

DOWN TO THE WIRE: THE DESPERATE NEED FOR THE TEXAS RACING INDUSTRY TO CATCH UP TO OTHER STATES

Comment*

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I. AGAINST ALL ODDS

*“Sad as it will be for a large, populous state with an affinity for gambling and horses to lose its industry, only fast action is capable of saving things.”*¹

In 1983, the evolution of horse racing and its sporadic growth in Texas was characterized as “a story rich in drama, romance and humor.”² Texans from all classes would gather at the racetrack, “[s]pending long, bright afternoons watching glorious animals round the curves of a white fence and head for home [in] a fine contrast to life’s normal humdrum.”³ Texas was the land of “big spenders and horse-crazy cowboys,” and Texans proudly lived up to the label.⁴ Racetracks were packed, the breeding industry was booming, and more Texans attended horse races than any other sport.⁵

The future of Texas horse racing is a different story. The existence of what was once clearly Texas’s most popular sport is now seriously threatened in the state.⁶ Many horsemen predict that live racing in Texas will soon cease altogether without significant legislative relief.⁷ The relief has not yet come, forcing many horsemen to “vote with their feet” by moving their horses and trainers out of state in search of a more favorable racing environment.⁸ The

1. Brian Schartz, Comment to *A Texas-Sized Hole in the Betting Landscape*, PAULICK REP. (Oct. 1, 2013, 2:28 PM), <http://www.paulickreport.com/news/lay-s-paddock/a-texas-sized-hole-in-the-betting-landscape/> (emphasis added).

2. LARRY MATHIS, INTERIM S. COMM. ON HORSE RACING AND PARI-MUTUEL BETTING, 62D LEG., R.S. (1971); HORSE RACING AND THE PARI-MUTUEL: HAS TEXAS COME OF AGE? 5 (1973), www.lrl.state.tx.us/scanned/interim/62/H787.pdf.

3. Gregory Curtis, *Behind the Lines*, TEX. MONTHLY, Apr. 1983, at 6.

4. Carol Flake, *Trailing the Field*, TEX. MONTHLY (Feb. 1996), <http://www.texasmonthly.com/articles/trailing-the-field/>.

5. Curtis, *supra* note 3, at 5; Christian McPhate, *Fading Breed: Horseman Argue Gaming Tech Could Save Texas Horse Racing*, DENTON RECORD-CHRONICLE (Oct. 10, 2015, 11:27 PM), <http://www.dentonrc.com/local-news/local-news-headlines/20151010-fading-breed.ece?ssimg=2477251>.

6. Curtis, *supra* note 3, at 5.

7. Ray Paulick, *The Breeders’ Cup Forum: The Battle Cry in Texas*, PAULICK REP. (Dec. 19, 2012, 10:33 AM), <http://www.paulickreport.com/features/the-breeders-cup-forum/the-breeders-cup-forum-the-battle-cry-in-texas/>. “Horsemen” is a broad term that encompasses horse owners, caretakers, trainers, riders, breeders, veterinarians, farriers, and generally any person who identifies as such. See Kay Helzer, *We Must Save the Horse Racing Industry in Texas*, STAR-TELEGRAM (Oct. 14, 2015, 5:44 PM), <http://www.star-telegram.com/opinion/opn-columns-blogs/other-voices/article39215829.html> (stating that over half a million Texans, both men and women, identify as horsemen).

8. See McPhate, *supra* note 5; Schartz, *supra* note 1.

dedicated horsemen who have remained in Texas do not expect the industry to survive unless the legislature throws it a lifeline.⁹ As the future of the sport in Texas grows more uncertain, one thing seems clear: “Whoever is determined to be king of Texas racing may soon find themselves reigning over nothing much.”¹⁰

The downfall of horse racing “would be a tremendous loss to our great state.”¹¹ Not only is horse racing a rich piece of Texas’s heritage, it also provides a remarkable economic benefit and numerous jobs.¹² The backbone of the racing industry is more than high-profile racetracks, fast horses, and gambling; the industry is made up of thousands of Texans and their families who depend on the sport’s continued survival.¹³ Without horse racing, it is “our friends and neighbors, people in communities across Texas, who would be out of work.”¹⁴

This Comment discusses the viability of the Texas racing industry and the need for Texas to implement online pari-mutuel wagering.¹⁵ Part II explores the dynamic history of Texas horse racing and assesses the legal obstacles presently facing the sport.¹⁶ Part III delves into the economic importance of the Texas racing industry and analyzes solutions that other racing states have employed to enhance the industry in those states.¹⁷ Part IV sets forth a proposal for the future regulation of the racing industry and pari-mutuel wagering in Texas.¹⁸ Finally, Part V concludes by emphasizing the unlimited opportunities that horse racing holds for the state.¹⁹ In order to appreciate the potential peril facing the sport in Texas, it is necessary to first address the state’s history of horse racing and pari-mutuel wagering.

