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The New Slot Machine: An International Perspective on Why the United States Should Learn to Stop Loving the Loot Box

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THE NEW SLOT MACHINE: AN INTERNATIONAL PERSPECTIVE ON WHY THE UNITED STATES SHOULD LEARN TO STOP LOVING THE LOOT BOX

ABSTRACT

Games of chance are woven into the fabric of human culture. Rapid shifts in technology have resulted in the creation of the loot box, a new video game monetization scheme formed from the dregs of slot machines and trading cards. While extremely lucrative, the existence of loot boxes allows game companies to expose children to wager-like behavior, potentially creating a new generation of problem gamblers. The United States is both financially and culturally tied to video games as an industry and has been slow in its regulation of loot boxes. Given the problematic nature of loot boxes, existing regulations in the United States are not enough to curb their negative impact. Similarly, South Korea has deep ties to gaming and has taken a more hands-off approach in its supervision over loot boxes. This Comment argues that South Korea's approach is ineffective, and the United States would be better served by following the example of countries like Belgium. Loot boxes in video games are an egregious abuse of children's susceptibility to predatory marketing schemes and should be banned.

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INTRODUCTION

Games are an inseparable part of human history.¹ Dutch cultural theorist Johan Huizinga, in his seminal 1938 book on play titled *Homo Ludens*,² posited “[p]lay is older than culture, for culture, however inadequately defined, always presupposes human society, and animals have not waited for man to teach them their playing.”³ Play has evolved as man has evolved—modern technology has caused a paradigm shift, giving play a digital form within the magic circles of video games.⁴ Today, there are an estimated 2.7 billion gamers worldwide.⁵

¹ Janaki M. Kumar, Mario Herger & Rikke Friis Dam, *A Brief History of Games*, INTERACTION DESIGN FOUND. (2019), <https://www.interaction-design.org/literature/article/a-brief-history-of-games>.

² JOHAN HUIZINGA, *HOMO LUDENS: A STUDY OF THE PLAY-ELEMENT IN CULTURE* (1949) (explaining that prior to the inception of video games, game studies were rooted primarily in anthropology). See generally Gonzalo Frasca, *Ludology Meets Narratology: Similitude and Differences Between (Video)games and Narrative*, PARNASSO (1999), <https://ludology.typepad.com/weblog/articles/ludology.htm> (discussing how game studies have evolved over time).

³ HUIZINGA, *supra* note 2, at 1.

⁴ KATIE SALEN & ERIC ZIMMERMAN, *RULES OF PLAY: GAME DESIGN FUNDAMENTALS* 107 (2003) (“Magic circles” as a shorthand for the idea of a special place in time and space created by a game).

⁵ Tom Wijman, *Three Billion Players by 2023: Engagement and Revenues Continue to Thrive Across the Global Games Market*, NEWZOO (June 25, 2020), <https://newzoo.com/insights/articles/games-market-engagement-revenues-trends-2020-2023-gaming-report>.

With such a large consumer base, the video game industry has become highly lucrative, creating a global games market of \$159 billion USD.⁶

To serve gaming corporations' endless pursuit of increasing financial returns, game monetization schemes have become progressively more sophisticated.⁷ Some of these schemes, such as the loot box, pose ethical concerns and can be considered predatory because these systems are designed to disguise or withhold the true long-term cost of the activity until players are already financially and psychologically committed.⁸ In particular, loot boxes have been compared to traditional gambling.⁹ Both traditional and online gambling have been tightly regulated in the United States due to their propensity to cause, among other negative consequences, addictive tendencies.¹⁰ The existence of loot boxes allows game companies to expose children to wager-like behavior, potentially creating a new generation of problem gamblers.¹¹

This Comment will explore both the positive and negative effects of microtransactions and loot boxes on the video game industry in the United States and will examine whether these monetization schemes fit the traditional definition for gambling. This Comment will elucidate the problematic nature of loot boxes and how existing regulations in the United States are insufficient to curb their negative impact. Additionally, this Comment will draw a comparison to South Korea, a country possessing a long history with both video games and gambling, to illustrate the feasibility and efficacy of different solutions the United States may incorporate. Moreover, this Comment will investigate countries like Belgium, the Netherlands, and Australia, which have already taken on legislating loot boxes, and how the United States might take a similar approach.

⁶ Haydn Taylor, *Global Games Market Value to Reach \$159bn in 2020*, GAMESINDUSTRY.BIZ (June 26, 2020), <https://www.gamesindustry.biz/articles/2020-06-26-global-games-market-value-to-reach-usd159-3bn>.

⁷ See Daniel L. King & Paul H. Delfabbro, *Predatory Monetization Schemes in Video Games (e.g. 'Loot Boxes') and Internet Gaming Disorder*, 113 ADDICTION 1967 (2018), <https://onlinelibrary.wiley.com/doi/full/10.1111/add.14286>.

⁸ *Id.*

⁹ See Vic Hood, *Are Loot Boxes Gambling?*, EUROGAMER (Oct. 23, 2017), <https://www.eurogamer.net/articles/2017-10-11-are-loot-boxes-gambling>.

¹⁰ AM. GAMING ASS'N, RESPONSIBLE GAMING REGULATIONS AND STATUTES (Aug. 2016), <https://www.americangaming.org/wp-content/uploads/2019/01/Responsible-Gambling-Regulations-WEB.pdf>.

¹¹ David Zendle, Rachel Meyer & Harriet Over, *Adolescents and Loot Boxes: Links with Problem Gambling and Motivations for Purchase*, 6 ROYAL SOC'Y OPEN SCI. 1, 1, 3 (2019), <https://royalsocietypublishing.org/doi/10.1098/rsos.190049>.

I. WHY IS THIS MONETIZATION SCHEME PROBLEMATIC?

A. *Microtransactions and Loot Boxes*

Microtransactions are in-game purchases that unlock specific features or give the user special abilities, characters, or content.¹² The purchases are entirely virtual and the cost of these transactions can range from a few cents to more than \$99.¹³ The first instance of microtransactions was offered by Bethesda Softworks in 2006 for their game, *The Elder Scrolls IV: Oblivion*.¹⁴ The \$2.50 horse armor was not well received by consumers, who were wary of the new business model.¹⁵ Two years later, the App Store launched on Apple iPhones, where users could download games which used microtransactions as their main source of funding.¹⁶ In just the first three years, iOS apps made over \$3.6 billion in revenue with over eighty percent of that revenue coming from mobile games and their microtransactions.¹⁷ Fast forward to today and the global games market is expected to make \$117 billion from microtransactions alone, a whopping seventy-seven percent of its total revenue.¹⁸ Economically, the use of microtransactions seems to be the best possible model for the industry because game development costs are higher than ever, but the retail prices of AAA¹⁹ titles are decreasing in real terms.²⁰ Microtransactions allow companies to incur lower marginal costs while providing broader access to content for consumers.²¹

Microtransactions can be purely aesthetic (cosmetic), confer in-game advantages (pay-to-win), or contain randomized contents of uncertain value (loot boxes).²² While the former two categories have posed the problem of

¹² Prateek Agarwal, *Economics of Microtransactions in Video Games*, INTELLIGENT ECONOMIST (Dec. 20, 2017), <https://www.intelligenteconomist.com/economics-of-microtransactions>.

¹³ *Id.*

¹⁴ James Ransom-Wiley, *Bethesda Responds to Oblivion Backlash*, ENGADGET (Apr. 4, 2006), <https://www.engadget.com/2006-04-04-bethesda-responds-to-oblivion-backlash.html>.

¹⁵ *Id.*

¹⁶ *Apple's App Store Downloads Top 15 Billion*, APPLE NEWSROOM (July 7, 2011), <https://www.apple.com/newsroom/2011/07/07Apples-App-Store-Downloads-Top-15-Billion>.

¹⁷ *Id.*

¹⁸ Derek Strickland, *Newzoo: Microtransactions to Make \$117 Billion in 2020*, TWEAKTOWN (June 26, 2020), <https://www.tweaktown.com/news/73439/newzoo-microtransactions-to-make-117-billion-in-2020/index.html>.

¹⁹ AAA video games are big budget titles analogous to blockbuster movies in the film industry. Vann Vicente, *What are AAA (Triple-A) Video Games?*, HOW-TO GEEK (Apr. 1, 2020), <https://www.howtogeek.com/659948/what-are-aaa-triple-a-video-games>. The term "AAA+" has also been floated given the advent of microtransactions. *Id.*

²⁰ F.T.C., *Inside the Game: Unlocking the Consumer Issues Surrounding Loot Boxes* (Aug. 7, 2019), https://www.ftc.gov/system/files/documents/public_events/1511966/slides-loot-box-8-7-19.pdf.

²¹ *Id.*

²² David Zendle, Nick Ballou & Rachel Meyer, *The Changing Face of Desktop Video Game*

incentivizing game companies to release unfinished games,²³ recent focus has been on loot boxes and their resemblance to gambling.²⁴ Loot boxes are containers of randomized digital content holding items with varying degrees of in-game value.²⁵ Given the element of chance is present in both loot boxes and traditional gambling, it is easy to see why such a comparison would be made. Historically, gambling has been highly regulated in the United States,²⁶ so it is important to examine the gaming industry for harmful activity where similar levels of regulation would be appropriate.

The gaming industry is bigger than ever—more than 214 million people play games in the United States today.²⁷ These players spend an average of more than six hours per week playing games.²⁸ Moreover, forty-seven percent of gamers spend money on microtransactions.²⁹ Notably, a significant portion of the video gaming population in the United States is under the age of eighteen.³⁰ Specifically, approximately twenty-one percent of these video game players are minors, totaling more than 44.9 million gamers under the age of eighteen.³¹ The aforementioned statistics show that gaming companies created an environment which exposed children to a potential new form of gambling at an alarming rate.³²

Monetization: An Exploration of Trends in Loot Boxes, Pay to Win, and Cosmetic Microtransactions in the Most-Played Steam Games of 2010-2019, PSYARXIV PREPRINTS (Nov. 1, 2019), <https://psyarxiv.com/u35kt>.

²³ See Paula Thomas, *The Trend to Publish Unfinished Games: A Blessing for Developers, or a Curse for Players?*, COIN-DROP (Mar. 30, 2018), <http://coin-drop.com/trend-publish-unfinished-games>; see also Max Moeller, *Generation 8: The Rise of Games as a Service*, TECHRAPTOR (Dec. 6, 2018), <https://techraptor.net/gaming/guides/generation-8-rise-of-games-as-a-service> (discussing the prevalence of the “games as a service” and “early access” business models).

²⁴ See Hood, *supra* note 9 at 1.

²⁵ F.T.C., *supra* note 20, at 20.

²⁶ *Gambling in the United States: An Overview*, ENCYCLOPEDIA.COM (Oct. 16, 2020), <https://www.encyclopedia.com/reference/social-sciences-magazines/gambling-united-states-overview>.

