

## **NOTE**

### RECONSIDERING THE LEGAL DEFINITION OF GAMBLING: A RESUSCITATION OF THE GAMBLING INSTINCT TEST

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*The modern chance-based test for gambling is fundamentally flawed. It is descriptively inaccurate, difficult to apply, and easily circumvented. Despite these shortcomings, the test is by-and-large the only test employed for the identification of gambling activity. But this was not always the case. In the first part of the twentieth century, some courts employed a competing test that looked to the underlying psychological phenomenon rather than the mechanical form of the activity. This Note advocates for a re-adoption of that test. The modern test, originally put forth as the definition of a lottery, was never intended to be a test for gambling. Over time, courts warped this definition to the point where many forms of gambling could reasonably be deemed a “lottery,” blurring the distinctions between gambling and lotteries to such a degree that some states’ highest courts have held that the two terms are synonymous.*

*The competing test—referred to by modern academics as “the Gambling Instinct Test”—has been understudied and mischaracterized by the literature. Admittedly, the decisions applying the test were unstructured in their analysis; however, closer examination of those cases reveals that the test can be distilled into two steps: (1) whether there exists a contingent contract, and (2) whether the prospect of receiving a return of disproportionate value induced the gambling*

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*party into conveying her consideration. As so refined, resuscitation of the Gambling Instinct Test would bring the legal doctrine in lockstep with medical conceptions of gambling. Given the explosion of gambling activity in recent years, such a change has never been more necessary.*

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## INTRODUCTION

As one of the traditional vices, gambling has long been regulated by governments.<sup>1</sup> During the post-medieval period in England, gambling in and of itself was not unlawful, but the law tried to address its collateral consequences, such as the disruption of the public peace and members of the aristocracy gambling away their estates.<sup>2</sup> In early colonial America, the justification for and degree of regulation varied widely, from the wholesale condemnation of gambling as a form of idleness in Puritan Massachusetts, to more permissive laws in the southern colonies that only dealt with the evils of gambling as they arose.<sup>3</sup> Since those early days, gambling has twice gone through cycles of legalization and prohibition.<sup>4</sup> Given the rapid legalization of sports betting at the state level that has occurred in the years following the Supreme Court's landmark decision that a federal statute's prohibition on state authorization of sports betting violated the anti-commandeering principle,<sup>5</sup> we appear to be approaching the crest of what one prominent gambling law scholar terms "the third wave of legal gambling."<sup>6</sup>

Although gambling in the modern-day United States is primarily defined by statute, courts, "concerned that clever operators would find ways to subvert the [statutory] prohibitions," have frequently held that a

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<sup>1</sup> The earliest English anti-gambling statute was enacted by King Richard II in 1388. R. Randall Bridwell & Frank L. Quinn, *From Mad Joy to Misfortune: The Merger of Law and Politics in the World of Gambling*, 72 *Miss. L.J.* 565, 622–23 (2002) (citing 1388, 12 *Rich. 2 c. 6* (Eng.)). Records from third-century India indicate that there was a governmental department responsible for the regulation of gambling during the reign of Chandragupta Maurya. Ronald J. Rychlak, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 *B.C. L. Rev.* 11, 16 (1992) (citing Will Durant, *Our Oriental Heritage* 444 (1954)); Vincent A. Smith, *The Oxford History of India* 78 & n.2 (1919) (citing *Arthasāstra* bk. 3, ch. 20).

<sup>2</sup> See Nat'l Inst. L. Enf't & Crim. Just., U.S. Dep't of Just., *The Development of the Law of Gambling: 1776–1976*, at 4–13 (1977) [hereinafter *Development of the Law of Gambling*].

<sup>3</sup> *Id.* at 39–41, 240.

<sup>4</sup> See I. Nelson Rose, *Gambling and the Law: The Third Wave of Legal Gambling*, 17 *Vill. Sports & Ent. L.J.* 361, 368–74 (2010).

<sup>5</sup> *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1481 (2018). Thirty-six states and the District of Columbia have legalized sports betting since that decision, and a number of other states are currently in the process of legalization. Will Yakowicz, *Where Is Sports Betting Legal? A Guide to All 50 States*, *Forbes* (Jan. 9, 2023, 12:48 PM), <https://www.forbes.com/sites/willyakowicz/2022/01/07/where-is-sports-betting-legal-america-2022/> [<https://perma.cc/Y67H-4SNL>].

<sup>6</sup> See Rose, *supra* note 4, at 374–75 (tracing the third wave of legal gambling back to the early 1930s).

game or activity constituted gambling if the three elements of the common law definition—Prize/Chance/Consideration—were present.<sup>7</sup> Many modern state statutes now utilize this definition, often with slight variations.<sup>8</sup> However, this definition should not apply to all forms of gambling—nor was it originally intended to. The case most often cited in support for this definition, *FCC v. American Broadcasting Co.*, was defining a “lottery, gift enterprise, or similar scheme,” not gambling writ large.<sup>9</sup> Historically, lotteries have been recognized as a distinct form of gambling, not as an interchangeable term.<sup>10</sup> Accordingly, in using this definition to evaluate all forms of gambling, courts have stretched and twisted the three elements in order to fit their intuitions of whether a gambling-like activity should be prohibited or not.

Chance is the most consistently problematic element from this definitional framework. The prevailing test for the chance element is the Dominant Factor Test: if the winner is determined predominantly by chance, as opposed to skill, then the activity is gambling.<sup>11</sup> Although appealing at first glance, the chance/skill dichotomy is a nebulous concept. Various paradigmatic forms of gambling, such as poker and sports wagering, have such a material skill component that highly skilled gamblers have been able to make a substantial living off of their pursuits.<sup>12</sup> On the other hand, certain “games of skill”—such as common

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<sup>7</sup> Roland J. Santoni, An Introduction to Nebraska Gaming Law, 29 Creighton L. Rev. 1123, 1129 (1996) (citing examples of such cases from a number of states); D.A. Norris, Annotation, What Are Games of Chance, Games of Skill, and Mixed Games of Chance and Skill, 135 A.L.R. 104, 107 (1941) (“In construing statutes or ordinances prohibiting gaming, gambling, or gambling devices wherein nothing is said about chance or a game of chance or skill, many courts have required, inter alia, the element of chance to be involved.”).

<sup>8</sup> See, e.g., N.J. Stat. Ann. § 2C:37-1(b) (West 2023).

<sup>9</sup> See 347 U.S. 284, 290 (1954).

<sup>10</sup> See, e.g., *Phalen v. Virginia*, 49 U.S. (8 How.) 163, 168 (1850) (“Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries.”).

<sup>11</sup> Anthony N. Cabot, Glenn J. Light & Karl F. Rutledge, Alex Rodriguez, a Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance, 57 Drake L. Rev. 383, 390–91 (2009) [hereinafter Cabot et al., *Mixed Skill and Chance*]; Anthony N. Cabot & Louis V. Csoka, The Games People Play: Is It Time for a New Legal Approach to Prize Games?, 4 Nev. L.J. 197, 202 (Winter 2003–2004) [hereinafter Cabot & Csoka, *The Games People Play*].

<sup>12</sup> For instance, Haralabos Voulgaris has made millions as both a professional sports bettor and poker player, and he parlayed his success using statistical models in sports gambling into becoming the Director of Quantitative Research and Development for the Dallas Mavericks. See Marton, Haralabos Voulgaris’s Life: Biggest Profits, Losses, Private Life & Net Worth,

carnival games or hole-in-one contests—can be structured so as to create games where the luck component predominates over the skill component, even for the most skilled participants.<sup>13</sup> Even outside of these edge cases, the chance element has proved to be sufficiently confusing for courts in the analog context.<sup>14</sup> Given the importance of random number generation to the outcome of e-sports contests, the chance element is bound to cause even greater confusion in the coming years.<sup>15</sup>

The other two elements, consideration and prize, have seen difficulties as well. Although consideration is a well-defined concept in contract law, the Supreme Court in *FCC v. American Broadcasting Co.* departed from the so-called “contract theory” of consideration in favor of what is now referred to as the Economic Value Test, which many states have subsequently adopted.<sup>16</sup> There has been continual debate and disagreement over how to evaluate non-monetary consideration and the possibility of free entry under this test.<sup>17</sup> Prize has come under less scrutiny historically, but has recently come to the forefront in the debate over whether video game loot boxes should be considered gambling schemes.<sup>18</sup> The U.K. Gambling Commission declined to designate these loot boxes as a form of gambling because they did not view the in-game items awarded as prizes to have any real-life value outside of the game.<sup>19</sup>

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So Much Poker (Aug. 20, 2020), <https://somucho poker.com/haralabos-voulgaris-life-biggest-profits-losses-private-life-net-worth/> [<https://perma.cc/Z9CU-JKNQ>].

<sup>13</sup> See *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 87 (Nev. 1961).

<sup>14</sup> See, e.g., *Indoor Recreation Enters. v. Douglas*, 235 N.W.2d 398, 400–01 (Neb. 1975) (upholding a ruling that chess and checkers—paradigmatic examples of games of skill—are games of chance).

<sup>15</sup> See Yash Nair, *What Does RNG Mean in Gaming?*, DOT Esports (July 12, 2022, 11:16 AM), <https://dotesports.com/general/news/what-does-rng-mean-in-gaming> [<https://perma.cc/H2DH-XLU7>] (describing how video games use random number generators in which an algorithm decides a number value that determines certain in-game outcomes).

<sup>16</sup> Anthony N. Cabot, Glenn J. Light & Karl F. Rutledge, *Economic Value, Equal Dignity and the Future of Sweepstakes*, 1 UNLV Gaming L.J. 1, 10–15 (2010) [hereinafter Cabot et al., *Future of Sweepstakes*] (citing *FCC v. Am. Broad. Co.*, 347 U.S. 284, 296 (1954)).

<sup>17</sup> See Cabot et al., *Future of Sweepstakes*, supra note 16, at 23–36.

<sup>18</sup> See Mark D. Griffiths, *Is the Buying of Loot Boxes in Video Games a Form of Gambling or Gaming?*, 22 Gaming L.R. 52, 53 (2018). The loot box mechanism works as follows: “Players use real money to buy virtual in-game items and can redeem such items by buying keys to open the boxes where they receive a chance selection of further virtual items.” *Id.* at 52.

<sup>19</sup> U.K. Gambling Commission, *Virtual Currencies, eSports and Social Casino Gaming – Position Paper* ¶ 3(17)–(18) (2017), <https://assets.ctfassets.net/j16ev64qyf6l/4A644HIpG1g2ymq11HdPOT/ca6272c45f1b2874d09eabe39515a527/Virtual-currencies-eSports-and-soci>

Though the current definition of gambling can be summed up in a pithy phrase, its application in practice misses the forest for the trees.

A critical threshold in any system of regulation is the identification of the regulated activity. The modern application of Prize/Chance/Consideration has often resulted in normative policy judgments being made simultaneously with the classification of the activity—a fundamental misstep. Although we may now find that the outright prohibition of vices like gambling creates more harms than it prevents, we, as James Madison once warned, “ought not to assume an infallibility in rejudging the fallible opinions of others.”<sup>20</sup> Separating classification from moralization would better allow a regulatory scheme to adjust to changes in information, custom, and societal attitudes.

In lieu of the modern framework, this Note advocates for a modern revitalization of the Gambling Instinct Test, which simply looks to whether the activity in question triggers one’s gambling instinct.<sup>21</sup> The Gambling Instinct Test is a superior doctrine because it homes in on the central harm-causing mechanism of gambling. Like other vices, gambling is “prone to excess” and “particularly likely to compromise rational decision-making,” even amongst non-addicted adults.<sup>22</sup> As described in *City of Milwaukee v. Johnson*:

The machine makes an appeal to the gambling instinct, because the player has constantly before him the chance that the next play will assure him of the right on the next succeeding play to secure from 2 to 20 trade checks. Were it not for this appeal to the gambling instinct, these machines, which attempt to adhere to the letter of the law while violating its spirit, would never have been placed upon the market.<sup>23</sup>

The Gambling Instinct Test is typically associated with the deontological view of gambling: that gambling is a sin and inconsistent with a moral society.<sup>24</sup> This test, peaking in usage in the 1930s, has mostly fallen out

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al-casino-gaming.pdf [https://perma.cc/2HL8-E9FX] (“Where prizes are successfully restricted for use solely within the game, such in-game features would not be licensable gambling, notwithstanding the elements of expenditure and chance.”).

<sup>20</sup> The Federalist No. 37, at 180 (James Madison) (George W. Carey & James McClellan eds., 2001).

<sup>21</sup> See Cabot et al., *Mixed Skill and Chance*, supra note 11, at 393–94.

<sup>22</sup> See Jim Leitzel, *Regulating Vice*, in *The Handbook of Deviance* 45, 46 (Erich Goode ed., 2015).

<sup>23</sup> 213 N.W. 335, 339 (Wis. 1927).

<sup>24</sup> See Cabot et al., *Future of Sweepstakes*, supra note 16, at 4–5.

of favor since the 1950s, alongside the broad changes to society's moral judgment of gambling that occurred in that time period.<sup>25</sup> The Gambling Instinct Test has also been criticized for being a highly subjective test that "can vary widely in its application to particular games."<sup>26</sup> In light of these considerations, it may seem counterintuitive that this test would be a good fit for the modern era, where paternalistic legislation of morality is increasingly disfavored and more objective judicial methodologies are preferred. However, a broad, flexible definition better enables a smart, robust system of regulation than the illogical application of the current doctrine.

The Gambling Instinct Test is justly maligned for its subjectivity. This Note attempts to ameliorate this defect by providing more color to what it means to "appeal to the gambling instinct," first by delving deep into the cases which applied this test, and then by drawing from empirical research to find evidentiary indicators of when that instinct is being stimulated. But before doing so, some background on the current doctrinal definition is needed.

#### I. CURRENT DOCTRINE: PRIZE, CHANCE, AND CONSIDERATION

No federal statute provides a nationwide definition of gambling. The case most cited for providing the so-called "common law definition of gambling" is *FCC v. American Broadcasting Co.*, which declared that "there are three essential elements of a 'lottery, gift enterprise, or similar scheme': (1) the distribution of prizes; (2) according to chance; (3) for a consideration."<sup>27</sup> Although not all states define gambling in their regulatory statutes,<sup>28</sup> the vast majority at least incorporate the common law definition.<sup>29</sup>

Although some of these statutory definitions indicate that the legislature has recognized the problems inherent to Prize/Chance/Consideration, attempts to address these problems often

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<sup>25</sup> See, e.g., *Mills-Jennings of Ohio, Inc. v. Dep't of Liquor Control*, 435 N.E.2d 407, 409–10 (Ohio 1982) (detailing Ohio's shift away from an anti-gambling public policy).

<sup>26</sup> See Cabot et al., *Mixed Skill and Chance*, supra note 11, at 394.

