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All In with Jack High: DiCristina as the Final Surge to Federally Legalize Online Texas Hold ‘Em Poker

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ALL IN WITH JACK HIGH: DICRISTINA AS THE FINAL SURGE TO FEDERALLY LEGALIZE ONLINE TEXAS HOLD ‘EM POKER

By: Ashleigh N. Renfro*

ABSTRACT

In United States v. DiCristina, the Eastern District of New York ruled that Texas Hold ‘Em poker is game of skill, and thus, not illegal under the federal Illegal Gambling Business Act. In the decision, the court found that the statute’s text and legislative history did not indicate that Congress intended to include Texas Hold ‘Em poker amongst other illegal gambling activities. But most importantly, the Eastern District found that the analytical and psychological elements of the game allow a skilled player to perform better than another. This, the court reasoned, differentiated Texas Hold ‘Em poker from other types of illegal gambling activities.

Though the Second Circuit Court of Appeals ultimately disagreed on statutory interpretation grounds, the Eastern District’s skill analysis still stands and gives credence to the longstanding argument that the game, because it allows skilled players to excel over non-skilled players, sits on its own compared to prohibited gambling activities. In effect, DiCristina laid the foundation and answered one of the last remaining questions keeping Congress from legalizing online Texas Hold ‘Em poker. This Comment will explore various legalization surges throughout America’s history of gambling that ultimately helped push forward new periods of regulation and reform. This Comment will also examine the rise and fall of internet gambling and the current federal laws keeping the once thriving industry from returning. Additionally, this Comment will look at prior conclusions of the skill-versus-chance argument before DiCristina, and the Eastern District’s approach to resolving the skill versus chance issue. Lastly, this Comment will examine recent developments surrounding online Texas Hold’ Em poker that mirror surges of prior periods of reform, and together with DiCristina, urge Congress to use these final strongholds to advance federal legislation allowing for interstate online Texas Hold ‘Em poker.

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I. INTRODUCTION

If there was ever a time to make a big move, it was now. My chip stack was low, and if I didn’t double-up soon, it’d all be over. Problem was, the dealer just dealt me a Jack-Eight of spades. Sure, there were only six players left, but even then, the win rate on a Jack-Eight is 14%—translation, an 86% chance of losing. ALL-IN! There it was—hands didn’t shake too badly when I threw in the chips, but my heart pounded at my collared shirt. These guys knew me—I’d played Texas Hold ‘Em with them two nights a week for the last two years. Did they know my cards were weak? The table was as still as it had been all night, and tension beaded my opponents’ brows. Two players to my left folded, and then two more to my right—but there was still Pauli. What could he have? Pocket threes? Suited connectors? Cigar smoke clouded the warehouse lights as the regulars, now spectators, hovered around the table to see the next move. CALL! There it was, I got Pauli’s call. Larry came over to tend to his managerial duties, including giving the chips a quick count to see what I would take away if my Jack-Eight survived. Then he gave the dealer the okay to lay down the flop. But, as the first three cards turned over, the warehouse doors slammed open! Holy Shit—are those the Feds?¹

1. Fictitious dramatization.

In the fall of 2012, federal courts across the United States set important precedent, ruled on crucial matters of law, and kept loyal to basic fundamentals of American jurisprudence. Judge Jack Weinstein's court, of the Eastern District of New York, was no exception. On August 21, 2012, in *United States v. DiCristina*, the Eastern District made an unconventional, yet significant play.²

The actions of Lawrence DiCristina, perhaps best characterized as a true entrepreneur, sparked the matter in what would soon come before the Eastern District.³ By day, DiCristina operated an electric bicycle business.⁴ On Monday and Thursday nights, however, the warehouse of the Staten Island, New York, bicycle business was used as a Texas Hold 'Em (T.H.E.) poker room, which was fully equipped with hired dealers, food and cocktails, and waitresses to serve the players' needs.⁵ Game nights—typically advertised through text message—lasted upwards of eight hours and allowed DiCristina and his business partner, Stefano “Mitzie” Lombardo, to collect a 5% rake, i.e., an amount taken from the pot on every hand.⁶ Much of this rake went towards the cost of operating, but the remainder constituted DiCristina's and Mitzie's nightly profit.⁷ In June 2011, federal agents arrested DiCristina and Mitzie, and brought down the two-night-a-week, alleged—in the government's eyes at least—illegal gambling business.⁸

Charged with violating the federal Illegal Gambling Business Act (IGBA), DiCristina moved to dismiss the indictment and introduced expert testimony to advance the theory that T.H.E. poker is a game of skill, not chance, and does not fall under the IGBA's purview.⁹ The Eastern District, however, excluded the expert's testimony from the jury but reserved decision on the motion to dismiss.¹⁰ After a jury conviction and with his motion to dismiss reserved, DiCristina renewed his skill-versus-chance argument and aimed for acquittal.¹¹ Ultimately, the Eastern District found, among other things, that because T.H.E. poker is predominated by skill rather than chance, it does not

2. See generally *United States v. DiCristina*, 886 F. Supp. 2d 164 (E.D.N.Y. 2012).

3. See *id.* at 198 (discussing evidence at trial, i.e., Lawrence DiCristina's two-night-a-week poker room ran from the back warehouse of his electronic bicycle business).

4. See *id.*

5. *Id.*

6. *Id.* (“A five percent “rake” for the house was collected by the dealers from each pot . . . [and] dealers were paid twenty-five percent of the rake.”).

7. *Id.*

8. Warrant for Arrest *United States v. DiCristina*, No. 11–414, 2012 U.S. Dist. WL 3573895 (E.D.N.Y. Aug. 21, 2012), 2011 WL 8844184.

9. *DiCristina*, 886 F. Supp. 2d at 170–71.

10. *Id.* at 171 (“It was ruled that whether [Texas Hold 'Em] poker constituted gambling was a matter of law that would be decided by the court, rather than the jury.”).

11. *Id.* at 168.

fall under the IGBA's definition of illegal gambling.¹² As a result, the court dismissed DiCristina's indictment and vacated the conviction.¹³

The decision was the first of its kind at the federal level and is what some consider a "landmark opinion."¹⁴ Though the Second Circuit Court of Appeals ultimately disagreed on technical statutory interpretation grounds,¹⁵ the Eastern District's analysis gives credence to the longstanding argument that the game, because it allows skilled players to excel over non-skilled players, stands on its own compared to prohibited gambling activities. *DiCristina* laid the foundation and answered the skill-versus-chance argument—one of the last remaining questions keeping Congress from legalizing online T.H.E. poker. This helps further legitimize a game played by millions of Americans in garages, warehouses and, today, on home computers. Beyond that, it comes at a time when the American economy needs its next big surge of the proverbial wave of gambling regulation. With recent developments that undeniably mirror gambling legalization surges of the past, and now, with *DiCristina*, Congress should deliberately push forth and pass a bill that would once and for all legalize the billion-dollar online T.H.E. poker industry.

This Comment will analyze the *DiCristina* decision relative to America's history of gambling regulation and current climate surrounding online T.H.E. poker legalization at both the state and federal levels. These conclusions help advocate for future congressional decision making surrounding T.H.E. poker's place in gambling laws—specifically, internet gambling laws at the federal level. To do this, Part II of this Comment lays the foundation of gambling in America, including a look at its need and surge wave-like history; T.H.E. poker and online play; and the current state of federal laws prohibiting online T.H.E. poker. Part III discusses prior law concerning the skill-versus-chance argument before *DiCristina*. Part IV discusses the *DiCristina* decision itself, looking at the court's thorough approach leading to the holding. Lastly, Part V analyzes potential implications of the Eastern District's decision, as well as other key developments currently surrounding online poker legalization. Together, these conclusions serve as the final strongholds allowing Congress to push forward with federal legalization of online T.H.E. poker.

12. *Id.* at 235.

13. *Id.*

14. Maurice "Mac" VerStandig, *Attorney Maurice VerStandig on Significance of Ruling That Poker is a Game of Skill*, POKER NEWS GLOBAL (Aug. 25, 2012), <http://www.pokernews.com/news/2012/08/maurice-verstandig-significance-judge-poker-gambling-13291.htm>.

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

II. GAMBLING IN AMERICA—LAYING THE FOUNDATION

Three times over, the gambling industry has been regulated, prohibited, and regulated again. This suggests that in periods of reform, knowing gambling's history plays a key part in shaping its future. Thus, the following provides a general and non-exhaustive overview of America's three waves of gambling regulation, as well as information regarding the current state of online T.H.E. poker prohibitions and the game itself. Looking at the lessons and patterns of waves past can ultimately aid in resurrecting the currently prohibited online T.H.E. industry.