9. See McPhate, *supra* note 5 (reporting that Texas horsemen visited lawmakers in Austin, Texas “[j]ust to let them know we’re dying We need some kind of help”).

10. Scharz, *supra* note 1.

11. Helzer, *supra* note 7.

12. *Id.*

13. TEX. RACING COMM’N, STUDY OF THE CURRENT STATE OF HORSE AND GREYHOUND RACING IN TEXAS AND INDUSTRY RECOMMENDATIONS FOR IMPROVEMENT 13 (2011), <http://www.txrc.texas.gov/agency/news/postings/Report-Current-State-of-Texas-Racing.pdf>.

14. Helzer, *supra* note 7.

15. Although the Texas racing industry includes both horse and greyhound racing, the primary focus of this Comment is horse racing. Sadly, the last greyhound racetrack in Texas closed in 2015, “blaming competition from Louisiana casinos, rising costs and inability to get expanded gambling authorized at the track.” Associated Press, *Agreement Means Dog Racing Returns to Texas*, ABC13 EYEWITNESS NEWS (July 16, 2016), <http://abc13.com/hobbies/agreement-means-dog-racing-returns-to-texas/1429800/>. Nevertheless, greyhound owners and racetracks recently comprised a racing schedule that will allow greyhound racing to resume in the state on an annual basis from November to February. *Id.* The resolution proposed in this Comment would benefit the entire Texas racing industry, including greyhound racing. See *infra* Part IV.

16. See *infra* Part II.

17. See *infra* Part III.

18. See *infra* Part IV.

19. See *infra* Part V.

II. OFF TO THE RACES

A. *A False Start: The History of Horse Racing in Texas*

Horse racing has been an integral part of Texas culture since before the first settlers arrived.²⁰ The settlers' first horse races were likely experienced in accidental confrontations with members of the Comanche Tribe.²¹ In the late 1700s, horse racing attracted many Spanish Texans, even on religious holidays, when participation could result in twenty-five lashes.²² Stephen F. Austin brought three hundred families to Texas in 1823, and he outlawed gambling in the colony.²³ Horse racing was permitted, however, to encourage the breeding of faster and healthier horses to work on the colonists' farms.²⁴ Horse racing quickly became a favorite recreation, and crowds from within a hundred miles of the track would leave home for several days and travel by horseback to attend the races.²⁵ In the 1890s, organized horse races drew thousands of people to the Fair Park Track in Dallas, Texas to attend races and place bets with bookmakers.²⁶ Betting at the tracks was conducted on "Texas principles of honesty" until 1905, when the legislature first sanctioned gambling at racetracks.²⁷ For the first time, pari-mutuel betting on horses was legalized—only to be outlawed four short years later.²⁸

In 1933, the Texas Legislature once again approved racetrack gambling in order to ease financial strain from the Great Depression.²⁹ Within months of the passage of the racing law, four major racetracks were built, bringing

20. MATHIS, *supra* note 2, at 9.

21. *Id.*

22. RUPERT N. RICHARDSON ET AL., TEXAS: THE LONESTAR STATE 32 (10th ed. 2010).

23. JAMES L. HALEY, STEPHEN F. AUSTIN AND THE FOUNDING OF TEXAS 34 (2003).

24. *Id.* Historically, wagering on horse races did not create the same negative feelings as other forms of gaming. Nelson Rose, *Gambling and the Law: The International Law of Remote Wagering*, 40 J. MARSHALL L. REV. 1159, 1163 (2007). Horse racing was proposed to improve the breed and was thus actively encouraged across the country. *Id.*

25. WILLIAM CURRY HOLDEN, SOCIAL AND ECONOMIC MOVEMENTS OF THE TEXAS FRONTIER 1846–1900, at 163 (1930). It was not uncommon for entire towns within a forty-mile radius of the racetrack to be nearly deserted on race days. *Id.*