<sup>27</sup> *Id.* at 390 (citing *FCC v. Am. Broad. Co.*, 347 U.S. 284, 289–91 (1954)); *Am. Broad. Co.*, 347 U.S. at 290; see also 38 C.J.S. *Gaming* § 5 (2022) ("There are three elements to gambling: consideration, chance, and reward.").

<sup>28</sup> See 38 Am. Jur. 2d *Gambling* § 1 (2022).

<sup>29</sup> See Nicole Davidson, Comment, *Internet Gambling: Should Fantasy Sports Leagues Be Prohibited?*, 39 San Diego L. Rev. 201 app. (2002) (describing the definition of gambling in each state).

only result in a convoluted and hazy statutory scheme.<sup>30</sup> For the most part, no legislature has actually attempted to address the fundamental issue—that the statutes use the definition of a *lottery* as the base of the definition, building out piecemeal from that foundation to cover conduct that one would intuitively deem to be gambling. Not only does this approach result in an impracticable definition,<sup>31</sup> but this is also out of step with historical understandings of lotteries, gambling, and distinctions between the two.<sup>32</sup>

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<sup>30</sup> Virginia’s gambling statute, codified at Va. Code Ann. § 18.2-325 et seq. (West 2022), is an example of one such scheme. Section 18.2-325 first defines “illegal gambling” more or less in line with Prize/Chance/Consideration but includes “the playing or offering for play of any skill game.” Section 18.2-332 then specifies a number of “acts not deemed ‘consideration’” for purposes of gambling. The Code goes on to except and exempt certain activities from the gambling prohibitions. Sporting tournaments and social gambling are both wholly excepted from the definition. Va. Code Ann. §§ 18.2-333 to -334 (West 2022). Other gambling activities, such as the state lottery, sports betting, and casino gaming, are exempted from the prohibitions if operators comply with the regulations of that respective section. Va. Code Ann. §§ 18.2-334.2 to -334.6 (West 2022). Each of these exemptions may have its own exclusions. Sports betting, for instance, excludes fantasy sports, as authorized by Va. Code § 59.1-556 et seq., from its definition. Va. Code Ann. § 58.1-4030 (West 2022). For a fantasy sports contest to satisfy the statutory definition, “no winning outcome [may be] based on the score, point spread, or any performance of any single actual team or combination of teams.” Va. Code Ann. § 59-556 (West 2022). By the plain import of the text, Virginia appears to consider any fantasy football leagues that have each player start a team defense to be sports betting, not fantasy contests. That is the standard configuration for most fantasy football leagues. See *What Is an IDP League*, Dynasty League Football (Apr. 26, 2014), <https://dynastyleaguefootball.com/what-is-an-idp-league/> [<https://perma.cc/3LYA-8W6R>]. Even ignoring this oddity, a statutory scheme this convoluted benefits no one but lawyers that specialize in gambling regulation.

<sup>31</sup> See Development of the Law of Gambling, *supra* note 2, at 804–05 (“Tacking succinct new statutes onto old-fashioned and endless lists of outlawed activities leads more to confusion than to double coverage.”).

<sup>32</sup> The expansion of the definition of “lottery” can be traced to the case of *People ex rel. Ellison v. Lavin*, 71 N.E. 753, 755–56 (N.Y. 1904) (“The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game?”). Other jurisdictions quickly adopted the *Lavin* test. See Bridwell & Quinn, *supra* note 1, at 645. Prior to *Lavin*, gambling and lotteries were distinct concepts, and “games of skill” could readily be found explicitly mentioned in gambling prohibitions. See, e.g., *The Book of the General Lawes and Libertyes Concerning the Inhabitants of the Massachusetts* (1660), *reprinted in* *The Colonial Laws of Massachusetts* 119, 153 (Fred B. Rothman & Co. 1995) (1889) (prohibiting “the Games of Shuffle-board and Bowling” in its anti-gambling statute). Compare Gambling, 1 Noah Webster, *An American Dictionary of the English Language* 714 (1828) (defining gambling as “gaming for money”), and Gaming, *id.* (“The act or art of playing any game in a contest . . . for a prize or stake. . . . The practice of using cards, dice, billiards and the like, according to certain rules, for winning money.”), with Lottery, 2 Noah Webster, *An American Dictionary of the English Language* 70 (1828) (“A scheme for the distribution of prizes by chance, or the distribution itself.”).



The modern application of the legal definition of gambling tends to operate mechanically, where each element is evaluated separately from the others. Each element must be present for an activity to qualify as gambling, unless the activity is otherwise expressly included within the statute's scope.

### A. Chance

Of the three elements, chance has the largest variety of doctrinal tests currently in practice. The most common test for chance amongst the several states is the Dominant Factor Test.<sup>33</sup> Under this test, courts evaluate whether “chance is the dominant factor in determining the result of the game, even though the result may be affected to some degree by skill or knowledge.”<sup>34</sup> In other words, “chance must predominate over skill in the results of the game.”<sup>35</sup>

In theory, the test implies a quantitative assessment, where “the threshold for predominance is the point at which either skill or chance crosses the 50% mark.”<sup>36</sup> In practice, “the rule that chance must be the *dominant* factor [has been] taken in a qualitative or causative sense rather than in a quantitative sense.”<sup>37</sup>

Some states instead apply the Material Element Test, where courts must determine whether chance is a material element affecting the outcome of the contingent event upon which the bet is made. For example, in *People v. Turner*, the court considered whether “the shell game” constituted a form of gambling activity.<sup>38</sup> In the shell game, as typically

<sup>33</sup> Also known as the “Predominance Test.” Cabot et al., *Mixed Skill and Chance*, supra note 11, at 390.

<sup>34</sup> Opinion of the Justices No. 373, 795 So. 2d 630, 635 (Ala. 2001).

<sup>35</sup> *United States v. Marder*, 48 F.3d 564, 569 (1st Cir. 1995) (applying Massachusetts law).

<sup>36</sup> Cabot et al., *Mixed Skill and Chance*, supra note 11, at 391–92.

<sup>37</sup> *State ex rel. McKittrick v. Globe-Democrat Publ'g Co.*, 110 S.W.2d 705, 717 (Mo. 1937); see also Steven D. Levitt, Thomas J. Miles & Andrew M. Rosenfield, *Is Texas Hold ‘Em a Game of Chance? A Legal and Economic Analysis*, 101 *Geo. L.J.* 581, 593–95 (2013) (describing how courts have counterintuitively applied the Dominant Factor Test qualitatively). The Supreme Court of Illinois has recently taken a quantitative approach, finding, on the basis of peer-reviewed statistical analyses, that daily fantasy sports are not considered gambling because they are “contests in which the outcome is mathematically more likely to be determined by skill than chance.” *Dew-Becker v. Wu*, 178 N.E.3d 1034, 1039–41 (Ill. 2020); see also *id.* at 1042–43 (Karmeier, J., dissenting) (criticizing the Court for taking a minority view and noting that New Jersey, Delaware, Washington, Massachusetts, Missouri, Iowa, Alabama, Pennsylvania, North Carolina, and Kentucky all apply a qualitative approach).

<sup>38</sup> *People v. Turner*, 629 N.Y.S.2d 661, 661–62 (N.Y. Crim. Ct. 1995).

played, the game’s operator places three “shells” on a flat surface, and a ball underneath one of the shells.<sup>39</sup> The operator then quickly moves the shells around the flat surface in front of a crowd of spectators before taking bets from spectators on which shell contains the ball.<sup>40</sup>

The court, in accordance with the gambling statute of New York, applied the Material Element Test.<sup>41</sup> Although the court noted that both the skill of the operator (in manipulating the position of the shells) and the skill of the spectator (in tracking the position of the shells) may influence the outcome of the contest, that skill element did “not change the essential character of the contest” from being a game of chance.<sup>42</sup> The court found that because the spectator could always ignore the movements of the shells and pick at random, and that doing so actually increased the odds in the spectator’s favor, the game was fundamentally one in which the outcome was determined by chance.

That a talented player might, in a given instance, see through the dealer’s manipulation and follow the movement of the object does not remove the element of chance . . . any more than the fact that a talented blackjack player may count the cards and thus increase the odds in favor of winning.<sup>43</sup>

At least one scholar has expressed doubts as to whether the Material Element Test is actually distinct from the Dominant Factor Test.<sup>44</sup> If there is any difference between these tests in application, it may arise in games like poker, for which there is a systemic chance aspect, but more skilled players tend to out-perform their opponents as the number of games played increases.<sup>45</sup> Though common sense may dictate that there be some

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<sup>39</sup> John Philip Quinn, *Fools of Fortune or Gambling and Gamblers, Comprehending a History of the Vice in Ancient and Modern Times, and in Both Hemispheres* 348–49 (1892).

<sup>40</sup> *Id.* at 349.

<sup>41</sup> *Turner*, 629 N.Y.S.2d at 662 (“Gambling differs from other kinds of contests in that in gambling[,] ‘the outcome depends *in a material degree upon an element of chance*, notwithstanding that skill of the contestants may also be a factor therein.’ . . . The skill of the player may increase the odds in the player’s favor, but cannot determine the outcome regardless of the degree of skill employed.” (emphasis added) (quoting N.Y. Penal Law § 225.00(1) (McKinney 2015))).

<sup>42</sup> *Id.* at 662–63.

<sup>43</sup> *Id.* at 663.

<sup>44</sup> See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 *Harv. J. Sports & Ent. L.* 1, 28 n.185 (2012).

<sup>45</sup> For additional information on systemic chance and other ways in which chance can affect the outcome of a game, see sources cited *infra* notes 86–90 and accompanying text.

difference between the “dominant” influence versus an influence that is merely “material,” some courts have seemed to blur the line.<sup>46</sup>

A few states, such as Hawai’i and Texas, apply the Any Chance Test, whereby if any modicum of chance affects the outcome, then courts will find the chance element satisfied.<sup>47</sup> In a (relatively) recent application of this test, a Texas court considered whether a certain brand of coin-pusher games fell under the statutory prohibitions against the possession of a “gambling device.”<sup>48</sup> The court declined to “read the definition at issue as requiring any quantitative comparison of the respective proportions of chance and skill involved in a particular contrivance. Rather, [it] requires only that the outcome of any trial be ‘determined by chance.’”<sup>49</sup> In interpreting this language, the court reasoned that “[e]ven a contrivance that is predominantly a game of skill may be determined by chance,” regardless of whether the proportion of skill to chance was 99 to 1, 75 to 25, or 100% chance.<sup>50</sup> “[I]t is the incorporation of chance that is the essential element of a gambling device, not the incorporation of a particular proportion of chance and skill.”<sup>51</sup>

Once again, it is questionable whether this test can truly be distinguished from the Material Element Test. Surely even Any Chance states would require that chance have a “material” or “meaningful” effect on the outcome. Otherwise, even chess, the quintessential game of pure skill, would qualify as a game of chance in those jurisdictions.<sup>52</sup> If

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<sup>46</sup> See, e.g., *State ex rel. Tyson v. Ted’s Game Enters.*, 893 So. 2d 355, 374 (Ala. Civ. App. 2002) (“As long as chance matters—as long as chance makes a meaningful difference in the outcome—the activity differs in kind, not just in degree, from a game of skill. The issue is whether the nature of the game is such that the role of chance in determining the outcome is thwarted by the skill involved, or whether chance meaningfully alters the outcome and thereby predominates over the skill.”), *aff’d sub nom.* *Ex parte Ted’s Game Enters.*, 893 So. 2d 376 (Ala. 2004). Does the verb “predominate” not imply a degree of influence stronger than something that “meaningfully alters” the outcome of a game?

<sup>47</sup> See Cabot et al., *Mixed Skill and Chance*, *supra* note 11, at 393 n.67; Christine Daleiden, *When Raffles, Sweepstakes, Games of Chance and Skill Constitute Illegal Gambling in Hawaii*, *Haw. Bar J.*, Feb. 2015, at 6, 11–12. (advising that Hawai’i’s gambling prohibition applies unless the winner is chosen “entirely” on the basis of skill).

<sup>48</sup> *State v. Gambling Device*, 859 S.W.2d 519, 521 (Tex. App. 1993).

<sup>49</sup> *Id.* at 523 (quoting Tex. Penal Code Ann. § 47.01(3) (West 1993)).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> See Jeffrey C. Meehan, *The Predominate Goliath: Why Pay-to-Play Daily Fantasy Sports Are Games of Skill Under the Dominant Factor Test*, 26 *Marq. Sports L. Rev.* 5, 18 (2015). Perhaps, however, this is more of a criticism of the Material Element Test than the Any Chance Test. “The term ‘material’ has various meanings” in different bodies of law. Cabot et al.,

anything, this implication indicates that the Texas Court of Appeals perhaps was overzealous in its dicta.

Finally, on the opposite end of the spectrum, we have the Pure Chance Test. Under the Pure Chance Test, the outcome “must be a matter depending entirely upon chance.”<sup>53</sup> American courts in seemingly every state have departed from this test.<sup>54</sup> While the Pure Chance Test makes sense when evaluating whether an activity is a *lottery* (in the historically accurate sense of the word), it has little use in identifying gambling.

### B. Prize and Consideration

For the most part, the test for the prize and consideration elements is the same: the Economic Value Test. Rather than applying the generic contract law test for consideration, courts typically evaluate whether players have hazarded “something of value and not merely the formal or technical consideration, such as registering one’s name or attending at [sic] a certain place, which might be sufficient consideration to support a contract.”<sup>55</sup> To be clear, consideration “must come from participants in the game in part at least as payments for their chances and that the indirect advantage to the . . . [business] is not in itself a price paid by participants.”<sup>56</sup>

The Economic Value Test was quite controversial when it was first developed. However, the Supreme Court’s adoption of the test in 1954 marked an inflection point in the adoption of the test at the state level.<sup>57</sup> In *American Broadcasting*, the Court considered a challenge from radio and television stations to FCC regulations implementing the anti-lottery provisions of the Communications Act of 1934 that prohibited broadcaster “give-away” programs.<sup>58</sup> The FCC regulations provided that

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Mixed Skill and Chance, *supra* note 11, at 403. Although courts should favor the contract law variation (meaning “significant”) because gambling is, in essence, a form of contract, see *infra* note 195, exchanging one vague term for another only marginally reduces the subjectivity of the test. See Cabot et al., *Mixed Skill and Chance*, *supra* note 11, at 403.

<sup>53</sup> *United States v. Rosenblum*, 121 F. 180, 182 (C.C.S.D.N.Y. 1903) (quoting *Hall v. Cox* [1899] 1 QB 198 at 200 (Eng.) (opinion of Smith, J.)).

<sup>54</sup> See *Bridwell & Quinn*, *supra* note 1, at 645 (quoting L.C. Thomas, Note, *Contests of Skill and the Lottery Laws*, 23 Va. L. Rev. 431, 434–35 (1937)).

<sup>55</sup> *Mobil Oil Corp. v. Att’y Gen.*, 280 N.E.2d 406, 411 (Mass. 1972) (quoting *Commonwealth v. Heffner*, 24 N.E.2d 508, 508–09 (Mass. 1939)).