A. *The Needs, the Surges, and the Results of Gambling's Three Waves*

Since the beginning of the nation's history and from the first judicial commerce clause interpretations, gambling has nestled itself comfortably into the most stigmatized of categories—one reserved for those activities “injurious to the public morals.”¹⁶ Religious groups and moralists have always and will always stigmatize gambling because they view it as plainly wrong and a harm that influences the public's values and priorities.¹⁷ These same gambling opponents believe that gambling threatens the family, destroys local business communities, preys upon young persons, and contributes to crime and corruption.¹⁸

Despite opposition, American societies have always tolerated some forms of legalized gambling because of their undeniable power to create revenue and provide entertainment to the masses. No one can deny gambling's source of economic production as it has bailed out economies and raised money for armies, churches, and prestigious universities.¹⁹ Modernly, with Americans spending fifty billion dollars a year more on lottery tickets than movie tickets,²⁰ few can overlook the machine that is the gambling industry.

16. See *Champion v. Ames*, 188 U.S. 321, 357 (1903) (explaining the federal government's commerce clause power to regulate the lottery, or, as the Court saw it, a harmful product placed into the stream of commerce).

17. Anthony Cabot & Robert Hannum, *Poker: Public Policy, Law, Mathematics, and the Future of an American Tradition*, 22 T.M. COOLEY L. REV. 443, 489–90 (2005); see generally Jeff Asher, *The Gambling Evil*, BIBLE TALK WITH JEFF ASHER, www.bibletalk.net/articles/gamble.html (last visited Oct. 21, 2012).

18. Stanley Kilgore, *Is Gambling a Bad Bet for Society?* <http://www.saneok.org/files/Gambling&Bible/Sermons/Gambling-BadBetForSociety.pdf> (last visited Oct. 21, 2012) (discussing problems that may suggest that gambling is bad for society).

19. See generally RICHARD MCGOWAN, *STATE LOTTERIES AND LEGALIZED GAMBLING, PAINLESS REVENUE OR PAINFUL MIRAGE* 5 (1994) (listing the various beneficiaries of lotteries); see also *History of Gambling in the United States*, CAL. STATE LIBRARY, <http://www.library.ca.gov/crb/97/03/chapt2.html> (last visited Oct. 24, 2012) (explaining that lottery sales historically helped to establish prestigious universities and churches).

20. Symposium, *Betting on the Budget: Can State Legislatures Go All In or Will the Federal Government Force Them to Fold?*, 17 VILL. SPORTS & ENT. L.J. 361, 361–62

Because of the polarized stances historically taken by gambling opponents and proponents, societal standards with respect to gambling laws have shifted back and forth from prohibition to regulation.²¹ Twice before in these cycles, the periods of legalized gambling booms ended in scandal, ruin, and ultimately, prohibition.²² The current and third of these aptly named, “waves,”²³ brought with it various forms of legalized gambling still prevalent today, including casino and charitable gaming, pari-mutuel betting, lotteries, and racetracks.²⁴

But going from prohibition to regulation in each of the three respective waves was not easy. Each period of regulation was ushered in by an intervening source acting as momentum for new laws to *surge* forward in response to the needs of the time. And now, like the evolution of each wave, state and federal economies lie in wait for the next surge to help carve out a permanent²⁵ home—or perhaps even set in motion a fourth wave for federally legalized online T.H.E. poker—an industry crippled by a 2011 Department of Justice takedown of T.H.E. poker’s biggest online sites.

1. The First Wave: 1600s to the Mid-1800s

Despite different attitudes among America’s first settlers,²⁶ many agreed that some form of regulated gambling was necessary because the colonies faced serious economic hardships.²⁷ With a lack of a fiscal infrastructure and too few banks to provide the capital for roads, mortgages, and homes,²⁸ private colonial brokers turned to the lottery as a bailout method.²⁹ And with hostilities between the thirteen colonies and the Kingdom of Great Britain rising, there was no better source than gambling, in particular, the lottery, to fund the Revolu-

(2010) (discussing that in 2008, Americans spent ten billion dollars on movie tickets, while spending over sixty billion dollars on lottery tickets).

21. See generally CALIFORNIA STATE LIBRARY, *supra* note 19 (“Scandal and political control by gaming interests have led to backlashes which result in regulation and/or prohibition.”).

22. Symposium, *supra* note 20, at 365.

23. See generally CALIFORNIA STATE LIBRARY, *supra* note 19; Symposium, *supra* note 20, at 368–76; MCGOWAN, *supra* note 19, at 5–20.

24. See CALIFORNIA STATE LIBRARY, *supra* note 19.

25. See *infra* Part II.B.2 (discussing the boom and collapse of online gambling).

26. See CALIFORNIA STATE LIBRARY, *supra* note 19 (The Puritans believed in an all-out gambling prohibition, and thus banned the possession of cards and dice, and prohibited any gambling activity. Conversely, the new English settlers considered many forms of gambling a “proper gentlemen’s diversion.”)

27. MCGOWAN, *supra* note 19, at 5, 9 (discussing hardships faced by America’s first settlers as they settled the new world as well as the coming of the Revolutionary War).

28. Symposium, *supra* note 20, at 368.

29. *Id.* (explaining that [t]he earliest settlements were funded, in part, by English lotteries); see also CALIFORNIA STATE LIBRARY, *supra* note 19 (discussing that the lotteries were used to bail out America’s earliest colonies).

tionary War.³⁰ This funding earned the title of the “watershed”³¹ event in America’s lottery history and launched a program that would expand enormously in the years after the war.³²

From the beginning, however, some were opposed to gambling and the lottery on moral grounds.³³ Because of this, legalizing gambling required an extra surge of momentum from outside sources. For example, one great surge advancing the legalization of Colonial America’s first lottery was the preciseness of the program’s operations and administration.³⁴ Specifically, the first lottery act set clear rules and created an administrative body of directors responsible for the program’s oversight, including signing and designedly cutting a buyer’s ticket in efforts to prevent counterfeits.³⁵

Another surge that advanced the legalization of early lotteries came when America’s famed leaders praised and endorsed the programs. The new programs garnered support from people such as Benjamin Franklin, Thomas Jefferson, George Washington, and John Hancock.³⁶ These leaders used the lottery to raise funds for both personal gain³⁷ and public works projects.³⁸ This high-profiled backing helped gambling gain support from the majority of voters.

Aside from the lottery, technological and social developments surged other forms of gambling. For example, new steamboats gave rise to the riverboat gambler.³⁹ Similarly, small casinos situated themselves in taverns and roadhouses, and thereafter, posh card clubs.⁴⁰

The rise of gambling and in particular, the lottery, resulted in economic increases distributed among many beneficiaries,⁴¹ including the Continental Army; prestigious universities such as Harvard and Yale;

30. See generally MCGOWAN, *supra* note 19, at 6–9 (discussing Pre-Revolutionary War lottery activity).

31. *Id.* at 6.

32. *Id.* at 9 (“With the coming of the Revolutionary War, the number of lotteries . . . greatly expanded.”).

33. CALIFORNIA STATE LIBRARY, *supra* note 19 (“There was always a group opposing gambling on moral grounds.”).

34. University of Notre Dame Libraries, *Massachusetts Lottery, A Description of the First Colonial Government Lottery*, <http://www.coins.nd.edu/ColCurrency/CurrencyText/MA-44descrip.html> (last visited Nov. 13, 2012) (“The act was very specific giving details of the administration of the lottery.”).

35. *Id.*

36. *E.g.*, CALIFORNIA STATE LIBRARY, *supra* note 19; MCGOWAN, *supra* note 19, at 9.

37. See MCGOWAN, *supra* note 19, at 9 (explaining Thomas Jefferson’s attempted use of a private lottery to cover his personal debts).

38. CALIFORNIA STATE LIBRARY, *supra* note 19 (“Ben Franklin, John Hancock, and George Washington were all prominent sponsors of specific lotteries for public works projects.”).

39. *Id.*; see also Symposium, *supra* note 20, at 368.

40. CALIFORNIA STATE LIBRARY, *supra* note 19.

41. See MCGOWAN, *supra* note 19, at 5 (describing the lottery’s various beneficiaries, in Table 1.1).

and ironically, even churches.⁴² But, as gambling grew, so did its predisposition to scandal. In a notable lottery scam, project contractors hired to use lottery funds to beautify the nation's capital fled with the money before the winner was paid.⁴³ And, where riverboat gambling thrived, so did the tricks of professional riverboat gamblers who preyed upon amateur tourists looking to strike it big.⁴⁴

The first wave drew near in the 1840s, when virtually all states outlawed lotteries.⁴⁵ Many Americans developed a Jacksonian resentment⁴⁶ towards gambling and believed the activities went against their moral sensibilities.⁴⁷ This morality, coupled with common scandals, caused a near complete prohibition of the lottery and many other forms of gambling.⁴⁸

2. The Second Wave: Mid-1800s to the Early 1900s

The two biggest needs underlying the second wave of gambling regulation were the increased public demand for gambling, and the need of some states to fund a Civil War.⁴⁹ Specifically, as the western frontier expanded and the California gold rush began, risk-craving miners looked to gambling as their source of recreational risk taking.⁵⁰ And, like the first wave of legalized gambling, governments at all levels faced the reality of funding an unpopular civil war and its devastating blow to the economy.⁵¹

An enormous surge that pushed forward gambling legalization in different parts of the country was the development of revenue-raising state-licensing and enforcement programs.⁵² As evidenced, to serve the massive population boom in the west, state and local governments specifically made gaming houses legal in order raise revenues through new licensing programs.⁵³ Additionally, legislators allowed private lot-

42. *Id.*; see also CALIFORNIA STATE LIBRARY, *supra* note 19.

