

## NOTE

### DON'T HATE THE PLAYER, HATE THE GAME: VIDEO GAME LOOT BOXES, GAMBLING, AND A CALL FOR ADMINISTRATIVE REGULATION

#### I. INTRODUCTION

Video games<sup>1</sup> have become a mainstream hobby amongst American citizens of all ages.<sup>2</sup> In fact, in 2021, the Entertainment Software Association found that nearly 227 million Americans played video games in some capacity.<sup>3</sup> However, what if you were told video games were exposing children to gambling addiction?<sup>4</sup> Presently, that is the reality for certain video games, as video game companies have inserted a potential gambling mechanic, known as “loot boxes,” into their games.<sup>5</sup>

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1. There is a debate in the video game community as to whether “video game” or “videogame” is the grammatically correct way to refer to a video game. *See, e.g.*, Mark Serrels, *The Big Question: Video Games or Videogames?*, KOTAKU (Sept. 10, 2014, 1:15 PM), <https://www.kotaku.com.au/2014/09/the-big-question-video-games-or-videogames>; Chris Kohler, *On ‘Videogame’ Versus ‘Video Game’*, WIRED (Nov. 12, 2007, 3:39 PM), <https://www.wired.com/2007/11/on-videogame-ve>. In view of the Merriam-Webster dictionary, among others, this Note will use “video games.” *See Video Game*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/video%20game> (last visited Oct. 13, 2021); *see also* Kohler, *supra* (“[I]t should be two words, because Google searches were turning up far more results for ‘video game’ than ‘videogame.’”); Serrels, *supra* (“I am and have always been a ‘video game’ man.”). *But see* Kohler, *supra* (“As for Wired? We use videogame.”).

2. *See generally* Victor Yanev, *Video Game Demographics – Who Plays Games in 2021*, TECHJURY, <https://techjury.net/blog/video-game-demographics/#gref> (Sept. 9, 2021) (denoting several statistics regarding the popularity of video games in 2021); ENT. SOFTWARE ASS’N, 2021 ESSENTIAL FACTS ABOUT THE VIDEO GAME INDUSTRY 2-17 (2021), <https://www.theesa.com/wp-content/uploads/2021/08/2021-Essential-Facts-About-the-Video-Game-Industry-1.pdf> (reporting several statistics evidencing the proliferation of video games as an entertainment medium through 2021).

3. ENT. SOFTWARE ASS’N, *supra* note 2, at 2 (“There are nearly 227 million players across all ages in the [U.S.A.] (226.6 million players)[.]”).

4. *See* Connor Simanski, *Introducing Youth Problem Gambling Through Gaming*, MESSENGER (Dec. 26, 2020), <https://www.messengernews.net/opinion/local-columns/2020/12/introducing-youth-problem-gambling-through-gaming>.

5. *See* Alex Wiltshire, *Behind the Addictive Psychology and Seductive Art of Loot Boxes*, PCGAMER (Sept. 28, 2017), <https://www.pcgamer.com/behind-the-addictive-psychology-and-seductive-art-of-loot-boxes>; *see also* Simanski, *supra* note 4. Loot boxes can be defined as a video game mechanic which allows a player to pay real-world money to open a chest containing a random assortment of items that can be used in the video game. *See* Devin Pickell, *Loot Boxes – The Most Controversial In-Game Monetization*, G2 LEARN HUB (July 29, 2019), <https://learn.g2.com/loot->

This mechanic has caused children to go into extreme debt.<sup>6</sup> Some have even gone so far as to steal their parents' credit cards and electronics in order to engage in the game mechanic.<sup>7</sup> One specific instance led to a family needing to remortgage their home.<sup>8</sup>

To simulate how loot boxes can negatively impact an individual, imagine someone enjoying a soccer video game so much that they decide to spend a small amount of money on “packs”<sup>9</sup> for a chance to obtain player Lionel Messi.<sup>10</sup> Flash forward a couple of hours and, suddenly, they have spent thousands of dollars on packs—to no avail.<sup>11</sup> Disappointed in their behavior, they turn the game off and swear to never spend real money on it again.<sup>12</sup> Regardless, the next time they turn it on, the desire to spend overwhelms them.<sup>13</sup> Suddenly, a week passes, and they have accrued a modest debt.<sup>14</sup> This is the dilemma that many players face when they fall prey to the “loot box.”<sup>15</sup> On a global level, this dilemma is exacerbated by the fact that children also commonly play video games that contain loot boxes.<sup>16</sup>

There are no lack of troubling stories with regard to loot boxes.<sup>17</sup> However, there are a lack of concrete figures regarding how much

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boxes. A more comprehensive definition of loot boxes is found later in this Note. *See infra* Part II.B.1.

6. Rory Young, *Study Reveals That Children Are Going into Debt Over Loot Boxes*, GAMERANT (Dec. 24, 2020), <https://gamerant.com/study-reveals-children-going-debt-loot-boxes>.

7. Jonathan Chadwick, *One in Six Children Steal Money from Their Parents to Pay for Addictive Computer Game 'Loot Boxes', Survey Reveals – As Campaigners Call for Them to be Classed as Gambling*, DAILY MAIL, <https://www.dailymail.co.uk/sciencetech/article-9082781/One-six-children-steal-money-pay-video-game-loot-boxes.html> (Dec. 23, 2020, 11:06).

8. *Id.* (“Three young gamers’ loot box buying habits resulted in their families having to remortgage their homes to cover the costs, according to the study.”).

9. *See* Aaron Potter, *FIFA 20 Parents Guide – All you Need to Know About Loot Boxes*, CONSOLEDEALS (Sept. 10, 2019, 12:00 AM), <https://www.console-deals.com/blog/fifa-20-parents-guide-loot-boxes-11360>. “Packs,” which may be used interchangeably with the term “loot boxes,” are video game mechanics which allow the player to spend cash for a “pack of players” in a similar fashion as to buying a physical pack of baseball cards. *Id.*

10. *See* ‘How My Son Went from Gamer to Compulsive Gambler’, BBC (Oct. 8, 2019), <https://www.bbc.com/news/stories-49941610> (using this news story as the template for a hypothetical situation). Obtaining items from a pack or loot box refers to the act of a player receiving a prize from a loot box. *See* Potter, *supra* note 9.

11. *See* ‘How My Son Went from Gamer to Compulsive Gambler’, *supra* note 10.

12. *See id.*

13. *See id.*

14. *See id.*

15. Ellen McGrody, *For Many Players, Lootboxes Are a Crisis That’s Already Here*, VICE (Jan. 30, 2018, 2:08 PM), <https://www.vice.com/en/article/kznmwa/for-many-players-lootboxes-are-a-crisis-thats-already-here> (discussing situations where loot box purchases have adversely affected children).

16. *See* *Loot Boxes 101: A Primer for Parents*, FAMILY ZONE, <https://www.familyzone.com/anz/families/blog/what-you-need-to-know-about-loot-boxes> (last visited Oct. 13, 2021).

17. *See, e.g.,* ‘How My Son Went from Gamer to Compulsive Gambler’, *supra* note 10; Ethan Gach, *Meet the 19-Year-Old Who Spent Over \$10,000 on Microtransactions*, KOTAKU (Nov. 29,

players spend on loot boxes, and even less information on how much children spend on loot boxes.<sup>18</sup> The best information available are sales figures released by video game companies as to how much of their profits resulted from loot box purchases.<sup>19</sup> Further, available statistics mainly consider worldwide spending, and there are even fewer sets of information regarding individual countries, such as the United States.<sup>20</sup> That said, troubling stories regarding loot boxes are still numerous.<sup>21</sup> Further, there are a breadth of studies regarding the negative effects of loot boxes on children.<sup>22</sup> The practice itself also initiated vast consumer outcry.<sup>23</sup> As such, although data regarding how much consumers and children spend on loot boxes is scarce, the issues surrounding loot boxes are still well-documented.<sup>24</sup>

A loot box can generally be defined as a video game mechanic that allows the video game player to pay a fee using real-world money for the chance to obtain a randomized assortment of items in said game.<sup>25</sup> Depending on the game, a player could either pay for the loot box directly or pay a fee for virtual currency<sup>26</sup> that is used to purchase the loot box.<sup>27</sup> The game is coded to reward all items at different rates to create rarity.<sup>28</sup> With respect to the situation described above, a video

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2017, 5:12 PM), <https://kotaku.com/meet-the-19-year-old-who-spent-over-10-000-on-microtra-1820854953>.

18. See J. Clement, *Consumer Spending on Gaming Loot Boxes and Currency Packs Worldwide from 2020 to 2025*, STATISTA (June 2, 2021), <https://www.statista.com/statistics/829395/consumer-spending-loot-boxes-skins/#:~:text=In%202017%2C%20consumers%20spent%20around,by%20the%20end%20of%202022>.

19. See *id.*

20. See *id.*; see also Kayleigh Partleton, *31% of Young Gamers Don't Know How Much They Spend on Loot Boxes*, POCKET GAMER (Dec. 23, 2020, 4:44 PM), <https://www.pocketgamer.biz/news/75397/report-31-of-young-gamers-dont-know-how-much-they-spend-on-loot-boxes>.

21. See, e.g., 'How My Son Went from Gamer to Compulsive Gambler', *supra* note 10; Gach, *supra* note 17.

22. See Eric W. Dolan, *Two Large Studies Have Found a Link Between Loot Box Spending and Problem Gambling*, PSYPOST (Mar. 18, 2019), <https://www.psypost.org/2019/03/two-large-studies-have-found-a-link-between-loot-box-spending-and-problem-gambling-53341>.

23. See Sam Skopp, *Loot Boxes That Caused an Uproar*, LOOPER, <https://www.looper.com/320815/loot-boxes-that-caused-an-uproar> (Apr. 20, 2021, 9:44 PM).

24. See, e.g., 'How My Son Went from Gamer to Compulsive Gambler', *supra* note 10; Gach, *supra* note 17; Clement, *supra* note 18; Partleton, *supra* note 20.

25. See Pickell, *supra* note 5.

26. See Jay Peters, *IRS Backtracks on Whether Video Game Currencies Are Taxable*, VERGE, <https://www.theverge.com/2020/2/13/21137045/irs-provision-virtual-currency-tax-returns-fortnite-v-bucks> (Feb. 14, 2020, 3:34 PM). In the context of video games, virtual currency refers to an in-game currency used to purchase in-game items, such as loot boxes. *Id.* Players obtain virtual currency by exchanging real-world money. *Id.*

27. See, e.g., *Purchasing Loot Boxes*, BLIZZARD, <https://us.battle.net/support/en/article/73354#:~:text=You%20can%20purchase%20Loot%20Boxes,prompted%20for%20your%20Blizzard%20password> (last visited Oct. 13, 2021).

28. See generally Allegra Frank, *Overwatch Loot Box Probabilities Revealed – At Least for China*, POLYGON (May 5, 2017, 2:00 PM), <https://www.polygon.com/2017/5/5/15558448/overwatch-loot-box-chances-china> (explaining how

game player would purchase a loot box that could contain an assortment of soccer players that can be used in the game.<sup>29</sup> Given the algorithm configurations, players have a lower chance of getting better soccer players, such as Messi.<sup>30</sup> Since it is harder to get better athletes, who are desired in order to win, the player is enticed to spend more money.<sup>31</sup> The items received in loot boxes tend to not have resale value.<sup>32</sup> However, certain games allow the sale of prizes received in loot boxes on secondary markets.<sup>33</sup> In this respect, loot boxes are a lottery.<sup>34</sup> The sequence of events delved into above closely mirrors the behaviors of a gambling addict.<sup>35</sup> Critics of loot boxes have taken notice and called for regulation by way of legislation in order to categorize loot boxes as a form of gambling.<sup>36</sup>

The problem that loot boxes create is directly intertwined with their lack of regulation and tendency to elicit gambling behaviors.<sup>37</sup> Children commonly play video games that contain loot boxes and have been unwittingly exposed to possible gambling addiction as a result.<sup>38</sup> Loot box business practices also target children as they visually simulate

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items in loot boxes have different rates of appearance in that certain items have a higher chance of being given to the player as compared to other items).

29. See *supra* text accompanying notes 9-16; 'How My Son Went from Gamer to Compulsive Gambler', *supra* note 10.

30. See 'How My Son Went from Gamer to Compulsive Gambler', *supra* note 10; see also Potter, *supra* note 9.

31. See 'How My Son Went from Gamer to Compulsive Gambler', *supra* note 10.

32. See, e.g., Matthew Gault, 'Nearly All' Counter-Strike Microtransactions Are Being Used for Money Laundering, VICE (Oct. 29, 2019, 9:32 AM), <https://www.vice.com/en/article/8xw7nx/nearly-all-counter-strike-microtransactions-are-being-used-for-money-laundering> (showing that a video game company runs its own secondary market where the items received from loot boxes may be sold).

33. See *id.*

34. *Are Loot Boxes Considered Gambling?*, ONLINE GAMBLING WEBSITES (Apr. 15, 2020), <https://www.onlinegamblingwebsites.com/blog/are-loot-boxes-considered-gambling/#:~:text=Loot%20boxes%20are%20essentially%20like,is%20something%20of%20a%20lottery.&text=They've%20been%20made%20possible%20by%20cloud%20gaming> ("[Loot boxes] tend to contain an unknown item or items, so what will be in them is something of a lottery.").

35. Compare David Hill, *Requiem for a Sports Bettor*, RINGER (June 5, 2019, 6:20 AM), <https://www.theringer.com/2019/6/5/18644504/sports-betting-bettors-sharps-kicked-out-spanky-william-hill-new-jersey>, with 'How My Son Went from Gamer to Compulsive Gambler', *supra* note 10; see also *supra* text accompanying notes 9-16.

36. See Alex Hudson, *Video Game Loot Boxes Should Be Regulated Like Casinos*, Politicians Say, NEWSWEEK (July 8, 2020, 6:58 AM), <https://www.newsweek.com/video-game-loot-boxes-should-regulated-like-casinos-politicians-say-1516107>.

37. See 'How My Son Went from Gamer to Compulsive Gambler', *supra* note 10; Giancarlo Valdes, 'Zero' Chance It Passes: Game Analysts Break Down Senator's Anti-Loot Box Bill, GAMESBEAT (May 13, 2019, 11:35 AM), <https://venturebeat.com/2019/05/13/zero-chance-it-passes-game-analysts-break-down-senators-anti-loot-box-bill>.

