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## Putting Texas Back in Texas Hold 'Em

Scott Sloan

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# Putting Texas Back in Texas Hold ‘Em

Scott Sloan\*

*Texas takes pride in its unique Western heritage and its adventurously independent spirit. However, the Texas Legislature has spurned a widely popular and uniquely Texan pastime, Texas Hold ‘Em. Despite praising Texas’s cultivation of Texas Hold ‘Em, Texas law condemns participation in the game to the secrecy of Texans’ homes. Ironically, while maintaining an allegedly strict stance against commercial gambling, Texas manages its own lottery and administers pari-mutuel wagering on dog and horse racing tracks.*

*In a futile attempt to exploit perceived loopholes in Texas’s private-gambling exception, some Texans have opened businesses, dubbed “Private Card Rooms,” that invite individuals to play commercial games of Texas Hold ‘Em in their establishments. Though legal enforcement against such establishments has been inconsistent, the law does not lend itself to any valid interpretation that would permit these card rooms. Instead of upholding such draconian laws, the Texas Legislature should embrace the goal of these card rooms and change the law to permit commercial participation in Texas Hold ‘Em. Whether through the use of other states’ legal models or novel legislation, Texas Hold ‘Em should be allowed in public to mitigate the inconsistent state law, increase tax revenues, and sanction public participation in the state’s namesake recreation that has influenced the world.*

I.	INTRODUCTION .....	104
II.	ORIGIN OF POKER AND TEXAS HOLD ‘EM .....	104
	A. <i>Poker’s Most Popular Variant</i> .....	105
	B. <i>History of Texas Hold ‘Em</i> .....	107
III.	LEGAL HISTORY OF AMERICAN GAMBLING .....	110
	A. <i>General Gambling Law and Its Regional Nuances</i> .....	110
	B. <i>Horse Racing: A Different Legal Animal</i> .....	113
	C. <i>States’ Enduring Addiction to the Lottery</i> .....	115
	D. <i>Texas Gambling Law and Its Regional Influences</i> .....	116
IV.	PURSuing A COMMERCIAL GAME: ARE CARD ROOMS THE ANSWER? .....	122
	A. <i>The Dilemma</i> .....	122
	B. <i>Texas Law’s Impact on Card Rooms</i> .....	124
	C. <i>Federal Law’s Impact on Card Rooms</i> .....	129
V.	HOW TO BEST LEGALIZE TEXAS CARD ROOMS .....	132
VI.	CONCLUSION .....	135

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## I. INTRODUCTION

Despite praising Robstown, Texas, as the birthplace of Texas Hold ‘Em,<sup>1</sup> the Texas Legislature has outlawed public participation in the game since 1903.<sup>2</sup> Though playing Texas Hold ‘Em in the privacy of one’s home is legal,<sup>3</sup> Texas law prohibits individuals from playing the game at public facilities that profit from the game in any way.<sup>4</sup>

This Article asserts that Texas should legalize card rooms and analyzes two potential methods the legislature could use. First, this Article will explain the mechanics and classification of Texas Hold ‘Em and then discuss the American and Texan history of both Texas Hold ‘Em and gambling in general. Next, this Article will make the case for why Texans need legalized card rooms and demonstrate how current efforts to establish legal “private poker clubs” fail to comply with Texas law. Finally, this Article will suggest two different methods Texas could use to legalize card rooms.

## II. ORIGIN OF POKER AND TEXAS HOLD ‘EM

As a variant of the card game poker, any historical discussion of Texas Hold ‘Em must begin with the origin of poker. Though poker’s precise ancestry is not definitively known, a version of poker, “Poque,” was first played near New Orleans by French colonists around 1830.<sup>5</sup> American Southerners likely bastardized Poque’s pronunciation into the two syllable “pok-uh” or “poker.”<sup>6</sup> After poker’s birth in New Orleans saloons, the game traveled north on the Mississippi River via riverboats,<sup>7</sup> after which soldiers during the Civil War spread poker’s popularity throughout the country.<sup>8</sup> American soldiers further spread poker during

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1. H.C.R. No. 109, 80(R) Leg. (Tex. 2007).

2. Nanci Monroe Kimmey & Georgia Kemp Caraway, *NORTH TEXAS STATE FAIR AND RODEO* 6 (2016).

3. TEX. PENAL CODE ANN. § 47.02 (West, Westlaw through end of 2017 Reg. & 1st C.S. of 85th Leg.).

4. *Id.*

5. Anthony Cabot & Robert Hannum, *Poker: Public Policy, Law, Mathematics, and the Future of an American Tradition*, 22 T.M. COOLEY L. REV. 443, 447 (2005).

6. David Parlett, *A History of Poker*, PAGAT.COM, <https://www.pagat.com/poker/history.html> (last updated Dec. 23, 2010).

7. Cabot & Hannum, *supra* note 5.

8. Blake Griffin & Barbara Osborne, *The Legality of Charity Poker in North Carolina*, 19 J. LEGAL ASPECTS SPORT 7, 10 (2009). In 1875, a *New York Times* writer went so far as to say he “was ‘forced to the conclusion that the national game is not baseball, but poker.’” Jack Kelly, *Poker: The Very American Career of the Card Game You Can Learn in 10 Minutes and Work on*

World War II, this time sharing it with the world.<sup>9</sup> Now the game of poker is “so rooted in American culture” that poker-related terms frequent historical literature, government regulation, and the common parlance.<sup>10</sup>

#### A. *Poker’s Most Popular Variant*

Texas Hold ‘Em belongs to a family of card games called poker,<sup>11</sup> and its popularity has swelled so significantly worldwide that many now consider the word “poker” to be synonymous with Texas Hold ‘Em.<sup>12</sup> Poker is classified as a vying game in which players progressively raise the betting stakes, forcing opponents to either continue risking escalating bets or to “fold” and forfeit their previous bets.<sup>13</sup> Players’ hand strength is judged according to a standardized list of valid five-card combinations, traditionally ranked by their statistical rarity from highest to lowest as follows:<sup>14</sup>

- straight flush (five cards in sequence and suited, like 2, 3, 4, 5, 6, all of hearts),<sup>15</sup>
- four of a kind (like 2, 2, 2, 2, x);
- full house (three of a kind and two of a kind, like 2, 2, 3, 3, 3);
- flush (any five cards with the same suit, like 2, 3, 7, 9, 10, all of hearts);
- straight (five cards in sequence, like 2, 3, 4, 5, 6);
- three of a kind (like 2, 2, 2, x, y);
- two pair (like 2, 2, 3, 3, x);
- one pair of any two cards (like 2, 2, x, y, z); and

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for the Rest of Your Life, AM. HERITAGE (Nov./Dec. 2006), <https://www.americanheritage.com/poker>.

9. Griffin & Osborne, *supra* note 8.

10. *Id.* Poker analogies became commonplace during the Cold War: “Who was bluffing? Who had the better hand? Who was willing to raise the stakes?” Kelly, *supra* note 8. Terms like “all-in,” “poker face,” “blue chip,” and “stack the deck” have seeped into the everyday language of many Americans. Steve Ruddock, *10 Poker Terms, Phrases, and Clichés That Went Mainstream*, NJ.COM, [https://www.nj.com/onlinegamblingnj/index.ssf/2014/07/10\\_poker\\_terms\\_phrases\\_and\\_cli.html](https://www.nj.com/onlinegamblingnj/index.ssf/2014/07/10_poker_terms_phrases_and_cli.html) (last updated Mar. 29, 2019).

11. Kaitlyn Dunphy, *Following Suit with the Second Circuit Defining Gambling in the Illegal Gambling Business Act*, 79 BROOK. L. REV. 1295, 1305 (2014).

12. Parlett, *supra* note 6; *Texas Hold’em*, PAGAT.COM, <https://www.pagat.com/poker/variants/texasholdem.html> (last visited Nov. 18, 2019).

13. Parlett, *supra* note 6.

14. Kelly, *supra* note 8.

15. Sometimes a “royal flush” is added as the highest possible straight flush (A, K, Q, J, 10 of one suit) to make the list have ten combinations. Parlett, *supra* note 6.

- singular high card higher than the opponent's highest card (like the 10 in 2, 3, 5, 8, 10 would beat 2, 4, 6, 7, 8, since 10 is higher than 8).<sup>16</sup>

Regardless of how many cards are dealt, a player's hand may only beat another player's hand by containing a superior five-card combination from the designated list above.<sup>17</sup> Though some games may inaccurately include "poker" in their title, like Pai Gow Poker or Video Poker, the game of poker is narrowly defined as a vying game based on five-card hands.<sup>18</sup>

While there are many types of poker,<sup>19</sup> there is only one Texas Hold 'Em. Texas Hold 'Em is a type of "seven-card stud" poker game, meaning each player has the opportunity to view seven cards from which to make a five-card hand.<sup>20</sup> In Texas Hold 'Em, each player is dealt two face-down "hole" cards and uses these cards in combination with five face-up "community" cards to make the best five-card hand.<sup>21</sup> Players participate in rounds of betting after they receive their hole cards and three more times in between the dealing of the community cards.<sup>22</sup> If willing to match opponents' bets, players continue wagering until the final round and then must show their hands to determine which hand wins the entire collection of bets, or the "pot."<sup>23</sup>

Texas Hold 'Em is different from almost every gambling game played in a casino because players compete against each other to win money, not against the casino.<sup>24</sup> Competing against other players qualifies poker as a "nonbanked game."<sup>25</sup> Virtually every other casino game, including blackjack, craps, and roulette, is considered a "banking game" and pits the "bank," or casino, against each of the players individually.<sup>26</sup> However, when one plays Texas Hold 'Em in a casino, the casino provides

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16. *Id.*

17. *Id.*

18. *Id.*

19. Other well-known poker games include Omaha, Seven-Card Stud, and Razz. *Top 10 Poker Games 2019*, CARDSCHAT, <https://www.cardschat.com/top-10-poker-games.php> (last visited Nov. 18, 2019).

20. Griffin & Osborne, *supra* note 8, at 11.

21. *Id.* at 11-12.

22. *Id.* at 12.

23. *Id.*

24. Cabot & Hannum, *supra* note 5, at 452-53.

25. *An Introduction to Casinos, Gambling: What's at Stake?*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/reference/social-sciences-magazines/introduction-casinos> (last visited Nov. 18, 2019).

26. *Card Games: Banking Games*, PAGAT.COM, <https://www.pagat.com/banking/> (last visited Nov. 18, 2019).

a dealer who may be tipped by players and who takes a small percentage from each pot on behalf of the casino, called a “rake.”<sup>27</sup> Taking a rake allows the casino to make money from poker, while the players try to profit from their opponents.