<sup>56</sup> *Id.* (quoting *Commonwealth v. Wall*, 3 N.E.2d 28, 30 (Mass. 1936)).

<sup>57</sup> Cabot et al., *Future of Sweepstakes*, *supra* note 16, at 7–11 (noting that other tests for prize and consideration have now been abandoned in all but a select few states).

<sup>58</sup> *FCC v. Am. Broad. Co.*, 347 U.S. 284, 285 (1954).

the consideration required to support a lottery could be (1) furnishment of any money or thing of value, or the possession of a product of a sponsor of the program; (2) being required to tune in to the program; (3) being required to answer a question correctly, the answer to which question was either given or hinted at by a previous broadcast of the program; or (4) being required to recite a phrase, either over the phone or via mail, that had been specified or hinted at by a previous broadcast of the program.<sup>59</sup>

The Court rejected this broad construction of consideration, relying primarily on the fact that “not a single home contestant is required to purchase anything or pay an admission price or leave his home to visit the promoter’s place of business; the only effort required for participation is listening.”<sup>60</sup> The Court invoked fairness considerations flowing from the rule of lenity and the FCC’s departure from prior administrative interpretations given by the Post Office and the Department of Justice.<sup>61</sup> Broadly speaking, *American Broadcasting* reflected a view that the definition of a lottery should not encompass activities the Justices considered harmless.<sup>62</sup>

There is one exception to the general similarity in the test’s application to both prize and consideration: “no purchase necessary” sweepstakes<sup>63</sup> do not satisfy the Economic Value Test.<sup>64</sup> An example of such a contest is the McDonald’s Monopoly sales promotion.<sup>65</sup> If there is no obligation for consumers to make a purchase to participate, then there is no

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<sup>59</sup> Id. at 288–89.

<sup>60</sup> Id. at 294.

<sup>61</sup> Id. at 294–96. Even though these regulations concerned civil regulations, they interpreted a criminal statute, and the Court refused to allow for “one construction for the Federal Communications Commission and another for the Department of Justice.” Id. at 296.

<sup>62</sup> Of interest for purposes of this Note, the Court in dicta implicitly expressed disapproval with the Gambling Instinct Test: “It is apparent that these so-called ‘give-away’ programs have long been a matter of concern to the Federal Communications Commission; that it believes these programs to be the old lottery evil under a new guise, and that they should be struck down as illegal devices *appealing to cupidity and the gambling spirit*.” Id. at 296 (emphasis added); cf. *infra* Subsection III.A.2 (describing applications of the Gambling Instinct Test that make use of similar language).

<sup>63</sup> Also referred to as “Flexible Entry Sweepstakes,” see Cabot et al., *Future of Sweepstakes*, *supra* note 16, at 15–17, or “‘flexible participation’ schemes,” see 81 Op. Att’y Gen. Ky. 259, 2-801 (1981).

<sup>64</sup> See, e.g., *Cal. Gasoline Retailers v. Regal Petroleum Corp.*, 330 P.2d 778, 785–89 (Cal. 1958).

<sup>65</sup> See 2013 MONOPOLY Game at McDonald’s “Official Rules,” Play at McDonald’s (June 30, 2013), <https://web.archive.org/web/20130630005749/http://www.playatmcd.com/rules.html> [https://perma.cc/22NM-3SAU].

consideration.<sup>66</sup> The consumers who did make a purchase “could not be said to have paid a consideration for [entry] since they could have received [it] free.”<sup>67</sup> This wrinkle does not hold true on the prize side for obvious reasons: a sweepstakes conferring a prize only to certain participants is no less a lottery than a sweepstakes that confers different prizes to all participants.

## II. PROBLEMS WITH PRIZE/CHANCE/CONSIDERATION

When construed narrowly, Prize/Chance/Consideration provides an accurate and workable definition of a lottery. However, courts have not adhered to the narrow construction, instead interpreting this definition to capture any activity that contains the three elements, justifying this practice by reference to the expansive intent of the legislature:

[T]he courts have shown a general disposition to bring within the term “lottery” every species of gaming, involving a disposition of prizes by lot or chance, . . . which comes within the mischief to be remedied—regarding always the substance and not the semblance of things, *so as to prevent evasions of the law* . . .<sup>68</sup>

By interpreting the definition of a lottery so expansively, many other forms of gambling that would not, in common parlance, be deemed a lottery fall within the scope of the legal definition. As a result, the distinction between lotteries and gambling writ large has blurred. Practically speaking, this may not have been a problem at a time when the intent of the legislature was to prohibit any activity that even seemed like gambling; now that societal—and, in turn, legislative—attitudes have changed, we are left with uncertainty over what activities even qualify.

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<sup>66</sup> See *Cudd v. Aschenbrenner*, 377 P.2d 150, 157 (Or. 1962). However, schemes in which participants receive a “free” entry into a promotional drawing only after the purchase of the sponsor’s product would typically fall within the purview of Prize/Chance/Consideration. See *State v. Cox*, 349 P.2d 104, 105, 107 (Mont. 1960).

<sup>67</sup> *Regal Petroleum*, 330 P.2d at 786 (quoting *People v. Carpenter*, 297 P.2d 498, 500–01 (Cal. Dist. Ct. App. 1956)).

<sup>68</sup> See Opinion of the Justices No. 373, 795 So. 2d 630, 640 (Ala. 2001) (quoting Opinion of the Justices No. 277, 397 So. 2d 546, 547 (Ala. 1981)); see also Levitt, *supra* note 37, at 613 (arguing courts perceive gambling addiction to be the legislature’s concern when regulating gambling but the Dominant Factor Test does not adequately consider harm to gambling addicts).

*A. Difficulties with the Chance Element*

In recent years, chance has become “the pivotal criterion” in determining whether an activity qualifies as gambling.<sup>69</sup> Fantasy sports, particularly daily fantasy sports, have brought this element to the forefront of the conversation.<sup>70</sup> However, the chance/skill dichotomy hardly has any descriptive force with respect to common understandings of gambling, and the past century of case law applying Prize/Chance/Consideration to all gambling-like activities has shown that courts are unable to apply the various tests for chance consistently.

*1. The Distinction Between Skill and Chance Is Illusory*

In isolation, it appears easy to distinguish between chance and skill. Skill can be defined in various ways, but in general, “[t]raditional hallmarks of games of skill include learned or developed ability, identifiable strategy or tactics that result in positive outcomes, and technical expertise.”<sup>71</sup> Chance, in this context, can be defined as “a lack of control over events or the absence of ‘controllable causation’—‘the opposite of intention.’”<sup>72</sup> Evaluation of the chance element requires one “to envision a continuum with pure skill on one end and pure chance on the other,” and make a determination for the activity in question in line with the test particular to the jurisdiction.<sup>73</sup> Though this conception seems reasonable on its face, further inspection reveals its erroneous nature.

First, chance and skill are not diametric opposites. Games of skill can be structured in such a way that they operate as *de facto* games of chance. Consider a hole-in-one contest, which has been held by various courts to

<sup>69</sup> Opinion of the Justices No. 373, 795 So. 2d at 635.

<sup>70</sup> See, e.g., Zachary Shapiro, Note, Regulation, Prohibition, and Fantasy: The Case of FanDuel, DraftKings, and Daily Fantasy Sports in New York and Massachusetts, 7 Harv. J. Sports & Ent. L. 277, 285–87 (2016) (concluding that “there is no ‘slam-dunk’ legal answer to whether [daily fantasy] is a game of skill or chance”).

<sup>71</sup> *Id.* at 285; see also Opinion of the Justices No. 358, 692 So. 2d 107, 111 (Ala. 1997) (defining skill as “merely the exercise, upon known rules and fixed probabilities, of ‘sagacity,’ which is defined as ‘quickness or acuteness of sense perceptions; keenness of discernment or penetration with soundness of judgment; shrewdness; [the] ability to see what is relevant and significant’” (citation omitted)).

<sup>72</sup> Opinion of the Justices No. 373, 795 So. 2d at 635 (citing Chance, Black’s Law Dictionary (6th ed. 1990)).

<sup>73</sup> Cabot & Csoka, *The Games People Play*, *supra* note 11, at 222.

be a game of skill.<sup>74</sup> There is undoubtedly skill involved in golf as an activity. Moreover, a contestant's skill substantially affects the outcome of a hole-in-one contest—"a skilled player will get [the ball] in the area . . . more often than an unskilled player."<sup>75</sup> Nonetheless, the likelihood of success of any given attempt is exceedingly low. *Golf Digest* estimates that the odds of an average player acing a given hole are 48,000 to 1; for a good, but not quite pro-level golfer, those odds jump up to 20,000 to 1; for the elite, PGA Tour-level players, their odds are a paltry 14,000 to 1.<sup>76</sup> Although skill can more than triple one's likelihood of success, even "[a] professional's chances of acing [sic] a hole are more akin to an act of God than a demonstration of skill."<sup>77</sup> Indeed, those odds are similar to the likelihood of any given person being struck by lightning over the course of his lifetime—15,300 to 1.<sup>78</sup>

This phenomenon can likewise be seen with certain games of chance. For example, for a single hand of Texas Hold 'Em poker between a World Series of Poker-level professional and an amateur determined not to fold,<sup>79</sup> given the right combination of cards, the amateur can beat the professional *even if the professional plays optimally*.<sup>80</sup> However, much like how a professional golfer's skill will manifest over an increasing

<sup>74</sup> E.g., *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 87 (Nev. 1961); *Cobaugh v. Klick-Lewis, Inc.*, 561 A.2d 1248, 1250 n.1 (Pa. Super. Ct. 1989). But see Memorandum Robert D. Cook, Assistant Deputy Att'y Gen., S.C. Att'y Gen. to J. Gregory Hembree, City Att'y, N. Myrtle Beach 5 (Sept. 5, 1995) (citing *Cobaugh*, 561 A.2d at 1251 (Popovich, J., dissenting)) (informal opinion, describing the legality of "Million Dollar Mulligan").

<sup>75</sup> *Las Vegas Hacienda*, 359 P.2d at 87 (quoting the testimony of a professional golfer).

<sup>76</sup> David Owen, Oh My Gosh, Alice, I Made a Hole-in-One, *Golf Digest* (Nov. 10, 2010), <https://www.golfdigest.com/story/gd200509-david-owen-aces> [<https://perma.cc/TY64-HZDM>]; see also *Cobaugh*, 561 A.2d at 1252 (Popovich, J., dissenting) (noting similar figures).

<sup>77</sup> *Cobaugh*, 561 A.2d at 1252 (Popovich, J., dissenting).

<sup>78</sup> How Dangerous is Lightning?, Nat'l Weather Serv., <https://www.weather.gov/safety/lightning-odds> [<https://perma.cc/45GL-QLQQ>] (last visited Jan. 24, 2023) (estimating one's odds of being struck, given an eighty year lifespan, based on averages for 2009–2018).

<sup>79</sup> Violating a cardinal rule of poker. See Kenny Rogers, *The Gambler*, *on The Gambler* (United Artists 1978) ("You got to know when to hold 'em / know when to fold 'em / know when to walk away / and know when to run.").

<sup>80</sup> For instance, imagine a hand where the amateur is dealt an ace and king of hearts, and the professional is dealt a queen of diamonds and of clubs. The professional's odds of winning pre-flop are 54%. The flop reveals a queen of hearts, a queen of spades, and an ace of spades. At this point, the professional's odds of winning are greater than 99%. The turn then reveals a jack of hearts, dipping the professional's odds to 98%—only one card could result in the amateur's victory. The river returns that one card: the ten of hearts. This is the definition of a bad beat. All odds calculated using The Ultimate Texas Hold'em Odds Calculator, *Beat the Fish*, <https://www.beatthefish.com/poker-strategy/texas-holdem-odds/> [<https://perma.cc/6RZ6-FDHS>] (last visited Jan. 22, 2023).



number of holes played, so too will the poker professional's. And just because an amateur's odds of besting a professional in a single poker tournament are better than an ordinary grandmaster's chances of beating the world champion in a single game of chess does not mean that poker is any less a game of skill than chess—it simply means that it is comparatively more a game of chance.<sup>81</sup>

Second, whether a contest is of skill or of chance says little about whether putting up consideration for the possibility to win a prize based on the outcome of that contest constitutes gambling. When Michael Jordan wagers on a social golf match with Tour professional Rickie Fowler, he is unquestionably gambling;<sup>82</sup> however, when a budding professional golfer pays an entry fee of \$1,400 for an opportunity to win \$8,000, most would say he is not.<sup>83</sup>

What is the differentiating factor between these two activities? We cannot say that chance predominated in the former and not the latter. The underlying game, golf, is the same. If anything, Jordan had better odds than the worst player on a mini-tour—he was a skilled enough golfer to have at least one match with Fowler come down to the 18th hole.<sup>84</sup> While it could be argued that chance has a material effect upon *one game* of golf, but not a full tour, this argument is unsatisfactory. At the very least, this point is debatable. Where does one draw the line of materiality? Best of three? Best of five? In any case, common sense would dictate that even if Jordan wagered with Fowler over a best-of-seven series, he is nevertheless still gambling, regardless of whether we think that contest to be a game of skill or a game of chance.<sup>85</sup> Simply put, chance does not resolve the inquiry.

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<sup>81</sup> Christopher F. Chabris, *Could an Amateur Win the World Series of Poker?*, Wall St. J. (Nov. 6, 2015, 11:27 AM), <https://www.wsj.com/articles/could-an-amateur-win-the-world-series-of-poker-1446827133> [<https://perma.cc/ZVP9-UEPR>].

<sup>82</sup> See Jason Sobel, *Rickie Fowler's Favorite Golf Gambling Story: 1-on-1 with Michael Jordan*, Action Network (Sept. 23, 2021, 2:02 PM), <https://www.actionnetwork.com/golf/rickie-fowler-favorite-golf-gambling-story-michael-jordan-jason-sobel> [<https://perma.cc/CTP6-LHFC>].

<sup>83</sup> See Sean Zak, *Life on the Mini Tours*, Golf.com (Feb. 2, 2015), <https://golf.com/news/life-on-the-mini-tours/> [<https://perma.cc/P34Z-KYXC>].

<sup>84</sup> See Sobel, *supra* note 82.

<sup>85</sup> Indeed, that is how gambling would have been conceived of prior to the early 20th century distortion of the definition. See *supra* note 32.