38. Vic Hood, *Are Loot Boxes Harmful to Your Kids? Yes, Says Children's Organization*, TECHRADAR (Oct. 22, 2019), <https://www.techradar.com/news/are-loot-boxes-harmful-to-your-kids-yes-says-childrens-organization>.

casinos.<sup>39</sup> Further, parents do not consistently supervise their children while they are playing video games.<sup>40</sup> As long as a credit card number is affiliated with a game or game system, then the child may press a singular button to buy a loot box and their parents would not know until they receive a statement.<sup>41</sup> This has resulted in parents discovering that their child has spent a moderate to severe sum of their money without really understanding how much they have spent.<sup>42</sup>

As no laws or regulations have been passed to curtail the gambling problems surrounding loot boxes, this Note seeks to address the issue by advocating for the Federal Trade Commission (“FTC”) to increase its role in regulating the practice.<sup>43</sup> The FTC would exercise jurisdiction over loot boxes via its power to regulate consumer protection and interstate gambling issues with special attention to protecting children.<sup>44</sup> This Note advocates for a remedy by way of the FTC because, in the context of loot boxes, a federal administrative remedy would be the most appropriate remedy, as compared to state or federal legislation.<sup>45</sup>

Part II of this Note provides a brief history of the development of video games as an entertainment medium,<sup>46</sup> as well as a comprehensive history on the rise and fall of loot boxes as a business practice.<sup>47</sup> Further, Part II discusses the development of gambling law in this country with respect to online gambling,<sup>48</sup> and the laws which give the FTC the jurisdiction to regulate loot boxes.<sup>49</sup> Part III analyzes two pertinent legal issues surrounding loot boxes.<sup>50</sup> The Part first applies the nature of loot boxes to the common law elements of gambling to determine whether loot boxes legally qualify.<sup>51</sup> It then considers the different entities that may reasonably be considered to have the power to regulate loot boxes,

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39. See Gregory Day & Abbey Stemler, *Are Dark Patterns Anticompetitive?*, 72 ALA. L. REV. 1, 13-14 (2020) (“Especially alarming is that children are prime targets[.]”); see also Wiltshire, *supra* note 5.

40. *Kids, Parents, and Video Games*, FED. TRADE COMM’N CONSUMER INFO. BLOG, <https://www.consumer.ftc.gov/articles/0270-kids-parents-and-video-games> (last visited Oct. 13, 2021).

41. See *How to Use Credit or Debit Cards on PlayStation Store*, PLAYSTATION, <https://www.playstation.com/en-us/support/store/ps-store-credit-debit-card> (last visited Oct. 13, 2021). Like subscription services, video games allow players to link a credit card number with the game so the card can be immediately charged, rather than having to enter the entire number with every purchase. See *id.*

42. See Potter, *supra* note 9.

43. See *infra* Part IV.B.

44. See 15 U.S.C. § 45(a)(2) (2018).

45. Cf. Joel Weinberg, Comment, *Everyone’s a Winner: Regulating, Not Prohibiting, Internet Gambling*, 35 SW. U. L. REV. 293, 316-20 (2006) (advocating that the creation of a new federal agency is the best way to regulate online gambling).

46. See *infra* Part II.A.

47. See *infra* Part II.B.

48. See *infra* Part II.C.

49. See *infra* Part II.D.

50. See *infra* Part III.

51. See *infra* Part III.A.

and determines which of those entities has the greatest power.<sup>52</sup> Part IV sets forth regulations for video game companies to curtail the harmful effects of loot boxes with special attention given to preventing participation from minors and suggests that the FTC should act as the body of administration and oversight.<sup>53</sup>

## II. THE HISTORY OF GAMING, BACKGROUND ON THE RISE OF LOOT BOXES, THE LAW OF ONLINE GAMBLING, AND THE FEDERAL TRADE COMMISSION

Video games, and gaming itself, have a rich history.<sup>54</sup> From their inception in 1958, video games have steadily evolved.<sup>55</sup> Video games have gone from being a purely one-person experience, to being something that could be shared between friends.<sup>56</sup> From there, new innovations proliferated.<sup>57</sup> The evolution of video games has culminated in a vast online experience, which bore the subject of this Note.<sup>58</sup>

This Part seeks to establish a brief general history of gaming,<sup>59</sup> followed by a detailed history of the loot box controversy.<sup>60</sup> In its discussion of loot boxes, this Part defines what a loot box is, and proceeds to detail the rise, controversy, and contemporary status of the business practice, as well as the most recent court cases involving loot boxes.<sup>61</sup> The Part then pivots to describing the legal history of online gambling<sup>62</sup> and the FTC's role in consumer protection regulation.<sup>63</sup>

### A. A Brief History of Gaming

The first video game is believed to have been created by physicist William Higinbotham in October 1958.<sup>64</sup> From there, video game companies began to develop arcade machines that played games, and subsequently developed home consoles, which allowed games to be

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52. See *infra* Part III.B.

53. See *infra* Part IV.

54. See Alexander Rechsteiner, *The History of Video Games*, NAT'L MUSEUM BLOG, <https://blog.nationalmuseum.ch/en/2020/01/the-history-of-video-games> (last visited Oct. 13, 2021).

55. See *id.*

56. See *id.*

57. See *id.*

58. See *id.*

59. See *infra* Part II.A.

60. See *infra* Part II.B.

61. See *infra* Part II.B.

62. See *infra* Part II.C.

63. See *infra* Part II.D. The Federal Trade Commission's ("FTC") consumer protection jurisdiction allows them to regulate loot box business practices and is discussed later in this Note. See *infra* Part III.B.

64. *October 1958: Physicist Invents First Video Game*, AM. PHYSICAL SOC'Y NEWS, Oct. 2008, at 2.

played at home, rather than at an arcade.<sup>65</sup> The next big development in gaming technology occurred in 1995, when video games jumped from two-dimensional gameplay to three-dimensional gameplay.<sup>66</sup> Suddenly, players could explore a three-dimensional space rather than being limited to moving from side to side.<sup>67</sup> This shift came on the heels of a video game crash.<sup>68</sup> The next big development occurred when video games were allowed to connect to the internet.<sup>69</sup> Online video game access allowed players from across the country to play with each other.<sup>70</sup> As such, many games released during this time included online features.<sup>71</sup>

Increased online access in video games also opened the door for the issue discussed in this Note, as it allowed companies to further monetize their products by charging players remotely through the game and its online access.<sup>72</sup> Initially, companies began selling extensions to certain video games that could be bought in those games, or on an online marketplace.<sup>73</sup> These extensions were known as downloadable content (“DLC”).<sup>74</sup> However, gaming companies soon discovered that they could simply ask players to pay a smaller fee for a chance at obtaining random items, rather than spending valuable resources developing novel DLC.<sup>75</sup> Thus, the concept of loot boxes was born.<sup>76</sup>

### B. *The History of Loot Boxes*

Loot boxes emerged as a common feature of video games shortly after those same games were able to connect to the internet.<sup>77</sup> However, it is incredibly difficult to ascertain the exact time loot boxes emerged,

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65. History.com Editors, *Video Game History*, HIST., <https://www.history.com/topics/inventions/history-of-video-games> (June 10, 2019).

66. *Id.* The release of *Super Mario 64* is largely credited as the video game which culturally signaled a shift from two-dimensional gameplay to three-dimensional gameplay. *Id.*; see also Rich Stanton, *What Made Super Mario 64 So Special?*, EUROGAMER (Apr. 12, 2015), <https://www.eurogamer.net/articles/2015-04-12-what-made-super-mario-64-so-special> (“Super Mario 64 was not the first 3D game by a long shot, and not even the first 3D platformer. The game seems like a pioneer because it became *the* template for true 3D design - and so is now something of a legendary creation.”).

67. History.com Editors, *supra* note 65.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. See Steven T. Wright, *The Evolution of Loot Boxes*, PCGAMER (Dec. 8, 2017), <https://www.pcgamer.com/the-evolution-of-loot-boxes>.

73. See Mike Williams, *The Harsh History of Gaming Microtransactions: From Horse Armor to Loot Boxes*, USGAMER (Oct. 11, 2017), <https://www.usgamer.net/articles/the-history-of-gaming-microtransactions-from-horse-armor-to-loot-boxes>.

74. See *id.*

75. See *id.*

76. Wright, *supra* note 72.

77. *Id.* (“Loot boxes are a relatively recent development in multiplayer games . . .”).

as the practice can be traced back to multiple sources.<sup>78</sup> Separate from inspiration, the path to the implementation and subsequent controversy can also be analyzed pursuant to the growth of post-sale monetization in the gaming industry.<sup>79</sup>

### 1. What Is a Loot Box?

Without respect to legal definitions, loot boxes are akin to lotteries.<sup>80</sup> In fact, it could be said that loot boxes mirror the circumstances which encompass the purchase of a scratch-off ticket or lottery.<sup>81</sup> Loot boxes may be purchased upon loading up a video game.<sup>82</sup> In the game, one can press a button that normally says “shop” on it.<sup>83</sup> Upon pressing the button, the player will be brought to a screen where a loot box may be purchased.<sup>84</sup> After the player enters their credit card information, an animation will play that signifies the “opening” of the loot box.<sup>85</sup> This animation usually depicts the opening of a chest or a pack of cards.<sup>86</sup> After the animation plays, the player will be presented with the in-game items that they have obtained.<sup>87</sup> This process plays out the same for every loot box purchase, except for the fact that the player need not repeatedly insert their credit card information.<sup>88</sup> As such, the gambling act is the purchasing of a virtual box that gives one the chance to obtain certain prizes.<sup>89</sup>

### 2. The Rise

Video game critics speculate that loot boxes first appeared on a large scale in *Team Fortress II*, a free-to-play shooting game.<sup>90</sup> Providing this is accurate, this means that the loot box timeline begins in 2010.<sup>91</sup> Other video game critics speculate that the first game to

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78. *See id.*

79. *See id.*

80. *See Are Loot Boxes Considered Gambling?*, *supra* note 34.

81. Mattha Busby, ‘Easy Trap to Fall Into’: Why Video-Game Loot Boxes Need Regulation, *GUARDIAN* (May 29, 2018, 1:50 PM), <https://www.theguardian.com/games/2018/may/29/gamers-politicians-regulation-video-game-loot-boxes>.

82. *See, e.g., Purchasing Loot Boxes*, *supra* note 27.

83. *See, e.g., id.*

84. *See, e.g., id.*

85. *See* Chris Bam Harrison, *The User Experience of Lootboxes*, *PROTOTYPR.IO* (Jan. 25, 2018), <https://blog.prototypr.io/the-user-experience-of-lootboxes-fcfe92206a6b>.

86. *See id.*

87. *See id.*

88. *See id.*; *How to Use Credit or Debit Cards on PlayStation Store*, *supra* note 41.

89. *See* Harrison, *supra* note 85.

90. Wright, *supra* note 72 (“The first big Western game to incorporate loot boxes on a major scale was *Team Fortress 2*.”).

91. *See id.*



implement loot boxes in the United States was *FIFA 09*.<sup>92</sup> The game implemented a card pack opening system that is almost identical to most loot box systems now.<sup>93</sup> As *FIFA 09* was released in 2009, loot boxes could have effectively been born in 2009 and evolved since then.<sup>94</sup> The inception of loot boxes may also be traced back to the implementation of trading card mechanics in video games.<sup>95</sup>

Mobile games with loot box mechanics are commonly referred to as “gacha” games.<sup>96</sup> Like most mobile games, they are free of charge, and make their money via in-app purchases.<sup>97</sup> Gacha games, however, include in-app purchases that are functionally equivalent to loot boxes.<sup>98</sup> It is thought that gacha games, which originated in Japan, inspired loot boxes as well.<sup>99</sup> Contemporarily, loot box practices in mobile games have all the same issues as console loot boxes.<sup>100</sup> However, the fact that these games are free and on mobile devices has led to greater accessibility to unregulated gambling.<sup>101</sup> As such, even mobile games have led to people spending thousands of dollars for a random chance to receive in-game items.<sup>102</sup> In view of the practice’s subsequent history, loot boxes are the culmination of an industry’s attempt to further monetize their products after their initial sale, and the desire to establish this practice as normative in video games.<sup>103</sup>

### 3. The Controversy

Loot box practices in video games were initially a fringe issue, entering the public eye via a controversy in the game *Star Wars Battlefront II*.<sup>104</sup> State and federal actors have since made several

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92. See Martin Korda, *FIFA 09: Ultimate Team*, EUROGAMER, <https://www.eurogamer.net/articles/fifa-09-ultimate-team-review> (Mar. 31, 2009).

93. See *id.*

94. See *id.*

95. Wright, *supra* note 72.

96. See Andrea Sandoval, *Loot Boxes and Gacha Games Dubbed Newest Forms of Gambling*, BORDERZINE (Nov. 13, 2018), <https://borderzine.com/2018/11/loot-boxes-and-gacha-games-dubbed-newest-forms-of-gambling>.

97. See *id.*

98. See *id.*

99. Wright, *supra* note 72 (“[T]he ‘gacha games’ that emerged in the early 2010s in Japan proved . . .”).

100. See Sandoval, *supra* note 96.

101. See *id.*

102. See *id.*; see also ProZD, *Gacha Games*, YOUTUBE (Jan. 15, 2018), <https://www.youtube.com/watch?v=-IUWc3ColIA> (parodying issues of spending thousands of dollars on gacha games).

103. Wright, *supra* note 72 (“For these titans of the industry, however, it wasn’t so much about creating new games to take advantage of these monetization strategies, but rather bolting them onto their mammoth properties[.]”).

