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Thinking Outside the Box: Matchmaking State Gambling Law Frameworks to International Approaches to Loot Box Regulation

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**THINKING OUTSIDE OF THE BOX:
MATCHMAKING STATE GAMBLING LAW
FRAMEWORKS TO INTERNATIONAL
APPROACHES TO LOOT BOX
REGULATION**

*By: Emerson B. Marles**

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I. INTRODUCTION

“Mom! I spent the mortgage money on my video game!” This statement is frightening enough to send a chill down any parent’s spine. Unfortunately, these nightmarish scenarios involving absurd expenditures on video games have become realities for parents and other individuals across the globe. One mother reported that her six-year-old son used her credit card to spend over \$16,000 on the game *Sonic Forces: Speed Battle*, resulting in an inability to pay her mortgage payments.¹ Similar economic tragedy befell a nineteen-year-old adult who reportedly spent over \$17,000 on games such as *Counter-Strike: Global Offensive* and *Smite* over several years.² Another article told of a seven-year-old who spent nearly \$7,500 of his father’s money on Apple iPad games over the span of two weekends.³ What causes these situations to occur? Are game developers and publishers really charging such high prices for access to their virtual products? Is there something nefarious at work within the video game industry?

¹ See Dalton Cooper, *6 Year Old Spends \$16,000 on Microtransactions Using Mom’s Credit Card*, GAMERANT, <https://gamerant.com/6-year-old-spends-16k-microtransactions-moms-credit-card-sonic-forces-ios-apple/> (last visited Jan. 30, 2023).

² See Ethan Gach, *Meet The 19-Year-Old Who Spent Over \$17,000 On Microtransactions*, KOTAKU (Nov. 30, 2017, 10:00 AM), <https://www.kotaku.com.au/2017/11/meet-the-19-year-old-who-spent-over-17000-on-microtransactions/>.

³ See Rob Thubron, *11-year-old accidentally spends almost \$7,500 on microtransactions using Dad’s credit card*, TECHSPOT (Apr. 4, 2017, 2:15 PM), <https://www.techspot.com/news/68791-11-year-old-accidentally-spends-almost-7500-microtransactions.html>.

These financial crises are the result of the video game industry's adoption of a new, service-based video game monetization model that places heavy emphasis on what have become known as "microtransactions."⁴ A "microtransaction" is a "payment made for purchase of . . . additional [virtual] content in video games."⁵ Microtransaction-based, live-service business models allow for companies to receive a continuous stream of revenue (instead of profiting only through a one-time sale of a game) by "craft[ing] games with continual play elements . . . and [through] continual releases of 'new' content" that can be purchased individually.⁶ This business model has proven to be extremely lucrative for the video game industry and has enabled the "industry to become bigger than film and music combined."⁷

Microtransactions have become a controversial aspect of the video game industry in recent years for many reasons including: their potential impact on gaming competition, their potential negative effects on children,⁸ and their addictive and exploitable nature.⁹ However, one type of microtransaction, the "loot box," or a "game-related purchase with a chance-based outcome,"¹⁰ has become the most infamous among them. Loot boxes come in different forms, such as those that may be acquired without payment,¹¹ though they are

⁴ See JAMES CLOSE & JOANNE LLOYD, LIFTING THE LID ON LOOT BOXES: CHANCE-BASED PURCHASES IN VIDEO GAMES AND THE CONVERGENCE OF GAMING AND GAMBLING 6-7 (2021), https://www.begambleaware.org/sites/default/files/2021-03/Gaming_and_Gambling_Report_Final.pdf.

⁵ Nenad Zoran Tomić, *Economic Model of Microtransactions in Video Games*, 1 J. of Econ. Sci. Rsch. 17 (2019), <https://core.ac.uk/download/pdf/233120305.pdf>.

⁶ CHRISTOPHER BALL & JOSEPH FORDHAM, MONETIZATION IS THE MESSAGE: A HISTORICAL EXAMINATION OF VIDEO GAME MICROTRANSACTIONS 2 (2018), http://www.digra.org/wp-content/uploads/digital-library/DIGRA_2018_paper_195.pdf.

⁷ CLOSE & LLOYD, *supra* note 4, at 6.

⁸ See Tomić, *supra* note 5, at 22.

⁹ See Lies van Roessel & Jan Svelch, *Who Creates Microtransactions: The Production Context of Video Game Monetization*, in GAME PRODUCTION STUDIES 197, 201 (Olli Sotamaa & Jan Svelch eds., 2021) (ebook), <https://library.oapen.org/bitstream/handle/20.500.12657/47043/9789048551736.pdf?sequence=1#page=198>.

¹⁰ CLOSE & LLOYD, *supra* note 4, at 8.

¹¹ See CLOSE & LLOYD, *supra* note 4, at 7.

commonly characterized by “boxes of unknown contents which cannot be opened unless [the player] pay[s] a certain amount. . . .”¹²

Due to loot boxes’ both paid-for and randomized nature, loot boxes have become the subject of major international criticism with many maintaining the belief that this monetization practice constitutes gambling.¹³ This accusation is mainly due to loot boxes’ similarities to “traditional forms of chance-based gambling, such as slot machines.”¹⁴ Members of the international community have taken varying approaches to loot box regulation.¹⁵ Some countries, such as Belgium and the Netherlands, have led the charge for stringent loot box regulation by declaring that some loot boxes fall under their statutory definitions of “gambling,” thus bringing loot boxes under applicable gambling laws.¹⁶ Other countries, such as China and Japan, have regulated loot boxes using methods that place heavy emphasis on the importance of consumer safety from misleading or deceptive practices, rather than classifying loot boxes as “gambling.”¹⁷ However, there remain numerous countries, including the United Kingdom and, notably, the United States, that have not yet directly regulated loot

¹² Tomić, *supra* note 5, at 20.

¹³ Tomić, *supra* note 5, at 20-21.

¹⁴ Matthew E. Perks, *Regulating In-Game Monetization: Implications of Regulation on Games Production*, in *GAME PRODUCTION STUDIES* 217, 221 (Olli Sotamaa & Jan Svelch eds., 2021) (ebook), <https://library.oapen.org/bitstream/handle/20.500.12657/47043/9789048551736.pdf?sequence=1#page=218>.

¹⁵ See CLOSE & LLOYD, *supra* note 4, at 32-33.

¹⁶ See Press Release from Kansspelautoriteit, *Some loot boxes in violation of the gambling law* (Apr. 19, 2018), <https://kansspelautoriteit.nl/nieuws/2018/april/artikel-0/>; see also Phillipe Vlaeminck & Robbe Verbeke, *The Gambling Law Review: Belgium*, *THE LAW REVIEWS* (May 9, 2022), <https://thelawreviews.co.uk/title/the-gambling-law-review/belgium>.

¹⁷ See Leon Y. Xiao et al., *Gaming the system: suboptimal compliance with loot box probability disclosure regulations in China*, 2021 *BEHAVIORAL PUBLIC POLICY* 1, 4, <https://doi.org/10.1017/bpp.2021.23>; see also Bo Hyun Kim, *Balancing Liberty and the Public Interest in Loot Box Regulation*, *THE REGULATORY REVIEW* (Oct. 21, 2021), <https://www.theregreview.org/2021/10/12/hyun-kim-balancing-liberty-public-interest-loot-box-regulation/>.

boxes at all.¹⁸ This is partially due to a purported inability to reconcile loot boxes with current statutory definitions of “gambling.”¹⁹

This Comment advocates for the adoption of loot box regulations in the United States and consists of three sections, following this introductory section. Section II provides a comprehensive summary of relevant background information including: the history of the video game industry, the modern monetization of video games, the loot box controversy, the approaches of various international jurisdictions to the regulation of loot boxes, and a summary of several states’ gambling law frameworks. The Comment’s third section assumes that loot boxes can be classified as “gambling” under United States statutory frameworks and focuses on a state-specific analysis to loot box regulation, acknowledging that “gambling . . . [is] considered an area subject to the States’ traditional police powers. . . .”²⁰ Because “[e]ach state determines what kind of gambling it allows within its borders, where the gambling can be located, and who may gamble,” resulting in “[e]ach state . . . enact[ing] different laws pertaining to these topics,”²¹ this Comment asserts that uniform, federal regulation of loot boxes may not be within the several states’ best interests. Instead, to uphold state sovereignty in regulating gambling within their borders, a state-specific approach to loot box regulation would be more appropriate. In crafting such state-specific regulations, it may be beneficial to consider the approaches of the international community to loot box regulation. Therefore, this Comment analyzes the gambling law frameworks of three states and attempts to “matchmake” those states’ frameworks to the loot box regulation approaches of various international jurisdictions, based on criteria such as regulatory stringency and public policy interests. The

¹⁸ See generally NADINE DORRIES, DEPARTMENT FOR DIGITAL, CULTURE, MEDIA & SPORT, CONSULTATION OUTCOME: GOVERNMENT RESPONSE TO THE CALL FOR EVIDENCE ON LOOT BOXES IN VIDEO GAMES, 2020-1, HL, at ¶ 25-41 (UK), <https://tinyurl.com/55z2ddcc>; see also Kim, *supra* note 17.

¹⁹ E.g. DORRIES, *supra* note 18, at ¶¶ 33-36.

²⁰ *Nat’l Collegiate Athletic Ass’n v. Christie*, 926 F. Supp. 2d 551, 571 (D.N.J. 2013).

²¹ Cornell Law School, *Gambling Law: An Overview*, LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/wex/gambling#:~:text=Gambling%20Law%3A%20An%20Overview,and%20otherwise%20regulates%20the%20activity> (last visited Jan. 31, 2023).

fourth, and final, section of this Comment provides final remarks regarding the future of loot box regulation. Loot box microtransactions present substantial risks to vulnerable populations and it is time for the United States to take action to protect American consumers.

II. HISTORY AND BACKGROUND

A. The History of the Technologically-Innovative Video Gaming Industry

The video game industry arose out of the computer and software industries.²² As a result of technological developments occurring within computer-related industries following World War II,²³ “early prototypes of video games were [being] developed in labs [as early as] the 1960s.”²⁴ Prior to the 1970s, however, video games “were limited to the large, refrigerator-sized computers found only in laboratories and research centers” and were “neither sold commercially or generally available to the public.”²⁵ Thus, there was an early need to remove technological “barriers to commercial production of video games . . . [including] public access and affordability.”²⁶ Only then could the video game industry truly emerge.

The video game industry’s barriers began to lift following the development of “microprocessors” in 1971.²⁷ Consequently, “computer components could be produced more cheaply and in greater quantity.”²⁸ Following this technological innovation, Nolan

²² Casey O’Donnell, *The North American Game Industry, in THE VIDEO GAME INDUSTRY: FORMATION, PRESENT STATE, AND FUTURE* 99, 100 (Peter Zackariasson & Timothy Wilson eds., 2012) (ebook), <https://tinyurl.com/yvny84y>.

²³ Mark J.P. Wolf, *Influences and Precursors, in THE VIDEO GAME EXPLOSION: A HISTORY FROM PONG TO PLAYSTATION AND BEYOND* 17, 19 (Mark J.P. Wolf ed., 2008) (ebook), <https://tinyurl.com/yckvm2md>.

²⁴ Omri Wallach, *50 Years of Gaming History, by Revenue Stream (1970-2020)*, VISUAL CAPITALIST (Nov. 23, 2020), <https://www.visualcapitalist.com/50-years-gaming-history-revenue-stream/>.

²⁵ Wolf, *supra* note 23, at 13.

²⁶ *Id.* at 18.

