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## From Video Gaming to Underage Gambling: Illinois's Options in Addressing the New Loot Box Monetization Model

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# From Video Gaming to Underage Gambling: Illinois’s Options in Addressing the New Loot Box Monetization Model

BY KATLIN D. KIEFER\*

*This Comment proposes that loot boxes should be regulated as gambling within the United States, particularly in Illinois. Part I provides a factual background and history on the practice of loot boxes. Part II sets forth the legal precedent of gambling in the United States overall and then in Illinois specifically. Part III covers the current case law that exists around loot box adjacent mechanics and summarizes the general court perspective on the matter. Part IV proposes that courts interpret the contents of loot boxes to be “things of value” within the meaning of most gambling statutes as a means of regulation on the practice. Part V explains why the regulation of loot boxes is necessary as children especially are susceptible of developing a gambling addiction via their use and also establishes some options for how Illinois could combat such predatory tactics.*

I. LOOT BOX INTRODUCTION .....	97
A. THE CONTROVERSY SURROUNDING LOOT BOXES.....	99
B. REGULATING LOOT BOXES AS GAMBLING.....	100
1. GAMBLING INTRODUCTION.....	100
2. LOOT BOX REGULATION INTERNATIONAL OVERVIEW .....	100
1. COUNTRIES WHERE LOOT BOXES ARE LEGAL .....	101
2. COUNTRIES WHERE LOOT BOXES ARE EITHER PARTIALLY OR FULLY ILLEGAL .....	102
3. LOOT BOX REGULATION IN THE UNITED STATES.....	105
II. UNITED STATES LAWS GOVERNING GAMBLING.....	108
A. FEDERAL GAMBLING LAWS .....	108
B. ILLINOIS GAMBLING LAWS .....	110
III. CASE LAW SURROUNDING LOOT BOXES .....	114
A. <i>KATER V. CHURCHILL DOWNS INC.</i> .....	114
B. <i>MASON V. MACHINE ZONE, INC.</i> .....	116
C. <i>SOTO V. SKY UNION, LLC</i> .....	117

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D. PHILLIPS V. DOUBLE DOWN INTERACTIVE LLC .....	117
E. CASE LAW SUMMARY .....	119
IV. VIRTUAL REWARDS FROM LOOT BOXES ARE “THINGS OF VALUE” .....	120
V. LOOT BOX REGULATION PROPOSAL .....	121
A. REGULATION IS NECESSARY .....	121
B. OPTIONS FOR POTENTIAL REGULATION.....	121
1. ILLINOIS STATUTE ADDRESSING LOOT BOX MECHANICS .....	121
2. PETITIONING FOR ESA/ERSB (THE INDUSTRY) TO SELF-REGULATE.....	122
C. CONCLUSION .....	122

## I. LOOT BOX INTRODUCTION

A video game would naturally be described as a good. The full game is traditionally placed on a storage device which is then transferred to a consumer. The typical revenue model of pay-to-play (P2P) would support this classification.<sup>1</sup> This form of video game monetization involves a consumer paying one upfront cost in exchange for a complete physical game. However, with the increasing prevalence and efficiency of the Internet, video game publishers now sell digital copies as well as provide content updates after the initial obtainment of a game.<sup>2</sup> This innovation allowed for the free-to-play (F2P) revenue model to be implemented. This monetization is based upon consumers downloading the game for no cost and then participating in *microtransactions*, which are payments of real money, usually for a small amount, for virtual rewards within the game itself.<sup>3</sup>

Increasingly, video game developers are treating games as a service, and this is the basis for a new revenue model. Developers of P2P are implementing continued updates, support, multiplayer server maintenance, and other sustained features that fundamentally change the classification of their game from a good to a service.<sup>4</sup> As in F2P games, where developers rely on microtransactions for compensation as there is no upfront income, for P2P games as a service, developers need a continual income stream to bolster continuous development of features.<sup>5</sup> This has allowed for the saturation of microtransactions in video games today as well as the invention and increased use of loot boxes.<sup>6</sup>

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1. Tatu Latvala, *Elements of Gambling in Video Game: Microtransactions – Loot Boxes* 16 (2019).

2. *Id.*

3. *Id.* at 17.

4. *Id.* at 15-17.

5. *Id.* at 17.

6. Latvala, *supra* note 1, at 17-19.

Loot boxes are a form of microtransaction that are chance based. Instead of a normal microtransaction, where the consumer knows exactly what virtual content is being purchased, a loot box is a randomized container of virtual content that contains items of differing in-game value.<sup>7</sup> Often, a loot box will contain a highly valued item with incredibly low odds and players are taking the chance to obtain that item in particular. Loot boxes are a much more effective microtransaction as they lock virtual content behind not only a paywall, but also a game of chance which will often incite repeat purchases.<sup>8</sup>

Loot boxes can be typified into two categories: cosmetic and fundamental.<sup>9</sup> Cosmetic loot boxes have no bearing on a player's ability to play the game. These boxes are made up of rewards such as recolored items or different "skins" (outfits) that are purely superficial.<sup>10</sup> A modern game published by Blizzard Entertainment, Inc., that employs cosmetic loot boxes is *Overwatch*.<sup>11</sup> Released in 2016, *Overwatch* popularized the modern loot box mechanics seen today.<sup>12</sup> Fundamental loot boxes, however, have rewards that impact how well a player can play the game or whether or not the player can progress.<sup>13</sup> Locking fundamental components of a game behind a chance component has created more backlash than cosmetic loot box implementation.<sup>14</sup> Controversy surrounded Electronic Arts' (EA) release of the game *Star Wars Battlefront II* in 2017 for this very reason.<sup>15</sup> These loot boxes allowed for players to pay for major characters or enhancements that would usually require hours of playtime to unlock in game.<sup>16</sup> EA was accused of promoting pay-to-win strategies because of these fundamental loot boxes as

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7. Brian Crecente, *What Are DLC, Loot Boxes and Microtransactions? An Explainer*, VARIETY (Nov. 28, 2017, 8:22 AM), <https://variety.com/2017/gaming/features/what-is-a-loot-box-1203047991/> [<https://perma.cc/5ULZ-ZRHS>].

8. *Id.*

9. Alex Huntly, *The Moral Issue with Gaming Loot Boxes*, MEDIUM (Sept. 19, 2018), <https://medium.com/lunar-works-lab/the-moral-issue-with-gaming-loot-boxes-b76ee2713ec4> [<https://perma.cc/BKD7-2VWJ>].

10. *Id.*

11. *Id.*

12. Dustin Bailey, *Loot Boxes Lead Overwatch to \$1 Billion of In-Game Revenue*, PCGAMESN (July 24, 2019), <https://www.pcgamesn.com/overwatch/revenue> [<https://perma.cc/YL26-G2YD>].

13. Huntly, *supra* note 9.

14. Gene Park, *How a Star Wars Video Game Faced Charges That It Was Promoting Gambling*, WASH. POST (Nov. 18, 2017, 1:00 PM), <https://www.washingtonpost.com/news/comic-riffs/wp/2017/11/18/how-a-star-wars-video-game-faced-charges-that-it-was-promoting-gambling/> [<https://perma.cc/6EQA-QD7F>].

15. *Id.*

16. Ben Gillbert, *'We Got It Wrong': EA Exec Apologizes for 'Star Wars' Loot Box Fiasco, Promises to 'Be Better'*, BUS. INSIDER (Apr. 17, 2018, 9:11 AM), <https://www.businessinsider.com/star-wars-battlefront-2-ea-apologizes-for-loot-box-fiasco-2018-4> [<https://perma.cc/7BN5-6XFU>].

well as targeting children due to the *Star Wars* branding.<sup>17</sup> In response to the outrage, EA subsequently removed the loot box mechanics from the game.<sup>18</sup>

#### A. THE CONTROVERSY SURROUNDING LOOT BOXES

The *Star Wars Battlefront II* controversy prompted some industry self-correction. Apple specifically revised their guidelines for the App Store to be stricter a month after the controversy.<sup>19</sup> The new guidelines required that companies that utilize loot boxes must explicitly state in-game the availability of items in the boxes and the probability of obtaining those items. If companies did not comply with these new guidelines, their apps would be rejected during review and deleted from the iOS App Store. Most apps did not disclose the scope of items or probability of loot boxes before this, so companies were forced to very quickly implement these disclosures.<sup>20</sup>

The industry self-correction was lackluster compared to the responses from governments and politicians internationally. Loot boxes have long been equated to gambling and this incident drew enough media attention to prompt responses from leaders and lawmakers.<sup>21</sup> Belgium's Minister of Justice responded with the recommendation to completely ban loot boxes after a report by the Belgium Gaming Commission regarding the addictive nature of the gaming mechanic.<sup>22</sup> A State of Hawaii Representative, Chris Lee, also announced that he would be considering legislation that would prohibit the sale of games with loot boxes to minors as well as a complete ban on loot boxes in games entirely.<sup>23</sup> Lee's main criticism of the loot boxes introduced in *Star Wars Battlefront II* was the potential negative effect on the younger generation and he called the game "an online casino designed to lure kids into spending money."<sup>24</sup>

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17. Park, *supra* note 14.