104. See Gita Jackson, *A Guide to the Endless, Confusing Star Wars Battlefront II Controversy*, KOTAKU (Nov. 21, 2017, 9:40 AM), <https://kotaku.com/a-guide-to-the-endless-confusing-star-wars-battlefront-1820623069>.

attempts to pass legislation either banning or curtailing loot box practices and their negative effects.<sup>105</sup> To date, none have been passed into law.<sup>106</sup>

Loot boxes did not become controversial because of their potential negative impact on children, but rather, because consumers felt the practice was anti-consumer in its entirety.<sup>107</sup> Normally, when a consumer purchases a product, they expect to be able to use it in its entirety without having to engage in further purchases.<sup>108</sup> This is true for video games as well.<sup>109</sup> Under normal circumstances, a consumer should be able to experience the entire video game without having to engage in further purchases, unless the purchase is an entirely new product, like DLC.<sup>110</sup>

Loot boxes run contrary to this principle, as they necessitate payment for certain content within games that could normally be experienced without paying a fee.<sup>111</sup> This is why loot boxes became controversial in the game *Star Wars Battlefront II*.<sup>112</sup> In that circumstance, items that could be obtained in loot boxes could also be obtained by merely playing the game.<sup>113</sup> However, obtaining items that were found in loot boxes took an inordinate amount of time, whereas paying for a loot box to potentially obtain the item took virtually no time at all.<sup>114</sup> This discrepancy is what first launched loot boxes into the public eye.<sup>115</sup> Soon thereafter, more substantive criticisms, such as loot boxes' similarities to gambling and their potential effects on children, began to be levied by legislators and psychological experts.<sup>116</sup>

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105. See S. 1629, 116th Cong. (2019); H.R. 2686, 29th Leg., Reg. Sess. (Haw. 2018); S. 6266, 65th Leg., Reg. Sess. (Wash. 2018).

106. See, e.g., Michael Brestovansky, 'Loot Box' Bills Fail to Advance, HAW. TRIB. HERALD (Mar. 24, 2018, 12:05 AM), <https://www.hawaiitribune-herald.com/2018/03/24/hawaii-news/loot-box-bills-fail-to-advance>.

107. See Riordan Zentler, *Game On: 'Microtransactions' Are Rampant in the Gaming Industry*, SPOKESMAN-REV., <https://www.spokesman.com/stories/2020/jul/09/game-on-microtransactions-are-rampant-in-the-gamin> (Oct. 20, 2020).

108. See *id.*

109. See *id.*

110. Jeffrey Cook, *From Expansion Packs to DLC: The Evolution of Additional Video Game Content*, ARTIFICE (Oct. 2, 2016), <https://the-artifice.com/expansion-packs-dlc-evolution-additional-video-game-content>.

111. See Zentler, *supra* note 107.

112. See Jackson, *supra* note 104.

113. See *id.*

114. See *id.*

115. Pickell, *supra* note 5.

116. See Makena Kelly, *How Loot Boxes Hooked Gamers and Left Regulators Spinning*, VERGE (Feb. 19, 2019, 8:00 AM), <https://www.theverge.com/2019/2/19/18226852/loot-boxes-gaming-regulation-gambling-free-to-play>; see, e.g., S. 1629, 116th Cong. (2019); see also Hood, *supra* note 38.

Criticism of loot boxes from individuals other than consumers of video games generally came in three forms.<sup>117</sup> First, loot boxes were criticized as a form of gambling.<sup>118</sup> Without regard to the legal definition of gambling, critics felt that the ability to pay a fee in order to receive a random assortment of in-game items constituted gambling.<sup>119</sup> Further, reports of individuals becoming addicted to purchasing loot boxes began to surface.<sup>120</sup> Soon thereafter, studies were done regarding the negative effects of loot boxes on children and adolescents playing games, as many games that were targeted towards those groups included loot boxes.<sup>121</sup> These studies generally concluded that loot boxes had a negative effect on children and adolescents by exposing them to gambling at an early age.<sup>122</sup> Legislators reacted by pushing for legislation either regulating or banning loot boxes.<sup>123</sup> For example, U.S. Senator Josh Hawley pushed for a bill banning the sale of games with loot boxes to children, calling for broader regulation in the video game industry.<sup>124</sup> Several states around the country introduced similar bills that also did not pass.<sup>125</sup> As such, loot boxes have continued to thrive—even today.<sup>126</sup>

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117. See Andrew E. Freedman, *What Are Loot Boxes? Gaming's Big Controversy Explained*, TOM'S GUIDE (Aug. 9, 2019), <https://www.tomsguide.com/us/what-are-loot-boxes-microtransactions,news-26161.html> (showing parents and legislators as two of the forms); Dolan, *supra* note 22 (showing psychologists as the third form).

118. See Freedman, *supra* note 117.

119. See *id.*

120. Andy Chalk, *Loot Boxes Are a Matter of 'Life or Death' for Problem Gamblers*, Says Researcher, PCGAMER (Aug. 9, 2019), <https://www.pcgamer.com/loot-boxes-are-a-matter-of-life-or-death-for-problem-gamblers-says-researcher>.

121. See generally David Zendle et al., *Adolescents and Loot Boxes: Links with Problem Gambling and Motivations for Purchase*, ROYAL SOC'Y PUBL'G 1, 14-17 (2019), <https://royalsocietypublishing.org/doi/pdf/10.1098/rsos.190049> (studying loot box data with respect to adolescents and potential harmful effects pursuant to gambling); see also Dolan, *supra* note 22. With regard to the effects of loot boxes on minors, studies generally find that purchasing loot boxes is akin to gambling. See, e.g., Zendle et al., *supra* at 2. The study, conducted by David Zendle, tested how loot boxes affected minors by conducting a survey of individuals aged sixteen through eighteen. *Id.* at 6. The survey received 1,155 serious responses and asked questions related to how often participants purchased loot boxes, how soon they purchased loot boxes after first buying the underlying game, and how much money they spent on loot boxes. *Id.* at 6-7. The data collected from these surveys showed that a significant majority of participants bought loot boxes and exhibited signs of problem gambling. *Id.* at 9-10. Through this data, the study connected the purchasing of loot boxes by minors to problem gambling and impulsive spending. *Id.* at 9-17.

122. See, e.g., Zendle et al., *supra* note 121, at 16-17.

123. See, e.g., S. 1629, 116th Cong. (2019).

124. *Id.*

125. See H.R. 2686, 29th Leg., Reg. Sess. (Haw. 2018); S. 3024, 29th Leg., Reg. Sess. (Haw. 2018); S. 6266, 65th Leg., Reg. Sess. (Wash. 2018); see also Brestovansky, *supra* note 106 (reporting that the Hawaii loot box bills failed to pass).

126. See Matthew Forde, *PGC Helsinki Digital: Loot Boxes Are Still the "Number One Monetisation Method Used in Core Games" Globally on Mobile*, POCKET GAMER (Sept. 15, 2020, 11:40 AM), <https://www.pocketgamer.biz/asia/news/74489/pgc-helsinki-digital-loot-boxes-are-still-the-number-one-monetisation-method-used-in-core-games-globally-on-mobile>.

#### 4. Loot Boxes Today

Despite the controversy criticizing loot box practices as unregulated gambling, the business practice continues to be included in game releases.<sup>127</sup> As it stands, loot boxes pervade the video game market in both console games and mobile games.<sup>128</sup> This can be seen in view of recent video game releases, such as *Genshin Impact* and *FIFA 21*.<sup>129</sup> The unregulated continuation of loot box practices have been met with some contemporary roadblocks from self-regulatory agencies, such as the FTC, and consumers, which are described below.<sup>130</sup> Regardless, these roadblocks have done little to actually address the issues that loot boxes pose.<sup>131</sup>

In response to the growing public pressure against loot boxes, the video game industry has recently announced self-regulation measures in an attempt to assuage the public.<sup>132</sup> Specifically, the Entertainment Software Rating Board (“ESRB”)<sup>133</sup> has announced such measures.<sup>134</sup> Responsible for placing ratings on video games in a similar manner by which ratings are placed on movies, the ESRB recently announced that their rating system will now take the presence of loot boxes in video games into consideration.<sup>135</sup> Further, the ESRB will denote in their ratings the presence of loot boxes in any game generally.<sup>136</sup> This measure allows consumers to observe whether a game contains loot box

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127. *See id.*

128. *See id.*

129. Gene Park, *I Spent \$130 in ‘Genshin Impact.’ If You Might Do This, Maybe Don’t Play It*, WASH. POST (Oct. 6, 2020, 3:30 PM), <https://www.washingtonpost.com/video-games/2020/10/06/genshin-impact-gambling/>; Bill Cooney, *EA Removes FIFA 21 Ad Selling Loot Boxes to Children After Backlash*, DEXERTO, <https://www.dexerto.com/fifa/ea-faces-backlash-after-targeting-kids-with-fifa-21-loot-box-ads-1425459> (Oct. 1, 2020).

130. *See* Jay Peters, *ESRB Introduces a New Label to Indicate That a Game Has Loot Boxes*, VERGE (Apr. 13, 2020, 12:51 PM), <https://www.theverge.com/2020/4/13/21219192/esrb-new-label-loot-boxes-gacha-game> (showing a roadblock from the Entertainment Software Rating Board (“ESRB”)); Amy Hebert, *Video Games, Loot Boxes, and Your Money*, FED. TRADE COMM’N CONSUMER INFO. BLOG (Sept. 26, 2019), <https://www.consumer.ftc.gov/blog/2019/09/video-games-loot-boxes-and-your-money> (showing a roadblock from the FTC); Andy Chalk, *Loot Box Lawsuit Claims Electronic Arts Ran an ‘Unlicensed, Illegal Gaming System’*, PCGAMER (Oct. 22, 2020), <https://www.pcgamer.com/loot-box-lawsuit-claims-electronic-arts-ran-an-unlicensed-illegal-gaming-system> (showing a roadblock from the general public).

131. *See* Derek Tonin, *Loot Boxes Concerning, but Regulation a Step Too Far*, FTC Group Says, CALVINAYRE.COM (Aug. 17, 2020), <https://calvinayre.com/2020/08/17/business/loot-boxes-concerning-but-regulation-a-step-too-far-ftc-group-says>.

132. *See* Peters, *supra* note 130.

133. *About ESRB*, ELEC. SOFTWARE RATING BD., <https://www.esrb.org/about> (last visited Oct. 13, 2021). The ESRB is a non-profit, self-regulatory agency in the field of video games and is widely known to be responsible for rating all published video games. *Id.*

134. *See* Peters, *supra* note 130.

135. *See id.*; *see also* Rob Thubron, *Most Parents Don’t Pay Attention to Video Games’ Age Rating*, TECHSPOT (July 15, 2018, 8:40 AM), <https://www.techspot.com/news/75509-most-parents-dont-pay-attention-game-age-rating.html>.

136. Peters, *supra* note 130.

mechanics prior to purchase.<sup>137</sup> Although a good start, critics have pointed out that many consumers, especially parents, do not pay attention to this rating system.<sup>138</sup> As such, it has been argued that the ESRB has offered a hollow solution to the loot box issue, as many children will still be exposed to loot boxes due to parental laziness or a lack of technological literacy.<sup>139</sup>

The FTC has also engaged in investigations of potential predatory loot box practices.<sup>140</sup> The FTC has primarily analyzed issues relating to loot boxes via workshops where experts in the fields of gambling, video games, and child psychology opine on how loot box issues should be handled.<sup>141</sup> Generally, the FTC has opted to allow the video game industry to self-regulate.<sup>142</sup> However, unlike the ESRB, the FTC has also encouraged parents to educate themselves on loot box practices so that their children do not gain exposure to gambling at an early age.<sup>143</sup> Again, critics and consumers have been dissatisfied with the conclusions of regulatory bodies.<sup>144</sup> One online critic specifically criticized the FTC workshop, writing that:

[T]he report doesn't do very much to propose solutions with teeth to them. Due to mixed views of the panelists on regulatory approaches, the primary ways they advocate loot boxes should be curbed involve self-regulation. They suggest new [ESRB] initiatives to disclose if a game offers loot boxes, and better educational tools and disclosures to keep consumers informed of what they're getting into. Those efforts pale in comparison to how the gambling industry is regulated, of course. It's illegal for children to step up to a craps table and shoot some dice, but they can very easily spend a fortune with daddy's credit card to unlock the best basketball players for their virtual team. You can't always expect the most from a workshop, and specifically not from the laissez-faire FTC of the Trump administration. But when contrasted to how Europe and the U.K. have emphasized the growing problems of the video game industry, the FTC's middle ground approach is pretty weak.<sup>145</sup>

Generally speaking, it appears as though the current actions taken by both administrative and self-regulatory agencies are not enough to combat the issues and dangers posed to children by the presence of loot

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137. *See id.*

138. Thubron, *supra* note 135.

139. *See id.*

140. *See* Hebert, *supra* note 130.

141. *See id.*

142. *See* Tonin, *supra* note 131.

143. *See* Hebert, *supra* note 130.

144. *See, e.g.,* Tonin, *supra* note 131.

145. *Id.*

boxes in video games.<sup>146</sup> Further, video game critics, child psychologists, and video game consumers seem to agree with this view.<sup>147</sup> Since regulatory bodies have not been regulating loot box practices to the general public's liking, the general public has responded by attempting to take the issue into their own hands.<sup>148</sup> However, all of the successful pressure against the legality of loot boxes has been brought internationally.<sup>149</sup>

Presently, there is a class action lawsuit pursuant to loot boxes and gambling pending against Electronic Arts ("EA") in Canada, which has increased pressures on the industry.<sup>150</sup> Countries, including Belgium and the Netherlands, have successfully passed laws classifying loot boxes as a form of gambling.<sup>151</sup> Public backlash, primarily via social media, has been effective in forcing the hand of companies to renege on certain parts of their loot box business models.<sup>152</sup>

## 5. Cases Concerning Loot Boxes and Similar Issues

Several lawsuits in this country have been brought that involve loot boxes tangentially, but do not directly address the question of whether loot boxes constitute gambling.<sup>153</sup> However, the Northern District of

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146. See Eric Abent, *ESRB Reveals New Loot Box Labels but We're Seeing Two Problems*, SLASH GEAR (Apr. 13, 2020, 3:11 PM), <https://www.slashgear.com/esrb-reveals-new-loot-box-labels-but-were-seeing-two-problems-13616524>.

147. See Chalk, *supra* note 120. Research reports conducted by child psychologists, articles written by video games critics, and the general public all express concern over the lack of legislative or administrative response to the presence of loot boxes in video games. See *id.*; Zendle et al., *supra* note 121, at 14-17; Tonin, *supra* note 131. Specifically, they all express the same concerns that loot boxes are inherently predatory towards children and gambling addicts, and that the government should step in and recognize loot boxes as gambling. See Zendle et al., *supra* note 121, at 1-3; Tonin, *supra* note 131; McGrody, *supra* note 15.

148. See Chalk, *supra* note 130.

149. See generally Nicholas Straub, *Every Country with Laws Against Loot Boxes (& What the Rules Are)*, SCREEN RANT (Oct. 5, 2020), <https://screenrant.com/lootbox-gambling-microtransactions-illegal-japan-china-belgium-netherlands> (listing countries with laws banning loot box practices, which all happen to be international).

