Let's Not "Spit the Bit" in Defense of "The Law of the Horse": The Historical and Legal Development of American Thoroughbred Racing

Joan S. Howland
LET'S NOT "SPIT THE BIT"¹ IN DEFENSE OF "THE LAW OF THE HORSE": THE HISTORICAL AND LEGAL DEVELOPMENT OF AMERICAN THOROUGHBRED RACING²

JOAN S. HOWLAND³

There seems always to have been racing, and its adherents. It is illimitable, and so are they.⁴

INTRODUCTION

In 1996, at a conference held at the University of Chicago, Judge Frank H. Easterbrook of the United States Court of Appeals for the Seventh Circuit warned his fellow jurists, as well as legislators, academics, and practitioners,

---

¹. "Spit the bit" is a colloquialism used in the horse racing world to describe a horse that is "short" or begins to lag in a race, and backs off the "pull" on the reins, indicating to the jockey that the horse is tiring and no longer eager to be at the head of the field.

². This article is based on a paper, entitled There is No Reason To "Spit the Bit" in Defense of "The Law of the Horse": A Presentation on the Importance of Equine Law, the Historical Background of American Thoroughbred Racing, and Recent Developments in the Law of Thoroughbred Racing, presented at the 2002 Equine Law Conference held in San Mateo, California, on Oct. 11, 2002.

³. Roger F. Noreen Professor of Law and Associate Dean for Information & Technology, University of Minnesota Law School. The author would like to express her deepest appreciation to Rachel Clark Hughey (University of Minnesota Law School, '03) for her invaluable research support and editorial assistance. The author would like to sincerely thank Paul Welling (University of Minnesota Law School, '02) for his superb research assistance and editorial guidance during the early stages of this project. Deepest appreciation is also extended to Michael J. Hannon of the Duke University School of Law for his critical editorial review, keen insights, and valuable suggestions. The author would like to thank David Zopfi-Jordan of the University of Minnesota Law Library staff for his heroic efforts in obtaining even the most obscure sources. This article is dedicated to the memory of the author's grandfather, John Stephen Nellis, who instilled in her both a passion for Thoroughbred racing and the unwavering conviction that a well researched and prudent trifecta wager is the safest investment known to man. He also provided her with the astute guidance that "[i]f you buy one of those little souvenir pencils, you never have to wonder which track you're at today." See BRENDAN BOYD, RACING DAYS 21 (1995).

⁴. Id. at 26.
not to pursue the creation of a special body of law to deal with issues arising from the cyber revolution. He cautioned against prescribing “legal adaptations for cyberspace,” and analogized the predilection toward the development of unique laws and tenets to deal with cyberspace to the body of law Karl N. Llewellyn termed “The Law of the Horse.” Judge Easterbrook suggested:

[The best way to learn the law applicable to specialized endeavors is to study general rules. Lots of cases deal with sales of horses; others deal with people kicked by horses; still more deal with the licensing and racing of horses, or with the care veterinarians give to horses, or with prizes at horses shows. Any effort to collect these strands into a course on the “Law of the Horse” is doomed to be shallow and to miss unifying principles.]

Judge Easterbrook’s comments during the conference, and their subsequent publication in the University of Chicago Legal Forum, continue to spark debate about whether law school curriculums “should be limited to [traditional] subjects that could illuminate the entire law.” Judging by the current avalanche of law review articles written on cyberlaw and the proliferation of law in cyberspace courses offered in American law schools, the segment of the legal community that contends cyberlaw is worthy of study has won the debate in spite of Judge Easterbrook’s admonishments. So why is

---

6. Id.
7. Karl N. Llewellyn, Across Sales on Horseback, 52 HARV. L. REV. 725, 735, 737 (1939). See also Karl N. Llewellyn, The First Struggle to Unhorse Sales, 52 HARV. L. REV. 873 (1939). One might question whether Karl Llewellyn, albeit a brilliant legal scholar with expertise ranging from commercial law to jurisprudence to American Indian law, was qualified to make analogies referencing equine law. Except for research forays to the Southwest to study American Indian legal systems, Llewellyn appears to have spent his entire life in urban surroundings. There is no evidence to indicate that Llewellyn had any contact with horses either for pleasure or sport, or any knowledge of the legal or business dealings common in the horse industry. See James J. Connolly et al., Alcoholism and Angst in the Life and Work of Karl Llewellyn, 24 OHIO N.U. L. REV. 43 (1998).
8. See Easterbrook, supra note 5, at 207.
9. Id.
10. Id. (referencing Gerhard Casper who, as Dean of the University of Chicago Law School, contended that a course in “The Law of the Horse” was not appropriate for an institution of Chicago’s exceptional caliber).
11. As of September 2002, more than 150 cyberlaw and law & technology courses are being taught at law schools accredited by the American Bar Association. These courses range from survey courses to highly specialized courses. The 2002-03 curriculum at Harvard Law School includes an offering entitled “Evidence, Truth and the Internet.” “Cyberlaw is emerging as a doctrinal area of its own, on par with contracts and torts.” See Alan Heinrich et al., At the Crossroads of Law and Technology, 33 LOY. L.A. L. REV. 1035, 1048 (2000).
the law of the horse not equally worthy of study, reflection, and instruction? Those jurists, scholars, and practitioners who have no interest in equine law might answer this question with the flip retort, “unlike the law of cyberspace, no one gives a horse’s ‘tail’ about the law of the horse.” Arguably, even with the recent downturn in the sectors of the economy driven by technology, cyberlaw is much “hotter” than equine law in terms of academic interest, employment opportunities for recent law school graduates, and revenue potential for practicing lawyers. This argument, albeit true, does not justify a dismissal of the law of the horse, especially in regard to horse racing. Much like cyberlaw, equine law is highly regulated by statutes, case law, and administrative restrictions and rulings. Contracts, securities, negligence, tax, labor, gaming, and licensing are all critical issues in the world of horses just as they are in cyberspace. In addition, the constraints beyond legal limits that regulate behavior in cyberspace—social norms, economics, and the physical world—also regulate the behavior of those individuals involved in the horse industry.

My intention in this article is to discuss the historical antecedents of horse racing and the development of this sport in the United States since the Colonial Era. In order to do this, it is necessary to start from horse racing’s beginnings. This historical tour will demonstrate that horse racing and its associated legal norms are much older and well established than many legal doctrines from more well known, but comparatively younger, legal subjects. Through this discussion I will demonstrate how the evolution of the law of Thoroughbred racing reflects the changing nature of American legal and social norms.

HISTORICAL ORIGINS OF THOROUGHBRED RACING

The American horse industry produces goods and services valued at $25.3 billion annually, with a total impact of $112.1 billion on the United States economy. Each year Thoroughbred racing contributes $7.383 billion to the...
U.S. Gross Domestic Product (GDP) and supports nearly 500,000 jobs. In 2000, the total dollars legally wagered in the United States on horse racing reached a record $14.6 billion. In contrast, the World Wrestling Federation generated merely $456 million in the same twelve-month period. A poll conducted in 2002 by TNS Intersearch Sports, a unit of ESPN, indicated that the number of horse racing fans increased by 5.4% among Americans ages twelve and older in 2001. The National Association for Stock Car Auto Racing (NASCAR) was the only sport that reported a greater increased interest in the same age group (10.9%). This bright picture of the Thoroughbred racing industry is in sharp contrast to the gloom and doom that is painted by pundits who point to the aging fan base, lower track attendance figures, closure of race tracks, and decrease in the number of foals registered as indicators that horse racing is spiraling downward toward oblivion. The reality is that the first decade of the twenty-first century is a robust but turbulent time for Thoroughbred racing. However, tumultuous times and controversy have colored the history of horse racing not only in the United States, but since the sport’s inception in ancient Greece and Rome.

A. Classical Origins of Horse Racing

The origins of American Thoroughbred horse racing reach back far beyond the sport’s usually acknowledged British antecedents. The earliest reference in literature to the use of the horse in racing in any form appears in Homer’s The Iliad. Chapter 23 vividly describes the chariot race at the funeral games held in honor of the Macedonian general Patrocles, including the


17. Id. at 36 (citing International Statistical Survey of Horse Racing and 2000 Statistics, compiled by the Societe d’Encouragement and presented at the 34th International Conference of Racing Authorities, Paris, France, Oct. 8, 2001). This increase in purses can be attributed in large part to the continued expansion of simulcasting and video lottery terminals.


19. Id.


21. Id.

22. After the death of Seleucus, Patrocles was dispatched by Antiochus to quell a revolt in Asia Minor, and was killed in battle with the Bithynians. See 13 ENCYCLOPEDIA BRITANNICA 726 (11th ed. 1910), available at http://43.1911encyclopedia.org/P/PA/PATROCLES.htm (last visited Feb. 13, 2004).
Antilokhos, the fourth, readied his team – resplendent son of the heroic Lord Nestor Neleiaides. Horses of Pylos drew his war-car. At his elbow now his father halted, with a word to the wise:

"Antilokhos, by heaven, even as a youngster Zeus and Poseidon cared for you and taught you every kind of horsemanship. No need for me to add instruction, when you know so well the trick of making turns. However, these are slow horses, and they may turn in a second-rate performance. The other teams are faster. But the charioteers know no more racing strategy than you do. Work out a plan of action in your mind, dear son, don’t let the prize slip through your fingers. Astuteness makes a forester, not brawn, and by astuteness on the open sea a helmsman holds a ship on the right course though roughed by winds. One driver beats another thinking it out beforehand. Many a one will trust his team and chariot so far that he wheels wide on turns, and carelessly, to one side, then the other, and his horses careen over the track, not kept in hand.

