

“LOOT BOXES”: ILLEGAL GAMBLING DEVICES UNDER SOUTH CAROLINA LAW

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I. INTRODUCTION.....	712
II. BACKGROUND: LOOT BOXES, GENERALLY.....	714
A. <i>What is a Loot Box?</i>	714
B. <i>Questionable Practices Implemented by Developers via Loot Boxes</i>	715
C. <i>The “Gambling-Like” Qualities of Loot Boxes that Impact Vulnerable Populations</i>	717
III. THE LEGAL HIERARCHY OF GAMBLING LAW ANALYSIS IN THE UNITED STATES.....	720
A. <i>The U.S. Constitution and Murphy v. NCAA</i>	720
B. <i>Federal Gambling Statutes and the Commerce Clause</i>	722
C. <i>The Indian Gaming Regulatory Act and Tribal Gambling Law Jurisdiction</i>	725
D. <i>Federal Regulations</i>	726
E. <i>State Constitutions</i>	727
F. <i>State Statutes and Their Interpretive Case Law</i>	728
IV. LOOT BOXES AS GAMBLING UNDER SOUTH CAROLINA LAW.....	730
A. <i>Plain Statutory Language</i>	730
B. <i>South Carolina Case Law Interpreting Section 12–21–2710</i>	731
C. <i>Are Loot Boxes Illegal Gambling Devices?</i>	733
i. <i>Consideration</i>	734
ii. <i>Chance</i>	734
iii. <i>Reward and Loot Boxes’ Value</i>	737
D. <i>Who is in Violation of Section 12-21-2710?</i>	34
V. CONCLUSION.....	741

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I. INTRODUCTION

“Loot boxes” and other similar microtransactions have become increasingly popular revenue producing mechanics for video game developers since their introduction into Western gaming in 2009, and as popularity of the mechanic has grown, so too have criticisms that loot boxes mimic not only the psychological and sociological effects of gambling, but that they potentially meet the legal standard for gambling as well.¹ With loot boxes, video game players may spend real world currency to open virtual “boxes” that have a chance, with generally undisclosed odds, to provide item(s) of varying rarity and value that either help progression within the game or provide cosmetic benefit.² While the video game industry lauds staggering profits from the mechanic,³ the addiction-like tendencies and habits that are formed by repetitive interactions with loot boxes generated calls for regulation, particularly when loot boxes’ impact on child gamers is considered.⁴

Both domestically and internationally, governments have begun to regulate loot boxes by placing varying levels of restrictions on the revenue producing mechanic.⁵ The prevalent path for regulation is either to treat loot boxes as a form of gambling and address the legality of loot boxes under existing gambling restrictions, or to create new restrictions that are inclusive of the mechanic.⁶ But, at least in the United States, loot boxes often fail to fall neatly within the common law legal framework for gambling where one provides consideration during a game of chance to win a “thing of value,” or

1. See John Bennett, *Fake Loot, Real Money: The Uncertain Legal Future of Loot Boxes*, 39 ENT. & SPORTS LAW. 12, 12–15 (2023).

2. See John J. Chung, *Loot Boxes May Exploit Gamers, but Their Sale Does Not Constitute Unlawful Gambling*, 29 ROGER WILLIAMS U. L. REV. 110, 110–12 (2024).

3. See Scott Van Voorhis, *The \$15 Billion Question: Have Loot Boxes Turned Video Gaming into Gambling?*, HARV. BUS. SCH. (Apr. 21, 2023), <https://hbswk.hbs.edu/item/the-15-billion-question-have-loot-boxes-turned-video-gaming-into-gambling> [<https://perma.cc/A526-Q9WU>] (noting that the loot box business generates around \$15 billion a year in revenue for gaming companies).

4. See Alexander Mann, *Pseudo-Gambling and Whaling: How Loot Boxes Prey on Vulnerable Populations and How to Curtail Future Predatory Behavior*, 15 WASH. J.L. TECH. & ARTS 200, 220–22 (2020); see also Nerilee Hing et al., *Loot Box Purchasing is Linked to Problem Gambling in Adolescents When Controlling for Monetary Gambling Participation*, 11 J. BEHAV. ADDICTION 396, 403 (2022).

5. See Andrew V. Moshirnia, *Precious and Worthless: A Comparative Perspective on Loot Boxes and Gambling*, 20 MINN. J.L. SCI. & TECH. 77, 99–107 (2019) (highlighting legislation from within and outside the United States regulating loot box revenue mechanics).

6. See Bennett, *supra* note 1, at 17, 21 (explaining complications that arise from treating loot boxes as gambling under existing law and highlighting the Protecting Children from Abusive Games Act as an example of new proposed restrictions more inclusive of the loot box mechanic).

a prize.⁷ The requirement that, for an activity to be gambling, a player must win a “thing of value” is where many legal arguments campaigning for loot boxes’ classification as a gambling artifice fail, due to the lack of an objective, real world value for the contents of the loot boxes, and the inability at times to transfer title of the loot boxes’ contents to another player or cash out any winnings.⁸

The goal of this Note is first to determine if loot boxes are prohibited by federal gambling law. After answering that they are not—outside of one federal statute that would prohibit loot boxes if they were prohibited by state law—the Note moves to whether loot boxes fall specifically within South Carolina’s existing statutory framework for gambling. The argument will turn on how South Carolina’s interpretations of “game of chance” and “thing of value” are broad in scope and, thus, likely to be inclusive of loot boxes.

Part I provides background and addresses the history of the loot box mechanic, its rise to prevalence, and the negative impact it has had on gamers both financially and psychologically due to its shared characteristics with gambling.

Part II analyzes the hierarchy of legal authority on gambling in the United States to ascertain whether any federal gambling law currently prohibits the loot box mechanic. It then performs the same analysis, but under state gambling law. Part II begins with a discussion of Congress’s power to regulate gambling under Article I of the U.S. Constitution and the anticommandeering rule. The Part then moves to federal statutes addressing gambling, to the lack of inclusion of gambling in many federal regulations, then to state constitutions. Lastly, the Part addresses various states’ approaches to statutory gambling regulation with a final landing place of South Carolina’s statutory framework for gambling.

Part III discusses South Carolina gambling statutes and case law interpreting those statutes. Because South Carolina has not yet had a case addressing loot boxes specifically, Part III analyzes case law addressing other illegal gambling devices in South Carolina. Part III also briefly notes why other states have declined to interpret loot boxes as a form of gambling and addresses how South Carolina would affirmatively classify loot boxes as illegal gambling devices because of how courts in the State have interpreted the “value, chance, and consideration” framework. Part III closes by discussing who is in violation of South Carolina law due to loot boxes’ classification as illegal gambling devices.

Lastly, Part IV concludes by briefly addressing how, despite loot boxes being illegal gambling devices under South Carolina law, seizing and destroying the boxes would logistically be extremely difficult.

7. See Chung, *supra* note 2, at 133.

8. *Id.* at 133 n.51.

II. BACKGROUND: LOOT BOXES, GENERALLY

A. *What is a Loot Box?*

The loot box first emerged in Chinese games in 2006, with a move to Western markets in 2009 thanks largely to the game studio Electronic Arts and its attempts to increase revenue by implementing a new wave of microtransactions.⁹ Microtransactions are small, incremental purchases of assets built into games that allow production companies to increase revenue without potentially losing customers because of an increased video game direct sale price.¹⁰ Players purchase loot boxes with either real world currency or an in-game virtual currency and are promised a randomized reward.¹¹ This reward can range from ultra-rare items that are unavailable through normal gameplay progression to items that are “relatively useless.”¹²

Loot boxes come in a variety of formats:

- (1) [C]osmetic items to change a character’s appearance (“skins”) or expressions (“emotes”);
- (2) card packs containing items or characters of differing value;
- (3) “pay-to-progress” transactions, like extra energy or time, as an incentive to continue game play; and
- (4) “pay-to-win” transactions, such as stronger characters and better weapons, that give players that pay an advantage over players that do not purchase them.¹³

A player always receives *something* in exchange for their purchase of a loot box; however, the utility of the contents of a loot box in actually progressing or improving performance in a video game varies dramatically depending on the style of the game and the developers’ intent.¹⁴ Therefore, the value of the rewards, especially the cosmetic rewards, is generally subjective to the player.¹⁵ But, certain games have third-party markets where

9. See Bennett, *supra* note 1, at 13.

10. See *id.*

11. FED. TRADE COMM’N, F.T.C. VIDEO GAME LOOT BOX WORKSHOP (2020), https://loot_box_workshop_staff_perspective.pdf [<https://perma.cc/HNY2-B47E>] [hereinafter F.T.C. LOOT BOX WORKSHOP].

12. See Chung, *supra* note 2, at 111–12.

13. F.T.C. LOOT BOX WORKSHOP, *supra* note 11, at 1–2.

14. See *id.* at 2; Maddie Level, Comment, *Unboxing the Issue: The Future of Video Game Loot Boxes in the U.S.*, 68 KAN. L. REV. 201, 209 (2019) (quoting Jason Schreier, *ESRB Says It Doesn’t See ‘Loot Boxes’ as Gambling*, KOTAKU (Oct. 11, 2017), <https://kotaku.com/esrb-says-it-doesnt-see-loot-boxes-as-gambling-1819363091> [<https://perma.cc/V7PV-9P6X>]).

15. Chung, *supra* note 2, at 135.

cosmetic rewards and even the loot boxes themselves may be bought and sold for occasionally hundreds of thousands of dollars.¹⁶

While the player is conveyed some benefit in exchange for the currency spent to open the randomized loot box, developers' altruism is likely not the reason for the pervasiveness of the mechanism. The device is designed to increase revenue, and it has been successful in doing so.¹⁷ Blizzard Entertainment, developer of popular video game *Overwatch*, reported that out of its \$7.18 billion earned in the fiscal year for 2017, a staggering \$4 billion dollars came from in-game purchases of loot boxes.¹⁸ As of 2023, the video game industry reported making \$15 billion annually in revenue solely from loot boxes in both free-to-play and full-priced video games.¹⁹ It then follows that there exists a motivation to increase the efficacy of loot boxes and, therefore, profit generated year over year.

