

# **The History that Preceded Historical Gaming: How Parimutuel Wagering Won its Place in America, as Typified by Kentucky**

Alex Gardner<sup>1</sup>

*Much focus lately has been given to the emergence of sports gambling nationally and the changing landscape surrounding the regulation of gambling, specifically bookmaking. This focus usually doesn't include parimutuel gambling. This paper traces the legal history of parimutuel wagering on horse racing since its creation in the nineteenth century to the new issues surrounding parimutuel wagering today. Parimutuel wagering on horse racing has faced a variety of legal challenges as it has spread across the world but has generally prevailed, solidifying itself as an accepted form of gambling. The legal challenges to parimutuel wagering on horse racing seem to follow a similar pattern of treatment by the governments in the jurisdictions where it is introduced. The treatment of parimutuel wagering on horse racing by Kentucky's government exemplifies this historical pattern and provides insight into the future of parimutuel wagering on horse racing nationally as new forms of parimutuel wagering are introduced, namely historical horse racing. Informing this paper are historical newspaper articles as well as current ones, legal briefs, court decisions, and academic studies. Kentucky's embrace of parimutuel wagering on horse racing in the early twentieth century led to a resurgence nationally and Kentucky is again leading the way in spreading parimutuel wagering across the country through historical horse racing.*

<sup>1</sup> A special thanks to Professor Sara Mayeux, my seminar professor at Vanderbilt, and Hayes Gardner for their support and guidance.

Few events can compete with the thrill of the Kentucky Derby. The parade of the horses and the trumpeter blaring a call to the post amplify the excitement for the hordes of spectators. The excitement builds as the horses race around the track at an average speed of 38 miles per hour, in what is known as “The Fastest Two Minutes in Sports.”<sup>2</sup> Viewers are not only enveloped in the spectacle itself, but many have wagered money on the race. As the horses make their final turn, bettors scream out support to the particular horses they have backed, occasionally referring to them by name but usually just by their number. Seasoned bettors know the different types of wagers (e.g., win, place, show, exacta, trifecta, superfecta, pick-5) and the inherent risks as well as rewards, but perhaps they aren’t aware that they are engaging in parimutuel wagering which has a long and controversial history.

Kentucky has a rich history of horse racing that is intertwined with the history of parimutuel wagering. While the industry is experiencing changes, enthusiasm still abounds. The 2018 Kentucky Derby was attended by 157,813 people and nine of the top 10 highest attended Kentucky Derby races have been in the last 10 years.<sup>3</sup> What’s more impressive, and critical to horse racing’s bottom line, is that a record \$149.9 million was wagered on the 2018 Kentucky Derby race itself – an 8% increase from the previous year.<sup>4</sup> While most horse racing fans know how to wager on horse races, they are less informed of the history and legal structures that afford them this ability. Horse tracks utilize parimutuel wagering, which operates by arranging bettors to compete amongst themselves instead of against the institution organizing the wagering; the institution just takes a percentage of the total amount wagered as their compensation.

<sup>2</sup> Linnea Zielinski, “How fast do Kentucky Derby horses run?,” *Metro Media US*, May 2, 2018, <https://www.metro.us/sports/how-fast-do-kentucky-derby-horses-run>.

<sup>3</sup> Gabe Hauari, “Over 157,000 people braved the elements at the 2018 Kentucky Derby,” *Louisville Courier Journal*, May 5, 2018, <https://www.courier-journal.com/story/sports/horses/triple/derby/2018/05/05/2018-kentucky-derby-attendance/584193002/>.

<sup>4</sup> Gregory Hall, “Derby Day Rain Doesn’t Dampen Record Betting,” *Blood Horse*, May 6, 2018, <https://www.bloodhorse.com/horse-racing/articles/227410/derby-day-rain-doesnt-dampen-record-betting>.

Parimutuel wagering has faced a variety of legal challenges as it has spread but has seemingly overcome them all. Throughout its existence, parimutuel wagering has found success in new markets, attracted scrutiny from governments, survived this scrutiny, and then taken hold as an established form of legal wagering. Kentucky's jurisprudence exemplifies this history of parimutuel wagering and provides a model of what's likely to come in states across the country.

### **I. Parimutuel Wagering: Background and Early History**

Parimutuel wagering is generally defined as a gambling structure in which patrons gamble amongst themselves and the odds are not fixed by a bookmaker or the 'house.' Instead, the organization that conducts the gambling takes a small set percentage while the majority of the gambled money is awarded to the winning bettors. Exact definitions vary but are not in conflict. The word parimutuel is French and translates as "to wager among ourselves."<sup>5</sup> The Merriam-Webster dictionary defines parimutuel as "a betting pool in which those who bet on competitors finishing in the first three places share the total amount bet minus a percentage for the management."<sup>6</sup> The Federal Interstate Horse Racing Act defines parimutuel wagering as "any system whereby wagers with respect to the outcome of a horserace are placed with, or in, a wagering pool conducted by a person licensed or otherwise permitted to do so under State law, and in which the participants are wagering with each other and not against the operator."<sup>7</sup>

Parimutuel wagering contrasts with a common form of gambling known as bookmaking.

<sup>5</sup> Joe Drape, "As Family Helped Build Betting System, It Witnessed Horse Racing History," *New York Times*, January 31, 2016, <https://www.nytimes.com/2016/02/01/sports/horse-racing/in-building-a-modern-betting-system-a-family-was-an-eyewitness-to-horse-racing-history.html>.

<sup>6</sup> "Pari-mutuel." Merriam-Webster.com. Accessed November 4, 2018. <https://www.merriam-webster.com/dictionary/pari-mutuel>.

<sup>7</sup> 15 USCS § 3002(13).

A bookmaker is “a person who determines odds and receives and pays off bets.”<sup>8</sup> A bookmaker can also be an institution like a casino. A bookmaker sets the odds for outcomes, like the various probabilities of different horses winning a race, and those odds stay fixed. So, when a bettor places a bet they know exactly how much they will receive should they win the bet. All the bets are paid to the bookmaker and all of the winnings are paid out from the bookmaker. Therefore, the bookmaker has an interest in the outcome of the event. For example, if a substantial number of people bet on a horse and that horse wins the bookmaker can lose money paying out the bets they owe; but the opposite is also true, if a horse on which few people have bet wins the bookmaker can make a lot of money. The system of bookmaking places the bettor and the bookmaker in opposition; the bettor wins if the event they wagered on occurs and the bookmaker wins if the event does not occur. Parimutuel wagering does not place the bettor and organization taking their bets in opposition. The organization conducting the parimutuel wagering just takes a set percentage of the total amount bet as their fee and pays out the rest. This percentage is set and monitored at the state level, which each state determining how they want to govern parimutuel wagering, if allowing it at all.

In Kentucky, horse racing is regulated by the Kentucky Horse Racing Commission (KHRC).<sup>9</sup> The KHRC is an independent state agency responsible for “regulating the conduct of horse racing and pari-mutuel wagering on horse racing and related activities within the Commonwealth of Kentucky.”<sup>10</sup> The commission promulgates regulations “governing and regulating mutuel wagering on horse races under what is known as the pari-mutuel system of

<sup>8</sup> "Bookmaker." Merriam-Webster.com. Accessed December 1, 2018. <https://www.merriam-webster.com/dictionary/bookmaker>.

<sup>9</sup> "Kentucky Horse Racing Commission." Public Protection Cabinet | Kentucky Horse Racing Commission. 2016. Accessed December 01, 2018. <http://khrc.ky.gov/Pages/default.aspx>.

