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Repository Citation

Bennett Liebman, *Pari-Mutuels: What Do They Mean and What Is at Stake in the 21st Century?*, 27 Marq. Sports L. Rev. 45 (2016)
Available at: <http://scholarship.law.marquette.edu/sportslaw/vol27/iss1/3>

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PARI-MUTUELS: WHAT DO THEY MEAN AND WHAT IS AT STAKE IN THE 21ST CENTURY?

BENNETT LIEBMAN*

I. INTRODUCTION

The popularity of horse racing in the United States has been in a freefall for decades.¹ What was once clearly the most popular sporting event in the United States in the mid-twentieth century,² has been facing significant drops in public

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1. See, e.g., Editorial, *The Sport of Paupers*, TIMES UNION (Sept. 28, 2015), <http://www.timesunion.com/tuplus-opinion/article/Editorial-The-sport-of-paupers-6535909.php>; Liz Mullen, *Some Racetrack Marketing Efforts Fly in the Face of Tradition*, LOUISVILLE BUS. FIRST (June 5, 2015), <http://www.bizjournals.com/louisville/print-edition/2015/06/05/some-racetrack-marketing-efforts-fly-in-the-face.html>; Childs Walker, *Crown Would Afford Racing a Fleeting Glow*, BALT. SUN, June 7, 2014, at 1A; Randal C. Archibold, *Pacing, and Worrying: Hard Times Overtake New York's Harness Tracks*, N.Y. TIMES (July 11, 2002), <http://www.nytimes.com/2002/07/11/nyregion/pacing-and-worrying-hard-times-overtake-new-york-s-harness-tracks.html>; Frederick C. Klein, *On Sports: Horse Racing Is Going to the Dogs*, WALL ST. J., Mar. 3, 1995, at B14.

2. There are numerous sources attesting to the former overwhelming popularity of racing. See Stanley Levey, *Racing Now Virtual King of Sports, Topping Baseball in Gate Appeal*, N.Y. TIMES, Apr. 30, 1953, at 1; Byron Roberts, *One of a Kind Rides Bus to Bowie*, WASH. POST, Jan. 26, 1964, at C6; *Horse Racing Attendance and Handle Set U.S. Records but Sag in Britain*, N.Y. TIMES, Dec. 19, 1964, at 34. Harness racing in the 1950s and 1960s was often described as the “fastest-growing” sport in the nation. Charles Grutzner, *Upsurge of Harness Racing Spreads Scandals Over U.S.*, N.Y. TIMES, Oct. 25, 1953, at 1; Braven Dyer, *Sports Parade*, L.A. TIMES, Mar. 14, 1957, at C1; Tony Sisti, *Starter on Wheels Put Trots on Its Feet*, NEWSDAY, Sept. 28, 1960, at C17; Bion Abbot, *Sulkies Go Today at Santa Anita*, L.A. TIMES, Mar. 13, 1963, at B1. For pari-mutuel sports, “[i]t is estimated that in 1980, over 105 million fans passed through the gates . . . [T]he bottom line comes down to the fact that more people pay to attend the five sports subsidized by pari-mutuel wagering than any other combined group of sports.” BOB & BARBARA FREEMAN WITH JIM MCKINLEY, *WANTA BET?*, at vii (1982). “[A]ttendances at race meetings have far exceeded other major league professional sporting events.” ROGER MUNTING, *AN ECONOMIC AND SOCIAL HISTORY OF GAMBLING IN BRITAIN AND THE USA* 124, 227 (1996). “During the course of the year [1957] it became more evident than ever that Thoroughbred racing had become tremendous in scope; had become, in fact, the leading sport from various angles in the United States, perhaps the world.” ROBERT F. KELLEY, *RACING IN AMERICA 1937–1959*, at 222 (1960).

interest as measured by attendance and in handle—the amount of money wagered on horse racing.³ While this decrease has been most pronounced in harness racing,⁴ thoroughbred racing has also continued to see major decreases in handle.⁵

Numerous innovations have attempted to maintain public interest in horse racing. The permissible types of wagers have increased vastly.⁶ Betting that was once only permissible at the racetrack, where the physical race was taking place, is now available in most states at off-track wagering facilities via telephone accounts and via the Internet. By now, not only have most states allowed pari-mutuel⁷ wagering, but a potential bettor in most of these states can place bets at his or her home on horse races held in every state in the nation and in many foreign countries.⁸ Previous broadcasting restrictions on the display of

3. The Daily Racing Form defines “handle” as the “[a]mount of money wagered in the pari-mutuels on a race, a program, during a meeting, or a year.” THE ORIGINAL THOROUGHBRED TIMES RACING ALMANAC 833 (2005); *Help: Glossary of Horse Racing Terms*, DAILY RACING FORM, http://www1.drf.com/help/help_glossary.html#H (last visited Dec. 15, 2016). Roger Munting defines handle as a “term used predominantly in the USA to refer to gross gambling expenditure, sometimes referred to as turnover.” MUNTING, *supra* note 2, at ix. Even in 1939, Lincoln Plaut, the editor of the Daily Racing Form was stating that racing was “by far the world’s number one sport.” PROCEEDINGS OF THE NATIONAL ASSOCIATION OF STATE RACING COMMISSIONERS 43 (1939).

4. Harness racing is conducted in approximately one-third of American states. See U.S. TROTting ASS’N, *Race Dates*, in THE TROTting & PACING GUIDE 80 (2015), http://www.ustrotting.com/track-side/tpg/pdf/2015/TP2015_79-110_RaceDates.pdf. In New York State, taking into consideration changes in the consumer price index, “live handle on harness racing . . . was 32% higher in 1940 than it was in 2014, even with more than 20 times as many races being conducted in 2014 than in 1940.” Bennett Liebman, *2014: The Unfortunate State of New York Horse Racing*, SARATOGA INST. ON EQUINE RACING, & GAMING LAW (Nov. 17, 2015), <https://saratogainstitute.wordpress.com/2015/11/17/2014-the-unfortunate-state-of-new-york-horse-racing/>.

5. From 2003 to 2014, thoroughbred handle in the United States dropped by 30.5% without taking into account changes in the consumer price index. *Pari-Mutuel Handle*, JOCKEY CLUB, <http://www.jockeyclub.com/default.asp?section=FB&area=8> (last visited Dec. 15, 2016). Factoring in the changes in the consumer price index, the decrease was 46%. From 1989 to 2014, the number of thoroughbred races in the United States decreased by 44.3%. *Number of Races*, JOCKEY CLUB, <http://www.jockeyclub.com/default.asp?section=FB&area=6> (last visited Dec. 15, 2016). Thoroughbred racing, nevertheless, remains a significant business with racetracks in more than half of American states. See generally *2016 Fact Book*, JOCKEY CLUB, <http://www.jockeyclub.com/default.asp?section=Resources&area=11> (last visited Dec. 15, 2016).

6. See, e.g., Larry Milson, *Betting Turns Exotic Win, Place, Show Left at the Post As Racetracks Go to Gimmicks*, GLOBE & MAIL, Oct. 29, 1983; Stan Isaacs, *119th Belmont Stakes Out of Left Field Take Exotic Road to Riches*, NEWSDAY, June 2, 1987, at 114.

7. In this article, pari-mutuel will be spelled with a hyphen except where applicable statutes and commentary spell the word in a different manner.

8. “By the 1990s, pari-mutuel on-track betting was ‘all but universal’ in the American states.” Stephanie A. Martz, Note, *Legalized Gambling and Public Corruption: Removing the Incentive to Act Corruptly, or, Teaching an Old Dog New Tricks*, 13 J.L. & POL. 453, 459 n.36 (1997) (citing MUNTING, *supra* note 2, at 220).

horse races have long since been erased.⁹ Horse racing was not conducted on Sundays in the United States until the late 1960s,¹⁰ but is now regularly scheduled on Sundays. Yet, in spite of this virtual elimination of these limitations in the means of wagering on horse racing, public interest in horse racing—other than occasional interest in the Triple Crown—has continued to diminish. Many racetracks have closed.¹¹ Some have only been kept open due to their dual use as “racinos”: racetracks that simultaneously serve as slot machine parlors or full-scale casinos.

Technology now offers additional horse racing possibilities to increase its wagering menu. There is the potential for exchange wagering, where a bettor places bets on or against a specific horse directly against another bettor; futures wagering; added pools where the racetrack adds its own money into the wagering pool; guaranteed pools under which the racetrack itself guarantees that bettors will be betting into a minimum guaranteed pool; wagering on the overall success rate of individual jockeys; drivers; or trainers over a given date or season; rebates given regularly to larger bettors; fantasy horse racing games; wagering on historic, previously-run horse races; and a greater ability to add fixed-odds wagering to the mix of wagers.

Yet, these innovations in horse racing wagering run smack against various federal and state laws, and Constitutional provisions. The principal problem for horse racing lies in the federal Professional and Amateur Sports Protection Act¹² (PASPA), which—except for Nevada where bookmaking on horse racing has been grandfathered in—permits only pari-mutuel wagering on horse racing. This PASPA ban has also been bolstered by certain state constitutional provisions and state statutes limiting horse race wagering to pari-mutuel wagering.

The restrictions limiting horse race wagering to pari-mutuels is further muddled by the fact that the term pari-mutuel is generally not defined by legislative or constitutional enactments. It is not defined in PASPA or in the

9. See WALTER B. EMERY, BROADCASTING AND GOVERNMENT: RESPONSIBILITIES AND REGULATIONS 243, 249 n.14 (1961); Howard J. Samuels, *The Off-Track Betting Experiment in New York*, 17 HOW. L.J. 731, 749–53 (1973). The FCC “has taken the position that the *amount* of time devoted to horse racing programs and the *amount* of information presented for the benefit of bettors are important in determining whether such programs are against the public interest.” EMERY, *supra*, at 249 n.14.

10. Sunday racing started in the United States at Green Mountain Park in Pownal, Vermont in 1968. See Louis Effrat, *5 Trot Betting Records Set as Racing on Sunday Starts in Vermont*, N.Y. TIMES, Apr. 1, 1968, at 65.

11. These shuttered tracks include facilities that were among many others, Roosevelt Raceway in New York, Hollywood Park and Bay Meadows in California, Garden State Park in New Jersey, Longacres in Washington, Rockingham in New Hampshire, and Colonial Downs in Virginia.

12. Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701–3704 (2016).

state constitutional provisions limiting horse race betting to pari-mutuels. Only in some state statutes is pari-mutuel defined, and on these occasions the term is often only minimally defined.

This article will review the current federal and state statutory schemes governing pari-mutuels, assess the dictionary definitions of pari-mutuels, outline the history of pari-mutuels, review the case law governing pari-mutuels and attempt to provide a working definition of pari-mutuels, and assess whether some of the innovations in horse race wagering are ultimately compatible with the requirements of a pari-mutuel racing system.

II. FEDERAL LEGISLATION

A. *The Professional and Amateur Sports Protection Act and Pari-Mutuel Racing*

The Professional and Amateur Sports Protection Act, passed in 1992, now governs the permissible gambling territory of all American sports, including horse racing. Viewed as a whole, PASPA was designed to stop the spread of sports wagering in the United States. Faced with the possibility that states were contemplating expanding their lottery offerings to make wagering on sports contests part of the lottery, Congress acted to put a halt to any further expansion of sports gambling.¹³ Utilizing the Commerce Clause as a basis for regulating the sports wagering field, PASPA froze any potential expansion of sports gambling. The Senate report on the legislation stated that the legislation

serves an important public purpose, to stop the spread of State-sponsored sports gambling and to maintain the integrity of our national pastime. States would be prohibited from sponsoring, operating, advertising, promoting, licensing, or authorizing sports lotteries or any other type of sports betting that is based on professional or amateur games or performances therein.¹⁴

While states that had previously authorized and utilized sports gambling were protected by being grandfathered in PASPA,¹⁵ it became unlawful for all

13. See Jason Goldstein, Note, *Take the Money Line: PASPA, Bureaucratic Politics, and the Integrity of the Game*, 11 VA. SPORTS & ENT. L.J. 362, 363 (2012).

14. S. REP. NO. 102-248, at 4 (1991).

15. One commentator has stated that “this grandfather clause grants Nevada a virtual monopoly over casino sports gambling.” Michael Welsh, *Betting on State Equality: How the Expanded Equal*

other states, other governmental entities, and individuals

to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.¹⁶

PASPA was not the first effort to restrain state lotteries from utilizing sports results as a vehicle for gambling. Starting with the 1890s, federal law had restricted the interstate transportation of lottery tickets, and starting in the 1930s, federal law had restricted the ability to advertise or broadcast information about lotteries.¹⁷ With the legalization of many state lotteries—starting with New Hampshire in 1963—and the threat that the federal government would prosecute state lotteries for violating the federal lottery laws,¹⁸ federal law was changed in 1975 to accommodate the interests of both lottery states and non-lottery states.¹⁹ The law largely exempted lottery states from the reach of the federal lottery restrictions.²⁰ Yet, in the statute, there was a clear restriction on sports lotteries. The term “lottery” for the terms of the exemptions did not apply to the “placing or accepting of bets or wagers on sporting events or contests.”²¹

Nonetheless, even though the 1975 law, in theory, made it almost virtually impossible to conduct a sports lottery, enforcement of this provision has been next to impossible to achieve. In 1976, when the National Football League brought a lawsuit and tried to use this provision to shut down the sports card lottery for football established by the State of Delaware, its attempt was

Sovereignty Doctrine Applies to the Commerce Clause and Signals the Demise of the Professional and Amateur Sports Protection Act, 55 B.C. L. REV. 1009, 1010 (2014); see Anthony G. Galasso, Jr., Note, *Betting Against the House (and Senate): The Case for Legal, State-Sponsored Sports Wagering in a Post-PASPA World*, 99 KY. L.J. 163, 167 (2010–2011).

16. 28 U.S.C. § 3702 (2016).

17. See G. Robert Blakey & Harold A. Kurland, *The Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923, 938–39, 943–49 (1978).

18. Warren Weaver, Jr., *Saxbe Threatens Suit to Shutdown State Lotteries*, N.Y. TIMES, Aug. 31, 1974, at 1, <http://www.nytimes.com/1974/08/31/archives/saxbe-threatens-suit-to-shut-down-state-lotteries-he-calls-13.html>.

19. Pub. L. No. 93-583, 88 Stat. 1916 (1975).

20. H.R. REP. NO. 93-1517, at 13 (1974).

21. 18 U.S.C. § 1307(d) (2016).

unsuccessful.²² The court found that the sports league did not have a private right of action against a State governmental instrumentality. The court stated:

It is true that Congress in 1974 enacted 18 U.S.C. § 1307 for the purpose of exempting state sponsored lotteries from certain of the prohibitions of Sections 1301–1304 and defined “lottery” for this purpose as not including “the placing or accepting of bets or wagers on sporting events or contests”. While this clearly exhibits an intent to exclude state sponsored sports betting from the exclusion, it does not alter the basic purpose of the statute or those who comprise its direct beneficiaries.²³

Thus, under the holding of *NFL v. Governor of Delaware*, only the federal government is empowered to enforce the anti-lottery restrictions of 18 U.S.C. §§ 1301–1308.²⁴

The State of Oregon had started a Sports Action Lottery in 1989, which seemed to prompt congressional attention to this overall issue.²⁵ This lottery

22. *NFL v. Governor of Delaware*, 435 F. Supp. 1372, 1391 (D. Del. 1977).

23. *Id.* at 1388 (emphasis omitted).

24. In 1990, then Senator Albert Gore introduced legislation to end any ambiguities in 18 U.S.C. § 1307 to prevent states from utilizing sports related lotteries. See 136 CONG. REC. S16,829 (daily ed. Oct. 23, 1990) (statement of Sen. Gore). Senator Gore stated,

[s]ports lotteries based on the outcomes of these games will only serve to undermine the integrity of sports events. There is ambiguity in the current law which has given rise to plans in some States to institute sports lotteries as a way to bring in new revenues, to cash in on the overwhelming interest in sports as part of a lottery marketing strategy.

Id. at S16,831. Identical legislation was introduced by Representative John Bryant of Texas who said,

[t]he State-controlled Sports Lottery Clarification Act of 1990, will clarify the provisions of title 18 of the United States Code which exempt State-conducted lotteries from the criminal code's prohibitions. The bill will make it clear that lotteries based on point spreads and other schemes that are tantamount to betting on professional sports are prohibited.

136 CONG. REC. E1599 (daily ed. May 18, 1990) (statement of Hon. John Bryant). Senator Dennis DeConcini in explaining PASPA in 1992 noted that the 1975 amendment to section 1307 had been designed to prevent lotteries from accepting wagers on sports contest but “unfortunately, this has not been interpreted to prohibit sports lotteries.” 138 CONG. REC. S7276 (daily ed. June 2, 1992) (statement of Sen. DeConcini).

25. See Brad Buursma, *Oregon to up Lottery Ante with Sports Betting*, CHI. TRIB., July 17, 1989, at 1.

allowed sports pool wagering on various professional sports and amateur sports. After the Oregon lottery initiative, both houses of Congress had expressed interest in limiting the spread of state-authorized gambling on sports events, most especially the possibility that state lotteries would expand their way into sports gambling. Legislation banning state sports lotteries was introduced in both houses in 1989. The Senate passed legislation in that year banning state participation in sports lotteries,²⁶ and in 1990,

the House adopted H.R. 4843 as an amendment to the Comprehensive Crime Control Act (H.R. 5269), which ultimately passed on October 5. On October 19, the Senate integrated their version of the sports lottery ban into the Copyright Amendments Act of 1990 (S. 198). The House, however, did not approve this bill. A less inclusive version of the Copyright Amendments Act did pass Congress; however, it excluded the lottery ban provisions from the final version.²⁷

Similarly, in the 102nd Congress in 1991, both houses introduced separate legislation banning the expansion of state-sponsored sports gambling. The House passed its version of PASPA in October 1991.

On June 2, 1992, however, the Senate passed its version of PASPA.²⁸ The House, by voice vote, passed the Senate version of PASPA with amendments on October 6, 1992, and the Senate agreed to the House amendments, also by voice vote, on October 7, 1992. The legislation was signed by President George H.W. Bush and became effective on October 28, 1992.

Specifically exempted from this broad ban on sports wagering—besides the states that were grandfathered in—were “parimutuel animal racing or jai-alai games.” Thus, unlike other forms of sports wagering, which cannot be expanded, states could, after PASPA’s effective date, actually enact laws permitting pari-mutuel wagering on animal racing and jai-alai.²⁹ Horse racing

26. 135 CONG. REC. S13,762–763 (daily ed. Oct. 19, 1989) (proposed legislation seeking to declare state-sponsored sports lotteries to be unlawful per se under the Lanham Trademark Act of 1946, 15 U.S.C. §§ 1051–1127 (1989)). The proposed sports lottery ban was eventually dropped from the Copyright Amendments Act of 1990. *See* Sports Lottery Act, S. REP. NO. 101-198, at Title VI (1990). Congressional action was also spurred in part by the revelations that Cincinnati Reds manager Pete Rose has regularly wagered on his team’s games.

27. Goldstein, *supra* note 13, at 363–64 (citations omitted). H.R. 4843 had been adopted by the House Judiciary Committee, without dissent, in substance as an amendment to the Comprehensive Crime Control Act. *Id.*

28. The vote on S. 474 was 88–5 in support of the legislation.

29. Besides horse racing, there exists racing in America on greyhounds and on mules. Additionally,

for many decades in Nevada had, besides utilizing pari-mutuels, been conducted through bookmaking. This bookmaking on animal racing and jai-alai can only be conducted in Nevada under the provision in PASPA authorizing wagering schemes authorized by statute before October 2, 1991, which had also been actually “conducted in that [s]tate or other governmental entity at any time during the period beginning September 1, 1989, and ending October 2, 1991.”³⁰ Thus, only Nevada can offer non-pari-mutuel wagering on animal racing, and such wagering needs to be limited to the schemes that were actually conducted in Nevada between September 1, 1989 and October 2, 1991.³¹

It should be noted that PASPA’s ban on non-pari-mutuel wagering would likely have significant enforcement issues. Under PASPA, the only entities that can enforce PASPA by injunction are the Attorney General, an amateur sports organization, and a professional organization, “whose competitive game is alleged to be the basis of such violation.”³² Assuming that all entities in animal racing and jai-alai are professional, the definition of a “professional sports organization means (A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more professional athletes participate, or (B) a league or association of persons or governmental entities described in subparagraph (A).”³³ While this definition fits nicely within the scope of major sports leagues, such as professional baseball, hockey, football, and basketball, it seems unsuited when applied to the

since there are many breeds of horses, pari-mutuel racing on horses does include not only thoroughbred and harness racing but also wagering on Arabians, quarter horses, paints and appaloosas. See *Internet Gambling Prohibition Act of 1999: Hearing Before the Subcomm. on Telecomms., Trade, and Consumer Prot. of the Comm. on Commerce of the H.R.*, 106th Cong. 45 (2000) (statement by Anne Poulson, President, Virginia Thoroughbred Association). It should also include pinto racing, cutter racing, chariot racing, chuckwagon racing, show jumping racing and barrel racing. See CAL. BUS. & PROF. CODE § 19546(a) (2016); OKLA. STAT. tit. 3A, § 200.1(A)(5) (2016); WYO. STAT. ANN. § 11-25-102(a)(v) (2016). The potential for pari-mutuel barrel racing in Florida has been a significant political issue over the past several years. See *Fla. Quarter Horse Track Ass’n v. State*, 133 So. 3d 1118, 1119 (Fla. Dist. Ct. App. 2014); Paul Flemming, Dave Hodges & Doug Blackburn, *Gretna Gears up for Barrel Racing, Card Room*, TALLAHASSEE DEMOCRAT (Fla.), Oct. 30, 2011.

