

BETTER GOOD THAN LUCKY: A LEGAL ANALYSIS OF POKER AS A SKILL GAME IN A CHANGING GAMBLING CLIMATE

Economist Steven Levitt likens the game of poker to playing a sport or a musical instrument.¹ Many people from all walks of life enjoy playing recreationally. It takes little skill to pick up a basketball or a guitar, but a great deal of skill obtained over thousands of hours of practice to play well. People spend money to improve, take lessons, and hire coaches. Millions play for enjoyment; a much smaller group plays on college teams or in dive bars. And a rarefied few make it to Madison Square Garden. No one disputes that those activities require skill or that there is some luck involved in making it to the top. Poker is much the same, yet the law generally treats it as a game of pure luck, a vice from which the American public needs to be protected.

Poker² is restricted by both federal and state law. The Unlawful Internet Gambling Enforcement Act (UIGEA), passed in 2006, outlaws the knowing receipt of funds over the internet for the purposes of gambling.³ Although it does not expressly ban online poker, it effectively cut off the United States from the global online poker industry and ended Americans' ability to play online professionally or recreationally. The UIGEA does not define illegal gambling but instead relies on state definitions. Other applicable federal statutes also defer to states to determine what constitutes illegal gambling.⁴

State gambling laws rarely mention poker, online or otherwise. Instead, they rely on the courts to determine what counts as gambling. Most states use the *dominant factor test* to judge whether luck or skill is the primary influencer of the outcome of a game to decide if gambling regulations are applicable to that game.⁵ Roulette is strictly luck-based. Chess lies at the opposite end of the spectrum. Even a skill game like chess, however, "can be affected by the random factors of who draws white (and thus goes first) or whether one's opponent is sick or distracted."⁶ Most games, and indeed life activities, fall somewhere in between. Poker, this Note argues, is on the skill side of the spectrum. As attitudes toward gambling liberalize across the

1. Steven D. Levitt, Thomas J. Miles & Andrew M. Rosenfield, *Is Texas Hold 'Em a Game of Chance? A Legal and Economic Analysis*, 101 GEO. L.J. 581, 582–83 (2013).

2. For the purposes of this Note, poker refers to any variant of the card game where players compete against each other but does not include table games or video lotteries labeled poker where participants face losing odds against the house.

3. Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361–5367.

4. Illegal Gambling Business Act, 18 U.S.C. § 1955(a)–(b); Wire Act, 18 U.S.C. § 1084.

5. *Op. of the Justices*, 795 So. 2d 630, 635 (Ala. 2001).

6. *Dew-Becker v. Wu*, 178 N.E.3d 1034, 1039 (Ill. 2020).

country, it is time for courts to treat poker as the evidence demands—as a game of skill. When anachronistic paternalism curtails lucrative industry and limits personal liberty in service of a mischaracterization of the game, nobody wins.

Part I of this Note provides an overview of federal gambling laws as they relate to poker. Part II addresses state gambling law, beginning by discussing a variety of tests that courts use to determine which activities are covered by prohibitions on games of chance, and then explaining how the most common test is applied incorrectly. Part III delves into statistical and qualitative evidence that poker is a skill game and discusses one case where the dominant factor test was properly applied. Part IV considers the moralizing and paternalistic motives for courts' traditional distortions of the test and finds that, given the proliferation of sports betting and daily fantasy sports, it does not make sense to treat poker as uniquely problematic. Part V suggests that the best way forward is through state-by-state legislation to legalize and regulate poker. In some states, a court's correct application of the dominant factor test to designate poker outside of an existing gambling ban could nudge legislators in the right direction.

I. APPLICABLE FEDERAL GAMBLING LAWS

To understand the relevance of the skill versus chance debate to the amount of government oversight appropriate for poker, it is necessary to look at the interplay between state and federal gambling regulation. Three federal laws have the most bearing on the legality of poker across the country. The UIGEA, which addresses online wagering, does not explicitly mention poker, but has the effect of banning online poker.⁷ The Illegal Gambling Business Act (IGBA) is the primary federal statute concerning brick-and-mortar poker operations.⁸ Both defer to states on the definition of illegal gambling. Interpretation of the Wire Act,⁹ and its relevance to forms of gaming other than sports betting, is currently in flux and of great importance to the future of online poker.¹⁰

7. 31 U.S.C. §§ 5361–5367.

8. 18 U.S.C. § 1955.

9. 18 U.S.C. § 1084.

10. Parita Patel, Note, *Re-Interpreting and Amending the Wire Act and the Unlawful Internet Gambling Enforcement Act to Address Modern Forms of Online Gambling*, 50 RUTGERS L. REC. 74 (2022); Christopher Soriano, *The Consequences of Federal Attempts to Regulate State Gaming Policy – PASPA and the Wire Act as Two Sides of the Same Coin*, 45 SETON HALL LEGIS. J. 633 (2021); Michelle Minton, *The Original Intent of the Wire Act and Its Implications for State-Based Legalization of Internet Gambling*, 18 GAMING L. REV. & ECON. 974 (2014).

A. *Unlawful Internet Gambling Enforcement Act*

The UIGEA, passed in 2006, aims to curb internet gambling by prohibiting financial institutions from knowingly accepting or processing illegal payments “in connection with the participation of another person in unlawful Internet gambling.”¹¹ The UIGEA specifies that an unlawful internet gambling transaction refers to “any wager that is unlawful in a particular jurisdiction where the bettor is located.”¹² The statute defines the term “bet or wager” as

the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome.¹³

Unlike other anti-gambling statutes, where poker has been collateral damage in a crackdown on mob-run numbers rackets, the UIGEA was prompted by early-2000s animus against internet poker.¹⁴ A small group of Republican lawmakers was concerned about the accessibility of online poker and its growing popularity.¹⁵ There is little evidence, however, that Congress shared the concerns of a few outspoken members. Previous anti-

11. 31 U.S.C. §§ 5361–5367. The Congressional Findings and Purpose section of the UIGEA states that the 1999 National Gambling Impact Study Commission “recommended the passage of legislation to prohibit wire transfers to Internet gambling sites or the banks which represent such sites.” 31 U.S.C. § 5361(a)(2).

12. John T. Holden & Marc Edelman, *A Short Treatise on Sports Gambling and the Law: How America Regulates Its Most Lucrative Vice*, 2020 WIS. L. REV. 907, 953. The statute allows for intermediate routing, meaning transactions sent across state lines via the internet are permitted if they are not prohibited in the starting or ending jurisdiction, even if they are illegal in a state through which the data is transmitted. The UIGEA was designed to target offshore operators, so the emphasis was placed on the location of the wager’s initiation. *Id.* at 953–54.

13. 31 U.S.C. § 5362(1).

14. See Jeffrey S. Moad, Note, *The Pot’s Right: It’s Time for Congress to Go “All in” for Online Poker*, 102 KY. L.J. 757, 766 (2014); Holden & Edelman, *supra* note 12, at 914–19.

15. Walter T. Champion, *Dueling D.O.J. Opinions Fight for the Soul of E-Gambling in the Wake of New Hampshire Lottery Commission v. Rosen*, 12 UNLV GAMING L.J. 97, 101 (2021). A few Republican congressmen, led by Iowa’s Rep. Jim Leach and Virginia’s Bob Goodlatte, were intent on addressing gambling addiction in minors, a problem exacerbated by the easy access to gambling provided by the internet. CHARLES DOYLE & KENNETH R. THOMAS, CONG. RSCH. SERV., RS21487, INTERNET GAMBLING: A SKETCH OF LEGISLATIVE PROPOSALS IN THE 108TH AND 109TH CONGRESSES (2006). Rep. Spencer Bachus, a Republican from Alabama, echoed Leach’s concerns in defense of the UIGEA after its passage, saying “illegal Internet gambling brings the casino into [young people’s] bedrooms and dorm rooms, sometimes with tragic consequences,” adding that young people “by the tens of thousands have been exposed to the risk of becoming compulsive, addictive gamblers.” Bachus cited support for the UIGEA from forty-nine state attorneys general and the American Psychiatric Association. Press Release, Rep. Spencer Bachus, Bachus Statement on Committee Vote to Protect UIGEA, HOUSE FIN. SERVS. COMM. (June 25, 2008), <https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=227989> [<https://perma.cc/DSQ4-9FC2>].

gambling bills did not generate much support, but they did provide language for Senate Majority Leader Bill Frist to borrow for an eleventh-hour attachment to an unrelated bill on port security that had to be passed before Congress recessed for an extended break that night.¹⁶ No Democrats on the Senate-House conference committee even saw the final language of the bill, suddenly containing the UIGEA, until it reached the floor.¹⁷ At that point, conference reports can no longer be amended. Thus, the only option for Congress to stop the UIGEA required a “no” vote to a homeland security bill, five years after the September 11th terrorist attack—a political nonstarter.¹⁸ The SAFE Port Act, and with it the UIGEA, passed the House 409–2 and received unanimous support in the Senate.¹⁹

Despite the motivation behind the UIGEA, the statute does not explicitly mention poker, nor does it criminalize any gambling activity that is not otherwise banned by federal or state law.²⁰ The statute’s circular language essentially defines “unlawful Internet gambling” as gambling that is already unlawful.²¹ Because it was passed at the last minute with no discussion, the law had no accompanying regulations or implementation plan.²² Internet gambling site operators, payment processors, and customers did not know what was actually permitted or prohibited. Some operators left the United States market in response,²³ others continued operations by finding less-reputable payment processors and changing the labeling of their

16. James Romoser, Note, *Unstacking the Deck: The Legalization of Online Poker*, 50 AM. CRIM. L. REV. 519, 535 n.129 (2013). Gaming law expert I. Nelson Rose argued that Frist, “didn’t care about Internet gaming,” but harbored presidential ambitions and wanted to earn points with Leach, whose home state of Iowa held the first presidential caucuses. I. Nelson Rose, *Enforcing a Stupid Law*, 12 GAMING L. REV. & ECON. 547, 547 (2008).

17. Romoser, *supra* note 16, at 535 n.129.

18. “[V]oting against it meant voting in favor of Islamist terrorists.” Rose, *Enforcing a Stupid Law*, *supra* note 16, at 547.