18. Gillbert, *supra* note 16.

19. *The Fine Line Between Gambling and Gaming: The Short International History of Loot Box/Gacha and Regulations for All Game Devs*, ADISH CO. (Oct. 9, 2018), <https://cs-agents.com/blog/history-loot-box-gacha/> [<https://perma.cc/CXE7-W443>] [hereinafter *International History*].

20. *Id.*

21. Zaid Jilani, *Video Game "Loot Boxes" Are Like Gambling for Kids – and Lawmakers Are Circling*, THE INTERCEPT (Dec. 8, 2017, 9:30 AM), <https://theintercept.com/2017/12/08/video-games-loot-boxes-gambling-gaming-star-wars-battlefront-2/> [<https://perma.cc/R7T4-HZE8>].

22. *See id.* *See also* Giuseppe Nelva, *Politicians from Belgium and Hawaii Seeking to Regulate Loot Boxes*, DUALSHOCKERS (Nov. 21, 2017, 11:58 PM), <https://www.dualshockers.com/politicians-belgium-hawaii-loot-boxes-regulation/> [<https://perma.cc/KE9H-4AKC>].

23. Nelva, *supra* note 22.

24. *Id.*

## B. REGULATING LOOT BOXES AS GAMBLING

### 1. *Gambling Introduction*

Whether or not loot boxes qualify as gambling is steeped in gambling law and thus differs based on what each jurisdiction's definition of "gambling" is. The classic definition of gambling is to risk something valuable on an unknown outcome in hope of getting a reward.<sup>25</sup> Most loot boxes, when analyzed under this fundamental definition, would be considered gambling as all the elements are met. These elements can simply be known as consideration, chance, and prize.<sup>26</sup> However, while these basic elements are almost universal, their interpretation and scope vary wildly depending on the jurisdiction. For example, the prize element in the United States generally requires that a successful play rewards the player with "something of value," which is relevant in the loot box debate as whether or not virtual items are *valuable* is disputed.<sup>27</sup> If a video game publisher does not offer any way to monetize the in-game item in the real world and does not authorize any third parties to enable such monetization through online trading, the prize is generally found to not be "something of value" and prevents loot boxes from being classified as gambling.<sup>28</sup> Each loot box implementation is also unique because what is at stake, how high the stakes are, and its presentation are not uniform for every game and thus can make it difficult for legislators to address the topic broadly.

### 2. *Loot Box Regulation International Overview*

The state of loot box regulation is varied across the world and there is no current international agreement on this issue.<sup>29</sup> Some countries have outright declared loot boxes gambling while others have only outlawed certain

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25. Jilani, *supra* note 21.

26. 38 AM. JUR. 2D *Gambling* § 2 (2021).

27. *See id.* *See also* Kater v. Churchill Downs Inc., 886 F.3d 784 (9th Cir. 2018); Mason v. Mach. Zone, Inc., 851 F.3d 315 (4th Cir. 2017); Soto v. Sky Union, LLC, 159 F. Supp. 3d 871 (N.D. Ill. 2016); Phillips v. Double Down Interactive LLC, 173 F. Supp. 3d 731 (N.D. Ill. 2016).

28. David Zeffman & Rahul Gandhi, *UK Parliamentary Committee Says 'Loot Boxes' Should Be Considered Gambling and Regulated Accordingly*, CMS LAW-NOW (Sept. 25, 2019), [https://www.cms-lawnow.com/?sc\\_itemid={3E939932-7A6C-4175-AD9A-845AA1471A55}&sc\\_lang=en&sc\\_pd\\_view=1&ec\\_eq=OniyJ%2bCnsHv%2bafWiLLdz57rtYUrYWuysdaX-Folh9hN9GiJ%2b14nJWA7YwL3DtqY23pwt%2f4t%2f06u8IRJGtN0WKli1aa9Hw7UFVTbBV%2bMddKanxt6ZQHUQXEOH3CMoO%2bWzzGySvuYOIl%2fIshUM4CWDQ4SP7GDrYIW%2bbhrzD0r3MJGMMt6kr3waYsIzfWMSyUbqB](https://www.cms-lawnow.com/?sc_itemid={3E939932-7A6C-4175-AD9A-845AA1471A55}&sc_lang=en&sc_pd_view=1&ec_eq=OniyJ%2bCnsHv%2bafWiLLdz57rtYUrYWuysdaX-Folh9hN9GiJ%2b14nJWA7YwL3DtqY23pwt%2f4t%2f06u8IRJGtN0WKli1aa9Hw7UFVTbBV%2bMddKanxt6ZQHUQXEOH3CMoO%2bWzzGySvuYOIl%2fIshUM4CWDQ4SP7GDrYIW%2bbhrzD0r3MJGMMt6kr3waYsIzfWMSyUbqB) [https://perma.cc/HV5T-WM2V].

29. *International History*, *supra* note 19.

mechanics. There are also countries that have imposed no regulation whatsoever on loot boxes as they have determined that the practice does not qualify as gambling. All of these countries are using their own domestic laws to create this determination on whether loot box mechanics in video games qualify as gambling.<sup>30</sup>

*i. Countries Where Loot Boxes are Legal*

A few countries have already determined that loot boxes are not gambling under their domestic law.<sup>31</sup> These countries include France, the United Kingdom (UK), and New Zealand. In France, ARJEL, the gambling regulatory agency for the country, announced in its activity report for the 2017–2018 period that loot boxes do not constitute gambling. The agency’s reasoning for this outcome was because a reward is always guaranteed and that the virtual rewards obtained have no real monetary value outside of the game. The report did not deny that the loot box mechanic could promote gambling behavior.<sup>32</sup>

The United Kingdom’s Gambling Commission also released an official statement around the time of the Star Wars Battlefront II controversy in 2017, but not in response to it specifically. A petition signed by over 15,000 people expressed the stance that loot boxes in video games for children should be banned because of its similarity to gambling. The United Kingdom’s Gambling Commission thus instigated an investigation into the issue. However, the Commission concluded after the investigation that loot box mechanics were not gambling under UK law similar to the French response because the virtual rewards were only valuable in the game and did not correspond to monetary value.<sup>33</sup> The Gambling Commission did not fully support their implementation however, as the statement also warned that loot boxes exemplify how “the line between video gaming and gambling is becoming increasingly blurred.”<sup>34</sup> While loot boxes currently cannot be considered gambling under British law, this may change in the near future. The United Kingdom’s Parliament Committee on Digital, Culture, Media and Sport conducted its own investigation into loot boxes in September of 2019 and released a report that made many recommendations to Parliament regarding the mechanic.<sup>35</sup> The report recommends that the mechanic should be regulated by UK gambling laws, loot boxes should be outright removed from games targeted at

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30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Colin Campbell, *UK Gambling Commission Weighs in on Loot Crate Legality*, POLYGON (Nov. 24, 2017, 2:01 PM), <https://www.polygon.com/2017/11/24/16696974/uk-gambling-commission-loot-crate> [<https://perma.cc/8UN9-5Z8Y>].

35. Zeffman & Gandhi, *supra* note 28.

children, and the rating board should take loot box inclusion into account when rating a video game so as to make vulnerable people aware.<sup>36</sup> The report also put onus on video game publishers to both crack down on third-party trading of loot box rewards for real money as well as be required to share player data regarding the purchasing of loot boxes to better understand the affect it is having on vulnerable players. The report acknowledges that a change in legislation is a long-term solution and instead recommended a different regulation method by an “online harms regulator.”<sup>37</sup>

New Zealand also weighed in on the issue after the Star Wars Battlefront II controversy and its gambling regulation group found that loot boxes did “not meet the legal definition of gambling.”<sup>38</sup> The reasoning is similar to that of the British or the French as the prize of a virtual item is not considered valuable. A New Zealand official elaborated, stating that “gamers do not purchase loot boxes seeking to win money or something that can be converted into money.”<sup>39</sup> This official conceded that while they “appear to be gambling,” since they do not meet the legal definition, the government is unable to regulate the mechanic under its relevant gambling statute.<sup>40</sup>

## II. COUNTRIES WHERE LOOT BOXES ARE EITHER PARTIALLY OR FULLY ILLEGAL

Very few countries have been able to regulate loot boxes under their existing law. The first time a country attempted to impose regulation, the mere threat escalated to a direct intervention by the industry itself. In Japan, an incredibly similar video game monetization mechanic to loot boxes had become popular in the early 2010s.<sup>41</sup> This monetization method is known as *gacha*, which is the Japanese word for “capsule toys.” The name derives from how a capsule toy is only able to be purchased without knowing what is inside first and is a comparable surprise mechanic. The word *gacha* is often used as a synonym for loot boxes as the only real difference between the two mechanics is that virtual, in-game currency is used to purchase *gacha* whereas loot boxes typically are purchased outright with real money. While in-game currency can be earned through gameplay, it is also available for purchase with real currency as well and thus are the same concept.<sup>42</sup> Many loot boxes of popular games could be described accurately as *gacha*.