²⁷ *2020 Essential Facts About the Video Game Industry*, ENT. SOFTWARE ASS’N [hereinafter *Essential Facts*], <https://www.theesa.com/esa-research/2020-essential-facts-about-the-video-game-industry>.

²⁸ *The State of Online Gaming – 2020*, LIMELIGHT NETWORKS, <https://www.limelight.com/resources/white-paper/state-of-online-gaming-2020>.

²⁹ Derek Strickland, *47% of Gamers Spend Money While Playing Games*, TWEAKTOWN (June 24, 2017), <https://www.tweaktown.com/news/58103/47-gamers-spend-money-playing-games/index.html>.

³⁰ J. Clement, *Distribution of Video Gamers in the United States in 2020, by Age Group*, STATISTA (May 5, 2021), <https://www.statista.com/statistics/189582/age-of-us-video-game-players-since-2010>.

³¹ *Id.*

³² See generally The Conversation, *How Esports Is Quietly Spawning a Whole New Generation of Problem Gamblers*, THENEXTWEB (Oct. 4, 2020), <https://thenextweb.com/syndication/2020/10/04/how-esports-is-quietly-spawning-a-whole-new-generation-of-problem-gamblers> (discussing the role of esports in exposing children to gambling and showing that microtransactions are not the only problem).

B. *A Brief History of Gambling Regulation in the United States*

To better understand how a government can regulate loot boxes, it is important to know how gambling and its regulations developed over time. Games of chance have existed for millennia, from the Royal Game of Ur in 3000 BCE Mesopotamia³³ to Senet in ancient Egypt.³⁴ As civilizations industrialized and technology advanced, new and more complex forms of gambling have been produced.

Games of chance were popular even in the colonial era among the first settlers of America.³⁵ By the 1680s, the upper class of Virginia was deeply involved in gambling on horse races in an effort to promote a shared sense of values among the social elite.³⁶ Specifically, their elaborate betting rules and formal codes promoted social disparity and had the consequence of marginalizing those outside their circle of wealth.³⁷ The social, political, and economic disparity caused by gambling was not challenged at all until the mid-eighteenth century, when Baptists and Methodists denounced gambling itself as sinful.³⁸ Additionally, lotteries were used both as sources of entertainment and revenue to fund the original thirteen colonies before Britain restricted them in 1769.³⁹

Technology and gambling intersected in 1894 when Charles August Fey built the first coin-operated gambling machine.⁴⁰ He later went on to create the first three-reel slot machine with automatic payouts in 1898.⁴¹ Both the clergy and law frequently opposed the use of slot machines and eventually had them banned in San Francisco in 1909⁴²—the rest of the country followed suit by banning virtually all gambling by 1910.⁴³ Fey and his market competitors

³³ James Aird, *Royal Game of Ur Resurrected*, ARCHAEOLOGY NEWS NETWORK (Aug. 31, 2018), <https://archaeologynewsnetwork.blogspot.com/2018/08/royal-game-of-ur-resurrected.html>.

³⁴ Danielle Zwang, *Senet and Twenty Squares: Two Board Games Played by Ancient Egyptians*, METRO. MUSEUM ART (July 19, 2017), <https://www.metmuseum.org/blogs/metkids/2017/ancient-egypt-board-games>.

³⁵ T.H. Breen, *Horses and Gentleman: The Cultural Significance of Gambling Among the Gentry of Virginia*, 34 WM. & MARY Q. 239, 239–57 (1977).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Michael Troy, *America: Built by Lottery*, UNLEARNED HIST. (Jan. 16, 2016), <http://unlearnedhistory.blogspot.com/2016/01/america-built-by-lottery.html>.

⁴⁰ Dan Glimme, *Slot Machine*, ENCYCLOPEDIA BRITANNICA (Nov. 12, 2015), <https://www.britannica.com/topic/slot-machine>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ I. Nelson Rose, *Gambling and the Law: Pivotal Dates*, PBS (1997), <https://www.pbs.org/wgbh/pages/frontline/shows/gamble/etc/cron.html>.

circumvented the law by building machines without coin slots, where payout happened covertly across a saloon counter.⁴⁴ In an effort to fight the Great Depression, states started legalizing gambling as a source of revenue, starting with Nevada in 1931.⁴⁵ Today, slot machines are by far the largest profit generator for nearly every casino, totaling around thirty to fifty percent of total revenue.⁴⁶ Importantly, states now require that casinos post slot machine payback odds publicly.⁴⁷

Through exponential innovation, the internet brought widespread access to information, entertainment, and more pertinently, new types of money-making opportunities.⁴⁸ Internet gambling first appeared in the mid-1990s, creating a hugely profitable market by the end of 1997 of more than 200 online casinos approaching annual revenues of \$1 billion.⁴⁹ Despite the popularity and successful commercialization of the industry, Congress passed the Unlawful Internet Gaming Enforcement Act in 2006, which made it illegal to deposit and withdraw funds from online gambling sites.⁵⁰ Interestingly, Congress did not target gambling itself, but instead targeted payment processing companies, effectively making online gambling obsolete for anyone residing in the United States.⁵¹ The Act had the somewhat expected consequence of the inception of a number of unregulated offshore gambling sites.⁵²

Of note is the Interstate Wire Act of 1961, often called the Federal Wire Act.⁵³ There has been ambiguity as to whether the language of the Act applies to internet gambling. The relevant text reads:

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

⁴⁴ Glimne, *supra* note 40.

⁴⁵ *Nevada Legalizes Gambling*, HISTORY.COM (Mar. 3, 2010), <https://www.history.com/this-day-in-history/nevada-legalizes-gambling>.

⁴⁶ Glimne, *supra* note 40.

⁴⁷ *Slot Machine Payback Statistics*, AM. CASINO GUIDE, <https://www.americancasinoguide.com/slot-machine-payback-statistics.html>.

⁴⁸ *The History of Online Gambling*, ONLINEGAMBLING.COM, <https://www.onlinegambling.com/online-history>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ 18 U.S.C. § 1084.

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.⁵⁴

In September 2011, the U.S. Department of Justice released an opinion concluding “interstate transmissions of wire communications that do not relate to a ‘sporting event or contest’ fall outside the reach of the Wire Act.”⁵⁵ However, in 2018, the Department of Justice reversed its opinion, explaining the Wire Act is “not uniformly limited to gambling on sporting events or contests.”⁵⁶ This reversal was too little, too late—in the interim years, states like Delaware,⁵⁷ Nevada,⁵⁸ and New Jersey⁵⁹ had already paved the way for a booming online gambling market. It is only a matter of time until states circumvent the law just as Fey did with his slot machines.

It is clear that as gambling evolves, the law must evolve to be better tailored to the needs of affected parties. And just as easily, as the law evolves, the gambling industry finds new ways of skirting the rules. To end this perpetual cycle, why not just ban gambling in the United States altogether? The simple answer is that the industry is too important of an economic engine and job creator.⁶⁰ In 2017 alone, gambling contributed \$261 billion to the economy, generated \$40.8 billion in tax revenues to federal, state, and local governments, and created nearly 1.8 million jobs across America.⁶¹ Regardless of any questions of morality, it is easy to see why a sweeping prohibition of gambling would have devastating consequences.

Still, those moral questions have been left in a state of ambiguity. The Internet Gambling Regulation, Consumer Protection, and Enforcement Act in 2009 is an important piece of legislative history regarding the protection of minors.⁶² The resolution was intended “to provide for the licensing of Internet

⁵⁴ *Id.*

⁵⁵ Virginia A. Seitz, *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*, DOJ (Sept. 20, 2011) (citing 18 U.S.C. § 1084(a)), <https://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf>.

⁵⁶ Michael Sykes, *New DOJ Opinion Expands Wire Act Outside of Sports Betting*, AXIOS (Jan. 15, 2019), <https://www.axios.com/departments-of-justice-sports-betting-casinos-wire-act-2814c61f-2675-478a-8c82-8ef168bf75f3.html>.

⁵⁷ H.B. 333, 146th Gen. Assemb. (Del. 2012).

⁵⁸ A.B. 114, 77th Assemb., Reg. Sess. (Nev. 2013).

⁵⁹ A. 2578, 215th Gen. Assemb., Reg. Sess. (N.J. 2012).

⁶⁰ *National Economic Impact of the U.S. Gaming Industry*, AM. GAMING ASS'N (June 1, 2018), <https://www.americangaming.org/resources/economic-impact-of-the-u-s-gaming-industry-2>.

⁶¹ *Id.*

⁶² Internet Gambling Regulation, Consumer Protection, and Enforcement Act, H.R. 2267, 111th Cong. (2009–2010).

gambling activities by the Secretary of the Treasury, to provide for the consumer protections on the Internet, to enforce the tax code, and for other purposes.”⁶³ It acknowledged the increasing popularity of internet gambling, stating “there is no Federal or State regulatory regime in place to protect United States citizens who choose to engage in this interstate activity . . .”⁶⁴ Specifically, the bill proposed:

Internet gambling in the United States should be controlled by a strict Federal . . . licensing and regulatory framework to protect underage and otherwise vulnerable individuals, to ensure the games are fair, to address the concerns of law enforcement, and to enforce any limitations on the activity established by the States and Indian tribes.⁶⁵

Although the bill did not pass, it serves as an example that in the past, Congress has been aware that vulnerable parties, especially minors, require strict regulatory protection from potential abuse stemming from gambling.

The U.S. government has customarily protected minors with heightened care in its legislation.⁶⁶ To participate in gambling in the United States, a person must be either eighteen or twenty-one depending on the state and the type of activity.⁶⁷ Generally, these age restrictions are put in place to protect young people from the high risks associated with gambling.⁶⁸ These risks can include financial problems and debt, health risks (addiction, self-esteem issues, stress and anxiety), and reduced performance and attendance at work or school.⁶⁹ While the law concedes that gambling generates a litany of safety concerns, it does not afford the same treatment for microtransactions and loot boxes. This is understandable, considering humanity has thousands of years of experience with traditional games of chance and only recently has the loot box reared its head. Indeed, lawmakers need to take a hard look at the analogous nature of loot boxes to gambling and enact legislation to tackle this novel problem.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See generally *Overview of Child Protection Laws*, LAW FIRMS.COM, <https://www.lawfirms.com/resources/child-custody/types-child-custody/overview-child-protection-laws> (providing a background in legislation protecting minors).

⁶⁷ *Legal Gambling Age in the US*, GAMBLING.COM, <https://www.gambling.com/us/laws/legal-gambling-age-in-the-us>.

⁶⁸ *Age Restrictions at Casinos Explained*, TOP CASINO BONUS (Mar. 4, 2019), <https://top-casino-bonus.com/age-restrictions-casinos-explained>.