*2. Courts Fail to Evaluate Chance with Any Sort of Consistency*

Even if one accepts that there is a meaningful, useful distinction between games of skill and games of chance, experience has shown that courts are unable to evaluate this element consistently. There is little consensus about what sort of chance matters when evaluating the chance element under any of the various tests. Commentators have identified various ways in which chance can affect the outcome of a game: games with a systemic chance aspect, where random events, such as a dice throw, a drawing of cards, or a number randomly generated by a computer, play a role in determining the outcome of the game;<sup>86</sup> games in which players have imperfect information—i.e., where players must engage in non-sequential decision-making;<sup>87</sup> games for which the typical pool of participants lacks sufficient skill-level to influence the outcome, even if some limited class of participants could develop such skill;<sup>88</sup> and games where chance may “thwart” skill in outcome-determination, even if skill determines more outcomes than chance over multiple rounds of the game.<sup>89</sup> Courts have not been clear about their rationale in choosing whether or not to adopt one or more of these analytical perspectives, or if there is even any rationale at all.<sup>90</sup>

*B. Difficulties with Prize and Consideration*

Unlike chance, some sort of prize and consideration are necessary elements of gambling. Without these two elements, there is no contract and thus no gambling. However, the existence of prize and consideration alone is not sufficient—there must be some third element, otherwise the

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<sup>86</sup> See Cabot et al., *Mixed Skill and Chance*, supra note 11, at 395–96.

<sup>87</sup> See *id.* at 396–98.

<sup>88</sup> See J. Royce Fichtner, *Carnival Games: Walking the Line Between Illegal Gambling and Amusement*, 60 *Drake L. Rev.* 41, 51–52 (2011).

<sup>89</sup> See Levitt et al., supra note 37, at 594–97.

<sup>90</sup> See, e.g., *Commonwealth v. Plissner*, 4 N.E.2d 241, 245 (Mass. 1936) (describing the “thwarting” perspective as an “alternative” to the Dominant Factor Test, but not finding any error in the lower court applying that formulation over a more conventional application of the Dominant Factor Test); *People v. Turner*, 629 N.Y.S.2d 661, 662–63 (N.Y. Crim. Ct. 1995) (noting that even though games like poker require considerable skill, they are nonetheless games of chance because of the systemic presence of chance, but then abandoning this systemic perspective for the imperfect-information and skill-of-the-average-participant conceptions of chance when evaluating the shell game).

definition just describes contracts of conditional promise.<sup>91</sup> Consequently, problems with chance impact the accuracy of the definition much more than problems with prize and consideration. Nonetheless, the growth of gambling in virtual spaces has brought to the forefront some of the flaws with the Economic Value Test.

*1. Virtual Prizes and Consideration Complicate the Economic Value Test*

One of the original justifications for the Economic Value Test was that where the consideration wagered lacked monetary value, the scheme “lack[ed the] element which is the source of all evil connected with lotteries or gambling,” and thus was not intended to be captured within the definition.<sup>92</sup> This is because “the anti-lottery statutes were enacted to prevent the impoverishment of the individual and its attendant evils.”<sup>93</sup> Courts reasoned that there was nothing unlawful in a person giving away money or property by lot or chance (e.g., via a raffle), so long as there was no attempt to evade the law.<sup>94</sup> “The vice is in the payment of a consideration for the chance.”<sup>95</sup>

Since the advent of the internet, it is no longer as clear what qualifies as having economic value. As prominent gambling law jurists Anthony Cabot, Glenn Light, and Karl Rutledge have noted, “[t]he interactivity of the internet allows promoters to run sweepstakes that can be supported by third-party advertisers and allows promoters to derive revenues from the sale of information received from participants in the sweepstakes through questionnaires and data mining.”<sup>96</sup> Although this data clearly has economic value in the aggregate, courts have been hesitant to recognize any economic value in a lone individual’s data.<sup>97</sup>

Companies have already begun taking advantage of this loophole. For instance, take the iPhone and Android application Upside Games, a sports

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<sup>91</sup> Cf. 7 Richard A. Lord, *Williston on Contracts* § 17:2 (4th ed. 2022) (“It is of the essence of a gaming bargain that it be performable only on the happening of a condition.”).

<sup>92</sup> *State v. Bussiere*, 154 A.2d 702, 706 (Me. 1959).

<sup>93</sup> See *Cudd v. Aschenbrenner*, 377 P.2d 150, 154–55 (Or. 1962) (quoting *Bussiere*, 154 A.2d at 706 in support of its holding).

<sup>94</sup> See *McFadden v. Bain*, 91 P.2d 292, 294 (Or. 1939).

<sup>95</sup> *Id.*

<sup>96</sup> Cabot et al., *Future of Sweepstakes*, *supra* note 16, at 34.

<sup>97</sup> See, e.g., *Dwyer v. Am. Express Co.*, 652 N.E.2d 1351, 1356 (Ill. App. Ct. 1995) (finding that although consumer data has value, a single piece of personal information “has little or no intrinsic value” in isolation).

betting platform masquerading as a “fantasy sports app.”<sup>98</sup> Owned and operated by a blockchain company,<sup>99</sup> Upside Games offers users “free” entry into prop bet pools for various sports.<sup>100</sup> One such contest offered a \$50 prize for the user(s) who correctly ordered the top three wide receivers by receiving yards in the Divisional Round of the 2023 National Football League playoffs.<sup>101</sup> Unlike the typical “no purchase necessary” sweepstakes, Upside Games is not promoting some product or service alongside the contest—the only product or service is the contest itself. As a for-profit company, presumably there is some economic value gained here, but it is difficult to discern what that may be.<sup>102</sup> Unless a court would be willing to buck the trend of the last fifty years and assume economic value must be present if a commercial entity operates a prize scheme, no consideration is present in this activity.<sup>103</sup>

Virtual prizes have also generated some controversy about the application of the definition. For example, in a loot box scheme, “[p]layers use real money to buy virtual in-game items and can redeem such items by buying keys to open the boxes where they receive a chance selection of further virtual items.”<sup>104</sup> Video game loot boxes appeal to a psychological stimulus that underlies many forms of traditional gambling:

<sup>98</sup> Upside Games, <https://www.upsidegames.com> [<https://perma.cc/N5CY-UYS2>] (last visited Jan. 21, 2023).

<sup>99</sup> Terms & Conditions, Upside Games (Oct. 17, 2019), <https://www.upsidegames.com/legal> [<https://perma.cc/2PGW-8LFR>]; Our Portfolio, Chainable Corp. (Feb. 15, 2021), <https://www.chainablecorp.io/portfolio> [<https://perma.cc/ZJC6-G8YR>].

<sup>100</sup> Upside Games: Registration Screen, Chainable Corp. (iPhone application), <https://apps.apple.com/us/app/upside-games/id1458355064> [<https://perma.cc/F9JQ-KDVN>] (last visited Apr. 21, 2022) (claiming free entry for users).

<sup>101</sup> Upside Games: NFL Wild Card – Top Receivers, Chainable Corp. (iPhone application), <https://apps.apple.com/us/app/upside-games/id1458355064> [<https://perma.cc/F9JQ-KDVN>] (last visited Jan. 22, 2023).

<sup>102</sup> While the natural assumption would be that Upside Games is selling user data, their privacy policy explicitly disclaims any such practice without the user’s permission. Terms & Conditions, Upside Games (Oct. 17, 2019), <https://www.upsidegames.com/legal> [<https://perma.cc/2PGW-8LFR>].

<sup>103</sup> See, e.g., *Cudd v. Aschenbrenner*, 377 P.2d 150, 156–57 (Or. 1962); see also *Cabot et al., Future of Sweepstakes*, supra note 16, at 8 (noting that the Promoter Benefit Test for consideration in gambling is of “questionable . . . viability,” despite finding “some favor in the 1960s and early 1970s”). But cf. *Russell v. Equitable Loan & Sec. Co.*, 58 S.E. 881, 884–86 (Ga. 1907) (finding that “[i]t is not mere value of the thing to be obtained that makes it a prize,” but that where there is “some scheme of mere chance, founded upon consideration, [such a scheme] would impress the article with the character of prize”). A similar argument could be made for consideration, were the scheme’s prize to be of economic value.

<sup>104</sup> Griffiths, supra note 18, at 52.

variable-ratio reinforcement schedules.<sup>105</sup> For the typical loot box scheme, elements of consideration and chance are clearly present.<sup>106</sup> Although there has been some legislative effort in the United States to regulate loot boxes, none so far have taken hold.<sup>107</sup>

Other vectors of regulation have similarly turned up fruitless. The Entertainment Software Rating Board (“ESRB”), the self-regulatory body for the video game industry, considers loot boxes more akin to packs of baseball cards than slot machines, since the player always receives some virtual item.<sup>108</sup> Nor are the courts persuaded. In a class action suit alleging that Google violated California law by offering games which employed loot box schemes in the Google Play Store, the U.S. District Court for the Northern District of California found that, because the loot boxes only offered a chance to win in-game items, and because those items lack “any real-world transferable value,” loot boxes fall outside of the scope of California’s definition of gambling.<sup>109</sup> In so holding, the court rejected

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<sup>105</sup> See Vic Hood, *Are Loot Boxes Gambling?*, Eurogamer (Oct. 23, 2017), <https://www.eurogamer.net/articles/2017-10-11-are-loot-boxes-gambling> [<https://perma.cc/884J-HFPQ>].

<sup>106</sup> See Griffiths, *supra* note 18, at 52 (describing how keys for loot boxes are bought with “real money” (i.e., consideration) and how those keys can be used “to open the boxes where [players] receive a chance selection” of virtual prizes); see also Maddie Level, Comment, *Unboxing the Issue: The Future of Video Game Loot Boxes in the U.S.*, 68 U. Kan. L. Rev. 201, 212–16 (2019) (analyzing loot boxes under Prize/Chance/Consideration).

<sup>107</sup> Level, *supra* note 106, at 221–22 (describing unsuccessful legislative efforts in various states and in Congress).

<sup>108</sup> 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/4WF3-Z5B7>]. But see S. Env’t & Commc’ns Refs. Comm., Parliament, *Gaming Micro-Transactions for Chance-Based Items* 43 (Austl. 2018) [hereinafter *Loot Box Report*] (finding that consumer spending habits indicated that loot boxes were more comparable to gambling than baseball cards).

<sup>109</sup> *Coffee v. Google, LLC*, No. 20-cv-03901, 2022 WL 94986, at \*1, \*12 (N.D. Cal. Jan. 10, 2022) (quoting *Taylor v. Apple, Inc.*, No. 20-cv-03906, 2022 WL 35601 (N.D. Cal. Mar. 19, 2021) (order granting motion to dismiss)); see also *Mai v. Supercell Oy*, No. 20-cv-05573, 2021 WL 4267487, at \*4 (N.D. Cal. Sept. 20, 2021) (finding similarly); *Soto v. Sky Union, LLC*, 159 F. Supp. 3d 871, 880 (N.D. Ill. 2016) (same); U.K. Gambling Commission, *supra* note 19, at ¶ 3(18) (same). On account of this conclusion, the court declined to address Google’s argument that loot boxes are not gambling because they are incorporated into games of skill. *Coffee*, 2022 WL 94986, at \*13. This argument was the justification for the highest court in the Netherlands overturning a lower court’s decision to assess a €10 million civil penalty against Electronic Arts for violating Dutch gambling laws with loot boxes in FIFA Ultimate Team. See Tom Phillips, *EA’s €10m Dutch FIFA Loot Box Fine Overturned*, Eurogamer (Mar. 9, 2022), <https://www.eurogamer.net/articles/2022-03-09-eas-10m-dutch-fifa-loot-box-fine-has-been-overturned> [<https://perma.cc/QS82-R6QU>] (describing ABRvS 9 maart 2022, AB 2022, 690 m.nt. (De raad van bestuur van de Kansspelautoriteit/Electronic

arguments asserting that the prizes' value could be evidenced by their cash value on secondary markets, citing the U.S. Court of Appeals for the Ninth Circuit precedent for the proposition that "a virtual item cannot constitute a thing of value where its sale would violate applicable terms of use."<sup>110</sup> Aside from these complications, it is not even certain that the Economic Value Test accurately probes the nature of gambling, even when evaluated correctly.

*2. Even if Consideration Lacks Economic Value, Gambling May Still Be Occurring*

If the courts of the mid-twentieth century were incorrect in postulating that "hazarding something of value" is "the source of all evil connected with lotteries or gambling," then what becomes of the Economic Value Test?<sup>111</sup> And even if the courts' underlying assumptions are correct, does the fact that the harms are de minimis lead to the conclusion that such activity is not gambling? That sort of reasoning seems to put the cart before the horse. If the harms are indeed de minimis, then the logical conclusion should be that the activity should be lightly regulated, if regulated at all, not that the activity falls outside of the scope of the definition. The Economic Value Test is a prime example of how courts' desires to reach the "right result" in an immediate, moral sense can lead to logically unsound reasoning and doctrinal confusion many years down the road once circumstances have changed.

One flaw of the Economic Value Test—and Prize/Chance/Consideration more broadly—is that it evaluates the nature of the activity in the abstract and in the aggregate. It looks to whether there is a *possibility* for entry without valuable consideration, ignoring whether any participants actually entered into the contest for free. Prior to the widespread adoption of the test, courts were more concerned with this loophole. For example, in holding that a punchboard scheme with the option for free entry nonetheless qualified as gambling, the court observed that there was no evidence of a participant ever entering the contest

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Arts, Inc.) (Neth.); see also *Mason v. Mach. Zone, Inc.*, 140 F. Supp. 3d 457, 461–64 (D. Md. 2015), *aff'd*, 851 F.3d 315 (4th Cir. 2017) (evaluating the video game as a whole instead of the in-game casino in isolation in finding no illegal gambling).

<sup>110</sup> *Coffee*, 2022 WL 94986, at \*13 (citing *Kater v. Churchill Downs Inc.*, 886 F.3d 784, 788 n.2 (9th Cir. 2018)).

<sup>111</sup> But see *State v. Bussiere*, 154 A.2d 702, 706 (Me. 1959).

without consideration.<sup>112</sup> As stated in 1936 by the Supreme Court of Texas, dealing with a similar set of facts:

In fact, the whole plan is built up and made profitable because no normal person likes to “bum” his neighbor for something, and by an appeal to the psychology of cupidity which makes some take a chance of making large gains by a small outlay. Those who invented and formulated the plan may not have been “learned in the law,” but their knowledge of mass-psychology was not wanting.<sup>113</sup>

While the court’s assessment of a participant’s motivation for declining to enter for free is arguable, its assertion that the plan’s formulators knew what they were doing is correct. If the scheme’s operators conduct their activities to have the same appeal as gambling, consumers actually behave in the same manner as they would when gambling, and the activity looks to an objective observer like gambling, then courts should think horses, not zebras. The justifications that support the regulation of gambling generally—be it consumer protection, unfair competition, or any of a host of associated negative externalities<sup>114</sup>—remain relevant whether *every* sweepstakes participant purchases a ten-piece McNuggets, or just nine out of every ten.