<sup>10</sup> *Id.*

wagering.”<sup>11</sup> It also manages different funds (e.g., the Kentucky Thoroughbred Breeders' Incentive Fund, the Kentucky Horse Breeders' Incentive Fund, and the Kentucky Thoroughbred Development Fund) that promote the horse industry in the state which are financed through taxes on certain horse racing related activities.<sup>12</sup> The Commission is composed of 15 private individuals who all have ties to the horse racing industry. Some have direct ties to the industry as equine veterinarians, equine attorneys, and one is a famed former jockey (Pat Day) while others are professionals in different fields but also breed or own thoroughbred racehorses.<sup>13</sup> The power of the commission to regulate horse racing in Kentucky was affirmed as early as 1909 when the Kentucky Court of Appeals (then the highest Kentucky court) held that “the commission has complete control of racing in Kentucky” and can regulate betting at Kentucky racetracks.<sup>14</sup>

Parimutuel wagering is not defined in the Kentucky statutes. The Kentucky Administrative Regulations define parimutuel wagering as “a system or method of wagering approved by the commission [Kentucky Horse Racing Commission] in which patrons are wagering among themselves and not against the association and amounts wagered are placed in one or more designated wagering pools and the net pool is returned to the winning patrons.”<sup>15</sup> In a recent ruling the Franklin Circuit Court provided a definition for parimutuel wagering that satisfied Kentucky statutes, regulations, and existing case law.<sup>16</sup> The Court held that, in Kentucky, parimutuel wagering is “(1) a system or method of wagering approved by the

<sup>11</sup> Ky. Rev. Stat. § 230.361.

<sup>12</sup> "Kentucky Horse Racing Commission | Programs" Public Protection Cabinet | Kentucky Horse Racing Commission. 2016. Accessed December 01, 2018. <http://khrc.ky.gov/Pages/programs.aspx>.

<sup>13</sup> "Kentucky Horse Racing Commission | Commission Members" Public Protection Cabinet | Kentucky Horse Racing Commission. 2016. Accessed December 01, 2018. <http://khrc.ky.gov/Pages/commissioners.aspx>.

<sup>14</sup> “Death Knell To Bookmaking: The Court of Appeals Decides Against Latonia,” *Louisville Courier Journal*, December 11, 1909, 1.

<sup>15</sup> 810 KAR 1:001, Section 1 (48).

<sup>16</sup> *Appalachian Racing, LLC v. Family Trust Found. of Ky., Inc.*, No. 10-CI-01154 (Franklin Circuit Court Oct. 24, 2018).

Commission [Kentucky Horse Racing Commission]; (2) in which patrons are wagering among themselves and not against the Association; (3) amounts wagered are placed in one or more designated wagering pools; and (4) the net pool is returned to the winning patrons.”<sup>17</sup>

Parimutuel wagering was created by Joseph Oller in 1866 as a way to circumvent France’s prohibitions on lotteries.<sup>18</sup> Oller stayed busy as he was also the founder and manager of Paris’s Moulin Rouge.<sup>19</sup> He first created a sweepstakes game of total chance that was based on horse racing results.<sup>20</sup> A bettor would pay to draw a horse at random and an equal number of tickets for each horse would be sold — if the bettor’s horse finished first they would win their share of the money that had been pooled, minus Oller’s fee.<sup>21</sup> This system was wildly successful but drew the ire of the Paris police since the sweepstakes was governed entirely by chance, which made it an illegal lottery.<sup>22</sup> Oller then decided to remove the chance but keep the pools — instead of randomly assigning a horse to a bettor, each bettor got to select their horse.<sup>23</sup> He called his new creation “Paris Mutuels” which is the origination of the word parimutuel.<sup>24</sup> Oller also created a machine to assist the individuals operating parimutuel pools called a totalisator (also referred to as a totalizator) which helped track the number and amount of bets.<sup>25</sup> In 1868, just two years after he created the “Paris Mutuels,” Oller was indicted by police because they still considered the “Paris Mutuels” to be an illegal lottery.<sup>26</sup> Oller went to trial and the court adjudicating his case determined that parimutuel wagering was legal since bettors selected their

<sup>17</sup> *Id* at 6.

<sup>18</sup> *See* “‘Paris Mutuels’: Pool-Selling in the Old World and the New,” *Cincinnati Enquirer*, July 9, 1877, 2.

<sup>19</sup> “Pari-Mutuel Inventor, Death of Joseph Oller,” *Times* (London), Apr. 22, 1922.

<sup>20</sup> “Mutuel Betting in France,” *Chicago Daily Tribune*, September 29, 1908

<sup>21</sup> “‘Paris Mutuels’: Pool-Selling in the Old World and the New,” *Cincinnati Enquirer*, July 9, 1877, 2.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Ferran Canyameres, *L’Homme de la belle époque* (Paris: Les Editions Universelles, 1946), [https://books.google.com/books?id=cIFRAAAAcAAJ&source=gbs\\_navlinks\\_s](https://books.google.com/books?id=cIFRAAAAcAAJ&source=gbs_navlinks_s) 43.

<sup>26</sup> “The Paris Betting Agencies,” *Western Mail* (Cardiff), September 1, 1874, 5.

horse which removed the element of chance.<sup>27</sup> Straight out of the gate parimutuel wagering faced legal challenges, but its proponents emerged victorious in what would become the pattern regarding legal challenges to parimutuel wagering for the next 150 years.

Parimutuel wagering was discontinued for a short period due to another challenge by the French government.<sup>28</sup> In 1874, the French Public Prosecutor undertook a new action against Oller and 23 other parimutuel wagering businesses in an attempt to deny their ability to continue the parimutuel wagering.<sup>29</sup> The prosecutor argued a claim of fraud, alleging that the firms took bids on horses that were scratched or running under assumed names, and argued that a new pool, created by picking the winner of successive races or by betting against this occurring, turned the parimutuel wagering into a game of chance.<sup>30</sup> All the parimutuel operators on trial were found guilty, all the operators had their documents and furniture seized, and all were fined – Oller received the largest fine which was 5,000 francs.<sup>31</sup> This was ultimately just a temporary setback as less than 15 years later the French government once again allowed parimutuel wagering.

The resiliency of parimutuel wagering was exemplified by France's reintroduction of it not 15 years after the courts had ruled against its existence. The removal of parimutuel wagering from the sport of horse racing created a hole that was quickly filled by the bookmakers, and with the bookmakers came scandals.<sup>32</sup> The prevalence of bookmakers led to "abuses" that

<sup>27</sup> *Id.*

<sup>28</sup> See O. E. Bodington, "French Law on Taxation of Betting." *Journal of Comparative Legislation and International Law* 5, no. 4 (1923): 178-81, 178. <http://www.jstor.org/stable/752965>; "Prosecution of Paris Betting Agents," *London Daily News*, August 24, 1874.

<sup>29</sup> Bennett Liebman, "Pari-Mutuels: What Do They Mean and What is at Stake in the 21<sup>st</sup> Century?," *Marquette Sports Law Review* 27 (Fall 2016): 65; "Prosecution of Paris Betting Agents," *London Daily News*, August 24, 1874.

<sup>30</sup> Bennett Liebman, "Pari-Mutuels: What Do They Mean and What is at Stake in the 21<sup>st</sup> Century?," *Marquette Sports Law Review* 27 (Fall 2016): 65.

<sup>31</sup> "The Septennate," *The Times* (London), August 29, 1874, at 5.

<sup>32</sup> Bennett Liebman, "Pari-Mutuels: What Do They Mean and What is at Stake in the 21<sup>st</sup> Century?," *Marquette Sports Law Review* 27 (Fall 2016): 66.