B. Questionable Practices Implemented by Developers via Loot Boxes

Developers have not been shy about their intentions behind the implementation of loot boxes in their games.²⁰ An anonymous *Overwatch* employee put it simply: “we want to build anticipation.”²¹ That anticipation building teeters a line of subtlety: “[w]e do this in a lot of ways—animations, camera work, spinning plates, and sounds. We even build a little anticipation with the glow that emits from a loot box’s cracks before you open it.”²²

However, other attempts to push players towards purchases have been far more overt. In 2017, game developer Activision obtained a patent entitled “System and Method for Driving Microtransactions in Multiplayer Video Games” to generate further revenue from its loot boxes and microtransaction pathways.²³ Activision generated revenue with a variety of techniques.²⁴

16. See Robbie Landis, *CSGO Skin Sells for 160k, but Why?*, ESPORTS ILLUSTRATED (Mar. 16, 2023), <https://esi.si.com/news/csgo-skin-sells-for-160k> [<https://perma.cc/L92B-2Q8W>]; *Steam Community Market*, STEAM, <https://steamcommunity.com/market/search?appid=730> [<https://perma.cc/PTM4-K2BM>] (an example of an online-based marketplace where players can sell the loot boxes they receive in-game for real world currency in lieu of opening them and receiving the rewards within).

17. See Mann, *supra* note 4, at 211.

18. *Id.*

19. See Van Voorhis, *supra* note 3.

20. See Heather Alexandra, *Loot Boxes Are Designed to Exploit Us*, KOTAKU (Oct. 13, 2017), <https://kotaku.com/loot-boxes-are-designed-to-exploit-us-1819457592> [<https://perma.cc/83HP-XLSG>].

21. *Id.*

22. *Id.*

23. See Moshirnia, *supra* note 5, at 89 (citing U.S. Patent No. 9,789,406 (filed May 14, 2015) (issued Oct. 17, 2017)).

24. See *id.* at 89–90.

Game developers created an “achievement gap” where the game matched a junior player against a “marquee” player who had already purchased or obtained elite weapons for the game with the hope that the junior player would then purchase loot boxes and other microtransactions to obtain the gear the marquee player used.²⁵ The system for driving microtransactions further focuses in on these junior users and their “lesser” gear by tracking their preferred playstyle to match them into multiplayer lobbies with advanced players who can act as “role models” of the same playstyle.²⁶ For example, an aspiring sniper in a *Call of Duty* game would be matched with someone with an advanced sniper rifle in a targeted attempt to get that aspiring sniper to spend money to emulate the player that the game *knows* the junior player envies.²⁷ Lastly, assuming the junior player was hooked by the aforementioned methods—and either purchased an item directly or purchased a loot box in an attempt to obtain an item—the junior player is then placed in a targeted matchmaking situation where the new item is designed to perform well.²⁸ This psychologically reinforces that the decision to purchase was a correct one and encourages subsequent purchases of in-game items.²⁹

No matter if developers label their efforts to refine loot boxes as “building anticipation” or choose to speak as plainly as Activision’s patent does, the goal appears to be the same: to create an amenable view of in-game purchases like loot boxes.³⁰ A succinct way of describing these efforts is the “Hook, Habit, Hobby” model that looks at how developers of “free-to-play,” or “free-to-purchase” games are still able to make hundreds of millions of dollars in annual profits despite the zero dollar retail price of their games.³¹ Developers hook a player in with an initial purchase and then utilize tools such as loot boxes to psychologically condition players to form a habit.³² Developers then attempt to turn a habit player into a “hobby” player by offering the most unique rewards to those who commit serious time and money to the game as a way to reinforce a player’s idea that the game is important.³³

While this somewhat gentle manipulation by video game developers could be concerning to some, most people are used to attempts to sway their

25. *Id.* at 89.

26. *See id.* at 89–90.

27. *See id.*

28. *Id.* at 90.

29. *Id.*

30. *See supra* notes 20–22 and accompanying text.

31. *See Mann, supra* note 4, at 212–13.

32. *See id.* at 213–14.

33. *See id.* at 215.

personal choices and autonomy.³⁴ Further, most are accustomed to trading that autonomy in favor of receiving pointed, personalized offerings based on data surrounding their interests.³⁵ So, why is there a focus on the potential dangers of loot boxes as they are currently formatted if the main draw of the mechanic is to entice users to spend more money on a product, a goal which other services and products already share?³⁶ The concern for many is that loot boxes’ qualities simulate the risk and reward experience of gambling and that those qualities impact the large audience of video game players that are children.³⁷

C. The “Gambling-Like” Qualities of Loot Boxes that Impact Vulnerable Populations

Participating in video games, generally, already exposes children and other easily influenced vulnerable persons to risk.³⁸ The World Health Organization went as far in its eleventh edition of *International Classification of Diseases* to add “gaming disorder” as a new type of addictive behavior with a related entry for “hazardous gaming.”³⁹ Hazardous gaming describes “a pattern of gaming, either online or offline, that *appreciably increases* the risk of harmful physical or mental health consequences to the individual or to others around this individual . . . [due to] the frequency of gaming, [or] the amount of time spent on these activities”⁴⁰ Also, children who experience

34. See, e.g., *Social Media Manipulation by Political Actors an Industrial Scale Problem*, UNIV. OXFORD (Jan. 13, 2021), <https://www.ox.ac.uk/news/2021-01-13-social-media-manipulation-political-actors-industrial-scale-problem-oxford-report> [<https://perma.cc/TCX3-MX4M>] (describing the widespread incidence of social media “manipulation” campaigns that use disinformation as way to sway voters).

35. See Pietra Daneluzzi Quinelato, *Consumer Manipulation Through Behavioral Advertising: Regulatory Proposal by the Data Services Act*, 2 BRAZ. J.L. TECH. & INNOV. 1, 1, 4 (2024) (explaining how online platforms facilitate interactions between businesses and users while also allowing businesses access to “unparalleled access to a wealth of information[]” about users).

36. See *id.* at 8 (highlighting various mechanics used by large companies to target individual users into spending more money on their platforms).

37. See Jason W. Osbourne, *How Loot Boxes in Children’s Video Games Encourage Gambling*, FORBES (May 25, 2023, 11:46 AM), <https://www.forbes.com/sites/jasonwosborne/2023/05/25/how-loot-boxes-in-childrens-video-games-encourage-gambling/> [<https://perma.cc/5ZH7-27DA>].

38. See Moshirnia *supra* note 5, at 86 & n.40; *ICD-11 for Mortality and Morbidity Statistics, 6C51 – Gaming Disorder*, WORLD HEALTH ORG., <https://icd.who.int/browse/2024-01/mms/en#1448597234> [<https://perma.cc/8EQA-LNHS>].

39. Moshirnia *supra* note 5, at 86.

40. *Id.* (quoting WORLD HEALTH ORG., INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES AND RELATED HEALTH PROBLEMS 6C51 (11th ed. 2018)).

bullying are not only more likely to escape into video games,⁴¹ but are also more likely to self-identify with and conflate the importance of their digital, video game based persona with their own self-esteem.⁴² Therefore, exposure to any mechanic or product that is comparable in structure or appearance to a gambling device should draw closer scrutiny due to the already inherent risks involved with video gaming⁴³ combined with children's increased susceptibility to developing a pathological gambling problem.⁴⁴

Loot boxes contain, at minimum, the structure of a gambling device because players give money to open the randomized loot box with the hopes of winning a prize of loot or in-game gear.⁴⁵ Gambling, at its base level, is risking something of value, like money, on a chance based opportunity to win a prize.⁴⁶ Players spend either real world currency or in-game currency to acquire loot boxes.⁴⁷ Real world currency has value.⁴⁸ In-game currency's value is a bit trickier to define, as it is either acquired by spending real world currency⁴⁹ or by obtaining it in the game through a variety of methods such as completing in-game challenges.⁵⁰ The latter way of obtaining in-game currency draws concerns about the subjective "value" of the effort and time spent playing a video game, which becomes an issue when discussing loot boxes in a legal framework.⁵¹ The player takes a chance because the contents of loot boxes are randomized with no ability for the player to sway the outcome.⁵² As a "prize" the player could get a duplicate of a common item or a vied-for legendary item.⁵³ While loot boxes may parallel gambling conceptually, some developers have been more bold than mere metaphor: *NBA 2K20* was famous for allowing players to play virtual slot machines,

41. See Jeremie Richard et al., *Bullying Victimization and Problem Video Gaming: The Mediating Role of Externalizing and Internalizing Problems*, INT'L J. ENV'T RSCH. & PUB. HEALTH, Feb. 2021, at 1, 8.

42. Bennett, *supra* note 1, at 13.

43. See *supra* notes 38-40 and accompanying text.

44. See Moshirnia, *supra* note 5, at 85 ("[A]pproximately 4 percent to 8 percent of adolescents are pathological gamblers. In contrast, the rate of pathological gambling in adults hovers around 1 percent.").

45. F.T.C. LOOT BOX WORKSHOP, *supra* note 11.

46. 8 AM. JUR. 2D *Gambling* § 2, Westlaw (database updated Jan. 2025).

47. F.T.C. LOOT BOX WORKSHOP, *supra* note 11.

48. See Daniel Kurt, *How Currency Works*, INVESTOPEDIA (June 7, 2024), <https://www.investopedia.com/articles/investing/092413/how-currency-works.asp> [https://perma.cc/WA7B-2X2F].

49. See, e.g., *Be Safe with FUT Coins and FIFA Points*, EA HELP (June 5, 2023), <https://help.ea.com/ca/help/fifa/be-safe-with-fut-coins-and-fifa-points/> [https://perma.cc/HTC6-2DGU].