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36. *Id.*

37. *Id.*

38. Eddie Makuch, *Loot Boxes Are Not Gambling, New Zealand Says*, GAMESPOT (Dec. 12, 2017, 3:53 PM), <https://www.gamespot.com/articles/loot-boxes-are-not-gambling-new-zealand-says/1100-6455608/> [<https://perma.cc/7FJD-8TKU>].

39. *Id.*

40. *Id.*

41. *International History*, *supra* note 19.

42. *Id.*



Japan's controversy with gacha or loot boxes came long before the rest of the world. In 2012, most of the games featured in the Japanese app market featured gacha whereas the rest of the world did not have such a high saturation.<sup>43</sup> The particular game model that was the subject of this controversy is known as *kompū gacha* or *complete gacha*, a system that requires players to obtain a full, complete set of items (items A-D) through gacha mechanics to then obtain a rare item (the *grand prize*). Kompū gacha can be described as a multi-level or combination-style loot box mechanism.<sup>44</sup> In May of 2012, a newspaper reported that the government was looking to regulate and ban the complete gacha model.<sup>45</sup> As a result of the report, the stocks of the Japanese game companies that created these complete gacha games plummeted. Six main game companies responded by announcing that they would remove all complete gacha features in their games and not include the model in future games. The remaining companies followed this trend and the model was eliminated from the market. The mere threat by the government provoked an economic downfall that prompted game companies to self-regulate.<sup>46</sup> However, even though the threat prompted the desired response, Japan officially declared the specific complete gacha model illegal under its Act against Unjustifiable Premiums and Misleading Representations.<sup>47</sup> Standard gacha is still very prevalent in Japan and thus only certain types of loot boxes are outlawed.<sup>48</sup>

As with Japan, the Netherlands determined that some loot boxes qualify as gambling and thus providing that “game of chance to Dutch players without a license is prohibited.”<sup>49</sup> The Netherlands Gambling Authority analyzed loot boxes in ten popular games and found four violated its Betting and Gaming Act. The reasoning that these loot boxes constituted gambling was because the content of the boxes was determined by chance, and critically, that the prizes could be traded outside of the game and thus the prizes have a

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43. *Id.*

44. Sebastian Schwidessen, *Loot Boxes in Japan: Legal Analysis and Kompū Gachu Explained*, BAKER MCKENZIE (Aug. 2, 2018), <https://s3.amazonaws.com/documents.lexology.com/a2abc5ef-26b8-4f16-ace4-884bc988fc29.pdf?AWSAccessKeyId=AKIAVYILUYJ754JTDY6T&Expires=1582605799&Signature=wg8wlO3gVCLQSDNFUG66ACVbTPY%3D> [https://perma.cc/9D9R-MUYE].

45. *International History*, *supra* note 19.

46. *Id.*

47. Kathleen De Vere, *Japan Officially Declares Lucrative Kompū Gacha Practice Illegal in Social Games*, ADWEEK (May 18, 2012), <https://www.adweek.com/digital/japan-officially-declares-lucrative-kompū-gacha-practice-illegal-in-social-games/> [https://perma.cc/4V4H-ZYNK].

48. Schwidessen, *supra* note 44.

49. Wesley Yin-Poole, *The Netherlands Declares Some Loot Boxes Are Gambling*, EUROGAMER (Apr. 19, 2018), <https://www.eurogamer.net/articles/2018-04-19-the-netherlands-declares-some-loot-boxes-are-gambling> [https://perma.cc/P5YV-JKB4].

market value.<sup>50</sup> If the content of the loot box is not transferable, then the practice is legal gaming whereas if the content is transferable, then the practice is deemed illegal gambling.<sup>51</sup> The Netherlands Gambling Authority did not name these games outright, but the games were determined to be *FIFA 18*, *Dota 2*, *PlayerUnknown's Battlegrounds*, and *Rocket League*.<sup>52</sup> While these games do not facilitate the trading and sale of the virtual items within the games themselves, the items can be traded or sold outside of the game and thus the prize has real monetary value. In-game items in *Dota 2*, for example, could be sold and traded via the digital *Steam Marketplace*, which is managed by *Steam*, the largest digital video game distribution service for PC gaming.<sup>53</sup> The Netherlands Gambling Authority also set out that all publishers and developers remove “addiction-sensitive” elements, such as “almost winning” effects and the ability to quickly open multiple boxes in succession.<sup>54</sup> Companies were given around two months to comply with the law or face fines and then potentially prosecution if fines did not prove to be effective.<sup>55</sup> In response to this ban, companies have either made the necessary changes so that the loot boxes’ content is no longer transferable, or have removed the loot boxes entirely for Dutch players. *Dota 2* in-game items have been disabled from being traded or sold on the *Steam Marketplace* and *Rocket League*’s loot boxes are disabled from being opened in the Netherlands.<sup>56</sup>

In contrast to Japan and the Netherlands partially banning loot boxes, Belgium has declared loot boxes of all types to be illegal gambling under its

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50. *Id.*

51. *Loot Boxes & Netherlands Gaming Authority's Findings*, DUTCH GAMES ASSOCIATION (Apr. 26, 2018), <https://dutchgamesassociation.nl/news/loot-boxes-netherlands-gaming-authoritys-findings/> [https://perma.cc/KPJ5-D37E].

52. Yin-Poole, *supra* note 49.

53. See Sam Prell, *The Netherlands is Taking Government Action on Loot Boxes – Here's What You Need to Know*, GAMESRADAR (Apr. 20, 2018), <https://www.gamesradar.com/the-netherlands-is-taking-government-action-on-loot-boxes-heres-what-you-need-to-know/> [https://perma.cc/VYJ5-9LSK]; Cliff Edwards, *Valve Lines Up Console Partners in Challenge to Microsoft, Sony*, BLOOMBERG (Nov. 4, 2013, 10:18 AM), <https://www.bloomberg.com/news/articles/2013-11-04/valve-lines-up-console-partners-in-challenge-to-microsoft-sony> [https://perma.cc/5J3P-UKQ2].

54. Yin-Poole, *supra* note 49.

55. Shabana Arif, *The Netherlands Starts Enforcing Its Loot Box Ban*, IGN (Jun. 20, 2018, 4:49 AM), <https://www.ign.com/articles/2018/06/20/the-netherlands-starts-enforcing-its-loot-box-ban> [https://perma.cc/7CYN-PRUN].

56. See *e.g.*, *id.*; Raymond Bakker, *Rocket League Loot Boxes Disabled in the Netherlands and Belgium Due to Government Regulations*, ZERO LIVES (Apr. 16, 2019, 7:21 PM), <https://zerolives.com/article/ne2hbneT/rocket-league-loot-boxes-banned-in-the-netherlands-and-belgium-due-to-government-regulations> [https://perma.cc/ECM6-HGW6].

laws purely because they are games of chance.<sup>57</sup> The Belgian Gaming Commission looked at the games *Star Wars Battlefront II*, *FIFA 18*, *Overwatch*, and *Counter-Strike: Global Offensive* in an investigation after the *Battlefront* controversy. All except *Star Wars Battlefront II* were deemed to be in violation of the law and the game only escaped this labeling because the loot boxes had already been removed from the game following its launch. If companies failed to comply with the law, the publishers could face “a prison sentence of up to five years and a fine of up to 800,000 euros.” These punishments could be doubled if minors are involved according to a statement from the Belgium Minister of Justice Koen Geens.<sup>58</sup> For companies to comply with Belgian law, they either need to remove the feature entirely from Belgian players or alter the loot box mechanic so to remove the chance element. *Rocket League* chose to treat the Netherlands and Belgium the same and just remove the loot boxes entirely for that region.<sup>59</sup> However, *Dota 2* is attempting to comply with Belgian law while also keeping some of the loot box mechanic intact by allowing Belgian players to see what’s in a loot box before the purchase and limit the player to only purchasing one box at a time.<sup>60</sup> Some companies have chosen an even more drastic approach to comply with the law, which is to remove the game entirely from the region. Nintendo, Japan’s foremost video game company, decided to remove two of its popular mobile games from the Belgian market due to the gambling law. After the removal date, neither game was available to download or play.<sup>61</sup>

### III. LOOT BOX REGULATION IN THE UNITED STATES

Loot boxes are also not generally identifiable under most United States law as gambling.<sup>62</sup> This is because most of the virtual items involved

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57. Wesley Yin-Poole, *Now Belgium Declares Loot Boxes Gambling and Therefore Illegal*, EUROGAMER (Apr. 27, 2018), <https://www.eurogamer.net/articles/2018-04-25-now-belgium-declares-loot-boxes-gambling-and-therefore-illegal> [https://perma.cc/8P44-YXUV].