“corrupt[ed] the turf.”<sup>33</sup> Bookmakers brought about “disagreeable features of English low-class betting life” including disruptive behavior described as “rowdyism” and in extreme cases defaulting bookmakers would disappear.<sup>34</sup> The Parisian authorities were forced to address this festering issue in March of 1884 when there was a riot “among the Anglo-Parisian betting fraternity in the Rue du Hanovre.”<sup>35</sup> Private individuals and businesses neighboring this street created a petition asking the Prefect of Police to interfere with the bookmakers and that he did, coming down “like a holy terror upon the whole gang of rouges and tricksters that infested the quarter.”<sup>36</sup> The “public saloons, agencies, and other haunts” that housed the bookmakers were closed and legal proceedings were initiated against those who resisted.<sup>37</sup> The problems and scandals from the bookmaking system drove France to reintroduce the parimutuel wagering system in 1887.<sup>38</sup> Parimutuel wagering was formally authorized by legislation in 1891 and again the public immediately embraced it, wagering an estimated 505 million francs over the next 5 years.<sup>39</sup>

Parimutuel wagering’s first expansion out of France was into England where its legality was subsequently challenged.<sup>40</sup> Parimutuel wagering was exposed to an international audience at the 1867 Universal Exhibition in Paris and was well received as members of royal families from various countries, including England, gathered around to see the system work.<sup>41</sup> The expansion to England was also encouraged by Oller, who placed advertisements in London papers soliciting

<sup>33</sup> “Mutuels: Found To Be Fairest,” *Cincinnati Enquirer*, April 5, 1908, C1.

<sup>34</sup> Henry La Luberne. “Betting in France.” *The Daily Inter Ocean* (Chicago), December 15, 1889, 23.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Bennett Liebman, “Pari-Mutuels: What Do They Mean and What is at Stake in the 21<sup>st</sup> Century?,” *Marquette Sports Law Review* 27 (Fall 2016): 66.

<sup>39</sup> “Betting in Paris,” *The Daily Inter Ocean*, May 26, 1896, 5.

<sup>40</sup> See Bennett Liebman, “Pari-Mutuels: What Do They Mean and What is at Stake in the 21<sup>st</sup> Century?,” *Marquette Sports Law Review* 27 (Fall 2016): 67.

<sup>41</sup> “Prosecution of Paris Betting Agents,” *London Daily News*, August 24, 1874.

Englishmen to place bids through his parimutuel system.<sup>42</sup> The system in England operated just like Oller's parimutuel wagering system in France.<sup>43</sup> In August of 1870, police arrested the operators of a parimutuel wagering machine at the Wolverhampton racetrack, which is just outside of Birmingham (and is still open to this day).<sup>44</sup> This arrest culminated in the case of *Tollett v. Thomas* which went all the way to the English High Court, who determined that parimutuel wagering was a game of chance.<sup>45</sup> Chief Justice Cockburn's analysis focused on the uncertainty of the payouts; bettors had no way of knowing exactly what their potential payout would be until after the window for wagering had already closed, and in his eyes, this uncertainty turned parimutuel wagering into a game of chance.<sup>46</sup> Parimutuel wagering remained illegal in England until the Racecourse Betting Act of 1928, otherwise known as the "Totalisator Bill," was passed<sup>47</sup> and has remained legal ever since.<sup>48</sup>

Shortly after jumping the Channel from France to England, parimutuel wagering hopped the pond to America late in the 19<sup>th</sup> century. American newspapers consistently published an effective illustration of how parimutuel wagering operated in order to introduce Americans to this new form of gambling.<sup>49</sup> Six horses named A, B, C, D, E, and F are entered into a race. Individuals who want to wager on the winner of the race approach the operator of the parimutuel wagering machine, sometimes known as the totalizator. The wagering individual buys one ticket

<sup>42</sup> "Pari-Mutuel Betting," *The Sportsman*, March 19, 1870; "Pari-Mutuel Betting," *The Sportsman*, May 7, 1870.

<sup>43</sup> Bennett Liebman, "Pari-Mutuels: What Do They Mean and What is at Stake in the 21<sup>st</sup> Century?," *Marquette Sports Law Review* 27 (Fall 2016): 67-8.

<sup>44</sup> *Id* at 67.

<sup>45</sup> O. E. Bodington, "French Law on Taxation of Betting." *Journal of Comparative Legislation and International Law* 5, no. 4 (1923): 178-81, 178. <http://www.jstor.org/stable/752965>.

<sup>46</sup> Bennett Liebman, "Pari-Mutuels: What Do They Mean and What is at Stake in the 21<sup>st</sup> Century?," *Marquette Sports Law Review* 27 (Fall 2016): 68.

<sup>47</sup> "Commons And The Post Office," *The Times* (London), July 13, 1928, 14.

<sup>48</sup> "82 years of betting: a history of the Tote," *The Telegraph* (London), December 11, 2010, <https://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/leisure/8194547/82-years-of-betting-a-history-of-the-Tote.html>.

<sup>49</sup> See "Gambling by Pools: 'Paris Mutuals' and 'Combination Mutuals,'" *Daily American* (Nashville), November 15, 1876, 4; "'Paris Mutuals': Pool-Selling in the Old World and the New," *Cincinnati Enquirer*, July 9, 1877, 2.

for \$5 on horse C. The operator makes out a ticket indicating the amount wagered and the horse it was wagered on. The totalizator is then adjusted to display how many tickets have been sold for each horse and is updated continuously. Ticket sales end right as the race begins. In this example 100 tickets, worth \$5 each, have been sold. There were 10 tickets sold for horse A, 20 for B, 25 for C, 5 for D, 10 for E, and 30 for F. All told there is \$500 in the pool of bets. The operator would then take their commission, which was originally 10%.<sup>50</sup> So there is now \$450 to be distributed to the individuals holding winning tickets. If horse A wins, each ticket for horse A pays \$45; if horse B wins, each ticket pays \$22.50; if horse C wins, each ticket pays \$18, and so on.

Parimutuel wagering found immediate success in America. Parimutuel wagering first appeared in America in the spring of 1872 at the Jerome Park Racetrack in Westchester County, New York,<sup>51</sup> which was so close to New York City it eventually became the Jerome Park Reservoir in the Bronx.<sup>52</sup> In less than 18 months, patrons at the Lick House saloon in San Francisco, located 2,500 miles away from Jerome Park, were able to place bets on a parimutuel machine.<sup>53</sup> Parimutuel wagering continued to spread like wildfire across the United States such that by 1877 it had reportedly appeared at every racetrack and “at the scene of nearly every sporting event in the country.”<sup>54</sup> In a nod to its popularity, a semi-professional baseball team from Paris, Kentucky nicknamed themselves the ‘Mutuals’ so as to be called the ‘Paris

<sup>50</sup> “Gambling by Pools: ‘Paris Mutuals’ and ‘Combination Mutuals,’” *Daily American* (Nashville), November 15, 1876, 4.

<sup>51</sup> “‘Paris Mutuals’: Pool-Selling in the Old World and the New,” *Cincinnati Enquirer*, July 9, 1877, 2.

<sup>52</sup> “The End of Jerome Park; A Famous Race Course to be Turned into a City Reservoir,” *The New York Times*, December 30, 1894, at 20.

<sup>53</sup> “The Pari-Mutual Pool Selling,” *San Francisco Chronicle*, November 14, 1873, 3.

<sup>54</sup> “‘Paris Mutuals’: Pool-Selling in the Old World and the New,” *Cincinnati Enquirer*, July 9, 1877, 2.

Mutuals.’<sup>55</sup> This popularity was driven by its appeal to both the rich and poor, the youth, and “[e]ven women became infatuated with the excitement of betting in the pools...”<sup>56</sup>

As in France, allegations of misconduct followed parimutuel wagering’s rapid spread across the country.<sup>57</sup> Operators of parimutuel wagering pools were accused of bribing jockeys and stablemen in an attempt to manipulate the pools.<sup>58</sup> In one widely reported scam, it was suspected that the operators running the parimutuel wagering would increase the total number of bets made on a winning horse by reallocating bets away from a losing horse. This tactic would not alter the amount in each horse’s pool but would allow the operators to pocket the share of the winnings from the altered tickets.<sup>59</sup> The example used earlier to illustrate how parimutuel wagering works can also illustrate how this scam works. A race begins and there is \$450 in the pool after the operator takes their \$50 commission. Ten tickets were purchased for horse A so if horse A wins the holders of these tickets get \$45. But operators would sometimes move tickets around such that it appeared that 15 people bet on horse A; if horse A wins, the holders of the tickets now only get \$30. The ten people who actually bought tickets for horse A would pocket \$300 from the pool and the operators would collect the remaining \$150 as fruits of their scam.