But a skilled charioteer with slower horses, keeping his eye on the turning post, will cling to it as he takes the curve, remembering to give his horses rein into the stretch but with a sure hand, watching the front-runner.

As to the mark, it stands out; you can’t miss it: a dry stump, a man’s height above the ground, of oak or pine, not rotted by the rain, where the outward course turns home. Around this mark there is smooth footing. It may be a memorial of a man dead long ago, or a turning post built in the old days. Now the Prince Akhilleus makes it our halfway mark. As you drive near it, hug it with car and horses; you yourself in the chariot basket lean a bit to the left and at the same time lash your right-hand horse and shout to him, and let his rein run out. Your left-hand horse should graze the turning post so that your wheelhub seems to scrape the edge.

But mind there’s no collision with the stump: you’ll hurt the horses and destroy the car, and that will bring joy to your adversaries, humiliation to you. No, son, be cool and watchful.
If on the turn you overtake and pass, there's not a chance of someone catching you - not if he drove the great horse of Adrestos, fleet Arion, born of the gods, or those of Laomedon, splendid ones bred here."

When he had told his son the ultimate arts of charioteering, Nestor sat down again.23

The ancient Greeks introduced chariot racing to the Olympic games in 666 B.C.24 Thirty-two years later at the thirty-third Olympics, bare back racing was added.25 The Calpe, a mares only race, became part of the games in 496 B.C.26 Shortly thereafter, a race featuring colts was added to the roster of Olympic events.27 The races were run in heats and a final, each race lasting twelve laps.28 Wagering, a long tradition in the racing world, was a common practice even in Ancient Greece. In Aristophanes' Clouds, written in 423 B.C., the hero Strepsiades is brought to near financial ruin through his own ill-advised wagers at the track and those of his profligate son Pheidippides.29

The Greeks were also the first civilization to document training and breeding practices.30 Xenophon, the Greek historian and philosopher born in 430 B.C., included among his essays one entitled Hippike (The Art of Horsemanship), which offers guidance on how to choose, ride, groom, and generally manage a horse.31 Xenophon, who opened his essay boasting that he had spent a great deal of his time riding and therefore was well versed in horsemanship,32 cautioned even the experienced horseman when buying a horse to look for well-formed feet, supple knees, a broad chest, and a neck that "should not be thrown out from the chest like a boar's, but, like a cock's, should rise straight up."33 Xenophon surmised that nations whose upper classes vigorously pursue field sports have a greater probability of achieving

25. Id.
26. Id.
27. Id.
28. Id.
30. Id. at 12.
32. Id. at 13.
33. Id. at 16.
success in war. Discussing the relevance of horse racing to preparing men for battle, he stated, "[t]he moment [that] the horse faces the stretch after finishing the turn [on an oval race course], the rider should push him on to go faster. In war, of course, turns are executed for the purpose of pursuing or retreating . . . ."34

Many other ancient civilizations, including those of Rome and North Africa, pursued horse racing as vigorously as the Greeks. The Roman Emperor Caligula was the first documented royal racing fanatic, housing his favorite horse in a marble stable with a retinue of servants. Rumors even spread that the deranged Caligula intended to make the horse his consul.35 The Flavian emperor Domitian, who ruled in the first century A.D., was known to hold a hundred races a day in the Circus Maximus.36 Horse racing also became a popular sport in China, Persia, Arabia, and other countries of the Middle East.37 Arabian and Turkish horses were especially prized for their speed and temperament.38

B. British Origins of Thoroughbred Racing

Although the leaders of the early Christian church were unyielding in their condemnation of horse racing (the fourth Canon of the Council of Arles, issued in the fifth century, stipulated excommunication for charioteers who participated in public games),39 the sport flourished in the years preceding the Middle Ages.40 Racing particularly thrived in Britain, where the Romans had introduced the sport after their conquest in the first century A.D.41 An early Breton poem (c. 500 A.D.) vividly depicts a horse race where the victor won the hand of Princess Alienor, daughter of King Brodrick.42

Despite the significant decline of horse racing throughout most of the civilized world in the Dark Ages, it continued to flourish in Ireland. The illuminations in the Book of Kells (c. 700 A.D.) depict horsemen riding bareback with bits and bridles.43 The Curragh, the great racing center of Ireland, began hosting events in the 300s A.D., and by the 700s A.D. held

34. Id. at 43.
35. LONGRIGG, supra note 24, at 16.
36. Id.
37. Id. at 12-19.
38. See generally id.
39. Id. at 19.
40. Id.
41. Id. at 20.
42. Id. (citing GODOLPHIN DARLEY, RACING IN FRANCE 7 (1950)).
races that lasted nearly a week.\footnote{Id. at 464.}

The Fenchas ("Brehon Laws"), published in the early 700s A.D., stipulated that every man of rank in Ireland be taught to ride.\footnote{Id. at 419 (citing Brehon Laws, vol. II at 157).} These laws also provided that any established fair green or racecourse could be used for horse racing gratis, regardless of anyone's title to the property.\footnote{Id. at 449.} It is not surprising that racing featured so prominently in the early laws of Ireland; during pagan times, Irishman had believed that one of the many benefits of the afterlife was the opportunity to view continuous horse racing.\footnote{Id. at 463.}

The successful Norman conquest of Britain by William the Conqueror in 1066 heralded an era of relative prosperity for England and the emergence of horse racing as one of the most popular spectator sports. In Description of the City of London (c. 1174), the Monk of Canterbury, William Fitzstephen, comments on the weekly horse sales and races.\footnote{See JOHN STOW, A SURVEY OF LONDON 26 (Alan Sutton Pub. Ltd. 1994)(1598); see also LONGRIGG, supra note 24, at 23.} In discussing these events, Fitzstephen states:

[i]n a plane field without one of the gates (Smithfield) every Friday, unless it be one of the more solemn festivals, is a noted show of well-bred horses exposed for sale. The earls, barons, and knights who are resident in the city, as well as a multitude of citizens, flock thither either to look on or buy . . . . When a race is to be run by such horses . . . which, in like manner, according to their breed are strong for carriage and vigorous for the course, the people raise a shout and order the common horses to be withdrawn to another part of the field. The jockeys, who are boys expert in the management of horses, which they regulate by means of curb bridles, sometimes by threes and sometimes by twos, as the match is made, prepare themselves for the contest. Their chief aim is to prevent a competitor from getting before them. The horses too, after their manner, are eager for the race; their limbs tremble, and impatient of delay they cannot stand still; upon the signal being given they stretch out their limbs, hurry on the course, and are borne along with unremitting speed. The riders, inspired by the love of praise and the hope of victory, clap spurs to their flying
horses, lashing them with whips and inciting them by their shouts.\textsuperscript{49}

According to \textit{The Romance of Sir Beues of Hamptoun}, written in 1327,\textsuperscript{50} during the reign of Richard III horses were raced over a three-mile course for twenty pounds of ready gold.\textsuperscript{51} King John, who came to the British throne in 1199, was a great racing enthusiast, and expenditures for "running expenses" are mentioned with great frequency in the royal accounts.\textsuperscript{52}

In 1512, during Henry VIII's reign, public racing became a weekly event at Chester, and the King established his own racing stables at Eltham.\textsuperscript{53} Henry was particularly interested in improving the royal stud and led the movement to strengthen English bloodstock by importing horses from Turkey, Naples, and Spain.\textsuperscript{54} Racing continued to flourish in England after Henry's death in 1547, although it was not until James I came to the throne in 1607 that a monarch favored racing over the more conventional sport of hunting.\textsuperscript{55} James, an avid sportsman who "freely indulged"\textsuperscript{56} in horse racing, is credited with importing the first Arab stallion to England to strengthen the sturdy but slow English stock. James had been counseled by one of the most famous horsemen of the period, Gervase Markham, to introduce Arabian sires to his stables as their offspring had "wonderful speede in both short and long courses."\textsuperscript{57} Following this astute guidance, James authorized the expenditure of 154 pounds (with eleven pounds for the groom) for the purchase of a steed to become known as the "Markham Arabian."\textsuperscript{58} This initial experiment with infusing Arabian blood into the British stock proved disappointing,\textsuperscript{59} but James' confidence in the superior qualities of Arabians was not shaken. Eventually, with more success, he added a second Arabian, Place's White

\textsuperscript{49} See JOYCE, supra note 43, at 505.

\textsuperscript{50} THE ROMANCE OF SIR BEUES OF HAMPTOUN 165-69 (Eugen Kolbing trans., N. Trubner & Co. 1885) (1327).

\textsuperscript{51} Id. at 165, l.3518.

\textsuperscript{52} See 13 ENCYCLOPEDIA BRITANNICA, supra note 22, at 727.

\textsuperscript{53} Id.

\textsuperscript{54} Id. at 718 (citing Sir Thomas Chaloner).