50. See, e.g., *id.*

51. See *infra* Part III.C.iii.

52. See Chung, *supra* note 2, at 110-12.

53. See F.T.C. LOOT BOX WORKSHOP, *supra* note 11.

prize wheels, and pachinko machines for real currency under the guise of a loot box mechanic.⁵⁴

Video game developers have, by emulating the risk, reward, and chance ratios of popular casino games, created a mechanic that triggers a powerful neurological response.⁵⁵ Additionally, “[o]pportunities for repetitive continuous play, auditory and visual reinforcement, and the difficulties in keeping track of multiple electronic microtransactions, may also increase impaired control over loot box spending.”⁵⁶ Developers want to build an anticipation that triggers players to create a behavioral pattern to open boxes repeatedly, and they do so successfully.⁵⁷ Loot boxes have encouraged children to spend thousands of dollars while attempting to satisfy that behavioral need for a reward.⁵⁸ The influence of the mechanic does not stop once the game turns off, however.⁵⁹ Children who spend on loot boxes are significantly more likely to develop at risk or problem gambling behaviors in adolescence than those not exposed to the mechanic.⁶⁰

Owing to these parallels, many critics of the loot box mechanic have worked to curb its impact on children and society by regulating the mechanic under existing law or by enacting new legislation.⁶¹ International efforts to regulate loot boxes attack the issue from a variety of lenses.⁶² Belgium, for example, firmly decided that loot boxes fit within its framework of illegal gambling and banned the mechanic outright for children and adults.⁶³ Courts in some countries found that only certain types of loot boxes are problematic, focusing on the dangers of video games containing loot boxes whose contents can be sold by players on a real world marketplace.⁶⁴ But, most popularly,

54. Mann, *supra* note 4, at 212.

55. Bennett, *supra* note 1, at 14.

56. Hing et al., *supra* note 4, at 402.

57. See Alexandra, *supra* note 20 (describing the powerful draw that loot boxes have in games); see also Mann, *supra* note 4, at 212–16 (analyzing the psychology behind the “Hook, Habit, Hobby” model used by games to make players susceptible to spending money on loot boxes).

58. See Mann, *supra* note 4, at 218–19.

59. See Caterina Primi et al., *Loot Boxes Use, Video Gaming, and Gambling in Adolescents: Results from a Path Analysis Before and During COVID-19-Pandemic-Related Lockdown in Italy*, FRONTIERS PSYCH., Sept. 27, 2022, at 1, 1.

60. *Id.*

61. See Bennett, *supra* note 1, at 15.

62. See Leon Y. Xiao, *Loot Box State of Play 2023: A Global Update on Regulation*, GAMES INDUSTRY.BIZ (Dec. 5, 2023), <https://www.gamesindustry.biz/loot-box-state-of-play-2023-a-global-update-on-regulation> [https://perma.cc/T88C-6CUA] (noting different means utilized by countries to regulate loot boxes, including “enforcing consumer protection law; requiring that specific information be disclosed; or demanding action from age rating organisations [sic]”).

63. *Id.*

64. See *id.*

countries skew towards a consumer protection approach by requiring probability disclosures in games about the odds of obtaining certain prizes from the loot boxes, recommending games with loot boxes to older players only, or simply requiring a warning label stating the game contains loot boxes.⁶⁵

In the United States, the most notable attempts at regulation come from failed legislation, with multiple proposed bills honing in on the dangers of the mechanic to children.⁶⁶ In 2018, Hawaii proposed a bill that called attention to the “exploitative gambling-like” features of loot boxes, noting that loot boxes typically are subject to far fewer disclosure requirements than casino gambling games,⁶⁷ and Washington called for its State Gambling Commission to determine definitively if loot boxes fell under state gambling laws.⁶⁸ In 2019, a bill was introduced in the United States Senate entitled “Protecting Kids from Abusive Games Act,” which declined to mention gambling in its drafting language.⁶⁹ The failed bill did, however, include a proposed full ban on loot boxes in minor-oriented games and a call to action for further studies on the psychological effects of the mechanic and its potential to cause compulsive buying behavior.⁷⁰ Therefore, many attempts at regulating loot boxes in the United States thus far have been slightly amorphous in terms of addressing gambling and have waffled between federal versus state level regulation of the issue.⁷¹ So, what is the path forward? While enacting a new federal statute to regulate loot boxes under gambling law may be a way of quieting the discourse,⁷² are loot boxes currently prohibited gambling under current federal law? What about state law?

III. THE LEGAL HIERARCHY OF GAMBLING LAW ANALYSIS IN THE UNITED STATES

A. *The U.S. Constitution and Murphy v. NCAA*

Loot boxes are not prohibited as a form of gambling by the U.S. Constitution, but the Constitution does provide both federal and state

65. *See id.*

66. *See infra* notes 67-69 and accompanying text.

67. *See* H.R. 2686, 29th Leg., Reg. Sess. (Haw. 2018).

68. S. 6266, 65th Leg., Reg. Sess. (Wash. 2018).

69. *See* S. 1629, 116th Cong. (2019).

70. *See id.*

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

72. *See* U.S. CONST. art. VI, cl. 2. A federal statute regulating loot boxes could preempt the various state regulations on this matter, providing a uniform approach for dealing with these mechanics.

legislators the ability to regulate loot boxes as gambling, if they so choose.⁷³ The Constitution makes no direct textual reference to gambling.⁷⁴ However, the Supreme Court’s 2018 opinion in *Murphy v. NCAA* neatly outlines how Congress could, as long as it regulates citizens directly, prohibit forms of gambling.⁷⁵ *Murphy* addressed New Jersey’s attempt to legalize sports gambling within the state at casinos and horseracing tracks.⁷⁶ The National Collegiate Athletic Association (“NCAA”) and the major professional sports leagues then brought a civil action to enjoin the New Jersey law on the ground that it violated the Professional and Amateur Sports Protection Act (“PASPA”).⁷⁷ PASPA made it unlawful for a state or any of its subdivisions “to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme” involving events for amateur and professional athletes.⁷⁸ The State responded that PASPA infringed on its sovereignty to regulate its own laws and citizens in violation of the “anticommandeering” rule.⁷⁹

The “anticommandeering” rule arises out of *New York v. United States* and *Printz v. United States* and the Court’s affirmation that the Tenth Amendment ensures that states “retain a significant measure of sovereign authority . . . to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.”⁸⁰ The Court noted it has long been clear that Congress has the ability to regulate individuals directly according to any of its Article I powers under the Constitution, and specifically, Congress may regulate via its Article I power to regulate interstate commerce or spending.⁸¹ However, while Congress may provide incentives to states to encourage them to regulate or prohibit behaviors at the state level, Congress is wholly unable to directly compel states to act in a certain way by effectively commandeering a state legislature to achieve a federal purpose.⁸²

73. See U.S. CONST. art. I, § 8, cl. 3; *id.* amend. X; *Murphy v. NCAA*, 584 U.S. 453, 486 (2018) (“Congress can regulate sports gambling directly, but if it elects not to do so, each State is free to act on its own.”).

74. See U.S. CONST.

75. See *Murphy*, 584 U.S. at 472, 486.

76. *Id.* at 458.

77. *Id.* at 462.

78. 28 U.S.C. § 3702, *invalidated by* *Murphy v. NCAA*, 584 U.S. 453 (2018).

79. See *Murphy*, 584 U.S. at 462–63.

80. *New York v. United States*, 505 U.S. 144, 156 (1992) (alteration in original) (internal quotation marks omitted) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 549 (1985)); see also *Printz v. United States*, 521 U.S. 898, 935 (1997).

81. See *New York v. United States*, 505 U.S. at 166.

82. See *id.*

This is the notion that the Court relied upon as it held that the anticommandeering rule also applied in the negative in *Murphy*.⁸³ It held that the federal government should be prevented not only from telling state legislatures what laws they must enact but also that the federal government should be prevented from commandeering state legislatures by telling the legislatures what laws they are *not* allowed to pass.⁸⁴ Therefore, PASPA and its provision that prohibited state authorization of gambling was unconstitutional because it violated the anticommandeering rule because of its “direct command to the states.”⁸⁵

This made it clear that, under the anticommandeering rule, regulation of gambling could not occur on a federal level by Congress commanding states to or preventing states from enacting legislation on the subject.⁸⁶ However, the Court did confirm that Congress may regulate gambling federally, provided it does so properly, and noted that it would not be within the Court’s purview to say definitively if certain types of gambling should be legalized.⁸⁷ A federal gambling statute is proper provided Congress can point to an Article I power that allows it to regulate the behavior, and if the statute either regulates both state and private actors equally, or directly prohibits certain individual behavior without commandeering state legislatures to do so.⁸⁸ Thus, loot boxes are not prohibited gambling or prohibited gambling devices under the U.S. Constitution because the document makes no references to gambling, but the Constitution provides the mechanisms by which loot boxes could be prohibited by other legal authorities.

B. Federal Gambling Statutes and the Commerce Clause

While federal statutes may regulate gambling, loot boxes are not prohibited by current federal gambling statutes because those statutes generally defer to state law or only prohibit specific games or gambling devices. As mentioned, Congress’s Article I enumerated powers include its ability to regulate interstate commerce.⁸⁹ As Justice Ginsburg explained in her dissent in *Murphy*, when Congress regulates gambling on a federal level, the

83. See *Murphy*, 584 U.S. at 474–75.

84. See *id.* at 475.

85. See *id.* at 480.

86. See *id.* at 486.

87. See *id.* (“The legalization of sports gambling requires an important policy choice, but the choice is not ours to make.”).

88. See *id.* at 475–77, 486; see also *Reno v. Condon*, 528 U.S. 141, 151 (2000) (holding that a federal law restricting both state governments and private individuals from disseminating personal information on driver’s license applications was constitutional).

89. See U.S. CONST. art I, § 8, cl. 3.

Commerce Clause is generally how it does so.⁹⁰ Congress is allowed to regulate three broad categories of activity under its Commerce Clause power.⁹¹ Congress may regulate the use of channels of interstate commerce; the instrumentalities of commerce, or persons or things in interstate commerce; and economic activities that substantially affect interstate commerce.⁹² Gambling has already been found to fall under all of the activities that Congress may regulate via the Commerce Clause.⁹³ For example, lottery tickets shipped across state lines have been subjected to federal law,⁹⁴ and in 2006 Congress passed the Unlawful Internet Gambling Enforcement Act (“UIGEA”), declaring it unlawful:

[T]o place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.⁹⁵

A “bet or wager” under the UIGEA is “the staking or risking by any person of something of value upon . . . a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome.”⁹⁶ A key exception to the UIGEA, however, is that it does not apply to bets or wagers made within a single state only, if that state expressly authorizes such activity.⁹⁷ So, the UIGEA does not apply to purely intrastate gambling if there is a state level statute that allows such activity.⁹⁸ Therefore, though players do use the internet to transmit something of value—money—on the chance that they receive a “reward” depending on the contents of the unopened loot box, loot boxes are not prohibited under the UIGEA unless one can point to a federal or state law that prohibits the mechanic.

