Washington Journal of Law, Technology & Arts

Volume 16 | Issue 2 Article 4

3-19-2021

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Cover Page Footnote

J.D. Candidate, Florida State University College of Law, Class of 2021; B.A. in History, University of North Florida. With thanks to Prof. David Landau for his incredible guidance and immense patience. The author also thanks Nicholas Poppell, Amelia Ulmer, Jacob Imig, Joe McGehee, Matthew Webb, Michael O'Donnell, and lastly Kaori and Eduardo Reyes for their encouragement and support throughout this process.

WASHINGTON JOURNAL OF LAW, TECHNOLOGY & ARTS
VOLUME 16, ISSUE 2 WINTER 2021

OPEN-WORLD REGULATION: THE URGENT NEED FOR FEDERAL LEGISLATION ON VIDEO GAME LOOT BOXES

Alex Reyes[*]

CITE AS: A REYES, 16 WASH. J.L. TECH. & ARTS 87 (2021)
https://digitalcommons.law.uw.edu/wjlta/vol16/iss3/4

ABSTRACT

Loot boxes are items in video games that contain randomized prizes that players can purchase with real-world money. In recent years, loot boxes have come under scrutiny because the relationship between behavior and the underlying mechanics of loot boxes are similar to that of addictive behaviors associated with real-world gambling. Many papers suggest solutions focused on industry changes without direct regulation. However, these papers neglect the enormous profit incentive to maintain a business practice which can have detrimental behavioral effects on children. The United States federal government must take example from a growing number of European countries and ban the sale of loot boxes to children.

Growing concern in the United States has been met with attempts to regulate loot boxes as gambling. However, the nature of loot boxes causes them to fall between the cracks in our present regulatory infrastructure, which is created through state gambling laws. Common law on what constitutes a prize typically requires that the item have transferrable value. Game developers restrict players from selling items gained through loot boxes, so this

[*] J.D. Candidate, Florida State University College of Law, Class of 2021; B.A. in History, University of North Florida. With thanks to Prof. David Landau for his incredible guidance and immense patience. The author also thanks Nicholas Poppell, Amelia Ulmer, Jacob Imig, Joe McGehee, Matthew Webb, Michael O'Donnell, and lastly Kaori and Eduardo Reyes for their encouragement and support throughout this process.

requirement usually cannot be met through state gambling laws or common law. This paper will examine the Federal Government's ability to regulate loot boxes on a national level and propose model legislation.

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INTRODUCTION

In recent years, patterns of gambling behavior associated with video games have become a great concern to legislatures around the world.[1] This paper will primarily focus on regulating loot box sales to children. As will be shown, children are one of the most vulnerable consumer groups when it comes to developing problematic gambling behaviors.

In 2015, Grady Ballard initially only saw small transactions appear in his credit card statements.[2] Grady was infuriated when he saw twenty-seven charges, which totaled $356.85.[3] What he found out was that his son, Elijah Ballard, racked up these charges in order to get "skins," which are custom designs for weapons, in the video game *Counter-strike: Global Offensive*. Elijah then used these skins to engage in a game of chance on a third-party website in the hopes of winning more valuable skins.[4] This activity is a form of online gambling called skin-betting. What Grady did not know was that these charges were accrued after Elijah already sold his iPad in order to purchase two skins worth a combined $900.[5] Over time, Elijah was making larger and larger wagers on skin-betting websites, so he needed more and more cash.[6]

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[1] Kevin Webb, *Regulators from More Than a Dozen Countries Are Looking to Crack Down on 'Loot Boxes,' A Controversial Video Gaming Practice that Could Be Too Much Like Gambling*, BUSINESS INSIDER (Sept. 17, 2018, 6:49 PM), https://www.businessinsider.com/loot-boxes-european-regulation-2018-9#:~:text=Regulators%20from%20more%20than%20a,be%20too%20much%20like%20gambling&text=Belgium%20and%20the%20Netherlands%20have,and%20have%20banned%20the%20practice. *See also*, Edwin Hong, *Loot Boxes: Gambling for the Next Generation*, 46 W. St. L. Rev. 61, 70-71 (2019) (In South Korea, some members of the National Assembly have proposed amendments to require that companies disclose the potential prizes and odds of winning. In China, the government created requirements that companies had to follow in order to sell loot boxes).

[2] Shaun Assael, *Skin in the Game*, ESPN (Jan. 20, 2017), http://www.espn.com/espn/feature/story/_/id/18510975/how-counter-strike-turned-teenager-compulsive-gambler.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

Researchers and regulators are becoming more and more concerned about loot boxes and the potential harms these virtual items pose to consumers. Researcher David Zendle defines loot boxes as "items in video games that may be bought for real-world money, but which provide players with a randomized reward of uncertain value." [7] When players purchase a loot box, "players have no way of knowing whether it contains a rare and appealing item, or something else entirely."[8] Players can potentially spend large sums of money in their pursuit of rarer items. In 2016, Lance Perkins was stunned when he found $7,625 was charged from his 17-year-old son's Xbox Live account.[9] Perkins gave "his son a credit card for emergencies or to make purchases for the family's convenience store."[10] Instead, the 17-year-old used Perkins's card to rack up charges on a game in the *FIFA* series.[11] In *FIFA*, a player can purchase a loot box to obtain certain rare players.[12] In 2017, Roy Dobson from Lancashire, United Kingdom ("U.K."), found out that his 11-year-old child spent around $7,465 on in-app purchases in just two weekends.[13] The app Dobson's son was using utilized in-game currency, a form of currency that the player buys with real-world money in order to pay for certain in-game items.[14] In 2018, a survey by the U.K. Gambling Commission showed that one underage gamer spent £1,000 a year, around $1,400, on *FIFA*

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[7] David Zendle et al., *The Prevalence of Loot Boxes in Mobile and Desktop Games*,102 ADDICTION 1768, 1768 (2020).
[8] *Id.*
[9] Rob Thubron, *Teenager Spends Almost $8,000 on Microtransactions Without Father's Knowledge*, TECHSPOT (Jan. 13, 2016, 9:30 AM), https://www.techspot.com/news/63454-teenager-spends-almost-8000-microtransactions-without-father-knowledge.html.
[10] *Id.*
[11] *Id.*
[12] Matthew R. Yost, *Video Game Gambling: Too Big a Bet for New Jersey*, 70 RUTGERS U. L. REV. 335, 343 (2017).
[13] Rob Thubron, *11-year-old Accidentally Spends Almost $7,500 on Microtransactions Using, Dad's Credit Card*, TECHSPOT (Apr. 4, 2017, 2:15 PM), https://www.techspot.com/news/68791-11-year-old-accidentally-spends-almost-7500-microtransactions.html.
[14] David Zendle et al., *Paying for Loot Boxes is Linked to Problem Gambling, Regardless of Specific Features Like Cash-Out and Pay-To-Win*, 102 COMPUTERS IN HUM. BEHAV. 181, 183 (2020).

loot boxes to obtain better players for his team. [15] In 2019, a member of the public reported to the House of Commons' Digital, Culture, Media and Sport Committee that his adult son spent £50,000 in the British game *Runescape*.[16] The Commission was shown a bank statement which showed that the son spent £247.93 in one day, by making five separate transactions.[17] Jagex, the company which runs *Runescape*, told the Commission that players could possibly spend up to "£1,000 [per] week or £5,000 [per month]".[18] Still, Jagex noted further, "only one player had hit that limit in the previous 12 months.[19]

While these cases may be outliers, video game companies rely on the income of these high-paying consumers—labeled "whales."[20] The term originated in the gambling industry to refer to "extremely wealthy, high roller patrons."[21] While 1.9% of all players spent money on mobile games, these "whales" made up 90% of the $46.1 billion in total mobile game market revenue for 2017.[22] These accounts from players, coupled with growing revenues, began to concern international regulators who questioned whether loot boxes should be considered gambling.

Newer releases of desktop games over the past several years

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[15] Alex Hern & Rob Davies, *Video Game Loot Boxes Should be Classed as Gambling, Says Commons*, THE GUARDIAN (Sept. 12, 2019, 1:01 PM), https://www.theguardian.com/games/2019/sep/12/video-game-loot-boxes-should-be-classed-as-gambling-says-commons.

[16] DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, IMMERSIVE AND ADDICTIVE TECHNOLOGIES, 2017-2019, HC 1846, at ¶ 62 (U.K.).

[17] *Id*.

[18] *Id*. at ¶ 63.

[19] *Id*.

[20] Kyle Langvardt, *Regulating Habit-Forming Technology*, 88 FORDHAM L. REV. 129, 140 (2019). Paul Tassi, *Why It's Scary When 0.15% Mobile Gamers Bring In 50% of the Revenue*, FORBES (Mar. 1, 2014, 4:28 PM), https://www.forbes.com/sites/insertcoin/2014/03/01/why-its-scary-when-0-15-mobile-gamers-bring-in-50-of-the-revenue/.

[21] Lisa Fletcher et al., *Biggest Loser? Gambler Dropped $127M in a Year*, ABC NEWS (Dec. 8, 2009, 3:18 PM), https://abcnews.go.com/GMA/gambler-dropped-127-million-vegas-blames-casino-losses/story?id=9272730.

[22]Andrei Klubnikin, *Microtransactions in Games: The Good, the Bad, and the Ugly*, GAMEANALYTICS (Feb. 14, 2018), https://gameanalytics.com/blog/microtransactions-games-good-bad-ugly.html.

have only increased the prevalence of loot boxes mechanics, as "young people have reported that playing games with loot boxes has led to addictive behavior…."[23] Researchers note these mechanics are designed with human psychology in mind to encourage players to wager more and more of their money.[24] Recent research shows a relationship between loot boxes and gambling. [25] So, children who are exposed to video games with loot boxes may develop gambling habits later in life.[26] The "emotional rush of loot boxes," the growth of online celebrity endorsements, and gameplay mechanics which use stringent leveling systems and in-game currency, distort children's valuations of these in-game items, creating an environment that coerces children to continue to purchase loot boxes.[27]

This paper seeks to answer the question of whether the United States federal government has the authority to regulate loot boxes, and whether loot boxes should be regulated through existing state gambling laws or by federal statute.

Part I will examine the growing legal landscape regarding loot box regulation in the United States and abroad. Part II will analyze Congress' authority to regulate loot boxes pursuant to its Commerce Clause powers[28] and applicable limitations.[29]Part III will examine common law theories on gambling and the Unlawful Internet Gambling Enforcement Act, to see how loot boxes may be outside the reach of these laws. Finally, Part IV will look at policy

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[23] Matthew Busby, *Loot Boxes Increasingly Common in Video Games Despite Addiction Concerns*, THE GUARDIAN, (Nov. 22, 2019, 5:51 A.M.), https://www.theguardian.com/games/2019/nov/22/loot-boxes-increasingly-common-in-video-games-despite-addiction-concerns#:~:text=Research%20by%20academics%20at%20the,over%20the%20past%20nine%20years.

[24] Zendle et al., *supra* note 14, at 182-83.

[25] Zendle et al., *supra* note 14, at 183.

[26] *Id*.

[27] Elpidio Cruz, Note, *Tbe Psychological and Virtual Siege of Loot Boxes*, 23 J. TECH. L. & POL'Y 215, 223-24 (2019). (The author uses the example of YouTube vlogger, Ninja, to demonstrate the possible influence a single celebrity may have over a significantly large audience, noting Ninja's twenty-two million subscribers and his level of notoriety garnering a monthly income of $500,000).

[28] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 551 (2012).