\textsuperscript{55} Id. at 727.

\textsuperscript{56} Id. at 719.

\textsuperscript{57} GERVAISE MARKHAM, HOW TO CHUSE, RIDE, TRAIN, AND DYET BOTH HUNTING HORSES AND TRAINING HORSES (1599), cited in LONGRIGG, supra note 24, at 31.

\textsuperscript{58} GERVAISE MARKHAM, THE COMPLETE JOCKEY OF THE MOST EXACT RULE AND METHODS TO BE OBSERVED FOR THE TRAINING UP OF RACE-HORSES ETC. ch.iii, v., xv (1680), cited in LONGRIGG, supra note 24, at 42.

\textsuperscript{59} The Markham Arabian was neither a success on the race track nor as a sire. See 13 ENCYCLOPEDIA BRITANNICA, supra note 22, at 719.
Turk, to his stables.  

Although somewhat disrupted during the oppressive reigns of Oliver Cromwell (1653-1658) and his son Richard Cromwell (1658-1659), the popularity of racing thrived in England with the ascent of Charles II to the throne in 1660. Under royal patronage, the race courses at Newmarket, Epsom, and Chester became viable sporting and social centers. Not only was Charles an avid breeder and racing fan, he often mounted a steed himself in competition. According to a court observer, English diarist John Evelyn, "yesterday his majestie rode himself three heats and a course and won the Plate, all [four] were hard and near [closely] run, and I do assure you the king won by good horsemanship." Evelyn's countryman, poet Alexander Pope, had a somewhat more cynical view: "In Days of Ease, when now the weary sword Was Sheathed and Luxury with Charles restored; In every taste of foreign Courts improved. 'All, by the King's Example, lived and loved.' Then Peers grew proud in Horsemanship to excel, Newmarket's Glory rose, as Britain's fell."

Charles' successor and brother, James II, was an equally enthusiastic horseman, preferring only hunting and his mistresses to a day at the track. Had James' attempts to restore the Catholic faith to England not led to his eventual exile, he may have proven to be a force in the racing world equal to his brother. During James' reign, the Duke of Berwick brought the prolific sire The Stradling (a.k.a. Lister Turk) to England, captured at the Siege of Buda in 1686. The offspring of this exceptional stallion greatly strengthened racing bloodstock throughout the British Isles.

With the ascendance of Queen Anne to the throne in 1702, horse racing entered a golden era and became firmly entrenched in the sporting cultures of England and Ireland. Anne, an avid horse breeder and racing enthusiast, generously opened the royal purses to sponsor racing events throughout her realm. Anne was the leading force behind the establishment in 1711 of

---

60. LONGRIGG, supra note 24, at 45.
61. Id. at 46-47.
62. Id. at 47.
63. JOHN EVELYN, DIARY (William Bray ed., Henry Colburn 1850), cited in LONGRIGG, supra note 24, at 47.
64. ALEXANDER POPE, IMITATIONS OF HORACE, POETICAL WORKS bk II, epistle I, ll.139 et seq., at 365 (Herbert Davis ed., 1966), cited in LONGRIGG, supra note 24, at 47.
65. LONGRIGG, supra note 24, at 49.
66. 13 ENCYCLOPEDIA BRITANNICA, supra note 22, at 719.
67. Id. at 728.
68. LONGRIGG, supra note 24, at 55.
69. See 13 ENCYCLOPEDIA BRITANNICA, supra note 22, at 728.
horse racing at Ascot, a course which remains one of the world’s most famous racing venues.

The seventeenth and early eighteenth centuries witnessed not only the formalization of English racing, but also the introduction of the bloodstock which was to spawn the Thoroughbred breed. Between 1630 and 1730, three legendary mounts were imported to England: the Byerly Turk\(^70\) (from Turkey), the Darley Arabian (from Asia Minor), and the Godolphin Arabian (from Tunis via France).\(^71\) These exceptional stallions are the wellhead to which every Thoroughbred can be traced.\(^72\) Each sired a line of outstanding horses that can be identified by specific descendants; the lines of Eclipse, Matchem and Herod have become the “founding fathers” of all modern Thoroughbreds.\(^73\) Of these three, Eclipse, foaled on April 1, 1764, the day after an eclipse of the sun that inspired his name, was the most prolific.\(^74\) His progeny include several outstanding mounts of the era including King Fergus (1775), Joe Andrews (1778), and Mercury (1778).\(^75\) Eclipse also is celebrated because he never lost a race.\(^76\) When he finished lengths ahead of the next finisher during his first race at Epsom in 1769, his legendary status was assured when his owner Dennis O’Kelly uttered one of the most famous phrases in racing history, “Eclipse first, the rest nowhere.”\(^77\)

II. AMERICAN THOROUGHBRED RACING

A. Colonial Beginnings

Along with their religious beliefs, social mores, and political philosophies, the early American colonists brought horses and horse racing to the New World. Despite the disapproval of the Puritan hierarchy, by the mid 1600s, horse racing had become a popular and largely unregulated recreation throughout the colonies. The quality of the racing stock significantly improved when the elegant but short-winded European horses were mated

\(^70\) The preferred spelling appears to be Byerly Turk, however, some references use the spelling Beyerly Turk. See Edward L. Bowen, The Jockey Club’s Illustrated History of Thoroughbred Racing in America 33 (1994).

\(^71\) Id.

\(^72\) Howland & Hannon, supra note 14, at 1.

\(^73\) Id.

\(^74\) Bowen, supra note 70, at 33.

\(^75\) Id.

\(^76\) Id.

\(^77\) Longrigg, supra note 24, at 79. For a discussion of the origins of the Thoroughbred breed and the European roots of horse racing, see id. at 75.
with the smaller and sturdier horses raised by the indigenous populations, including the Cherokees, Seminoles, and Creeks. 78 Although primitive tracks laid out in rural pastures and clearings were initially the most common venues for racing events, by the late 1640s “spontaneous competitions became a frequent occurrence on the major thoroughfares of several colonial cities.” 79 Sassafras Street in the center of Philadelphia became so popular for such matches that the wide boulevard was eventually renamed “Race Street.” 80 Another fashionable race course in the City of Brotherly Love was Centre Square, which was also the preferred spot for public hangings. 81 On occasions when these two spectator sports were scheduled simultaneously, “horses raced around the gallows which stood in the infield.” 82

As the clatter of hooves and cheers of bystanders became increasingly disruptive to the normal course of urban business, many communities passed ordinances relegating racing to venues on the outskirts of town. The residents of Plymouth passed a decree in 1674 that stated, “whatsoever [person] shall Run a Race with any horse kind in any street or Comon Road shall [forfeit] five shillings in [money] forthwith to be levied by the Constable or sit in the stockes one houre if it be not payed.” 83 In 1665, New York governor Richard Nicholls, looking for an alternative to the streets of New York City where the citizens were becoming increasingly irritated with the noise and crowds generated by these competitions, established America’s first full-sized race track on Long Island. 84 Within a decade several other colonies, including Maryland and Virginia, followed suit by providing public funding for similar courses.

The acceptance of racing as a sport and pleasant diversion from the hardships of daily life was not universal. In 1677, the City Council of Boston, a bastion of colonial conservatism, issued an order designed to impede wagering on racing. The order stated:

The Council being informed, that among other Evils that are prevailing among us, in this day of our Calamity, there is practiced by some that vanity of Horse racing, for [money], or [moneys] worth,

78. HOWLAND & HANNON, supra note 14, at 1.
79. Id.
81. Id. at 24.
82. Id.
83. Records of the Colony of New Plymouth in England, Laws 1623-1682, at 236 (William White, 1861) (1674); see also ROBERTSON, supra note 80, at 8.
84. LONGRIGG, supra note 24, at 106.
thereby occasioning much mispence of precious time, and the drawing
of many persons from the duty of their particular callings, with the
hazard of their Limbs and lives. It is hereby ordered that henceforth it
shall be [unlawful] for any person to do or practice in that kind, within
four miles of any town, or in any Highway or Common Rode, on
penalty of forfeiting twenty shillings a piece, nor shall any Game or
run in that kind for any [money] or [moneys] worth upon penalty of
forfeiting Treble the value thereof, one half to the party's forming, and
the other half to the treasury, nor shall any accompany or [abet] any in
that practice on the like penalty.85

The practices and culture surrounding colonial horse racing were
reflections on the social stratification and non-egalitarian atmosphere of pre-
Revolutionary America. A statute passed in Virginia in 1670 decreed that
horse racing was a sport reserved for gentlemen and that laborers were to be
excluded from participation.86 The 1674 Court Records of York County refer
to this statute in a case that reports:

James Bullocke, a Taylor, having made a race for his mare to run with
a horse belonging to Mr. Matthew Slader for two thousand pounds of
tobacco and caske, it being contrary to Law for a labourer to make a
race, being a sport for gentlemen, is fined for the same one hundred
pounds of tobacco and caske.87

The plot of this minor melodrama thickens in a related case, which reports
that:

Whereas Mr. Matthew Slader and James Bullocke, by condition under
the hand and seal of the said Slader, that his horse should run out of
the way that Bullocke's mare might win, which is an apparent cheat, is
ordered to be put in the stocks and there sit the space of one hour.88

