I. INTRODUCTION

As long as Americans have been playing poker, the government has tried to stop them. During the nineteenth century, when the game first became popular, legislatures tried to banish it, but poker flourished anyway on the rough-and-tumble frontier. Its evangelists were thieves and cheats; its outposts were seedy saloons; its sanctuaries were lavish riverboats that could leave their docks to evade the law of the land.

From these shadowy roots, a game evolved that embodies the American ethos, with its freewheeling individualism, its veneration of risk, and its capitalist system of keeping score. Far from just a gambler's vice or a swindler's hustle, poker slowly straightened out—and as it did, it filtered upward into polite society. It has been enjoyed in the White House by the likes of Ulysses S. Grant, Dwight Eisenhower, Richard Nixon, and Barack Obama. For thirty-three years, Chief Justice William Rehnquist played in an elite monthly game. Mark Twain was an avid card shark; so is U.S. Olympian Michael Phelps. And a young Bill Gates used poker winnings to help start
Today, tens of millions of Americans play poker at casinos and around kitchen tables. They also play on the Internet--the twenty-first century equivalent of the lawless frontier.

Located offshore, walled off from U.S. regulation or taxation, the online poker industry emerged in 1998. It began to boom in 2003, when an amateur player--prophetically named Chris Moneymaker--turned a $40 entry in an online tournament into a $2.5 million first prize in the world championship of poker. His success inspired casual players to flock to poker web sites, and by 2011, more than two million Americans played online, with $20 billion at stake.

But online poker in the United States has always operated in a digital underworld, carefully calibrated to evade efforts by federal authorities to eradicate the industry. The federal crackdown began in earnest in 2006, when conservative lawmakers used legislative gamesmanship to criminalize some financial transactions related to Internet betting. It culminated five years later, when the Department of Justice unleashed a flurry of criminal indictments and seized the domain names of the largest poker web sites operating in the United States. The day of the indictments--April 15, 2011, known as Black Friday in the poker world--quashed the poker boom.

Given these prosecutorial actions, most American players might not realize that no federal law makes online poker illegal. Although the industry has lingered for years in a legal gray zone, two recent developments--a surprising reversal at the Department of Justice and a pivotal ruling in the Eastern District of New York--clarify the legal status of the game. Together, these developments undermine the suppression of online poker under federal law. And they illuminate a clear path for federal or state lawmakers to shut down poker's online underworld by bringing the game into the light.

This Note analyzes the current legal landscape of online poker and argues that a safe, well-regulated, and properly taxed regime of online poker is both feasible and desirable. Part II examines how state laws have traditionally treated poker as illegal gambling, despite mounting evidence that poker should be considered a game of skill, not a game of chance. Part III evaluates three federal statutes that potentially implicate online poker, and it explains how a recent Department of Justice opinion and a federal court case limit the reach of those statutes. Part IV proposes three potential paths for federal or state regulation of online poker and argues that a system of interstate compacts is the best way forward. Part V concludes.

II. SKILL VERSUS LUCK: POKER AT THE STATE LEVEL

Gambling policy is primarily a state concern. Under the Tenth Amendment of the U.S. Constitution, states can use their police power to permit or prohibit various forms of gambling within their borders. All states and the District of Columbia take advantage of this power, and their policies vary widely--from the gamblers' paradise of Nevada to its neighbor, Utah, one of only two states to ban all gambling. In general, states criminalize gambling activities unless expressly authorized by statute, as in the case of state-run lotteries or state-regulated casinos.

In the vast majority of states, a common threshold inquiry determines whether a given activity constitutes "gambling" at all. Simply put, if the activity involves risking money on a "game of chance," it is gambling. But if the activity is considered a game of skill, gambling laws generally do not prohibit risking money on it. Chess is the classic example of a purely skill-based game. The polar opposite is a game like roulette, in which the outcome of a spinning wheel is subject solely to random chance.

Of course, people risk money on all sorts of pursuits that involve a complicated mixture of skill and luck. To analyze betting games in which both skill and luck play a role, most states apply a "dominant factor" test. Under this test, a court "asks whether chance dominates skill in determining the outcome of a game." If chance is the dominant factor, then betting on the game is deemed impermissible gambling.
applied to a motley line-up of gaming endeavors, including slot machines, raffles, archery, checkers, cockfighting, pinball--and poker. n34

Obviously, the game of poker involves a significant element of chance due to the random shuffle of the cards. In any single hand, a player might start with inferior cards but get lucky and end up the winner once all of the cards are dealt. Or the player might start with high-value cards and a strong probability to win the hand but take an unlucky "bad beat." n35 On occasion, the player might be dealt unbeatable cards, making it easy to win the hand no matter what the other players do. This inherent unpredictability is part of what makes poker fun.

At the same time, it takes only a few minutes at a poker table to see that successful players, rather than passively waiting to hit a stroke of lucky cards, employ a variety of sophisticated skills at all stages of the game. These skills include patience and self-discipline; strategic, analytical thinking; the calculation of mathematical odds; the understanding of human psychology; the observation of opponents' betting patterns and other tendencies; and, of course, the art of deception. n36 Strong players use these skills to manipulate aspects of the game that are not determined by chance. One simple way they do this is by carefully choosing when to bluff at the pot, thereby allowing players to win hands despite being dealt weak cards. n37 A more complicated strategy some players employ is to use sophisticated principles of game theory to ensure that their opponents cannot exploit their play. n38

Few recreational poker players possess all of these skills, but a small percentage of players, after intense study of the game, hone them to a sheen. n39 And over the course of many hands, a player's eventual success (measured, of course, by the amount of money won or lost) is unquestionably correlated with that player's overall ability. n40 This phenomenon dramatically distinguishes poker from conventional gambling games, like roulette or slot machines or the lottery, where skill plays no role. n41

Despite the clear strategic features ingrained in the game of poker, state courts have generally found them insufficient to be considered the "dominant factor" in the game's outcome. n42 For instance, the North Carolina Court of Appeals acknowledged in 2007 that "a skilled player may give himself a statistical advantage" [*523] in poker, but held that chance predominates over skill because the means of winning any given hand of poker are not entirely under a player's control. n43 "No amount of skill," the court noted, "can change a deuce into an ace." n44 Similarly, in 2010, a Pennsylvania appellate court reversed a trial court's ruling that poker was not "unlawful gambling" under state law. n45 The appellate court held that chance predominates over skill despite the fact that "skill can determine the outcome in a poker game." n46 Although no published state court decision has applied the dominant factor test to online poker specifically, the reasoning that courts have historically used to evaluate in-person poker games would apply equally to online poker.

Economist Steven Levitt--of Freakonomics fame--and two co-authors argue persuasively in a new paper that this reasoning is wrong. n47 State courts, they argue, consistently commit a series of logical and legal errors when applying the dominant factor test. n48 One key mistake courts make (a mistake that appears in the recent decisions from North Carolina and Pennsylvania) is the use of a single hand of play as the relevant frame of reference, even though poker is typically played in sessions that last hundreds of hands. n49 Analyzing the relative roles of skill and chance in poker by looking at a single hand is akin to comparing the relative skill of two golfers based on a single hole of golf. If a competent amateur golfer and a top professional golfer each played a single hole, the amateur might, out of luck, manage to finish the hole in fewer strokes. But if the two golfers competed in a standard four-round tournament (consisting of 72 holes), the pro would always defeat the amateur. That it takes a sufficient sample size for skill to become definitive does not mean that golf--or poker--is a game of chance. n50

A second flaw in many state court decisions on poker is that courts tend to allow a moralistic concern about gambling addiction to override a faithful application of the legal test. n51 While compulsive gambling is a genuine social problem, a "reflexively restrictive and disconnected" legal doctrine is an ill-suited solution. n52 [*525] The 150-year history of poker in America shows that people will play poker one way or another, and the fifteen-year history of Internet poker shows that Americans will find a way to play online. As discussed below in Part IV, a more
effective way to cope with potential antisocial effects of the game is not through overbroad prohibition attempts but rather through robust regulations that require companies to put appropriate safeguards in place. n\textsuperscript{53}

In any event, the history of knee-jerk hostility toward \textit{poker} in most state courts may not last much longer. The global phenomenon of \textit{online poker} has exposed the folly of state-level attempts to proscribe digital interactions between overseas companies and American citizens operating computers in their own homes. n\textsuperscript{54} At the same time, voluminous data mined from millions of \textit{online poker} hands are producing, for the first time, evidence that demonstrates the pivotal role of skill in \textit{poker} with statistical certainty. n\textsuperscript{55} Most important, changes at the federal level have opened the legal door for states to embrace \textit{online poker}. Part III discusses these changes.