[29] Murphy v. NCAA, 138 S. Ct. 1461, 1482 (2018).

considerations taken from a current congressional bill on the subject of digital gambling and how the bill can help determine steps for future regulation.

PART I: CURRENT RESPONSE TO LOOT BOXES AND MICROTRANSACTIONS

A. Regulator Response: The Netherlands, Belgium, and the United Kingdom

Over the past few years, regulators from all over the world addressed or are addressing how loot boxes and other design elements of video games borrow elements from the gambling industry.[30] For the purposes of this paper, we will first be exploring Europe's response to loot boxes. The Netherlands and Belgium are examples of a strict legal approach to loot box regulation. These nations implemented, what are effectively, total bans on loot boxes, reasoning that they contravened their gambling laws.[31] The U.K. provides an interesting case study as regulators were originally skeptical that loot boxes should be categorized as gambling. During the legislative process, representatives of the video game industry lobbied Parliament to show how loot boxes were dissimilar to gambling.[32] However, the U.K. government was

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[30] Kevin Webb, *Regulators from More Than a Dozen Countries Are Looking to Crack Down on 'Loot Boxes,' A Controversial Video Gaming Practice that Could Be Too Much Like Gambling*, BUSINESS INSIDER (Sept. 17, 2018, 6:49 PM), https://www.businessinsider.com/loot-boxes-european-regulation-2018-9#:~:text=Regulators%20from%20more%20than%20a,be%20too%20much%20like%20gambling&text=Belgium%20and%20the%20Netherlands%20have,and%20have%20banned%20the%20practice.

[31] David J. Castillo, Note, *Unpacking the Loot Box: How Gaming's Latest Monetization System Flirts with Traditional Gambling Methods*, 59 SANTA CLARA L. REV. 165, 187 (2019); *see also* Edwin Hong, *Loot Boxes: Gambling for the Next Generation*, 46 W. ST. L. REV. 61, 73-74 (2019)(After the Netherlands Gaming Authority made their announcement developers Valve and Electronic Arts removed loot box features from their games in the Netherlands. After the Belgium Gambling Commission made their announcement of their regulations, Valve, Blizzard, and Electronic Arts removed loot boxes features from their games in Belgium.)

[32] Ana Diaz, *EA Calls Its Loot Boxes 'Surprise Mechanics,' Says They're Used Ethically*, POLYGON, (Jun. 21, 2019, 9:10 AM),

not persuaded by the video game industry and in a 2019 report, which documented Parliament's investigation into loot boxes, ultimately concluded that loot boxes contained an element of chance that made them unsuitable for sale to children, and should therefore be prohibited.[33] The report cited new research on videogame design elements that showed a correlation between loot boxes and gambling behavior.[34]

1. The Netherlands

In the Netherlands, regulators have adopted substantial regulations on loot boxes.[35] In 2018, the Netherlands Gaming Authority released a report that revealed "four out of ten loot boxes violated the Betting and Gaming Act."[36] Those boxes violated the Act because the "prizes were determined by chance" and "the prizes could be traded outside of the game, thereby having market value."[37] The Gaming Authority also conducted a study which showed that all forms of loot boxes were addictive, despite finding only certain loot boxes as gambling.[38] The Gaming Authority called on developers to remove "addiction-sensitive elements of loot boxes" including the "stunning visual effects, ability to open them in quick succession, and the 'almost winning' effects that tease at a jackpot."[39] For games in the Netherlands, developers such as Valve, immediately disabled the feature to open loot boxes.[40] Electronic Arts ("EA") eliminated loot boxes from its game *Star Wars Battlefront II*, in response to the Gaming

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https://www.polygon.com/2019/6/21/18691760/ea-vp-loot-boxes-surprise-mechanics-ethical-enjoyable.

[33] DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, IMMERSIVE AND ADDICTIVE TECHNOLOGIES, *supra* note 16 at 79.

[34] *Id.* at ¶ 80-85.

[35] Edwin Hong, *Loot Boxes: Gambling for the Next Generation*, 46 W. ST. L. REV. 61, 73 (2019).

[36] *Id.*

[37] *Id.*

[38] *Id.* at 74.

[39] *Id.* at 73.

[40] *Id.*

Authority's findings.[41] The Gaming Authority stated that it would take action against other developers that violated these laws, which would include fines or complete sales bans.[42]

2. Belgium

In Belgium, the Gambling Commission found that loot boxes violated the Belgian Gaming and Betting Act.[43] The Commission looked at four elements to determine if loot boxes are gambling.[44] The elements were: "if it is 1) a game, where 2) a bet is placed that leads to 3) loss or win by at least one player, and 4) chance serves as an element in the course of the game, indication of the winner, or determination of the size of winnings."[45] Opening loot boxes or starting a spinning wheel, requires active participation from the user, so these mechanics were considered a game.[46] The Commission found that purchasing a loot box or in-game currency constituted placing a bet.[47] The loss or win element was satisfied when loot boxes provided the player an item that other players are precluded from obtaining.[48] The use of a random number generator satisfied the chance element of the test.[49]

The Belgium Commission made several recommendations for future action including: "1) criminal prosecution for operators, 2) specific permits developed for games of chance in video games, 3) prohibitions on the purchase of games with paid loot boxes by minors, and 4) age verifications in markets."[50] After the Commission made these recommendations, members of the gaming industry quickly responded. Valve immediately disabled opening of loot crates in Belgium.[51] Blizzard, another video game

[41] *Id.*
[42] *Id.*
[43] *Id.* at 75.
[44] *Id.* at 74.
[45] *Id.*
[46] *Id.*
[47] *Id.* at 75.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*

developer, stated that it would disable its loot boxes in its virtual card game *Heroes of the Storm*.[52] EA refused to remove loot boxes from its *FIFA* series games, which resulted in a criminal investigation by the Brussels prosecutor's office.

3. The United Kingdom

In a 2017 inquiry, the U.K.'s Gambling Commission took the stance that loot boxes were not gambling because their in-game items were not capable of being cashed out in the real world.[53] However, the Gambling Commission has begun to shift its position.

In 2018, the Gambling Commission found that thirty-one percent of young people, ages 11-16, claimed to "have paid money or used in-game items to open loot boxes to get other in-game items, within a computer or app-based game."[54] The Commission saw an increase in the number of respondents who were considered "at-risk" gamblers under the *Diagnostic and Statistical Manual of Mental Disorders Fourth Edition*'s ("DSM-IV") problem gambling screen.[55] The individuals "at-risk" for problem gambling rose from 0.9% in 2017 to 1.7% in 2018.[56] The Commission also saw an increase in the number of respondents who were considered "problem" gamblers under the DSM-IV's criteria for problem gambling.[57]

A recent study in the U.K. by Dr. David Zendle has shown a correlation between loot boxes and problem gambling across a variety of age groups.[58] There were two correlations that were found among the results: first, that "the more money gamers spent

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[52] *Id.*
[53] *Loot boxes within video games,* GAMBLING COMMISSION, (Nov. 24, 2017), https://www.gamblingcommission.gov.uk/news-action-and-statistics/News/loot-boxes-within-video-games.
[54] GAMBLING COMMISSION, YOUNG PEOPLE & GAMBLING 2018, 2018, HC, at 6 (U.K.) https://www.gamblingcommission.gov.uk/pdf/survey-data/young-people-and-gambling-2018-report.pdf.
[55] *Id.* (The acronym for the screen is the DSM-IV-MR-J).
[56] *Id.* at 32.
[57] *Id.*
[58] Zendle et. al., *supra* note 14, at 190.

on loot boxes, the more severe their problem gambling"[59] and second, that "gamers who paid for loot boxes scored more than twice as high on measures of problem gambling than those who did not."[60]

Other factors that strengthened the relationship between loot box spending and problem gambling included "near misses" and the use of "in-game currency," also known as "scrips" in the gambling industry.[61]

Near-misses are a feature in different kinds of real-world gambling where the player is shown that they were close to winning a highly-valued prize but instead won a prize of lesser or no value.[62] Research on gambling shows that near-misses "lead to cognitive distortions whereby the player believes they are more likely to win in the future" and the player is encouraged to continue playing.[63] Real-world examples include slot machines, which show losing combinations that are close to those required to win large amounts.[64] Near-miss mechanics are found in the video game *Dota 2*, where players are shown a spinning selection of rewards that disappear over time.[65] Often, the player will receive a less valuable reward, however, some of the last rewards to disappear are extremely rare.[66]

Scrips are a substitute for currency used in the gambling context to create valuation biases so players don't have a reference for how much they are spending.[67] This feature is commonly represented through casino chips.[68] Past research shows that real-

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[59] *Id*.
[60] *Id*.
[61] *Id*. at 187-88. (Scrips are a substitute for real-world currency, and in the context of video games, act as a middleman between real world currency and in-game currency. Near misses, in the context of loot boxes, are mechanic where players are shown a variety of rare items that players might have won by opening that loot box. Typically, this display implies that players have almost received these valuable items from opening the loot box.)
[62] *Id*. at 183.
[63] *Id*.
[64] *Id*.
[65] *Id*.
[66] *Id*.
[67] *Id*.
[68] *Id*.

world poker players' tendencies to gamble are strengthened when they are using chips compared to when they are using cash.[69] In *Fire Emblem Heroes*, players can use real-world currency to purchase a certain number of orbs for "the chance to randomly receive a new character."[70] Dr. Zendle's study showed that similar to a poker players' tendency to spend more with chips, a gamer's tendency to spend more on loot boxes was strengthened when using in-game currency albeit a much smaller magnitude.[71]

Ultimately, the U.K. is moving toward national regulation of loot boxes. The Department for Digital, Culture, Media and Sport ("Department") conducted numerous oral investigations with members of relevant agencies, video game industry leaders, and researchers, studying loot boxes and their effects on players.[72] A Department report outlined the potential "psychosocial and financial harms" to gamers through the use of "immersive technologies."[73] The Department defined "immersive technologies" as technologies that " integrate virtual content with the physical environment thus 'immersing' the user in a simulated experience."[74] The Department identified that the mechanics behind these immersive technologies can cause serious harm to a minority of people who struggle to maintain control over their use of digital technology.[75] In identifying the potential harms of these immersive the report looked into the links between game design mechanics and gambling, where loot boxes were one of the main mechanics investigated.[76]

B. *Loot Boxes – Mechanics and Lack of Uniformity in Rating*

An issue the Department explored was why games with loot boxes were not rated as games that contained simulated

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[69] *Id*.
[70] *Id*.
[71] *Id*. at 188.
[72] DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, IMMERSIVE AND ADDICTIVE TECHNOLOGIES, *supra* note 16.
[73] *Id*. at 3.
[74] *Id*. at 6.
[75] *Id*. at 3.
[76] *Id*.

gambling.[77] They noted the Gambling Commission's 2018 report, which reported that thirty-one percent of 11-16-year-old gamers had paid money for a loot box or used in-game items to open loot boxes.[78] The Department also noted that a study from Dr. Zendle and Dr. Paul Cairns found a link between "the amount that gamers spend on loot boxes and their score on the Problem Gambling Severity Index (PGSI)."[79] The Zendle and Cairns study consisted of 7,000 gamers and suggested "'the gambling-like features of loot boxes are specifically responsible for the observed relationship between problem gambling and spending on loot boxes,' as other forms of microtransactions[80] did not display such a strong link."[81] Furthermore, the study found the same link was twice as strong among adolescents as it was in adults.[82] When asked to speak on the matter, Dr. Zendle stated that while a causative relationship between loot boxes and problem gambling has not been established, individuals who are predisposed to gambling addiction can develop issues as they migrate from video game gambling mechanics in loot boxes to real-world casinos.[83]

