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A GLOBAL ANALYSIS INTO LOOT BOXES: IS IT “VIRTUALLY” GAMBLING?

Kevin Liu[†]

Abstract: The video game industry has expanded rapidly in recent years by implementing a microtransaction business model and expanding to a new market of mobile gaming. However, the introduction of loot boxes has been controversial; similar to gambling, gamers pay real money for a randomized microtransaction for a chance to win a random virtual prize of perceived value. Additionally, the items won from these loot boxes, such as cosmetic skins, can potentially be used to bet on other games of chance or even on the outcomes of competitive esports games. With the ease of online payments, the use of manipulative operant conditioning, and exploitive advertisements, young gamers are subject to gambling tendencies. However, there is a global split between whether loot boxes fit under the definition of gambling. Countries around the world have responded in four different ways: (1) outright banning loot boxes; (2) regulating loot boxes in various ways; (3) investigating loot boxes further; and (4) not recognizing loot boxes as gambling and taking no further action. This Comment seeks to challenge the global question of whether loot boxes are gambling and instead ask whether loot boxes are inducing the same effects of gambling on young children. Whether loot boxes fit under pre-existing gambling constructs, the effects on children are prevalent. Treading a fine line between its government paternalistic approach and respecting economic freedom, the United States should take steps to regulate loot boxes in a manner that will protect minors from the effects of gambling without crippling the video game industry.

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I. INTRODUCTION

Throughout history, lifestyles and societal norms have continually transformed alongside improving technology and emerging industries. While tangible assets are limited by the confines of the physical world, the advent of the Digital Age has generated another realm of property and currency: the virtual world. Taking the lead, the video game industry has created fantasy worlds and iconic characters that have allowed the industry to thrive and develop into a 134.9 billion USD global games market.¹ With the popularity of downloadable game applications on smart phones and tablets, the recent

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¹ James Batchelor, *Global Games Market Value Rising to \$134.9bn in 2018*, GAMESINDUSTRY.BIZ (Dec. 18, 2018), <https://www.gamesindustry.biz/articles/2018-12-18-global-games-market-value-rose-to-usd134-9bn-in-2018>.

market trend has shifted towards a free-to-play business model that relies solely on in-game transactions for revenue.² The most popular form of microtransactions are “loot boxes” that cost real money currency and have randomized virtual goods that lure in gamers with dreams of covetous prizes and prestige but are statistically likely to be worth nearly nothing.³ The virtual prizes can then be used as wagers for both traditional games of chance or upon the outcomes of professional esports games.

These instances exemplify how gambling now exists in a new virtual context. Historically, gambling has been regulated by the U.S. government due to its propensity to lead to addiction and other adverse tendencies. Following the traditional physical forms of gambling, the influx of online gambling was analyzed and regulated by U.S. legislation in 2006 for analogous reasons to traditional gambling.⁴ Now taking place in video games, loot box microtransactions expose our nation’s children to the same risks as traditional gambling.

While this Comment will draw parallels to gambling, we will not delve into whether the loot box business model fits perfectly into the traditional definition of gambling. Instead, this Comment will focus on both the positive and negative effects of microtransactions on the video game industry and *theorycraft* potential stances and solutions that the United States should adopt to protect our nation’s children from adverse effects similar to those found from gambling. Part II will expand on how the ever-growing video game industry has significant influence over a vast majority of children today and, thus, needs to be examined. Part III will explore the history of gambling regulations, analyze how loot boxes are analogous to gambling for children, and demonstrate how video game developers are inducing these effects through game mechanics. Parts IV and V will make note of how different countries have responded to this global phenomenon and recommend a stance for the United States to take. Part VI concludes by identifying the parties that need to take action and providing potential solutions.

² Andrew E. Freedman, *What Are Loot Boxes? Gaming’s Big New Problem, Explained*, GAMESINDUSTRY.BIZ (last updated Feb. 27, 2018), <https://www.tomsguide.com/us/what-are-loot-boxes-microtransactions,news-26161.html>.

³ *Id.*

⁴ FED. DEPOSIT INS. CORP., UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006 OVERVIEW (2010).

II. WHY SHOULD THE VIDEO GAME INDUSTRY BE EXAMINED FOR POTENTIAL ILLEGAL GAMBLING?

In recent years, video game corporations have significantly expanded their reach and enhanced their technology, implementing internet capability to traditional consoles and introducing games onto modern mediums such as smart phones. The generational shift and the boom of smartphone devices has seen the popularity of video games flourish, with the video game industry's global revenues projected to have an annual growth rate of 10.9% in 2018.⁵ Ever since the introduction of the mobile app store in 2008,⁶ a substantial selection of games were released for mobile devices that virtually everyone owned,⁷ and anyone could develop game applications for relatively cheap and market them online for a profit; a previously untapped market, the mobile sector now accounts for 51% of the global games market.⁸ In addition, Newzoo's 2018 Global Games Market Report reveals that there are currently approximately 2.3 billion gamers⁹ across the globe, as opposed to approximately 1.2 billion gamers¹⁰ in 2013. In just five years, the number of global gamers nearly doubled, creating a world where nearly a third of the population are gamers.¹¹ With the help of mobile gaming and loot box microtransactions, more people are getting into gaming and spending more money than ever before, which gives the video game industry an expanding influence on the global population.

Focusing on just the U.S. population, the second largest video market in the world,¹² there are approximately 211 million American gamers,

⁵ Batchelor, *supra* note 1.

⁶ Stephen Silver, *Apple Details History of App Store on Its 10th Anniversary*, APPLEINSIDER, (July 5, 2018, 11:16 AM) <https://appleinsider.com/articles/18/07/05/apple-details-history-of-app-store-on-its-10th-anniversary>.

⁷ *Mobile Fact Sheet*, PEW RESEARCH CENTER (Feb. 5, 2018), <https://www.pewinternet.org/fact-sheet/mobile/>. 77% of Americans own smartphones in 2018.

⁸ Tom Wijman, *Mobile Revenues Account for More Than 50% of the Global Games Market as It Reaches \$137.9 Billion in 2018*, NEWZOO (Apr. 30, 2018), <https://newzoo.com/insights/articles/global-games-market-reaches-137-9-billion-in-2018-mobile-games-take-half/>.

⁹ Tom Wijman, *Newzoo's 2018 Report: Insights Into the \$137.9 Billion Global Games Market*, NEWZOO (June 20, 2018), <https://newzoo.com/insights/articles/newzoos-2018-report-insights-into-the-137-9-billion-global-games-market/>.

¹⁰ *Global Games Market Report Infographics: 2013*, NEWZOO (July 15, 2013), <https://newzoo.com/insights/infographics/global-games-market-report-infographics-2013/>.

¹¹ *How Many Gamers Are There?*, GAIMIN (July 20, 2019), <https://gaimin.io/how-many-gamers-are-there/>.

¹² *U.S. Games Market 2018*, NEWZOO (Aug. 1, 2018), <https://newzoo.com/insights/infographics/us-games-market-2018/>.

which is roughly 67% of our population.¹³ Also, the amount of time each American spends playing video games has increased by 50% since 2003 with the average gamer spending over two hours a day playing video games.¹⁴ In addition, of the paying gamer population, 79% spent real money on in-game microtransactions for virtual goods within the first half of 2018.¹⁵ With an increase in gamers who spend more time and money on video games, U.S. consumer spending on both video game software and hardware aggregated an astounding 36 billion USD in 2017.¹⁶

The most important and relevant factor of all is the percentage of gamers under the age of eighteen, a population of people Congress routinely protects with heightened care. Of the 211 million American gamers discussed earlier, 28% are under 18 years old.¹⁷ With some *quick maths*, there are over 59 million gamers under the age of eighteen in the United States. This is a startling number of minors that are increasingly exposed to the gambling-like conditions as a result of opening loot boxes, which the Comment will discuss in later sections.

In this Digital Age, video games are now household products that are rapidly expanding and integrating into everyday lifestyles with increasing influence over a large population of children. The video game pop culture phenomenon has a global reach that will continue to influence the world; if there are any adverse effects similar to gambling stemming from these games, the government must regulate it, just like all other types of detrimental addictions, such as tobacco and alcohol.¹⁸

¹³ Brian Crecente, *Nearly 70% of Americans Play Video Games, Mostly on Smartphones (Study)*, VARIETY (Sept. 11, 2018, 6:30 AM), <https://variety.com/2018/gaming/news/how-many-people-play-games-in-the-u-s-1202936332/>.

¹⁴ Christopher Ingraham, *It's Not Just Young Men – Everyone's Playing a Lot More Video Games*, WASH. POST (July 11, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/07/11/its-not-just-young-men-everyones-playing-a-lot-more-video-games/?utm_term=.65d6f14b553a.

¹⁵ *Global Games Market Report Infographics*, *supra* note 10.

¹⁶ *Essential Facts About the Computer and Video Game Industry*, ENT. SOFTWARE ASS'N (2018), http://www.theesa.com/wp-content/uploads/2018/05/EF2018_FINAL.pdf.

¹⁷ *Age Breakdown of Video Game Players in the United States in 2018*, STATISTA (2019), <https://www.statista.com/statistics/189582/age-of-us-video-game-players-since-2010/>.

¹⁸ Alan Greenblatt, *What is the Age of Responsibility?*, GOVERNING THE STATES AND LOCALITIES (Oct. 1, 2019, 1:00 AM), <https://www.governing.com/topics/public-justice-safety/What-is-the-Age.html>.

III. HOW ARE LOOT BOXES ANALOGOUS TO GAMBLING?

A. *History of Gambling Regulations*

In order to truly understand the parallels between traditional gambling and this new loot box phenomenon, one must first understand the development of gambling and its regulations. Games of chance existed as early as 2300 B.C. with evidence of gambling from Ancient China with simple games involving tiles.¹⁹ As time passed and civilizations intermingled and advanced, gambling games spread and evolved into games of chance involving cards, dices, and tiles.²⁰

In 1887, games of chance were mechanized into the form of slot machines—known as one-armed bandits at the time.²¹ With its advanced mechanized features, slot machines revolutionized gambling by allowing winnings to be precisely manipulated by its owners.²² Eventually, both the clergy and the law opposed the morality and necessity of manipulated odds, and slot machines were ultimately banned in 1909 in California,²³ along with virtually all other forms of gambling throughout the United States by 1910.²⁴ However, that did not stop people from indulging in the thrill of gambling by using machines placed in commonly frequented places such as saloons, bowling alleys, or barber shops; these slot machines were altered to accept tokens and dispense things other than cash such as cigarettes or chewing gum to stay comply with gambling laws.²⁵ When gambling was eventually re-legalized in 1931,²⁶ each state in the United States developed their own regulation regarding permitted odds of return for slot machines, which are posted publicly.²⁷

¹⁹ *The History of Gambling*, GAMBLING.NET (last visited May 11, 2019), <https://www.gambling.net/history/>.

²⁰ *Id.*

²¹ Dan Glimne, *Slot Machine*, ENCYCLOPAEDIA BRITANNICA (Nov. 12, 2015), <https://www.britannica.com/topic/slot-machine>.

²² GAMBLING.NET, *supra* note 19.

²³ Glimne, *supra* note 21.

²⁴ Nelson Rose, *Gambling and the Law: Pivotal Dates*, PBS (1997), <https://www.pbs.org/wgbh/pages/frontline/shows/gamble/etc/cron.html>.

²⁵ Jon Friedl, *The Ultimate Guide to Slot Machine History*, PROFESSOR SLOTS (Sept. 18, 2018), <https://professorslots.com/slot-machine-history/>.

²⁶ George G. Fenich, *A Chronology of (Legal) Gaming in the U.S.*, 3 GAMING RES. & REV. J., 65 (1996).

²⁷ *Slot Machine Payback Statistics*, AMERICAN CASINO GUIDE, <https://www.americancasino.com/slot-machine-payback-statistics.html>.