²⁷ *Id.*

²⁸ *Id.*

Bushnell created *PONG*, an arcade table-tennis game.²⁹ Applying a coin slot system,³⁰ *PONG* “became many people’s first experience of a video game.”³¹ *PONG* acted as a kick-starter for the video game industry,³² leading other companies, eager to take their share of the well-established coin-operated machine market,³³ to create their own *PONG* “clones” as well as new video game titles.³⁴ As a result, “the video game was able to achieve commercial success through its integration into the same market venues as the pinball game,” ultimately leading to the supplantation of pinball as the king of arcade games.³⁵

However, by the late 1970s and early 1980s “the coin-operated business was drying up [as people] no longer wanted to spend quarters to play ‘television games.’”³⁶ Furthermore, the industry, as a whole, was crashing in terms of profits.³⁷ Video game companies needed to find a new source of revenue and eventually landed on the sale home video game systems,³⁸ or “consoles:” “device[s] capable of playing numerous different games and displaying that content on a home television

²⁹ Wallach, *supra* note 24.

³⁰ STEVEN L. KENT, *THE ULTIMATE HISTORY OF VIDEO GAMES, VOLUME 1* (2001) (ebook), <https://tinyurl.com/3855kzbh>.

³¹ Wolf, *supra* note 23, at 18.

³² Wallach, *supra* note 24.

³³ Wolf, *supra* note 23, at 18 (recounting that freestanding, countertop coin-operated machines date back to the 1880s and flourished well into the 1960s.).

³⁴ Wallach, *supra* note 24 (mentioning that new game franchises, such as *Space Invaders*, *Pac-Man* and *Donkey Kong*, came into being during the late 1970s and early 1980s.).

³⁵ Wolf, *supra* note 23, at 18-19.

³⁶ KENT, *supra* note 30; *see also* Wallach, *supra* note 24 (“In short order, the arcade market began to plateau. After dwindling due to a glut of *Pong* clones, the release of *Space Invaders* in 1978 reinvigorated the market . . . Unfortunately, the gaming industry grew too quickly to maintain.”).

³⁷ Mark J.P. Wolf, *Introduction*, in *BEFORE THE CRASH: EARLY VIDEO GAME HISTORY 1*, 4 (Mark J.P. Wolf ed., 2012) (ebook), <https://tinyurl.com/yhtp949m> (“The video game industry’s profits in 1983 were down 35 percent from 1982, and industry-wide losses were around \$1.5 billion.”).

³⁸ *See id.* at 5.

screen.”³⁹ Bushnell once again took lead in the industry through the creation of the Atari Video Computer System (“VCS”), achieving decent profitability.⁴⁰ The VCS notably implemented a groundbreaking “cartridge” system that allowed for the playing of “more games than purely console-based systems,” which “[had] their games hardwired into them.”⁴¹ Video game companies “saw the success of [the VCS] . . . and realized that a big demand existed for home versions of arcade games.”⁴² A great “technological race” followed in which numerous emerging video game companies competed to “recapture the wary market.”⁴³ Competitors touted technological selling-points such as “high quality games,” “processing power,” and “enhanced storage capacity.”⁴⁴ This period also was characterized by technological advancements in graphical fidelity being outputted by consoles.⁴⁵ Today, video game companies, embracing the “cartridge”-like model of the VCS, have continued to and produce new games to sell new consoles, the sale of which leads to greater demand for new games, creating “a positive self-reinforcing spiral.”⁴⁶

³⁹ Casey O’Donnell, *The North American Game Industry*, in *THE VIDEO GAME INDUSTRY: FORMATION, PRESENT STATE, AND FUTURE* 99, 101 (Peter Zackariasson & Timothy Wilson eds., 2012) (ebook), <https://tinyurl.com/yvny84y>.

⁴⁰ KENT, *supra* note 30.

⁴¹ Mark J.P. Wolf, *Modes of Exhibition*, in *THE VIDEO GAME EXPLOSION: A HISTORY FROM PONG TO PLAYSTATION AND BEYOND* 13, 15 (Mark J.P. Wolf ed., 2008) (ebook), <https://tinyurl.com/yckvm2md>.

⁴² KENT, *supra* note 30.

⁴³ Wallach, *supra* note 24 ([stating that large players in the video game industry \(Nintendo, Sega, Sony, Microsoft\) competed for dominance in the market between 1985 and 2001, placing emphasis on their own, unique technological improvements.](#))

⁴⁴ *Id.*

⁴⁵ See Mark J.P. Wolf, *Imaging Technologies*, in *THE VIDEO GAME EXPLOSION: A HISTORY FROM PONG TO PLAYSTATION AND BEYOND* 9, 11 (Mark J.P. Wolf ed., 2008) (ebook), <https://tinyurl.com/yckvm2md> (stating that interactive 3-D filled polygon graphics became the standard graphic type used in both arcade and home video games in the mid-1990s.); see also O’Donnell, *supra* note 22, at 100 (stating that early game developers were restricted to simplistic graphics, comprised of basic shapes (or combinations of those shapes) and 8x8 sprite pixel art.)

⁴⁶ See Ulf Sandqvist, *The Games They Are A Changin’: New Business Models and Transformation Within the Video Game Industry* 23 *HUMANITIES AND SOCIAL SCIENCES LATVIA* 4, 10 (2015), http://dspace.lu.lv/dspace/bitstream/handle/7/34333/Humanities_Social_sciences_2015_2.pdf?sequence=1#page=4.

Despite the fact that “[t]he game console remains at the forefront for both video game developers and publishing companies alike,”⁴⁷ new “advances in miniaturisation and network technology” have paved the way for portable, interconnected gaming devices.⁴⁸ Now, following the introduction of Apple’s iPhone,⁴⁹ “[m]obile phones and other portable devices have also become a major gaming platform with the capability of running games with advanced graphics.”⁵⁰ In addition, the evolution and integration of network technology has allowed video games to not only become incorporated into social networks,⁵¹ but also for the possibility of online play.⁵²

Internet connectivity has also led to the formation of a “digital economy,” or “e-business,” which has allowed for digital game distribution on levels higher than ever before.⁵³ E-business efficiently allows for “a developing company . . . [to] directly reach and sell to a large number of consumers” while not having to rely on the resources of a large company.⁵⁴ As a result, digital distribution “has become an important part of many game developers’ business models.”⁵⁵ The following subsection will explore the modern video game monetization business model; one which places heavy emphasis on targeting the market through the use of digital means.⁵⁶

B. The Modern Video Game Business Model

Since its non-commercial beginnings on hulking computers in American laboratories,⁵⁷ video gaming has developed into a booming,

⁴⁷ O’Donnell, *supra* note 22, at 101.

⁴⁸ See Sandqvist, *supra* note 46, at 12-13.

⁴⁹ Wallach, *supra* note 24.

⁵⁰ Sandqvist, *supra* note 46, at 12-13.

⁵¹ See *id.* at 14.

⁵² Wallach, *supra* note 24 (recalling the launch of Microsoft’s Xbox Live online gaming platform as well as successes of multiplayer games, including Blizzard’s World of Warcraft.).

⁵³ Sandqvist, *supra* note 46, at 13.

⁵⁴ *Id.* at 15-16.

⁵⁵ *Id.* at 14-15.

⁵⁶ Sandqvist, *supra* note 46, at 13.

⁵⁷ See KENT, *supra* note 30.

global industry valued at nearly \$200 billion as of 2021.⁵⁸ Further growth of the industry is expected as a result of “[a]dvances in technology[,] . . . continued innovation in both hardware and software[,] . . . [t]he proliferation of smartphones, the growing internet penetration rate, and the easy availability of games on the internet. . . .”⁵⁹ Indeed, as is evident from the history of the industry, technological innovation and quality improvements were, and still remain, central to the industry’s success. However, as the industry continues to grow, so does “the complexity associated with game development . . . and the amount of content necessary to meet the growing demand of players. . . .”⁶⁰ Consequently, “financial time and risk associated with game development has [also] continued to climb.”⁶¹ Today, “[i]n terms of manufacturing and sales costs, [the expense and complexity of game development] has pushed [the] development process into Hollywood movie territory.”⁶² How has the industry addressed rising costs of production while still managing to turn a profit?

Today, innovations in both technology miniaturization and, especially, network technology have been the driving forces behind the modern video game business model.⁶³ Specifically, network technology has allowed for the emergence of a digital economy and the digital distribution of video games;⁶⁴ a system that meshes well with the increased accessibility of video games created by portable devices “with the capability of running games with advanced graphics. . . .”⁶⁵ However, just as the digital economy makes it easier for developers to

⁵⁸ *Video Game Market Size, Share & Trends Report 2022-2030*, GRAND VIEW RESEARCH, <https://www.grandviewresearch.com/industry-analysis/video-game-market> (last visited Jan. 31, 2023).

⁵⁹ *Id.*

⁶⁰ O’Donnell, *supra* note 22, at 107.

⁶¹ *Id.*

⁶² *Global Video Game Market Size, Share & Industry Trends Analysis Report 2022-2028*, REPORTLINKER, https://www.reportlinker.com/p06289298/Global-Video-Game-Market-Size-Share-Industry-Trends-Analysis-Report-By-Type-By-Device-By-Regional-Outlook-and-Forecast-.html?utm_source=GNW (last visited Jan. 31, 2023).

⁶³ See Sandqvist, *supra* note 46, at 12.

⁶⁴ See *id.* at 12-14.

⁶⁵ *Id.* at 13.

distribute games to consumers,⁶⁶ so too does it “make it easier to sell *complementary products* or *downloadable content* (DLC) for games.”⁶⁷ Traditionally, “physical games . . . had a fairly short revenue period and were then removed from the prime shelf space in the stores. [But,] [b]y selling new minor content connected to the game, the periods of revenue can be stretched.”⁶⁸ Recognizing this potential for prolonged revenue streams, game developers have shifted to a “‘service’ business model, with developers accruing ongoing revenue via . . . [the continuous sale of] downloadable digital content,”⁶⁹ commonly referred to as “microtransactions.”⁷⁰

Microtransactions “denote a payment when purchasing . . . additional content in video games.”⁷¹ Generally, microtransactions sell to consumers the ability to “make cosmetic changes to the existing game design, bring additional content otherwise unavailable . . . , improve position under existing conditions, [or to] buy time or subscribe to access certain game modes.”⁷² Some examples of microtransaction content include “alternative looks or costumes,” completely new characters or vehicles, “new missions [or other playable story content],” “improvements and bonuses,” and virtual, “premium currency” that can be used to improve or expedite the gaming experience (such as “gems” or “gold.”)⁷³ These game-related purchases “can be found in just about every genre of game.”⁷⁴ Furthermore, microtransactions typically cost only a few dollars in an attempt “to reach as many users as possible.”⁷⁵

⁶⁶ See *id.* at 13-14.

⁶⁷ *Id.* at 14.

⁶⁸ *Id.* at 15.

⁶⁹ CLOSE & LLOYD, *supra* note 4, at 6.

⁷⁰ See generally Daniel L. King & Paul H. Delfabbro, *Predatory monetization schemes in video games (e.g. ‘loot boxes’) and internet gaming disorder*, 113 ADDICTION 1967, 1967-69 (2018), <https://doi.org/10.1111/add.14286>.

⁷¹ Tomić, *supra* note 5, at 18.

⁷² *Id.*

⁷³ *Id.* at 18-20.

⁷⁴ CLOSE & LLOYD, *supra* note 4, at 7.

⁷⁵ Tomić, *supra* note 5, at 18.

Similar to how the content sold through microtransactions varies, the methods for their implementation also differ.⁷⁶ Microtransaction schemes often fall within one of two categories: (1) those where content “value is known up-front” and (2) those where content value is not known up-front and that, instead, employs “randomized rewards.”⁷⁷ Within the latter scheme, players receive what have become commonly referred to as “loot boxes,” or “boxes of unknown content which cannot be opened unless [the player] pay[s] a certain amount” of real or virtual tender.⁷⁸ Upon opening the box, the player is provided a “chance to win select items from a larger pool of variable rarity and desirability.”⁷⁹ Loot box contents “vary from cosmetic details to serious improvements that make gameplay easier.”⁸⁰ Similarly, “loot boxes can come in various . . . shapes and sizes” and ultimately differ in how they are presented to the player.⁸¹ These chance-based microtransactions have proven to be extremely lucrative, accounting for “\$15 billion in revenue across the video game industry in 2020,” alone.⁸² However, loot boxes “have come under increasing media, academic, and legal scrutiny” as a result of their “structural and psychological similarities with gambling.”⁸³ The following subsection will dive into this loot box controversy and explore the reasons why loot boxes have created large amounts of concern and backlash.