III. THE EVOLVING FEDERAL LANDSCAPE

States, of course, do not have a monopoly on the regulation of gambling. Congress has the power, under the Commerce Clause, to target gambling activities that spill across state lines. n\textsuperscript{56} Since the nineteenth century, Congress has relied on that power to federalize certain gambling crimes, usually with the purpose of supplementing state gambling laws. n\textsuperscript{57} And because \textit{online poker} transcends state boundaries, the federal government plays an important role in shaping the legal landscape for the game.

Although the word "\textit{poker}" does not appear anywhere in the U.S. Code, n\textsuperscript{58} three federal statutes potentially implicate \textit{poker} played over the Internet. The first is the Interstate Wire Act of 1961, which bans the transmission of certain betting information across state lines. n\textsuperscript{59} The second is the Illegal Gambling Business Act [*526] of 1970, which makes it a federal crime to operate a gambling business that violates an underlying state law. n\textsuperscript{60} The third is the Unlawful Internet Gambling Enforcement Act of 2006, which aims to block electronic payments to illegal gambling web sites. n\textsuperscript{61} Properly construed, the first two statutes do not apply to \textit{online poker} at all, and, as a consequence, the third statute has limited reach.

A. The Wire Act

For years, the most menacing federal law for fans of \textit{online poker} was the Wire Act, a five-decades-old statute that originally targeted the telegraph, not the Internet. n\textsuperscript{62} Until December 2011, the Department of Justice relied on it as its primary rationale for its longstanding position that all \textit{online} gambling, including \textit{online poker}, violated federal law. n\textsuperscript{63} Congress passed the law in 1961 at the urging of Robert F. Kennedy, the country's new attorney general, who wanted broad new federal powers to disrupt interstate sports-betting activities associated with organized crime. n\textsuperscript{64} The statute's key provision is a ninety-four-word labyrinth packed with nested phrases, but it can be simplified to three essential elements. n\textsuperscript{65} To successfully prosecute under the Wire Act, the government must show that a defendant (1) was "engaged in the business of betting or wagering," (2) knowingly used "a wire communication facility," and (3) transmitted across state lines certain types of information related to "bets or wagers." n\textsuperscript{66} Interestingly, although it repeatedly refers to "bets or wagers," the statute never mentions "gambling," and the skill-versus-luck distinction so important in state gambling statutes has never arisen in the context of the Wire Act.

The first element of the law limits its purview to businesses, as distinguished from individuals placing bets or wagers through those businesses. n\textsuperscript{67} Courts have concluded that Congress did not intend to punish "mere bettors," a term that [*527] encompasses both the casual gambler and the sophisticated "professional gambler" wagering large sums of money. n\textsuperscript{68} The Wire Act, therefore, does not cover individual \textit{poker} players, even skilled professionals using \textit{online poker} as their main source of income.

Companies that operate \textit{online poker} sites are a different matter. To Kennedy and the 1961 Congress, "the business of betting or wagering" meant bookmaking n\textsuperscript{69} --that is, the enterprise of setting odds and accepting other people's bets, usually on the outcomes of horse races or other sporting events. Although \textit{online poker} companies are not "bookies" in the traditional sense, they do "book" bets from their customers by facilitating \textit{poker} games and allowing players to bet on the outcome of the cards. They also charge their customers a fee--normally a small percentage deducted from each
pot. Online poker companies, then, are probably "engaged in the business of betting or wagering."

These companies are also certainly covered by the Wire Act's second element, which requires the use of "a wire communication facility." n70 That term originally targeted the telephone and telegraph lines relied on by bookmakers, n71 but today the broad statutory definition covers any communication medium using wires, including the Internet. n72

Far less clear is the scope of the Wire Act's third element, which sets forth what sorts of wire communications are prohibited under the law. n73 The statute lists two categories of interstate communications that are illegal when transmitted by gambling businesses using wire communication facilities. n74 First, the law bars the transmission "of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest." n75 Here, the phrase "any sporting event or contest" unequivocally establishes that this category is limited to communications related solely to sports wagers. n76 Bets made in the context of a poker game (or any other wagers on events other than the outcome of a sports contest) are thus not covered by the first category.

In its second category of prohibitions, the law bars any transmission that "entitles the recipient to receive money or credit" either "as a result of bets or wagers" or in exchange "for information assisting in the placing of bets or wagers." n77 Unlike the first category, this category contains no language explicitly limiting its scope to sports wagers. Read broadly, it would prohibit all wire communications involving the exchange of money for information on any type of bet or wager--including, presumably, bets or wagers made in a poker game. But the statute can also be interpreted more narrowly by reading the limiting language from the first category--"on any sporting event or contest"--into the second category, even though it does not appear there grammatically.

In 2001, a federal court in the Eastern District of Louisiana considered the Wire Act's scope in a group of consolidated cases known as In re MasterCard. n78 The court held that "a plain reading of the statutory language clearly requires that the object of the gambling be a sporting event or contest." n79 And even if a plain reading were not dispositive, the court continued, the Wire Act's legislative history--coupled with recent congressional attempts to amend the statute to expand its scope beyond sports betting--provide added certainty that the Wire Act "is restricted to the types of events enumerated in the statute, sporting events or contests." n80 This interpretation holds up as a matter of logic; it makes little sense that a statute would specifically ban communications related to "bets or wagers on any sporting event or contest," and then, in the next breath, ban information exchanges related to all "bets or wagers" in general. Indeed, the vast majority of prosecutions under the Wire Act have been limited to sports betting operations. n81

Only one published federal court decision has construed the Wire Act to cover betting or wagering information unrelated to sporting events--but significantly, that decision did not involve poker. n82

Despite the legislative history and the case law to the contrary, the Department of Justice chose the more aggressive interpretation of the Wire Act. Both before and after In re MasterCard, the agency broadly construed the statute's second category of prohibitions and maintained that the Wire Act banned all Internet gambling, including online poker. n83 Almost nobody except the agency itself believed that this interpretation was correct, yet the agency persisted. n84 In June of 2009, for instance, it "[o]pen[ed] a new front in the government's battle against Internet gambling." n85 Citing the Wire Act, federal prosecutors in the Southern District of New York ordered Wells Fargo, Citibank, and several smaller banks to freeze more than $30 million in payouts owed to a total of 27,000 online poker players. n86 Prosecutors also issued seizure orders for the funds. n87 The seizures were never challenged in court, n88 but at the time commentators questioned whether the Department of Justice had surpassed its legal authority. n89 I. Nelson Rose, a leading expert on gambling law, called the action "a tremendous gamble on the part of the U.S. Department of Justice to go after players and even more of a gamble to go after poker players." n90

Recently, the Department of Justice seemed to rethink its gamble. On December 23, 2011, the agency quietly released an official opinion reversing its expansive interpretation of the Wire Act. n91 The opinion analyzes the statute in great detail, and it relies on textual analysis, legislative history, and principles of statutory interpretation to conclude that "the Act's prohibitions relate solely to sports-related gambling activities in interstate and foreign commerce." n92 Specifically, the opinion acknowledges the logical necessity of reading the statute's naked references to "bets or wagers"
as "shorthand references" to the "bets or wagers on any sporting event or contest" enumerated in the first category of prohibitions. In addition to its solid legal underpinning, the opinion is particularly authoritative because it was issued by the Office of Legal Counsel ("OLC"), the elite unit in the Department of Justice that acts as an in-house law firm for the executive branch. The OLC opinion thus represents the official position of the Obama administration. It also comports exactly with the holding of In re MasterCard.