And even when the consideration and prize are completely divorced from cash value, the psychological impulse that is stimulated by gambling activity—the neurological phenomenon that makes gambling a vice—still appears to be triggered.<sup>115</sup> Consider Twitch.tv’s channel points: viewers can earn channel points for various activities, including watching, following, or interacting with a Twitch channel.<sup>116</sup> The channel points can be redeemed for various non-monetary rewards specific to the channel.<sup>117</sup> In essence, channel points are the virtual equivalent of a customer loyalty program. In 2020, Twitch introduced prediction contests, whereby content-creators can set up a binary-choice question about the occurrence

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<sup>112</sup> See *Meserole v. Sutton*, 41 Pa. D. & C. 408, 412–13 (1941).

<sup>113</sup> *City of Wink v. Griffith Amusement Co.*, 100 S.W.2d 695, 698 (Tex. 1936).

<sup>114</sup> See Jim Leitzel, *Regulating Vice: Misguided Prohibitions and Realistic Controls* 222–23 (2008).

<sup>115</sup> Cf. *id.* at 225 (describing the role of neurochemistry in gambling addictions and problem gambling).

<sup>116</sup> Channel Points Guide for Creators, Twitch.tv, <https://help.twitch.tv/s/article/channel-points-guide> [<https://perma.cc/2HBH-ZWJ5>] (last visited Mar. 25, 2022).

<sup>117</sup> *Id.*; Channel Points Acceptable Use Policy, Twitch.tv (Dec. 10, 2019), <https://www.twitch.tv/p/en/legal/channel-points-acceptable-use-policy/> [<https://perma.cc/S HQ8-P57Q>].

of a certain event during the stream, and viewers can stake a portion of their channel points on getting the prediction correct.<sup>118</sup> The viewers who guess correctly receive a proportionate share of the pool of points staked.<sup>119</sup> As stated by Twitch, the purpose of this new feature is to foster better engagement from viewership by giving them a “stake” in the events of the stream.<sup>120</sup> This statement parallels quite closely to statistical correlations between the quantity of bets placed on a sporting event and “ticket sales, fan engagement, and overall viewership.”<sup>121</sup> It is hard to look at this activity and characterize it as anything but gambling.<sup>122</sup>

Finally, the Economic Value Test gets away from the core functions that consideration serves for contracts generally. One of the key roles of consideration is simply allowing courts to objectively, efficiently, and accurately determine the validity of a contract *ex post*.<sup>123</sup> It also provides an objective, efficient, and accurate basis for establishing the appropriate remedy.<sup>124</sup> There aren’t any problems regarding the validity of a contract inherent to Twitch prediction contests, loot boxes, or the Upside Games challenges—for each transaction, mutual assent is clear. And as for the remedy, either restitution—returning channel points and game tokens or deleting personal data—or specific performance should be adequate

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<sup>118</sup> Mariella Moon, Twitch Viewers Can Bet Their Channel Points on Predictions, Engadget (Nov. 14, 2020), <https://www.engadget.com/twitch-predictions-channel-points-182233979.html> [<https://perma.cc/AW9E-RWSN>].

<sup>119</sup> *Id.*

<sup>120</sup> Channel Points Predictions: Let Viewers Guess Your Destiny, Twitch.tv: Blog (Dec. 12, 2020), <https://blog.twitch.tv/en/2020/12/12/channel-points-predictions-let-your-viewers-guess-your-destiny/> [<https://perma.cc/9GPM-284W>].

<sup>121</sup> How the Sports Betting Industry Affects Viewership and Ticket Sales, TicketNews (Dec. 16, 2020), <https://www.ticketnews.com/2020/12/how-the-sports-betting-industry-affects-viewership-and-ticket-sales/> [<https://perma.cc/92TB-WTDL>]; Andrew Marquardt, Legalized Sports Betting in the U.S. Doubled in 2021. Here’s Why That Will Continue After ‘the Greatest Weekend in NFL Playoff History.’, Fortune (Jan. 24, 2022), <https://fortune.com/2022/01/24/legalized-sports-betting-in-the-u-s-doubled-in-2021-heres-why-that-will-continue-after-the-greatest-weekend-in-nfl-playoff-history/> [<https://perma.cc/ZZ7U-7D33>].

<sup>122</sup> Indeed, that appears to be the sentiment held by a host of countries where legal restrictions prohibit viewers from participating in predictions. See Moon, *supra* note 118 (speculating that those countries’ gambling regulations are the cause of the prohibitions).

<sup>123</sup> Alex M. Johnson, Jr., Contracts and the Requirement of Consideration: Positing a Unified Normative Theory of Contracts, *Inter Vivos and Testamentary Gift Transfers*, 91 N.D. L. Rev. 547, 589–90 (2015).

<sup>124</sup> *Id.* at 593–94.



remedies in transactions that fail the Economic Value Test.<sup>125</sup> The only function that “economic value” consideration serves is to differentiate “immoral” activity from socially acceptable fun. But if we are questioning the immorality of gambling, do we really want a definition that fossilizes in amber the moral values of a previous generation?

### *C. Why These Problems Matter*

At the end of the day, any of the above examples may not be worth regulating. The harms from such gambling may in fact be de minimis, as the courts in the '50s and '60s theorized. But there is no reason to prejudge these activities simply because they appear innocuous. “Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”<sup>126</sup> Diagnosis is the first step in problem management.

A definition of gambling that incorporates assumptions about the extent of harm from certain activities begs the fundamental question. Such a definition is even more unworkable when we have reason to believe those assumptions are false. If we agree that gambling should be subject to some degree of regulation—or, at the very least, that we do not want to foreclose the option of regulating gambling at a future point in time—then our diagnostic tools should accurately identify the activities which produce the social ills we would like to rectify.<sup>127</sup>

The Dominant Factor Test and the Economic Value Test may appear to be quantitative methods of analysis, but empirical studies have demonstrated otherwise. Professors Levitt, Miles, and Rosenfield developed an empirical framework for evaluating the chance/skill dichotomy using four null hypotheses to test for the presence of skill, and a win-rate/time-horizon analysis to determine the predominance of one over the other.<sup>128</sup> Based on their findings, they concluded that “it is almost inconceivable that luck could be the predominant determinant of [poker]

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<sup>125</sup> See 66 Am. Jur. 2d Restitution and Implied Contracts § 1 (2022) (“The principle of restitution is to deprive the defendant of benefits that in equity and good conscience the defendant ought not to keep even though the plaintiff may have suffered no demonstrable losses.”); 71 Am. Jur. 2d Specific Performance § 10 (2022) (“A decree for specific performance of a contract is available only if an action at law for compensatory damages for breach of the contract by failing to carry it out is inadequate under the circumstances of the case to do complete justice between the parties.”).

<sup>126</sup> Louis D. Brandeis, *Other People's Money and How the Bankers Use It* 92 (1914).

<sup>127</sup> See Levitt et al., *supra* note 37, at 613.

<sup>128</sup> *Id.* at 618–19, 633–34.

outcomes if there are even small differences in skill.”<sup>129</sup> Professors Towfigh, Glöckner, and Reid undertook a similar study for sports betting, finding that it could not be definitively classified as either a game of chance or of skill, but that it was nonetheless a “dangerous” game, with a ten times greater likelihood of addiction and a higher degree of systematic overconfidence compared to traditional lotteries.<sup>130</sup> Based on these findings, they concluded that “the traditional differentiation between games of chance and games of skill when determining dangerousness has no empirical basis,” and that the presence of skill in a game may actually make a game *more* dangerous because it gives participants an “illusion of control.”<sup>131</sup> Finally, in a 2018 study submitted to the Australian Parliament, Drs. Zendle, McCall, Barnett, and Cairns found that, despite the prevailing sentiment held by the video game industry and governments around the world, consumer spending habits for loot boxes remained linked with problem gambling regardless of any variations in the loot box scheme.<sup>132</sup> And these are just three game types that have garnered significant media attention—many more inaccuracies could be lurking in the grass.

These problems matter now more than ever. Gambling regulation sits at an inflection point. Public perception of gambling is more favorable now than it has ever been in American history. The National Council on Problem Gambling, having conducted the most comprehensive study of gambling issues of the past twenty years, has reported that only fourteen percent of those surveyed believe that gambling is immoral.<sup>133</sup> Consequently, legislatures are rapidly loosening once-strict gambling prohibitions.<sup>134</sup> If this sentiment holds, and “the government adopts a policy view which states that [gambling] should be allowed as an aspect of individual freedom, the correct approach to implementation of that policy is regulation.”<sup>135</sup>

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<sup>129</sup> *Id.* at 634.

<sup>130</sup> Emanuel V. Towfigh, Andreas Glöckner & Rene Reid, *Dangerous Games: The Psychological Case for Regulating Gambling*, 8 *Charleston L. Rev.* 147, 183–84 (2013).

<sup>131</sup> *Id.* at 184–85.

<sup>132</sup> David Zendle, Cade McCall, Herbie Barnett & Paul Cairns, *Submission 42, to Loot Box Report*, *supra* note 108.

<sup>133</sup> Nat’l Council on Problem Gambling, *National Detail Report: National Survey on Gambling Attitudes and Gambling Experiences 1.0*, at 33 (2021).

<sup>134</sup> See sources cited *supra* note 5 and accompanying text.

<sup>135</sup> Cabot & Csoka, *The Games People Play*, *supra* note 11, at 231.

An inaccurate definition poses significant risk of under-regulation. As noted by Professor I. Nelson Rose, “the lessons of history are clear: everywhere that gambling has been made legal but allowed to operate without strict government controls it has been plagued by corruption, scandals, and widespread social problems. The result is that the gambling was then either regulated, or outlawed, within a few years.”<sup>136</sup> To avoid repeating history, we must be able to properly identify and formulate well-reasoned policy to address gambling. But this step is not possible if our legal definition is fundamentally flawed. A better definition is required.

### III. PROPOSED SOLUTION: A REVITALIZED GAMBLING INSTINCT TEST

So Prize/Chance/Consideration does not work—what are the alternatives? One approach is to forego attempting to define gambling as a whole, and have a statute provide a list of activities that qualify as gambling.<sup>137</sup> This approach, however, is underinclusive by design, and states that take this approach may be slow to regulate new forms of gambling. Another option is to decline to define gambling by statute, leaving the definitional task to the courts.<sup>138</sup> But if the common law approach resulted in Prize/Chance/Consideration, then perhaps we should question whether the task truly falls within the judicial “bailiwick.”<sup>139</sup>

A third and more interesting definitional approach is what Professor Anthony Cabot has called the Gambling Instinct Test, which “looks at the nature of an activity to determine whether it appeals to one’s ‘gambling instinct,’ regardless of whether skill or chance dominates.”<sup>140</sup> Although

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<sup>136</sup> I. Nelson Rose, *The Dangers of Under-Regulated Gambling*, 19 *Gaming L. Rev. & Econ.* 4, 4 (2015).

<sup>137</sup> See, e.g., Nev. Rev. Stat. §§ 463.0152–463.0153 (2021) (listing faro, monte, roulette, keno, bingo, etc.).

<sup>138</sup> See, e.g., *State v. Torres*, 831 S.W.2d 903, 904 (Ark. 1992) (noting that Ark. Code Ann. § 5-66-103(a) (1987) does not define the relevant terms “gambling” or “gaming house”). Although that provision of the code has since thrice been amended, none of those three amendments have added a definition of those key terms. See *An Act to Repeal Arkansas Code § 5-66-103(b)*, 2005 Ark. Acts 70; *An Act to Increase the Penalty for the Offense of Keeping a Gambling House*, 2007 Ark. Acts 555; *An Act to Make Various Corrections to the Arkansas Code of 1987 Annotated*, 2007 Ark. Acts 827.

<sup>139</sup> Cf. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019) (noting that while “[s]ome interpretive issues may fall more naturally into a judge’s bailiwick,” agencies are often more adept at defining technical rules).

<sup>140</sup> Cabot et al., *Mixed Skill and Chance*, *supra* note 11, at 393–94; see also Cabot & Csoka, *The Games People Play*, *supra* note 11, at 223 (referring to the test as “the Any Chance Test”).

the opinions which recited this test are technically still good law, the Gambling Instinct Test is all but dead letter: no court has applied the test in the past thirty-five years.<sup>141</sup>

The test has been criticized for being emblematic of “the Progressive Era’s belief in moral weakness as the source of vice and its faith in law’s potential to protect the vulnerable.”<sup>142</sup> It is derided for being “highly subjective,” “imprecise,” and “not susceptible to meaningful analysis by a trier of fact.”<sup>143</sup> But the test is misconceived. These criticisms can in part be attributed to Professor Cabot mistakenly classifying the Gambling Instinct Test as a test for the presence of the chance element, an error carried forward by other scholars.<sup>144</sup> Most certainly, the Gambling Instinct Test is a poor test for chance—it does not test for the presence of chance at all. But that is not a bug; it is a feature.

### A. Historical Application of the Test

#### 1. A Standalone Test

The first thing that should be noted about the Gambling Instinct Test is that it would still be used even for fact patterns where the element of chance was clearly present.<sup>145</sup> In fact, the operation of the test was completely separate from Prize/Chance/Consideration altogether.

For instance, in *Meserole v. Sutton*, the court heard a “petition for the return of certain personal property confiscated by the police as illegal

<sup>141</sup> 1 Gregory R. Gemignani et al., *Gaming Law & Practice* § 2.02(3)(d) (2022).

<sup>142</sup> Levitt et al., *supra* note 37, at 611.

<sup>143</sup> Jonathan Hilton, Comment, *Refusing to Fold: How Lawrence DiCristina Went Bust Fighting for a Novel Interpretation of the Illegal Gambling Business Act*, 83 U. Cin. L. Rev. 1467, 1478 (2015) (quoting Cabot et al., *Mixed Skill and Chance*, *supra* note 11, at 394, 412).

<sup>144</sup> See sources cited *supra* note 140; see also Erica Okerberg, *What’s in a Game? A Test Under Which We May Call a “VGT” a Gambling Game Is Not So Sweet: Why Courts Should Not Apply the Material Element Test to VGTs*, 5 UNLV Gaming L.J. 27, 28 (2014) (quoting Cabot et al., *Mixed Skill and Chance*, *supra* note 11, at 393–94) (noting how the Gambling Instinct Test evaluates the chance element); Edelman, *supra* note 44, at 28–29 (quoting Cabot et al., *Mixed Skill and Chance*, *supra* note 11, at 393–94) (same). Cabot, Light, and Rutledge appear to have recognized the mistake in a later article, see Cabot et al., *Future of Sweepstakes*, *supra* note 16, at 4–5, but the original error persists in the literature. See Gemignani et al., *supra* note 141, § 2.02(3)(d) (2022) (describing the Gambling Instinct Test as a test for chance, despite acknowledging that the test does away with the chance/skill dichotomy). But see Levitt et al., *supra* note 37, at 610–13 (noting that courts employed the Gambling Instinct Test when the Dominant Factor Test failed to accurately identify the problem activities the legislature sought to regulate).