30. 28 U.S.C. § 3704(a)(2)(B) (2016).

31. This “actually was conducted” language could conceivably place certain constraints on horse race wagering in Nevada. In the case of *Office of the Comm’r of Baseball v. Markell*, 579 F.3d 293, 301 (3d Cir. 2009), the State of Delaware, which had an exemption from PASPA for conducting a sports lottery under § 3704(a)(1) attempted to have its lottery accept general bets on sports. The Third Circuit, however, limited the exemption to the wagering that was actually conducted in Delaware in 1976 which was multi-game parlay wagering only on professional football. *Markell*, 579 F.3d at 304. Arguably, a court, strictly following the *Markell* reasoning, could find that if certain wagers—such as proposition wagers on horse races—had not actually been conducted in Nevada between September 1, 1989, and ending October 2, 1991, then such wagers would be impermissible under PASPA.

32. 28 U.S.C. § 3703 (2016).

33. 28 U.S.C. § 3701(3)(A)–(B) (2016).

decentralized world of animal racing. A state racing commission needs to approve the schedules of most racing. Does that make it appropriate for a state racing commission to invoke and enforce PASPA? Similarly, does even the smallest racetrack, which certainly “organizes, schedules, or conducts” the races, have the right to enforce PASPA?³⁴ As applied to animal racing and jai-alai, it may be that only the Attorney General can enforce PASPA, or it could be that the Attorney General plus almost any entity associated with racing and jai-alai has the right to utilize PASPA.

The initial problem posed by the exemption given to animal racing is that the term “pari-mutuel” is undefined in PASPA. There is also relatively little in legislative history of PASPA, which provides a hint as to what was meant by the term “pari-mutuel.” For example, both the applicable House and Senate committees held hearings on PASPA in 1991. Nobody from the pari-mutuel industries testified or provided any materials to the respective legislative committees. The closest that a comment came to mentioning pari-mutuels came from testimony offered to the Senate subcommittee holding the hearing³⁵ by the North American Association of State and Provincial Lotteries (NASPL)—the umbrella non-profit organization representing individual states and Canadian provinces offering lotteries. In testifying about sports pool lotteries, NASPL’s President, James E. Hosker, described such lotteries as pari-mutuel, which meant, “[p]rizes are awarded on a parimutuel basis, that is, the available prize pool is divided equally among the winners in proportion to their wagers.”³⁶ The House subcommittee hearing on PASPA did not even contain any testimony on the subject of pari-mutuels.³⁷

In the Senate Judiciary Committee report endorsing the passage of PASPA, there was no substantive mention of pari-mutuels in the majority report.³⁸ Only in the minority report issued by Senator Chuck Grassley was there any significant mention of pari-mutuels. In his statement, in support of state-sponsored sports pool lotteries,³⁹ Senator Grassley adopted the language

34. *Id.*

35. See *Prohibiting State-Sanctioned Sports Gambling: Hearing on S. 472 and S. 474 Before the Subcomm. on Patents, Copyrights and Trademarks of the S. Comm. on the Judiciary*, 102nd Cong. 1 (1991).

36. *Id.* at 125 (statement of Jake E. Hosker, President, North American Association of State and Provincial Lotteries).

37. See generally *Professional and Amateur Sports Protection Act: Hearing on H.R. 74 Before the Subcomm. on Econ. and Commercial Law of the Comm. of the H. Comm. on the Judiciary*, 102nd Cong. (1991).

38. See S. REP. NO. 102–248 (1991).

39. *Id.* at 17. Grassley concluded, “Sports pool lotteries pose no threat to the integrity of professional sports. Rather, they are a potential new source of substantial nontax revenue for the many important programs funded by State lotteries.” *Id.*

of NASPL President Hosker stating, “[g]enerally, wagers are limited to no more than \$20 and prizes are parimutuel, that is, all winners share the prize pool in proportion to their respective wagers.”⁴⁰

Similarly, there is minimal information in the floor debate on what might constitute pari-mutuel wagering. The House of Representatives did not discuss pari-mutuels in its debate at all. After it had passed the legislation, Representative Bryant, the House sponsor of PASPA, extended his remarks⁴¹ to note that pari-mutuel wagering on keirin races,⁴² which had been passed and implemented in New Mexico in 1991, should be an acceptable sports wager under PASPA, since it met the terms of the exception contained in 28 U.S.C. § 3704(a)(2) for betting or gambling schemes authorized by law and in use between September 1, 1989 and October 2, 1991.⁴³

The Senate only mentioned pari-mutuels in the context of its final passage of the legislation on October 2, 1992. On the day that the Senate agreed to the House’s changes in the legislation, Senator DeConcini, one of the principal sponsors of PASPA, was asked questions as to whether PASPA would apply to a number of wagering schemes in place in various states.⁴⁴ In response to the question posed by New Mexico Senator Domenici as to whether pari-mutuel

40. *Id.* at 13.

41. 138 CONG. REC. E3326–327 (daily ed. Oct. 29, 1992) (statement of Rep. John Bryant).

42. Keirin is sprint bicycle racing. It is a sport that has been extremely popular in Japan and has been an Olympic sport since 2000.

43. It should be noted that post-passage legislative statements, such as that made by Representative Bryan, are of limited value. As has been stated, “statements after enactment do not count; the legislative history of a bill is valuable only to the extent it shows genesis and evolution, making ‘subsequent legislative history’ an oxymoron.” *Cont’l Can Co., v. Chi. Truck Drivers, Helpers & Warehouse Workers Union (Ind.) Pension Fund*, 916 F.2d 1154, 1157 (7th Cir. 1990); *see Barber v. Thomas*, 560 U.S. 474, 486 (2010); “[T]he Court normally gives little weight to statements, such as those of the individual legislators, made *after* the bill in question has become law.” *Barber*, 560 U.S. at 486.

44. This was similar in context to Representative Bryant’s explanations in 138 CONG. REC. E3326 (daily ed. Oct. 29, 1992) (statement of Rep. John Bryant). Senator DeConcini’s remark has minimal determinative effect on the interpretation of PASPA.

The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed.

United States v. Trans-Missouri Freight Ass’n, 166 U.S. 290, 318–19 (1897). *See Szehinskyj v. Att’y Gen. of the U.S.*, 432 F.3d 253, 256 (3d Cir. 2005) (holding “[t]his case is a perfect illustration of the well-known admonition that what individual legislators say a statute will do, and what the language of the statute provides, may be far apart indeed. The law is what Congress enacts, not what its members say on the floor.”).

keirin racing in New Mexico would qualify to be exempted from the PASPA sports wagering ban, Senator DeConcini responded that keirin was akin to horse racing and should not be considered one of the “competitive games” subject to PASPA. Senator DeConcini contended, “[t]his bill is meant to prohibit States from changing the nature of baseball, football, hockey, and basketball from wholesome entertainment for the entire family to a game played for the purpose of gambling. Clearly, this is not meant to apply to a sport such as Keirin racing.”⁴⁵ Even crediting DeConcini’s explanation, nothing in the congressional debates on PASPA made anything remotely clear about the meaning of the term “pari-mutuel.”

The only item in the entire congressional history of PASPA on pari-mutuels was the statement in the Senate Judiciary Committee minority report, stating that in pari-mutuel wagering, “all winners share the prize pool in proportion to their respective wagers.”⁴⁶ So, the term pari-mutuel is undefined in PASPA and the legislative history of PASPA provides little basis for determining what would constitute pari-mutuel betting.

B. Other Federal Statutes

While PASPA is largely silent on the meaning of the term “pari-mutuel,” other federal statutes do provide some definitions. The Interstate Horse Racing

45. 138 CONG. REC. S17,435 (daily ed. Oct. 7, 1992) (statement of Sen. Dennis DeConcini). Senator DeConcini’s explanation is hardly compelling. The fact is that keirin racing is a competitive individual sprint cycling event played in the Olympics and in much of the world. It would be hard to distinguish keirin races as something other than “competitive games” subject to the PASPA ban under 28 U.S.C. § 3702 (1992). Betting on individuals running in a sprint race would be subject to PASPA. Why would bicyclists competing in a sprint race be exempt from PASPA? If keirin racing in New Mexico is exempt from PASPA, it would need to be for the fact it was grandfathered in under 28 U.S.C. § 3704(a)(2) (1992) as cited by Representative Bryant. See in 138 CONG. REC. E3326 (daily ed. Oct. 29, 1992) (statement of Rep. John Bryant); S. REP. NO. 102–248, at 4 (1991). Similarly, the notion of Senator DeConcini that “competitive” games under PASPA might not include horse racing and jai-alai because they are generally the subjects of betting makes limited sense. In much of the world, these major team sport games are subject to wagering. Specifically, in regard to horse racing, a large number of significant traditional steeplechase events in the United States are not subject to wagering. (See for example the major steeplechase racing in Aiken, South Carolina and in Far Hills, New Jersey). See generally Pamela MacKenzie, *October Ritual*, CURIER NEWS (Bridgewater, NJ), Oct. 20, 2013, at A1. Would these steeplechase events somehow be subject to PASPA because they are family attractions not played for the purpose of gambling? The one plausible explanation is that animal racing and jai-alai are “competitive games” that are exempted from PASPA when conducted in a pari-mutuel fashion.

46. See S. REP. NO. 102–248, at 13. Unlike statements of individual legislators, the Supreme Court has noted, “[i]n surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature’s intent lies in the Committee Reports on the bill.” *Garcia v. United States*, 469 U.S. 70, 76 (1984); see *Holder v. Hall*, 512 U.S. 874, 933 n.28 (1994).

Act⁴⁷—which governs the conditions under which individuals in one state can wager on races conducted in another state⁴⁸—contains a definition of pari-mutuel. “Pari-mutuel” is defined 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.”⁴⁹ There are no court decisions that explain the definition of pari-mutuel. Under the Interstate Horse Racing Act, a pari-mutuel system would need to be authorized by state law, be a “wagering pool,” and be a system in which players wager against each other. Again, there is no indication that the drafters of PASPA were referencing the Interstate Horse Racing Act.

Additionally, the use of the term “pari-mutuel” only has minimal applicability to the acceptance of interstate wagers. “Pari-mutuels” only come into play in the Interstate Horse Racing Act under the limited circumstance where an off-track betting office does not need to receive the consent of a local racetrack where the state, in which the off-track betting office is located in, conducts “at least 250 days of on-track parimutuel horseracing a year.”⁵⁰ Additionally, the Interstate Horse Racing Act limits the pari-mutuel takeout that can be charged by an off-track betting office.⁵¹ That amount cannot exceed the takeout utilized for off-track bets conducted on races within the state where the off-track betting office is located.⁵² A higher takeout rate may also be charged by the off-track betting office if “such greater takeout is authorized by State law in the off-track State.”⁵³

Other federal statutes reference “pari-mutuels,” but these statutes provide no definition. The term “pari-mutuel” is mentioned on three occasions in the Internal Revenue Code, but there are no definitions provided.⁵⁴ Pari-mutuels are also mentioned in the Johnson Act⁵⁵ governing the interstate transportation

47. Interstate Horseracing Act of 1978, Pub. L. No. 95–515, 92 Stat. 1811; 15 U.S.C. §§ 3001–3007 (2016).

48. *See generally* 15 U.S.C. § 3001 (2016).

49. 15 U.S.C. § 3002(13) (2016).

50. *Id.* § 3004(b)(2).

51. Takeout refers to the commission taken from the wager by the proprietor of the pool before the payments are made to the winning bettors. Takeout is generally shared by the track holding the race, the State in the form of taxation and by the horsemen competing at the track for the purpose of increasing purses.

52. 15 U.S.C. § 3004(c).

53. *Id.*

54. *See* 26 U.S.C. §§ 872(b)(5), 3402(3)(C), 4402(1) (2016).

55. 15 U.S.C. §§ 1171–1178.

of gambling machines⁵⁶ and in the general allocation of funds to local government.⁵⁷ Other than the Interstate Horse Racing Act, the other federal statutes provide no guidance in defining the term “pari-mutuel.”

III. STATE CONSTITUTIONAL PROVISIONS

Eleven states have constitutional provisions that limit betting on horse racing to pari-mutuel wagering. The existence of these provisions amplifies the limitation in PASPA that gambling on horse racing—apart from Nevada—must be conducted under a pari-mutuel system. Even if it were possible to find that PASPA did not require pari-mutuel gambling on horse racing,⁵⁸ the existence of these state constitutional provisions would make it impossible to conduct nationwide non-pari-mutuel wagering on horse racing. Additionally, these state provisions have the ability to further confuse the horse race gambling situation because the term “pari-mutuel” is defined differently at the state constitutional level than at the federal PASPA level.

These are basically states that have constitutional provisions that otherwise ban gambling, and in order to provide for gambling on horse racing, the constitutions had to be amended to specifically authorize pari-mutuel racing. Foremost of these is New York, which has traditionally had the highest handle of any state. The New York Constitution specifically banned all gambling, so that in order to authorize pari-mutuel gambling, the constitution had to be amended to provide an exception to the anti-gambling provision.⁵⁹ New York’s constitutional authorization allows only for pari-mutuel wagering solely on horse races. Consequently, betting on dog races, and presumably mule racing, would be illegal in New York.⁶⁰

Florida, another significant racing state, has a constitutional requirement for pari-mutuel racing. In order to protect gambling on horse racing from being considered a prohibited lottery, the Florida Constitution reads, “[l]otteries, other than the types of pari-mutuel pools authorized by law as of the effective date of this constitution, are hereby prohibited in this state.”⁶¹

Other states requiring that horse race gambling must be pari-mutuel are Alabama, which in its constitution authorizes a local option for pari-mutuels in

56. *Id.* Machines “designed and manufactured primarily for use at a racetrack in connection with parimutuel betting” are given an exemption from the Johnson Act. *Id.* § 1178(1).

57. 31 U.S.C. § 6705 (2016).

58. *See* 138 CONG. REC. S17,435 (daily ed. Oct. 7, 1992) (statement of Sen. DeConcini).

59. N.Y. CONST. art. 1, § 9, cl. 1.

60. *See id.*

61. FLA. CONST. art. X, § 7.

two counties;⁶² Arkansas;⁶³ Delaware;⁶⁴ Idaho;⁶⁵ Kansas;⁶⁶ Minnesota;⁶⁷ Missouri;⁶⁸ Nebraska;⁶⁹ and Wisconsin.⁷⁰ Several other states mention pari-mutuels in their constitutions, but not for the purposes of authorizing pari-mutuel wagering. Oregon bans its state lottery from conducting pari-mutuel racing.⁷¹ Georgia bans all forms of “pari-mutuel betting,”⁷² and Ohio defines “casino gambling” to not include pari-mutuel wagering.⁷³

What is common to all fourteen states that mention pari-mutuel wagering in their constitutions is that none of these states have any definitions of the term “pari-mutuel.” In that manner, these states are similar to PASPA by limiting horse race gambling to pari-mutuels without specifying what is actually meant by pari-mutuels.

IV. STATE STATUTES ON PARI-MUTUELS

Forty-three states have provisions allowing for pari-mutuel wagering.⁷⁴ Only seven states and the District of Columbia lack provisions authorizing pari-mutuel wagering.⁷⁵ Many of these states fail to provide any definition of “pari-mutuel,”⁷⁶ and many go to great lengths to avoid providing any

62. ALA. CONST. § 5.01, cl. 7, pt. 8; *id.* § 3. For certain municipalities in Alabama, “the Legislature has reserved . . . the right to enact local statutes, or general statutes applying to one or more municipalities in a class less than the whole of the state, that exempt pari-mutuel wagering at race meetings from the general prohibition of the Alabama Criminal Code.” ALA. CODE § 11-65-1(9) (2016).

63. ARK. CONST. amend. 46.

64. DEL. CONST. art. II, § 17.

65. IDAHO CONST. art. III, § 20(b).

66. KAN. CONST. art. 15, § 3b.

67. MINN. CONST. art. X, § 8.

68. MO. CONST. art. III, § 39(c), cl. 1.

69. NEB. CONST. art. III, § 24, cl. 4.

70. WIS. CONST. art. IV, § 24, cl. 5.

71. OR. CONST. art. XV, § 4, cl. 4(c).

72. GA. CONST. art. I, § II, ¶ VIII(a).

73. OHIO CONST. art. XV, § 6(9)(d).

74. *See Governments—State & Territorial Governments: Casino Gaming & Pari-Mutuel Wagering*, LEXISNEXIS 50-STATE SURVS., STATUTES & REGS. (2015), <https://advance.lexis.com/document/?pdmfid=1000516&crd=59ae916e-08b2-45e1-9b63-3590147d7b51&pdactivityid=59a14cff-c716-4ba7-83b1-502d8f82599d&pdtargetclientid=-None-&comp=qt8tk&prid=b6491df0-8b09-42ea-9c45-1fec3d64989c>.

75. *See id.* The seven states are Alaska, Georgia, Hawaii, Mississippi, North Carolina, South Carolina and Utah.

76. *See* IOWA CODE § 99D.2(7) (2016).

definition.⁷⁷

Nonetheless, there are a decent number of states that purport to define the term. The definitions are often sparse and few are similar. Uniformity in these definitions is rarely present. Few also mention the two contexts referred to in the history of federal law: (a) the notion of an equal division to all winners in proportion to their wagers in the PASPA history; or (b) the idea that in a pari-mutuel system, the participants play against themselves and not against the operator of the game, similar to the definition in the Interstate Horse Racing Act.⁷⁸

Some of the definitions are bare bones. For example, Arizona defines pari-mutuel wagering as, “a system of betting that provides for the distribution among the winning patrons of at least the total amount wagered less the amount withheld under state law.”⁷⁹ Georgia, where pari-mutuels are forbidden, defines pari-mutuel betting minimally to be “a method or system of wagering on actual races involving horses or dogs at tracks which involves the distribution of winnings by pools.”⁸⁰

Collectively, the state statutes defining pari-mutuels tend to mention seven elements. These elements include the following: (1) a requirement that the wager be placed through licensed or authorized organizations;⁸¹ (2) the requirement of a pool;⁸² (3) a guarantee of payment to the bettors of all amounts

77. Montana certainly goes out of its way not to define pari-mutuel. It defines “parimutuel facility,” “parimutuel network,” and “simulcast parimutuel network” but fails to define “parimutuel.” MONT. CODE ANN. § 23-4-101(11), (12), (18) (2016).

78. One exception to this is Florida, which comes close to the concept of proportionate payment to the winners. The definition is “a system of betting on races or games in which the winners divide the total amount bet, after deducting management expenses and taxes, in proportion to the sums they have wagered individually and with regard to the odds assigned to particular outcomes.” FLA. STAT. § 550.002(22) (2016). Idaho, on the other hand, approximates the notion of the Interstate Horse Racing Act’s definition of bettor playing against each other and not against the house. The Idaho definition is “any system whereby wagers with respect to the outcome of a race 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.” IDAHO CODE § 54-2502(8) (2016). California’s definition in respect to exchange wagering states, “‘Parimutuel’ means any system whereby wagers with respect to the outcome of a horse race are placed with, or in, a wagering pool conducted by an authorized person, and in which the participants are wagering with each other and not against the person conducting the wagering pool.” CAL BUS. & PROF. CODE § 19604.5(16) (2016).

79. ARIZ. REV. STAT. ANN. § 5-101(23) (2016).

80. GA. CODE ANN. § 50-27-3(20) (2016). Thus, the Georgia definition simply amounts to pari-mutuel as meaning a pool on actual races.

81. *See, e.g.*, 230 ILL. COMP. STAT. § 3.12 (2016); NEV. REV. STAT. ANN. § 464.005(5) (2016); N.J. STAT. § 5:5-129(3) (2016); N.M. STAT. ANN. § 60-1A-2(R) (2016); OKLA. STAT. tit. 3A, § 200.1.1(A)(10) (2016); TEX. REV. CIV. STAT. ANN. art. 179e, § 1.03(18) (2016); WYO. STAT. ANN. § 11-25-102(a)(v) (2016).