What caused the sudden turnabout? Ironically, after years of aggressive antigambling posturing, the impetus for the agency's reversal was the expansion of government-sponsored gambling. New York and Illinois wanted to begin selling their state lottery tickets over the Internet, and they wanted to use out-of-state transaction processors to do so. Under the broad interpretation of the Wire Act, the states' plans risked violating the law because the plans entailed electronically sending across state lines "information assisting in the placing of bets or wagers." Technically, therefore, the OLC opinion answers only the narrow question of whether the Wire Act allows states to offer Internet lotteries while using out-of-state processors; by altering its interpretation of the Wire Act, the agency could conclude that it does.

But the opinion's implications are potentially far-reaching. Although the thirteenseven-page document never mentions poker, it paves the way for the express legalization of online poker, at least at the state level. Given the OLC's conclusion that the Wire Act applies only to sports betting, the law now presents no obstacle for states wishing to legalize and regulate any non-sports online gambling, including poker. State legislatures may come to view poker just as they view their lotteries—as an easy salve for their cash-strapped state budgets. As will be discussed in Part IV, some states have already begun taking advantage of the new opening, and even a large, multi-state online poker network, governed entirely through state agreements, may be on the horizon.

The OLC opinion, however, should not be read as a conscious softening of the federal government's position on commercial gambling over the Internet. In a letter to congressional leaders explaining the agency's new position, the Department of Justice took pains to clarify that its new stance on the Wire Act is not meant to give a free pass to unsavory online poker operators. The agency emphasized that it would still be able to use other federal statutes to prosecute Internet gambling businesses if those businesses are part of "organized criminal networks." Nevertheless, the OLC opinion, despite attempts to downplay its significance or bury its release over Christmas weekend, will have major consequences for the online poker world. After more than a decade of asserting that Internet poker violates federal law, the Department of Justice now acknowledges that its primary rationale for federal criminalization was legally incorrect.

B. Illegal Gambling Business Act

A second statute that has been applied to online poker is the Illegal Gambling Business Act of 1970 ("IGBA"). Like its predecessor the Wire Act, the IGBA was passed as part of a federal crackdown on organized crime, and it covers only businesses and their operators, not individual gamblers. Also like the Wire Act, the IGBA can be read to criminalize a broad swath of gambling activities.

Its key provision makes it a federal crime to run a "gambling business" if that business meets certain size requirements and violates a state or local law in the jurisdiction in which it is conducted. The IGBA, therefore, is primarily a bootstrapping statute: a business cannot violate the IGBA unless it also violates an underlying state or local law. Indeed, many federal courts appear to have assumed that the IGBA does little more than federalize state gambling crimes.

Construed as such, the IGBA could be a powerful tool to prosecute online poker companies at the federal level. As explained in Part II, state courts have consistently used the "dominant factor" test to interpret the laws of their states as criminalizing the running of poker games. And because poker web sites generally accept players from all fifty states without regard to underlying state or local law, the IGBA appears to enable the federal prosecution of these sites based on violations of individual state laws. The Department of Justice takes that view: it has cited the IGBA at
But casting doubt on this interpretation is the statute's apparent requirement that the defendant also be guilty of running a "gambling business" for the purposes of federal law. Though subtle, the structure of the IGBA suggests that "gambling business" has a distinct federal meaning, apart from what it might mean under state law. The relevant portion reads, "'Illegal gambling business' means a gambling business which . . . is a violation of the law of a State or political subdivision in which it is conducted [and meets the minimum size requirements]." The placement of the words "gambling business" indicates a threshold federal element: for a violation of the IGBA to occur, the law requires, first, the existence of a "gambling business," and, second, that the business meets the statute's various prongs, one of which is the violation of an underlying state or local law.

Although poker businesses are gambling businesses under most state laws, that fact does not decide the question of whether they are gambling businesses—or more concretely, whether poker is "gambling"—for the purposes of the IGBA or federal law in general. The IGBA itself provides a partial definition: gambling, according to the statute, "includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein." Although this definition is not exhaustive, all of the nine enumerated games have one thing in common: players bet on fortuitous outcomes of future events over which they have no control. They are, in short, games of chance.

Building on this definition, a federal court recently conducted a skill-versus-chance analysis for poker to determine whether the game is covered by the IGBA. The analysis was conceptually similar to the inquiry traditionally carried out by state courts, but the federal court came out a different way. In United States v. Dicristina, the defendant was prosecuted under the IGBA for running a live poker game in the back room of a Staten Island warehouse. A jury found him guilty, but in a rigorous 120-page opinion, Senior Judge Jack Weinstein—the 91-year-old lion of the bench in the Eastern District of New York—overturned the conviction. In doing so, he carefully dissected the IGBA and conducted the most detailed application of the "dominant factor" test to the game of poker that has yet been published.

"Neither the text of the IGBA nor its legislative history demonstrate that Congress designed the statute to cover all state gambling offenses," Judge Weinstein held. "Nor does the definition of 'gambling' include games, such as poker, which are predominated by skill." To reach his conclusion that a business violates the IGBA only if that business operates "a game that is predominately a game of chance," Judge Weinstein considered the nature of the nine "gambling" offenses enumerated by the statute, as well as dictionary definitions of the word, its common-law understanding, and its usage in other federal statutes. Interestingly, his opinion relies on the state definitions of gambling as games in which chance predominates—and then breaks with the consensus in state courts in order to hold that poker is a game in which skill predominates, not chance.

The primary rationale for this departure is an in-depth examination of the raw mathematics of the game. The defendant in Dicristina offered expert testimony from an economist (and poker player) who analyzed data from an archive of 415 million hands played on a popular Internet poker site. The statistics conclusively demonstrated that skilled poker players have an overwhelming statistical advantage over a meaningful sample of hands played. For instance, the expert analyzed players' results when holding particular cards, and he found that certain players tend to win money while holding those cards, while others with the same cards usually lose money. Moreover, the players who obtain the best results with any particular hand also show the highest profits with all other hands, suggesting that players' abilities, not the luck of the draw, consistently determines the results. Based on this and other evidence, the expert "demonstrated that skill could be shown statistically to determine more than 50% of the outcome in poker in as few as 240 hands--a number of hands which would be played in a typical social game." It is fitting that Judge Weinstein relied on data culled from online poker to reach his decision about the defendant's brick-and-mortar poker room, because the decision should shape the future of online poker. Most immediately, it creates a benchmark in federal case law unequivocally establishing that poker is not covered by the IGBA. And
although only time will tell whether its reasoning will be adopted by other federal courts or trickle down to state courts, *Dicristina* certainly has the makings of a case that will permanently move the law in a new direction. It is written by a well-respected jurist, it is backed by a voluminous factual record, [*535*] and, most importantly, it recognizes the reality that *poker*, far from being a sibling to lotteries and slot machines, is a *sui generis* skill-based game.