Another scandal emerged regarding parimutuel wagering on the 1876 presidential election. Parimutuel pool-sellers, particularly in New York City, began branching out and organizing pools on events outside of horse racing like rowing and walking matches.<sup>60</sup> Pools organized around the Presidential election brought unprecedented levels of attention and with

<sup>55</sup> "The Brown Bosses." *St. Louis Globe-Democrat*, September 7, 1876, 8.

<sup>56</sup> "Paris Mutuals': Pool-Selling in the Old World and the New," *Cincinnati Enquirer*, July 9, 1877, 2.

<sup>57</sup> "Gambling by Pools: 'Paris Mutuals' and 'Combination Mutuals,'" *Daily American* (Nashville), November 15, 1876, 4; "Paris Mutuals': Pool-Selling in the Old World and the New," *Cincinnati Enquirer*, July 9, 1877, 2.

<sup>58</sup> "Horsemen to Organize: Abuses of the Trotting Turf to be Rectified," *The Milwaukee Sentinel*, March 1, 1897, 7.

<sup>59</sup> "Gambling by Pools: 'Paris Mutuals' and 'Combination Mutuals,'" *Daily American* (Nashville), November 15, 1876, 4.

<sup>60</sup> "Paris Mutuals': Pool-Selling in the Old World and the New," *Cincinnati Enquirer*, July 9, 1877, 2.

that huge sums of money; it was reported that somewhere between \$1 million and \$3 million dollars were invested in parimutuel pools on the election.<sup>61</sup> It was alleged that supporters of Democratic candidate Samuel Tilden, who was governor of New York, manipulated parimutuel pools in New York City in an attempt to benefit themselves personally and influence voting in other parts of the country.<sup>62</sup> However, attempts to manipulate the pools were not successful as Republican Rutherford B. Hayes emerged as president following a disputed election, and all of the money in the pools was returned to the bettors following public pressure on the pool-sellers to do so.<sup>63</sup>

Within a few years of its introduction to America, the surging popularity of parimutuel wagering waned for a few decades as its legality was questioned, mirroring its experience in England and France. Just two years after parimutuel wagering appeared at Jerome Park Racetrack, the New Jersey Legislature attempted to suppress parimutuel wagering at tracks in their state but the measure failed.<sup>64</sup> In 1877, the New York legislature banned parimutuel wagering pools, partially in response to the fiasco created by gambling on the 1876 presidential election.<sup>65</sup> Efforts to end parimutuel wagering pools spread throughout the country. Illinois contemplated outlawing parimutuel wagering as it had fallen from being the most popular form of betting to “now used only to accommodate the small fry.”<sup>66</sup> Ohio outlawed pool selling and punished those who tried to circumvent the law by wagering on pools in neighboring

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> “‘Paris Mutuals’: Pool-Selling in the Old World and the New,” *Cincinnati Enquirer*, July 9, 1877, 2.

<sup>64</sup> “Gambling by Pools: ‘Paris Mutuals’ and ‘Combination Mutuals,’” *Daily American* (Nashville), November 15, 1876, 4.

<sup>65</sup> 1877 N.Y. Laws 192; “‘Paris Mutuals’: Pool-Selling in the Old World and the New,” *Cincinnati Enquirer*, July 9, 1877, 2.

<sup>66</sup> “After the Pool-Rooms: The Next Illinois Legislature to Be Asked to Act Concerning Them,” *St. Louis Globe-Democrat*, October 31, 1886, 5.

Kentucky.<sup>67</sup> The Alabama legislature passed an “anti-pool selling law” in 1897 that was upheld by their Supreme Court in 1899.<sup>68</sup> The San Francisco Board of Supervisors passed an ordinance prohibiting pool-selling in 1899.<sup>69</sup> As a result of these legal obstacles, parimutuel wagering fell into disuse across the country and bookmakers “held sway in the betting rings.”<sup>70</sup>

## II. Parimutuel Wagering in the Twentieth Century

Around the turn of the century, bookmaking became the target of the progressive movement which reduced gambling generally but set the table for parimutuel wagering’s return with Kentucky at the center.<sup>71</sup> Progressives strongly opposed bookmakers, finding them to be immoral and dishonest, and pressured state governments to outlaw bookmaking.<sup>72</sup> In a 1909 case, the Kentucky Court of Appeals detailed how there was a public “revolt” against gambling across the country due to gamblers “overtaking the racetracks” with the public demanding a “cessation of the betting evil.”<sup>73</sup> In that opinion the Court upheld the constitutionality of a statute that outlawed gambling generally while allowing parimutuel wagering specifically.<sup>74</sup> Similarities were drawn between France, England, and the United States, all having had the racetracks “corrupted” by bookmakers.<sup>75</sup> The number of racetracks in the United States dwindled from 314

<sup>67</sup> “A Roundabout Way of Betting,” *The New York Times*, June 2, 1887, 4.

<sup>68</sup> “Pool Selling Illegal: Alabama Supreme Court Upholds the Anti-Pool Law – May Stop Racing in That State,” *The New York Times*, December 21, 1899, 1.

<sup>69</sup> “San Francisco’s Anti-Betting Law,” *The New York Times*, March 14, 1899, 8.

<sup>70</sup> “Facts About New System: Tremendous Success of Pari-Mutuel Betting Scheme in France,” *Louisville Courier Journal*, April 6, 1908, 7.

<sup>71</sup> Bennett Liebman, “Pari-Mutuels: What Do They Mean and What is at Stake in the 21<sup>st</sup> Century?,” *Marquette Sports Law Review* 27 (Fall 2016): 73.

<sup>72</sup> *Id.*

<sup>73</sup> “Death Knell To Bookmaking: The Court of Appeals Decides Against Latonia,” *Louisville Courier Journal*, December 11, 1909, 1; *State Racing Comm’n, v. Latonia Agric. Ass’n*, 123 S.W. 681, 684 (Ky. 1909).

<sup>74</sup> *State Racing Comm’n, v. Latonia Agric. Ass’n*, 123 S.W. 681, 684 (Ky. 1909).

<sup>75</sup> “Some Facts About the Pari-Mutuel Betting: How System of Wagering Has Grown in Favor Among Turf Lovers,” *Louisville Courier Journal*, May 22, 1910, D4.

in 1897 to only 43 in 1908.<sup>76</sup> Tracks closed as the states in which they were located outlawed gambling on horse races, like Tennessee did in 1905.<sup>77</sup> The national closure of tracks drove horse owners to seek greener pastures and Kentucky was especially appealing to northern horse owners.<sup>78</sup> This influx of horses, horse owners, and their incredible amounts of money is credited with creating the horse racing industry in central Kentucky as we know it today.<sup>79</sup> The prestige, success, and influence of horse racing in central Kentucky have led it to be called the “Horse Racing Capital of the World.”<sup>80</sup>

After a 20-year absence, parimutuel wagering returned to Churchill Downs for the 1908 Derby where it was immediately successful.<sup>81</sup> In October of 1907, a Louisville sheriff said he would raid the bookmakers at Churchill Downs when the track opened for the fall meet unless he was restrained by an injunction.<sup>82</sup> Churchill Downs did not hold fall races but began preparations to replace the bookmakers with parimutuel wagering in order to be able to hold spring races.<sup>83</sup> In order to ensure that racing could continue, Churchill Downs received an injunction from Kentucky’s highest court, the Court of Appeals, preventing local authorities from interfering with the parimutuel pools.<sup>84</sup> In preparation for the reintroduction of parimutuel wagering during

<sup>76</sup> Bennett Liebman, “Pari-Mutuels: What Do They Mean and What is at Stake in the 21<sup>st</sup> Century?,” *Marquette Sports Law Review* 27 (Fall 2016): 73.