43. CALIFORNIA STATE LIBRARY, *supra* note 19.

44. *Id.* ("Gambling establishments were started in the river towns and were popular . . . [among] professional gamblers prey[ing] upon . . . cash-laden travelers . . .").

45. See MCGOWAN, *supra* note 19, at 6; CALIFORNIA STATE LIBRARY, *supra* note 19 (explaining that by 1840, most states had banned lotteries.).

46. CALIFORNIA STATE LIBRARY, *supra* note 19; see also Symposium, *supra* note 20, at 369 (explaining a reform in ideals of the lottery led by President Andrew Jackson's call for a "clean sweep" to "throw the rascals out").

47. CALIFORNIA STATE LIBRARY, *supra* note 19 (discussing lotteries as a form of offensive wagering).

48. See generally *id.* ("The second wave began with the Civil War and the continuing expansion of the western frontier.").

49. Symposium, *supra* note 20, at 370 ("The second wave began with the Civil War and the continuing expansion of the western frontier.").

50. CALIFORNIA STATE LIBRARY, *supra* note 19 (discussing the miners and their risk-taking spirit, which became lured in by the promise of abundant riches).

51. MCGOWAN, *supra* note 19, at 14.

52. Symposium, *supra* note 20, at 370 (discussing the new licensing programs as a way to raise revenue).

53. *Id.*

tery brokers to begin lotteries under the watchful eye of the new licensing programs.⁵⁴ By 1850, both states and cities licensed gambling establishments to raise money.⁵⁵ Seemingly, these new licenses acted as a compromise in again garnering support of the majority.

The second wave of regulation resulted in answered calls of the public's demand and partial funding of the Civil War, including post-war Reconstruction.⁵⁶ Beyond this though, legislators began carving out room in statutes for particular gambling activities while keeping others illegal.⁵⁷ Similarly, some states kept many forms of gambling illegal but allowed their citizens to bet on horseraces.⁵⁸

With gambling's successes, there also came scandal. Perhaps the most notable and public of all the scandals from the second wave was the Louisiana lottery scandal. To raise money for its war efforts, Louisiana chartered a lottery program that gained popularity from its enormous payouts and unregulated interstate mail-out system.⁵⁹ When the charter ended, private brokers successfully bought the votes of Louisiana lawmakers in order to keep the program alive.⁶⁰ The public outrage of the political scandal, coupled with increased frustrations of the use of the mail to solicit money from other states forced Congress to act.⁶¹

Upon the urging of President Benjamin Harrison, almost all lottery activity ended.⁶² And in 1895, Congress enacted a law that made it a federal crime to carry or send a lottery ticket through interstate commerce.⁶³ Subsequently, the Supreme Court affirmed the federal power over interstate gambling in the famous *Lottery Case*.⁶⁴ Thus, by the early 1900s, the second wave of gambling ended with once-successful lottery programs and most other forms of gambling activities facing vast prohibitions in a large majority of the country.⁶⁵

54. *Id.*

55. CALIFORNIA STATE LIBRARY, *supra* note 19.

56. Symposium, *supra* note 20, at 370 ("The South turned to state-licensed lotteries as a painless way to raise revenue.")

57. *Id.* (explaining that gaming houses were explicitly made legal).

58. *Id.*

59. See MCGOWAN, *supra* note 19, at 14 ("There were two aspects to this lottery that were groundbreaking. First, the size of the lottery was enormous[,] . . . [and] it was truly the first national lottery held on a weekly basis.")

60. Symposium, *supra* note 20, at 371 (explaining that the lottery's operators succeeded in their attempts to buy the Louisiana state legislature).

61. MCGOWAN, *supra* note 19, at 15 ("The rather flagrant method that Morris and his associates were employing in order to ensure that the Serpent's charter would be renewed was reported throughout the country."); see generally Symposium, *supra* note 20, at 371-72.

62. MCGOWAN, *supra* note 19, at 15.

63. Symposium, *supra* note 20, at 374.

64. *Id.*; see also *Champion v. Ames*, 188 U.S. 321, 357 (1903).

65. Symposium, *supra* note 20, at 373 (explaining that America, like the end of the first wave of gambling, was "virtually free of legalized gambling.")

3. The Third Wave: Great Depression to Present Day

In the third wave of gambling, lawmakers faced the most trying economic times the country had ever seen. With the Stock Market Crash of 1929, the public once again demanded legalized gambling as a way to raise money.⁶⁶ Primary factors that surged legalization forward were the widespread acceptance of gambling; new state-run lottery programs; proactive legislation to curb scandals of the past; and, once again, technological advancements.

With their mines in decline and their economy in shambles, Nevada legislators passed the Wide-Open Gambling Act of 1931 that legalized casinos.⁶⁷ And where a population boom ensued because of the construction of the Hoover Dam, widespread acceptance of these new casinos flourished.⁶⁸ Thereafter, many states jumped on the liberal bandwagon and opened racetracks that allowed pari-mutuel betting, while others introduced charitable or social gambling, i.e., bingo.⁶⁹

With increased public acceptance, lawmakers saw a need to prevent history from repeating itself. In efforts to curb scandals similar to those of the past, Congress took a forward-thinking approach. In the 1950s, the Senate organized a committee to investigate the mob's influence on casinos.⁷⁰ The Senate Committee to Investigate Organized Crime in Interstate Commerce found that many of the mobsters connected to the casino industry were withholding tax dollars as profit.⁷¹ The findings could have led to another all-out prohibition on gambling, but instead the committee cleaned up existing problems and allowed honestly run gambling operations to continue.⁷²

Beyond this, the lottery saw resurgence in 1964 when New Hampshire introduced its state-run lottery program.⁷³ The program received overwhelming voter support when the legislature introduced it as an alternative to increased sales and income taxes.⁷⁴

Because of the economic needs of the time, gambling made its largest push. Today, Nevada and fourteen other states operate land-based or riverboat casinos, with many more allowing tribal or racetrack casinos.⁷⁵ Additionally, after the Senate's tax-skimming discoveries, a

66. *Id.* at 374.

67. *Nevada Legalizes Gambling*, HISTORY.COM, <http://www.history.com/this-day-in-history/nevada-legalizes-gambling> (last visited Nov. 15, 2012).

68. City of Las Vegas, *History*, LASVEGASNEVADA.GOV, <http://www.lasvegas-nevada.gov/FactsStatistics/history.htm> (last visited Nov. 15, 2012).

69. Symposium, *supra* note 20, at 374.

70. CALIFORNIA STATE LIBRARY, *supra* note 19.

71. *Id.*

72. *Id.*

73. MCGOWAN, *supra* note 19, at 15.

74. *Id.* at 15–16.

75. *State of the States: The AGA Survey of Casino Entertainment*, AM. GAMING ASS'N 4 (2012) http://www.americangaming.org/sites/default/files/uploads/docs/sos/aga_sos_2012_web.pdf.

cleansing of the casino industry took place.⁷⁶ Eventually, the mob families sold their interests in the casinos and apparent law-abiding companies and private individuals took over.⁷⁷ And still prevalent in today's gambling market are state-authorized charitable and pari-mutuel betting establishments. Currently, forty-seven states allow some form of charitable gaming,⁷⁸ while forty-four states have some form of automated pari-mutuel betting systems in place.⁷⁹ In terms of lottery programs, other states followed suit after seeing the newly regulated success in New Hampshire. Today, forty-three states still sponsor legalized lotteries.⁸⁰

B. *Texas Hold 'Em Poker and Internet Play—On a Wave of Its Own*

Each wave of gambling had at least one activity with the ability to draw the masses.⁸¹ Today, T.H.E. is that activity. Millions of Americans play T.H.E. poker in every community of every state in the union.⁸² Like the steamboats that eventually created the riverboat gambler, T.H.E. created the online poker player. And like the first two waves, the fast rising money-making ability of online T.H.E. poker gave rise to scandal. In true wave form, the grim state of the economy, coupled with the revenue raising power of online T.H.E. poker, has Congress taking a second look at one of the most publicly demanded gambling activities of this era. To understand what is at stake if Congress decides to legalize and regulate T.H.E. poker, or maintain its illegality, it is important to know how this potential online wave evolved.

1. Texas Hold 'Em—Not Your Grandfather's Card Game

a. *Basic Game Play*

T.H.E. poker has been described as a mix between reason, intuition, and bravado.⁸³ In a clockwise rotation, two players begin the hand by

76. CALIFORNIA STATE LIBRARY, *supra* note 19.

77. *Id.*

78. See *Gambling in the United States*, WIKIPEDIA (Feb. 25, 2014, 3:21 PM), http://en.wikipedia.org/wiki/Gambling_in_the_United_States (see table explaining the types of legal gambling in the different states).