19. See Ryan S. Landes, Note, *Layovers and Cargo Ships: The Prohibition of Internet Gambling and a Proposed System of Regulation*, 82 N.Y.U. L. REV. 913, 932 n.123 (2007); I. Nelson Rose, *Congress Makes Sausages*, 11 GAMING L. REV. 1, 1–3 (2007).

20. 31 U.S.C. §§ 5361–5367. The UIGEA itself says that it is “necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.” 31 U.S.C. § 5361(a)(4).

21. Romoser, *supra* note 16, at 535.

22. Champion, *supra* note 15, at 101 (“[T]he Board of Governors of the Federal Reserve System and the Secretary of the Department of the Treasury, in consultation with the Department of Justice, ‘found it impossible to issue those regulations since it is difficult to determine whether a particular [i]nternet gambling transaction is illegal.’”).

23. PartyPoker, the largest international poker website at the time and a publicly traded company on the London Stock Exchange, was among those to withdraw from the U.S. market. Simon Bowers, *Players Walk Away as US Law Wipes Out 90% of PartyGaming’s Poker Revenue*, GUARDIAN (Oct. 16, 2006, 7:19 PM), <http://www.guardian.co.uk/business/2006/oct/17/usnews.gambling> [https://perma.cc/T6P6-R9RD].

transactions.²⁴ The UIGEA exacerbated many of the security issues that animated the fear of online poker in the first place. The rampant operation of online poker sites in the United States continued despite the UIGEA until April 15, 2011, a day known as “Black Friday,” when the U.S. Department of Justice (DOJ) indicted several of the largest sites and their owners for violations of the UIGEA²⁵ and the IGBA, in addition to charges of bank fraud and money laundering.²⁶

Black Friday essentially ended the online poker boom era in the United States. But that does not mean there is no hope for a resurgence. Because the UIGEA defines illegal gambling in terms of what is prohibited in the jurisdictions where the bets originate and the payment processing terminates, states remain free to set gambling policy. States can define whether poker is permissible in their state, and networks of states where it is permitted can join together to allow wagering across state lines, provided that poker is legal in all states involved.

B. Illegal Gambling Business Act

The IGBA, passed in 1970, was designed to expand the federal government’s power to combat organized crime.²⁷ The statute makes it a federal crime to run a “gambling business” of a certain size.²⁸ Unlike the Wire Act, which created a new class of activity criminalized under federal law, the IGBA is a bootstrapping statute, meaning it allows federal charges to attach to a state law violation. A business is only illegal under the IGBA

24. Full Tilt Poker, Absolute Poker, and PokerStars were among the most prominent companies to continue operations until they were indicted in 2011. Nate Silver, *After ‘Black Friday,’ American Poker Faces Cloudy Future*, N.Y. TIMES: FIVETHIRTYEIGHT (Apr. 20, 2011, 8:47 PM), <http://fivethirtyeight.blogs.nytimes.com/2011/04/20/after-black-friday-american-poker-faces-cloudy-future/> [https://perma.cc/58EQ-5VNW].

25. *See id.*

26. *See A History of Poker’s Black Friday*, POKERLISTINGS: BLACK FRIDAY BULLETIN BOARD | US ONLINE POKER LEGAL UPDATES (Sept. 19, 2012), <http://www.pokerlistings.com/black-friday-history-week-how-the-uigea-changed-everything> [https://perma.cc/Y4Z4-2JY7]; *Black Friday: The Day that Changed Online Poker*, CARD PLAYER (Apr. 13, 2012), <http://www.cardplayer.com/poker-news/13127-black-friday-the-day-that-changed-online-poker> [https://perma.cc/754H-N6HP]; Gary Wise, *PokerStars Settles, Acquires FTP*, ESPN (July 31, 2012, 11:52 AM), http://espn.go.com/poker/story/_id/8218085/pokerstars-reaches-settlement-department-justice-acquires-fulltilt-poker [https://perma.cc/HY22-PXUS]; Press Release, U.S. Att’y’s Off., S.D.N.Y., Manhattan U.S. Attorney Charges Principals of Three Largest Internet Poker Companies with Bank Fraud, Illegal Gambling Offenses, and Laundering Billions in Illegal Gambling Proceeds (Apr. 15, 2011) [hereinafter S.D.N.Y. Press Release], <https://archives.fbi.gov/archives/newyork/press-releases/2011/manhattan-u.s.-attorney-charges-principals-of-three-largest-internet-poker-companies-with-bank-fraud-illegal-gambling-offenses-and-laundering-billions-in-illegal-gambling-proceeds> [https://perma.cc/6M32-CN4P].

27. Holden & Edelman, *supra* note 12, at 917–18.

28. 18 U.S.C. § 1955(a). To be illegal under the IGBA, a business must have five or more participants and either operate for more than thirty days or exceed \$2,000 in gross revenue in a single day.

if it constitutes illegal gambling under state or local law.²⁹ Gambling, as defined by the IGBA, “includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games,³⁰ or selling chances therein.”³¹ The non-exhaustive list only explicitly mentions games that “have one thing in common: players bet on fortuitous outcomes of future events over which they have no control,” in other words, a game of chance.³² Despite the implicit emphasis on games of chance, the DOJ has used the IGBA at least twice in major cases prosecuting online poker.³³

C. Wire Act

The Wire Act was promulgated in 1961 to target a major funding source of organized crime.³⁴ Focused on disrupting the flow of information that facilitated horse racing and sports betting over the telephone, the Act criminalizes the passing of gambling information across state lines using electronic wires.³⁵ The Wire Act was passed long before internet gambling was possible, but during the proliferation of online gambling until 2011, the federal government’s position was that the Act prohibited all gambling conducted online.³⁶ The Wire Act reads:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers *on any sporting event or contest*, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers,

29. Romoser, *supra* note 16, at 531–32.

30. Games called “policy,” “numbers,” or “bolita” are “lottery-style games historically associated with organized crime.” *Id.* at 531 n.114.

31. 18 U.S.C. § 1955(b)(4).

32. Romoser, *supra* note 16, at 533.

33. The Southern District of New York seized \$30 million in online poker players’ winnings in 2009, citing both the IGBA and the Wire Act. Instead of going after the profits of FullTiltPoker.com and PokerStars.com, the DOJ seized money won by players, who found themselves unable to cash out. Russell Goldman, *Feds Freeze Poker Champ’s Winnings*, ABC NEWS (June 10, 2009, 5:05 PM), <https://abcnews.go.com/Business/story?id=7808131&page=1> [<https://perma.cc/43J6-W752>]. The second indictment to cite the IGBA was Black Friday in 2011. *See* S.D.N.Y. Press Release, *supra* note 26.

34. Patel, *supra* note 10, at 75.

35. Wire Act, 18 U.S.C. § 1084.

36. Champion, *supra* note 15, at 98. For its first forty years, the Wire Act only applied to sports betting, but a DOJ opinion under the Bush administration in 2002 announced that the Act was applicable to all online gambling. Minton, *supra* note 10, at 982–83.

shall be fined under this title or imprisoned not more than two years, or both.³⁷

The key question is whether the phrase “on any sporting event or contest” applies to every clause in the paragraph or only to “the transmission of information assisting in the placing of bets or wagers” but not to the placing of the wagers themselves.³⁸ Before 2011, the DOJ interpreted the Wire Act as covering all forms of internet gambling, including poker.³⁹ In December 2011, under the Obama Administration, the DOJ’s Office of Legal Counsel quietly reversed its position that the Wire Act covers all kinds of gambling.⁴⁰ Instead, it interpreted the sports betting modifier to apply to all of the clauses and decided that the Act only prohibits transmissions related to sports betting and racing.⁴¹ The memo explained that it was “difficult to discern” why Congress would block the transmission of all types of bets but only prohibit the transmission of information related to sports.⁴²

The most widespread and immediate effect of the DOJ’s 2011 opinion was to allow states to operate lotteries over the internet.⁴³ It took until 2014 for several states to rely on the opinion to form interstate compacts to allow residents of different states to play poker against each other online. The Multi-State Internet Gaming Agreement (MSIGA), formed in February 2014 between Nevada and Delaware, was the first agreement of its kind creating an association to oversee internet gaming operations in member states.⁴⁴ New Jersey, Michigan, and West Virginia have since joined.⁴⁵

Despite many states investing in online gambling systems that either required out-of-state transaction processors or relied on participants placing

37. 18 U.S.C. § 1084 (emphasis added).

38. For a detailed textual analysis of this question, see George E. Kernochan III, Note, *New Hampshire Lottery Comm’n v. Jeffrey Rosen: High Wire Act—Interstate Daily Fantasy Sports Hang in the Balance*, 29 *SPORTS LAWS J.* 91 (2022).

39. *Champion*, *supra* note 15, at 98. Despite holding that the Wire Act prohibited online poker, the DOJ used the UIGEA to indict online poker providers and did not mention the Wire Act in its April 2011 “Black Friday” indictments. *Id.*

40. Whether the Wire Act Applies to Non-Sports Gambling, 35 *Op. O.L.C.* 134 (2011).

41. *Id.* at 139–43.

42. *Id.* at 140–41.

43. See *Champion*, *supra* note 15, at 104.

44. See Multi-State Internet Gaming Agreement, Nev.-Del., Feb. 25, 2014, http://gov.nv.gov/uploadedFiles/govnv.gov/Content/News_and_Media/Press/2014_Images_and_Files/MultistateInternetGamingAgreement.pdf [<https://perma.cc/ZW7Y-DY55>].