90. *See Murphy*, 584 U.S. at 494 (Ginsburg, J. dissenting) (“Nor is there any doubt that Congress has power to regulate gambling on a nationwide basis, authority Congress exercised in PASPA.”); *see also* *United States v. Riehl*, 460 F.2d 454, 458 (3d Cir. 1972) (deferring to a determination by congress that gambling affected interstate commerce, resulting in a determination that a federal criminal prohibition on gambling was a valid exercise of congressional power under the commerce clause).

91. *United States v. Lopez*, 514 U.S. 549, 558 (1995).

92. *Id.* at 558–59.

93. *See infra* notes 94–95.

94. *Lottery Case*, 188 U.S. 321, 363–64 (1903).

95. 31 U.S.C. § 5362(10)(A).

96. *Id.* § 5362(1)(A).

97. *Id.* § 5362(10)(B).

98. *See id.*

Federal gambling statutes other than the UIGEA take different paths to regulating gambling activity because of Congress's inability to regulate gambling unless it falls within one of three well defined categories of Commerce Clause precedent.⁹⁹ Some statutes regulate only gambling activity that is undoubtedly a channel of commerce, an instrumentality of commerce, or a thing in interstate commerce.¹⁰⁰ Loot boxes could be considered a "thing" in interstate commerce because the loot box is sent from cloud storage to a player's home video game console or computer.¹⁰¹ However, because loot boxes are not mentioned by these narrowly drafted statutes that prohibit specific forms of gambling, they are not prohibited by those statutes. Also, like the UIGEA, most federal gambling statutes allow the behavior if it is authorized by applicable state law, or conversely, only punish the behavior if it is strictly prohibited by the state law.¹⁰² Therefore, because loot boxes are not mentioned as a gambling device that is prohibited by federal statute, and because most federal gambling statutes defer to state law, loot boxes are not prohibited under most federal laws. They are, however, prohibited under the UIGEA when another federal law or applicable state gambling law specifically prohibits loot boxes because, when a player electronically purchases and opens a loot box, they use the internet to place a "bet or wager."¹⁰³ Players "bet or wager" when they open a loot box by participating in the chance-based game that is the loot box upon an agreement to receive the box's valuable contents.¹⁰⁴

99. See *supra* notes 90-92 and accompanying text.

100. See 18 U.S.C. § 1082(a) (making unlawful gambling ships that are on the "high seas" or otherwise subject to federal jurisdiction but not the jurisdiction of any state); 18 U.S.C. § 1301 (prohibiting lottery tickets from being shipped in interstate or foreign commerce).

101. Loot boxes are digital assets. See Bennett, *supra* note 1, at 13. As digital assets, companies utilize cloud-based software to deliver loot boxes from their servers to buyers' inboxes across the United States. See *What is Cloud Storage?*, GOOGLE, <https://cloud.google.com/learn/what-is-cloud-storage> [<https://perma.cc/5SAR-8C22>].

102. See, e.g., 18 U.S.C. § 1953(b) (allowing the transportation of wagering paraphernalia across state lines to a state where the paraphernalia is legal); 18 U.S.C. § 1955(b)(1)(i) (making unlawful an "illegal gambling business" that is in violation of state law in the state in which it is conducted).

103. See 31 U.S.C. § 5362(10)(A) (making it "unlawful internet gambling" to "knowingly transmit a bet or wager . . . which involves the use[] . . . of the Internet where such bet or wager is unlawful under any applicable . . . State law in the State . . . in which the bet or wager is initiated, received, or otherwise made"); *Id.* § 5362(10)(B) (excepting wagers made exclusively within a state and that are permitted by applicable state law).

104. See F.T.C. LOOT BOX WORKSHOP, *supra* note 11, at 1.

C. The Indian Gaming Regulatory Act and Tribal Gambling Law Jurisdiction

Tribal gambling law cannot prohibit loot boxes because, assuming for analysis that loot boxes are a form of gambling, tribes do not have the jurisdiction to unilaterally prohibit nor authorize any gambling other than “Class I gaming.”¹⁰⁵ Congress passed 25 U.S.C. §§ 2701–2721 in 1988 to regulate the conduct of gaming and gambling on Indian Lands and to establish the National Indian Gambling Commission.¹⁰⁶ The Act regulates gambling in a unique way compared to previously discussed federal statutes. It breaks down gambling activities into three different “classes” and provides varying guidance depending on the class of gaming the activity falls under.¹⁰⁷ Class I gaming, defined as “social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations[,]” is completely within the jurisdiction of tribal law.¹⁰⁸ Class II gaming includes bingo, games similar to bingo, and any card games—besides blackjack, baccarat, chemin de fer—that are either specifically authorized or not specifically prohibited by the law of the state in which the tribal land is located.¹⁰⁹ Class II gaming is within the jurisdiction of the local Indian tribes, but is only allowed if it is permitted by the law of the state the tribe is located in, the local tribe adopts an ordinance or resolution regulating the Class II gaming, and that ordinance or resolution is approved by the Chairman of the National Indian Gambling Commission.¹¹⁰ Class III gaming is any form of gaming that is not mentioned in Class I or Class II, including any electronic version of any game of chance or slot machine of any kind.¹¹¹ For Class III games to be lawful there must be: an authorizing tribal ordinance or resolution, approval by the Chairman of the National Indian Gambling Commission, the game must be permitted by the applicable state law, and there must be a Tribal-State Compact to work out the logistics of allowing the gaming on the Tribal Land and within the respective state.¹¹² A state can have multiple tribal gaming compacts with the multiple tribes within the State, with each compact having different activities

105. See *infra* notes 106–112 and accompanying text.

106. See 25 U.S.C. §§ 2701–21.

107. See 25 U.S.C. § 2710.

108. 25 U.S.C. §§ 2703(6), 2710(a)(1).

109. 25 U.S.C. § 2703(7)(A)–(B).

110. 25 U.S.C. § 2710(a)–(b).

111. 25 U.S.C. §§ 2703(7)(B)(ii), (8).

112. 25 U.S.C. §§ 2710(d)(1), (3).

permitted or prohibited.¹¹³ Some states, like South Carolina, have no tribal gaming compact whatsoever.¹¹⁴

The tribal–state compacts tend to further restrict and define which specific Class III games will be permitted, how the games’ odds or chances will be published and displayed, and how the tribe will handle video games and electronic gambling machines versus live, in person games.¹¹⁵

Loot boxes are not Class I games, as they have no connection to traditional tribal ceremonies or celebrations nor are they a social game played simultaneously between multiple people.¹¹⁶ Nor are they Class II games because they are not among the games defined as such.¹¹⁷ Loot boxes could fall within Class III games and thus be considered a form of gambling because they could be “electronic . . . game[s] of chance . . . of any kind.”¹¹⁸ “Game of chance” is not defined within the Indian Gaming Regulatory Act, and loot boxes can be “games of chance” under state level gambling law depending on the broadness of the definition used.¹¹⁹

So, while the Indian Gaming Regulatory Act and the tribal-state compacts that flow from it provide more specific definitions and examples regarding the regulation of gambling than other federal statutes, tribal law is not the correct vehicle for regulating loot boxes. Simply put, tribal gambling law does not prohibit the loot box mechanic as a potential gambling device because it does not have the authority to regulate any gambling or gaming other than Class I gaming without a state’s approval, and loot boxes are not Class I games.

D. Federal Regulations

Loot boxes are not prohibited as illegal gambling nor as illegal gambling devices by federal regulations because federal regulations provide only very pointed gambling oversight. Many of the regulations that mention gambling in their text are focused on (1) prohibiting gambling activity on specific

113. See *Gaming Compacts*, U.S. DEP’T OF THE INTERIOR, <https://www.bia.gov/as-ia/oig/gaming-compacts> [<https://perma.cc/KWF9-246C>].

114. See *id.* (twenty-three states do not have Tribal-State Compacts).

115. See *Tribal-State Compact Between the Catawba Indian Nation and the State of North Carolina*, U.S. DEP’T OF THE INTERIOR (Mar. 19, 2021), <https://www.bia.gov/sites/default/files/dup/assets/as-ia/oig/pdf/508%20Compliant%202021.03.25%20Catawba%20Indian%20Nation%20Tribal%20State%20Gaming%20Compact.pdf> [<https://perma.cc/9WQH-RM4D>]. Section five of this compact relates to the regulation of Class III gaming and speaks specifically to the publication of odds and chances while section six specifically relates to video games and gambling machines. *Id.*

116. See Chung, *supra* note 2; 25 U.S.C. § 2703(6).

117. See Chung, *supra* note 2; 25 U.S.C. § 2703(7)(A).

118. 25 U.S.C. § 2703(7)(B)(ii).

119. See Chung, *supra* note 2; 25 U.S.C. § 2703(7)(A)-(8); *infra* section II.F.

federal government property¹²⁰ or (2) prohibiting the disbursement of certain federal grant or loan funds to businesses that generate revenue from gambling.¹²¹ Thus, because of the limited scope of the authority on gambling within the Federal Regulations, loot boxes cannot be analyzed under, and thus are not prohibited by, any federal gambling related regulation.

E. State Constitutions

Loot boxes are not expressly prohibited gambling nor gambling devices under state constitutions because state constitutions either decline to make any reference to gambling at all, choose to only reference lotteries, or fail to provide a scope for “games of chance” that they prohibit. State constitutions take various approaches to the topic of gambling.¹²² Some constitutions make no mention of any sort of gambling or game of chance.¹²³ Others carve out specific guidelines for establishing a state run lottery but decline to address other modes of gambling.¹²⁴ Georgia’s Constitution allows the creation of a lottery system and nonprofit bingo games but then specifically prohibits all types of casino gambling and parimutuel betting.¹²⁵ Utah’s Constitution goes so far as to expressly prohibit all games of chance and lotteries.¹²⁶ South Carolina specifically authorized lotteries, nonprofit bingo, and nonprofit raffles¹²⁷ but does not expressly mention any other gambling activities outside of prohibiting “officers” from any gambling or betting on games of chance.¹²⁸

120. *See, e.g.*, 5 C.F.R. § 735.201 (2025) (prohibiting gambling by government employees on government property or while on duty); 7 C.F.R. § 500.6 (2025) (prohibiting gambling on United States National Arboretum property); 4 C.F.R. § 25.7 (2025) (prohibiting gambling at the United States Government Accountability Office).