58. *Id.*

59. Bakker, *supra* note 56.

60. Liz Lanier, *Valve Takes the Mystery Out of Dutch ‘Dota 2’ Loot Boxes*, VARIETY (July 26, 2018, 9:00 AM), <https://variety.com/2018/gaming/news/dota-2-dutch-loot-boxes-visible-1202886752/> [https://perma.cc/8WES-WVRT].

61. Amrita Khalid, *Nintendo Pulls Two Mobile Games in Belgium Due to Loot Box Laws*, ENGADGET (May 21, 2019), [https://www.engadget.com/2019/05/21/nintendo-pulls-two-mobile-games-in-belgium-due-to-loot-box-laws/?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce\\_referrer\\_sig=AQAAAG5X47CgREoGsTHQLgWKroNmsfTJCUa3YM1wx36DZnpILZGIDMA8ObKLzZJ2zZ4msjT\\_QRnj0EKnpIAXM9DG3UPctwu8ZDtKtExl-DsDQitG5PC3N4w9QxCjL3RJ2bfxQhXiIdh5f5e6g9G52pXw3Un2sxXwV1\\_F5G\\_aKtW43y](https://www.engadget.com/2019/05/21/nintendo-pulls-two-mobile-games-in-belgium-due-to-loot-box-laws/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2x1LmNvbS8&guce_referrer_sig=AQAAAG5X47CgREoGsTHQLgWKroNmsfTJCUa3YM1wx36DZnpILZGIDMA8ObKLzZJ2zZ4msjT_QRnj0EKnpIAXM9DG3UPctwu8ZDtKtExl-DsDQitG5PC3N4w9QxCjL3RJ2bfxQhXiIdh5f5e6g9G52pXw3Un2sxXwV1_F5G_aKtW43y) [https://perma.cc/898F-JLH6].

62. Sebastian Schwidessen, *Loot Box Latest: Big Fish Casino Decision Reversed by US Court*, LINKEDIN (Apr. 3, 2018), <https://www.linkedin.com/pulse/loot-box-latest-big-fish-casino-decision-reversed-us-sebastian/> [https://perma.cc/VR2N-EGS6].

do not satisfy the *valuable* prize element since they cannot be redeemed for real money.<sup>63</sup> As noted earlier, there has been some drive to legislate the issue in the United States after the *Star Wars Battlefront II* debacle and this charge was led by Hawaii State Representative Chris Lee in 2017.<sup>64</sup> More recently, in May of 2019, another legislative effort was undertaken by U.S. Senator Josh Hawley to ban loot box sales to children.<sup>65</sup> The proposed bill, “Protecting Children from Abusive Games Act,” would outright prohibit the sale of loot boxes to any minor under the age of eighteen and make it unlawful for child-oriented games to include any pay-to-win type mechanics.<sup>66</sup> The penalty for game companies that engage in these practices targeting minors would be a financial fine.<sup>67</sup> The proposed bill has bipartisan support as Hawley, a Republican, is joined by both Senator Ed Markey and Senator Richard Blumenthal, both Democrats, in sponsorship of the bill.<sup>68</sup> Hawley criticized the loot box model as exploitative and stated: “[o]nly the addiction economy could produce a business model that relies on placing a casino in the hands of every child in America with the goal of getting them desperately hooked.”<sup>69</sup> Markey also offered some justification for the bill with the statement of: “[i]nherently manipulative game features that take advantage of kids and turn play time into pay time should be out of bounds.”<sup>70</sup>

The bill’s announcement drew some pushback from the trade via the Entertainment Software Association (ESA), the main American industry group for video game publishers.<sup>71</sup> The ESA cited other countries’ findings, including the UK’s, that loot boxes did not constitute gambling and that in-game parental controls more than placated the concern of exploitation.<sup>72</sup> The ESA has previously declared their opposition to such legislative regulation as such efforts stifle their “freedom to innovate and test new business models.”<sup>73</sup> Due to this refusal to change when threatened with legislation, it is unlikely the American industry will engage in any major self-regulation like the Japanese industry did.

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63. *Id.*

64. Nelva, *supra* note 22.

65. Makena Kelly, *Bill to Ban the Sale of Loot Boxes to Children Presses Forward with Bipartisan Support*, THE VERGE (May 23, 2019, 6:46 AM), <https://www.theverge.com/2019/5/23/18636535/loot-boxes-josh-hawley-markey-blumenthal-privacy-video-games> [<https://perma.cc/M9P7-CF6G>].

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. Kelly, *supra* note 65.

71. *Loot Boxes Should be Banned, Says US Senator*, BBC (May 9, 2019), <https://www.bbc.com/news/technology-48214293> [<https://perma.cc/VKD8-DD2U>].

72. *Id.*

73. *Id.*

Some minor self-regulation has occurred by the industry from the Entertainment Software Rating Board (ESRB). The ESRB's primary purpose is to help parents make informed decisions regarding the games and apps their children interact with.<sup>74</sup> The ESRB provides ratings for games with three parts: age appropriateness, content concerns, and interactive elements which denote whether players interact online, etc.<sup>75</sup> The ESRB is a voluntary effort by the industry, but all console manufacturers as well as certain retailers and online storefronts require ESRB ratings.<sup>76</sup> The ESRB originally made a statement that the organization did not believe loot boxes fell under gambling in October of 2017.<sup>77</sup> However, the organization then announced in late February of 2018 that the ESRB would be implementing a new "In-Game Purchases" notice as a part of the interactive element in a game's rating.<sup>78</sup> The notice does not attempt to equate the purchases to gambling and is placed on a wide variety of games in which content can be purchased internally.<sup>79</sup> The ESRB defended the small response as a "first step" and that they would be open to more feedback.<sup>80</sup>

The change in rating notices by the ESRB is considered to be in reaction to the original *Star Wars Battlefront II* controversy prompted by the Hawaiian State Representative's proposed bill and a request made by a U.S. Senator Maggie Hassan, asking the Federal Trade Commission (FTC) to review the rating process with loot boxes as a focus.<sup>81</sup> Later in the fall of 2018, Senator Hassan, a Democrat, also raised concerns over loot boxes in a hearing with the FTC, but is not currently a cosponsor of Senator Hawley's "Protecting Children from Abusive Games Act."<sup>82</sup> Only a few legislators are currently engaged in active efforts to address the loot box issue, but their efforts have not gone unnoticed as the industry has begun defensive efforts as well as implemented some minor changes in response to public concern. The loot box campaign has been compared to the video game industry's struggles with violent content in the early nineties. That particular controversy finally re-

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74. *ESRB Home*, ESRB, <https://www.esrb.org/> [<https://perma.cc/43BY-8UFW>].

75. *Id.*

76. *Frequently Asked Questions*, ESRB, <https://www.esrb.org/faqs/#are-all-games-required-to-have-a-rating> [<https://perma.cc/4UGL-WWPS>].

77. *International History*, *supra* note 19.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. Kelly, *supra* note 65.

sulted in the formation of the ESRB, which is the industry's own self-regulation, not official government regulation.<sup>83</sup> Similarly, loot boxes are not currently regulated by applicable gambling laws nor is there any passed, relevant legislation overseeing their use. Only the slightest efforts by the video game industry to self-regulate in response to widespread controversy regarding loot boxes are active.

## II. UNITED STATES LAWS GOVERNING GAMBLING

Gambling is mainly governed by state law as opposed to federal law.<sup>84</sup> This is due to the fact that gambling regulation has long been considered a traditional state police power, which means Congress only has the ability to regulate under the Commerce Clause.<sup>85</sup> The Federal government has only chosen to regulate gambling in a few limited areas, mostly in an effort to combat the rise of organized crime in the past.<sup>86</sup>

### A. Federal Gambling Laws

The Wire Act of 1961 outlawed the use of wire communication to make interstate bets or wagers for sports betting and was primarily motivated to help states suppress organized criminal gambling.<sup>87</sup> When passed, the Act was only intended to cover the use of telegraph wires, but the federal government has always extended it to Internet communications as well.<sup>88</sup> Similarly, the Wire Act has been interpreted to apply to all forms of online gambling by the federal government, but the Fifth Circuit held in *In re MasterCard Intl., Inc.* (2002) that the statute only applies specifically to sports betting and contests.<sup>89</sup> While the Department of Justice originally confirmed this view in a memorandum in 2011, the Department later retracted this view in another opinion in late 2018 and declared that the Wire Act applied to all

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83. Ben Gilbert, *The Video Game Industry is Facing Government Scrutiny Over Loot Boxes, and the Most Powerful Leaders in Gaming are Divided Over What to Do*, BUS. INSIDER (June 23, 2019, 6:41 AM), <https://www.businessinsider.com/video-game-industry-loot-box-legislation-2019-6#regardless-of-the-gambling-debate-at-least-one-us-senator-is-proposing-legislation-to-regulate-loot-boxes-in-games-3> [<https://perma.cc/X4HL-S7D7>].