### B. History of Texas Hold 'Em

The first hand of Texas Hold 'Em was reportedly dealt in Robstown, Texas, in the early 1900s,<sup>28</sup> memorialized in 2007 by a House Concurrent Resolution to officially recognize the city as its birthplace.<sup>29</sup> Ultimately, Texas Hold 'Em came to the masses through the marketing genius of Benny Binion and his Las Vegas Binion's Horseshoe Club casino.<sup>30</sup>

One of Texas Hold 'Em's first and most notable public appearances occurred in a storied poker game at Benny Binion's Horseshoe Club.<sup>31</sup> In 1949, Binion was sought out to host “the biggest [poker] game this world ha[d] to offer”<sup>32</sup> and obliged by delivering a marathon two-man poker match in his casino's lobby that lasted five months straight, with players breaking “for sleep only ‘once every four or five days.’”<sup>33</sup> Binion's intuition that poker simply needed “some nuanced PR” to become more visible<sup>34</sup> came to fruition as he observed “that the public had come to watch poker at his casino ‘with the fervor of dedicated sports fans.’”<sup>35</sup>

Meanwhile, Texas was further cultivating Texas Hold 'Em in the 1950s and 60s through the labors of professional card players, called “rounders”<sup>36</sup> and “road gamblers,” who drove between Texas towns to find their next high stakes poker game.<sup>37</sup> At the time, the game was referred to by multiple names such as Hold Me Darlin', Tennessee Hold Me, or simply Hold'em.<sup>38</sup> Back in Las Vegas, the California Club became the first

27. Cabot & Hannum, *supra* note 5, at 453.

28. H.C.R. No. 109, 80(R) Leg. (Tex. 2007).

29. *Id.*

30. Johnny Hughes, *The Legend of Benny Binion*, BLUFF MAG., Jan. 2012, at 1, 48.

31. Griffin & Osborne, *supra* note 8, at 12.

32. JAMES MCMANUS, COWBOYS FULL: THE STORY OF POKER 237-38 (2009). Lester “Benny” Binion pioneered high-stakes gambling through no-limit craps games he ran “in the shadow of the Dallas courthouse.” Benny's reputation as a fair dealer earned him the patronage of some of Dallas's highest-rolling oil tycoons like Howard Hughes, H.L. Hunt, and Clint Murchison. *Id.*

33. *Id.* at 240.

34. *Id.* at 239.

35. Griffin & Osborne, *supra* note 8, at 12.

36. H.C.R. No. 109, 80(R) Leg. (Tex. 2007).

37. Kelly, *supra* note 8. Notable road gamblers included Doyle “Dolly” Brunson and Amarillo Slim. *Id.*

38. *Id.* at 8; MCMANUS, *supra* note 32, at 247.

casino to offer Texas Hold ‘Em as an official game in 1963.<sup>39</sup> “[F]rom there[,] the game spread like wildfire to the most popular poker rooms in the city.”<sup>40</sup> Texas Hold ‘Em legends began travelling to Las Vegas to christen new Texas Hold ‘Em games at casinos like the Golden Nugget, Stardust, and Dunes.<sup>41</sup>

In 1970, Binion organized the first World Series of Poker (WSOP) tournament at his Binion’s Horseshoe casino.<sup>42</sup> When Binion dedicated the poker tournament exclusively to Texas Hold ‘Em in 1972, public interest in the game “began to swell.”<sup>43</sup> Texas Hold ‘Em appealed to spectators because it included exposed community cards in the center of the table, as opposed to other poker variants with fewer visible cards.<sup>44</sup> Even so, audiences could not see the players’ “hole cards”—cards the players held in their hands—unless and until a “showdown” occurred, where the final players showed their hands to determine a winner.<sup>45</sup> Eventually, the “hole card” camera was invented to allow viewers on television to see players’ hole cards.<sup>46</sup> The introduction of this camera to the 2002 WSOP was revolutionary for the viewership and popularity of the game.<sup>47</sup> Seeing players’ hole cards gave audiences at home more information than the live audience or the tournament players themselves, cultivating engagement and strategy awareness.<sup>48</sup>

In addition to the excitement created by the hole cam, the advent of online gambling websites generated a further surge in Texas Hold ‘Em’s popularity,<sup>49</sup> beginning offshore in 1998.<sup>50</sup> In 2003, America witnessed the aptly named Chris Moneymaker overcome enormous odds by turning a \$40 online poker tournament fee into a \$2.5 million first place victory at

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39. SAM FARHA & STORMS REBACK, FARHA ON OMAHA: EXPERT STRATEGY FOR BEATING CASH GAMES AND TOURNAMENTS 7 (2007). Corky McCorquodale introduced the game to the California Club. *Id.* The Texas Legislature claims, however, that Texas Hold ‘Em was played for the first time in 1967 in the Golden Nugget Casino, not 1963 in the California Club. H.C.R. No. 109, 80(R) Leg. (Tex. 2007).

40. FARHA & REBACK, *supra* note 39.

41. MCMANUS, *supra* note 32, at 246-47. Texas Hold ‘Em legends include Doyle Brunson, Amarillo Slim, Bryan “Sailor” Roberts, Johnny Moss, and Crandell Addington. *Id.*

42. Griffin & Osborne, *supra* note 8, at 12-13.

43. *Id.* at 13.

44. Kelly, *supra* note 8.

45. Teddy Greenstein, *Poker’s Top Trump Card: Hole Cam*, CHI. TRIB. (July 14, 2006), <https://www.chicagotribune.com/news/ct-xpm-2006-07-14-0607140125-story.html>.

46. *Id.*

47. *Id.*

48. *Id.*

49. Griffin & Osborne, *supra* note 8, at 13.

50. James Romoser, *Unstacking the Deck: The Legalization of Online Poker*, 50 AM. CRIM. L. REV. 519, 520 (2013).

the WSOP.<sup>51</sup> Inspired by Moneymaker’s success, Americans flocked to their computers to play Texas Hold ‘Em online.<sup>52</sup> With as many as 23 million Americans gambling online in 2005,<sup>53</sup> the American Gaming Association reported that one in five adults played poker that same year.<sup>54</sup> By 2011, “with \$20 billion at stake,” over two million Americans played poker online.<sup>55</sup>

From its sullied upbringing by crooked cardsharps on the Mississippi River, Texas Hold ‘Em has evolved into a game of sophistication “that embodies the American ethos.”<sup>56</sup> Texas Hold ‘Em has climbed so high in polite society that it has even been played in the White House by numerous presidents.<sup>57</sup> The game has even invaded the highest court in the land, as former Justices William Rehnquist and Antonin Scalia routinely played poker.<sup>58</sup> Current Justices Elena Kagan, Brett Kavanaugh, and John Roberts play as well.<sup>59</sup>

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51. *Id.*

52. *Id.*

53. Frank Ahrens, *New Law Cripples Internet Gambling; Banks Are Barred from Handling Transactions*, WASH. POST (Oct. 14, 2006), [https://www.washingtonpost.com/archive/politics/2006/10/14/new-law-cripples-internet-gambling-span-classbankheadbanks-are-barred-from-handling-transactionsspan/9c8f8ddf-1a23-4a48-93a3-d040949feced/?utm\\_term=.6ce3aeac6ef1](https://www.washingtonpost.com/archive/politics/2006/10/14/new-law-cripples-internet-gambling-span-classbankheadbanks-are-barred-from-handling-transactionsspan/9c8f8ddf-1a23-4a48-93a3-d040949feced/?utm_term=.6ce3aeac6ef1).

54. Griffin & Osborne, *supra* note 8, at 13.

55. Romoser, *supra* note 50, at 519-20.

56. *Id.* at 519.

57. *Id.* Ulysses S. Grant, Dwight Eisenhower, Richard Nixon, and Barack Obama played poker in the White House. Other U.S. presidents who played poker include Theodore Roosevelt, Warren Harden, Franklin Roosevelt, and Harry Truman. Martin Harris, *U.S. Presidents Who Played Poker*, POKER STARS, [https://www.pokerstars.com/en/blog/2016/us-presidents-who-played-poker-162602.shtml?no\\_redirect=1](https://www.pokerstars.com/en/blog/2016/us-presidents-who-played-poker-162602.shtml?no_redirect=1) (last visited Nov. 18, 2019).

58. Other poker-playing Justices include Chief Justice William Rehnquist (Romoser, *supra* note 50, at 519); Justice Scalia (Roxanne Roberts, *Time off the Bench: The Social Lives of Supreme Court Justices*, WASH. POST (Mar. 1, 2016), [https://www.washingtonpost.com/lifestyle/style/time-off-the-bench-the-social-lives-of-supreme-court-justices/2016/03/01/ae68362e-df36-11e5-846c-10191d1fc4ec\\_story.html?utm\\_term=.60105cc78254](https://www.washingtonpost.com/lifestyle/style/time-off-the-bench-the-social-lives-of-supreme-court-justices/2016/03/01/ae68362e-df36-11e5-846c-10191d1fc4ec_story.html?utm_term=.60105cc78254)).

59. Justice Elena Kagan (doclotto, *A Poker-Playing, Cigar Smoking Supreme Court Justice? Why Not?*, POKERMOMENTS (May 12, 2010), <https://pokermoments.com/a-poker-playing-supreme-court-justice-why-not/>); Justice Kavanaugh (*Supreme Court Nominee Brett Kavanaugh Questioned About Gambling Habits and Poker Games*, CARDSCHAT (Sept. 13, 2018), <https://www.cardschat.com/news/brett-kavanaugh-questioned-about-gambling-habits-and-poker-games-71101/>); and Chief Justice John Roberts (Ann E. Marimow & Carol D. Leonnig, *Royce Lamberth Steps Down from Court Post*, WASH. POST (July 16, 2013), [https://www.washingtonpost.com/local/royce-lamberth-steps-down-from-court-post-outspoken-on-governmentincompetence/2013/07/16/831b4f2a-ec10-11e2-bed3-b9b6fe264871\\_story.html?utm\\_term=.d33f9ed562d6](https://www.washingtonpost.com/local/royce-lamberth-steps-down-from-court-post-outspoken-on-governmentincompetence/2013/07/16/831b4f2a-ec10-11e2-bed3-b9b6fe264871_story.html?utm_term=.d33f9ed562d6)).



### III. LEGAL HISTORY OF AMERICAN GAMBLING

Tracing its roots to ancient civilization,<sup>60</sup> gambling has pervaded American history since the establishment of the first colonies.<sup>61</sup> As the colonies, and then the states, formed their own regional identities, they developed different attitudes and legal classifications of specific gambling activities and of gambling in general. While the South and West historically elevated horse race gambling above legal reproach, the sentiment of the entire nation dramatically oscillated concerning lotteries. Southern and Western states often juggled the competing legislative goals of allowing certain individuals to gamble<sup>62</sup> and protecting the public from the “evil example” of gambling.<sup>63</sup> These seemingly divergent objectives gave rise to significant distinctions between how courts viewed the nature and locations of certain gambling activities. Specifically, the courts began to discriminate between private and public gambling activities<sup>64</sup> and between fairly and unfairly structured gambling games.<sup>65</sup> The Western and Southern legal influences provide insight into the reasoning behind the gambling laws in Texas’s history, which might guide future efforts to implement new law without upsetting historical objectives.

#### A. General Gambling Law and Its Regional Nuances

Gambling has played a role in American history as far back as the first settlement of the American colonies and continues in many of its original forms today. America’s genesis in Jamestown relied extensively on gambling in the form of English lotteries from the Virginia Company of London.<sup>66</sup> Despite Jamestown’s lottery-backed funding, the Puritans who settled New England condemned the idleness of playing cards, resulting in the 1633 fine on card playing in Plymouth Colony.<sup>67</sup> Since gambling was not directly contrary to the Bible’s teachings, Puritans did

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60. Humans began gambling before recorded history and developed sophisticated gambling dice by 1300 B.C. William Grimes, *I Got the Cricket Right Here: Gambling Past and Present*, N.Y. TIMES (Oct. 6, 2006), <https://www.nytimes.com/2006/10/06/books/06book.html>.

61. Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 24 (1992).

62. See discussion *infra* Sections III.B-C.

63. *Wheelock v. State (Wheelock III)*, 15 Tex. 260, 264 (1855); *Commonwealth v. Dent*, 992 A.2d 190, 196 (Pa. Super. Ct. 2010).

64. See NAT’L INST. OF LAW ENF’T & CRIMINAL JUSTICE, LAW ENF’T ASSISTANCE ADMIN. & U.S. DEP’T OF JUSTICE, THE DEVELOPMENT OF THE LAW OF GAMBLING: 1776-1976, at 263-64, 380 (1977) [hereinafter DOJ]; discussion *infra* Section III.D.

65. See *Stearnes v. State*, 21 Tex. 692, 697 (1858); DOJ, *supra* note 64, at 381.

66. See *supra* text accompanying note 65.

67. Kelly, *supra* note 8.

not denounce gambling as evil per se, but instead condemned it as an unproductive use of time.<sup>68</sup> Puritans' animosity toward gambling and cards, or "the devil's picture book," was likely a reaction to the disdained excesses of the European aristocrats, who valued idleness as a courtly virtue.<sup>69</sup> By the Revolutionary War, "Northeastern colonies had uniformly banned public gaming and declared such activity a public nuisance."<sup>70</sup>

Ironically, the object of the Puritans' ire became the archetype for the South, with Southerners embracing an elitist European view of gambling.<sup>71</sup> Especially among the planter aristocracy, Southerners celebrated the virtue of gambling, since "carefreeness" was viewed as an aspiration, contrasting with the "hardworking, stiff-collared yeoman farmer of New England."<sup>72</sup> Colonial laws concerning gambling in the South focused on "nuisances" resulting from gambling instead of idleness.<sup>73</sup> These original laws centered on undermining the enforceability of gambling transactions and criminalizing disruptive activities associated with gambling.<sup>74</sup> Overall, the Southern colonies' legislative posture toward gambling was more dispassionate than the stringent legislative stance in New England.<sup>75</sup>

After the Revolutionary War, the Great Revival of the 1830s created a national movement to criminalize gambling in an effort toward moral reform.<sup>76</sup> However, Southern states took a more focused approach against "casino games enjoyed by the masses in taverns and public places," as opposed to "civilized poker games of gentlemen planters."<sup>77</sup> Judges in the South carefully distinguished public and private gambling<sup>78</sup> by "criminaliz[ing] gambling venues that neither themselves nor their professional friends would ever frequent."<sup>79</sup> In Alabama, for instance, "the offices of attorneys or court clerks could be used for gambling after hours," but "[l]ess elite places of business," like barber shops and liquor stores,

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68. DOJ, *supra* note 64, at 40-41.

69. Kelly, *supra* note 8.

70. DOJ, *supra* note 64, at 49.

71. Kelly, *supra* note 8.

72. DOJ, *supra* note 64, at 243.

73. *Id.* at 237-38 (citations omitted).

74. *Id.* at 238.

75. *Id.* at 242.

76. *Id.* at 245-46.

77. Joshua C. Tate, *Gambling and the Law in the Nineteenth Century South: Evidence from Nacogdoches County, Texas, 1838-1839*, 15 J.S. LEGAL HIST. 131, 133 (2007) (quoting DOJ, *supra* note 64, at 247-48). This sentiment was engendered by North Carolina's Act of November 16, 1835. DOJ, *supra* note 64, at 247-48.

78. Tate, *supra* note 77.

79. *Id.* at 136.

were considered public.<sup>80</sup> Similarly, since Virginia is the Southern states' lodestar for gambling legislation, Virginia's highest court held that a store owner enjoying a card game in his store after hours was not gambling in a public place.<sup>81</sup>

After the Civil War, the South's lax attitude toward gambling shifted, and many Southern states, led by Protestant influences, implemented rigid antigambling policies.<sup>82</sup> Many Southern states followed the example of their Northern neighbors by incorporating anti-lottery clauses into their state constitutions.<sup>83</sup> By contrast, the West's historically low-tax structure encouraged Western states to turn toward gambling legalization as a source of government revenue.<sup>84</sup> The Great Depression in particular caused six Western states, including Texas, to establish wagering systems for horse racing.<sup>85</sup> When efforts were made to limit commercial gambling, many Western states sought to prohibit games of chance instead of games of skill, which generally would fall outside of the statutes.<sup>86</sup> This practice of allowing games of skill and disallowing games of chance currently pervades many states' jurisprudence where states often use chance-measuring tests to distinguish between the two types of games.<sup>87</sup>

From the beginning of the 20th century to the 1960s, there was an American gambling lull.<sup>88</sup> Outside of Nevada and areas that allowed horse and dog racing, "legal gambling was at a historic low in this nation."<sup>89</sup> Suddenly, in 1964, Americans experienced a resurgence in gambling, starting with New Hampshire's reintroduction of the state-run lottery.<sup>90</sup> In the 1970s, Native American tribes began establishing gambling operations to raise revenue for tribal-government operations<sup>91</sup> and today twenty-nine

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80. *Id.*

81. *Windsor v. Commonwealth*, 31 Va. (4 Leigh) 680, 682 (Va. Gen. Ct. 1833); DOJ, *supra* note 64, at 249.

82. DOJ, *supra* note 64, at 276; *see also* David A. Skeel & William Stuntz, *The Criminal Law of Gambling: A Puzzling History*, in *GAMBLING: MAPPING THE AMERICAN MORAL LANDSCAPE* 257, 281-82 (Alan Wolfe & Erik C. Owens eds., 2009).

83. DOJ, *supra* note 64, at 86.

84. *Id.* at 398-99.

85. *Id.*

86. *Id.* at 381.

87. *See* discussion *infra* Section III.D.

88. Ronald J. Rychlak, *The Introduction of Casino Gambling: Public Policy and the Law*, 64 *Miss. L.J.* 291, 303 (1995).

89. *Id.*

90. *Id.*

91. *History*, NAT'L INDIAN GAMING COMMISSION, <https://www.nigc.gov/commission/history> (last visited Nov. 18, 2019). Native American tribes have inherent authority to establish and regulate gaming operations in states that permit some form of gambling. *Id.*

states have Native American casinos.<sup>92</sup> American gambling is so prevalent today that all states, except for Hawaii and Utah, have some form of legalized gambling.<sup>93</sup>

*B. Horse Racing: A Different Legal Animal*

Despite its dramatic ebbs and flows in popularity, horse racing and its concomitant wagering has often enjoyed a legal status unique to most other forms of gambling in the United States. Originally private affairs,<sup>94</sup> small-scale races on highways became finable offenses in Plymouth Colony as early as 1674.<sup>95</sup> Horse racing was largely banned in the Northern colonies.<sup>96</sup> This legislative attitude continued through the mid-1800s, such that “[b]y 1860, most Northeastern states had taken some legislative action against gambling on horseraces.”<sup>97</sup>

Alternatively, horse racing in the Southern colonies became enormously popular as a tool to imitate the social life of the English gentry.<sup>98</sup> Planters demonstrated their elite social status, courage, and brawn through the rituals of betting and racing.<sup>99</sup> The South’s love of horse racing endured after the Revolutionary War, with the establishment of enclosed courses for spectators.<sup>100</sup> Unlike the North’s laws, Southern law excluded horse racing from the legal definition of gambling because it was generally regarded as a gentlemanly sport.<sup>101</sup> Southern courts, like those in Arkansas and Texas, found horse racing to be outside of their gambling laws’ purview, while virtually all jurisdictions outside of the South found horse racing to be “a ‘game’ within the intent of anti-gaming legislation.”<sup>102</sup> The Virginia General Court of 1851 went so far as to say that “no sport or pastime has . . . been more favourably . . . indulged by ‘all ranks and professions of society’ in Virginia than horse racing.”<sup>103</sup> As the Western judiciaries emphasized their tolerance for games of skill and prohibition

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92. *Indian Casinos*, 500 NATIONS, [https://www.500nations.com/Indian\\_Casinos.asp](https://www.500nations.com/Indian_Casinos.asp) (last visited Nov. 18, 2019).

93. Rychlak, *supra* note 88, at 303-04.

94. DOJ, *supra* note 64, at 54-55.

95. *Id.* at 55.

96. Steven Riess, *The Cyclical History of Horse Racing: The USA’s Oldest and (Sometimes) Most Popular Spectator Sport*, 31 INT’L J. HIST. SPORT 29, 31 (2014).

97. DOJ, *supra* note 64, at 92.

98. Riess, *supra* note 96, at 30.

99. *Id.*

100. *Id.* at 32.

101. DOJ, *supra* note 64, at 249.

102. *Id.* at 263-64.

103. *Commonwealth v. Shelton*, 49 Va. (8 Gratt.) 592, 598 (Va. Gen. Ct. 1851).

against games of chance, they found the beloved sport of horse racing to be a legally permissible game of skill.<sup>104</sup>

During the Civil War, horse racing appreciation became national when states began encouraging the sport to find and propagate faster cavalry horses.<sup>105</sup> Starting in 1864, dedicated horse racing tracks began to open, and “by the 1880’s horseracing’s influence was felt ‘in or near the larger cities in all parts of the United States.’”<sup>106</sup> Meanwhile, the French developed the pari-mutuel (French for “mutual bet”) wagering system in which pooled bets are paid out based on odds generated by participants’ bet distribution.<sup>107</sup> The pari-mutuel system eventually became “the dominant form of horserace gambling.”<sup>108</sup>

Horse racing’s popularity reached historic heights in the late 1800s,<sup>109</sup> but Protestant opposition to gambling, crime, and animal abuse eventually prompted an anti-racing movement.<sup>110</sup> Though pari-mutuel wagering was only allowed in Kentucky, Maryland, and Louisiana in the early 1920s, it proliferated illegally<sup>111</sup> until a prolegalization effort succeeded in the North. Though many Protestant-majority Southern states still refused to legalize horse racing,<sup>112</sup> all Northern states allowed racing tracks.<sup>113</sup> In the face of the Great Depression, ten states, including Texas, legalized racing to increase their revenues.<sup>114</sup> The sport continued to grow in popularity through the 1950s, and government revenues from horse racing continued to increase yearly through 1975.<sup>115</sup>

In more recent times, concern over horses’ health and competition from other forms of gambling, among other factors, have led to a steady decline in American horse racing.<sup>116</sup> In modern times, horse racing’s popularity has waned, ranking 13th among American sports, behind high school sports and figure skating.<sup>117</sup>

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104. DOJ, *supra* note 64, at 263-64.

105. *Id.* at 88.

106. *Id.* at 88-89 (quoting H. SELECT COMM. ON CRIME, ORGANIZED CRIM. INFLUENCE IN HORSERACING, H.R. REP. NO. 93-326, at 98 (1973)).