⁶⁹ *Id.*

C. *Are Loot Boxes de facto Gambling?*

A list of what constitutes gambling is provided in 18 U.S.C. § 1955(b)(4), which codifies a prohibition on illegal gambling businesses: “‘gambling’ 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.”⁷⁰ It is not exactly clear whether loot boxes fall under this definition. Loot boxes are undeniably a form of selling chances, but the language “selling chances therein” likely refers to selling chances within the aforementioned list, which loot boxes are not a part of. Generally, when one or more things of a class are expressly mentioned, others of the same class are excluded.⁷¹ Moreover, it is difficult to argue that loot boxes fall under any of the mentioned categories—the strongest argument is that they are analogous to slot machines, but even so, mere analogy would not be strong enough. Analogy does not allow for a literal reading of the text that includes loot boxes within the list and it is extremely unlikely that loot boxes were intended to be included, considering they are a recent development that did not exist at the time the code was written.

Notably, 18 U.S.C. § 1955 makes no mention of internet gambling or any use of modern technology at all.⁷² The law is not always well equipped to tackle novel issues generated by technological innovation. 31 U.S.C. § 5361 explains “[n]ew 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.”⁷³ 31 U.S.C. § 5362, which lays out definitions for a prohibition on funding of unlawful internet gambling, may be more relevant here.⁷⁴ The code defines the term “bet or wager”:

(A) means 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;

⁷⁰ 18 U.S.C. § 1955(b)(4).

⁷¹ *Expressio Unius Est Exclusion Alterius*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/legal/expressio%20unius%20est%20exclusio%20alterius>.

⁷² 18 U.S.C. § 1955.

⁷³ 31 U.S.C. § 5361(a)(4).

⁷⁴ 31 U.S.C. § 5362.

(B) includes the purchase of a chance or opportunity to win a lottery or other prize (which opportunity to win is predominantly subject to chance);

...⁷⁵

In simpler terms, a bet or wager has three components: (1) consideration, (2) chance, and (3) the opportunity to receive something of value.⁷⁶ Here, loot boxes likely fall under this definition because consumers (1) pay real money to buy loot boxes that (2) have random odds of (3) obtaining virtual content.⁷⁷ Of course, there are some exceptions. In games like *Overwatch*, players can obtain free loot boxes through the normal course of playing the game.⁷⁸ In *Counter-Strike: Global Offensive*, players have a chance to receive crates after each completed game, but they cannot be opened without the purchase of a key in-game or on a secondary market.⁷⁹ While these exceptions may pose relevant concerns, this Comment focuses primarily on the problematic class of purchasable loot boxes.

1. Things of Value

While the definition of “bet or wager” under 31 U.S.C. § 5362 likely encompasses loot boxes, some legislatures are not so sure. Some ambiguity lies in the third element—do virtual items have value? This opacity can act as somewhat of a loophole for game developers. While randomized products like baseball cards have cognizable market value, it appears at face value that loot box content does not. In fact, bodies such as the U.K. Gambling Commission have not classified loot boxes as gambling because the items received cannot be cashed out for real money.⁸⁰ Likewise, in two relatively recent cases, courts held virtual chips are not “things of value” because they cannot be cashed out for “real world” money or any equivalent.⁸¹ On the other hand, in the 2018 case, *Kater v. Churchill Downs, Inc.*, the U.S. Court of Appeals for the Ninth Circuit held that a virtual casino game fell under Washington’s definition of illegal

⁷⁵ *Id.* § 5362(1)(A)–(B).

⁷⁶ *Id.*

⁷⁷ F.T.C., *supra* note 20.

⁷⁸ Daniel Friedman, *Are Overwatch's Loot Boxes Worth Your Money?*, POLYGON (May 26, 2016, 12:30 PM), <https://www.polygon.com/2016/5/26/11785084/overwatch-loot-system-guide>.

⁷⁹ Crates cannot be opened without a corresponding key, making it so the player is not paying for the loot box itself, but still must pay for it to be opened. *CSGO: A Guide to Skins, Crates, Keys, Trading & More!*, BANANATIC (Jan. 13, 2018), <https://www.bananatic.com/games/csgo-prime-b2p-158/csgo-a-guide-to-skins-crates-keys-trading-more-7790>.

⁸⁰ Hood, *supra* note 9.

⁸¹ *See* *Mason v. Machine Zone, Inc.*, 851 F.3d 315, 319–20 (4th Cir. 2017); *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871, 882 (N.D. Ill. 2016).

gambling because its virtual casino tokens could qualify as “things of value.”⁸² Washington defines gambling as:

[(1)] staking or risking something of value [(2)] upon the outcome of a contest of chance or a future contingent event not under the person’s control or influence, [(3)] upon an agreement or understanding that the person or someone else will receive something of value in the event of a certain outcome.⁸³

Washington defines a “thing of value” as:

any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise, directly or indirectly, contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge.⁸⁴

The court agreed with Kater’s argument that virtual chips are a “thing of value” because they are a “form of credit . . . involving extension of . . . entertainment or a privilege of playing [Big Fish Casino] without charge.”⁸⁵ Although the virtual chips did not have outright pecuniary value, they were required to play the game and therefore had “value.”⁸⁶ The court applied this analysis even though users received free chips throughout the course of normal gameplay.⁸⁷ This may be important to show that even free loot boxes may not be safe from a gambling analysis. Moreover, although the game’s Terms of Use states that virtual chips have no monetary value and cannot be exchanged “for cash or any other tangible value,” the game includes a mechanism for transferring chips between users.⁸⁸ Users can amass chips that can be used to cash out winnings through the use of a secondary “black market” outside the game.⁸⁹ The Ninth Circuit’s decision illustrates virtual items can derive actual value through the mere potential to have value outside of the game.⁹⁰ This concept, construed broadly, postulates that almost any type of loot box likely falls under the definition of “bet or wager” under 31 U.S.C. § 5362.

⁸² See *Kater v. Churchill Downs, Inc.*, 886 F.3d 784 (9th Cir. 2018).

⁸³ WASH. REV. CODE § 9.46.0237 (2005).

⁸⁴ WASH. REV. CODE § 9.46.0285 (1987).

⁸⁵ *Kater*, 886 F.3d at 787 (quoting WASH. REV. CODE § 9.46.0285 (1987)).

⁸⁶ *See id.*

⁸⁷ *See id.*

⁸⁸ *Id.* at 786 (quotations omitted).

⁸⁹ *Id.*

⁹⁰ *Id.*

31 U.S.C. § 5362 also lays out a definition for unlawful internet gambling, using the crucial language that bets or wagers must be made in accordance with State regulations including “age and location verification requirements reasonably designed to block access to minors . . .”⁹¹ Again, the law recognizes the need to protect minors; unfortunately, states do not currently limit access to loot boxes on the basis of age. However, recent legislative pushes in this direction will be discussed in a later section.

2. *The Comparison to Collectible Trading Cards*

Several proponents of loot boxes, such as the Entertainment Software Rating Board (ESRB),⁹² have argued loot boxes are not gambling, comparing them to collectible card packs.⁹³ As early as the 1860s, sporting goods companies were printing baseball cards for advertising purposes.⁹⁴ The first card set resembling modern baseball cards was created by Topps in 1951.⁹⁵ Some of the higher rarity cards, sometimes called insert cards,⁹⁶ can sell for thousands of dollars in secondary markets.⁹⁷ Defenders of loot boxes are quick to make the comparison to trading cards because there is significant legal history holding trading card packs do not constitute illegal gambling in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO).⁹⁸

To prevail on a civil RICO claim, a plaintiff must prove the defendant engaged in (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity, and additionally must establish that (5) the defendant caused injury to the plaintiff’s business or property.⁹⁹ A RICO plaintiff must show their injury was proximately caused by the prohibited conduct and that

⁹¹ 31 U.S.C. § 5362 (10)(B)(ii)(I).

⁹² The ESRB is a self-regulatory body for the video game industry that routinely rates games to suggest age-appropriateness. *About ESRB*, ESRB, <https://www.esrb.org/about>.

⁹³ Brendan Sinclair, *Loot Boxes Aren’t Gambling – ESRB*, GAMESINDUSTRY.BIZ (Oct. 11, 2017), <https://www.gamesindustry.biz/articles/2017-10-11-loot-boxes-arent-gambling-esrb>.

⁹⁴ *A Brief History of Baseball Cards*, CYCLEBACK, <http://www.cycleback.com/1800s/briefhistory.htm>.

⁹⁵ *A History of Baseball Cards*, ALL VINTAGE CARDS, <https://allvintagecards.com/history-baseball-cards> (last updated Feb. 22, 2021).

⁹⁶ John Cook, *A Beginner’s Guide to Sports Card Collecting*, <https://www.liveabout.com/beginner-guide-to-sports-card-collecting-784278> (last updated Jan. 27, 2019).

⁹⁷ *History of Trading Cards*, ESL SPORTS CTR., <http://www.eslsportscentre.com/history-of-trading-cards>; Dylan Hughes, *Trading Warfare: Why Trading Cards Have Disappeared from Retail Shelves*, MARKER (June 2, 2021), <https://marker.medium.com/trading-warfare-why-trading-cards-have-disappeared-from-retail-shelves-a6f9f3adfe37>.

⁹⁸ See *Chaset v. Fleer/Skybox Int’l, LP*, 300 F.3d 1083, 1087 (9th Cir. 2002); *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998); *Major League Baseball Props., Inc. v. Price*, 105 F. Supp. 2d 46, 51 (E.D.N.Y. 2000).

⁹⁹ *Chaset*, 300 F.3d at 1086.

they suffered a concrete financial loss (not mere injury to a valuable intangible property interest).¹⁰⁰ In *Chaset v. Fleer/Skybox International, LP*, a consolidation of eight cases, the U.S. Court of Appeals for the Ninth Circuit held:

Purchasers of trading cards do not suffer an injury cognizable under RICO when they do not receive an insert card. At the time the plaintiffs purchased the package of cards, which is the time the value of the package should be determined, they received value—eight or ten cards, one of which might be an insert card—for what they paid as a purchase price. Their disappointment upon not finding an insert card in the package is not an injury to property.¹⁰¹

The Fifth Circuit had reached a similar result years prior in *Price v. Pinnacle Brands, Inc.*, holding “[i]njury to mere expectancy interests or to an ‘intangible property interest’ is not sufficient to confer RICO standing.”¹⁰² Moreover, in *Major League Baseball Properties, Inc. v. Price*, the U.S. District Court for the Eastern District of New York determined, “[t]his bargain delivers actual value to each party because the chance itself is of value regardless of whether or not the card purchaser later suffers a ‘loss.’”¹⁰³ The main takeaway from these cases is purchasers of trading cards lack standing to sue under RICO due to the lack of any cognizable financial injury.¹⁰⁴ The same could be said for loot boxes—it is arguable that technically, consumers are getting what they paid for.