By the 1990s, technology had advanced with the commercialization of the Internet and, along with it, the advent of the next great phenomenon: internet gambling.²⁸ Gambling had always been a prominent pastime, but the synergistic addition of online features created an augmented social and accessible platform that generated billions in revenue.²⁹ The popularity led to an explosion of unregulated offshore internet gambling websites.³⁰ To combat this new realm of gambling, the U.S. Congress passed the Unlawful Internet Gambling Enforcement Act (UIGEA) in 2006, regulating individuals and companies that processed payments for illegal internet gambling.³¹ The language of the UIGEA did not specifically prohibit online gambling, but it rendered financial transactions involving online gambling illegal, causing online gambling platforms to be unable to pay out winners.

It is worth noting the existence of the Internet Gambling Regulation, Consumer Protection, and Enforcement Act, a bill proposed in 2009 in the United States.³² Its purpose was “to provide for the licensing of Internet gambling activities by the Secretary of the Treasury, to provide for consumer protections on the Internet, [and] to enforce the tax code”³³ While the bill ultimately did not pass, the findings regarding online gambling are significant indicators of congressional intent.³⁴ Congress acknowledged that “millions of people have chosen to gamble online,” but “there is no Federal or State regulatory regime in place to protect United States citizens who choose to engage in this activity, or to oversee operators to establish and enforce standards of integrity and fairness.”³⁵ Nonetheless, the most important point was that “[i]nternet gambling in the United States should be controlled by a strict Federal, State, and tribal licensing and regulatory framework to protect underage and otherwise vulnerable individuals”³⁶ That statement is a testament to the fact that Congress is aware that underage individuals require protection from gambling in the form of strict regulations.

²⁸ Geraldine, *The History of Online Gambling*, CASINOS.CO, <https://www.casinos.co/history-online-gambling/> (last updated Jan. 14, 2019).

²⁹ *The History of Online Gambling*, ONLINEGAMBLING.COM, <https://www.onlinegambling.com/online-history/> (last visited May 30, 2019).

³⁰ *Id.*

³¹ UNLAWFUL INTERNET GAMBLING, *supra* note 4.

³² Internet Gambling Regulation, Consumer Protection, and Enforcement Act, H.R. 2267, 111th Cong. (2009–2010).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

In 2011, the Department of Justice suddenly pivoted from their long-held stance regarding the legality of online gambling.³⁷ U.S. Deputy Attorney General James Cole wrote that “[t]he Department’s Office of Legal Counsel (“OLC”) has analyzed the scope of the Wire Act [of 1961], 18 U.S.C. § 1084, and concluded that it is limited only to sports betting.”³⁸ Within the next two years, three states legislatures passed bills and pioneered the way for legalized online gambling: Delaware,³⁹ Nevada,⁴⁰ and New Jersey.⁴¹ As seen from past congressional findings, strict regulations were imperative in order to break into a previously untapped market for gambling and to protect individuals.

In New Jersey, Bill A2578 was enacted with strict regulations to help revitalize its ailing economy by allowing local land-based casinos to apply and obtain online gaming permits.⁴² To ensure proper regulation, the Division of Gaming Enforcement (DGE) was tasked with safeguarding the integrity of the casino gaming industry in New Jersey.⁴³ The DGE was responsible for (1) vetting license applicants; (2) assuring the honesty, good character, and integrity of casino owners, operators, employees, and vendors; (3) making sure that casino games are fair; (4) monitoring for exclusion list violations; and (5) checking for information systems integrity.⁴⁴ Similar to the congressional findings discussed above, A2578 focused on protecting underage individuals by restricting user eligibility to players over twenty-one years of age that were physically inside the state of New Jersey.⁴⁵ In addition, to combat compulsive gambling issues, the DGE mandated that licensees (1) must prominently display the contact information of an organization where players can seek help; and (2) must pay 250,000 USD to addiction programs.⁴⁶

³⁷ Nathan Vardi, *Department of Justice Flip-Flops on Internet Gambling*, FORBES (Dec. 23, 2011), <https://www.forbes.com/sites/nathanvardi/2011/12/23/departments-of-justice-flip-flops-on-internet-gambling/#474a6e56600e>.

³⁸ *Id.*

³⁹ H.R. 333, 146th Gen. Assemb. (Del. 2012).

⁴⁰ A.B. 114, 77th Assemb., Reg. Sess. (Nev. 2013).

⁴¹ B. 2578, 215th Gen. Assemb., Reg. Sess. (N.J. 2012)

⁴² H.R. 333, *supra* note 39.

⁴³ *About the Division of Gaming Enforcement*, THE OFFICE OF THE ATT’Y GEN. OF N.J. (Apr. 18, 2019), <https://www.nj.gov/oag/ge/mission&duties.htm>.

⁴⁴ *NJ Gambling Laws-The Law Legalizing Online Poker and Casino Games*, NJ ONLINE GAMBLING, <https://www.njonlinegambling.com/a2578/> (last visited Apr. 18, 2019).

⁴⁵ *Id.*

⁴⁶ *Id.*

However, in late 2018, the Department of Justice again reversed their 2011 opinion regarding the Wire Act to find that “the words of the statute are sufficiently clear and that all but one of its prohibitions sweep beyond sports gambling.”⁴⁷ While a bit ambiguous, this new opinion could be signaling that the Department of Justice’s stance is that the Wire Act applies to all variations of online gambling. This could alter Nevada, Delaware, and New Jersey’s online gambling regulations. Gambling legislatures in these states will now have to review the opinion and its implications and, once again, adapt their gambling industry.

There is one common theme seen throughout the history of gambling in its various evolutionary forms: gambling must adapt to regulations, and regulations must adapt to gambling. Today, some form of gambling is legal in virtually every state, albeit highly regulated. But, why regulations, and why not just outright ban gambling? The answer is quite straightforward. In 2017, gambling contributed 261 billion USD to the U.S. economy, generated 40.8 billion USD in federal, state, and local tax revenues, and provided nearly 1.8 million jobs for Americans.⁴⁸ For an industry that has continually teetered on the line of morality, the upsides would be tremendous if the harm was controlled by strict regulations.

Before online gambling was legalized anywhere in the United States, American investment bank Goldman Sachs already predicted that online gambling—gauged to be worth up to 12 billion USD—would be legalized eventually in the United States because it was “logical to assume that the U.S. market will eventually regulate—given the potential implications for U.S. tax to take.”⁴⁹ When it was finally legalized in New Jersey, the licensees were subject to a five percent increase in taxes with the intent of stimulating the state’s then weak economy.⁵⁰ Gambling has always been legalized as a tool to generate revenue for states, and it has been able to do

⁴⁷ *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, ONLINE POKER REPORT, <https://www.onlinepokerreport.com/wp-content/uploads/2019/01/2018-OLC-Wire-Act-Opinion.pdf>. The Online Poker Report released this opinion before the Department of Justice, presumably due to the government shutdown.

⁴⁸ *See National Economic Impact of the U.S. Gaming Industry*, AMERICAN GAMING ASS’N. (June 1, 2018), <https://www.americangaming.org/resources/economic-impact-of-the-u-s-gaming-industry-2/>.

⁴⁹ OCR Editor, *Goldman Sachs: U.S. to Legalize Online Gambling*, ONLINE CASINO REPORTS (July 9, 2009), <https://www.onlinecasinoreports.com/articles/goldman-sachs-us-to-legalize-online-gambling.php>.

⁵⁰ *NJ Gambling Laws*, *supra* note 44.

so with strict regulations.⁵¹ However, there will always be a balancing test that determines whether the harm outweighs the potential benefits, and gambling regulations will continue to adjust and adapt to maintain that balance.

Within the past few years, it seems as though gambling has yet again evolved and taken on a new form, hidden away behind façades of video games. Similar to gambling, the current marketing strategy of free-to-play video games are designed to maximize revenue in a thriving video game industry. However, due to the lack of regulations, it inadvertently exposes underage children to the dangers of gambling through two different avenues: loot box microtransactions and skin betting. The next few sections will discuss how the video game industry is sheltering a new form of gambling, enchanting our nation's vulnerable children with illusions of fantasy and grandeur. Just as gambling had been regulated in the past, loot boxes should receive a similar treatment.

B. *Microtransactions*

Microtransactions are a business model that has emerged from within the video game industry in recent years where a typically free-to-play game offers in-game purchases that provide either (1) a competitive edge in a play-to-win environment or (2) a cosmetic upgrade to models within the game.⁵² Game studios are now purposefully developing entire virtual worlds around the microtransaction model, sometimes requiring them to complete the game or to stay competitive in a multi-player game.

Depending on the game, these microtransactions can unlock things such as in-game currency, in-game items, new game content, additional playtime, or random loot boxes; anything unlocked from the microtransactions would remain purely virtual and cost anywhere from ninety-nine cents to ninety-nine USD or more.⁵³ However, randomized loot boxes are a prevalent model now and embody a strong gambling tone that is both exploitive and addictive. The three elements that define gambling are

⁵¹ A *History of American Gambling Laws*, HG.ORG LEGAL RESOURCES, <https://www.hg.org/legal-articles/a-history-of-american-gaming-laws-31222>. Gambling pioneer states, such as Nevada and New Jersey, have routinely used gambling during weak economic eras to generate additional revenue.

⁵² *Economics of Microtransactions in Video Games*, INTELLIGENT ECONOMIST (Dec. 20, 2017), <https://www.intelligenteconomist.com/economics-of-microtransactions/>.

⁵³ *Id.*

(1) consideration, (2) chance, and (3) a prize of value.⁵⁴ Similarly, loot boxes could fall under this definition because customers have to (1) pay for loot boxes with real money that (2) has random odds for (3) a random virtual prize. For that reason, this Comment will focus primarily on loot boxes and its semblance to gambling and its aftereffects. The factors most likely to expose children to gambling-like conditions are (1) the ease of purchase on internet-enabled devices, (2) the exploitive use of psychological conditioning, and (3) manipulative advertisements.

1. *Modern Devices and Payment Methods Facilitate Ease of Access*

Children are spending an alarming amount of time on their mobile devices nowadays.⁵⁵ In-game purchases are as effortless as the simple click of a button if credit card information is linked to a mobile or tablet device. In a 2017 report, it was shown that two out of three online shoppers store their card information on websites or mobile apps for future purchases.⁵⁶ In addition, online credit card purchases have always been linked to larger uninhibited spending; a consumer's willingness-to-pay increases up to 100% when given the option of a credit card rather than cash.⁵⁷ Researchers found that using credit cards dulls the pain of paying by allowing a separation in time between purchase and payment and by lumping all purchases into one final sum, causing people to overspend when using credit cards.⁵⁸ With the shift to digital media and microtransactions available on internet-enabled devices, these purchases are constrained only by the boundaries of credit card limits and self-restraint.

⁵⁴ 31 U.S.C. § 5362 (2006) (defining a "bet or wager" to be "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," which "includes the purchase of a chance or opportunity to win . . . [a] prize (which opportunity to win is predominantly subject to chance)").

⁵⁵ See generally Jenny Anderson, *Even Teens Are Worried They Spend Too Much Time on Their Phones*, QUARTZ (Aug. 23, 2018), <https://qz.com/1367506/pew-research-teens-worried-they-spend-too-much-time-on-phones/>.

⁵⁶ Michelle Crouch, *Poll: 94 million Americans Store Their Card Information Online*, CREDITCARDS.COM (May 31, 2017), <https://www.creditcards.com/credit-card-news/store-card-information-online.php>.

⁵⁷ Drazen Prelec & Duncan Simester, *Always Leave Home Without It: A Further Investigation of the Credit-Card Effect on Willingness to Pay*, 12 *MARKETING LETTERS* 5–12 (2001).

⁵⁸ Utpal Dholakia, *Does It Matter Whether You Pay with Cash or a Credit Card?*, *PSYCHOLOGY TODAY* (July 11, 2016), <https://www.psychologytoday.com/blog/the-science-behind-behavior/201607/does-it-matter-whether-you-pay-cash-or-credit-card>.