Despite disapproval from conservative religious factions and the legal
fiction that horse racing was an entertainment reserved for the social elite,
horse racing exploded throughout the colonies. Although the horses
themselves were almost exclusively owned by wealthy breeders and ridden by
either the owner himself or one of his servants, all strata of society participated
as observers and gamblers on the outcome. As the number of tracks and

85. The Colonial Laws of Massachusetts, 1672-1686, at 347, April 9, 1677 (1890).
86. York County, Virginia Records, 1672-1676, at 90 (abstracted and compiled by Benjamin D.
Weisiger, III (1989)).
87. LONGRIGG, supra note 24, at 110; ROBERTSON, supra note 80, at 8.
88. Id. at 8-9. This is one of the first record examples of a rigged match in American racing
history.
events proliferated, racing enthusiasts began advocating for standard rules to
govern the length of courses, behavior during the races, and the quality of
horses permitted to participate. Desiring to avoid oversight by the Crown,
horsemen took matters into their own hands. In 1735, a jockey club was
organized in Charleston, South Carolina to bring together gentlemen interested
in breeding and racing horses. Although primarily a social organization, the
club also operated a race course and certified, in a blatantly arbitrary manner,
those who would be allowed to participate in events. A competing club was
founded in Charleston in 1758 by Edward Fenwick, a scion of a wealthy
colonial family which had been involved in breeding and racing horses since
the 1630s. This second jockey club was the first American entity to require
owners to provide proof of bloodlines when entering horses in racing events.
As a reflection of the entrepreneurial nature of this association, when the
weather proved inclement, the club sponsored cockfighting events as an
alternative to horse racing.

With the growing popularity of horse racing, breeders became increasingly
interested in finding stock to produce stronger and faster mounts. Cognizant
of the reputation of the superiority of the horses being bred in England,
colonial enthusiasts began angling to infuse their horses with Thoroughbred
blood. The first identifiable Thoroughbred to be imported to the Colonies
arrived in 1730. Carrying the moniker Bully Rock, this superb mount was
sired by the Darly Arabian out of a mare by the Byerly Turk. The racing
stock of the colonies was further strengthened in the 1740s with the
importation from England of Bonny Lass, a mare out of a daughter sired by
the Darly Arabian.

Governor Samuel Ogle of Maryland is generally acknowledged as the
individual responsible for first promoting Thoroughbred racing in the
colonies. In the 1750s, Governor Ogle championed organized horse racing
at Annapolis “between pedigreed horses, in the English style.” Perhaps
more importantly, he imported the prolific stallion Spark and the filly Queen

89. Id.; LONGRIGG, supra note 24, at 110.
90. ROBERTSON, supra note 80, at 22.
91. LONGRIGG, supra note 24, at 110.
92. Id.
93. 13 ENCYCLOPEDIA BRITANNICA, supra note 22, at 734.
94. Id.
95. Id.
96. THE JOCKEY CLUB, 1996 FACT BOOK: A GUIDE TO THE THOROUGHBRED INDUSTRY IN
NORTH AMERICA 6 (1996).
97. Id.
Mab, who were the progenitors of generations of the country's finest Thoroughbreds.  

Along with Virginia and South Carolina, Maryland emerged as a leading venue for racing in the Colonies. The state's race tracks became important sporting and social centers. The course at Annapolis gained particular prominence, attracting such important figures as Maryland Royal Governor Sir Robert Eden and wealthy plantation owners from neighboring Virginia including George and Martha Washington. Obviously more than just an observer, George Washington notes in his diary in 1772 that he had lost one pound, six shillings as a result of wagers placed at Annapolis.

Political conditions of the late 1760s and early 1770s, which eventually culminated with the colonial rebellion in 1776, significantly affected both the contemporary and future development of horse racing in America. In retaliation against the oppressive Stamp Act and other Intolerable Acts, the disgruntled Colonies passed the Non-Importation Acts. With the passage of this legislation, the Colonies pledged themselves to surviving without both luxuries and necessities from England. "As regards turf stock [this legislation] was observed with remarkable strictness." The importation of new blood lines came to a virtual standstill. As the tension between the Colonies and the Crown heightened and the attention of the wealthy and commercial classes increasingly focused on political and financial matters, interest in both racing and breeding declined abruptly. By 1774, almost all race courses in the Colonies had ceased hosting events.

With the onset of the Revolutionary War, the importance of horses, even Thoroughbreds, shifted dramatically. Along with powder, shot, food rations, and blind courage, horse flesh became a critical commodity to both patriots and loyalists. In referencing the colonists' willingness to sacrifice their horses for independence from British rule, racing historian John Hervey states,
“the patriots sacrificed their best and costliest animals with the most wholehearted devotion. The only ones they endeavored to conserve and keep out of harm’s way were the aged stallions and mares unfit for service - everything else was offered up to the alter of freedom.” A perusal of the stud books, which survived the vicissitudes of war, unearths the “pathetically monotonous entry, ‘last record,’” undoubtedly indicating death of a superbly bred horse on the battlefield.

Perhaps the only place and time in which horse racing flourished during the Revolutionary War was in New York throughout the British Occupation (1776-1783). Despite other pressing concerns, the British officers organized regular horse racing events. “Adding insult to injury, the British, besides requiring that ‘God Save the King’ be played every hour, took over the Flatland Plains race course-in Brooklyn, of all places-and renamed it Ascot Heath.”

B. Post-Revolutionary War Racing

With the conclusion of the conflict with England in 1783, horse racing was resurrected in the new nation with great enthusiasm. Once again, not all Americans viewed horse racing as a benign pastime. As in the days prior to the Revolution, the breeding and racing of Thoroughbreds was an activity almost exclusively of wealthy landowners who were the only individuals with the resources needed to pursue a costly and purely recreational activity. With a sense of equality, at times bordering on fanaticism, many Americans labeled any activity suspect that appeared to be reserved only for the patrician class. This attitude was especially prevalent in the Northeastern states where an emerging religious conservatism was replacing the tolerance of the Church of England. In some Northern states, racing trotters or quarter horses was permitted but racing Thoroughbreds was not allowed for “some obscure theological reason.” To quote one source:

At an early age the inherent love of [the] Englishmen for horse-racing showed itself in America. . . . Unfortunately, however, racing [fell] into bad repute, from the number of mauvais sujets it attracted, and although the Southern gentlemen did their utmost to cleanse away the stain, the fanatical puritanical spirit of many Northern States tabooed

109. Id.
110. ROBERTSON, supra note 80, at 28.
111. Id.
112. LONGRIGG, supra note 24, at 106.
113. Id. at 213.
the institution for years.\footnote{114. PARKER GILLMORE, GUN, ROD, AND SADDLE 106-107 (1869).}

On March 19, 1802, the New York Assembly enacted a statute specifically intended to "prevent Horse-Racing."\footnote{115. An Act to Prevent Horse-Racing, and for Other Purposes Therein Mentioned, ch.44, 1802 N.Y. Laws 52-53.} Similar legislation was passed in Pennsylvania and New Jersey.\footnote{116. An Act Against Horse Racing, ch.244, 1820 Pa. Laws 282-83; An Act Concerning Horse-Racing, 1797 N.J. Laws 193-94.} Even legislatures of the more southern states, traditionally the bastions of the greatest racing events, succumbed to the new mood of conservatism and egalitarianism. In 1790, North Carolina passed a statute designed to end horse racing throughout the state.\footnote{117. The State Records of North Carolina, vol. XXI, 1788-90, at 762 (Nash Brothers, 1903) (Nov. 11, 1790).} In 1792, Virginia enacted legislation that prohibited all wagering of bets of more than $7.00 on any horse race, cock fight, or any other sport or pastime.\footnote{118. An Act reducing into one, the several Acts to prevent unlawful Gaming, ch.46, 1792 Va. Laws 183.} South Carolina was one of the few states to duck the wave of conservatism. Racing resumed as early as 1783 in Charleston, even though the city "lay in almost complete ruin"\footnote{119. HERVEY, supra note 99, at 131.} from the devastation of the Revolutionary War.