<sup>77</sup> Richard Locker, “Tennessee tries again to re-establish horse racing with pari-mutuel wagering,” *Knoxville News Sentinel*, May 12, 2016, <http://archive.knoxnews.com/news/local/tn-tries-again-to-reestablish-horse-racing-with-pari-mutuel-wagering-32a6883d-94bf-6888-e053-0100007-379260121.html>.

<sup>78</sup> Hilary Busis, “The Mane Event: How did central Kentucky become horse country?,” *Slate*, April 30, 2010, <https://slate.com/news-and-politics/2010/04/how-did-central-kentucky-become-horse-country.html>

<sup>79</sup> *Id.*

<sup>80</sup> Tom LaMarra, “Kentucky and Florida in ‘Horse Capital’ Battle,” *BloodHorse*, March 28, 2002, <https://www.bloodhorse.com/horse-racing/articles/188744/kentucky-and-florida-in-horse-capital-battle>.

<sup>81</sup> “Facts About New System: Tremendous Success of Pari-Mutuel Betting Scheme in France,” *Louisville Courier Journal*, April 6, 1908, at 7.

<sup>82</sup> “Sheriff Will Stop Betting at Track: So Notifies President Grainger, of Jockey Club,” *Louisville Courier Journal*, October 12, 1907, at 1.

<sup>83</sup> “Will Hold Spring Races: Even If Paris Mutuals Have to Take Place of the ‘Books,’” *Louisville Courier Journal*, January 29, 1908 at 6.

<sup>84</sup> *Grinstead v. Kirby*, 110 S.W. 247 (Ky. 1908).

the 1908 spring meet, the *Louisville Courier Journal* ran a long article explaining how to “play” the parimutuel pools complete with examples and illustrative charts.<sup>85</sup> The article went on to describe parimutuel wagering as being “absolutely just to all bettors alike.”<sup>86</sup> On May 5, 1908 Stone Street won the 34<sup>th</sup> Kentucky Derby but the real story seemed to be the success of the parimutuel wagering which found “immediate favor with the big throng” of 15,000 spectators.<sup>87</sup> Louis Cella, a “multi-millionaire track magnate,” was in attendance for the Derby and was so impressed by the parimutuel wagering system that he stated he would use his influence to try to have parimutuel wagering installed at every track in which he owned an interest.<sup>88</sup>

Louis Cella wasn't the only one who took notice and the success of the parimutuel pools at the Derby led to the expansion of pools elsewhere. The Latonia Racetrack in northern Kentucky immediately began to offer parimutuel wagering.<sup>89</sup> It was also reported that Tennessee, Missouri, Illinois, and Louisiana might begin to utilize parimutuel wagering.<sup>90</sup> The success of the pools was recognized outside the United States as well. In September of 1908, an official associated with Churchill Downs traveled to Paris to interview an 83-year-old Joseph Oller.<sup>91</sup> Oller praised Churchill Downs's use of the parimutuel wagering system stating: “I am glad the people of America are showing concern in my method. It is the only way to bet, and the history of betting in France shows it.”<sup>92</sup> Officials in Canada were so impressed by the parimutuel

<sup>85</sup> “How to Play Pari-Mutuels: Facts about Novel System To Be Used at Churchill Downs,” *Louisville Courier Journal*, April 5, 1908, C10.

<sup>86</sup> *Id.*

<sup>87</sup> “Rank Outside Wins the Thirty-Fourth Kentucky Derby: Fifteen Thousand People Cheer Mightily as the Battle is Stubbornly Fought Out at Churchill Downs,” *Louisville Courier Journal*, May 6, 1908, 6.

<sup>88</sup> “Pari-Mutuels Come To Stay: New System of Betting is Favorably Received by the Public,” *Louisville Courier Journal*, May 6, 1908, 10.

<sup>89</sup> *Id.*

<sup>90</sup> “Some Facts About the Pari-Mutuel Betting: How System of Wagering Has Grown in Favor Among Turf Lovers,” *Louisville Courier Journal*, May 22, 1910, D4.

<sup>91</sup> “Mutuel Betting in France: American Turfman Pays Visit to Founder of System,” *Louisville Courier Journal*, September 29, 1908, 9.

<sup>92</sup> *Id.*

wagering system that it was reportedly considering “supplanting” bookmakers with machines.<sup>93</sup> And indeed, in 1910, an amendment was passed in Canada that allowed parimutuel wagering.<sup>94</sup> Parimutuel wagering offered a viable alternative to the besieged bookmakers and the overwhelming success of parimutuel wagering was summarized as a “death-knell” for the bookmakers.<sup>95</sup> Indeed, parimutuel wagering has displayed its resiliency as the number of states that allow parimutuel wagering has increased from a low of six in the early twentieth century to 43 currently.<sup>96</sup>

### **III. Parimutuel Wagering wins in Commonwealth v. Kentucky Jockey Club**

Supporters of parimutuel wagering clashed with opponents in the 1927 Kentucky gubernatorial election. Opposition to parimutuel wagering had been slowly gaining traction since its resurgence; in 1924 the lower house of Kentucky’s General Assembly passed a bill that would prohibit parimutuel wagering at Kentucky racetracks which had been sought since at least 1922.<sup>97</sup> In the 1927 gubernatorial primaries, both the Democratic and the Republican parties were split on whether to repeal the law that allowed parimutuel wagering at racetracks; this was considered the largest issue in the primary election and dominated the coverage.<sup>98</sup> Judge Flem D. Sampson (who was also on the Kentucky’s highest court at the time, the Court of Appeals) was

<sup>93</sup> “Some Facts About the Pari-Mutuel Betting: How System of Wagering Has Grown in Favor Among Turf Lovers,” *Louisville Courier Journal*, May 22, 1910, D4.

<sup>94</sup> Sheppard, R. Ronald, and Garry J. Smith, "Gambling". In *The Canadian Encyclopedia*. Historica Canada. Article published February 07, 2006; last modified December 16, 2013. <https://www.thecanadianencyclopedia.ca/en/article/gambling>

<sup>95</sup> “Pari-Mutuels Come To Stay: New System of Betting is Favorably Received by the Public,” *Louisville Courier Journal*, May 6, 1908, 10.

<sup>96</sup> Bennett Liebman, “Pari-Mutuels: What Do They Mean and What is at Stake in the 21<sup>st</sup> Century?,” *Marquette Sports Law Review* 27 (Fall 2016): 58, 73.

<sup>97</sup> “Committee to Meet in Anti-Gambling Drive,” *Louisville Courier Journal*, July 31, 1922, 9; “Kentucky House Opposes Mutuels: Vote in Favor of Prohibiting Betting on Tracks of That State is 56 to 38,” *The New York Times*, February 14, 1924, 13.

<sup>98</sup> “Kentucky Widens Split on Betting: Race for Gubernatorial Nomination Involves Continuance of Pari-Mutuel System,” *The New York Times*, May 29, 1927, E1.

the favorite for the Republican nomination and was considered the candidate of the racing interests.<sup>99</sup> John Crepps Wyckliffe Beckham, who had served as Governor and a United States Senator previously, was the Democratic favorite and was assumed to oppose legalized betting.<sup>100</sup> It was presumed to be a tight race with each candidate syphoning support from the other's party.<sup>101</sup> Sampson and Beckham won their primaries and faced each other in the general election that year.<sup>102</sup> Sampson won the election among allegations of fraud, but he was politically isolated as he had Democratic Lieutenant Governor, Democratic Attorney General, and a Democratic state House and Senate.<sup>103</sup> With a supporter of parimutuel wagering in the Governor's mansion, opponents were forced to try a new approach in their attempts to rid the state of parimutuel wagering.

