny high enough to strike down the contested state regulation.\(^\text{44}\) Determining the level of scrutiny is vital because the Court rarely upholds any legislation against a due process challenge when it applies strict judicial scrutiny. State action touching non-fundamental liberties is typically afforded high deference by the Court and almost always survives judicial scrutiny.\(^\text{45}\) The Court has traditionally recognized two different sets of fundamental liberties that receive strict judicial scrutiny: 1) liberties enumerated in the Constitution’s Bill of Rights\(^\text{46}\) and 2) liberties the Court deems self-evident, essential, fundamental and help give “life and substance” to the Constitution’s specific guarantees.\(^\text{47}\)

The Court has consistently afforded these two sets of liberties the highest level of judicial scrutiny, known as strict scrutiny or the compelling governmental interest test.\(^\text{48}\) Therefore, if it can be argued that any of the aforementioned liberties concerning fantasy sports participants or providers are specifically listed, or if an analogy can be drawn to a fundamental liberty that the court has enunciated, then any anti-fantasy sports league regulation against the liberty would have to pass the extremely high litmus test of judicial strict scrutiny. At that juncture, the state’s typical arguments concerning the evils commonly associated with gambling would not pass constitutional muster.

However, if a liberty does not fall under one of these two categories, then any corresponding regulations are afforded an extremely low standard of judicial scrutiny, the rational basis test. None of the mentioned liberties associated with fantasy sports leagues seem to possess characteristics that would classify them within either of the two sets of specially protected liberties.
(I) No Infringement with Specifically Listed Liberties

The specifically listed liberties within the Bill of Rights offer little worthwhile text as support for the assertion that state regulation of fantasy sports leagues infringes upon a specifically listed protection. Conceivably, fantasy sports participants could invoke the First Amendment’s protection that government shall not infringe upon citizens’ liberties of free speech or to peaceably assemble. The argument would be that by participating in a fantasy sports league and contributing money to it, a fantasy sports participant is exercising his freedom of speech by expressing to the world a particular way to allocate one’s resources.

However, First Amendment liberties have primarily been tied to speech that is offered in the “marketplace of ideas” to affect the political process. The Court has consistently rejected the idea that any activity is absolutely protected from regulation simply because it entails some theoretical embodiment of expression. The Court has held “[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one’s friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.” Such regulation only accidentally interferes with speech and in these situations the Court has employed a balancing test to determine whether the state’s regulatory interest outweighs the amount of accidental interference on the speaker; in light of the expressive alternatives available to the speaker. Here, the state interest would be to eliminate the negative effects of gambling, and the potential interference with speech is minimal because there are readily available alternatives for a participant to express his views on how society should allocate its resources.

The same sort of analysis probably holds true for a potential invocation of the First Amendment’s protection of the freedom of association. The likely argument would be that a fantasy participant is choosing to spend his time and money associating with a particular group of individuals to share a common interest and that the First Amendment expressly protects this. However, the Court has rejected the proposition that the amendment’s protections are as far reaching as the realm of purely social associations.

The Court has protected the First Amendment’s specifically listed freedom of association when it involves those activities commonly linked to political association, like speech assembly. In *Dallas v. Stanglin*, the Court held that a city ordinance, restricting the age of minors who could attend dance halls, did not violate the First Amendment because the “Constitution does not recognize a generalized right of social association….” The Court held so even after considering that dance hall patrons paid a fee to “associate” in the dance hall. It stated that this kind of association did not constitute the expressive action captured by the First Amendment and that the affected people were not taking positions on public issues. An attenuated argument could be made that fantasy sports participants are different from the dance hall patrons because fantasy leagues are frequently comprised of friends and not strangers (although one could pay an entry fee to be assigned to a league of strangers). However, the tone of this decision seems to indicate a propensity of the Court not to protect any kind of social association that is not some how involved with furthering a public debate.
Like their incongruence with any specifically listed liberty, the liberties associated with the participation in or the providing of fantasy sports leagues probably do not analogize favorably with the recognized fundamental yet unlisted liberties that are also afforded strict judicial scrutiny. This reality exists for two reasons. First, while critics may argue that the Court’s current stance is fairly ambiguous, the Court has at least delineated a class of liberties that it will protect as fundamental. Generally, these unlisted, fundamental rights the Court currently recognizes spawned from the controversial Roe v. Wade decision—a decision that specifically deemed fundamental a woman’s liberty to choose whether to have an abortion, and more broadly, a citizen’s right to privacy and to make intimate, individual and family decisions.

Second, the Court has taken a clear stance against recognizing economic liberties as fundamental. This marks a sharp distinction between the Court’s stances early in the twentieth century. Indeed, if fantasy sports leagues existed in the early twentieth century, a claim that a regulation was violating a participant’s liberty to spend money freely or a provider’s liberty to contract would have been welcomed by the Court. Times have changed. Absent a display of judicial smoke and mirrors, the Court claims to apply a highly deferential standard of review to regulation touching on mere economic liberties. This is the likely standard that would be applied in a fantasy sports opinion.

With prospects so bleak of the Supreme Court recognizing as fundamental the affected liberties of a regulated fantasy league, it may seem like a futile exercise to analyze the Court’s rationale and reasoning in this area. However, there are a few reasons to do so. First, there is always the possibility that the Court will extend its protection to include new fundamental liberties. Observers of the Court’s substantive due process jurisprudence have long warned of judicial subjectivity in deciding exactly what is fundamental. There is a possibility that a Court could surprise observers in a future enunciation of what is fundamental. There has at least been a tremor in one district court that the right to free association is, in fact, fundamental (although the case was overruled and denied certiorari).

(a) No Congruence with Roe

Griswold v. Connecticut established current substantive due process jurisprudence. In Griswold, the constitutionality of two statutes prohibiting the use of contraception was challenged on substantive due process grounds. The Court reiterated its stance that it would not strike down laws touching “economic problems” or “business affairs” with substantive due process. However, the Court expanded its conception of fundamental liberties, recognizing certain liberties that exist within the “penumbras” of the specifically listed rights.

In Roe v. Wade, the Court further indicated which unlisted liberties it would recognize as fundamental. The Court again recognized as fundamental the Griswold right of privacy along with those “personal rights that can be deemed fundamental or implicit in the concept of ordered liberty.” The Court also extended fundamental treatment to activities relating to marriage, procreation, family relationships, child rearing, and education. Therefore, for these liberties mentioned in Roe, the Court utilizes the compelling state interest test when scrutinizing corresponding regulations. Note that Planned Parenthood of Southeastern Pa. v. Casey inserted a new step in the Court’s scrutiny process. Before applying the two-prong compelling state interest test the Court asks whether the state action is an “undue burden” on the infringed upon liberty. The Court will only apply the compelling state interest test if it finds that the state action places an undue burden on the liberty.