26. MATHIS, *supra* note 2, at 9. During the frontier days, betting was widespread and not considered morally wrong. HOLDEN, *supra* note 25, at 164. It was not until European settlers occupied the country and religion became more dominant that betting fell into dispute and was viewed by the majority as a sin. *Id.*

27. MATHIS, *supra* note 2, at 10.

28. Peter Applebome, *Texas to Vote on Legalizing Betting on Horses*, N.Y. TIMES (Nov. 2, 1987), <http://www.nytimes.com/1987/11/02/us/texas-to-vote-on-legalizing-betting-on-horses.html>. Pari-mutuel is defined as "[a] process of wagering in which the wagerers bet amongst themselves, instead of against the house." *Wagering Information*, TEX. RACING COMMISSION, <http://www.txrc.texas.gov/publications/wager.php> (last visited Sept. 27, 2017).

29. RICHARDSON ET AL., *supra* note 22, at 334; MATHIS, *supra* note 2, at 9. The Great Depression resulted in a wave of gambling across the nation. Rose, *supra* note 24. Twenty states opened racetracks in the 1930s, and Nevada re-legalized casino gambling in 1931. *Id.*

jobs and revenue to thousands of suffering Texans.³⁰ In 1937, Texas Governor Jimmy Allred called a special session to once again outlaw pari-mutuel wagering, stating that “[t]he very foundation of morality and character of our people is being undermined by . . . gambling.”³¹

B. Back in the Saddle: The Origin of the Texas Racing Act

Fifty years later, Texas had more horses than any other state, yet it was one of only ten states that prohibited wagering at racetracks.³² Texas was the fourth highest producer of Thoroughbred foals in the nation at the time, and surveys revealed that many Texans wagered at racetracks in neighboring states.³³ Racing enthusiasts from all over the country spoke longingly of Texas as “the sport’s ultimate frontier—even its salvation.”³⁴ It was predicted that the legalization of pari-mutuel wagering in Texas would “mark the start of an important new era in the sport.”³⁵

For most of the century, the pari-mutuel gambling dispute was waged between horse people and economic promoters on one side and religious groups on the other.³⁶ As one reporter described, debates “over horse-race betting drew blood as two soulful Texas traditions met head on. From one side came the tradition of the horse and horseman, . . . from the other side came the Bible and the preacher . . .”³⁷ In the late 1980s, due to financial problems and a changing population, the issue of legalizing wagering at racetracks once again rose to the forefront of Texas politics.³⁸ One Texas legislator, arguing in favor of pari-mutuel betting, emphasized that it would provide jobs and tax revenues and that “most importantly, horse racing is as Texan as the longneck beer and the rodeo.”³⁹

In 1986, the legislature enacted the Texas Racing Act (TRA), which legalized pari-mutuel wagering on horse and greyhound racing.⁴⁰ The Texas Racing Commission (TRC) is the state agency charged with regulating and

30. MATHIS, *supra* note 2, at 10–11. From 1934 to 1937, horse racing generated around a half million dollars for the Texas treasury each year. *Id.* at 11.

31. *Id.* at 10. The four racetracks were shut down after only a few years of operation. Ray Paulick, *Deja Vu: Texas Racing on the Brink*, PAULICK REP. (Feb. 8, 2016, 5:33 PM), http://www.paulickreport.com/news/ray-s-paddock/deja_vu_texas_racing_on_the_brink/.

32. Applebome, *supra* note 28.

33. Flake, *supra* note 4.

34. *Id.*

35. *Id.*

36. Applebome, *supra* note 28. See generally Weston Ware, *A History of the Texas Baptist Fight against Pari-Mutuel Gambling in Texas, 1905–1997*, STOP PREDATORY GAMBLING, <https://web.archive.org/web/20140413162625/http://stoppredatorygambling.org/texas/a-failed-policy/no-horsing-around/> (last visited Dec. 21, 2017).