The Department looked at older research to determine the basic gambling mechanics used to make video game gambling so addictive.[84] Research from the early 20th century showed that the randomness throughout the mechanism created the gambling addiction.[85] Random rewards are used as a reinforcement mechanism to keep a player engaged.[86] A prime example of the randomness principle is a slot machine, where the player performs

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[77] *Id*. at 21-22.
[78] *Id*. at 27; *see also* Hong, *supra* note 35, at 74.
[79] DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, IMMERSIVE AND ADDICTIVE TECHNOLOGIES, *supra* note 16.
[80] *Id*. at 24. ("[M]icrotransactions" - small payments that players make throughout the process of playing a game, for example to acquire in-game skills or items or to progress more quickly through levels).
[81] *Id*. at 29.
[82] *Id*. at 29; *see also* Hong, *supra* note 35, at 75.
[83] DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, IMMERSIVE AND ADDICTIVE TECHNOLOGIES, *supra* note 16 at 30.
[84] *Id*. at 42.
[85] *Id*.
[86] *Id*.

an action (pulls a lever), there is a delay (quick or long), then there is a reward (big or small). Video game developers use this principle to extend user involvement or get them to come back to the game.[87] King, the developer of the game *Candy Crush*, uses this mechanism by providing the player with pop-ups at random intervals offering motivation or a "free spin" to win a power-up that enhances gameplay.[88] Here, the player "pulls a lever" by playing the game, the delay in the pop-up is random, and the reward is random as well.[89] Through this system, the player is rewarded for just using the app, incentivizing future use.[90]

Industry leaders were reluctant to discuss data on player engagement or acknowledge the active use of these psychological mechanics in their games.[91] For example, Dr. Jo Twist, CEO of The Association for U.K. Interactive Entertainment ("UKIE") argues that players have agency in the choice of games they play and how long they play them.[92] Richard Wilson, the Chief Executive of The Independent Game Developers' Association ("TIGA"), a trade organization for the video game industry in Europe, acknowledged that there were players who played video games excessively.[93] However, he also stated that government solutions required participation from representatives of the industry and should take conservative steps going forward.[94] The Department found the lack of acknowledgement over the particular mechanics of the video games as well as the lack of transparency from developers "unacceptable."[95]

The Gambling Commission reported to the Department that it was concerned that the current Pan European Game Information ("PEGI") ratings were not being enforced uniformly in regards to

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[87] DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, IMMERSIVE AND ADDICTIVE TECHNOLOGIES, *supra* note 16.
[88] *Id*.
[89] *Id*.
[90] *Id*.
[91] *Id*. at 44.
[92] *Id*.
[93] *Id*.
[94] *Id*.
[95] *Id*.

gambling mechanics in video games.[96] One parent was concerned that a game called *Bricky Farm* was rated for 4 year olds when it contained a roulette style wheel which gave the player gems for further advancement in the game.[97] The Gambling Commission agreed that "current age ratings were not in line with public expectation" as games containing gambling mechanics should not be allowed to children in the "4-plus" and "12-plus" PEGI ratings.[98] The Department recommended the immediate establishment of a scientific working group to look at the effects of gambling-like mechanics in video games.[99]

Dr. Zendle also raised concerns that current PEGI guidelines place warnings on games with simulated gambling, but not on games containing loot boxes.[100] Dr. Zendle made recommendations to the Department to: (1) have PEGI create content descriptors and parental warnings for games with loot boxes, and (2) consider restricting games with loot boxes to people of legal gambling age.[101] The head of the Gambling Commission agreed with Dr. Zendle and recommended that the U.K. government apply the same PEGI ratings for gambling games and age restrictions to games containing loot boxes.[102]

C. Loot Boxes – Fitting them into the Legal Framework.

Another issue that the Department explored was how to fit loot boxes as gambling under the present legal framework in the U.K..[103] The largest issues were: (1) valuation,[104] and (2) determining if loot boxes are games of chance.[105] The Department posed this question to Dr. Aaron Drummond and Dr. James Sauer,

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[96] DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, IMMERSIVE AND ADDICTIVE TECHNOLOGIES, *supra* note 16 at 21.
[97] *Id.* at 26.
[98] *Id.*
[99] *Id.* at 27.
[100] *Id.* at 30.
[101] *Id.*
[102] *Id.*
[103] *Id.* at 31-34.
[104] *Id.* at 31.
[105] *Id.* at 33.

researchers looking into the psychological similarities between loot boxes and real-world gambling.[106] They stated that the current definition of "value" was too narrow and did not represent the social value in the prizes won through loot boxes and the psychological power this value had to influence human behavior.[107] Another form of valuation came from the presence of skin-betting websites.[108] The Gambling Commission concluded that video game companies effectively act as a central bank to disseminate in-game items and that skin-betting provides continuous engagement with the game as players try to collect more skins.[109] The Department agreed that the definition of value needed to be expanded to reflect the reality of people's experiences in spending real-world money in video games.[110]

Furthermore, the Department decided that the business models of game developers created imbalances of information regarding the methods these games use to maximize users' attention,[111] which can incentivize players to interact with gambling mechanics in their games.[112] An example of game development that encourages players to purchase loot boxes is "gaming telemetry," which collects a player's data in the background for use in analytics." to help with flow.[113] Some companies, such as EA, use this data for dynamic difficulty adjustment, where the difficulty of the video game may be automatically adjusted to keep the user engaged.[114] In pay-to-win games with online multiplayer gameplay, difficulty adjustment will come in the form of pairing a lesser-skilled player with a more skilled player to incentivize the lesser-skilled player to engage in a

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[106] DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, IMMERSIVE AND ADDICTIVE TECHNOLOGIES, *supra* note 16 at 31.
[107] *Id.*
[108] *Id*. at 33. ("'[S]kin betting' or 'skin gambling' is the use of virtual items acquired in a game as a method of payment for a stake in external, unlicensed gambling.)
[109] *Id.* at 34.
[110] *Id.*
[111] *Id*. at 35.
[112] *Id*. at 42.
[113] *Id.* at 36.
[114] *Id.* at 37.

microtransaction to gain a competitive advantage.[115] In EA's *Star Wars Battlefront II*, players could find "Star Cards" in loot boxes, which gave stat boosts and abilities to users' characters.[116] These loot boxes could be earned through gameplay or purchased.[117] However, many players found the gameplay method so difficult that the immediacy of receiving a loot box through a microtransaction seemed necessary to maintain "competitive balance" in online multiplayer battles.[118]

Video game companies were not clear with the Department as to how they used player information gained through telemetry.[119] Epic Games, the company that owns *Fortnite*, refused to give the Department details on player engagement, despite giving players weekly reports on their playtimes.[120] EA's spokesperson gave a similar answer regarding gameplay information in *FIFA*, and refused to provide data on length of play, despite the fact that EA tracks this data.[121] The Department declared that the companies were "willfully obtuse" about how they used this data.[122]

The Department not only looked at what video game companies put in their games to facilitate loot box spending, but also what they did not put to deter minors from loot box mechanics.[123] Notably, the Department focused on the lack of "age estimation" algorithms.[124] These algorithms collect data to compare against the age a user states in their player profile as a

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[115] DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, IMMERSIVE AND ADDICTIVE TECHNOLOGIES, *supra* note 16 at 37; *see also*, Andrew V. Moshirnia, *Precious and Worthless: A Comparative Perspective on Loot Boxes and Gambling*, 20 MINN. J.L. SCI. & TECH. 77, 92 (2018).
[116] Andrew V. Moshirnia, *Precious and Worthless: A Comparative Perspective on Loot Boxes and Gambling*, 20 MINN. J.L. SCI. & TECH. 77, 92 (2018).
[117] *Id*. at 93.
[118] *Id*. at 93.
[119] DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, IMMERSIVE AND ADDICTIVE TECHNOLOGIES *supra* note 16, at 39.
[120] *Id*. at 34.
[121] *Id.*
[122] *Id.*
[123] *Id*. at 41.
[124] *Id*. at 40

form of age verification.[125] The Department viewed these lack of robust controls over underage gambling as companies not fully considering the adverse effects loot boxes had on users.[126]

The aforementioned nations referenced in Part I are some of the first to approach the regulation of loot boxes through the lens of national gambling laws. The Netherlands and Belgium approach provides an analogue that can be applied to a federal regulatory scheme in the United States ("U.S.").[127] Currently, U.S. gambling is governed by both federal and state law.[128] The way in which European countries define gambling and how they go about regulating loot boxes under these definitions helps to highlight the problems with regulating loot boxes under U.S. state gambling laws, which will be discussed below. Ultimately, this paper will argue for a ban similar to the Netherlands and Belgium, but with a more constrained focus on restricting sales of loot boxes to children. However, at this moment, the U.S. is similar to the U.K. in that its appropriate regulatory agency, the Federal Trade Commission, is still investigating various sources and examining different solutions. The following section will look at the latest step that the U.S. federal government has taken to address the growing concern of loot boxes.

D. The United States – Recent FTC Workshop

In 2018, Senator Maggie Hassan requested that the Federal Trade Commission ("FTC") investigate loot boxes in video games.[129] On November 27, 2018, the FTC Chairman agreed to Senator Hassan's request.[130] On February 22, 2019, the FTC stated it was holding a public workshop to gather perspectives from both the "gaming industry and consumer advocates."[131]

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[125] *Id.*
[126] *Id.* at 41.
[127] Hong, *supra* note 35, at 75.
[128] Yost, *supra* note 12, at 340.
[129] Colin Campbell, *FTC Pledges Loot Crate Investigation (Update)*, POLYGON (Nov. 27, 2018, 7:41 PM), https://www.polygon.com/2018/11/27/18115365/ftc-loot-crate-investigation-senator-hassan.
[130] *Id.*
[131] Makena Kelly, *FTC to Hold a Public Workshop on Loot Box Concerns this*

On August 7, 2019, the FTC held a public workshop called "Inside the Game: Unlocking the Consumer Issues Surrounding Loot Boxes."[132] The event was divided up into three panels[133]. The first panel "explore[d] the role of loot boxes and other similar mechanics and the impact of monetization modes on end users."[134] The second panel presented recent academic research on the role of loot boxes.[135] The third panel discussed "self-regulatory initiatives and consumer education."[136] However, the subject matter and the solutions the panelists spoke on fell into a spectrum of federal intervention with industry self-regulation of loot boxes on one end and then full regulation on every aspect of microtransactions on the other.[137]

E. Industry Self-Regulation

Sean Kane, a founding member of the Video Game Bar Association, suggested that the decision to make in-game purchases and what content should be available to children, should be left to the end user, assuming the user is an adult.[138] Kane gave a history of video games that detailed how as development costs went up, the companies needed ways of gaining revenue aside from just the retail price.[139] Kane highlighted the "freemium" model as providing player diversity in the games available to them, since these games are free to download and play.[140] While there may be items to purchase in these games, ultimately, player agency

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Year, THE VERGE (Feb. 22, 2019, 12:31 PM), https://www.theverge.com/2019/2/22/18236352/loot-box-video-game-ftc-workshop-hassan-congress.

[132] FED. TRADE COMM'N, INSIDE THE GAME: UNLOCKING THE CONSUMER ISSUES SURROUNDING LOOT BOXES (2019), https://www.ftc.gov/system/files/documents/public_events/1511966/loot_boxes_workshop_transcript.pdf.

[133] *Id*. at 2.