82. *See, e.g.*, COLO. REV. STAT. § 12-60-102(20.5) (2016); 230 ILL. COMP. STAT. § 5/3.12; KAN.

wagered minus an amount deducted (takeout) for commissions to the operator and the government;⁸³ (4) authority for the operator to add monies to the pool;⁸⁴ (5) the fact that pari-mutuel wagering involves participants betting against other participants;⁸⁵ (6) the requirement of a proportionate payment to the winning ticket holders;⁸⁶ and (7) the types of events on which pari-mutuel racing can take place.⁸⁷ As a subset of the types of events that may feature pari-mutuel racing, some states limit the events to live and simulcast racing.⁸⁸ On the other hand, Kentucky, by statute,⁸⁹ has authorized pari-mutuel wagering on historical horse racing,⁹⁰ and Idaho had authorized wagering on historical horse races,⁹¹ but Idaho's authorization has been repealed.⁹²

Taken as a group, the individual state definitions provide little assistance beyond the federal laws on what actually constitutes pari-mutuel wagering. There is some general consensus of a pooled wagering system on which the

STAT. ANN. § 74-8802(aa) (2016); N.M. STAT. ANN. § 60-1A-2(S); N.J. STAT. ANN. § 5:5-129(3); OKLA. STAT. tit. 3A § 200.1(10)-(11); OR. REV. STAT. § 462.010(9) (2016); TEX. REV. CIV. STAT. ANN. art. 179e, § 1.03(18); W. VA. CODE § 19-23-3(18) (2016); WYO. STAT. ANN. § 11-25-102(a)(vi).

83. *See, e.g.*, IND. CODE ANN. § 4-31-2-12 (2016); MD. CODE ANN. BUS. REG. § 11-101(m) (2016); MINN. STAT. § 240.01 Subd. 14 (2016); NEV. REV. STAT. ANN. § 464.005(1); N.M. STAT. ANN. § 60-1A2(R); OR. REV. STAT. § 462.010(9)(b); TEX. REV. CIV. STAT. ANN. art. 179e, § 1.03(18); VA. CODE ANN. § 59.1-365 (2016); W. VA. CODE § 19-23-3(18); WIS. STAT. § 562.01(9) (2016); WYO. STAT. ANN. § 11-25-102(a)(vi).

84. *See* VA. CODE ANN. § 59.1-365. California and New Jersey permit an exchange wagering license to make "corrective wagers" with a bettor in order to avoid the market impact of a voided wager. CAL. BUS. & PROF. CODE § 19604.5(a)(3) (2016); N.J. STAT. § 5:5-170(3).

85. *See, e.g.*, CAL. BUS. & PROF. CODE § 19604.5(16); IDAHO CODE § 54-2502(8) (2016); NEV. REV. STAT. ANN. § 464.005(5); N.J. STAT. § 5:5-129(2).

86. *See, e.g.*, FLA. STAT. § 550.002(22) (2016); COLO. REV. STAT. § 12-60-102(20.5); KAN. STAT. ANN. § 74-8802(aa).

87. *See, e.g.*, COLO. REV. STAT. § 12-60-102(20.5); 230 ILL. COMP. STAT. § 5/3.12; IND. CODE § 4-31-2-12; KAN. STAT. ANN. § 74-8802(aa) horse racing and greyhounds; MINN. STAT. § 240.01 Subd. 14; NEV. REV. STAT. ANN. § 464.005(5) race or sporting event; N.M. STAT. ANN. § 60-1A-2(R); OKLA. STAT. tit. 3A § 200.1(10); 42 R.I. GEN. LAWS § 42-61.2-1(4)(i)-(ii) (2016) dog racing and jai-alai; TEX. REV. CIV. STAT. ANN. art. 179e, § 1.03(18); VA. CODE ANN. § 59.1-365 only horse racing; W. VA. CODE § 19-23-3(18); WYO. STAT. ANN. § 11-25-102(a)(v) horses and dogs. While not in the definition of pari-mutuel, Wisconsin limits pari-mutuel wagering to horse races and dogs. WIS. STAT. § 562.05(1g). Wisconsin also authorizes pari-mutuel wagering on snowmobile races. *Id.* § 562.124(1m).

88. *See* COLO. REV. STAT. § 12-60-102(20). "Pari-mutuel pool" means a wagering pool into which pari-mutuel wagers on a live race or on a simulcast race are taken." *Id.* *See also* N.M. STAT. ANN. § 60-1A-2(R) (2016). "*Pari-mutuel* wagering" means a system of wagering in which bets on a *live* or simulcast horse race are pooled." *Id.* (emphasis added).

89. *See* KY. REV. STAT. ANN. § 138.511(9)(a) (2016).

90. *See* Appalachian Racing, LLC v. Family Tr. Found. of Ky., Inc., 423 S.W.2d 726, 730 (Ky. 2014).

91. 2013 Idaho Sess. Laws 333.

92. S. 1011, 63d Leg., 1st Reg. Sess. (Idaho 2015). *See generally* Coeur d'Alene Tribe v. Denney (*In re* Verified Petition for Writ of Mandamus), No. 43169, 2015 Ida. LEXIS 294, at *2 (Idaho 2015).

winnings are paid to successful bettors minus amounts allowable for deductions. Yet, there is little indication of what an actual “pool” consists of. On other issues, some states limit pari-mutuels to live racing, while a few states now allow racing on previously-run “historical” races. Some statutes specify that in pari-mutuel racing, the wagering is conducted between the bettors. Yet, does that preclude racetrack licenses from guaranteeing the size of a wagering pool, guaranteeing a minimum payout to bettors, adding to the size of the wagering pool, or wagering against an individual bettor, as in the case of “corrective wagers” authorized for exchange wagering in New Jersey and California?⁹³

With the state statutory definitions not providing much added understanding as to the meaning of pari-mutuels, potential ways to provide a workable definition of pari-mutuels would be to review the dictionary definitions of pari-mutuels and to review the actual working history and development of pari-mutuel wagering.

V. THE PARI-MUTUEL DEFINITIONS

Unfortunately, the dictionary definitions of “pari-mutuels” do not add much to the rudimentary definitions contained in the state statutes. The *Oxford English Dictionary* defines pari-mutuel as “[a] form of betting ‘in which those who have put up a stake on the winning horse divide among themselves the total of the stakes on the other horses’ (less the percentage of the managers—i.e. in France, the Government).”⁹⁴ A similar definition can be found in *Black’s Law Dictionary*, which defines pari-mutuel betting as “[a] system of gambling in which bets placed on a race are pooled and then paid (less a management fee and taxes) to those holding winning tickets.”⁹⁵ The *Encyclopedia Britannica* provides much the same definition, stating:

In pari-mutuel betting, the player buys a ticket on the horse he wishes to back. The payoff to winners is made from the pool of all bets on the various entries in a race, after deduction of an operator’s commission and tax. The system has the advantages of always giving the operator a profit and allowing any number of bettors to win.⁹⁶

93. See CAL. BUS. & PROF. CODE § 19604.5(3) (2016); N.J. STAT. § 5:5-170(3) (2016).

94. *Pari mutuel*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

95. *Parimutuel Betting*, BLACK’S LAW DICTIONARY (8th ed. 2004).

96. *Pari-mutuel*, BRITANNICA, <https://www.britannica.com/topic/pari-mutuel> (last visited Dec. 15, 2016). Britannica has a similar description in its definition of “pool.”

This is a little different than the consensus finding of the state statutes requiring, but not defining a pool, and adding the winnings are paid to successful bettors minus amounts allowable for deductions.

Webster's New World Dictionary finds pari-mutuel to be "a system of betting on races in which those backing the winners divide, in proportion to their wagers, the total amount bet, minus a percentage for the track operators."⁹⁷ Webster's, thus, adds the requirement of a proportionate payment to winners as part of the definition but states nothing specifically about a pool.⁹⁸

Again, the dictionaries provide no more assistance in determining the scope of pari-mutuel wagering than the state statutes, which amount to nebulous generalizations.⁹⁹

VI. THE HISTORY OF PARI-MUTUEL WAGERING

A. *Joseph Oller and Pari-Mutuels in France*

While some might think that pari-mutuel wagering has been around ever since organized horse racing started, that is hardly the case. There is a clear history to pari-mutuel wagering, and there is one actual and acknowledged inventor in Joseph Oller.¹⁰⁰ The invention of pari-mutuels was not even Oller's major contribution to cultural history. He was probably better known as the founder and manager of Moulin Rouge, probably the most famous nightclub of all time.¹⁰¹

The pari-mutuel story dates from Paris in 1862. Oller pioneered a sweepstakes game based on horse racing results. This was a system based on total chance.¹⁰² The bettor paid for a chance and was randomly assigned a horse on a given race.

97. *Pari-mutuel*, Webster's New World College Dictionary (3d ed. 1994).

98. *Id.*

99. For a contrary point of view, see *Wyo. Downs Rodeo Events, LLC v. State*, 134 P.3d 1223, 1230 (Wyo. 2006), which finds the term pari-mutuel to be "thoroughly digested".

100. *Pari-Mutuel Inventor, Death of Joseph Oller*, TIMES (London), Apr. 22, 1922, at 12; *Prosecution of Paris Betting Agents*, LONDON DAILY NEWS, Aug. 24, 1874. In some works, Oller's first name is frequently reported incorrectly as Pierre.

101. *Joseph Oller Dies*, VARIETY (London), Apr. 28, 1922, at 2; Laura Ewald, *Moulin Rouge Owns Fabled, Bawdy Past*, INDIANAPOLIS STAR, July 20, 2001, at 2E; Michela Wrong, *Moulin Rouge Kicks Up 100th Anniversary*, PHILA. INQUIRER, Oct. 6, 1989, at D3.

102. See *Mutuel Betting in France*, CHI. DAILY TRIB., Sept. 29, 1908, at 9. Oller explained, "I devised a sort of lottery plan whereby the numbers of the various horses in a race were shaken up in a bag. Each holder of a ticket in the pool drew a card. The person who held the number of the winning horse took the pool." *Id.*

If there are ten horses entered for a race, an equal number of tickets are sold at a stated price, and a drawing of tickets had, each ticket bearing the name of one of the horses entered. None of those investing in a sweepstakes knows the horse he is backing until he draws his ticket, and this is governed entirely by chance.¹⁰³

If the horse won, the bettor collected. As operated, this was hardly different than a raffle or a sweepstakes.¹⁰⁴ You place a wager, you get a random ticket, and if that ticket is drawn (or in this case if the horse that your ticket represents wins) you receive a prize.

Apparently, this raffle/sweepstakes system was initially, financially lucrative. Other operators copied Oller. However, it was learned that the Paris police were poised to bring charges against this sweepstakes system. The police were charging that the system was an illegal lottery that was dependent totally on chance (betting itself was not illegal in France, but lotteries were illegal). In order to avoid the illegal lottery charge based on chance, “Mr. Oller eliminated this feature from his poules [sic] and called them ‘Paris Mutuels.’”¹⁰⁵

In place of the system under which the bettors were assigned their designated horse by pure chance, Oller devised a system under which the bettors selected the horses themselves. “By this scheme each investor selected the horse he desired to bet on, and, if his favorite proved successful, he became entitled to all the money in the pool, less the commission exacted by Mr. Oller.”¹⁰⁶

The French authorities still pursued Mr. Oller, and he was brought up on charges that he was operating an illegal lottery.

A long lawsuit, lasting over seven months, ended in a judgment being given by the Court of Appeal in M. Oller’s favour, as it was considered that the fact of the person exercising his own discretion as to which animal he should invest upon deprived it to a certain extent of its elements of “chance,” and made it much the same thing as betting pure and simple, which is a lawful act in France.¹⁰⁷

103. “*Paris Mutuals*,” CIN. ENQUIRER, July 9, 1877, at 2.

104. *See Id.*

105. *Id.*

106. *Id.*

107. *The “Paris-Mutuels*,” LONDON DAILY NEWS, July 28, 1872; *see Prosecution of Paris Betting Agents*, *supra* note 100; Guillaume Longchamps, *Betting on the Races*, DAILY INTER OCEAN (Chi.),

With Oller's successful defense, the pari-mutuel system prospered in Paris. Not only did Oller expand his business, but also numerous other pari-mutuel operators began to operate in Paris. The Oller system operated in the following manner:

There is a machine with numbers running, say, from 1 to 20. Supposing fourteen horses to be engaged in a race. Their names are printed on small slips of paper, and each is placed against one of the fourteen numbers; the several animals thus becoming No. 1, No. 2, and so on. People are then at liberty to stake upon the horse which most takes their fancy, until a given time in the day, when the electric bell gives five minutes' notice of the close. Supposing that the total number of stakes upon the fourteen horses is 200, it follows that the amount of each stake being five francs, there is a sum of 1,000 francs available for distribution. From this sum ten per cent, or 100 francs, is deducted by the keepers of the agency for their own commission; and this is the manner in which they make a profit out of the transactions. There, therefore, remain 900 francs to be divided amongst those who have staked on the winning horse. If, for instance, No. 9 was the animal that had proved successful, and if ten stakes appeared against his name, the 900 francs would have to be divided into ten shares of 90 francs each; that is, that each five francs invested would yield 90 francs.¹⁰⁸

Oller improved upon his pari-mutuel system. "To keep a running record of ticket sales on individual horses, Oller developed hand-operated tallying machines which also showed the total sales on all horses in a given race."¹⁰⁹ While the pari-mutuel business was interrupted by the Franco-Prussian War of 1870, Oller's business after the war was extremely financially lucrative.¹¹⁰

July 5, 1891, at 6. The Oller pari-mutuel operation was considered not "to be a game of chance, and was entitled to benefit by Article 1966 of the Code Napoleon, which by inference legalizes betting on races and other manly exercises." *The Paris Betting Agencies*, W. MAIL (Cardiff), Sept. 1, 1874.

108. *The "Paris-Mutuels," supra* note 107.

109. JOHN C. SCHMIDT, WIN-PLACE-SHOW: A BIOGRAPHY OF HARRY STRAUS, THE MAN WHO GAVE AMERICA THE TOTE 43 (1989).

110. *See The Paris Betting Agencies, supra* note 107. "By these inventions, Oller has amassed a handsome fortune." *Gambling on the Turf*, SPORTING GAZETTE, Aug. 29, 1874.

Competitors—many from England—joined in the pari-mutuel business.¹¹¹ The number and popularity of the pari-mutuel businesses became a nuisance in Paris, and the French Public Prosecutor took action against twenty-four of the pari-mutuel businesses, including Oller's.¹¹² The prosecutor's argument involved two distinct issues. One general fraud claim involved in the pari-mutuel firms took wagers on horses that had already been scratched from races or were running horses under assumed names.¹¹³ The other claim is that by expanding the betting pool from one race to a series of races in which the winning bettor had to select the winning horses (called the Pari de Combinaison Mutuelles or more generally the combination pools), the wager was changed into a game of chance.¹¹⁴ In addition, Oller added another potential wager under which the bettors could place wagers that nobody would select all the winners in the Pari de Combinaison Mutuelles.¹¹⁵ The authorities charged that the Pari de Combinaison Mutuelles turned the wagering into an event of pure chance so that Oller's prior favorable decision regarding pari-mutuels would no longer be controlling.

All the pari-mutuel operators were tried, and all were found guilty. Oller was forced to pay a 5,000 franc fine, and all the operators had their offices and wagering materials confiscated.¹¹⁶ His appeals were unsuccessful.¹¹⁷ All betting in France was left to the bookmakers.

111. See *Betting in Paris and the Grand Prix*, LONDON DAILY NEWS, June 13, 1874; see also *Mutuel Betting in France*, *supra* note 102.

112. *The Betting Men in Paris*, LONDON SPORTING TIMES, Aug. 28, 1875.

113. *Id.*; *Prosecution of Betting Men*, DUBLIN FREEMAN'S J. & DAILY COM. ADVERT., Aug. 28, 1875, at 47.

114. *Prosecution of Paris Betting Agents*, *supra* note 100. The combination bet in 1870's Paris appears to be quite similar to the current Pick 6 regularly employed in American racing where the successful bettor needs to pick the winners of six designated races. In the case of *State v. Lovell*, 39 N.J.L. 458 (1877), the court described the combination pool as being

similar to what are called French pools. In combination pools there must be at least three events or contests. The person speculating in combination pools must select his choice in the contests, the same as is done in the French pools for the one contest, but in order to win he must have selected the winner in each contest. If any one of his choices fails, he wins nothing. Any number of persons may select the same combination, and if any particular combination wins, the persons having selected that combination are entitled to the total amount, less the commission, to be equally divided upon producing their cards or tickets. The sum deposited on each selection of a combination is uniform.

Id. at 458.

115. *Prosecution of Paris Betting Agents*, *supra* note 100.

116. *The Septennate*, TIMES (LONDON), Aug. 29, 1874, at 5.

117. Cour d'appel de Paris, No. 195, Dec. 31, 1874; Court de cassation [Cass.], June 18, 1875, at 8643; *The Conviction of English Bookmakers in Paris*, MANCHESTER GUARDIAN, Aug. 27, 1875, at 6.

Oller, however, enjoyed the last laugh. There were numerous scandals involving the bookmaking system forcing the French government to prohibit bookmaking in 1887.¹¹⁸ France went back to the pari-mutuel system in 1887, which legislation formally authorized pari-mutuels in 1891.¹¹⁹

[Oller] was amply compensated later on for this untoward incident of his early career; for when the Government was preparing its Pari Mutuel scheme in 1891 it sought the assistance of Mr. Oller, who originally introduced the Pari Mutuel system into France, and he was for long years connected with its management. He rose, indeed, to a position of high standing in the racing and theatrical world in Paris.¹²⁰

The 1891 law strictly banned direct and indirect bookmaking. The law provided, “[w]hoever shall carry on betting on horse-races in any place and under any form whatsoever by offering to *all comers* to bet or by betting with *all comers* either directly or through an intermediary shall be subject to the penalties set forth in . . . the Penal Code.”¹²¹

Initially, the pari-mutuel takeout on French wagering was 8%, with none of the money being allocated to the government. Four percent went to the expenses of the track, 2% to charities, 1% to breeders, and 1% to water districts unable to provide their own water.¹²² Subsequently, the takeout was raised to 11%, with management receiving 4%, 3% to charities, 2% for water districts, 1.5% to breeders, and .5% to agricultural education.¹²³ The reviews of the post-1891 French pari-mutuel system were that it was a tremendous success.¹²⁴ In 1923, it could be written that “it is indisputable that in France it has put an end to a system of widespread and intolerable abuse and immorality, and it is now, to all appearance, so grounded in the institutions of the country that it is unlikely that it will ever be fundamentally altered.”¹²⁵

118. *Mutuels*, CIN. ENQUIRER, Apr. 5, 1908, at C1.

119. O.E. Bodington, *French Law on Taxation of Betting*, 5 J. COMP. LEGIS. & INT’L L. 178, 178 (1923).

120. *Id.* at 179.

121. *Id.* at 180.

122. *Mutuels*, *supra* note 118.

123. Bodington, *supra* note 119, at 181.

124. *See id.*

125. *Id.*

B. Great Britain

With the great success of the pari-mutuel system in France, it was no surprise that pari-mutuels would soon be imported across the English Channel to Great Britain. Similarly, it was hardly a surprise that the pari-mutuel system in Great Britain would be subject to legal challenges.

The law in Great Britain authorized bookmaking but banned games of chance. Any person playing or betting in a public place with any table or instrument of gaming at any game of chance was liable to be convicted as a rogue and vagabond.¹²⁶

On August 10, 1870, operators brought a pari-mutuel machine to the racetrack at Wolverhampton.¹²⁷ They set up shop offering pari-mutuel wagering to the public and were arrested by the local police.

The pari-mutuel machine operation worked in the following manner:

The machine had on it numbers, besides each of which were three holes, and behind these holes were figures, which, by a mechanical contrivance, were made to shift on the turning of a key, so that any number from 0 to 999 would be exhibited behind these holes. On the top of the machine was the word “total;” and beside it were holes in which could be exhibited in a similar manner figures shifting on the turn of the key. . . . Any person who wished to bet on a particular horse deposited with the appellants half-a-crown, and received a ticket with the number appropriated to the horse; and the appellants, by a turn of the key, altered the figures, increasing the sum indicated alongside of that number by one; and the same turn of the key increased the figures beside “total” by one. When the race had been run the holders of tickets with the number of the winning horse had divided among them the amount of all the half-crowns deposited, less 10 per cent., which the appellants retained as proprietors of the machine.¹²⁸

In short, the pari-mutuel system in Great Britain differed little from Oller’s system in Paris. The wagering was in a pool totally contributed by the bettors

126. Vagrant Act Amendment 1868, 31 & 32 Vict. c. 52, § 3 (Eng.).

127. *Tollett v. Thomas* [1871] 6 QBD 514, 515 (Eng.).

128. *Id.* at 514–15. Chief Justice Cockburn observed of this system, “Thus, with ingenuity worthy to be employed in a better cause, it was contrived that each person, who was induced to bet, might see at a glance what was the amount of the odds offered if he bet on any particular horse.” *Id.* at 519.

who wagered against themselves. The proprietors took a certain amount from the gross pool as a commission. The amounts from the net pool were distributed to the bettors in proportion to their wagers.