C. The Loot Box Controversy

Loot boxes truly entered into the public spotlight with the release of Electronic Arts’s (hereinafter “EA”) *Star Wars: Battlefront II*

⁷⁶ *Id.* at 19.

⁷⁷ Roessel & Svelch, *supra* note 9, at 200.

⁷⁸ Tomić, *supra* note 5, at 20.

⁷⁹ Perks, *supra* note 14, at 221.

⁸⁰ Tomić, *supra* note 5, at 20.

⁸¹ CLOSE & LLOYD, *supra* note 4, at 7 (“They might be called crates, chests, packs, cases, bundles or cartons. In some games, they might not be constrained to the item shop, but are instead discovered in the virtual environment. Often, a game will offer loot boxes for free, encouraging later real-money purchases.”).

⁸² Derek Saul, ‘Exploits Kids For Profit’: Multi-Billion-Dollar Loot Box Industry Fire As Campaigners Urge Regulators To Investigate FIFA Video Game Maker, FORBES (June 2, 2022, 10:07 AM), <https://tinyurl.com/263vcucr>.

⁸³ CLOSE & LLOYD, *supra* note 4, at 1.

in November of 2017.⁸⁴ In *Battlefront II*, EA notoriously implemented loot boxes in a way that led to “a large amount of content in the game (characters, cosmetics, upgrades, etc.) . . . [being] locked behind a ‘soft’ paywall.”⁸⁵ *Battlefront II* quickly became infamous within the video gaming community as “[p]layers found themselves in a situation where publishers expected them . . . [to purchase] chance-based microtransactions to efficiently access all game content.”⁸⁶ Scrutiny of *Battlefront II* quickly spread to “video game journalist sites, official and unofficial forums, . . . social media platforms,”⁸⁷ and “mainstream press sites such as CNN and The Huffington Post.”⁸⁸ Among the accusations thrown toward loot boxes was that they constituted gambling practices and should be regulated as such.⁸⁹ Further investigation and research has since provided evidence that loot boxes, in fact, share “structural and psychological similarities with gambling.”⁹⁰

Loot boxes have been frequently likened to “slot machines” because of their “highly similar” designs.⁹¹ For example, loot boxes and slot machines both employ what is known as a “variable ratio reinforcement schedule,” in which rewards, or “reinforcement,” occur at random intervals.⁹² When rewards are randomized, humans and

⁸⁴ Perks, *supra* note 14, at 222.

⁸⁵ *Id.* (“Though these items could be unlocked through repeated play, players were upset that those willing to pay or ‘gamble’ their money, could unlock them quicker and arguably have an advantage over other plays in the online competitive modes.”); *see generally* Gamespot Staff, *Star Wars Battlefront 2’s Loot Box Controversy Explained*, GAMESPOT (Nov. 22, 2017, 12:37 PM), <https://www.gamespot.com/articles/star-wars-battlefront-2s-loot-box-controversy-expl/1100-6455155/>.

⁸⁶ Perks, *supra* note 14, at 222-23.

⁸⁷ *Id.* at 223.

⁸⁸ Gamespot Staff, *supra* note 85; *see also* CLOSE & LLOYD, *supra* note 4, at 9. (“EA’s infamously woolly defence on Reddit earned an entry in *The Guinness Book of World Records* as the ‘most hated’ post on the internet ever—[thus] intensif[ying] the spotlight on loot boxes.”).

⁸⁹ *See* Gamespot Staff, *supra* note 89.

⁹⁰ *See generally* CLOSE & LLOYD, *supra* note 4, at 1-27.

⁹¹ Mark D. Griffiths, *Is The Buying of Loot Boxes in Video Games a Form of Gambling or Gaming?*, 22 *Gaming Law L. Rev.* 52, 54 (2018), <https://doi.org/10.1089/qlr2.2018.2216>.

⁹² CLOSE & LLOYD, *supra* note 4, at 13-14.

animals “are more compelled to keep repeating the behavior that provides a chance of reward.”⁹³ Slot machines, and other forms of gambling, take advantage of this psychological phenomenon to retain “higher engagement with, and spending on, gambling.”⁹⁴ Loot boxes also employ this addictive reinforcement schedule for profit as they “involve the staking of something of value (money), on [an] uncertain outcome. . . .”⁹⁵ Other general similarities between loot boxes and slot machines include their use of “variable value of the prizes, near-miss features, . . . , visual and sound cues associated with participation and reward,”⁹⁶ and the psychological concept of “entrapment.”⁹⁷

Peer-reviewed, psychological studies have also provided evidence that loot box systems and gambling possess undeniable similarities and interconnectivity. One study concluded that “in the way [loot boxes] encourage and sustain user engagement, loot-box systems share important structural and psychological similarities.”⁹⁸ In particular, the study found that nearly half of the twenty-two analyzed games with loot box systems met the five Griffiths criteria for “gambling activities.”⁹⁹ Another study investigated the potential link between “problem gambling” and loot box use.¹⁰⁰ In this study, the

⁹³ *Id.* at 14.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Keith Whyte, *Research Spotlight – Loot Boxes or Slot Machines?*, INTERNATIONAL ASSOCIATION OF GAMING REGULATORS (Sept. 25, 2018), <https://iagr.org/industry-news/research-spotlight-loot-boxes-or-slot-machines/>.

⁹⁷ See King & Delfabbro, *supra* note 70, at 1967 ([defining “entrapment” as “the belief that one has invested too much to quit.”](#) [Continuous spending on loot boxes “may have a ‘sunk cost’ effect that serves to justify continued expenditure.”](#)).

⁹⁸ Aaron Drummond & James D. Sauer, *Video game loot boxes are psychologically akin to gambling*, 2 NATURE HUMAN BEHAVIOUR 530, 532 (2018), <https://doi.org/10.1038/s41562-018-0360-1>.

⁹⁹ *Id.* at 531 (“Griffiths specifies five characteristics common to most gambling activities, and that distinguish gambling from other risk-taking behaviour: (1) The exchange of money or valuable goods. (2) An unknown future event determines the exchange. (3) Chance at least partly determines the outcome. (4) Non-participation can avoid incurring losses. (5) ‘Winners gain at the sole expense of losers. . . .’”).

¹⁰⁰ See David Zendle & Paul Cairns, *Video game loot boxes are linked to problem gambling: Results of a large-scale survey*, PLOS ONE, Nov. 2018, at 1, 1-12, <https://doi.org/10.1371/journal.pone.0206767>.

researchers determined that “there is an important relationship between problem gambling and the use of loot boxes.”¹⁰¹ Most notably, it was found that more severe problem gambling was associated with higher amounts spent on loot boxes.¹⁰² Causal directionality was not determined in this study, however, these results may “confirm the existence of a causal relationship between buying loot boxes and problem gambling” in that loot boxes “may well be acting as a ‘gateway’ to problem gambling . . . ,”¹⁰³ as well as any associated risks.¹⁰⁴ On the other hand, problem gambling may instead be causing increased loot box spending, thus “providing another outlet for individuals who are already problem gamblers to engage in harmful and excessive gambling-related behavior.”¹⁰⁵ Therefore, loot box systems may be taking advantage of vulnerable individuals, notably those with gambling problems.¹⁰⁶ In fact, evidence already exists for loot box systems’ manipulation of vulnerable individuals as a “disproportionate amount of [loot box] revenue is derived from [a small number of] high-level spenders,” often with gambling problems, referred to as “whales.”¹⁰⁷

The apparent similarities between loot boxes and gambling have “started to attract the interest of legislators and politicians across the . . . world.”¹⁰⁸ However, “early attempts at legislation have often struggled with the . . . unique challenges posed by loot boxes.”¹⁰⁹ The

¹⁰¹ *Id.* at 6.

¹⁰² *Id.* at 6-7.

¹⁰³ *Id.* at 9.

¹⁰⁴ See CLOSE & LLOYD, *supra* note 4, at 24-26 (stating that research has shown that financial harm and psychiatric disorders can result from problem gambling.).

¹⁰⁵ Zendle & Cairns, *supra* note 100, at 9.

¹⁰⁶ See CLOSE & LLOYD, *supra* note 4, at 32.

¹⁰⁷ *Id.* at 3, 24 (. . . [G]ame developers . . . appear to be generating outsized loot box profits from at-risk individuals, likely to include both those with disordered gambling and disordered gambling—but not from wealthy gamers. . . .’); see also *id.* at 27-30 (elaborating on the different cohorts most susceptible to loot box systems including males, “young people,” uneducated individuals, minorities, and unemployed individuals.).

¹⁰⁸ *Id.* at 13.

¹⁰⁹ *Id.* at 32.

following subsection will provide a broad overview of international approaches to loot box regulation.

D. International Approaches to Loot Box Regulation

In light of growing evidence supporting the existence of relationships and similarities between loot boxes and gambling, “it became necessary for countries . . . to decide whether loot boxing fell in the realm of gambling or not according to domestic laws.”¹¹⁰ Presently, there remains no consensus regarding whether loot boxes are to be regulated and, if so, whether they are to be regulated under a gambling law framework.¹¹¹

1. Belgium: Leading the Loot-Box-as-Gambling Charge

Belgium currently maintains one of the world’s strictest approaches to loot box regulation as it holds that “certain types of ‘loot boxes’ in electronic games [fall] within the scope of the concept of games of chance.”¹¹² Such a finding is notable as Belgium maintains a strict ban on games of chance that are not otherwise allowed under the Gaming Commission’s permitting/licensing system.¹¹³ Belgium’s tight leash on games of chance, and its “relatively strict gambling laws” in general,¹¹⁴ are justified by the commission’s strong commitment to protecting “vulnerable players,” such as minors.¹¹⁵

Applying loot boxes of several games to their gambling law framework, the Gaming Commission found that they qualified as games of chance “because all of the constitutive elements of gambling

¹¹⁰ *The Fine Line between Gambling and Gaming: The Short International History of Loot Box/Gacha and Regulations for all Game Devs*, CS AGENTS (Oct. 19, 2018), <https://cs-agents.com/blog/history-loot-box-gacha/>.

¹¹¹ See generally Kim, *supra* note 17; see also CLOSE & LLOYD, *supra* note 4, at 32-33.

¹¹² Vlaemminck & Verbeke, *supra* note 16.

¹¹³ PETER NAESSENS, FPS JUSTICE GAMING COMMISSION, RESEARCH REPORT ON LOOT BOXES 8 (2018), <https://gamingcommission.paddlecms.net/sites/default/files/2021-08/onderzoeksrapport-loot-boxen-Engels-publicatie.pdf>.

¹¹⁴ CLOSE & LLOYD, *supra* note 4, at 32.

¹¹⁵ NAESSENS, *supra* note 113, at 3-4.

[were] present.”¹¹⁶ Such a decision was “aided by Belgium’s . . . strict gambling laws, which [have] rather broadly interpreted notions of ‘value’ (i.e. ‘money’s worth),”¹¹⁷ thus allowing for regulation of loot boxes that other countries would not regulate for want of real-world monetary value.¹¹⁸ As a result of this decision, if any video game’s loot box system satisfies the Act’s requirements for a “game of chance” and is not otherwise licensed, “the active operators [violate Belgian law and] risk a prison sentence . . . and fines. . . .”¹¹⁹ Belgium’s approach to loot box regulation, while somewhat effective in protecting players from manipulative video games, has been criticized for overregulating, encroaching on freedom of choice, and being relatively ineffective due to poor enforcement.¹²⁰ Regardless, Belgium’s player-prioritizing loot box regulation approach has garnered the attention of the world as other countries have generated a “significant interest in emulating this approach. . . .”¹²¹

2. The Netherlands: Belgium’s Younger Sibling

The Netherlands has also recently held that some loot boxes constitute gambling under Netherlands’s gambling laws and should be regulated as such due to their addictive nature.¹²² After conducting an investigation into ten loot boxes in 2018, the Kansspelautoriteit (hereinafter “KSA”), the “independent administrative body and . . . supervisor and regulator of gambling services in the . . .