Whether or not legislators buy the comparison, there are several qualities specific to loot boxes that distinguish them from card packs, showing that they require more carefully tailored regulatory schemes. The following sections will explain some of these qualities and the risks associated with children buying loot boxes, ultimately demonstrating why loot boxes should be considered unlawful internet gambling.

D. Loot Boxes Are Too Easy to Purchase

Children are spending an increasingly longer amount of time on mobile devices every year.¹⁰⁵ Gaming corporations have made microtransactions

¹⁰⁰ *Id.* at 1086–87.

¹⁰¹ *Id.* at 1087.

¹⁰² *Pinnacle Brands, Inc.*, 138 F.3d at 607.

¹⁰³ *Major League Baseball Props., Inc.*, 105 F. Supp. 2d at 51.

¹⁰⁴ *See Chaset*, 300 F.3d 1083; *Pinnacle Brands Inc.*, 138 F.3d 602; *Major League Baseball Props., Inc.*, 105 F. Supp. 2d 46.

¹⁰⁵ *See* Jingjing Jiang, *How Teens and Parents Navigate Screen Time and Device Distractions*, PEW RES. CTR. (Aug. 22, 2018), <https://www.pewresearch.org/internet/2018/08/22/how-teens-and-parents-navigate-screen-time->

extremely easy to access—with just a few button presses on a mobile device, a consumer can spend thousands of dollars. Dr. Marcus Carter, former president of the Digital Games Research Association of Australia, argued it is like “having [a] slot machine in your pocket that actively encourages you to gamble at your most vulnerable moment.”¹⁰⁶ This problem is exacerbated by the fact that players can save their payment information for future purchases. A study showed that two out of every three online shoppers have their card information stored on at least one website or mobile app, and about ten percent say they always save their card information no matter where they are shopping.¹⁰⁷ Paying with credit cards adds a level of abstraction to payment compared to paying with cash.¹⁰⁸ This may cause players to feel like they are spending less than they really are, priming them for additional purchases.¹⁰⁹ As a result, microtransactions and credit cards form a deadly combination, arming children with the capability to completely empty their parents’ bank accounts.¹¹⁰ This is especially egregious when it comes to “free-to-play” games, which entice players into downloading games for no cost, only to spring the loot box trap later on.¹¹¹

E. Game Developers Induce Addictive Behavior by Design

Academics and gambling research groups have focused heavily on the psychologically addictive elements of loot box systems, with many labelling the practice as “simulated gambling.”¹¹² In particular, research has centered on the mechanisms through which loot boxes put players on a “variable ratio reinforcement schedule,” in which players do not know exactly when they will get a reward, driving them to purchase frequently in hopes of winning.¹¹³ Reinforcement schedules are a crucial element of B.F. Skinner’s method of operant conditioning, in which individuals learn to make associations between

and-device-distractions.

¹⁰⁶ Patrick Lum, *Video Game Loot Boxes Addictive and a Form of ‘Simulated Gambling’*, *Senate Inquiry Told*, *GUARDIAN* (Aug. 16, 2018) (quoting Marcus Carter), <https://www.theguardian.com/games/2018/aug/17/video-game-loot-boxes-addictive-and-a-form-of-simulated-gambling-senate-inquiry-told>.

¹⁰⁷ Michelle Crouch, *Poll: 94 Million Americans Store Their Card Information Online*, *CREDITCARDS.COM* (June 1, 2017), <https://www.creditcards.com/credit-card-news/store-card-information-online>.

¹⁰⁸ See Utpal Dholakia, *Does It Matter Whether You Pay with Cash or a Credit Card?*, *PSYCHOL. TODAY* (July 11, 2016), <https://www.psychologytoday.com/us/blog/the-science-behind-behavior/201607/does-it-matter-whether-you-pay-cash-or-credit-card>.

¹⁰⁹ *Id.*

¹¹⁰ See Zoe Kleinman, *‘My Son Spent £3,160 in One Game’*, *BBC NEWS* (July 15, 2019), <https://www.bbc.com/news/technology-48925623>.

¹¹¹ Soham Kulkarni, *The Psychology of Freemium Games*, *MEDIUM* (Mar. 9, 2019), <https://medium.com/strategy-insider/https-medium-com-sk-sohamkulkarni-the-psychology-of-freemium-games-b66f68a51205>.

¹¹² Lum, *supra* note 106.

¹¹³ *Id.*

particular behaviors and consequences through reinforcement and punishment.¹¹⁴ Loot boxes and other forms of gambling are problematic in this respect because of their unpredictability, which makes purchasing behavior very difficult to extinguish.¹¹⁵ Moreover, those who engage in loot box systems can have both short-term consequences (e.g. overspending) and more serious long-term effects like migrating to more conventional forms of gambling.¹¹⁶ In fact, the Association of Heads of Independent Schools of Australia cited research finding around twenty percent of simulated gambling players moved on to online commercial gambling and five percent of young Australians would develop gambling problems before they were even twenty-five years old.¹¹⁷

Top gaming companies use a variety of methods to ensure players return as repeat customers:

(1) *exploitation of player data* (i.e., the use of individual and/or player population data to optimize the type and scheduling of purchasing offers or discounts for each player, such that important conditions of the product [e.g., price, availability]: are manipulated or determined by factors that take advantage of personal information [e.g., available funds] rather than basic supply or demand factors); (2) *limited disclosure of the product* (i.e., referring broadly to non-disclosure or misrepresentation of important conditions of the purchase, including the long term value or utility of a purchased item, and/or that product features are affected by player analytics); (3) *adaptive solicitation* (i.e., purchasing offers that are triggered by certain player behaviors and other analytics); [sic] (5) *limited possession* (i.e., granting a player temporary possession of an item to encourage urgent use and/or additional purchasing); and (6) *price and/or currency manipulation* (i.e., altering the prices of items or the value of currency based on player analytics and/or other non-player factors to encourage purchasing).¹¹⁸

R.A. v. Epic Games, Inc. in 2019 stands as an example of a corporation using some of these shady business practices.¹¹⁹ The plaintiff brought a class action against the developers of the popular online game, *Fortnite*, for a series of

¹¹⁴ Saul McLeod, *Skinner-Operant Conditioning*, SIMPLYPSYCHOLOGY (2018), <https://www.simplypsychology.org/operant-conditioning.html>.

¹¹⁵ *Id.*

¹¹⁶ Lum, *supra* note 106.

¹¹⁷ *Id.*

¹¹⁸ Daniel L. King et al., *Unfair Play? Video Games as Exploitative Monetized Services: An Examination of Game Patents from a Consumer Protection Perspective*, 101 COMPUT. HUM. BEHAV. 131–43 (Dec. 2019), <https://www.sciencedirect.com/science/article/pii/S0747563219302602>.

¹¹⁹ *R.A. v. Epic Games, Inc.*, No. CV 19-1488-GW-Ex, 2019 WL 6792801 (C.D. Cal. July 30, 2019).

alleged material misrepresentations, the likes of which are commonly used in today's largest online games.¹²⁰ The plaintiff contended younger players have difficulty conceptualizing how much actual money is spent on in-game purchases.¹²¹ *Fortnite* induces players to purchase “V-Bucks,” an in-game currency which must be used to purchase loot boxes.¹²² This level of abstraction makes it difficult for players to relate individual “V-Bucks” values with specific dollar amounts. Additionally, *Fortnite*'s loot boxes come in different rarities, but the actual odds of receiving specific in-game items are not displayed in-game.¹²³ When a player hovers their cursor over loot boxes, a thought bubble appears showing high-value loot even though the chances of getting them are low.¹²⁴ Moreover, another enticing feature is that the loot boxes have a chance to randomly upgrade to a higher rarity upon purchase.¹²⁵ Finally, certain loot boxes that offer high rarity loot are available only for a twenty-four hour period, contributing to a “sense of artificial scarcity” that induces players to purchase them before they expire.¹²⁶ After a transfer of venue, the court unfortunately dodged any question regarding the misrepresentations, instead holding that the plaintiff, a minor, effectively disaffirmed the end-user license agreement and was entitled to a refund.¹²⁷ Although the opinion leaves consumers in the dark about the legality of loot box sales practices, that the issue was even briefly considered by the courts is a step in the right direction.

These sales practices can influence players in widely differing degrees. A 2016 report by mobile marketing automation firm Swrve found only 0.19% of all players contribute to an enormous forty eight percent of mobile games revenue.¹²⁸ These big spenders who drive the majority of microtransaction revenue have been termed “whales.”¹²⁹ Companies are highly reliant on their “whales” and may go the extra mile to accommodate their needs, much like how a casino coddles its high rollers.¹³⁰ Spending by these users can reach gargantuan

¹²⁰ *Id.*; King et al., *supra* note 118, at 137.

¹²¹ *Epic Games*, slip op. at 1.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ R.A. *ex rel* Altes v. Epic Games, Inc., No. 5:19-cv-325-BO, 2020 WL 865420 (E.D.N.C. Feb. 20, 2020).

¹²⁸ Jon Cifuentes, *Half of All Mobile Games Revenue Reportedly Comes from only 0.19% of Players*, VENTUREBEAT (Mar. 23, 2016), <https://venturebeat.com/2016/03/23/half-of-all-mobile-games-revenue-comes-from-only-0-19-of-players-report>.

¹²⁹ Vic Hood, *Interview with the Video Game Whale*, EUROGAMER (Oct. 25, 2017), <https://www.eurogamer.net/articles/2017-10-20-interview-with-the-whale>.

¹³⁰ Dean Takahashi, *The DeanBeat: This Player Spent \$2 Million in a Mobile Game. Then He Led a*

proportions, with some players spending upwards of \$2 million on a single game.¹³¹ This type of spending can have extremely negative consequences, with recovering microtransaction addicts citing dependency, financial loss, and the destruction of social life.¹³²

F. Skin Gambling Is a Derivative of Loot Boxes

Even if a legislature were to decide definitively that loot boxes do not constitute gambling, the virtual goods obtained through loot boxes can act as an avenue to serious betting practices. The most common example involves skins, which are purely cosmetic content that change the look of an item within a game.¹³³ While some skins can be purchased, skins are also often dropped through loot boxes.¹³⁴ Skin gambling is the use of virtual goods like skins as virtual currency to bet on the outcome of professional esports matches or other games of chance.¹³⁵ Skin gambling is primarily a practice within Valve's *Counter-Strike: Global Offensive*, although it does exist within a few other games.¹³⁶ Valve's Steam marketplace has an "open API,"¹³⁷ meaning its code is publicly available and accessible.¹³⁸ While this allows users to make positive contributions to the community, it also has the drawback of leaving a backdoor open for potential mischief.¹³⁹ Unregulated third-party websites can use the API to allow gamers to transfer their skins to other sites, where gamers can trade the skins for real money.¹⁴⁰ These sites allow users to freely buy and sell skins without having to abide by Valve's \$400 limit on trades, which in turn fuels the skin gambling economy.¹⁴¹ Although Valve wrote cease and desist letters to dozens of these third-party websites in 2016, \$5 billion worth of skins were still

Boycott, VENTUREBEAT (Oct. 14, 2016), <https://venturebeat.com/2016/10/14/the-deanbeat-this-player-spent-2-million-in-a-mobile-game-then-he-led-a-boycott>.