While “freemium” games pride themselves on free access to all, their use of the bait-and-switch tactic and focus on monetizing their player base through additional microtransactions exposes the hypocrisy. However, what happens when a child has access to an account that is linked to a parent’s credit card? Parents generally allow children to download “educational” apps under the pretense that these are completely free.⁵⁹ However, once a child knows the password to an app store account, they are bound only by their own undeveloped moral compass and their understanding of the value of money. Game developers recognize this reality and continue to profit off the children with their newfound covert access to money by manipulating their behavior to spend even more.

2. *Developers Intentionally Induce Psychological Addiction*

Similar to the findings of early gambling researchers regarding slot machines—which are essentially an antiquated rendition of loot boxes⁶⁰—game developers utilize operant conditioning to induce an addictive gambling-like behavior from gamers.⁶¹ Variable rate reinforcement is a psychological practice where a response is reinforced after fluctuating intermittent outcomes.⁶² This type of erratic schedule creates unpredictable rewards that lead to highly engaged and repetitive behavior⁶³ which results in a high and steady response rate from the individual.⁶⁴ Dr. Luke Clark, the director of the Center for Gambling Research at the University of British Columbia, has stated that “dopamine cells are most active when there is maximum uncertainty, and the dopamine system responds more to an uncertain reward than the same reward delivered on a predictable basis.”⁶⁵ In the loot box context, gamers will continue to

⁵⁹ Evan Symon, *How Young Gamers Can Quietly Ruin Their Parents’ Finances*, CRACKED (June 17, 2018), <http://www.cracked.com/personal-experiences-2570-how-young-gamers-can-quietly-ruin-their-parents-finances.html>.

⁶⁰ John Haw, *Random-ratio Schedules of Reinforcement: The Role of Early Wins and Unreinforced Trials*, 21 J. GAMBLING ISSUES 56, 57 (2008).

⁶¹ Alex Wiltshire, *Behind the Addictive Psychology and Seductive Art of Loot Boxes*, PC GAMER (Sept. 28, 2017), <https://www.pcgamer.com/behind-the-addictive-psychology-and-seductive-art-of-loot-boxes/>.

⁶² Kendra Cherry, *Variable-Ratio Schedules Characteristics*, VERYWELL MIND (Mar. 2, 2018), <https://www.verywellmind.com/what-is-a-variable-ratio-schedule-2796012>.

⁶³ Kendra Cherry, *What Is a Schedule of Reinforcement?*, VERYWELL MIND (Dec. 13, 2017), <https://www.verywellmind.com/what-is-a-schedule-of-reinforcement-2794864>.

⁶⁴ Reinforcement Schedules—Introduction to Psychology, LUMEN, <https://courses.lumenlearning.com/wmopen-psychology/chapter/reading-reinforcement-schedules/> (last visited Apr. 18, 2019).

⁶⁵ Wiltshire, *supra* note 61.

spend money to open loot boxes; however, statistics dictate that they will only get something valuable in unpredictable rates.⁶⁶

Not only do game developers utilize variable rate reinforcements, they rely on fixed conditioning that target children as young as preschoolers. Many mobile games for children are laced with advertisements disguised under a friendly veil.⁶⁷ Similar to B.F. Skinner's experiments with rats,⁶⁸ children are positively reinforced and rewarded with in-game content with every purchase. However, the game animations are structured in a way that manipulates and shames children into a behavior where they make purchases with negative reinforcements. For example, in a popular game app, Doctor Kids, if a child cancels the pop-up to buy something, the in-game character will shake its head, look sad, and begin to cry.⁶⁹ These advertisements raised ethical questions as to whether vulnerable and developing children are being targeted with deceptive advertisements.

In response, consumer and public health advocacy groups have contacted the Federal Trade Commission (FTC), calling upon the organization to examine questionable practices utilized on the children's app market.⁷⁰ The complaint letter from these advocacy groups alleges that the app store is "misrepresenting to parents that the apps in the Family Section . . . are child-appropriate when they are not, in violation of Section 5⁷¹ of the FTC Act" when apps for children contain deceptive and unfair advertising practices.⁷² As discussed above, game advertisements use cartoon avatars to emotionally manipulate children into making purchases. Data from the University of Michigan and the C.S. Mott Children's Hospital⁷³ suggests that these advertisements prey on children's "weaknesses in attention control

⁶⁶ *Id.*

⁶⁷ Joanne Orlando, *The App Trap: How Children Spend Thousands Online*, THE CONVERSATION (Feb. 18, 2014), <https://theconversation.com/the-app-trap-how-children-spend-thousands-online-21652>.

⁶⁸ Praveen Shrestha, *Skinner's Theory on Operant Conditioning*, PSYCHESTUDY (Nov. 17, 2017) <https://www.psychestudy.com/behavioral/learning-memory/operant-conditioning/skinner>.

⁶⁹ Chavie Lieber, *Apps for Preschoolers Are Flooded with Manipulative Ads, According to a New Study* (Oct. 30, 2018, 6:00 PM) <https://www.vox.com/the-goods/2018/10/30/18044678/kids-apps-gaming-manipulative-ads-ftc>.

⁷⁰ *Id.*

⁷¹ FED. TRADE COMM'N, SEC. 5 UNFAIR OR DECEPTIVE ACTS OR PRACTICES, (2016).

⁷² Complaint at 2–3, In the Matter of Request to Investigate Google's Unfair and Deceptive Practices in Marketing Apps for Children (Fed. Trade Comm'n 2018).

⁷³ Marisa Meyer, Victoria Adkins, Nalingna Yuan, Heidi M. Weeks, Yung-ju Change, & Jenny Radesky, *Advertising in Young Children's Apps: A Content Analysis*, 40 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 32 (2019).

and impulse inhibition” and the fact that “children are known to develop trusting, emotional parasocial relationships with media characters.”⁷⁴

Especially at young ages, where a child’s perceived value is tied to emotional responses,⁷⁵ it is vital that young children are protected from emotionally manipulative and exploitive conditioning practices that could shape their consumer behavior for life. Game developers are getting creative with how they can generate more money; some are even going as far as exploring patents for matchmaking that encourages players to spend more money.⁷⁶ Children now have the ability to be independent consumers earlier with access to mobile phones or tablets linked to accounts with saved payment options, so it is imperative that they do not fall into the “app trap” laid out by developers and establish behaviors similar to those found in gambling. As much as gamers believe it’s a one-time purchase, microtransactions thrive off impulse buying.⁷⁷

3. *This Practice Is Exploitive of Its Consumers*

Contrary to popular belief, the distribution of players who generate these microtransaction revenues is not even; according to a data scientists from Yokozuna Data, two percent of players generate approximately fifty percent of the revenue.⁷⁸ When free-to-play game developers structure their products around pulling the most vulnerable players in to generate a large percentage of their revenue, the controversial freemium business model becomes extremely exploitive and unethical. Entrapped in games designed to induce addictions, people who spend enormous amounts of money on free-to-play games are known within the industry as “whales.”⁷⁹ There are

⁷⁴ REQUEST TO INVESTIGATE GOOGLE’S UNFAIR AND DECEPTIVE PRACTICES, *supra* note 722 at 31–32.

⁷⁵ Janine Williams et al., Can We Measure Children’s Perceived Value? (July 8, 2014) (unpublished manuscript presented at 2014 Academy of Marketing Conference), https://marketing.conference-services.net/resources/327/4002/pdf/AM2014_0149_paper.pdf.

⁷⁶ Heather Alexandra, *Activision Patents Matchmaking That Encourages Players to Buy Microtransactions*, KOTAKU (Oct. 17, 2017), <https://kotaku.com/activision-patents-matchmaking-that-encourages-players-1819630937>.

⁷⁷ Gabe Duverge, *Insert More Coins: The Psychology Behind Microtransactions*, TOURO U. WORLDWIDE (Feb. 25, 2016), <https://www.tuwo.edu/psychology/psychology-behind-microtransactions/>.

⁷⁸ *How Much Money Gamers Spend on Microtransactions*, MYBROADBAND (Nov. 17, 2017), <https://mybroadband.co.za/news/gaming/237890-how-much-money-gamers-spend-on-microtransactions.html>.

⁷⁹ Mike Rose, *Chasing the Whale: Examining the Ethics of Free-To-Play Games*, GAMAUTRA (July 9, 2013), https://www.gamasutra.com/view/feature/195806/chasing_the_whale_examining_the_.php?page=1.

even instances of a whale spending up to two million USD within four years, struggling to keep up in a pay-to-win game environment.⁸⁰ In these competitive pay-to-win games, many game developers rely on loss aversion to lead players to habits of impulse buying.⁸¹

In a series of interviews with whales, most of them have admitted to addictive tendencies and have splurged their entire paychecks into microtransactions, falling into the instant gratification trap with just a few clicks.⁸² Many of these whales openly admit to their regrets, realizing how much money they just spent on virtual items.⁸³ Similar to traditional gambling, microtransactions have the ability to ruin lives, especially for the younger generations who are exposed early on to the concept of gambling.

C. Skin Betting

Although skin betting is a separate source of gambling not actively encouraged by game developers, it is a derivative of microtransactions. In some free-to-play games, loot boxes randomly drop cosmetic skins of different rarity depending on chance. These skins, sometimes limited edition and only available during certain events, are collectible virtual items that change the appearance of an in-game item. Some games allow cosmetic skins to be acquired through grinding countless hours of gameplay and trading with in-game currency. Microtransactions provide an enticing alternative and faster way to collect more skins in exchange for real currency. The contents of loot boxes, such as cosmetic skins, can then be used as “things of value” for bets, and subsequently, exchanged on a separate platform for real money.

Skin betting can be found on unregulated third-party websites that enable anyone to gamble using virtual cosmetic skins as currency.⁸⁴ Rising from the popularity of competitive video games, professional electronic

⁸⁰ Dean Takahashi, *The DeanBeat: This Player Spent \$2 Million in a Mobile Game. Then He Led a Boycott*, VENTUREBEAT (Oct. 14, 2016, 8:00 AM), <https://venturebeat.com/2016/10/14/the-deanbeat-this-player-spent-2-million-in-a-mobile-game-then-he-led-a-boycott/>.

⁸¹ Duverge, *supra* note 77.

⁸² Rose, *supra* note 79.

⁸³ Gita Jackson, *Apex Legends Player Spent \$500 to Unlock a Rare Item, Says ‘It Wasn’t Worth It’*, KOTAKU (Feb. 22, 2019), https://kotaku.com/apex-legends-player-spent-500-to-unlock-a-rare-item-s-1832822740?utm_source=Kotaku_Twitter&utm_campaign=Socialflow_Kotaku_Twitter&utm_medium=Socialflow.

⁸⁴ *CSGO Skins Gambling Sites: Best Alternatives to Skin Betting*, ESPORTSBETS, <https://www.esportsbets.com/csgo-skin-betting-sites/> (last visited Apr. 26, 2019).

sport (esport) players compete in organized tournaments or franchises for either real-time strategy (RTS), fighting, first-person shooter (FPS), or multiplayer online battle area (MOBA) games. Akin to a casino chip or cash, virtual currency can be used to bet on the outcomes of professional matches,⁸⁵ in a lottery-type pool, or other games of chance. In 2016, it was estimated that 7.4 billion USD worth of skins were wagered worldwide as opposed to 550 million USD for cash wagers.⁸⁶ However, some third-party websites also allow these skins to be sold back for real-world money, so some people engage in skin betting to convert virtual items into real currency.⁸⁷ In an extreme form, popular YouTube gaming personalities misled viewers by promoting a skin betting website without disclosing that they owned it.⁸⁸ Their venture was particularly shady because they would both self-promote and pay other influencers to promote their gambling website using misleading fabricated footage of themselves “winning” the skins.⁸⁹ The viewers who watched would be both enticed and deceived into thinking that valuable “loot” was easily won from these skin betting sites.