45. Multi-State Internet Gaming Agreement, amended Sept. 27, 2017, <https://www.nj.gov/oag/ge/2017news/MSIGA%20signed%20by%20all.pdf> [<https://perma.cc/Q7G3-9SKY>]; Press Release, Michigan Gaming Control Bd., Michigan Signs Multijurisdictional Poker Agreement Allowing Internet Players to Compete Across State Lines (May 23, 2022), <https://www.michigan.gov/mgcb/news/2022/05/23/multijurisdictional-poker-agreement-signed> [<https://perma.cc/P4F7-56NE>]; Press Release, West Virginia Lottery, West Virginia Joins Multi-State Internet Gaming Agreement (MSIGA) (Nov. 14, 2023), <https://wvlottery.com/media-center/west-virginia-joins-multi-state-internet-gaming-agreement-msiga/> [<https://perma.cc/QZ4M-WGXW>].

bets across state lines, the DOJ changed its mind again under the Trump Administration. On November 2, 2018, the DOJ issued a memo that reversed the 2011 opinion and re-expanded the government's interpretation of the Wire Act to cover all forms of gambling.⁴⁶ Gaming law expert Walter Champion described the 2018 opinion as “a nonsensical bone thrown to [Sheldon] Adelson,” Trump's “friend, casino magnate, intransigent foe of internet gambling, and uber campaign contributor.”⁴⁷

In response to the DOJ's 2018 change of heart, the New Hampshire Lottery Commission (NHLC) brought a lawsuit seeking a declaratory judgment that the Wire Act only applies to sports betting. The District Court of New Hampshire held for the NHLC, ruling that the DOJ violated the Administrative Procedure Act in issuing the new memo, and finding that fatal errors in the memo allowed the court to set it aside.⁴⁸ A week after Sheldon Adelson's death in January 2021, the First Circuit affirmed the decision. The court said the text of the relevant section was “not entirely clear” and “the government's resolution of the Wire Act's ambiguity would lead to odd and seemingly inexplicable results.”⁴⁹ With the setting aside of the 2018 memo, the 2011 memo returned to force, meaning that unless the DOJ takes further action, the Wire Act will not apply to online poker. The DOJ under President Biden is unlikely to take pains to return to a Trump-era policy struck down by the court. While it is possible that future Republican administrations could revisit the issue, Adelson is no longer driving the lobbying effort against online gaming, and states' reliance on interstate transmission of gambling information only continues to grow.

II. STATE GAMBLING LAW

Federal anti-gambling legislation rests on state definitions of gambling. A few states, by constitution or penal statute, either explicitly prohibit poker

46. Reconsidering Whether the Wire Act Applies to Non-Sports Gambling, 42 Op. O.L.C. ___ (Nov. 2, 2018) (slip op.).

47. Champion, *supra* note 15, at 99. The opinion attempted to circumvent the lack of congressional will to pass the Restoration of America's Wire Act, a bill heavily advocated for by Adelson and designed to expand the Wire Act to prevent all forms of online gambling. Restoration of America's Wire Act, H.R. 707, 114th Cong. (2015); Alex Rogers, *House Introduces Online Gambling Bill Backed by Sheldon Adelson*, TIME (Feb. 4, 2015, 4:45 PM), <https://time.com/3695948/sheldon-adelson-online-gambling/> [<https://perma.cc/U32N-A5GF>].

48. N.H. Lottery Comm'n v. Barr, 386 F. Supp. 3d 132 (D.N.H. 2019), *aff'd in part, vacated in part sub nom.* N.H. Lottery Comm'n v. Rosen, 986 F.3d 38 (1st Cir. 2021).

49. *Rosen*, 986 F.3d at 60–61. The First Circuit granted NHLC's motion for summary judgment but found that relief under the Declaratory Judgment Act was sufficient. Accordingly, it vacated the lower court's granting of additional relief under the Administrative Procedure Act. *Id.* at 60–62.

or define illegal gambling in a way that clearly encompasses poker.⁵⁰ Only legislative action or state constitutional amendments can impact the legal status of poker in those jurisdictions. This Note focuses instead on the vast majority of states that leave it to state courts to determine whether poker falls within the contours of illegal gambling within their borders.

Generally, in order for a game to constitute gambling, it must involve: (1) an award of a prize; (2) that is determined by chance; (3) for which consideration was paid.⁵¹ The reward and consideration aspects are rarely in contention, but the meaning of the element of chance is open to judicial interpretation. According to one definition, chance is “a lack of control over events or the absence of ‘controllable causation’—‘the opposite of intention.’”⁵² But “the element of chance in any situation is generally not a question of kind but of degree.”⁵³ How much skill must be involved before the outcome is no longer determined by chance?

States vary widely in the language used in their statutes and constitutions in reference to the permissible level of chance in an activity before it becomes gambling, suggesting that state courts should apply very different tests to determine which activities are covered by various gambling prohibitions. While a variety of tests exist, in practice, most state courts use the “dominant factor” test regardless of whether it aligns best with the plain language of the laws of their state.⁵⁴ Methodology across courts is inconsistent at best, but courts typically apply their chosen test in artificially restrictive ways in order to designate skill-based games as legally impermissible simply because they are traditionally considered gambling.⁵⁵ In particular, courts distort the dominant factor test when analyzing poker in two ways: by applying it qualitatively rather than according to its implied quantitative nature, and by using a single hand as the unit of analysis.⁵⁶

50. For example, Wisconsin’s state constitution specifically prohibits the legislature from authorizing poker as a state-run lottery. WIS. CONST. art. IV, § 24(6)(c). Idaho’s state constitution bans gambling as “contrary to public policy,” and excludes poker and other casino games from permitted exceptions. IDAHO CONST. art. III, § 20(1)–(2). The Oklahoma penal code explicitly includes poker in its list of games whose operation is forbidden. OKLA. STAT. tit. 21, § 941 (2023).

51. Emanuel V. Towfigh, Andreas Glöckner & Rene Reid, *Dangerous Games: The Psychological Case for Regulating Gambling*, 8 CHARLESTON L. REV. 147, 160 (2013); see, e.g., *Commonwealth v. Dent*, 992 A.2d 190, 192 (Pa. Super. Ct. 2010).

52. *Op. of the Justices*, 795 So. 2d 630, 635 (Ala. 2001) (quoting *Chance*, BLACK’S LAW DICTIONARY 231 (6th ed. 1990)).

53. *Id.*

54. Levitt et al., *supra* note 1, at 587.

55. Courts may be motivated by a concern for gambling addicts and, in some cases, the absence of readymade regulatory schemes to police an activity should they find it to fall outside of existing prohibitions on gambling. *Id.*

56. See generally *id.*

A. Tests for the Permissible Level of Chance

The earliest cases distinguishing games of chance from games of skill were debates over the meaning of constitutional prohibitions on “lotteries.”⁵⁷ The “English” and “American” interpretations arose as competing paradigms, both based on the understanding that games of chance fall on a spectrum, with pure chance lotteries at one end and pure skill games at the other.⁵⁸ Under the English Rule, only games of pure chance constitute lotteries for the purposes of constitutional interpretation. The influence of any skill, “no matter how *de minimis*,” removes a game from falling under a ban on lotteries.⁵⁹ The prevailing view in the United States, however, is that games falling at various points along the spectrum can qualify as prohibited lotteries “even though the result may be affected to some degree by skill or knowledge.”⁶⁰ Courts have developed four different tests to determine how much chance is too much to permit a game to escape gambling regulation: the dominant factor test, the material element test, the any chance test, and the gambling instincts test.

1. Dominant Factor Test

The dominant factor test, also known as the “American Rule” because of its prevalence, is by far the most common standard in United States courts.⁶¹ Under this test, “it is not necessary for the distribution of prizes to be purely by chance, but only for such distribution to be by chance as the dominating element, even though affected to some extent by the exercise of skill or judgment.”⁶² Games which are “mathematically more likely to be

57. *Id.* at 588.

58. *Id.* at 589.

59. *Op. of the Justices*, 795 So. 2d 630, 635 (Ala. 2001).

60. *Id.*

61. *Id.* The test has also been referred to as the “predominant purpose test” and the “predominant factor test.” *Dew-Becker v. Wu*, 178 N.E.3d 1034, 1039 (Ill. 2020).

62. *State v. Coats*, 74 P.2d 1102, 1109 (Or. 1938) (Kelly, J., specially concurring); *see also, e.g.*, *Joker Club, L.L.C. v. Hardin*, 643 S.E.2d 626, 629 (N.C. Ct. App. 2007) (“We have held that an inquiry regarding whether a game is a game of chance or skill turns on whether chance or skill predominates.”); *Op. of the Justices*, 795 So. 2d at 641 (“[W]here the *dominant* factor in a participant’s failure or success in any particular game or scheme is chance, the scheme is a lottery—despite the use of some degree of judgment or skill.”); *Hotel Emps. & Rest. Emps. Int’l Union v. Davis*, 981 P.2d 990, 996 (Cal. 1999) (“‘Chance’ means that winning and losing depend on luck and fortune rather than or at least more than, judgment and skill.”); *In re Allen*, 377 P.2d 280, 281 (Cal. 1962) (“The test is not whether the game contains an element of chance or an element of skill but which of them is the dominating factor in determining the result of the game.”); *State v. Stroupe*, 76 S.E.2d 313, 316 (N.C. 1953) (“[M]ost courts have reasoned that there are few games, if any, which consist purely of chance or skill, and that therefore a game of chance is one in which the element of chance predominates over the element of skill.” (quoting D.A. Norris, Annotation, *What Are Games of Chance, Games of Skill, and Mixed Games of Chance and Skill*, 135 A.L.R. 104, 113 (1941))).

determined by skill than chance are not considered gambling.”⁶³ When applied correctly, the dominant factor test should find games that are 51% skill to be legal.⁶⁴ Courts have applied the dominant factor test to a wide variety of activities, from games commonly considered gambling today such as slot machines⁶⁵ and roulette,⁶⁶ to those less traditionally associated with gambling, including baseball,⁶⁷ pinball,⁶⁸ and shuffleboard.⁶⁹

In a typical formation of the rule, the Alaska Supreme Court described the considerations relevant to determining when skill is a predominant factor:

- (1) Participants must have a distinct possibility of exercising skill and must have sufficient data upon which to calculate an informed judgment. . . .
- (2) Participants must have the opportunity to exercise the skill, and the general class of participants must possess the skill. . . .
- (3) Skill or the competitors’ efforts must sufficiently govern the result. Skill must control the final result, not just one part of the larger scheme. . . .
- (4) The standard of skill must be known to the participants, and this standard must govern the result.⁷⁰

63. *Dew-Becker*, 178 N.E.3d at 1039.

64. *United States v. Dicristina*, 886 F. Supp. 2d 164, 231 (E.D.N.Y. 2012) (“To predominate, skill must account for a greater percentage of the outcome than chance—i.e., more than fifty percent.”), *rev’d on other grounds*, 726 F.3d 92 (2d Cir. 2013).

65. *E.g.*, *Hoke v. Lawson*, 1 A.2d 77 (Md. 1938).

66. *E.g.*, *Zaft v. Milton*, 126 A. 29 (N.J. Ch. 1924).

67. *E.g.*, *Utah State Fair Ass’n v. Green*, 249 P. 1016 (Utah 1926); *Ex parte Neet*, 57 S.W. 1025 (Mo. 1900).