Although some conservative religious leaders continued to rail against the evils of horse racing, the sport was generally accepted and flourished during the first sixty years of the nineteenth century. Despite being labeled as a "horse-racer, gambler, and brawler,"\footnote{120. BOWEN, supra note 70, at 23.} Andrew Jackson was a popular and respected candidate for the Republican Party during the 1824 presidential election. Although he was defeated, this loss was more likely due to Henry Clay's support of John Quincey Adams than to Jackson's love of the turf. Jackson made little effort to change his behavior, remained a colorful figure on the Tennessee racing scene, and was duly elected to the presidency in 1828. Even while residing in the White House, Jackson maintained a racing stable and personally oversaw his horses' training. However, to deflect further criticism, when Jackson entered his own horses in races, he listed his personal secretary, Major A. J. Donelson, as the mounts' owner.\footnote{121. ROBERTSON, supra note 80, at 42.}

The tension between moral conservatives who disapproved of racing, especially wagering on such events, and the attitudes of the general populace often were reflected in the court decisions of the time. In 1838, a case arose in
Tennessee, State v. Posey,\textsuperscript{122} regarding a state statute that exempted turf-racing from the laws against gaming.\textsuperscript{123} Although betting on sporting events was generally illegal in Tennessee, the defendant Posey had been found innocent at the trial level of wagering two dollars on a horse race that was held on a dirt path not normally used for racing.\textsuperscript{124} The trial court acquitted Posey on the reasoning that the venue used for the race was not a public road and that because the horse race was held on a dirt road the contest fell within the exemption for turf racing.\textsuperscript{125} On appeal, the Supreme Court reversed, stipulating that the applicable statute only exempted races run "upon a track or path made or kept for the purpose of horse-racing . . ."\textsuperscript{126} The Court further admonished not just the defendant but the racing community in general by stating:

The legislature never intended to tolerate horse-races gotten up and run at distilleries, grog shops and musters, where the crowds of exited intoxicated persons would render it alike dangerous and demoralizing. Indeed the policy of the exemption of horse-racing from the penalties of the statutes against gaming may in all cases be regarded as questionable; and it is the duty of the courts to construe these statutes so as to suppress the mischief of gaming, and consequently to exempt such only as fall within the express provisions of the law.\textsuperscript{127}

An expanding racing circuit in the early nineteenth century traversed not only the eastern seaboard, but also the middle portion of the country. Illinois, Indiana, Iowa, Ohio, Wisconsin, Michigan, and Missouri all boasted race tracks within a few years of statehood. Long before joining the Union, the citizens of California, a decidedly non-puritanical lot, enthusiastically embraced horse racing as a favorite pastime. The California Gold Rush of 1848 brought population, money, and Thoroughbreds to the West Coast.\textsuperscript{128} By 1860, California had a string of race courses stretching from Los Angeles to the new capitol at Sacramento. Some racing historians contend that "no less than eight racecourses are . . . buried under modern San Francisco."\textsuperscript{129} In 1854, the legendary mount Belmont was brought to California by the sons of

\textsuperscript{122} 20 Tenn. 384 (1839).
\textsuperscript{123} Act of 1820, ch.5, \textit{explained by} Act of 1833, ch. 5 (Comp. Stat. 360).
\textsuperscript{124} Posey, 20 Tenn. at 385.
\textsuperscript{125} \textit{Id.}
\textsuperscript{126} \textit{Id.} at 386.
\textsuperscript{127} \textit{Id.}
\textsuperscript{128} LONGRIGG, \textit{supra} note 24, at 214.
\textsuperscript{129} \textit{Id.}
Ohio breeder Garrett Williamson. The blood of this prolific stallion helped to make many of the Pacific coast racing stables equal to their counterparts in the East.

California was unique among racing venues in exploring the possibilities of generating state revenue thorough the taxation of winnings from racing. Prior to statehood in 1841, a new law prescribed that the winner of each race be taxed $2 for every $25 wager, $5 for every $50 bet, and 6% of all sums wagered over $100. An idea ahead of its time, this statute was repealed in 1846.

California historian Hubert Howe Bancroft reports litigation arising from a race in 1839, which featured a purse of "a barrel of brandy, two broken horses and five dollars." At the conclusion of event, the loser complained that his horse had been struck in the head by his opponent during the race. The judge fined both participants $10 and ordered that the race be run again twenty days later.

C. Emergence of the American Thoroughbred

The decade prior to the outbreak of the Civil War witnessed the emergence of a distinctively American breed of Thoroughbred. No longer did breeders and trainers need to travel to Ireland, England, and France to find new stock to improve their stables. Although exceptional horses were being bred in the Northeast and along the southern Atlantic seaboard, Kentucky became the nation’s foremost breeding center. Kentucky, with its rich limestone soil, similar to that found in southern Ireland, produced the bluegrass that was "the best natural grazing in the world for horses." Any residual doubts about the preeminence of Kentucky’s breeding stables were put to rest by the birth in 1850 of Lexington, "perhaps the greatest competitor and undoubtedly the greatest sire of the century."

The American racing scene of the 1850s was also characterized by a growing interest in the formation of a national governing board to regulate racing. Although state laws governed wagering, the rules of the racing

130. ROBERTSON, supra note 80, at 83.
131. Id. at 82.
132. Id.
133. Id.
134. Id.
135. HOWLAND & HANNON, supra note 14, at 4; LONGRIGG, supra note 24, at 209.
136. Id. For a discussion of Lexington and his progeny, see HERVEY, supra note 99, at 273-317.
137. HERVEY, supra note 99, at 227.
events were generally vague and defined by local communities. As owners began transporting their horses across county and state lines to compete, the need for standardized racing policies and procedures became an issue of increasing concern. In addition, there were energetic, but ultimately futile, efforts to establish a national racing track that "would serve as the focal point of American racing. . . ."138 The brewing tensions between the North and the South over states' rights and slavery, however, made the 1850s an inopportune time for the formation of a national regulatory body or one premier racing venue.139

D. Darkest Days of American Racing: 1861-1865

Just as the Civil War is a key element of almost every aspect of American political, economic, and social history, the conflict also redefined American Thoroughbred racing. After four years of warfare, horse racing in the eleven Confederate states was decimated. The majority of Southern horse breeders lost their fortunes, and many their lives, during the hostilities. The great Southern race courses and breeding farms vanished. With few exceptions, all the Thoroughbred stock in the South was commandeered for the Confederate forces. As racing historian John Hervey observed,

A study of the Stud Book for the period of and immediately following the [Civil] War will reveal the havoc that those four years of fie and sword, ravage and destruction, had wrought in the breeding industry of the Blue Grass. Host of mares that should have been producing high-class performers are either gone entirely from sight or their produce, if listed, might well have been left blank . . . the same story over again, as that of the losses suffered during the Revolution, except that now, instead of being confined to a comparatively restricted area, the whole South was despoiled.140

Although Kentucky was technically neutral, many of the state's most ardent horsemen chose to support the Confederate cause. As they left for battle, they took their horses with them. Wealthy Kentucky landowner Keene Richards generously equipped his entire calvary company with Thoroughbreds when he received a commission in the Confederate army.141 By 1865, the majority of Kentucky's Thoroughbreds, the finest breeding stock in the country, lay dead on the battlefields of Vicksburg, Chattanooga,

138. ROBERTSON, supra note 80, at 79.
139. HERVEY, supra note 99, at 229.
140. Id. at 346.
141. Id. at 343.
Chancellorsville, and Fredericksburg.

John Hervey makes the astute observation,

the victory of the North was long delayed by the superiority of the Southern cavalry; this including (1) the much higher class of horses and (2) the much better horsemanship of their riders. The North, whose progress had been along industrial lines, had for years neglected production of high types of riding horses to concentrate upon heavier and slower ones. The South, remaining predominantly agricultural, had continued along its time-honored lines. It had tremendous advantage, when war came, of hosts of thoroughbred, part-bred and saddle-bred animals whose adaptability for cavalry was unequaled. Its citizens, man for man, had been as a rule set in the saddle as soon as they could walk and were finished equestrians in childhood. To this the North could oppose only horses much inferior and men just as inferior in their handling. The result was a strong factor in the capacity of the South to withstand the greater man-power and physical resources which the North possessed. But as the years passed this could not be maintained. After 1863, calvary replacement became one of the most pressing needs of the Confederacy, and its equine resources became exhausted as did its fighting strength.142

However, it would be incorrect to assume that all horse racing or litigation associated with the sport, ceased during the Civil War. In December of 1861, the Supreme Court of Arkansas heard a case involving "Rorie and others [who] were indicted, in the Conway Circuit Court, for betting at a 'certain game of hazard, commonly called a horse race.'"143 The Supreme Court found that betting upon a horse race was not illegal under the state statute prohibiting betting of money at "any game of hazard or skill."144 In affirming the circuit court decision, the Supreme Court stated,

The object of this act was to enlarge the prohibitions of the gaming act, which punished nothing but the keeping, etc., or betting at gaming banks, tables, etc., and cards, so as not only to embrace raffling and rondo, but other gambling contrivances and devices. But we do not think that the Legislature intended to embrace horse-racing by the words "any game of hazard or skill," "played," etc., however vicious betting at such sports may be.145

142. HERVEY, supra note 99, at 359.
144. Id. at 728 (citing 9 Ann. C. 14, §§ 9, 10 Gould's Dig. at 371).
145. Id.
Court records indicate that horse racing also continued in the North, despite the fact that the sport was illegal in many of the states that remained loyal to the Union. In March 1865, a month before the Confederacy's surrender at Appomattox, the New Jersey Court of Errors and Appeals heard the case of *Sutphin v. Crozer*.\(^{146}\) The case involved an appeal by the plaintiff regarding money wagered on a horse race that never took place.\(^{147}\) The lower court had found that, although horse racing was illegal in New Jersey, Sutphin, having accepted money as a wager on a race from Crozer, was obligated to return the wager when the race failed to take place.\(^{148}\) However, the higher court reversed, holding,

> Since the [state] act of 1846... which declares that all persons concerned in a horserace, directly or indirectly, shall be guilty of a misdemeanor, and that if any person shall be a stakeholder, he shall be guilty and punishable by fine and imprisonment, and which enacts that all promises and agreements made by any person, when the whole or any part of the consideration thereof shall be for money betted on the running or trotting of any horses, shall be utterly void and of no effect, no action can be maintained by one of the guilty parties against the others to recover back money thus illegally staked, whatever disposition may be made of it by the stakeholder.\(^{149}\)

**E. Post Civil-War Thoroughbred Racing**

With the devastation of the Southern economy, landscape, and Thoroughbred stock, the Northeast emerged at the end of the Civil War as the nation's racing and breeding center.\(^{150}\) The region's bloodstock, much of it imported from Kentucky prior to the war, had been preserved and had multiplied. In addition, the war had created or augmented the fortunes of many Northern "new money" industrialists who had been assigned lucrative government contracts for guns, ammunition, and other goods essential to supporting the Union troops.\(^{151}\) With substantial fortunes but little social pedigree, these millionaires viewed participating in the recreations of the more established elements of society, such as horse racing, as a way to achieve respectability. The number of breeding stables and racing venues exploded

\(^{147}\) Id.
\(^{148}\) Id.
\(^{149}\) Id. at 463.
\(^{150}\) HOWLAND & HANNON, supra note 14, at 5.
\(^{151}\) Id. at 5-6.
during the decade between 1865 and 1875.