Since Casey, the trend of the current Supreme Court seems to be in the direction of restricting the scope of substantive due process. Perhaps this trend is best articulated in the Court’s recent decision in Washington v. Glucksberg. The case involved the liberty of a terminally ill patient to end his life with the use of assisted suicide techniques. Following the Roe reasoning, one would have assumed that this was a fundamental, unlisted liberty that the Court would nurture due to the intimate, familial decision it involves. However, the Court explained that restraint was necessary in the due process arena and that it must “exercise the utmost care whenever…asked to break new ground in this [substantive due process] field.” After Glucksberg, the prevailing viewpoint is that the Court’s
recognition of fundamental, unlisted liberties extends only to the liberty of abortion. 85
Given the Court’s holding in Glucksberg, it is extremely difficult to imagine that the liberties previously identified with fantasy sports leagues could fit within the Court’s established framework. No reasonable analogy can be made between the liberty to participate in fantasy sports with the liberty of a woman to have an abortion. However, as the history of the Court shows, changes in reasoning, policy stances, and Constitutional interpretations are not unprecedented, so there is at least a possibility, however slim, that the Court could tweak its position.
One line of attack with some support in Supreme Court precedent (that has never been explicitly overruled) is the right to social association protected under the Due Process Clause. 86 The Court could deduce that the freedom of First Amendment is moot without the implied liberty of social association. If the Court accepted this argument, then the claim of a properly situated set of fantasy participants may be a viable one. 87
In the 1984 Roberts v. Jaycee opinion, the Supreme Court recognized the right of intimate social association as integral to the maintenance of the Bill of Rights. The Court explained that “because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State.” 88 The Court insinuated that those associations that attended the “sustenance of the family” were clear examples of associations that are protected because they “reflect the realization that individuals draw much of the emotional enrichment from close ties with others” and that protection “safeguards the ability independently to define one’s identity that is central to any concept of liberty.” 89 The Court went on to explain a sliding scale approach used to identify which associations garnered heightened judicial scrutiny. It extends the greatest protection to the most intimate familial relations and the least protection to large business enterprises. 91 Factors such as size, purpose, policies, selectivity, and congeniality all played a part in the determination of whether a particular association was more akin to a protected, intimate familial association or an unprotected large business enterprise. 92
The Roberts Court’s application of these factors indicates how the Court might treat participation in an intimate fantasy sports league. In Roberts, the particular association in issue was a non-profit membership corporation involved in nurturing civic interest and involvement in young men. 93 In finding that the association lacked the distinctive characteristics that would qualify it for heightened constitutional protection, the Court pointed to the fact that the group was very large and generally unselective in its membership. 94 For example, the group was comprised of 430 members and there were no established criteria for scrutinizing applicants. 95 New members were consistently and actively recruited and there was no consideration given to their backgrounds. 96

DEPENDING on the kind of fantasy sports league in question, there is an argument available that participation may qualify for constitutional protection under a fundamental right of social association. For example, millions of people around the country participate in a kind of fantasy sports league, where friendship and the maintenance of ties is as important as how many points Shaquille O’Neal scored in last night’s game.
the country participate in a kind of fantasy sports league, where friendship and the maintenance of ties is as important as how many points Shaquille O’Neal scored in last night’s game. These are the intimate leagues across the country - the modern day poker crew - comprised of life-long friends and relatives, where group size is limited by the number of close friends you invite and the criterion for selection include whether you had the same 6th grade teacher or whether you share the same DNA.

These kinds of leagues and their profound effect on people's family and social lives have been well documented. The writings of Bill Simmons, popular writer for ESPN.com and ESPN the Magazine, provide a poignant depiction of this kind of intimate fantasy league in which millions of Americans take part. Several of Simmons bi-weekly articles are devoted to his fantasy sports experience with special attention given to the stories that arise out of the yearly fantasy sports drafts attended by himself, his close friends, and his father. Simmons related that, “[w]e travel to the same house every year. Eat the same food every year.” In describing the camaraderie and pleasure that arose out of a typical fantasy football session, Simmons said, “...an entire weekend was built around the draft: partying like rock stars on Friday, playing football all day Saturday, more partying Saturday night.” Simmons described with fondness the time he and his father spent together in fantasy baseball leagues: “[b]ack in the 1980s, Dad and I teamed up for five championships in nine years, driving teams out of our league....Those were the days. I spent entire weekends charting positions, scouring for sleepers, re-charting players and preparing for every possible draft scenario.”

Unlike the association in Roberts, these fantasy sports leagues are distinctly small in size, one of the key factors mentioned in the case. Additionally, there is not an open-ended admissions policy. Rather, membership is primarily based on ties of friendship and family. Congeniality within these groups is high, as it is a well-known fact in the fantasy sports industry that good-natured ribbings and criticisms of fellow managers’ teams is an inevitable reality of fantasy sports league participation. Finally, the purpose of participating in such leagues is admittedly varied; however it cannot be denied that one of the main rationales for participation is intrinsically linked in the need to communicate and associate with one’s friends.

Other forms of fantasy sports league participation may also fall under the protection of the Roberts paradigm. For example, even Internet leagues where an individual pays a subscription fee to be assigned to a random group provide the opportunity for friendships and relationships to grow. Jim Hopkinson, product marketing manager for ESPN.com in 2001, explains that the spirit of competition implicit in fantasy sports leagues engenders a sense of community even among former strangers. Hopkinson personally participates in
leagues with players from Atlanta, Boston, and Poland. The unique functions of Internet sites, with their message board and instant messaging capabilities, allow managers of teams to form friendships and bonds with people around the country.

Since there are usually no size limitations on participating in an on-line fantasy sports service and membership is not limited by any criterion, on-line fantasy sports do not meet the requirements for constitutional protection set out in Roberts. However, recent scholarship suggests that the sudden predominance of the Internet over the daily lives of the average citizen may require a reevaluation of how society views the reality of association. “Virtual communities” in the form of message boards, chat rooms, discussion forums, and on-line games constitute some types of 21st century associations. Participation in such Internet associations allows for values like “variable self-definition and individual empowerment” that organizations of the past, such as the Boy Scouts or book clubs, once provided. Therefore, a court today, seeking to resurrect the Roberts recognition of a fundamental liberty of social association, may very well choose to include associations developed online. Expansion would likely extend to participation in online fantasy sports leagues where relationships developed over the span of the season.

**Recent Scholarship**

Recent scholarship suggests that the sudden predominance of the Internet over the daily lives of the average citizen may require a reevaluation of how society views the reality of association. “Virtual communities” in the form of message boards, chat rooms, discussion forums, and on-line games constitute some types of 21st century associations. Not acknowledging this fact would be an act of blatant inconsistency by the state.

Section 849.085 exempts participation in certain “penny-ante” games from criminality that would normally fit under the state’s general prohibition of gambling. This exception protects those participants who engage in traditional social gambling games within their dwellings where the opportunity to win money is secondary to the social benefits derived from the activity. Protected games include “poker, pinochle, bridge, rummy, canasta, hearts, dominoes, and mah-jongg in which the winnings of any player in a single round, hand, or game do not exceed $10 in value.” Florida law also allows these same games to be played in authorized “card-rooms” within licensed pari-mutuel facilities.