¹³¹ *Id.*

¹³² See Luke Winkie, *Here's How Loot Box & Microtransaction Addiction Destroys Lives*, IGN (July 13, 2020), <https://www.ign.com/articles/heres-how-loot-box-addiction-destroys-lives>.

¹³³ *Skins & Skin Betting*, VIDEOGAMES.ORG, <https://www.videogames.org.au/skin-betting>.

¹³⁴ *Id.*

¹³⁵ James Duffy, *Skin Betting vs. Cash Betting in Esports*, SMART WALLET (July 26, 2020), <https://thesmartwallet.com/skin-betting-cash-betting-esports/?articleid=15460>.

¹³⁶ Shaun Assael, *Skin in the Game*, ESPN (Jan. 20, 2017), http://www.espn.com/espn/feature/story/_/id/18510975/how-counter-strike-turned-teenager-compulsive-gambler/ ("Counter-Strike has spawned a wild multibillion-dollar world of online casino gambling; it's barely regulated and open to any kid who wants in.").

¹³⁷ API stands for Application Programming Interface. See Jonathan Freeman, *What Is an API? Application Programming Interfaces Explained*, INFOWORLD (Aug. 8, 2019), <https://www.infoworld.com/article/3269878/what-is-an-api-application-programming-interfaces-explained.html>.

¹³⁸ Assael, *supra* note 136.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

wagered that year.¹⁴² Valve’s “crackdown” on skin gambling seems little more than performative, as the skins gambling industry is projected to experience growth well into 2022.¹⁴³ The global esports betting market is expected to be worth up to \$15 billion in 2020, compared to less than \$6 billion in 2016.¹⁴⁴

Skin gambling exposes children to high-risk behavior as long as they have the skins and the time to gamble. A United Kingdom-based study analyzed 880,000 tweets from 417 accounts related to gambling operators—it found that seventeen percent of followers were under sixteen, and another sixty-nine percent were aged sixteen to twenty-three.¹⁴⁵ Moreover, the U.K. Gambling Commission’s 2017 annual report found forty-five percent of eleven to sixteen year-olds were aware of skin gambling, and eleven percent had already engaged in placing bets using virtual items.¹⁴⁶ New regulations to protect minors would find little success trying to reign in third-party sites as they are generally registered abroad.¹⁴⁷ Legislators should instead target loot boxes themselves to prevent minors from easily procuring the key to the skin gambling backdoor.

G. Recognition of Gaming Disorder

In 2018, the World Health Organization (WHO) included “gaming disorder” in the Eleventh Revision of the International Classification of Diseases.¹⁴⁸ It is defined as “a pattern of gaming behavior (‘digital-gaming’ or ‘video-gaming’) characterized by impaired control over gaming, increasing priority given to gaming over other activities to the extent that gaming takes precedence over other interests and daily activities, and continuation or escalation of gaming despite the occurrence of negative consequences.”¹⁴⁹ For gaming disorder to be

¹⁴² Katie Barlowe, *\$5 Billion in Skins Wagered in 2016 Despite Valve Shutdown*, CASINO.ORG (Jan. 24, 2017), <https://www.casino.org/news/5-billion-skins-wagered-2016-despite-valve-shutdown>.

¹⁴³ Brendan Sinclair, *Loot Boxes, Skins Gambling to Hit \$50 billion by 2022—Report*, GAMESINDUSTRY.BIZ (Apr. 17, 2018), <https://www.gamesindustry.biz/articles/2018-04-17-loot-boxes-skins-gambling-to-hit-usd50-billion-by-2022-report>.

¹⁴⁴ The Conversation, *supra* note 32.

¹⁴⁵ *Id.*

¹⁴⁶ *Skin Betting: ‘Children as Young as 11 Introduced to Gambling’*, BBC NEWS (Dec. 12, 2017), <https://www.bbc.com/news/technology-42311533>.

¹⁴⁷ Sonia Livingstone, *The Rise of Skin Gambling: How Outdated Legislation Allows Thousands of UK Children to Gamble Online*, LONDON SCH. ECON. & POL. SCI. (Apr. 17, 2019), <https://blogs.lse.ac.uk/parenting4digitalfuture/2019/04/17/the-rise-of-skin-gambling-how-outdated-legislation-allows-thousands-of-uk-children-to-gamble-online>.

¹⁴⁸ *Gaming Disorder*, WORLD HEALTH ORGANIZATION [WHO] (Sept. 14, 2018), <https://www.who.int/news-room/q-a-detail/gaming-disorder>. The International Classification of Diseases is the basis for identification of health trends and statistics globally and the international standard for reporting diseases and health conditions. It is used by medical practitioners and researchers around the world. *Id.*

¹⁴⁹ *Id.*

diagnosed, “the behaviour [*sic*] pattern must be of sufficient severity to result in significant impairment in personal, family, social, educational, occupational or other important areas of functioning and would normally have been evident for at least 12 months.”¹⁵⁰

Not many generations have grown up with gaming, so the world’s understanding of its potential boons and pitfalls is under a shadow of uncertainty. WHO’s definition reflects this uncertainty, purposely casting a wide net that encompasses any gaming related activity. While loot boxes likely fall under “gaming behavior,” the issue seems more nuanced than WHO’s preliminary understanding shows. More research should be done to determine whether loot box addiction requires its own classification, or if mere gaming and gambling classifications suffice. Other healthcare bodies around the globe are also starting to examine the repercussions of engaging with loot boxes. For example, Claire Murdoch, England’s National Health Service Mental Health Director, has stated that loot boxes are “setting kids up for addiction by teaching them to gamble.”¹⁵¹ The purpose of a classification specific to loot boxes would be to further legitimize loot box addiction in the eyes of healthcare professionals across the globe. Starting this conversation among the medical community to publicize the gravity of loot box addiction has the potential to spur policymakers to regulate loot boxes.

II. LOOT BOX REGULATION IN THE UNITED STATES

State legislatures in at least four states (California, Hawaii, Minnesota, and Washington) introduced bills in 2018 aimed at regulating loot boxes—all failed to pass.¹⁵²

In 2018, the ESRB announced that all physical, boxed games containing in-game purchases must include a label indicating so.¹⁵³ The label does not specifically mention loot boxes and applies evenly across all games that include any type of additional content to be purchased.¹⁵⁴ Just before this announcement,

¹⁵⁰ *Id.*

¹⁵¹ Wesley Yin-Poole, *NHS Chief Says Loot Boxes Are “Setting Kids Up for Addiction” to Gambling*, EUROGAMER (Jan. 18, 2020), <https://www.eurogamer.net/articles/2020-01-18-nhs-mental-health-boss-says-loot-boxes-are-setting-kids-up-for-addiction-to-gambling>.

¹⁵² Julia K. Kadish & James G. Gatto, *The Legality of Loot Boxes: A Primer*, NAT’L L. REV. (Dec. 1, 2020), <https://www.natlawreview.com/article/legality-loot-boxes-primer>.

¹⁵³ Kyle Orland, *ESRB Defends “Fun” Loot Boxes as It Starts Labeling All “In-Game Purchases”*, ARS TECHNICA (Feb. 27, 2018), <https://arstechnica.com/gaming/2018/02/esrb-defends-fun-loot-boxes-as-it-starts-labeling-all-in-game-purchases>.

¹⁵⁴ *Id.*

Senator Maggie Hassan (D-NH) sent an open letter to the ESRB urging them to examine whether games with loot boxes are being marketed “in an ethical and transparent way that adequately protects the developing minds of young children from predatory practices.”¹⁵⁵ The ESRB replied, stating in part “[w]e believe that the combination of upfront disclosures about the availability of in-game purchases combined with activating parental controls is a quick and effective way to address the concerns you have raised.”¹⁵⁶ It is unlikely that the ESRB’s labeling alone will have much effect, especially given digital game sales outnumber physical purchases by a significant margin, increasingly so in the midst of the COVID-19 pandemic.¹⁵⁷ Some large gaming corporations like Capcom are increasingly phasing out physical media,¹⁵⁸ so the ESRB may need to take steps that more forcefully affect digital games.

In 2020, the ESRB announced a new “Interactive Element” disclosure tag, used to describe game elements that may be of interest but do not influence a game’s rating.¹⁵⁹ Among these interactive elements is the “In-Game Purchases (Includes Random Items)” disclosure, sitting just below a game’s content rating to inform consumers of the presence of loot boxes.¹⁶⁰ Although disclosure to consumers is a positive step, it seems counterintuitive that something the ESRB believes requires disclosure has no effect on a game’s rating. In fact, it makes much more sense that if there is an interest in disclosure, then there must be some aspect of the game element that makes it controversial to parents. As lawmakers continue to have the conversation about regulating loot boxes and elucidating the associated dangers, perhaps the ESRB will be more inclined to allow the presence of loot boxes to affect a game’s rating.

In 2019, Senator Josh Hawley (R-MO) proposed the Protecting Children from Abusive Games Act to protect minors by focusing on several forms of manipulative design in games targeted at, or played by, consumers under the age of eighteen.¹⁶¹ The framework for determining which games target minors

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Owen S. Good, *COVID-19 Pandemic Turns Console Gamers to Digital Sales in Record Numbers*, POLYGON (Aug. 11, 2020), <https://www.polygon.com/2020/8/11/21363951/video-game-sales-digital-online-xbox-one-ps4-publisher-figures-ea-activision-2k-games>.

¹⁵⁸ Brendan Sinclair, *Capcom Says Its Game Sales Are 80% Digital and Rising*, GAMESINDUSTRY.BIZ (July 9, 2020), <https://www.gamesindustry.biz/articles/2020-07-09-capcom-says-game-sales-are-80-percent-digital-and-rising>.

¹⁵⁹ Kadish & Gatto, *supra* note 152.