¹¹⁶ NAESSENS, *supra* note 113, at 8, 16 (stating that Belgium defines “game of chance” under Article 2(1) of the Gaming and Betting Act of 7 May 1999 as “any game whereby a bet of any kind that is placed leads to the loss of this bet by at least one of the players, or a win of any kind for at least one of the players or organisers of the game, and whereby chance may even be a secondary element in the course of the game, indication of the winner or determination of the size of the winners.”).

¹¹⁷ CLOSE & LLOYD, *supra* note 4, at 32.

¹¹⁸ *E.g.* DORRIES, *supra* note 18, at ¶ 35.

¹¹⁹ *Id.* at 16.

¹²⁰ Leon Y. Xiao, *Breaking Ban: Belgium’s Ineffective Gambling Law Regulation of Video Game Loot Boxes*, 9 *COLLABRA: PSYCHOLOGY* 1, 4, 21 (2023), <https://doi.org/10.1525/collabra.57641>.

¹²¹ *Id.* at 4 (noting that other countries, such as Australia, have been “considering adopting a similar prohibition . . . of loot boxes that would mirror the current restrictive position in Belgium.”).

¹²² *See generally* Press Release from Kansspelautoriteit, *supra* note 16.

Netherlands,”¹²³ determined that four of those loot boxes satisfied the definition of “games of chance.”¹²⁴ Because such loot boxes were games of chance, they were deemed to be illegal as “[i]t is prohibited to offer . . . games of chance . . . without a license” in the Netherlands.¹²⁵

However, despite the KSA’s finding that loot boxes constitute games of chance when they contain the requisite elements of chance and economic value,¹²⁶ a recent holding by the Dutch Administrative Jurisdiction Division has created uncertainty around loot boxes’ designation as games of chance.¹²⁷ In that case, EA appealed a court order requiring them to make periodic penalty payments as a result of its violation of Article 1(1)(a) through the sale of loot boxes in association with *FIFA22*’s “Ultimate Team” mode.¹²⁸ On appeal, the Dutch “highest administrative court,”¹²⁹ held in favor of EA, reasoning that the loot boxes in question did not possess the requisite “chance” element because their acquisition and opening did not constitute an “independent game” in itself.¹³⁰ According to the Court, *FIFA22*’s loot box system was not a standalone experience and was, instead, intertwined with the rest of the game, which involves high levels of

¹²³ Kansspelautoriteit, *The Kansspelautoriteit*, <https://kansspelautoriteit.nl/english/> (last visited Feb 1, 2023).

¹²⁴ Press Release from Kansspelautoriteit, *supra* note 16; *see also* Alan Littler, *The Gambling Law Review: Netherlands*, THE LAW REVIEWS (May 9, 2022), [https://thelawreviews.co.uk/title/the-gambling-law-review/netherlands_\(stating_that_the_Dutch_define_“game_of_chance”_under_Article\(1\)\(1\)\(a\)_of_the_Betting_and_Gaming_Act_as_“an_opportunity_to_compete_for_prizes_or_premiums_if_the_winners_are_designated_by_means_of_any_calculation_of_probability_over_which_the_participants_are_generally_unable_to_exercise_a_dominant_influence.”_\)](https://thelawreviews.co.uk/title/the-gambling-law-review/netherlands_(stating_that_the_Dutch_define_“game_of_chance”_under_Article(1)(1)(a)_of_the_Betting_and_Gaming_Act_as_“an_opportunity_to_compete_for_prizes_or_premiums_if_the_winners_are_designated_by_means_of_any_calculation_of_probability_over_which_the_participants_are_generally_unable_to_exercise_a_dominant_influence.”_)).

¹²⁵ Press Release from Kansspelautoriteit, *supra* note 16.

¹²⁶ Press Release from Kansspelautoriteit, Loot boxes (Oct. 3, 2019), <https://tinyurl.com/bdde9btj>.

¹²⁷ *See generally* Press Release from Kansspelautoriteit, Council of State ruling in FIFA case: penalty to EA unjustified (Mar. 9, 2022), <https://kansspelautoriteit.nl/nieuws/2022/maart/uitspraak-raad-state-fifa-zaak-dwangsom/>.

¹²⁸ Afdeling Bestuursrechtspraak Raad van State [Administrative Jurisdiction Division of the Council of State] March 9, 2022, UITSpraak [RULING] 202005769/1/A3, ECLI:NL:RVS:2022:690 ¶ 6, Raad van State, <https://www.raadvanstate.nl/uitspraken/@130150/202005769-1-a3>.

¹²⁹ Press Release from Kansspelautoriteit, *supra* note 127.

¹³⁰ Afdeling Bestuursrechtspraak Raad van State, *supra* note 128, at ¶ 9.

player participation and skill.¹³¹ Therefore, the loot box system in question was not in violation of Dutch law prohibiting unlicensed games of chance.¹³² While this holding is not a definitive conclusion that loot boxes are not gambling, it has created uncertainty around loot boxes in the Netherlands as it must be determined whether *all* loot boxes are merely a single element of a larger game of skill, thus falling outside Dutch gambling law.¹³³

3. China: An Informational Approach

Instead of regulating loot boxes directly under its strict gambling laws,¹³⁴ China employs an informational, disclosure-based approach designed to mitigate and disable gambling mechanisms that would otherwise harm its consumers.¹³⁵ Specifically, China's Ministry of Culture (hereinafter "MOC") requires "video game companies to disclose the probabilities of obtaining randomized rewards from loot boxes" and gives those companies great flexibility in deciding how to do so (for better or for worse).¹³⁶ Such mandated probability

¹³¹ *Id.* at ¶ 8.5.

¹³² *See id.* at ¶¶ 3, 9.

¹³³ Zak Thomas-Akoo, *Weerwind floats possible Dutch loot box ban*, IGAMINGBUSINESS (Aug. 26, 2022), <https://igamingbusiness.com/legal-compliance/weerwind-floats-possible-dutch-loot-box-ban/>. ("Under the initial KSA interpretation, loot boxes were considered a prohibited form of gambling, but the . . . ruling effectively legalised the products again.")

¹³⁴ *See generally* YAP WAI-MING & CINDY PAN, GAMING IN CHINA: OVERVIEW §§ 1, 2, Westlaw (database updated July 1, 2020), <https://uk.practicallaw.thomsonreuters.com/5-635-9387> ("Gambling in the People's Republic of China is illegal with the exception of Macau, Hong Kong, and Taiwan. The key legislation regulating gambling is Article 303 of the Criminal Law . . . and the Sixth Amendment to the Criminal Law . . . The only forms of . . . gambling in China are . . . two government authorized lotteries [sports lottery and welfare lottery] . . . Gambling is defined as an activity, for the purpose of making a profit, assembling persons to engage in gambling, opening or operating a gambling house, or making gambling a profession.").

¹³⁵ *See* Tracey Tang, *China: A Middle-Ground Approach: How China Regulates Loot Boxes and Gambling Features in Online Games*, MONDAQ (May 16, 2018), <https://www.mondaq.com/china/gaming/672860/a-middle-ground-approach-how-china-regulates-loot-boxes-and-gambling-features-in-online-games>; *see also* Xiao et al., *supra* note 17, at 3-4.

¹³⁶ Xiao et al., *supra* note 17, at 4.

disclosures are meant to “promote . . . consumers’ understanding and [to] help them make more informed loot box purchasing decisions.”¹³⁷ In addition, the MOC has required that loot boxes not be purchasable with real or virtual currency, the contents of loot boxes be “obtainable by other means,” and that records of loot box results be published and maintained.¹³⁸ Alongside the MOC, the State Administration of Publication, Press, Radio, Film and Television (hereinafter SAPPRFT; the agency in charge of “game content examination and approval”), “forbids any game content that induces users to directly or indirectly spend real money to acquire virtual items or services in a randomized way without detailed rules explicitly being provided to users.”¹³⁹ Companies who fail to follow these rules may be subject to punishment by either agency or held liable by consumers for violations of consumer protection regulations.¹⁴⁰ China’s loot box regulation approach may be a viable option for a jurisdiction that wishes to protect its consumers but finds itself unwilling or unable to classify loot boxes as games of chance.

4. Japan: Consumer Protection Approach

“Japan is the origin of loot box mechanisms” as the country has engaged with these mechanisms since as early as 2004.¹⁴¹ Thus, loot box mechanisms came under scrutiny in Japan much earlier than in other, more Western countries.¹⁴² In a manner similar to China, Japan has taken a unique approach to mitigating and preventing the harmful effects of loot boxes without heavy involvement of their gambling law.¹⁴³

¹³⁷ *Id.*

¹³⁸ Tang, *supra* note 135.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Sebastian Schwlddissen, *Loot Boxes in Japan: Legal Analysis and Kompu Gacha Explained* 4, BAKER MCKENZIE (Aug. 2, 2018), <https://www.lexology.com/library/detail.aspx?g=9207df10-a8a2-4f67-81c3-6a148a6100e2>.

¹⁴² *Id.* at 5.

¹⁴³ *Id.* at 13 (“When it comes to the regulation of gacha mechanisms in Japan, consumer laws are significantly more important than gambling laws.”).

Applying their definition of “gamble,”¹⁴⁴ Japan sets forth a general prohibition against gambling pursuant to Articles 185-187 of its Penal Code,¹⁴⁵ with exceptions for “horse racing, boat and other types of racing, lotteries, . . . soccer pools,”¹⁴⁶ and “momentary entertainment.”¹⁴⁷ “However, [n]o clear guidance exists on whether gacha (i.e. loot boxes) falls under the definition of gambling.”¹⁴⁸ Such a determination rides on unanswered questions such as whether loot box items are “things of value” under the Penal Code or whether loot boxes constitute “momentary entertainment.”¹⁴⁹ Therefore, instead of regulating loot boxes under its Penal Code relating to gambling, Japan “regulates [specific] loot boxes under a law protecting consumers from deceptive practices.”¹⁵⁰ This law is known as the Premiums and Representations Act of 1962 and contains provisions aimed to “protect consumers from misleading labelling of goods and services.”¹⁵¹

This regulatory approach was the product of a public debate surrounding loot box mechanisms that climaxed in 2012 with self-regulation efforts from large Japanese game companies and the Japanese Consumer Affairs Agency (hereinafter “CAA”) announcing that it “would take action against kompu gacha mechanisms” beginning that summer.¹⁵² “Kompu gacha,” as opposed to regular “gacha,” is a multi-level loot box mechanism in which “the player must first win several items via a standard gacha mechanism to . . . win another . . . rarer item.”¹⁵³ Notably, the CAA did not explicitly ban kompu gacha, but instead announced that consumer law would be

¹⁴⁴ *Id.* at 10 (stating that the Japanese define “gamble” as “an act where more than two persons bet on an outcome of a contest of chance to contend for a prize in the form of property or asset”).

¹⁴⁵ *Id.*

¹⁴⁶ Jennifer Roberts & Ted Johnson, *Problem Gambling: How Japan Could Actually Become the Next Las Vegas*, 6 UNLV GAMING L. J. 176, 178 (2016).

¹⁴⁷ *Id.* at 181.

¹⁴⁸ Schwlddessen, *supra* note 141, at 10.

¹⁴⁹ *See id.* at 10, 12.

¹⁵⁰ Kim, *supra* note 17.

¹⁵¹ Schwlddessen, *supra* note 141, at 13.

¹⁵² *See generally id.* at 4-7.

¹⁵³ *Id.* at 5.

applied to such mechanisms in the future.¹⁵⁴ Furthermore, the CAA prohibition against kompu gacha did not extend to regular gacha.¹⁵⁵ Overall, while Japan did not apply its laws to typical loot boxes, Japan's loot box regulation approach may serve as another attractive alternative to a jurisdiction that wishes to regulate outside of a gambling law framework.