68. *E.g.*, *Howle v. City of Birmingham*, 159 So. 206 (Ala. 1935).

69. *E.g.*, *State v. Bishop*, 30 N.C. 266 (1848).

70. *Morrow v. State*, 511 P.2d 127, 129 (Alaska 1973).

2. *Material Element Test*

A handful of states⁷¹ apply the material element test, which asks whether chance “has more than a mere incidental effect on the game.”⁷² It is a more restrictive test on games (or more liberal in what it considers gambling), since it considers a contest to be “a game of chance if the outcome depends in a material degree upon an element of chance, even if skill is otherwise dominant.”⁷³ Many games that would not be considered gambling under the dominant factor test would meet the requirements to be gambling under the material element test.⁷⁴ Even games widely considered pure skill games, such as Scrabble, could be determined to have a material element of chance involved, since elements like drawing letter tiles could have an impact on the outcome of any particular game.⁷⁵

This test is more subjective than the dominant factor test, since it lacks the requirement that chance accounts for at least 50% of the outcome of any given activity. It has been widely criticized as depending “too greatly on a subjective determination of what constitutes ‘materiality,’” that can vary from court to court.⁷⁶

3. *Any Chance Test*

In several states, courts have found that the wording of state law requires them to apply an any chance test, determining that the presence of even the

71. The exact number of states applying each test is difficult to pin down because many states have conflicts within their courts about the test to use or employ inconsistent language. One study named eight, possibly nine states, as material element states (Alabama, Alaska, Hawaii, Missouri, New Jersey, New York, Oklahoma, Oregon, and possibly Washington), Anthony N. Cabot, Glenn J. Light & Karl F. Rutledge, *Alex Rodriguez, a Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance*, 57 *DRAKE L. REV.* 383, 392 & n.64 (2009), but at least Alabama, Alaska, and New York also rely heavily on the dominant factor test. New York has often been considered a “material element” state. See *United States v. Dicristina*, 886 F. Supp. 2d 164 (E.D.N.Y. 2012), *rev'd on other grounds*, 726 F.3d 92 (2d Cir. 2013); *Plato's Cave Corp. v. State Liquor Auth.*, 496 N.Y.S.2d 436 (N.Y. App. Div. 1985). But a long line of New York cases, beginning with *People ex rel. Ellison v. Lavin*, 71 N.E. 753 (N.Y. 1904), have applied the dominant factor test. A 2022 decision resolved the conflict, at least for the moment, in favor of the dominant factor test. *White v. Cuomo*, 192 N.E.3d 300 (N.Y. 2022).

72. Cabot et al., *supra* note 71, at 393.

73. *Dew-Becker v. Wu*, 178 N.E.3d 1034, 1040 (Ill. 2020) (explaining the differences between the dominant factor, material element, and any chance tests); see, e.g., *Thole v. Westfall*, 682 S.W.2d 33, 37 n.8 (Mo. Ct. App. 1984) (“[C]hance must be a material element in determining the outcome of a gambling game. It need not be the *dominant* element.”).

74. See, e.g., *Boardwalk Regency Corp. v. Att’y Gen.*, 457 A.2d 847, 850 (N.J. Super. Ct. Law Div. 1982) (rejecting the dominant factor test in favor of the material element test and holding that backgammon is a form of gambling because “the element of chance, represented by the rolling of two dice to begin the game and at the beginning of each player’s turn, is a decidedly material element in the game of backgammon”).

75. See Cabot et al., *supra* note 71, at 395.

76. *Dew-Becker*, 178 N.E.3d at 1040.

smallest element of chance in an activity raises it to the threshold of illegal gambling.⁷⁷ This test, as the Supreme Court of Illinois explained, “is essentially no test at all, as every contest involves some degree of chance.”⁷⁸ Even chess, the gold standard of skill games, would be considered impermissible gambling if the determination of which player moves first is made at random.⁷⁹

4. *Gambling Instincts Test*

A few courts have completely set aside the skill-chance debate in favor of a gambling instincts test, a highly subjective and paternalistic analysis of the nature of an activity to determine if it appeals to the risk-seeking nature of its participants.⁸⁰ This test has not been used widely or recently, but its moralistic tone and lack of objectivity have been revived by a newly proposed originalist test.⁸¹

5. *A New Originalist Test?*

While courts today nearly universally apply some test that weighs the relative influence of skill and chance on the outcome of an activity, judges have proposed another approach. Notably, three of the seven New York Court of Appeals judges who ruled on a 2022 case about the legality of daily fantasy sports supported in the dissent the complete removal of any discussion about luck and skill.⁸² Instead, the dissenters advocated abandoning the tests in favor of determining what was considered gambling when New York amended its constitution to prohibit gambling in 1894.⁸³ The dissent suggested “a careful examination of the historical and social context in which the 1894 amendment was placed in our Constitution, including looking to societal judgments about what types of activities constitute gambling.”⁸⁴ The dissenting judges wrote that poker and fantasy sports should both be considered gambling because society previously

77. *E.g.*, *State v. Gambling Device*, 859 S.W.2d 519, 523 (Tex. Ct. App. 1993) (reading the relevant Texas statute “to apply to contrivances that incorporate any element of chance, even if the exercise of skill also influences the outcome”).

78. *Dew-Becker*, 178 N.E.3d at 1040.

79. *Id.* at 1039.

80. *See, e.g.*, *City of Milwaukee v. Burns*, 274 N.W. 273, 275 (Wis. 1937) (determining that pinball machines were illegal gambling devices because their commercial appeal came from an “appeal to the gambling instinct”).

81. *See White v. Cuomo*, 192 N.E.3d 300, 326 (N.Y. 2022) (Wilson, J., dissenting).

82. *Id.*

83. *Id.* (“The constitutional meaning of gambling does not turn on some weighing of skill and chance, but rather on what types of activities are commonly understood to constitute gambling.”).

84. *Id.* at 325.

judged them to be harmful activities.⁸⁵ This backwards-looking approach focused on outdated anti-gambling animus rather than factual findings would be a startling departure from the language used in dozens of judicial opinions that frame their analysis under a test like the dominant factor test. But in practice, it may not be far from the way courts apply the test to reach preconceived determinations about what should be considered illegal gambling.

B. Application of the Dominant Factor Test to Poker

The dominant factor test is a nebulous standard that has led to a range of different conclusions about the same activities.⁸⁶ Yet, because of its potential for objectivity, it is the best option currently available to courts when evaluating whether poker is legal under vague gambling statutes, but only if it is applied properly. Many of the test's shortcomings stem from the way it is misapplied in order to avoid labeling poker a skill game, even where courts recognize the significant impact skill plays in determining winners and losers. The test is distorted when it is applied qualitatively rather than quantitatively and when courts confine analysis to a single hand of poker.

1. Courts Use Qualitative, Not Quantitative Analysis

The name “dominant factor test” implies a quantitative application, a weighing of two factors—skill and chance—to determine which has the larger impact on the outcome of an activity. But courts have widely rejected the mathematical measurement approach, holding instead that “the rule that chance must be the dominant factor is to be taken in the qualitative or causative sense, rather than the quantitative sense.”⁸⁷ The qualitative approach looks at whether “skill override[s] the effect of the chance.”⁸⁸ Under that analysis, evidence that poker is influenced by skill is discarded because no level of skill can “override” or negate the presence of chance in

85. *Id.* at 330.

86. Levitt et al., *supra* note 1, at 606.

87. *Minges v. City of Birmingham*, 36 So. 2d 93, 96 (Ala. 1948) (holding that a marketing scheme that required entrants to write in with reasons they liked Pepsi-Cola was not a lottery); *see also* *Sherwood & Roberts-Yakima, Inc. v. Leach*, 409 P.2d 160, 163 (Wash. 1965) (“The measure is a qualitative one; that is, the chance must be an integral part which influences the result. The measure is not the quantitative proportion of skill and chance in viewing the scheme as a whole.”); *State ex inf. McKittrick v. Globe-Democrat Publ'g Co.*, 110 S.W.2d 705, 717 (Mo. 1937) (en banc) (“[T]he question was not to be determined on the basis of mere proportions of skill and chance entering in the contest as a whole.”).

88. *State ex rel. Tyson v. Ted's Game Enters.*, 893 So. 2d 355, 374 (Ala. Civ. App. 2002) (asking if skill may “‘destroy the existence or effect of the chance?’ . . . [If not], it can hardly be said that the skill predominates over the chance in the qualitative or causative sense contemplated”).

the game. No matter how skillfully a player reacts to a deal of the cards and how much that impacts his chances of winning, skill cannot change the fact that the cards were distributed randomly. The North Carolina Supreme Court explained in 1892:

It is a matter of universal knowledge that no game played with the ordinary playing cards is unattended with risk, whatever may be the skill, experience or intelligence of the gamesters engaged in it. From the very nature of such games, where cards must be drawn by and dealt out to players, who cannot anticipate what ones may be received by each, the order in which they will be placed or the effect of a given play or mode of playing, there must be unavoidable uncertainty as to the results.⁸⁹

A Pennsylvania court acknowledged that “skill can determine the outcome in a poker game,” but still held that, under the predominant factor test, chance dominated because, “players are still subject to defeat at the turn of the cards.”⁹⁰ A different court, still claiming to apply a predominance inquiry, reached the same conclusion by looking at the “instrumentalities” of the game. It distinguished between poker and games like bowling, billiards, and chess, which are subject to chance occurrences but where, “the instrumentality for victory is in each player’s hands and his fortunes will be determined by how skillfully he uses that instrumentality.”⁹¹ In poker, “[n]o amount of skill can change a deuce into an ace. Thus, the instrumentality for victory is not entirely in the player’s hand.”⁹²

In contrast to these qualitative approaches, where the Colorado Attorney General applied a more quantitative version of the “chance dominant” test, she found that “poker is probably not a lottery because skill plays a larger, perhaps dominant role.”⁹³

89. *Joker Club, L.L.C. v. Hardin*, 643 S.E.2d 626, 630 (N.C. Ct. App. 2007) (quoting *State v. Taylor*, 16 S.E. 168, 169 (N.C. 1892)).