[134] *Id.* at 13.

[135] *Id.* at 112.

[136] *Id*. at 167.

[137] *Id*. at 236.

[138] *Id.* at 27.

[139] *Id.* at 26.

[140] *Id*.

governs whether they make the microtransaction.[141] When Kane spoke of loot boxes, he stated that not all loot boxes have a random element as some loot boxes tell the player its contents.[142]

Similarly, Jeff Haynes, the Senior Editor at Common Sense Media, argued that parents and consumers should have the choice whether to buy games containing loot box and microtransactions.[143] Haynes explored how certain kinds of loot boxes incentivize players to buy them because they provide upgrades that allow players to earn higher rewards.[144] Haynes also noted the developer controls the odds and the payout of the items.[145] Despite this, Haynes argued that ultimately the player has the autonomy to only purchase premium games that do not have loot boxes.[146]

Mike Warneke, Chief Counsel of Tech Policy at the Entertainment Software Association, the leading trade organization for video game developers, defended the elements in video games suspected of incentivizing gambling behaviors.[147]He described loot

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[141] FED. TRADE COMM'N, *supra* note 132.
[142] *Id*. at 23.
[143] *Id*. at 38.
[144] *Id*. at 30. The first category of loot box is the "cosmetic loot box." These loot boxes feature items that customize the design of characters, their weapons, or in-game expressions. The second category of loot box is the "mode specific" loot box. These types of loot boxes are tied to specific sections of the game and can be used to get better characters for multiplayer settings and provide a competitive advantage. Haynes states that these types of loot boxes are still largely optional because the player can earn the items during normal gameplay. However, he does note that some companies will make earning the items more difficult, so as to make it near impossible to earn certain power-ups without resorting to loot-boxes. Haynes gives the example of *Star Wars Battlefront II*, where the amount of time to get one power-up would take real-world days of consistent gameplay. The third category of loot box is the "pay-to-loot" model where the players are required to pay money to ultimately be successful. This mechanic is found in online card games like *Hearthstone* and *Magic the Gathering*, where only certain packs will reward high level cards. Shooters, such as *Call of Duty: Black Ops*, will make you pay for high-powered gear but the game then places the gear in "blackjack staches," and so the player can only acquire that gear at random.
[145] *Id*. at 33.
[146] *Id*. at 38.
[147] *Id*. at 46-48.

boxes as a mechanism not consistent with gambling and in-game currency as not a form of scrip.[148] Warneke compared loot boxes to baseball cards, arguing that both loot boxes and baseball cards contain an item the purchaser can generally predict, but the buyer does not know the specific item until they open it.[149]

Warneke's generalization of in-game currency downplayed their use as scrips, and instead analogized the mechanism more to play money.[150] He said publishers use this currency, instead of having the player pay cash directly, because (1) it is impractical to make the player have to go through the entire transaction process for every $1 transaction, and (2) to preserve narrative integrity in the game.[151] Under Warneke's theory, play money helps to facilitate transactions, while also maintaining the design of the game by disguising the money as a currency that fits within the setting.[152]

Patricia Vance, president of the Entertainment Software Rating Board ("ESRB"), spoke on current parental controls implemented for game labeling and system settings.[153] Current labeling for physical copies, as of 2018, presents descriptors that indicate the ability for "in-game spending."[154] This label is required on any game that holds opportunities for the player to have the ability to "make a purchase using cash."[155] Parental settings within the platforms allow parents to control what parts of the video games children can access.[156] Parents have the ability to "control in-game purchases or block them altogether."[157] Account holders can also be notified whenever a purchase is made.[158]

Vance argued against further government regulation, by asserting that disclosing in-game purchasing options and providing

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[148] FED. TRADE COMM'N, *supra* note 132.
[149] *Id.*
[150] *Id.* at 47.
[151] *Id.*
[152] *Id.*
[153] *Id.* at 168-79.
[154] *Id.* at 176.
[155] *Id.*
[156] *Id.* at 173.
[157] *Id.*
[158] *Id.*

parents with controls to these features were sufficient to stop children from purchasing loot boxes.[159] The ESRB performed research and saw that parents were becoming more informed over time about loot boxes, and determined that active communication, not government regulation, was the key to informing parents so that they could make decisions.[160] Vance assured the panel that parents could find information on how to implement controls on systems and navigate video games on the ESRB website.[161] Vance also gave assurances that the ESRB would partner with retailers like GameStop to provide an insert with every physical purchase of a new console, that will remind parents to set parental controls on their accounts.[162] However, it should be noted that free-to-play games aren't sold at brick-and-mortar stores, so this plan may not be as effective as Vance assures.

Development costs are an important business concern as well, as costs have risen into the hundreds of millions for some games.[163] Most costs come from growing marketing expenses. For example, *Call of Duty: Modern Warfare 2*, cost up to $50 million to produce but the "marketing expenses and the cost of producing and distributing discs" created a launch budget of $200 million.[164] However, the workshop focused on the need for balancing these concerns with the growing concern for the impact loot boxes have on children's mental health.[165]

F. Government Regulation

The researchers participating in the FTC workshop

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[159] FED. TRADE COMM'N ,*supra* note 132 at 228-29.
[160] *Id.* at 175.
[161] *Id.* at 177.
[162] *Id.*
[163] *Id.* at 24. The top grossing games of 2018 had budgets over $200 million dollars. *Red Dead Redemption 2* had a budget of $265 million; *Call of Duty: Modern Warfare 2* had a budget of $250 million; and *Star Wars: The Old Republic* $200 million.
[164] Ben Fritz, *Video Game Borrows Page from Hollywood Playbook*, LOS ANGELES TIMES (Nov. 18, 2009, 12:00 AM), https://www.latimes.com/archives/la-xpm-2009-nov-18-fi-ct-duty18-story.html.
[165] *Id*. at 234.

commented on current studies regarding the effect of loot boxes on gamers,[166] while consumer advocacy groups spoke on the need for federal regulation.[167]

The researchers at the panel presented data that suggested a link between loot box spending and negative effects on human behavior.[168] Dr. Zendle, in particular, commented that the features of loot boxes "look[ed] so much like gambling."[169] Dr. Zendle also argued that problem gambling could be triggered by loot boxes as the gamer originally does not start spending much money, but then, over time, spends more and more money on loot boxes as their gambling problem becomes more severe.[170] As the gamer becomes more conditioned to the formal gambling characteristics of loot boxes, this conditioning transfers over when the gamer encounters real-world gambling that shares these characteristics with loot boxes.[171] Dr. Zendle also found that there was a link to problem gambling regardless of the type of loot box a game utilized.[172] However, he noted that further research was required to explore the correlation.[173] Still, Dr. Zendle suggested that analogies to baseball cards were not appropriate because determining the safety of a device based on similarities to other objects would not adequately determine the safety of the technology at issue.[174]

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[166] *Id*. at 112.
[167] *Id*. at 55, 179, 185.
[168] *Id*. at 112, 136, 148.
[169] *Id.* at 114. (Dr. Zendle compares loot to more emblematic forms of gambling, such as roulette wheel, through the general mechanics both systems rely on. "Both when you're playing on a roulette wheel or while you're opening a loot box, your wagering something that you have in your hand of value now on the uncertain hope of getting something of greater value later on.").
[170] *Id.* at 115.
[171] FED. TRADE COMM'N, *supra*, note 132.
[172] *Id.* at 123. (When comparing cosmetic and paid-to-win loot boxes, the study did not find a difference in the strength of the link between loot boxes and problem gambling.); *see also*, *supra* n. 31.
[173] *Id.*
[174] *Id*. at 122. (Dr. Zendle stated, "Say I run a cinema and I serve Coca-Cola to all my customers. Coca-Cola is a thick, black, viscous liquid, full of energy, and I sort of got a great deal of engine oil. And I said to you, I know what, I'm just going to swap out the Coca-Cola in people's cups with engine oil because it's similar in that it's also a thick, black, viscous liquid.")

Dr. Adam Elmachtoub stated that regulation should be aimed at monitoring a company's listed probabilities for certain items.[175] He first approaches this topic by defining loot boxes by their effect on consumer valuations.[176] He divided loot boxes into two categories: unique boxes and traditional boxes.[177] Unique boxes give an item randomly but will always allocate a new, unique item to the player.[178] Traditional boxes will give an item randomly but the player can potentially receive duplicates.[179] Through economic analysis, he found that unique boxes benefitted the developer because they could charge a premium for rarer prizes.[180] Traditional boxes benefitted the consumer because the possibility of duplicate items necessitates a lower price point.[181] Dr. Elamchtoub argues that the traditional loot box system should be preferred since a player can buy the same number of loot boxes as unique loot boxes, but pay less money in the long-run.[182] The seller retains some value because the rare item is still available to sell in another box.[183] In order to keep the traditional loot box relatively fair, sellers should set the probabilities uniformly at random.[184] However, companies can make more money by lying about these probabilities.[185] Dr. Elamchtoub recommends that regulation would be needed to monitor developers to ensure probabilities are not changed and to protect consumers from potentially paying more money than they usually would.[186]

Representatives from NGOs specializing in consumer protection spoke out as proponents for regulation of loot boxes.[187]

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[175] FED. TRADE COMM'N, *supra*, note 132 at 139-140.
[176] *Id*. at 139.
[177] *Id*. at 140.
[178] *Id*. at 139.
[179] *Id*.
[180] *Id*. at 143.
[181] *Id*.
[182] *Id*.
[183] *Id*.
[184] *Id*. ("Simply, if there is 1,000 items, allocate each item with probability 1/1000 regardless of how much these items vary in quality.").
[185] *Id*. at 145.
[186] *Id*. at 143.
[187] *Id*. at 55, 167.

John Breyault, Vice President of the National Consumers League, argued that the informational asymmetry greatly affects younger players who are not as capable of apprising the "value proposition of these [industry] schemes."[188] Breyault explained that research from Dr. Zendle found that adolescents were twice as likely to show measurements of problem gambling than adults under similar circumstances.[189] Players can also be confused by the exchange rates of money as more video games incorporate in-game currencies.[190] Price tags on items can read "$1.99" which can mislead a player from the practical price of "$2," and so the player will more likely spend money on the item.[191] Bonuses piled on top of their purchases can make young players lose sight of the item's value.[192] Breyault also found fault with the baseball card analogy, as baseball cards have fixed odds because they are physically produced for sets.[193] Loot boxes are different because their odds can be manipulated based on greater amounts of information given by the player.[194]

Anna Laitin, director of financial policy for Consumer Reports, spoke on how the ESRB label for in-game purchases addressed quite a huge range of microtransactions, lacking detail in what type of purchases are included with the game.[195] The label can range from buying a new character, all the way to surprise loot boxes.[196] Despite mobile games containing more detailed information sections, the labels shown at the front contain the

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[188] FED. TRADE COMM'N, *supra*, note 132 at 61. (These monetization schemes are often enabled by information asymmetry between the players and the industry regarding things like game related preferences, how much money a consumer may have spent in the past, their spending habits).
[189] *Id.* at 62.
[190] *Id.*
[191] *Id.* at 63.
[192] *Id.*
[193] *Id*. at 66.
[194] *Id.* (Breyault asked two questions. "If that is indeed the case, what factors are being used to influence loot box drop odds? Is it things like data on how players are playing the game, how many available funds they may have in their account, whether they've purchased things in the past?").
[195] *Id.* at 182.
[196] *Id*. at 182.

broad label of "in-app purchases."[197]