¹⁶⁰ *Id.*

¹⁶¹ Steven Blickensderfer & Nicholas A. Brown, *U.S. Regulation of Loot Boxes Heats Up with Announcement of New Legislation*, NAT’L L. REV. (May 9, 2019), <https://www.natlawreview.com/article/us-regulation-loot-boxes-heats-announcement-new-legislation>.

would be similar to the Children’s Online Privacy Protection Act.¹⁶² The bill would prohibit loot boxes, which it defines broadly as any “microtransactions offering randomized or partially randomized rewards to players.”¹⁶³ Furthermore, the bill would outlaw pay-to-win game design, including:

- (1) attempting to induce players to spend money to quickly advance through game content that is otherwise available for no additional cost;
- and (2) manipulating the balance in competitive multiplayer games to give players who purchase additional microtransactions a competitive advantage over other players who do not pay the additional fees.¹⁶⁴

If passed, the bill would have a significant impact on current trends in game design and monetization.¹⁶⁵ Some analysts believe a bill like this one is inevitable, while others criticize it for being ineffective.¹⁶⁶ Joost van Dreunen, co-founder of Nielsen-owned research firm SuperData, believes such a bill is a necessary step and is optimistic the industry can rally to formulate their own regulatory framework before the government can, given gaming’s long history of self-regulation.¹⁶⁷ Tom Wijman, a senior market analyst at Newzoo, believes the gaming industry would not incur significant financial loss from the prohibition of loot boxes because corporations can still profit from regular microtransactions.¹⁶⁸ Wedbush Securities analyst Michael Pachter is less enthusiastic about the passage of such a bill—while he acknowledges the loot box issue as legitimate, he believes the sponsor of the bill would have to demonstrate that children are, in fact, being taken advantage of.¹⁶⁹ As legal understanding of gaming and loot boxes develops and more data is available for statistical analysis, the dangers posed to children by loot boxes should become more apparent.

While protecting minors is paramount, economic preservation of the gaming industry is also a crucial interest. In 2020, Washington lawmakers put forth legislation to protect game developers from class-action lawsuits.¹⁷⁰

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Giancarlo Valdes, ‘Zero’ Chance It Passes: Game Analysts Break Down Senator’s Anti-Loot Box Bill, VENTUREBEAT (May 13, 2019), <https://venturebeat.com/2019/05/13/zero-chance-it-passes-game-analysts-break-down-senators-anti-loot-box-bill>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Brendan Sinclair, *Washington Bills Would Carve Out Exceptions for Games in Gambling Law*, GAMESINDUSTRY.BIZ (Jan. 27, 2020), <https://www.gamesindustry.biz/articles/2020-01-27-washington-bills-would-carve-out-exceptions-for-video-games-in-gambling-law>.

Significantly, both bills¹⁷¹ proposed to change the legal definition of “illegal gambling games” to carve out an exception for video games, stating:

For purposes of this section, ‘illegal gambling games’ does not include online games of chance when played solely for entertainment purposes with virtual items if such virtual items may be used only for gameplay and may not be, per the terms of service of the game, transferred, exchanged, or redeemed for money or property.¹⁷²

Interestingly, the legislation does not seem to interfere with the ruling made in *Kater v. Churchill Downs, Inc.* In that case, the determining factor was not that loot box content could be cashed out, but that the virtual chips extended users’ privilege of playing the game itself.¹⁷³ However, the legislation, if passed, would introduce more leeway in future design spaces for monetization techniques.

Consumers have become increasingly concerned about the potential exploitative business practices gaming corporations may be engaged in, especially those including loot boxes in their games.¹⁷⁴ Several class action lawsuits were recently brought in California against game developers, game publishers, and game distributors.¹⁷⁵ Some of the lawsuits have alleged violations of unfair competition laws by the gaming industry’s engagement in unlawful business under the state’s gambling law, while other cases such as *R.A. v. Epic Games, Inc.* argue that gaming corporations materially misrepresent their marketing and selling of the loot box.¹⁷⁶

III. LOOT BOX REGULATION IN SOUTH KOREA

A. South Korea’s Strange Relationship with Gambling

To properly draw a parallel, it is important to examine how South Korea has handled gambling. Oddly, although lotteries, horse racing, boat racing, and cycling are all legal forms of gambling in South Korea, casino gambling results in a three-year prison sentence.¹⁷⁷ South Korea’s gambling laws present an interesting dichotomy—tourists can gamble but locals cannot.¹⁷⁸ Casino

¹⁷¹ H.B. 2720, 66 Leg., Reg. Sess. (Wash. 2020); S. 6568, 66 Leg., Reg. Sess. (Wash. 2020).

¹⁷² Sinclair, *supra* note 158.

¹⁷³ See *Kater v. Churchill Downs, Inc.*, 886 F.3d 784 (9th Cir. 2018).

¹⁷⁴ Kadish & Gatto, *supra* note 152.

¹⁷⁵ *Id.*; *R.A. v. Epic Games, Inc.*, No. CV 19-1488-GW-Ex, 2019 WL 6792801 (C.D. Cal. July 30, 2019).

¹⁷⁶ Kadish & Gatto, *supra* note 152.

¹⁷⁷ *South Korea’s Complex Relationship with Gambling*, HAPS MAG. (May 31, 2019), <https://www.hapskorea.com/south-koreas-complex-relationship-with-gambling>.

¹⁷⁸ *Id.*

gambling is mostly prohibited for South Korean citizens—of the twenty-three land-based casinos in the country, only one, Kangwon Casino, allows South Koreans to gamble.¹⁷⁹ This restriction on casino gambling mirrors the negative public perception of gambling that has been fostered over many generations.¹⁸⁰ Moreover, a study by the Korean Center on Gambling Problems found the average South Korean is two to three times more likely to suffer from gambling addiction than any other nationality.¹⁸¹ Additionally, online gambling is strictly illegal in South Korea and the government has taken a variety of measures against the activity such as blocking gambling sites or throttling internet connections to those sites.¹⁸²

B. South Korea and the Gaming Industry

South Korea has an involved history of both promoting and regulating the gaming industry.¹⁸³ The South Korean government understood the industry's value and its potential for future business development early on.¹⁸⁴ The aim of initial gaming policies was to enhance the competitiveness of the domestic game industry throughout the international market by providing strong governmental support.¹⁸⁵ The Game Industry Promotion Act¹⁸⁶ was passed in 2006 as the first piece of legislation in the world exclusively concerned with gaming.¹⁸⁷ In 2009, gaming became fully integrated into the South Korean government when the Game Industry Promotion Institute was integrated into the Korea Creative Contents Agency, and the Department of Game Industry Contents was formed within the Ministry of Culture.¹⁸⁸ This type of support allowed gaming to flourish and become an integral part of South Korean culture; internet cafes called “PC bangs” are essential to the social life of young South Koreans.¹⁸⁹

¹⁷⁹ *Id.* While Kangwon Casino is the largest casino in the country, it is also remotely located far north of major cities, making it difficult to visit for the average person. *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ See 2014 *Modularization of Korea's Development Experience: The Success Story of the Cultural Industry in Korea: The Case of the Game Industry*, KNOWLEDGE SHARING PROGRAM (2014) [hereinafter KNOWLEDGE SHARING PROGRAM], <http://www.eksp.kr/en/detail.jsp?midx=12> (scroll down and click “PDF Download”).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ Geim San-eob Jinheungbeob [Game Industry Promotion Act] (S. Kor.).

¹⁸⁷ KNOWLEDGE SHARING PROGRAM, *supra* note 183.

¹⁸⁸ *Id.*

¹⁸⁹ *South Korea \$9.8 Billion Video Game Market to 2026 - Focus on Mobile, Download, Online Games, Gaming Networks*, GLOBENEWSWIRE (Nov. 3, 2020) [hereinafter GLOBENEWSWIRE], <https://www.globenewswire.com/news-release/2020/11/03/2119249/0/en/South-Korea-9-8-Billion-Video-Game-Market-to->

Although the nation only ranks twenty-eighth in total population,¹⁹⁰ South Korea is the world's fourth largest market for video games.¹⁹¹ By 2026, South Korea's video games market is projected to be worth \$9.8 billion.¹⁹² Considering the importance of the industry to the South Korean economy, the country's government has been hesitant about taking on a true watchdog role and enacting total bans for harmful activity. However, the government has taken on a variety of other measures.

The South Korean government has historically wrestled with the repercussions of an untethered gaming industry on its user base. In 2011, South Korea passed the controversial Youth Protection Act which forbids children under the age of sixteen from playing online video games between midnight and six a.m.¹⁹³ The regulation saw considerable resistance—in fact, the constitutionality of the Act was disputed in 2014, but it was ultimately upheld.¹⁹⁴ Later that year, the government started allowing children to be exempted upon parental request.¹⁹⁵ The effectiveness of this regulation has been called into question, since it is easy for children to skirt the ban by logging in with their parents' national I.D. numbers.¹⁹⁶ In August 2021, the regulation was finally abolished in an effort to “respect the rights of the youths and encourage healthy home education.”¹⁹⁷

Given South Korea's problematic history with gambling, it follows that the nation would be hypersensitive to any activity that could potentially resemble gambling. In the past, South Korea has considered placing the excessive playing of video games on an official list of addictions alongside problem gambling, alcoholism, and drug abuse.¹⁹⁸ However, South Korea generally prefers to regulate microtransactions by letting the Game Rating and Administration

2026-Focus-on-Mobile-Download-Online-Games-Gaming-Networks.html.

¹⁹⁰ *South Korea Population*, WORLDOMETER (2021), <https://www.worldometers.info/world-population/south-korea-population>.

¹⁹¹ GLOBENEWSWIRE, *supra* note 189.

¹⁹² *Id.*

¹⁹³ Cheongsongyeon Bohobeop [Youth Protection Act] (S. Kor.).

¹⁹⁴ Yoo Sun Chung, *Analysis of “Shutdown Law” Precedent – Case No.: 2011Hun-Ma659, 2011Hun-Ma683*, LEX KOREA (Sept. 28, 2015), <http://lexkorea.org/?p=331>.

¹⁹⁵ Min-Jeong Lee, *South Korea Eases Rules on Kids' Late Night Gaming*, WALL ST. J. (Sept. 2, 2014), <https://www.wsj.com/articles/BL-KRTB-6517>.

¹⁹⁶ *Id.*

¹⁹⁷ Evgeny Obedkov, *South Korea to Abandon ‘Cinderella Law’ That Prevents Minors from Playing Online Games at Night*, GAME WORLD OBSERVER (Aug. 25, 2021), <https://gameworldobserver.com/2021/08/25/south-korea-to-abandon-cinderella-law-that-prevents-minors-from-playing-online-games-at-night>.

¹⁹⁸ Jaeyeon Woo, *Internet Games Prove Challenging for South Korea*, WALL ST. J. (Oct. 30, 2013), <https://www.wsj.com/articles/BL-KRTB-4453>.