107. *Id.* at 89.

108. *Id.* at 90.

109. Riess, *supra* note 96, at 37. At horse racing’s peak, Americans bet millions at the 314 tracks nationwide. *Id.*

110. *Id.*

111. DOJ, *supra* note 64, at 103.

112. *Id.* at 106.

113. *Id.*

114. Riess, *supra* note 96, at 39.

115. *Id.* at 41.

116. *Id.* at 44-45.

117. *Id.* at 46.

C. *States' Enduring Addiction to the Lottery*

Despite governmental vacillation on lottery legality, lotteries helped establish and fund many of America's important institutions and are used as a source of government revenue by most states today.<sup>118</sup> After England stopped sending its own lottery funding to the Americas, the colonists turned to domestic lotteries to raise capital.<sup>119</sup> Up until the Civil War, American lotteries proved an effective tool for collecting money to build roads, hospitals, churches, and colleges.<sup>120</sup>

In the early to mid-1800s, newly empowered Democrats used the lottery to pit working class Americans against the elitist Whigs by likening the lottery to Whig corporations.<sup>121</sup> Buoyed by an Evangelical campaign against the lottery,<sup>122</sup> "the perception that lotteries were a voluntary tax . . . was gradually replaced by a belief that they actually imposed a highly regressive levy."<sup>123</sup> New York led the movement by banning the lottery in 1821.<sup>124</sup> However, after the Civil War and Reconstruction, lotteries were reimplemented in some Southern and Western states to provide financial funding to hurting state governments.<sup>125</sup> Most notoriously, the Louisiana Lottery was "sold in every state and territory in the nation" by 1877.<sup>126</sup> To end the interstate impact of state lotteries, like Louisiana's, Congress ultimately banned lottery materials from interstate commerce in 1895.<sup>127</sup> This Federal action reflected public sentiment "that lotteries [were] to be regarded . . . as among the most dangerous and prolific sources of human misery."<sup>128</sup>

Consequently, the lottery remained dormant for the first half of the 20th century until New Hampshire reintroduced its state-run lottery in 1964, signaling a return to lottery usage.<sup>129</sup> Tantalized once again by its

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118. Forty-four states today offer lotteries. Only six states, Alaska, Hawaii, Utah, Nevada, Alabama, and Mississippi, prohibit lotteries. *The 6 States Where You Can't Play Powerball*, ABC NEWS (Jan. 13, 2016), <https://abcnews.go.com/US/states-play-powerball/story?id=36267614>.

119. Rychlak, *supra* note 61.

120. *Id.* at 25. American lotteries were used to build or improve forty-seven colleges, including Harvard, Yale, Princeton, and Dartmouth. *Id.* at 299-300.

121. *Id.* at 32.

122. Herbert Hovenkamp, *Law and Morals in Classical Legal Thought*, 82 IOWA L. REV. 1427, 1447 (1997).

123. Rychlak, *supra* note 61, at 33.

124. DOJ, *supra* note 64, at 167.

125. Rychlak, *supra* note 61, at 38-39.

126. *Id.* at 40 (citations omitted). The infamous Louisiana Lottery, chartered in 1868, was also known as "The Serpent." *Id.*

127. *Id.* at 42-44.

128. *Id.* at 12-13.

129. Rychlak, *supra* note 88.

generous revenues, states began reimplementing the lottery.<sup>130</sup> By 1974, eleven states had legal lotteries,<sup>131</sup> and today, forty-four states, including Texas, have legalized lotteries.<sup>132</sup>

*D. Texas Gambling Law and Its Regional Influences*

Influenced by the West and the South, Texas gambling laws have historically disfavored public displays of gambling and games of chance but still resulted in the legalization of the lottery and pari-mutuel gambling.<sup>133</sup> Texas's first laws against gambling were in 1837, outlawing "games of chance."<sup>134</sup>

Consistent with the codes of its Western neighbors, Texas's 1856 Penal Code defined illegal gambling as gambling perpetrated in public, allowing individuals to privately gamble on games of chance.<sup>135</sup> The case law that helped form this statutory private-public distinction established two main factors for defining the term "public": (1) the proximity and relation of the location to an ordinary dwelling house and (2) the location's frequency of use by gamblers.<sup>136</sup> These two factors emerged from three cases decided in 1855, all called *Wheelock v. State*, involving the same gambler, William H. Wheelock.<sup>137</sup> In *Wheelock I* and *Wheelock II*, Wheelock first gambled in an "unoccupied dwelling house" and then in "a vacant house used for 'a sleeping apartment only.'"<sup>138</sup> The court determined that Wheelock's first two gambling locations were "outhouse[s] where people resort,"<sup>139</sup> meaning they were within the public's view because of their proximity to residences.<sup>140</sup> Turning to the locations' frequency of use, the court decided that evidence of previous gambling use and contemporaneous observers' presence at these buildings made them public under the gambling statute.<sup>141</sup> However, in *Wheelock*

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130. *Id.*

131. *Id.*

132. *The 6 States Where You Can't Play Powerball*, *supra* note 118.

133. DOJ, *supra* note 64, at 380.

134. Act of June 25, 1837 (An Act to Suppress Gambling) § 1 (repealed 1840), *reprinted in* 1 OLIVER C. HARTLEY, A DIGEST OF THE LAWS OF TEXAS 457, art. 1458 (Philadelphia, Thomas, Cowperthwait & Co. 1850); Tate, *supra* note 77, at 131.

135. DOJ, *supra* note 64, at 380.

136. Tate, *supra* note 77, at 134.

137. *Wheelock v. State (Wheelock I)*, 15 Tex. 253 (1855); *Wheelock v. State (Wheelock II)*, 15 Tex. 257 (1855); *Wheelock III*, 15 Tex. 260 (1855); Tate, *supra* note 77, at 134-35.

138. Tate, *supra* note 77, at 135.

139. *Wheelock I*, 15 Tex. 253.

140. Tate, *supra* note 77, at 135.

141. *Id.*

III, “although the location was an abandoned house similar to that in *Wheelock I*,” the court was unable to declare the location public because it “failed the frequency-of-use test.”<sup>142</sup>

In *Wheelock III*, the Texas Supreme Court expressed frustration with the Texas Legislature’s choice to allow private places as exceptions to the gambling law, stating that “[t]he legislature would, perhaps, more effectually have suppressed the evil they aimed to suppress, if they had prohibited all gaming, in whatever place.”<sup>143</sup> The court concluded that “[the lawmakers] appear to have intended the prevention of the evil example rather than the suppression of the evil itself.”<sup>144</sup> This statement articulates the seemingly contradictory goals of the Texas Legislature in allowing certain types and contexts of gambling, while decrying their evil and forbidding their public display.

Further, the Texas Supreme Court distinguished that “[a] place may be public during some hours of the day, and private during other hours.”<sup>145</sup> In Texas, a lawyer’s office may be a public place during the usual hours of business and private during the evening and night, while “a house ‘for retailing spirituous liquors’” may never be deemed private.<sup>146</sup> Yet even a card game in the middle of the woods was closely scrutinized by the Texas Supreme Court, which said that a place “may be made public, for the time being only, by the congregation of a number of people.”<sup>147</sup> Fortunately for those gamblers, the court considered their location private because they were out of view from the road, and there was no indication of previous gambling there.<sup>148</sup> Texas case law from this time effectuates the seemingly conflicting objectives of allowing working professionals to engage in civilized games like poker and averting the general public’s eye from its perceived evil.

An additional legal nuance of the mid-1800s, smacking of Western influence, is Texas’s historic ambivalence toward nonbanked games, like poker, and opposition toward banking games.<sup>149</sup> In *Stearnes v. State*, the court decried banking games as “one against the many” in which the bank would win all of the participants’ money if the game continued long

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142. *Id.*

143. *Wheelock III*, 15 Tex. 260, 264 (1855).

144. *Id.*

145. *Id.*

146. *Cherry v. State*, 30 Tex. 439, 440 (1867).

147. *Bledsoe v. State*, 21 Tex. 223, 223-24 (1858).

148. *Id.*

149. DOJ, *supra* note 64, at 381.



enough.<sup>150</sup> Bank games were prohibited due to the grave disadvantage posed to participants, whereas card games, like poker, played against opponents, rather than the bank, were permissible because they lacked the commercial nature of bank games.<sup>151</sup> This Western legal philosophy against gambling inequity also correlated with prohibiting betting on games of chance while allowing betting on games of skill, as was seen with horse racing.<sup>152</sup>

While the prevailing Western philosophy carefully defined and allowed for games of skill, Texas's gambling law in the 20th century ignored other states' example by constructing its law to apply to all card game bets.<sup>153</sup> As noted in *Hoffman v. State*, Texas courts have construed the legal code "as drawing no distinction between games of chance and games of skill, but as condemning all games upon which money or 'anything of value' is staked or waged on the outcome."<sup>154</sup> However, many other states were not so quick to dispose of the skill-chance distinction and instead employ a variation of four categories of tests to evaluate a game's skill and chance elements.<sup>155</sup> The dominant factor test is the most prevalent test used,<sup>156</sup> and it evaluates a game's elements to determine whether chance or skill is the dominant factor influencing the outcome of the game.<sup>157</sup>

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150. 21 Tex. 692, 697 (1858); DOJ, *supra* note 64, at 381.

151. DOJ, *supra* note 64, at 381.

152. *Id.*

153. TEX. PENAL CODE ANN. § 47.02 (West, Westlaw through end of 2017 Reg. & 1st C.S. of 85th Leg.).

154. 219 S.W.2d 539, 542 (Tex. Civ. App.-Dallas 1949) (no writ).

155. 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, 390-94 (2009). The four categories of tests are as follows: (1) Dominant Factor Test; (2) Material Element Test; (3) Any Chance Test; and (4) Gambling Instinct Test. *Id.*

156. *Id.* at 390-91.

157. *Id.* at 391. As an example of the analysis' difficulty, consider chess: a game that is traditionally considered a purely skill-based game, yet involves some element of chance. *Id.* Though the player with the white pieces always moves first, there is no method in the rules for determining who is white, so one player hides both colors behind her back and the other chooses a hand to determine her color. However, in certain tournament styles, the *Handbook* dictates that color is assigned "by drawing lots." *Handbook*, WORLD CHESS FED'N C.04.4.3(7.2), <https://www.fide.com/component/handbook/?id=168&view=article> (last visited Nov. 18, 2019). Notably, the player who moves first has a demonstratable statistical advantage. See generally Haroldo V. Ribeiro et al., *Move-by-Move Dynamics of the Advantage in Chess Matches Reveals Population-Level Learning of the Game*, 8 PLOS ONE 1 (2013).