5. United Kingdom: Testing the Water

The United Kingdom (hereinafter "UK") recently published its response to a call for investigation into video game loot boxes issued by the UK Department of Digital, Culture, Media & Sport in 2020.¹⁵⁶ The UK ultimately "considered three broad types of responses that could be pursued: improved industry-led protections, . . . , making changes to the Gambling Act 2005, and strengthening other statutory consumer protections."¹⁵⁷

Addressing whether the UK would regulate loot boxes under existing regulatory frameworks for gambling, the government concluded that "[w]hile many loot boxes share similarities with traditional gambling products, . . . the prize does not normally have real world monetary value outside of the game, and its primary utility is to enhance the in-game experience."¹⁵⁸ In other words, loot box prizes do not possess "money or money's worth" under UK gambling law, a required element for something to constitute "gaming" when playing a game of chance for a prize.¹⁵⁹ In addition, the government noted that such a change to existing legislation "would have significant implementation challenges and risks of unintended consequences,"¹⁶⁰

¹⁵⁴ See *id.* at 15.

¹⁵⁵ *Id.* at 7, 19 ("Regular loot box mechanisms fail to meet the . . . first requirement of being a "Premium" under . . . [the] Act[:] . . . that the generated items must be 'given as a means of inducing customers.' . . . [K]ompu gacha serves the purpose of inducing customers to purchase more and more regular gacha rolls . . . However, this does not apply to standard loot boxes. . .").

¹⁵⁶ See DORRIES, *supra* note 18, at *Foreword*.

¹⁵⁷ *Id.* at ¶ 26.

¹⁵⁸ *Id.* at ¶ 35, 245.

¹⁵⁹ See Gambling Act 2005, c. 19 (UK), <https://www.legislation.gov.uk/ukpga/2005/19/section/6>.

¹⁶⁰ DORRIES, *supra* note 18, at ¶ 36.

while also being extremely costly.¹⁶¹ Nevertheless, the UK vowed to continue regulating the “trading of items obtained from loot boxes [that] does amount to unlicensed gambling.”¹⁶²

Instead of regulating under a gambling law scheme, the government placed heavy emphasis on the use of industry-led protections to combat the dangers of loot boxes.¹⁶³ To support this position, the government noted that “games companies and platforms have the technical expertise and capability to develop and improve protections” that “support safe and responsible gaming.”¹⁶⁴ Furthermore, the government stated that “an industry-led approach . . . avoids the risk of unintended consequences which may be associated with legislation” and “can enable development of tailored, quickly adaptable] tools and information that work across . . . [the] varied sector.”¹⁶⁵

Lastly, the UK considered the use of other, existing protections against the damages caused by loot boxes.¹⁶⁶ Specifically, the government believed that “the UK’s current consumer and data protection legislation and guidance provided a strong foundation for mitigating the risks of harms associated with loot boxes,” yet it cautioned that direct changes of these laws could lead to “unintended consequences.”¹⁶⁷ Ultimately, the UK approach is one that explicitly denies the applicability of gambling law to the loot box mechanisms and that, instead, opts for alternative means of regulation.

6. United States: The Sleeping Giant

There is “currently no legal consensus . . . in the United States around the illegality of loot boxes.”¹⁶⁸ However, that is not to say that there has been no discussion of this issue within American legislatures

¹⁶¹ See *id.* at ¶¶ 248, 250.

¹⁶² *Id.* at ¶¶ 5.

¹⁶³ See *id.* at ¶¶ 27-32.

¹⁶⁴ *Id.* at ¶ 28.

¹⁶⁵ *Id.*

¹⁶⁶ See *id.* at ¶¶ 37-39.

¹⁶⁷ *Id.* at ¶ 38.

¹⁶⁸ Kim, *supra* note 17.

and governmental bodies. For instance, in 2019, the Federal Trade Commission (hereinafter “FTC”) organized a workshop on microtransactions, loot boxes, their accompanying issues, and potential regulation.¹⁶⁹ This FTC workshop likely resulted from calls to action from government officials, such as Senator Maggie Hassan, who not only urged the Entertainment Software Rating Board “to review its ratings policies on . . . [games with] ‘loot boxes,’”¹⁷⁰ but also “secured a commitment from . . . [the FTC] . . . that they [would] investigate ‘loot boxes.’”¹⁷¹ In addition, numerous state and federal legislatures have seen proposed legislation aimed at combatting loot boxes; all of which have not been passed.¹⁷² Included among the proposed legislation are: Federal Senate bill S. 1629;¹⁷³ Hawaii House bills 2686 and 2727, and Senate bills 3024 and 3025;¹⁷⁴ Minnesota House bill 4460;¹⁷⁵ Washington Senate bill 6266,¹⁷⁶ and Illinois House bill 2943.¹⁷⁷

Why have the states not regulated loot boxes under any of their gambling laws? The issue is thought to be the incompatibility of loot boxes with the typical elements of “gambling” in federal statutes as

¹⁶⁹ See generally FTC BUREAU OF CONSUMER PROTECTION, FTC VIDEO GAME LOOT BOX WORKSHOP: STAFF PERSPECTIVE 1-12 (2020).

¹⁷⁰ Tae Kim, *Senator calls for further protections from ‘predatory’ monetization practices in video games*, CNBC (Feb. 22, 2018, 7:17 PM), <https://www.cnn.com/2018/02/22/senator-hassan-calls-for-further-protections-from-predatory-monetization.html>.

¹⁷¹ *National Coverage of Senator Hassan Securing Guarantee from FTC Chairman to Investigate Loot Boxes in Video Games*, MAGGIE HASSAN UNITED STATES SENATOR FOR NEW HAMPSHIRE (Nov. 29, 2018), <https://www.hassan.senate.gov/news/in-the-news/national-coverage-of-senator-hassan-securing-guarantee-from-ftc-chairman-to-investigate-loot-boxes-in-video-games>.

¹⁷² Julia R. Radish, *The Legality of Loot Boxes: A Primer*, NATIONAL LAW REVIEW (Dec. 1, 2020), <https://www.natlawreview.com/article/legality-loot-boxes-primer>.

¹⁷³ See generally S. 1629, 116th Cong. (2019).

¹⁷⁴ Jasmine Henry, *Hawaii State Rep. Introduces Groundbreaking Loot Box Bills*, GAMERANT (Feb. 13, 2018), <https://tinyurl.com/2fc8wkas>.

¹⁷⁵ See generally H.R. 4460, 90 Leg., Reg. Sess. (Minn. 2018), <https://www.revisor.mn.gov/bills/bill.php?b=House&f=HF4460&cssn=0&y=2017>.

¹⁷⁶ See generally S. 6266, 65 Leg., Reg. Sess. (Wash. 2018).

¹⁷⁷ See generally H.R. 2943, 102 Gen. Assemb., Reg. Sess. (Ill. 2021).

well as individual state gambling laws.¹⁷⁸ Common “[l]egal definitions of gambling rest on three [elements]: (1) consideration (i.e. the wager), (2) chance, (3) . . . prize.”¹⁷⁹ Loot boxes, and virtual items in general, tend to falter when attempting to satisfy the third element.¹⁸⁰ Notably, “most courts . . . have found that ‘prizes’ awarded in video games do not constitute things of value because players cannot sell them. . . .”¹⁸¹ However, some courts have held that virtual items may constitute a “prize” or “thing of value” to the extent necessary to satisfy the third element.¹⁸² For the purposes of this Comment, it will not explore the intricacies of whether or not loot boxes could meet these elements and be brought under the jurisdiction of American gambling laws. Numerous scholars have already set forth credible arguments in favor of such a determination.¹⁸³ Instead, this Comment assumes that such scholarly arguments are persuasive to the extent that they could influence a court or legislative body to bring loot boxes under gambling regulations.

E. State Gambling Laws and Policies

While the federal government employs “its power under the Commerce Clause to regulate interstate gambling, [and] international gambling . . . ,” “[e]ach state determines what kind of gambling it allows within its borders. . . .”¹⁸⁴ As a result, [e]ach state has enacted different laws” relating to the topic of gambling.¹⁸⁵ Under the

¹⁷⁸ SKADDEN, VIDEO GAMING: IS MY LOOT BOX LEGAL? 1 (2019), https://www.skadden.com/-/media/files/publications/2019/09/quarterly-insights/video_gaming_is_my_loot_box_legal.pdf; *see also* CLOSE & LLOYD, *supra* note 4, at 34.

¹⁷⁹ CLOSE & LLOYD, *supra* note 4, at 34.

¹⁸⁰ *Id.* at 34; *see e.g.* *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871, 879 (N.D. Ill. 2016).

¹⁸¹ SKADDEN, *supra* note 178, at 1.

¹⁸² *See Kater v. Churchill Downs Inc.*, 886 F.3d 784, 787-88 (9th Cir. 2018) (holding that virtual casino chips fell under the statutory definition of a “thing of value” because they extended privilege to play).

¹⁸³ *See* Andrew Velzen, *Loot Boxes-Is the Gaming Industry Involved in A Crap Shoot?*, 22 TUL. J. TECH. & INTELL. PROP. 91-110 (2020); *see also* Maddie Level, *Unboxing the Issue: The Future of Video Game Loot Boxes in the U.S.*, 68 U. KAN. L. REV. 201, 212-6 (2019).

¹⁸⁴ Cornell, *supra* note 21.

¹⁸⁵ *Id.*

assumption that loot boxes could be considered a form of gambling within a jurisdiction of the United States, it is worth considering whether states should consider doing so, and to what extent. This subsection will briefly describe the gambling laws and policies of three states, each possessing gambling laws of varying levels of stringency: Hawaii, Massachusetts, and Nevada.

1. Hawaii: Saying “Aloha” (“Goodbye”) to Gambling

Hawaii “has been a gambling-free zone since it became the 50th US state in 1959.”¹⁸⁶ As such, it continues to deem all forms of “gambling” to be a misdemeanor.¹⁸⁷ The state broadly defines “gambling” as occurring when a person “stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome.”¹⁸⁸ This definition is sufficiently broad to encapsulate participation in “all internet gambling activities” in addition to all forms of land-based gambling, lotteries, and charitable gaming.¹⁸⁹ Not only do Hawaii statutes criminalize gambling, itself, but it also criminalizes the promotion of gambling,¹⁹⁰ the possession of gambling records,¹⁹¹ and the possession of gambling devices.¹⁹² Very limited defenses are available for those who engage in gambling-related activities.¹⁹³

There appear to be multiple reasons why Hawaii maintains its harsh stance toward gambling practices. One reason is economical: “local lawmakers seem to be convinced that keeping . . . [gambling illegal] is beneficial to the local economy . . . [because] the introduction of land-based gambling facilities would be detrimental to local

¹⁸⁶ Stan Fox, *Hawaii Gambling Laws: Find out what forms of gambling are legal or illegal in the Aloha State*, LETSGAMBLEUSA (Sept. 27, 2022), <https://www.letsgambleusa.com/hawaii/gambling-laws/>.

¹⁸⁷ Haw. Rev. Stat. Ann. § 712-1223(2) (West 2022).

¹⁸⁸ *Id.* § 712-1220.

¹⁸⁹ Fox, *supra* note 186.

¹⁹⁰ *See* Haw. Rev. Stat. Ann. §§ 712-1221, 712-1222 (West 2022).

¹⁹¹ *See id.* §§ 712-1224, 712-1225.

¹⁹² *See id.* § 712-1226.

¹⁹³ *See id.* §§ 712-1227, 712-1231, 712-1232.

businesses because tourists would start spending money in casinos instead.”¹⁹⁴ Another is cultural: Hawaii is seen as a place for “connecting with nature, being at peace, and interacting with family and friends.”¹⁹⁵ It is believed that the introduction of gambling practices would destroy the natural and family-centered ambiance of the state.¹⁹⁶ These two reasons, in combination with “gambling addiction horror stories,” convince the local authorities and population of Hawaii that gambling has no place in their state.¹⁹⁷

2. Massachusetts: Constant Evolution

As one of the original thirteen colonies, Massachusetts “has a long history with gaming, going back to the days before it was a state.”¹⁹⁸ That history involved an intense “back and forth between supporting legalized gambling to enacting puritanical anti-gambling statutes.”¹⁹⁹ Today, “Massachusetts gambling law is dense, but it’s generally permissive” with some exceptions for some forms of gambling that remain rigorously regulated.²⁰⁰ For instance, betting,

¹⁹⁴ Fox, *supra* note 186.