84. Schwidessen, *supra* note 62.

85. Jordan Hollander, *The House Always Wins: The World Trade Organization, Online Gambling, and State Sovereignty*, 12 RUTGERS J. L. & PUB. POL'Y 179, 182 (2015).

86. *Id.*

87. *Id.* at 185.

88. *Id.* at 186.

89. *Id.* Elizabeth A. Walsh, *In Re Mastercard International, Inc.: The Inapplicability of the Wire Act to Traditional Casino-Style Games*, 20 J. MARSHALL J. COMPUT. & INFO. L. 445, 446 (2002).

online gambling.<sup>90</sup> This opinion was challenged by the New Hampshire Lottery Commission in U.S. District Court for New Hampshire based on the sale of state lottery tickets online and summary judgment was issued in their favor by U.S. District Court Judge Paul Barbadoro, setting aside the Department of Justice opinion and reaffirming that the Wire Act is limited to sports gambling.<sup>91</sup> The federal government appealed this decision and the current interpretation of the Wire Act is clearly in dispute, but its original understood purpose supported the intention that traditional intrastate gambling was under state control.<sup>92</sup>

The Unlawful Internet Gambling Enforcement Act (UIGEA) was passed in 2006 and does not actually directly regulate gambling.<sup>93</sup> The UIGEA merely “prohibits Internet gambling operators from accepting money related to any online gambling that violates state or federal law.”<sup>94</sup> Specifically, the UIGEA does not change the states’ definitions of legal or illegal gambling, and it directly allows for states to enact intrastate online gambling systems.<sup>95</sup> The UIGEA simply disallows banks from handling gambling transactions that are illegal under state law.<sup>96</sup> Neither the Wire Act nor the UIGEA attempt to define gambling and leave this up to the various states.<sup>97</sup>

The three general concepts of gambling can be derived from various state laws: “(1) players stake or risk something of value, (2) chance is a material factor, and (3) successful play is rewarded by something of value.”<sup>98</sup> The opportunity for free or continued plays does not negate the first element, often known as consideration.<sup>99</sup> Chance is defined as “a lack of control over events or the absence of controllable causation.”<sup>100</sup> The prize, reward, or “something of value” does not necessarily have to be limited to only having

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90. See Hollander, *supra* note 85, at 186; Natasha Bach, *Justice Department Says All Online Gambling Is Illegal*, FORTUNE (Jan. 15, 2019, 4:02 AM), <https://fortune.com/2019/01/15/online-gambling-illegal-doj/> [<https://perma.cc/B48D-5AVW>].

91. Michael Cousineau, *NH Lottery Commission Wins Its Case Over Online Lottery Sales*, N.H. UNION LEADER (June 3, 2019), [https://www.unionleader.com/news/courts/nh-lottery-commission-wins-its-case-over-online-lottery-sales/article\\_76d049db-43d3-591e-81d7-9c19a9167662.html](https://www.unionleader.com/news/courts/nh-lottery-commission-wins-its-case-over-online-lottery-sales/article_76d049db-43d3-591e-81d7-9c19a9167662.html) [<https://perma.cc/6ZCH-KPA9>].

92. See David Brooks, *Feds Continue Fight Against Online Betting, Threatening Lottery Sales*, CONCORD MONITOR (Aug. 19, 2019, 3:58 PM), <https://www.concordmonitor.com/wire-lottery-nh-online-27828752> [<https://perma.cc/E4MV-UDSL>]; Hollander, *supra* note 85, at 186.

93. Hollander, *supra* note 85, at 193-94.

94. *Id.* at 194.

95. *Id.*

96. *Id.*

97. *Id.* at 185, 194.

98. 38 AM. JUR. 2D *Gambling* § 2 (2020).

99. *Id.*

100. *Id.*

the opportunity to win money as the opportunity to win free games has also satisfied this element.<sup>101</sup>

As the states have all been able to enact or not enact their own gambling programs as they see fit, this has led to a wide variety in the type of gambling among the states.<sup>102</sup> Utah and Hawaii are the only two states that prohibit all forms of gambling in the state, with Utah even amending its criminal code to include Internet gambling in that prohibition.<sup>103</sup> Almost all other states permit some type of gambling. For example, forty-seven states and the District of Columbia allow some form of charitable gambling and forty-three states and the District of Columbia maintain a state-sanctioned lottery.<sup>104</sup> In regard to online gambling, very few states conduct online schemes, probably due in part to the unknown effect of the Wire Act.<sup>105</sup> Currently, six states offer the sale of lottery tickets online: Georgia, Kentucky, Illinois, Michigan, New Hampshire, and Pennsylvania.<sup>106</sup> Only four states have sanctioned intrastate online casino-type gambling: Nevada, New Jersey, Delaware, and Pennsylvania.<sup>107</sup> Several states expressly criminalize online casino gambling, including Illinois.<sup>108</sup>

### *B. Illinois Gambling Laws*

Illinois has long participated in gambling schemes, first dating back to the 1920s where the state legalized horse racing betting.<sup>109</sup> In 1990, the state passed the Riverboat Gambling Act which allowed for commercial casinos as long as they were located on boats operating outside of Lake Michigan and in counties with populations over three million people.<sup>110</sup> In 2009, Illinois expanded to allow for video gaming machines to be hosted in licensed local bars and other similar venues through the Video Gaming Act.<sup>111</sup> The last piece of major legislation was passed in 2019, the Illinois Gambling Act,

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101. *Id.*

102. Hollander, *supra* note 85, at 198.

103. *Id.*

104. *Id.*

105. *Id.* at 199.

106. Sandra Grauschopf, *Can You Buy Lottery Tickets Online?*, THE BALANCE EVERYDAY (Aug. 24, 2019), <https://www.thebalanceeveryday.com/can-you-buy-lottery-tickets-online-4582051> [<https://perma.cc/WN2B-48CU>].

107. *Pennsylvania Joins Nevada, New Jersey and Delaware as States Where Online Gambling Is Legal*, MARKETWATCH (July 15, 2019, 3:02 PM), <https://www.marketwatch.com/story/pennsylvania-joins-nevada-new-jersey-and-delaware-as-states-where-online-gambling-is-legal-2019-07-15> [<https://perma.cc/UF4Z-DD92>].

108. Hollander, *supra* note 85, at 200.

109. *Illinois Gambling Laws*, GAMBLING LAW US, <https://www.gambling-law-us.com/illinois/gambling-laws/> [<https://perma.cc/5KTK-5852>].

110. *Id.*

111. *Id.*



which expanded all areas of the state's gambling scheme including allowing for a limited number of stand-alone casinos, sports betting at casinos, online, and at sports venues, as well as increasing the number of video gaming machines allowed at licensed venues.<sup>112</sup>

In Illinois, the Criminal Code of 1961 makes gambling in its various forms illegal in the State barring some enumerated exceptions.<sup>113</sup> According to the Illinois Criminal Code, to commit gambling in the State, a person must knowingly play a game of chance or skill for money or other thing of value.<sup>114</sup> Illinois notably does not strictly denote a game of chance only and allows for games of skill to be included. The Illinois definition also already provides a distinction for the prize as the "something of value" can be something explicitly other than money. The statute also enumerates other offenses that constitute gambling that go beyond just wagering in a game such as selling pools on result of any contest, possessing a book of recorded bets, or setting up their own lottery.<sup>115</sup> The list of exceptions to the rule are broad and include the game known as *bingo* when conducted accordingly, lotteries conducted by the State of Illinois, charitable games when conducted accordingly, and games of skill or chance where money or other things of value can be won but no payment or purchase is required to participate.<sup>116</sup> Other gambling allowed for under the Illinois Gambling Act and the Video Gaming Act are exempt as well.<sup>117</sup> However, online gambling that is not permitted by these Acts or other enumerated exceptions is strictly prohibited.<sup>118</sup>

A person commits gambling when he or she (12) knowingly establishes, maintains, or operates an Internet site that permits a person to play a game of chance or skill for money or other thing of value by means of the Internet or to make a wager upon the result of any game, contest, political nomination, appointment, or election by means of the Internet. This item (12) does not apply to activities referenced in items (6), (6.1), (8), (8.1), and (15) of subsection (b) of this Section.<sup>119</sup>

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112. Joe Barnas, *What You Need to Know About Illinois' Gambling Expansion*, ILL. POL'Y (June 13, 2019), <https://www.illinoispolicy.org/what-you-need-to-know-about-illinois-gambling-expansion/> [<https://perma.cc/P62R-36JK>].