150. See Stoyan Todorov, *Class-Action Lawsuit Seeks 12-Year of Loot Box Money from EA*, GAMBLING NEWS (Oct. 25, 2020), <https://www.gamblingnews.com/news/class-action-lawsuit-seeks-12-year-of-loot-box-money-from-ea>; see also Chalk, *supra* note 130.

151. Wesley Yin-Poole, *Now Belgium Declares Loot Boxes Gambling and Therefore Illegal*, EUROGAMER, <https://www.eurogamer.net/articles/2018-04-25-now-belgium-declares-loot-boxes-gambling-and-therefore-illegal> (Apr. 27, 2018).

152. See, e.g., Cooney, *supra* note 129 (reporting that a video game company pulled advertisements related to loot boxes after public complaints on Twitter).

153. See, e.g., *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871, 883-84 (N.D. Ill. 2016) (reviewing whether the use of virtual currency in online gambling is adequate consideration); *R.A. v. Epic Games, Inc.*, No. 5:19-cv-325-BO, 2020 U.S. Dist. LEXIS 28953, at \*2 (E.D.N.C. Feb. 20, 2020); *Estavillo v. Blizzard Entertainment, Inc.*, No. 5:19-cv-05540-EJD, 2019 WL 6612061, at \*1 (N.D. Cal. Dec. 5, 2019). *R.A. v. Epic Games, Inc.*, involved misrepresentation and consumer protection claims with regard to loot boxes, but did not address whether loot boxes constitute gambling. *Epic Games, Inc.*, 2020 U.S. Dist. LEXIS 28953, at \*2. *Estavillo v. Blizzard Entertainment, Inc.*, involved claims under California law and the Americans with Disabilities Act

California has recently heard two cases that face this issue more closely.<sup>154</sup> Although only binding to California State gambling law, the analysis in these cases is pertinent to whether loot boxes satisfy the common law elements of gambling, as discussed later in this Note.<sup>155</sup>

The first of these two cases is *Coffee v. Google, LLC*.<sup>156</sup> In *Coffee*, plaintiffs, representing a class, alleged that loot boxes constitute illegal “slot machines or devices” under California law.<sup>157</sup> Plaintiffs spent about \$600 on loot boxes between two mobile games available on defendant’s Google Play Store.<sup>158</sup> Defendant received thirty percent of in-game purchases made in games sold on their online store.<sup>159</sup> From this, the plaintiffs alleged that the defendants profited from a game mechanic that “entice[d] consumers, including children, to engage in gambling and similar addictive conduct.”<sup>160</sup> The plaintiffs further asserted that the defendant offering such games on their online store amounted to the offering of a gambling device to consumers and children, and pled three claims under this theory.<sup>161</sup> Ultimately, the *Coffee* court did not need to answer whether loot boxes constitute gambling under California law, as the defendant was found to be immune from liability under all the pled causes of action pursuant to Section 230 of the Communications Decency Act of 1996.<sup>162</sup> Further, the plaintiffs were found to lack

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with regard to unclear refund terms for loot boxes. *Estavillo*, 2019 WL 6612061, at \*1. The plaintiff, representing himself pro se, alleged that he had depression and turned to video games for therapy and socialization. *See id.* Pro se representation refers to a plaintiff or defendant representing themselves without a lawyer. *See Pro Se*, BLACK’S L. DICTIONARY (5th Pocket ed. 2016). While the plaintiff was playing video games, he also bought loot boxes in games developed by the defendant. *Estavillo*, 2019 WL 6612061, at \*1. Eventually, the defendant banned the plaintiff from playing their games due to abusive behavior. *Id.* In response, plaintiff brought suit, as he could not claim refunds for the loot box content he could no longer access. *Id.* Loot box content refers to the in-game reward a player gains from purchasing a loot box. *Purchasing Loot Boxes*, *supra* note 27; *see supra* Part I (discussing what rewards a player can get from a loot box). Ultimately, the court in this matter denied both of the plaintiffs’ claims due to a failure to state an actionable claim and did not opine on whether loot boxes constitute gambling. *Estavillo*, 2019 WL 6612061, at \*4; *see also* FED. R. CIV. P. 12(b)(6) (showing the civil procedure rule under which the plaintiff’s claims were dismissed).

154. *See Coffee v. Google, LLC*, No. 20-cv-03901-BLF, 2021 U.S. Dist. LEXIS 26750, at \*1 (N.D. Cal. Feb. 10, 2021); *Mai v. Supercell Oy*, No. 5:20-cv-05573-EJD, 2021 U.S. Dist. LEXIS 178949, at \*1-2 (N.D. Cal. Sept. 20, 2021).

155. *See infra* Part III.A.1.

156. 2021 U.S. Dist. LEXIS 26750, at \*1.

157. *Id.* at \*2 (internal quotation marks omitted).

158. *See id.* at \*4. The underlying mobile games were *Final Fantasy Brave Exvius* and *Dragon Ball Z Dokkan Battle*. *Id.* at \*3.

159. *Id.* at \*5 (“[F]or every Loot box sale in a game downloaded from the Google Play store, Google receives 30% of the revenue[.]”) (internal quotation marks omitted).

160. *Id.* at \*6.

161. *See id.* at \*6-7. Plaintiffs claimed: (1) unjust enrichment; (2) violation of California’s Unfair Competition Law; and (3) violation of California’s Consumers Legal Remedies Act. *Id.*

162. *See id.* at \*8-9.

That question presents several thorny issues, the resolution of which could have a profound impact on video games, developers, and players. The Court concludes that it would be imprudent to address those issues on the scant record before it, particularly

standing for two of their claims, and did not adequately plead the third claim.<sup>163</sup> Regardless, this case paved the way for *Mai v. Supercell Oy*,<sup>164</sup> where the loot box gambling issue under California law was directly addressed.<sup>165</sup>

The *Mai* case also involved a class action suit alleging unjust enrichment, and violations of California's Unfair Competition Law and California's Legal Remedies Act.<sup>166</sup> The defendant in this case developed and published video games containing loot boxes.<sup>167</sup> The plaintiff alleged that he spent at least \$150 on loot boxes in defendant's games, and argued that, since loot boxes are gambling under California law, defendant had fostered an illegal gambling system.<sup>168</sup> The *Mai* court disagreed, and offered three arguments as to why, under California law, loot boxes do not constitute gambling.<sup>169</sup> First, in holding that the plaintiff lacked standing, the *Mai* court held that the loss of virtual currency did not constitute an "economic injury" as virtual currency cannot be exchanged for real-world cash after being purchased.<sup>170</sup> Second, the *Mai* court held that since loot boxes are a mechanic in a game of skill, they cannot be considered a "slot machine or device."<sup>171</sup> Finally, the *Mai* court held that the rewards gained from loot boxes are not things of value because they have no real-world monetary value.<sup>172</sup> Although specific to California law, these arguments are pertinent to the application of loot boxes to the common law elements of gambling.<sup>173</sup>

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when all claims in the complaint are subject to dismissal on other grounds. For purposes of the present motion, it is unnecessary to determine whether Loot Boxes are illegal slot machines or devices under California's gambling laws. Accordingly, the Court limits its evaluation of the motion to Google's arguments that it is entitled to immunity under the CDA and that Plaintiffs have not alleged essential elements of their claims.

*Id.* at \*9.

163. *See id.* at \*34-38.

164. No. 5:20-cv-05573-EJD, 2021 U.S. Dist. LEXIS 178949 (N.D. Cal. Sept. 20, 2021).

165. *See* Hannah Albarazi, *Court Pulls Plug on Gambling Suit Against Video Games*, LAW360 (Sept. 20, 2021, 10:24 PM), <https://www.law360.com/articles/1423472/court-pulls-plug-on-gambling-suit-against-video-games>.

166. *Mai*, 2021 U.S. Dist. LEXIS 178949, at \*1.

167. *Id.* at \*2-3. The underlying video games in this case are *Clash Royale* and *Brawl Stars*. *Id.*

168. *Id.* at \*3.

169. *See id.* at \*4-12 (showing the three reasons the *Mai* court held that loot boxes were not considered gambling under California law).

170. *See id.* at \*6-8. Under the California statutes alleged to be violated, an economic injury was needed to sustain a cause of action. *Id.*

171. *See id.* at \*8-11. Video games containing loot boxes are unquestionably games of skill. *Id.* However, it could be said that loot boxes themselves, as distinct from the video game, are their own game of chance. *Id.* The *Mai* court rejected the idea that the video game and the loot box were severable. *Id.*

172. *See id.* at \*11. This is the most cogent argument against classifying loot boxes as gambling, as discussed later in this Note. *See infra* Part III.A.1.

173. *See infra* Part II.C.1 (discussing the common law elements of gambling); *infra* Part III.A.1 (applying loot boxes to the common law elements of gambling).



### C. *The Development of American Gambling Law and Its Application Online*

Gambling law in this country is a patchwork of state and federal law.<sup>174</sup> Generally, most gambling activity is considered local in nature, and laws regulating such conduct have been left to the individual states.<sup>175</sup> However, in certain circumstances where gambling activity has fallen under the Commerce Clause,<sup>176</sup> the federal government has elected to pass its own legislation.<sup>177</sup>

#### 1. The State Common Law Test

Due to the nature of the relationship between state and federal gambling law, the legal elements of gambling are primarily gleaned from state common law.<sup>178</sup> Despite the fact that each state has the opportunity to create different gambling laws, each state usually defines gambling using the same three common law elements.<sup>179</sup> These elements are: (1) consideration; (2) chance; and (3) prize.<sup>180</sup> However, states do disagree as to what qualifies as a “prize” as it pertains to the legal definition of gambling, which has resulted in a minority and a majority rule on the subject.<sup>181</sup>

Consideration, in this context, is similar to the principle as seen in contract law.<sup>182</sup> The consideration element of gambling is satisfied when one must pay money to engage in the underlying gambling activity.<sup>183</sup> Examples include money payment for chips at a casino or exchanging

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174. See I. Nelson Rose, *Gambling and the Law: An Introduction to the Law of Internet Gambling*, U. NEV. L.V. GAMING RSCH. & REV. J., 2006, at 1, 1-6 (explaining the relationship between state and federal law regarding gambling).

175. See *id.* at 6 (“Gambling has always come under a state’s police power.”).

176. U.S. CONST. art. I, § 8, cl. 3.

177. See, e.g., 18 U.S.C. §§ 1081–1084 (2018). This set of statutes is the Wire Act. *Id.* The Act exercised federal control over interstate wire communications used to place bets. See *id.*; see also *Champion v. Ames*, 188 U.S. 321, 354 (1903) (holding that the articles of gambling are commerce and can be regulated by the federal government if used between the several states).

178. See Rose, *supra* note 174, at 2.

179. See, e.g., *Automatic Music & Vending Corp. v. Liquor Control Comm’n*, 396 N.W.2d 204, 206 (Mich. 1986).

180. *Id.*

181. Compare *State v. Pinball Machs.*, 404 P.2d 923, 927 (Alaska 1965) (showing the minority rule), with *Mai v. Supercell Oy*, No. 5:20-cv-05573-EJD, 2021 U.S. Dist. LEXIS 178949, at \*11 (N.D. Cal. Sept. 20, 2021) (showing the majority rule). Legal scholarship surrounding the common law elements of gambling do not expressly refer to a majority and minority prize rule. See, e.g., Rose, *supra* note 174, at 2. Rather, the existence of two different views about prize and legal value, and the fact that one interpretation as opposed to the other is preferred by a majority of states, signals the general existence of a majority and minority rule. See *infra* text accompanying notes 188-95.

182. See, e.g., *Hamer v. Sidway*, 27 N.E. 256, 257 (N.Y. 1891) (defining consideration at common law); see also Rose, *supra* note 174, at 2 (“Consideration is a legal term, most commonly found in the law of contracts.”).

183. See Rose, *supra* note 174, at 2 (“Almost all jurisdictions today find there is no consideration for gambling unless players are required to spend money.”).

money for credit electronically on sports betting websites, such as DraftKings.<sup>184</sup>

The chance element refers to the nature of the game involved in the underlying gambling activity.<sup>185</sup> The underlying game must be a game of chance, where luck is more determinative in the game's outcome than skill.<sup>186</sup> This element is easily visualized in consideration of casinos, as games such as blackjack, roulette, and craps are clearly determined more by luck than by skill.<sup>187</sup>

The prize element pertains to what is earned by an individual after engaging in a game of chance for some consideration.<sup>188</sup> In traditional gambling contexts, the chips earned from partaking in a game of blackjack would satisfy this element of gambling.<sup>189</sup> However, the prize cannot just be any item gained by paying consideration to partake in a game of chance.<sup>190</sup> The prize earned must have value.<sup>191</sup> The majority of states hold that a prize must have value in that it has monetary value.<sup>192</sup> Further, certain majority jurisdictions hold that a gambling prize cannot be limited to secondary markets in value, whereas others rule that monetary value in a secondary market is enough for it to be considered a valid gambling prize.<sup>193</sup> However, a minority of states deem it unnecessary for the prize to have monetary value altogether, holding that “[i]t is not the essence of gambling that the element of prize have a monetary market value. If that which one seeks to attain, regardless of whether it has value in money, may be attained by chance after payment of a price, then one is gambling.”<sup>194</sup> This view, held in cases such as *State v. Pinball Machines*, mirrors the views of international

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184. See *What Is Gambling?*, INT'L CTR. FOR YOUTH GAMBLING PROBLEMS & HIGH-RISK BEHAVS., <https://youthgambling.mcgill.ca/Gambling2/en/adolescents/whatisgambling.php> (last visited Oct. 13, 2021) (listing various activities that are considered gambling).

185. See Rose, *supra* note 174, at 2.

186. See *id.*; see also *Game of Skill*, BLACK'S L. DICTIONARY (5th Pocket ed. 2016) (“A game in which the outcome is determined by a player's superior knowledge or ability, not chance.”); *Game of Chance*, BLACK'S L. DICTIONARY (5th Pocket ed. 2016) (“A game whose outcome is determined by luck rather than skill.”).