Due to the growth of interest in horse racing, in 1866 wealthy racing
enthusiasts Leonard W. Jerome and August Belmont took the lead in
establishing the American Jockey Club in New York City to “promote the
improvement of horses, to elevate the public taste in sports of the turf, and to
become an authority on racing matters in the country.” One of the first acts
of this new organization was to sponsor the first Belmont Stakes in 1867. The
fledgling but powerful Club also was instrumental in orchestrating the
acceptance of the circular or mile oval track, which allowed observers to view
an entire race.

By the late 1860s, Thoroughbred racing had been resurrected in the former
Confederacy and in the border states. Maryland’s Pimilico race course opened
in 1870. The first race was won by Lexington’s progeny Preakness, whose
name was later given to the state’s most prestigious racing event. Rebuilding the breeding stock and reestablishing racing venues was a
particularly high priority of Kentucky horsemen. In 1875, Colonel
Merriwether Lewis Clark spearheaded the establishment of the Kentucky
Jockey Club in Louisville at the course which was to become known as
Churchill Downs. Aristides, a descendent of Lexington, won the inaugural
race, the first Kentucky Derby, on May 17, 1875.

California, only marginally affected by the Civil War and blessed by a
moderate climate, vast lands suitable for pasturing, and numerous established
breeding enterprises, became a Mecca for Thoroughbred racing. By the early
1890s, the state boasted forty race tracks between San Diego in the south to
Arcata in the north. Senator Leland Stanford assembled the state’s premier
breeding stable at his farm in Palo Alto, which for a time was the largest stud
facility in the world. The Senator also was the driving force behind the
creation of the Pacific Coast Blood Horse Association, organized as a board of
control for racing throughout the state.

F. Racing From the Gilded Age Through the Great Depression

The decades between 1890 and 1930 were characterized by both turmoil
and progress for the American racing scene. By the late 1890s, race tracks

152. ANITA LESLIE, THE FABULOUS LEONARD JEROME 88 (1954) (quoted in LONGRIGG, supra
note 24, at 223).
153. BOWEN, supra note 70, at 48.
154. Id.
155. ROBERTSON, supra note 80, at 123.
156. HERVEY, supra note 99, at 234.
157. HOWLAND & HANNON, supra note 14, at 7.
were hotbeds of rumors about illegal wagering, doping, and fraudulent races. Many tracks were burdened by poor management, as well as dishonest trainers and jockeys. The growing distrust of the racing industry, coupled with a resurgence of conservative religious values, led to the banning of horse racing in many parts of the country, including Wisconsin and Michigan between 1880 and 1915. Despite the considerable state tax revenue generated by the racing industry, New York passed legislation in 1895 that outlawed wagering on horse racing of any type. “Between 1897 and 1908, the number of race tracks in the United States decreased from 314 to 25.” Although the remaining tracks, such as those in Kentucky and Maryland, “prospered due to a lack of competing venues, the breeding farms in these states suffered from a dearth of out of state buyers.”

The introduction of pari-mutuel betting, initially in Kentucky and eventually in other states, helped to restore confidence in the integrity of the horse racing, and thereby its viability. The pari-mutuel system was developed in the 1870s by French perfumer, Pierre Oller, who augmented his modest income and supported his gambling habit by dealing in lotteries and running a bookmaking operation. “Loosely translated, the term pari-mutuel means ‘to wager between ourselves.’” Within the system, participants bet among themselves, and the winners divide the money wagered in proportion to their individual bets.

In pari-mutuel wagering, the players place their bets on selected horses, then all bets are pooled, and the winners are determined by the amount of money and total number of bets placed on an individual horse. The more money wagered on an individual horse, the lower the odds on the horse and the lower the payout should the mount win. Conversely, less money may be bet on a horse not favored to win, resulting in higher odds. However, if the horse does win, the payout is greater.

158. 1891 Wis. Laws, vol. 1, ch. 279, at 352.
161. LONGRIGG, supra note 24, at 230; HOWLAND & HANNON, supra note 14, at 7.
162. HOWLAND & HANNON, supra note 14, at 7-8.
163. For a historical analysis of pari-mutuel betting, see FRED S. BUCK, HORSE RACE BETTING: A COMPREHENSIVE ACCOUNT OF PARI-MUTUEL AND BOOKMAKING OPERATIONS 3 (1971).
164. HOWLAND & HANNON, supra note 14, at 8.
165. BUCK supra note 16336, at 3. See also Id.
The advantage of the pari-mutuel system is that it has a "certain degree of fairness built into it, an attribute that might make pari-mutuel wagering less offensive to a legislature or court sitting in judgment." In the 1880s and 1890s, a few tracks experimented with this new wagering system. These experiments, however, were met with limited enthusiasm, especially by established bookmakers, and during the nineteenth century the pari-mutuel system never received widespread acceptance.

Colonel Matt J. Winn, who became manager and part-owner of Churchill Downs in Louisville, Kentucky in 1902, is responsible for proving to the American horse racing industry, to the public, and to lawmakers, the benefits and prudence of the pari-mutuel system. In 1908, shortly before the running of the Kentucky Derby at Churchill Downs, the conservative and irascible mayor of Louisville, James Grinstead, moved to enforce Section 1961 of the Kentucky Statutes which made bookmaking illegal. Afraid that this would prohibit all wagering on the Derby and ultimately result in a significant financial loss for Churchill Downs, Colonel Winn moved for a restraining order. In the subsequent litigation, the Kentucky Court of Appeals held that, under the statute, although bookmaking was illegal, pool selling was permissible. Fortuitously, the Colonel remembered several pari-mutuel machines that had been briefly used at the track during the 1880s and that had long been hidden under a blanket of dust in the race course's basement. He quickly retrofitted them and the machines were utilized with great success at the 1908 Derby. Within a few years, pari-mutuel betting became the preferred method of wagering at tracks throughout the nation and greatly restored the wagering public's and lawmakers' confidence in the ethics of the racing business.

The 1920s, marked by a perception of prosperity, a relaxation of social mores, and a national sense of confidence following the Allied victory in World War I, were an ideal time for the sophisticated but high risk sport of horse racing. Thoroughbred racing received a tremendous boost with the emergence of Man O' War, who won twenty of his first twenty-one races in
1919 and 1920. This giant of the turf captured the hearts and imagination of racing enthusiasts and the general public alike. Man O’ War had equal billing with movie star Charlie Chaplin and baseball legend Babe Ruth as these three media heroes became worshiped as the decade’s “Holy Trinity.”

Although the economy, along with the stock market, fell in October of 1929, horse racing, a potentially lucrative activity for the prudent participant, continued to prosper. The health of the horse racing industry during the Depression was reflected by the opening of several new race tracks, including California’s Bay Meadows in 1932 and Kentucky’s Keeneland in 1936.

The 1930s also witnessed the legalization of pari-mutuel wagering in almost all states, except a few in the Bible Belt such as Oklahoma. According to racing historian Roger Longrigg, “The Great Depression lowered purses and yearling prices; it was nevertheless good for racing because impoverished state budgets needed the revenue from the pari-mutuel.” In 1933, ten states overcame their previous scruples against the perceived evils of wagering at racing events by legalizing the pari-mutuel system: California, Michigan, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, Texas (momentarily), Washington, and West Virginia. As the role of government as a regulator expanded under the presidency of Franklin D. Roosevelt, the creation of state racing commissions eliminated the role of the Jockey Club as the national governing body. However, the Jockey Club