<sup>145</sup> *Contra* sources cited *supra* note 140.

gambling devices.”<sup>146</sup> The plaintiffs seeking return of their property were storekeepers who operated a punchboard in their shop.<sup>147</sup> Consumers who presented the shopkeepers with a Treasures Mint wrapper, “or a reasonable facsimile thereof,” were entitled to a chance at a prize ranging from 15¢ to \$15.<sup>148</sup> The plaintiffs argued that there was no valuable consideration required for participation in the scheme, and therefore no illegal gambling had occurred.<sup>149</sup> In essence, by accepting “reasonable facsimile[s]” of Treasure Mints wrappers, the plaintiffs were attempting to fall into the “no purchase necessary” loophole.<sup>150</sup>

The court, disavowing the reasoning of other states’ courts applying the Economic Value Test, did not find the possibility of free entry “sufficient to remove the taint of illegality.”<sup>151</sup> Instead, the court stated that, in deciding whether gambling had occurred, “the entire scheme must be examined to determine whether an illegal device has not been merely clothed with the semblance of innocence. . . . [I]nquiry must be made into its tendency to inflame the gambling instinct . . . .”<sup>152</sup> In short, consideration was the disputed issue in this case; the presence of chance was never in doubt.<sup>153</sup>

The Gambling Instinct Test was likewise applied to cases where the element of prize was in question. In *Heartley v. State*, a defendant appealed his conviction of unlawful possession of a gambling device—in this case, a mint vending machine.<sup>154</sup> The vending machine resembled an “ordinary slot machine,” operated by a consumer inserting a nickel and pulling the lever.<sup>155</sup> Regardless of the combinations that would appear on the machine, the player always received a package of mints for her nickel; however, if certain combinations appeared, the player would be entitled

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<sup>146</sup> 41 Pa. D. & C. 408, 409 (1941).

<sup>147</sup> Id. A punchboard is “a board full of holes containing slips of paper, used in a gambling game in which a player attempts to push out a slip marked with a winning number.” Punchboard, Collins English Dictionary (12th ed. 2014).

<sup>148</sup> *Meserole*, 41 Pa. D. & C. at 409.

<sup>149</sup> Id. at 410–11.

<sup>150</sup> See id. (making tacit acknowledgement of the plaintiffs’ attempt to conduct a “flexible participation lottery,” which some states had found to be lawful). For further discussion of such schemes, see sources cited supra note 63.

<sup>151</sup> *Meserole*, 41 Pa. D. & C. at 411.

<sup>152</sup> Id.

<sup>153</sup> Id. at 410 (“It is unquestioned that the punchboard is a game of chance and that if valuable consideration is given . . . it constitutes an unlawful gambling device . . .”).

<sup>154</sup> 157 S.W.2d 1, 1 (Tenn. 1941).

<sup>155</sup> Id. at 2.

to a certain number of free plays, the precise number dependent on the particular combination.<sup>156</sup> The caveat here was that no mints were deposited by the machine during these free plays, “but by means of such free plays . . . certain combinations containing numerous sayings, and also the prediction of one’s fortune, appear.”<sup>157</sup>

The Tennessee Supreme Court acknowledged that some courts had found that where the prize is limited to additional amusement, such a machine is not a gambling device “since the player receives nothing of value.”<sup>158</sup> However, it ultimately decided that Heartley’s machine was a gambling device.<sup>159</sup> The court stated that for a prize to be a “thing of value,” it simply needed to be “any ‘thing’ affording the necessary lure to indulge the gambling instinct”—here, the “added inducement of receiving something for nothing.”<sup>160</sup> Much like in *Meserole*, the presence of chance in the game was not at issue—only prize. Nevertheless, the Gambling Instinct Test was applied to find the machine a gambling device.

This is not to say that the Gambling Instinct Test was never used when the element of chance was called into question. In *State ex rel. Dussault v. Kilburn*, the Montana Supreme Court considered whether a pinball machine was a “gambling device” within the meaning of the Montana gambling statutes.<sup>161</sup> The machine required payment of 5¢ to operate and offered a reward of a variable number of “trade checks” worth 5¢ or more, only redeemable at the defendant’s store.<sup>162</sup> Kilburn argued that the machine fell outside the prohibitions of the statute because the element of skill predominated over the element of chance.<sup>163</sup>

The court acknowledged that it previously utilized the Dominant Factor Test when “determining the character of [a] game,” but distinguished that case as involving a lottery, not a gambling device.<sup>164</sup> Rather, the court focused on whether a device was “used for the purpose of betting”<sup>165</sup>—i.e., “the encouragement of the gambling instinct latent in many

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 3 (quoting 24 Am. Jur. Gaming and Prize Contests § 35 (1939)).

<sup>159</sup> *Id.*

<sup>160</sup> *Heartley*, 157 S.W.2d at 3 (quoting *State v. Mint Vending Mach.*, 154 A. 224, 228 (N.H. 1931)).

<sup>161</sup> 109 P.2d 1113, 1113 (Mont. 1941).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 1113–14.

<sup>164</sup> *Id.* at 1115 (citing *State v. Hahn*, 72 P.2d 459, 461 (Mont. 1937)).

<sup>165</sup> *Id.* at 1115–16 (citing *Peers v. Caldwell* [1915] KB 325, [331] (appeal taken from Eng.)).

people.”<sup>166</sup> In the words of the court, “an innocent game *involving the element of skill alone* becomes a gambling device when players bet on the outcome.”<sup>167</sup> And because the players wagered 5¢ on the outcome of the pinball game, the court thus held that the machine fell within the scope of the statute.<sup>168</sup>

The takeaway from these three cases is that the Gambling Instinct Test does not operate as part of the larger Prize/Chance/Consideration definition; rather, it acts as a substitute definition in and of itself. Courts apply the test when they feel that the traditional Prize/Chance/Consideration tests for chance fail to accurately identify gambling activity, and thus fail to achieve the public policy goals the legislature sought to address via the gambling statute.<sup>169</sup> And for whatever quibbles we may have about this brand of statutory interpretation, we can nevertheless glean lessons from these cases. These courts correctly identified the inaccuracy of Prize/Chance/Consideration, and perhaps happened upon a viable solution.

## 2. *Inducement and But-For Causation*

A second thing that may be noticed about the test is that it appears to be a circular definition—any grammar teacher worth his salt teaches his students not to define a word using the word itself. But this circularity is merely superficial.

Not every court that used the general language of the Gambling Instinct Test gave it the requisite clarity that we would expect of a well-reasoned opinion.<sup>170</sup> However, for the ones that did, there was a consistent thread: the courts focused on what induced players to play the game. This thread can be traced back to the earliest application of the test. In *State v. Shorts*, the defendants appealed an indictment for setting up and operating a lottery.<sup>171</sup> The defendants had circulated handbills throughout Trenton advertising a giveaway of “eight hundred costly presents, of various

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<sup>166</sup> Id. at 1116.

<sup>167</sup> Id. at 1116 (emphasis added).

<sup>168</sup> Id.

<sup>169</sup> See Levitt et al., *supra* note 37, at 610–13.

<sup>170</sup> See, e.g., *Kilburn*, 109 P.2d at 1116 (“The vice of the game consists not alone in the amount of money risked in playing it, but also in the encouragement of the gambling instinct.”). This is the penultimate statement of the opinion, and one can only really give content to “the gambling instinct” by making inferences from previous statements in the opinion.

<sup>171</sup> 32 N.J.L. 398, 398–400 (N.J. 1868).

values, [to] be distributed among the audience who should be present at the exhibition.”<sup>172</sup> Each guest was given a numbered ticket for “a trivial price.”<sup>173</sup> When it came time for the giveaway, Shorts would get up on stage and call out a number, and the guest with the corresponding ticket would come up on the stage.<sup>174</sup>

Mr. Shorts, if he considered such person would be a good advertiser for his exhibition, presented him with one of the articles advertised to be given away; but if he disliked the personal appearance of the party holding such ticket, or if such party refused to advertise and speak well of the exhibition, [Shorts] was under no obligation to give him any present.<sup>175</sup>

The defendants argued that this giveaway could not be classified as a lottery because the distribution depended not on chance, but on “free will.”<sup>176</sup>

The Supreme Court of New Jersey disagreed. Because “there was a chance of disproportionate gain, . . . [which] is the stimulus to the spirit of gaming which the law prohibits,” the giveaway scheme “clearly” constituted an illegal lottery.<sup>177</sup> The chance—or, more precisely, opportunity—of disproportionate gain that tempted people’s “cupidity” was, in the court’s view, the social ill at which these laws were aimed.<sup>178</sup> Put differently, it is the inducement of receiving a disproportionate return for one’s consideration that is the essential characteristic of gambling.

This simple concept would be a common refrain in opinions put forth in the heyday of the Gambling Instinct Test. The Chancery Court of New Jersey, in finding that certain chewing gum vending machines were gambling devices, declared it “unescapable that the underlying hope of the [consumer] is based upon the chance of getting something for nothing, or gain out of all proportion to what one has a right to expect.”<sup>179</sup> The

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<sup>172</sup> Id. at 399.

<sup>173</sup> Id. at 399, 401.

<sup>174</sup> Id. at 399.

<sup>175</sup> Id.

<sup>176</sup> Id. at 400.

<sup>177</sup> Id. at 401. The court, however, overturned the indictment on lack of factual proof as to the allegation in the indictment. Id. at 402.

<sup>178</sup> Id. at 401–02 (“It is an affair conspicuously within the mischief at which the statute is levelled.”).

<sup>179</sup> *Zaft v. Milton*, 126 A. 29, 30–32 (N.J. Ch. 1924).



court followed its statement with a citation to *Shorts*.<sup>180</sup> *Heartley* spoke similarly: “It is [the] inducement of receiving something for nothing that arouses the gambling instinct.”<sup>181</sup> Though these statements carry an anachronistic, moralizing tone, the inducement concept provides some much needed clarity to the bare tautology that the modern literature associates with the test.<sup>182</sup>

What, then, is the limiting principle of the Gambling Instinct Test? Like other areas of contract law dealing with inducement, the possibility of “making large gains by a small outlay” does not need to be the sole inducing factor.<sup>183</sup> Put differently, the Gambling Instinct Test incorporates a standard of but-for causation: Would the consumer have offered up her consideration “but for” the prospect of receiving a relative windfall? “[A] but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.”<sup>184</sup> Generally speaking, both at common law and in ordinary meaning, inducement has a built-in causation requirement.<sup>185</sup>

A test of but-for causation can best be seen in the New Hampshire Supreme Court’s decision holding mint vending machines similar to those in *Heartley* to be unlawful “gambling implement[s]” within the meaning of the state’s statutes.<sup>186</sup> The court decided that gambling did not require the stakes to have value but it could be established by “any inciting force sufficient to induce the risk.”<sup>187</sup> It is from this threshold of sufficiency that we can infer a requirement of but-for causation.<sup>188</sup>

<sup>180</sup> *Id.* at 32 (citing *Shorts*, 32 N.J.L.).

<sup>181</sup> *Heartley v. State*, 157 S.W.2d 1, 3 (Tenn. 1941).

<sup>182</sup> To this point, the test needs a better name. Unfortunately, neither the original application nor my refined test, see *infra* Section III.B, readily lend themselves to a name that is succinct, yet still descriptive—something like “the Inducement Test” fails to capture what a fact-finder should really be looking for.

<sup>183</sup> *Meserole v. Sutton*, 41 Pa. D. & C. 408, 413 (1941) (quoting *City of Wink v. Griffith Amusement Co.*, 100 S.W.2d 695, 698 (Tex. 1936)); cf. *Pac. Maxon, Inc. v. Wilson*, 619 P.2d 816, 817 (Nev. 1980) (permitting contract rescission if “the misrepresentation is part of the inducement to enter into the transaction”), *cited in* 27 Richard A. Lord, *Williston on Contracts* § 69:32 (4th ed. 2022).

<sup>184</sup> *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020).

<sup>185</sup> *United States ex rel. Cimino v. IBM*, 3 F.4th 412, 418 (D.C. Cir. 2021).

<sup>186</sup> *State v. Mint Vending Mach.*, 154 A. 224, 225, 228 (N.H. 1931).

<sup>187</sup> *Id.* at 228.

<sup>188</sup> The previous statement was one of many uses of such language: “[The requirement of value] would be satisfied by any ‘thing’ affording the necessary lure to indulge the gambling

To give further color to what it means for an inciting force to be sufficient, we can turn to the distinction between the but-for and motivating-factor tests used in the assessment of liability under Title VII.<sup>189</sup> This distinction is most apparent in the context of sporting tournaments, such as those discussed in Subsection II.A.1. When an aspiring professional golfer registers for a mini-tour, she certainly may be *motivated* to enter that specific tournament by the prize. And the amount of the prize may motivate her to choose one tournament over another. But the possibility of winning a cash prize did not induce her to put down an entry fee as consideration; rather, it is the hope of moving up the professional ranks, or perhaps even the love of the game, that induced her to enter into that “transaction.” Although the opinions applying the Gambling Instinct Test often gave less-than-explicit guidance on its application, enough was given so that clear distinctions may be drawn, even if those lines are nevertheless along subjective lines.

### 3. *Perspective of the Gambler, Not the House*

Lastly, even if one doubts that the Gambling Instinct Test is descriptively accurate, we nevertheless can take one lesson away from its application: gambling should be defined not by reference to the form of the activity, but by reference to the underlying psychological phenomenon. Following an articulation of a definitional test that incorporated the inducement concept, the Supreme Court of North Carolina gave an explanation as to why this is the superior approach:

[N]o sooner is a lottery defined, and the definition applied to a given state of facts, than ingenuity is at work to evolve some scheme of evasion which is within the mischief, but not quite within the letter, of the definition. But, *in this way, it is not possible to escape the law's condemnation, for it will strip the transaction of all its thin and false apparel and consider it in its very nakedness.* It will look to the

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instinct.”; “If the satisfaction of having one’s fortune told is sufficient moment to an operator to induce the spending of his nickels therefor, it must have an inciting value to him.”;

We have to conclude that it was the intention of the Legislature to declare a slot machine a gambling implement whenever the thing played for was a sufficient inducement to its patrons to encourage them to hazard or chance money beyond the purchase of the article which the machine vends, if any.

Id.

<sup>189</sup> Cf. *Bostock*, 140 S. Ct. at 1739–40 (contrasting the two approaches).

substance and not to the form of it, in order to disclose its real elements and the pernicious tendencies which the law is seeking to prevent.<sup>190</sup>

As implied by the court in this passage, trying to define gambling by the form of the activity is like trying to nail Jell-O to a tree. Those who conduct gambling activities are not trying to engage in conduct with a certain form—instead, they are attempting to appeal to a psychological impulse. Likewise, when modern legislatures decide to regulate gambling, they do so motivated by the perceived social ills of gambling—social ills that are caused by the underlying psychological phenomenon.<sup>191</sup> So if gambling operators are unconcerned with the precise form of the activity, and the form is irrelevant to the potential harms of gambling, then why should the legal definition focus solely on form?