**C. Unlawful Internet Gambling Enforcement Act**

The remaining federal statute relevant to *online poker* is the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA"). [*128*] Unlike the laws discussed above, the UIGEA clearly targets Internet gambling. [*129*] It bars anyone "engaged in the business of betting or wagering" from knowingly accepting any financial transaction, such as credit card payments or bank transfers, "in connection with . . . unlawful Internet gambling." [*130*] It also requires banks and other financial institutions to establish procedures to "identify and block" those transactions. [*131*] And it defines "unlawful Internet gambling" as placing or receiving a "bet or wager" over the Internet if that bet or wager violates federal or state law in the jurisdiction in which it is made or received. [*132*]

Despite characterizations of the UIGEA as outlawing all *online* gambling, [*133*] the law does not criminalize any new gambling or betting activity. It is similar to the IGBA in that it is, in essence, a bootstrapping statute. The UIGEA simply prohibits businesses from accepting payments in connection with any gambling activity that is otherwise illegal under federal or state law. [*134*] But the statute's [*536*] circular language--essentially defining "unlawful Internet gambling" as gambling that is already unlawful--added to the pre-existing ambiguities in the Wire Act and the IGBA to create a confusing legal haze. [*135*]

After the UIGEA's unexpected passage, nobody--not the players, not the *poker* companies, and not the banks that were supposed to be blocking illicit transactions--knew exactly where *poker* stood. Some major *online poker* companies traded on the London Stock Exchange pulled out of the U.S. market. [*136*] A handful of other, privately held companies remained open to American players. [*137*] For a while, these companies flourished in the shadows, much like the saloons and steamboats of *poker's* early days. [*138*] Then, in 2011, the Department of Justice unleashed its "Black Friday" indictments, instantly shutting down the three largest U.S.-facing web sites and alleging a vast web of criminal conduct, including bank fraud and money laundering, as well as violations of the UIGEA. [*139*]

Despite the severity of the indictments and their partial reliance on the UIGEA, the power of the UIGEA as a federal prosecutorial tool is limited. Significantly, the most serious charges in the Black Friday indictments were not premised on the UIGEA or on any federal gambling statute. [*140*] Even more important, the Department of Justice issued those indictments before the agency's reversal on the Wire Act, and also before *Dicristina* held that *poker* is not "gambling" for the purpose of [*537*] federal law. In light of those two developments, the applicability of the UIGEA to *online poker* is almost certainly diminished.

Its diminished effect stems from the necessity of bootstrapping the UIGEA's "unlawful Internet gambling" prohibition onto some other federal or state law. Given current interpretations, the two bootstrapping candidates in federal law--The Wire Act and the Illegal Gambling Business Act--are both inapposite because, as explained above, neither applies to *poker*. [*141*] Although state laws are a possibility, the UIGEA is highly susceptible to a *Dicristina*-like analysis: regardless of how state laws treat *poker*, the UIGEA as a threshold matter applies to financial transactions only if they are associated with "unlawful Internet gambling." [*142*] If *poker* is not gambling for federal purposes, then the UIGEA, like the IGBA, cannot touch it.

To be sure, the holding of *Dicristina* is limited to the IGBA's specific definition of gambling. [*143*] The opinion mentions the UIGEA only in passing. [*144*] But the opinion also contains language suggesting a much broader application of its rule: it explains, for instance, that "[f]ederal gambling laws historically targeted games of chance" [*145*] and that "chance (as compared to skill) has traditionally been thought to be a defining element of gambling." [*146*] Case law on the UIGEA is sparse, and the question of whether the UIGEA applies to games predominated by skill has never been litigated. [*147*] But it is highly likely that federal courts would apply the standard test for gambling--the
"dominant factor" test--to determine the scope of the UIGEA. And under Dicristina's holding that poker is a "game of skill," poker would fall outside the UIGEA's purview altogether.

Even if the Dicristina analysis were not extended to the UIGEA, the law would still depend on underlying state laws to have any prosecutorial effect. This crucial limitation means that the UIGEA poses no obstacle for states to set up legal poker networks if they wish to do so. In fact, the UIGEA contains explicit exemptions for intrastate betting and for legal gambling, even if betting information electronically跨越 state lines. In sum, the UIGEA almost certainly does not prevent the federal regulation of online poker, and it undoubtedly allows regulation by and among the states.

IV. THREE PATHS FORWARD

The legal landscape for online poker is now a clean slate. The Wire Act opinion, the Dicristina decision, and the limitations of the UIGEA interlock to make clear that no federal law directly criminalizes either playing online poker or running an online poker business. This reality creates both a risk and an opportunity. The risk is that unscrupulous foreign companies, unchecked by American oversight, may fill the void--just as the market was dominated by three apparently fraudulent companies before the 2011 indictments. The opportunity is that Congress, the states, or both, can confidently set up a safe, licensed, revenue-generating online poker regime.

A well-regulated regime would have numerous benefits. First, government regulators can monitor for cheating and ensure that online poker games are fair. Second, a regulatory regime can prevent minors from playing by requiring strict age-verification software. Third, regulations can guard against compulsive betting by mandating in-game features that allow players to restrict their own play or limit excessive losses. Fourth, mandatory geo-location software can ensure that legal poker sites accept players only from jurisdictions in which online poker is legal. Fifth, government monitoring would prevent poker sites from becoming fronts for money laundering or other criminal activity. Sixth, U.S.-based poker companies would boost the economy--one study anticipates 10,000 new poker-based jobs.

Seventh, for the first time the government would be able to collect billions of dollars in tax revenue from online poker companies and from individual players' winnings.

These benefits can be achieved in three basic ways. The first option is comprehensive federal legislation. The second option is individual state action. The third (and likely best) option is a system of interstate compacts, similar to current multi-state lotteries.

A. Federal Legislation

Under the federal option, Congress can pass legislation allowing the U.S. government to issue licenses to reputable companies, thereby giving those companies the right to legally offer online poker to Americans. A potential federal regulatory structure is already in place: the National Indian Gaming Commission, within the Department of the Interior, has regulated gambling activities on Native American lands since 1988. Although the commission deals mainly with brick-and-mortar casinos, its mission could be expanded to cover online poker. Alternatively, a similar regulatory agency could be created. A federal online poker regime also would have the advantage of consistent, across-the-board standards--though as a practical and political matter, any federal law to set up a national poker network would likely have to give states the ability to opt out.

In recent years, several influential congressmen have introduced bills of this sort. In 2007, 2009, and 2011, former Representative Barney Frank (D-Mass.) sponsored legislation seeking to legalize almost all online betting, as long as it occurred on properly licensed sites. His proposal at one point was approved by a 41-to-22 bipartisan vote in the House Financial Services Committee, but it failed to progress any further. In 2010, during the lame-duck session of Congress, Senate Majority Leader Harry Reid (D-Nev.) tried to push through a bill to legalize and regulate online poker exclusively, but that bill also failed.

Most recently, after the 2012 elections, Reid tried again--this time, with the unlikely ally of former Senator Jon Kyl
Kyl, a staunch opponent of gambling, was one of the architects of the UIGEA passage in 2006. But he reached a compromise with Reid (whose constituents include Nevada casino companies that stand to benefit from expanded online poker) on a bill to create an online poker licensing regime while explicitly banning most other forms of online betting. Despite being powerful figures in their respective caucuses, Reid and Kyl did not garner enough support to attach the bill to unrelated financial legislation, and the [540] proposal died when the new Congress was sworn in. Poker industry leaders now feel the prospects for any federal poker bill are dim given the current congressional gridlock.

B. Individual State Action

States, however, are free to bypass Congress and legalize Internet poker on their own. In the past, the uncertainty about the status of online poker under federal law prevented states from acting unilaterally. But in light of the recent legal developments—and perhaps bowing to revenue-raising temptation—some states are already seizing the opportunity that online poker presents.