187. See *What Is Gambling?*, *supra* note 184.

188. See Rose, *supra* note 174, at 2.

189. See *What Is Gambling?*, *supra* note 184.

190. See Rose, *supra* note 174, at 2.

191. See *id.*

192. See, e.g., *Mai v. Supercell Oy*, No. 5:20-cv-05573-EJD, 2021 U.S. Dist. LEXIS 178949, at \*11 (N.D. Cal. Sept. 20, 2021) (ruling that in California gambling law, a prize must be something that has monetary value).

193. Compare *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871, 883-84 (N.D. Ill. 2016) (ruling against use of secondary markets in determining the value of a prize), with *Kater v. Churchill Downs, Inc.*, 886 F.3d 784, 788-89 (9th Cir. 2018) (holding that value on a secondary market, as opposed to a primary market owned by the entity offering the gambling activity, satisfies the prize element).

194. *State v. Pinball Machs.*, 404 P.2d 923, 927 (Alaska 1965); see generally *Phillips v. Double Down Interactive, LLC*, 173 F. Supp. 3d 731, 736-39 (N.D. Ill. 2016) (considering whether winning online chips in an online casino constitutes winning a prize of value).

jurisdictions which have begun to regulate loot boxes as a form of gambling.<sup>195</sup>

## 2. History of Federal Regulation of Online Gambling Conduct

The federal government has only occasionally used its power under the Commerce Clause to exercise control over online conduct.<sup>196</sup> With regard to online gambling, the federal government has passed several statutes, through its commerce power, that control, or have previously controlled, such conduct including the: (1) Wire Act;<sup>197</sup> (2) Interstate Transportation of Wagering Paraphernalia Act;<sup>198</sup> and (3) Illegal Gambling Business Act.<sup>199</sup> The most notable and contemporary pieces of federal legislation passed under this power, with regard to the regulation of interstate gambling activities, are known as the Unlawful Internet Gambling Enforcement Act (“UIGEA”),<sup>200</sup> which was passed into law in October of 2006,<sup>201</sup> and the Professional and Amateur Sports Protection Act (“PAPSA”),<sup>202</sup> which was passed into law on October 28, 1992.<sup>203</sup> However, contrary to Congress’s intentions to exercise control over online gambling, the Supreme Court has recently held that the regulation of online gambling may be the responsibility of the several states.<sup>204</sup>

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195. 404 P.2d at 927 (Alaska 1965); *see, e.g.*, Kevin Liu, *A Global Analysis into Loot Boxes: Is It “Virtually” Gambling?*, 28 WASH. INT’L L.J. 763, 794 (2019) (“Belgium has found that ‘what is important is that players attach value to [the loot box prize] and that this value is also emphasized by the game developers themselves.’”).

196. *See, e.g.*, 15 U.S.C. §§ 8401–8405 (2018). This set of statutes is known as the Restore Online Shoppers’ Confidence Act. *Id.* The act uses the federal government’s commerce power by placing guidelines that online stores must follow while selling to customers. *See id.*

197. 18 U.S.C. §§ 1081–1084 (2018). The Wire Act has been used by the federal government to prosecute internet gambling cases against the owners of online gambling websites, as the statute provides criminal liability for knowingly using wire communications to engage in interstate gambling activity. *See* Michael Blankenship, Note, *The Unlawful Internet Gambling Enforcement Act: A Bad Gambling Act? You Betcha!*, 60 RUTGERS L. REV. 485, 488 (2008).

198. 18 U.S.C. § 1953 (2018). This Act has been used to combat internet gambling by criminalizing the interstate transport of gambling paperwork via a website. *See* Blankenship, *supra* note 197, at 490.

199. Blankenship, *supra* note 197, at 487; *see also* 18 U.S.C. § 1955 (2018). This Act allows the government to seek criminal liability for an online gambling business that is illegal in respects other than its internet status. *See* Blankenship, *supra* note 197, at 491.

200. 31 U.S.C. §§ 5361–5367 (2018).

201. *UIGEA Explained*, BETTINGUSA.COM, <https://www.bettingusa.com/laws/uigea> (last visited Oct. 13, 2021) (“The *Unlawful Internet Gambling Enforcement Act of 2006* (UIGEA) was signed into law by President George W. Bush in October of 2006.”).

202. 28 U.S.C. §§ 3701–3704 (2018).

203. *See* Jill R. Dorson, *What Is PAPSA, the Federal Ban on Sports Betting?*, SPORTSHANDLE (July 1, 2020), <https://sportshandle.com/what-is-paspa-sports-betting-ban-professional-amateur-sports/#:~:text=What%20Was%20PASPA%2C%20the%20Federal,state%20failed%20to%20do%20so> (“When the law was passed in 1992 . . .”).

204. *See* *Murphy v. NCAA*, 138 S. Ct. 1461, 1481, 1483–85 (2018).

The UIGEA prohibits a gambling business from “knowingly accept[ing], in connection with the participation of another person in unlawful Internet gambling” funds that were used in gambling activities.<sup>205</sup> In short, the law prohibits the use of online channels to transfer financial instruments used in gambling if the gambling behavior violates a federal or state law.<sup>206</sup> Further, the UIGEA provides that violations may rise to both criminal<sup>207</sup> and civil liability.<sup>208</sup> This law has been successfully invoked to challenge illegal gambling practices at the federal level,<sup>209</sup> but has also been constitutionally challenged, albeit unsuccessfully.<sup>210</sup> Regardless, the law is relevant to the loot box conversation.<sup>211</sup> The UIGEA expressly prohibits the processing of financial transactions that are related to any form of online gambling.<sup>212</sup> The UIGEA does not ban any form of gambling; instead, it bans payments made to unauthorized gambling sites.<sup>213</sup> For the UIGEA to cover loot boxes, purchasing a loot box would have to be considered a financial transaction pursuant to gambling rewards.<sup>214</sup> The UIGEA cannot be used to blanketly illegalize a gambling method, if loot boxes are to be considered one.<sup>215</sup> Further, the UIGEA contains an exemption for fantasy sports, which further hurts the argument of applying the UIGEA to loot boxes.<sup>216</sup> This is because it is likely that gambling jurisprudence applied to online sports betting may also be applied to loot box practices.<sup>217</sup> Unfortunately, PAPSA is not helpful for curtailing loot boxes.<sup>218</sup>

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205. 31 U.S.C. § 5363.

206. See *Glazer Capital Mgmt., LP v. Elec. Clearing House, Inc.*, 672 F. Supp. 2d 371, 374 (S.D.N.Y. 2009).

207. 31 U.S.C. § 5366(a). This section of the UIGEA provides that violations shall result in fines, imprisonment, or both. *Id.*

208. 31 U.S.C. § 5365. This section provides civil remedies for violation of the UIGEA separated from the section setting out criminal liability. *Id.*

209. See, e.g., *United States v. Rubin*, 743 F.3d 31, 34-37, 40 (2d Cir. 2014).

210. See *generally* *Interactive Media Ent. & Gaming Ass’n v. Att’y Gen. of the U.S.*, 580 F.3d 113 (3d Cir. 2009) (holding that the UIGEA survives a constitutional attack based on the vagueness doctrine).

211. See Alex Weldon, *The Latest Chapter in ‘Are Loot Boxes a Form of Online Gambling?’*, ONLINE POKER REP. (Aug. 29, 2020, 3:00), <https://www.onlinepokerreport.com/44170/loot-boxes-as-online-gambling>.

212. See 31 U.S.C. § 5363; see also *Sports Betting Laws from Around the World, GAMBLING SITES*, <https://www.gamblingsites.com/sports-betting/laws/#:~:text=There%20is%20NO%20prohibition%20against,it's%20not%20explicitly%20illegal%20either.&text=The%20UIGEA%20makes%20it%20illegal,it%20illegal%20to%20bet%20online> (last visited Oct. 13, 2021) [hereinafter *Sports Betting Laws*].

213. *Sports Betting Laws*, *supra* note 212.

214. See 31 U.S.C. § 5363; see also *Sports Betting Laws*, *supra* note 212.

215. See 31 U.S.C. § 5363; see also *Sports Betting Laws*, *supra* note 212.

216. *UIGEA Explained*, *supra* note 201 (“[T]he UIGEA specifically exempts . . . fantasy sports.”).

217. See Dorson, *supra* note 203.

218. See *id.*; see also Weldon, *supra* note 211.

In *Murphy v. NCAA*, the Supreme Court held that PAPSA was unconstitutional.<sup>219</sup> PAPSA was held to be unconstitutional not because Congress did not have the power to regulate sports gambling directly, but rather, because the act sought to “regulate[] state governments’ regulation’ of their citizens.”<sup>220</sup> In other words, the federal government has the power to regulate interstate gambling, so long as it does not compel states to enact or administer a federal regulatory program.<sup>221</sup> Without an effective replacement, the Supreme Court’s ruling on PAPSA “cleared the way for individual states to determine whether and how to legalize sports betting.”<sup>222</sup> In other words, each and every state could make their own decisions as to sports betting within their state lines.<sup>223</sup> New York courts have made rulings adverse to online sports betting that afford some guidance.<sup>224</sup> Individual plaintiffs were also recently successful in a New York state court regarding a New York law which dictated that online gambling through fantasy sports was not gambling.<sup>225</sup> States where online sports gambling is not legal or partially legal tend to require disclosures made by the company offering the service, and measures to ensure children do not participate.<sup>226</sup>

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219. 138 S. Ct. 1461, 1485 (2018).

220. *Murphy*, 138 S. Ct. at 1485 (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)).

221. *See id.*

222. Dorson, *supra* note 203.

223. *See id.*

224. *See generally* Michael Levenson, *Fantasy Sports Contests Are Illegal Gambling*, *New York Appeals Court Rules*, N.Y. TIMES (Feb. 6, 2020), <https://www.nytimes.com/2020/02/06/us/28-Fan-duel-draft-kings-law.html> (discussing a New York State court case invalidating a New York law which allowed online sports betting).

225. *See White v. Cuomo*, 181 A.D.3d 76, 86 (N.Y. App. Div. 2020); *see also* Levinson, *supra* note 224. In 2020, the highest New York court struck down a law passed by Governor Andrew Cuomo which legalized online sports betting in the state. *See Cuomo*, 181 A.D.3d at 86. At the lower-court level, part of the law was struck down because it violated the New York state constitution. *White v. Cuomo*, 87 N.Y.S.3d 805, 814-15 (N.Y. Sup. Ct. 2018). However, the lower court severed a part of the bill, holding that it was still constitutional because daily fantasy sports betting was not a game of skill. *Id.* at 822. On appeal, the higher court disagreed and struck down the law on both issues. *Cuomo*, 181 A.D.3d at 86. Fantasy Sports refers to online games in which an individual assembles a team of players with the goal of those players performing well so that the individual can accrue more points than their adversary, who also assembled a team of different players. *See generally* Chris Isidore, *Fantasy Sports: What Is It, Anyway?*, CNN (Oct. 6, 2015, 5:13 PM), <https://money.cnn.com/2015/10/06/news/companies/fantasy-sports-101/index.html>. People tend to gamble on fantasy sports, as well. *See Daily Fantasy Sports Sites*, BETTINGUSA.COM, <https://www.bettingusa.com/fantasy> (last visited Oct. 13, 2021). One such fantasy sport is known as “daily fantasy sports” and refers to assembling a daily or weekly team that competes with thousands of others rather than a single adversary. *See id.*

226. *See* Ashlee Kieler, *FanDuel, DraftKings to Pay \$12M to Resolve False Advertising Allegations in New York*, CONSUMERIST, <https://consumerist.com/2016/10/25/fanduel-draftkings-to-pay-12m-to-resolve-false-advertising-allegations-in-new-york> (Oct. 31, 2016, 4:29 PM).

*D. The Federal Trade Commission's Jurisdiction over Consumer Protection*

The FTC was commissioned in 1914 via the Federal Trade Commission Act.<sup>227</sup> Generally speaking, the statute gives the FTC the power to (1) promote competition; and (2) protect consumers.<sup>228</sup> The FTC's power to promote competition refers to its power to enforce antitrust regulations such as the Sherman Antitrust Act,<sup>229</sup> or the Clayton Antitrust Act,<sup>230</sup> via investigations and lawsuits.<sup>231</sup> Regarding consumer protection, the FTC's website states:

The FTC protects consumers by stopping unfair, deceptive or fraudulent practices in the marketplace. [The FTC] conduct[s] investigations, sue[s] companies and people that violate the law, develop[s] rules to ensure a vibrant marketplace, and educate[s] consumers and businesses about their rights and responsibilities. [The FTC] collect[s] reports on hundreds of issues from data security and deceptive advertising to identity theft and Do Not Call violations, and make[s] them available to law enforcement agencies worldwide for follow-up. [The FTC's] experienced and motivated staff use[] 21st century tools to anticipate – and respond to – changes in the marketplace.<sup>232</sup>

The FTC's jurisdiction over consumer protection is granted via a statute which grants the FTC the ability to promulgate rules, engage in administrative enforcement, and seek judicial remedies concerning “[u]nfair methods of competition in or affecting commerce . . . .”<sup>233</sup> In exercising its jurisdiction over consumer protection, the FTC may “prosecute any inquiry necessary to its duties in any part of the United States.”<sup>234</sup> Further, it is authorized “[t]o gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects

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227. 15 U.S.C. §§ 41–58 (2018).

228. *What We Do*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/what-we-do> (last visited Oct. 13, 2021); *Bureau of Consumer Protection*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-consumer-protection> (last visited Oct. 13, 2021).

229. 15 U.S.C. §§ 1–7 (2018).

230. 15 U.S.C. §§ 12–27 (2018); 29 U.S.C. §§ 52–53 (2018). The Clayton Antitrust Act is codified in two different chapters of the United States Code. *See* 15 U.S.C. §§ 12–27; 29 U.S.C. §§ 52–53.

231. *See* 15 U.S.C. § 45(a)(1) (2018); *see also A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N, <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority> (May 2021) [hereinafter *A Brief Overview*].

232. *What We Do*, *supra* note 228.

233. 15 U.S.C. § 45(a)(4)(A).