175. See Betting or Letting Premises for Betting on Races; ch.15, art.52, 1931 Okla. Laws § 2187.
176. LONGRIGG, supra note 24, at 282.
177. See An act to provide for the regulation and licensing of horse racing, ch.769, 1933 Cal. Laws 2046-54; An act to provide, regulate and license the conducting of racing meets in the state of Michigan, ch.199, 1933 Mich. Pub. Acts 295-302; An Act Relating to Horse Racing and Creating a State Racing Commission, ch.62, 1933 N.H. Laws 68-73; An Act Relating to and Prohibiting Horse Racing Except Where a License Therefore Has Been First Obtained, ch.55, 1933 N.M. Laws 72-76; An Act Creating an Agricultural and Breeders’ Association for the County of McDowell on Approval by the Voters of Said County, ch.373, 1933 N.C. Laws 525-29; An Act Creating an Agricultural and Breeders’ Association for the County of Pasquotank on Approval by the Voters of Said County, ch.511, 1933 N.C. Laws 865-69; An Act Creating an Agricultural and Breeders’ Association for the County of Rowan on Approval by the Voters of Said County, ch.545, 1933 N.C. Laws 896-99; An Act Creating an Agricultural and Breeders’ Association for the Counties of New Hanover and Haywood on the Approval by the Voters of Said Counties and to Permit Horse Racing Therein, ch.563, 1933 N.C. Laws 952-35; An Act to provide for, regulate and license horse racing in the state of Ohio, § 1079, 1933 Ohio Laws 367-75; An Act Relating to, providing for, and authorizing and regulating thoroughbred horse and animal racing, ch.397, 1933 Or. Laws 672-78; An Act Amending and reenacting, ch.10, 1933 Tex. Laws 433-35; An Act relating to, providing for, and authorizing and regulating thoroughbred and/or standard bred horse racing, ch.55, 1933 Wash. Laws 290-96; An Act to provide revenue for the general school fund by the regulation, control and licensing of horse racing within the state of West Virginia, ch.47, 1933 W. Va. Acts 341-46; see also LONGRIGG, supra note 24, at 282.
retained substantial regulatory power and influence at the state level. In addition, the racing industry continued to regard the Jockey Club’s breeding registry as “the official means of qualifying horses to race.” Other regulatory reforms of the 1930s included the introduction of saliva testing to determine the presence of illegal drugs in a horse’s system and the requirement of tattooing of horses’ lips to facilitate identification.

In an effort to escape the vicissitudes and uncertainty of the Great Depression, Americans found distraction in the glamour and excitement of the racing track, much as they lost themselves in the fantasy world of the cinema. The public followed the careers of mesmerizing Thoroughbreds such as Stagehand, Kayak II, Whirlaway, Granville, and Omaha just as avidly as they did those of Shirley Temple, Jackie Coogan, Clark Gable, and Greta Garbo.

The two greatest stars of the turf in the 1930s were Seabiscuit, an unlikely sway-backed mount who became the era’s leading money winner, and the 1937 Triple Crown Winner, War Admiral, who “habitually shot straight into the lead” at the start of any race and held the spot until he crossed the finish line. As one scholar notes, “The anticipation of a battle between Seabiscuit and War Admiral was a fever that permeated the country....” In 1938, the long awaited match between these two horses took place at the Pimilico Race Course in Maryland. In addition to the 40,000 spectators—the largest attendance in Pimilico’s history—who crammed into the stands and the infield, racing enthusiasts worldwide hovered around their radios to hear the race called. Even President Franklin D. Roosevelt delayed a press conference so that he could follow the race from start to finish. War Admiral was the favorite at one to four, while Seabiscuit’s odds were eleven to five. In providing a eyewitness account of the race, historian John Hervey wrote,

[Seabiscuit and War Admiral] ran locked in combat amid excitement that was indescribable... [s]o they struggled, matching stride for stride, to the top of stretch. With the advantage of the rail, Seabiscuit began to assume the offensive... When they were at the last furlong pole, it was evident that the race was over. Both jockeys put up their

178. Bowen, supra note 70, at 112.
179. Id.
180. For a comprehensive study of this legendary Thoroughbred, see Laura Hillenbrand, Seabiscuit (2001).
181. Robertson, supra note 80, at 326.
182. Id. at 322.
184. Robertson, supra note 80, at 326.
whips and Seabiscuit, going strongly, the Admiral a very tired colt, the bay [Seabiscuit] won by three open lengths. 185

With this win, Seabiscuit secured his reputation as the most renowned Thoroughbred in American racing history.

**G. Thoroughbred Racing During World War II**

Despite obvious disruptions in almost all aspects of American life, World War II did not have a discernable negative impact on the horse racing industry. “Contrary to what might have been expected, the effect of World War II on racing was to increase [racing’s] prosperity.” 186 Racing historian Robert Kelley observed, “[World War II] brought changes in some respects, unevenness in others, but in spite of this tragic background, Thoroughbred racing grew and thrived.” 187 The total amount of purse money distributed reached a record of nearly $18 million in 1941, 188 a figure that was surpassed each subsequent year through 1945 when the total mutuel handle was $1.4 billion. 189 With many other professional sporting events canceled during the war years, Thoroughbred racing attracted a new and enthusiastic fan base. The excitement surrounding Count Fleet’s ultimately successful bid for the Triple Crown in 1943 was a particularly welcome distraction from the news about the heavy fighting that spring and summer in Italy, North Africa, and the Solomon Islands.

Although Thoroughbred racing continued after the entry of the United States into the war in December of 1941, “[r]ace meetings were subject to approval by local War Manpower Commissions, which established ceilings on the number of personnel that could be employed and investigated to insure that none of them were vital to the war effort in other jobs.” 190 In an effort to guarantee both government and public support for the continuation of racing during the war, the management of several race courses transformed the track infields into vegetable plots, better known as “victory gardens.” Most race courses also sponsored war bond sales and other fund raising activities on racing days. By 1944, contributions to the war effort by the racing industry had surpassed $16.5 million. 191

---

186. Robertson, *supra* note 80, at 339.
188. Robertson, *supra* note 80, at 339.
189. Id. at 365.
190. Id. at 356.
California, considered particularly vulnerable to enemy attack because of its location on the Pacific Coast, was the only state in which horse racing was significantly affected by the global hostilities. In January of 1942, California Governor Culbert L. Olson suspended many recreational events including horse racing. Bay Meadows in San Mateo obtained an exception to this mandate by pledging 92% of the track’s profits to the war effort.

A darker side of California’s racing history during World War II is reflected in the use of the closed Santa Anita and Tanforan race tracks as Japanese Assembly Centers. In response to national security concerns, Executive Order 9066, was issued on February 19, 1942. This presidential decree mandated the relocation of all persons of Japanese ancestry from the West Coast. Along with thirteen other assembly centers in California, Oregon, Washington, and Arizona, the Santa Anita race track in San Diego County and the Tanforan race track twelve miles south of San Francisco were designated as sites where evacuees would be detained until moved to more permanent Relocation Centers. Under the supervision of the Wartime Civilian Control Agency, 7816 Japanese were detained at Tanforan between April 28 and October 13, 1942. Santa Anita became the nation’s largest assembly center, quartering a total of 18,719 detainees prior to their transfer to permanent facilities for the remainder of the war. At both locations, internees were housed in the facilities that had previously been used as horse stalls and tack rooms. A newspaper published by the Santa Anita evacuees was euphemistically titled the Santa Anita Pacemaker. Editor Ed Shimano, explaining the selection of the newspaper’s title in the first issue, wrote “this newspaper is supposed to set the pace for the Japanese in the center.... A pacemaker in a horse race is the horse that leads the way for the others to a certain point, that’s what we are going to do.”

On a more positive note, The Thoroughbred Racing Association (TRA), a “war baby” that became a permanent player in the American racing scene, was

192. Racing also was canceled briefly in Florida during the winter season in 1943.
194. HERB PHIPPS, BILL KYNE OF BAY MEADOWS 82 (1978).
197. Id.
198. Ed Shimano, SANTA ANITA PACEMAKER, May 15, 1942, at 1 (vol. 1). An interesting aside is that the Pledge of Allegiance was prominently displayed on the front page of each issue of the newspaper. See Donald H. Estes and Matthew T. Estes, Further and Further Away: The Relocation of San Diego’s Nikkei Community-1942, 39 J. SAN DIEGO HISTORY 1 (1993).
formed in 1942. In 1946, the Thoroughbred Racing Protective Bureau, an offshoot of the TRA, was created to provide services to racing "analogous to that performed for the federal government by the [Federal Bureau of Investigation]." The first head of this new organization was Spencer Drayton, a former F.B.I. agent recommended by J. Edgar Hoover. During the years immediately following World War II, the Horsemen’s Benevolent and Protective Association, founded in 1940, also assumed a new role. Originally established to provide financial assistance to destitute horsemen and to protect horses from abusive practices, the Association and its state divisions evolved into the agent for "owners in negotiations with racetracks over the percentages of the betting handle earmarked for purses." The formation of these various regulatory bodies was part of a calculated industry-driven effort to retain as much control of horse racing as possible in the hands of breeders and owners, rather than in state or federal entities.

When the war continued longer than anticipated, James F. Byrnes, Director of War Mobilization and Reconversion, issued an order on December 23, 1944 mandating that, due to the shortage of manpower and other resources caused by the conflict, horse racing was to be suspended throughout the nation. According to the directive:

The operation of race tracks not only requires the employment of manpower needed for more essential operations, but also manpower, railroad transportation, as well as tires and gasoline in the movement of patrons to and from the track, and in the movement of horses. . . . The existing war situation demands the utmost effort that the people of the United States can give. . . . The operation of race tracks is not conducive to this all-out effort. Therefore, with the approval of the President, I urge that the management of these tracks take immediate measures to bring the present race meetings to a close by January 3, 1945. . . . I am confident that the management . . . can be depended upon to take action without the necessity of recourse to other measures.