79. *Pari-Mutuel Betting/State Racing Commissions*, <http://answers.usa.gov> (last visited Oct. 12, 2012).

80. *Lottery Results*, <http://www.usa.gov/Topics/Lottery-Results.shtml> (last visited Oct. 24, 2012).

81. See *supra* Part II.A.1–3 (e.g., the lotteries of the first wave or casino gaming of the third wave).

82. Diane Dimond, *America's Pastime a Crime? Time to Re-Shuffle Laws!*, HUFFINGTON POST (Sept. 12, 2012 1:18 PM), http://www.huffingtonpost.com/diane-dimond/americas-pastime-a-crime_b_1877872.html.

83. H.R. Res. 109, 80th Leg. (Tex. 2007).

posting their “blinds.”⁸⁴ Next, each player gets two cards face down, and based on his perceived value of these two cards, places a bet or folds.⁸⁵ After every player has either folded, called the minimum bet, or raised, the dealer lays three cards face up where the players then use those three cards to create a combination of the best five cards.⁸⁶ Now, players may bet, raise, or fold to bets before them, but must keep in mind that two more cards will be dealt, each followed by a round of bets. The rounds of bets serve as a way for the strong hands to put their money behind their cards, or for bluffers to persuade other players to fold.

b. Rise in Popularity

It is apparent why the Texas State Legislature officially recognized Robstown, Texas, as the “birthplace” of T.H.E. poker,⁸⁷ as the card game is a favorite Friday night activity for millions of Americans. In fact, one is hard-pressed not to be able to find either a nearby casino featuring the game as its main poker room attraction, a home game, or a local pub sponsoring a charity T.H.E. game.

With the advent of the World Series of Poker in 1970 and increased television coverage emerging soon after,⁸⁸ T.H.E. became mainstream.⁸⁹ Its popularity was just beginning as today, nearly every major casino in Las Vegas features an exclusive T.H.E. poker room.⁹⁰ In 2012, the Rio All-Suite Hotel and Casino hosted the forty-third annual World Series of Poker Main Event with more than 6,500 players buying in at \$10,000 a seat.⁹¹ In the end, the winner took home more than eight million dollars.⁹²

2. The Internet Boom and Collapse

Most recently, the advent of the internet surged forward the popularity of online gambling and gave Americans the opportunity to place a bet or play a hand of cards, all in the click of a button. Many credit Chris MoneyMaker’s “rags-to-riches” story for sparking the overnight

84. ISABEL CROUCHER, TEXAS HOLD ‘EM POKER 21 (2006) (discussing the start of a every hand in T.H.E. and explaining that a “blind” is an initial agreed upon amount of money in the pot to start the game).

85. *Id.* at 22–23.

86. *Id.* at 24.

87. H.R. Res. 109, 80th Leg. (Tex. 2007).

88. Nolan Dolla, *WSOP History—From Moss to Gold*, WORLD SERIES OF POKER, www.wsop.com/wsop/history.asp (last visited Nov. 20, 2012).

89. H.R. Res. 109, 80th Leg. (Tex. 2007).

90. See generally *Las Vegas Poker by Casino*, LAS VEGAS INSIDER, www.lasvegasinsider.com/html/pokerbycasino.htm (last visited Nov. 20, 2012).

91. *2012 Main Event: The Final Table is Set!*, POKER LISTINGS, <http://www.poker-listings.com/wsop/2012/event61/live-updates?day=7> (last visited Nov. 21, 2012).

92. *Greg Merson Wins 2012 Main Event for \$8,531,853*, POKER LISTINGS, <http://www.pokerlistings.com/wsop/2012/event61/live-updates?day=9> (last visited Nov. 21, 2012).

popularity of online T.H.E. poker.⁹³ Before 2011, millions of American's obtained accounts on major poker sites such as Poker Stars, Full Tilt, or Absolute Poker. Anytime day or night, one could use a debit card, load funds, and play online T.H.E. poker against other players from around the world. The economic impact was enormous, and at the peak of online poker play, revenues amounted to roughly sixty billion dollars worldwide, with tax revenues of American's accounting for over three billion dollars.⁹⁴

Like other gambling booms, however, scandal interrupted online T.H.E. poker's growth. On April 15, 2011, or as known in the gambling world, *Black Friday*, the Department of Justice kicked in the doors of the virtual casinos.⁹⁵ The founders of the three largest online poker sites—Poker Stars, Full Tilt, and Absolute Poker—were indicted under the Unlawful Internet Gambling Enforcement Act (UIGEA). The government alleged that the companies used fraudulent methods to circumvent federal laws and trick banks into processing online gambling payments.⁹⁶ From that fateful day in 2011, the interstate online T.H.E. industry has remained crippled, even amidst outspoken support for regulation by key members of Congress, including Senate Majority Leader, Harry Reid.⁹⁷ More recently, while Congress has attempted to legalize online poker while keeping most other games illegal, it remains at an impasse.⁹⁸

C. Basic Gambling Regulation: Federal and State Schematic Interplay

The federal government leaves gambling regulation primarily to the states.⁹⁹ As such, some states choose to prohibit most types of gambling, while others allow some forms of legal gambling including lotteries, charitable bingo, and pari-mutuel horseracing.¹⁰⁰ Conversely,

93. Josh Chumbley, *Follow the Yellow Chip Road: The Path to Legalizing Internet Poker*, S. ILL. U. L.J. 547–48 (2012) (“The rags-to-riches story of Moneymaker, an accountant from Tennessee, who turned \$39 a seat into \$2.5 million quickly spread across the country and created what has been termed, ‘The Moneymaker Effect.’”).

94. Judy Xanthopoulos, *Internet Poker Industry and Revenue Analysis, Final Report*, POKER PLAYERS ALLIANCE 1, <http://theppa.org/pdf/InternetPokerFinalReport.pdf>.

95. *Events of Poker's “Black Friday,”* www.beatthefish.com/poker-black-friday.htm (last visited Nov. 21, 2012).

96. Chad Holloway, *The Black Friday Timeline: One Year Without Poker*, POKER NEWS GLOBAL, <http://www.pokernews.com/news/2012/04/the-black-friday-timeline-one-year-without-online-poker-12445.htm> (last visited Nov. 21, 2012).

97. *Id.* (“1:25 p.m. PDT–2:00 p.m. PDT: Senate Majority Leader Harry Reid . . . spoke out in support of online poker.”).

98. Steve Fries, *How Reid Lost His Internet Poker Gamble*, POLITICO (Jan. 23, 2013, 12:04 AM), <http://www.politico.com/story/2013/01/how-reid-lost-his-internet-poker-gamble-86595.html>.

99. MCGOWAN, *supra* note 19, at 42; *Chun v. New York*, 807 F. Supp. 288, 292 (S.D.N.Y. 1992).

100. MCGOWAN, *supra* note 19, at 42.

two states, Utah and Hawaii, have completely prohibited all types of gambling¹⁰¹ while states like Nevada and New Jersey take a more liberal approach—setting up licensing schemes for hotels and casinos.¹⁰²

Along those same lines, states have chosen different types of regulatory schemes to govern the activities. Many states choose to regulate with a common scheme that prohibits games of chance, i.e., games determined entirely or partly by luck, whereby skill does not help one's chances of winning.¹⁰³ Common games of chance include craps, raffles, and roulette.¹⁰⁴ Conversely, some states allow games of skill, i.e., games in which success depends primarily on superior knowledge, experience, attention, and an ability to overcome luck.¹⁰⁵ Some examples include chess, darts, pool,¹⁰⁶ and fantasy sports leagues.¹⁰⁷

Congress may only regulate gambling so long as the activity falls within the confines of the Commerce Clause.¹⁰⁸ For example, one of the first pieces of federal legislation was the 1895 Federal Lottery Act that prevented citizens from transporting foreign lottery tickets across state lines.¹⁰⁹ Today, the major pieces of federal legislation include the Wire Act, the Travel Act, the Illegal Gambling Business Act,¹¹⁰ and the UIGEA.¹¹¹

The FBI notes on its website that online gambling is illegal,¹¹² but currently, no federal law *explicitly* makes online T.H.E. poker illegal. Instead, online gambling faces indirect obstacles. While Delaware, New Jersey, and Nevada have introduced legislation regulating internet gambling within their borders,¹¹³ indirect federal laws remain that prohibit interstate online gambling.¹¹⁴

For example, the Wire Act, enacted in 1961, makes it a crime to knowingly, through wire communications, transmit bets or help others

101. *Id.*

102. *Id.* at 43.

103. *See e.g.*, *New York v. Cohen*, 289 N.Y.S. 397, 399 (Magis. Ct. 1936); *Joker Club, L.L.C. v. Hardin*, 643 S.E.2d 626, 629–30 (N.C. Ct. App. 2007).