234. *Id.* § 43.

commerce . . . .”<sup>235</sup> Deceptive practices, within the statute, generally refer to material representations, omissions, or practices that are likely to mislead reasonable consumers.<sup>236</sup> A practice is unfair where it causes “substantial injury to consumers [that] is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”<sup>237</sup> The FTC curtails unfair or deceptive business practices by engaging in agency rulemaking, administrative enforcement, or judicial proceedings.<sup>238</sup>

The FTC’s rulemaking authority over consumer protection is primarily drawn from 15 U.S.C. § 57(a), which allows the FTC to promulgate rules that “define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce.”<sup>239</sup> The FTC partakes in rulemaking by having proceedings investigating deceptive practices.<sup>240</sup> In order to commence a proceeding, the FTC must have “reason to believe” that the underlying practices are prevalent.<sup>241</sup> After these proceedings, the FTC may go ahead with promulgating the underlying rules.<sup>242</sup> Although administrative, these rules hold weight and could lead to civil liability.<sup>243</sup> The FTC may seek judicial remedy for violation of their rules, so long as a violation occurs “with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule.”<sup>244</sup> Beyond liability for violation of an FTC rule, violators may also be responsible for civil damages caused to consumers, regardless of whether the violation was committed knowingly.<sup>245</sup>

The FTC also has broad jurisdiction to engage in administrative enforcement of consumer protection laws.<sup>246</sup> The FTC engages in administrative enforcement through: (1) administrative adjudication; (2) enforcement of final commission orders; (3) seeking redress pursuant to an administrative order; and (4) enforcing civil penalties on entities.<sup>247</sup> Administrative adjudication refers to the FTC’s ability to have a matter

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235. *Id.* § 46(a).

236. *A Brief Overview*, *supra* note 231.

237. 15 U.S.C. § 45(n) (2018); *see A Brief Overview*, *supra* note 231.

238. *See generally A Brief Overview*, *supra* note 231 (discussing rulemaking, administrative enforcement, and judicial proceedings as the three ways the FTC exercises its power over competition and consumer protection).

239. 15 U.S.C. § 57a(a)(1)(B) (2018).

240. *Id.* § 57a(b)(3); *see A Brief Overview*, *supra* note 231.

241. 15 U.S.C. § 57a(b)(3). “Prevalent” means that the issue for which the FTC is seeking to have a proceeding must be relevant and ripe. *See id.*

242. *See id.*

243. *See id.* § 57b; *see also A Brief Overview*, *supra* note 231.

244. *See A Brief Overview*, *supra* note 231 (internal quotation marks omitted).

245. *See id.*

246. *See* 15 U.S.C. § 45(a) (2018); *A Brief Overview*, *supra* note 231.

247. *See A Brief Overview*, *supra* note 231.

heard before an administrative law judge (“ALJ”) in a proceeding governed by the FTC’s rule of practice.<sup>248</sup> In this circumstance, the FTC brings a complaint before the ALJ and the company alleged to be engaging in unfair or deceptive practices litigates from the other side.<sup>249</sup> At the close of the proceeding, the ALJ will issue their initial decision and conclusions of fact and law.<sup>250</sup> Here, the ALJ also recommends the entry of an order to cease and desist of certain activities, or dismisses the FTC’s complaint.<sup>251</sup> These decisions can be appealed within the Administrative Court and to any United States Court of Appeals.<sup>252</sup> If the FTC’s administrative order goes unchallenged, the order can be enforced.<sup>253</sup> After further judicial review, the FTC may then also seek redress for consumers through its ability to impose civil damages onto companies who caused harm to consumers through practices discussed in the administrative order.<sup>254</sup>

To enforce its orders, or seek redress for consumers under its consumer protection jurisdiction, the FTC must also petition the court for enforcement.<sup>255</sup> Specifically, the FTC is authorized to seek preliminary<sup>256</sup> and permanent injunctions<sup>257</sup> against parties where the FTC has a reason to believe that they are violating the FTC’s rules, administrative orders, or federal laws which concern consumer protection.<sup>258</sup> The FTC tends to use these injunctions for several purposes.<sup>259</sup>

Despite the FTC’s breadth of tools to handle deceptive and unfair business practices, the FTC has presently elected to only participate in investigations, and subsequently, hold panels pursuant to loot box issues.<sup>260</sup> These investigations and panels have not produced the necessary results for loot box regulation, as they have generally advocated for self-regulation by the industry and greater parental

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248. *See id.* (“If the respondent elects to contest the charges . . .”).

249. *See id.*

250. *See id.*

251. *See id.*

252. *See* 15 U.S.C. § 45(c) (2018); *see also A Brief Overview, supra* note 231.

253. *See* 15 U.S.C. § 45(c).

254. *See A Brief Overview, supra* note 231.

255. *See id.*

256. *Preliminary Injunction*, BLACK’S L. DICTIONARY (5th Pocket ed. 2016). A preliminary injunction can be defined as “[a] temporary injunction issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case.” *Id.* An injunction is a court order preventing certain actions from being performed by certain parties. *See Injunction*, BLACK’S L. DICTIONARY (5th Pocket ed. 2016).

257. *Permanent Injunction*, BLACK’S L. DICTIONARY (5th Pocket ed. 2016). A permanent injunction can be defined as “[a]n injunction granted after a final hearing on the merits.” *Id.*

258. 15 U.S.C. § 53(a) (2018).

259. *See A Brief Overview, supra* note 231.

260. *See Hebert, supra* note 130.



involvement.<sup>261</sup> A practical look at how the FTC has handled loot boxes, as opposed to a general discussion of the FTC's power, can be found earlier in this Note.<sup>262</sup>

### III. LEGAL ISSUE: ARE LOOT BOXES ACTUALLY GAMBLING?

This Note considers two legal issues that are pertinent to inquiries pursuant to the regulation of video game loot box practices.<sup>263</sup> The first legal issue looks to answer the question of whether loot boxes constitute gambling in view of both the majority and minority rules.<sup>264</sup> The second legal issue seeks to identify which governmental body has the constitutional power to regulate the business practice.<sup>265</sup>

This Part begins by applying loot box practices to the common law elements for an action to be considered gambling.<sup>266</sup> In doing so, this Part concludes that loot boxes constitute gambling under the minority view on prizes earned from a gambling activity, but not under the majority view.<sup>267</sup> This Part then considers a common counterargument to the consideration of loot boxes as gambling.<sup>268</sup> The counterargument compares loot box practices to physical trading cards.<sup>269</sup> This Part also delineates why loot box regulation matters in the first place, as it is easy to forget why loot boxes need to be regulated in the minutiae of the law.<sup>270</sup> Finally, this Part pivots to a separate issue regarding whether state or federal entities should have jurisdiction over regulation of loot boxes.<sup>271</sup>

#### A. *The Majority and Minority Rule: How the Loot Box Gambling Comparison Fares*

Applying loot box methodology to the common law elements of gambling is relatively simple regarding the consideration and chance elements.<sup>272</sup> Issues arise in application to the prize element, however, as

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261. See Tonin, *supra* note 131.

262. See *supra* Part II.B.3.

263. See *infra* Part III.A–B.

264. See *infra* Part III.A; see also *supra* note 181 and accompanying text.

265. See *infra* Part III.B.

266. See *infra* Part III.A.1.

267. See *infra* Part III.A.1.

268. See *infra* Part III.A.2.

269. See *infra* Part III.A.2.

270. See *infra* Part III.A.3.

271. See *infra* Part III.B.

272. See Liu, *supra* note 195, at 794. Each argument in the *Mai* case addresses one of the common law elements of gambling. *Mai v. Supercell Oy*, No. 5:20-cv-05573-EJD, 2021 U.S. Dist. LEXIS 178949, at \*6-11 (N.D. Cal. Sept. 20, 2021); see *supra* text accompanying notes 170-72. The first argument cuts against the consideration element and questions the validity of virtual currency as adequate gambling consideration. *Mai*, 2021 U.S. Dist. LEXIS 178949, at \*6-8. The second argument cuts against the skill element, asserting that loot boxes cannot be severed from the

the items received from loot boxes, which mostly constitute items that can only be used within the game they are obtained, can be said to not have legal value.<sup>273</sup> This is an issue because the prize element of gambling at common law may turn on whether the prize received from a gambling activity has legal value.<sup>274</sup>

### 1. Application

Loot boxes satisfy the consideration element for gambling in that they allow a payment of real-world money in exchange for the ability to partake in a gambling activity.<sup>275</sup> In this circumstance, the player pays for the loot box, which is the underlying gambling activity.<sup>276</sup> In certain games, loot boxes may be earned without spending money, and as a prize for playing the game.<sup>277</sup> Regardless, the mere presence of an ability to buy the loot box in the video game shows that the player is exchanging consideration for the loot box.<sup>278</sup>

The chance element of gambling refers to whether or not the underlying gambling activity is a game of chance, as opposed to a game of skill.<sup>279</sup> If a game for which one pays a consideration to earn a prize is one where skill dominates the outcome, the game cannot be a gambling activity.<sup>280</sup> As such, in order for loot boxes to meet the legal standard for gambling, it must be said that they are a game of chance.<sup>281</sup> Opening a loot box merely requires the player to press a single button to pay, and then open the box.<sup>282</sup> Purchasing something that has the ability to reward a random assortment of items satisfies the chance element of gambling.<sup>283</sup> Loot boxes offer just that.<sup>284</sup>

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underlying game. *Id.* at \*8-11. These arguments are attenuated to the California law addressed in *Mai* as opposed to common law gambling generally. See Carl C. Jones, *The Fox in the Henhouse: The Failure of the Video Game Industry's Self-Regulation with Regard to Loot Boxes*, 24 CHAP. L. REV. 245, 262, 275 (2020). As such, this Note will only address the third argument in *Mai*, as the third argument is a common criticism against classifying loot boxes as gambling. See *infra* text accompanying notes 288-300.

273. See *infra* text accompanying notes 288-300.

274. See Rose, *supra* note 174, at 2.

275. See *Soto v. Sky Union, LLC*, 159 F. Supp 3d 871, 881 (N.D. Ill. 2016) (holding that payment for gems, a virtual currency, in a game used to purchase loot boxes is consideration pursuant to the legal elements of gambling).

276. See, e.g., *Purchasing Loot Boxes*, *supra* note 27.

277. *Sky Union*, 159 F. Supp 3d at 881.

278. See *id.* (holding that the ability to earn gems and loot boxes for free in a video game does not preclude a finding in favor of the consideration element where it is possible to spend money in the video game).

279. See Rose, *supra* note 174, at 2.

280. See *id.*

281. See Liu, *supra* note 195, at 794.

282. See Cecilia D'Anastasio, *Why Opening Loot Boxes Feels Like Christmas, According to Game Devs*, KOTAKU (Mar. 20, 2017, 2:00 PM), <https://kotaku.com/why-opening-loot-boxes-feels-like-christmas-according-1793446800>.

283. Liu, *supra* note 195, at 794; see Busby, *supra* note 81.

Loot boxes offer a prize.<sup>285</sup> When an individual purchases a loot box with consideration, they engage in a game of chance to obtain the prize of a random assortment of items that may be used in the game in which the loot box is purchased.<sup>286</sup> The prizes awarded from loot boxes would not satisfy the majority rule for gambling prizes, but would satisfy the minority rule.<sup>287</sup>

The majority rule for gambling prizes requires that the prize achieved from paying consideration to partake in a game of chance be something of legal value.<sup>288</sup> Generally, this means the prize must be worth real money or must have resale value.<sup>289</sup> Although some loot box prizes are able to be sold in a secondary market, giving them real-world value, the vast majority of loot box prizes are items that are given to the player to be used in the game and cannot be transferred or sold in any capacity.<sup>290</sup> As such, loot box prizes generally have no monetary value and cannot satisfy the majority rule regarding gambling prizes.<sup>291</sup>

When a loot box is purchased, the purchaser attaches value to the loot box prize.<sup>292</sup> The minority rule for gambling prizes calls for the prize to be something which an individual “seeks to attain, regardless of whether it has value in money, [and] may be attained by chance after payment of a price . . . .”<sup>293</sup> An individual purchasing a loot box, who attaches value to the prizes loot boxes give, definitely meets this standard.<sup>294</sup> As such, loot boxes meet the minority rule.<sup>295</sup> In view of academic studies involving the harmful effects of loot boxes on children,<sup>296</sup> the adoption of the minority rule, with respect to loot boxes only, is urged.<sup>297</sup> Further, even if there is hesitation to classify loot boxes as gambling in accordance with the majority rule regarding gambling

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284. See Liu, *supra* note 195, at 794 (stating that loot boxes satisfy the chance element of gambling because they offer the opportunity to obtain a random assortment of items).

285. D’Anastasio, *supra* note 282.

286. See *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871, 881-84 (N.D. Ill. 2016); D’Anastasio, *supra* note 282.

287. Compare *Mai v. Supercell Oy*, No. 5:20-cv-05573-EJD, 2021 U.S. Dist. LEXIS 178949, at \*11, with *State v. Pinball Machs.*, 404 P.2d 923, 927 (Alaska 1965).

288. See Rose, *supra* note 174, at 2.

289. See *Sky Union*, 159 F. Supp. 3d at 881.

290. Liu, *supra* note 195, at 792-96. Loot box prizes that have secondary market value are generally sold outside of the video game environment and may or may not be endorsed by the video game company. See Zendle et al., *supra* note 121, at 2. One such game that has such a marker is Counter-Strike: Global Offensive. See *id.* Courts disagree as to whether secondary market value satisfies the prize element of gambling. Compare *Sky Union*, 159 F. Supp. at 883-84, with *Kater v. Churchill Downs, Inc.*, 886 F.3d 784, 788-89 (9th Cir. 2018).

291. See *Sky Union*, 159 F. Supp. at 881, 883-84.

292. See Liu, *supra* note 195, at 794.

293. *State v. Pinball Machs.*, 404 P.2d 923, 927 (Alaska 1965).