The third-party skin betting websites are predominantly unlicensed, unregulated, and located abroad, so there are no proper safeguards to verify that their user base is of legal age to gamble in their jurisdiction.⁹⁰ Skin betting allows vulnerable young children to fall victim to the dangers of gambling as long as they have some virtual currency with which to gamble. In the United Kingdom, the Gambling Commission’s annual report found that 45% of children between the ages of 11 and 16 knew of the existence of skin betting, and 11% of that same age group had gambled with in-game items before.⁹¹ The addictive nature of gambling can easily destroy a child’s

⁸⁵ See generally *Murphy v. National Collegiate Athletic Association* 138 S.Ct. 1461 (2018); *PASPA; In re MasterCard Int’l Inc.*, 313 F.3d 257 (5th Cir. 2001).

⁸⁶ Chris Grove, *Understanding Skin Gambling*, NARUS, 3 (2016), <https://www.thelines.com/wp-content/uploads/2018/03/Skin-Gambling-White-Paper-V2.pdf>.

⁸⁷ *Skin Betting: ‘Children as Young as 11 Introduced to Gambling’*, BBC NEWS (Dec. 12, 2017), <http://www.bbc.com/news/technology-42311533>.

⁸⁸ Timothy J. Seppala, *Valve Distances Itself From ‘Counter-Strike’ Gambling Sites*, ENGADGET (July 14, 2016), <https://www.engadget.com/2016/07/14/valve-distances-itself-from-counter-strike-gambling-sites/>.

⁸⁹ Steve Dent, *YouTubers Avoid Fine Over Valve ‘CS:GO’ Gambling Scam*, ENGADGET (Sept. 8, 2017), <https://www.engadget.com/2017/09/08/youtube-csgo-lotto-fcc-no-fine/>.

⁹⁰ Maddy Meyers, *Inside the Unregulated and Scam-filled World of Video Game Betting*, KOTAKU (Mar. 20, 2017, 12:00 PM), <https://www.kotaku.com.au/2017/03/inside-the-unregulated-and-scam-filled-world-of-video-game-betting/>.

⁹¹ GAMBLING COMM’N., *YOUNG PEOPLE AND GAMBLING REPORT 2017* at 22 (U.K.).

life, so there must be safeguards implemented to prevent underage exposure in this new domain of virtual gambling.

IV. HOW HAS THE WORLD RESPONDED TO LOOT BOXES?

The loot box phenomenon has hit the world with gamers, parents, legislators, and game developers alike asking one question: are loot boxes gambling? Each state (or province) has its own gambling regulatory body and determines its own course of action to address this question. Throughout the world, the minimum age for gambling typically ranges between the ages of 18 and 25,⁹² and, in some countries, gambling is outrightly illegal, such as the United Arab Emirates,⁹³ or only legal under specific circumstances, such as Korea.⁹⁴ In 2017, the average gamer was 35 years old, but children under 18 accounted for 29% of the global gaming population, exposing the youth even in jurisdictions with a minimum age of 18.⁹⁵ The effects of microtransactions have only been getting more and more apparent, and countries have responded largely in four different ways: (1) not recognizing loot boxes as gambling; (2) outright banning loot boxes; (3) regulating loot boxes in various ways; and (4) investigating loot boxes further.⁹⁶ This section will focus primarily on what stakeholders have determined to be the proper way to regulate loot boxes.

A. *Not Gambling*

Many countries, regulatory bodies, and game developers have recognized the loot boxes controversy but determined that, from a legal standpoint, loot boxes are not gambling. With near-identical rationale, the United Kingdom's Gambling Commission Office,⁹⁷ France's ARJEL,⁹⁸ and

⁹² *Around the World*, GAMBLING AGE, <http://www.gamblingage.com/around-the-world/> (last visited Apr. 28, 2019).

⁹³ Sean Hayes, *South Korea's Gambling Law*, KOR. L. BLOG (Feb. 9, 2017), <https://www.thekoreanlawblog.com/2017/02/koreas-gambling-law.html>.

⁹⁴ *Id.*

⁹⁵ ENT. SOFTWARE ASS., ESSENTIAL FACTS ABOUT THE COMPUTER AND VIDEO GAME INDUSTRY 7 (2017), http://www.theesa.com/wp-content/uploads/2017/09/EF2017_Design_FinalDigital.pdf.

⁹⁶ T.J. Hafer, *The Legal Status of Loot Boxes Around the World, and What's Next in the Debate*, PCGAMER (Oct. 26, 2018), <https://www.pcgamer.com/the-legal-status-of-loot-boxes-around-the-world-and-whats-next/>.

⁹⁷ Fraser Brown, *The UK Gambling Commission Has Not Connected Loot Boxes with Gambling*, PCGAMER (Nov. 23, 2018), <https://www.pcgamer.com/the-uk-gambling-commission-has-not-connected-loot-boxes-with-gambling/>.

New Zealand's Gambling Compliance Office⁹⁹ have concluded that loot boxes do not qualify as a form of gambling. The U.K. Gambling Commission ultimately determined that the inability to convert virtual currency into real currency precludes loot boxes from being defined as a licensable gambling activity.¹⁰⁰ Similarly, ARJEL dismisses the argument that loot boxes do not qualify as gambling for two main reasons: (1) there is always a prize and (2) the items obtained have no real-world value.¹⁰¹ New Zealand's Gambling Commission Office bases its determination that loot boxes do not meet the legal definition of gambling per its Gambling Act 2003¹⁰² based on the fact that gamers "do not purchase loot boxes seeking to win money or something that can be converted into money."¹⁰³ The common theme among these decisions is that loot boxes are excluded as gambling because of their inability to provide gamers with real-world monetary prizes.

Although these countries have confirmed the legality of loot boxes, it does not mean that loot boxes are of no concern. The UK Gambling Commission's Young People & Gambling 2018 report has found that 31% of its participants have opened a loot box and that 3% have bet with in-game items, drawing inferences of possible early addictions.¹⁰⁴ On the other hand, ARJEL's 2017-2018 Activity Report was concerned with the "near miss" aspect of loot boxes, drawing a strong parallel to the variable response rates of slot machines.¹⁰⁵ However, the United Kingdom has wagered that relevant regulatory bodies will eventually self-regulate and "[speak] to the industry to ensure that those who purchase and play video games are informed and protected,"¹⁰⁶ and ARJEL has simply called for the Gaming Regulators European Forum to clarify loot box rules and raise awareness

⁹⁸ Andy Chalk, *French Gambling Regulator Determines That Loot Boxes Are Not Legally Gambling*, PCGAMER (July 4, 2018), <https://www.pcgamer.com/french-gambling-regulator-determines-that-loot-boxes-are-not-legally-gambling/>.

⁹⁹ Owen S. Good, *Another Regulator Says Loot Boxes Are Not Gambling*, POLYGON (Dec. 16, 2017), <https://www.polygon.com/2017/12/16/16785474/loot-boxes-gambling-law-government-star-wars-battlefront-2>.

¹⁰⁰ Colin Campbell, *UK Gambling Commission Weighs in on Loot Crate Legality*, POLYGON (Nov. 24, 2017, 2:01 PM), <https://www.polygon.com/2017/11/24/16696974/uk-gambling-commission-loot-crate>.

¹⁰¹ Chalk, *supra* note 988; Sebastian Schwidessen, *French Gambling Regulator Releases its Position on Loot Boxes*, LINKEDIN (June 29, 2018) <https://www.linkedin.com/pulse/french-gambling-regulator-releases-its-position-loot-sebastian/>.

¹⁰² Gambling Act 2003, S4 (N.Z.).

¹⁰³ Good, *supra* note 99.

¹⁰⁴ GAMBLING COMM'N., *supra* note 91.

¹⁰⁵ Chalk, *supra* note 988.

¹⁰⁶ Hafer, *supra* note 96.

among consumers.¹⁰⁷ While the United Kingdom and France have declared that loot boxes are not gambling, they are still taking steps towards mitigating potential impacts.

B. Regulation

1. Japan

As one of the world's leaders when it comes to video games,¹⁰⁸ Japan was the first region to regulate microtransactions.¹⁰⁹ Starting July 1, 2012, any developers utilizing *kompū gacha* would be subject to fines under Japan's Act against Unjustifiable Premiums and Misleading Representations and the Law for Preventing Unjustifiable Extra or Unexpected Benefit and Misleading Representation.¹¹⁰ *Kompū gacha*, also known as "complete *gacha*," is a mechanic in games where gamers can collect a grand prize if they amass a complete set of items from randomized loot boxes.¹¹¹ However, the rarity of completing a set was far too expensive, causing the expected payouts to be far lower than what the consumers were paying.¹¹² This mechanism was seen as lucrative and exploitive after two extreme cases were publicized in Japan: (1) a middle school boy spent 5,000 USD in a month and (2) a primary school student spent over 1,500 USD within three days.¹¹³

After 688 parent complaints were filed between 2011 and 2012, these concerns prompted Japan's Consumer Affairs Agency to equate these *kompū gacha* mechanisms to gambling.¹¹⁴ As Jin Matsubara, Japan's Minister of State for Consumer Affairs and Food Safety said, "significantly increasing

¹⁰⁷ *Id.*

¹⁰⁸ *Japan Games Market 2018*, NEWZOO (Aug. 1, 2018), <https://newzoo.com/insights/infographics/japan-games-market-2018/>. Japan is the 3rd largest game market with 67.6 million gamers.

¹⁰⁹ Kathleen De Vere, *Japan Officially Declares Lucrative Kompū Gacha Practice Illegal in Social Games*, ADWEEK (May 18, 2012), <http://www.adweek.com/digital/japan-officially-declares-lucrative-kompū-gacha-practice-illegal-in-social-games/>.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Betable Blog, *Why "Kompū Cacha" Was Banned*, GAMASUTRA (May 25, 2012), http://www.gamasutra.com/blogs/BetableBlog/20120525/171124/Why_quotKompū_Gachaquot_Was_Banned.php%20.

¹¹³ *Id.*

¹¹⁴ Kathleen De Vere, *How Japan's Social Game Regulations Will Impact GREE, DeNA and the U.S.*, ADWEEK (May 8, 2012), <http://www.adweek.com/digital/how-japans-social-game-regulations-will-impact-gree-dena-and-the-u-s/?red=im>.

the passion for gambling is not appropriate to the education of children.”¹¹⁵ After the announcement that *kompū gacha* would be banned, many of Japan’s game production companies formed a self-regulation council to regulate monetization.¹¹⁶ Affected companies like GREE, DeNA, Mixi, CyberAgency, Dwango, and NHN all announced that they would phase out the mechanic from both their own games and other games operating on their platforms by the end of May 2012.¹¹⁷ Concerned parents, regulatory governmental agencies, and game developers all came together to eliminate *kompū gacha* as soon as possible to protect young children from engaging in underage gambling.

Although regular *gacha*, a mechanic more akin to simple randomized loot boxes, was not banned, Japan took the first steps toward regulating microtransactions. However, it seems unlikely that Japan will ban *gacha* entirely and instead opt towards regulation. The Japanese Parliament recently, in June 2018, approved a bill to legalize casino gambling for the first time.¹¹⁸ Japanese Prime Minister Shinzo Abe has recognized gambling’s ability to stimulate Japan’s economy.¹¹⁹ However, similar to the treatment of microtransactions, the new laws include several safeguards to prevent addiction: (1) only three casinos will open; (2) Japanese citizens may only enter three days a week, up to ten days a month; and (3) Japanese citizens will be charged 6,000 yen upon entry.¹²⁰

2. South Korea

South Korea is a country where video game addiction has been an ongoing issue for many years.¹²¹ The South Korean National Assembly has had a history of regulating the video game industry for quite some time with

¹¹⁵ Jon Russell, *Japan’s Mobile Gaming Industry Faces a Ban on Lucrative ‘Kompū Gacha’*, THE NEWT WEB: ASIA (May 5, 2012), <https://thenextweb.com/asia/2012/05/06/japans-mobile-gaming-industry-faces-a-ban-on-lucrative-kompū-gacha-games/>.