¹⁹⁵ *Why Casinos in Hawaii are Prohibited?*, GO TOURS HAWAII, <https://gotourshawaii.com/go-hawaii/why-casinos-in-hawaii-prohibited/> (last visited Feb. 2, 2023).

¹⁹⁶ *Id.*

¹⁹⁷ See Benjamin Webb, *Hawaii Gambling Laws - Aloha Gamblers?*, BEST CASINO SITES, <https://www.bestcasinosites.net/blog/hawaii-gambling-laws.php> (last visited Feb. 2, 2023).

¹⁹⁸ Audrey Weston, *Gambling in Massachusetts: Where to Gamble & State Gaming Laws*, GAMBLING SITES (Nov. 16, 2022), <https://www.gamblingsites.com/online-gambling-jurisdictions/us/massachusetts/#faq>.

¹⁹⁹ Thomas Wood, *Rigging the Game: The Legality of Random Chance Purchases (“Loot Boxes”) Under Current Massachusetts Gambling Law*, 20 J. OF HIGH TECH. L. 275 (2020) (“On the one hand, Harvard University, the Massachusetts State House, and the Plymouth Rock memorial were all funded from gambling revenues collected by the state. Yet in 1646, Massachusetts became the first colony to enact anti-gambling statutes . . . After a financial crisis in the early 1970s, the Commonwealth reversed course again and adopted a state-run lottery program.”).

²⁰⁰ Weston, *supra* note 198; see Mass. Gen. Laws Ann. ch. 271, §§ 1-51 (West 2022).

sports betting, and terminal-based gaming remain unauthorized.²⁰¹ In general, Massachusetts defines “illegal gaming,” as either (1) “a banking or percentage game played with cards, dice, tiles, dominoes, or [(2)] an electronic, electrical or mechanical device or machine for money, property, checks, credit, or any representative of value. . . .”²⁰² Activities not considered illegal gaming include “(1) [a]ny lottery game . . . conducted by the Massachusetts lottery commission; (2) [a]ny game . . . approved by the Massachusetts Gaming Policy Advisory Committee; (3) [h]orse and dog race betting under MGL chapter 128A and 128C; (4) game[s] of bingo . . . under chapter 271; and (5) [c]haritable games . . . conducted under chapter 271.”²⁰³ Online gaming and social gaming have yet to receive express legislation, however some social gaming has been considered by the state Attorney General in the context of the state’s “daily fantasy sports” regulations.²⁰⁴ Currently, the gambling industry is growing in the state.²⁰⁵ Land-based gambling is “undergoing rapid expansion” as a result of the 2011 Expanded Gaming Act which “divided Massachusetts into three regions and allowed for the construction of one . . . casino in each of them, along with an additional slots facility.”²⁰⁶ While the state does

²⁰¹ BILL GANTZ & JOSEPH F. CAPUTI, GAMING IN THE UNITED STATES: MASSACHUSETTS § 4 Westlaw (database updated Aug.1, 2020), <https://us.practicallaw.thomsonreuters.com/7-636-2435>.

²⁰² Mass. Gen. Laws Ann. ch. 4, § 7 (West 2022).

²⁰³ *Id.*

²⁰⁴ See GANTZ & CAPUTI, *supra* note 201, at §§ 2, 12 (“Social gaming” includes “free-to-play or ‘freemium’ type games in which games are provided for free but players can purchase enhanced game features, functionality or virtual goods that cannot be redeemed for cash or tangible prizes.” Online gambling involves remote or internet-based gambling.).

²⁰⁵ Stan Fox, *Massachusetts Gambling Laws: Find out what forms of gambling are legal or illegal in the Bay State*, LETSGAMBLEUSA (Sept. 27, 2022), <https://www.letsgambleusa.com/massachusetts/gambling-laws/>.

²⁰⁶ *Id.*

not currently have laws directly addressing online gambling,²⁰⁷ it is likely that the state's framework will soon catch up to the digital age.²⁰⁸

While there is no explicit policy behind Massachusetts's gambling law framework,²⁰⁹ such motivations may be surmised from different sources. While Chapter 271, governing Crimes Against Public Policy, lacks any declaration of purpose of the chapter, Chapter 23K, governing the Massachusetts Gaming Commission, does possess such a section.²¹⁰ Among the goals of the Commission are to “provide for new employment opportunities in all sectors of the economy,” to “promote local . . . businesses and the tourism industry,” and to support “efforts to combat compulsive gambling. . . .”²¹¹ As the Commission's goal is to create the process for implementing the expanded gaming law,²¹² it is not farfetched to assume that their ideals are derivative of the state's general gambling framework. Here, the Commission, and thus the state, seeks to improve its economy while remaining wary of the dangers of gambling. These interests are further evidenced by the content of the Expanded Gaming Act, which not only allowed for the creation of “thousands of jobs . . . [.] while also generating \$300-\$500 million in new revenue for the Commonwealth,”²¹³ but also provided for a “myriad of mitigation efforts” such as “public health and addiction services” as well as “community and cultural mitigation.”²¹⁴ Overall, Massachusetts recognizes the benefits of allowing for carefully-regulated gambling

²⁰⁷ Weston, *supra* note 198 (stating that even though there are no laws directly governing online gaming, some laws may arguably address the concept such as the prohibition against gambling in a public place, possession of an illegal gambling device, and the use of telephone lines for gaming purposes.).

²⁰⁸ See GANTZ & CAPUTI, *supra* note 201, at § 18 (stating that a report published by a state-authorized Special Commission found that not only is the legalization of online gaming “inevitable,” but also that such legalization financially complements the land-based gambling industry.).

²⁰⁹ See generally Mass. Gen. Laws Ann. ch. 271, §§ 1-51 (West 2022).

²¹⁰ See Mass. Gen. Laws Ann. ch. 23K, § 1 (West 2022).

²¹¹ *Id.*

²¹² See Commonwealth of Massachusetts, *Overview of the Massachusetts Gaming Commission*, MASS.GOV (Sept. 30, 2021), <https://tinyurl.com/2p9e7fp7>.

²¹³ Massachusetts Gaming Commission, *Expanded Gaming Act*, MASSGAMING, <https://tinyurl.com/3mntm6ya> (last visited Feb. 3, 2023).

²¹⁴ *Id.*

and has increasingly done so to benefit its constituents and its economy.

3. Nevada: What Happens in Vegas . . .

Nevada finds itself on the opposite side of the spectrum to Hawaii as gambling is not only allowed, it is commonplace.²¹⁵ In fact, “Nevada is home to one of the world’s most recognisable skylines—the Las Vegas Strip,”²¹⁶ the “center of gambling in the U.S.”²¹⁷ Nevada broadly defines “game” or “gambling game” as “any games played with cards, dice, equipment or any mechanical or electronic device or machine for money, property, checks, credit or any representative of value . . . or any other game or device approved by the Commission, upon recommendation of the Board, pursuant to NRS 463.164.”²¹⁸ The state’s broad definition of “gambling game” has allowed for a plethora of gambling-related activities to be brought under the gambling law,²¹⁹ most of which may be conducted only when duly licensed,²²⁰ by the state’s Gaming Control Board and Gaming Commission.²²¹ Lotteries, however, remain illegal in Nevada under its constitution.²²²

Nevada’s pro-gambling stance is mainly driven by the rationale that “[t]he gaming industry is vitally important to the economy of the State and the general welfare of its inhabitants.”²²³ Indeed, not only was casino gambling legalized back in 1931 to “help lift Nevada out

²¹⁵ Sonia Church Vermeys & Erin Elliott, *The Gambling Law Review: USA - Nevada*, THE LAW REVIEWS (May 9, 2022), <https://thelawreviews.co.uk/title/the-gambling-law-review/usa-nevada>.

²¹⁶ *Id.*

²¹⁷ *Nevada’s Gambling Laws*, FINDLAW (June 20, 2016), <https://www.findlaw.com/state/nevada-law/nevada-gambling-laws.html>.

²¹⁸ Nev. Rev. Stat. Ann. § 463.0152(1) (West 2022).

²¹⁹ See Vermeys & Elliott, *supra* note 215 (stating that Nevada gambling laws and regulations allow for the licensing and regulation of online, land-based, online, and mobile gambling along with the “manufacture, sale[, service] or distribution of gaming devices.” Nevada also allows for, and regulates, race and sport wagering, daily fantasy sports, and (hybrid) games of skill.).

²²⁰ See Nev. Rev. Stat. Ann. § 463.160 (West 2022).

²²¹ See *id.* at § 463.140.

²²² NEV. CONST. art. 4, § 24.

²²³ Nev. Rev. Stat. Ann. § 463.0129(1)(a) (West 2022).

. . . from the Great Depression,”²²⁴ but, today, gambling revenue continues to bring upwards of \$10 billion per year into the state.²²⁵ The lucrative gambling industry in Nevada ultimately generates one-third of its general tax revenues from state gambling taxes,²²⁶ to the benefit of its citizens.²²⁷ However, Nevada acknowledges that gambling is not merely a harmless cash-cow and “the gaming industry is heavily regulated at the state level . . . to ensure its integrity and longevity.”²²⁸ The state legislature addressed this directly in the purpose section of its gambling laws: “[t]he continued growth and success of gaming is dependent upon public confidence and trust that . . . [the legal gaming business is] conducted honestly and competitively, that [gaming] . . . does not unduly impact the quality of life . . . and that gaming is free from criminal and corruptive elements.”²²⁹ Overall, Nevada places vital importance upon its gambling industry due to the economic and welfare-related benefits that it promises and, therefore, allows for a broad array of gambling-related activities. However, it maintains a tight leash on its system to ensure that it remains safe and welcoming to the public.

With each state’s gambling frameworks and policies in mind, Section III will set forth a “matchmaking” analysis between each state and potentially-compatible international approaches to loot box regulation.

²²⁴ Vermeys & Elliott, *supra* note 215.

²²⁵ *Nevada Gaming Law*, STATE BAR OF NEVADA, <https://tinyurl.com/yhth6ha7> (last visited Feb. 3, 2023).

²²⁶ *Id.*

²²⁷ *How Gaming Benefits Nevada*, NEVADA RESORT ASSOCIATION, <http://www.nevadaresorts.org/benefits/> (last visited Feb. 3, 2023) (stating that “. . . tourism and gaming has allowed Nevada to . . . not collect a state personal or corporate income tax, providing . . . [for] less tax burden and additional economic freedom . . . [and] allowing Nevada to have one of the lowest household tax burdens in the country.”).

²²⁸ Vermeys & Elliott, *supra* note 215.

²²⁹ Nev. Rev. Stat. Ann. § 463.0129(1)(b) (West 2022).

III. ANALYSIS

Due to the previously-discussed, undeniable similarities between loot box opening and gambling practices, it is essential that loot boxes be regulated in the United States, whether under an assumably-valid gambling law approach or otherwise. While regulation on the federal level may be possible, the restrictions of the Commerce Power on Congress would likely prevent regulation *within* states under a federal gambling law framework.²³⁰ Even if regulated outside of a gambling law framework, federal regulation may be inadequate to address the specific concerns and preferences of each individual state. Gambling law, instead, has traditionally “been vested in the states of the union.”²³¹ This may be due to how states traditionally reserve police powers over issues of public health and safety.²³² As the “[h]arms from gambling affect health and wellbeing,”²³³ states control its regulation within their sovereign borders and have already acted in accordance with this power.²³⁴ Assuming that loot boxes may constitute “gambling,” the states would have the authority to regulate loot boxes within their borders under a gambling law framework. In addition, the states, themselves, are best situated to decide if and how to regulate loot boxes to best support their own policies and objectives.