121. *See, e.g.*, 7 C.F.R. § 25.621(i) (2025) (prohibiting certain Department of Agriculture grant funds from being disbursed to “support or promote gambling[.]”); 7 C.F.R. § 1980.412(k) (prohibiting certain Department of Agriculture loans from being disbursed to support any legitimate business activity “when more than 10 percent of the gross annual revenue is derived from legalized gambling activity[.]”); 13 C.F.R. § 109.400(b)(7) (2025) (prohibiting small business loans under the Intermediary Lending Pilot Program from being disbursed to a business deriving “more than one-third of gross annual revenue from legal gambling activities[.]”).

122. *See infra* notes 123-128.

123. *See, e.g.*, N.C. CONST.; ALASKA CONST.

124. *See, e.g.*, NEV. CONST. art. IV, § 24; WASH. CONST. art. II, § 24.

125. GA. CONST. art. I, § 2, ¶ VIII (“... [A]ll forms of pari-mutuel betting and casino gambling are hereby prohibited; and this prohibition shall be enforced by penal laws.”).

126. UTAH CONST. art. VI, § 27 (“The Legislature shall not authorize any game of chance, lottery or gift enterprise under any pretense or for any purpose.”).

127. *See* S.C. CONST. art. XVII, § 7.

128. *See id.* at § 8 (“It shall be unlawful for any person holding an office of honor, trust or profit to engage in gambling or betting on games of chance; and any such officer, upon conviction thereof, shall become thereby disqualified from the further exercise of the functions of his office, and the office of said person shall become vacant, as in the case of resignation or death.”).

So, constitutions can fail to address individual “games of chance” or casino gambling games directly, and when they do address them, they can fail to define those terms within the text of the constitution.¹²⁹ This makes it difficult to discern whether a mechanic such as loot boxes would fall within the constitutional framework without looking at interpretive state case law or searching state statutes and regulations for more concrete definitions of these gambling law terms of art. Thus, because gambling is at times either not addressed within state constitutions or is addressed only with minimal specificity, it is not clear whether loot boxes are expressly prohibited under many states’ constitutions. Loot boxes may, however, be prohibited under state constitutions that ban all games of chance, like Utah, provided that loot boxes meet the respective statutory or common law definition of game of chance in that state.

F. State Statutes and Their Interpretive Case Law

While loot boxes have not yet been found to be illegal gambling by the few courts that have applied their state’s respective gambling statutes to the mechanic,¹³⁰ loot boxes could be prohibited as illegal gambling or illegal gambling devices depending on the state. State statutes provide a clearer framework to address what does and what does not constitute gambling behavior. States vary in their approach to this. Some states have decided to codify an exact definition of gambling.¹³¹ Others have decided to codify which activities or games the state is going to prohibit but decline to provide

129. *See supra* notes 123-128 and accompanying text.

130. *See infra* notes 136-137; *Coffee v. Google, LLC*, No. 20-cv-03901-BLF, 2022 U.S. Dist. LEXIS 4791, at *40–41 (N.D. Cal. Jan. 10, 2022) (holding that loot boxes are not illegal “slot machines” under California law); *Mai v. Supercell Oy*, 648 F. Supp. 3d 1130, 1137–38 (N.D. Cal. 2023), *vacated*, 2024 LEXIS 11317 (9th Cir. May 9, 2024).

131. *See, e.g.*, UTAH CODE ANN. § 76-10-1101(8) (LexisNexis through 2024 4th Sp. Sess.) (defining gambling as “risking anything of value on for a return or risking anything of value upon the outcome of a contest, game, gaming scheme, or gaming device when the return or outcome[] . . . is based on an element of chance[] . . . and is in accord with an agreement . . . that someone will receive anything of value in the event in the event of a certain outcome”); WASH. REV. CODE ANN. § 9.46.0237 (LexisNexis through 2024 Reg. Sess.) (defining gambling as “staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the person’s control or influence, upon an agreement or understanding that the person or someone else will receive something of value in the event of a certain outcome”); NEV. REV. STAT. ANN. § 463.0152(1) (LexisNexis through 2024 revisions) (defining “game” or “gambling game” as “any game played with cards, dice, equipment or any mechanical or electronic device or machine for money, property, checks, credit or any representative of value”).

a definition of the term “gambling.”¹³² A common theme within states’ regulatory attempts surrounding gambling is to directly codify all or part of the framework of consideration, chance, and value or reward.¹³³ The idea is that someone risks some form of consideration for the chance to win a prize or a thing of some value.¹³⁴ State courts will use the framework of consideration, chance, and value or reward to aid in interpretation of the text of gambling statutes.¹³⁵ The broad nature of the language of many state statutes for gambling that do not limit “gambling” to specific games, paired with the ability of state courts to rely on common law precedent to interpret the verbiage of the statutes when there is conflict over the text’s meaning are helpful when deciding if a game or machine is a form of gambling. If a new form of potential gambling, like loot boxes, is brought under scrutiny via a lawsuit, courts can merely plug the characteristics of loot boxes into their respective state’s statutory framework.¹³⁶ When ambiguity arises about the meaning of terms like “thing of value” or “consideration,” parties may make arguments that cite common law decisions surrounding gambling devices with analogous components to help interpret meaning.¹³⁷ Thus, depending on the state, loot boxes could be a form illegal gambling or illegal gambling devices.

In summation, though Congress *could* regulate loot boxes under gambling statutes at the federal level under its Commerce Clause power, provided it

132. See CAL. PENAL CODE § 330 (Deering through 2024 legislation) (providing a variety of games that are illegal, including “faro, monte, roulette, lansquenet, rouge et noire, rondo, tan, fan-tan, seven-and-a-half, twenty-one, hokey-pokey, or any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or other representative of value”).

133. See *Ward v. W. Oil Co.*, 387 S.C. 267, 278, 692 S.E.2d 516, 522 (2010); see, e.g., WIS. STAT. 945.01(3)(a) (LexisNexis through 2024 Leg. Sess.); MD. CODE ANN. CRIM. LAW § 12-101(d) (LexisNexis through 2024 Reg. Sess.) (“‘Gaming device’ means: a gaming table, except a billiard table, at which a game of chance is played for money or any other thing or consideration of value; or a game or device at which money or any other thing or consideration of value is bet, wagered, or gambled.”).

134. See WIS. STAT. § 945.01(3)(a) (LexisNexis through 2024 Reg. Sess.) (“A gambling machine is a contrivance which for a consideration affords the player an opportunity to obtain something of value, the award of which is determined by chance[.]”).

135. See, e.g., *Miss. Gaming Comm’n v. Treasured Arts*, 699 So. 2d 936, 938–39 (Miss. 1997) (using consideration, chance, and value or reward framework to analyze whether a scratch-off card that allowed the player to win long-distance telephone minutes violated a constitutional prohibition on lotteries); see also *Quick Charge Kiosk LLC v. Kaul*, 944 N.W.2d 598, 603–04 (Wis. 2020) (using common law definition of “consideration” to determine whether a kiosk that allowed the wagering of credits in return for a dollar inserted violated the state’s prohibition on gambling machines, which required that consideration be paid into the machine).

136. See *Tran v. Aniplex of Am. Inc.*, No. 22STCV23278, 2023 Cal. Super. LEXIS 18058, at *20–24 (Cal. Super. Apr. 25, 2023) (analyzing loot boxes under relevant California gambling statutes).

137. See *Taylor v. Apple, Inc.*, No. 20-cv-03906-RS, 2021 U.S. Dist. LEXIS 265916, at *12–14 (N.D. Cal. Mar. 19, 2021) (comparing loot boxes and virtual currency with gambling chips sold in casinos).

regulates individuals' behavior directly,¹³⁸ loot boxes are not currently prohibited under any federal or tribal law, save for perhaps the UIGEA.¹³⁹ State constitutions also do not prohibit the mechanic, at least not without the help of state statutes.¹⁴⁰ Some state statutes have more direct, element based definitions of "gambling."¹⁴¹ Therefore loot boxes could be a prohibited form of gambling depending on which state's statutory framework is interpreted. With that in mind, the rest of the Note will analyze the legality of loot boxes under South Carolina's current gambling laws.

IV. LOOT BOXES AS GAMBLING UNDER SOUTH CAROLINA LAW

A. Plain Statutory Language

It is not initially clear if loot boxes are prohibited under the plain language of South Carolina's gambling statutes. South Carolina does not expressly define "gambling" or "gaming" statutorily. It does provide a fairly robust list of what games are prohibited by law, however.¹⁴² If South Carolina's statutory scheme for gambling was limited to that list, it would be clear that loot boxes are not listed as a prohibited game and thus are not illegal.¹⁴³ Nor do loot boxes fit as specifically authorized lottery devices under the state's Lottery Act.¹⁴⁴ However, elsewhere in the statutory framework of South Carolina is a more broader provision. South Carolina Code section 12-21-2710 addresses "Types of machines and devices prohibited by law" and notes certain types of machines and devices that are prohibited by law.¹⁴⁵ Specifically:

It is unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State any vending or slot machine, or any video game machine with a free play feature operated by a slot in which is deposited a coin or thing of value, or other device operated by a slot in which is deposited a coin or thing of value for the play of poker, blackjack, keno, lotto, bingo, or craps, or any machine or device licensed pursuant to Section 12-

138. *See supra* Sections II.A.–B.

139. *See supra* Sections II.A.–D.

140. *See supra* Sections II.E–F.

141. *See supra* Section II.F.

142. *See* S.C. CODE ANN. § 16-19-10 (2015) (making private lotteries unlawful); S.C. CODE ANN. § 16-19-40 (making unlawful playing any game of cards or dice and a variety of "gaming table" games in certain places); S.C. CODE ANN. § 16-19-130 (making it unlawful to wager on horse racing or any type of pool betting); S.C. CODE ANN. § 16-19-160 (making unlawful any punchboards used for gaming).

143. *See supra* note 142.

144. *See* S.C. CODE ANN. § 59-150-20(7) (2020).