¹¹⁶ De Vere, *Japan Officially Declares*, *supra* note 109.

¹¹⁷ *Id.*

¹¹⁸ Ed Adamczyk, *Japan Legalizes Casino Gambling; First Resorts Expected in Mid- ‘20s*, UPI (July 20, 2018, 1:21 PM), https://www.upi.com/Top_News/World-News/2018/07/20/Japan-legalizes-casino-gambling-first-resorts-expected-in-mid-20s/3701532103125/.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Bryan Clark, *South Korea’s Lost Generation of Gamers Offer a Preview of What’s to Come*, TNW (Nov. 13, 2018), <https://thenextweb.com/gaming/2018/11/13/south-koreas-lost-generation-of-gamers-are-a- preview-of-whats-to-come/>.

both the Games Industry Promotion Act¹²² and the Youth Protection Act.¹²³ More recently, South Korea's Fair Trade Commission sanctioned several game developers for deceiving players regarding the odds of obtaining an in-game item from loot boxes.¹²⁴ The Ministry of Culture, Sports, and Tourism implemented what they call the "Selection System of Game Availability Period."¹²⁵ This meant that starting July 1, 2012, the South Korean government required all gaming companies with over 100 employees and 27 million USD in revenue to have a built-in control system that allowed parents to set restrictions on when their children could play games.¹²⁶ This mandate shifts responsibility back onto parents to regulate their child as they deem fit. If there are any adverse effects that originate from any game, parents are now regulating their children's play time. However, this law does not apply to console games, completely free games, or games that are rated M or 18+.¹²⁷

While there are no laws specifically targeting loot boxes, the South Korean Games Ratings Board has taken the role of a regulator, preventing some games from being approved in the past due to "potential line-blurring ethics of online gambling."¹²⁸ Most recently, Activision-Blizzard's *Diablo III* game had a real-money auction house (RMAH) that allowed players to purchase in-game virtual items for varied prices, which could then be cashed out for real money.¹²⁹ The South Korean Games Rating Board would not approve *Diablo III* because the RMAH resembled gambling too closely.¹³⁰ When Blizzard finally removed the "cash-out" option of the RMAH, the

¹²² Geim San-eob Jinheungbeob [Game Industry Promotion Act], Act No. 11690, Mar. 23, 2013.

¹²³ Cheongsongyeon Bohobeop [Youth Protection Act], Act No. 14067, Mar. 2, 2016 (S. Kor.). Also known as the Shutdown Law or Cinderella Law, this Act forbids children under the age of sixteen to play online video games between the hours of 00:00 and 06:00.

¹²⁴ Charlie Hall, *South Korea Fines Game Companies Close to \$1M Over Loot Crates*, POLYGON (Apr. 10, 2018, 10:55 PM), <https://www.polygon.com/2018/4/10/17219006/loot-crate-south-korea-fines-nexon-one-million>, (game developers—like Nexon—stated that items were given out "at random" while odds of certain items were closer to 0.5%).

¹²⁵ Paul Tassi, *New Korean Law Lets Parents Decide When Their Kids Can Play Games*, FORBES (July 2, 2012, 12:43 PM), <https://www.forbes.com/sites/insertcoin/2012/07/02/new-korean-law-lets-parents-decide-when-their-kids-can-play-games/#1141097a34b6>.

¹²⁶ Eric Caoili, *New Anti-Game Addiction System, This Week in Korean New*, GAMASUTRA (June 29, 2012), https://www.gamasutra.com/view/news/171408/New_antigame_addiction_system_this_week_in_Korean_news.php.

¹²⁷ *Id.*

¹²⁸ William Usher, *Korea Says No to Diablo III's Real Money Auction House*, CINEMABLEND (2012), <https://www.cinemablend.com/games/Korea-Says-Diablo-III-Real-Money-Auction-House-38309.html>.

¹²⁹ *Id.*

¹³⁰ Anton Telitsyn, *Real Money Trading in Games: A Cryptocurrency Solution*, HACKERNOON (Oct. 4, 2017), <https://hackernoon.com/real-money-trading-in-games-a-cryptocurrency-solution-5fdc719cc4f6>.

board finally approved the game with an 18+ rating.¹³¹ For video games, South Korea has opted to place authority in the parents' hands to regulate their children's play time and to have their Games Rating Board appropriately place age restrictions on games that are not appropriate for children or would induce addictive behavior. Even offline, South Korea strictly regulates all forms of gambling and only allows legal gambling in one establishment: Kangwon Land Casino.¹³²

3. China

The Chinese video game market is the largest in the world and was expected to generate 37.9 billion USD of revenue in 2018 with 619.5 million gamers.¹³³ Acknowledging the rapid growth of online games, China's Ministry of Culture performed a random check on 200 game operators to find that 36 had illegal content such as gambling.¹³⁴ In addition to pursuing compliance with its existing laws, the Ministry of Culture released a new regulation that required all online game operators to "disclose the name, property, content, quantity, and draw/forged probability of all virtual items and services that can be drawn/forged on the official game website or a dedicated draw probability webpage of the game."¹³⁵ The regulation also requires the game operators to (1) "publicly announce the random draw results by customers on either the official website or in game and keep those records for more than 90 days"; (2) to "require gamers to use valid ID's for real name registration" to play or purchase anything; and (3) to "limit the amount of money that gamers can spend per transaction when purchasing an in-game item or service," which will trigger a two-step payment confirmation via e-mail or text.¹³⁶ All of these provisions are enacted to prevent accidental payments from young children and to keep the game fairer for the players.

Excluding Hong Kong and Macau, China has strict gambling laws and even has its financial institutions block financial transactions to and from

¹³¹ *Id.*

¹³² Hayes, *supra* note 933.

¹³³ *China Games Market 2018*, NEWZOO (Aug. 3, 2018), <https://newzoo.com/insights/infographics/china-games-market-2018>.

¹³⁴ ZhugeEX, *China's New Online Gaming Regulations*, ZHEGEEX BLOG (Dec. 12, 2016), <https://zhugeex.com/2016/12/chinas-new-online-gaming-regulations/>.

¹³⁵ *Id.*

¹³⁶ *Id.*

online gambling websites.¹³⁷ Article 303 of the 1997 revision of the Criminal Law of the People's Republic of China states that “[w]hoever, for the purpose of profit, gathers people to engage in gambling, runs a gambling house, or makes gambling his profession shall be sentenced to fixed-term imprisonment of not more than three years, criminal detention or public surveillance, and shall also be fined.”¹³⁸ However, even with a strict stance against gambling, China's approach towards loot boxes set forth regulations that do not cripple the thriving video game industry business model but rather take the risk out of the gambling by posting all probabilities and random draw results to help prevent gambler's fallacy. The transparency, two-step payment confirmation, and the spending limit are all additional safeguards implemented to prevent children from inadvertently developing a gambling addiction.

C. *Illegal Gambling*

1. *Belgium*

The Belgian Gambling Commission and the Belgian Minister of Justice set the tone in the European Union by pushing for the ban of all loot box monetization schemes in the entirety of Europe in mid-November 2017.¹³⁹ As opposed to scrutinizing loot boxes using antiquated criteria set forth in the era of traditional gambling, the Belgian Gambling Commission focused more heavily on the similar addictive aftereffects caused by loot boxes. The Commission stated that “[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.”¹⁴⁰ Belgium's rally against loot boxes sent ripples throughout the entire industry, encouraging several

¹³⁷ SimontheSorcerer, *Simon's Guide to Gambling in China*, SIMON'S ONLINE GAMBLING BLOG (last updated Oct. 28, 2015), <https://simonsblogpark.com/onlinegambling/simons-guide-gambling-china/>.

¹³⁸ 中华人民共和国刑法[Criminal Law of the People's Republic of China] (promulgated by the Standing Comm, Nat'l People's Cong., Mar. 14, 1997) 1997 STANDING COMM, NAT'L PEOPLE'S CONG. GAZ. 83 (China).

¹³⁹ 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.

¹⁴⁰ Haydn Taylor, *Belgian Gambling Commission Targets EA and Blizzard Over Loot Boxes*, GamesIndustry.biz (Nov. 16, 2017), <https://www.gamesindustry.biz/articles/2017-11-16-belgian-gambling-commission-targets-ea-and-blizzard-over-loot-boxes>.

countries to begin their own investigations into loot boxes.¹⁴¹ Australia's Victorian Commission for Gambling and Liquor Regulation (VCGLR) revealed that loot boxes constitute a form of gambling in Victoria and that it is "engaging with interstate and international counterparts" to work on policy changes that would "modernize and inform both federal and state-based legislation."¹⁴² In addition, both the German government¹⁴³ and the Dutch Gaming Authority¹⁴⁴ launched full investigations to determine whether loot boxes are games of chance.

Eventually, the Belgian Gambling Commission again led the charge themselves and declared that loot boxes were gambling in its Research Report on Loot Boxes in April 2018,¹⁴⁵ emphasizing that the "protection of vulnerable players played a key role in the Belgian Gaming and Betting Act of 7 May 1999 (Gaming and Betting Act)."¹⁴⁶ The Report underwent a thorough analysis of exploitive techniques used to lure players into buying loot boxes and explaining how loot boxes fit within the definition of gambling set forth in Article 2(1) of the Gaming and Betting Act.¹⁴⁷ Ultimately, it concluded that the gaming industry's self-regulation provided inadequate protection and that "paid loot boxes . . . fit the description of a game of chance because all of the constitutive elements of gambling are present (game, wager, chance, win/loss)."¹⁴⁸ Thus, video game companies that illegally utilize loot boxes with the constitutive elements of gambling violate the Gaming and Betting Act and can be criminally prosecuted in

¹⁴¹ Hafer, *supra* note 93.

¹⁴² Alex Walker, *Victoria's Gambling Regulator: Loot Boxes 'Constitute Gambling'*, KOTAKU: AU (Nov. 22, 2017), <https://www.kotaku.com.au/2017/11/victorias-gambling-regulator-loot-boxes-constitute-gambling/>.

¹⁴³ Andy Chalk, *Germany May Ban Loot Boxes*, PC GAMER (Feb. 6, 2018), <https://www.pcgamer.com/germany-may-ban-loot-boxes/>.

¹⁴⁴ Hannah Dwan, *Belgian and Dutch Authorities Are Investigating Loot Boxes in Video Games*, TELEGRAPH (Nov. 17, 2017, 11:25 AM), <https://www.telegraph.co.uk/gaming/news/belgian-dutch-authorities-investigating-loot-boxes-video-games>.

¹⁴⁵ BELGIAN FPS JUSTICE GAMING COMMISSION, RESEARCH REPORT ON LOOT BOXES (Apr. 2008), https://www.gamingcommission.be/opencms/export/sites/default/jhksweb_nl/documents/onderzoeksrapport-loot-boxen-Engels-publicatie.pdf.

¹⁴⁶ Wet van 7 mei 1999 op de kansspelen, de weddenschappen, de kansspelinrichtingen en de bescherming van de spelers [Gaming Act of 7 May 1999 on Games of Chance, Betting, Gaming Establishments and the Protection of Players], BELGISCH STAATSBLAD [Official Gazette of Belgium], (Belgium) https://www.gamingcommission.be/opencms/opencms/jhksweb_en/law/law/index.html.

¹⁴⁷ *Id.*, at Art. 2(1).

¹⁴⁸ RESEARCH REPORT ON LOOT BOXES, *supra* note 145, at 16. The Report examined popular games that utilize loot boxes such as Overwatch, Star Wars Battlefront II, FIFA 18, and Counter-Strike: Global Offensive.