The penny-ante exception was born solely out of the Florida Legislature’s reaction to the
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previously mentioned\textsuperscript{12}`Largo Eight” fiasco.\textsuperscript{12} There was a huge national, state, and local outcry concerning the citation of the eight senior citizens for participating in a social activity with such minimal monetary consequences.\textsuperscript{12} This public uproar undoubtedly was fueled by sentiments that the involvement of money in certain social activities positively contributes to the competitive and social interaction of participants.\textsuperscript{125} By passing Section 849.085, the government sent a message to the public that it recognized the marriage of money and gamesmanship in certain associational activities.\textsuperscript{126} This sometimes symbiotic relationship between activities involving money and genuine social activity is well documented. The group of seven senior citizens\textsuperscript{127} who were arrested for playing 20-cent-a-hand pinochle in a public place expressed sadness over how regulation of their activity affected their relations.\textsuperscript{128} A certain level of camaraderie was lost as some members of the group dropped out because of fear of further sanction.\textsuperscript{129} Other states, like Colorado and Arizona, have codified broad “social gambling” exceptions to their gambling regulatory framework.\textsuperscript{130} In Colorado, social gambling is allowed if it is not part of a business gambling scheme and if the gambling is “incidental to a bona fide social relationship.”\textsuperscript{131} Colorado courts have defined “incidental to a bona fide social relationship” as “refer[ring] to a game or wager which is made available to participants who have some legitimate common relationship to one another other than to engage in gambling.”\textsuperscript{132}

At the heart of Section 849.085 is this same concession that certain intimate associations involving money are protected from regulation when the gambling is only a tributary of the main activity. Those people should not have to worry about being arrested and convicted in the state of Florida.”\textsuperscript{133} Thomas’s quote alludes to the notion that these kind of social associations are more enjoyable when the prospect of winning a lot of pride and a little bit of money is at stake.

This concept is undoubtedly understood by the justices of the Supreme Court of the United States. Chief Justice William Rehnquist’s reputation as lover of recreational gambling is well documented.\textsuperscript{134} The recent release of Justice Blackmun’s papers, written while on the bench, reveals that several of the justices participated in small stakes betting pools.\textsuperscript{135} A day after the 1992 presidential election, Chief Justice Rehnquist announced that Justice Sandra Day O’Connor had won around 18 dollars in an election pool while, “John [Justice John Paul Stevens] and I have lost $6.30.”\textsuperscript{136}

Just as in poker or pinochle or a Supreme Court betting pool, the fantasy sports experience shared by a group of friends is heightened when there is the added element of small monetary gain.\textsuperscript{137} An intimate fantasy football game among a group of college buddies with a pot of $100 is no different than a poker game between four couples where ten-dollar hands are played. In both instances, the state should not interfere.

C. Economic Liberty Interest

However, before the Floridian fantasy participant chokes on his own chips and beer from the excitement of having discovered the substantive due process loophole to prevent state regulation of his activity, some caution is recommended. The likelihood of the Court’s expanding the Roe doctrine
to include a resurrection of the Roberts paradigm is tenuous at best. The Court’s recognition of fundamental yet unlisted liberties has been strictly limited to the liberty of abortion or, at most, to the liberty to have control over decisions regarding personal, intimate choices.138 If this is the case, participation in fantasy sports leagues is relegated to nothing more than an exercise of one’s economic liberty-- a type of liberty provided little protection by the current Court. This is the same economic liberty interest that fantasy sports providers would invoke to challenge an application of Florida’s anti-gambling statutes against their business.

(I) The Court’s Treatment of Economic Liberties

The modern Court analyzes the regulation of economic liberties with a very low standard of scrutiny.139 Its stance was crystallized in Williamson v. Lee Optical Co.140 The case presented the loose “rational basis” test, stating “[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it [emphasis added].”141 This test presents an extremely low hurdle for any legislature to jump.142 In fact, the Court has not used the test to strike down a law on economic substantive due process grounds.143 To meet the test, all that is required is a determination by the Court that a legislature might have concluded a particular law or regulation was a rational means to solve a certain problem.144 After cases like Lee Optical, the Court continued to uphold laws that infringed upon economic liberties because of its refusal to recognize those liberties as fundamental.145

Therefore, if a court rules that participation in fantasy sports leagues is indeed an exercise of economic liberty, the prospects are initially bleak for a fantasy sports participant in Florida. The legislature would merely offer its rationale for regulating fantasy sports, for example, that the legislature concluded that participating in fantasy sports has negative effects on the economy or that it negatively affects the family.146 The Court would have to decide whether the legislature could have reasonably thought the regulation was a rational way to achieve those goals. However, even with this extremely low standard of scrutiny, the Court’s treatment of economic liberties is not just an academic exercise where it instantly stamps its approval on economic legislation with just a cursory look.

Even under the loosest version of the rational basis test, a “regulation is unconstitutional only if [it is] arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty.”147 The Court explains that “[p]rotection against governmental arbitrariness is at the core of...[substantive] due process.”148 Florida courts have followed the Supreme Court’s lead and explain that “[w]hen a particular attempted exercise of the police power by a state, or under its authority, passes the bounds of reason and assumes the character of a merely arbitrary fiat, it will be stricken down and declared void.”149 While it is rare for a court to void legislation when applying the rational basis test, there are instances when it occurs.

For example, in 2003, a Florida appellate court in the case Joseph v. Henderson150 voided a state law affecting certain prisoners because the application of the law constituted an arbitrary distinction.151 There, the empowering state law involved the payment by certain prisoners of a “booking fee” to further the state interest of alleviating the financial burdens of incarcerating prisoners.152 The statute distinguished between two groups of prisoners based on the procedure through which they were brought to jail and only made those who were brought to jail under a particular procedure pay the fee.153 It was conceded by the State that the plaintiff prisoner in the case who was forced to pay the fee could have indeed been brought to jail under the procedure that did not require a fee.154 In fact, the court could not find any reasonable distinction between the two procedures that would justify a basis for differing treatment.155 The state appellate court held that this statute violated substantive due process because there was nothing in the record to illuminate why a distinction had been made.156 The court said that it could not “say that the distinction drawn between the [procedures] bears a fair and substantial relation to the object of the legislation” and that the statute, therefore, violated due process.157

(2) Probable Application to Fantasy Sports Leagues

The state’s potential regulation of fantasy sports leagues involving the exchange of money under Section 849.14 would constitute an arbitrary exercise of its police powers. Section 849.14
prohibits wagering “any money or other thing of value upon the result of any trial or contest of skill, speed or power or endurance of human or beast” and anyone who does “shall be guilty of a misdemeanor of the second degree.” In his advisory opinion, Florida Attorney General Robert Butterworth clearly stated that participating in fantasy sports leagues, including those intimate leagues with minimal money involved, is prohibited by the statute.

In direct opposition to Section 849.14 stand several imposing facilities where wagering money upon the results of contests involving both man and beast takes place thousands of times a day. The state’s pari-mutuel industry is glaring in terms of both the amount of money involved each year and the huge exception it represents to the Florida gambling regulation scheme. Pari-mutuel is defined as, “a system of betting on races or games in which the winners divide the total amount bet, after deducting management expenses and taxes, in proportion to the sums they have wagered individually and with regards to the odds assigned to particular outcomes.” More simply put, it is the exact activity outlawed by Section 849.14. Inside a pari-mutuel facility, Florida welcomes its citizens to place as much money as desired on the outcome of a horse race, dog race, or the outcome of a jai-alai game and to stay as long as their wallets allow. Furthermore, as previously explained, Florida has exempted several social, penny-ante games.