²³⁰ See *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (stating that Congress may only regulate under its commerce power in regard to “the channels of interstate commerce,” “the instrumentalities of interstate commerce,” and “those activities have a substantial relation to interstate commerce.”); see also Cornell, *supra* note 21 (“Congress has used its power under the Commerce Clause to regulate [only] interstate gambling, international gambling, and relations between the United States and Native American territories,” not intrastate gambling.).

²³¹ MICHAEL BELLETIRE, LEGISLATING AND REGULATING CASINO GAMING: A VIEW FROM STATE REGULATORS 1 (1999), <https://govinfo.library.unt.edu/ngisc/reports/belletire.pdf>.

²³² See *Berman v. Parker*, 348 U.S. 26, 32 (1954).

²³³ Heather Wardles et al., *Gambling and public health: we need policy action to prevent harm*, THEBMJ, May. 2019, at 1, 2, <https://doi.org/10.1136/bmj.l1807>.

²³⁴ See Cornell, *supra* note 21 (“Each state determines what kind of gambling it allows within its borders, where the gambling can be located, and who may gamble. Each state has enacted different laws pertaining to these topics. The states also have differing legal gambling ages. . . .”).

Therefore, the states should be the ones to decide whether and how to regulate loot boxes.

A. Hawaii

Turning first to Hawaii, the Aloha State has set forth multiple reasons for its no-nonsense anti-gambling stance including: preservation of the local economy,²³⁵ protection of the state's cultural roots,²³⁶ and the mitigation of harms associated with problem gambling.²³⁷ Hawaii likely has strong interests to regulate loot boxes as loot boxes have been shown to function similarly to other gambling practices,²³⁸ thus giving rise to the same dangers which Hawaii strives to prevent. Specifically, loot boxes may cause nightmarish problem gambling habits for those who engage in their opening.²³⁹ Furthermore, allowing loot boxes to be present in Hawaii may injure the family and nature-centered culture of the state. For instance, loot boxes' addictive nature may threaten to remove individuals from the ambiance of Mother Earth and from their families. Lastly, the allowance of loot box purchasing may divert expenditures away from the local economy as individuals may choose to invest their money in loot boxes instead of the entertainment goods and experiences made available by local vendors.

Under the assumption that loot boxes may constitute gambling, Hawaii would likely best be able to protect its interests by regulating under its current gambling law framework. As Hawaii's current gambling law criminalizes essentially all forms of gambling,²⁴⁰ placing loot boxes under the jurisdiction of its gambling law would allow the state to remove all paid, harmful loot boxes within its borders, thus ensuring maximum protection from the harms that would otherwise threaten its public policies. The same could not be said if Hawaii chose to regulate in a manner similar to countries such

²³⁵ Fox, *supra* note 186.

²³⁶ *Why Casinos in Hawaii are Prohibited?*, *supra* note 195.

²³⁷ Webb, *supra* note 197.

²³⁸ See, e.g. CLOSE & LLOYD, *supra* note 4, at 14. (likening loot boxes to slot machines.).

²³⁹ See Zendle & Cairns, *supra* note 100, at 9.

²⁴⁰ See Haw. Rev. Stat. Ann. § 712-1220-712-1232 (West 2022).

as China, Japan, and the UK. China's informational approach, while somewhat effective, would not allow Hawaii to completely remove the harms of such loot boxes as the informational approach allows for the continued existence and use of loot boxes, with a few disclosure-related safeguards in place to mitigate the damages.²⁴¹ Japan's consumer-protection approach is inferior for similar reasons: such approach allows for the continued use of loot boxes with some restrictions in place to protect consumers from deceptive practices,²⁴² thus not fully removing loot boxes' harmful attributes. The United Kingdom's approach is also inadequate as it also allows for the survival of loot boxes, placing faith on industry self-regulation and consumer/data protection laws.²⁴³

Therefore, the regulatory approaches of both Belgium and the Netherlands are most likely be of interest and instructive to Hawaii as both have adopted a gambling law approach.²⁴⁴ Furthermore, both of these countries regulate loot boxes under policy reasoning that Hawaii would also likely find persuasive. Belgium regulated to protect vulnerable players, such as minors,²⁴⁵ while the Netherlands regulated loot boxes due to their addictive elements.²⁴⁶ Likewise, Hawaii possesses a similar interest to protect particularly-vulnerable individuals, and thus the family unit, from the horrors of gambling addiction. Should Hawaii choose to draw inspiration from these two countries, the state would have to take care to craft its regulations in a manner that does not overregulate to the extent that they encroach excessively upon freedom of choice, like Belgium has been criticized of doing.²⁴⁷ In addition, the regulations must clearly define which loot boxes are legal and which are not, drawing upon the questions created by the recent ruling in the Netherlands.²⁴⁸ Carefully crafted gambling

²⁴¹ See Xiao et al., *supra* note 17, at 4.

²⁴² See Schwlddessen, *supra* note 141, at 4-7, 13.

²⁴³ See DORRIES, *supra* note 18, at ¶¶ 27-32, 38.

²⁴⁴ See NAESSENS, *supra* note 113, at 16 ; *see also* Press Release from Kansspelautoriteit, *supra* note 16.

²⁴⁵ See NAESSENS, *supra* note 113, at 3-4, 17.

²⁴⁶ See Press Release from Kansspelautoriteit, *supra* note 16.

²⁴⁷ See Xiao, *supra* note 120, at 2, 5.

²⁴⁸ See *generally* Afdeling Bestuursrechtspraak Raad van State, *supra* note 128; *see also* Thomas-Akoo, *supra* note 133 ("Under the initial KSA interpretation, loot

laws around loot boxes will need to also be adequately enforced to be successful, as can be learned by the apparent failures on the part of Belgium.²⁴⁹ Overall, a gambling law approach would be most beneficial to Hawaii and, as such, Hawaii should consider looking to, and drawing inspiration from, countries that have already done so.

B. Massachusetts

Instead of setting forth strict anti-gambling views similar to Hawaii, the Bay State appears to walk more of a middle-ground when it comes to the regulation of gambling. Although the gambling law in Massachusetts, today, is “generally permissive,”²⁵⁰ the state’s Puritan roots continue to shine through.²⁵¹ Specifically, these roots persist in the form of prohibitions against certain types of gambling,²⁵² as well as a continued commitment to the mitigation of the harms of gambling.²⁵³ Nonetheless, the gambling industry of Massachusetts continues to grow.²⁵⁴ Land-based gambling has, in particular, experienced expansion in recent years.²⁵⁵ Furthermore, online gambling may soon see legislative regulation.²⁵⁶ As previously mentioned, the two main policies behind Massachusetts’s growing gambling law framework appear to be (1) the invigoration of the state’s economy and (2) the mitigation/elimination of the evils of gambling.²⁵⁷ Similar to Hawaii, Massachusetts likely has an interest in regulating loot boxes under its second goal, alone, as loot boxes can potentially present harms

boxes were considered a prohibited form of gambling, but the . . . ruling effectively legalised the products again.”)

²⁴⁹ See generally Xiao, *supra* note 120.

²⁵⁰ Weston, *supra* note 198.

²⁵¹ See *id.* (“Massachusetts was founded as a Puritan haven from the evils of the secular world.”).

²⁵² See, e.g. GANTZ & CAPUTI, *supra* note 201, at § 4. (stating that Massachusetts gambling law prohibits betting and sports betting, for example.).

²⁵³ See Mass. Gen. Laws Ann. ch. 23K, § 1 (West 2022); see also Massachusetts Gaming Commission, *supra* note 213.

²⁵⁴ See Fox, *supra* note 205.

²⁵⁵ *Id.*

²⁵⁶ See GANTZ & CAPUTI, *supra* note 201, at § 18.

²⁵⁷ See Mass. Gen. Laws Ann. ch. 23K, § 1 (West 2022); see also Massachusetts Gaming Commission, *supra* note 213 ([stating that the passing of the Expanded Gaming Act both strengthened Massachusetts’s economy and provided for mitigation efforts.](#)).

characteristic of gambling practices. To serve both state goals, regulation under a gambling law framework is likely the best course of action.

The regulation of loot boxes under a gambling law framework would best serve Massachusetts's public policy interests because such an approach appears to be the only one that allows for the generation of revenue *in addition* to the curbing of gambling vices. For example, while China's loot box regulation approach serves the purpose of protecting consumers through mandated informational disclosures,²⁵⁸ it does not appear to generate any revenue for the sovereign. Similarly, Japan's approach also does not focus on the bolstering of its economy and is, instead, preoccupied with the goal of protecting consumers from deceptive sales practices.²⁵⁹ Lastly, the UK approach does not benefit financially from the regulation of loot boxes by simply asking the industry to be more consumer-friendly and regulating under consumer and data protection laws.²⁶⁰ All of these approaches likely do not generate any revenue for the state unless the consumer protection laws relied upon, when violated, require payments to the government.

Instead, a gambling-law approach to loot boxes based in Massachusetts's current framework may optimally serve both goals. First, by placing loot boxes under the watchful eye of Massachusetts's gambling law, this activity may be directly regulated to the extent desired to reduce the harmful effects of engaging in such an activity. Second, the state could benefit financially under such an approach. For example, Massachusetts currently requires that all "gaming vendor[s] . . . be licensed or registered by the . . . Commission prior to . . . conducting business at a gaming establishment. . . ."²⁶¹ To acquire such

²⁵⁸ See See Xiao et al., *supra* note 17, at 4; see also Tang, *supra* note 135.

²⁵⁹ See Schwlddensen, *supra* note 141, at 13 ("The Premiums and Representations Act was enacted in 1962 to protect consumers from misleading labelling of goods and services," not necessarily to generate revenue.)

²⁶⁰ See DORRIES, *supra* note 18, at ¶¶ 27-32, 38.

²⁶¹ Massachusetts Gaming Commission, *Division of Licensing*, MASSGAMING, <https://massgaming.com/the-commission/inside-mgc/division-of-licensing/> (last visited Feb. 3, 2023).

licenses, the state may charge the applicant for an application fee.²⁶² While game developers and publishers surely are not “gaming vendors,”²⁶³ the state could adopt loot box-specific gambling law regulations that establish a similar licensing procedure for such entities. Under such regulations, game developers and publishers that wish to profit off of the sale of loot boxes in the state could be required to possess a renewable license. In addition, the state could possibly draw inspiration from its lottery practices.²⁶⁴ In doing so, it could make the receipt of such licenses contingent upon the state receiving a percentage of every dollar spent on those loot boxes. For instance, for every dollar spent on loot boxes, two cents must go to the state while the remainder of the profits go to the video game company. This gambling law approach to loot box regulation would create an initial and ongoing revenue source for Massachusetts while providing the opportunity to profit from loot boxes absent violation of other law. As Massachusetts’s best option to consistently serve both of its gambling law public policy goals is through a gambling law framework, it would be wise for the state to look toward countries such as Belgium and the Netherlands for inspiration, taking into account the shortcomings mentioned in the previous subsection of each of those approaches and attempting to avoid them.

C. Nevada

Lastly, the analysis turns to the Silver State: Nevada. As previously mentioned, Nevada finds itself on the opposite side of the spectrum to Hawaii because gambling is welcome and widespread.²⁶⁵

²⁶² See e.g. Massachusetts Gaming Commission, *Casino Vendor Licensing and Registration*, MASSGAMING, <https://massgaming.com/licensing/vendor-licensing-and-registration/> (last visited Feb. 3, 2023).

²⁶³ See *id.* (defining “gaming vendors” as those that conduct “business” with a gaming establishment).

²⁶⁴ See Massachusetts State Lottery Commission, *Supporting Communities*, THELOTTERY, <https://www.masslottery.com/about/support-communities> (last visited Feb. 3, 2023) (providing an infographic illustrating the distribution of each dollar spent on the lottery in Massachusetts: seventy-three cents go to “prizes to players,” nineteen cents go to “local aid to cities & towns,” six cents go to “commissions & bonuses to lottery retailers,” and two cents go toward “administrative expenses.”).