Belgium.¹⁴⁹ In the aftermath, game developers had a choice to make: remove loot boxes,¹⁵⁰ withdraw their game,¹⁵¹ or face criminal prosecution.¹⁵²

2. Netherlands

Following closely behind Belgium's lead, the Netherlands Gaming Authority (Kansspelautoriteit) established its own analysis into loot boxes in its report—Study into Loot Boxes: A Treasure or a Burden—drawing authority from its own Betting and Gaming Act.¹⁵³ However, its conclusion slightly varied from the Belgian ruling;¹⁵⁴ the Dutch report found that only loot boxes that had virtual prizes that could be traded outside of the game for real-world market value were prohibited without a proper gambling license.¹⁵⁵ The report further acknowledges that loot boxes were addictive in a way similar to slot machines in terms of design and mechanisms, encouraging socially vulnerable groups, such as minors, to play games of chance.¹⁵⁶ As a preventative measure, the Gaming Authority demanded games that use loot boxes to remove “addiction-sensitive” elements such as flashy animations to induce thrill.¹⁵⁷

3. Australia

Two months after Belgium and the Netherlands banned loot boxes, Australia's Senate decided to join in and passed a motion to investigate loot

¹⁴⁹ *Id.*

¹⁵⁰ Matt Kim, *Loot Boxes Removed in Europe From Overwatch, Heroes of the Storm, and NBA 2K to Comply with Region-Specific Gambling Laws*, US GAMER (Aug. 27, 2018), <https://www.usgamer.net/articles/loot-boxes-removed-belgium-netherlands-overwatch-nba-2k-heroes-of-the-storm>.

¹⁵¹ Natalie Whitehead, *Belgium's Anti-Lootbox Stance Causes Games to Be Withdrawn*, LEGAL GAMBLING AND THE LAW (Nov. 9, 2018), <https://www.legalgamblingandthelaw.com/news/belgiums-anti-lootbox-stance-causes-games-to-be-withdrawn/>.

¹⁵² Rift, *Belgium Considers Criminal Charges Against EA For Loot Box Gambling*, SANKAKU COMPLEX (Sept. 14, 2018), <https://www.sankakucomplex.com/2018/09/14/belgium-considers-criminal-charges-against-ea-for-loot-box-gambling/>.

¹⁵³ *Loot Boxes*, KANSSPELAUTORITEIT (Last visited Apr. 28, 2019), <https://kansspelautoriteit.nl/english/loot-boxes/>.

¹⁵⁴ RESEARCH REPORT ON LOOT BOXES, *supra* note 145.

¹⁵⁵ KANSSPELAUTORITEIT, *supra* note 153.

¹⁵⁶ *Id.*

¹⁵⁷ Matt Davidson, *The Netherlands Determines Some Loot Boxes Are Gambling*, IGN (Apr. 20, 2018, 6:51 AM), <https://www.ign.com/articles/2018/04/20/the-netherlands-determines-some-loot-boxes-are-gambling>.

boxes.¹⁵⁸ To better inquire into microtransactions, the Australian Environment Communications References Committee conducted a large-scale study and surveyed nearly 7,500 game enthusiasts in September 2018.¹⁵⁹ The study provided empirical evidence of a link between loot box spending and problem gambling, concluding that “[t]he more severe gamers’ problem gambling was, the more likely they were to spend large amounts of money on loot boxes.”¹⁶⁰ The lead researchers also claimed that “loot boxes share so many formal similarities with other forms of gambling that they meet the ‘psychological criteria’ to be considered gambling themselves.”¹⁶¹ The results of this study support claims that loot boxes are psychologically akin to gambling and suggest that loot boxes could be a gateway to gambling and exploit gambling disorders without regulation.¹⁶² However, while the study has found these psychological links to gambling, Australia’s Senate has not codified the study’s recommendations into legislation yet.

While a select few nations have established differing stances regarding loot boxes, there are still several countries that remain dubious. However, after the wave of studies from Belgium and the Netherlands, fifteen gambling regulators from Europe and one from the United States organized a collaborative effort at 2018 Gambling Regulators European Forum to “address the risks created by the blurring of lines between gaming and gambling.”¹⁶³ The effort is mostly motivated by concerns regarding consumer protection, especially when it comes to the safety of children online.¹⁶⁴ As more and more nations join in the loot box debate, it is entirely

¹⁵⁸ Joe Donnelly, *Australian Senate Backs Loot Box Investigation*, PCGAMER (June 28, 2018), <https://www.pcgamer.com/australian-senate-backs-loot-box-investigation/>.

¹⁵⁹ Shaun Prescott, *Loot Boxes Are “Psychologically Akin To Gambling”*, *According to Australian Study*, PCGAMER (Sept. 18, 2018), <https://www.pcgamer.com/loot-boxes-are-psychologically-akin-to-gambling-according-to-australian-study>.

¹⁶⁰ Senate Standing Comm. on Environment and Communications, *Gaming Micro-transactions for Chance Based Items*, FEDERAL PARLIAMENT’S PARLIAMENTARY LIBRARY (Nov. 27, 2018) https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Gamingmicro-transactions/Public_Hearings.

¹⁶¹ Jeff Grubb, *Australian Study: Loot Boxes Are More Like Gambling Than Baseball Cards*, VENTUREBEAT (Sept. 17, 2018), <https://venturebeat.com/2018/09/17/loot-boxes-australian-study/>.

¹⁶² *Id.*

¹⁶³ 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>. These gambling regulators include representatives from Austria, the Czech Republic, France, Gibraltar, Ireland, Isle of Man, Jersey, Latvia, Malta, the Netherlands, Norway, Poland, Portugal, Spain, Washington State, and the United Kingdom.

¹⁶⁴ *Id.*

possible that there will eventually be an international consensus and policy to protect children from predatory business practices.

D. *Other Stakeholders*

In addition to legislatures, other stakeholders have also publicly expressed their opinions on the legality of loot boxes. The American Entertainment Software Rating Board (ESRB) stated that loot boxes do not constitute gambling because it is a “similar principle to collectible card games” since the player is still guaranteed to receive in-game content.¹⁶⁵ Michael Gallagher, the ESRB President has openly contended that government regulation of loot boxes would “challenge our industry’s freedom to innovate, and impairs our ability to continuously test new business models, which drive creativity and engagement with our audience.”¹⁶⁶ However, the ESRB has taken note of similar issues discussed by the Belgian Gambling Commission and announced an initiative to place labels on video games containing microtransactions and to begin an awareness campaign to highlight controls available to parents.¹⁶⁷ The Pan European Game Information (PEGI)—the European equivalent of the ESRB—has also announced a new label for physical releases to help inform parents of purchase choices.¹⁶⁸ While still helpful as a first step, both the ESRB’s and PEGI’s initiatives accentuates its focus on protecting parents from unwarranted spending rather than preventing children from developing gambling tendencies.¹⁶⁹

Many dominant game developers have also held firm to their loot box microtransaction business models because of its high profit potential.¹⁷⁰ 2K

¹⁶⁵ 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>.

¹⁶⁶ Kyle Orland, *Trade Group Prez: Loot Box Regulation “Challenges Our Freedom to Innovate”*, ARS TECHNICA (May 25, 2018, 8:54 AM), <https://arstechnica.com/gaming/2018/05/trade-group-prez-loot-box-regulation-challenges-our-freedom-to-innovate/>.

¹⁶⁷ Owen S. Good, *ESRB Introducing ‘In-Game Purchases’ Label in Response to Loot Box Controversy*, POLYGON (Feb. 28, 2018, 11:01 AM), <https://www.polygon.com/2018/2/27/17057978/esrb-loot-crate-box-in-game-purchases-label>.

¹⁶⁸ *Video Game Boxes to Warn Parents About Extra Purchases*, SKYNEWS (Aug. 30, 2018, 1:06 PM), <https://news.sky.com/story/video-games-boxes-to-warn-parents-about-extra-purchases-11485534>.

¹⁶⁹ Owen S. Good, *ESRB’s New ‘In-game Purchases’ Label, Explained*, POLYGON (Feb. 28, 2018, 8:25 AM), <https://www.polygon.com/2018/2/28/17059936/esrb-loot-crates-loot-boxes-label-in-game-purchases>.

¹⁷⁰ Seth G. Macy, *EA Made \$5.1 Billion In Revenue For 2018, Anthem Still On Track For 2019 Release*, IGN (May 8, 2018, 3:02 PM), <https://www.ign.com/articles/2018/05/08/ea-made-51-billion-in-revenue-for-2018-anthem-still-on-track-for-2019-release>.

Games has even attempted to rally their consumers to contact local government to support loot boxes,¹⁷¹ referring to loot boxes as an “unfortunate reality of modern gaming” due to people’s lack of patience.¹⁷² On the other hand, other game developers, such as Nintendo, are calling upon their peers to create sustainable business through other means.¹⁷³ However, because game developers have little authority over the law, their actions have consequences subject to the laws of the jurisdictions they are selling their games in.

Most notably, Electronic Arts Inc. (EA) has continuously defended its controversial use of loot crates by reminding players that they can still earn crates by playing the game and that the business model prevents EA from charging additional costs that would otherwise splinter the gaming community.¹⁷⁴ Even when Belgium announced that it would prosecute illegal loot box gambling, EA initially refused to comply and remove loot boxes from the games sold in Belgium.¹⁷⁵ However, after pressure from the Belgian government, EA eventually conceded and removed loot boxes from their FIFA 18 game.¹⁷⁶

V. WHAT ACTIONS SHOULD THE UNITED STATES TAKE?

In the United States, advocates from six different states have taken action in early 2018: Washington, Hawaii, California, New York, Michigan, and Indiana.¹⁷⁷ Washington State Senator Kevin Ranker introduced a bill into the Legislature to highlight three major concerns: (1) whether loot box mechanics constitute gambling under Washington law; (2) whether loot box mechanics belong in games and apps; and (3) whether minors should have

¹⁷¹ Ian Boudreau, *2K Asks Fans to Tell Belgium They Want Loot Boxes*, PCGAMESN (Sept. 3, 2018), <https://www.pcgamesn.com/nba-2k19/2k-asks-belgium-fans-for-loot-box-help>.

¹⁷² Ali Jones, *2K Says Microtransactions Are “An Unfortunate Reality” Of Gaming Now*, PCGAMESN (Sept. 5, 2018), <https://www.pcgamesn.com/2k-microtransactions>.

¹⁷³ Yuki Furukawa & Yuji Nakamura, *Super Mario Creator Warns Gaming Industry: Don’t Be Too Greedy*, BLOOMBERG (Aug. 22, 2018, 1:27 AM), <https://www.bloomberg.com/news/articles/2018-08-22/super-mario-creator-warns-gaming-industry-don-t-be-too-greedy>.

¹⁷⁴ Haydn Taylor, *Belgian Gambling Commission Targets EA and Blizzard Over Loot Boxes*, GAMESINDUSTRY.BIZ (Nov. 16, 2017), <https://www.gamesindustry.biz/articles/2017-11-16-belgian-gambling-commission-targets-ea-and-blizzard-over-loot-boxes>.

¹⁷⁵ Rift, *supra* note 152.

¹⁷⁶ Wesley Yin-Poole, *EA Buckles in Belgium, Stops Selling FIFA Points Following Loot Box Gambling Pressure*, EUROGAMER (Jan. 9, 2019), <https://www.eurogamer.net/articles/2019-01-29-ea-buckles-in-belgium-stops-selling-fifa-points-following-loot-box-gambling-pressure>.

¹⁷⁷ Oliver Rudgewick, *Loot Boxes – Is It Time To Regulate?*, GAMBLINGINSIDER (Nov. 1, 2018), <https://www.gamblinginsider.com/in-depth/6198/loot-boxes-is-it-time-to-regulate>.

easy access to games and apps that feature loot boxes.¹⁷⁸ Recognizing that consumer protection is vital when loot boxes are “specifically designed to exploit and manipulate the addictive nature of human psychology,”¹⁷⁹ advocates from Hawaii,¹⁸⁰ California,¹⁸¹ New York,¹⁸² Michigan,¹⁸³ and Indiana¹⁸⁴ have introduced bills that call for the (1) prohibition of sales of video games with loot box mechanics to minors, (2) requirement of warning labels specific to microtransactions, and/or (3) disclosure of the odds of potential prizes.