37. Curtis, *supra* note 3, at 5.

38. Applebome, *supra* note 28.

39. Curtis, *supra* note 3, at 5.

40. See Texas Racing Act, TEX. REV. CIV. STAT. ANN. art. 179e (West 2017).

enforcing the TRA.⁴¹ The TRC's responsibilities include licensing racetracks, overseeing horse and greyhound races, and monitoring wagering transactions.⁴²

Texans welcomed the return of pari-mutuel betting with tremendous enthusiasm.⁴³ The grand opening of three Class 1 racetracks—Lone Star Park in Dallas, Sam Houston Race Park in Houston, and Retama Park in San Antonio—added to the anticipation of what was in store for Texas racing.⁴⁴ Indeed, many people in the horse business believed that Texas horse racing had the potential to be “even more grand than Kentucky.”⁴⁵ Texas quickly became “a major horse racing state,” and, in October 2004, hosted 53,000 fans for the Breeders' Cup at Lone Star Park.⁴⁶

C. Racing Has a Gambling Problem: The Decline of Texas Horse Racing

Over the next decade, horse racing experienced a sharp decline nationwide as other entertainment and gambling choices gained popularity.⁴⁷ Suddenly, “horse racing [was] like a game of checkers in a Nintendo world”⁴⁸ Even the most prestigious racetracks in the nation were forced to make renovations and improvements in order to compete with other sports and games.⁴⁹

According to the TRC, from 2000 to 2009, track attendance in Texas fell by 35%, and wagering was down by 37%.⁵⁰ One of the reasons for the decline is that Texas is surrounded by states that offer casino-style gambling.⁵¹ Those states boost horse racing prizes with revenue from the casinos, enabling them to offer higher purses than racetracks in Texas.⁵² In

41. See *id.*; *Compact with Texans*, TEX. RACING COMMISSION, <http://www.txrc.texas.gov/agency/compact.php> (last visited Sept. 30, 2017).

42. Texas Racing Act, art. 179e, § 3.021.

43. Ray Paulick, *A Texas-Sized Hole in the Betting Landscape*, PAULICK REP. (Oct. 1, 2013, 2:28 PM), <http://www.paulickreport.com/news/ray-s-paddock/a-texas-sized-hole-in-the-betting-landscape/>.

44. *Id.* Class 1 racetracks are tracks that offer higher purses and therefore host the fastest horses. Flake, *supra* note 4.

45. McPhate, *supra* note 5.

46. Gary Jacobson, *A Last Hurrah for Texas Horse Racing?*, DALL. MORNING NEWS (May 3, 2014, 5:51 PM), <http://www.dallasnews.com/business/headlines/20140503-a-last-hurrah-for-texas-horse-racing.ece>. The Texas racing industry peaked in 2000 with attendance of 3.3 million and wagering of \$633 million. TEX. RACING COMM'N, *supra* note 13, at 7.

47. Jacobson, *supra* note 46.

48. Flake, *supra* note 4.

49. *Id.* Churchill Downs, a prominent racetrack in Kentucky, experienced a drop in its handle and attendance until the state approved off-track betting; Del Mar in San Diego, California, constructed a new grandstand; Saratoga Race Course in New York was forced to juggle racing dates in order to attract larger crowds. *Id.*

50. TEX. RACING COMM'N, *supra* note 13, at 7.

51. Jacobson, *supra* note 46. The WinStar World Casino, only about an hour north of Dallas, Texas, is one of the largest casinos in the world. *Id.*

52. *Id.* Slot machines were incorporated into racetracks in New Mexico in 1998, Louisiana in 2002,

2009, Louisiana horse racing purses amounted to \$106 million, while Texas purses amounted to only \$30 million.⁵³

Every racing state dedicates specific funds, known as state bred purses, to the owners and breeders of winning racehorses that were bred in the state.⁵⁴ The awards are funded from a percentage of all pari-mutuel pools at the track; therefore, as wagering declined in Texas, the awards and incentives for owners and breeders lessened as well.⁵⁵ The lure of higher purses in neighboring states drew racehorse breeders and trainers away from Texas, many of whom were reluctant to leave.⁵⁶ “As much as I want to be loyal to the fine people who I have worked with in Texas,” one horseman explained, “there comes a point where you have to say enough is enough I, like many others before me, can no longer afford to wait.”⁵⁷

The decline in wagering also impacted the state’s agriculture industry because broodmares and stallions were transported to other states.⁵⁸ Every horse that is “bred, foaled, raised, raced and retired” in Texas both directly and indirectly impacts the state’s agricultural economy.⁵⁹ The TRC reported that a single mare can provide up to \$100,000 a year to the Texas agricultural industry; thus, the fairly recent loss of 15,000 mares equated to a \$1.5 billion loss to the state.⁶⁰ Texas also went from having the majority of the top fifty Quarter Horse stallions in the nation to only five in 2009, therefore losing its position as a national leader in Quarter Horse breeding.⁶¹ Additionally, several racetracks were forced to cease operations or lay off employees “in an attempt to survive.”⁶²