To fully understand the arbitrariness of applying Section 849.14 to fantasy sports participation, the activity must be compared with these exceptions that Florida has carved out. There is no question that gambling creates real problems for individuals and society, and that is why a majority of states across the country outlaw all forms. However, Florida’s stark exceptions to its gambling laws indicate that the state may not have as honest a motive to alleviate gambling’s ills as it purports.

The Supreme Court recently expressed skepticism in a similar situation involving a federal gambling regulatory scheme, in the case Greater New Orleans Broadcasting Association v. U.S. In that case, the federal government sought to regulate casino gambling radio and television advertisements. However, the statute contained various exceptions including the protection of advertisements about the state-sponsored lottery and gaming in Native American casinos. In evaluating the government’s argument that it had a justifiable policy interest in alleviating the social costs associated with gambling, the Court expressed doubt as to the seriousness of the state’s interest because of the many exemptions. The Court stated that in light of the many exemptions,

The federal policy of discouraging gambling in general, and casino gambling in particular, is now decidedly equivocal. Any measure of the effectiveness of the Government’s attempt to minimize the social costs of gambling cannot ignore Congress simultaneous encouragement of tribal casino gambling...[The] regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it [emphasis added].

The Court concluded that the government did not present any rational basis or convincing reason why privately owned casino advertisements were singled out for special attention. Using this rationale, it is unreasonable for Florida to single out fantasy sports participation for regulation when there are a host of similarly situated exemptions. Indeed, if Florida wants to justify the regulation of fantasy sports, it would have to provide convincing justifications for at least one of the following: 1) that fantasy sports participation somehow more directly causes the traditional negative effects associated with gambling than do the exempted forms of gambling and therefore is a
more viable target for regulation, and/or 2) that participation in fantasy sports leagues presents separate and distinct negative effects to society that provide the state with a reasonable objective to regulate. This note contends the state can prove neither.

(a) Traditional Ills of Gambling: Not Apparent with Fantasy Sports Participation Because They Are Analogous to Harmless Penny-Ante Games

There are several classic evils associated with gambling that are cited by states as to why gambling is illegal. Florida courts have long recognized the noxious qualities of gambling and its ability to “prey upon the hard earnings of the poor” and “plunder the ignorant and simple.” However, when analyzed reasonably, it becomes quite apparent that participation in intimate fantasy sports leagues does not contribute to these evils. In fact, when compared to the potential negative consequences on society caused by the exempted gambling activities (most notably the Pari-Mutuel industry), the impotency of the effects of involvement in fantasy sports leagues becomes quite apparent.

The experience of participating in these leagues strongly parallels the experience common with protected penny-ante games. The money involved is minimal and is secondary to the social aspects of the game. Thus, there is no danger of breeding compulsive gamblers, who are the main cause of gambling’s negative effect on society. State Attorney Randy Means, spokesperson for the attorney who requested the Attorney General’s advisory opinion, felt that Florida should pass a bill exempting fantasy sports from the anti-gambling statute because of this very fact. Means said,“if the other exemptions [lottery, bingo, jai-alai, etc.] are exempt, then it should make sense that this penny-ante kind of stuff should be exempt also.”

(i) No Effect on Crime Rate

Traditional arguments against gambling accuse the industry of helping to increase crime rates in a number of ways. First, there are strong indicators that an active gambling industry provides a fertile breeding ground for organized crime. Second, compulsive gamblers are often driven to commit crimes to support their habit. Profits made from gambling are often used to fund other forms of illegal activity.

It is almost comical to suggest that an intimate fantasy sports league comprised of friends and family does anything to contribute to the problem of crime. Like groups participating in penny-ante games, these groups do not provide an adequate niche for an organized crime syndicate to flourish because of the obvious fact that these intimate leagues are comprised usually of a handful of close friends. There is neither a bookie to call nor an organized debt collection system. Furthermore, the money involved in these intimate fantasy leagues is miniscule in relation to the type of money exchanged in pari-mutuel facilities and other exempted activities. The little amount of money involved in these intimate fantasy leagues also leads to the reasonable conclusion that other crimes would not be committed to support a participant’s hobby. In contrast, it is documented that those Florida citizens who take part in the legally supported gambling exceptions do commit crimes to support their habit. Two out of three compulsive gamblers in Florida will commit crimes to pay off debts or feed their addiction.
Arguments are also made that gambling has noticeable adverse effects on the economy. Compulsive gamblers are often forced to declare bankruptcy which means that thousands of businesses are forced to recoup gamblers' outstanding debts by raising consumer prices. Society more often than not is the one paying the economic costs of the gambling industry.

Again, it is hard to understand how participation in intimate fantasy sports leagues would harm the economy more so than betting at the horse or dog track. First, it is absurd to assert that a member of an intimate fantasy sports league would have to declare bankruptcy as a result of not winning the league. The money is too minimal and the state cannot seriously believe that situations would arise where close friends would place so much money on the line so as to go broke.

A person playing protected penny-ante poker at ten dollars a hand would go bankrupt faster than a fantasy sports participant because the fantasy sports money is only exchanged at the end of a season. For the poker game, a tireless crew could play 50 hands a night for a week and have $3500 exchange hands. This multiplied over a year far exceeds the typical 100-150 dollar pots involved with intimate fantasy leagues.

And there are potentially disastrous effects on the economy that could spawn out of abusive participation in the pari-mutuel industry. Since 1937, the Division of Pari-Mutuel Wagering boasts that 57 trillion dollars has been wagered on pari-mutuel events. The state apparently has no concern about where this money came from, whose lives were negatively affected, and how many people went bankrupt. That concern is reserved for the participants of this author's fantasy league where last year's money pot for the football season was 75 dollars.

There is simply no documentation or evidence that participation in fantasy sports has produced suicide or caused an abnormally high level of anxiety since its inception. As far as the effect on youth, it is true that children do participate in fantasy sports. However there are two reasons as to why this fact does not justify the regulation of the activity. First, there is no mention in the penny-ante Section 849.085 of any age minimum. In fact, when defining the different kinds of dwellings where people may participate in the penny-ante games, the statute includes college dorm rooms as one of the definitions. Many college freshmen come to school at the age of 17, one year less than the typical age of majority. Second, the state is clearly not overly concerned with exposing children to gambling because Section 550.0425(3) specifically allows for children under the age of 18 to work within a pari-mutuel facility.

(b) Special Evils of Fantasy Sports Participation?

(i) Sanctity of Sport

Because it is fairly obvious that participation in fantasy sports does not cause the negative effects of gambling that the exempted pari-mutuel activities do, the only way Florida can hope to justify regulation is to show special evils caused specifically by fantasy
Particularly concerning fantasy sports leagues, several arguments have been offered regarding why regulation is preferred. They all fail. For example, some feel that participation in fantasy sports inevitably focuses too much attention on individual players while sacrificing focus on teams as a whole, which in turn tarnishes the sanctity of sports.196 This argument fails because it is not a constitutionally permissible objective of the state to dictate the way the American public thinks about sports. Even the weakest version of the rational basis test requires that the legislative objective be reasonable.197 Regulation based on an objective to steer cultural trends that have no realistic impact on the health, welfare, and safety of society does not pass even this weak test.