The conflict surrounding parimutuel wagering culminated in the Attorney General, Frank Daugherty, filing suit against the Kentucky Jockey Club. The suit was filed on November 23, 1927, only a few weeks after Sampson won the gubernatorial election; it was initially filed by Attorney General Daughtery, and J.W. Cammack continued the suit after he was sworn in as Attorney General in 1928.<sup>104</sup> The suit was originally filed only against the Kentucky Jockey Club; it was amended to include the Latonia Jockey Club and Churchill Downs when the Kentucky Jockey Club dissolved and then passed its racing assets to the newly created Latonia Jockey Club and Churchill Downs in an alleged attempt to avoid "the relief prayed in the original petition, and [for] the fraudulent purpose of attempting to avoid the damages due to the

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> "Kentucky Defeats Enemy of Betting: Sampson, Republican, Has Lead for Governor Over Beckham of Nearly 25,000," *The New York Times*, November 10, 1927, 2; "Sampson wins by 10,000 in Kentucky Tally: Republican Outruns Ticket to Defeat Beckham, Foe of Pari-Mutuels, for Governor, Count Indicators," *New York Herald Tribune*, November 10, 1927, 15.

<sup>104</sup> "1,000,000 is Asked From Racing Body," *Louisville Courier Journal*, November 18, 1928, 1.

Commonwealth of Kentucky.”<sup>105</sup> The Attorney General alleged that the parimutuel wagering conducted on the races was a lottery which violated “Section 226 of the present Constitution of Kentucky and Section 2573 Kentucky Statutes.”<sup>106</sup> The Commonwealth sought \$1,000,000 in damages as “these corporations had misused and abused the powers granted to them under their charters” as well as an injunction against the racetracks from using their property for unlawful purposes in the future.<sup>107</sup> The Jefferson County Circuit Court judge held that the suit was barred by the statute of limitations and the Commonwealth appealed to the Kentucky Court of Appeals.<sup>108</sup>

On appeal the Commonwealth of Kentucky argued that parimutuel wagering was a lottery which contravened the Kentucky Constitution, the Bill of Rights, and the Fourteenth Amendment.<sup>109</sup> A central issue revolved around the interpretation of Section 226 of the Kentucky Constitution, which read in part “[l]otteries and gift enterprises are forbidden, and no privilege shall be granted for such purposes, and none shall be exercised, and no schemes for similar purposes shall be allowed.”<sup>110</sup> The Commonwealth argued that rule of contemporaneous construction was not applicable in this instance and instead the words in the Constitution should be used in their ordinary sense at the time the Constitution was adopted which would include parimutuel wagering.<sup>111</sup> The Commonwealth also made an interesting argument that utilized the Bill of Rights and the Fourteenth Amendment, contending that that the exceptions for parimutuel wagering create special rights for that class of people that are not conferred onto other

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*, 2.

<sup>107</sup> Brief of Appellant, *Commonwealth of Kentucky v. Kentucky Jockey Club*, 238 Ky. 739 (1931).

<sup>108</sup> “State Loses in Turf Suit; Appeal Granted,” *Louisville Courier Journal*, August 7, 1929, 1.

<sup>109</sup> Brief of Appellant, *Commonwealth of Kentucky v. Kentucky Jockey Club*, 238 Ky. 739 (1931).

<sup>110</sup> *Id.* at 16.

<sup>111</sup> *Id.* at 39-46.

Kentuckians.<sup>112</sup> The last relevant argument made by the state was one of policy, encouraging the court to follow the people's "moral progress" and "stand on the side of Christian sentiment" by ruling against parimutuel wagering.<sup>113</sup>

Appellees Kentucky Jockey Club, Latonia Jockey Club, and Churchill Downs argued that the laws allowing parimutuel wagering did not violate Kentucky's Constitution or the Bill of Rights.<sup>114</sup> The previous Kentucky Constitution did not contain a prohibition against lotteries, but it had been replaced by a more recent Constitution in 1892 which prohibited lotteries unless they had been authorized by the Legislature.<sup>115</sup> There were also laws prohibiting the operation of machines used in betting, with an exception created for "French Pools."<sup>116</sup> When the present Constitution was adopted in 1892, all the state statutes were revised as well; the preexisting laws allowing parimutuel wagering were carried forward in their entirety.<sup>117</sup> Appellees contended that when the Constitution was passed there was understood to be a difference between lotteries and parimutuel wagering; for example, immediately after the Constitution was passed the Attorney General began to prosecute anyone who operated a lottery while not taking any legal action against operators of parimutuel wagering.<sup>118</sup> Appellees also cite to various statutes passed by the Legislature over the previous 30 involving parimutuel racing and horse racing generally that make no reference to the Constitutional prohibition on lotteries.<sup>119</sup> Just as Oller successfully argued with the French authorities, appellees contended that chance is the predominating factor in lotteries which distinguishes it from parimutuel wagering.<sup>120</sup> In response to appellant's

<sup>112</sup> *Id* at 68-71.

<sup>113</sup> *Id* at 95.

<sup>114</sup> Brief of Appellees, *Commonwealth of Kentucky v. Kentucky Jockey Club*, 238 Ky. 739 (1931).

<sup>115</sup> *Id* at 8-12.

<sup>116</sup> *Id* at 9.

<sup>117</sup> *Id* at 9.

<sup>118</sup> *Id* at 12.

<sup>119</sup> *Id* at 15-20.

<sup>120</sup> *Id* at 24-32.

argument regarding the classifications issue, appellee's offered caselaw holding that these classifications are reasonable under the police power of the state.<sup>121</sup>

The Court of Appeals ruled that parimutuel gambling was legal as it did not contravene the Constitutional prohibition on lotteries. The case was decided by a vote of 6-1 nearly four years after the litigation began.<sup>122</sup> The Court began by examining the history of the statutes as well as the two previous Kentucky Constitutions.<sup>123</sup> The argument for the Commonwealth is best summarized as "the words of the Constitution must be construed in their ordinary sense, most obvious to the common understanding of the people who ratified the instrument, and that the contemporaneous construction cannot be invoked to ascertain the meaning when the words used are themselves perfectly plain and free from ambiguity."<sup>124</sup> The Court made their way through the cases and sources cited by the Appellants but was unconvinced by their argument.<sup>125</sup> The Court instead looked to the debates surrounding Constitutional Convention, especially the rejection of an amendment that would forbid all wagering which indicated to the Court "that it was the intention of the Convention not to include in section 226 anything but lotteries of the type familiar at the time."<sup>126</sup> The potential "evils" of gambling were acknowledged, but the Court was unable "to declare that the section of the Constitution condemning lotteries was understood by the people who adopted it as itself outlawing betting upon horse races, by the pari mutual system, or the other forms of betting."<sup>127</sup> *Commonwealth v. Kentucky Jockey Club* cemented parimutuel wagering's legal standing in Kentucky and parimutuel wagering has continued to

<sup>121</sup> *Id* at 47.

<sup>122</sup> "Mutuel Act Held Constitutional;: Vote 6 to 1, Richardson Dissenting," *Louisville Courier Journal*, March 4, 1931, 1.

<sup>123</sup> *Commonwealth v. Ky. Jockey Club*, 238 Ky. 739, 745-9 (1931).

<sup>124</sup> *Id* at 749.

<sup>125</sup> *Id* at 749-51.

<sup>126</sup> *Id* at 751.

<sup>127</sup> *Id* at 754.

thrive in Kentucky with recent innovations in the industry mirroring the ingenuity of Joseph Oller over 150 years ago.