113. 20 ILL. L. & PRAC. *Gambling and Lotteries* § 1 (2019).

114. 720 ILL. COMP. STAT. 5/28-1 (West through P.A. 101-651).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. 720 ILL. COMP. STAT. 5/28-1 (West through P.A. 101-651).

Gambling under Illinois law is a Class A misdemeanor.<sup>120</sup> A second or subsequent conviction under subsections (a)(3) through (a)(12), which are offenses that manage gambling schemes as opposed to merely participating in them, is a Class 4 felony.<sup>121</sup>

To prevent confusion, the Video Gaming Act of 2009 does not cover the video game *good* as discussed *infra*, and thus does not have any impact on loot box mechanics. The Video Gaming Act makes “Video Gaming Terminals” legal in Illinois only in licensed establishments.<sup>122</sup> These establishments include certain liquor venues, truck stops, and veterans clubs throughout the State.<sup>123</sup> A Video Gaming Terminal (VGT) is an electronic machine that plays or simulates the play of a video game upon the insertion of cash. Examples of these games include video poker, line up, and blackjack, which are typically casino-type games.<sup>124</sup> The VGT must also use microprocessors to dispense to the players free games or credits that then can be redeemed for cash. A VGT is not a terminal that is for “amusement purposes only” or that directly dispenses coins, cash, or tokens.<sup>125</sup> Thus, this Act has no authority over video games distributed and sold for in-home use.

As discussed earlier, Illinois has recently passed the Illinois Gambling Act to expand its gambling schemes in 2019. The Act was specifically enacted according to the legislative intent section of the statute to financially benefit the State by encouraging economic development, promoting tourism, and increasing revenue to offset State expenses and support the education fund.<sup>126</sup> This is not the first time Illinois has attempted to use massive gambling schemes to generate hopefully equally massive revenue.<sup>127</sup>

The Video Gaming Act was introduced and passed in 2009, during the depths of the Great Recession, in less than forty-eight hours.<sup>128</sup> The Video Gaming Act was the state’s largest gambling expansion since the creation of the lottery in 1974. Legislators predicted that video gambling would generate \$300 million a year, but it took nearly a decade for the prospect to reach

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120. *Id.*

121. *Id.*

122. *FAQs Regarding the Video Game Act and Video Gaming License Applications*, ILL. VIDEO GAMING TECHS., INC., <http://illinois.vgt.net/files/2010/07/VideoGamingFAQs4-9-12.pdf> [<https://perma.cc/A6GJ-E5S5>].

123. *Id.*

124. *Id.*

125. *Id.*

126. 230 ILL. COMP. STAT. 10/2 (West through P.A. 101-651).

127. Jason Grotto, *How Illinois Bet on Video Gaming and Lost*, ROCKFORD REGISTER STAR (Jan. 18, 2019, 4:18 PM), <https://www.rrostar.com/news/20190118/how-illinois-bet-on-video-gaming-and-lost> [<https://perma.cc/CL4R-NUYF>].

128. Dan Mihalopoulos, *Illinois Is Poised To Become the Gambling Capital of the Midwest*, PROPUBLICA ILL. (June 4, 2019, 4:00 AM), <https://www.propublica.org/article/illinois-gambling-expansion-bill-sports-betting-video-gambling> [<https://perma.cc/3PYH-RPYC>].

revenue predictions, which strained Illinois's already dire financial situation.<sup>129</sup> By 2017, video gambling had brought in less than \$1 billion, which was \$1.3 billion short of what lawmakers anticipated. The State also borrowed hundreds of millions of dollars to complete the venture, which cost the taxpayers more than \$10 billion in new debt.<sup>130</sup>

Illinois, as of 2019, has more than 30,000 video gaming machines operating outside of casinos, which is more than any other state.<sup>131</sup> The number is likely to rise as licensed establishments can now operate six machines instead of five under the Illinois Gambling Act.<sup>132</sup> However, as stated, the venture wasn't quite as successful as anticipated and the video gambling companies have exploited the quickly produced legislation to reap massive profits.<sup>133</sup> Lawmakers demanded a far smaller share of the profits than what is charged in other states and ignored the inevitable regulatory costs as it set aside no money to support its regulatory agency. The state was forced to divert \$83 million in revenue gained from casino taxes to support the work of the Illinois Gaming Board (IGB), the regulatory agency overseeing all of the State's gambling schemes, which is run by five part-time members.<sup>134</sup> The Board administers a regulatory and tax collection system for riverboat gambling and video gaming in Illinois while also providing regulatory oversight of riverboat and casino gambling, video gaming, and sports wagering in the State. However, the Board has also been inundated by accusations of dubious conduct, including violations of the Open Meetings Act and bid-rigging.<sup>135</sup>

The Illinois Gambling Act is seeking to rectify some of the rushed missteps of its predecessor including supporting the Illinois Gaming Board.<sup>136</sup> The legislature gave the IGB an \$8 billion budget increase and as much as \$20 million in additional funding to handle its growing responsibilities including sports betting. Lawmakers also gave the IGB broad authority to close its meetings under the Open Meetings Act, thus making the board less transparent and shielded from scrutiny.<sup>137</sup> The Illinois Gambling Act also drastically increased the amount of money set aside to fight gambling addiction from \$800,000 a year to \$6.8 million. Addiction counselors are ap-

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129. *Id.*

130. Grotto, *supra* note 127.

131. *Id.*

132. Robert Channick, *Illinois Is Set To Become a Midwest Gambling Mecca*, CHI. TRIB. (Dec. 20, 2019), <https://www.chicagotribune.com/business/ct-biz-gambling-sports-betting-illinois-20191220-5lbt7qb65gorc2kmggjszskhm-story.html> [https://perma.cc/QNE8-SU8T].

133. Grotto, *supra* note 127.

134. *Id.*

135. *Id.*

136. Mihalopoulos, *supra* note 128.

137. *Id.*

preciative of the funding but are still cautious of the massive gambling expansion. Studies show that addiction rises as the number of gambling opportunities increases.<sup>138</sup> However, the gamble of the Illinois Gambling Act may not be successful just as the Video Gaming Act was, despite the changes. The recent Act's passage does demonstrate Illinois' increased reliance on gambling schemes for revenue fundraising, despite their failings financially and socially.

### III. CASE LAW SURROUNDING LOOT BOXES

The theory of whether loot box and microtransaction mechanics would qualify as gambling has been tested in the nation's courts. There are four notable cases, two based in Illinois, implicating online games that have discussed the issue, often under a gambling loss recovery claim.<sup>139</sup> The key factor that is present in all four cases is whether the virtual items obtained in these games are valuable and thus satisfy the prize requirement of gambling. A majority of the cases found that the items do not satisfy the valuable prize element as they cannot be officially exchanged for real world money and thus do not have real world value.<sup>140</sup>

#### A. *Kater v. Churchill Downs Inc.*<sup>141</sup>

*Kater* provides the only potentially favorable decision for the argument that loot boxes could constitute gambling depending on the rewards inside. A virtual casino game player brought a class action suit against that virtual casino's owner and operator under the Washington's Recovery of Money Lost at Gambling Act to recover monies paid to the virtual casino because those monies were lost to an illegal gambling operation.<sup>142</sup> All virtual or online gambling is illegal in Washington.<sup>143</sup> The virtual casino in *Kater*, *Big Fish Casino*, is a game that can be downloaded for free and be played for free by using only the virtual casino chips awarded without charge.<sup>144</sup> However, users also have the option to purchase additional chips and other virtual items that extend or enhance gameplay.<sup>145</sup> Players are required to have a minimum quantity of chips in order to play the games and if they run out, they must wait a certain time for additional chips to be awarded

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138. *Id.*

139. Schwidessen, *supra* note 62.

140. *Id.*

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

142. *Kater v. Churchill Downs Inc.*, No. C15-612 MJP, 2015 WL 9839755, at \*1 (W.D. Wash. Nov. 19, 2015).

143. *Kater*, 886 F.3d at 786.

144. *Kater*, 2015 WL 9839755, at \*1.