Laitin also spoke on "dark patterns," which she defined as "[t]actics to nudge consumer[s] [toward] taking actions."[198] "Grinding" is a game design feature that has been adapted to make players do pointless work over a long period of time to make loot boxes seem like a less costly alternative.[199] Daily bonuses incentivize people to keep playing every day.[200] Pay-to-win features allow a gamer to play the game, but performance is hindered in competitive play if they do not spend money on items to help with gameplay.[201]

Keith Whyte, executive director of the National Council on Problem Gambling, went further and advocated for the establishment of a regulatory framework around loot boxes.[202] The National Council on Problem Gambling is neutral in its stance on legalized gambling, with decades of experience and partnerships with the "government, gaming industry, counselors, regulators, researchers, and recovering gamblers."[203] Whyte noted that most published studies on the connection between loot boxes and gambling have "found an association" between the two.[204] Whyte further stated, "protection features must be put in place to protect vulnerable players from developing gambling problems."[205] Known populations susceptible to gambling problems include "males, youth, and…veterans."[206] Therefore, he argued that regulatory framework for loot boxes should be modeled off frameworks regulating the gambling industry.[207]

One recommendation Whyte gave as a remedy was to

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[197] FED. TRADE COMM'N, *supra*, note 132.
[198] *Id*. at 183.
[199] *Id*. at 183. (Laitin described "grinding" as a process in video games where for a reward, the player "do[es] a lot of relatively pointless work for a very, very, very long time").
[200] *Id*.
[201] *Id*. at 183-84
[202] *Id*. at 187.
[203] *Id*. at 186.
[204] *Id*. at 188.
[205] *Id*. at 187.
[206] *Id*. at 188.
[207] *Id*. at 189.

improve information transparency.[208] The video game industry should create ways to incentivize a player's "pro-social behavior," such as figuring out the odds in a game.[209] Incentivization is an opportunity for the video game industry to improve further than the gambling industry by displaying the odds in a more understandable way than complex play tables for slot machines.[210]

Another recommendation was to raise the ESRB rating for games with loot boxes to users of a higher age than those in the "Teen" rating.[211] Whyte noted that in the gambling industry, there are discussions about consumer education protection, so it follows that with loot boxes, ratings should properly reflect the content in video games.[212] Whyte notes that if a parent based their parental controls on the ESRB rating, and this rating is artificially low, then "that might not trigger the appropriate level of parental controls."[213]

Keith Whyte further argued that third-party objective regulation is necessary as a consumer protection feature to ensure that video game developers are held accountable to the odds stated to their players.[214] Whyte noted that members of the gambling industry would not trust slot machine manufacturers to self-certify "the odds and randomness of their machines."[215]

Another suggestion to limit harm to players is to allow gamblers to self-exclude by limiting payments from the gamer.[216] This system can be effective since the gambling occurs in an environment where transactions are monitored.[217] Third-party

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[208] FED. TRADE COMM'N, *supra*, note 132 at 189-90.
[209] *Id*. at 189.
[210] *Id*.at 190.
[211] *Id*., *see also* ESRB Ratings Guide, ENTERTAINMENT SOFTWARE RATING BOARD, https://www.esrb.org/ratings-guide/ (last visited Apr. 5, 2020). Games featuring gambling are supposed to be designated "Adults only 18+."
[212] FED. TRADE COMM'N, *supra*, note 132.
[213] *Id.*
[214] *Id.* at 191.
[215] *Id.* at 192. (Independent testing labs are used in the State of New Jersey and Nevada to verify slot machines, and tests in those labs often find that machines don't perform adequately.)
[216] *Id.* at 193-94.
[217] *Id.*

regulators would need information from developers to determine if these systems are in place.[218] Whyte also suggests companies should publicly disclose their information on player participation and loot box spending.[219]

Much of these panelists' concerns of the effects loot boxes have on children are rooted in how much video game companies rely on loot boxes to make massive profits.[220] Developer EA received thirty-one percent of its net bookings over the past three years just from microtransactions.[221] The EA game *Star Wars Battlefront II*, made approximately $2.8 billion from microtransactions alone in 2019.[222] In EA's last quarter for 2019, the company made $993 million in microtransactions.[223] Take-Two Interactive, parent company to Rockstar and 2K Games, made $857.8 million in "recurrent consumer spending" for the three-month period ending in September 30, 2019.[224] Recurrent consumer spending is defined by "all manner of 'ongoing consumer engagement'" including "virtual currency, add-on content, and in-game purchases."[225] Such spending was thirty-seven percent of Take-Two Interactive's total revenue during the three-month period ending in September 30, 2019.[226] This trend

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[218] FED. TRADE COMM'N, *supra*, note 132 at 194.
[219] *Id.* at 194.
[220] *Id.* at 60, 106-107, 120, 146, 187, 227 (Breyault mentions the increase in profitability in selling loot boxes, and in answering a question on the panel, he expressed that he does not see any reason for the industry to turn away from this model since it provides companies increased profits. Breyault wants the FTC to keep an eye on the industry. Dr. Zendle is concerned because the link between problem gambling and loot box spending existed in adolescents and was stronger than in adults. Whyte is concerned for the vulnerability of certain people making up a disproportionate percentage of the massive profits from loot boxes.)
[221] *Id.* at 59.
[222] Eddie Makuch, *EA Made Almost $1 Billion On Microtransactions Last Quarter*, GAMESPOT (Feb. 3, 2020), https://www.gamespot.com/articles/ea-made-almost-1-billion-on-microtransactions-last/1100-6473240/. (The article attributes this profit to "live services," however the author defines "live services" as a "microtransaction bucket").
[223] *Id.*
[224] *Id.*
[225] *Id.*
[226] *Id.*

does not look like it is stopping either; as John Breyault noted in the panel, "[T]otal spending on loot boxes and skin gambling is forecast to go up to $50 billion by 2022, and that's nearly doubling since last year."[227] While this paper does not examine whether companies purposefully target loot boxes towards children, their reliance on loot boxes to make a profit despite children engaging with these mechanics, draws concern as to whether video game companies are trying hard enough to protect child consumers.

Ultimately, these panelists overwhelmingly pointed out the need for regulation in regard to the sales of loot boxes to children.[228] Highlighted in an FTC report on the presentation, "several of the panelists and comments to the public docket . . . [noted] . . . that kids are vulnerable to manipulation and social pressure, or may not fully understand the costs of the transaction."[229] Even with assurances from the industry of protections such as the "ESRB's current rating system, disclosures, and parental controls, some panelists and commenters questioned whether the current protections were sufficient."[230] As Dr. Domoff noted, parental interaction with children is very limited when it comes to how they monitor children's social media use.[231] This lack of supervision likely extends to loot box purchases, so without adequate parental interaction, the risk of harm spreads to a larger number of children. While the report noted that the panelists came to a diverse set of conclusions, the FTC noted some panelists asserted that "the industry has not policed this area well and government regulation will mitigate the risk that industry economic motivations could result in consumer exploitation."[232] This position falls in line with the growing concern within Europe, which has shifted to directly regulating loot boxes at a national level.[233] This growing concern for the potential harms to children's

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[227] FED. TRADE COMM'N, *supra*, note 132, at 58.
[228] FED. TRADE COMM'N, FTC VIDEO GAME LOOT BOX WORKSHOP: STAFF PERSPECTIVE 3 (2020).
[229] *Id*.
[230] *Id*.
[231] FED. TRADE COMM'N, *supra*, note 132, at 149-50.
[232] FED. TRADE COMM'N, *supra*, note 132, at 6.
[233] Haydn Taylor, *Loot Boxes Should be a Consumer Protection Matter Not a Gambling One, Says EU Report*, GAMESINDUSTRY.BIZ, Jul. 27, 2020,

psychology, ease for children to purchase these products, and the wide, interstate reach of the online market necessitates setting the United States' gaze on federally regulating loot boxes. The question is now, how should the United States accomplish this?

PART II: ANTI-COMMANDEERING AND THE COMMERCE POWER

As regulatory efforts pick up steam in the United States, this paper examines the extent of the federal government's regulatory authority over gambling and microtransactions as an economic activity. In the context of loot boxes and similar mechanics as a form of gambling, the following section will examine *Murphy v. NCAA*, the latest Supreme Court case on the subject of gambling.[234] Since *Murphy*'s holding gave states more authority to govern sports gambling, it is necessary to understand the possible limits that the anti-commandeering doctrine may place on the federal government regarding the regulation of loot boxes as a form of gambling.[235]

The subsequent sections will examine Congress' power over interstate commerce to demonstrate the power the federal government will likely use to regulate microtransactions and loot boxes.

A. Murphy v. NCAA – Anti-Commandeering and the States

One step in understanding limits to the federal government's ability to regulate loot boxes and their application to the states is to examine *Murphy,* where the Supreme Court reaffirmed that the federal government can only regulate individuals, not the states.[236] The facts in *Murphy* were as follows. In 1992, Congress passed the Professional and Amateur Sports Protection Act ("PASPA"), which made it unlawful for a state "to sponsor, operate, advertise,

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https://www.gamesindustry.biz/articles/2020-07-27-loot-boxes-should-be-a-consumer-protection-matter-not-gambling-says-eu-report; *see also,* Diaz, *supra*, note 32; Hong, *supra*, note 35, at 75.

[234] Murphy v. NCAA, 138 S. Ct. 1461, 1482 (2018).

[235] *Murphy*, 138 S. Ct. at 1482.

[236] *Id.* at 1476.

promote, license, or authorize by law or compact…. a lottery, sweepstakes, or other betting gambling, or wagering scheme based… on competitive sporting events."[237] PASPA allowed the United States Attorney General and sports organizations to file suit in federal court against states that violated the Act.[238] In *Murphy*, the New Jersey Legislature enacted a statute that authorized sports gambling within the state,[239] repealing state provisions that prohibited sports gambling schemes.[240] The National Collegiate Athletic Association ("NCAA") brought an action against the New Jersey Governor and other state officials, seeking to enjoin the law as the NCAA argued that the law violated PASPA.[241] New Jersey responded by arguing that PASPA unconstitutionally infringed on the State's sovereign authority and implicated the anti-commandeering doctrine.[242]

The Supreme Court held that the PASPA provision, which prohibited state authorization of sports gambling, violated the anti-commandeering doctrine.[243] Justice Alito wrote that the anti-commandeering doctrine "withholds from Congress the power to issue orders directly to the States."[244] The Court looked to *New York v. United States*, where the federal government passed a law that required states to "take title" to low-level radioactive waste or to "regulate according to the instructions of Congress."[245] The Court in that case held the scheme unconstitutional. Justice O'Connor noted that the Constitution "confers upon Congress the power to regulate individuals, not States."[246] Further, the *New York*

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[237] *Murphy*, 138 S. Ct. at 1470; *See* 28 U.S.C. § 3702(1).
[238] *Murphy*, 138 S. Ct. at 1470-71.
[239] *Id*. at 1471.
[240] *Id*. at 1465.
[241] *Id*. at 1471.
[242] *Id*. at 1470-71. ("The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States.").
[243] *Id*. at 1478.
[244] *Id*. at 1475.
[245] *Murphy*, 138 S. Ct. *at* 1476; *see also* New York v. United States, 505 U.S. 112, 144 (1992).
[246] *Murphy*, 138 S. Ct.at 1476. *See also New York*, 505 U.S. at 144.