The operators of the pari-mutuel were convicted and appealed their conviction to the Queen's Bench. The court found little difficulty in finding that there was betting, that the betting took place in a public place, and that the pari-mutuel machine was an instrument of gaming. The main issue of the case turned on whether pari-mutuel wagering was a game of chance.¹²⁹

Chief Justice Cockburn determined that pari-mutuel wagering on horse racing was a game of chance and affirmed the conviction of the operator-appellants. In finding that pari-mutuel horse racing was a game of chance, Justice Cockburn avoided the general issue of whether horse racing itself was a game of chance. While Cockburn noted that "experience shews that there is nothing about which there is so much uncertainty as the event of a horse-race,"¹³⁰ he found that it was unnecessary to make a ruling on that issue.¹³¹ Instead, the issue turned on the nature of pari-mutuel wagering.

Justice Cockburn found that "if some additional element of chance be introduced, the wagering on a horse-race may be converted into a game of chance."¹³² In this case, the element of chance came in the form of the uncertainty of the actual payout to the individual winning bettors. There was no way to determine this amount at the time of the wager. The earliest time at which the amount of the winning return could be determined was after the wagering had closed for the race. The uncertainty of the final payoff was what turned pari-mutuel horse racing into a game of chance. "There being, then, this element of chance in the transaction among the parties betting, we think it may properly be termed, as amongst them, a game of chance."¹³³ Since the role of chance in determining the actual gain in the transaction was material, "we may properly hold the wagering in question to have been wagering on a game of chance."¹³⁴

The opinion in *Tollett v. Thomas* adds another element to the definition of pari-mutuel. In a pari-mutuel system, the return to the bettors on wagers is only known after the wagering on the event has been closed.

Under this ruling, pari-mutuel horse race wagering was banned in Great Britain for many years. It was not until 1928 that pari-mutuel wagering through

129. *Id.* at 516–17.

130. *Id.* at 517.

131. *Id.* at 517–18.

132. *Id.* at 521.

133. *Id.*

134. *Id.*

the “tote” was legalized with the Racecourse Betting Act.¹³⁵

C. *United States*

1. The Initial Entry of Pari-Mutuels in the 1870s

The racetrack operators in the United States similarly saw the success of the pari-mutuels in Paris, and, much as in the United Kingdom, they tried to bring pari-mutuels into use in the United States. Before 1870, the main form of wagering at the American tracks—which were reopening after the Civil War—was the auction pool, also known as the Calcutta pool.¹³⁶ Under this system,

135. Betting Act 1928, 18 & 19 Geo. 5 c. 41, § 2(b) (Eng.). See *M. P.s Vote for the “Tote,”* DAILY MAIL, Mar. 17, 1928. At the House of Commons debate on the tote, Winston Churchill as Chancellor of the Exchequer, said,

I am all for that change. I believe that the contrast between British racecourses and French racecourses [where the tote system is already in operation] is a contrast between 18th century barbarism and rowdyism and the new civilisation that we hope the 20th century will offer for very large numbers of people.

214 Parl Deb HC (5th ser.) (1928) col. 2275-364 (UK). Churchill added, “the time would come when Englishmen would as soon think of repealing the Daylight Saving Act as the law which ensured them the totalisator.” *Totalisator Bill’s Escape*, MANCHESTER GUARDIAN, Mar. 17, 1928, at 15; see *82 Years of Betting: A History of the Tote*, TELEGRAPH (Dec. 11, 2010), <http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/leisure/8194547/82-years-of-betting-a-history-of-the-Tote.html>.

136. Montana and Wyoming continue to have limited authorizations to have Calcutta pools run by certain not-for-profit organizations. In Montana, a Calcutta pool

means a form of auction pool conducted by an organization authorized by the department. The Calcutta pool must be an auction pool in which: (1) a person's wager is equal to the person's bid; (2) the proceeds from the pool, minus administrative costs and prizes paid, are contributed to a charitable or nonprofit corporation, association, or cause.

MONT. CODE ANN. § 23-5-221(1)–(2) (2016). In Wyoming, a

“Calcutta wagering” means wagering on the outcome of amateur contests, cutter horse racing, dog sled racing, professional rodeo events or professional golf tournament in which those who wager bid at auction for the exclusive right to “purchase” or wager upon a particular contestant or entrant in the event and when the outcome of the event has been decided the total wagers comprising the pool, less a percentage “take-out” by the event’s sponsor, is distributed to those who “purchased” or wagered upon the winning contestants or entrants.

WYO. STAT. ANN. § 6-7-101(a)(i) (2016).

bettors bid on the right to choose horses in a race. The highest bidder got to pick the horse of his choice, usually the favorite. “Then there was bidding [down] for the right to make the next selection, and so on down the line.”¹³⁷ The auctioneer/proprietor of the auction took a commission for the service. Initially the commission was set at three percent.¹³⁸

The auction pool had some obvious disadvantages as a betting mechanism.

First, the odds against an individual horse could not be determined until all the entries had been sold. Secondly, the bettor with the greatest amount of capital could monopolize the most logical choice. Those frozen out by this method, had either to buy an entry he didn’t particularly like, or not bet at all.¹³⁹

This differentiated auction pool wagers from pari-mutuel betting, where the bettor could always wager on the contestant he or she wishes to wager on.

Given the limitations of auctions pools, it is hardly surprising that racetrack proprietors wanted an alternative to this form of wagering. The first American racing executive to utilize the Oller pari-mutuel pools was Leonard Jerome,¹⁴⁰ who ran America’s premier racetrack in the 1860s and 1870s, Jerome Park in Westchester County in New York State.¹⁴¹

In the spring at the Jerome Park meeting of 1872, Jerome brought pari-mutuels to Jerome Park and operated them himself with a commission of

137. STEVEN A. RIESS, *THE SPORT KINGS AND THE KINGS CRIME HORSE RACING, POLITICS, AND ORGANIZED CRIME IN NEW YORK 1865-1913*, at 18 (2011); see *State v. Lovell*, 39 N.J.L. 458, 458 (1877) (describing an auction pool as follows:

Any person desiring to invest money in a pool on the race offers to the auctioneer a certain amount of money for the choice or selection of a horse which he supposes will be the winner of the race. A number of bids may be offered for the first choice. The person offering the highest amount obtains the first choice or selection of the horse he supposes will be the winner, which horse he then and there names; the amount then and there offered for this first choice is then and there deposited in the hands of the person conducting the pools.)

A similar description of an auction pool can be found in *People v. Weithoff*, 16 N.W. 442, 442–43 (Mich. 1883) and in *James v. State*, 63 Md. 242, 248–49 (Md.1885).

138. See RIESS, *supra* note 137.

139. *Wanta Bet?*, *supra* note 2, at 8–9.

140. More than half a century later, Jerome’s grandson, Winston Churchill, would help bring pari-mutuel wagering to Great Britain. See 214 Parl Deb HC (5th ser.) (1928) col. 2275-364 (UK).

141. While in Westchester County in the nineteenth century, Jerome Park’s location is now in the Bronx, not too far from current Yankee Stadium.

five percent.¹⁴² It was said, “[h]e put on a blue flannel shirt and opened the Paris mutuels in the United States.”¹⁴³ They soon spread to most of the racetracks in America.¹⁴⁴ At Jerome Park, the control of the pari-mutuels went from Leonard Jerome to the gambler John Chamberlain, and in 1874, the notorious John Morrissey obtained the right to conduct pari-mutuel wagering at Jerome Park and at Saratoga.¹⁴⁵

Morrissey, known as “Old Smoke,” was a unique figure in American life in the last half of the nineteenth century.¹⁴⁶ A former heavyweight-boxing champion, he became a politician who served in the United States Congress, the New York State Senate, and played a key part of the Tammany machine in New York City. He also established and operated Saratoga Race Course and ran many of the gambling establishments that were appurtenant to the running of the track. Morrissey personified the trifecta of government, corruption and gambling.

Under Chamberlain and Morrissey, there were questions involving the integrity of the pari-mutuel process. There were allegations that after the pools had been closed, they had been tampered with to lower the return on the winning horses, thereby providing additional revenue to the pool operators.¹⁴⁷

Additionally, the pari-mutuel operators became even more suspect due to the voting on the presidential election of 1876 between Republican Rutherford B. Hayes and Democrat Samuel J. Tilden. Tilden was the governor of New York State and a political ally of John Morrissey. There was an incredible amount of wagering on the presidential election.¹⁴⁸ One estimate was that \$2 million¹⁴⁹ was wagered on the election with \$350,000 wagered with Morrissey.¹⁵⁰ It was alleged that Morrissey used his position as the most significant holder of wagers on the election to manipulate his stated odds in order to make it appear that Tilden was the favorite to win the election.¹⁵¹

142. “*Paris Mutuels*,” *supra* note 103, at 2; see Damon Runyan, *Bright Lines*, AUSTIN STATESMAN, Nov. 7, 1939, at 4; J.H. Considine, *Pari-Mutuel in Kentucky*, N.Y. HERALD TRIB., Sept. 21, 1927, at 20.

143. *The Paris Mutuel*, DAILY AM. (Nashville), July 29, 1880, at 3.

144. “*Paris Mutuels*,” *supra* note 103, at 2; *Paris Mutuels*, TURF, FIELD, & FARM, June 25, 1875, at 446; *To-Day's Event: The Night Before the Big Race*, S.F. CHRON., Nov. 15, 1873, at 3.

145. *The Paris Mutuel*, *supra* note 143, at 3.

146. See ELLIOTT J. GORN, *THE MANLY ART: BARE-KNUCKLE PRIZE FIGHTING IN AMERICA* (2010).

147. *The Paris Mutuel*, *supra* note 143; see *Paris Mutuels*, *supra* note 144.

148. See *Money Talks*, CIN. ENQUIRER, Nov. 4, 1876, at 5; *Political Pools*, DAILY AM. (Nashville), Nov. 4, 1876, at 1.

149. *The Pool-Room Betting*, CIN. ENQUIRER, Nov. 17, 1876, at 2.

150. RIESS, *supra* note 137, at 40.

151. See *One Sided Industry*, N.Y. TRIB., Dec. 14, 1876, at 4; 151. “*Paris Mutuels*,” *supra* note

More significantly, with the results of the 1876 election becoming extraordinarily uncertain, Morrissey, a month after the election, but before a winner had been ascertained, called off the all the wagers on the election.¹⁵² While he returned the bulk of the wagers, he did, however, retain his two percent commission on the \$350,000 that was wagered with him.

The negative reaction to the role of Morrissey's pari-mutuels, especially in elections, was significant.¹⁵³ The New York State legislature, in which Morrissey sat as a Senator, voted to end all pari-mutuel pools. An effort to allow only racetracks to continue to have pools on their own properties failed.¹⁵⁴ The law, as passed, banned occupying "any part or portion of any room or building, or occupy any place upon public or private grounds anywhere within the state . . . for the purpose of recording or registering bets or wagers, or of selling pools."¹⁵⁵ The wagers condemned consisted of "the result of any trial or contest of skill, speed or power of endurance, of man or beast, or upon the result of any political nomination, appointment or election."¹⁵⁶ Morrissey spoke against the bill in the Senate, but did not vote on the legislation.¹⁵⁷

With that legislation, pari-mutuel wagering on horse racing basically faded in New York and in the rest of the nation, although Morrissey continued to operate pari-mutuel pools in Saratoga in 1877, claiming that he did not believe that the law was intended to apply to racetracks.¹⁵⁸ Morrissey died at age forty-seven in 1878, before the Saratoga season started, bringing to an end the short-lived era where pari-mutuels were the featured means of wagering at New York racetracks in the nineteenth century. With New York being the center of American horse racing, other racetracks followed New York's example, and bookmaking became the basis of wagering at the horse tracks.

In 1887, the New York State legislature passed the Ives Pool Law, which decriminalized betting, wagering, and selling pools at racetracks.¹⁵⁹ Under this

103, at 2; *Of Interest to Bettors*, COURIER-J. (Louisville), Dec. 10, 1876, at 3.

152. "Paris Mutuals," *supra* note 103, at 2; *Of Interest to Bettors*, COURIER-J. (Louisville), Dec. 10, 1876, at 3.

153. *Pool-Selling, Political and Equine*, N.Y. DAILY TRIB., Mar. 8, 1877, at 4.

154. *Article 3*, N.Y. TIMES, Mar. 13, 1877, at 4.

155. 1877 N.Y. Laws 192.

156. *Id.*

157. RIESS, *supra* note 137, at 41; *Buffalo Races Open Today with Brilliant Prospects*, UTICA MORNING HERALD, July 31, 1877.

158. *The Turf*, UTICA MORNING HERALD, Aug. 11, 1877; *Turf Matters*, DAILY COURIER (Syracuse), Aug. 1, 1877. See *Abandoning Bigelow*, N.Y. EVENING EXPRESS, Oct. 19, 1877 at 2; *Out-door Sports*, N.Y. TRIB., Aug. 13, 1877, at 2; *Saratoga Sport*, DAILY AM. (Nashville), Aug. 17, 1877, at 4.

159. See 1887 N.Y. Laws 604; *Brennan v. Brighton Beach Racing Ass'n*, 9 N.Y.S. 220, 222 (N.Y. Gen. Term 1890).

law, pari-mutuels returned to New York facilities.¹⁶⁰ Yet, with the opposition of the bookmakers, the pools never regained their previous popularity¹⁶¹ and all but faded out of American racing.¹⁶²

2. The Return of Pari-Mutuels

Under the bookmaking system of wagering, American horse racing thrived in the late nineteenth century. Bookmaking, however, became subject to increasing political pressure with the rise of the Progressive Movement in the 1890s and into the early twentieth century.¹⁶³ The Progressive Movement, while believing that gambling itself was indecent, was particularly anti-bookmaking. Progressives saw bookmakers as both immoral and dishonest and threatened the basic fairness of racing.¹⁶⁴ With the Progressive movement in full sway, state governments began to crack down on horse racing. In 1897, there were 314 racetracks operating in the United States. By 1908, that number had been reduced to forty-three by 1908.¹⁶⁵

The anti-gambling movement even reached into Kentucky. In 1907, the local sheriff in Louisville, utilizing a law that had previously been ignored, stated that he would ban bookmakers from operating at Churchill Downs by raiding the track.¹⁶⁶ Based on this threat, Churchill Downs' fall meeting was cancelled.

In 1908, however, even with the continued threat of punitive action from the city of Louisville, Churchill Downs applied for a racing license.¹⁶⁷ It was

160. *Betting at Jerome Park*, N.Y. TRIB., Apr. 29, 1888, at 12.

161. See RIESS, *supra* note 137, at 87–90.

162. By 1889, the pari-mutuels were out of Churchill Downs. See *Field of Thirteen May Start in the Derby*, COURIER-J. (Louisville), May 3, 1908, at C5. Before the running of the Kentucky Derby in 1908, which utilized pari-mutuel wagering, the Daily Racing Form noted, “[t]o race-goers of the present generation, the system of betting that will be in operation at the current Louisville meeting is a novelty, although well-known and popular thirty years ago.” *Louisville’s New Betting Departure*, DAILY RACING FORM (Chi.), May 3, 1908.

163. See HENRY CHAFETZ, *PLAY THE DEVIL: A HISTORY OF GAMBLING IN THE UNITED STATES FROM 1492 TO 1955*, at 378 (1960). “The drive to make gambling on races illegal began in about 1890 and intensified till, by the twentieth century, many states were outlawing it.” *Id.* “Horse-race gambling was a prime target of the reformers—less because horse racing was popular and widespread than because of the unprincipled practices and dishonesty attached to the track.” *Id.* at 370.

164. “Public opinion revolted when the gamblers overran the race tracks.” State Racing Comm’n, v. Latonia Agric. Ass’n, 123 S.W. 681, 684 (Ky. 1909).

165. WILLIAM H.P. ROBERTSON, *THE HISTORY OF THOROUGHBRED RACING IN AMERICA* 196 (1964). “By 1911, only six states allowed horse racing.” MUNTING, *supra* note 2, at 112.

166. *Sheriff Will Stop Betting at Track*, COURIER-J. (Louisville), Oct. 12, 1907, at 1.

167. See *Will Hold Spring Races*, COURIER-J. (Louisville), Jan. 29, 1908, at 6. An anecdotal version of the Churchill Downs move towards pari-mutuels in 1908 is told by Matt Winn, the general manager of the track in his book. See FRANK G. MENKE, *DOWN THE STRETCH: THE STORY OF COLONEL MATT J. WINN* 69–77 (1945).

Churchill Downs' position that pari-mutuel pools would be permitted.¹⁶⁸ Churchill Downs received a license and made the decision to resurrect the use of pari-mutuels and banish bookmakers in order to comply with the law.¹⁶⁹ The city of Louisville threatened to raid the track,¹⁷⁰ but the track received an injunction preventing the authorities from interfering with pari-mutuel wagering.¹⁷¹ For the 1908 meeting, the track brought in eleven pari-mutuel machines.¹⁷² They were an enormous success on Kentucky Derby Day.¹⁷³ According to contemporaneous press accounts, approximately \$80,000 was handled through the machines on Derby Day with the track retaining a 5% commission.¹⁷⁴ They continued to be successful throughout the meet and continued at the next Kentucky meeting at Latonia.¹⁷⁵ At the 1911 Kentucky Derby, the pari-mutuel machines were handling approximately a quarter of a million dollars.¹⁷⁶

There was considerable praise for the pari-mutuel system. Even Joseph Oller commenting from Paris on the Kentucky experiment said, "I am glad that 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."¹⁷⁷ The *Toronto Globe and Mail* wrote, "[t]hat it is workable and eminently superior to the bookmaking system has long ago been established by the experience of other countries."¹⁷⁸ Even former Tammany boss Richard Croker said that pari-mutuels were "the salvation of betting on races."¹⁷⁹ The *Chicago Tribune* found that pari-mutuel

168. *See id.* at 72.

169. *Pari-Mutuels Resurrected*, COURIER-J. (Louisville), Apr. 12, 1908, at C3.

170. MENKE, *supra* note 167, at 74; *Threatens Raid on Racetrack*, CHI. DAILY TRIB., May 4, 1908, at 11.

171. *Betting Will Be Allowed*, WASH. POST, May 5, 1908, at 9; *Grinstead v. Kirby*, 110 S.W. 247, 248 (Ky. 1908). *See "Lays Down,"* COURIER-J. (Louisville), May 12, 1908, at 5.

172. *Pari-Mutuel Betting Is Satisfactory*, DAILY RACING FORM (Chi.), May 29, 1908; *Mutuels*, CIN. ENQUIRER, Apr. 5, 1908, at C1.

173. *Pari-mutuels Come to Stay*, COURIER-J. (Louisville), May 6, 1908, at 10. *See Derby to Rank Outsider*, DAILY RACING FORM (Chi.), May 6, 1908.

174. *Id.*; ROBERTSON, *supra* note 165, at 200 (claiming that the pari-mutuel handle was \$67,570); MENKE, *supra* note 167, at 75 (using the same \$67,750 amount).

175. *Latonia Derby Next in Order*, COURIER-J. (Louisville), June 1, 1908, at 6. Latonia, however, waged an unsuccessful battle against the Kentucky Racing Commission, which would not let Latonia authorize bookmakers in addition to its use of pari-mutuel pools. *State Racing Comm'n v. Latonia Agric. Ass'n*, 123 S.W. 681, 682 (Ky. 1909).

176. *Perfecting the Pari-Mutuel*, DAILY RACING FORM (Chi.), May 21, 1911. In 1911, the minimum price of pari-mutuel tickets was reduced to \$2 from \$5, which helped to increase the handle at Churchill Downs. *See* MENKE, *supra* note 167, at 75.

177. *Oller Talks of Pari-mutuels*, COURIER-J. (Louisville), Sept. 27, 1908, at C2.

178. *Spring Days with the Horses*, GLOBE, May 7, 1908, at 7.

179. *Croker's O.K. on Pari-Mutuels*, COURIER-J. (Louisville), Sept. 14, 1908, at 7.

wagering,

is far superior to the eastern method or even the so-called walkabout system, and it is the prediction of many turf critics that eventually the machines will entirely supplant the ubiquitous bookie at all tracks in the country Again the public makes the prices, not a coterie of smart turfmen, and the ramifications from railbird to jockey and trainer right on up to the bookie and plunger are minimized.¹⁸⁰

The *Cincinnati Enquirer* appreciated and summed all the attributes of pari-mutuel wagering. The paper wrote,

Pari-mutuel means equal or reciprocal participation by all alike. “Pari,” a French word, means equal and “mutuel” means an interchange division or participation. Thus the public, not the bookmaker, makes the odds and the entire amount of money played in the various pari-mutuel machines goes into a general pool, from which the winning tickets are paid, less a commission of 5 per cent deduction by the racing association and authorized by the State Racing Commission.¹⁸¹

The Enquirer concluded, “[i]t is probable no greater hit was ever made on a race track than the introduction of a machine as a substitute for the ‘skin’ combination odds laid by bookmakers on various tracks.”¹⁸²

With the success of pari-mutuels in Kentucky, they spread to Maryland. Pimlico Race Course in Maryland brought in pari-mutuels for its 1911 season.¹⁸³ In that year, the pari-mutuels were utilized together with bookmakers. For the 1913 season, however, the local racing commission banned bookmaking.¹⁸⁴ The commission’s chairman stated:

180. *Pari-Mutuels Lessen Turf Evils*, CHI. DAILY TRIB., May 10, 1908, at B1.