Subsequent to this directive, race courses throughout the United States

199. ROBERTSON, supra note 80, at 350.
200. Id.
201. Id.
202. BOWEN, supra note 70, at 125.
203. See ROBERTSON, supra note 80, at 364.
began to implement plans to cease activities as requested. By January 2, 1945, American horse racing had come to halt for the first time since the 1600s. In March of 1945, however, President Roosevelt appointed Frederick Moore Vinson, future Chief Justice of the United States Supreme Court, to replace Byrnes as Director of War Mobilization and Reconversion. Born and bred in Kentucky, racing was in Vinson’s blood and he rescinded the ban on May 9, 1945, the day after the German surrender was ratified in Berlin. The race course at Narragansett opened on May 12th and within days horses were entering the gates at tracks across the country. Although 1945 was a short season, attendance figures passed the 24,000,000 mark and the purse distribution of $32 million set a new record. 

**H. Thoroughbred Racing in the Second Half of the Twentieth Century**

The racing world of the 1950s reflected the prosperity and optimism which defined America during this decade. In 1950, the Thoroughbred industry boasted 22,000 starters, a foal crop exceeding 9000 and $50 million in purse distribution. A wealth of racing “stars” burst on the scene, including Native Dancer, Tom Fool, Nashua, Swaps, and Bold Ruler. The growing enthusiasm for racing was further spurred by the broadcasting of racing events over the new medium of television. Racing historian Edward Bowen contends that Native Dancer, unbeaten in nine races in 1952, was “racing’s first television idol, with his dramatic charges from far back.” Thousands of Americans were glued to the television on Saturday afternoons to witness the next episode in the saga of Native Dancer, the most mesmerizing Thoroughbred since Seabiscuit.

An event of major consequence to the American racing industry occurred in 1951 when the New York Court of Appeals reversed a lower court decision involving the Jockey Club. In *Fink v. Cole*, the Court struck down the statute that gave the Jockey Club broad discretion to promulgate, implement, and enforce the rules governing horse racing. The Court held that the New York Legislature’s delegation of its licensing power to the Jockey Club was

204. *Id.*
205. *Id.* at 364.
207. BOWEN, *supra* note 70, at 123.
208. *Id.* at 125-26.
"an unconstitutional relinquishment of legislative power in violation of... the Constitution of this State which provides: 'The legislative power of this State shall be vested in the Senate and Assembly.'" Subsequent to this decision, many of the responsibilities that had long fallen under the purview of the Jockey Club were transferred to state administrative agencies.

The years since 1960 have required the racing industry to adapt to an aging fan base, increasing competition from other spectator sports, technological advancements including simulcasting and Internet gaming, and erratic cycles in the bloodstock market. Drug scandals and labor disputes have tainted the public's perception of the sport. Soft economies and high inflation also have cast a dark shadow on the racing scene. Over the past twenty years, track attendance has fallen from approximately 75 million annually in the mid-eighties to 41,846,000 in 1997. Several tracks have closed temporarily or permanently. On a more positive note, with the expansion of simulcasting and off-track betting operations, the pari-mutuel turnover grew from $13.115 billion in 1988 to a record $14.550 billion in 2001. This phenomenon, combined with greater cooperation among the participants within the industry, aggressive and [astute track] management, innovative marketing, increased and diversified media exposure, and significant capital infusion have resulted in a surviving and thriving industry.

A major factor contributing to the survival of horse racing as a profitable industry has been "the dramatic growth in off-track betting, where a stunning 80% of the money gets spent." This development is the result of two factors: the increase in simulcasting and the liberalization of off-track betting legislation. Through the phenomenon of interstate simulcasting, "which exploded in the 1990s," tracks are able to contract to broadcast their races throughout the country and recoup a percentage of the monies bet on their races. Of the $3.2 billion bet on races hosted at Churchill Downs in 2000,
only about one-third was bet at the track itself. The remaining two-thirds was wagered at tracks throughout the nation, which could access Churchill Downs’s “signal” through simulcasting technologies, and at a wide range of off-track betting facilities. California, traditionally a hold out against off-track betting, legalized off-site betting and account wagering in 2001. In an effort to further attract revenue, the California legislature liberalized the laws regarding simulcasting by enacting legislation that permits wagering on simulcasted out of state and international horse races without the consent of race participants.

The federal government appears to be somewhat behind the curve in regard to what some might consider the inevitable next step for the racing industry in the Age of Technology. In June 2002, the House Judiciary Committee reported the Combating Illegal Gambling Reform and Modernization Act (H.R. 3215) out of Committee on a fifteen to twelve vote. Fortunately for the racing industry, the bill did not pass in the House. If passed, the bill would have amended the 1961 Wire Act that bans gambling over telephone wires, to include gaming over the Internet and via other technologies. The bill attempted to regulate Internet gambling sites located outside the U.S. by allowing law enforcement, with a court order, to prevent credit card companies and other entities from processing certain forms of payments to illegal Internet gambling businesses. In addition, the legislation prohibited states from legalizing various forms of Internet gambling if they could not provide credible assurances that the gaming would stay within state borders and that mechanisms had been put in place to prevent minors from participating.

During Committee deliberations all provisions that allowed states to legalize interstate pari-mutuel wagering and ensured the continuation of activities that have long been legal under the Interstate Horse Racing Act were eliminated from the drafted legislation. The deletion of these provisions was a particular blow to the racing industry, which has found account wagering one its most “fertile areas of potential growth.” Although the

---

221. CAL. BUS. & PROF. CODE § 19596.2 (2003).
224. Paul Moran, Ban of Bets on Internet Would Hurt, NEWSDAY, June 20, 2002, at A76. Account wagering provides off-site betters with the ability to establish accounts with specified
Combating Illegal Gambling Reform and Modernization Act did not pass, Congress continues to consider other bills dealing with financial transactions associated with Internet gambling.225

One bone thrown, probably inadvertently, by the federal government to the horse racing industry is hidden deep within the economic stimulus package signed by President George W. Bush on March 9, 2002.226 The Job Creation and Worker Assistance Act of 2002 (H.R. 3090) contains $38.7 billion in tax incentives over a ten year period. Among the statute’s many provisions intended to “jump start” the economy by encouraging businesses to spend money is a 30% depreciation bonus in the first year when businesses purchase assets such as computers, office equipment, and factory machinery.227 Due to the fact that agricultural assets are covered by this section, Thoroughbred owners qualify for the bonus for horses purchased after September 10, 2001 and before September 11, 2004. To qualify for the bonus, the tax payer must be able to demonstrate that the purchase of the horse was part of a business enterprise. It appears that taxpayers purchasing a horse through a syndicate agreement would qualify for the deduction.228

CONCLUSION

As Thoroughbred racing has evolved over the past four hundred years, the legal developments surrounding this complex and highly regulated sport have reflected this transformation. Long gone are the days when spontaneous matches were held on public streets, between mounts of indeterminate origins and ability. No longer is wagering limited to the owners themselves, and perhaps a few interested bystanders, with the stakes as modest as a pint of lager or a sack of new harvest apples. In the twenty-first century, Thoroughbred racing is a sophisticated, highly regulated, often lucrative, and frequently controversial sport that draws the attention of a wide range of interested parties. Along with wagering and taxation, negligence issues remain a significant concern.229 Drug testing, with related search and seizure issues, minimums. See McLean, supra note 18, at 156.

228. For a complete analysis of the legislation, see CCH Tax Briefing: Job Creation and Worker Assistance Act of 2002, Special Report, March 11, 2002.
229. Equine liability acts have been considered or passed by 44 states. See Krystyna M. Carmel, The Equine Activity Liability Acts: A Discussion of Those in Existence and Suggestions for a Model
continues to draw considerable attention.\textsuperscript{230} Licensing, syndication, and racing commission rule making authority are additional topics of much debate among participants, legislators, and the courts. However, the one constant that has remained since the sport's origins in Ancient Greece is the presence of the dazzling horses themselves that continue to capture both the imagination and hearts of even the most cynical citizens of the racing world.

How the horse dominated the mind of the early races, . . .

You were a lord if you had a horse. Far back, far back in our dark soul the horse prances. . .

The horse, the horse! The symbol of surging potency, and the power of movement, of action, in man.

\textit{-D. H. Lawrence}\textsuperscript{231}


\textsuperscript{230} See Anobile v. Pelligrino, 303 F.3d 107 (2d Cir. 2002). In this case, the United States Court of Appeals for the Second Circuit found that a 1997 search of track dormitories, aimed at investigating the doping of horses and drug use by track workers, violated the workers' rights under the Fourth Amendment. \textit{Id.} The court upheld the constitutionality of the searches of the racetrack barns and vehicles on the premises, noting that authorities had the right under state law to "enter into or upon the buildings, stables, rooms, motor vehicles, or other places within the [raceway] grounds." \textit{Id.} at 114. However, the court held that the authority to conduct searches does not constitutionally extend to dormitories, which are used solely as residences for racetrack employees, because "[p]rivacy expectations are high in homes, or even in private rooms" and a search conducted in such locations is highly intrusive. \textit{Id.} at 122.

\textsuperscript{231} D. H. LAWRENCE, APOCALYPSE (1932).