145. *Id.*

to them for free or they must purchase directly from *Big Fish Casino*'s operator, Churchill Downs.<sup>146</sup> Players must agree to the virtual casino's Terms of Use before playing; the agreement states that the chips have no cash value and cannot be exchanged for cash or merchandise.<sup>147</sup>

A game player who brought suit argued that the casino chips could constitute something of value because they allowed users to extend gameplay. This argument rested on Washington's definition of "thing of value," which included "any form of credit or promise . . . involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge."<sup>148</sup> Originally, at the district court level, the court agreed with the majority principle and found that the virtual casino chip obtained could not be considered a "thing of value" under Washington law.<sup>149</sup> The lower court held that despite the definition, extended gameplay could not result in any gain to the user, "aside from amusement that accompanies continuing to play a game that is already available to play for free."<sup>150</sup> As the prize requirement was not satisfied, the *Big Fish Casino* game did not constitute illegal gambling and thus the district court granted Churchill Down's motion for dismissal for failure to state to a claim.<sup>151</sup>

However, on appeal, the Ninth Circuit reversed the district court's decision and held that *Big Fish Casino* did fall within Washington's definition of an illegal gambling game as the casino chips satisfy the prize requirement.<sup>152</sup> The chips allow for users to continue playing without charge, which is defined outright in the Washington statute as a "thing of value."<sup>153</sup> This interpretation of the prize requirement is known as the continuance of entertainment or privilege of playing.<sup>154</sup> The chips do not merely *enhance* gameplay, but extend as a user needs these chips in order to play the games included within *Big Fish Casino*.<sup>155</sup> As the court notes, this decision is unique to Washington in its analysis of its own state statute and broad definition of "thing of value"<sup>156</sup> and thus its outcome is rare compared to similar fact cases. However, it does show that states could expand their definition of valuable prize to include virtual in-game currency that allows for continued play considering its pervasiveness in the mobile, free-to-play industry.

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146. *Id.*

147. *Id.*

148. *Kater v. Churchill Downs Inc.*, No. C15-612 MJP, 2015 WL 9839755, at \*3 (W.D. Wash. Nov. 19, 2015).

149. *Id.*

150. *Id.* at \*3.

151. *Id.* at \*4.

152. *Kater v. Churchill Downs Inc.*, 886 F.3d 784, 785 (9th Cir. 2018).

153. *Id.* at 787.

154. *Id.*

155. *Id.* at 788.

156. *Id.*

*B. Mason v. Machine Zone, Inc.*<sup>157</sup>

A player of the mobile video game *Game of War* brought a class action against the game's developer under Maryland's gambling loss recovery statute, seeking to recover money lost spinning a virtual wheel in-game that allowed users to win virtual prizes.<sup>158</sup> The complaint was originally dismissed by the district court because the player failed to allege that she had lost money, which is required under the statute, when she spun the game's wheel. The Fourth Circuit affirmed this decision on appeal.<sup>159</sup> The player paid real money to obtain virtual gold, which was later used to obtain virtual chips to be used to spin a virtual wheel.<sup>160</sup> The court reasoned that as she used virtual chips, which are not redeemable for money, there was no real money at stake.<sup>161</sup> The rewards from the virtual wheel were either virtual gold or other virtual resources, that are both not money or redeemable for money.<sup>162</sup> The court found that based on the manner in which this inner game worked, the player could not have lost or won any money as a result of participation in that virtual activity.<sup>163</sup> Thus, the claim could not fall under the used statute as no money was actually lost.<sup>164</sup>

Another argument proposed revolved around the contention that because *Game of War* players can sell their accounts in a secondary market, money is therefore at stake when a player participates in the virtual wheel.<sup>165</sup> However, the court did not find this argument had any merit as virtual gold or chips were not sold on the market and thus are not equivalent to money.<sup>166</sup> Players' entire accounts are instead sold, which include their level of advancement in the game.<sup>167</sup> The court was also bothered by that fact that the player never attempted to sell any of her virtual resources or her account on the secondary market.<sup>168</sup> The court also notes in a footnote, as in *Kater*, attempting to sell virtual items on a secondary market violated the game developer's terms of service.<sup>169</sup>

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157. *Mason v. Mach. Zone, Inc.*, 851 F.3d 315 (4th Cir. 2017).

158. *Id.*

159. *Id.*

160. *Id.* at 319.

161. *Id.*

162. *Mason*, 851 F.3d at 319.

163. *Id.*

164. *Id.*

165. *Id.* at 320.

166. *Id.*

167. *Mason*, 851 F.3d at 320.

168. *Id.*

169. *Id.* at 320 n.3.

*C. Soto v. Sky Union, LLC*<sup>170</sup>

Online game players brought a class action against the game operator of *Castle Clash* under the Illinois Loss Recovery Act *inter alia*, attempting to recover lost money.<sup>171</sup> The court found that the random virtual prizes that were obtained when players spent virtual currency did not constitute “things of value” and thus players could not recover any money wagered on them.<sup>172</sup> The virtual rewards in *Castle Clash*, “Heroes and Talents,” cannot be monetized officially. The court reasoned that the virtual rewards merely improve the gameplay experience and therefore there is no liability where games of chance offer rewards with no value.<sup>173</sup> “[U]nder Illinois law, the possibility of winning a greater or lesser amusement is not gambling.”<sup>174</sup>

The argument of the secondary market appears in this case as well, with the online game players positing that the “Heroes and Talents” virtual rewards are worth the amount by which they increase the value of a *Castle Clash* account sold on a secondary market not provided or endorsed by Sky Union. A higher rarity Hero allows for a player to put a higher sales price on his or her account.<sup>175</sup> The court rejects this secondary market argument in this case for two reasons. First, a player cannot *cash out* with the game developer as there is no primary market, so a player must convince another player to pay the premium for rare virtual rewards.<sup>176</sup> Second, the court reiterates the reasoning of *Mason*, that players sell their entire accounts, not just Heroes or Talents, and thus the price of an account does not denote the value of the individual virtual items contained on that account.<sup>177</sup>

*D. Phillips v. Double Down Interactive LLC*<sup>178</sup>

A player of the online *Double Down Casino* game brought a class action suit against the gaming company “Double Down Interactive” for multiple claims including violating the Illinois Loss Recovery Act.<sup>179</sup> *Double Down Casino* featured authentic slot machines, roulette, poker, and blackjack and all their casino games are games of chance as the outcome is determined

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170. *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871 (N.D. Ill. 2016).

171. *Id.* at 882.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Soto*, 159 F. Supp. 3d at 879.

176. *Id.* at 880.

177. *Id.*

178. *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731 (N.D. Ill. 2016).

179. *Id.* at 732.

solely by computer algorithms.<sup>180</sup> In order to play the Casino's games, players must use virtual chips. Players receive a set amount of free chips upon first joining and then receive additional free chips daily.<sup>181</sup> The option to spend real money to buy more chips exists for when players run out of free chips and do not want to wait to play. These chips can only be used to play *Double Down Casino* games and Double Down does not offer any way for players to cash out their chips with Double Down for any real world money, goods, or other valuable items.<sup>182</sup> These *Double Down Casino* chips are incredibly similar to the *Big Fish Casino* chips in *Kater*. A secondary market does exist for *Double Down Casino* accounts, which allows players to cash out their chips unofficially. Double Down primarily earns its revenue through the sale of chips and reported in 2014 over \$240 million dollars in revenue.<sup>183</sup>

The court here in *Phillips*, is the same as the court in *Soto*, with the opinions only being decided within a couple of months of each other.<sup>184</sup> The court had to determine once again whether the virtual item, the "chips in this case" could be considered a "thing of value" as required for recovery under the Illinois Loss Recovery Act.<sup>185</sup> The court here did not choose to decide whether the chips are "things of value" because it was already determined there was no *winner* or *loser* in this scenario, which is another requirement of the Act. Under the Act, it is the winner that a plaintiff is entitled to recover his or her gambling losses from.<sup>186</sup> The court reasoned that Double Down cannot be a winner as it never directly participates in the games or have any direct stake in the outcome of any games as it always keeps the money a player pays for additional chips no matter the outcome.<sup>187</sup> The court found that the online player in this case could also not be deemed a loser as when the chips were bought, the right to continue playing the game was bought, and she never lost the value of those chips.<sup>188</sup>

However, the *Phillips* court seemed swayed by the argument that the chips did in fact constitute "things of value."<sup>189</sup> The online player outlined several reasons why the chips are things of value including:

the chips can be purchased by players for a discrete sum, that  
chips grant players the right to place additional wagers on

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180. *Id.* at 734.

181. *Id.*

182. *Id.* at 735.

183. *Phillips*, 173 F. Supp. 3d at 735.

184. *See Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871 (N.D. Ill. 2016); *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731 (N.D. Ill. 2016).

185. *Phillips*, 173 F. Supp. 3d at 739.