In particular, Nevada has passed extensive online betting regulations and is in the process of issuing licenses for online poker operators. Web sites hosting real-money poker games for the state's residents are expected to be up and running sometime in 2013, once gaming regulators approve the sites' technology. Delaware is also about to welcome online poker rooms. In June 2012, the Delaware state legislature legalized online poker along with Internet versions of blackjack, roulette, and the lottery; the state is currently working out regulatory and licensing details. And in New Jersey, the state legislature passed a bill giving the state's brick-and-mortar casinos the right to run online poker games for state residents. The state's Republican governor, Chris Christie, had vetoed a similar bill in 2011, but he signed this one in February 2013, and state regulators are reviewing licensing petitions. Other states may soon follow suit—at a minimum, legislators in California, Illinois, Iowa, and Massachusetts are seriously considering proposals to legalize online poker this year.

But the specter of individual states acting unilaterally to legalize online poker raises a serious problem that could doom them all: fragmentation. A state can legalize poker only for its own inhabitants; any company operating a poker site within that state would have to block players with out-of-state IP addresses from accessing the network. These balkanized intra-state poker networks, each subject to a different set of regulations, may not be large enough to thrive. Because of the nature of any poker economy—money tends to flow "uphill" from lesser skilled players to more skilled players—the market needs a critical mass of new players to be sustainable. Indeed, online poker has been such a phenomenal success internationally precisely because of the global supply of money and players. One study of the fiscal implications of legal online poker showed that a 20% decrease in the overall pool of players causes a 50% decrease in government revenues. Individual intra-state poker networks—especially in small states like Delaware—simply may not be large enough to succeed.

C. Interstate Compacts

A better option is for states to enter interstate compacts to form large, online poker networks covering multiple states. Article I of the U.S. Constitution contemplates the power of states to form compacts, and states routinely use this power. In fact, perhaps the most familiar examples of present-day interstate compacts are the massive "Powerball" and "Mega Millions" lotteries in which many states participate. Just as they do with these lottery games, states could create a multi-state online poker network that would be available to the inhabitants of all member states. The network could be subject to a unified regulatory and taxsharing plan, according to the terms of the "compact," and it could expand the size of the player base far beyond what any individual state can attract on its own. Two experts have even suggested that a multi-state network could be open to poker players from foreign countries.

To be sure, the language of the Compact Clause expressly requires that Congress consent to interstate agreements. But the Supreme Court has held that congressional consent is necessary only in narrow circumstances—namely, when 'the prohibition is directed to the formation of any combination tending to the increase of political power in the States,
which may encroach upon or interfere [*542] with the just supremacy of the United States.” n174 The Court has never invalidated an interstate compact for lack of congressional consent, and a multi-state poker agreement almost certainly would not trigger the consent requirement. Existing multi-state lottery agreements, for instance, did not need the approval of Congress. n175

Very recently, Nevada regulators latched onto the compact idea. In January 2013, the state’s Gaming Control Board submitted a bill to the state legislature that would allow the governor to enter agreements with other states in which online poker is legal. n176 A key reason cited for the proposal is to supplement Nevada’s nascent poker network with an influx of new players. n177

If states cooperate with Nevada, an expansive, well-regulated online poker network could be imminent. By joining a compact to regulate online poker, they can avoid having to wait for the calcified Congress to act, and they can solve the balkanization problem of states acting on their own. In addition, they can reap billions of dollars in new revenue and ensure that their poker-playing citizens do business with legitimate American companies.

V. CONCLUSION

Americans have been playing online poker for fifteen years. All evidence suggests they will continue to do so, regardless of whether their government tells them it is illegal. On Facebook--that trusty gauge of generational appetites--the third-party application with the most total "Likes" is “Texas HoldEm Poker.” n178 Its popularity is especially telling given that the application does not even offer "real" poker: people can play the game, but only using digital chips with no monetary value. The app’s parent company, Zynga, is poised to start offering online poker for real money--as soon as lawmakers allow it. n179

The legal trend certainly points in that direction. The Department of Justice has re-interpreted the Wire Act as irrelevant to online poker. A federal district court has ruled that the Illegal Gambling Business Act also does not apply. The Unlawful Internet Gambling Enforcement Act is ineffectual without an applicable statute on [*543] which to rely. And the states, despite historically treating poker as an illicit "game of chance," are beginning to move toward explicit legalization. The best path forward is an interstate compact to create a robust multi-state online poker network. A compact, as envisioned in this Note, would take advantage of the emerging judicial certainty that online poker is legal under federal law. And it would, for the first time, allow American online poker to be fully regulated, guaranteed safe, and properly taxed. As Mark Twain wrote, "There are few things that are so unpardonably neglected in our country as poker.” n180 Under a well-regulated interstate compact, the digital iteration of America’s pastime would no longer be neglected by America’s policymakers.

Legal Topics:

For related research and practice materials, see the following legal topics:

Computer & Internet Law\nCriminal Offenses\nCopyright Infringement Actions\nComputer & Internet Law\nPrivacy & Security\nState Regulation\nCriminal Law & Procedure\nCriminal Offenses\nMiscellaneous Offenses\nGambling\nElements

FOOTNOTES:

n2 See id. at 74-77 (describing the "outlaw cachet" that surrounded poker as it spread through the interior of the country).

n3 See id. at 68-73 (discussing early years when poker was known as "the Cheating Game").

n4 See id. at 159 (noting poker's origins in "grimy saloons and other dens of iniquity").

n5 See id. at 63 (explaining that land-based gambling operators moved their businesses onto Mississippi steamboats to avoid anti-gambling statutes).

n6 Some have even suggested that poker—not baseball—is the true American pastime. See James McManus, Op-Ed., No More Bluffing, N.Y. TIMES, Aug. 25, 2012, at A19 ("Poker is America's card game, some say its national pastime.").

n7 MCMANUS, supra note 1, at 13 (2009) ("He played poker . . . all through his Presidential career for money.").

n8 Id. at 16 (describing Eisenhower's natural aptitude for the game).

n9 Id. at 16 (discussing Nixon's ruthless style of play).

n10 Id. at 3-6 (quoting Obama naming poker as hidden talent, and describing his discipline at the table).


n14 MCMANUS, *supra* note 1, at 397.


n18 MCMANUS, *supra* note 1.


n23 See, e.g., 15 U.S.C. § 3001(a) (2006) ("The Congress finds that . . . the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders . . . .")

n24 See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Thomas v. Bible, 694 F. Supp. 750, 760 (D. Nev. 1988) ("Licensed gaming is a matter reserved to the states within the meaning of the Tenth Amendment . . . ."), aff'd, 896 F.2d 555 (9th Cir. 1990).


n26 See id. at 780-82 (summarizing different forms of gambling that various states expressly permit).

n27 Technically, the widely accepted formulation of the test for what constitutes gambling contains three elements: a predominant role of chance, a prize of value, and consideration paid by the player. See, e.g., J. Royce Fichtner, *Carnival Games: Walking the Line Between Illegal Gambling and Amusement*, 60 DRAKE L. REV. 41, 44-53 (2011) (explaining the three-part test).
n28 In some states, this definition of gambling is rooted in the state constitution. See, e.g., NEB. CONST. art. III, § 24, cl. 1 (barring legislature from authorizing any "game of chance" involving payment of money); UTAH CONST. art. 6, § 27 (declaring blanket prohibition on "any game of chance"). In most states, the definition is found in statutes. See, e.g., KY. REV. STAT. ANN. § 528.010(3)(a) (West 2012) (defining gambling as risking something of value on the outcome of a game "which is based upon an element of chance"); MONT. CODE ANN. § 23-5-112(13)(a) (2011) (defining gambling as risking anything of value "for a gain that is contingent in whole or in part upon lot [or] chance . . . ."); N.Y. PENAL LAW § 225.00(1)(2) (McKinney 2008) (defining gambling as betting on the outcome of "a future contingent event not under [the individual's] control or influence" or on the outcome of a contest or game "in which the outcome depends in a material degree upon an element of chance"); N.C. GEN. STAT. § 14-292 (2011) (prohibiting anyone from operating or playing in "any game of chance at which money, property or other thing of value is bet"); VA. CODE ANN. § 18.2-325(1) (2009) (defining "illegal gambling" as betting on any event "the outcome of which is uncertain or a matter of chance").