145. S.C. CODE ANN. § 12-21-2710 (Supp. 2024).

21-2720 and used for gambling or any punch board, pull board, or other device pertaining to games of chance of whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers, whether in words or figures or, which deposit tokens or coins at regular intervals or in varying numbers to the player or in the machine, but the provisions of this section do not extend to coin-operated non-payout pin tables, in-line pin games, or to automatic weighing, measuring, musical, and vending machines which are constructed as to give a certain uniform and fair return in value for each coin deposited and in which there is no element of chance.¹⁴⁶

The language “other device pertaining to games of chance” opens a door because this term is not defined in the text. Loot boxes are, by definition,¹⁴⁷ not among the list of machines in section 12-21-2710 that “give a certain uniform . . . return in value . . . in which there is no element of chance[,]”¹⁴⁸ so the express exclusion from the section does not apply, and case law must be looked at for further insight into how we should interpret loot boxes under South Carolina statutory authority.

B. South Carolina Case Law Interpreting Section 12-21-2710

South Carolina courts have not ruled specifically on loot boxes as they interpret what is an illegal gambling device under section 12-21-2710, but courts have provided a test that helps to determine if loot boxes are prohibited.¹⁴⁹ Generally, South Carolina courts’ primary goal in interpreting a statute is to effectuate the intent of the legislature.¹⁵⁰ If the words of a statute have a plain and ordinary meaning, then there is no need to employ other rules of statutory interpretation or to force a construction that expands or limits the statute’s operation.¹⁵¹

The primary precedent that helps interpret what qualifies as a “device pertaining to games of chance” under section 12-21-2710 is *Sun Light Prepaid*

146. *Id.* (emphasis added).

147. See Bennett, *supra* note 1, at 13 (“A loot box is a form of microtransaction consisting of a randomized set of in-game content; this content may range from common, seemingly valueless virtual goods to increasingly rare, highly sought-after items.”).

148. S.C. CODE ANN. § 12-21-2710.

149. See *infra* notes 161-167.

150. See *Ward v. W. Oil Co.*, 692 S.E.2d 516, 519 (2010) (“All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used. . .”).

151. *Id.*

Phonecard Co. v. State.¹⁵² *Sun Light* involved a dispute over a phone card dispenser that, for the sum of one dollar, gave customers a phone card for two minutes of phone service and an attached game piece with a set of nine symbols that, if shown in the correct order, entitled the customer to a cash prize.¹⁵³ The phone card dispenser sat within a traditional slot machine cabinet that offered the option to show “reels” spin as if the dispenser itself chose the winner, as opposed to the preprinted cards.¹⁵⁴ The dispenser played celebration music when issuing a winning game piece, had a “lock-out” feature that stopped the machine once a player won a certain amount of prize money, and the dispenser could not give change regardless of the denomination of money inserted.¹⁵⁵

While the dispenser always gave the customer the same return, a phone card with a game piece attached, the court held that the dispenser still contained an element of chance under section 12-21-2710 because if the machine dispensed only the sweepstakes portion without the phone card attached it would clearly be a “pull-tab” gambling device.¹⁵⁶ That the phone portion of the card had a utility to it was of no importance in classifying it as a game of chance, as the phone minutes were “mere surplusage” to the game aspect of the card.¹⁵⁷ Therefore, the phone card dispenser qualified as an “other device pertaining to games of chance” and was, thus, an illegal gambling device under section 12-21-2710.¹⁵⁸

Ward v. West Oil Co. provided further clarification on the court’s reasoning from *Sun Light*.¹⁵⁹ The case involved a clear pull board, or pull-tab, device under section 12-21-2710, adding little into our interpretation of “other device.”¹⁶⁰ However, the court’s opinion is helpful in analyzing a previously unaddressed form of potential gambling like loot boxes. The court implies in a parenthetical that, while not in the statutory language, it looks to see if the elements of consideration, chance, and reward are present when deciding whether a machine or game is a potential illegal gambling device.¹⁶¹ The court also quoted *Corpus Juris Secundum*’s statement that “an apparatus is a gambling device where there is anything to be won or lost as the result of

152. *Sun Light Prepaid Phonecard Co. v. State*, 360 S.C. 49, 600 S.E.2d 61 (2004).

153. *Id.* at 50–53, 600 S.E.2d at 62–63.

154. *Id.* at 52–53, 600 S.E.2d at 63.

155. *Id.*

156. *Id.* at 54–55, 600 S.E.2d at 64.

157. *Id.* at 55, 600 S.E.2d at 64.

158. *Id.* at 55–56, 600 S.E.2d at 65; S.C. CODE ANN. § 12-21-2710 (Supp. 2024).

159. *See Ward v. W. Oil Co.*, 387 S.C. 268, 275–77, 692 S.E.2d 516, 520–21 (2010).

160. *See id.* at 278, 692 S.E.2d at 522.

161. *Id.* (quoting *State v. 158 Gaming Devices*, 499 A.2d 940, 951 (Md. 1985) (“The three elements of gambling—consideration, chance and reward—are thus clearly present in a device which, for a price, and based upon chance, offers a monetary or merchandise reward to the successful player.”)).

chance, no matter how small the intrinsic value[.]” and also observed that courts will look behind the name and style of a device to ascertain its true character if a party asserts that an apparatus is one that is not intended or used for gaming or gambling.¹⁶² Also, if a player’s skill could alter the outcome of the game or device, then it likely does not fall within the definition of “other device pertaining to games of chance” under section 12-21-2710.¹⁶³ However, both games of chance *and* games of skill can be devices “used for gambling” under section 12-21-2710 that are licensed pursuant to section 12-21-2720.¹⁶⁴

Courts have recognized that the enforcement scope of section 12-21-2710 is broad.¹⁶⁵ This reflects South Carolina’s longstanding prohibition on gambling.¹⁶⁶ People or businesses are in violation of the statute even if the illegal gambling devices are not operational and are in violation for possession of even the component parts of an illegal gambling device.¹⁶⁷ The Fourth Circuit went as far as to agree that, based on the language of the statute, section 12-21-2710 could technically be read as broadly as to outlaw playing board games like Monopoly, though there is no indication that South Carolina would enforce the statute in such a “draconian fashion.”¹⁶⁸

C. Are Loot Boxes Illegal Gambling Devices?

Loot boxes should be illegal gambling devices under section 12-21-2710 because they are “other device[s] pertaining to games of chance[.]”¹⁶⁹ The contents of the loot boxes, while still generally merchandise rewards, are something won as the result of chance after the player pays real world money or other consideration to open the loot box. The intrinsic value of the contents of loot boxes should not be considered when determining if the boxes dispense

162. *Id.* (quoting 38 C.J.S. *Gaming* § 10 (Supp. 2010)).

163. *Compare* *Town of Mt. Pleasant v. Chimento*, 401 S.C. 522, 533, 737 S.E.2d 830, 838 (2012) (“[V]ideo game in which player’s skill could alter outcome not a ‘game of chance’ within the meaning of that term in § 12-21-2712[.]”) (citing *Allendale Cnty. Sheriff’s Off. v. Two Chess Challenge II*, 361 S.C. 581, 606 S.E.2d 471 (2004)) with *S.C. L. Enf’t Div. v. 1-Speedmaster S/N 00218*, 397 S.C. 94, 98–99, 723 S.E.2d 809, 811 (S.C. Ct. App. 2012) (holding a game is not a game of chance if a “good player” can win *every* hand).

164. *See* *1 Dragon’s Ascent Video Gaming Mach. v. S.C. L. Enf’t Div.*, 445 S.C. 252, 262–64, 912 S.E.2d 407, 412–13 (S.C. Ct. App. 2025) (“Whether an activity is gaming/gambling is not dependent upon the relative roles of chance and skill, but whether there is money or something of value wagered on the game’s outcome.”).

165. *See, e.g., Union Cnty. Sheriff’s Office v. Henderson*, 395 S.C. 516, 519–20, 719 S.E.2d 665, 666 (2011) (holding that non-operational gambling devices fall within the scope of the statute).

166. *See Chimento*, 401 S.C. at 538, 737 S.E.2d at 840 (Toal, C.J., concurring).

167. *See id.*

168. *See Martin v. Lloyd*, 700 F.3d 132, 137 (4th Cir. 2012).

169. *See* S.C. CODE ANN. § 12-21-2710 (Supp. 2024).

“a thing of value” after each play.¹⁷⁰ Lastly, while a player is guaranteed a “reward” every single time a loot box is opened that is not likely enough to remove them from being considered “games of chance,” because the phone cards in *Sun Light* were still games of chance despite customers receiving a set amount of phone minutes upon each dispense.¹⁷¹

1. *Consideration*

Loot boxes contain the element of consideration because, to open loot boxes, players give over either real world currency or virtual in-game currency that they have purchased directly or earned through time spent playing the game.¹⁷² Consideration in South Carolina can be a loss suffered by one party.¹⁷³ So, by giving up either their real world or virtual currency, regardless of arguments about the virtual currency’s value, players suffer a loss when they pay the price to open a loot box.

2. *Chance*

Loot boxes satisfy the gambling element of chance because, in an act devoid of skill, players open loot boxes hoping that they will receive an ultra-rare item, despite the odds being against them.¹⁷⁴ It is well established that the contents of loot boxes are randomized.¹⁷⁵ While players may have some general idea of the type of content they are going to receive, like a weapon or a cosmetic item, there is no possibility that a player’s skill or experience with the game could influence what the player receives when they open the box. This sets loot boxes apart from the games mentioned in *Speedmaster* where an adept player of the game could “win” every time, or almost every time.¹⁷⁶

However, there are prevailing counterarguments that the chance element for gambling does not exist for loot boxes. Loot boxes could be considered merely a *feature* of a larger video game, a game of skill, and are therefore either not a “game” at all, or the level of skill needed for the rest of the video game should outweigh the chance element of loot boxes, thus tipping the scale and making the video game and the intermeshed loot boxes overall a “game

170. *Id.*

171. *Sun Light Prepaid Phonecard Co. v. State*, 360 S.C. 49, 54, 600 S.E.2d 61, 64 (2004); S.C. CODE ANN. § 12-21-2710.

172. *See* F.T.C. LOOT BOX WORKSHOP, *supra* note 11.

173. *See* *Furman Univ. v. Waller*, 124 S.C. 68, 74, 117 S.E. 356, 358 (1923) (quoting Clark on Contracts § 64).

174. *See* F.T.C. LOOT BOX WORKSHOP, *supra* note 11, at 1.