90. *Commonwealth v. Dent*, 992 A.2d 190, 196 (Pa. Super. Ct. 2010) (overturning the trial court’s dismissal of charges based on its finding that, because skill predominated over chance, Texas Hold’em Poker was not unlawful gambling under the statute). The Superior Court compounded its logical confusion by relying on *Commonwealth v. Two Electronic Poker Game Machines*, 465 A.2d 973 (Pa. 1983). In *Dent*, the Superior Court ignored the language in *Two Electronic Poker Game Machines* distinguishing between video poker terminals played with losing odds against the house and poker games played against other opponents, where skills like holding, folding, bluffing, and raising “can indeed determine the outcome in a game.” *Two Electronic Poker Game Machines*, 465 A.2d at 978.

91. *Joker Club*, 643 S.E.2d at 630.

92. *Id.*

93. Colo. Op. Att’y Gen. No. 93-5 (Apr. 21, 1993), 1993 WL 380757, at *2–3. The Colorado Attorney General responded to an inquiry posed by a state representative asking whether the state constitution prohibited the General Assembly from enacting legislation to legalize gambling. The response said that lotteries and blackjack were impermissible lotteries under the Colorado Constitution, but poker was not. Thus, “legislative authorization of certain forms of poker would not be prohibited.” *Id.* at *9.

2. Courts Use a Single Hand as the Unit of Analysis

Another significant way that courts misanalyze poker under the dominant factor standard is by evaluating the impact that chance and skill have on the outcome of a single round of play. The analysis of a single hand has limited relevance to the activity at issue in each case, because the influence of skill only becomes apparent, and statistically measurable, over a large sample size.⁹⁴ Nobody outside of the courts conceptualizes poker as a single round.⁹⁵ Nearly all activities, when broken into their smallest units, show considerable variance due to the presence of chance. Stock traders analyze success on the basis of a portfolio, not a single trade. Sports teams play more than one game a season to determine who makes the playoffs. And poker players evaluate wins and losses across hundreds or thousands of hands.⁹⁶

The unit of analysis is particularly important in poker and other card games because the influence of skill “becomes observable only after multiple rounds of play.”⁹⁷ Starting hand value, which is determined entirely by chance, is important to one’s likelihood of winning a particular deal. Skilled players fold most of their starting hands, meaning that by exercising their skill, they forfeit the ability to win that hand in favor of improving their performance in a larger sequence. Over time, variance evens out differences in starting hand value, allowing skilled players to “pick their spots” to capitalize on their talent. The ability to read opponents and exploit one’s own image also develops over many hands.⁹⁸ By confining analysis to a single hand, courts eliminate the influence of the very skills they are supposed to be weighing.

In the case of poker tournaments, a single hand has no value as a unit of measurement. Participants pay an entry fee, for which they receive a set amount of tournament chips. Tournament chips have no monetary value and cannot be exchanged for cash. Prizes are awarded based on the order in which players are knocked out of the tournament by losing all of their chips.

94. See Levitt et al., *supra* note 1, at 595–606.

95. *Id.* at 597.

96. *But see* United States v. Dicristina, 886 F. Supp. 2d 164, 178 (E.D.N.Y. 2012), *rev’d on other grounds*, 726 F.3d 92 (2d Cir. 2013). The government’s expert witness argued that a single hand is the appropriate standard of measure because a player could get lucky and win a large amount in a single hand and then quit, leaving the losing player without the opportunity to win back his money. “You can drop out any time you want. So the fact that if you play one hand chance is the material decider, I would say that says it right there.” *Id.* This argument fails in the case of poker tournaments, where the chips on the table have no monetary value, and thus, a lucky player does not have the option of leaving after a winning hand and taking his earnings with him. By the rules of the game, a player cannot drop out anytime he wants.

97. Levitt et al., *supra* note 1, at 597.

98. *Id.* at 605–06.

The only opportunity to convert one's entry fee into a prize is to be successful over a substantial sequence of hands. The earliest case to address Texas Hold'em involved this style of tournament, yet the court still treated a single hand as the relevant unit of analysis.⁹⁹ A dissenting justice vehemently disagreed, calling the State's argument that poker is a game of pure chance a "canard."¹⁰⁰ He argued that the court should evaluate the influence of skill on the tournament as a whole, stressing that tournament chips were valueless.¹⁰¹

Courts have consistently discounted evidence that shows poker is a skill game over a large sample size in favor of analysis based on one hand. For example, the Court of Appeals of North Carolina heard four expert witnesses testify that poker was a game of skill.¹⁰² On the other side, a North Carolina Alcohol Law Enforcement officer testified for the state "that he had seen a television poker tournament in which a hand with a 91% chance to win lost to a hand with only a 9% chance to win."¹⁰³ Based on the testimonies, the court said, "[a]ll witnesses appeared to agree that in a single hand, chance may predominate over skill, but that over a long game, the most skilled players would likely amass the most chips."¹⁰⁴ Despite the witnesses' agreement that skill predominated over the long run, the court focused on analysis of a single hand and found that poker was a game of chance in violation of the state statute.¹⁰⁵

III. POKER IS A SKILL GAME WHEN THE DOMINANT FACTOR STANDARD IS APPLIED CORRECTLY

Historically, courts applying the dominant factor test to poker were confined to analysis based on the qualitative assertions of expert witnesses about the role skill and luck played in the outcome of the game.¹⁰⁶ It is perhaps understandable, given the lack of quantitative evidence available, that judges were swayed by gut feelings or societal impressions that poker should be considered gambling. However, since the advent of online poker enabled the recording and analysis of millions of hands at a time, there is an

99. See *People v. Mitchell*, 444 N.E.2d 1153 (Ill. App. Ct. 1983).

100. *Id.* at 1157 (Heiple, J., dissenting).

101. *Id.*

102. The plaintiff, seeking a declaratory judgment that poker was a game of skill and not in violation of state law, called as witnesses two professional poker players, a consultant who ran poker tournaments, and a casino manager. *Joker Club, L.L.C. v. Hardin*, 643 S.E.2d 626 (N.C. Ct. App. 2007).

103. *Id.* at 629.

104. *Id.*

105. *Id.* at 630.

106. See, e.g., *id.*; cf. Steven D. Levitt & Thomas J. Miles, *The Role of Skill Versus Luck in Poker: Evidence from the World Series of Poker*, 15 J. SPORTS ECON. 31 (2014) (providing quantitative analysis of live poker tournaments).

abundance of statistical proof to support the assertion that poker is a game dominated by skill.¹⁰⁷ If courts apply the dominant factor test correctly, by using quantitative proof and considering a time horizon of many rounds of play, the clear result is that poker is a skill game.

One district court applied the test appropriately and determined that Texas Hold'em was a game of skill under applicable federal law.¹⁰⁸ Defendant Lawrence DiCristina¹⁰⁹ was arrested for operating a semiweekly poker game out of his electric bicycle workshop in Staten Island, New York, and charged with violating the IGBA.¹¹⁰ Judge Jack Weinstein, known for his innovative thinking, held that to be guilty of a violation of the IGBA, one must have both violated state gambling law and operated a "gambling business" as defined by federal law.¹¹¹ The federal definition of gambling, according to Judge Weinstein, was limited to games of chance under the dominant factor test.¹¹² After detailed consideration of statistical evidence, Judge Weinstein determined that poker was a game of skill and reversed DiCristina's trial court conviction for operating a gambling business.¹¹³

The Second Circuit Court of Appeals reversed the ruling on the ground that the IGBA only required a violation of state gambling law, and as Judge Weinstein agreed, poker was illegal under New York penal statute.¹¹⁴ The Second Circuit did not reach the issue of whether skill or chance predominates in poker. Although the decision did not stand, Judge

107. See, e.g., Levitt et al., *supra* note 1, at 617–35; *United States v. Dicristina*, 886 F. Supp. 2d 164, 178 (E.D.N.Y. 2012), *rev'd on other grounds*, 726 F.3d 92 (2d Cir. 2013); see also Robert C. Hannum & Anthony N. Cabot, *Toward Legalization of Poker: The Skill vs. Chance Debate*, 13 UNLV GAMING RSCH. & REV. J. 1 (2009) (demonstrating the skill level inherent in poker through computer simulations rather than data from online poker hands); Michael A. DeDonno & Douglas K. Detterman, *Poker Is a Skill*, 12 GAMING L. REV. 31 (2008) (same).

108. *Dicristina*, 886 F. Supp. 2d at 234.

109. The district court case is styled "United States v. Dicristina" and spells the defendant's name "Dicristina" in the text of the opinion. The Second Circuit case is styled "United States v. DiCristina" and spells his name "DiCristina." This Note will use "Dicristina" to refer to the district court case and "DiCristina" to refer to the appellate case and the defendant.

110. Petition for Writ of Certiorari, *DiCristina v. United States*, No. 13-564, 2013 WL 5936540, at *7 (Nov. 4, 2013).

111. *Dicristina*, 886 F. Supp. 2d at 221–24.

112. *Id.* at 226–30.

113. *Id.* at 230–35. Judge Weinstein was clear that, while poker was not gambling under the dominant factor test used by federal law, it was illegal gambling under New York law because he said the state used the more restrictive material factor test. *Id.* at 234. A recent New York Court of Appeals decision about fantasy sports, *White v. Cuomo*, 192 N.E.3d 300 (N.Y. 2022), held that, despite statutory language implying otherwise, the state applied the dominant factor test. See also Jonathan Hilton, Comment, *Refusing to Fold: How Lawrence DiCristina Went Bust Fighting for a Novel Interpretation of the Illegal Gambling Business Act*, 83 U. CIN. L. REV. 1467 (2015) (analyzing and critiquing the *Dicristina* case); Ashleigh N. Renfro, Comment, *All In with Jack High: DiCristina as the Final Surge to Federally Legalize Online Texas Hold 'Em Poker*, 1 TEX. A&M L. REV. 751 (2014) (discussing the potential impact of the *Dicristina* decision).

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

Weinstein's opinion in *United States v. Dicristina* remains the blueprint for a proper analysis under the dominant factor test.

A full review of the voluminous statistical literature about the influence of skill in poker is beyond the scope of this Note, but it is important to understand conceptually the depth of skill involved in being a winning player and the strength of the quantifiable proof available. This Part will discuss some of the factors that winning players consider during a hand in the context of the analysis presented to the *Dicristina* court that led Judge Weinstein to find that poker is predominantly a skill game.