#### **IV. Parimutuel wagering today**

A recent legal challenge to parimutuel wagering in Kentucky involved an electronic gambling system known as historical racing, sometimes called instant racing.<sup>128</sup> Historical horse racing machines first appeared in Hot Springs, Arkansas at the Oaklawn race track in 2000 after state officials determined it was legal; historical horse racing helped save the track from closing due to declining attendance.<sup>129</sup> These electronic gambling systems are installed in terminals that resemble electronic slot machines. These terminals present previously run horse races through games with names like *Cash Carnival* or *Yukon Willie's Gold Rush*; these games are accompanied by the bells, whistles, balloons, and cartoons typical of electronic slot machines.<sup>130</sup> All the information that might allow a bettor to identify the race is scrubbed and instead bettors are presented with anonymized handicapping information like the trainer or jockey's winning percentage.<sup>131</sup> Bettors can choose to ignore this information and select the "handi helper" function which allows the terminal to run on its own.<sup>132</sup> The terminals do show a video of the actual race, but they only show the final seconds and the video is confined to a 2-inch square.<sup>133</sup>

<sup>128</sup> Janet Patton, "Judge Oks Instant Racing games; decision will be appealed," *Lexington Herald Leader*, December 30, 2010, <https://www.kentucky.com/sports/horses/article44072742.html>.

<sup>129</sup> Anna M. Tinsley, "Instant Racing Saved Arkansas Horse Track: Is Texas Next?," *Star-Telegram*, Dec. 6, 2014, <http://www.star-telegram.com/news/politics-government/article4314075.html>.

<sup>130</sup> Janet Patton, "Judge Oks Instant Racing games; decision will be appealed," *Lexington Herald Leader*, December 30, 2010, <https://www.kentucky.com/sports/horses/article44072742.html>.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

These terminals bear some of the hallmarks of a slot machine but are distinguished by their internal procedures that comply with parimutuel regulations.<sup>134</sup> The machines utilize an electronic system called a totalizator which “processes the cashing of wagers, calculates the odds for a given wager at the time the wager is placed and stores wagering information,” among other functions.<sup>135</sup> The totalizator automatically allocates a percentage of each wager into corresponding pools that reflect each different bet the bettor is making; if a bettor wins, their winnings are drawn from these pools.<sup>136</sup> Drawing the winnings from pools funded by other bettors’ wagers is what allows the terminals to comply with parimutuel laws.<sup>137</sup>

The Kentucky courts have determined that historical horse racing is parimutuel wagering in a timely decision entered on October 24, 2018.<sup>138</sup> The Kentucky Horse Racing Commission, the Kentucky Department of Revenue, and a group of Kentucky horse racing tracks and organizations filed a Petition for Declaration of Rights as Joint Petitioners in July of 2010 seeking “a declaration that certain administrative regulations, amended by the Commission, were a valid and lawful exercise of the Commission’s statutory authority to regulate pari-mutuel wagering of horse racing under KRS Chapter 230.”<sup>139</sup> The Joint Petitioners also sought a declaration that the historical horse racing machines were not prohibited by statutes regarding gambling and that the revenue generated from these machines is subject to the pari-mutuel tax

<sup>134</sup> *Appalachian Racing, LLC v. Family Trust Found. of Ky., Inc.*, No. 10-CI-01154 (Franklin Circuit Court Oct. 24, 2018)

<sup>135</sup> Justin Story, “Federal civil case against Kentucky Downs unfolding,” *Bowling Green Daily News*, June 7, 2015, [https://www.bgdailynews.com/news/federal-civil-case-against-kentucky-downs-unfolding/article\\_33544590-10a1-5706-af92-836c32b2a33e.html](https://www.bgdailynews.com/news/federal-civil-case-against-kentucky-downs-unfolding/article_33544590-10a1-5706-af92-836c32b2a33e.html).

<sup>136</sup> 10 Ky. Att’y Gen. Op. No. 10-001 (January 5, 2010), <https://ag.ky.gov/government/opinions/Opinions%20New/OAG10001.doc>

<sup>137</sup> *Appalachian Racing, LLC v. Family Trust Found. of Ky., Inc.*, No. 10-CI-01154 (Franklin Circuit Court Oct. 24, 2018)

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 2.

which was a valid exercise of the Department of Revenue’s authority.<sup>140</sup> The Family Foundation of Kentucky joined as an intervening respondent and the organization opposes expanded gambling in Kentucky generally.<sup>141</sup> Historical horse racing is defined in the regulations as “any horse race that: (a) was previously run at a licensed pari-mutuel facility located in the United States; (b) concluded with official results; and (c) concluded without scratches, disqualifications, or dead-heat finishes.”<sup>142</sup>

The Circuit Court entered its Opinion and Order in December of 2010 finding that the regulations were valid, pari-mutuel wagering on historical horse racing does not contravene statutory prohibitions on gambling, and the Department’s taxing of the revenue generated is a lawful exercise of their statutory authority.<sup>143</sup> The Family Foundation appealed the Circuit Court’s decision to the Court of Appeals who vacated the judgment and remanded the case so that discovery could be conducted.<sup>144</sup> The Supreme Court of Kentucky reviewed the Court of Appeals decision and agreed with them that discovery was necessary in order to determine if historical horse racing violated the statutory prohibitions on gambling.<sup>145</sup> The Supreme Court directly addressed the other two issues as well. It affirmed the Circuit Court’s finding that the Commission’s regulatory changes were “a valid and lawful exercise of the Commission’s statutory authority to regulate pari-mutuel wagering on horse racing in the Commonwealth.”<sup>146</sup> However the Supreme Court disagreed with the Circuit Court, finding that the Department of Revenue “exceeded its authority when it amended its regulations to allow revenue generated by

<sup>140</sup> *Id* at 2.

<sup>141</sup> *Id* at 2.

<sup>142</sup> 810 KAR 1:001, Section 1 (30)

<sup>143</sup> *Appalachian Racing, LLC v. Family Trust Found. of Ky., Inc.*, No. 10-CI-01154 (Franklin Circuit Court Oct. 24, 2018) at 3.

<sup>144</sup> *Id* at 3.

<sup>145</sup> *Id* at 4.

<sup>146</sup> *Id* at 4.

pari-mutuel wagering on historical horse races to be subject to the pari-mutuel tax.”<sup>147</sup> The Circuit Court then held a bench trial to answer these questions.

The sole issue before the Circuit Court was whether the historical horse racing constituted a pari-mutuel system of wagering and they found that it indeed did.<sup>148</sup> The Circuit Court made extensive findings of fact regarding the historical horse racing. These findings of fact include the following: “[a]ll money wagered is placed into a pool, and all payouts to winning patrons come from the pool,”<sup>149</sup> “[a]n association never has a financial interest in the outcome of any wager because once a pool is opened with an initial seed amount, only players contribute to or receive funds from the pool because associations do not add or withdraw money from the pool,”<sup>150</sup> and “[a]fter the patron places his wager, a ‘takeout’ amount is removed from the wager, and that amount goes to the Association.”<sup>151</sup> The Court found that historical horse racing system was “designed to align with the requirements of” the regulations, that it is “pari-mutuel system wagering” as defined by the regulations, and therefore the statutes exempt pari-mutuel wagering from being prohibited by another statute apply to historical horse racing.<sup>152</sup>

Historical horse racing has been a Kentucky success, just like parimutuel wagering was when reintroduced in Kentucky at the turn of the century. In June of 2018, Kentucky Downs, a racetrack in Kentucky, received approval to increase the number of historical horse racing machines on their premises from 755 to 1,200;<sup>153</sup> Kentucky Downs started with just 200

<sup>147</sup> *Id* at 4.

<sup>148</sup> *Id* at 7.

<sup>149</sup> *Id* at 17, n. 83.