294. See *id.*; see also Liu, *supra* note 195, at 794.

295. See *Pinball Machs.*, 404 P.2d at 927; see also Liu, *supra* note 195, at 794.

296. Zendle et al., *supra* note 121, at 14-17.

297. See *infra* Part IV.

prizes, loot boxes should still be considered gambling in view of its similarities to gambling activity, effects on children, and ease of access.<sup>298</sup>

While there is a cogent legal argument to consider loot boxes gambling under the adoption of the minority view of gambling prizes,<sup>299</sup> there is an equally cogent argument for adoption of the majority rule.<sup>300</sup> As such, the adoption of either rule will primarily focus on policy considerations.<sup>301</sup> The adoption of the minority rule, and subsequent classification of loot boxes as gambling, is backed by studies showing that loot boxes elicit gambling addiction in children and that companies are using psychological techniques to lure children into spending.<sup>302</sup> However, the classification of loot boxes as gambling has also been called “apocalyptically stupid,” and thus, such individuals advocate for the adoption of the majority rule regarding gambling prizes.<sup>303</sup>

## 2. Counterarguments

Arguments against classification of loot boxes as gambling, irrespective of the legal definition issues discussed above,<sup>304</sup> include the fact that classifying loot boxes as gambling would seemingly result in the classification of trading cards as gambling,<sup>305</sup> and that classifying loot boxes as gambling would force game developers to denote that some of their video games, originally marketed towards children, are now for adults.<sup>306</sup>

The trading card argument fails because the comparison with loot boxes is based on facial similarities.<sup>307</sup> In fact, the only similarity is that

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298. See Zendle et al., *supra* note 121, at 14-17; see also Spencer Rutledge, *How Loot Boxes Don't Resemble Trading Cards*, *HARDCORE GAMER* (Oct. 15, 2017), <https://hardcoregamer.com/2017/10/15/how-loot-boxes-dont-resemble-trading-cards/275720>.

299. See *Pinball Machs.*, 404 P.2d at 927; see also Chalk, *supra* note 120. *But see* Mai v. Supercell Oy, No. 5:20-cv-05573-EJD, 2021 U.S. Dist. LEXIS 178949, at \*11; Isobel Asher Hamilton, *There's a Debate Raging in Video Games over Whether Loot Boxes Should Be Classified As Gambling*, *BUS. INSIDER* (July 5, 2020, 5:22 AM), <https://www.businessinsider.com/classifying-video-game-loot-boxes-as-gambling-2020-7> (showing that there is a viable argument on both sides of the loot box controversy).

300. See *Mai*, 2021 U.S. Dist. LEXIS 178949, at \*11.

301. See Hamilton, *supra* note 299. Since the federal government is not bound by state law, it may elect to control loot boxes as gambling regardless of whether a loot box is considered gambling under any state's laws or the common law elements of gambling. See *infra* text accompanying notes 330-33.

302. See Zendle et al., *supra* note 121, at 14-17.

303. Hamilton, *supra* note 299 (internal quotation marks omitted).

304. See *supra* Part III.A.1.

305. See Wright, *supra* note 72.

306. See Hamilton, *supra* note 299. If games made for children are suddenly forced to be advertised as games made for adults, video game companies fear sales of those children's games will fall. See *id.*

307. See Rutledge, *supra* note 298.

both offer a random assortment of items for the payment of a fee.<sup>308</sup> The comparison ignores that it is much easier to purchase a loot box, as compared to a pack of trading cards.<sup>309</sup> Further, the same concerns regarding loot boxes and gambling behavior have generally not been extended to trading cards.<sup>310</sup> The comparison between loot boxes and trading cards ignores nuanced differences between the two business practices and, thus, cannot be an effective counterargument against the classification of loot boxes as gambling.<sup>311</sup>

The complaint that the classification of loot boxes as gambling would result in companies being forced to “slap[] [a] . . . label on a wide range of games aimed at children” rings hollow, as well.<sup>312</sup> Essentially, companies will be held accountable for marketing their games with loot boxes to children.<sup>313</sup> It is clear that loot boxes elicit addictive gambling behavior when purchased by children.<sup>314</sup> To refuse to classify loot boxes as gambling, simply because an ample amount of children’s games will then become games for adults, is simply nonsensical.<sup>315</sup>

### 3. Why Loot Box Regulation Matters

Irrespective of whether loot boxes constitute gambling under any legal definition, there are compelling reasons for governmental regulation.<sup>316</sup> Loot box practices have a negative impact on children and gambling addicts in this country.<sup>317</sup> Several psychological studies have found that buying loot boxes is linked to onset gambling addiction.<sup>318</sup> Further, the continued reign of loot box practices without government regulation has led to children going into debt, stealing their parents credit cards, stealing electronics, and even spending so much money that

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308. *See id.*; compare R.A. v. Epic Games, Inc., No. 5:19-cv-325-BO, 2020 U.S. Dist. LEXIS 28953, at \*2 (E.D.N.C. 2020) (defining loot boxes in part as receiving a random assortment of items), with Steve Rosen, et al., *Should Trading Cards Be Considered a Form of Gambling?*, CHI. TRIB. (Nov. 1, 2019, 5:20 PM), <http://www.chicagotribune.com/business/success/sns-201911011303--tms--kidmoneyctnsr-a20191101-20191101-story.html>.

309. *See* Rutledge, *supra* note 298. It is much easier to purchase loot boxes because they can be purchased remotely and opened immediately, whereas trading cards must be purchased physically, or remotely with a wait before being able to open them. *See id.*

310. *See id.* But see Erica Okerberg, *What’s in a Game? A Test Under Which We May Call a “VGT” a Gambling Game Is Not So Sweet: Why Courts Should Not Apply the Material Element Test to VGTS*, 5 U. NEV. L.V. GAMING L.J. 27, 32-33 (2014) (discussing and agreeing that trading cards implicate gambling issues).

311. *See* Rutledge, *supra* note 298.

312. Hamilton, *supra* note 299.

313. *See id.*

314. *See* Zendle et al., *supra* note 121, at 14-17.

315. *See id.*

316. *See* McGrody, *supra* note 15; *see also* Tonin, *supra* note 131.

317. *See* Wiltshire, *supra* note 5.

318. *See, e.g.*, Zendle et al., *supra* note 121, at 1-3, 14-17.

parents have to remortgage their homes.<sup>319</sup> These are not the behaviors we want our children to be expressing.<sup>320</sup> Regarding gambling addicts, there are several stories of young adults who have lost large sums of money due to loot box addiction.<sup>321</sup>

The lack of applicable federal law further compounds these issues, as all of the relevant statutes controlling online gambling behavior are unhelpful.<sup>322</sup> PAPSA is particularly unhelpful since it was found to be unconstitutional in 2018.<sup>323</sup> The UIGEA is also unhelpful, although it has been found to be constitutional.<sup>324</sup> The statute that seems to provide the most guidance is the Wire Act, but it is unlikely that it can be used to curtail loot boxes.<sup>325</sup> The problem with current online gambling laws is that they generally prohibit the interstate transfer of funds that were gained through gambling, and do not prohibit the gambling activities themselves.<sup>326</sup> The prohibition of gambling activities is generally left to the states.<sup>327</sup> However, the unique problem and nature of loot boxes necessitates federal administrative regulation.<sup>328</sup>

### B. *Why Federal Jurisdiction Supersedes State Jurisdiction As a Matter of Law*

In consideration of a textual view of our Commerce Clause jurisprudence, the practice of loot boxes falls under the jurisdiction of the federal government, as opposed to state governments.<sup>329</sup> This is because the purchasing of loot boxes is inherently interstate due to the nature of online spending.<sup>330</sup> Several statutory regulations have been passed which regulate online conduct via the Commerce Clause and

319. See Young, *supra* note 6; Chadwick, *supra* note 7.

320. See Chadwick, *supra* note 7.

321. See, e.g., Gach, *supra* note 17; 'How My Son Went from Gamer to Compulsive Gambler', *supra* note 10.

322. See 31 U.S.C. §§ 5361–5367 (2018); 28 U.S.C. §§ 3701–3704 (2018); 18 U.S.C. §§ 1081–1084 (2018). All of these aforementioned statutes are unhelpful due to their language. See 31 U.S.C. §§ 5361–5367; 28 U.S.C. §§ 3701–3704; 18 U.S.C. §§ 1081–1084.

323. Murphy v. NCAA, 138 S. Ct. 1461, 1481, 1483–85 (2018).

324. See Interactive Media Ent. & Gaming Ass'n v. Att'y Gen. of the U.S., 580 F.3d 113, 117–19 (3d Cir. 2009); see also 31 U.S.C. § 5363. The UIGEA is unhelpful because it does not outlaw gambling acts, but rather outlaws the transfer of funds won in gambling activities. See 31 U.S.C. § 5363; see also *UIGEA Explained*, *supra* note 201.

325. See 18 U.S.C. §§ 1081–1084; see also Blankenship, *supra* note 197, at 488. The Wire Act prevents the use of wire communications in an online gambling context. *Id.* Although unlikely, online video game systems could be considered wire communications. See *id.*

326. See 31 U.S.C. §§ 5361–5367; 28 U.S.C. §§ 3701–3704; 18 U.S.C. §§ 1081–1084; see also *supra* Part III.C.

327. See Rose, *supra* note 174, at 3.

328. See *infra* Part III.B, IV.A.

329. See Samuel Mogensen, Note, *Don't Chase Your Losses: Online Gambling Regulation and Solutions in Minnesota*, 44 MITCHELL HAMLIN L. REV. 1105, 1107–08, 1122 (2018) (describing jurisdiction over gambling issues in view of the Commerce Clause).

330. See *id.*

have been held to be constitutional.<sup>331</sup> As such, the Commerce Clause can be constitutionally invoked to regulate online conduct.<sup>332</sup> This does not necessarily mean that states cannot pass their own loot box laws, but, since this Note suggests a federal solution, any potential state law will be overshadowed in view of the Supremacy Clause.<sup>333</sup> Statutory regulations involving online gambling are not necessarily on point with regard to loot boxes, as discussed above.<sup>334</sup> As such, the remaining remedies for loot box issues are new federal legislation or administrative control.<sup>335</sup> Policy reasons as to why new federal legislation is undesirable are discussed later in this Note.<sup>336</sup>

With regard to administrative control, the FTC has jurisdiction over loot box practices under the Federal Trade Commission Act.<sup>337</sup> Specifically, the FTC can control loot boxes through its jurisdiction over consumer protection because loot boxes are a deceptive and unfair practice.<sup>338</sup> Loot boxes are a practice which causes substantial injury to consumers regardless of whether they are children or adult gambling addicts.<sup>339</sup> This is because the practice elicits gambling behaviors and causes consumers to waste money.<sup>340</sup> The FTC has already invoked its jurisdiction to conduct panels and investigations on loot box business practices.<sup>341</sup> Since loot boxes are an unfair business practice, they fall under the FTC's consumer protection jurisdiction and are subject to the FTC's tools for redress.<sup>342</sup>

#### IV. ADVOCATING FOR A SOLELY ADMINISTRATIVE SOLUTION

Loot boxes present a multifaceted issue where it could be argued that state governments, the federal government, or administrative agencies should have control on legal, or policy, grounds.<sup>343</sup> From a legal perspective, as stated, loot boxes can fall under federal control due

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331. See *id.* at 1122; see also Blankenship, *supra* note 197, at 487-88, 490-91.

332. See U.S. CONST. art. I, § 8, cl. 3; see also Mogensen, *supra* note 329, at 1107-08, 1122.

333. See U.S. CONST. art. VI, cl. 2.

334. See *supra* Part II.C.2.

335. See *infra* Part IV.A-B.

336. See *infra* Part IV.A-B.

337. See 15 U.S.C. §§ 41-58 (2018).

338. See 15 U.S.C. § 45(a)(4)(A); *A Brief Overview*, *supra* note 231; see also Harrison, *supra* note 85.

339. See, e.g., Young, *supra* note 6; Chadwick, *supra* note 7; Wiltshire, *supra* note 5; Gach, *supra* note 17; 'How My Son Went from Gamer to Compulsive Gambler', *supra* note 10.

340. See Zendle et al., *supra* note 121, at 14-17; Dolan, *supra* note 22; Gach, *supra* note 17; 'How My Son Went from Gamer to Compulsive Gamer', *supra* note 10.

341. See Hebert, *supra* note 130.

342. See *A Brief Overview*, *supra* note 231; see also Harrison, *supra* note 85.

343. See *supra* Part III.B.

to the Commerce Clause and Supremacy Clause.<sup>344</sup> However, it still remains to be determined whether Congress or a federal administrative agency should provide the remedy for loot boxes.<sup>345</sup> Part IV of this Note answers this question.<sup>346</sup>

This Part proposes a solution to curtail the negative effects of video game loot boxes through legal channels by making three considerations.<sup>347</sup> First, this Part proposes that the federal government should not continue to defer to states in online gambling issues, and loot boxes by extension, as a matter of policy.<sup>348</sup> If the federal government does not want to do so, it should at least exercise jurisdiction narrowly over loot boxes themselves.<sup>349</sup> Second, this Part proposes that when the federal government exercises jurisdiction over loot boxes, it should do so via the FTC.<sup>350</sup> Finally, this Part proposes several actions the FTC should take in order to regulate loot boxes.<sup>351</sup>

#### A. *Why Federal Jurisdiction over Loot Boxes Supersedes State Jurisdiction As a Matter of Policy*

Separate from legal implications, federal jurisdiction over loot boxes is more desirable as compared to state jurisdiction for policy reasons.<sup>352</sup> The primary consideration behind this sort of desirability implicates efficiency of regulation between the two entities.<sup>353</sup> Loot boxes can be sold and purchased anywhere and at any time.<sup>354</sup> Video games that contain loot boxes can also be sold and purchased in any state.<sup>355</sup> As such, delegating control of online gambling activity, and specifically loot boxes, to the states potentially relegates gaming companies to fifty different sets of rules and runs the risk of confusing consumers as to what is and is not allowed regarding loot boxes.<sup>356</sup> If the federal government chose to exercise control, then gaming companies would only have to refer to one set of regulations regarding loot boxes,

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344. See U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. art. VI, cl. 2; see also Mogensen, *supra* note 329, at 1107-08, 1122.

345. See *infra* Part IV.B.

346. See *infra* Part IV.A–C.

347. See *infra* Part IV.A–C.

348. See *infra* Part IV.A.

349. See *infra* Part IV.A.

350. See *infra* Part IV.B.

351. See *infra* Part IV.C.

352. Cf. Weinberg, *supra* note 45, at 316-20.

353. See *supra* Part III.B.

354. *Purchasing Loot Boxes*, *supra* note 27.