Dr. Randal D. Heeb, an economist and statistician, testified as an expert witness for the defendant in *United States v. Dicristina*. Before describing his mathematical research in detail, he illustrated for the court the number of distinct strategic choices a poker player makes in the course of playing a single hand.¹¹⁵ Each round begins with players being dealt two "hole cards."¹¹⁶ The most important decision is whether to play the particular hand dealt or fold before committing additional money to the pot.¹¹⁷ In making just that initial decision, a player must consider the value and suit of the cards themselves,¹¹⁸ his position at the table,¹¹⁹ the amount of chips in front of him and his opponents,¹²⁰ the actions taken by the players who choose to

115. *Dicristina*, 886 F. Supp. 2d at 173–74. Heeb focused his analysis on one variant of the game, Texas Hold'em, but his conclusions can be extrapolated to other forms of poker as well.

116. For a detailed explanation of Texas Hold'em gameplay, see *id.* at 172–73.

117. See DeDonno & Detterman, *supra* note 107 (finding that teaching subjects about choosing starting hands more selectively had the greatest impact on improving player performance over a control group); Levitt et al., *supra* note 1, at 629 (discussing the strong negative correlation between percentage of hands played and average win rate); *id.* at 635 (explaining the impact of hole cards on the average player's chances of winning with those cards).

118. Certain starting hands are statistically more likely to win. Heeb gives the example of a hand containing a King and a Nine, which both seem like high cards, but a more skilled player will understand that it is the type of hand that wins small pots and loses big ones.

119. Betting occurs in an order that rotates each hand. The person to act last has the most information and can make the best decisions, so skilled players will play a wider range of hands, and play them more aggressively, when in later positions, while they play fewer hands when in earlier positions.

120. For example, good players understand that the value of drawing hands (cards that are sequential in rank or share a suit and will need to improve with community cards, only available after subsequent rounds of betting, to make a straight or flush) will be worthless most of the time and extremely valuable when they hit. In order to capitalize on that value, the player must have enough chips on the table to be matched by other players, who also must have enough chips to cover big bets. If a player expects his hand to pay off once every twenty times, the player must believe he can win more than twenty times the cost of playing the hand in order to make money in the long run.

call, raise, or fold before his turn,¹²¹ and the number and relative skill levels of the players who remain in the hand.¹²²

Heeb also explains bluffing, a skill essential to the arsenal of a talented poker player, but also a conceptually significant occurrence. Because the goal of a bluff is to win the pot by convincing players with better hands to fold, winning via bluffing cannot be about the luck of the draw. The cards the victorious player was dealt were not necessarily winners, so the player's success was not based on a random event. Thus, the outcome of the hand must be based on the relative skill levels of the bluffing player and the player(s) who did not catch the bluff.¹²³ One study based on millions of hands of online poker found that at a typical nine-handed Texas Hold'em table, the hand with the actual highest value if the round were played to completion only won the pot thirty-one percent of the time.¹²⁴ Another study conducted on 103 million hands of online poker found that only twenty-four percent of hands reached showdown, meaning that seventy-six percent of the time, a player won by inducing the rest of the table to fold. In roughly half of the hands played to completion, the would-be winner had already folded, meaning the outcome was not determined by luck of the draw.¹²⁵

Heeb studied 415 million hands of No Limit Texas Hold'em played online at PokerStars between April 2010 and March 2011.¹²⁶ He conducted two different analyses, first investigating whether a player's average win rate across all the hands he played could predict his success when dealt particular hole cards in order to control for the influence of the luck of the deal on the likelihood of winning.¹²⁷ He determined that a player's overall success rate "had a statistically significant effect on the amount of money won or lost in a particular hand in poker."¹²⁸

121. If players who act before the skilled player's turn have demonstrated strong hands, he will be less likely to invest in a weak hand, unless he thinks he can bluff by showing increased strength through his willingness to continue in the hand after others' shows of strength.

122. The strength of a starting hand changes depending on the number of opponents it must beat. And a skilled player always takes into account the skill level and playing style of the players still in the hand.

123. *But see* United States v. Dicristina, 886 F. Supp. 2d 164, 194 (E.D.N.Y. 2012). The court quoted Dr. DeRosa, the government's expert witness, who made the case that bluffing was also luck-based because it was out of the winning player's control whether or not the superior hand(s) folded. "Every decision a player makes is a reaction to a chance event (the random distribution of cards) or another player's reaction to a chance event over which the player has no control." *Id.*

124. Levitt et al., *supra* note 1, at 622.

125. Hannum & Cabot, *supra* note 107, at 6.

126. *Dicristina*, 886 F. Supp. 2d at 178. While most research is conducted about online poker because of the availability of aggregate data, the results can be extrapolated to live poker. Online poker emphasizes the mathematical processing and pattern recognition aspects of poker skill in the absence of physical and facial cues. "The game is a game of skill in exactly the same way, whether it's played live or played over the internet. . . . The only difference . . . is that the live game brings in some additional elements of skill which are not available to the internet player." *Id.* at 179.

127. *Id.*

128. *Id.* at 181.

Second, Heeb randomly divided the entire set of players represented in the data set into two groups. With the first group, he used regression analysis to construct a “skill index” that included 240 aspects of players’ behavior that related to win rate. He then applied the skill index to the second group of players to determine whether players who the index deemed to be highly skilled based on their behavior performed better than players deemed to be of low skill.¹²⁹ Heeb’s analysis found that “[t]he lowest skill players according to the predicted skill index in fact achieve much worse results. Average players still don’t do very well. Very good players are winning players.”¹³⁰

The government countered Heeb with their own expert witness, econometrician Dr. David DeRosa, who testified that he had no personal experience playing or analyzing poker.¹³¹ DeRosa’s primary argument was that because so few players win money, skill cannot predominate over luck.¹³² While it is true that not all of the players rated as skilled in Heeb’s study made enough money to beat the rake charged by the site to play,¹³³ DeRosa’s argument does not hold water.¹³⁴ By definition, half of the players in a game of chess are losers, but that does not detract from the skill level inherent in the game. Olympians are the most skilled in their fields, but only three competitors win prizes in each event. Millions of golfers spend thousands of dollars on equipment, greens fees, and coaching, but they do not expect to turn pro. Of those who reach the level of playing professionally on the PGA Tour, many do not make enough money to cover their costs. Yet no one would argue that they are not skilled players or that the game

129. *Id.* at 182.

130. *Id.* Over around 880 hands of poker, the high skill group predominated over the low skill group with ninety percent confidence. Analysis of around 1400 hands was required to reach ninety-five percent confidence. According to Heeb, that many hands is “quite reasonably played in a relatively short amount of time by players that are playing poker seriously.” *Id.* at 184. He estimated that it would take around thirty hours of live play to reach 880 hands, roughly the same number of hours as the average three-day World Series of Poker tournament. *Id.* Hands are played much faster online, and skilled players frequently play ten or more tables at once, so it takes a much shorter amount of time online to reach the number of hands at which skill is statistically ensured to predominate.

131. *Id.* at 185.

132. *Id.* at 185–86 (“I go in with a certain amount of money, and I leave with more money. And if I don’t do that, I am a loser. I’m a loser. So a lot of this ranking stuff is irrelevant because skill should be winning money.”).

133. When the rake, the percentage of each pot taken by the website as a fee, was added back to players winnings, thirty-seven percent of players in Heeb’s data set showed a positive profit. *Id.* at 190. In another study, one in six players was profitable without controlling for the rake. Levitt et al., *supra* note 1, at 624.

134. The argument does, however, highlight the important distinction between house-banked games, where over time, the odds are set to make it impossible to win money from the game operator, and games like poker played against other opponents. *See, e.g.*, *Op. of the Justices*, 795 So. 2d 630, 642 (Ala. 2001) (stressing that in the video lottery terminal in question, while skill could minimize one’s losses, “even the most skilled player will, over time, be unsuccessful in winning more money than he or she has wagered”).

itself does not involve skill.¹³⁵ The fact that the majority of poker players do not turn a profit over time does not weaken the argument that skill is the dominant factor in determining which players win.

DeRosa's second argument was that the proper unit of measurement should be a single hand,¹³⁶ but as discussed previously, that demonstrates a misunderstanding of poker in particular and of games in general.¹³⁷ Heeb explains that baseball is a game of skill on every pitch, but it would not be possible to determine from a single pitch, or even a single game, which team is statistically the most skilled.¹³⁸ Skill becomes more apparent the longer a season goes, the more games that are played, the more pitches thrown or at bats taken. "But it's a skillful act in the execution of just one swing or pitch."¹³⁹ Similarly, with poker, each hand is an exercise of skill, "[b]ut to say that we have shown that with statistical certainty requires more and more information the more precisely we want to measure it."¹⁴⁰

Steven Levitt, Thomas Miles, and Andrew Rosenfield developed four tests to objectively establish the influence of skill in any particular activity:

- (1) Can one reject the null hypothesis that all players have the same expected payoff when playing the game?
- (2) Are there predetermined observable characteristics about players that help to predict payoffs?
- (3) Do actions taken by players during the game have statistically significant impacts on the payoffs they achieve?
- (4) Are player returns correlated over time, implying persistence in skill?¹⁴¹

Their research, as well as Heeb's, definitively answers "yes" to each question at statistically significant levels.¹⁴² While it is beyond mathematical doubt that skill influences poker outcomes, it is impossible to quantify an exact percentage of that influence. Still, the data is strong enough to meet the dominant factor test's requirement that skill account for at least fifty-one percent of a game's result.¹⁴³ After analyzing player win rates over several thousand hands, Levitt, Miles, and Rosenfield determined

135. See Rachel Croson, Peter Fishman & Devin G. Pope, *Poker Superstars: Skill or Luck? Similarities Between Golf—Thought to Be a Game of Skill—and Poker*, 21 CHANCE 25 (2008) (concluding that poker is as much a game of skill as golf and drawing parallels between the level of dominance of top golf and poker professionals).

136. *Dicristina*, 886 F. Supp. 2d at 186.

137. See *supra* Section II.B.2.

138. *Dicristina*, 886 F. Supp. 2d at 191.

139. *Id.* at 192.

140. *Id.* at 191 (quoting Def. Expert Supp. R.).

141. Levitt et al., *supra* note 1, at 619.

142. *Id.* at 617–35; *Dicristina*, 886 F. Supp. 2d at 171–98.