175. *Id.*

176. *See* S.C. L. Enf’t Div. v. 1-Speedmaster S/N 00218, 397 S.C. 94, 98–99, 723 S.E.2d 809, 811 (S.C. Ct. App. 2012).

of skill.”¹⁷⁷ While this argument is persuasive, South Carolina courts should analyze loot boxes the same way the court did the phone cards in *Sun Light*.¹⁷⁸ If we separate the rest of the game from the loot box “feature” and analyze it individually, the loot box is completely chance driven, like the sweepstakes part of the phone card.¹⁷⁹ The possible hundreds of hours regular of video game content that is attached to the loot boxes, however, do not seem to be “mere surplusage” when compared to the few seconds or minutes it takes to open a loot box.¹⁸⁰

Yes, loot boxes could fit the argument made about the games in *Speedmaster* that were determined to be overall skill-based despite having a chance-based element.¹⁸¹ Even adept players of a video game, who could “win” every time by completing the game have no control over whether they “lose” by receiving duplicate or worthless items occasionally from a game’s chance-based loot box element.¹⁸² Yet, with a statute that has been interpreted to restrict even the component parts of gambling devices individually, the size and scale of a gambling device appears to be unimportant when determining if they are truly games of chance.¹⁸³ Thus, South Carolina courts should separate the loot boxes from the skill-based games they exist within and analyze them as their own individual games rather than elements of the larger video game title.

Another common argument against loot boxes having a “chance” element is the comparison between opening trading card packs and opening loot boxes.¹⁸⁴ The Entertainment Software Rating Board relied heavily on that comparison as it defended against the backlash from players about the loot box mechanic:

While there’s an element of chance in these mechanics, the player is always guaranteed to receive in-game content (even if the player unfortunately receives something they don’t want). We think of it as a similar principle to collectible card games. Sometimes you’ll open a pack and get a brand new holographic card you’ve had your eye on

177. See Chung, *supra* note 2, at 130.

178. *Sun Light Prepaid Phonecard Co. v. State*, 360 S.C. 49, 54–55, 600 S.E.2d 61, 64 (2004).

179. See *id.*

180. See *id.* at 55, 600 S.E.2d at 61; Chung, *supra* note 2, at 130.

181. See *Speedmaster*, 397 S.C. at 98–99, 723 S.E.2d at 811.

182. See *id.*; *supra* note 14 and accompanying text.

183. See *Union Cnty. Sheriff’s Off. v. Henderson*, 395 S.C. 516, 519–20, 719 S.E.2d 665, 666 (2011).

184. See Chung, *supra* note 2, at 124–25.

for a while. But other times you'll end up with a pack of cards you already have.¹⁸⁵

But this reliance on a comparison to trading cards is misplaced. Critics argue that buying and selling trading cards is lawful activity and so, if loot boxes mirror trading cards in that players always receive content after purchasing, opening loot boxes is also likely lawful activity.¹⁸⁶ The types of cases relied upon by critics to designate trading cards as lawful, however, surround a completely different legal analysis.¹⁸⁷ In *Price*, appellants failed to allege sufficient economic injury to have standing under Racketeer Influenced and Corrupt Organizations Act ("RICO") when they did not receive cards they hoped for when opening a trading card pack because RICO does not recognize injury to expectancy interests.¹⁸⁸ The difference when analyzing loot boxes under South Carolina's section 12-21-2710 statute is that individuals are not attempting to use the statute to recover from economic injury.¹⁸⁹ Rather, the statute helps define the illegal gambling machines that the State is allowed to seize as a forfeiture and subsequently destroy.¹⁹⁰ Therefore, the comparison of loot boxes to the lawfulness of trading cards based on a RICO standard cannot be relied upon when determining if loot boxes are a prohibited illegal gambling device under section 12-21-2710.

That players always receive *something* when opening a loot box would have to be addressed by the court when determining the legal status of loot boxes. This again fits nicely into *Sun Light*, and how even though customers always received guaranteed phone minutes regardless of if they won on the sweepstakes part of the card, the phone card dispenser was still a game of chance and thus an illegal gambling device.¹⁹¹ Loot boxes do not have the two distinct parts that the phone cards in *Sun Light* did, however.¹⁹² Players receive a guaranteed item simultaneously with their purchase of the chance-based loot box mechanic, rather than receiving an item they know with 100% certainty, like phone minutes, and *then* choosing to engage in a chance to win a

185. *ERSB Says it Doesn't See Loot Boxes as Gambling*, KOTAKU (Oct. 11, 2017), <https://kotaku.com/esrb-says-it-doesnt-see-loot-boxes-as-gambling-1819363091> [https://perma.cc/V7PV-9P6X].

186. See Chung, *supra* note 2, at 124–26 & n.32.

187. See *Chaset v. Fleer/Skybox Int'l*, 300 F.3d 1083, 1099 (9th Cir. 2002) (discussing trading cards in the context of an alleged RICO violation); *Price v. Pinnacle Brands*, 138 F.3d 602, 607 (5th Cir. 1998) (also discussing trading cards in the context of RICO).

188. See *Price*, 138 F.3d at 607.

189. See S.C. CODE ANN. § 12-21-2710 (Supp. 2024).

190. See S.C. CODE ANN. § 12-21-2712 (2014).

191. See *Sun Light Prepaid Phonecard Co. v. State*, 360 S.C. 49, 54–55, 600 S.E.2d 61, 64 (2004).

192. See *id.* at 52–53, 600 S.E.2d at 63; Chung, *supra* note 2, at 110–12.

randomized reward.¹⁹³ The analysis hinges on the court’s discretion to ascertain the true character of the device.¹⁹⁴ Referencing back to the plain language of the statute, as instructed, is informative.¹⁹⁵ The statute covers games of chance of “whatever name or kind, including those machines, boards, or other devices that display different pictures, words, or symbols, at different plays or different numbers”¹⁹⁶ First, when deciding if something is a game of chance under the statute, the court is not limited to a set list of defined games and thus loot boxes could be found illegal under the statute.¹⁹⁷ Second, loot boxes, via their anticipation building features, “display different pictures, words, or symbols, at different plays” depending on the rarity of the item the player is about to receive.¹⁹⁸ Therefore, loot boxes meet the gambling element of chance because loot boxes are not a game of skill, and because they satisfy the threshold for a game containing elements of chance according to the plain language of section 12-21-2710.

3. *Reward and Loot Boxes’ Value*

If the reward received has absolutely no value, then loot boxes would not be illegal gambling devices under section 12-21-2710.¹⁹⁹ Other state courts that have addressed the issue of the value of “in-game prizes” have mostly agreed that these “in-game prizes,” like the contents of loot boxes, do not have value unless the prizes may be transferred for or converted into real world currency.²⁰⁰ The subjective value of the item to the player that paid to open the loot box has largely been ignored.²⁰¹ Therefore, for the large swath of games that make it clear the opener of the loot box has no right nor the technical ability to transfer the contents, loot boxes do not have value.²⁰² However, what about the games like *Counter-Strike*, that have approved

193. *Sun Light*, 360 S.C. at 52–53, 600 S.E.2d at 63; Chung, *supra* note 2, at 110–12.

194. *See Ward v. W. Oil Co.*, 387 S.C. 268, 278, 692 S.E.2d 516, 522 (2010).

195. *See, e.g., id.* at 268, 273–74, 692 S.E.2d at 519 (“The Court should give words their plain and ordinary meaning, without resort to subtle or forced construction to limit or expand the statute’s operation.”).

196. S.C. CODE ANN. § 12-21-2710 (Supp. 2024).

197. *See id.*

198. *See id.*; Alexandra, *supra* note 20 (noting that loot boxes incorporate “animations, camera work, spinning plates, and sounds”); Chanel J. Larche et al., *Rare Loot Box Rewards Trigger Larger Arousal and Reward Responses, and Greater Urge to Open More Loot Boxes*, 37 J. GAMBLING STUD. 141, 145–46 (2021) (Fig. 1 provides a visual example of this concept).

199. *See* S.C. CODE ANN. § 12-21-2710.

200. *See* Scott A. Goodstein, *When the Cat’s Away: Techlash, Loot Boxes; and Regulating “Dark Patterns” in the Video Game Industry’s Monetization Strategies*, 92 U. COLO. L. REV. 285, 291–92 (2021).

201. *See id.*

202. *See* Bennett, *supra* note 1, at 18.

marketplaces set up to sell items received from loot boxes?²⁰³ That exceeds the standard quoted by the *Ward* court that recognizes intrinsic value “no matter how small.”²⁰⁴

For the games that do allow transfer or the sale of the loot box contents, the prohibition on the mechanic under section 12-21-2710 is clear.²⁰⁵ For a price, players can open the loot box.²⁰⁶ The contents of the loot box then have the chance to be something relatively common or something that a player could sell for a substantial amount of money.²⁰⁷ Therefore, loot boxes in games that allow transfer of the contents of the loot boxes would clearly fall under section 12-21-2710 as prohibited illegal gambling devices.

For the games that do not allow the free transfer of the items received from loot boxes, there are still arguments for considering the items received as having value. In *Kater v. Churchill Downs, Inc.*, the Ninth Circuit, while interpreting Washington law, held that free virtual casino chips that could not be sold were still “things of value” because they extended the time players could continue to play within the online casino.²⁰⁸ Washington does have a codified definition of “thing of value” that specifically included “extension of a service.”²⁰⁹ South Carolina has not codified the definition of “thing of value” in terms of its gambling or gaming laws.²¹⁰ However, while analyzing an older version of a state gambling statute, the Supreme Court of South Carolina did find “amusement” to be a thing of value, and that someone would not be induced to put some money or time into a game unless they received something of value in return.²¹¹

This final element of the consideration, chance, value or reward framework seems to turn on whether South Carolina courts determine if loot boxes have “intrinsic value,” according to the court’s reasoning in *Ward*.²¹² Importantly, though, *receiving* a thing of value from the illegal gambling device is not in the plain language of the statute.²¹³ The South Carolina General Assembly included inserting “a coin or thing of value” and “deposit[ing] tokens or coins” language for examples of devices prohibited by section 12-21-2710, but made no mention of what players must receive from a game of chance to make it an illegal gambling device.²¹⁴ Arguably, then,

203. *See supra* note 16.

204. *See Ward v. W. Oil Co.*, 387 S.C. 268, 278, 692 S.E.2d 516, 522 (2010).