The decrease in wagering at Texas tracks hurt the state’s racing industry in virtually every measurable category.⁶³ Despite the wagering declines, however, Texans continued to gamble, spending \$2 billion at casinos in neighboring states as well as \$4 billion on lottery tickets in 2009.⁶⁴

and Oklahoma in 2006. TEX. RACING COMM’N, *supra* note 13, at 9.

53. TEX. RACING COMM’N, *supra* note 13, at 7.

54. *Id.* at 10.

55. *Id.* at 13.

56. Jacobson, *supra* note 46. In the 2000s, the number of licenses issued by the TRC for racehorse owners, breeders, and trainers decreased by more than 50%. TEX. RACING COMM’N, *supra* note 13, at 9.

57. Scharz, *supra* note 1.

58. TEX. RACING COMM’N, *supra* note 13, at 8. According to the Texas Thoroughbred Association, Texas breeding stock has dwindled from 466 stallions and 3,663 mares in 2000 to only 113 stallions and 900 mares in 2014. McPhate, *supra* note 5.

59. See *New Minnesota ADW Law to Boost Business at Canterbury*, PAULICK REP. (June 9, 2016, 9:49 AM), <http://www.paulickreport.com/news/the-biz/new-minnesota-adw-law-boost-business-canterbury/> (quoting Jay Dailey, President of the Minnesota Thoroughbred Association) (“Every stallion, mare and foal needs feed, bedding, veterinary care, farriers, barns, fencing, tack, farm equipment, trucks, trailers and people to provide care for these equine athletes.”).

60. TEX. RACING COMM’N, *supra* note 13, at 8.

61. *Id.* at 7.

62. *Id.* at 9. Manor Downs in Austin, the longest-operating Class 1 racetrack in the state, closed its doors in 2010. *Id.*

63. *Id.*

64. *Id.* Texans make up almost half of the gaming market in Louisiana, as well as nearly 37% of the

Furthermore, as the Texas racing industry struggled, racetracks and breeding industries in neighboring states flourished.⁶⁵

D. Off the Board: Advance Deposit Wagering in Texas

Throughout American history, different forms of gambling have drawn different attitudes and levels of acceptance.⁶⁶ Horse race wagering was generally tolerated and even encouraged because it fostered improvement of the breed.⁶⁷ It was only with the technological developments of the late nineteenth century that bookmaking became a social problem.⁶⁸ The invention of the telephone, telegraph, and pari-mutuel tote machine freed bettors from having to be physically present at the racetrack to wager.⁶⁹

In 1961, Congress passed the Interstate Wire Act (the Wire Act), which prohibited the interstate transmission of bets or wagers.⁷⁰ The Wire Act aimed to suppress organized crime by targeting the telegraph wires that illegal bookmakers used to obtain the results of horse races before their bettors.⁷¹ In 1978, Congress passed the Interstate Horseracing Act (IHA), which allowed racetracks to televise races to off-track locations for wagering.⁷² Congress amended the IHA in December 2000 to allow states to permit their citizens to place bets on horse races by phone or online.⁷³ This

market in Oklahoma. *Id.*

65. *Id.* at 10. Following the legalization of slot machines in Louisiana, purses rose from \$45,000 to \$245,000 per day. *Id.* Within two years of the legalization of slot machines in New Mexico, agri-business payrolls tripled and the number of jobs increased by 180%. *Id.* Finally, purses tripled in Oklahoma within a year of the passage of slot machines. *Id.*

66. Rose, *supra* note 24.

67. *Id.* The working horse held a significant role in the development of the agrarian and pre-industrial society. *Id.*

68. *Id.* at 1163–64.

69. *Id.* The pari-mutuel tote machine was the first mechanism to monitor wagering pools electronically. *History of the Tote*, SPORTSBETTING, <https://www.sbo.net/strategy/tote-systems/> (last visited Oct. 18, 2017).

70. 18 U.S.C. § 1084 (2016); see also Nelson Rose & Rebecca Bolin, *Game On for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets*, 45 CONN. L. REV. 653, 659 (2012).