181. *Mutuals*, CIN. ENQUIRER, May 22, 1910, at 16.

182. *Id.* Two years earlier, the *Enquirer* had stated that the pari-mutuel system “is conceded to be the fairest mode of wagering ever known on the turf. As a matter of fact, it and the auction pooling are the only forms that are absolutely just to all betters alike.” *Mutuels*, *supra* note 172. The same statement appeared in *How to Play Pari-Mutuels*, COURIER-J. (Louisville), Apr. 5, 1908, at C10.

183. *See Pimlico Meeting Opens with Big Crowd Present*, WASH. POST, Apr. 30, 1911, at 47.

184. *Ban on Bookmaking*, SUN (Balt.), June 12, 1912, at 1; *Bar Bookmakers at Pimlico*, DAILY RACING FORM (Chi.), June 19, 1912.

We decided for the pari-mutual system of betting because we believe it is the fairest way to conduct betting and expect it to benefit legitimate racing. The player selects his own favorite, and all the money is pooled, only a small percentage being deducted for payment of the expense of operating the system. The system has worked well in Kentucky and on foreign tracks.¹⁸⁵

Largely because of the move to pari-mutuels, Kentucky and Maryland were the only two major racing jurisdictions to escape unscathed from the attack on racing from the Progressive Movement. Pimlico, “[a]s the biggest [sic], if not the only, game along the Atlantic seaboard, it became enormously popular and prosperous.”¹⁸⁶ Matt Winn, the general manager of Churchill Downs would write, “[r]acing was faced with disaster because of a reform wave that was engulfing bookmakers, and the pari-mutuel machine was destined to be its salvation.”¹⁸⁷ By 1914, pari-mutuels “were in use at Douglas Park, Latonia, Lexington, Pimlico; Toronto, Winnipeg, Vancouver and Calgary (in Canada); Laurel, Maryland, Oklahoma City, Grand Rapids, Michigan, as well as Churchill Downs; a list which embraced about all the operating American and Canadian tracks.”¹⁸⁸ Most other racing jurisdictions, without pari-mutuels, had their tracks closed down for all or part of the 1910s.¹⁸⁹

Pari-mutuel wagering still was not used in most states after World War I, but a series of events helped propel its growth in the upcoming decades. First, better technology made horse racing more appealing as machines made it easier to wager and keep the public apprised of the actual ongoing odds. Secondly, professional sports—including horse racing—became progressively more popular after World War I.¹⁹⁰ Finally, during the Depression, the need for states to find revenue sources worked to make it easier to legalize pari-mutuel wagering. Revenue from pari-mutuels did not involve direct taxation, and it

185. *Bar Bookmakers at Pimlico*, *supra* note 184.

186. ROBERTSON, *supra* note 165, at 197.

187. MENKE, *supra* note 167, at 77.

188. *Id.*

189. For example, New York’s racetracks were shut down for more than two and a half years from 1910–1913. ROBERTSON, *supra* note 165, at 196. Several of New York’s racetracks, Brighton Beach, Sheepshead Bay, and Gravesend, never reopened after this blackout of racing. Nationally, the American Jockey Club reported in 1911 that “its registry of horses had declined by 2,300 in three years, two-thirds of American stallions were exported, and the number of broodmares and foals dropped by more than 50 percent.” RIESS, *supra* note 137, at 335.

190. Joan S. Howland, Essay, *Let's Not “Spit the Bit” in Defense of “The Law of the Horse”*: *The Historical and Legal Development of American Thoroughbred Racing*, 14 MARQ. SPORTS L. REV. 473, 497 (2004).

provided a painless source of revenue to the states. By 1935, pari-mutuels had been legalized in Louisiana, Illinois, Florida, New Hampshire, West Virginia, Ohio, Michigan, Massachusetts, Rhode Island, Maine, Delaware, and California.¹⁹¹ In short, “[t]he introduction of *pari-mutuel* betting in America in the interwar years led to a revival of horse racing.”¹⁹²

Engineer Harry Straus supplied the technology that brought pari-mutuel wagering into the modern age. Straus, who allegedly had been upset at a suspiciously low payoff in 1927 on a horse on which he had wagered on, began work on an improved pari-mutuel system.¹⁹³ To Straus, the problem was that the tickets were dispensed by hand, and the bets totaled manually. This made for a system that was slow, and often inaccurate in updating odds, which permitted cheating by clerks who might be able to place wagers on horses after the race had been run.¹⁹⁴ The goal was to perfect Oller’s pari-mutuel system which “assured each winning bettor an equitable share of the total amount of money bet on a horse—less a . . . deduction for track expenses—in proportion to his individual wager.”¹⁹⁵

What is needed to be accomplished was the recording of bets, a machine to issue a printed ticket, a machine to register the bet, an improved system to update patrons on odds and the amount wagered, and a method to prevent the unauthorized issuance of pari-mutuel tickets after the start of the race. Straus developed the totalizator—a system of rotary switches and relays based on the principles of automatic dial telephone.¹⁹⁶

Straus wrote,

[w]agers are collected by means of either a multiple bank rotary switch or by a relay chain. As bets are collected, betting relays are actuated which correspond to the value of the wagers. These relays step appropriate rotary switches, in the units, tens, hundreds, and thousands positions, etc. Each position . . . energizes a combination of indicator relays which cause illuminated numerals to appear on the display boards.¹⁹⁷

In America, Straus’ company—which became American Totalizator—was first

191. MUNTING, *supra* note 2, at 112.

192. *Id.* at 123.

193. *See* SCHMIDT, *supra* note 109, at 41–42.

194. *Id.* at 44.

195. *Id.* at 43.

196. *Id.* at 46.

197. *Id.* at 46–47.

used in 1933 in Arlington Park outside of Chicago and soon became the universal system used at American racetracks. New York State, which had been the last holdout jurisdiction in support of bookmakers, authorized pari-mutuels in 1939. The Straus innovation helped propel the growth of American horse racing and with technological upgrades, remains the basic system governing American racing.¹⁹⁸

Pari-mutuels with the totalizator system are now the only legal means of betting on horse racing, dog racing, and even jai-alai across the United States, except in Nevada. Even in Nevada, the pari-mutuel system overwhelmingly dominates the horse racing market. For the 2014 calendar year, statewide gambling licensees in Nevada won \$52.2 million through pari-mutuel wagering on animal racing.¹⁹⁹ At the same time, these gambling licensees won a total of \$16.5 million on all forms of sports wagering, other than basketball, football, baseball, and parlay cards.²⁰⁰ The \$16.5 million figure would include betting on such popular sports as hockey, soccer, golf, NASCAR, boxing, UFC, and tennis. Given the lower profile that racing currently enjoys, and given the availability of pari-mutuels, it would seem that the revenue contributions from non-pari-mutuel animal racing in Nevada are minimal.

The actual history and workings of pari-mutuels in the nineteenth century and early twentieth century would seem to define certain core elements of a working pari-mutuel definition. These core elements, not surprisingly, include many of the concepts in federal laws, the state enactments, and the dictionary definitions. They would include:

- (1) All the wagers in a category are placed into a pool.
- (2) The players wager against each other in the pool.
- (3) The organization conducting the pool may deduct a commission from the pool and pays the remainder to the winners.
- (4) The players are free to make their choice of whichever entrants they can wager on.
- (5) Winning bettors share the prize pool in proportion to their respective wagers.
- (6) The actual return to the winning bettors is not known until after wagering on the pool has closed.²⁰¹

198. *Id.* at 71.

199. NEVADA STATE GAMING CONTROL BOARD, GAMING REVENUE REPORT 37 (2015), <http://gaming.nv.gov/modules/showdocument.aspx?documentid=9691>.

200. *Id.*

201. In many respects, this working definition echoes the review of pari-mutuels summarized in the *Cincinnati Enquirer* in 1910. *See generally* *Mutuals*, *supra* note 181.

VII. CASE LAW AND ADVISORY OPINIONS ON PARI-MUTUELS

The final source for reviewing the working definition of pari-mutuels comes from American case law and the opinions of state attorney generals. These, roughly speaking, can be placed within two categories. One, coming largely from the first half of the twentieth century, focuses on whether pari-mutuels can be authorized in states that have banned lotteries in their state constitutions. The second category, involving cases from the twenty-first century, focuses on whether certain technological developments in race-betting can be considered to constitute pari-mutuel wagering.

A. *The Lottery Cases*

The early cases arose in those instances when the state and/or the pari-mutuel operators tried to establish pari-mutuel horse or dog racing in the face of a state constitutional provision or a statute banning lotteries. This overall issue is similar to the issue faced in France when Joseph Oller switched his horse racing game from a sweepstakes game to a pari-mutuel game,²⁰² and in Great Britain when it confronted pari-mutuels in the *Tollett v. Thomas* case.²⁰³

A good portion of the legal analysis in these cases focuses on the components of a lottery. Did the legislature or the drafters of the constitutional provision believe that a horse race was to be considered a lottery? Must a lottery consist purely of luck, or is a lottery where the elements of luck or chance predominate over the elements of skill? There has been considerable legal discussion over the years as to what degree of skill—if any—changes a game from a lottery to a non-lottery event. The traditional English rule was that a lottery had to be a game of pure luck, while the general rule in the United States was that a game would remain a lottery if the elements of luck predominated over the elements of skill.²⁰⁴ Thus, under the English rule, a game could still be considered a gambling transaction—even if there were elements of skill in the game. It should also be recognized that courts have been reluctant to find that pari-mutuel wagering on racing is a lottery when the state has passed legislation authorizing pari-mutuel racing.²⁰⁵

As a general rule—in all the cases, except one in the past sixty years—courts have found that pari-mutuel racing has not been considered to be a

202. See *The "Paris-Mutuels," supra* note 107.

203. *Tollett v. Thomas* [1871] 6 QBD 514, 516 (Eng.).

204. See generally *People ex rel. Ellison v. Lavin*, 71 N.E. 753 (N.Y. 1904).

205. This is due in part to traditional rules of statutory interpretation. “Every presumption must be indulged in favor of the constitutionality of the act; every reasonable doubt must be resolved in favor of its constitutionality. This proposition is elementary in this jurisdiction and in every jurisdiction of the country.” *Utah State Fair Ass'n v. Green*, 249 P. 1016, 1018 (Utah 1926).

lottery.²⁰⁶ “[A] substantial majority of other courts have held that pari-mutuel betting on horse or dog races does not contravene constitutional prohibitions against lotteries.”²⁰⁷ On the other hand, “there is, however, authority for the view that this type of wagering is a lottery within the purview of such a constitutional provision.”²⁰⁸

The earliest case arose in New Jersey in 1877.²⁰⁹ The court had to decide whether auction pools and pari-mutuel pools were legal in New Jersey, which had a penal law provision barring lotteries. The court quickly found that both pools were games of chance and, therefore, lotteries. Not only was the selection of winners in horse racing filled with chance, but the determination of the payout to the winning bettors was a matter of chance.²¹⁰ In an auction pool, the winner would not know how many people would bet against his or her wager, and in a pari-mutuel pool, the payout would be dependent on how many other bettors would bet with or against the winning bettor. The end result was that the payoff could not be determined at the time the wager was made. Therefore, the bets “contain every essential of a lottery.”²¹¹

The next case on whether pari-mutuel pools were banned as lotteries came in Michigan. In *People v. Reilly*, the court viewed the history of the anti-lottery

206. A number of opinions by state Attorney Generals—in states without pari-mutuels—have found that pari-mutuel wagering is a violation of the state’s constitutional provision banning lotteries. 1986 S.C. ATT’Y GEN. REP. 349, 349.

207. *Barnes v. Bailey*, 706 S.W.2d 25, 32 (Mo. 1986); Op. of the Justices, 251 So. 2d 751, 754 (Ala. 1971). See Op. of the Justices, 385 A.2d 695, 702 (Del. 1978); Charles Pickett, *Contests and the Lottery Laws*, 45 HARV. L. REV. 1196, 1216–17 (1932).

208. 38 AM. JUR. 2D *Gambling* § 52 (2016). See Annotation, *Pari-Mutuel and Similar Betting Methods on Race as Game of Chance or Gambling*, 52 A.L.R. 74, 74 (1928) stating “that the conducting of the sale of certificates under the ‘pari-mutuel’ betting plan, as described therein, constituted engaging in a game of chance, and likewise gambling, is in accord with the weight of authority on this precise point.” See also *State ex rel. Sorensen v. Ak-Sar-Ben Exposition Co.*, 226 N.W.2d 705, 708–09 (Neb. 1929) (“That a criminal lottery includes *pari-mutuel* gambling is shown by the constitutional and statutory provisions quoted as well as by the great weight of authority”).

209. See *State v. Lovell*, 39 N.J.L. 458 (1877).

210. *Id.* at 462.

Few persons who have witnessed a horse-race will, I think, hesitate to affirm that the success of any given horse is a more fortuitous event than such contingencies as these. The physical condition of the horse and his rider, the fastenings of his shoes, the honesty of purpose that actuates his rider and his owner in running him, the state of the weather and the track, and these same circumstances in the case of every horse that races against him, are all matters about which the judgment of the outside better can avail him no more than the arithmetical calculation of chances can avail the dicethrower.

Id.

211. *Id.* at 463.

statute and determined that there was no intent to include pool wagering on horse racing as a lottery.²¹² In Tennessee, however, the Supreme Court determined that pools on horse races were lotteries.²¹³ The court held, “[i]n the case now under consideration all the money is paid for the chance of winning the whole, less commissions. If a gift enterprise be a lottery, pool selling would perhaps be a lottery also.”²¹⁴

The action on the betting pools as lotteries moved to New York under the Ives Pool Law, which authorized betting pools on the grounds of racetracks.²¹⁵ The New York cases eventually decided that pari-mutuels were not lotteries. But, they did so based on the history of the New York enactments on lotteries and horse race gambling.

Initially, some courts found that the pools were violations of the anti-lottery provision of the state constitution. In *Irving v. Britton*, a court found that pool selling was an improper lottery.²¹⁶ The court stated, “[t]hat the event of a race is a contingency dependent upon chance is a self-evident proposition.”²¹⁷ While the state constitution was altered in 1894 to ban all gambling—and not just lotteries—the court in *Dudley v. Flushing Jockey Club* followed *Irving v. Britton* and found that pool selling was illegal gambling.²¹⁸

On the other hand, other lower courts have found that pari-mutuels were not prohibited lotteries. Much like the Michigan court in *People v. Reilly*,²¹⁹ the court in *Reilly v. Gray* found that horse races were not considered historically part of the general provisions against lotteries.²²⁰

While a different fact pattern was present, the New York Supreme Court in *In re Dwyer* used the same rationale—that horse race gambling stood apart from the lottery laws.²²¹ In *Dwyer*, the owner of the racetrack was charged with operating a lottery. The charge was based on the entry fee paid by owners who wished to enter their horses in races. The owners of horses paid an entry fee to allow their horses to run in a stakes race. That entry fee was used as a part of the purse that went to the winning horse. The court reviewing the history of

212. See *People v. Reilly*, 15 N.W. 520 (Mich. 1883); cf. *People v. Weithoff*, 16 N.W. 442, 443 (Mich. 1883) (stating that a pooling scheme on horse races was gaming).

213. *Daly v. State*, 81 Tenn. 228, 233 (Tenn. 1884).

214. *Id.*; cf. Recent Cases, *Lottery—‘Chance,’* 14 YALE L.J. 56 (1904).

215. See 1877 N.Y. Laws 604.

216. *Irving v. Britton*, 28 N.Y.S. 529, 532 (N.Y. Ct. Com. Pl. 1894).

217. *Id.* at 531.

218. *Dudley v. Flushing Jockey Club*, 35 N.Y.S. 245 (N.Y. Ct. Com. Pl. 1895). Cf. *Ludington v. Dudley*, 30 N.Y.S. 221, 222 (N.Y. Ct. Com. Pl. 1894).

219. *People v. Reilly*, 15 N.W. 520 (Mich. 1883).

220. *Reilly v. Gray*, 28 N.Y.S. 811, 816 (N.Y. Gen. Term 1894).

221. *In re Dwyer*, 35 N.Y.S. 884 (N.Y. Kings Special Term 1894).

lotteries in New York stated, “[n]o one there ever thought of a horse race for a stake being a lottery, and no such suggestion seems ever to have been made until now.”²²²

Eventually, the issue reached the New York Court of Appeals in 1897. By that time, the Ives Pool Law had been replaced by a law, and passed after the new 1894 Constitution had banned all gambling that simply decriminalized wagering at licensed racetracks.²²³ The court supported the 1895 law and agreed with the proposition that the state’s anti-lottery enactments were not intended to affect horse race betting. It stated,

A race or other contest is by no means a lottery simply because its result is uncertain, or because it may be affected by things unforeseen and accidental. When this statute against lotteries was passed, the legislature not only defined the meaning of the term, which cannot be fairly said to include a test of speed or endurance of horses for prizes or premiums, but it at the same time passed a statute relating to the racing of horses, which shows that such a contest was not intended to be included among the offenses which should be punishable under the statute against lotteries.²²⁴

The court similarly found that the use of entry fees to help fund purses for races was also not a lottery. The entry fees, when paid, became the property of the association running the race. The association then had an independent duty to fund the purse. Thus, it was unlike a lottery where the entire prize was paid by the contestants. Under the entry system, all that was presented was “a prize offered by one not a party to the contest.”²²⁵ The court did not believe that this was a lottery and stated,

We are of the opinion that the offering of premiums or prizes to be awarded to the successful horses in a race is not in any such sense a contract or undertaking in the nature of a bet or wager as to constitute gambling within the spirit and intent of the constitutional provision under consideration.²²⁶

222. *Id.* at 885–86.

223. *See* Eliot Spitzer, 1999 N.Y. OP. ATT’Y GEN. 3.

224. *People ex rel. Lawrence v. Fallon*, 46 N.E. 296, 296 (N.Y. 1897).

225. *Id.* at 297.

226. *Id.*

With this 1897 decision, the book was essentially closed in New York on the issue of whether horse race wagering was a lottery.²²⁷

With the declining interest in horse racing in the early twentieth century, there were no cases on this issue until after the conclusion of World War I. At his time, operators either tried to embark on pari-mutuel horse racing either on their own or after the passage of pari-mutuel enabling legislation. As stated previously, in the states without enabling legislation, the efforts to introduce pari-mutuels were generally unsuccessful. In the states authorizing pari-mutuel legislation, the efforts to implement pari-mutuels were often successful.

For example, in states without enabling legislation, pari-mutuel wagering on horse racing was found to be a lottery in the Nebraska case of *State v. Ak-Sar-Ben Exposition Co.*²²⁸ The court described the pari-mutuel system as one in which “a loser pays for a ticket the same as the winners, but gets nothing from the pool to which he contributed, while the winners take the entire fund, less the percentage retained by defendant.”²²⁹ The court held, “[t]he pari-mutuel system of betting and gambling on horse races, as operated by defendant and shown by the petition, contains every element of a criminal lottery—consideration, chance, price, means of disbursement.”²³⁰

A similar decision was reached by the Supreme Court in Florida, again in a state which had not authorized pari-mutuel wagering.²³¹ The court provided a lengthy elucidation on what it saw as pari-mutuel wagering. Pari-mutuels were

when a group of persons, each of whom has contributed money to a common fund and received a ticket or certificate representing such contribution, adopt a horse race, the result of which is uncertain, as a means of determining, by chance, which members of the group have won and which have lost upon a redivision of that fund, each contributor having selected a stated horse to win such race, the redeemable value of the certificates so obtained and held by the contributors to such fund being varied or affected by the result of such race, so that

227. In 1984, the New York State Attorney General cited this line of decision in issuing an opinion that a football sports pool could not be a lottery since sports pool wagering was not to be considered as fitting within the purview of the term “lottery.” 1984 N.Y. Op. Att’y Gen. 11.

228. See generally *State ex rel. Sorensen v. Ak-Sar-Ben Exposition Co.*, 226 N.W. 705, 709 (Neb. 1929).

229. *Id.* at 708.

230. *Id.* at 709.

231. See *Pompano Horse Club v. State ex rel. Bryan*, 111 So. 801, 814 (Fla. 1927).

the value of some is enhanced, while that of others is reduced or destroyed, the original purchase price of all having been the same, those who chose the winning horses being paid from the fund so accumulated more than they contributed thereto, by dividing amongst them the money contributed by those who chose losing horses and who therefore receive nothing.²³²

The court viewed this betting activity as a game of chance. Whether the horse race itself was a game of skill or chance did not matter,²³³ the pari-mutuel betting process tuned the betting into a game of chance.²³⁴

In an advisory opinion, the Supreme Court of Alabama ruled that pari-mutuels were banned under the anti-lottery provision of the state constitution.²³⁵ The court was asked by the legislature for its opinion on whether a statute authorizing pari-mutuel wagering on horse and dog racing would be constitutional. The issue for the court was whether there was sufficient “chance” in the operation of the game for pari-mutuels to be considered a lottery. While the court acknowledges that there were divisions among the states on the issue of chance, it decided the case on the basis of the notion that the exact amounts to be returned to winning bettors was unknowable at the time of the wager.²³⁶

[W]e conclude that the element of chance is so present in the form of partimutuel betting as to make that system with its paraphernalia, etc., a ‘lottery’ within the meaning of the constitution of this state. It is true that the result of the race may be determined by the qualities of the horse and rider, but the amount which the better will receive, if the horse of his choice wins, is purely a matter of chance.²³⁷

The Kansas Supreme Court found that pari-mutuel wagering was a violation

232. *Id.* at 812.