In May 2019, Senator Josh Hawley of Michigan announced the introduction of a landmark legislation: “The Protecting Children from Abusive Games Act.”¹⁸⁵ This bill, if passed, would effectively prohibit both loot boxes and pay-to-win game environments in games targeting those under the age of eighteen—determined by subject matter, visual content, and other indicators similar to those used to determine applicability of Children’s Online Privacy Protection Act (COPPA)—and even “games with wider audiences whose developers knowingly allow minor players to engage in microtransactions.”¹⁸⁶ Providing additional consumer protection for minors, the U.S. Federal Trade Commission (FTC) and State attorneys general could enforce these rules under unfair trade practice.¹⁸⁷ However, while this Comment suggests that we tread a fine line between the protection of children and allowing the video game industry to thrive, this bill could effectively destroy the mobile game model as is. Senator Hawley has been a

¹⁷⁸ Haydn Taylor, *Washington State Senator Introduces Bill to Determine Whether Loot Boxes are Gambling*, GAMESINDUSTRY.BIZ (Jan. 25, 2018), <https://www.gamesindustry.biz/articles/2018-01-25-washington-state-senator-introduces-bill-to-determine-whether-loot-boxes-are-gambling>; See also S.B. 6266, 64th Leg., Reg. Sess. (Wash. 2018).

¹⁷⁹ Jason M. Bailey, *A Video Game ‘Loot Box’ Offers Coveted Rewards, But Is It Gambling?*, N.Y. TIMES (Apr. 24, 2018), <https://www.nytimes.com/2018/04/24/business/loot-boxes-video-games.html>.

¹⁸⁰ David Lumb, *Can Legislation Fix Gaming’s Loot Box Problem?*, ENGADGET (Feb. 24, 2018), <https://www.engadget.com/2018/02/24/loot-boxes-gambling-legislation/>.

¹⁸¹ Sebastian Schwidessen, *USA: New Loot Box Bill Introduced ... Again*, LEXOLOGY (Apr. 30, 2018), <https://www.lexology.com/library/detail.aspx?g=04c83f73-6a42-43ec-baf3-dd30b7094ab0>.

¹⁸² A.B. 10075, 241th Leg., Reg. Sess. (N.Y. 2018).

¹⁸³ H.F. 4460, 90th Leg., Reg. Sess. (Minn. 2018).

¹⁸⁴ S.B. 333, 120th Gen. Assemb., Reg. Sess. (Ind. 2018).

¹⁸⁵ *Senator Hawley to Introduce Legislation Banning Manipulative Video Game Features Aimed at Children*, JOSH HAWLEY U.S. SENATOR FOR MISSOURI (May 8, 2019), <https://www.hawley.senate.gov/senator-hawley-introduce-legislation-banning-manipulative-video-game-features-aimed-children>.

¹⁸⁶ *The Protecting Children from Abusive Games Act*, JOSH HAWLEY U.S. SENATOR FOR MISSOURI (last visited May 11, 2019), https://www.hawley.senate.gov/sites/default/files/2019-05/2019-05-08_Protecting-Children-Abusive-Games-Act_One-Pager.pdf.

¹⁸⁷ *Id.*

proponent of the protection of children, introducing a bill just two months prior to expand the protection of COPPA.¹⁸⁸ His stance is that “[n]o matter this [microtransaction] business model’s advantages to the tech industry, one thing is clear: there is no excuse for exploiting children through such practices.”¹⁸⁹ While no new formal regulations have been implemented yet, these advocates are capturing attention and spurring conversation that will likely lead legislatures to address the dilemma created by loot boxes.

In addition to state senators and other advocates, FTC has also committed to independently investigating loot boxes with the public.¹⁹⁰ The FTC has the necessary statutory authority to initiate a rule-making proceeding to determine whether loot boxes are unfair or deceptive and subsequently warrant the promulgation of a regulation across the video game industry.¹⁹¹ However, the FTC currently does not hold any public opinion and is planning to hold a public workshop on August 7, 2019, in Washington, D.C., to analyze the video game industry’s sale of loot boxes.¹⁹² The workshop will cover (1) the overall history and evolution of loot boxes and their role in the game play and digital marketplace; (2) research examining consumer behavior with a focus on child and adolescent behavior, and (3) a discussion of consumer awareness and education regarding in-game microtransactions including the mechanics, marking, and financial commitments associated with loot boxes.¹⁹³

More and more stakeholders in the United States have increasingly gotten involved in the dialogue regarding loot boxes. However, no formal regulation has been promulgated, and the nation still seems relatively indecisive. What should the United States do now? Should the United States ban, regulate, or allow loot boxes to continue? Even throughout the world, there is no universal agreed-upon stance regarding whether loot boxes are gambling. Historically, the United State has implemented paternalistic

¹⁸⁸ Emily Birnbaum, *GOP Senator Announces Bill to Ban ‘Manipulative’ Video Game Design*, THE HILL (May 8, 2019, 12:02 PM), <https://thehill.com/policy/technology/442690-gop-senator-announces-bill-to-ban-manipulative-video-game-design>

¹⁸⁹ *Id.*

¹⁹⁰ Colin Campbell, *FTC Loot Box Investigation: What Happens Next?*, POLYGON (Nov. 29, 2018, 2:00 PM), <https://www.polygon.com/2018/11/29/18118164/ftc-loot-box-investigation-legal-analysis>.

¹⁹¹ *Id.*

¹⁹² *Inside the Game: Unlocking the Consumer Issues Surrounding Loot Boxes*, FED. TRADE COMM’N, (Aug. 7, 2019), <https://www.ftc.gov/news-events/events-calendar/inside-game-unlocking-consumer-issues-surrounding-loot-boxes>.

¹⁹³ *Id.*

policies to best protect the interests of the people, especially those that are vulnerable. Gambling—known for its addictive and life-breaking abilities—has continuously been under the government’s control even when it has taken different forms.¹⁹⁴ When the U.S. legislation acknowledged the shift of gambling onto online platforms, the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) was enacted.¹⁹⁵ Once more, gambling has evolved, disguised within an industry that our nation’s vulnerable youth are regularly exposed to.

On the other hand, the United States was also built as one of the first great free trade countries of the modern age,¹⁹⁶ ranked twelfth in the world in the 2019 Index of Economic Freedom.¹⁹⁷ Consumers should have some degree of autonomy to decide for themselves how they want to spend their hard-earned money. Treading a fine line between government paternalism and economic freedom, the United States should thoroughly investigate the loot box controversy to determine the most effective course of action. However, even with the increased awareness, whether loot boxes constitute gambling or not remains ambiguous.

A. *Ambiguity in the United States*

In the United States, there have been different approaches as to how loot boxes should be analyzed. First of all, some proponents of loot boxes, such as the ESRB,¹⁹⁸ argue that loot boxes are not like gambling due to their semblance to trading card packs.¹⁹⁹ Since the 1860’s,²⁰⁰ sports and entertainment trading card companies have sold sealed card packs—similarly targeted at kids—containing between five and twelve tangible physical cards that are randomized and revealed when the pack is opened.²⁰¹ Some packs even include more limited edition cards, known as

¹⁹⁴ *The History of Gambling*, *supra* note 19.

¹⁹⁵ *Unlawful Internet Gambling Enforcement Act*, *supra* note 4.

¹⁹⁶ Anthony Kim & Terry Miller, *New Trade Agenda for Advancing Economic Freedom in the World*, THE HERITAGE FOUNDATION (Nov. 26, 2018), <https://www.heritage.org/trade/report/new-trade-agenda-advancing-economic-freedom-the-world>.

¹⁹⁷ *Country Rankings*, 2019 INDEX OF ECONOMIC FREEDOM, <https://www.heritage.org/index/ranking>.

¹⁹⁸ Sinclair, *supra* note 165.

¹⁹⁹ Spencer Rutledge, *How Loot Boxes Don’t Resemble Trading Cards*, HARDCORE GAMER (Oct. 15, 2017), <https://www.hardcoregamer.com/2017/10/15/how-loot-boxes-dont-resemble-trading-cards/275720/>.

²⁰⁰ *A Brief History of Baseball Cards*, CYCLEBACK, <http://www.cycleback.com/1800s/briefhistory.htm> (last visited Apr. 4, 2019).

²⁰¹ *Id.*

“insert” cards, that have high value in secondary markets.²⁰² Loot box advocates have equated loot boxes to trading cards because allegations that trading card packs constituted unlawful gambling in violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO”) have been unsuccessful in the past.²⁰³

In the late 1990’s and early 2000’s, there were a series of cases that addressed whether trading card packs constituted gambling.²⁰⁴ In a consolidation of eight virtually identical cases, the Ninth Circuit Court analyzed whether the inclusion of rare insert cards—that held secondary market value—in trading card packs was a violation of RICO.²⁰⁵ To prevail on a civil RICO claim, a plaintiff must demonstrate that 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 [concrete financial] injury to plaintiff” that was proximately caused by the defendant.²⁰⁶ The plaintiffs asserted that the distribution of trading cards constituted gambling, a RICO violation, because the three elements of gambling—consideration, chance, and prize—were all present.²⁰⁷ However, when it came to the injury element of the RICO claim, the *Chaset* Court relied on the rationale of other courts.²⁰⁸ The Fifth Circuit held that trading card consumers did not suffer an injury cognizable under RICO because “[p]laintiffs do not allege that they received something different than precisely what they bargained for Injury to mere expectancy interests . . . is not sufficient to confer RICO standing.”²⁰⁹ Similarly, the United States District Court for the Eastern District of New York determined that trading card packs “deliver actual value to each party because the chance itself is of value regardless of whether or not the card purchaser later suffers a ‘loss.’ . . . The chance is real, and having paid for it and received it, the card purchaser has not suffered any financial loss or RICO property injury.”²¹⁰ In the end, every court determined that consumers of trading card packs lacked standing

²⁰² *Id.*

²⁰³ See generally *Chaset v. Fleer/Skybox Int’l., LP*, 300 F.3d 1083 (9th Cir. 2002); *Major League Baseball Props., Inc. v. Price*, 105 F. Supp. 2d 46 (E.D.N.Y. 2000); *Price v. Pinnacle Brands Inc.*, 138 F.3d 602 (5th Cir. 1998), per curiam.

²⁰⁴ *Id.*

²⁰⁵ *Chaset*, 300 F.3d at 1083.

²⁰⁶ *Id.* at 1086.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 1087.

²⁰⁹ See *Price*, 138 F.3d at 602.

²¹⁰ See *Major League Baseball Props.*, 105 F. Supp. 2d at 46.

to sue under RICO because there was no actual financial injury.²¹¹ From the U.S. court's perspective, trading card packs were not considered illegal gambling because there was always value received in the form of actual cards, whether they were the ones the consumers hoped for or not. Although in a slightly different context, advocates of loot boxes have latched onto this approach to similarly determine that loot boxes should not be considered illegal gambling.

On the other hand, some U.S. legislatures are still unsure of whether loot boxes should be considered gambling and, thus, continue their analysis. There are ultimately three elements that determine whether loot boxes should fall within the traditional U.S. definition of gambling: (1) consideration; (2) chance; and (3) a prize of value.²¹² While the chance element is generally satisfied due to randomized prizes, the consideration and prize prongs are the major points of contention—whether “free” boxes are valid consideration and whether virtual items are “things of value.” As discussed in Part IV, countries all over the world have interpreted this differently. The countries that have excluded loot boxes from gambling have determined that loot box prizes lack the requisite real-world value or ability to cash-out to constitute a proper prize.²¹³ As for the countries opting to ban loot boxes, Belgium has found that “what is important is that players attach value to [the loot box prize] and that this value is also emphasized by the game developers themselves.”²¹⁴ However, on the other hand, the Netherlands had only deemed loot boxes with the ability to convert prizes into real-world currency as illegal gambling.²¹⁵ Still undecided, the United States has a few precedent cases that supports an analysis similar to the Netherlands.²¹⁶

While there was one case that insignificantly supports the Belgian approach,²¹⁷ there were two past cases that have determined that virtual chips are not “things of value” because they cannot be redeemed for

²¹¹ *Chaset*, 300 F.3d at 1087, 1088.