Committee place appropriate age restrictions on games that may instigate addictive behavior.¹⁹⁹ These guidelines place the onus on parents to regulate what and how much their children play. The committee uses a variety of content descriptors to highlight potentially harmful content to consumers; in particular, there is a catch-all “gambling” descriptor that covers simulated gambling, betting, and microtransactions.²⁰⁰ The South Korean Games Rating Board has prevented games from being approved for domestic sales in the past due to the “potential line-blurring ethics of online gambling.”²⁰¹

C. Recent Regulations and Developments in South Korea

Recently, South Korea’s Fair Trade Commission (FTC) carried out an extensive review of ten game companies, including giants such as Nexon, NCSOFT, Blizzard, and Riot Games.²⁰² Part of the review included an investigation of unfair clauses regarding underage users’ in-game purchases.²⁰³ Specifically, the FTC grappled with the negative consequences on parents of unrestricted purchases made by minors.²⁰⁴ Some of the clauses included: (1) *de facto* parental permission when a minor signs up for a game; (2) limiting refunds for in-game purchases even when the receiving party has yet to accept the gift; and (3) inequitable periods of use for gifted items.²⁰⁵ The FTC is considering making it easier for parents to get refunds for in-game purchases if they can prove their children used their credit cards without permission.²⁰⁶

While most of South Korea’s game legislation has focused on curbing gambling and protecting children, the nation is also attempting to reverse the negative public stigma the law has created.²⁰⁷ In 2020, the South Korean Culture Ministry drafted the Game Business Act, a bill intended to remove any negative

¹⁹⁹ The Game Rating and Administration Committee is South Korea’s equivalent of the ESRB. See *Rating Guide*, GAME RATING & ADMIN. COMM’N, <https://www.grac.or.kr/english/enforcement/ratingguide.aspx> (last visited June 11, 2021).

²⁰⁰ *Content Descriptors*, GAME RATING & ADMIN. COMM’N, <https://www.grac.or.kr/english/enforcement/contentdescriptors.aspx> (last visited June 11, 2021).

²⁰¹ The South Korea Games Rating Board later became the Game Rating and Administration Committee. Will Usher, *Korea Says No to Diablo III’s Real Money Auction House*, CINEMABLEND (Jan. 4, 2012, 7:02 AM), <https://www.cinemablend.com/games/Korea-Says-Diablo-III-Real-Money-Auction-House-38309.html>.

²⁰² Lim Jeong-yeo, *FTC to Review Game Firms’ Consumer Regulations*, KOR. HERALD (Apr. 19, 2019), <http://www.koreaherald.com/view.php?ud=20190419000620>.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Lim Jeong-yeo, *After 15 Years, Korea Considers Overhaul of Games Industry Law*, KOR. HERALD (Feb. 23, 2020), <http://www.koreaherald.com/view.php?ud=20200220000959>.

connotations attached to the word “game” in the law.²⁰⁸ Given that games make up 67.2% of Korea’s cultural content industry, this move is not surprising.²⁰⁹ Notably, experts expressed that the bill should address the legal scope of the term “loot box” and detail ways to enhance game literacy, so the public can play in a productive manner.²¹⁰ This is not the first effort by the South Korean government to eliminate the ambiguity and abstraction of potentially predatory business models.²¹¹ South Korea already requires publishers selling loot boxes to disclose the probabilities of receiving each and every item within the boxes.²¹² In 2018, South Korea’s FTC fined Nexon, Netmarble, and NextFloor a total of 1 billion won (approximately \$945,200) for deceptive loot box promotions.²¹³

IV. PROPOSAL AND WORLDWIDE REGULATORY MODELS

Given the recent growth of the gaming market²¹⁴ and the total population of gamers in America,²¹⁵ any potential regulation should be careful not to completely cripple the gaming industry. While the ESRB already marks physical, boxed games that have in-game purchases, this practice has no bearing on online purchases in free-to-play games which constitute the majority of loot box content. The ESRB can go a step further and mark any game with loot boxes as “Mature 17+,”²¹⁶ but this would be extremely hard to enforce, especially with game companies itching to phase out physical media.²¹⁷ South Korea already had trouble enforcing an age restriction, as seen when children started committing identity theft by using their parents’ national I.D. numbers.²¹⁸ The same problem would apply if online game stores like Steam, the Epic Games Store, and the Apple App Store required stricter age-verification procedures than what currently exists. These issues rule out any regulation that imposes an age

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ T.J. Hafer, *The Legal Status of Loot Boxes Around the World, and What’s Next in the Debate*, PC GAMER (Oct. 26, 2018), <https://www.pcgamer.com/the-legal-status-of-loot-boxes-around-the-world-and-whats-next>.

²¹² *Id.*

²¹³ Jon Fingas, *South Korea Fines Game Studios Over Deceptive Loot Box Odds*, ENGADGET (Apr. 10, 2018), <https://www.engadget.com/2018-04-10-south-korea-fines-game-studios-over-loot-boxes.html>.

²¹⁴ *United States Video Gaming Market 2020-2026 by Category, User, Age Group, Gender, Income and Company—ResearchAndMarkets.com*, BUS. WIRE (Sept. 2, 2020), <https://www.businesswire.com/news/home/20200902005430/en/United-States-Video-Gaming-Market-2020-2026-by-Category-User-Age-Group-Gender-Income-and-Company—ResearchAndMarkets.com>.

²¹⁵ *Essential Facts*, *supra* note 27.

²¹⁶ *Ratings Guide*, ESRB, <https://www.esrb.org/ratings-guide> (last visited June 11, 2021).

²¹⁷ Sinclair, *supra* note 158.

²¹⁸ *See Lee, supra* note 195.

restriction—even those that would tie game accounts to social security numbers. Moreover, the United States should not rely on parents to exercise due diligence like South Korea does. A large percentage of parents buy their children games without paying heed to warning labels or ratings.²¹⁹

Another option is to require disclosure of odds like South Korea. In the United States, many companies already self-regulate independent of government intervention. Apple’s App Store requires “[a]pps offering ‘loot boxes’ or other mechanisms that provide randomized virtual items for purchase must disclose the odds of receiving each type of item to customers prior to purchase.”²²⁰ Likewise, Google’s Play Store now requires games with purchasable randomized virtual items to “disclose the odds of receiving those items in advance of purchase.”²²¹ While this is a step in the right direction, it is not enough. Disclosing the odds of winning has proven ineffective for dealing with traditional gamblers.²²² Cognitive biases known as gambling fallacies keep traditional gambling addicts gambling, even when they know the odds.²²³ They erroneously calculate the likelihood of random events based on previous events or believe that luck is disproportional and favors certain people or circumstances.²²⁴

Several countries have already taken the stance that loot boxes are not literally gambling. Trish Millward, of the Gambling Compliance Office for New Zealand’s Department of Internal Affairs, explained that loot boxes do not meet New Zealand’s legal definition of gambling under its 2003 Gambling Act.²²⁵ She went on to explain that loot boxes are a voluntary feature that provides players with another way to obtain virtual items that enhance their in-game experiences, but players do not purchase loot boxes seeking to win money or something that can be converted into money.²²⁶ Similarly, France’s gambling

²¹⁹ See Daniel Venegas, *Rated M for Minor*, SUBSTANCE (Dec. 15, 2015), <https://substance.media/rated-m-for-minor-95e8b643a7e4>.

²²⁰ *App Store Review Guidelines*, APPLE, <https://developer.apple.com/app-store/review/guidelines/#in-app-purchase> (last visited June 11, 2021).

²²¹ Mariella Moon, *Google Will Force Android Apps to Show the Odds of Getting Loot Box Items*, ENGADGET (May 29, 2018), <https://www.engadget.com/2019/05/30/google-android-apps-odds-loot-boxes>.

²²² Carrie A. Leonard, Robert J. Williams & John Vokey, *Gambling Fallacies: What Are They and How Are They Best Measured?*, J. ADDICTION RES. THERAPY 1, 2 (2015), <https://www.omicsonline.org/open-access/gambling-fallacies-what-are-they-and-how-are-they-best-measured-2155-6105-1000256.php?aid=66246>.

²²³ *Id.* at 1.

²²⁴ *Id.* at 2.

²²⁵ Owen S. Good, *Another Regulator Says Loot Boxes Are Not Gambling*, POLYGON (Dec. 16, 2017, 5:00 PM), <https://www.polygon.com/2017/12/16/16785474/loot-boxes-gambling-law-government-star-wars-battlefront-2>. See generally *Gambling Act 2003*, S4 (N.Z.) (defining gambling in New Zealand).

²²⁶ Good, *supra* note 225.

regulator, ARJEL,²²⁷ addressed concerns about loot boxes in its 2017–18 activity report, stating that microtransactions in video games “are undermining public policy goals for gambling.”²²⁸ It called for a combined European strategy to address the issue but declined to legally classify loot boxes as gambling.²²⁹ ARJEL argued that loot boxes do not qualify as gambling because they always provide something.²³⁰ While this line of reasoning does nothing to make gaming safer for children, ARJEL did call for regulators to take collective action on raising awareness of loot boxes’ potential risks.²³¹ Most pertinently, ARJEL explained the danger of loot boxes creating a feeling of a “near miss,” similar to slot machines.²³² The U.K. Gambling Commission highlighted the lack of cognizable real-world market value in virtual currency, precluding loot boxes from qualifying as licensable gambling activity.²³³ The unifying feature in all countries that have taken this stance is a focus on the lack of real-world value in loot box content. This type of analysis, however, is one-dimensional and fails to address the problem in a constructive way. Although the U.K. Commission refused to classify loot boxes as gambling, it aptly noted that parents are not interested in whether an activity meets a legal definition of gambling—parents are interested in whether a product is a potential risk to their child.²³⁴

While loot boxes may not be gambling under a strict legal sense, different countries have been investigating the similarity of loot boxes to gambling.²³⁵ For example, in 2018, the Australian Environment Communications References Committee conducted a study surveying over 7400 game enthusiasts who supported the position of academics claiming that loot boxes are psychologically akin to gambling.²³⁶ The study concluded, “[t]he more severe gamers’ problem gambling was, the more likely they were to spend large amounts of money on

²²⁷ ARJEL is now defunct and has been succeeded by the French Autorité Nationale des Jeux. *New French Regulator ANG Takes Over from ARJEL*, GAMING INTEL. (June 23, 2020, 11:07 AM), <https://www.gamingintelligence.com/products/casino/99637-new-french-gambling-regulator-anj-takes-over-from-arjel>.

²²⁸ Andy Chalk, *French Gambling Regulator Determines that Loot Boxes Are Not Legally Gambling*, PC GAMER (July 4, 2018), <https://www.pcgamer.com/french-gambling-regulator-determines-that-loot-boxes-are-not-legally-gambling>.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Loot Boxes Within Video Games*, UK GAMBLING COMM’N (Nov. 24, 2017), <http://www.gamblingcommission.gov.uk/news-action-and-statistics/News/loot-boxes-within-video-games>.

²³⁴ *Id.*

²³⁵ Hafer, *supra* note 211.