Others argue that there is a potential threat to the integrity of the sports involved because of the possibility that participants may try to influence the outcomes of individual games.198 Any scintilla of an argument practically fails. Fantasy teams are inevitably filled with players from all different teams and success is determined over the course of an entire season, so in order to have any real effect one would have to coordinate a scheme involving a number of games and a multitude of players. Furthermore, problems would arise when two players on the same fantasy team face each other in real life.199

Another argument aimed specifically at fantasy sports is that it may divert money away from local sporting industries because of the fact that participants may want to stay home to watch as many games as possible (to see the different games with their fantasy players) instead of going to the stadium to watch the local team.200 The link between this justification and fair regulation is fragile. First, there is no documented evidence of this phenomenon and it has only been posed as a hypothetical.201 Second, an equally strong argument could be made that fantasy sports help local sports teams because out of town fantasy participants will want to view their players in person.202

Because Florida cannot distinguish it from the exempted gambling activities it allows, singling out fantasy sports leagues that involve the exchange of money for regulation under Section 849.14 would be an arbitrary and capricious exercise of state police power. In all instances, involvement in fantasy sports leagues causes the same or fewer negative effects on society than exempted penny-ante games and always has fewer negative effects on society than does the exempted pari-mutuel industry. The situation is analogous to Greater New Orleans203 where the Supreme Court repudiated the government for attempting to regulate an activity that was indistinguishable from protected exemptions. If challenged in court, it is very probable that the state’s apparent position on fantasy sports would be deemed unconstitutional.

Florida could clear up the confusion surrounding fantasy sports participation and regain a sense of consistency in its regulatory scheme by merely adjusting Section 849.085 to include obvious instances of social gambling, like participation in fantasy sports leagues. Broadening the penny-ante statute to more closely match the social gambling exceptions of states like Colorado and Arizona would
capture intimate fantasy sports participation and eliminate the arbitrary exercise of police powers. Using the phrase “incidental to a bona fide social relationship” as the backbone of the exemption would better articulate the essence of what Representative Thomas was talking about when originally arguing for the penny-ante exception. This language adeptly covers all kinds of activities, not just fantasy sports participation, which was Representative Thomas’s original intent.

However, it seems that the Florida legislature specifically intended to exclude fantasy sports under Section 849.085 because the statute was drafted six years after the fantasy sports advisory opinion. Couple this with the fact that Florida courts have held that “[t]he penny-ante statute is an exception to long-standing Florida law that prohibits all such forms of gambling; as such, it is to be strictly construed,” and the Legislature’s intent is clear. Therefore, the only way for citizens to be assured that they will not be arrested for participation in a fantasy sports league is for a group of participants to seek a declaratory injunction under the Fourteenth Amendment’s Due Process Clause.

### IV. Conclusion

Fantasy sports leagues have swept the nation and have become a favorite pastime for millions of Americans. For a large portion of fantasy participants, the experience is shared with an intimate group and provides a means for maintaining relationships after ways have been parted. College and high school friends are able to stay connected in a fun and competitive way. For providers, fantasy sports leagues provide a profitable business opportunity in a thriving market. Florida’s position of regulation, articulated by an Attorney General’s advisory opinion that has never been challenged or refuted, unreasonably attacks these intimate associations. By this assumed position, the state of Florida has postured itself as a state involved in the practice of arbitrarily and capriciously exercising its police powers upon its citizens. A substantive due process challenge brought by participants with good standing would likely succeed either because the state interference infringed upon the fundamental liberty of social association or more likely because the interference with the economic liberty was arbitrary and capricious.

### ENDNOTES

* J.D. Candidate, Vanderbilt University Law School, 2004; B.A., University of Florida, 2001. The author wishes to thank his family for their constant support, his editors—Christopher Demko and Nicole D’Amato—for their helpful comments, Professor Thomas McCoy for his guidance on a host of constitutional questions, and most importantly, his fellow “criminals” — the members of the BBCFL and BBCBL (Broward Beach Club Fantasy Football League/ Broward Beach Club Fantasy Basketball League) — for years of pure enjoyment.


5 Id.

6 For the type of fantasy sports league being discussed in this note, all the web services provided was a central database for statistics to be stored.

7 Hereinafter, the term “fantasy sports” or “fantasy sports league” will be used to denote these particular types of fantasy leagues - where entry fees are aggregated to provide the end of the season prize for the league champion. This is not the only type of fantasy league, as many are played for no tangible prizes at all.

8 Indeed, even after graduation and after the group has dispersed to various states, participation in fantasy sports provides a strong basis for the continued friendship and daily communication between him and his friends.


10 Op. Att’y Gen. 91-3 (Fla. 1991) (“Prohibit[ing]...operation of and participation in a fantasy sports league whereby contestants pay an entry fee for the opportunity to select actual professional sports players to make up a fantasy team whose actual performance statistics result in cash payments from the contestants’ entry fees to the contestant with the best fantasy team.”)

11 Id.

12 See E-mail from Gerry Hammond, Assistant Attorney General, to Neville Dastoor. Thank you for contacting the Florida Attorney General’s Office regarding fantasy sports leagues. Attorney General
Crist has asked me to respond to your email. In Attorney General’s Opinion 91-03 (1991) this office concluded that section 849.14, Florida Statutes, prohibits the operation of and participation in fantasy sports leagues. This opinion is available on-line at www.myfloridalegal.com by accessing the Attorney General Opinions page. This is a searchable database of opinions and you may be interested in other opinions dealing with the subject of gambling. I would note that the statutes contain a number of exemptions from the general gambling prohibition in the Florida Constitution and Chapter 849, Florida Statutes. If you wish to review the statutes on this subject they are available at http://www.leg.state.fl.us. Thank you for contacting the Florida Attorney General’s Office to express your concerns.

Gerry Hammond, Assistant Attorney General.

13 Jay Newman, Fantasy Sports Leagues: Not All Fun and Games, Digitrends.net, at http://www.digitrends.net/marketing/13641_15358.html (last visited Oct. 10, 2002). But see Michael Thompson, Give Me $25 on Red and Derek Jeter for $26: Do Fantasy Sports Leagues Constitute Gambling?, 8 SPORTS LAW, J. 21 (2001) (explaining that Utah’s gambling law § 76-10-1101(1), while not specifically prohibiting participation in fantasy sports, probably does because it prohibits any activity that involves “risking anything of value when the return or outcome of the activity is based on any element of chance”).

14 Greg Auman, Feel Free to Enter fantasy leagues, but there’s no pay, St. PETERSBURG TIMES, Jul. 26, 2002, at C2. However, this is an inexact science as large, well known fantasy providers may differ on their interpretation of state statutes. See ESPN Fantasy Football Rules-Legal Restrictions, ESPN.com, at http://games.espn.go.com/content/ffl/2002/rules?page=legal (interpreting the relevant state statutes and consequently explaining that “[r]esidents of Arizona, Florida, Maryland, Montana, North Dakota, Puerto Rico, Vermont, and the province of Quebec may play and have their places noted in the standings, but are not eligible to win any prizes”).