²⁶⁵ Vermeys & Elliott, *supra* note 215.

The state's expansive and relatively-inclusive gambling law allows for the enjoyment of numerous different gambling-related activities,²⁶⁶ excluding lotteries,²⁶⁷ so long as these activities are permitted by the proper state authorities.²⁶⁸ Nevada's supportive approach to in-state gambling is grounded in public policy similar to Massachusetts's growing gambling law:²⁶⁹ economic boons and the welfare of the state's citizens.²⁷⁰ Gambling revenue heavily bolsters Nevada's economy and allows for the state to improve the welfare of those who reside in it.²⁷¹ Nevertheless, the state maintains strict regulations on these lucrative gambling practices to protect the integrity of the industry and the welfare of the public.²⁷² Like the previously-discussed states, Nevada certainly has an interest in regulating loot boxes because of their undeniable similarities to gambling practices, the state's awareness of the corruptive elements of gambling practice, and Nevada's commitment to the welfare of its citizens. Once again, under similar reasoning applied to Massachusetts, it is this Comment's position that Nevada's interests would be best served under a gambling law approach to the regulation of loot boxes.

The main reason why Nevada would benefit best from regulating under a gambling law approach is the same as that of Massachusetts: the state's emphasis on the lucrateness of the gambling industry. As mentioned in the previous subsection, while the non-gambling law approaches of China, Japan, and the UK may be useful in protecting the population from gambling vices, they remain less capable of generating revenue for the benefit of the state and its citizens. A gambling law approach, on the other hand, has the potential to accomplish both goals.

²⁶⁶ See *Nevada's Gambling Laws*, *supra* note 217.

²⁶⁷ See NEV. CONST. art. 4, § 24.

²⁶⁸ See Nev. Rev. Stat. Ann. §§ 463.140, 463.160 (West 2022).

²⁶⁹ See Mass. Gen. Laws Ann. ch. 23K, § 1 (West 2022); *see also* Massachusetts Gaming Commission, *supra* note 213.

²⁷⁰ See Nev. Rev. Stat. Ann. § 463.0129(1) (West 2022).

²⁷¹ See *Nevada Gaming Law*, *supra* note 225; *see also* *How Gaming Benefits Nevada*, *supra* note 227.

²⁷² See Nev. Rev. Stat. Ann. § 463.0129(1)(b) (West 2022).

A gambling law approach could allow for profit acquisition through a licensing system, similar to that proposed for Massachusetts. In Nevada, “. . . it is unlawful for any person . . . either solely or in conjunction with others . . . (a) [t]o deal, operate, carry on, conduct, maintain, or expose for play . . . any gambling game . . . [or any related activity or device] without having first procured . . . all . . . gaming licenses. . . .”²⁷³ To obtain the applicable state licenses, the Nevada Gaming Control Board and Gaming Commission often charge both initial and annual fees.²⁷⁴ For example, to legally operate interactive gaming,²⁷⁵ a potential license-holder must pay an initial fee of \$500,000 and then an annual fee of \$250,000.²⁷⁶ By bringing loot boxes under an existing gambling law, such as that governing interactive gaming, or by creating a new law altogether, Nevada may profit from initial and recurring licensing fees. This money would not only accomplish the state’s goal of bolstering its economy, but it would also allow for improvement of the general welfare as citizens benefit from a more-profitable state.²⁷⁷ This is but one way that Nevada could profit from loot box regulation under a gambling law approach.

Furthermore, by regulating loot boxes through a state apparatus instead of, for instance, the video game industry, the state will retain the power to mitigate the corruptive vices that may potentially arise out of such devices. In this way, rather than hoping that the video game industry prioritizes the welfare of consumers over their own profits, the public welfare may be safeguarded to the extent desired by the state. As a gambling law framework best serves the public policy goals of Nevada that relate to gambling-related practices, it is recommended that this state also turn to Belgium and the Netherlands when considering how to go about regulating loot boxes

²⁷³ Nev. Rev. Stat. Ann. § 463.160 (West 2022).

²⁷⁴ See *License Fees and Tax Rate Schedule*, NEVADA GAMING CONTROL BOARD, <https://gaming.nv.gov/index.aspx?page=94#interactivegaming-lic> (last visited Feb. 4, 2023).

²⁷⁵ See Nev. Rev. Stat. Ann. § 463.016425 (West 2022) (defining “interactive gaming” as “the conduct of gambling games through the use of communications technology that allows a person . . . to transmit to a computer information to assist in the placing of a bet or wager and corresponding information related to the display of the game. . . .”).

²⁷⁶ *License Fees and Tax Rate Schedule*, *supra* note 274.

²⁷⁷ See e.g. *How Gaming Benefits Nevada*, *supra* note 227.

within their borders (borrowing from those approaches, when beneficial, while remedying their associated deficiencies).

D. Two Approaches Are Better Than One

For both varying and (at times) similar reasons, it is this Comment's position that the states of Hawaii, Massachusetts, and Nevada would benefit optimally from the regulation of loot boxes under a gambling law approach. Therefore, it is recommended that these states' legislatures consider enacting such an approach to loot box regulation, drawing inspiration and learning vicariously from trendsetting international jurisdictions such as Belgium and the Netherlands. That is not to say, however, that a gambling law framework is the only viable framework through which loot boxes may be addressed. Nor is it to say that frameworks must be employed in exclusivity. In fact, this Comment acknowledges that the several aforementioned approaches have individual merit and may also be used in tandem with one another, to both a state's and its consumers' benefits. The gambling law approach, in particular, may be well-complemented by concurrent implementation of a China-inspired mandated-disclosure law, a Japan-inspired consumer-protection law, or a call for industry self-regulation similar to that of the UK.

Hawaii, for example, may have more to gain through the simultaneous implementation of a gambling law regulatory framework and a state-issued request for industry self-regulation. As previously mentioned, typical legal definitions of gambling involve three elements: consideration, chance, and prize.²⁷⁸ Hawaii's definition of "gambling" conforms to this typical model as it too contains the elements of consideration, chance, and prize.²⁷⁹ While this Comment assumes that paid loot boxes may meet these three elements, loot boxes come in many different forms, including those that are offered

²⁷⁸ CLOSE & LLOYD, *supra* note 4, at 34.

²⁷⁹ See Haw. Rev. Stat. Ann. § 712-1220 (West 2022) ("A person engages in gambling if he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome.").

“for free, encouraging later real-money purchases.”²⁸⁰ Free loot boxes, while they may not threaten Hawaii’s policy interest of protecting its local economy as much as paid loot boxes,²⁸¹ may still pose a danger to Hawaii’s interests regarding the avoidance of problem-gambling and damage to the state’s pro-family/nature dynamic.²⁸² Furthermore, free loot boxes may evade the typical gambling law framework as they do not satisfy the requisite “consideration” or “wager” element due to their gratuitous nature. As a result, while Hawaii could mitigate the harms of paid loot boxes by essentially “banning” them under their gambling law framework, the harms associated with free loot boxes could still run rampant under a gambling law framework, enacted alone. A call to industry self-regulation, similar to that of the UK,²⁸³ could help “plug the holes” that a gambling law framework leaves behind by asking for the industry to provide consumer-oriented loot boxes or to employ a more consumer-friendly monetization model, altogether. This is but one example of how international loot box regulatory approaches can supplement one another. It is, therefore, also recommended that the several states consider all of the many different approaches to loot box regulation. By doing so, they may forge a custom regulatory approach that adequately addresses the perceived dangers posed by this form of microtransaction.

IV. CONCLUSION

The video game industry, and its success, is characterized by technological and quality-related innovations.²⁸⁴ However, innovation is not costless.²⁸⁵ Loot boxes are amongst those microtransactions that entered the video gaming scene to meet the rising monetary demands of video game development as well as to bring continuous revenue into

²⁸⁰ CLOSE & LLOYD, *supra* note 4, at 7.

²⁸¹ See Fox, *supra* note 186.

²⁸² See *Why Casinos in Hawaii are Prohibited?*, *supra* note 195; *see also* Webb, *supra* note 197.

²⁸³ See generally DORRIES, *supra* note 18, at ¶¶ 27-30.

²⁸⁴ See Sandqvist, *supra* note 46, at 8-17.

²⁸⁵ See O’Donnell, *supra* note 22, at 107 (“As the complexity associated with game development has increased, and the amount of content necessary to meet the growing demands of players also increases, the financial time and risk associated with game development has continued to climb.”).

the video game industry.²⁸⁶ Unfortunately, loot boxes possess undeniable relationships and similarities to gambling practices, such as spinning slot machines.²⁸⁷ As a result, loot boxes have been found to be potentially accompanied by, or even leading to, the evils characteristic of gambling-related practices, such as problem gambling.²⁸⁸ The nations of the world have taken notice of the risks posed by loot boxes, especially toward minors,²⁸⁹ and have mounted several, varying responses.²⁹⁰ Belgium and the Netherlands decided to combat the negatives of loot boxing through placing certain loot boxes under their statutory definition of “gambling.”²⁹¹ China and Japan, on the other hand, sought to mitigate the dangers of loot boxes through application of consumer protection laws, requiring video game publishers to inform their consumer-bases and to avoid deceptive practices.²⁹² The United Kingdom declined to regulate loot boxes under a gambling law framework and, instead, chose to rely on its existing consumer and data-protection laws while calling on the video game industry to intervene.²⁹³

The United States, amidst discussion of the topic within its many legislatures, has yet to take a position regarding the regulation of loot boxes.²⁹⁴ The states are best able to decide whether and how to regulate loot boxes because they possess the authority to regulate gambling within their borders.²⁹⁵ Furthermore, they are best-situated

²⁸⁶ See generally Sandqvist, *supra* note 46. (mentioning that e-commerce, and the possibility of selling virtual content (such as loot boxes), arose in the wake of financial concerns, such as the financial crisis of 2007 and the high financial risk of game production. The selling of minor, virtual content was seen as a way to extend revenue streams.).

²⁸⁷ See CLOSE & LLOYD, *supra* note 4, at 13-14.

²⁸⁸ See generally Zendle & Cairns, *supra* note 100, at 9.

²⁸⁹ See e.g. NAESSENS, *supra* note 113, at 17 (“The lack of regulation and control of these video games is particularly problematic with regard to minors . . . , who can take part in games of chance without any protection.”).

²⁹⁰ See CLOSE & LLOYD, *supra* note 4, at 32-33.

²⁹¹ See NAESSENS, *supra* note 113, at 16; see also Press Release from Kansspelautoriteit, *supra* note 16.

²⁹² See Tang, *supra* note 135; see also Schwlddessen, *supra* note 141, at 13.

²⁹³ See DORRIES, *supra* note 18, at ¶¶ 25-39.

²⁹⁴ Kim, *supra* note 17 (stating that there is “currently no legal consensus . . . in the United States around the illegality of loot boxes.”).

²⁹⁵ See Cornell, *supra* note 21.

to understand their individual wants and needs. Under the assumption that loot boxes may satisfy the traditional legal elements of “gambling,”²⁹⁶ this Comment sets forth that regulation of loot boxes under a gambling law approach would maximally serve the individual, gambling-related policy interests of Hawaii, Massachusetts, and Nevada--all of whom possess differing views on gambling-related practices and their regulation. As such, these states should consider looking toward, and drawing inspiration from, the efforts of Belgium and the Netherlands when attempting to address loot boxes. Nevertheless, this Comment acknowledges that the diverse approaches to loot box regulation possess individual merit and are not mutually exclusive in their potential application. Therefore, it is imperative that the several states give attention to the regulatory approaches of all nations when designing their own loot box regulatory approaches. Ultimately, video games are not “all fun and games” and it is time for the United States to realize this, to take a stand against loot boxes, and to protect American consumers.

²⁹⁶ See CLOSE & LLOYD, *supra* note 4, at 34 (stating that “[l]egal definitions of gambling rest on three components: (1) consideration . . . , (2) chance and (3) the prize.”).