143. See, e.g., Dr. Heeb's analysis, *supra* notes 126–30 and accompanying text.

that “[l]uck in hole cards is not an important factor in determining player outcomes.”¹⁴⁴ Given an appropriately large time horizon, “it is almost inconceivable that luck could be the predominant determinant of outcomes”¹⁴⁵

IV. LEGAL LANDSCAPE FOR GAMING HAS CHANGED IN FAVOR OF REGULATION

Protecting Americans from the moral and social evil of gambling was once viewed as a logical reason for courts to distort the dominant factor test to maintain poker’s status as a vilified, and thus illegal, game. However, the country has shifted away from a puritanical approach to gambling and toward a policy of regulation and taxation. It does not make sense for courts to treat poker as uniquely dangerous while states rush to legalize sports betting. In addition, the favorable treatment courts have given to daily fantasy sports highlights the need to approach poker as a skill game. Widespread fantasy sports legislation also demonstrates that states can regulate games that involve an element of chance in a way that aims to protect underage and at-risk participants and could be replicated to regulate online poker.

A. Moralization and Paternalism Are No Longer Adequate Justifications for a Prohibition on Poker

The societal conception of the evils of many activities and lifestyle choices has changed over time. Gaming is no exception. In 1900, a habeas corpus petitioner was jailed “on a charge of playing baseball on Sunday.”¹⁴⁶ It required a Missouri Supreme Court decision to determine that baseball was not a game of chance, and the law forbidding “playing at cards or games of any kind” on Sundays only applied to “games of chance or other games of an immoral tendency.”¹⁴⁷ In 1964, a woman filed a habeas corpus petition after being jailed for hosting a game of bridge.¹⁴⁸ The California Supreme Court held that she had not violated the law because bridge was a skill game.¹⁴⁹ It is conceivable that, decades from now, criminalizing poker will seem as ridiculous as state prohibitions on baseball and bridge.

144. Levitt et al., *supra* note 1, at 635.

145. *Id.* at 634.

146. *Ex parte Neet*, 57 S.W. 1025, 1026 (Mo. 1900).

147. *Id.*; see also *State v. Prather*, 100 P. 57 (Kan. 1909) (holding that playing baseball on Sunday did not violate a similar law).

148. *In re Allen*, 377 P.2d 280, 281 (Cal. 1962).

149. *Id.*

In the nineteenth and early twentieth century, the judiciary's justification for gambling prohibitions focused on the immorality of earning something for nothing. Early court cases about games of chance demonstrated "a theme associating gambling with idleness, corruption, moral decay, and exploitation of the weak and poor."¹⁵⁰ The Supreme Court of Ohio wrote in 1905, "[a]ll highly civilized peoples recognize the evils to society arising from the encouragement of the gambling spirit, and it is for the purpose of discouraging this vice and preventing the spread of it that laws are passed . . . to punish and prohibit."¹⁵¹ The North Carolina Supreme Court described the gambling spirit as "the lure that draws the credulous and unsuspecting into the deceptive scheme, and it is what the law denounces as wrong and demoralizing."¹⁵²

Over the last century, courts have shifted language from justifying their rulings because of the inherent immorality of certain games to focusing on the presence of chance. Yet the distorted application of the dominant factor test to make it overly restrictive has been designed to achieve the same end—protecting society from playing games historically considered immoral.¹⁵³ However, this holdover no longer makes sense because society has stopped viewing gambling as immoral.¹⁵⁴ The New York Court of Appeals recognized this shift in a 2022 case, writing that the "public does not consider authorized gambling a violation of some prevalent conception of good morals [or], some deep-rooted tradition of the common weal."¹⁵⁵

In addition to anachronistic concerns about morality, courts are worried about protecting citizens from the dangers of "criminal activity and undesirable social behavior correlated with gambling."¹⁵⁶ Gambling addiction is a modern understanding of the gambling spirit.¹⁵⁷ Problem gambling is a serious issue,¹⁵⁸ and experts caution that online gambling increases access for pathological gamblers.¹⁵⁹ One study argues that games

150. Towfigh et al., *supra* note 51, at 153.

151. *Stevens v. Cincinnati Times-Star Co.*, 73 N.E. 1058, 1062 (Ohio 1905).

152. *State v. Lipkin*, 84 S.E. 340, 343 (N.C. 1915).

153. Levitt et al., *supra* note 1, at 610–12.

154. *But see White v. Cuomo*, 192 N.E.3d 300, 326 (N.Y. 2022) (Wilson, J., dissenting), discussed *supra* Section II.A.5. Strict adherence to an originalist viewpoint makes changing norms irrelevant to interpretation of state constitutional provisions. According to that philosophy, a paternalistic holdover not only makes sense but is required to maintain the conception of gambling that existed at the time the provisions were drafted.

155. *White*, 192 N.E.3d at 309 (alteration in original).

156. Towfigh et al., *supra* note 51, at 156. These undesirable social effects include "loss of interest in family and friends, increased incidents of divorce, and abdication of familial support." *Id.* (footnote omitted).

157. Levitt et al., *supra* note 1, at 609.

158. Problem gambling has been linked to increased rates of child abuse, criminal activity, homelessness, and suicide. Towfigh et al., *supra* note 51, at 157–58.

159. Holden & Edelman, *supra* note 12, at 937.

like poker and sports betting are more dangerous than pure lotteries because they provide players with a sense of control over the outcome that encourages them to overestimate their chances of winning.¹⁶⁰

But a paternalistic approach to gambling addiction involving the prohibition of games with any element of chance does not make sense. The incidence of alcoholism is greater than pathological gambling, and yet no state outlaws alcohol.¹⁶¹ Shopaholics have greater access to stores through the proliferation of online shopping, but they are expected to police themselves without even the protections available to gambling addicts like self-exclusion and age verification.¹⁶²

Most importantly, there is a lack of logical consistency between courts' efforts to restrict skill games in order to protect people from societal harms while states have drastically liberalized their gambling policies in the last decade. Regardless of whether gambling prohibition was based on a desire to protect Americans from the corruption of their souls or from the harms of gambling addiction, the trend has been toward legalization and regulation and away from blanket prohibition.¹⁶³ The result of the current framework of gambling law and regulation is "a public policy position that seems to assert that gambling is bad/illegal, except when it is not."¹⁶⁴

The evolving attitude toward gambling can be seen most strikingly in the area of sports betting. In 1992, then-NFL Commissioner Paul Tagliabue urged Congress to pass the Professional and Amateur Sports Protection Act (PASPA), freezing state sports betting prohibitions in place so that no new states could legalize wagering on sports.¹⁶⁵ Tagliabue feared that "[w]ith legalized sports gambling, our games instead will come to represent the fast buck, the quick fix, the desire to get something for nothing."¹⁶⁶ All major league sports strongly opposed the proliferation of sports betting.

160. The authors advocate abandoning the dominant factor test because "distinguishing between games of chance and games of skill is not suitable for differentiating between dangerous and harmless games." Towfigh et al., *supra* note 51, at 185–86. They acknowledge that stock trading exhibits the same concerning qualities. *Id.* at 182.

161. Dallis Nicole Warshaw, Note, *Breaking the Bank: The Tax Benefits of Legalizing Online Gambling*, 18 CHAP. L. REV. 289, 308–09 (2014).

162. *Id.*

163. See, e.g., *Dew-Becker v. Wu*, 178 N.E.3d 1034, 1039 (Ill. 2020) (discussing the trend in Illinois toward more relaxed gambling laws).

164. Elizabeth Steyngrob, Note, *Real Liabilities for Fantasy Sports: The Modern Inadequacies of Our Archaic Legal Framework*, 18 U. PA. J. BUS. L. 1207, 1230 (2016).

165. See Soriano, *supra* note 10, at 636–39. At the time, only Nevada allowed betting in sports books. Sports-themed lotteries were permitted in Oregon, Delaware, and Montana. New Jersey was given a year after the passage of PASPA to legalize sports betting but chose not to do so. *Id.*; see also Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701–3704, *invalidated by* *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453 (2018).

166. Soriano, *supra* note 10, at 638 (citing Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701–3704).

In May 2018, the Supreme Court invalidated PASPA on the ground that it violated the Tenth Amendment of the United States Constitution.¹⁶⁷ The decision returned to states the ability to make their own choices about the legality of sports betting. Before the end of the year, more than twenty states had already introduced legislation to legalize some variety of sports betting.¹⁶⁸ By February 2024, thirty-eight states and the District of Columbia had passed some form of sports betting legislation and another six states had legislation pending.¹⁶⁹ Now every major league sport has official betting partnerships, advertisements for sports books appear during nearly every commercial break of televised sporting events, and betting lines have become a staple of game coverage.¹⁷⁰ The post-PASPA sea change is still recent, but so far, doomsday predictions about the erosion of the integrity of athletics sure to be caused by the spread of sports betting have failed to come to fruition.

With the nationwide explosion in legalized and regulated gambling, it no longer makes sense for courts to adhere to anachronistic notions of the immorality of gambling or to use fears about problem gambling as a rationale for applying an illogically restrictive version of the dominant factor test to poker. While courts at one time could have had legitimate concerns that branding poker a skill game would turn it loose into an unregulatable world, the rapid proliferation of sports betting has demonstrated that states are willing and able to establish regulatory systems to protect players and to capitalize on revenue.

B. Treatment of Daily Fantasy Sports Is Markedly Different than Poker

Judicial insistence on treating poker as illegal gambling makes even less sense in light of the rapid proliferation of daily fantasy sports (DFS), which has been treated as a game of skill despite arguably depending more on luck than does poker.¹⁷¹ In traditional fantasy sports, participants build rosters of players from different real-life teams in an effort to create the strongest possible team subject to the restrictions of the particular fantasy league. Results “are premised on an aggregation of statistics concerning each individual athlete’s performance on specific tasks, and . . . pit the rosters of

167. *Murphy*, 584 U.S. at 486.

168. Holden & Edelman, *supra* note 12, at 932.

169. *U.S. Legal Sports Betting*, AM. GAMING ASS’N (Feb. 14, 2024), https://www.americangaming.org/wp-content/uploads/2023/04/AGA_New_LSBMap_040423.pdf [<https://perma.cc/8LN8-W6XN>].