When other states have applied the dominant factor test to Texas Hold 'Em, the results have been mixed.<sup>158</sup> Undeniably, the game involves an element of chance because a player with an initially weak hand can play the hand poorly but still win with the turn of a lucky card.<sup>159</sup> However, skilled players can employ sophisticated principles like statistical calculation, pattern recognition, and psychological understanding to consistently win the game,<sup>160</sup> contributing to the undeniable correlation between a player's skill and his or her consistent long-term profits.<sup>161</sup> Some courts have thoroughly examined poker under the dominant factor test and determined that it is predominantly a game of skill.<sup>162</sup> But even for other courts that admitted that "a skilled player may give himself a statistical advantage"<sup>163</sup> and that "skill can determine the outcome in a poker game,"<sup>164</sup> they found chance to be the dominant factor in poker.<sup>165</sup> Nevertheless, significant questions remain as to whether courts are correctly applying the dominant factor test to Texas Hold 'Em.<sup>166</sup> Many argue that the courts are erroneously looking at a single hand of poker, instead of evaluating a full session, which could consist of hundreds of hands.<sup>167</sup> Just as an amateur might beat a professional golfer on a single hole but would never beat the professional in a seventy-two-hole tournament, an amateur poker player might beat a professional in a single hand but would be unable to beat the professional in a longer series of hands.<sup>168</sup> Importantly, even if Texas nominally denies incorporating the chance-skill distinction in its gambling laws, this Western philosophy has still influenced Texas's historical and present legislative stance on horse race gambling.

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158. See Chuck Humphrey, *Poker as a Game of Skill: Recent Cases*, GAMBLING-LAW-US (Oct. 11, 2010), <http://www.gambling-law-us.com/Articles-Notes/Recent-Cases-Poker-Game-Skill.htm>; see also Romoser, *supra* note 50, at 523-24.

159. Romoser, *supra* note 50, at 522.

160. *Id.* at 522-23.

161. *Id.* at 523.

162. See, e.g., *United States v. Dicristina*, 886 F. Supp. 2d 164, 234 (E.D.N.Y. 2012), *rev'd*, 726 F.3d 92 (2d Cir. 2013); see also *Cabot & Hammum*, *supra* note 5, at 459; Humphrey, *supra* note 158 (describing the trial court decision in *Colorado v. Raley*, determining that poker is predominantly a game of skill).

163. *Joker Club, L.L.C. v. Hardin*, 643 S.E.2d 626, 627, 630-31 (N.C. Ct. App. 2007).

164. *Commonwealth v. Dent*, 992 A.2d 190, 196 (Pa. Super. Ct. 2010).

165. Romoser, *supra* note 50, at 523-24.

166. *Id.* at 524.

167. *Id.*

168. *Id.*

Early Texas law viewed horse racing as a legal game of skill,<sup>169</sup> selectively abandoning its concern over gambling's public visibility. Even though it was not legislatively sanctioned at the time,<sup>170</sup> Chief Justice Hemphill of the 1851 Texas Supreme Court described horse racing as a "sport" having a "distinctive designation . . . not prohibited by the law of the land."<sup>171</sup> He went on to reject the classification of horserace wagering as a "gambling device."<sup>172</sup> Despite this historic regard for horse racing, Texas's law prohibited pari-mutuel gambling for most of the 20th century.<sup>173</sup> Though contrary to Texas's modern anti-gambling stance, Texas voted to allow horse racing and pari-mutuel gambling in 1987 and tracks became fully operational in 1992.<sup>174</sup>

Despite its relatively recent establishment, the sport has steadily declined since its popularity peak in 2000.<sup>175</sup> However, the Texas legislature seems unwilling to allow the Texas Racing Commission, which administrates Texas's racing and pari-mutuel gambling, to rescue itself.<sup>176</sup> In an effort to add revenue to the racetracks' weak income, the Commission created a new rule sanctioning "historical racing," which allows gamblers to bet on an electronic simulation featuring old horseraces.<sup>177</sup> The Commission was then forced to repeal the rule after the Texas Legislature threatened to halt funding and shut down The

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169. *McElroy v. Carmichael*, 6 Tex. 454 (1851).

170. Julie Domel, *From the Vault: Betting on Horse Racing Made Illegal in Texas in 1937 . . . Again*, MYSA (Aug. 19, 2010, 4:08 PM), <https://blog.mysanantonio.com/vault/2010/08/from-the-vault-betting-on-horse-racing-made-illegal-in-texas-in-1937-again/>.

171. *McElroy*, 6 Tex. 456.

172. *Id.* (citations omitted).

173. Peter Applebome, *Texas to Vote on Legalizing Betting on Horses*, N.Y. TIMES (Nov. 2, 1987), <https://www.nytimes.com/1987/11/02/us/texas-to-vote-on-legalizing-betting-on-horses.html>. Horse racing was prohibited except for two anomalous four-year stints of legalization in 1905 and 1933. *Id.*

174. Vivian Elizabeth Smyrl, *Texas Racing Commission*, TEX. ST. HIST. ASS'N, <https://tshaonline.org/handbook/online/articles/mdtnq> (last visited Nov. 18, 2019).

175. At its financial peak in 2000, Texans wagered \$633.7 million on racetracks, whereas Texans only bet \$285 million in 2018. JOHN T. STEEN III, TEX. RACING COMM'N, TEXAS RACING COMMISSION 2018 ANNUAL REPORT 2 (2019). Racetrack attendance was only at 1.5 million in 2013, less than half of its peak in 2000. Gary Jacobson, *A Last Hurrah for Texas Horse Racing?*, DALL. MORNING NEWS (May 2014), <https://www.dallasnews.com/business/business/2014/05/03/a-last-hurrah-for-texas-horse-racing>.

176. Jamie Lovegrove, *Texas Racing Commission Nixes Historical Racing*, TEX. TRIB. (Feb. 18, 2016), <https://www.texastribune.org/2016/02/18/texas-racing-commission-repeals-historical-racing/>.

177. *Id.*

Commission.<sup>178</sup> Ignoring the revitalization successes of other states,<sup>179</sup> the Texas Legislature seems unwilling to help the racing industry.

Another uncharacteristic Texas gambling expansion was its legalization of the lottery in 1992.<sup>180</sup> As other states used important governmental projects to justify the lottery's negative impact, Texas also created its lottery under the premise of a noble goal, fully funding Texas education.<sup>181</sup> But even at the beginning, the Lottery proceeds were never fully dedicated to Texas education and instead went into the state's general revenue fund for the first five years.<sup>182</sup> Even today, not all of the profits go to Texas schools, with only 27.1% of the revenue going to the Foundation School Fund.<sup>183</sup> Somewhat betraying its noble intentions through its failure to fully fund Texas education<sup>184</sup> or to exclusively dedicate its revenue to Texas education, the Texas Lottery remains intact because of its irresistible appeal as a voluntary tax.

Currently, Texas statute broadly defines gambling to include both games of chance and games of skill,<sup>185</sup> but the law permits private, social gambling.<sup>186</sup> At first, this law seems consistent with Texas's history of allowing private forms of gambling and disallowing public gambling observation, however, the existence of both the lottery and pari-mutuel gambling confounds any perceived legal consistency. By sanctioning and administering two different forms of gambling, Texas has opened the door for other exceptions to its allegedly strict anti-gambling stance. Texas's current gambling law seems targeted at the more dated objective of protecting the public from gambling's evil example; however, the law's goal should be shifted toward controlling the inequities of gambling. The

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178. *Id.*

179. Ray Paulick, 'We Believe in the Future of Horse Racing': Belinda Stronach Outlines Plans for Company's Assets, PAULICK REP. (Nov. 12, 2018), <https://www.paulickreport.com/news/ray-s-paddock/we-believe-in-the-future-of-horse-racing-belinda-stronach-outlines-plans-for-companys-assets/>.

180. Pennylynn Webb, *Texas Lottery—Another Broken Promise from Austin*, PALESTINE HERALD-PRESS (Mar. 8, 2018), [https://www.palestineherald.com/news/texas-lottery-another-broken-promise-from-austin/article\\_672048c2-2347-11e8-b409-6b6c5e99a140.html](https://www.palestineherald.com/news/texas-lottery-another-broken-promise-from-austin/article_672048c2-2347-11e8-b409-6b6c5e99a140.html).

181. *Id.*

182. *Id.*

183. *Id.* The Texas Lottery's revenue is apportioned as followed: 62.5% goes to winners, 5.4% goes to retailer commissions, 4% goes to administrative costs, and 0.4% goes to Veterans Assistance. Additionally, unclaimed prize money, totaling \$626 million from 1992 to 2011, is not designated for the education fund, but goes to the state's general fund instead. *Id.*

184. *Id.* Though legislators originally promised the Lottery would fully fund Texas education, the funds only paid about 5% of the Texas education budget in 2015. *Id.*

185. TEX. PENAL CODE ANN. § 47.02(a) (West, Westlaw through end of 2017 Reg. & 1st C.S. of 85th Leg.).

186. *Id.* § 47.02(b).

historically Western influences that focused on allowing non-banked games and games of skill should be resurrected to amend current Texas law. As Texas Hold ‘Em is a non-banked game, considered by many a game of skill, this game should fit within Texas’s philosophically Western legal framework.

#### IV. PURSUING A COMMERCIAL GAME: ARE CARD ROOMS THE ANSWER?

There are currently three physical venue options for poker: a private locale, a casino, and a card room.<sup>187</sup> Though Texans are permitted to play Texas Hold ‘Em at private locations, Texas law clearly prohibits casinos,<sup>188</sup> and this Article assesses whether card rooms are currently a viable legal option for commercial play. Current Texas card room owners believe they have created a legally permissible operational structure,<sup>189</sup> but their card rooms violate the Texas statutes against “keeping a gambling place” and against “gambling promotion,” exposing owners to potential federal prosecution.<sup>190</sup>

##### A. *The Dilemma*

To play Texas Hold ‘Em, one must either organize a private game, such as a game in one’s home, or participate in a commercially operated game, such as a game in a casino or card room. In a commercially operated poker game the operator—or “house”—furnishes the venue, dealer, and supplies in exchange for a rake from each betting pot. By contrast, in a private game, the host proffers the furnishings at his or her expense and does not generally utilize a dealer.

Although private games are currently the only legal way to play Texas Hold ‘Em in Texas, this format suffers from several detrimental limitations. First, private games deny players on-demand games because a would-be host, rather than the interested poker player, has the power to decide when a game will be held in their home. Second, private games inhibit a player’s skill development. Players desiring to improve their poker skills by encountering new players would be forced to engage in an

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187. This Article does not address the alternative, nonphysical venue of the Internet.

188. PENAL § 47.04. This law against “keeping a gambling place” is subsequently explained. See discussion *infra* Section IV.B.

189. Matt Keyser, *Legal Poker Clubs in Texas? Don’t Bet Big Just Yet*, KHOU-TV (Mar. 6, 2018), <https://www.khou.com/article/news/local/texas/legal-poker-clubs-in-texas-dont-bet-big-just-yet/285-526408156>.