16 Auman, supra note 14, at C2 (reporting that Sportsline.com, Yahoo.com, and ESPN.com all allow Florida residents to participate in their fantasy leagues, but cannot collect prizes).

17 George White, Fans Get a Kick out of Fantasy Football, ORLANDO SENTINEL, Aug. 31, 1991, at A1 (reporting that Randy Means, spokesperson for the attorney who requested the Attorney General’s opinion, said that “enforcement of fantasy sports” would definitely take a low profile because of the urgency of more important cases pending” and that any potential enforcement would be reserved for “a guy who sets up several large leagues encompassing maybe a thousand people in the city.”)


19 See FLA. STAT. ch. 849.085 (2003).

20 Carrol v. Florida, 361 So. 2d 144, 146 (Fla. 1978) (explaining that police powers are the sovereign right of the state to enact laws for the protection of lives, health, morals, comfort, and general welfare).

21 Id. (“[w]hen a particular attempted exercise of the police power by a state, or under its authority, passes the bound of reason and assumes the character of a merely arbitrary fiat, it will be stricken down and declared void.”). But see Holley v. Adams, 238 So. 2d 401, 404 (Fla. 1970) (explaining that “every reasonable doubt must be indulged in favor of the act”).


23 White, supra note 17, at A1 (reporting that Randy Means, spokesperson for the state attorney who requested the Attorney General’s opinion and who now is charged with prosecuting violators, felt that Florida should pass a bill exempting fantasy sports from the anti-gambling statute—“I hope they do, and the law enforcement people hope they do…Just from the standpoint that, if the other exemptions [lottery, bingo, jai-alai, etc] are exempt, then it should make sense that this penny-ante kind of stuff should be exempt also.”).


25 See Lawrence v. Texas, 539 U.S. 558 (2003); Washington v. Glucksberg, 521 U.S. 702, 727 (1997) (“in light of our prior cases, those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment…many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected…”).


27 This section does not deal with the basic answer to this question- that this scheme poses an infringement on individual liberty. That argument will be addressed in the remainder of the note.
In 1990, misdemeanor gambling charges were filed, but later dropped, against a firefighter who organized a fantasy football league on city time. White, supra note 17, at A1.

White, supra note 17, at A1.

Infra note 34.

Tim Nickens, House Okays Small-Stakes Gambling, St. PETERSBURG TIMES, May 24, 1989, at 6B.

Id.

Id.

Also, there is a danger that in today’s post-September 11th environment, where the United States has witnessed an increased effort by the Department of Justice to eradicate the possibility of new terrorist threats, that fantasy sports participants who fit a particular profile could be arrested and brought into custody for questioning relating to subjects outside of the scope of their gambling. See Adam Cohen, Rough Justice, TIME, Dec. 10, 2001, at 20; see also Josh Tyrangiel, Israel Jews In The Dragnet, TIME, Dec. 10, 2001, at 35 (describing a situation where an Israeli immigrant was arrested by federal authorities, detained for three weeks, handcuffed to a chair for four hours, administered a polygraph test without counsel, and could not contact her family for violating the terms of her tourist visa because she and her friends were peddling toy helicopters inside of three shopping malls).

U.S. CONST. amend. XIV.

See Kathleen Sullivan & Gerald Gunther, CONSTITUTIONAL LAW 446-47 (14th ed. 2000) (“As a result of the selective incorporation technique illustrated by Duncan, all the criminal process guarantees of the Bill of Rights are applicable to the states, with the exception of the grand jury indictment provision of the 5th Amendment and arguably, the ‘excessive bail’ provision of the 8th Amendment…. Outside the criminal area, the Court has applied against the states as a matter of due process the freedom from establishment of religion, and the rights of free exercise speech, press, assembly, and petition for redress of grievances protected by the 1st Amendment, and the right against uncompensated takings protected by the 5th Amendment. It has not applied to the states the protections of the 2nd or 3rd Amendments or the right to jury trial for civil suits at common law for more than $20 set forth in the 7th Amendment”). For the purpose of this Comment, the 14th Amendment is the enabling statute that allows for a substantive due process claim because any action would be brought against the state of Florida.

See, e.g., John Hart Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980) (proposing that substantive due process is an oxymoron akin to the phrase ‘green pastel redness’B).
Acknowledging “there are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the Lochner era demonstrates, there is reason for concern lest the only limits to judicial intervention become the predilections of those who happen at the time to be Members of this Court.”) (emphasis added).

See, e.g., Lawrence v. Texas, 539 U.S. 558 (2003) (overturning Bowers v. Hardwick, 478 U.S. 186 (1986), by holding that the right for persons of the same sex to engage in certain sexual intimate conduct was included under the broader fundamental right to privacy- an inclusion the Court had not recognized in Bowers).


Dallas, 490 U.S. at 19.

Id. at 26.

See Patrick Burns, Fantasy Football Popularity Boost Magazines, Card Sales, Web Sites, KNIGHT RIDDER/TRIBUNE NEWS, Sept. 11, 2001 (explaining that fantasy football becomes a “social event” that is very popular among a company’s employees because it developed a camaraderie that is sustained for months at a time).

Dallas, 490 U.S. at 26.

54 See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 295 (1984) (explaining that a regulation which forbade overnight sleeping in a state park did not infringe upon protestors’ First Amendment freedom of expression protections because the state action was an accidental interference on speech, there was a legitimate interest in protecting and maintaining the park, and the regulation did not present any “barrier to delivering to the media, or to the public by other means, the intended message concerning the plight of the homeless.”).

55 See licking “reasonable reading of the Court’s recent precedent. of economic liberties that could not be protected under any loopholes” to allow a protection positions on public questions’….”).

56 Dallas, 490 U.S. at 26.


58 Dallas, 490 U.S. at 19.

59 Id. at 26.

60 Id. at 24-45 (“The hundreds of teenagers who congregate each night at this particular dance hall are not members of any organized association; they are patrons of the same business establishment. Most are strangers to one another, and the dance hall admits all who are willing to pay the admission fee. There is no suggestion that these patrons ‘take positions on public questions’…”.


62 Id.


64 As will be discussed later, the Court has been accused of employing several different “loopholes” to allow a protection of economic liberties that could not be protected under any reasonable reading of the Court’s recent precedent.

65 Moore v. East Cleveland, 431 U.S. 494, 502 (1977) (acknowledging “there are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the Lochner era demonstrates, there is reason for concern lest the only limits to judicial intervention become the predilections of those who happen at the time to be Members of this Court.”) (emphasis added).


67 381 U.S. 479 (1965).

68 Id.

69 Id. at 480-81.

70 Id. at 482 (stating that the Court was not interested in acting as a “super-legislature” to determine the wisdom and need for laws involving economic interests).