Court noted that Congress has the power to "pass laws requiring or prohibiting certain acts," but lacks the power to compel the States to require or prohibit those acts.[247] The law violated the anti-commandeering doctrine because it directed the States to become agents of Congress and the federal government by forcing the States to "take title."[248]

In *Murphy*, the Court held that when a state "completely or partially repeals" old laws that ban sports gambling, then the state is "authorizing that activity."[249] The New Jersey statute repealing the state ban on sports gambling "permitt[ed]" and "authoriz[ed]" sports betting.[250] This authorization violated the provision in PASPA, but the Court found that the PASPA provision violated the anti-commandeering doctrine.[251]

However, the anti-commandeering doctrine does allow for the federal government to govern private actors directly, just not state legislatures.[252] The Court in *Murphy* elaborated on several cases that illustrated federal schemes that governed private actors but did not impose on state sovereignty.[253]

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[247] *Murphy*, 138 S. Ct. at 1476-77. *See also New York*, 505 U.S. at 166.
[248] *Murphy*, 138 S. Ct. at 1477. *See also New York*, 505 U.S. at 178.("Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.").
[249] *Murphy*, 138 S. Ct. at 1474.
[250] *Id.*
[251] *Id.* at 1478.
[252] *Id.* at 1476-77.
[253] *Id.* at 1476-78. *See* South Carolina v. Baker, 485 U.S. 505 (1988) (In *South Carolina v. Baker*, the Court held that a federal statute requiring states to issue registered bonds, punishable by denying federal tax exemptions to state and local bonds, did not violate the anti-commandeering doctrine. The statute only required the state to conform to a federal standard that applied to the federal government and private corporations. The statute did not make the state enact the law for the federal government, but rather used the exemptions as an incentive.); *see* Reno v. Condon, 528 U.S. 141, 146 (2000) (In *Reno v. Condon*, the Court held that a federal statute preventing state motor vehicle departments (DMVs) from disclosing personal information on record did not violate the anti-commandeering doctrine. The statute applied to both state and private persons that obtained information from a DMV. Similar to Baker, the federal statute "regulated state activities" rather than sought "to control or influence the manner in which States regulate private parties."); *see* Hodel v. VA Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) (In Hodel v. VA Surface Mining &

B. Murphy Establishes that Federal Regulation of Video Game Gambling May Not Violate the Anti-Commandeering Doctrine

In accordance with *Murphy*, the federal government would not have trouble enforcing a regulatory regime over gambling mechanics in video game content, even if a state already made gambling regulations against these mechanics in video games as Congress can regulate the video developers directly.[254]

Speaking more to the necessity for federal regulation, no state has successfully passed state legislation to regulate loot boxes or gambling mechanics. [255] States have tried and failed to pass any laws on loot boxes in the context of state gambling, the federal government has more of a reason to regulate freely without conflicting with anti-commandeering principles. In *Murphy*, New Jersey already had a state law that prohibited sports gambling, so when the New Jersey legislature repealed the restriction on sports gambling, PASPA's ban compelled state action to align itself with

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Reclamation Association, the Court held that the federal statute establishing a regulatory regime over surface coal mining operations, premised on "cooperative federalism", did not violate the anti-commandeering doctrine. The federal statute required that the States adopt a permanent program to regulate surface level coal mining, and if a state failed to submit a program, the federal government would implement a federal program in the state. This regulatory scheme did not violate the anti-commandeering doctrine because the federal government "allowed", but did not "require" the States to participate in the program.)

[254] *Murphy*, 138 S. Ct. at 1476.

[255] Hong, *supra* note 35, at 77-79. (In Hawaii, Congressman Chris Lee tried to get two bills passed through the Hawaii House of Representatives. The House Bill failed and the Senate Bill is unrecognizable to the House Bill. In Washington, Senator Kevin Ranker introduced Senate Bill 6266, which would instruct the Washington Gambling Commission to "investigate the use of loot boxes and similar mechanisms." The bill, indefinitely postponed since February of 2018, currently sits in the Washington Senate Committee on Rules. In Minnesota, Representative Rick Hansen introduced House Bill 4460, which would prohibit sales of video games containing loot boxes to a person under the age of 18. As of writing this paper this bill is still in the House Committee on Commerce and Regulatory Reform.

the federal law.[256] Since no state statutes currently exist on loot boxes, the federal government can take regulatory action toward loot boxes and other gambling mechanics in video games under the Commerce Clause, mentioned later on, without potentially violating the anti-commandeering doctrine.[257]

Marc Edelman, a professor of law at the Zicklin School of Business, wrote that the Supreme Court allowed the states an "opportunity to introduce their own sports-gambling laws based on their own independent policy."[258] After *Murphy*, Delaware, New Jersey, Mississippi, Pennsylvania, West Virginia, and Rhode Island passed laws legalizing casino-style gambling.[259] While Congress cannot compel the States to take State action to accomplish federal goals on gambling, if the federal government does not choose to regulate, then the States are free to regulate gambling for their own citizens.[260]

It is still unclear what outcomes could occur if a state decides to pass its own laws to regulate loot box activity. As explained in *Murphy*, the federal government cannot restrict State legislatures from exercising their sovereign authority to regulate gambling within their borders.[261] However, one way the federal government could still regulate loot boxes and other gambling mechanics within video games is by directly targeting video game developers and the Entertainment Software Association ("ESA"). As we will discuss soon, private actors engaged in an economic activity can be regulated through Congressional legislation under the Commerce Clause.[262]

C. The Commerce Power: National Federation of Independent Businesses v. Sebelius

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[256] *Murphy*, 138 S. Ct. at 1465.
[257] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 551 (2012).
[258] Marc Edelman, *Developments: Regulating Sports Gambling in the Aftermath of Murphy v. National Collegiate Athletic Association*, 26 Geo. Mason L. Rev. 313, 339 (2018).
[259] *Id*. at 325.
[260] *Murphy*, 138 S. Ct. at 1484-85.
[261] *Id.*
[262] U.S. CONST. art. I, § 8, cl. 3.

Congress can regulate existing, interstate economic activity through the Commerce Clause.[263] Microtransactions are the mode by which players purchase virtual items such as loot boxes and other downloadable content.[264] With the rise of online gaming, gamers can make microtransactions on their device anywhere in the United States.[265] Microtransaction regulation would fall under the Commerce Clause as an economic activity[266] or an activity when aggregated with other activities, affects commerce.[267]

In 2018, the video game industry made total revenue exceeding $43 billion.[268] The nature of this economic activity is predominantly interstate, with digital format sales consisting of eighty-three percent of the content revenue made throughout the industry.[269] Additionally, the video game industry self-regulates when it comes to microtransactions and the nature of their products.[270] For example, the ESA is the leading representative of the video game industry, representing the industry in matters such as free speech[271] and government attempts to link video games with gun violence.[272] The interstate nature of digital sales and the

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[263] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 551 (2012); U.S. CONST. art. I, § 8, cl. 3.

[264] Brian Crecente, *What are DLC, Loot Boxes and Microtransactions? An Explainer*, VARIETY (Nov. 28, 2017, 8:28 AM), https://variety.com/2017/gaming/features/what-is-a-loot-box-1203047991/.

[265] *The Unstoppable Rise of Online Gaming*, ON: YORKSHIRRE MAGAZINE, https://www.on-magazine.co.uk/stuff/tech/the-unstoppable-rise-of-online-gaming/.

[266] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 551 (2012).

[267] Wickard v. Filburn, 317 U.S. 111, 127-28 (1942).

[268] ESA, ENTM'T. SOFTWARE ASS'N, *2019 Essential Facts About the Computer and Video Game Industry* (last visited Apr. 14, 2020). https://www.theesa.com/esa-research/2019-essential-facts-about-the-computer-and-video-game-industry/.

[269] *Id.*

[270] PROMARKET, *Self-Regulation and the Video Game Industry: A New Stigler Center Case Study* (Apr. 10, 2019). https://promarket.org/2019/04/10/self-regulation-and-the-video-game-industry-a-new-stigler-center-case-study/.

[271] Brown v. Entm't Merchants Ass'n, 564 U.S. 786 (2011).

[272] Alex Gangitano, *Video Game Group Pushes Back on Blaming Industry for Shootings*, THE HILL, (Aug. 6, 2019), https://thehill.com/business-a-lobbying/456326-video-game-group-pushes-back-on-blaming-industry-for-shootings.

absence of state regulation allows the federal government to regulate loot boxes through the Commerce Clause.

In *National Federation of Independent Businesses v. Sebelius*, Chief Justice Roberts wrote that Congress' commerce power is expansive, but limited to "activity."[273] The Court examined the individual mandate of the Affordable Care Act, which compelled individuals to buy health insurance or receive a penalty filed with the Internal Revenue Service ("IRS").[274] Congress has the power to regulate commerce, but Congress cannot compel commerce by requiring people purchase a product.[275] The Court found that the individual mandate compelled individuals into the healthcare market by purchasing health insurance, essentially regulating their *inactivity* as opposed to their *activity* in commerce.[276] Justice Roberts wrote that inactivity is "divorced from any link to an existing commercial activity."[277] Thus, the power to regulate requires regulation of an existing commercial activity.[278]

Congress' authority to regulate existing commercial activity still has an "expansive" reach over almost every product or action in commerce.[279] Congress' authority even extends past interstate commerce into activities that "have a substantial effect on interstate commerce."[280] Congress' authority to regulate extends even further to activities that affect commerce, when those activities aggregate with similar activities that affect commerce.[281]

Microtransactions would be considered an activity in interstate commerce, since the transaction can take place from any state using an online service.[282] One example is Xbox Live, the

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[273] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 551 (2012).
[274] *Sebelius*, 567 U.S. at 539–40.
[275] *Id.* at 552.
[276] *Id.* at 548.
[277] *Id.* at 556.
[278] *Id.* at 550.
[279] *Id.* at 536.
[280] Nat'l Fed'n of Indep. Bus. v. Sebelius, 67 U.S. 519, 549 (quoting *United States v. Darby*, 312 U.S. 100, 118–19 (1941)).
[281] *Id.* at 549 (citing *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942)).
[282] *The Unstoppable Rise of Online Gaming*, ON: YORKSHIRRE MAGAZINE, https://www.on-magazine.co.uk/stuff/tech/the-unstoppable-rise-of-online-

online service for the Xbox console. Xbox Live provides the player with an account that is connected to a credit card so that players can conduct microtransactions within Xbox games.[283] These functions are performed through the Microsoft Store, a marketplace for games and in-game content.[284] Therefore, Congress would have an existing commercial activity to regulate, as console developers and other third-parties use online services to act as markets for players to purchase loot boxes, virtual currency, and other downloadable content from every state.

PART III: GAMBLING AND FEDERAL STATUTES

Next is an examination on the common law rules of gambling and current federal statutes that tackle gambling. The elements of the common law rules show how the courts may examine claims regarding the video game industry's business practices toward microtransactions.[285] Recall that gamers' valuations of the contents in loot boxes was a key topic in the debate amongst the FTC panelists when discussing whether loot boxes were considered gambling.[286] In exploring how these concerns match current common law rules and the federal law, we ultimately find that these rules are inadequate for addressing the

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gaming/. (The transaction can be anywhere where the player uses a device to enter into a microtransaction.)

[283] XBOX, https://www.xbox.com/en-US/microsoft-store (last visited Apr. 13, 2020).

[284] *Id.*

[285] *See* Kater v. Churchill Downs Inc., 886 F.3d 784, 789 (9th Cir. 2018) (valuation of virtual currency in video games); Liston v. King.com, Ltd., 254 F. Supp. 3d 989, 993 (N.D. Ill. 2017) (in-game items had value, where loss of that value amounted to a harm sufficient for standing).