²¹² 31 U.S.C. § 5362.

²¹³ *Chalk*, *supra* note 98.

²¹⁴ RESEARCH REPORT ON LOOT BOXES, *supra* note 145, at 10.

²¹⁵ *Whitehead*, *supra* note 151.

²¹⁶ *Loot Box Decision Reversed by US Court*, UNITED STATES GAMBLING ONLINE (May 15, 2018), <http://www.unitedstatesgamblingonline.com/news/loot-box-decision-reversed-by-us-court.html>.

²¹⁷ *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731 (N.D. Ill. 2016) (noting that virtual casino chips *could* have monetary value because the player buys them with real currency).

monetary value.²¹⁸ However, the Ninth Circuit recently ruled that a virtual casino game could fall within Washington’s definition of an illegal gambling game because its virtual casino token could qualify as a “thing of value” in *Kater v. Churchill Downs Inc.*²¹⁹ Similar to 31 U.S. Code § 5362,²²⁰ Washington State’s statute defines gambling as the “[1] staking or risking of 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.”²²¹ The Revised Code of Washington further elaborates and 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.”²²²

The *Kater* Court drew upon two separate analyses—for the consideration and the prize elements—to determine whether the game constituted illegal gambling. First, the court looked to whether the tokens satisfied the consideration element for gambling. In line with the Washington State’s gambling statute, the court held that the consideration element was satisfied because Big Fish Casino allowed users to earn and reuse casino tokens as “a form of credit . . . involving extension of . . . entertainment or privilege of playing [Big Fish Casino] without charge.”²²³ Big Fish’s biggest contention was that the chips were “free” if you waited for the periodic free grant period, so it should not be considered valid consideration.²²⁴ However, consideration does not have to be monetary to be valid. As seen in landmark contracts case, *Hamer v. Sidway*, the New York Court of Appeals held that forbearance of a legal right on promises of future benefits made by other parties can constitute valid consideration.²²⁵ In Big Fish Casino, users could earn more chips by not playing the game and

²¹⁸ See generally *Mason v. Machine Zone Inc.*, 851 F.3d 315 (4th Cir. 2017); and *Soto et al v. Sky Union, LLC*, 159 F.Supp.3d 871, (N.D. Ill. 2016).

²¹⁹ See *Kater v. Churchill Downs Inc.*, 886 F.3d 784 (9th Cir. 2018).

²²⁰ 31 U.S.C. § 5362. **Error! Bookmark not defined.**

²²¹ WASH. REV. CODE § 9.45.0237 (2005).

²²² WASH. REV. CODE § 9.46.0285 (1987).

²²³ *Id.*

²²⁴ *Kater*, 886 F.3d at 784.

²²⁵ See *Hamer v. Sidway*, 27 N.E. 256 (N.Y. 1891) (holding that abstaining from alcohol, tobacco, swearing, and gambling until the age of twenty-one was adequate consideration to recover \$5,000).

collecting them after a set waiting period. The forbearance of playing the game—a legal right—and waiting should be considered adequate consideration, invalidating Big Fish’s argument.

After the consideration element, the *Kater* Court looked to whether the prize chips were “things of value.” Big Fish Casino argued that the chips had no real-world value within the game because its Terms of Use stated that virtual chips have no monetary value and cannot be exchanged “for cash or any other tangible value.” However, there was an external mechanism that created real secondary market value. Users had the ability to transfer and exchange chips with other users for money, which effectively gave it real secondary market value.²²⁶ Ultimately, the *Kater* Court reasoned that the ability to exchange a virtual good for real-world money gave it real world “value,” thus qualifying as a “thing of value” in a prize element analysis.²²⁷

Based on the Ninth Circuit holding, skins—and other virtual items obtained from loot boxes—are “things of value” under the condition that it could be traded between users on a marketplace or cashed out, either directly within the game or indirectly using third party websites. Although past cases filed against Valve Corporation for skin betting have not been able to reach the court,²²⁸ this case marks the beginning of a future where U.S. courts address loot box contents as “things of value” for gambling purposes under particular circumstances, similar to the Dutch perspective. In addition, the Ninth Circuit holding eliminates the defense that “free” loot boxes eliminate the consideration prong. Most games have ways of earning loot boxes through either waiting and collecting or by grinding for levels. This should not preclude them from the gambling analysis.

Considering the United States’ emphasis on paternalism, a free market, and recent case law, the United States should adopt an approach to ban the more egregious loot box models that allow players to redeem virtual items for real-world currency, while enacting other carefully balanced

²²⁶ *Big Fish Terms of Use*, BIG FISH GAMES (Mar. 28, 2019), <https://www.bigfishgames.com/company/terms.html>

²²⁷ *Kater*, 886 F.3d at 784.

²²⁸ See *McLeod v. Valve Corp.*, No. C16-1227-JCC, 2016 U.S. Dist. LEXIS 137836 (W.D. Wash. Oct. 4, 2016); *G.G. v. Valve Corp.*, No. C16-1941-JCC, 2017 U.S. Dist. LEXIS 5060 (W.D. Wash. Apr. 3, 2017). *McLeod* was dismissed for lack of relief, personal jurisdiction, and subject matter. On the other hand, the court determined in *G.G.* that the plaintiffs had a proper claim. However, Valve’s Steam Subscriber Agreement had a valid arbitration agreement. The inability of skin betting cases of getting a verdict in court is problematic.

regulations to further protect the youth of our nation without crippling the video game industry as a whole. Even as the loot box debate remains relatively ambiguous with its different approaches, this Comment challenges stakeholders to consider not whether loot boxes fit perfectly into antiquated gambling statutes, but all the detrimental gambling-like effects exposed to the world's gaming youth.

B. *Potential Solutions*

As seen in various countries' loot box investigations, there are a variety of potential solutions that could help mitigate the harmful side of loot boxes without incapacitating the thriving video game market. With discussions around loot boxes at an all-time high, the ESRB and the video game industry could choose to be proactive to remain a self-regulating industry²²⁹ or wait for government regulations to mandate changes that would likely introduce additional costs and ambiguity over new unpredictable standards.²³⁰ The ESRB has already begun use of microtransaction-specific labels and efforts into educating parents.²³¹ However, the ESRB could go above and beyond and use their ratings system to mark games with loot box mechanics as 18+ only.²³² It would help immensely if stores would age-verify people purchasing video games (and maybe even redeemable app store gift cards).

With the lucrative profits from microtransactions, game developers are very unlikely to phase out their microtransaction business models and reattach a monetary value to games to add a parental wall. Fortunately, there are several other modifications that could help eliminate the gambling effects from loot boxes. First of all, the ability to "cash out" and redeem virtual goods for real currency could be eliminated if all loot box content were account-bound. Gamers would still be free to purchase loot boxes if they so choose without the virtual item being conflated with real currency if there was no way to trade, purchase, or bet using virtual "tokens." In the

²²⁹ Mathew McCurley, *Disney/Lucasfilm Side with Fans in 'Star Wars Battlefront II' Cash Grab*, ROLLINGSTONE (Nov. 19, 2010), <https://www.engadget.com/2010/11/19/the-lawbringer-self-regulation-and-the-video-game-industry/> (noting that the industry has been self-regulating since the formation of the ESRB in 1994).

²³⁰ *Id.*

²³¹ Good, *supra* note 99.

²³² *ESRB Ratings*, ESRB, <http://www.esrb.org/ratings/> (last visited May 30, 2019).

eyes of the majority of the world, this would eliminate loot boxes from being considered gambling.

Game developers could possibly exclude loot boxes that exploit consumers by creating a pay-to-win environment. While fun, competitions are a “zero-sum” game where there must be a winner and a loser,²³³ invoking an inherent will to win that evolved from biological traits that co-evolved with the basic need to survive.²³⁴ Virtual items that provide a competitive edge simply creates a trap where players will restlessly continue to outspend other players to have a better chance of winning. The loss aversion mindset is exploited to compel people to plummet down a spending addiction to fuel their desire to be a winner.

Loot box spending can also really get out of hand with the ease of saved payment methods. Game developers and app store platforms can hold themselves out more children-friendly if they implement a few changes to help both parents and children avoid the shock of unexpected bills. Similar to the South Korean approach, parental control awareness and control could help mitigate these concerns. For example, there could be a parental control to determine whether microtransactions are turned off for downloaded games or, to a lesser degree, whether multi-step verification payment and/or a financial spending limit per time period could be enabled.

Lastly, another common solution seen in proposed bills was to disclose the odds of winning.²³⁵ In the United States, Apple’s App Store Review Guidelines Section 3.1.1 already self-regulates by requiring that “[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.”²³⁶ Similarly, Google implemented changes to its Play Store to require games offering randomized virtual items to “disclose the odds of receiving those items in advance of purchase” to better manage consumer expectations.²³⁷ However, as seen in traditional gambling, there are several cognitive biases—known as gambling

²³³ Sander van der Linden, *The Psychology of Competition*, PSYCHOLOGY TODAY (June 24, 2015), <https://www.psychologytoday.com/us/blog/socially-relevant/201506/the-psychology-competition>.

²³⁴ *Id.*

²³⁵ See recently proposed state laws, *supra* note 181, 182, 183 & 184.

²³⁶ *App Store Review Guidelines*, APPLE, <https://developer.apple.com/app-store/review/guidelines/#in-app-purchase> (last visited May 11, 2019).

²³⁷ 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/>.

fallacies—that demonstrate that knowing the odds do not single-handedly prevent addicts from gambling.²³⁸ Some gamblers erroneously perceive the likelihood of random events given previous events or even that luck is disproportional, favoring certain people or other circumstances.²³⁹ Disclosing the odds is definitely a step in the right direction to help spread awareness of the issue with loot boxes; however, it has proven ineffective by itself for traditional gamblers.

VI. CONCLUSION

The video game industry, taking advantage of the loot box microtransaction business model, has improved and blossomed in recent years, spreading its influence over an increasing number of consumers that are spending more and more money on gaming. However, the world has spoken out against the loot box controversy, unable to come to a universal position on whether the microtransaction business model is inadvertently targeting vulnerable youth with gambling-like tendencies. Even as the global loot box discussion drags on, it continues to evolve into different forms as new technology arises.²⁴⁰ Taking the lead from other countries, the United States—treading a fine line between paternalist policies and maintaining free market—now has the task of following suit and determining the future of loot boxes in our nation.

With all the suggested modifications above, it is likely that no single adjustment alone would change the fate of the loot box business model. Multiple changes could be required to steer loot boxes down a path where the young can enjoy video games while allowing the industry to continue flourishing. It is now up to leaders of the video game industry, parents, and legislators to cooperate and determine what the appropriate measures are to keep our vulnerable youth safe.

²³⁸ Carrie A Leonard, Robert J Williams, John Vokey, *Gambling Fallacies: What are They and How are They Best Measured?*, OMICS ONLINE (Dec. 31, 2015), <https://www.omicsonline.org/open-access/gambling-fallacies-what-are-they-and-how-are-they-best-measured-2155-6105-1000256.php>.

²³⁹ *Id.*

²⁴⁰ James Davenport, *Battle Passes Are Replacing Loot Boxes, But They're Not Necessarily a Better Deal*, PC GAMER (July 5, 2018), <https://www.pcgamer.com/battle-passes-are-replacing-loot-boxes-but-theyre-not-necessarily-a-better-deal/>; Matthew Smith, *From Gold to Greatswords, Blockchain Lets Games Truly Own Their Loot*, DIGITAL TRENDS (Apr. 16, 2018), <https://www.digitaltrends.com/computing/future-of-blockchain-in-gaming/>.