186. *Id.*

187. *Id.* at 740.

188. *Id.* at 741.

189. *Id.* at 739.



casino games without spending any additional money, that Double Down makes millions of dollars on chip sales each year, and that players can buy and sell their accounts (and with it their chips) on the secondary market.<sup>190</sup>

The court remarked that the argument had “surface appeal” and was most compelled by the fact that as players spend money on the chips, the chips obviously have a monetary value, and Double Down has obviously as a result made millions of dollars on chip sales over the years.<sup>191</sup> However, as the “things of value” argument was not at issue in the case according to the court, these statements are merely dicta that hold very little authoritative weight.

#### *E. Case Law Summary*

While limited understandings can be drawn from such a small pool of cases, the opinions expressed by the courts tend to agree. The courts are less tolerant of virtual items that themselves act as money in the game by extending or allowing additional plays of games. Especially if this is the only virtual item to be bought or had in the game. This concept ties into the apparent distrust of stereotypical gambling with criticism of games that call themselves “casinos” and typically feature casino games only with “chips” as currency. These views are expressed in both *Kater* and *Phillips*.<sup>192</sup> The courts seem more tolerant of the standard loot box formula though as they cannot usually find any *valuable* traits about a new virtual character or a new virtual costume. This view is most apparent in *Soto*.<sup>193</sup> Most game developers do not provide their own marketplace to buy or sell these items and typically outright disallow the process in their Terms of Service. However, secondary markets of players do buy and sell these items by offering whole account access via username and password. Courts are fixated on the fact that companies do not allow this use of their product and that the secondary markets are not made up of the individual virtual items, but instead the total accounts for the players, which encompass more than just those virtual items and thus make it difficult to determine their worth. Secondary market arguments were present in all four cases discussed.

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190. *Phillips*, 173 F. Supp. 3d at 739.

191. *Id.*

192. *See Kater v. Churchill Downs Inc.*, 886 F.3d 784 (9th Cir. 2018); *Phillips*, 173 F. Supp. 3d at 731.

193. *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871 (N.D. Ill. 2016).

#### IV. VIRTUAL REWARDS FROM LOOT BOXES ARE “THINGS OF VALUE”

I propose that the majority opinion regarding loot box rewards being not “things of value” is outdated and harmful. If a loot box features in-game currency as a reward, this may allow the continuance of play or allow for more items or loot boxes to be purchased, thus continuing the cycle of purchasing. This type of reward effectively operates as money in the game. As considered in *Phillips*, the in-game currency clearly has value to the player as players spend real money to obtain it and the game company clearly profits heavily from monetizing its game this way.<sup>194</sup> Expanding on this thought process, the other virtual items received from loot boxes that are not in-game currency also hold intrinsic value. The game company sets the odds to make incredibly rare items to increase the buy-rate of a loot box in an effort to make more money. The rarity of that item has great value versus common items and can then be traded as a hot commodity on secondary markets.<sup>195</sup> Often, what makes accounts valuable are the existence of specific, high-rarity, individual virtual rewards.<sup>196</sup> If given the ability, most players would just buy and sell items individually as opposed to selling whole accounts, but this process is restricted by the game company. The game company does this, in part to comply with laws, but also to restrict players from being able to simply purchase the item they want in a one-time, transparent transaction as opposed to the system its created of randomized, blind purchases that may take several or numerous transactions to complete. The loot box system is incredibly more valuable of a monetization tool than simple microtransactions and now accounts for a significant portion of game companies’ profits.<sup>197</sup> By not defining loot box rewards as “things of value” to fit within gambling definitions, the gaming industry is being allowed to massively profit off of gambling-style schemes without oversight.

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194. *Phillips*, 173 F. Supp. 3d at 739.

195. Jeremy Peel, *Why Fortnite Accounts Are Selling for Hundreds of Dollars on eBay*, PCGAMESN (July 17, 2018), <https://www.pcgamesn.com/fortnite/fortnite-account-for-sale-skull-trooper> [<https://perma.cc/5QJJ-W44Y>].

196. *Id.* (“‘Season One items make my account more valuable,’ he tells us, ‘because at the time not that many players had Fortnite.’ In other words, it’s scarcity alone that’s bumping up the prices of OG accounts.”).

197. Tae Kim, *‘Loot Boxes’ Could Be Trouble for the Videogame Industry. Here’s What You Need to Know.*, BARRON’S (Apr. 15, 2019), <https://www.barrons.com/articles/videogame-publishers-face-scrutiny-over-the-use-of-lock-boxes-51555120828> [<https://perma.cc/NMB4-UGJQ>] (“Cowen analyst Doug Creutz has estimated that a third of Electronic Arts’ . . . annual sales came from loot-box-related mechanisms, versus 18% for Activision Blizzard (ATVI) and about 11% for Take-Two Interactive Software (TTWO).”).

## V. LOOT BOX REGULATION PROPOSAL

### A. Regulation is Necessary

Oversight of some kind is necessary for the gaming industry's use of loot boxes. Oversight is especially pertinent because these companies are allowed to operate and engage with minors who do not have the competency to make informed decisions regarding financial purchases, especially those predicated on chance. A recent study from 2019 found that loot boxes can cause gambling addictions in young people and reported that this link between loot boxes and gambling was stronger in adolescents than in adults.<sup>198</sup> The study observed the link between problem gambling and loot box spending was increased in games where loot boxes were offered for a *limited time* and where loot boxes were occasionally gifted to players' accounts for free.<sup>199</sup> The authors proposed that the reason for the correlation may relate to the urgency of a limited time item appealing to problem gamblers more than those without an addiction.<sup>200</sup> Similarly, the authors gave the hypothesis that the free loot boxes enticed susceptible adolescents, who are more likely to develop problem gambling, by giving them a "taste" of a gambling-like mechanism.<sup>201</sup> So even if loot boxes do not fit into the exact definition of gambling, they are producing the effects of gambling addiction, even in those who technically should not be exposed to the practice at all. Loot boxes are essentially creating a whole new generation of gamblers.

### B. Options for Potential Regulation

The options to combat this problem in Illinois are limited. The industry is unlikely to self-regulate without some new controversy as a motivator. The practice is just far too lucrative. I have identified two potential solutions to regulate loot boxes in Illinois.

#### 1. Illinois Statute Addressing Loot Box Mechanics

The first option of a new law is very straightforward, but very unlikely to be adopted. Illinois could adopt a new statute or amend its Gambling Act

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198. Chelsea Tatham, *Study: Video Game 'Loot Boxes' Linked to Gambling Addiction in Young People*, WTSP (July 1, 2019, 12:03 PM), <https://www.wtsp.com/article/tech/study-video-game-loot-boxes-linked-to-gambling-addiction-in-young-people/67-97ae4e3d-bcac-43d6-af01-6adbb5a247e4> [<https://perma.cc/G5UR-S28F>].

199. David Zendle et al., *Adolescents and Loot Boxes: Links with Problem Gambling and Motivations for Purchase*, ROYAL SOCIETY OPEN SCI., June 2019, at 1, 15.

200. *Id.*

201. *Id.*

to address loot boxes in video games as gambling or provide specific provisions regarding its use in relation to minors. This solution would be very similar to how Belgium handled the issue.<sup>202</sup> Illinois could extend its “something of value” definition to include a continuance of play theme or virtual items that by their terms cannot be sold. However, this solution would probably not be adopted as Illinois is currently implementing a massive gambling scheme to generate state revenue. While some of this scheme has allotted money for gambling addiction treatment and awareness, it is undoubtable that Illinois is “gamble-happy” at the moment and is unlikely to install regulation for loot boxes where in every other area the State has uninstalled regulation. There is also the matter that the currently questionable and undermanned Illinois Gaming Board would be in charge of executing the law. The Board would likely be an ineffective regulatory body of the gaming industry.

### *2. Petitioning for ESA/ERSB (the Industry) to Self-Regulate*

The second option would be attempting to induce the industry to self-regulate without massive backlash. The state could petition the two major organizations, the ESA and the ERSB, to pressure companies to remove loot boxes from children’s games overall or ask for more lenient changes, such as allowing a player to set limits on loot box spending or disable the option altogether. However, the industry has shown that it only responds to backlash or criticism with the most minor of changes. It is unlikely that requests from state governments are likely to sway the industry when there is no incentive or penalty to comply.

## C. CONCLUSION

The gaming industry requires a heavy hand that Illinois does not currently have. As states are able to control gambling regulation in any way they see fit, Illinois, despite its ineffective agency, would be able to halt loot box mechanics, at least within the State. Illinois, though, looks to gambling just as the gaming industry does: as a money-making scheme. The odds that Illinois implements any regulation on loot boxes in the near future are low.

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202. *International History*, *supra* note 19.