[286] FED. TRADE COMM'N, INSIDE THE GAME: UNLOCKING THE CONSUMER ISSUES SURROUNDING LOOT BOXES (2020).(Mike Warneke comparing loot boxes to baseball cards and scrips as one-to-one transactions; John Breyault stating that price tags may not reflect the actual value the players are paying; Dr. Elmachtoub stating that probabilities need regulation so players can get the economic value out of traditional loot boxes; Anna Laitin, describing how grinding as a design feature is built to make players value loot boxes as a low cost alternative.)

concerns for loot boxes.

A. Elements of Gambling

In most of the United States, gambling is generally defined as "an event where someone risks something of value in the hopes of winning a valuable prize based on the outcome of an uncertain event."[287] The general definition breaks down into three core elements: "consideration, chance, and a prize."[288]

Consideration is determined by one of three theories: (1) valuable consideration theory, (2) contract consideration theory, or (3) promoter benefit theory.[289] The most common theory in the United States is valuable consideration theory.[290] Under this theory, a participant must give something of value to participate in a prize event.[291] States that apply this theory in their gambling laws require that a game is pay-to-play and cannot have a free method of entering the event.[292] Contract consideration theory requires a player to provide sufficient consideration to create a binding contract.[293] This theory has the lowest threshold for finding consideration, as a mere change in position for a party is sufficient.[294] Promoter benefit theory requires that a promoter (of an event or contest) receives a benefit of any kind to make a finding of consideration.[295]

A game of chance is determined to be gambling through one of three theories: (1) the Predominance test, (2) the Material Element test, or (3) the Gambling Instinct test.[296] The Predominance test looks at chance and skill as a continuum and

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[287] ROBERT W. STOCKER, ET AL, 1 GAMING LAW & PRACTICE § 2.02 (Matthew Bender ed., 2020 ed.).
[288] *Id.*
[289] *Id.*
[290] *Id.*
[291] *Id.*
[292] STOCKER, ET AL., *supra* note 287.
[293] *Id.*
[294] *Id.*
[295] *Id.*
[296] *Id.*

determines which characteristic dominates in a game or event.[297] . The Material Element test determines that if chance plays any material role in a game or event, then the game or event is considered gambling.[298] The Gambling Instinct test determines a game is gambling if a game or event appeals to someone's gambling instinct.[299] Games determined to be gambling usually have small amounts of consideration, long odds, and large prizes.[300] In some jurisdictions, these common law tests are replaced with statutes that define gambling.[301] The nature of loot boxes places them within the reach of these theories, as even representatives of the industry acknowledge the element of chance in loot boxes.[302]

Prizes are deemed present "when a participant can win something of marketable value in excess of the amount paid to enter."[303] A prize's marketable value and transferability are important in determining digital objects as prizes.[304] For example, some courts have defined additional lives in arcade consoles as not transferrable and therefore "not prizes for a gambling event analysis" even though the digital objects were considered marketable.[305] Despite the arcade console promoter's intention for

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[297] STOCKER, ET AL., *supra* note 287. (The Predominance test consists of two paradigms: the "American Rule" and the "English Rule." Determining whether to use either paradigm for the Predominance test depends on the jurisdiction. The "American Rule" uses the continuum to determine if a game or event is gambling. The "English Rule" requires that a game involve only "pure chance" to be considered gambling. An event or game that involves any amount of skill will not be considered gambling.)

[298] STOCKER, ET AL., *supra* note 287.

[299] *Id.*

[300] *Id.*

[301] *Id.*

[302] Cf. FED. TRADE COMM'N, INSIDE THE GAME: UNLOCKING THE CONSUMER ISSUES SURROUNDING LOOT BOXES 46-48 (2020). (Warneke is making a comparison of loot boxes to baseball cards, but the comparison requires a description where the player is taking a chance that they will get a certain reward. While there are a limited number of cards, the player is betting that the odds are in their favor of getting the card they want.)

[303] *Id.*

[304] *Id.*

[305] *Id.*

these digital objects not to have monetary value, the object's marketability provided monetary value.[306] Companies that make online casino games can avoid marketability issues by prohibiting the transfer of free plays or extra play credits between players or through other services.[307]

Ultimately, these common law theories do not provide a definitive answer as to whether loot boxes can be regulated as gambling. The variation in scope among each theory[308] gives the possibility that courts may be underinclusive when making a holding on the status of loot boxes. For example, the valuable consideration theory may not include loot boxes that are free[309] but require grinding to win, which, in the case of *Star Wars Battlefront II*, was meant to incentivize players to choose the much easier method of paying for loot boxes.[310] On the other hand, the promoter benefit theory could include these free loot boxes as consideration because the prizes give a competitive advantage in gameplay.[311] Fulfilling the prize element leaves room for interpretation as courts make different interpretations of what defines market value and transferability.[312] As seen with *Counter Strike: Global Defensive*, the developers may create their own valuations for items that players win, but the reality of third-party sites creates an issue over which party has a more accurate valuation of the item.[313] If developers can argue that a player's winnings have no value, then the theory on prizes cannot provide a remedy to regulate developers.[314] Because common law theories

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[306] *Id*; *contra*, *Mason v. Mach. Zone, Inc.*, 140 F. Supp. 3d 457 (D. Md. 2015) ("But of course Plaintiff was not wagering with dollars; she was playing with virtual gold. Plaintiff acquired that "gold" in the "gold store," where she exchanged her real-world currency for a nontransferable, revocable license to use virtual currency for entertainment purposes.").

[307] *Id*.

[308] *Id.*

[309] *Id*.

[310] FED. TRADE COMM'N, *supra*, note 132, at 183.

[311] *Id.*; *see* Moshiarna, *supra* note 116.

[312] *Id*.

[313] *See* Taylor Stanton Hardenstein, Comment, *"Skins" in the Game: Counter-Strike, Esports, and the Shady World of Online Gambling*, 7 UNLV GAMING L.J. 117, 121-22 (2017).

[314] *See Mason v. Mach. Zone, Inc.*, 140 F. Supp. 3d 457 (D. Md. 2015) ("But of

on gambling may not give a conclusive answer to whether loot boxes are gambling, federal regulation is needed.

B. Current Federal Statutes: The Unlawful Internet Gambling Enforcement Act

One way to understand how the federal government views video games and gambling is to examine the Unlawful Internet Gambling Enforcement Act ("UIGEA"), an Act addressing problems concerning the interstate nature of digital transactions in the Internet age.[315] The UIGEA prohibits any person engaging "in the business of betting and wagering" from accepting financial instruments for unlawful internet gambling.[316]

First, the terms "bet" and "wager" should be looked at to determine how the UIGEA defines gambling. The language in § 5362 (1)(A) defines the terms "bet" or "wager" as:

> [T]he staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome.[317]

Also, in the UIGEA definition of "bet" and "wager," there is evidence that Congress adopted the Predominance test to define the terms.[318] In § 5362(1)(B), a purchase of a chance or opportunity to win a prize is considered a "bet" or "wager" when chance is the predominant factor to winning.[319]

Next, the UIGEA's definition of "unlawful Internet gambling"

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course Plaintiff was not wagering with dollars; she was playing with virtual gold. Plaintiff acquired that "gold" in the "gold store," where she exchanged her real-world currency for a nontransferable, revocable license to use virtual currency for entertainment purposes.").

[315] Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361–5366 (2020).

[316] *Id.*

[317] *Id.*

[318] *Id.* § 5363(1)(B).

[319] *Id.*

provides an understanding of the contexts where an internet transmission is considered gambling. The UIGEA defines "unlawful Internet gambling" as:

> [T]o place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.[320]

The UIGEA does not apply to intrastate gambling.[321] It also does not apply to activity that would fit the definition of "unlawful Internet gambling" but is expressly authorized by the states where the transaction is initiated and received.[322]

The UIGEA provides the necessary definitions and verbiage for future regulations to control loot boxes as a form of gambling. "Bets" and "wagers" apply the Predominance test in § 5363(1)(B), which is an appropriate theory to characterize the type of event that occurs with a loot box because the outcome of opening of a loot box is pure chance.[323] Therefore, a loot box would provide a chance to win a prize under § 5363(1)(B).[324]

The UIGEA definition of "Unlawful Internet gambling" provides a template action for future regulations.[325] All consoles have their own networks that use the internet to facilitate transactions between the player and the developer of the console.[326] Because loot boxes provide players with a chance to win prizes, per the Predominance theory's, purchasing loot boxes through these networks would be similar to transmitting a "bet" or "wager" under the definition of "unlawful Internet gambling."[327]

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[320] 31 U.S.C. § 5363(10)(A).
[321] *Id.* § 5363(10)(B)(i) – (ii).
[322] *Id.* § 5363(1)(B)(ii) (2020).
[323] *Id.* § 5363(1)(B) (2020).
[324] *Id*.
[325] *Id*. § 5362(10)(A) (2020).
[326] XBOX, https://www.xbox.com/en-US/microsoft-store (Last visited Apr. 13, 2020).
[327] *Id.* § 5363(10)(A).

While the UIGEA provides language regarding gambling and its context with the internet and technology, the Act itself cannot regulate loot boxes. The UIEGA did not make internet gambling illegal,[328] rather it made it illegal for banks to process transactions made by United States residents with unlawful gambling sites.[329] Further, the UIGEA has lost much of its authority through court reversals and the Justice Department's narrowing of the related Wire Act.[330]

PART IV: MODEL LEGISLATION AND PUBLIC POLICY

Lastly, we come to our final option of federal regulation. As examined previously, the federal government has the authority under *Murphy*[331] and *Sebelius*[332] to regulate loot boxes. Federal law and regulation can create a direct solution to loot boxes whereas they might fall through the cracks of state common law on gambling[333] and the UIGEA.[334] On May 23, 2019, Senator Hawley introduced Senate Bill 1629 ("the Bill") which was referred to the Committee on Commerce, Science, and Transportation.[335] The Bill

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[328] David J. Castillo, Note, *Unpacking the Loot Box: How Gaming's Latest Monetization System Flirts with Traditional Gambling Methods*, 59 SANTA CLARA L. REV. 165, 181 (2019). *See* 31 U.S.C. § 5362(10)(A).
[329] *Id.*
[330] *Id.* at 179-82. ("The Wire Act, through the Federal Communications Commission's jurisdiction, empowers federal, state, and local law enforcement agents to "discontinue, or refuse, the leasing, furnishing, or maintaining of" facilities used for such purposes. It did not, however, provide a definition for "bet or wager… The differing court interpretations of the Wire Act appear to be moot following the release of a memoranda by the Justice Department in 2011 specifying that interstate transmissions unrelated to a "sporting event or contest" fall outside the Wire Act's reach. The effects of the Wire Act's limitation are seen through the explosion of internet gambling worldwide in the twenty-first century.").
[331] Murphy v. NCAA, 138 S. Ct. 1461, 1476-77 (2018).
[332] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 536 (2012).
[333] STOCKER, ET AL., *supra* note 287.
[334] Castillo, *supra* note 328, at 181.
[335] S. 1629, 116th Cong. (2019).

provides a template for regulating the use of loot boxes in video games.[336] First, the Bill defines terms such as "add-on transaction," "minor-oriented games," "pay-to-win microtransaction," and "loot box."[337] Second, the Bill tailors its prohibition to sales aimed toward minors.[338] Lastly, while the Bill places the majority of regulatory authority with the FTC, the Bill also provides a carve-out for a state enforcement mechanism.[339]

The Bill's terms and definitions in Section 2 provide broad regulatory targets for objects and entities.[340] "Minor-Oriented Games" are defined as an "interactive digital entertainment product" for which the target audience is "individuals under the age of 18."[341] The Bill gives a non-exclusive list of characteristics in a game that can be evidence that the game is targeting individuals under the age of 18, including: subject matter of the product, visual content of the product, music and audio, use of animated characters that appeal to children, age of characters in a product, presence of celebrities under the age 18 or appeal to those under the age of 18, language in the product, content in advertising, empirical evidence of the audience, and other evidence demonstrating the target is underage.[342] Regulations based off this standard should work alongside regulations to implement age algorithms, as mentioned earlier, and to disclose data from these algorithms.[343]

Add-On Transaction is defined in the Bill as:

> [A] payment to the game publisher of an interactive digital entertainment product, an affiliate of the publisher, or any other person who accepts such payment for the benefit of the publisher, of either money or an in-game proxy for money, such as a virtual currency, that can be purchased

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[336] *Id.* at § 1-3.
[337] *Id.* at § 2.
[338] *Id.* at § 1.
[339] *Id.* at § 3.
[340] *Id.* at § 2.
[341] S. 1629 § 2(5).
[342] *Id.* § 2(5)(A)-(K).
[343] DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, IMMERSIVE AND ADDICTIVE TECHNOLOGIES *supra* note 16 at 40.