Most importantly, adopting the perspective of the individual gambler allows for legal understandings of gambling to merge with modern scientific research on the causes of gambling addiction. The tests that courts use to identify gambling today were developed nearly a century before the concept of gambling addiction emerged.<sup>192</sup> And while technocratic governance has been the general trend since the time of the New Deal, regulation of gambling has curiously been left out of this movement.<sup>193</sup> Correction of this curiosity is long overdue.

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<sup>190</sup> *State v. Lipkin*, 84 S.E. 340, 343 (N.C. 1915) (emphasis added). The court continued:

It is the one playing at the game who is influenced by the hope enticingly held out, which is often false or disappointing, that he will, perhaps and by good luck, get something for nothing, or a great deal for a very little outlay. This is the lure that draws the credulous and unsuspecting into the deceptive scheme, and it is what the law denounces as wrong and demoralizing.

*Id.* at 343.

<sup>191</sup> Cf. Levitt, *supra* note 37, at 613 (“These decisions reveal that the courts perceive the ‘gambling spirit,’ or in modern terms, ‘gambling addiction,’ to be the legislature’s true concern.”).

<sup>192</sup> *Id.* at 613.

<sup>193</sup> See Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 *Yale L.J.* 1487, 1495–99, 1519 (1983) (describing the ebbs and flows of societal affinity for technocracy, with the New Deal marking a zenith for the movement’s popularity, and noting “a reemerging respect for technocrats” at the time of his writing); Anders Esmark, *The Technocratic Take-Over of Democracy: Connectivity, Reflexivity and Accountability 1* (3d Int’l Conf. on Pub. Pol’y, Working Paper No. T07P08, 2017), <https://www.ippapublicpolicy.org/file/paper/594bba371f736.pdf> [<https://perma.cc/WE6K-BSK7>] (noting a renewed debate over the merits of technocracy after a dormant period starting in the 1980s).

*B. Updating the Old Test*

Building off of the old cases, we can lay out the definitional test for gambling in two steps. First, was consideration given in exchange for a conditional promise of some other consideration? Second, did the prospect of receiving a return of disproportionate value upon the occurrence of the stipulated condition induce one party into conveying her consideration?<sup>194</sup> In other words, the first prong of the test requires the existence of a conditional contract; the second prong ascribes a but-for test as to the purpose of the transaction.

This refined test makes explicit what has often gone unstated in discussions of gambling: that gambling is a form of contract.<sup>195</sup> It also closely aligns with the definition of a gambler from the first edition of Black's Law Dictionary, published just prior to the doctrinal shift towards Prize/Chance/Consideration: "One who fellows or practices games of chance or skill, *with the expectation and purpose of thereby winning*

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<sup>194</sup> One potential conundrum with this test is that courts tend to disfavor subjective mental-state tests when the regulated party is not the one whose mental state is being analyzed. See, e.g., *California v. Hodari D.*, 499 U.S. 621, 628 (1991) ("[T]he test for existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person."); Marcy Strauss, *Reconstructing Consent*, 92 *J. Crim. L. & Criminology* 211, 221–22 (2002) ("Although the Supreme Court in *Schneekloth [v. Bustamonte]*, 412 U.S. 218 (1973), suggested that a defendant could try to invalidate the consent to search based on numerous subjective factors relating to the suspect's mental state or character, it is a rare case in which the court actually analyzes any of these factors. Even more rare is the case where the court finds them determinative and excludes the evidence."). Whether step two of this inquiry should be an objective or subjective test is a nuanced issue deserving of deeper analysis than can be given here. A tentative suggestion: For purposes of regulating an activity where one side of the transaction is offering fixed consideration in exchange for contingent consideration, the perspective should be that of the ordinary participant; when evaluating a transaction where both sides are offering contingent consideration (with the exception, perhaps, of "house banking game[s]," see 25 C.F.R. § 502.11 (2023)), the perspective should be that of the actual participants.

<sup>195</sup> This fundamental principle is best illustrated by lotteries and betting, where consideration is given in exchange for a promise to pay out a prize upon the occurrence of the named condition—e.g., the Yankees winning the World Series, or the promisee's lottery ticket being drawn. "[A] conditional promise is no less a promise because there is small likelihood that any duty of performance will arise, as in the case of a promise to insure against fire a thoroughly fireproof building." Restatement (Second) of Contracts § 2 cmt. e (Am. L. Inst. 1981). The same is true of poker: the chips staked by each player are the consideration, and the pot of all stakes are promised to be given to the player who wins the hand. More broadly, the common law viewed gambling as contractual, albeit illegal and unenforceable. 38 C.J.S. Gaming § 45 (2022).

money or other property.”<sup>196</sup> Perhaps more importantly, the refined test closely resembles a definition of gambling proposed in 2017 by a team of psychological researchers: “Staking money or something of material value on an event having an uncertain outcome *in the hope of winning* additional money and/or material goods.”<sup>197</sup> Reframing the test in this way also addresses one of Professor Cabot’s criticisms: the test as so formulated is now much more “susceptible to meaningful analysis by a trier of fact.”<sup>198</sup> And adopting a test without any assessment of the chance element assuages concerns over any supposed “imprecis[ion].”<sup>199</sup> Yet one critique persists. The test, even as clarified, arguably remains “highly subjective,” and without any further guidance, the evaluation of the test may still “vary widely in its application to particular games.”<sup>200</sup> For that guidance, we may turn to empirical research on gambling to provide heuristics for when an appeal to the gambling instinct is being made.

As a preliminary note, it is important to distinguish between evidence of gambling activity and evidence of problem gambling. To conflate the two makes the same mistake as the Economic Value Test for prize and consideration—it presumes that harm inheres in gambling activity, and therefore all gambling activity must cause harm. Evidence of problem gambling may inform how strictly to regulate that activity but will be consistently underinclusive for the initial diagnosis of gambling. A definitional test should only be concerned with diagnosis; decisions about the degree of regulation come after.

One strong indicator of gambling activity identified by psychological research is the presence of variable-ratio reinforcement schedules. As first theorized by B.F. Skinner, schedules of reinforcement describe forms of operant conditioning whereby a reward is conveyed for a certain number of behavioral responses, thus reinforcing that behavior.<sup>201</sup> As opposed to fixed-ratio reinforcement schedules, which convey a reward “upon completion of a fixed number of responses counted from the preceding”

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<sup>196</sup> Gambler, Black’s Law Dictionary (1st ed. 1891) (emphasis added). Lottery was given its standard definition. See Lottery, Black’s Law Dictionary (1st ed. 1891).

<sup>197</sup> Robert J. Williams, Rachel A. Volberg, Rhys M.G. Stevens, Lauren A. Williams & Jennifer N. Arthur, Can. Consortium for Gambling Rsch., *The Definition, Dimensionalization, and Assessment of Gambling Participation* 11 (2017) (emphasis added).

<sup>198</sup> Cf. Cabot et al., *Mixed Skill and Chance*, supra note 11, at 412 (criticizing the gambling instinct test for not being susceptible to meaningful analysis).

<sup>199</sup> Cf. id. (describing the gambling instinct test as imprecise).

<sup>200</sup> Id. at 394.

<sup>201</sup> Charles B. Ferster & B.F. Skinner, *Schedules of Reinforcement* 1–2 (1957).

reward, the rewards for variable-ratio reinforcement schedules are conveyed after a semi-random number of responses which, over time, come out to a certain mean number of responses.<sup>202</sup> Conveyance of the reward is thus unpredictable to the operant.<sup>203</sup> To illustrate these concepts: Imagine you want to teach your dog to sit on command. If you were to give your dog a treat every time he sits in response to your vocal command, that would be a fixed-ratio reinforcement schedule, with a response/reward ratio of 1 to 1. Were you to give him a treat once every three times he sits on command, the ratio would be “fixed” at 1 to 3. Were you to give him a treat every few times he sits (sometimes every one, sometimes every two, sometimes every three), that would be a variable-ratio reinforcement schedule. Variable-ratio reinforcement schedules are not only commonly associated with various forms of gambling, but gambling is indeed *the paradigmatic example* of such schedules in action.<sup>204</sup> Because reinforcement schedules can be observed ex ante, and because the correlation is so strong, the presence of a variable-ratio reinforcement schedule in a game’s conveyance of a reward is the strongest and most useful evidence of gambling activity.<sup>205</sup>

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<sup>202</sup> Id. at 5. The “ratio” spoken of in this context is the ratio of behavioral responses to reinforcing rewards. Id.

<sup>203</sup> See id. at 391.

<sup>204</sup> See Introduction to Psychology: Reinforcement Schedules, Course Hero (citing B.F. Skinner, Science and Human Behavior 397 (1953)), <https://www.coursehero.com/study-guides/asu-wmopen-psychology/reading-reinforcement-schedules/> [<https://perma.cc/8JTG-6SBH>] (last visited Jan. 17, 2023); Rose M. Spielman et al., Psychology § 6.3: Operant Conditioning, OpenStax (Dec. 8, 2014) (citing B.F. Skinner, Science and Human Behavior 397 (1953)), <https://openstax.org/books/psychology/pages/6-3-operant-conditioning> [<https://perma.cc/UH33-FZUT>]; see also Mark R. Dixon & Jordan Belisle, Gambling Behavior, in The Routledge Companion to Consumer Behavior Analysis 231, 233 (Gordon R. Foxhall ed., 2016) (noting that B.F. Skinner once suggested that “[a]ll gambling systems are based on variable-ratio schedules,” but that the scientific community has generally moved on from this conceptualization (quoting B.F. Skinner, About Behaviorism 60 (1974))).

<sup>205</sup> A relatively recent study has shown that a sub-type of these schedules, random-ratio reinforcement schedules (which have a larger distribution in ratios than variable-ratio schedules), may be even more closely linked to certain forms of gambling and “may have etiological significance in the development of problematic levels of gambling in vulnerable individuals.” John Haw, Random-Ratio Schedules of Reinforcement: The Role of Early Wins and Unreinforced Trials, 21 J. Gambling Issues 56, 57–59, 62 (2008) (quoting Louise Sharpe, A Reformulated Cognitive-Behavioral Model of Problem Gambling: A Biopsychosocial Perspective, 22 Clinical Psych. Rev. 1, 8 (2002)). However, as noted by the author, “[t]here is still uncertainty regarding the behavioural differences between a [variable-ratio] and a [random-ratio] schedule;” thus, further research may be necessary to discern whether this distinction is worth incorporating into a legal definition. Haw, *supra*, at 59.

Another strong indicator of gambling activity is correlations in consumer spending habits between the activity in question and other forms of gambling. The Zendle and Cairns study on video game loot boxes provides an example of what such an indicator would look like.<sup>206</sup> The researchers categorized subjects into one of four categories: non-problem gamblers, low-risk gamblers, moderate-risk gamblers, and problem gamblers.<sup>207</sup> The researchers then compared the relationship between subjects' spending on loot boxes and problem gambling with the relationship between spending on other sorts of micro-transactions and problem gambling, finding that the amount spent on loot boxes presented a stronger correlation with the severity of the subject's gambling habit than the relationship between other micro-transactions and problem gambling.<sup>208</sup> Where there is such a strong correlation, there is a high likelihood that the examined activity is stimulating the same psychological impulses as more traditional forms of gambling.

Though weaker evidence than the aforementioned factors, indicators of problem gambling can also serve as an indirect way to identify gambling activity. Professor Mark Griffiths, whose psychological research focuses primarily on gambling, has identified various factors which may increase the addictive potential of a particular form of gambling, three of which could be relevant to this inquiry: the illusion of control, the possibility of immediate repeat play, and the number of potential rewards.<sup>209</sup> However, these factors are not an exhaustive list, nor are they necessarily relevant in every case, nor are they meant to be tallied up mechanically—they are merely a guide to courts for evaluating the two-part touchstone test.<sup>210</sup> Staying focused on the questions of contingent contract and inducement,

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<sup>206</sup> David Zendle & Paul Cairns, Video Game Loot Boxes Are Linked to Problem Gambling: Results of a Large-Scale Survey, *Plos One* (Nov. 21, 2018), <https://doi.org/10.1371/journal.pone.0206767> [<https://perma.cc/P6WL-DDYC>]. Although there are some legitimate criticisms of the specifics of the Zendle & Cairns study, see *Loot Box Report*, *supra* note 108, at 43–44, it nonetheless serves as a replicable model for identifying activities as gambling.

<sup>207</sup> Zendle & Cairns, *supra* note 206, at 6 tbl.1.

<sup>208</sup> *Id.* at 6–7 tbls.1 & 3.

<sup>209</sup> See Mark D. Griffiths & Michael Auer, The Irrelevancy of Game-Type in the Acquisition, Development, and Maintenance of Problem Gambling, *Frontiers in Psych.*, Jan. 2013, at 1–3.

<sup>210</sup> Cf. *Ironhawk Techs., Inc. v. Dropbox, Inc.*, 2 F.4th 1150, 1160–61 (9th Cir. 2021) (describing how courts should evaluate the eight-factor trademark infringement inquiry put forth by *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348–49 (9th Cir. 1979)).

issues that “fall more naturally into a judge’s bailiwick,”<sup>211</sup> should promote consistency and accuracy in application of the test.

In addition to scientific study, consistency in evaluation of the test could be improved by delegating adjudication of the issue to administrative agencies.<sup>212</sup> Not only can an administrative agency employ experts on the psychology of gambling and conduct studies to inform their adjudications, but the adjudicating officials’ repeated exposure to a recurring set of familiar fact patterns can further the administration of justice. “‘Cumulative experience’ begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated.”<sup>213</sup> Empirical study and administrative expertise should provide a much more accurate definition of gambling than ivory-tower theorizing ever could.

### C. Smoke Testing the New Definition

Legal definitions are, in essence, algorithms, where a certain set of facts are the input, and a legal classification based on those facts is the output.<sup>214</sup> Therefore, insofar as there are inputs for which we know the correct output, any legal definition can be “smoke tested” against these inputs to see if it outputs the correct classification. Gambling has a number of paradigmatic test cases: lotteries, betting, and casino games.<sup>215</sup>

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<sup>211</sup> *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019).

<sup>212</sup> See Cabot & Csoka, *The Games People Play*, supra note 11, at 255. Undoubtedly, implementing this definition at a national level would go even further in fostering consistency in application. Any attempt to do so may walk a tenuous line between preemption and commandeering. For a discussion of that tenuous line, see generally Edward A. Harnett, *Distinguishing Permissible Preemption from Unconstitutional Commandeering*, 96 *Notre Dame L. Rev.* 351 (2020) (discussing and critiquing the conventional understanding of the distinction between preemption and commandeering). Tenth Amendment concerns may be particularly sharp given the historical pedigree of state regulation of gambling. See Cabot & Csoka, *The Games People Play*, supra note 11, at 230. And any sort of “cooperative federalism” scheme may run into additional problems related to the Take Care Clause and Unitary Executive Theory. See Ronald J. Krotoszynski Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 *Duke L.J.* 1599, 1623–25 (2012).