104. D.A. Norris, Annotation, *What are Games of Chance, Games of Skill, and Mixed Games of Chance and Skill*, 135 A.L.R. 104 (1941).

105. *Cohen*, 289 N.Y.S. at 399.

106. Norris, *supra* note 104.

107. Sports Agent Blog, *Fantasy Football Gets Key Court Ruling*, OPPOSING VIEWS (Aug. 16, 2010), <http://www.opposingviews.com/i/fantasy-football-gets-key-court-ruling>.

108. U.S. CONST. art. I, § 8, cl. 3; *see also* MCGOWAN, *supra* note 19, at 43.

109. Federal Lottery Act of Mar. 2, 1895, ch. 191, 28 Stat. 963 (current version at 18 U.S.C. § 1301 (1892)).

110. JULIA HORNLE & BRIGITTE ZAMMIT, *CROSS-BORDER ONLINE GAMBLING LAW AND POLICY* 44 (2010).

111. *See generally id.* at 114–15 (discussing the passage and effect of the UIGEA).

112. *Online Gambling, Don't Roll the Dice*, FBI (June 6, 2007), www.fbi.gov/news/stories/2007/june/gambling_060607.

113. *See generally* DEL. CODE ANN. tit. 29, § 4827 (West 2010); N.J. STAT. ANN. §§ 5:12-95.17 to 5:12-95.33 (West 2013); NEV. REV. STAT. ANN. §§463.745–780 (West 2011).

114. *See generally* 18 U.S.C. § 1084(a) (2006); 31 U.S.C. §§ 5361–67 (2006).

transmit bets in interstate commerce.¹¹⁵ Basically, it prohibits online wagering though wire communications in order to transmit, or assist in the transmission of bets or related information for placing bets.¹¹⁶ Though not entirely clear what types of gambling fall under the Act's purview, a recent Obama Administration initiative—solidifying a 2002 Fifth Circuit Court of Appeals decision—directs that the Wire Act applies only to internet sports betting.¹¹⁷

The UIGEA also indirectly prohibits online gambling. The UIGEA prohibits third-party organizations from providing monetary transfer services for online gambling companies.¹¹⁸ In other words, the Act makes the receipt of payment with respect to international or interstate online gambling illegal.¹¹⁹ This indirectly applies to financial intermediaries by creating liability in aiding and abetting situations.¹²⁰

III. PRIOR LAW AND ATTEMPTS AT WINNING THE SKILL-VERSUS-CHANCE ARGUMENT

The skill-versus-chance argument surrounding T.H.E. poker allows proponents to distinguish the game from other forms of online gambling.¹²¹ To cast an activity into the illegal or regulated sphere of gambling, there typically must be a prize, chance, and consideration.¹²² Proponents of online poker legalization urge that T.H.E. poker is not a chance-based game.¹²³

Until *DiCristina*, whether poker was considered a skill-based game was a “matter of public and judicial debate.”¹²⁴ Some state lawmakers, however, have taken the debate away from the courts, and have explicitly or implicitly codified poker as illegal gambling or included it in

115. 18 U.S.C. § 1084(a) (2006).

116. MCGOWAN, *supra* note 19, at 45.

117. *Id.* at 46; *see also In re Mastercard Int'l Inc.*, 313 F.3d 257, 263 (5th Cir. 2002) (“Because the Wire Act does not prohibit non-sports internet gambling, any debts incurred in connection with such gambling are not illegal.”); *see also* Nelson Rose & Rebecca Bolin, *Game on for Internet Gambling: With Federal Approval, States Line up to Place Their Bets*, 45 CONN. L. REV. 653, 655 (2012) (“[T]he Obama Administration announced that the major federal anti-gambling statute, the Wire Act, now applies only to bets on sports events and races.”).

118. *See generally* 31 U.S.C. §§ 5361–67 (2006); *see also* Laura A. Lieberman, *Congressional Underlay: The Weaknesses of Proposed Online Gambling Regulation*, J.L. ECON. & POL., Fall 2012, at 957.

119. MCGOWAN, *supra* note 19, at 114.

120. *Id.*

121. Xanthopoulos, *supra* note 94, at 14.

122. *Morrow v. Alaska*, 511 P.2d 127, 128 (Alaska 1973) (discussing the lottery's three distinct characteristics).

123. Xanthopoulos, *supra* note 94 (comparing poker to the casino-style internet games, e.g., slot-machines, involving random number generations and no input decisions from the player. Also claiming that poker involves skill as the player makes crucial decisions and depends on his knowledge of the probabilities and odds of winning certain card configurations).

124. *United States v. DiCristina*, 886 F. Supp. 2d 164, 194 (E.D.N.Y. 2012).

their definitions of illegal games of chance.¹²⁵ Where statutes do not address the issue, state courts have typically come down on the side of poker being a game of chance.¹²⁶

For example, in *Joker Club v. Hardin*, the North Carolina Court of Appeals held that although poker involves a great amount of skill, it is predominated by chance.¹²⁷ The court reasoned that while in the end, the most skilled player would accumulate the majority of chips, single hands are predominated by chance.¹²⁸ Further, the court explained that the test involved a question of whether skill or chance predominated, not whether there was skill or chance involved.¹²⁹ Based on this reasoning, the court stated that timely bluffing and odds analysis capabilities make it more likely for skilled players to win, but “no amount of skill can change a deuce into an ace.”¹³⁰

Similarly, in *Pennsylvania v. Dent*, the Pennsylvania Supreme Court looked closer at the skill-versus-chance issue.¹³¹ The trial and appellate court found it apparent that skill predominated chance in T.H.E. poker.¹³² Each stated that players have a distinct possibility of exercising skill and each has sufficient data available to make an informed judgment.¹³³ The Supreme Court, however, reversed, stating that while the outcome of a game of poker is dependent on some degree of skill, it is predominantly a game of chance.¹³⁴

Likewise, in *Colorado v. Raley*, the trial court ruled in favor of the defendants who operated a weekly T.H.E. poker game at a local bar.¹³⁵ The court heard expert testimony from University of Denver statistics and mathematics professor, Robert Hannum, who stated that

125. *E.g.*, OHIO REV. CODE ANN. § 2915.01(D) (West 2011) (defining a “game of chance” as poker, craps, roulette other game where the outcome is largely determined by chance); ARK. CODE ANN. § 5-66-12 (2012) (“If a person bets any money . . . on any game of . . . poker, . . . or at any other game of cards known by any name now known to the law, . . . upon conviction he or she is guilty of a violation”); TEX. PENAL CODE ANN. § 47.02(a)(3) (2011) (“A person commits an offense if he . . . plays and bets money or other things of value at any game played with cards, dice, balls, or any other gambling device.”).

126. *See* Chuck Humphrey, *Poker as a Game of Skill: Recent Cases*, <http://www.gambling-law-us.com/Articles-Notes/Recent-Cases-Poker-Game-Skill.htm> (last visited Oct. 12, 2012).

127. *Joker Club, L.L.C. v. Hardin*, 643 S.E.2d 626, 631 (N.C. Ct. App. 2007).

128. *Id.* at 629, 631.

129. *Id.* at 629.

130. *Id.* at 630.

131. *See generally* *Pennsylvania v. Dent*, 992 A.2d 190, 192 (Penn. 2010) (reviewing the trial court’s decision that because skill predominates over chance in T.H.E. poker, it is not illegal under state law).

132. *Id.*

133. Humphrey, *supra* note 126. (“The court opined that each player must know the rules and mathematical odds, as well as know how to read his opponent’s tells and styles.”).

134. *Dent*, 99 A.2d at 196.

135. *Colorado v. Raley*, No. 09SC732, slip op (Colo. 2010); *see also* Humphrey, *supra* note 126 (discussing the jury’s not guilty verdict).

the skilled player wins ninety-seven percent of the time.¹³⁶ The jury found the defendants not guilty, but on appeal, the district court found that it was error to admit Hannum's testimony as the skill-versus-chance argument was a question of law.¹³⁷

Federally, many circuits have held poker to be a game of chance.¹³⁸ Pertinent to this Comment, the Second Circuit has ruled that poker is a game of chance, but only on a narrow scope.¹³⁹ For example, in *United States v. Gotti*, the defendant operated a poker business featuring a *variant* of poker called Joker Poker. This variant of poker, however, involved significantly less skill than T.H.E. poker.¹⁴⁰

IV. GOING ALL IN WITH JACK HIGH: *UNITED STATES v. DiCRISTINA*

The time was ripe for a close look at the complexities of T.H.E. poker, and it began when Lawrence DiCristina went all in on the theory that it is a game of skill—a category free from the IGBA's purview. In what some consider a “landmark opinion,”¹⁴¹ the Eastern District definitively agreed with DiCristina and declared T.H.E. poker a skill-based game.¹⁴² In doing so, the court arguably turned federal poker law on its head.¹⁴³ To reach its conclusion, the Eastern District took a thorough approach and looked at the inner workings of the statute itself and the intricacies of the game.