190. See discussion *infra* Sections IV.A-C.

overwhelming amount of coordination. While a commercial game provides consistent operation and fosters a steady supply of participants, a private game's imposition upon its host would never allow for the same availability of poker games and players. Finally, and most frighteningly, private games fail to provide players with proper security. Brimming with cash, poker games are the perfect target for theft, including dangerous criminal acts, such as armed robbery.<sup>191</sup> As potential targets, both the host and the poker player live in constant fear for their safety.<sup>192</sup>

As a result of these limitations, private games are an inadequate alternative to a commercial venue for poker players. Having a dependable and safe location to play Texas Hold 'Em is only practicable through a commercial venue. But because Texas lacks casinos,<sup>193</sup> card rooms appear to be the best solution for recreational and professional poker players trying to play Texas Hold 'Em in Texas. However, the legality of these rooms is far from clear. Texas card rooms began opening in 2015, labeling themselves as "private poker clubs."<sup>194</sup> Proponents of these card rooms believe that the branding and structure of these private clubs exploit an alleged loophole in the Texas gambling laws.<sup>195</sup> Although some of these card rooms, like those in Houston,<sup>196</sup> have operated without legal pushback, pending litigation threatens several Austin and San Antonio card rooms.<sup>197</sup> The Attorney General of Texas has declined to comment about these ongoing investigations,<sup>198</sup> but police action in the Dallas area shows the fragility of the card rooms' status. Most recently, a card room

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191. Storied Texas Hold 'Em legend Doyle Brunson tells of the numerous times he had to look "down at the business end of a shotgun" during armed robberies of his poker games. DOYLE BRUNSON, *SUPER SYSTEM: A COURSE IN POWER POKER 7* (3d ed. 1979); see also *Trial Begins in Case of 2014 Murder at Private Poker Game Near Houston*, CARDSCHAT (Oct. 9, 2018), <https://www.cardschat.com/news/trial-begins-in-case-of-2014-murder-at-private-poker-game-near-houston-72401>.

192. John MacCormack, *Poker Rooms Flourishing, But Will the Law Shut Them Down*, SAN ANTONIO EXPRESS-NEWS (Oct. 19, 2018), <https://www.expressnews.com/news/local/article/Poker-rooms-flourishing-but-will-the-law-shut-13320725.php>.

193. Texas has one, undisputedly legal, Native American Casino, the Kickapoo Lucky Eagle Casino. *Texas Casinos*, 500 NATIONS, [https://www.500nations.com/Texas\\_Casinos.asp](https://www.500nations.com/Texas_Casinos.asp) (last visited Jan. 12, 2019).

194. Keyser, *supra* note 189.

195. *Id.*

196. Ted Oberg, *Legal Gambling? Poker Rooms in Texas Teeter on a 'Razor's Edge'*, ABC13 NEWS (Apr. 6, 2018), <https://abc13.com/legal-gambling-how-poker-rooms-find-a-path-to-legality/3306850/>.

197. Sean Chaffin, *AG Offers No Opinion on Texas Poker Clubs, Lawsuit Continues*, POKERNEWS (July 13, 2018), <https://www.pokernews.com/news/2018/07/ag-offers-no-opinion-on-texas-poker-clubs-lawsuit-continues-31489.htm>.

198. *Id.*

called FTN Poker in McKinney, Texas, was forced to close on October 24, 2017, after the McKinney Police Department threatened to file criminal charges against it.<sup>199</sup> The nearby city of Plano, Texas, also dealt with this issue and forced Poker Rooms of Texas to close its doors in 2017.<sup>200</sup> The Plano Police Department's senior legal advisor commented that "[t]he model we have seen that seems to be popular falls under illegal gambling."<sup>201</sup>

Card room owners who believe their operations are legal would be well advised to more rigorously examine Texas law while also taking note of the relevant federal gambling laws that raise the stakes of their actions. Specifically, the Texas statutes against "keeping a gambling place" and "gambling promotion" prohibit the activities of these card rooms, which potentially subject card room owners to federal prosecution under gambling laws like the Illegal Gambling Business Act.<sup>202</sup>

#### B. *Texas Law's Impact on Card Rooms*

Since Texas Hold 'Em firmly sits within Texas's definition of gambling, card room owners and participants must rely on statutory defenses to avoid being convicted of gambling offenses. Attempting to shield themselves from violating Texas's law against "keeping a gambling place," card room owners have intentionally structured their operations to satisfy this statute's affirmative defense.

According to Chapter 47 of the Texas Penal Code, gambling occurs when one "plays and bets for money . . . at any game played with cards."<sup>203</sup> Therefore, there is no doubt that when one plays Texas Hold 'Em, for money, it is considered a gambling activity.<sup>204</sup> However, it is a defense to the charge of gambling if three elements are met.<sup>205</sup> First, the game is played in a private place.<sup>206</sup> A private place is defined as "a place

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199. Valerie Wigglesworth, *McKinney Poker Club Closes Rather than Face Criminal Charges over Illegal Gambling*, DALL. MORNING NEWS (Oct. 2017), <https://www.dallasnews.com/news/mckinney/2017/10/24/mckinney-poker-club-closes-rather-face-criminal-charges-illegal-gambling>.

200. Meredith Yeomans, *Poker Clubs in Collin County Shut Down*, NBC DFW (Oct. 24, 2017), <https://www.nbcdfw.com/news/local/Poker-Clubs-in-Collin-County-Shut-Down-452924663.html>.

201. Wigglesworth, *supra* note 199.

202. See discussion *infra* Section IV.C.

203. TEX. PENAL CODE ANN. § 47.02 (West, Westlaw through end of 2017 Reg. & 1st C.S. of 85th Leg.).

204. *Id.*

205. *Id.*

206. *Id.* § 47.02(b).

to which the public does not have access.”<sup>207</sup> This definition excludes places like restaurants, taverns, and common areas of apartments.<sup>208</sup> Second, and the most relevant legal provision, “no person received any economic benefit other than personal winnings.”<sup>209</sup> Third, all participants bear the same risks of winning and losing.<sup>210</sup> In a properly played Texas Hold ‘Em game, all participants always have the same risks of winning and losing, so a fairly played game easily fulfills the third element. If all three elements are met, then the defense is satisfied, and participation in a Texas Hold ‘Em game is legal.<sup>211</sup>

In addition to the offense of gambling participation, one commits the crime of “keeping a gambling place” by allowing one’s property to be used “as a gambling place.”<sup>212</sup> A “gambling place” is any real estate used for “the making or settling of bets.”<sup>213</sup> Since a “bet” is “an agreement . . . to win or lose something of value . . . ‘partially by chance,’”<sup>214</sup> Texas Hold ‘Em certainly involves multiple bets per game. But just as the law provided the three-element defense to the charge of gambling, Texas law repeats the same three-element test for “keeping a gambling place,” except that this statute provides it as an affirmative defense.<sup>215</sup>

Applying these statutes to the current card rooms in Texas, club owners and participants alike depend on a successful defense to the charges of gambling and keeping a gambling place. The first and third elements of the defense are satisfied with relative ease; however, the second element, that “no person receive any economic benefit” other than personal winnings, is likely insurmountable. Texas card rooms emphasize their private nature by insisting on the title of private clubs and creating a membership requirement for patronage.<sup>216</sup> Instead of taking a traditional rake, as one might see in a casino, Texas poker rooms charge their members an hourly participation fee.<sup>217</sup> Card room owners insist that, by

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207. *Id.* § 47.01(8).

208. *Id.*

209. *Id.* § 47.02(b).

210. *Id.*

211. *Id.* § 47.02.

212. *Id.* § 47.04.

213. *Id.* § 47.01(3).

214. *Id.* § 47.01(1).

215. *Id.*

216. *Id.* § 47.02(b); Jon Sofen, *Texas Post Oak Poker Club Owner Daniel Kebort on Lone Star State Legality: CardsChat Exclusive*, CARDSCHAT (May 13, 2018), <https://www.cardschat.com/news/texas-poker-club-owner-on-card-room-legality-cardschat-exclusive-63193>.

217. Sofen, *supra* note 216.



foregoing a rake and charging an hourly fee, they are not receiving an “economic benefit.”<sup>218</sup>

The first element, that the game take place in a private place, is likely met through these clubs’ membership structures. Whereas a private place means “a place to which the public does not have access,”<sup>219</sup> the poker clubs’ use is only open to its members.<sup>220</sup> While labeling their establishments “clubs” and using a membership structure might seem to define the poker clubs as private, whether a place is private can be “a question of fact, or a mixed question of law and fact, and is always proper to be submitted to the jury.”<sup>221</sup> So while the poker clubs would likely be considered private, prosecutors could argue that when a member of the public can walk into a poker club, acquire membership, and begin playing within minutes, these clubs betray the purpose of the law.<sup>222</sup> Depending on the facts and law submitted, a jury’s classification of a poker club as private might not be certain. Regardless, these poker clubs almost certainly satisfy the third element of the defense, that all participants bear equal risk, if they are hosting fair games of Texas Hold ‘Em.

Facially, operating a commercial Texas Hold ‘Em venue where “no person receive[s] any economic benefit other than personal winnings”<sup>223</sup> seems impossible. Two types of individuals normally derive economic benefit from a Texas Hold ‘Em game: dealers, who would ordinarily profit from tips,<sup>224</sup> and owners, who ordinarily profit from the rake.<sup>225</sup> Club owners seem to think that by foregoing a rake, they are not receiving an economic benefit from the gambling activities.<sup>226</sup> Even though the membership structure avoids a rake, arguably shifting the direct profit

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218. *Id.*

219. PENAL § 47.01(8).

220. Sofen, *supra* note 216.

221. Parker v. State, 26 Tex. 204, 207 (1862).

222. “The object of the law is to prevent gaming at places which are within the observation of persons indiscriminately, because of the consequences resulting from the evil example.” *Id.* “Whether a place is private for such purposes has been determined by the scope of access by others.” Op. Att’y Gen. DM-344 (1995).

223. PENAL § 47.02(b)(2).

224. “The dealer received money as a tip for each hand he dealt . . . . The dealer’s tips were an economic benefit . . . .” *Gaudio v. State*, No. 05-91-01862-CR, 1994 WL 67733 (Tex. App.-Dallas 1994) (writ ref’d) (mem. op., not designated for publication).

225. The casino provides a dealer, who does not play, and the casino makes money by taking a percentage of each pot, charging an hourly fee, or collecting a flat amount for every hand. The first of these is the most common; a “rake” (percentage extracted) of 5% to 10% is typical. Cabot & Hannum, *supra* note 5, at 453.

226. Matt Keyser, *Houston Councilman on Poker Rooms: ‘Illegal Under Texas Law,’* KHOU-TV (Apr. 30, 2018), <https://www.khou.com/article/news/local/houston-councilman-on-poker-rooms-illegal-under-texas-law/285-547352800>.

source away from the gambling activity itself, the membership's sole objective is participation in gambling. Further, even if one successfully argues that a club's benefit was merely incidental to gambling, the catchall, "any," of the statute's phrase "any economic benefit"<sup>227</sup> seems to encompass indirect profits from a gambling-based membership program. The dealers, who are forbidden from accepting tips in the form of poker chips, depend on a similar parsing of "economic benefit" and exclusively accept cash tips.<sup>228</sup> This practice is implemented through the card room's policy of disallowing cash within the poker games and instead requiring players to convert money into poker chips with the cashier before they begin a game.<sup>229</sup>

Texas card rooms' folly is well demonstrated by a Court of Appeals case in Dallas, *Gaudio v. State*.<sup>230</sup> In this case, Richard Gaudio rented an apartment to conduct a regular poker game with his friends.<sup>231</sup> With the agreement of the group, Gaudio used a small percentage of each betting pot, similar to a rake, to pay for the apartment's expenses.<sup>232</sup> Unlike a normal rake taken by the house, the money was strictly used for apartment expenses and not for Gaudio's personal profit.<sup>233</sup> The poker group also used a dealer who occasionally played with them and received tips during the games.<sup>234</sup> Through these tips the dealer received an economic benefit, defeating Gaudio's potential affirmative defense against the charge of keeping a gambling place.<sup>235</sup> However, the court also analyzed whether Gaudio's particular conduct of paying rent from cuts of the betting pot would have independently disqualified him from an affirmative defense.<sup>236</sup> Since paying the rent with money taken from the pots relieved Gaudio of his legal obligation to pay rent, the court found that this service also qualified as an economic benefit and would independently destroy his affirmative defense.<sup>237</sup>

Directly applying *Gaudio* to current Texas card rooms, even if venues benevolently operated with the sole purpose of covering building

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227. PENAL § 47.02(b).