n30 E.g., People v. Lavin, 71 N.E. 753, 755 (N.Y. 1904) ("Throwing dice is purely a game of chance, and chess is purely a game of skill.")

n31 See Roberts v. Commc'n's Inv. Club, 431 A.2d 1206, 1211 & n.5 (R.I. 1981) (stating that "most jurisdictions" have adopted the test and collecting cases from various states in which the test was adopted).


n33 Id.

n34 Id. at 588 (citing D.A. Norris, Annotation, What Are Games of Chance, Games of Skill, and Mixed Games of Chance and Skill, 135 A.L.R. 104 (2010)).

n35 See MCMANUS, supra note 1, at 476 (defining bad beat as "a big hand overcome on the last card by someone playing a long-shot draw").

n37 See, e.g., Levitt et al., supra note 32, at 623 (noting that most poker hands are won because the winning player forces all other players to fold).


n39 See Levitt et al., supra note 32, at 582 (“The very small fraction who succeed as professionals are exceptionally skilled and earn very substantial sums . . . .”).

n40 Id. at 585, 620-33 (analyzing data from online poker to conclude that “[t]he empirical evidence suggests that skill is the primary factor determining the distribution of player returns”); see generally Steven D. Levitt & Thomas J. Miles, The Role of Skill Versus Luck in Poker Evidence from the World Series of Poker, J. SPORTS ECON., June 22, 2012, available at http://jse.sagepub.com/content/early/2012/06/20/1527002512449471.full.pdf (demonstrating statistically that players identified in advance as “highly skilled” achieved superior return on investment compared to all other players at 2010 World Series of Poker); see also infra text accompanying notes 121-29 (discussing a federal district court’s analysis of the long-term role of skill in poker).

n41 The comparison to casino games demonstrates another distinguishing feature of poker: Players compete against each other on a level playing field, and the house makes money by taking a small percentage out of each pot. In conventional gambling, players compete against the house, which has a built-in mathematical advantage that cannot be overcome in the long run.

banc) (holding that the role of chance in "low ball" poker is sufficient for it to constitute unlawful gambling).

n43 Joker Club, 643 S.E.2d at 630-31.

n44 Id. at 630.

n45 Dent, 992 A.2d at 191, 197.

n46 Id. at 196.

n47 See Levitt et al., supra note 32, at 593-606 (discussing various problems with courts' application of dominant factor test).

n48 Id.

n49 Id. at 595-97.

n50 See id. at 597 ("The focus on a single round of play misses that skill in many games becomes observable only after multiple rounds of play."). But see Joker Club, L.L.C. v. Hardin, 643 S.E.2d 626, 630-31 (N.C. Ct. App. 2007) (rejecting the golf analogy because "[a]lthough chance inevitably intervenes [in golf], it is not inherent in the game and does not overcome skill, and the player maintains the opportunity to defeat chance with superior skill").

n51 See Levitt et al., supra note 32, at 610-13 (attributing courts' "confused use of the dominant factor test" to moral sentiments originating
in Progressive Era).

n52 Id. at 613.

n53 See infra Part IV.

n54 See MCMANUS, supra note 1, at 402-04 (discussing folly of attempts to shut down online poker and comparing such attempts to Prohibition).

n55 See Levitt et al., supra note 32, at 620-33 (analyzing data from more than 12 million hands played by 2,775 players); see also infra text accompanying notes 125-29 (discussing testimony of expert who analyzed 415 million hands).

n56 See U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"); Stevie A. Kish, Note, Betting on the Net: An Analysis of the Government's Role in Addressing Internet Gambling, 51 FED. COMM. L.J. 449, 457 (1999) ("If gambling in one state will substantially affect the economic affairs of another state, . . . the federal government is permitted to intervene to regulate the activity . . . ").


n60  Id. § 1955.


n62  Rose & Bolin, supra note 57, at 659 (citing DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMBLING PROHIBITION AND THE INTERNET 99 (2005)).

n63  See id. at 670 (listing various DOJ statements asserting broad sweep of Wire Act).

n64  Id. at 659.

n65  The full text of the key provision is:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.


n66  Id.

n68 Id.

n69 Id. at 328 ("Congress intended the business of gambling to mean bookmaking, i.e., the taking and laying off of bets, and not mere betting.").

n70 See § 1084(a) ("Whoever . . . uses a wire communication facility . . . ").

n71 Rose & Bolin, supra note 57, at 659 (citing DAVID G. SCHWARTZ, CUTTING THE WIRE: GAMBLING PROHIBITION AND THE INTERNET 99 (2005)).

n72 See 18 U.S.C. § 1081 (2006) (defining "wire communication facility" as any instrument used to transmit communications "by aid of wire, cable, or other like connection"). In 2001, the Court of Appeals for the Second Circuit upheld the conviction of an online sports-betting operator, noting that the Internet and the telephone are "two forms of wire facilities" for the purposes of the Wire Act. United States v. Cohen, 260 F.3d 68, 76 (2d Cir. 2001).

n73 See id. § 1084(a) (prohibiting the transmission of "bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest" and prohibiting the transmission of "a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers").

n74 Id.

n75 Id.

n76 In theory, the phrase "sporting event or contest" could be read such that "sporting" modifies only "event" and not "contest." This construction would expand the law's prohibitions to all "contests," not just those related to sports. But no court has ever adopted this
construction, and it is implausible because it would render the term "sporting event" redundant. Furthermore, as will be discussed below, the legislative history clearly indicates that Congress intended to target sports contests specifically.

n77 § 1084(a). This construction treats the phrase "for information assisting in the placing of bets or wagers" as the object of the closely preceding phrase "entitled the recipient to receive money or credit." An alternative construction could treat the phrase "for information assisting in the placing of bets or wagers" as the object of the earlier phrase "knowingly uses a wire communication facility." The alternative construction likely results in a broader reading of the statute's scope, but it is almost certainly incorrect. For a detailed discussion of why the first construction—the one used in this Note—is most faithful to both legislative intent and principles of statutory interpretation, see 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, at 4 n.5 (2011) [hereinafter OLC Opinion], http://www.justice.gov/olc/2011/state-lotteries-opinion.pdf.

n78 In re MasterCard Int'l Inc. Internet Gambling Litig., 132 F. Supp. 2d 468, 479-81 (E.D. La. 2001), aff'd, 313 F.3d 257 (5th Cir. 2002). The case was a consolidation of numerous claims against credit card companies alleging that the companies violated the Wire Act by allowing gamblers to use credit cards for casino-style Internet gambling (but not sports betting).

n79 Id. at 480.

n80 Id. at 481. The legislative history is particularly powerful in this case. For a detailed consideration, see OLC Opinion, supra note 77, at 7-12.

n81 See, e.g., United States v. Marder, 474 F.2d 1192, 1194 (5th Cir. 1973) (stating the government satisfied an element of the Wire Act by proving that wagering information was "relative to sporting events"); United States v. Kaczowski, 114 F. Supp. 2d 143, 153 (W.D.N.Y. 2000) ("[A] plain reading of [the Wire Act] demonstrates the criminality of the placing of bets or wagers on any sporting event or contest . . . .") .