> with money, that-(i) unlocks a feature of the product; or (ii) adds to or enhances the entertainment value of the product.[344]

The inclusion of virtual currency in the definition addresses the reality of in-game currency used as payment.[345] In-game currencies can possibly protect distributors and publishers from claims that in-game currency has value based on transferability by placing in the Terms of Use agreement that in-game currency cannot be transferred.[346] By leaving out any reference to transferability,[347] the law can make liable all distributors and publishers who use a proxy for money in their games.[348]

"Pay-to-win microtransactions" are defined as a type of add-on transaction that, from the perspective of a reasonable user, the transaction would help ease progression, assist in accomplishing an achievement, assist in receiving a reward, or permit the user to continue to access content inaccessible due to a limit placed to stop the player from continuing.[349] "Pay-to-win microtransactions" occur when, if only for the transaction, a user gets a competitive advantage in a game that a reasonable user would consider a competition with other users.[350]

The definition of "pay-to-win microtransactions" helps to address situations such as with *Star Wars Battlefront II*, where the developers made a system in which gaining experience provided a free option to gain abilities to use in the multiplayer battles, but it was nearly impossible to gain enough experience to get more cards and maintain a competitive advantage.[351] Therefore, players had no

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[344] S. 1629, 116th Cong. § 2(6)(A)(i)-(ii).
[345] Zendle, *supra* 14 at 183.
[346] *Mason v. Mach. Zone, Inc.*, 851 F. 3d 320 (D. Md. 2015) ("But of course Plaintiff was not wagering with dollars; she was playing with virtual gold. Plaintiff acquired that "gold" in the "gold store," where she exchanged her real-world currency for a nontransferable, revocable license to use virtual currency for entertainment purposes.").
[347] *See*, S. 1629, 116th Cong. § 2(6)(A)(i)-(ii).
[348] *Id.*
[349] *Id.* § 2(7)(A)(i)(I)-(IV).
[350] *Id.* § 2(7)(A)(i).
[351] Moshirnia, *supra* note 116.

choice but to buy loot boxes in order to stay competitive.[352] The Bill also differentiates between downloadable content where players know exactly what they'll be getting, and add-on content that urges players to make a purchase for the possibility of getting a randomized reward.[353]

"Loot boxes" are defined as:

> [A]n add-on transaction to an interactive digital entertainment product that: (A) in a randomized or partially randomized fashion: (i) unlocks a feature of the product; or (ii) adds to or enhances the entertainment value of the product; or (B) allows the user to make 1 or more additional add-on transactions: (i) that the user could not have made without making the first add-on transaction; and (ii) the content of which is unknown to the user until after the user has made the first add-on transaction.[354]

This definition of loot boxes is quite broad and encompasses all gambling mechanics. The Bill also forecloses the option to argue that skill represented a predominant factor in a game.[355] The Bill's focus on existence of chance in the interactive digital product,[356] rather than how much chance is involved in winning a prize,[357] broadens the universe of products that the Bill can regulate.[358]

The Bill's primary function is in Section 1, which contains a prohibition against selling "pay-to-win microtransactions" and "loot boxes" in "minor-oriented" games or when the distributor or publisher "has constructive knowledge that any users are under age 18."[359] Section 1(a)'s prohibition targeting "minor-oriented" games is useful for developing further legislation because it uses more factors for determining if a game is for minors and does not purely

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[352] *Id.*
[353] S. 1629, 116th Cong. § 2(7)(B)(iii).
[354] S. 1629, 116th Cong. § 2(8).
[355] *Id.* § 2(8)(A); *see also*, STOCKER, ET AL., *supra* note 287.
[356] S. 1629, 116th Cong. § 2(8)(A).
[357] Stocker, *supra* note 287.
[358] Hong, *supra* note 35. (Some games utilize spinning wheels or other methods rather than present the play with a container holding randomized content).
[359] S. 1629, 116th Cong. § 1(a) – (b).

rely on the ESRB rating of a game to determine what elements make the game more oriented toward minors.[360] Section 1(b)'s standard for constructive knowledge would probably work effectively with a statute that applies a duty of due care standard to developers. With this standard, developers would have the burden of proving that they did their best requisite research to make sure minors did not play a game with microtransactions or loot boxes.

Lastly, the enforcement mechanism provides a scheme that satisfies the anti-commandeering rule and the Commerce Clause. The Bill does not give rise to anti-commandeering issues as PASPA did in the *Murphy* case. Instead, the Bill gives State Attorneys General the option to bring a civil action claim against any person that violates the Act and bring them into an appropriate State court.[361] Indeed, Section 3(b)(3)(A)-(C) specifically note that the statute is not to be construed to prevent the State Attorneys General from exercising their state powers to: (A) conduct investigations; (B) administer oaths or affirmation; or (C) compel the attendance of witnesses or the production of documentary and other evidence.[362] Under this Bill, the only limits placed on a State would be that the State would need to give written notice and a copy of the complaint for the action to the Federal Trade Commission ("FTC")[363] and to hold off during the pendency of FTC action against any named defendant.[364]

This enforcement mechanism also places authority in the correct agency. The FTC is instructed under 15 U.S.C. § 45(a)(1)-(2) to promulgate rules against unfair or deceptive acts or practices in or affecting commerce,[365] while 15 U.S.C. § 45(b) empowers the FTC to file an action against a person:

> Whenever the Commission shall have reason to believe that any such person, partnership, or corporation [uses] or [used] any unfair method of competition or unfair or

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[360] *Id.* § 2(7)(B)(iii).
[361] *Id.* § 3(b)(1)(A).
[362] *Id.* § 3(b)(1)(B)(ii)(3).
[363] *Id.* § 3(b)(1)(B)(i)(I)-(II).
[364] S. 1629, 116th Cong. § 3(b)(5).
[365] Federal Trade Commission Act, 15 U.S.C. § 45(a)(1)-(2) (2020).

> deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint.[366]

Since this Bill regulates an interstate industry that engages in economic activity, the Commerce Clause grants Congress the authority to regulate it. As to the scope of the FTC's authority, the Bill lists prohibited business activities, so violators would be engaging in an unfair business practice if they continued to sell loot boxes to minors, and enforcement would be under the FTC's domain.[367]

Furthermore, the Bill treats the sale of loot boxes to minors as a civil infraction which may be more appropriate as a tool to disincentivize game developers than the current options, like individual civil actions brought directly by video game players.[368]

The civil infraction proposed in the Bill does not target the injury to the consumer, but rather the action of selling loot boxes to minors.[369] The Bill is stopping developers from receiving any benefit that the company may receive from the sale at the time they sold it.[370] Also, having the FTC file the claim shifts regulatory responsibility away from the consumer to the government as a regulator of these developers.[371]

Senator Hawley's proposed Bill would provide more predictability for developers and publishers to plan their businesses more accurately by understanding whom they can sell to. Also, the Bill requires companies have constructive knowledge only to

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[366] 15 U.S.C. § 45(b) (2018).
[367] *Sebelius*, 567 U.S. at 551.
[368] S. 1629 § 3(a)(3)(B)(ii).
[369] S. 1629 § 1(a) - (b).
[370] *Id.* at § 3 (b)(1)(A)(iii).
[371] 15 U.S.C. § 45(b) (2018).

determine if a user is a minor.[372] The Bill also sets out a clear adjudicatory feature, in requiring the FTC to provide hearings for defendants, where they are given the opportunity to show cause for why the FTC should not enter an order against them.[373] During these hearings, developers can show that they have consumer research, programs for detecting age, [374] or other types of evidence that show they have reason to believe that the consumer was not a minor.

CONCLUSION

The US federal government is capable of regulating loot boxes and should follow the example set out by European nations. Congress has authority to regulate the video game industry under the Commerce Clause. Direct regulation of loot boxes and pay-to-win microtransactions to a specific class of consumers would be the most efficient method of enforcement, as seen in Senator Hawley's Bill where it tailors regulation to sales of loot boxes to minors.

The Bill allows businesses to obtain revenue through the sale of loot boxes and pay-to-win microtransactions to adults[375] while still protecting children, a class of consumers that are particularly vulnerable and susceptible to maladaptive gambling behaviors.[376]

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[372] S. 1629 § 1(b).
[373] 15 USC § 45(b) (2018).
[374] DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, IMMERSIVE AND ADDICTIVE TECHNOLOGIES *supra* note 16 at 40.
[375] Eddie Makuch, *EA Made Almost $1 Billion On Microtransactions Last Quarter*, GAMESPOT, Feb. 3, 2020, https://www.gamespot.com/articles/ea-made-almost-1-billion-on-microtransactions-last/1100-6473240/; *See also* FED. TRADE COMM'N, INSIDE THE GAME: UNLOCKING THE CONSUMER ISSUES SURROUNDING LOOT BOXES 60 (2020).
[376] Kevin Webb, *Regulators from More Than a Dozen Countries Are Looking to Crack Down on 'Loot Boxes,' A Controversial Video Gaming Practice that Could Be Too Much Like Gambling*, BUSINESS INSIDER (Sept. 17, 2018, 6:49 PM), https://www.businessinsider.com/loot-boxes-european-regulation-2018-9#:~:text=Regulators%20from%20more%20than%20a,be%20too%20much%20like%20gambling&text=Belgium%20and%20the%20Netherlands%20have,and%20have%20banned%20the%20practice.

The FTC workshop included a spectrum of opinion on varying levels of regulation that showed the balance of interests between business and consumers.[377] Video game developers need revenue to create more games, however children and other vulnerable individuals need another level of protection in addition to self-regulation. While society wants companies to innovate and create video games that expand the reaches of our imagination, regulators should work to further mold the relationship between businesses and consumers into one of mutual benefit, rather than one of detriment to one side.

Recent discussions and government actions regarding loot boxes are an indication of a growing concern for the potential for harm that technology can have on children. The relationship between behavior in children and loot boxes needs further study to determine if loot boxes cause any future maladaptive behaviors that can lead to gambling addiction. As technology advances and becomes more of a part of our daily lives, our growing interactions with it can normalize certain features which can have problematic consequences in the future. Thus, this is an area that should continue to be studied as technologies and corresponding regulations develop.

[377] FED. TRADE COMM'N, INSIDE THE GAME: UNLOCKING THE CONSUMER ISSUES SURROUNDING LOOT BOXES 60 (2020).