170. Ted Dahlstrom, *Sports Betting Partnership Tracker*, SPORTS HANDLE (Mar. 8, 2024), <https://sportshandle.com/partnership-tracker/> [<https://perma.cc/8G6E-R8AK>]; see Holden & Edelman, *supra* note 12, at 965–66.

171. See generally John J. Chung, *The Legality of Online Daily Fantasy Sports Versus the Illegality of Online Poker*, 27 ROGER WILLIAMS U. L. REV. 1 (2022).

participants against one another rather than tying success to the outcome of sporting events.”¹⁷² DFS allows competitors to pay entry fees to win prizes awarded for building winning fantasy sports rosters in contests that last between a single day and a week rather than an entire season.

DFS appeared on the national scene in the late 2000s, a decade before *Murphy v. NCAA* allowed states to legalize traditional sports betting.¹⁷³ The UIGEA, passed in 2006, effectively shut down many online poker sites in the United States.¹⁷⁴ The statute contained an express carve out for fantasy sports,¹⁷⁵ giving poker blogger Kevin Bonnet the idea to develop a product that felt like a cross between sports betting and a poker tournament but arguably fell within the UIGEA’s fantasy sports exemption.¹⁷⁶ Bonnet never achieved commercial success, but other poker players founded two companies based on the DFS idea that went on to be enormously profitable: FanDuel and DraftKings.¹⁷⁷ The two companies have emerged as the clear leaders of the American DFS industry, which brought in \$350 million in revenue in 2019.¹⁷⁸ Top tournament prizes frequently reach \$1 million.¹⁷⁹

DFS is currently legal to play for prizes in forty-four states.¹⁸⁰ Exactly half of those states, prompted by significant lobbying efforts, have passed legislation expressly legalizing and regulating DFS.¹⁸¹ Others, including California, Massachusetts, and Kansas, have relied on the dominant factor test to establish the legality of DFS.¹⁸² The true influence of luck versus skill in DFS is an open question. Much like poker, DFS fits somewhere on the continuum between a game of pure chance and pure skill. Some argue that it is closer to traditional sports betting, which has always fallen on the chance side of the dividing line.¹⁸³ Others argue that DFS is closer to

172. *White v. Cuomo*, 192 N.E.3d 300, 305 (N.Y. 2022) (describing in detail the game play of what the court calls interactive fantasy sports (IFS)).

173. 584 U.S. 453 (2018).

174. *See supra* Section I.A.

175. 31 U.S.C. § 5362(1)(E)(ix) (excluding “fantasy or simulation sports game[s]” from the definition of a “bet” or “wager”).

176. Marc Edelman, John T. Holden & Adam Scott Wandt, *U.S. Fantasy Sports Law: Fifteen Years After UIGEA*, 83 OHIO ST. L.J. 117, 124–25 (2022).

177. *Id.* FanDuel was founded in 2009 and DraftKings in 2012. Andrew J. Griffin, Note, *A Fantastic Gamble: An Analysis of Daily Fantasy Sports Under the UIGEA and the Predominance Test*, 23 B.U. J. SCI. & TECH. L. 456, 458 (2017).

178. Edelman et al., *supra* note 176, at 126.

179. Chung, *supra* note 171, at 13.

180. One can risk money to win prizes on DraftKings.com in all states but Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. *Where Can You Play DraftKings Daily Fantasy Sports?*, DRAFTKINGS, <https://www.draftkings.com/where-is-draftkings-legal/> [https://perma.cc/W4HC-H6NB].

181. Edelman et al., *supra* note 176, at 128–30, 132.

182. *Id.* at 129 n.92.

183. Holden & Edelman, *supra* note 12, at 921.

traditional, season-long fantasy sports,¹⁸⁴ which have always been considered games of skill.¹⁸⁵

Several courts have found that DFS is not illegal gambling because it is not a game of chance.¹⁸⁶ In the most recent case, *White v. Cuomo*, petitioners alleged that New York's statute legalizing fantasy sports violated the state constitution's ban on gambling. New York's highest court applied the dominant factor test in support of the legislature's determination that fantasy sports are a skill-based activity.¹⁸⁷ Should other states with broad constitutional bans on gambling choose to legalize poker, courts may be similarly called upon to apply the dominant factor test to uphold the legislation as constitutional on the ground that poker is a game of skill.

The only reason for courts or legislatures to treat poker more harshly than DFS is that DFS did not exist until after the national attitude toward gambling had liberalized. Thus, while there is much precedent for misapplying the dominant factor test to poker to protect citizens from the evils of gambling, no such precedent, or prejudice, exists to bias courts against DFS. Courts should look to the treatment of DFS as a guide for appropriate analysis of the skill inherent in poker.

Further, states have established licensing requirements and regulations that require online DFS providers to undertake age, location, and identity verification as well as to provide problem gambling resources and self-exclusion options.¹⁸⁸ Some states have even required that DFS platforms impose monthly limits on how much players can deposit to prevent overspending.¹⁸⁹ The success of these regulations should provide courts with assurance that similar options are available to allow Americans to safely participate in online poker.

V. THE PATH FORWARD: STATE-BY-STATE POKER LEGISLATION AND INTER-STATE COMPACTS

For several years after the passage of the UIGEA, hopes were high for a legislative compromise that would allow for the regulation and taxation of poker on a federal level. Between 2009 and 2012, several bills were

184. See generally Jeffrey C. Meehan, Note, *The Predominant Goliath: Why Pay-to-Play Daily Fantasy Sports Games Are Games of Skill Under the Dominant Factor Test*, 26 MARQ. SPORTS L. REV. 5 (2015) (arguing that DFS requires the same amount of skill as traditional fantasy sports); Chung, *supra* note 171, at 13–19 (explaining the elements of skill and luck involved in DFS without determining which is dominant).

185. Meehan, *supra* note 184, at 12–13.

186. Dew-Becker v. Wu, 178 N.E.3d 1034, 1040 (Ill. 2020); White v. Cuomo, 192 N.E.3d 300 (N.Y. 2022).

187. White, 192 N.E.3d at 316.

188. Edelman et al., *supra* note 176, at 131.

189. *Id.*

introduced that would either repeal parts of the UIGEA or strengthen it with respect to other forms of gambling and create a carve out for online poker.¹⁹⁰ The most recent federal bill aimed at legalizing online poker was the Internet Poker Freedom Act of 2013, which would have created the Office of Internet Poker Oversight within the Department of Commerce.¹⁹¹ The bill, like all of its predecessors, failed to make it out of committee.¹⁹² After his bill failed in 2012, Senator Harry Reid (D-NV) said that “the chances of legalizing online poker at the federal level are exceedingly slim.”¹⁹³ No attempts have been made to legalize poker nationally since 2013.

Federal legislation, which would require the ability for states to opt out, is most desirable because it would allow online poker websites to operate nationally under a single licensing scheme. Poker sites require a large pool of players to draw from in order to be viable. At their peak, PokerStars and Full Tilt drew hundreds of thousands of players from the entire world and were able to offer games of all varieties and price points twenty-four hours a day. States with small populations which can only draw customers from within their borders have a much more limited player pool, and sites operating within a single state may have difficulty developing a viable product.¹⁹⁴ However, federal legislation is not a realistic option at this time.

The next best option is for states to legalize poker individually and then form compacts to share the regulatory burden and to increase the size of the player pool. Currently, states that have legalized online poker only allow licensees to offer games among in-state residents. The exception is the only active online poker compact, the Multi-State Internet Gaming Agreement, formed between Nevada and Delaware and joined by New Jersey, Michigan, and West Virginia.¹⁹⁵ Residents of those five states can play each other on jointly regulated platforms.

States that do choose to legislate the legalization of poker should borrow regulations from DFS and traditional sports books that require sites to verify the ages and identities of their customers and provide assistance to patrons

190. For example, in 2009, Rep. Barney Frank (D-MA) introduced the Internet Gambling Regulation, Consumer Protection, and Enforcement Act, which would have banned sports betting online and implemented age protections and anti-money laundering measures. H.R. 2267, 111th Cong. (2009). In 2012, Sen. Harry Reid (D-NV) partnered with UIGEA-supporter Sen. Jon Kyl (R-AZ) to propose the Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act, which would have reinforced anti-gambling measures but exempt poker and horse racing. Online poker was to be taxed at sixteen percent. Warsaw, *supra* note 161, at 306.

191. Internet Poker Freedom Act of 2013, H.R. 2666, 113th Cong. (2013).

192. Warsaw, *supra* note 161, at 305–06.

193. *Id.* at 307.

194. Soriano, *supra* note 10, at 646 (“[A]n online poker game can only proceed if there are a sufficient number of players logged in at the same time willing to play at various stakes.”).

195. *Id.*

with gambling problems, including hotlines, self-exclusion, and deposit limits.

Courts may be reluctant to act first, ahead of state legislatures, by accurately applying the dominant factor test to poker before their state passes online poker regulation for fear that designating poker a skill game without a safety net in place would instantly place poker on par with chess and checkers. While ideally legislatures across the country will act swiftly to regulate online poker, some states may require nudging from the courts to overcome political inertia. Because there is now some regulatory framework in place in the majority of states to address online sports betting and DFS, state governments will need less time to establish poker regulations and will be able to react quickly to establish consumer protections. Once poker is found to be beyond a blanket ban, state legislators will quickly step in to provide appropriate regulation and taxation. In states with broad constitutional gambling bans, courts may also be relied upon to determine that poker is a skill game in order to validate state legislation.¹⁹⁶

CONCLUSION

Data shows that poker outcomes over time are heavily determined by skill. Historically, courts have misapplied the dominant factor test by overlooking quantitative evidence and by using a single hand as the unit of analysis in order to avoid designating poker as exempt from prohibitions on games of chance. Likely courts have been reluctant to find that poker is a skill game because of a desire to protect citizens from the moral and social harms of gambling, with which poker has long been associated. However, attitudes toward gambling in the United States have changed. The nationwide trend is away from moral disapprobation and toward legalization and regulation. It no longer makes sense to treat poker with undue judicial hostility. Instead, in the vast majority of states where the dominant factor test is the appropriate standard, courts should properly apply it by using quantitative evidence and an adequately large sample size, leading to the unmistakable conclusion that poker outcomes are more influenced by skill than by chance. Hopefully, more states will also legislate to legalize and regulate poker in keeping with their treatment of daily fantasy sports.

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196. See *White v. Cuomo*, 192 N.E.3d 300 (N.Y. 2022).

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