n83 The department reiterated this position in numerous publications and communications. See, e.g., Matt Richtel, Wall St. Bets on Gambling on the Web, N.Y. TIMES, Dec. 25, 2005, at A1 (quoting a DOJ spokeswoman saying the agency considers online gambling
illegal); Letter From Michael Chertoff, Assistant Attorney Gen., U.S. Dep't of Justice, to Dennis Neilander, Chair, Nev. Gaming Control Bd. (Aug. 23, 2002), available at http://www.in.gov/legislative/igareports/agency/reports/IGC01.pdf (construing the Wire Act to apply to "information assisting in the placing of bets or wagers" generally, not merely to sports wagers). The department's 2011 opinion quotes an internal memorandum noting that the department "has uniformly taken the position that the Wire Act is not limited to sports wagering and can be applied to other forms of interstate gambling." OLC Opinion, supra note 77, at 2.

n84 Rose & Bolin, supra note 57, at 670 ("Except for the DOJ itself, no one seemed to agree with its aggressive position on the Wire Act.").


n86 Russell Goldman, Feds Freeze Poker Champ's Winnings, ABC NEWS (June 11, 2009), http://www.abcnews.go.com/Business/story?id=7808131&page=1&singlePage=true. In addition to the Wire Act, the prosecutors also cited the Illegal Gambling Business Act. Id.

n87 Id.

n88 The seized money belonged to players who had "cashed out" some or all of their winnings, and when the authorities intervened, the money was in the process of being routed from the accounts of popular offshore poker Web sites into those players' bank accounts. But the players never challenged the seizures because the poker companies apparently reimbursed everyone who had money seized. See id. (stating that the companies reimbursed all players who were unable to cash out); Dan Cypra, Gambling Law Expert Nelson Rose Comments on Online Poker Seizure, POKER NEWS DAILY (Jun. 18, 2009), http://www.pokernewsdaily.com/gambling-law-expert-nelsonrose-comments-on-online-poker-seizure-2994/ (explaining obstacles to a court challenge).

n89 See Cypra, supra note 88 (quoting legal expert questioning legal basis for the seizures); Richard Morrison, Feds Crack Down on Internet Poker, COMPETITIVE ENTER. INST. (June 10, 2009), http://www.cei.org/news-releases/feds-crack-down-internet-poker (quoting policy analyst calling seizures "outrageous and potentially unlawful").

n90 Cypra, supra note 88.
Although the opinion is dated September 20, 2011, the agency waited until the Friday before Christmas to release it, probably to avoid media attention. Rose & Bolin, supra note 57, at 672.

OLC Opinion, supra note 77, at 12.

Id. at 7.


OLC Opinion, supra note 77, at 2.

Id. Of course, the “bets or wagers” at issue here were associated with state-run lotteries and were therefore perfectly legal in their own right. But the text of the Wire Act contains no distinction for interstate transmission of bets that would otherwise be legal in the jurisdiction in which they are made.

Id. at 1-2 (“Because the proposed New York and Illinois lottery proposals do not involve wagering on sporting events or contests, the Wire Act does not, in our view, prohibit them.”).

See infra Part IV.

n100 Id.

n101 United States v. Sacco, 491 F.2d 995, 998 (9th Cir. 1974) ("The legislation was aimed at curtailing syndicated gambling, the lifeline of organized crime . . . .").

n102 See 18 U.S.C. § 1955(a) (2006) (defining a violator as anyone who "conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business").

n103 Id. § 1955(a)-(b). The size requirements are that the business must involve five or more participants, and it must either operate for more than thirty days or have gross revenues of more than $ 2,000 in a single day. Id. § 1955(b)(1)(ii)-(iii).

n104 The IGBA's bootstrapping requirement illustrates a key difference from the Wire Act, which creates an entirely new class of federally criminalized activity (i.e., the interstate transmission of sports-betting information) regardless of underlying state and local law.

n105 See, e.g., United States v. Gotti, 459 F.3d 296, 340 (2d Cir. 2006) (defining "illegal gambling business" in IGBA according to state law without discussing the possibility of a separate federal definition of "gaming business"); United States v. Truesdale, 152 F.3d 443, 446 (5th Cir. 1998) (same); United States v. Cyprian, 23 F.3d 1189, 1199 n.14 (7th Cir. 1994) (same); Sacco, 491 F.2d at 998 (same).

n106 See supra Part II.

n107 Any such prosecution under the IGBA would raise a jurisdictional issue: Does a poker web site "conduct" business in a given state simply by allowing players from that state to access the site? For a useful discussion of the jurisdictional analysis, see Christopher Grohman, Reconsidering Regulation: A Historical View of the Legality of Internet Poker and Discussion of the Internet Gambling Ban of 2006, 1 J.
n108 The first was the Southern District of New York's seizure of $34 million in payouts in 2009, when prosecutors cited the IGBA in addition to the Wire Act. Goldman, supra note 86. The second was the "Black Friday" indictments of 2011, when prosecutors cited the IGBA alongside various other federal criminal statutes, most of them unrelated to gambling. See Press Release, U.S. Attorney for the S.D.N.Y., Manhattan U.S. Attorney Charges Principals of Three Largest Internet Poker Companies with Bank Fraud, Illegal Gambling Offenses and Laundering Billions in Illegal Gambling Proceeds (Apr. 15, 2011), available at http://matchbin-assets.s3.amazonaws.com/public/sites/990/assets/FZWC_Bank_Fraud_and_Internet_Gambling_Indictment.pdf.

n109 In 2012, a federal district court considered this interpretation and concluded that the statute is, at a minimum, ambiguous (and should therefore be construed in favor of defendants). United States v. Dicristina, 886 F. Supp. 2d. 164, 227 (E.D.N.Y. 2012). "Congress could have explicitly defined gambling under the IGBA to mean criminal gambling as defined by state law. It did not," the court noted. Id. at 223. Moreover, it is plausible to read the statute as "limit[ing] what kinds of state gambling crimes would trigger IGBA liability by providing an independent federal definition of gambling." Id. at 223-24.


n111 See Dicristina, 886 F. Supp. 2d. at 200 ("Close reading of the IGBA reveals that it requires both a violation of an applicable state law and proof of additional federal elements.").

n112 See id. at 228-34 (acknowledging the possibility of different definitions of gambling under federal and state law).


n114 Some of the statute's enumerated games may be unfamiliar to contemporary readers. Games known as "policy," "numbers," or "bolita" were all lottery-style games historically associated with organized crime. See Scott M. Deitche, Policy, Numbers, Lottery, Bolita, NETPLACES, http://www.netplaces.com/mafia/making-money/policy-numbers-lottery-bolita.htm (last visited Mar. 15, 2013) (explaining how the games worked).
n115 *Dicristina*, 886 F. Supp. 2d. at 198.


n117 *Dicristina*, 886 F. Supp. 2d. at 170.

n118 *Id.* at 235.

n119 *Id.*

n120 *Id.* at 230-31.

n121 *Id.* at 195-96.

n122 *Id.* at 230 ("Expert *poker* players draw on an array of talents, including facility with numbers, knowledge of human psychology, and powers of observation and deception. Players can use these skills to win even if chance has not dealt them the better hand.").

n123 *Id.* at 178-85.
n124 See id. at 234 (stating that the plaintiff's expert "has shown persuasively that skilled players will predominated [sic] over the less skilled in a relatively short time" and that the government's counter-expert "has provided no basis for the court to conclude that chance predominates over skill in poker").

n125 Id. at 183-84.

n126 Id.

n127 Id. at 232. The consequence of this holding is that the word "gambling" means something different at the federal level than it does at the state level. Judge Weinstein acknowledges and accepts this consequence—in fact, he notes that the defendant could have been prosecuted in state court because, under settled New York law, poker constitutes gambling. Id. at 168-69.

n128 The law is codified at 31 U.S.C. §§ 5361-67 (2006). One of the congressional findings that introduces the law explicitly acknowledges the failures of previous state and federal efforts to stop online gambling: "New mechanisms for enforcing gambling laws on the Internet are necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders." Id. § 5361(a)(4).