A. Background

Lawrence DiCristina was the owner of an electronic bicycle business¹⁴⁴ in Staten Island, New York, as well as a T.H.E. enthusiast. Every Monday and Thursday night, DiCristina housed and hosted a T.H.E. poker room under the lights of the business's warehouse.¹⁴⁵ Players typically arrived at 10:00 p.m. and bought in for \$100–\$300 a

136. Humphrey, *supra* note 126.

137. *Id.*

138. See e.g., *Johnson v. Entm't Co.*, 199 F.3d 710, 717 (4th Cir. 1999); see also *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1028 (2d Cir. 1990) (“Plaintiffs further claimed that offering of illegal cash prizes constituted both a “special inducement” to play video poker in violation of S.C. Ann. § 12-21-1084(B) and an unfair trade practice in violation of the South Carolina Unfair Trade Practices Act (SCUPTA), S.C. Code Ann. §§ 39-5-10 . . .”).

139. See, e.g., *Mashantucket Pequot Tribe*, 913 F.2d at 1028; see also *United States v. Gotti*, 459 F.3d 296, 342 (2d Cir. 2006).

140. See *Gotti*, 459 F.3d at 343; see also *United States v. DiCristina*, No. 11-414, 2012 U.S. Dist. WL 3573895, at *52 (E.D.N.Y. Aug. 21, 2012).

141. VerStandig, *supra* note 14.

142. See generally *United States v. DiCristina*, 886 F. Supp. 2d 164, 231–35 (E.D.N.Y. 2012).

143. VerStandig, *supra* note 14.

144. *DiCristina*, 886 F. Supp. 2d at 198.

145. *Id.*

seat.¹⁴⁶ Play sometimes lasted until 7:00 a.m. the next morning¹⁴⁷ and allowed DiCristina to collect a five percent rake¹⁴⁸—that is until federal agents learned of the two-night-a-week operation.¹⁴⁹

In June 2011, special agents arrested DiCristina and others for operating an illegal gambling business.¹⁵⁰ With the sound of shuffling cards and falling chips only a memory, DiCristina faced charges of violating the IGBA.¹⁵¹

In December 2011, a grand jury charged DiCristina with violating the IGBA by operating an illegal gambling business involving poker and conspiring with others to do so.¹⁵² Before trial, DiCristina moved to dismiss the indictment arguing that poker is not illegal under the IGBA.¹⁵³ Specifically, DiCristina claimed that the IGBA's text and legislative history clearly indicate that the IGBA does not include T.H.E. poker.¹⁵⁴ Moreover, he claimed that poker was a skill, not chance-based game and could not fall under IGBA's definition of illegal gambling.¹⁵⁵

During trial, Dr. Randall Heeb—economist, statistician, and poker player himself—gave expert testimony pertaining to the defense's skill theory.¹⁵⁶ The court, however, ruled that the issue was a question of law and excluded the testimony, but reserved decision on the motion to dismiss.¹⁵⁷ The jury found DiCristina guilty of the offenses of operating an illegal gambling business and of conspiring to do so.¹⁵⁸ After its verdict, however, DiCristina renewed his motion to dismiss¹⁵⁹ and looked to the Eastern District to decide the skill-versus-chance argument.

B. *The Decision*

From the start, Judge Weinstein conceded that poker is an illegal game of chance under New York state law.¹⁶⁰ Equally important, however, was his clarification that the issue before the Eastern District was “whether a business involving illegal poker games violated the

146. *Id.*

147. *Id.*

148. *Id.*

149. See Warrant for Arrest, *DiCristina*, 2011 WL 8844184.

150. *Id.*

151. Superceding Indictment, *DiCristina*, 2011 WL 8844183.

152. *Id.*

153. See generally *DiCristina*, 886 F. Supp. 2d 164.

154. See generally Defendant Lawrence DiCristina's Supplemental Brief, *DiCristina*, 2012 WL 3620366.

155. *DiCristina*, 886 F. Supp. 2d at 164.

156. *Id.* at 173–85.

157. *Id.* at 171.

158. *Id.*

159. *Id.*

160. *Id.* at 164 (“New York courts have long considered that poker contains a sufficient element of chance to constitute gambling under the state's laws.”).

federal IGBA.”¹⁶¹ In deciding the issue, the Eastern District looked at the IGBA and focused on three matters: the text, the legislative history, and T.H.E. poker’s characterization as either a game of skill or a game of chance.

To begin, the court focused its attention on the statute’s text. The IGBA makes it a crime for anyone to conduct or manage an illegal gambling business.¹⁶² “Gambling,” as defined by the statute, “includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.”¹⁶³

Thus, to convict DiCristina under the IGBA, the government had to show a violation of New York state law, and show that the activity was included in the IGBA’s definitions of illegal gambling. The Eastern District looked to the list of “gambling” activities and concluded that poker did not fall within the category of those listed games.¹⁶⁴ In its interpretation, the court stated that poker must be “sufficiently similar” to those listed in the statute,¹⁶⁵ and agreed with DiCristina that the games listed were all games predominated by chance.¹⁶⁶ The court also looked at dictionary and common law definitions of gambling and determined that in those, the element of chance plays a larger role.¹⁶⁷

The Eastern District found that if Congress wanted to limit confusion, it could have specified that “illegal gambling” under the IGBA included all games prohibited by state law.¹⁶⁸ After all, Congress had chosen to do this in other federal statutes.¹⁶⁹ Judge Weinstein noted DiCristina’s point that Congress “does not . . . hide elephants in mouseholes,”¹⁷⁰ and stated that poker is that elephant, perhaps even an “eight hundred pound gorilla” that Congress would not have ignored.¹⁷¹ In other words, if Congress wanted to include poker in the list of illegal gambling activities, it easily could have.

Helping further interpret the IGBA’s ambiguities, the Eastern District looked at the statute’s legislative history and asked whether Con-

161. *Id.*

162. 18 U.S.C. § 1955(a) (2006).

163. § 1955(b)(2).

164. *See DiCristina*, 886 F. Supp. 2d at 222–25.

165. *Id.* at 226 (discussing the rule of ejusdem generis in clarifying ambiguities).

166. *Id.* at 229.

167. *Id.* at 227 (explaining that dictionary definitions of gambling mostly include activities where the wager is placed on a game of chance or uncertain outcome. And at common law, gambling consisted of wagering something of value on the outcome of a game in which chance predominated over skill).

168. *Id.*

169. *See* 18 U.S.C. § 1166 (“[An] activity that violates state . . . law is punishable even though it may not violate federal law.”).

170. *DiCristina*, F. Supp. 2d. at 225 (quoting *Bilski v. Kappos*, 130 S. Ct. 3218, 3250 (2010)).

171. *Id.*

gress intended to include T.H.E. poker as illegal gambling.¹⁷² Judge Weinstein pointed out that the purpose of the statute was to answer concerns about organized crime.¹⁷³ In particular, the IGBA was meant to give the federal government “a new substantive weapon . . . to strike at organized crime’s principal source of revenue: illegal gambling.”¹⁷⁴ The court noted that Congress did not discuss what kinds of games to regulate beyond those actually listed in the statute,¹⁷⁵ but stated that those listed appear to be the types perceived as most in danger of organized crime influence.¹⁷⁶

Solidifying the decision, the Eastern District pushed forward to give a very specific and analytical answer to the classic skill-versus-chance argument. The court conceded that many state laws and courts classify poker as a game of chance,¹⁷⁷ but refused to rely on those analyses for the IGBA’s classification.¹⁷⁸ To begin, the court noted that while some players’ actions benefit from chance, their decisions skillfully overcome that element of chance.¹⁷⁹ The court stated that the majority of poker hands end when one player induces another to fold, and because a player never reveals his cards, his decisions alone can determine the outcome, even with a weak hand.¹⁸⁰ This, the court stated, distinguished poker from other games listed in the IGBA.¹⁸¹

Next, where the trial court dismissed Dr. Heeb’s testimony as irrelevant, the Eastern District considered it and opined that Dr. Heeb’s testimony was persuasive evidence proving that skill predominates.¹⁸² The Eastern District summarized that

(1) poker involves a large number of complex decisions, which allow players of varying skill to differentiate themselves, (2) many people play poker for a living and consistently win money over time, (3) players who obtain superior results with other starting hands tend to obtain superior results with any given hand, indicating that the players’ abilities, not the cards, are responsible for the results, and (4) the published studies are all consistent with these conclusions.¹⁸³

172. *Id.*

173. *Id.* at 203.

174. *Id.*

175. *Id.* at 227; *see also id.* at 206 (discussing Congress’s concern of the mafia playing a role in *some* gambling activities).

176. *Id.* at 227.

177. *See id.* at 195.

178. *Id.* at 231 (“Although many states, including New York, consider poker to fall within the common law definition of gambling as a game of chance . . . this factor is not determinative in construing a federal statute.”).

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 231–32.