²³⁶ Dustin Bailey, *Australian Committee Declares Loot Boxes Are a “Way of Exploiting Gambling Disorders”*, PCGAMESN (Sept. 17, 2018), <https://www.pcgamesn.com/loot-boxes-australia>.

loot boxes.”²³⁷ While loot boxes may not precisely fit into the current American legal definition of gambling because traditional loot box content does not have real monetary value, this Comment argues that loot boxes are even worse than gambling precisely because the content does not have economic value. It is akin to a Skinner box²³⁸ without food or water as a tangible reward; the only reward is a direct dose of dopamine. Loot boxes are an egregious abuse of children’s susceptibility to predatory marketing schemes and their inability to fully understand the financial and moral ramifications of their actions. The justification for regulation is similar to that in contract law, where minors lack the capacity to form a contract.²³⁹ Moreover, simply giving loot box content value to satisfy the legal definition of gambling would not solve the problem but create new ones, further enabling children to bet, gamble, and cash out.²⁴⁰

South Korea’s approach to loot boxes is likely too hands-off to deal with the problem efficiently in the United States. South Korea’s government has spent considerable resources trying to regulate gaming, because the industry has such ingrained cultural and economic significance; however, this approach causes an endless struggle between lawmakers and game developers who constantly look for the next loophole. The United States should avoid playing this game of Whack-a-Mole and ban loot boxes outright by either expanding the legal definition of gambling to include loot boxes or drafting new legislation to explicitly eliminate loot box content. Although the gaming industry would take a financial blow, no financial incentive is reason enough to place children in danger. The United States can take elements of South Korea’s approach, such as requiring the disclosure of probabilities, to make interim, gradual changes in the right direction. An eventual total ban on loot boxes, while leaving other forms of non-chance driven microtransactions and downloadable content broadly allowable, would serve the interest in protecting minors while also limiting economic loss for the gaming industry. Although the United States is economically tied to gaming, it should look to the example of countries who are not bound by those chains; the lack of a strong economic motivator has helped certain countries view the problem through a more objective lens.

In this vein, the United States can follow Belgium’s example. As early as 2017, the Belgian Gambling Commission and the Belgian Minister of Justice

²³⁷ *Id.*

²³⁸ A Skinner box, also known as an operant conditioning chamber, is a device used to objectively record an animal’s behavior in a compressed time frame. An animal can be rewarded or punished for engaging in certain behaviors like lever pressing. McLeod, *supra* note 114.

²³⁹ Restatement (Second) of Contracts § 12 (Am. L. Inst. 1981).

²⁴⁰ Duffy, *supra* note 135.

pushed for a total ban on loot boxes by focusing on their addictive qualities.²⁴¹ The Commission understood this was novel legal ground with potential for heavy consequences if left unchecked, stating

[g]ames of chance cannot be compared to any other kind of economic services. They may cause people to become addicted to gambling and cause them to lose a great deal of money. For this reason, a number of protective measures have been implemented to protect players against these sorts of potential risks.²⁴²

In 2018, the Commission declared in their Research Report on Loot Boxes that loot boxes are gambling, referring to the same policy justification of protecting vulnerable players that was used to pass the Belgian Gaming and Betting Act in 1999.²⁴³ The report underwent a detailed analysis of the predatory nature of loot box monetization and established that loot boxes fit the Belgian legal definition of gambling.²⁴⁴ The Commission did not mince its words: the paid loot boxes in the examined video games were illegal.²⁴⁵ The report concluded video game companies could be criminally prosecuted in Belgium for including loot boxes in their games because loot boxes contain all the elements of gambling: (1) game; (2) wager; (3) chance; and (4) win/loss.²⁴⁶

The Commission recommended several steps that regulators can take to make gaming safer for children.²⁴⁷ The Commission plans to better inform parents and children about the presence of gambling elements in games, making clear which games are not suitable for minors.²⁴⁸ The Commission also recommended that specific permits must be developed for games of chance in

²⁴¹ Alex Wawro, *Belgian Officials Say They'd Like Loot Boxes Banned, but Investigation Continues*, GAMASUTRA (Nov. 21, 2017), https://www.gamasutra.com/view/news/310188/Belgian_officials_decide_yes_loot_boxes_are_gambling_and_theyd_like_them_banned.php.

²⁴² Nick Santangelo, *Battlefront II and Overwatch Loot Boxes Being Investigated by Belgian Gambling Authority*, TWINFINITE (Nov. 16, 2017), <https://twinfinite.net/2017/11/battlefront-ii-and-overwatch-loot-boxes-being-investigated-by-belgian-gambling-authority>.

²⁴³ *Research Report on Loot Boxes*, BELGIAN GAMING COMM'N (Apr. 2018), https://www.gamingcommission.be/opencms/export/sites/default/jhksweb_nl/documents/onderzoeksrapport-loot-boxen-Engels-publicatie.pdf. See generally Wet van 7 mei 1999 op de kansspelen, de weddenschappen, de kansspelinrichtingen en de bescherming van de spelers [Act on Games of Chance, Betting, Gaming Establishments and the Protection of Players], B.S., Dec. 30, 1999 (Belg.), https://www.gamingcommission.be/opencms/opencms/jhksweb_en/law/law/index.html (placing severe restrictions on the operation of gambling establishments).

²⁴⁴ *Research Report on Loot Boxes*, *supra* note 243.

²⁴⁵ *Id.* at 16.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 17–18.

²⁴⁸ *Id.* at 17.

video games.²⁴⁹ Additionally, it recommended a principal ban on minors purchasing games with paid loot boxes.²⁵⁰ Moreover, the Commission advocated for mandatory age verification in supermarkets when people purchase codes or gift cards for video games to prevent minors from making the payments associated with video games that include games of chance.²⁵¹

The Commission also outlined specific changes that game distributors and game developers could make.²⁵² The Commission recommended that gaming companies clearly indicate chances of winning for various item values.²⁵³ Additionally, the Commission's Technical Assessments team wanted full control of the random number generators used for loot boxes.²⁵⁴ The Commission also asked developers to provide full player data and payment data for analytics purposes.²⁵⁵ Additionally, the Commission recommended implementation of a financial ceiling for the monetary amount that can be spent on loot boxes.²⁵⁶ Moreover, the Commission explained that the presence of paid loot boxes may not impede or disadvantage a normal game without paid loot boxes (essentially banning the pay-to-win model).²⁵⁷ Finally, the Commission advocated for a gambling symbol to indicate to consumers that games with loot boxes contain gambling.²⁵⁸

The Netherlands took a slightly different approach to Belgium, determining only some loot boxes were banned.²⁵⁹ A study by the Netherlands Gaming Authority concluded only loot boxes containing virtual content with cognizable real-world market value contravene the law without a gambling license.²⁶⁰ With this important distinction, the majority of loot boxes in games today would be completely legal. Although this is not the approach this Comment advocates for, the study highlights some key points. The report emphasizes the highly addictive nature of loot boxes, also making an analogy to slot machines as this Comment does.²⁶¹ The Gaming Authority also makes a forward-looking statement,

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.* at 18.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Study Into Loot Boxes: A Treasure or a Burden?*, NETH. GAMING AUTH. (Apr. 10, 2018), <https://www.slideshare.net/OlivierOosterbaan/netherlands-gaming-authority-study-into-loot-boxes-a-treasure-or-a-burden>.

²⁶⁰ *Id.*

²⁶¹ *Id.*

understanding that vulnerable groups such as minors can be induced into playing other games of chance through exposure to loot boxes.²⁶² The Gaming Authority also underlined the addiction potential of flashy visual and sound elements associated with loot boxes.²⁶³ The Netherlands' approach is somewhat of a non-answer to the problem. While the Netherlands Gaming Commission concedes the danger posed to minors through exposure to loot boxes, the paradigm it constructed has virtually no effect on the most popular games containing loot boxes, almost all of which contain only virtual content with no cognizable real-world market value. The United States should learn from the Netherlands' characterization of loot boxes, but not its regulation of them.

While the reasoning for Belgium's total ban is not applicable in the United States since loot boxes likely do not fall under the American legal definition of gambling, the ethos behind the ban is directly applicable. Belgium's example was just the beginning: more than fifteen gambling regulators joined forces at the 2018 Gambling Regulators European Forum to "address the risks created by the blurring of lines between gaming and gambling."²⁶⁴ The focus of this forum was twofold: (1) to tackle unlicensed third-party websites offering illegal gambling linked to popular video games; and (2) to ensure that features within games, such as loot boxes, do not constitute gambling under national laws.²⁶⁵ The second focus indicates that more countries will reevaluate their own definitions of gambling and whether loot boxes may be included in these definitions.²⁶⁶ The forum's primary motivator was to encourage game companies to work with gambling regulators and take action to ensure that consumers, particularly children, are afforded the utmost protection from potential danger.²⁶⁷

Recently, in 2020, the United Kingdom changed its tune on loot boxes.²⁶⁸ The House of Lords Gambling Committee filed a wide-ranging report covering the entire gambling industry, focusing in part on new forms of gambling, especially those targeting children.²⁶⁹ Specifically, the report states that there is

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ An example of illegal gambling on unlicensed third-party websites is skin gambling. Emma Kent, *15 European Gambling Regulators Unite to Tackle Loot Box Threat*, EUROGAMER (Sept. 17, 2018), <https://www.eurogamer.net/articles/2018-09-17-15-european-gambling-regulators-unite-to-tackle-loot-box-threat>.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Loot Boxes: Lords Call for 'Immediate' Gambling Regulation*, BBC NEWS (July 2, 2020) [hereinafter *Lords Call*], <https://www.bbc.com/news/technology-53253195>.

²⁶⁹ *Id.*

an “extraordinarily robust” connection between loot box spending and problem gambling.²⁷⁰ The report then goes on to make an extremely useful statement: “If a product looks like gambling and feels like gambling, it should be regulated as gambling.”²⁷¹ The House of Lords want loot boxes to be classified as “games of chance,” bringing them under the Gambling Act 2005.²⁷² Lord Grade, chairman of the committee, explained that the driving force behind many other countries’ loot boxes is that “they can see the dangers” of teaching children how to gamble.²⁷³ As legislators become more technologically literate, it is only a matter of time until other countries’ legislative bodies follow suit in this conversation.

CONCLUSION

When loot boxes and microtransactions first hit the market, it was open season for game developers and gaming corporations to make as much money as possible. Their mechanisms were not fully understood, and their long-term impact had yet to be seen. But as time has passed, it has become evident that loot boxes pose a genuine threat to the safety of minors across the globe. Not only is this threat financial, but it is also developmental and potentially life-ruining, creating a new generation of problem gamblers.

As lawmakers continue to better understand the potential dangers of loot box content on an international scale, more and more countries may feel pressure to examine the problem on their own terms. Compared to other nations around the world, the United States’ understanding and progress on this front is extremely primitive. The United States should not be left in the dust. Lawmakers and game developers alike should come together to make gaming safer and leave our children a world we can be proud of. After all, children are our nation’s future

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²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Lords Call, supra* note 268. *See generally* Gambling Act (2005) (UK) (regulating gambling, and more specifically, games of chance).

²⁷³ *Id.*

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