355. See *id.*

356. See Alexandra M. Prati, Note, *Video Games in the Twenty-First Century: Parallels Between Loot Boxes and Gambling Create an Urgent Need for Regulatory Action*, 22 VAND. J. ENT. & TECH. L. 215, 242-43 (2019) (“State regulation of video games would apply a patchwork of disparate laws to developers producing games for national audiences.”).



making it easier for them to program video games in accordance with our laws.<sup>357</sup> Further, if there is only one set of rules, there would be no confusion as to what is and is not allowed regarding loot boxes amongst consumers.<sup>358</sup>

One could argue, however, that federal regulation of loot boxes and online gambling conduct is not preferable to state regulation, as the states already regulate offline gambling activity.<sup>359</sup> This argument fails to consider that online and offline gambling are wholly different with regard to access and commerce.<sup>360</sup> In order to participate in offline gambling, one must physically go to a gambling establishment.<sup>361</sup> In this circumstance, the gambler and the provider of the gambling activity must both be in one place at the same time to engage in gambling activity.<sup>362</sup> State regulation of offline, in-person gambling is preferable because this sort of gambling cannot occur between two states.<sup>363</sup> All involved parties must be in the state to engage in the gambling activity.<sup>364</sup> Offline gambling activity only implicates interstate commerce where the fruits of said gambling activities, or their instruments, are being transported between states.<sup>365</sup> In this circumstance, the federal government has actually passed constitutional federal laws criminalizing transport between states.<sup>366</sup> With regard to loot boxes, the same consideration should be afforded.<sup>367</sup> Although it is technically possible for loot box purchases to occur within one state, it is far more likely that the purchaser and purchasee are in different states.<sup>368</sup> As such, state regulation is not preferable.<sup>369</sup>

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357. *Id.*

358. *Id.*

359. *See* Dorson, *supra* note 203.

360. *See* MintDice, *Online Gambling Vs. Offline Gambling: Settling the Popularity Debate*, MEDIUM (Dec. 24, 2019), <https://medium.com/bitcoin-news-today-gambling-news/online-gambling-vs-offline-gambling-settling-the-popularity-debate-a16a5247d6a4#:~:text=Unlike%20offline%20gambling%2C%20where%20you,time%2C%20effort%2C%20and%20money.>

361. *See id.*

362. *See id.*

363. *See id.*

364. *See id.*

365. *See id.*

366. *See, e.g.*, Interstate Transportation of Wagering Paraphernalia Act, 18 U.S.C. § 1953 (2018); Wire Act, 18 U.S.C. §§ 8401–8405 (2018).

367. *See* Prati, *supra* note 356, at 228, 246, 249.

368. *See* Blankenship, *supra* note 197, at 488 (“The government maintains that [i]nternet gambling ‘occurs in the location it is placed and in the location in which it is received.’”); *Purchasing Loot Boxes*, *supra* note 27.

369. *See* Prati, *supra* note 356, at 242-43.

*B. Federal Legislation Versus Administrative Regulations: Why the Federal Trade Commission Should Have Primary Control*

Federal regulation, via administrative law and the FTC, is preferable to bare federal legislation pursuant to the regulation of video game loot boxes.<sup>370</sup> The FTC's mission is to engage in consumer protection.<sup>371</sup> Further, Congress has bestowed the ability to litigate and regulate consumer protection upon the FTC.<sup>372</sup> The FTC has also already engaged in investigations and workshops regarding loot boxes.<sup>373</sup> As such, it seems that the FTC already has specialized knowledge on the subject, as compared to Congress, a legislative body that is constantly handling a breadth of specialized issues.<sup>374</sup> Further, administrative agencies such as the FTC are free from the "swirl of controversial politics and daily pressures of special-interest groups."<sup>375</sup> As such, they can regulate from a point of view that is more politically insular.<sup>376</sup> Regardless, the FTC has taken a laissez-faire approach to regulation of loot boxes.<sup>377</sup> This creates an issue, as, regardless of whether loot boxes are gambling or whether an issue actually exists, the FTC has punted the issue to self-regulatory bodies, such as the ESRB and parents.<sup>378</sup>

*C. FTC Regulation of Loot Boxes*

Regulation of loot boxes via the FTC would occur via the FTC's power to investigate consumer protection, promulgate regulations, and bring suit against violators.<sup>379</sup> The FTC could promulgate several rules that would curtail the negative effects of loot boxes on children or gambling addicts.<sup>380</sup> These rules will generally center around the prevention of child purchasers, and potential disclosures that video game companies must make.<sup>381</sup> The FTC could require video game companies to collect photo identification of the players of their games to verify ages.<sup>382</sup> Further, the FTC could require video game companies to

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370. Cf. Weinberg, *supra* note 45, at 316-20.

371. *What We Do*, *supra* note 228.

372. *Id.*; see 15 U.S.C. § 46(a) (2018).

373. See, e.g., Hebert, *supra* note 130.

374. See *id.* (showing the FTC's specialized knowledge through a panel held by the FTC).

375. Mary Gardiner Jones, *The Role of Administrative Agencies as Instruments of Social Reform*, 19 ADMIN. L. REV. 279, 290 (1967) ("The very isolation of administrative agencies from the swirl of controversial politics and the daily pressures of special-interest groups renders them ideal vehicles for the administration of overall social policies . . .").

376. *Id.*

377. See Tonin, *supra* note 131.

378. See *id.*

379. See 15 U.S.C. § 46(a) (2018).

380. *Id.* § 57a (2018).

381. See *supra* Part III.A (discussing children and gambling addicts as the two groups most susceptible to loot boxes).

382. 15 U.S.C. § 46(a) (providing the rule under which the FTC would make the rule).

program more rigid parental controls into their games.<sup>383</sup> For example, the FTC could require video game companies to program their products so that loot box purchasing is locked for accounts which show any sign that they are owned by a child.<sup>384</sup> The game company would then request that the player provide proof of age in order to release the lock.<sup>385</sup> If it is decided that loot box regulation will be left to state law, the FTC could require video game companies to track what state the game is being played from via IP address and lock out players within certain states.<sup>386</sup> Further, although the ESRB has already created a label to denote whether a game contains loot boxes, the FTC may require video game companies to create a more noticeable label than the one provided by the ESRB.<sup>387</sup>

With regard to disclosures, the FTC may adopt similar disclosures that sports betting websites are required to engage in by certain states.<sup>388</sup> Disclosures may include: (1) a disclosure that players need to be above the age of eighteen to buy loot boxes; (2) a disclosure of the numerical odds by which loot boxes give players certain items; (3) a disclosure in video game advertisements that the game contains features that constitute gambling; and (4) a disclosure that games containing loot boxes are not appropriate for children.<sup>389</sup> If it is decided that loot box regulation will be left to the states, disclosures as to what states allow loot boxes may also be necessary.<sup>390</sup> With the previous suggested controls in mind, the FTC's regulation would read:

§ XX.REGULATION OF LOOT BOXES AND OTHER VIDEO GAME GAMBLING MECHANICS

(a) *Definitions.* For the purposes of this section:

(1) A "loot box" is defined as a mechanic in a video game that allows the game player to pay a consideration to open an in-game chest of random in-game items.

(2) A "minor oriented game" is defined as a game that is rated below "M" on the ESRB's rating scale.

(3) A "game publisher" is any company which publishes a video game.

(b) *General Loot Box Regulation.* If a game publisher is to publish a game containing loot boxes into the market, they must:

(1) include a label on the video game packaging which indicates to the purchaser that the video game contains loot boxes;

383. See *id.*; see also *Loot Boxes 101: A Primer for Parents*, *supra* note 16. Most video games allow parents to create certain settings for children; see generally *Kids, Parents, and Video Games*, *supra* note 40 (defining parental controls).

384. See 15 U.S.C. § 46(a)–(b).

385. See *id.*

386. See *id.*

387. See *id.*; see also Peters, *supra* note 130.

388. See Kieler, *supra* note 226.

389. See *id.*

390. See *id.*

- (2) disclose the presence of loot boxes in the game in any and all advertisements; and
- (3) include several in-game disclosures including:
  - (i) the nature of loot boxes and how they lead to gambling addiction; and
  - (ii) a disclosure of the numerical odds by which each in-game item can be obtained in the loot box.
- (c) *Regulation of Loot Boxes in Minor Oriented Games.* If a game publisher is to publish a minor oriented game containing loot boxes, they must comply with all the regulations in this rule and
  - (1) require players to authenticate their age to be allowed to purchase loot boxes;
  - (2) implement a system that limits the player's spending at a certain amount; and
  - (3) have an in-game disclosure that:
    - (i) video games with loot boxes are not suitable for children.
- (d) *Violation of Regulations.* If a video game publisher publishes a game containing loot boxes that does not follow these guidelines, the Federal Trade Commission reserves the right, in its administrative capacity, to:
  - (1) investigate the video game publisher alleged to be in violation; and
  - (2) bring a suit for injunctive relief against the video game publisher alleged to be in violation.<sup>391</sup>

If a video game company were to violate these regulations, then they would be subject to administrative and judicial hearings.<sup>392</sup> Ideally, an administrative action would initially be brought by the FTC in front of an ALJ.<sup>393</sup> The ALJ would then hear both parties, make their conclusions as to the law and facts, and then issue an order as to whether the video game company knowingly violated the FTC loot box regulations.<sup>394</sup> In this circumstance, the video game company would have a chance to appeal through the FTC, or to a federal court.<sup>395</sup> If there is no appeal, the FTC would seek enforcement in federal court.<sup>396</sup> Enforcement would involve enjoining the video game company from continuing to sell loot boxes in the underlying involved games.<sup>397</sup> If the FTC has a “reasonable belief” that the loot box practice conveyed civil

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391. See *Ratings Guide*, ELEC. SOFTWARE RATING BD., <https://www.esrb.org/ratings-guide> (last visited Oct. 13, 2021) (showing the different ESRB age ratings); cf. S. 1629, 116th Cong. (2019) (borrowing language used in the proposed law to inspire the proposed regulatory language); 16 C.F.R. § 1.1 (2020) (using FTC rules as the format for drafting the loot box regulation language).

392. See 15 U.S.C. § 45(a) (2018); *A Brief Overview*, *supra* note 231; see also *supra* Part II.D (discussing the broad consumer protection jurisdiction of the FTC).

393. See *A Brief Overview*, *supra* note 231; see also *supra* Part II.D.

394. See *A Brief Overview*, *supra* note 231; see also *supra* Part II.D.

395. See 15 U.S.C. § 45(c); *A Brief Overview*, *supra* note 231; see also *supra* Part II.D.

396. See 15 U.S.C. § 45(c); *A Brief Overview*, *supra* note 231; see also *supra* Part II.D.

397. 15 U.S.C. § 53(b) (2018); see also *supra* Part II.D.

damages on consumers, the agency may also seek redress and civil liabilities for consumers at federal court.<sup>398</sup>

## V. CONCLUSION

Based on the foregoing, it is clear that loot boxes pose both legal<sup>399</sup> and policy-driven<sup>400</sup> issues regarding their effect on the general public, necessitating some sort of administrative action.<sup>401</sup> Since their conception, and up to present day, loot boxes have presented problems to the public.<sup>402</sup> At the start, the issue was related to consumer satisfaction.<sup>403</sup> However, as the business practice gained traction, people began to realize the business practice was akin to gambling and had a negative effect on children.<sup>404</sup> The psychological and journalistic literature reflects that this issue persists today.<sup>405</sup> Without some sort of government intervention, video game companies are likely to maintain their loot box practices, as they are a lucrative means to monetize products post-sale.<sup>406</sup> As such, the federal government should immediately intervene via the FTC.<sup>407</sup>

Loot boxes constitute gambling under the common law elements of gambling.<sup>408</sup> One must pay cash, or pay via virtual currency, to open a loot box.<sup>409</sup> Loot boxes are completely chance-based, as there is no chance for the player to have any input which will increase their odds of receiving a better output from a loot box.<sup>410</sup> Under the minority rule for prize, the items received from loot boxes have value as well.<sup>411</sup> However, if the majority rule is adopted, the FTC and federal government should still consider making an exception for loot boxes due to their drastic effect and impact on children playing video games.<sup>412</sup>

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398. See *A Brief Overview*, *supra* note 231.

399. See *supra* Part III.

400. See *supra* Part II.B.

401. See *supra* Part IV.

402. Compare Jackson, *supra* note 104 (showing an example of loot boxes being an issue in 2017), with Fiona Simmons, *Study: Young Gamers Steal Money from Parents to Buy Loot Boxes*, GAMBLING NEWS (Dec. 24, 2020) <https://www.gamblingnews.com/news/study-young-gamers-steal-money-from-parents-to-buy-loot-boxes> (showing an example of loot boxes being an issue in 2020).

403. See Zentler, *supra* note 107.

404. See Freedman, *supra* note 117; Chalk, *supra* note 120; Zendle et al., *supra* note 121, at 14-17.

405. See Zentle et al., *supra* note 121, at 14-17; Dolan, *supra* note 22.

406. See Wright, *supra* note 72.

407. See *supra* Part IV.B.

408. See *supra* Part III.A (applying the purchasing of loot boxes to the common law elements of gambling).

409. See *Purchasing Loot Boxes*, *supra* note 27.

410. Compare *Game of Chance*, *supra* note 186 (defining a game of chance), with Liu, *supra* note 195, at 785, 794. See also Pickell, *supra* note 5.

411. See *State v. Pinball Machs.*, 404 P.2d 923, 927 (Alaska 1965); see also Liu, *supra* note 195, at 794.

412. See *supra* Part III.A.

The FTC has jurisdiction over loot box practices through several means.<sup>413</sup> Loot box practices inherently implicate interstate commerce and are thus under federal jurisdiction via the United States Constitution.<sup>414</sup> The FTC has the power to engage in administrative enforcement and rulemaking regarding consumer protection.<sup>415</sup> Loot boxes fall under consumer protection, as they can be considered a deceptive or unfair business practice as applied to children.<sup>416</sup> Further, the FTC should control, as opposed to state or federal governments, due to their specialized technological knowledge and ease on video game companies in following one set of rules.<sup>417</sup> Under the FTC's control, rules will be created and enforced, which curtail the negative effects of loot boxes on children and gambling addicts.<sup>418</sup> These rules will be enforced in administrative hearings and at federal courts.<sup>419</sup> This system, controlled by the FTC, would be the most efficient way to handle the problems loot boxes pose.<sup>420</sup>

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413. *See supra* Part III.B.

414. *See Purchasing Loot Boxes, supra* note 27; *see also* U.S. CONST. art. I, § 8, cl. 3.

415. *See* Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2018); *A Brief Overview, supra* note 231; *see also supra* Part II.D.

416. *See supra* Part III.B.

417. *See supra* Part IV.A–B.

418. *See supra* Part IV.C.

419. *See supra* Part IV.C.

420. *See supra* Part IV.A–B.

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