More specifically, the court looked at Dr. Heeb's testimony highlighting the "skilled strategic choices" made by poker players.¹⁸⁴ He opined that this skill could include many things, including how much to wager, whether to play a hand at all, or whether to bluff, raise, or fold.¹⁸⁵ The Eastern District agreed, stating that, "[b]luffing, raising, and folding require honed skills to maximize the value of the cards dealt by Lady Luck."¹⁸⁶

Additionally, the court also noted that the skill used in T.H.E. poker differs from other forms of gambling.¹⁸⁷ Particularly, the best players can rely on their sophistication to change the outcome of the entire game—so much so that many people make a living from playing poker as opposed to other types of gambling.¹⁸⁸

Perhaps solidifying T.H.E.'s legitimacy was the court's use of Dr. Heeb's win-rate studies.¹⁸⁹ The first study examined whether a player's win rate on all hands was predictive of their success in a particular kind of hand.¹⁹⁰ Dr. Heeb concluded that a player's skill did in fact show through and had an impact on the amount of money won or lost based on a particular hand.¹⁹¹

In addition, the court considered Dr. Heeb's use of "complex regression analysis" to show that skill predominates in poker.¹⁹² In this analysis, Dr. Heeb created a skill index that related how skillfully one played in relation to actual win rates.¹⁹³ This index showed whether more skilled poker players actually won more money than those of lower skill levels.¹⁹⁴ The court took notice of the results of the analysis and Dr. Heeb's statement that "the 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."¹⁹⁵

Finally, the court noted that Dr. Heeb himself looked at other studies in unpublished or published newspapers and the results remain the same—poker is predominated by skill.¹⁹⁶ With this in mind, the court considered the government's expert witness, Dr. DeRosa, who did not

184. *Id.* at 173–76.

185. *Id.*

186. *Id.* at 174.

187. *Id.* at 175–76.

188. *Id.* (stating that the most skilled of these players can earn as much as a professional baseball player).

189. *See generally id.* at 177–85.

190. *Id.* at 179.

191. *Id.*

192. *Id.* at 182.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 231–34.

present any contrary analysis proving that chance predominated over skill.¹⁹⁷

Based on the overwhelming evidence suggesting that T.H.E. poker is predominated by skill, and the government's lack of evidence indicating otherwise, the court held that under the IGBA, T.H.E. poker is a game predominated by skill, not chance.¹⁹⁸ After this conclusion combined with the conclusions on the IGBA's text and legislative history, the court dismissed the conviction, and for the time being, allowed DiCristina's record to remain free from IGBA violations.

In August 2013, the Second Circuit Court of Appeals reversed the Eastern District's decision on interpretive grounds, holding that the plain language of the IGBA includes T.H.E. poker.¹⁹⁹ While the Eastern District's interpretation of the IGBA fails, its careful look at the skill-versus-chance argument remains intact and provides lawmakers with a solid foundation moving forward as the Second Circuit did not invalidate this analysis, opining that the "question of whether skill or chance predominates in poker is inapposite to [the] appeal."²⁰⁰

V. SURGING FORWARD AFTER *DiCRISTINA*

After *DiCristina*, the time is as ripe as ever for legalized online T.H.E. poker. As evidenced by the prior waves, gambling is an industry that looks at the past to help mold the future.²⁰¹ This perhaps accounts for the waves of regulation, to prohibition, and back to regulation again.

Looking at the future of online T.H.E. poker relative to waves past, Congress should deliberately push forth a bill to legalize online T.H.E. poker. Not only do recent developments surrounding online T.H.E. poker mirror surges of the past, but *DiCristina* resolved one of the last great debates standing in the way of legalization. Together these surges stand as the final strongholds to make one of America's past-times a lawful online activity.

A. *Shaping the Future Relative to History: Recent Developments Mirroring Surges of Waves Past*

Each of the three waves of gambling regulation came in response to a pressing need of the time. But before new laws formed, going from prohibition to regulation in each wave required intervening surges to push forth new regulations. The potential online gambling wave follows on a parallel path. Today, in legalizing online T.H.E. poker, Con-

197. *Id.* at 232.

198. *Id.* at 235.

199. *United States v. DiCristina*, 726 F.3d 92, 106 (2d Cir. 2013).

200. *Id.* at 100.

201. *See supra* Part II.A.3 (discussing Congress's effort to curb scandals of the past by creating new investigatory committees to safeguard and prevent scandals in the future).

gress could respond to a struggling economy, and further protect the security of an American public that all but demands legalization. And if looking at our past is indicative of future reform, current developments mirroring surges of the past favor new legalizations.

It is no secret that the American economy needs a boost, and the most obvious impact of federal gambling regulation is revenue and job creation. Over the last decade and even more during the 2012 presidential campaign, one was hard pressed to go five minutes without hearing legislators discuss the need to boost the economy and create jobs for Americans. Legalized online T.H.E. poker can provide this boost. Since *Black Friday*, there have been several attempts at pushing forth federal online poker legislation.²⁰² Representative Joe Barton, from Texas, introduced House Resolution 2366, a bill to amend the UIGEA and legalize online poker.²⁰³ Like hopeful lawmakers of each wave, Barton found that bringing back the industry would mean a surge in substantial tax revenues, and thousands of new jobs for Americans.²⁰⁴

Barton's bill and others like it typically set up a threefold taxing scheme.²⁰⁵ Specifically, taxes would come in the form of individual income taxes, user taxes built into legalized online sites, and corporate taxes coming from newly formed poker site operators.²⁰⁶ Before the codification of the UIGEA, estimates indicated that tax revenues created by online American gamblers accounted for over three billion dollars.²⁰⁷ With a threefold taxing scheme, even the most cynical of gambling opponents would agree that the revenues could be impactful. And at the very least, these taxing schemes would keep tax revenues in the United States, whereas before and after *Black Friday*, the poker sites mostly operated overseas.²⁰⁸

Additionally, online T.H.E. legalization would create jobs. With legalization, newly formed American T.H.E. sites would likely enter the industry from all corners of the United States. Aspiring online T.H.E. poker corporations know the vast market encompassing the game. Because of this market's size, such online corporations would need sufficient support. Likewise, a bill like H.R. 2366 requires "qualified state

202. See e.g., Internet Gambling Regulation, Enforcement, and Consumer Protection Act of 2013, H.R. 2282, 113th Cong. (2013); Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act of 2011, H.R. Res. 2366, 112th Cong. (2011).

203. See generally Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act of 2011, H.R. Res. 2366, 112th Cong. (2011).

204. *Id.* § 2(7).

205. Xanthopoulos, *supra* note 94, at 2.

206. *Id.* at 8–11.

207. *Id.* at 1.

208. Interview by Darren Rovell with Brian Balsbaugh, POKER ROYALTY (Apr. 18, 2012, 3:06 PM), http://www.cnbc.com/id/42649117/Insider_Breakdown_Of_Poker_039s_Black_Friday (generally discussing the prevalence of international poker sites before and after Black Friday).

agencies” to oversee the licensing and enforcement of the new regulation.²⁰⁹ Such licensing and enforcement programs would also create jobs.

Next, like the western expansion in gambling’s second wave, there is a need to respond to the American public, which is all but demanding legalization. Over the last decade, even after the UIGEA came about, roughly ten million Americans gambled online.²¹⁰ Though *Black Friday* caused a large majority of American online poker players to disappear, the demand is ever present as Americans play on international or even black-market poker sites.²¹¹ In this era, however, protecting American’s financial security is crucial.

Those who continue to play online T.H.E. through internationally run sites risk their financial security. Many sites and “e-wallets” connect American players to overseas sites not subject to the same oversight.²¹² Voicing a notable concern, Congressman Bob Goodlatte referred to these international operations as private “fly-by-night” companies that are unlicensed, un-taxed, and unregulated.²¹³ Like the licensing and enforcement efforts of the western expansion, today’s federal bills provide a surge of security by creating an all-encompassing licensing and enforcement scheme. For example, House Resolution 1174, aimed to protect gambling consumers.²¹⁴ To protect these consumers, the bill planned to put in place strict licensing requirements for internet gambling operators.²¹⁵ Specifically, it would have made risk-based methods to identify and fight against money laundering and fraud, and enhance user security.²¹⁶ Similar types of plans are prevalent in other potential bills and help surge forward legalization.²¹⁷

Next, like the specificity and preciseness involved in writing the first lottery acts, the meticulous details of online poker bills cover a multitude of concerns. For example, Barton’s H.R. 2366 proposed a system whereby online poker sites would not be allowed to operate without a license in good standing with the appropriate state agency.²¹⁸ Further, a newly formed “Office of Internet Poker Oversight” would exist

209. H.R. Res. 2366, 112th Cong. (2011).

210. David O. Stewart, *Online Gambling Five Years After UIGEA*, AM. GAMING ASS’N 6 http://www.americangaming.org/sites/default/files/uploads/docs/final_online_gambling_white_paper_5-18-11.pdf.

211. Interview, *supra* note 208.

212. Gerd Alexander, *The U.S. on Tilt: Why the Unlawful Internet Gambling Enforcement Act is a Bad Bet*, DUKE L. & TECH. REV. 3 (2008).