71 Id. at 484-85.

72 Id. at 152-53.


74 Id. at 152-53.

75 Id. at 152.

76 Id. at 152-53; see also SULLIVAN & GUNTHER, supra note 37, at 451 (questioning the true extent of Roe’s fundamental right concept).

77 Many legal commentators have criticized the ambiguity of the Court’s phrase “implicit in the concept of ordered liberty” and have suggested that one cannot be sure whether a particular liberty falls within its reach unless a particular Court holding allows it. See Hand, supra note 41, at 744-745.


79 Id.

80 Id. at 835.


83 Id.

84 Id. at 720.

85 Melchoir, supra note 81, at 1374 (“The most important aspect of the Court’s decision in Glucksberg is its unwillingness to allow the tide of liberty interests to advance any further or faster than necessary to protect established fundamental rights. After the Court found unenumerated liberty interests in using contraception, having an abortion, raising children and providing them with education as one sees fit, and withdrawal of life-sustaining nutrition and hydration, the Court recognized a limit on the sphere of fundamental rights. After Glucksberg, the liberty interest in physician-assisted suicide falls outside of that sphere.”).

86 This is not impossible, as Roe spoke of deriving the fundamental rights from within the penumbras of the Constitution’s specific Amendment. In Roe, the Court
unearthed the right of privacy from within the penumbra of the specifically listed Amendments and that to not recognize the right would be to give the Constitution no meaning.

87 For this argument of trying to fit within the potential fundamental yet unlisted liberty of social association, those participants that play in largely anonymous leagues through an Internet site would not qualify. This section will focus on those intimate leagues comprised of friends and family, or even those leagues that begin with strangers, yet a sense of community evolves.


89 Id. at 618.

90 Id. at 619.

91 Id. at 620.

92 Id.

93 Id at 612.

94 Id. at 621.

95 Id.

96 Id.

97 See Burns, supra note 55 (explaining that fantasy sports leagues help to boost the camaraderie and form friendships among factory co-workers).

98 Indeed, these are the kinds of leagues that Attorney General Butterworth was probably talking about in his advisory opinion. He specifically said that he was discussing a “fantasy football league by a group of football fans in which contestants pay $100 for the right to manage one of eight teams....” See Op. Att’y Gen. 91-3 ( Fla. 1991).

99 Bill Simmons is a columnist for Page 2 on www.espn.com and also ESPN The Magazine, as well as one of the writers for “Jimmy Kimmel Live” on ABC. In a relatively short amount of time, his articles have attracted a cult following because of his ability to effectively encapsulate the relationship men have with their sports.

100 Simmons, supra note 1.

101 Id.


104 See Mike Unger, Just a Fantasy?, THE CAPITAL (Annapolis, Md.), Sept. 15, 2002 at A1 (explaining that many participants consider their football leagues to be “12 month league[s]” and that groups throw parties year round that are based on the fantasy league”).

105 White, supra note 17 (reporting that one league took 50 family members on a cruise and reserved a special room for the draft); see also Unger, supra note 102 (explaining that in one league comprised of close friends participants would fly from all over the country to a central location to attend the annual draft).


107 See Mark Niesse, Fans of Fantasy Sports Flood Internet for Simulated Games, SOUTH BEND TRIB., May 28, 2001, at B7 (reporting that ESPN.com’s senior vice president for programming, production, and operations feels that fantasy sports leagues “[allow] managers to gloat about players on their teams or joke about competing managers”).

108 There are a multitude of reasons as to why one would participate in fantasy sports. For example, one may have an insatiable appetite for sports in general and may just be trying to further feed this hunger. Also, a person may just like the thrill of the involvement of money.

109 See Jessica Temple, Fantasy Baseball Revives Talk of the Game, SOUTH BEND TRIB., Mar. 18, 2001, at F1 (explaining that while gambling may be a motivation for some to participate in fantasy sports, many enthusiasts take part to keep up with the game and to enjoy their friends and family). Indeed, one of the Roberts Court’s main justifications for identifying a fundamental yet unlisted right of social association was because it recognized that certain associations “involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thought, experiences and beliefs but also distinctively personal aspects of one’s life.” Roberts, 468 U.S. at 472.

110 Temple, supra note 109, at F1.

111 Id.

112 Niesse, supra note 107 (explaining that these leagues often “develop cultures based on the personalities of the managers”).


114 Id.

115 Id.

116 Id. at 486.

117 It is the contention of this author, that under the Roberts paradigm, Boy Scouts organizations and intimate book clubs would fall under the protective umbrella of intimate associations.

The Reality of Fantasy

119 Id.
120 Id.
121 Ch. 849.086.

122 See infra Part II.
123 Bill Moss, Fame was in the Cards for the Largo 81/After Paying Marker to Society, Gamblers Find Their Game Legal, St. Petersburg Times, Oct. 1, 1989, at 5B.
124 The State as Hypocrite, St. Petersburg Times, Jul. 16, 1991, at 6A.
125 Unger, supra note 104 (explaining that people love fantasy football because it enables them to have competitive weekly head-to-head match-ups with their friends, where pride and money are at stake).
127 See infra Part II.
128 Kaylois Henry, Pasco Pinochle Players Call Arrest Raw Deal, St. Petersburg Times, Jul. 26 1991, at 1A.
129 Id.
133 Nickens, supra note 31.
135 Id.
136 Id.
137 Thompson, supra note 13, at 25 (explaining that the involvement of money in intimate fantasy sports participation may simply add to the interest and competitiveness of the participants).
139 Sullivan & Gunther, supra note 37, at 477. This treatment of economic liberties represents a substantial change from the Court’s position early in the 20th century when they were treated as fundamental rights that were afforded a high level of scrutiny. See Note, Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconceived, 103 Harv. L. Rev. 1363, 1363-83 (1990); see also Lochner v. New York, 198 U.S. 45 (1905) (striking down a maximum hours law for bakers because it deemed the economic liberty of contract a fundamental liberty under the 14th Amendment); Coppage v. Kansas, 236 U.S. 1 (1915) (recognizing as fundamental the right to contract for property).
140 Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955) (upholding a state regulation that made it unlawful for unlicensed optometrists or ophthalmologists to fit, duplicate, or replace, lenses or other optical appliances reasoning that that the law “need not be in every respect logically consistent with its aims to be constitutional”).
141 Lochner, 198 U.S. at 46 (articulating the rational basis test as an asking of the question of whether the state action in question is “a fair, reasonable and appropriate exercise of the [police power], or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor or which may seem to him appropriate or necessary to support himself and his family?”).
142 See Agency for Health Care Admin. v. Hameroff, 816 So. 2d 1145, 1149 (Fla. Dist. Ct. App. (2002)) (“[T]he judiciary extends great deference to federal, state, and local lawmakers when reviewing economic legislation under due process and equal protection principles where no fundamental right is impaired and no suspect class is offended. This true presumption of constitutionality is a paradigm of judicial restraint and an acknowledgment of separation of powers principles. As the [United States Supreme] Court has explained,‘We refuse to sit as a ‘super- legislature to weigh the wisdom of legislation’.... Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours.’”).
143 Sullivan & Gunther, supra note 37, at 477 (“No socioeconomic law has been invalidated on substantive due process grounds since 1937”).
144 Id.
145 See, e.g., Ferguson v. Skupra, 372 U.S. 726, 731 (1963) (explaining that the Court had abandoned “the use of the vague contours of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise”).
146 The policy reasons for the regulation of gambling will be discussed in detail later.
147 Nebbia v. New York, 291 U.S. 502, 510-11 (1934) (explaining that “the guaranty of due process...demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought the be attained.”).
148 County of Sacramento v. Lewis, 523 U.S. 833 (1998); see also Nebbia, 291 U.S. at 502.
149 Carrol v. Schlesser, 361 So. 2d 144, 146 (Fla. 1978); see also Joseph v. Henderson, 834 So. 2d 373, 375 (Fla. Dist. Ct.App. 2003) (explaining that “in order to determine whether a
statute violates substantive due process, a determination must be made as to whether it bears a reasonable relationship to a legitimate legislative objective and is not discriminatory, arbitrary, or oppressive.”).