<sup>213</sup> *NLRB v. Seven-Up Bottling Co. of Mia.*, 344 U.S. 344, 349 (1953).

<sup>214</sup> Cf. Caleb Nelson, *Statutory Interpretation* 905 (2011) (making a similar point to distinguish changes in a legal directive’s *application* from changes to its *meaning*).

<sup>215</sup> Cf. Sarah Remes, Note, *Legalizing America’s New Pastime: Teaming Up with the House for Pari-Mutuel Sports Betting*, 16 *Wake Forest J. Bus. & Intell. Prop. L.* 551, 558 (2016) (breaking down gambling into “three main buckets: lotteries, wagers, and gaming”).



Prize/Chance/Consideration is a poor legal definition because it fails some of the fundamental test cases for gambling—namely sports betting and poker, both of which are undoubtedly games of skill.<sup>216</sup>

Recognizing that gambling is a form of contract, we can also establish some negative test cases—for purposes of the definition of gambling, such cases would be activities which share mechanical similarities to gambling, but are agreed not to be gambling. Two such edge cases are insurance contracts and securities trading.<sup>217</sup> Like poker and sports betting, these two edge cases show the defects of Prize/Chance/Consideration: both fall under the scope of the definition.<sup>218</sup> Using these two negative test cases, as well as the three positive ones identified above, we can evaluate the proposed definition.

### *1. Positive Case Testing*

Of the three paradigmatic categories, lotteries most clearly satisfy the old definition. They likewise satisfy the new test. Take a traditional “pure chance” lottery, such as a Powerball drawing. At step one, we look to see if there is a contingent contract. Here, there is such a contract: each participant has offered consideration for a ticket with her five selected numbers; if her five numbers are drawn (the contingency), then the participant wins the jackpot (the contingent consideration). At step two, we evaluate whether the participant would not have staked her consideration but for the prospect of receiving a return disproportionate to that consideration. For Powerball, that is again clearly satisfied. The participant paid her consideration not for a mere piece of paper, but for the prospect of winning a jackpot that is orders of magnitude larger than her staked consideration. Because step two is clearly resolved, there is no need to look at any additional indicators of gambling activity.

Next, we can evaluate a casino game that the old definition struggles with: poker. For purposes of this discussion, we assume that the “chips” are either cash or tokens of cash value. As noted above, step one is

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<sup>216</sup> See *supra* note 12 and accompanying text.

<sup>217</sup> See, e.g., Roy Kreitner, *Speculations of Contract, or How Contract Law Stopped Worrying and Learned to Love Risk*, 100 *Colum. L. Rev.* 1096 *passim* (2000); *id.* at 1096 (arguing that “no analytic formula [can] distinguish gambling from risk allocation” like commodities futures trading and insurance contracts).

<sup>218</sup> Unsurprisingly, many legislatures explicitly exempt these two activities from the definition. See, e.g., Haw. Rev. Stat. § 712-1220 (2022); Ariz. Rev. Stat. Ann. § 13-3301(6) (2021).

satisfied: a player's staked chips are the consideration, the contingency is the win conditions, and the pot of all stakes is the contingent consideration. We thus move on to step two. In the context of poker, we are asking whether a player would have paid consideration to play the game if there were no possibility of winning the pot. It is the prospect of winning a disproportionate reward that differentiates poker from an ordinary card game. The possibility of winning a pot of greater value than what he put down is not just a but-for cause, but *the* but-for cause of a poker player putting down his consideration.

For the final positive test case, we shall analyze another game of mixed chance and skill: sports betting. Once again, step one has been discussed above. For step two, we ask a similar question as we did for poker: Would the bettor have paid money to the bookie but for the possibility of a payout of greater value than her stake? And much like poker, the answer is clear: it would be a stretch to say that anything other than this possibility is a but-for cause of the bettor paying her consideration. Thus, for all three positive test cases, we can say that the new definition operates as expected.

## *2. Negative Case Testing*

The negative test cases should push the definition a little harder. Conveniently, the two chosen negative test cases not only produce errors when evaluated under Prize/Chance/Consideration, but also demonstrate what failure looks like at each of the two respective steps of analysis under the new test.

Beginning with insurance contracts, it is important to note first that the insured—not the insurer—is the potential “gambler” in this context.<sup>219</sup> Here, step one is trivially satisfied. At step two, we observe that although the potential insurance payout is significantly larger than the consideration put down by the insured, the possibility of getting a “windfall” did not induce her to enter into the transaction. It is a well-established tenet of insurance law that the policyholder must have an insurable interest at least equal to the amount of coverage purchased.<sup>220</sup> “The modern function of the requirement of an insurable interest is to

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<sup>219</sup> To explain further, the consideration conveyed to the insurer under the typical insurance contract is guaranteed, not contingent on the occurrence of an event.

<sup>220</sup> Kenneth S. Abraham & Daniel Schwarcz, *Insurance Law and Regulation* 302 (6th ed. 2015) (citing *Ryan v. Tickle*, 316 N.W.2d 580 (Neb. 1982)).

serve the principle of indemnity: the notion that the purpose of insurance is to protect the insured against suffering a loss, not to create the opportunity for gain.”<sup>221</sup> Indeed, the requirement of insurable interest originated in eighteenth-century English statutes aimed at gambling practices thinly veiled as insurance contracts.<sup>222</sup> As stated by Professor Robert Keeton, “the principle of indemnity is aimed chiefly at guarding against *inducements* to wagering.”<sup>223</sup> Thus, by looking to the purposes of the transaction, we can bring these two doctrines back into alignment. Returning to the application of the test, because the contingency that triggers payout of an insurance contract would cause the insured some sort of loss or harm, there is no “possibility of fortuitous profits” to act as an inducement.<sup>224</sup> And without this inducement, there can be no gambling.

Moving on to securities trading: at step one, we observe that there is no contingent contract for the generic sale of a stock. Although there is consideration on both sides, there is no *contingent* consideration—the seller’s duties under the contract terminate when the stock has been conveyed. And without any contingency, there can be no gambling.

Ending the test case here would be unsatisfactory. The simple purchase of a stock is hardly the only transaction occurring on the securities market.<sup>225</sup> As other commentators have noted, derivatives trading is particularly difficult to distinguish from gambling.<sup>226</sup> Compared to other forms of investment—such as stocks, houses, or even works of art, where “investors purchase and own such assets and have certain rights attendant

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<sup>221</sup> *Id.* at 215.

<sup>222</sup> See Robert H. Jerry, II, *Understanding Insurance Law 177–79* (1987) (describing Marine Insurance Act of 1745, 19 Geo. 2 c. 37 (UK) and the Life Assurance Act of 1774, 14 Geo. 3 c. 48 (Gr. Brit.)). For the various theories on what may constitute an insurable interest, see *id.* at 181–91.

<sup>223</sup> Robert H. Keeton, *Basic Text on Insurance Law 92* (1971).

<sup>224</sup> Cf. Jerry, *supra* note 222, at 179 (describing an insurance transaction as a socially useful protection against loss in contrast to a gambling transaction’s mere promise of profits).

<sup>225</sup> See John Detrixhe, *Options Trading Is Poised to Overtake the Stock Market*, Quartz (Nov. 22, 2021), <https://qz.com/2092197/options-trading-is-poised-to-overtake-the-stock-market/> [<https://perma.cc/T23W-FT9Y>].

<sup>226</sup> See generally, e.g., Timothy E. Lynch, *Gambling by Another Name: The Challenge of Purely Speculative Derivatives*, 17 *Stan. J.L. Bus. & Fin.* 67 (2011) (asserting that gambling contracts are simply purely speculative derivative contracts and, in light of this realization, recommending that purely speculative derivatives should generally be considered void for public policy reasons).

with ownership”—the speculative value of a derivative is purely contractual.<sup>227</sup>

For purposes of simplification, the forthcoming analysis will focus on futures contracts—“contracts that obligate parties to transact an asset at a predetermined future date and price”—to the exclusion of other types of derivatives, though it is nonetheless applicable.<sup>228</sup> At step one, we note that there is no explicit contingency present, which would normally end the inquiry. However, the transaction is not immediate. The contracting parties retain the option to mutually terminate the contract for sale and settle according to expectation damages—i.e., the difference in the price between time of agreement and time of settlement.<sup>229</sup> To the extent that mutual termination was implicit in the original agreement,<sup>230</sup> we can say that there is a two-way contingent contract: the “buyer” has promised to pay the difference in the price between Time 1 and Time 2 if the price at Time 1 is higher, whereas the “seller” has promised to pay that difference if the price at Time 2 is higher.<sup>231</sup>

Considered in a vacuum, it is hard to imagine a transaction that would more perfectly fit step two of the inquiry. But speculation is not the sole driver of derivative trades: derivatives can also be used to hedge a pre-existing risk or to give leverage to one’s holdings for a short-term influx of capital.<sup>232</sup> However, the fact that one side of the transaction may have

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<sup>227</sup> Timothy E. Lynch, *Derivatives: A Twenty-First Century Understanding*, 43 *Loy. U. Chi. L.J.* 1, 29 (2011).

<sup>228</sup> Adam Hayes, *Futures Contract*, Investopedia (Oct. 30, 2021), <https://www.investopedia.com/terms/f/futurescontract.asp> [<https://perma.cc/43Q2-4CNU>]. For an overview of the basics of derivatives, see Jason Fernando, *Derivatives: Types, Considerations, and Pros and Cons*, Investopedia (July 15, 2022), <https://www.investopedia.com/terms/d/derivative.asp> [<https://perma.cc/B2BD-CDCT>].

<sup>229</sup> See Kreitner, *supra* note 217, at 1102–05.

<sup>230</sup> Much like the insurable interest requirement, this distinction is already known to the law of contract. See Restatement (First) of Contracts § 523(1) (Am. L. Inst. 1932) (“A bargain purporting to be for purchase and sale is a wager if it is part of the bargain that no actual delivery of the subject matter shall be made, and that settlement between the parties shall be made on the basis of differences in market prices. But an undisclosed intention of one or both parties to a bargain does not invalidate it.”); *id.* § 523 cmt. a (“[A]n agreement that there shall be no actual delivery of the subject-matter . . . may be inferred from circumstances, as well as stated in express terms.”). Relevant circumstances may include whether the seller in fact owns the underlying asset at the time of agreement and whether the buyer has some non-speculative use for the asset (e.g., a commercial hedge of risk).

<sup>231</sup> So long as a given class of derivatives is frequently resolved by anticipatory breach instead of delivery of the underlying asset, this general idea holds. See Kreitner, *supra* note 217, at 1102–05.

<sup>232</sup> Lynch, *supra* note 227, at 19; Fernando, *supra* note 228.

non-speculative motivations does not resolve the issue. As discussed in Subsection III.A.3, the Gambling Instinct Test considers the perspective of the gambler, not the house. Here, since both sides are gambling (in that each has put forth contingent consideration), *both sides need to have a non-speculative motivation*. Under this analysis, a significant portion of futures trading appears to qualify as gambling.<sup>233</sup>

You might say this test has caused the definition to produce a little smoke. But if you are so inclined, do you feel similarly about a team taking bets against itself in order to hedge against risk?<sup>234</sup> Surely that team's motivations do not undermine the conclusion that anyone who would place such a bet would be gambling. If you are still hesitant about labelling certain derivative trades gambling, remember that this label says nothing about the degree of luck versus skill involved in the activity, nor does it resolve whether and to what extent the activity should be regulated.<sup>235</sup> Questions related to morality and cost/benefit analysis must follow the diagnostic, not precede it.

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<sup>233</sup> It is possible that this analysis could be applied to other sorts of derivatives as well—a topic which could be the subject of a paper on its own.

<sup>234</sup> Imagine, for instance, a match between two Premier League teams on the final day of the season. In a typical season, a fourth-place finish in the Premier League earns a team a spot in the next year's Champions League competition, whereas the fifth-place team would qualify for the lesser Europa League competition. Qualifying for the UEFA Champions League was worth \$13.63 million more than doing the same last year for the Europa League. See Sean Markus Clifford, *Champions League Prize Money Breakdown 2022: How Much Do the Winners Get?*, *Sporting News* (May 28, 2022), <https://www.sportingnews.com/us/soccer/news/champions-league-prize-money-breakdown-2022-how-much-winners/alyjqvtjhhxk311oivierz> [<https://perma.cc/6AJN-2JDP>]; Sean Markus Clifford, *Europa League Prize Money Breakdown: How Much Do the Winners Get in 2022?*, *Sporting News* (May 18, 2022), <https://www.sportingnews.com/us/soccer/news/europa-league-prize-money-breakdown-how-much-do-winners-2022/uvivwm7iuadjq8tbmrmr7ad> [<https://perma.cc/FS63-PWPR>]. If a fourth-place finish came down to one game, a team might try to hedge against this risk by taking bets against its victory. But surely this is irrelevant when those who are placing the bets are induced into the transaction by the prospect of a windfall.

<sup>235</sup> Although recent research has identified a significant conceptual and empirical overlap between gambling and speculative investing, see generally Jennifer N. Arthur, Robert J. Williams & Paul H. Delfabbro, *The Conceptual and Empirical Relationship Between Gambling, Investing, and Speculation*, 5 *J. Behav. Addictions* 580 (2016), the benefits of a more robust derivatives marketplace that includes speculative traders may outweigh the negative externalities associated with gambling. Cf. Lynch, *supra* note 226, at 107–25 (identifying ways in which purely speculative derivatives may confer a public benefit).

## CONCLUSION

Prize/Chance/Consideration is—and has always been—an ill-suited definitional test for gambling. The presence of chance in a game is neither a necessary nor sufficient condition for the identification of gambling activity. The core thesis of this Note is that gambling is a psychological phenomenon, and our legal definition should treat it as such. To that end, this Note identifies one historical approach that fits with that understanding: the Gambling Instinct Test.

Leading gambling law scholars have dismissed the test as subjective, moralizing, and unhelpful for finders of fact, in part due to a perception that it was simply another test for the presence of chance in a game. This Note corrects that view. Although previous applications of the test have been far from clear—uncertainty which undoubtedly contributed to its misconception—the test can be structured in a sufficiently disciplined way that it looks no different from doctrines well-established in other areas of law. While a quantitative, rule-like approach would be desirable, we simply do not understand the underlying psychological phenomenon well enough to reduce it to such terms.<sup>236</sup> Because of widespread prohibitions for the larger part of the past century, gambling has been woefully understudied. A test like Prize/Chance/Consideration that continually fails to capture gambling-like activities of a certain paradigm will only compound that problem. The Gambling Instinct Test—now stripped of its moralizing overtones and refined into an intelligible analytical framework—is the solution.

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<sup>236</sup> Cf. David Hackett Fischer, *Historians' Fallacies: Toward a Logic of Historical Thought* 61–62 (1970) (“The *fallacy of misplaced precision* is an empirical statement which is made precise beyond the practical limits of accuracy.”).