71. U.S. Justice Department Opinion on Internet Gaming: *What's at Stake for Tribes?: Hearing Before the S. Comm. on Indian Affairs*, 112th Cong. 7 (2012) [hereinafter *U.S. Justice Department Opinion on Internet Gaming: What's at Stake for Tribes?*] (statement of Professor I. Nelson Rose), <http://www.indian.senate.gov/sites/default/files/upload/files/Nelson-Rose-testimony020912.pdf>.

72. Amanda Stubblefield, *A Constitutional "Inquiry" into the Texas Racing Act: The Physical Presence Requirement for Wagering & the Dormant Commerce Clause*, 5 KY. J. EQUINE AGRIC. & NAT'L RESOURCES L. 349, 352 (2013); see also Interstate Horseracing Act of 1978, 15 U.S.C. § 3001(b) (1978).

73. I. NELSON ROSE & MARTIN D. OWENS, JR., *INTERNET GAMING LAW* 40 (2d ed. 2009), https://www.liebertpub.com/dcontent/files/samplechapters/Sample_InternetGamingLawSecondEdition_Re.pdf. Congress expanded the definition of "interstate off-track wager" to include "electronic media," meaning wager by a device on the Internet. *Id.*; see also Interstate Horseracing Act of 2000, 15 U.S.C. § 3002(3) (2006). Electronic media includes cellular, satellite, and other wireless contact as legitimate means to wager on horse races, and thus the 2000 amendment to the IHA "paved the way for online horserace betting . . ." Lexi Pandell, *The Quest to Make Horse Racing Cool Again*, WIRED (May 21, 2016, 7:00 AM), <https://www.wired.com/2016/05/nyquist-must-win-preakness-make-horse-racing-cool/>.

amendment expressly allowed a form of Internet wagering known as advance deposit wagering (ADW), so long as both the state in which the bettor was located and the state in which the bet was accepted authorized ADW.⁷⁴ ADW is a form of pari-mutuel wagering in which a bettor may deposit money into an account and then use the account balance to pay for pari-mutuel wagering over the phone or the Internet; winnings are deposited back into the account.⁷⁵ Today, ADW is the fastest growing segment of pari-mutuel wagering.⁷⁶ Over half of the states have opted in under the IHA to allow residents to wager online, including across state borders.⁷⁷ Texas, however, has not; therefore, Texas racetracks and businesses are prevented from operating online betting sites.⁷⁸

1. Don't Bet on It: The Outlaw of Advance Deposit Wagering in Texas

In January 2011, the TRC was directed to study the “issues related to revitalizing the racing industry in the state.”⁷⁹ One of the problems that the TRC addressed was illegal Internet wagering through ADW.⁸⁰ ADW allowed Texans to deposit money into an online account and bet on races conducted throughout the country, but did not allow Texas racetracks and horsemen to receive a share of the money that was wagered on Texas races through ADW websites.⁸¹ The TRC reported that the state’s economy loses fifteen cents of every dollar wagered through ADW, therefore depriving the Texas racing industry of nearly \$15 million.⁸²

Although the TRA required pari-mutuel wagering to be conducted “by an association within its enclosure” since 1986, the Act did not specifically mention the Internet.⁸³ In 2012, during the 82nd legislative session, the Texas Legislature clarified that the TRA prohibits Internet gambling on horse races

74. Rose, *supra* note 24, at 1171.

75. IOWA RACING & GAMING COMM’N, REPORT ON THE POSSIBLE AUTHORIZATION OF EXCHANGE WAGERING PURSUANT TO SENATE FILE 438, at 3 (2015), <https://www.legis.iowa.gov/docs/publications/DF/710962.pdf>.

76. Stubblefield, *supra* note 72, at 349.

77. *U.S. Justice Department Opinion on Internet Gaming: What’s at Stake for Tribes?*, *supra* note 71, at 6. The Department of Justice contends that all cross-border betting remains illegal under the Wire Act; however, it has never prosecuted anyone, and states continue to change their laws to allow their residents to bet across state borders. ROSE & OWENS, *supra* note 73, at 40; *see also* Rose, *supra* note 24, at 1187–88.

78. TEX. RACING COMM’N, *supra* note 13, at 12.

79. *Id.* at 1.

80. *Id.* at 12.

81. *Id.* at 12–13.