228. Sofen, *supra* note 216.

229. *Id.*

230. No. 05-91-01862-CR, 1994 WL 67733 (Tex. App.-Dallas 1994) (writ ref'd) (mem. op., not designated for publication).

231. *Id.* at \*1.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at \*3.

236. *Id.*

237. *Id.*

expenses, the profit from the gambling activity would be considered an economic benefit. Since these card rooms all operate to profit their owners beyond simple overhead-reimbursement, their economic benefit is even clearer than that in *Gaudio*, disqualifying them from an affirmative defense against keeping a gambling place. However, *Gaudio* also offers a glimmer of hope to card room owners in its dicta. Relying on a practice summary commentary, *Gaudio* suggests that the analysis of “no person” receiving an economic benefit should instead focus on “no person gambling there.”<sup>238</sup> Practice commentary authors Seth S. Searcy III and James R. Patterson wield particularly persuasive authority on the law’s intent due to their involvement in its creation.<sup>239</sup> While insignificant to granting exculpation for *Gaudio*, using this commentary’s wording might open the door for club owners to argue that they are not a person “gambling there” but instead are remotely collecting membership profits.<sup>240</sup> This phrasing could also exclude the dealer, who would not be “gambling there” with the patrons but simply receiving tips. Relying on the commentary’s interpretation of legislative intent, club owners might be able to successfully argue against their own economic benefit since they are not a person “gambling there,” allowing them to complete their affirmative defense against keeping a gambling place.

Though participation in gambling and keeping a gambling place are often the legal foci of card room owners attempting to comply with Texas law, “gambling promotion” is the most damning statute for these clubs since the statute omits an affirmative defense and implicates any piece of real estate where bets are made.<sup>241</sup> Like “keeping a gambling place,” “gambling promotion” also references a “gambling place” but occurs when one “operates or participates in the earnings of a gambling place.”<sup>242</sup> As defined above, a “gambling place” is any real estate where one makes

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238. *Id.*

239. H.C.R. No. 109, 80(R) Leg. (Tex. 2007). “Searcy was the staff director for the Texas Penal Code Revision Project . . . [and] served as the bar committee’s chief lobbyist for the proposed code in the 62nd Texas Legislature.” *Id.* “Patterson was a staff lawyer on the Penal Code project during 1969 and 1970.” He was also “on the staff of the Texas Legislative Council” during 1973 and “assisted the subcommittee of the House Committee on Criminal Jurisprudence that considered the Penal Code bill.” *Id.*

240. Though the court applied the same commentary’s statutory interpretation, the court found the dealer to be a “person gambling there” because he occasionally participated in the games with them. *Gaudio*, 1994 WL 67733. Unlike *Gaudio*, card room owners would not be participating in their own poker games.

241. TEX. PENAL CODE ANN. § 47.01(3) (West, Westlaw through end of 2017 Reg. & 1st C.S. of 85th Leg.).

242. *Id.* § 47.03.

or settles bets, clearly including a Texas Hold 'Em venue.<sup>243</sup> By operating and making money from real estate where Texas Hold 'Em is played, card room owners directly violate the gambling promotion law, rendering useless their already tenuous affirmative defense argument against keeping a gambling place. Prosecutors are increasingly utilizing the gambling promotion law to convict poker club owners.<sup>244</sup>

Since card room owners violate Texas's law against gambling promotion and almost certainly fail to affirmatively defend themselves against the charge of keeping a gambling place, their operations are federally categorized as illegal gambling businesses. Several federal statutes punish gambling businesses that are illegally operating under state law.<sup>245</sup> Therefore, card room owners have inadvertently subjected themselves to possible prosecution under federal law.

### C. Federal Law's Impact on Card Rooms

Independent from Texas's laws against gambling, there are several potentially relevant federal laws that might affect card room owners and individuals attempting to gamble. The main federal laws that criminalize gambling are the Interstate Wire Act of 1961 (Wire Act), the Illegal Gambling Business Act of 1970 (IGBA), the Unauthorized Internet Gambling Enforcement Act of 2006 (UIGEA), the International Travel Act (Travel Act), and formerly the Professional and Amateur Sports Protection Act of 1992 (PASPA). While some of these laws require the predicate violation of a state law to be triggered, others are independently federal crimes. Therefore, each federal law must be analyzed to understand its effect on Texas card rooms.

The Wire Act would affect any card room that attempts to transmit qualifying betting information interstate.<sup>246</sup> In order to prosecute under this Act, the government must prove that a defendant who is "engaged in the business of betting or wagering" used "a wire communication facility" to transmit certain types of gambling information.<sup>247</sup> If any Texas law incorporated online communication for transmission of gambling

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243. *Id.* § 47.01(3).

244. *Legal Guide*, STOP ILLEGAL GAMBLING HOUS., <https://www.stopillegalgamblinghouston.org/legal-guide> [[https://web.archive.org/web/20191201000000\\*/https://www.stopillegalgamblinghouston.org/](https://web.archive.org/web/20191201000000*/https://www.stopillegalgamblinghouston.org/)] (last visited Nov. 18, 2019).

245. See discussion *infra* Section IV.C.

246. Romoser, *supra* note 50, at 525. The law is called the "Wire" Act because it was originally targeting telegraph transmissions. *Id.*

247. 18 U.S.C.A. § 1084 (West, Westlaw through Pub. L. No. 115-281 (including Pub. L. Nos. 115-283 to 115-333, 115-335 to 115-384, 115-386, 115-391 to 115-396, and 115-398)).

information, the Wire Act could be violated. Outside of this Article's purview, the Wire Act likely prohibits individuals in any state, including Texas, from playing online poker,<sup>248</sup> since it would involve the "transmission of a wire communication which entitles the recipient to receive money . . . as a result of . . . wagers."<sup>249</sup>

Inapplicable to individual poker players but very important for card room owners, the IGBA creates federal liability for any gambling business in violation of state law.<sup>250</sup> According to the statute, an "illegal gambling business" is one that violates state or local law, has five or more individuals involved in the business, and has made over \$2000 in a single day or has operated for over thirty days.<sup>251</sup> Assuming a card room passes these low longevity and profit thresholds, a card room's violation of a Texas law, like keeping a gambling place or engaging in gambling promotion, brands it as an illegal gambling business, prosecutable under the IGBA.

Focusing on electronic betting transmission, the UIGEA would only be applicable to card rooms if they allowed online betting elements or became electronically interconnected with other card rooms. Designed to prevent electronic payments to Internet casinos,<sup>252</sup> the UIGEA prohibits those "engaged in the business of . . . wagering" from accepting various currencies from participants "in unlawful Internet gambling."<sup>253</sup> Such "unlawful Internet gambling" occurs when one "transmit[s] a bet or wager by any means . . . where such bet or wager is unlawful under any applicable Federal or State law."<sup>254</sup> Therefore, one can only violate the UIGEA after first violating another state or federal law.<sup>255</sup> Further, there is dispute as to whether UIGEA's definition of bet or wager, defined as "the

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248. An official opinion from the Office of Legal Counsel concluded "that the Act's prohibitions relate solely to sports-related gambling activities in interstate and foreign commerce." *Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act*, 35 Op. O.L.C. 1, 12 (2011), <http://www.justice.gov/olc/2011/state-lotteries-opinion.pdf>. However, on November 2, 2018, the Office of Legal Counsel changed its interpretation of the Wire Act, declaring that the prohibitions of the text "appl[ie]d to non-sports-related betting or wagering." *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 35 Op. O.L.C. 1 (2018).

249. 18 U.S.C.A. § 1084(a).

250. Romoser, *supra* note 50, at 531.

251. 18 U.S.C.A. § 1955(b)(1).

252. Nicholas M. Wajda, *Over-Playing a Weak Hand: Why Giving Individual States a Choice Is a Better Bet for Internet Gambling in the United States*, 29 T. JEFFERSON L. REV. 313, 328 (2007).

253. 31 U.S.C.A. § 5363 (West, Westlaw through Pub. L. No. 115-281 (including Pub. L. Nos. 115-283 to 115-333, 115-335 to 115-384, 115-386, 115-391 to 115-396, and 115-398)).

254. *Id.* § 5362(10)(A).

255. Romoser, *supra* note 50, at 535.

staking . . . of something of value upon . . . a game subject to chance,”<sup>256</sup> includes poker bets.<sup>257</sup> If Texas Hold ‘Em was excluded from the category of “a game subject to chance,” poker bets would not be considered a bet or wager and their electronic transmission would not be subjected to UIGEA prosecution, completely immunizing card rooms from the UIGEA.<sup>258</sup> However, the plain meaning of “a game subject to chance” seems to encompass Texas Hold ‘Em,<sup>259</sup> confirmed by the infamous UIGEA indictments against the United States’ largest poker websites in 2011.<sup>260</sup>

If the current Texas card rooms developed an interstate footprint, they might be subjected to punishment under the Travel Act of 1961. The Travel Act prohibits use of “the mail or any facility in interstate or foreign commerce” for “any unlawful activity.”<sup>261</sup> Just like the IGBA and the UIGEA, one must violate state or federal law to trigger potential prosecution under the Travel Act. The “unlawful activity” is defined as “any business . . . involving gambling . . . in violation of the laws of the State . . . or of the United States.”<sup>262</sup> Like the IGBA and UIGEA, the Travel Act targets businesses, like an illegal interstate card room, instead of individual gamblers.<sup>263</sup> However, the Travel Act does not seem to pose a major threat to local Texas card rooms that confine themselves to intrastate commerce.

Finally, PASPA, which originally prohibited states from sponsoring sports betting, was struck down by the Supreme Court as unconstitutional in 2018 by *Murphy v. National Collegiate Athletic Ass’n*.<sup>264</sup> Though PASPA was aimed at sports betting and its demise does not directly affect poker, many anticipate that states’ rush to legalize sports betting could

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256. 31 U.S.C.A. § 5362(1)(A).

257. Kerry O’Brien, *The Great Wildcard: How 2011 Shook the Online Poker World and Became a Game-Changer in the Battle for Legalization*, 38 J. LEGIS. 295, 296 (2012).

258. Thomas A. Flynn, *The Ace in the Hole: Why the Unlawful Internet Gambling Enforcement Act Did Not Categorically Ban Online Poker in the United States*, 5 GEO. MASON J. INT’L COM. L. 75, 86 (2013).