205. *See supra* Part III.C.ii

206. *See F.T.C. LOOT BOX WORKSHOP, supra* note 11, at 1.

207. *See Landis, supra* note 16.

208. *Kater v. Churchill Downs, Inc.*, 886 F.3d 784, 787–88 (9th Cir. 2018).

209. WASH. REV. CODE ANN. § 9.46.0285 (LexisNexis through 2024 Reg. Sess.).

210. *But see* S.C. CODE ANN. § 2-17-10(1)(a) (2014).

211. *See Alexander v. Martin*, 192 S.C. 176, 183, 6 S.E.2d 20, 23–24 (1939).

212. *See Ward v. W. Oil Co.*, 387 S.C. 268, 279, 692 S.E.2d 516, 522 (2010).

213. *See* S.C. CODE ANN. § 12-21-2710 (Supp. 2024).

214. *See id.*

courts would be forcing a construction that limits the operation of the statute if they required players to receive not only a thing of value, but something of “intrinsic” value from a game for it to be deemed an illegal gambling device.²¹⁵

Without forcing the requirement of intrinsic value²¹⁶ which requires courts to disregard personal or sentimental value, the subjective enjoyment or “amusement” the player gets out of the items or the loot box items’ utility for extending or improving the experience in game is something of value.²¹⁷ If amusement value is not considered, the value, at minimum, should be the amount of consideration spent to open the loot box because that is the value of the loot box on the in-game open market.²¹⁸ If the purchase of loot boxes does not have value, why would someone spend tens of thousands or hundreds of dollars to open loot boxes in the hopes of receiving nothing?²¹⁹

If South Carolina courts adopt the narrower intrinsic definition of “value” as they interpret section 12-21-2710, that would prevent many loot boxes from being prohibited as illegal gambling devices,²²⁰ but adopting that definition would be an incorrect interpretation of the statutory language.²²¹ Loot boxes, regardless of the alienability of the items received from them, should be illegal gambling devices in South Carolina.²²²

D. *Who is in Violation of Section 12-21-2710?*

Assuming that loot boxes are illegal gambling devices under section 12-21-2710, any individual or business, including video game manufacturers within South Carolina, are in violation of section 12-21-2710 if they are in possession of a loot box and do not meet a statutory exception within section 12-21-2710 that allows that possession.²²³ Under section 12-21-2710, it is “unlawful for any person to keep on his premises or operate or permit to be kept on his premises or operated within this State” any illegal gambling

215. See *Ward*, 387 S.C. at 278, 692 S.E.2d at 522.

216. See *Value, Intrinsic Value*, BLACK’S LAW DICTIONARY (12th ed. 2024) (“1. The inherent value of a thing, without any special features that might alter its market value. The intrinsic value of a silver coin, for example, is simply the value of the silver within it. 2. Value in the open market without regard for any personal or sentimental value. 3. The value inherent in an object, such as a \$100 bill considered as a piece of printed paper and not as currency with a market value of \$100.”).

217. See Goodstein, *supra* note 200.

218. See EA HELP, *supra* note 49 (indicating that FIFA coins can be bought).

219. See, e.g., Landis, *supra* note 16.

220. See S.C. CODE ANN. § 12-21-2710 (Supp. 2024); *Value*, *supra* note 216.

221. *Supra* notes 214-216 and accompanying text.

222. See *supra* notes 218-220.

223. See S.C. CODE ANN. § 12-21-2710.

device, like loot boxes.²²⁴ “Person” is not defined in the article containing section 12-21-2710.²²⁵ However, as shown show by the case law interpreting section 12-21-2710, actions under the statute are brought against the owner of the machines even if the owner is technically a business entity.²²⁶

South Carolina courts have held that the “keep on . . . premises or operate” language from section 12-21-2710 is met by mere possession of the illegal gambling devices on a party’s premises, regardless of if owner actually operates the devices.²²⁷ Intent surrounding what the owner of the devices is doing with the devices is not considered.²²⁸ There is an exception in the statute, however, for “gaming device manufacturers” in possession of illegal gambling devices if the manufacturer makes the devices for use in out-of-state jurisdictions.²²⁹

Possession of non-tangible gambling devices like loot boxes has not been specifically addressed by the South Carolina Legislature nor its courts.²³⁰ Though, while not yet adopted in South Carolina, looking at the Uniform Commercial Code’s 2022 amendments could be informative as South Carolina determines how someone comes into possession of a virtual, intangible item or device.²³¹ The 2022 U.C.C. amendments touch repeatedly on electronic records and electronic documents of title and emphasize how, for intangible goods and documents, an owner being in “control” of the item is the same as an owner possessing a tangible good or document.²³² These U.C.C. amendments for electronic property seem to mirror South Carolina’s dominion and control standard for tangible property.²³³ Thus, the key question to determine possession of intangible illegal gambling devices under section 12-21-2710 should be whether the individual or business has control over the device.

224. *See id.*

225. *See id.* §§ 12-21-2710 to -2750.

226. *See, e.g.,* State v. Four Video Slot Machs., 317 S.C. 397, 453 S.E.2d 896 (1995) (permitting action against individual owners of illegal gambling devices under section 12-21-2710 even though the individuals owned the machines through a business entity).

227. *See* State v. 192 Coin-Operated Video Game Machs., 338 S.C. 176, 188–89, 525 S.E.2d 872, 879 (2000).

228. *See id.* at 191, 525 S.E.2d at 880.

229. S.C. CODE ANN. § 12-21-2710.

230. *See supra* Part III.A-B.

231. *See, e.g.,* U.C.C. §§ 7-106, 12-105 (AM. L. INST. & UNIF. L. COMM’N 2022).

232. *See* U.C.C. § 12-105; *see also* Prefatory Note 1 to the 2022 UCC Amendments, at *1 (“[C]ontrol is best understood in a general sense as a functional equivalent of ‘possession’ of a controllable electronic record. . .”).

233. State v. Lee, 298 S.C. 362, 364, 380 S.E.2d 834, 836 (1989) (possession occurs when “the defendant had dominion or control over the thing allegedly possessed or had the right to exercise dominion or control over it”).

For loot boxes, then, any individual person or business that exerts control over a loot box, and is thus in possession of it, is in violation of section 12-21-2710 unless they meet the exception for a gaming device manufacturer creating the device for other states.²³⁴ This would include any video game company located in South Carolina that has possession of a loot box prior to its transfer to a South Carolina video game player. Due to the electronic intangible nature of loot boxes, potential defendants to section 12-21-2710 actions may claim that they are not truly in physical “possession” of the loot boxes. But as mentioned, if the “dominion and control” standard is followed, video game companies are in possession of loot boxes when they place the boxes online prior to them being purchased as they can control whether the box is available for sale or if the loot boxes are created at all.²³⁵ Video game players come into possession of the loot box only after they have given consideration to obtain the right to open the loot box and potentially control the transfer of its contents. Thus, because of the strict standard of “mere possession” that satisfies section 12-21-2710,²³⁶ video game companies that do not meet the statutory exception or players in possession of even *unopened* loot boxes are in violation of the illegal gambling devices statute.

V. CONCLUSION

While loot boxes should be illegal gambling devices under section 12-21-2710, and anyone in possession of loot boxes would be in violation of the statute, it nevertheless would be highly impractical to enforce loot boxes’ seizure and destruction and the prosecution of individuals and businesses in violation of section 12-21-2710.

South Carolina Law Enforcement Division (“SLED”) is charged with destroying illegal gambling devices once they are “seized.”²³⁷ Any person found to be in possession of an illegal gambling device under section 12-21-2710 is “guilty of a misdemeanor and, upon conviction, must be fined not more than five hundred dollars or imprisoned for a period of not more than one year, or both.”²³⁸ Would SLED realistically go after every player that has

234. S.C. CODE ANN. § 12-21-2710.

235. *See Lee*, 292 S.C. at 364, 380 S.E.2d at 836 (articulating a standard of dominion and control to define possession when the defendant was charged with possession of cocaine); *State v. 192 Coin-Operated Video Game Machs.*, 338 S.C. 176, 188–89, 525 S.E.2d 872, 879 (2000) (indicating that “mere possession” of a gambling device constitutes a violation of section 12-21-2710).

236. *192 Coin-Operated Video Game Machs.*, 338 S.C. at 188–89, 525 S.E.2d at 879 (indicating that “mere possession” of a gambling device constitutes a violation of section 12-21-2710).

237. S.C. CODE ANN. § 12-21-2712 (2014).

238. *Id.* § 12-21-2710.

purchased a loot box? How would that purchaser information be obtained? Or would they attempt to prosecute video game developers, risking a potential source of tax revenue for the state and potentially discouraging video game businesses from making a home in South Carolina? Also, with the technological sophistication of many online-based video games that may be edited in real time,²³⁹ what is to prevent developers from pushing out a slightly edited version of their loot box that “complies” with the statute, thus allowing them to avoid any consequences? Therefore, while loot boxes should be “illegal gambling devices” under South Carolina law, there is not a clear path as to how the State would successfully seize and destroy them.

Second, as discussed, loot boxes come in a variety of shapes and sizes.²⁴⁰ If SLED were to develop some sort of general enforcement plan surrounding loot boxes, the nuance between the different video games and the slight differences between each loot box mechanic must be addressed. Would SLED spend likely limited time and resources litigating at post-seizure hearings as the deep-pocketed²⁴¹ video game developers argue tirelessly about how their loot box is set apart from those that are per se prohibited under section 12-21-2710? Possibly. But unlikely.

Thus, though loot boxes should be illegal gambling devices under section 12-21-2710, the logistics of enforcing the prohibition of the mechanic appear insurmountable. As illicit technology continues to advance, likely so will technology for crime prevention, thus decreasing the resources needed for the appropriate seizure of intangible illegal devices. Until then, actual on the ground enforcement of a prohibition of loot boxes in South Carolina is at the whim of the resources of SLED and the South Carolina General Assembly.

239. See generally *What Game Updates and Patches Actually Do*, INSIDER GAMING (Oct. 29, 2022), <https://insider-gaming.com/what-game-updates-and-patches-do/> [<https://perma.cc/3ZQA-8P82>] (explaining how game developers use patches and updates to rectify issues in games after they have been released).

240. See F.T.C. LOOT BOX WORKSHOP, *supra* note 11, at 1–2.

241. See Mann, *supra* note 4, at 211.