233. *Id.* at 813.

234. *Id.* It should be noted that eventually New Jersey, Nebraska, and Florida amended their constitutions to authorize pari-mutuel wagering.

235. *Op. of the Justices*, 31 So. 2d 753, 756 (Ala. 1947). This opinion was eventually reversed in *Opinion of the Justices*, 251 So. 2d 751, 753 (Ala. 1971), finding that betting on a game of skill does not turn the betting into a lottery. *See Op. of the Justices*, 132 So. 2d 142, 142 (Ala. 1961) (showing that the Alabama Supreme Court divided evenly on the issue of whether pari-mutuels were lotteries).

236. *Op. of the Justices*, 31 So. 2d at 755, 761.

237. *Id.* at 755.

of its anti-lottery provision in the state constitution.²³⁸ In *State ex rel. Moore v. Bissing*, the operator of the racing facility attempted to operate a pari-mutuel system of wagering on dog races in the absence of a state legislative provision authorizing pari-mutuels. The court found that the operation had the three characteristics of a lottery. There was certainly consideration and a prize.²³⁹ As to the element of chance, the court saw ample chance in the operation of pari-mutuels.

[T]here is no guarantee that a certain dog is going to win, and neither is there any guarantee that a bettor will always pick a winner. In placing a wager the bettor takes a “chance” that he is picking the right dog. In the second place, under the pari-mutuel system of betting every bettor takes a “chance” on the *amount* he will win, even though his dog finishes in the exact position he bet that he would, for the reason that under this system the exact “odds” on a particular dog to “win, place or show” cannot be determined until the betting is closed and information regarding the number and amount of bets is tabulated by the pari-mutuel machine.²⁴⁰

Accordingly, the court found that pari-mutuel wagering on races constituted a lottery.

Finally, the Indiana Supreme Court in *State v. Nixon*, in 1979, found that a state statute authorizing pari-mutuels was invalid under its constitutional provision forbidding lotteries.²⁴¹ The court read the anti-lottery provision broadly giving it a very liberal construction²⁴² so that it would reach the mischief occasioned by lotteries.²⁴³ The court denigrated the reasons in cases from other states holding that pari-mutuel wagering was not a lottery. The court stated,

those courts have foreclosed a Practical, common sense inquiry as to purpose and have contented themselves with considerations of whether winners of lotteries, as that term is generally employed, need be determined “solely” by chance or

238. *State ex rel. Moore v. Bissing*, 283 P.2d 418, 418 (Kan. 1955).

239. *Id.* at 422.

240. *Id.* at 423.

241. *State v. Nixon*, 384 N.E.2d 152, 165 (Ind. 1979).

242. *See id.* at 161.

243. *Id.* at 162.

may be determined “predominately” by chance or even “substantially” by chance. Such considerations may be of technical and academic interests but are of little practical value in determining what the state's policy was to be in regard to enterprises in which the consumers, as a group, have no chance.²⁴⁴

Since pari-mutuels guaranteed a profit to the operator, returns to winning players were unknown, and since most players would lose, the court found that pari-mutuels constituted a lottery.

In our judgment, and notwithstanding that a degree of skill is involved in selecting the horses most likely to perform well, the unpredictability of the odds to be paid and the limited predictability of the performance of the animals combine to provide the degree of “chance” required to meet the traditional textbook definitions of the term “lottery.”²⁴⁵

Nonetheless, *Nixon* was negated by the Indiana Supreme Court in *George v. NCAA*.²⁴⁶ *George* found that the court in *Nixon* had read the anti-lottery provision excessively broadly, and had in fact interpreted “the constitutional prohibition on lotteries was interpreted to prohibit all forms of commercialized gambling.”²⁴⁷ Instead, the court in *George* decided that the proper definition of a lottery was the traditional definition that had been in place prior to *Nixon*.²⁴⁸ *Nixon* was the sole case where a legislative enactment authorizing pari-mutuel wagering was overturned by a court, and now the rationale used by that court has been repudiated.

The initial twentieth century case found that pari-mutuel wagering was not a lottery arose in Utah.²⁴⁹ Utah had passed legislation in 1925 known as the Redd Act, which authorized pari-mutuel wagering.²⁵⁰ In *Lagoon Jockey Club v. Davis County*, the court considered pari-mutuel betting on horse racing as

244. *Id.* at 159.

245. *Id.* at 161.

246. 945 N.E.2d 150, 159–60 (Ind. 2011).

247. *Id.* at 155.

248. *Id.*

249. *See generally* Utah State Fair Ass'n v. Green, 249 P.2d 1016 (Utah 1926).

250. State Horse Racing Commission, 1925 Utah Laws 151, *repealed by* State Horse Racing Commission, 1927 Utah Laws 5. *See generally* Lagoon Jockey Club v. Davis Cty., 270 P. 543, 544, 549 (Utah 1928) (Straup, J., dissenting).

basically a game of skill. “It seems to the court that the dominating element of the game is the race itself. The trial court found it was a game of skill, and as conclusions of law found it was not a game of chance, and, therefore, not prohibited by the Constitution.”²⁵¹ While there was an element of chance as to the uncertainty of the amount of payout to the winners, there was no element of chance in the amount an unsuccessful bettor would lose.²⁵² “Neither does the chance feature in any manner affect the amount he will lose, for this he can foresee at the time he registers his bet.”²⁵³ The court also viewed the history of the constitutional convention in Utah, which banned lotteries and determined it was not intended to ban horse racing,²⁵⁴ and it also repeated the rule of construction that every reasonable doubt should be used to support the validity of the Redd Act.²⁵⁵ Thus, the Utah Supreme Court found two bases for supporting pari-mutuel wagering. It was wagering on a game of skill, and the constitutional history supported the view that the anti-lottery provision was not aimed at horse racing. These two bases, plus the policy of presuming the constitutionality of legislation were sufficient to support the Utah pari-mutuel legislation.

Most of the cases finding that pari-mutuel wagering on horse racing is not a lottery focus on the factors cited by the *Green* case. Additionally, after a number of years, a further factor developed in supporting the notion that pari-mutuels were not lotteries. That was that the majority rule of the states had determined that pari-mutuels were not lotteries. In *Commonwealth v. Kentucky Jockey Club*, the Kentucky Supreme Court reviewed the issue of whether pari-mutuel legislation was an unconstitutional lottery.²⁵⁶ The court found, based on Kentucky’s constitutional history, that horse race betting was not a lottery.

It did not occur to any one during that period that betting on races, elections, or similar forms of wagering constituted a lottery. Indeed, the contention that betting on horse races by the pari mutuel system constitutes a lottery is of recent origin in this state. For nearly half a century the General Assembly and the Court of Appeals have proceeded upon the general understanding that the whole subject of betting and gaming was

251. *Utah State Fair Ass'n*, 249 P.2d at 1023.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 1018; see *The “Paris-Mutuels,” supra* note 107.

256. *Commonwealth v. Ky. Jockey Club*, 38 S.W.2d 987, 994 (Ky. 1931).

within the power of the Legislature to prohibit, regulate, or classify, prohibiting in part and permitting in part, according to its view of the public policy to be enforced.²⁵⁷

Additionally, “the weight of authority does not sustain the position . . . that the result of a horse race depends on mere chance within the meaning of that term in a definition of lottery.”²⁵⁸

The Illinois Supreme Court similarly affirmed the constitutionality of its pari-mutuel statute against an anti-lottery provision in the constitution.²⁵⁹ The Illinois Supreme Court, in its analysis, focused principally on the issue of whether the fact that nobody knew with certainty what the returns to the winning bettor would be and turned pari-mutuel wagering on horse racing into a lottery. The court disagreed, finding that the pari-mutuel system of betting was not at all a lottery.²⁶⁰ In fact, the court found major aspects of certainty—rather than chance—in the pari-mutuel wagering system.

While the amount of money to be divided is indefinite as to dollars and cents, it is definite in that the amount of money to be divided is the total stakes on the winning horse, less a given percentage to the management. The persons among whom the money is to be divided are not uncertain, as they are “those who bet on the winning horse.” The winning horse is not determined by chance, alone, but the condition, speed, and endurance of the horse, aided by the skill and management of the rider or driver, enter into the result. The amount to be paid by a principal to an agent under a contract to be paid 10 per cent. commission on all sales made by him is dependent in some degree on chance and the happening of many uncertain and contingent events, but the defense that such contract was for such reasons a gambling contract could not be maintained.²⁶¹

In short, any uncertainty in the pari-mutuel system did not turn pari-mutuel wagering into a lottery.

The Supreme Court of Arkansas also upheld the validity of a pari-mutuel

257. *Id.* at 993–94.

258. *Id.* at 992.

259. *People v. Monroe*, 182 N.E. 439, 448 (Ill. 1932).

260. *Id.* at 442.

261. *Id.*

law against the claim that it violated the anti-lottery provisions of the constitution.²⁶² The court stated that the “great weight” of other jurisdictions had found that pari-mutuel horse racing was not a lottery.²⁶³ While it found that pari-mutuels did involve gambling, there was no lottery involved.

The use of the pari-mutuel machine does not make the betting a lottery, if it is not otherwise so, as it makes no determination of what horses are winners. It is merely a wonderful machine which expedites calculations which could laboriously be made without its use. Its use in no manner affects the results of a race as it merely calculates the results of the betting after the races have been run and the respective winners announced.

We conclude, therefore, that while the element of chance no doubt enters into these races, it does not control them, and that there is therefore no lottery.²⁶⁴

In the other cases validating pari-mutuels, a Texas court found that the legislature did not intend that horse race betting should be considered a lottery.²⁶⁵ “The construction placed by the Legislature upon the constitutional prohibition against conducting a lottery in this state will not be set aside by the courts unless in their opinion such construction is clearly wrong, and we cannot so hold in this case.”²⁶⁶

In Arizona, the Supreme Court in *Engle v. State* found that an establishment, which offered wagering on out-of-state races, was not engaged in a lottery.²⁶⁷ While the wagering was gambling, it was not a lottery since “the decided weight of authority” established that horse racing was not a game of chance.²⁶⁸ While it is often cited that this case supports the view that pari-mutuels are not lotteries, the fact is that the gambling establishment proprietor was not conducting a pari-mutuel game. Instead, people would wager on races with him, and he would pay the winners based on the pari-mutuel prices at the track where the race was conducted. This is the converse of a pari-mutuel system; it was simply

262. Longstreth v. Cook, 220 S.W.2d 433, 438 (Ark. 1949).

263. *Id.* at 436–37.

264. *Id.* at 438. Chief Justice Griffen Smith issued a vigorous and lengthy dissent to this conclusion. *Id.* at 439–48. The case is discussed at Notes, *Constitutional Law—Prohibition Against Lotteries—Pari-Mutuel Wagering on Horse Races*, 25 N.Y.U. L. REV. 115, 123, 123 nn.1 & 4 (1950).

265. Panas v. Tex. Breeders & Racing Ass'n, 80 S.W.2d 1020, 1024 (Tex. Civ. App. 1935).

266. *Id.*

267. *Engle v. State*, 90 P.2d 988, 993 (Ariz. 1939).

268. *Id.*

a wager that was booked by the proprietor.²⁶⁹

The Michigan Supreme Court in *Rohan v. Detroit Racing Ass'n* validated pari-mutuels by citing the weight of precedent in other states.²⁷⁰

Under the above authorities it is clear that pari-mutuel betting on a horse race is not a lottery [sic]. In a lottery the winner is determined by lot or chance, and a participant has no opportunity to exercise his reason, judgment, sagacity or discretion. In a horse race the winner is not determined by chance alone, as the condition, speed, and endurance of the horse and the skill and management of the rider are factors affecting the result of the race.²⁷¹

In short, the *Rohan* court largely followed the concept that pari-mutuel wagering had to be a game of pure chance in order to violate the anti-lottery provision of the state constitution.²⁷²

After approximately 1950, the opinions validating pari-mutuels often were content with citing the extensive list of decisions in other states that had ruled in favor of the legality of pari-mutuels. In 1954, the Louisiana Supreme Court extensively quoted the decision of the Michigan Supreme Court in *Rohan* in reaching its decision that pari-mutuels were not lotteries.²⁷³ The Colorado Supreme Court similarly cited the weight of state authorities in finding that its pari-mutuel law did not violate its anti-lottery provision in the constitution²⁷⁴ as did the Idaho Supreme Court when it validated its state's pari-mutuel law.²⁷⁵

269. If Engle had actually involved a pari-mutuel operation, it would have been the sole time that a court validated a pari-mutuel system which had not been enacted into law or which was pending before the State legislature.

270. See *Rohan v. Detroit Racing Ass'n*, 22 N.W.2d 433, 439-40 (Mich. 1946).

271. *Id.* at 440.

272. See Francis Emmett Williams, *A P-M Victory in Michigan*, 1 LAW. & L. NOTES 5, 10 (1946). Williams later wrote, "[i]ncidentally, our race-track gambling which has the French name 'Paris Mutuels,' meaning mutual wagers, has a false front. The Paris Mutuels, or pari-mutuels, are all lotteries. They use lottery contracts and are set up to give the promoter a sure thing." JUDGE FRANCIS EMMETT WILLIAMS, *LOTTERIES, LAWS AND MORALS* 68 (1st ed.1958).

273. See *Gandolfo v. La. State Racing Comm'n*, 78 So. 2d 504, 509 (La. 1954).

274. *Ginsberg v. Centennial Turf Club, Inc.*, 251 P.2d 926, 929 (Colo. 1952). "We are fortified in this position by numerous decisions of appellate courts throughout the nation, and we are satisfied that the weight of authority is in harmony with this conclusion." *Id.*

275. See *Oneida Cty. Fair Bd. v. Smylie*, 386 P.2d 374 (Idaho 1963). The Idaho Supreme Court reviewed nearly all the decided cases on this issue and concluded,

[o]ur review of the numerous authorities cited by the eminent counsel appearing for the

The Alabama Supreme Court in an advisory opinion in 1971, altered its position that pari-mutuels were lotteries.²⁷⁶ It cited the “substantial majority of other courts”²⁷⁷ that had validated pari-mutuels in other states, and extensively quoted *Utah State Fair Ass'n v. Green*²⁷⁸ and stated its agreement with the conclusions in *Utah State Fair Ass'n*.²⁷⁹ Similarly, two attorney general opinions cited the weight of the overall state authority in their opinions finding that pari-mutuel wagering systems did not violate the ban on lotteries in their state’s constitutions.²⁸⁰

Perhaps the most interesting of the cases on whether pari-mutuels are lotteries involved the state of Delaware. In all other cases in other jurisdictions, there was an effort by members of the public or the government to shut down a pari-mutuel wagering operation. In Delaware, however, the case involved a legislative attempt—with the governor asking the Delaware Supreme Court for an advisory opinion—to validate the game of jai-alai as a possible State-operated lottery.²⁸¹ The advisory opinion request followed the federal court decision in *NFL v. Governor of Delaware*, which had found that a sports pool on football was valid in Delaware as a lottery.²⁸² The court, relying specifically on the intent of the members of the Constitutional Convention and legislature in drafting the State Constitution’s provisions on the lottery, found that pari-mutuels were not intended to be part of Delaware’s state lottery. The court stated, “[i]t is our conclusion that the pool or pari-mutuel system of wagering has never been considered a ‘lottery’ by the constitutional draftsmen

parties of record and as amicus curiae, with due regard accorded to the historical development of the English cases discussed, and the authorities from which we quote decided by our sister states, leads to the conclusion that a horse racing meet where the pari-mutuel system of wagering is used does not contravene the constitutional prohibition against lotteries. It is our firm opinion that the weight of authority in the United States (as well as in England) is in accord with that conclusion, based upon well grounded logical foundations, keeping in mind the historical distinction between “lottery” and “game of chance” as it has been developed.

Id. at 391. In later rejecting a petition for rehearing, the court found that if skill played any role in the distribution, it was not a lottery. *Id.* at 395.

276. Op. of the Justices, 251 So. 2d 751, 753 (Ala. 1971).

277. *Id.* at 754.

278. *Utah State Fair Ass'n v. Green*, 249 P. 1016 (Utah 1926).

279. *Op. of the Justices*, 251 So. 2d at 754.

280. *Pari-mutuel Betting on Simulcast Races*, No. 95-014, 1995 WL 111948 Op. Att’y Gen. 1 (Tenn. 1995); *Pari-mutuel Betting on Horse Races Does Not Constitute a Lottery, and No Constitutional Amendment Would Be Necessary to Permit It*, 1965 WL 158511 Op. Att’y Gen. 8 (Iowa 1965).

281. Op. of the Justices, 385 A.2d 695, 697 (Del. 1978).

282. *NFL v. Governor of Delaware*, 435 F. Supp. 1372, 1389 (D. Del. 1977).

of our State—either in 1897 or in 1973—and that it may not be made so now either by legislative act or judicial fiat.”²⁸³

Besides the somewhat cynical conclusion that pari-mutuels were found not to be lotteries in all states which had passed legislation enacting pari-mutuel legislation—except for Indiana²⁸⁴—(and that case’s logic was subsequently repudiated),²⁸⁵ the pari-mutuel/lottery cases emphasize certain traits that belong to pari-mutuel systems. These traits were emphasized in both the cases that upheld pari-mutuels and in the cases that invalidated pari-mutuels. To a large degree, these traits are very similar to the characteristics found in the pari-mutuel operations in the late nineteenth and early twentieth century.²⁸⁶

These cases emphasize the following:

(1) All the wagers in a category are placed into a pool. In fact, the pari-mutuels are almost treated synonymously as pools.

(2) The organization conducting the pool may deduct a commission from the pool and pay the remainder to the winners. This demonstrates that the organization conducting the pool cannot win.

(3) The players are free to make their choice of whichever entrants they can wager on. This is a key part of the notion that pari-mutuels involve some degree of skill and are not pure chance. The players are free to use their knowledge and strategy to make their betting choices.

(4) The actual return to the winning bettors is not known until after wagering on the pool has closed. This element is often a crucial element in those cases which have found that pari-mutuels are lotteries. The uncertainty of the ultimate payout to winning bettors is evidence that chance governs the actual winning in a pari-mutuel system. Even the cases finding that a pari-mutuel wagering system is not a lottery acknowledge the fact that the ultimate payout is uncertain.²⁸⁷

The other traits found in the analysis of pari-mutuel operations in the late nineteenth and early twentieth century—the fact that the players wager against each other in the pool and that winning bettors share the prize pool in proportion to their respective wagers—are given only slight recognition in the pari-mutuels/lottery cases. Yet, there is nothing in these cases that negates these factors. Viewed as a whole, the pari-mutuels/lottery cases support the six elements of the previously stated core elements of a working definition of

283. *Op. of the Justices*, 385 A.2d at 705 (emphasis added).

284. *See State v. Nixon*, 384 N.E.2d 152 (Ind. 1979).

285. *See George v. NCAA*, 945 N.E.2d 150, 160 (Ind. 2011).

286. *See SCHMIDT*, *supra* note 109, at 71.

287. Cases like *Utah State Fair Ass'n v. Green*, 249 P. 1016, 1023 (Utah 1926), and *People v. Monroe*, 182 N.E. 439, 442 (Ill. 1932), attempt to downplay the fact that the exact payout is uncertain.

pari-mutuel wagering.

B. *Twenty-First Century Instant Racing Cases*

Before approximately 1980, one of the games utilized frequently—and not lawfully—as fund raisers at charitable games of chance nights involved the showing of filmed horse races.²⁸⁸ At the event site, films of old horse races, frequently called “armchair racing,” would be shown and the patrons would be able to bet on the races. In 1977, the New York State Legislature passed a bill which authorized filmed horse racing as a game of chance that could be operated by religious and not-for-profit groups.²⁸⁹ Assembly Bill No. 8647-A in 1977 added filmed horse racing games as authorized games of chance under Section 186.3. In arguing for the legislation, Assemblyman Joseph Lentol stated, “[p]oker is the backbone of the traditional Las Vegas Nite and is the most lucrative game for the organization.”²⁹⁰ Governor Carey, however, vetoed the legislation stating, in part, that filmed horse racing was not an authorized game of chance under the state constitution.²⁹¹

Additionally, supermarkets across the country even ran for many years a sweepstakes game involving the results of filmed horse racing.²⁹² Supermarket chains, including the Grand Union Supermarket chain in the Northeast, televised shows called “Let’s Go to the Races,” where contestants would receive cards listing the horses for the previously-run races and would win prizes if their cards had winners in the horse races.²⁹³

288. Joel Greenberg, *Exposition for Fund-Raisers Will Conclude Today at Hotel*, HARTFORD COURANT, Aug. 28, 1972, at 21; *Armchair Races to Be Run May 8 by Northern Hills*, AM. ISRAELITE, Mar. 25, 1976, at 18; *GOP to Sponsor Armchair Races to Raise Funds*, HARTFORD COURANT, July 9, 1974, at 21C; *Rotary Club to Offer Filmed Horse Races: Suffield*, HARTFORD COURANT, Nov. 29, 1974, at 66C; *Whirl’s Fair, CBA Event Set for Nov. 25*, SCHENECTADY GAZETTE, Nov. 10, 1972, at 29.