n129 It is not clear, however, that most members of Congress knew what they were targeting when they passed this law. Its passage is a paragon of legislative gamesmanship. Late at night on Sept. 29, 2006, just hours before Congress was set to adjourn for its election recess, former Senate Majority Leader Bill Frist (R-Tenn.), with the support of a handful of other Republicans, lifted language from previous anti-gambling bills that had failed to get support. Frist attached the language as a rider to an uncontroversial, must-pass bill on security measures at the nation's seaports. The rider—which had nothing to do with port security—became known as the UIGEA. No Democrats on the Senate-House conference committee were permitted to see the final language of the bill, and because conference reports cannot be amended once they reach the floor, the only way for members of Congress to oppose the UIGEA was to vote "no" on safer seaports. After midnight, with Congress about to adjourn, the re-crafted bill passed in the House by a vote of 409-to-2 and in the Senate by unanimous consent. For a full account of the maneuvering, see I. Nelson Rose, Congress Makes Sausages, 11 GAMING L. REV. 1, 1-3 (2007), available at http://www.gamblingandthelaw.com/columns/209-congress-makes-sausages.html. See also Ryan S. Landes, Note, Layovers and Cargo Ships: The Prohibition of Internet Gambling and a Proposed System of Regulation, 82 N.Y.U. L. REV. 913, 932 n.123 (2007) (giving detailed procedural account of the maneuver).

n131 Id. § 5364.

n132 Id. § 5362(10)(A).


n134 See, e.g., Rose & Bolin supra note 57, at 667-68 (explaining that the UIGEA “prevent[s] the transmission of money from bettors to operators for unlawful gambling” and noting “there are no restrictions on the transmission of money from operators to bettors”).

n135 See Benjamin C. Wickert, Note, All In, But Left Out: How the Unlawful Internet Gambling Enforcement Act Seeks to Eradicate Online Gambling in the United States, 10 VAND. J. ENT. & TECH. L. 215, 235-36 (2007) (discussing ambiguity in the UIGEA and stating "the UIGEA itself does not specifically render any sort of Internet gambling illegal").


n137 E.g., Silver, supra note 21 (discussing two web sites, Full Tilt Poker and PokerStars, that continued operating in the United States).

n138 Specifically, the companies remained operational by becoming more evasive. As the UIGEA took effect, banks began blocking transactions that were potentially associated with online gambling—and online poker companies found workarounds in the form of shadowy third-party payment processors that disguised the nature of players' deposits. See, e.g., Black Friday History Week: How the UIGEA Changed Everything, POKERLISTINGS (Apr. 10, 2012), http://www.pokerlistings.com/black-friday-history-week-how-the-uigea-changed-everything (discussing one such payment-processing scheme). This situation, of course, created significant insecurity around poker players' financial transactions as they moved money into and out of their online accounts. See Landes, supra note 129, at 934 (“Under this regime, unregulated offshore financial institutions replace domestic ones that are carefully regulated to prevent theft and fraud.”).
n139  E.g., Silver, supra note 21; Black Friday: The Day that Changed Online Poker, CARDPLAYER (Apr. 13, 2012), http://www.cardplayer.com/poker-news/13127-black-friday-the-day-that-changed-online-poker. In July 2012, the companies reached a settlement with the Department of Justice in which one of the sites forfeited $ 547 million to the federal government and agreed to reimburse all of the players for money that had been frozen in their online accounts. Gary Wise, PokerStars Settles, Acquires FTP, ESPN (July 31, 2012, 5:25 PM), http://espn.go.com/poker/story/_/id/8218085/pokerstars-reaches-settlement-department-justice-acquires-fulltilt-poker.

n140  See Press Release, U.S. Attorney for the S.D.N.Y., supra note 108, at 5-7 (listing the charges and their respective maximum penalties).

n141  See supra Part III(A)-(B).


n143  United States v. Dicristina, 886 F. Supp. 2d. 164, 234 (E.D.N.Y. 2012) (“Because [poker] is not predominately a game of chance, it is not gambling as defined by the IGBA.”).

n144  Id. at 219 (describing UIGEA’s key provisions without interpretation).

n145  Id. at 228.

n146  Id. at 230.

n147  The UIGEA does contain a statutory definition for the term "bet or wager," which is a necessary element of "unlawful Internet gambling." In relevant part, a bet or wager is defined as the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will
receive something of value in the event of a certain outcome . . . . 31 U.S.C. § 5362(1)(A) (2006) (emphasis added). This definition is inconclusive. Although two commentators argue that the phrase "a game subject to chance" opens a loophole for skill games, Rose & Bolin, supra note 57, at 668, the phrase can easily be read to include games in which chance plays any role at all, even if overcome by skill.

n148 § 5362(10)(B)(ii).

n149 Indeed, the poker web sites currently serving Americans are, if anything, even less reputable than those operated by companies that were indicted in 2011. As a white paper from the American Gaming Association noted, "Prosecutions . . . have driven the more responsible offshore operators out of the U.S. market, leaving Americans to conduct their online gambling through largely unregulated websites." DAVID O. STEWART, AM. GAMING ASSN., ONLINE GAMBLING FIVE YEARS AFTER UIGEA 1 (2011), http://www.americangaming.org/sites/default/files/uploads/docs/final_online_gambling_white_paper_5-18-11.pdf.

n150 Id. at 3.

n151 The most comprehensive study of the issue estimated that legalizing all online betting (except sports betting) throughout the United States would produce more than $6 billion in domestic taxation per year. H2 GAMBLING CAPITAL, UNITED STATES: REGULATED INTERNET GAMBLING ECONOMIC IMPACT ASSESSMENT 1 (2010), available at http://waysandmeans.house.gov/media/pdf/111/2010may19_h2_gambling_capital_submission.pdf. The executive director of the Poker Players Alliance has estimated that online poker alone would generate between $15 billion and $20 billion in taxes over ten years. Christopher Beam, Don't Hate the Player—or the Game, SLATE (Dec. 10, 2010, 5:50 PM), http://www.slate.com/articles/news_and_politics/politics/2010/12/dont_hate_the_playeror_the_game.html.


n153 Rose & Bolin, supra note 57, at 679 (stating that in any national regulatory scheme for poker, "states have to be able to opt in or out").

n154 Josh Chumbley, Comment, Follow the Yellow Chip Road, 36 S. ILL. U. L.J. 547, 553-55 (2012) (describing the three bills).
n155 Id. at 554.

n156 Id. at 556-57.


n158 Id.

n159 Id.


n161 See Rose & Bolin, supra note 57, at 674-75 (noting that the DOJ’s past interpretation of the Wire Act prevented states from legalizing online betting).

n162 See id. at 679-84 (discussing state efforts).


n167 Id.

n168 Kredell, *supra* note 160.


n171 See U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the consent of Congress . . . enter into any Agreement or Compact with another State”).

n173 Rose & Bolin, *supra* note 57, at 677-78.


n175 Rose & Bolin, *supra* note 57, at 678.

n176 Stutz, *supra* note 163.

n177 *See id.* ("[T]he interstate gaming compacts would allow Nevada-based Internet poker websites to accept bets from gamblers from states with similar interactive gaming laws, considerably growing the size of the potential player pool.").

n178 Sixty-four million people had "liked" the "Texas HoldEm Poker" page as of September 2012, just ahead of the totals for "YouTube" and "Eminem." The only two pages with more total "Likes" than the poker app were Facebook itself and Facebook’s own smart-phone app. Brittany Darwell, *Top 25 Facebook Pages September 2012*, INSIDE FACEBOOK (Sept. 3, 2012), http://www.insidefacebook.com/2012/09/03/top-25-facebook-pages-september-2012/.


n180 MARK TWAIN AT YOUR FINGERTIPS: A BOOK OF QUOTATIONS 140 (Caroline Thomas Harnsberger ed., 2009).