<sup>150</sup> *Id* at 17, n. 84.

<sup>151</sup> *Id* at 14, n. 62.

<sup>152</sup> *Id* at 29.

<sup>153</sup> Matt Hegarty, “Kentucky Downs gets okay to operate more historical racing machines,” *Daily Racing Form*, June 19, 2018, <https://www.drf.com/news/kentucky-downs-gets-okay-operate-more-historical-racing-machines>.

machines in 2011.<sup>154</sup> This was in part because the historical horse racing handle at Kentucky Downs has increased from \$413 million in fiscal year 2016 to \$654 million in fiscal year 2018.<sup>155</sup> Other Kentucky tracks want to increase their handle through the use of historical horse racing machines; Churchill Downs and Keeneland have made plans to open a joint racetrack and betting parlor in south central Kentucky with 1,500 historical horse racing machines that received final approval in November of 2018.<sup>156</sup> Since Kentucky first allowed wagering on historical horse racing in September of 2011 over \$3.2 billion has been wagered using the machines, raising \$48,662,229 in Kentucky Excise taxes which goes to industry programs, a higher education fund, other tracks, and the Kentucky General Fund.<sup>157</sup>

Historical horse racing has expanded into other states and will continue to do so, just like parimutuel wagering expanded following its success in Kentucky. States across the country have followed Kentucky and Arkansas's lead by holding that these machines are legal including Alabama<sup>158</sup>, Nebraska<sup>159</sup>, Oregon<sup>160</sup>, Virginia<sup>161</sup>, and Wyoming<sup>162</sup>. There is an ongoing fight in

<sup>154</sup> "Churchill Downs and Keeneland get OK on joint \$150 million racetrack," *Louisville Courier Journal*, November 19, 2018, <https://www.courier-journal.com/story/news/2018/11/19/joint-churchill-downs-and-keeneland-racetrack-approved/2057893002/>.

<sup>155</sup> Matt Hegarty, "Kentucky Downs gets okay to operate more historical racing machines," *Daily Racing Form*, June 19, 2018, <https://www.drf.com/news/kentucky-downs-gets-okay-operate-more-historical-racing-machines>.

<sup>156</sup> "Churchill Downs and Keeneland get OK on joint \$150 million racetrack," *Louisville Courier Journal*, November 19, 2018, <https://www.courier-journal.com/story/news/2018/11/19/joint-churchill-downs-and-keeneland-racetrack-approved/2057893002/>.

<sup>157</sup> *Kentucky Historical Horse Racing Report for January, 2018*, Kentucky Horse Racing Committee, <http://khrc.ky.gov/Documents/2018-01-KHRC%20Historical%20Horse%20Racing%20Handle.pdf>.

<sup>158</sup> 09 Ala. Op. Att'y Gen. 020 (Dec. 2, 2008) and 01 Ala. Op. Att'y Gen. 114 (Mar. 13, 2001).

<sup>159</sup> Bob Hamar, "Racing commission Oks historical racing machines," *The Grand Island Independent*, October 30, 2018, [https://www.theindependent.com/sports/fonner/racing-commission-oks-historical-racing-machines/article\\_788eff0a-dc87-11e8-8119-b7bcff0b0811.html](https://www.theindependent.com/sports/fonner/racing-commission-oks-historical-racing-machines/article_788eff0a-dc87-11e8-8119-b7bcff0b0811.html).

<sup>160</sup> Andy Giegerich "And they're off: Portland Meadows fans can now wager on old races," *Portland Business Journal*, February 11, 2015, [https://www.bizjournals.com/portland/morning\\_call/2015/02/and-theyre-off-portland-meadows-fans-can-now-wager.html](https://www.bizjournals.com/portland/morning_call/2015/02/and-theyre-off-portland-meadows-fans-can-now-wager.html).

<sup>161</sup> Michael Martz, "Northham signs legislation aimed at reopening Colonial Downs, ordering 'reasonable limitations on the proliferation of gaming in Virginia,'" *Richmond Times-Dispatch*, April 9, 2018, [https://www.richmond.com/news/virginia/government-politics/general-assembly/northam-signs-legislation-aimed-at-reopening-colonial-downs-ordering-reasonable/article\\_6de9b63f-2a89-5b65-a7c0-bd4fc31e63da.html](https://www.richmond.com/news/virginia/government-politics/general-assembly/northam-signs-legislation-aimed-at-reopening-colonial-downs-ordering-reasonable/article_6de9b63f-2a89-5b65-a7c0-bd4fc31e63da.html).

<sup>162</sup> Steve Luhm, "Luhm: New law jump-starts horse racing at Wyoming Downs," *The Sale Lake Tribune*, March 9, 2013, <http://archive.sltrib.com/article.php?id=55975045&itype=CMSID>.

Idaho as historical horse racing was approved by the Idaho Legislature in 2013 only to be repealed by lawmakers two years later.<sup>163</sup> In 2018, Idaho voters rejected a proposition that would have allowed historical horse racing.<sup>164</sup> Many of these states are like Kentucky in that they don't define parimutuel wagering in their statutes while others go to great lengths to avoid a definition.<sup>165</sup> Other states should follow Kentucky's lead on historical horse racing, just as they followed Kentucky's lead on parimutuel wagering.

## V. Conclusion

Throughout its existence parimutuel wagering has proven to be a resilient form of wagering and therefore, as the most recent derivative of parimutuel wagering, historical horse racing will continue to thrive in Kentucky and across the nation. Parimutuel wagering has faced strong challenges in seemingly every market where it has been introduced, but has overcome them all. In France, England, and all across the United States, pushback against parimutuel wagering was swift with most jurisdictions outlawing the practice. Over time, its advantages over bookmaking became evident as it allowed the people to set the odds, didn't place the bettors in opposition to the organization conducting the wagering, discouraged unethical practices by the bookmakers due to more accountability, and removed the primary element from chance, distinguished it from lotteries. These advantages still remain and their value remains important today. As states look to expand their access to gambling, historical horse racing is a proven method of expanding access to gambling through existing regulatory structures. Others states

<sup>163</sup> Cynthia Sewell and Audrey Dutton, "Idaho blocks historical horse racing measure," *Idaho Statesman*, November 6, 2018, <https://www.idahostatesman.com/latest-news/article221232440.html>.

<sup>164</sup> *Id.*

<sup>165</sup> Bennett Liebman, "Pari-Mutuels: What Do They Mean and What is at Stake in the 21<sup>st</sup> Century?," *Marquette Sports Law Review* 27 (Fall 2016): 58-9.

should follow Kentucky's lead, as they did with parimutuel wagering, and allow historical horse racing.

This is not to say that parimutuel wagering is beyond reproach. Further examination could be given to the tax rates as Kentucky's 1.5 percent tax on the total historical horse racing handle seems a little low, not even raising \$50 million in taxes on \$3.2 billion worth of wagers.<sup>166</sup> One could also consider whether or not it is judicious to embrace an industry that is in part supported by regulatory arbitrage between the states as the rules regarding what type of wagering is allowed in each state vary. While this paper has not addressed these issues, gambling can be addictive and create social problems like any other addiction.

Throughout its existence parimutuel wagering has proven to be a resilient, withstanding various legal and cultural challenges. From its roots in France, to its expansion to England and then the United States, parimutuel wagering overcame these challenges due to the ingenuity of its design. Kentucky led the resurgence of parimutuel wagering at the beginning of the twentieth century and is now leading the way on a new form of wagering in the twenty-first century. Parimutuel wagering, and historical horse racing, are here to stay, and other states should emulate Kentucky like they have in the past.

<sup>166</sup> *Kentucky Historical Horse Racing Report for January, 2018*, Kentucky Horse Racing Committee, <http://khrc.ky.gov/Documents/2018-01-KHRC%20Historical%20Horse%20Racing%20Handle.pdf>.