289. S. 5861-A, 1977 S.-Assemb., Reg. Sess. (N.Y. 1977); see Fred Tuccillo, *Senate Reworks ‘Las Vegas Nights’*, NEWSDAY, June 7, 1977, at 19.

290. Letter from Joseph R. Lentol, Assemblyman 58th District, Kings Cty, to Honorable Judah Gribetz, Counsel to the Governor (June 30, 1977) (on file with author); see generally Bennett Liebman, *Why No Poker in New York State*, GOV’T L. ONLINE (2005), <http://dx.doi.org/10.2139/ssrn.1514598>.

291. Gov. Hugh L. Carey, Memorandum Filed with Senate Bill 6644 (Aug. 11, 1977), as reprinted in Pub. Papers of Gov. Carey at 436, http://nysl.cloudapp.net/awweb/main.jsp?flag=collection&smd=1&cl=all_lib&lb_document_id=101162&tm=1479855939299; See Bob Wacker, *Trying to Take the Chance Out of Gambling*, NEWSDAY, Feb. 19, 1978, at 25.

292. See Jim Murray, *Market Derby*, L.A. TIMES, July 5, 1963, at C1; Jerome M. Cowle, *The Games Markets Play*, L.A. TIMES, Dec. 4, 1966, at W54; Rona Cherry, *Supermarkets’ Give-Away Games Spread*, N.Y. TIMES, Oct. 7, 1976, at 84.

293. *Grand Union Running Races on TV*, GREENFIELD RECORDER (Mass.), Oct. 1, 1976, at 24; NEWSDAY, Jan. 12, 1977, at 25A. For an interesting case on this subject see *Boyd v. Piggly Wiggly S., Inc.*, 155 S.E.2d 630 (Ga. Ct. App. 1967).

The utilization of previously-run and filmed horse races, however, was given a new boost in the late twentieth century by the ownership of Oaklawn Park in Hot Springs, Arkansas.

As described in an Arizona Attorney General opinion,²⁹⁴ instant racing operates in the following fashion:

“Instant Racing” is a patented wagering system consisting of self-service gaming machines connected to a central server. Racetech, LLC, an Arkansas limited liability company, holds the patent. Instant Racing involves wagering on historical horse races that have occurred at racing venues throughout the United States. The patrons bet with each other, and the racetrack has no interest in the race’s outcome, but takes a prescribed percentage of the total pool of wagers.

Instant Racing terminals resemble casino slot machines. Bettors insert money (or the equivalent credit) into the terminal to make a wager. The terminal then displays information regarding a historic race while concealing the race’s location and date, as well as the horses and jockeys involved. The terminal provides bettors with past performance information on the race’s participants (frequently referred to as the “Daily Racing Form”), and bettors may then handicap the race and place bets in a variety of categories. After placing a wager, a bettor has the option of viewing the entire race or only the stretch run on a video screen.²⁹⁵

Additionally, as described by the Maryland Attorney General:

In traditional pari-mutuel wagering, those who successfully bet on the same winning outcome share a betting pool. This is not the case with Instant Racing. There, individual players—even those using machines in the same location—are each wagering on different races with different horses and different outcomes. A bettor who successfully chooses a winning horse can therefore never “share the mutuel pool” with another who has done the same, for the simple reason that *no one else is betting on the same race*. In traditional pari-mutuel wagering, only

294. See Instant Racing, No. 114-008 Op. Att’y Gen. 1 (Ariz. 2014).

295. *Id.* at 2 (citations omitted).

the same type of bets on the same race or series of races are pooled together. By contrast, with Instant Racing, wagers on completely different races are pooled together based only on the various types of “wins” available to the players. Instead of each betting pool being shared by all of those who selected the correct order of finish in a particular race, the Instant Racing winner takes all of the money that has accumulated in the applicable betting pool at the time of that person’s successful bet. . . .

Furthermore, bettors in a traditional pari-mutuel system, through their differing opinions and the money wagered on such opinions, participate directly in setting the odds on the various possible outcomes of a given race. Typically, the bettors are the only determinant of what the odds will be. For obvious reasons, this *cannot* occur in Instant Racing because, as noted above, no two players are ever betting on the same race.²⁹⁶

In short, the use of previously filmed races has been repurposed into a new slot machine, providing a limited amount of wagering information to the betting public.

As the patent holder has sought to market Instant Racing in various states, the fact is that the game has a significant attraction to many racetracks in the nation. First of all, it would seem to be a product that emphasizes horse racing and could potentially help market the racetrack’s own live racing program. Most importantly, in states where the racetracks have been unable to obtain slots and/or casino games to help boost purses and support their finances, Instant Racing has the capacity to serve as a substitute revenue source in lieu of slots and casino games.

Additionally, in some states, it might be possible to implement Instant Racing through the actions of the racing commission. This would enable the Instant Racing supporters to avoid the legislature where it might face pointed opposition not only from gambling opponents but also from entities trying to bring full-fledged casino gambling into a jurisdiction. It might be able to obtain approval of Instant Racing from a forum—the state racing commission—that might be more favorably inclined to the interests of racing associations. Instant

296. Gaming—Whether “Instant Racing” is Pari-mutuel Betting Authorized by the Maryland Horse Racing Act, 94 Op. Att’y Gen. 32, 40–41 (Md. 2009) (citations omitted). Similar language can be found in 2010. Instant Racing, 10-001 Op. Att’y Gen. 8 (Ky. 2010).

Racing, thus, has the potential to work as a faux slot machine.²⁹⁷

As Instant Racing has made its way into various states, the question has regularly arisen as to whether Instant Racing can be considered to be “pari-mutuel wagering” under a State’s laws and regulations.

To a large extent, the court cases and opinions by State Attorney Generals have tried to avoid ruling on the pari-mutuel question. Instead, the focus has been on whether the existing laws allow wagering on previously-run races. If the existing laws only permit wagering on live racing, then a state racing commission would lack the authority to permit Instant Wagering. At the very least, the state legislature would need to pass a law specifically authorizing wagering on previously-run races.

That has been the case in Arizona, where the Arizona Attorney General has opined that the applicable state statutes did not authorize wagering on historical races.²⁹⁸ Similarly, in Oregon, the court of appeals concluded “that the pertinent statutes permit the commission to authorize off-race course mutuel wagering only on live races.”²⁹⁹ The Nebraska Attorney General has similarly found that the definition of pari-mutuel in the Nebraska Constitution implied only that live races were appropriate subjects for wagering.³⁰⁰ Based on these decisions and other legislative actions, the Arizona Attorney General could state, “A number of courts and state legislatures outside Arizona have addressed this issue and have expressly or impliedly reached the same conclusion” that a specific statute was needed in order for a racing commission to authorize Instant Racing.³⁰¹ The one instance where a court rejected the notion that legislation was needed to implement Instant Racing was in Kentucky.³⁰²

In Kentucky, the racing commission by regulation authorized Instant Racing. While the Kentucky Supreme Court ruled that the Kentucky Department of Revenue did not have the authority, on its own, to place a tax on Instant Racing, it did rule that “[the horse racing commission] has the statutory authority to license and regulate the operation of pari-mutuel wagering on historic horse racing.”³⁰³ The racing commission defined pari-mutuel in terms of historical races “as a system or method of wagering approved by the

297. “[W]e take note from the record that the ‘Instant Racing’ terminals look like and are used like a slot machine or other similar gambling device.” *Wyo. Downs Rodeo Events, LLC v. State*, 134 P.3d 1223, 1229 (Wyo. 2006).

298. *See* *Instant Racing*, No. 114-008 Op. Att’y Gen. 2 (Ariz. 2014).

299. *MEC Or. Racing, Inc., v. Or. Racing Comm’n*, 225 P.3d 61, 67–68 (Or. Ct. App. 2009).

300. *Constitutionality of Legislation Authorizing Wagering on “Historic Horseraces,”* No. 10009 Op. Att’y Gen. 6 (Neb. 2010). *See State ex rel. Loontjer v. Gale*, 853 N.W.2d 494, 498 (Neb. 2014).

301. *Instant Racing*, No. 114-008 Op. Att’y Gen. 6 (Ariz. 2014).

302. *Appalachian Racing, LLC v. Family Tr. Found. of Ky., Inc.*, 423 S.W.3d 726, 736 (Ky. 2014).

303. *Id.* at 729.

commission in which patrons are wagering amongst 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.”³⁰⁴ The court provided for a fairly narrow definition of overall pari-mutuel—one in which largely involved the concept of players betting against one another.

The court, in the absence of a specific definition of pari-mutuel in state statutes, referred back to the definition of pari-mutuel in the Interstate Horse Racing Act.³⁰⁵ Section 3002(13) of the federal Interstate Horse Racing Act, defines pari-mutuel 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.”³⁰⁶ That definition comports well with the system of wagering described by the predecessor court, in *Commonwealth v. Kentucky Jockey Club*, as “French pool,” or “Paris mutual” wagering.³⁰⁷ Under that definition, betting on historical racing could be legal.

Nonetheless, the Kentucky Supreme Court added that while wagering on historical races could be pari-mutuel and that the rules of the racing commission were authorized on that subject,³⁰⁸ the case would be remanded to the trial court to determine, whether in fact, the actual operation of Instant Racing complied with the Kentucky penal laws on gambling.³⁰⁹ In 2015, the Kentucky legislature formally took action to decriminalize “devices dispensing or selling combination or French Pools on historical races at licensed, regular racetracks as lawfully authorized by the Kentucky Horse Racing Commission.”³¹⁰ Thus, any potential obstacle to the operation of Instant Racing in Kentucky was apparently obviated.

In short, the Kentucky decision is extremely perplexing. By avoiding to decide whether Instant Racing complied with statutory standards, the court largely evaded any need to make a substantive decision. Instead, all it did was

304. *Id.* at 737.

305. *Id.*

306. *See* 15 U.S.C. § 3002(13) (2016).

307. 38 S.W.2d 987, 991 (Ky. 1931).

308. “We can say, as we have in the preceding sections of this opinion, that as a matter of law the regulations allowing for pari-mutuel wagering on historical horse racing are valid.” *Appalachian Racing, LLC*, 423 S.W.3d at 742.

309. *Id.*

310. KY. REV. STAT. ANN. § 528.010(5)(d)(2) (West 2016). This made for an intriguing bootstrapping of the licensing of Instant Racing facilities. The racing commission licenses the facilities, and there is no longer any test to determine whether Instant Racing is in practice pari-mutuel (the issue reserved for decision by the Kentucky Supreme Court), because by virtue of the licensing, Instant Racing is deemed not to be in violation of the state’s criminal laws on gambling.

perfunctorily accept a limited definition of the term pari-mutuel without exploring any of the actual components of what pari-mutuel might signify in practice. It appears to be a most mindful effort not to make any decision on its own, but to make the legislature deal with the overall subject.

On the other hand, certain other opinions have ruled against Instant Racing as actually played. The Maryland Attorney General has stated, “[i]n our opinion, Instant Racing is not permitted at race tracks . . . in the State because it does not constitute pari-mutuel betting, as authorized by the Maryland Horse Racing Act.”³¹¹ The Attorney General first ruled that racing on historical races was not authorized since the Maryland statutes only allowed wagering on live races and not completed races. Then, the Attorney General found that there were no pools in Instant Racing.

A bettor who successfully chooses a winning horse can therefore never “share the mutuel pool” with another who has done the same, for the simple reason that *no one else is betting on the same race*. In traditional pari-mutuel wagering, only the same type of bets on the same race or series of races are pooled together. By contrast, with Instant Racing, wagers on completely different races are pooled together based only on the various types of “wins” available to the players.³¹²

The Attorney General found, “[t]his may be pooled betting, but it is not pari-mutuel betting as contemplated in the Maryland Horse Racing Act.”³¹³ This conclusion was further justified because in regular pari-mutuel betting, the players

participate directly in setting the odds on the various possible outcomes of a given race. Typically, the bettors are the only determinant of what the odds will be. For obvious reasons, this *cannot* occur in Instant Racing because, as noted above, no two players are ever betting on the same race.³¹⁴

311. Gaming—Whether “Instant Racing” is Pari-mutuel Betting Authorized by the Maryland Horse Racing Act, 94 Op. Att’y Gen. 32, 43 (Md. 2009); *see* Instant Racing, 10-001 Op. Att’y Gen. 8 (Ky. 2010).

312. Gaming—Whether “Instant Racing” is Pari-mutuel Betting Authorized by the Maryland Horse Racing Act, 94 Op. Att’y Gen. 40 (Md. 2009).

313. *Id.*

314. *Id.* at 40–41.

Finally, the use of seeded pools demonstrated to the Attorney General why Instant Racing could not be pari-mutuel.

While the allocation of wagers in Instant Racing provides for a takeout within the statutory limits, it will also frequently include a deduction for the seed pool, a concept foreign to pari-mutuel betting.

Since it is virtually assured that only one bettor will win the contents of a betting pool, Instant Racing provides for the seed pool to replenish betting pools immediately following payout from a win. However, the Maryland Horse Racing Act contains no provision for a “seed pool” as part of the takeout or otherwise; nor is there any reference to such a mechanism in the Commission's regulations. The seed pool is thus a key element of betting pools in Instant Racing, yet does not exist in pari-mutuel betting under the Maryland Horse Racing Act.³¹⁵

A similar decision was reached in Wyoming. The Wyoming Supreme Court concluded that Instant Racing was a gambling device under Wyoming law.³¹⁶ The court was unwilling to expand the traditional notions of pari-mutuel wagering to legalize Instant Racing.³¹⁷ It stated, “we are not dealing with a new technology here, we are dealing with a slot machine that attempts to mimic traditional pari-mutuel wagering. Although it may be a good try, we are not so easily beguiled.”³¹⁸

Finally, while resting his decision on the fact that previously-run races were not constitutional in Nebraska, the Nebraska Attorney General questioned the notion that Instant Racing could be pari-mutuel.³¹⁹ He wrote,

There appears, however, to be a distinction between parimutuel wagering on traditional live and simulcast races, and Instant Racing. Unlike most parimutuel wagering on live and simulcast races, where many wagers are made on a single race or series of races, Instant Racing involves wagers on many

315. *Id.* at 41.

316. *Wyo. Downs Rodeo Events, LLC v. State*, 134 P.3d 1223, 1230 (Wyo. 2006).

317. *Id.*

318. *Id.*

319. *See* Constitutionality of Legislation Authorizing Wagering on “Historic Horseraces,” No. 10009 Op. Att’y. Gen. 7 (Neb. 2010).

different races. The pools also do not pertain to specific races. It is not clear that wagering on historic horseraces through IRTs is truly “parimutuel” in nature.³²⁰

Thus, there is a split of the authorities on whether Instant Racing is pari-mutuel in operation. The authorities used two of the previously described attributes in reviewing Instant Racing. The Kentucky Supreme Court focused on the issue of whether players wagered against each other. The Maryland and Nebraska Attorney Generals and the Wyoming Supreme Court focused on the need for pools. Kentucky also mentioned the need for a deduction of a portion of the wager to go to commissions. Little focus was given to the proportionate payment to winning players, the freedom of players to choose their wagers, and the fact that payments were uncertain until the pools closed. It is not that the authorities negated these additional attributes; these attributes did not seem to concern them.

As it stands now, Instant Racing is legal by statute in Arkansas, Kentucky, Oregon, and Alabama. Idaho had allowed Instant Racing, but the Instant Racing law was repealed by the Legislature.³²¹ Wyoming had enacted legislation in 2013 to authorize Instant Racing,³²² but the machines were shut down after action by the Attorney General in 2015.³²³

VIII. SUMMARY OF THE DEFINITIONS

Thus, a historical review of the term pari-mutuel encompassing statutory definitions, dictionary commentary, historical definitions, and judicial and other legal determinations provides, as previously suggested, a working definition of six core elements or attributes.³²⁴

They are as follows:

- (1) All the wagers in a category are placed into a pool.
- (2) The players wager against each other in the pool.
- (3) The organization conducting the pool may deduct a commission from the pool and pay the remainder to the winners.

320. *Id.* at 12 (citations omitted).

321. *See* Coeur d’Alene Tribe v. Denney (*In re* Verified Petition for Writ of Mandamus), No. 43169, 2015 WL 7421342 (Idaho Nov. 20, 2015); Bryan Clark, *Supreme Court Ends Idaho’s Instant Racing*, IDAHO FALLS POST REG., Sept. 11, 2015, at 1D.

322. Simulcasting of Pari-mutuel Events, 2013 Wyo. Sess. Laws 246.

323. James Chilton, *Historic Horse Racing Companies Reeling from Shutdown*, LARAMIE BOOMERANG (Wyo.), Oct. 7, 2015, at A1.

324. *See* *Mutuals*, *supra* note 181.

(4) The players are free to make their choice of whichever entrants they can wager on.

(5) Winning bettors share the prize pool in proportion to their respective wagers.

(6) The actual return to the winning bettors is not known until after wagering on the pool has closed.³²⁵

In short, we have requirements for pools, player competition, commission deductions, free player choice, a proportionate payback to winners, and an unknown return.

IX. PARI-MUTUELS FACE INNOVATIONS IN GAMBLING

The question for racing is whether potential innovations can fairly be considered pari-mutuel. There have been developments in at least seven specific areas in racing over the past two decades.³²⁶ To what extent can these developments (1) affect new lottery/casino wagers; (2) seed the existing pools to increase interest in racing; (3) increase payments to winning bettors beyond the traditional pari-mutuel payment; (4) grant greater access to the tote information; (5) fixed-odds wagering; (6) exchange wagering; and (7) impact Instant Racing. The final section of this article will review how these innovations fare under the definition of pari-mutuel wagering.

A. *New Lottery/Casino Style Wagers*

It is hardly surprising that pari-mutuel entities have tried to increase the numbers of types of wagers offered to the betting public. These new wagers can broadly be classified into two categories. One is an attempt to make the bets as uncomplicated as some of the basic wagers in a game like roulette at a casino, where you can bet on odds or even, red or black. The concept here is that the public can be intimidated by the atmosphere at the racetrack and would appreciate a simple wager. These wagers do not depend on a specific horse winning or finishing in the top spots in a race. Thus, you might find wagers on

325. These attributes continue to echo the review of pari-mutuels summarized in the Cincinnati Enquirer in 1910. *See id.*

326. This article will not discuss the issue of fantasy sports wagering on horse racing. This is a complex issue that brings in issues such as overall state gambling laws, the Unlawful Internet Gambling Enforcement Act of 2006, PASPA, the Interstate Horse Racing Act and a host of other concerns not directly related to pari-mutuels. *See* James G. Gatto, *New Fantasy Lawsuit—A Horse of Another Color?*, MONDAQ (Dec. 10, 2015), <http://www.mondaq.com/unitedstates/x/450692/Gambling/New+Fantasy+Lawsuit+A+Horse+Of+Another+Color>.

whether the winner of the race has an odd or even program number,³²⁷ an over-under bet “based on the total of the program numbers of the first three finishers,”³²⁸ or a bet as to whether the total of the program numbers of the first three finishers are odd or even.³²⁹

There are now a number of future wagers where players can bet months before on major races such as the Kentucky Derby. There is the potential for in-race wagering with players betting on horses during the course of the race.

Racing has seen a series of proposition wagers as well. Thus, there have been head-to-head bets where the player wagers on whether one horse will finish ahead of a specified other horse.³³⁰ Other propositions wagers involve whether a specific trainer or jockey will have the most wins on a given racing program.

To a large extent, these simplified wagers have not been successful. After all, as at least one wag has noted, “What can be simpler than win, place, or show?” Nonetheless, these wagers are also clearly pari-mutuel. The requirements for pools, player competition, commission deductions, free player choice, a proportionate payback to winners, and an unknown return are all met.

The one possible complication is the use by racetracks of a quick pick option for bettors.³³¹ In the same manner as a jackpot lottery, some racetracks authorize quick picks where “the bettor lets a random computer generator select his picks.”³³² To a certain extent, this quick pick option might negate the concept that in a pari-mutuel system the player chooses the selections and that the players do not have free choice in a quick pick option. Yet, as long as the players have the full range of other betting options, there is no lack of player choice. The quick pick is simply an added player choice option. It does not limit player selection. It augments it. The situation is little different than a sweepstakes giveaway where the player is given numerous options for entering.³³³ As long as the full scope of legal wagering opportunities are made

327. Bob Summers, *Harness Racing Makes It Simple with Advent of No-Brainer Wagering*, BUFF. NEWS, July 13, 1996, at B.2.