259. *Id.*

260. *Id.* On “Black Friday,” April 15, 2011, the Department of Justice indicted three of the largest U.S.-serving poker websites, charging them with conspiracy to violate the UIGEA. Romoser, *supra* note 50, at 536.

261. 18 U.S.C.A. § 1952(A) (West, Westlaw through Pub. L. No. 115-281 (including Pub. L. Nos. 115-283 to 115-333, 115-335 to 115-384, 115-386, 115-391 to 115-396, and 115-398)); Michael J. Vener, *Internet Gambling Law: Is Prohibition Really Good Policy?*, 15 SW. J.L. & TRADE AM. 199, 204 (2008).

262. 18 U.S.C.A. § 1952(B).

263. Vener, *supra* note 261.

264. 138 S. Ct. 1461, 1471, 200 L. Ed. 2d 854 (2018).

buoy online poker legalization efforts and challenge some of its federal impediments.<sup>265</sup>

Texas card room operators are holding a losing hand. Card rooms likely violate at least two Texas laws, and their current operations trigger potential federal prosecution under at least the IGBA. Without current card rooms as a legal poker option, Texas Hold ‘Em players in Texas are limited to playing in private locations, like their homes, or seeking out-of-state poker venues.

## V. HOW TO BEST LEGALIZE TEXAS CARD ROOMS

The attempt of various Texas card rooms to commercialize Texas Hold ‘Em is bold but will likely prove futile without new laws. Legislative efforts to allow commercial card rooms could take several different forms. Two good options are (1) to amend the existing definition of gambling to include an enumeration of acceptable and unacceptable games or (2) to create a new authorizing statute to narrowly and specifically allow poker-hosting card rooms.

First, to legalize stand-alone card rooms, Texas should look to the California model, which governs sixty-six stand-alone card rooms, employs 23,000 workers, and generates about \$300 million in annual taxes.<sup>266</sup> Very similar to Texas’s historic concern about the inequality of banked games,<sup>267</sup> California’s central gambling statute prohibits “any banking or percentage games with cards.”<sup>268</sup> This statute governs gambling by identifying a particular list of prohibited games, like Roulette and Twenty-One,<sup>269</sup> while sanctioning poker games, like Texas Hold ‘Em, through omission.<sup>270</sup> California’s prohibition against percentage games, or games where the house takes a percentage of the gambling pot, parallels Texas’s gambling defense provision, only allowing gambling activities

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265. Tim Fiorvanti, *Does the SCOTUS Sports Betting Ruling Help in Legalization Efforts of Online Poker?*, ESPN (May 16, 2018), [http://www.espn.com/chalk/story/\\_/id/23513317/online-poker-potential-supreme-court-paspa-ruling](http://www.espn.com/chalk/story/_/id/23513317/online-poker-potential-supreme-court-paspa-ruling).

266. Hugo Martin, *California Card Club Owners Fear New Gambling Regulation Could Force Them to Fold on Blackjack-Type Games*, L.A. TIMES (Dec. 5, 2018), <https://www.latimes.com/business/la-fi-card-club-regulations-20181205-story.html>.

267. See discussion *supra* Section III.D.

268. CAL. PENAL CODE § 330 (West, Westlaw though Ch. 2 of 2019 Reg. Sess.).

269. *Id.*

270. *Tibbetts v. Van de Kamp*, 222 Cal. App. 3d 389, 396 (Ct. App. 1990). An 1885 amendment to California’s Penal Code section 330 included “stud-horse poker” in its list of prohibited games and was initially interpreted to include Texas Hold ‘Em (since it is a type of “stud game”). However, the court distinguished the two games and concluded that Texas Hold ‘Em was intentionally omitted from the list of prohibited games. *Id.*

where “no person receive[s] any economic benefit other than personal winnings.”<sup>271</sup> Both Texas and California statutes seem to be prohibiting the implementation of a house rake. While the current Texas card rooms attempt to circumvent this provision by supplanting a rake with a time-based membership fee, California card rooms replace rakes with a “drop” system, in which players are required to drop a set amount of money before each hand into a box produced by the dealer.<sup>272</sup>

Following California’s legal gambling model, Texas might be well served to statutorily define a specific list of legal and illegal gambling games within § 47.02(a) of its Penal Code, which defines gambling. By simply altering gambling’s definition, the other relevant Texas gambling offenses, like keeping a gambling place and gambling promotion, can remain unchanged and not affect card room operation. The gambling definition would enumerate prohibited banked games, like Californian law, but should also include an explicit list of acceptable non-banked gambling games, like Texas Hold ‘Em. However, Texas should veer from California’s prohibition of percentage games, in favor of allowing standard house rakes. Though California’s law seems to deliberately group banking and percentage games into one concept, they represent very different functions. While banking games pit participants against the house and are structured to significantly disadvantage participants in the long run, percentage games simply allow the house to take a rake from its hosting services as participants compete against one another. Commercial gambling operations necessarily require a means to collect for their services. Taking a percentage from gambling pots is no more or less inequitable than charging an hourly membership fee or implementing a “drop” system.<sup>273</sup> Nor do percentage games violate the proposed legislative objective of protecting gamblers from banked chance games. In fact, the “drop” is often substantially more than an ordinary rake.<sup>274</sup> Therefore, standard rakes for accepted games should be implemented and defined by statute.

Second, the Texas Legislature could create a separate authorizing statute, similar to the Florida model, instead of amending an existing statute. In Florida’s “Cardrooms Authorized” statute, the legislature

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271. TEX. PENAL CODE ANN. § 47.02(b) (West, Westlaw through end of 2017 Reg. & 1st C.S. of 85th Leg.).

272. Doug Hull, *What’s Rake Got to Do with It?*, RED CHIP POKER, <https://redchippoker.com/beat-rake-poker-podcast/> (last visited Nov. 18, 2019).

273. *Id.*

274. *Id.* “Hull notes that the ‘drop’ is far more punitive than the rake, because the amount taken out of the pot is in no way proportional to the size of the pot.” *Id.*



narrowly sanctions “games of poker . . . which are played in a nonbanking manner” in specific locations.<sup>275</sup> However, the statute introduces a unique nuance in that it restricts card rooms to locations where pari-mutuel permit holders are allowed to operate<sup>276</sup> and delegates their regulation to its Division of Pari-Mutuel Wagering (Florida’s version of the Texas Racing Commission).<sup>277</sup> For Texas, an authorizing statute could either tie card rooms to racing facilities, as they do in Florida, or allow them to exist as standalone establishments. An authorizing statute, then, would offer legislators more creative license than amending an existing statute. Regardless, consolidation of governance under the Texas Racing Commission, which controls Texas’s pari-mutuel wagering, would be an administratively convenient way to regulate card rooms. Since Texas currently suffers from declining revenue at its racing tracks,<sup>278</sup> attached card rooms might be an excellent way to supplement venues’ income while minimally increasing overhead costs.

Either amending § 47.02(a) of the Texas Penal Code or creating a new statute to circumvent its current restrictions would allow card rooms to operate legally in Texas. Amending the existing statute to include an enumeration of acceptable games would allow other gambling statutes to remain unaffected but would create an amendable list of acceptable gambling games. An authorizing statute, on the other hand, offers a clean slate to create legislation that narrowly allows card rooms and poker.

In addition to the described need for a commercially operated poker option,<sup>279</sup> Texas should implement card room-enabling legislation to boost its own economy. California card rooms producing \$300 million in annual taxes demonstrate the potential for Texas card room revenue.<sup>280</sup> Admittedly, some California card rooms collect substantial revenue from banked games masquerading as non-banked games,<sup>281</sup> which differs from the proposed Texas card rooms that would only offer the non-banked

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275. FLA. STAT. ANN. § 849.086(2)(a) (West, Westlaw through 2018 2nd Reg. Sess. of 25th Legis.).

276. *Id.*

277. *Id.* § 849.086(4).

278. Stephen Young, *Texas Horse Racing Is Fighting for Survival*, DALL. OBSERVER (Feb. 10, 2016), <https://www.dallasobserver.com/news/texas-horse-racing-is-fighting-for-survival-8014192>.

279. See discussion *supra* Section IV.A.

280. Martin, *supra* note 266.

281. Steve Ruddock, *How California Card Rooms Are Able to Offer House Banked Games*, PLAYCA (Feb. 24, 2015), <https://www.playca.com/311313/california-card-rooms-and-tribal-casinos-bickering/>. California card rooms offer games like “California Blackjack” that are reengineered to comply with California’s anti-banking law by utilizing a “third party bank.” *Id.*

game of poker. However, one can already see Texas's economic benefit from card rooms by looking at those already in operation. For instance, an existing Texas card room in Houston, Post Oak Poker Club, boasts that it currently generates \$250,000 in monthly revenue,<sup>282</sup> while a San Antonio card room owner claims his facility produces \$125,000 in annual sales taxes.<sup>283</sup> Additionally, if saving the Texas racing industry is of any motivation to Texas Legislators, adding card rooms to existing pari-mutuel gaming facilities could boost their economies by attracting new patrons and providing an alternative revenue source through the rakes from poker games.

While Texas's gambling statutes seem to honor the historical objective of shielding gambling from the public's view, the law's acceptance of the lottery and pari-mutuel gambling is conspicuously incongruous with this antiquated goal. To mitigate this inconsistency, Texas's legislative goal for gambling statutes should be refocused toward controlling the inequities of gambling from chance and banked games. Adjusting the legislative intent will be an important guide for Texas Legislators trying to implement the proposed amendments or new gambling statutes.

## VI. CONCLUSION

While Texas is quick to publicly claim the name and birthplace of Texas Hold 'Em, the Legislature impliedly condemns its evil example by restricting its participation to the shadow of private places, like homes. Private Texas Hold 'Em games, however, physically endanger participants and fail to provide an adequately practical outlet for either professional or recreational players. Though Texas's current law prohibits some public displays of gambling, presumably to mitigate gambling's evil example, the law's acceptance of other public gambling forms, like horse race gambling and the Texas Lottery, raises serious doubts about the Legislature's sincerity in preserving public naiveté. Faced with incongruity between the effect and intent of Texas's gambling law, the Texas Legislature should abandon the antiquated goal of screening gambling from the public's view manifested in its public-private distinctions. Instead, Texas should shift its legislative goal to the more relevant historical objectives of protecting citizens from inequitable games of chance and banking games. Commercially operated Texas Hold 'Em fits within the mold of a non-

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282. Oberg, *supra* note 196.

283. MacCormack, *supra* note 192.

banked game of skill. However casinos, which offer commercially operated poker in other states, should not be promoted under this shift of legislative objectives because they offer banked and chance games that undermine the proposed legislative goal. However, card rooms provide the perfect combination of convenience and safety that only a commercial operation can, while excluding the chance and banked games of a casino. Despite the creative attempt to solve this problem through the formation of "private poker clubs," current Texas poker rooms violate state law. Club owners who continue card room operation subject themselves to potential prosecution under the IGBA and other federal laws, depending on their specific operations. Though current law threatens these Texas card rooms, their utility as venues for commercially operated poker games compromising between private games and full casinos must not be ignored. These card rooms should be legalized through either amending the current definition of gambling or creating a new authorizing statute.