150 Joseph, 834 So. 2d at 373.

151 Id. at 375.

152 Id.

153 Id. (explaining that the statute distinguished between prisoners who were brought to jail under “writs of testificandum” and those who were brought under “writs of prosequeendum”).

154 Id. at 375-76 (“...it is not disputed that either writ could have been used to secure [the plaintiff’s] presence by the trial judge).

155 Id.

156 Id.

157 Id. It must be noted that the Florida Supreme Court has afforded great deference to the state legislature in its review of gambling legislation. See Division of Pari-Mutuel Wagering v. Florida Horse Council, 464 So. 2d 128, 130 (Fla. 1985) (“Authorized gambling is a matter over which the state may exercise its police power in a more arbitrary manner because of the noxious qualities of the enterprise as distinguished from those enterprises not affected with a public interest and those enterprises over which the exercise of the police power is not so essential for the public welfare”); Rodriguez v. Jones, 64 So. 2d 278, 279 (Fla. 1953). However, this does not afford the legislature a carte blanche as the Florida Supreme Court still reviewed the offered justifications for the statutes in question. See Division of Pari-Mutuel Wagering, 464 So. 2d at 130.


159 Op. Att’y Gen. 91-3 (Fla. 1991). It should be noted that Florida’s gambling laws seek to primarily outlaw gambling that occurs on games of chance. Therefore, it is tempting to make the argument that fantasy sports participation should not be regulated because successful participation requires a great deal of skill. However, “whether the actual fantasy game [is] in fact gambling [is] irrelevant because...any actual money that is awarded is based on professional players’ performances on the field and that, the Attorney General held, violates Florida law.” Thompson, supra note 13, at 38. The Attorney General’s stance was that Section 849.14 is violated because the payout of any money depends on the chance of a secondary actor reaching certain performance benchmarks.


161 Ch. 550.002(22).

162 “Pari-mutuel facility’ means a racetrack, fronton, or other facility used by a permitholder for the conduct of pari-mutuel wagering.” Ch. 550.002(23).

163 Jai-alai is a game of Spanish origin involving two players in a racquetball type situation.

164 Fla. Stat. ch. 550.155(1); see also News You Can Use, Division of Pari-Mutuel Wagering Newsletter (Fla. Dept. Bus. Prof'l Regulation), July 2002, available at http://www.state.fl.us/dbpr/pmw/newsletter/index.shtml#4 (last visited Mar. 28, 2004) (“Wagering on pari-mutuel events was originally authorized by the Florida legislature in 1931. Since then, Florida has become one of the most diverse pari-mutuel industries in the country, to include greyhound racing, horse racing, harness racing and jai alai. In addition, 11 card rooms operate in pari-mutuel facilities throughout Florida.”).

165 Alisa Ulferts & Steve Bousquet, Class Size Cost Could Revive Gambling Option, St. Petersburg Times, Nov. 19, 2002, at 1A (quoting a Miami gambling lobbyist as saying “It’s hypocritical to call [Florida] a nongambling state. We are the gambling state.”).


167 While the statute in this case was challenged on First Amendment grounds by private casino operators, the rationale the Court developed is applicable here.

168 Greater New Orleans, 527 U.S. at 190.

169 Id. at 189-90.

170 Id. at 192.


173 White, supra note 17.

174 Id.

175 See Davidson, supra note 172, at 222. Members of organized crime organizations often serve as “bookies” for people to place their bets, or they provide the “muscle” to efficiently collect outstanding debts.

176 See Thompson, supra note 13, at 25-26 (explaining that ninety percent of compulsive gamblers “are forced to commit crimes to pay their debts”); Davidson, supra note 172, at 222 (explaining legalized gambling creates “problem gamblers” who commit other crimes to support their habit); see also Social and Economic Impact and Facts About Problem Gambling in Florida, GamblingHelp.org, available at http://www.gamblinghelp.org/gambling/social2.htm (last visited Mar. 28, 2004).
The Reality of Fantasy

177 Davidson, supra note 172, at 221 n.142.

178 Id. at 222 (explaining that the private nature of fantasy sports leagues would not increase the street crime element).

179 Thompson, supra note 13, at 40.


181 Davidson, supra note 172, at 222 (explaining that “fantasy sports contests tend not to involve great amounts of money and arguably would not have any effect on the crime rate). “Fantasy sports leagues do not fit the profile of dangerous games.” Id.


183 Thompson, supra note 13, at 25.

184 Id. (explaining that states eventually pay three dollars in social and criminal costs for every dollar that is raised through legalized gambling).

185 Id. at 41 (explaining that “the time necessary to actually compete in a fantasy league makes participation in more than a handful of them logistically impossible”).

186 Id. (“One would have to participate in an inordinate number of games that require such minimal money down in order to accumulate any appreciable debt.”).


189 Davidson, supra note 172, at 224.


191 Davidson, supra note 172, at 224.

192 Id.

193 Ch. 550.0425(3). Children cannot work directly with wagering or alcoholic beverages. Id. However, it is clear that children working in a pari-mutuel facility are very much exposed to the world of gambling.

194 Davidson, supra note 172, at 225.

195 Nebbia v. New York, 291 U.S. 502, 537 (explaining that there still needs to be a “proper legislative purpose”).

196 Thompson, supra note 13, at 40.

197 Id. (“Consider a game played between the New York Yankees and the Boston Red Sox, in which Pedro Martinez is the starting pitcher for the Red Sox. It is entirely possible that one fantasy team has both Martinez and shortstop Derek Jeter of the Yankees. If one were interested in fixing the game in order to increase his personal fantasy point total, what would one do when Martinez pitched to Jeter? If you pay Jeter to strike out, you improve Martinez’s statistics, but you hurt Jeter. Similarly, if you were to pay Martinez to pitch too poorly so Jeter would get on base, you hurt Martinez’s stats. It simply is a no-win situation.”).

198 Id.

199 Id.

200 Id.

201 Id.

202 Id.


204 infra note 133 and accompanying text.

205 For example, there seems no reason to believe that if the poker game Thomas had been talking about was switched to an intimate game of WAR or Go Fish for small amounts of money that his attitude would have been any different. However, under the final version of the penny-ante statute, participation in these games would be criminalized.