328. Jennie Rees, *Churchill Plans 'Over/Under' Betting*, COURIER-J. (Louisville), Oct. 21, 2007, at C16. “The ‘over/under’ is based on the total of the program numbers of the first three finishers. The “number” for each race is established by mathematical formula based on field size. For instance, the number always will be 18 in an 11-horse race.” *Id.*

329. Bill Finley, *Will's Way Returns to Work*, N.Y. DAILY NEWS, May 8, 1997, at 98. Apparently, the bet was called “Racing Roulette.” *Id.*

330. See Barry Rozner, *New Wager Props up Breeders' Cup Betting*, DAILY HERALD (Chi.), Oct. 22, 2002, at 1.

331. See Will Oremus, *Game over—Horse Board Settles Inquiry into Bay Meadows Betting*, REDWOOD CITY DAILY NEWS (Palo Alto, Cal.), July 11, 2008.

332. *Id.*

333. See, e.g., *Glick v. MTV Networks*, 796 F. Supp. 743, 744 (S.D.N.Y. 1992).

available, players retain their full capacity to make wagers of their choice.³³⁴

As to the larger payment jackpot wagers, these are extreme versions of the combination wagers offered by Joseph Oller in the 1870s.³³⁵ Thus, we have bets in which the winning player needs to pick the winner in general from two to seven races. We have single race wagers where the winning player needs to select the correct order of finish from two to five wagers. The most extreme versions of these wagers now involve a super high five, where a player needs to select the first five finishers in correct order and the Rainbow Pick Six.³³⁶ The Rainbow Pick Six is not merely a contest to select the winners of six consecutive races. The full pool is only distributed if only one person is the winner of the Rainbow Pick Six, thus often making for extremely large payoffs. “[I]n the Rainbow 6, the whole pool is paid out only if a single ticket has all six winners. Otherwise, a consolation is paid out to the perfect tickets while 40 percent of the day's pool goes into the jackpot.”³³⁷

Again, these wagers should be seen as pari-mutuel. The situation is by no means different than 1870s Paris. All the combinations bets are pari-mutuel. There are auxiliary concerns. People might argue that the Super High Five represents a major integrity problem in that one trainer, jockey, or driver in a race, by not trying, can significantly alter the odds.³³⁸ The Rainbow Pick Six poses a potential problem of whether it represents an illegal commercial lottery. Not only are payments uncertain, but the fact that one needs to be the only winner of the wager, almost places the wager into a guessing game. In horse racing, people once considered the daily double—where you need to pick two winners in a row—to be a “gigantic numbers game with the form of the horses concerned frequently overlooked.”³³⁹ Now the sport is authorizing a wager where not only do you have to pick six winners in a row, but you have to be the only winning bettor to receive the full pool, you may be approaching the stage of the lottery. Yet, other than this lottery concern, these new wagers should be considered to be pari-mutuel.

334. This is clearly distinguishable from Joseph Oller's first wagering system where the player could only wager on what was essentially a quick pick. See *Mutuel Betting in France*, *supra* note 102.

335. See *State v. Lovell*, 39 N.J.L. 458, 461–62 (N.J. 1877).

336. The winning player needs to select the first five finishers in the race in the correct order. See, e.g., Mike Welsch, *Gulfstream Park West Receives Good Response to New Wagers*, DAILY RACING FORM (Chi.), Oct. 12, 2015.

337. Andrew Beyer, *Rainbow 6 an Elusive, Expensive Pot of Gold*, DAILY RACING FORM (Chi.), Feb. 4, 2013.

338. See Bill Finley, *High 5 Jackpot Is an Accident Waiting to Happen*, ESPN (Dec. 9, 2015), http://espn.go.com/horse-racing/story/_/id/14327536/high-5-jackpot-accident-waiting-happen.

339. William D. Richardson, *Daily Double Ban Authorized Here*, N.Y. TIMES, Jan. 11, 1946, at 25.

B. Seeding the Pools

In an effort to encourage more wagering, racetracks have on occasion seeded the betting pools. Thus, they have added a certain amount of money to the pari-mutuel pool, which should work to increase payouts and encourage wagering. For example, several years ago, Yonkers Raceway and the Meadowlands combined on a “Metro Six Shooter.” This was a Pick Six with races conducted at both tracks where the two tracks seeded the pools by adding \$30,000 to the betting pot.³⁴⁰ While the Maryland Attorney General in his opinion on Instant Racing added a warning on seeding pools there is nothing about seeding a pool that would detract from the pari-mutuel nature of the wager.³⁴¹ Players are still wagering against each other and not against management. The payouts to the winning bettors remain in proportion to their wagers. Seeding the pools, by itself, should be viewed as pari-mutuel.³⁴²

A somewhat more difficult issue is presented where a racetrack does not seed the pool directly, but guarantees the minimum size of the pool. For example, a racetrack might guarantee that there would be \$100,000 in a given Pick Six pool. If the pool reaches \$100,000, the racetrack pays nothing. If the pool does not reach the \$100,000 level, the track would need to make up the difference. In short, the racetrack is betting that the pool will be a minimum of \$100,000.

The argument could be made that this makes the racetrack a participant in the gambling, and accordingly prevents the game from being merely a competition between the players. Yet, this is not what is actually happening. The players are still competing against each other for the pools and are not competing against the racetrack. The racetrack is making a conditional arrangement to seed the pools. If the racetrack can, in fact, seed the pools, then it can hardly be prevented from being able to conditionally seed the pools via a guarantee. Seeding pools and guaranteeing the size of pools should properly be seen as pari-mutuel activities.

340. *Metro Six Shooter*, N.Y. DAILY NEWS, June 4, 2010, at 95.

341. See Gaming—Whether “Instant Racing” is Pari-mutuel Betting Authorized by the Maryland Horse Racing Act, 94 Op. Att’y Gen. 32, 41 (Md. 2009).

342. A regulation, which in effect, required off-track betting corporations to seed wagering pools on account of money that they had retained from their failure to place these moneys in the racetrack pools, was affirmed on procedural grounds in *N.Y.C. Off Track Betting Corp. v. N.Y. Racing & Wagering Bd.*, 608 N.Y.S.2d 328, 330 (N.Y. App. Div. 1994).

C. *Increasing Payments to Bettors Beyond the Traditional Pari-Mutuel Payments*

Again as an inducement to wager, and as competition among wagering entities for the betting dollar increases, racetracks and account wagering services have begun to work at paying their regular customers more than the traditional pari-mutuel winnings.

This can be accomplished in a number of ways. You could pay more than the mutual payoff to those winners who meet a certain criterion. For example, you could pay winners who are in attendance and bet at the racetrack an additional amount beyond the pari-mutuel price.³⁴³ Account wagering providers frequently provide a similar reward of a bonus payoff to successful bettors at certain tracks.

Racetracks and account wagering services often provide what amount to loyalty rewards or rebates on their wagering. It can almost be considered a Discover Card's reward or an airline's miles reward for wagering.³⁴⁴ Based on the amount a player wagers, he or she will receive a rebate from the wagering provider. The bigger the player, the more competition there is between account wagering services to attract the large bettor, known in the industry as a "whale," to bet with them.³⁴⁵ In 2006, *The New York Times* estimated that the rebate shops were returning from four percent to ten percent of money wagered to bettors.³⁴⁶ The Hong Kong Jockey Club, which is the most significant international player in horse racing, pays a rebate of ten percent to its biggest bettors.³⁴⁷

The issue becomes whether these higher payments and/or rebates violate the concept that bettors must share the prize pool in proportion to their

343. For example, the former Sportsman's Park in suburban Chicago once paid ten percent more to live customers on successful win bets. Neil Milbert, *Thoroughbreds Get Back on Track, but Sport Limping Despite New Law*, CHI. TRIB., Feb. 16, 1996, at 4.

344. See Joe Drape, *Horse Racing's Biggest Bettors Are Reaping Richest Rewards*, N.Y. TIMES, Apr. 26, 2004. For one of the earliest story on rebates, see Matthew McAllester, *Hijacked High Roller: Suffolk OTB's Most Valuable Client Lost to Vegas*, NEWSDAY, Jan. 28, 1996.

345. John Brennan, *Pick a Winner on the Web*, BERGEN REC., Apr. 7, 2013. Racing consultant Ken Kirchner said, "They make a concerted effort to attract bettors in a variety of ways, mostly by offering a **rebate** for a portion of their wagering action The best customers get the best price, just like in any business." *Id.*

346. Drape, *supra* note 344; see Paul Moran, *Horse Racing, Rebate Program Proves Bankrupt of True Rewards*, NEWSDAY, Mar. 30, 2006, at A58.

347. Alan Aitken, *How to Fight the Legal Operators? Give the Punter Better Prices*, S. CHINA MORNING POST, Jan. 26, 2016, <http://www.scmp.com/sport/racing/article/1905432/how-fight-illegal-operators-give-punter-better-prices>; Alan Aitken, *Racing's Big Move up in Class*, S. CHINA MORNING POST, June 29, 2012, <http://www.scmp.com/article/1005284/racings-big-move-class>.

respective wagers. In terms of rebates, there is no relation to the prize pool; the rebates are on the amount bet and not on the amount won.

A slightly different issue arises in terms of the bonus payments to winners. Some winning bettors are paid more than others. Yet, as long as there are uniform eligibility criteria for the bonus payment (e.g. betting live at the racetrack) and all bettors are theoretically able to fulfill the eligibility criteria, there is no discrimination against individual bettors.³⁴⁸ Everyone is eligible for the bonus payments, and that is what a proportionate betting system requires. The bettors in the same class are being treated equally, and the added payments should be seen as being no different in concept to seeding the pools. In place of seeding the pools, you are seeding the payouts.

There should be regulatory concerns on these bonus payouts and rebates. Are the eligibility criteria for the bonus payments uniformly enforced? Are certain individual bettors able to get preferential treatment?³⁴⁹ Yet, these issues do not affect the overall pari-mutuel issues presented by bonus payments and rebates. They should be viewed as pari-mutuel.

D. Granting Greater Access to Tote Information

A fan at a racetrack often needs to review the toteboard to see the latest changes in odds. The odds for straight wagers may be updated every thirty seconds or so. There is also fan access in the same general fashion to horse wagers such as daily doubles and exactas. There is generally no fan access to the odds on more exotic wagers, which feature bets on more than two horses.

348. See Milbert, *supra* note 343. The bonus payment analysis is no different in concept than the requirement in racing jurisdictions that a winning pari-mutuel wager must have a minimum payout, regardless of the actual odds. Traditionally, this occurs when there is an overwhelming favorite in the betting field while the jurisdiction requires a minimum payout frequently set at 5% of the wager. For example, New York regulations require the minimum payout to be \$2.10 on a \$2.00 wager. 9 NYCRR §§ 4009.6, 4122.15, 4215.6, 4406.2 (2016). So, a \$2.00 show wager on American Pharoah might, according to the actual odds, only be expected to return \$2.05 to bettors, but the State requires the facility to pay the winning bettors \$2.10. The Minnesota statute on minimum payouts authorizes the racing facility to “reduce the minimum payoff to \$1.05 on a \$1 ticket if there is not a sufficient amount in a pool to make a minimum payoff of \$1.10.” MINN. STAT. § 240.13(4) (2016). See 8 M.R.S.A § 275-E(1) (2016); ILL. ADMIN. CODE tit. 11, § 300.90 (2016); 810 KY. ADMIN. REGS. 1:011(11) (2016); N.D. ADMIN. CODE 69.5-01-08-05 (2016).

349. For example, Ahmed Zayat, who owned the Triple Crown winner American Pharoah, was allegedly allowed to bet on credit in wagering accounts with the New Jersey Sports Authority. According to a lawsuit, Zayat had a debt of \$286,000 that went unresolved for several months, thus enabling Zayat to bet and earn rebates without any money in his account. John Brennan, *Teaneck Bettor Ran up \$286,000 Debt; Lawsuit Targets Online Horse Wagering*, REC. (N.J.), Mar. 1, 2013, <http://archive.northjersey.com/news/nj-state-news/nj-governor-s-office/teaneck-bettor-ran-up-286-000-debt-lawsuit-targets-online-horse-wagering-1.718935?page=all>.

With the coming of big bettors, accompanied by rebates, certain bettors have been granted greater access to the tote system, thus enabling them to know the actual odds and bet large amounts just before the wagering closes. Many of these larger bettors use computer-robotic wagering. “[They] use algorithms to set up wagering programs. The idea is to take advantage of last-second odds anomalies by placing large wagers in a fraction of a second.”³⁵⁰

The question would be whether this late-second access to tote information would violate the concept that exact pari-mutuel payouts are uncertain until the pools have closed. Again, this access and ability to wager robotically does not violate the pari-mutuel concept. Nobody knows the exact winning payouts until the pools have closed. Bets are still being processed at the time of the robotic bet. Competing algorithms could be changing the calculus of the winning payout. The robotic wagers may have a good idea of what their bets should pay, but they do not know exactly what their bets will pay.

Similar to the bonus/rebate issue previously discussed, this is essentially a regulatory fairness issue. If the overall point of the pari-mutuel system is to encourage fairness to all players, should not all bettors be able to access the exact status of the odds and not have to wait for the tote to be updated? How do you decide which bettors have access to robotic wagering? How can ordinary bettors wager at nearly the last second? This would seem to be a largely ignored issue at the regulatory front, but it is not an issue as to whether robotic wagering is pari-mutuel. It is pari-mutuel, but it surely needs regulatory oversight. Besides the regulators, one would hope that the racetracks themselves might wish to try to expand access to the pool information, if only to assure their regular bettors that the racing game is not just for the whales.

E. Fixed Odds Wagering

Arguably, moving towards fixed-odds wagering would potentially help racing interests. Other countries are beginning to focus on the possibility of introducing fixed-odds wagering to their wagering menu.³⁵¹ For the 2015 Breeders’ Cup Classic, one account wagering firm was offering 4-1 fixed odds on American Pharoah winning for (up to a small number of wagers) new bettors joining the account wagering service. At the track, American Pharoah won at

350. Harry King, *Oaklawn Takes Aim at Robotic Wagering in Horse Racing*, FORT SMITH TIMES REC. (Ark.), May 3, 2015, <http://www.swtimes.com/sports/sports-columnists/king-oaklawn-takes-aim-robotic-wagering-horse-racing>; see *Q1 2007 Yobet.com Earnings Conference Call—Final*, FAIR DISCLOSURE WIRE (Q. EARNINGS REP.), May 8, 2007, Transcript No. 050807ab.786..

351. See Aitken, *How to Fight the Legal Operators? Give the Punter Better Prices*, *supra* note 347 (finding that speakers at an Asian Racing Conference are “emphasizing the growth of fixed odds betting” on horse racing).

odds of 3-5. Thus, the account wagering service was offering fixed odds wagering on American Pharoah.

Yet, there is little way that fixed odds wagering can be considered pari-mutuel. Fixed odds wagering fails on a number of pari-mutuel counts. There is no pool, the players wager against the house and not each other, there is no deduction for commission, and the actual return is known before the wagering on the race has closed.

Fixed odds wagering cannot be considered pari-mutuel.

F. Exchange Wagering

Exchange wagering could be viewed simplistically as a player-initiated form of fixed odds wagering. California law defines it as “a form of parimutuel wagering in which two or more persons place identically opposing wagers in a given market.”³⁵² Racing columnist Bill Finley has explained exchange wagering as follows:

Exchange wagering is the generic term for a system of betting where bets or betting propositions are matched among customers, much like eBay matches buyers and sellers. For instance, a customer might offer to book \$100 worth of win wagers on Zenyatta at 2-1 in the Breeders’ Cup Classic. If another customer is willing to bet on her at the price, the two bets are matched. The bettor does not have to wager the entire \$100. He or she can bet any amount up to \$100. Once bets are matched, the betting exchange takes a commission; currently Betfair charges the winning bettor anywhere from 2 to 5 percent of their winnings.³⁵³

This exchange wagering system, on its face, easily meets most of the requirements of a pari-mutuel system. The players play against each other. There is a deduction from the wagers for commissions. All the wagers in a category are placed into a pool—in the example given in the pool of wagers at 2-1 on or against Zenyatta, and the winning bettors share the prize pool in proportion to their wagers.

The one issue is whether the actual return is known before the bet finalizes.

352. CAL. BUS. & PROF. CODE § 19604.5(a)(7) (2016).

353. Bill Finley, Editorial, *Exchange Wagering: Questions and Answers*, THOROUGHBRED DAILY NEWS, Feb. 5, 2011, <http://www.thoroughbreddailynews.com/pdf/oped/oped110205.pdf>. Betfair is the major international corporation operating wagering exchanges.

Yet, in this case, the initial offeror can potentially withdraw the offer, and the offered wager might never be matched. Until the pool closes when the actual bets are fully or not fully matched, one would not know the return, or even if there would be any return. For instance, in the prior example, the person wagering \$100 against Zenyatta winning at 2-1 will not know what his or her return will be until the pool closes. Zenyatta might lose, and it would be possible that nobody even matched the offer. While it remains a close question, the more appropriate decision should be that exchange wagering is pari-mutuel.

Nonetheless, there is a troubling aspect to the legislation passed by both California and New Jersey on exchange wagering. They both provide for “corrective wagers” under which the exchange betting licensee is authorized to match the player’s offered wager under circumstances “in order to address the impact on that market of the cancellation or voiding of a given matched wager or a given part of a matched wager.”³⁵⁴ The obvious issue here is that this corrective wager is not between the bettors. It is a bet between the house and the player, and it can hardly be considered a pari-mutuel wager.

G. Instant Racing

Based on the previous description of Instant Racing, it would seem very unlikely that Instant Racing could be viewed as a pari-mutuel wager.³⁵⁵

There is one issue under Instant Racing that should be acceptable. There is nothing in the definition of pari-mutuel which should prevent wagering on previously-run races. While a particular state’s statutory or constitutional history might arguably be read to encompass only pari-mutuel wagering on live races, there is nothing inherent in the overall definition of pari-mutuel which would preclude wagering on historic races. Instant Racing would also seem to comply with the ability to freely make wagers and the pari-mutuel requirement that players are free to wager on their choice of entrants.

Instant Racing, however suffers from some inherent problems. As noted by the Maryland and Nebraska Attorneys General, there is no pooled wager. All bets of the same type are pooled together, but there is no provision for betting on the same race. Nobody shares a pool. The pools do not apply to specific races. There is no sharing of the pools since nobody else is betting on the same race. Thus, Instant Racing would fail the “pool” test. Without pools, there is no way to assess whether there are proportionate payouts to winning bettors,

354. CAL. BUS. & PROF. CODE § 19604.5(a)(3) (2016); N.J. STAT. ANN. § 5:5-170(3) (2016).

355. See Instant Racing, No. 114-008 Op. Att’y Gen. 2 (Ariz. 2014); Gaming—Whether “Instant Racing” is Pari-mutuel Betting Authorized by the Maryland Horse Racing Act, 94 Op. Att’y Gen. 32, 40-41 (Md. 2009); Instant Racing, 10-001 Op. Att’y Gen. 8 (Ky. 2010).

since that requirement presupposes the existence of pools.

It would also fail the requirement that players play against each other. Not only is there no pool, but in those instances where there is a winning wager, the pool needs to be replenished immediately. In these replenishment cases, the player is wagering against the house and not the other players. This cannot be viewed a pari-mutuel wager.³⁵⁶

Instant Racing may provide perfectly valid gambling devices, but it is difficult to square Instant Racing with the concept of a valid pari-mutuel operation. Nonetheless, in states that have enacted Instant Racing but do not have a constitutional requirement for pari-mutuel wagers on horse or other animals, it may be that Instant Racing is under little threat of a shutdown. Unless someone tries to utilize the pari-mutuel requirements in federal law to block Instant Racing, it is likely that the Instant Racing machines will continue to operate in a number of states.

X. CONCLUSION

The requirement of a pari-mutuel system of wagering on animals is part of federal law, some state constitutions, and of state statutes. Yet, in many instances, there is no definition of the term "pari-mutuel." Even where there are definitions provided, they are often amorphous and contain little value. This paper has attempted to distill the core elements of pari-mutuel wagering by reviewing statutes, constitutions, dictionaries, historical practices, and case law. This review found that the attributes of pari-mutuel racing are as follows:

- (1) All the wagers in a category are placed into a pool.
- (2) The players wager against each other in the pool.
- (3) The organization conducting the pool may deduct a commission from the pool and pays the remainder to the winners.
- (4) The players are free to make their choice of whichever entrants they can wager on.
- (5) Winning bettors share the prize pool in proportion to their respective wagers.
- (6) The actual return to the winning bettors is not known until after wagering on the pool has closed.³⁵⁷

At a time when horse racing is in a downturn, and new and innovative wagering strategies are in demand, this working definition of pari-mutuels

356. It is not clear from the cases and opinions whether a bettor using an Instant Racing machines knows the payout at the time the bet is made.

357. *See Mutuels*, *supra* note 181.

definitely precludes certain types of wagers. It would prevent fixed odds betting and Instant Racing. Yet, this definition should be viewed as sufficiently flexible to allow a host of newer types of wagers, which have the potential to restore horse racing—at least in part—to its former position of preeminence among American sports.