213. *Id.* at 16.

214. H.R. Res. 1174, 112th Cong. (2011).

215. *Id.* § 5381(5).

216. *Id.* § 5831(5)(E).

217. See e.g., H.R. 2366 § 110(e)(2), 112th Cong. (2011) (discussing identification plans to combat threats to internet gambling and facilities).

218. *Id.* § 102(a)(1).

under the Department of Commerce.²¹⁹ These offices would then designate qualified state agencies to handle strict licensing procedures.²²⁰ Even if a particular state remained opposed to legalized online gambling, it could opt out.²²¹

Further, like the notable proponents of the first lotteries during the first wave, T.H.E. poker has its notable historic and modern endorsers. Though these leaders do not have a direct effect on the immediate legalization of online poker, they indirectly cause an enormous surge in widespread acceptance whereby lawmakers become pressured to pass legislation. In the *DiCristina* decision itself, Judge Weinstein stated that “Justice Douglas was a regular at President Franklin Roosevelt’s poker parties . . . [and] Chief Justice Vinson played poker with President Truman.”²²² Besides politicians and lawmakers, Hollywood has joined in. Famous Hollywood players include the likes of Tobey “Spiderman” Macguire, Ben Affleck, and Jason “George Costanza” Alexander.²²³ Even Bill Gates enjoys the game that once caused him to skip his college classes to partake in T.H.E. marathons.²²⁴

Lastly, like the Senate’s 1950s efforts to curb scandals of the past, online-poker bills do the same thing by writing in safeguards that would likely prevent another *Black Friday*. For example, H.R. 1174 proposed that if any potential online operator was delinquent in filing their federal or state tax returns, a license may not be issued.²²⁵ Similarly, it proposed a bad-actor provision whereby restricting entities that were involved in internet gambling in the United States after the UIGEA’s enactment in 2006.²²⁶ This and similar provisions, along with a scattering of others that discuss licensing revocations and suitability determinations, seemingly attempt to keep out those who may pose a risk to increased scandal.

And where opponents use classic argument such as gambling being a danger to the individual, online internet poker bills recommend the creation of a built-in exclusion list.²²⁷ For example, the programs would place those with compulsive gambling problems on an exclusion list. One provision of H.R. 2366 states that:

219. *Id.* §103(b).

220. *Id.* § 103(c).

221. *Id.* § 104(a)(C)(i).

222. *United States v. DiCristina*, 886 F. Supp. 2d 164, 171 (E.D.N.Y. 2012).

223. *Top Ten Celebrity Poker Players*, TOPTENZ.NET, <http://www.toptenz.net/top-10-celebrity-poker-players.php> (last visited Jan. 12, 2013).

224. *The Rich History of Politics and Poker in the US*, POKER TIME (June 4, 2010, 4:42 PM), <http://www.toptenz.net/top-10-celebrity-poker-players.php>.

225. H.R. Res. 1174 § 5383(d)(3)(D), 112th Cong. (2011).

226. *Id.* § 5383(d)(3)(D).

227. H.R. Res. 2366 § 106, 112th Cong. (2011).

Each qualified state agency shall establish and maintain a list of persons self-excluded from playing Internet poker through Internet poker facilities licensed by the qualified State agency.²²⁸

The surges surrounding online T.H.E. undeniably mirror surges from waves past. The potential for enormous revenue increases; the ability to safeguard Americans' security; precisely drafted bills; and efforts to curb scandals, surge the push forward for reform. Because of this, Congress can begin moving to finally legalize online T.H.E. poker. But, because doubts remain, *DiCristina* can be used.

B. *Tip Your Dealer—Using DiCristina's "Skill" Conclusion as the Final Surge to Legalize Online Texas Hold 'Em Poker.*

The developments that parallel gambling legalization surges from waves past, leave one question to be answered—is T.H.E. poker a game of skill such that Congress should federally legalize online poker? Shortly after *Black Friday*, some suggested that all that stood in the way of legalized T.H.E. poker was the great debate of whether Lady Luck was too powerful to allow the game under federal laws.²²⁹ After *Black Friday*, United States Attorney General Eric Holder stated that it was the Justice Department's job to enforce the laws on the books, and Congress's job to decide the skill-versus-chance matter.²³⁰ After *DiCristina*, Congress's answer becomes much easier. As discussed below, *DiCristina* lays a compelling and persuasive framework for the age-old question of skill versus chance. Moreover, its analysis rebuts contrary decisions and complicates future prosecution under similar federal laws.

First, the *DiCristina* decision methodically answers the skill-versus-chance argument, which never before received this level of meticulous scrutiny. The Eastern District uncovered the best possible way of looking at T.H.E. poker, which after years of debate, can safely be called an analytical game requiring practice and mastery of the probabilistic details of the game, as well as psychological mastery of one's opponent across the table. The Eastern District also backed up its conclusion with analytics, making inferior analyses seem superficial and hasty.

Second, because of *DiCristina's* analysis, decisions to the contrary will now fall under the microscope. The government's expert did not provide contrary studies refuting the skill-versus-chance argument. And, Dr. Heeb himself searched for contrary studies—he found nothing. Until economists and statisticians complete studies that refute Dr.

228. *Id.* § 106(C)(1)(A).

229. *Online Poker Indictments—When Does Skill Become the Predominate Factor in Poker?*, POKER JUNKIE, <http://blog.pokerjunkie.com/poker-news/online-poker-indictments-when-does-skill-become-the-predominate-factor-in-poker> (last visited Jan. 20, 2012).

230. *See id.*

Heeb's analyses, *DiCristina* places a burden on courts to thoroughly develop their opinions when taking a *de novo* look at the skill-versus-chance argument.

Finally, some believe *DiCristina* will have minimal to no effect on federal internet poker laws.²³¹ Others predict that the Justice Department's ability to prosecute illegal poker businesses is hindered.²³² Those who doubt its impact rest upon the fact that *DiCristina*'s skill conclusion only binds those appealing to the Eastern District.²³³ Skeptics correctly note that no state laws change because of *DiCristina* and that the Eastern District narrowly interpreted the skill debate under the purview of the IGBA.²³⁴ It is not a far cry, however, to say that the decision could transcend jurisdictional lines because it faced and accepted the analytics concerning T.H.E. poker's variable that some courts seemingly saw as a daunting, or even absurd task prior to *DiCristina*.

When confronted with the same skill-versus-chance argument in the context of other federal gaming statutes, courts with a lack of precedential guidance would likely welcome the use of the Eastern District's solidly organized opinion as guidance.²³⁵ For example, the Eastern District specifically mentioned the UIGEA in its opinion. Under the statute, people engaged in the business of "betting or wagering" are prohibited from processing financial transactions related to unlawful internet gambling.²³⁶ Now, analysis by prosecutors and defendants gets interesting. Those districts or circuits that have not decided the skill issue will be forced to address *DiCristina*'s analysis because the UIGEA defines "betting or wagering" as "the risking by any person of something of value upon . . . a game subject to chance."²³⁷

On its own, *DiCristina* helps Congress answer one of the last remaining questions blocking legalization of online poker. Beyond that, analyzing poker as anything but a game of skill becomes much more difficult, and prosecution of such an issue under statutes like the UIGEA becomes much more challenging to the point that reform is

231. See Gaming Counsel, *Shifting Opinions: United States v. DiCristina*, POKERATI (Sept. 18, 2012, 1:50 PM), <http://pokerati.com/2012/09/shifting-opinions-united-states-v-dicristina/>.

232. Mark Hichar, *U.S. District Court for the Eastern District of NY Hold That Poker is Not "Gambling" Under the Federal Illegal Gambling Business Act*, PUB. GAMING RES. INST., <http://www.publicgaming.com> (last visited Jan. 22, 2013).

233. *Id.*

234. *Id.*

235. Cadwalader—Financial Restructuring, *Gaming Alert—Eastern District of New York Rules Poker is Not Gambling Under IGBA*, JD SUPRA LAW NEWS (Aug. 27, 2012), <http://www.jdsupra.com/legalnews/gaming-alert-eastern-district-of-new-y-63157/>.

236. 31 U.S.C. §§ 5361–67 (2006).

237. *Id.* § 5362(1)(A).

inevitable. Because of this, Congress should confidently respond to the powerful legalization surge that is *DiCristina*.

VI. CONCLUSION

There is no dispute that it is too early to know exactly what impact *DeCristinia* will have on online T.H.E. poker regulation in the United States. But throughout America's history of gambling reform, surging sources have acted as momentum for new laws to take shape and lawmakers mostly looked to these past surges to mold the future. Now, after *DiCristina*, Congress should move confidently in the direction of legalizing online T.H.E. poker as recent developments surrounding the game mirror surges of waves past. Moreover, *DiCristina* resolved one of the last remaining questions surrounding online T.H.E. legalization. Together, these final strongholds move America closer to a new period of gambling regulation featuring online T.H.E. poker as the main attraction.