82. *Id.*

83. Interstate Horseracing Act of 1978, 15 U.S.C. § 3001(b) (1978); Stubblefield, *supra* note 72, at 361.

in Texas.⁸⁴ The effect of the Act was an in-person requirement for horse-race wagering by Texans.⁸⁵

2. *A Win by a Nose: The Dormant Commerce Clause Question*

The IHA requires compliance with a state's laws in order for an interstate off-track racing bet to be legally accepted.⁸⁶ Although ADW is illegal in Texas, ADW operators around the country were serving Texas customers without consequence.⁸⁷ Prior to the 82nd legislative session, the TRC issued cease and desist letters to several ADW companies that were taking online racing bets from Texas residents.⁸⁸ Churchill Downs Inc., which operates an online-wagering site known as TwinSpires.com, brought suit against the TRC, arguing that a requirement to bet in person violated the Dormant Commerce Clause because it had a discriminatory effect on interstate commerce.⁸⁹

Article 1, § 8, Clause 3 of the United States Constitution grants Congress the power to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁹⁰ The United States Supreme Court held that Congress's commerce power included the ability to prohibit the transportation of lottery tickets between states, and courts have extended this reasoning to enable Congress to “prohibit *all* interstate transmission of wagers.”⁹¹ The Dormant Commerce Clause applies when Congress has not clearly addressed a particular issue, such as Internet gambling.⁹² A statute violates the Dormant Commerce Clause when it impermissibly discriminates against interstate commerce.⁹³ In the context of online gambling, “[b]ecause some states might opt to legalize online gambling, legislation in other states aimed at prohibiting online gambling undoubtedly would disrupt the

84. See Texas Racing Act, TEX. REV. CIV. STAT. ANN. art. 179e, § 11.04 (West 2017) (“[A] person may not place, in person, by telephone, or over the Internet, a wager for a horse race or greyhound race conducted inside or outside this state.” (emphasis added)).

85. See Interstate Horseracing Act of 1978 § 3001(b); Stubblefield, *supra* note 72, at 361–62; see also Texas Racing Act, art. 179e, § 11.011(f) (“Nothing in this Act is to be construed to allow wagering in Texas on simulcast races at any location other than a racetrack licensed under this Act . . .”).

86. Interstate Horseracing Act of 1978 § 3001(b); Stubblefield, *supra* note 72, at 352.

87. TEX. RACING COMM'N, *supra* note 13, at 12. Because ADW providers do not incur the insurmountable costs associated with operating a racetrack facility, they often offer rebates to online customers (sometimes as much as 10% of the customer's wagers), which attracts many racing fans to online betting. *Id.*

88. Paulick, *supra* note 43.

89. Paul DeBenedetto, 5th Circ. *Won't Rehear Texas Online Horse Betting Ban*, LAW360 (Oct. 28, 2014, 6:58 PM), <http://www.law360.com/articles/591211/5th-circ-won-t-rehear-texas-online-horse-betting-ban>; see also *Churchill Downs Inc. v. Trout*, 589 F. App'x 233 (5th Cir. 2014).

90. U.S. CONST. art. I, § 8, cl. 3.

91. See *Champion v. Ames*, 188 U.S. 321, 328 (1903); *Martin v. United States*, 389 F.2d 895, 899 (5th Cir. 1968).

92. Rose, *supra* note 24, at 1178.

93. Stubblefield, *supra* note 72, at 354–55.

common market of the United States and violate the Dormant Commerce Clause.”⁹⁴

Churchill Downs asserted that the TRA discriminated against online-betting websites and out-of-state racetracks that were barred from accepting Texans’ bets, even though they compete in the same market.⁹⁵ Churchill Downs relied on *Cherry Hills Vineyards, L.L.C. v. Lilly*, a case in which the Sixth Circuit found that an in-person purchase requirement for wine had a discriminatory effect on out-of-state companies.⁹⁶ The Fifth Circuit held that while *Lilly* supported the assertion that Texas’s in-person betting requirement had a discriminatory effect, the broad view of discriminatory effects taken in *Lilly* is a view the Supreme Court has not yet endorsed.⁹⁷

Churchill Downs also relied on the Supreme Court decision in *Granholm v. Heald*, a case in which the Court struck down state laws that permitted in-state wineries to ship wine directly to customers, while banning out-of-state wineries from doing so.⁹⁸ The Fifth Circuit reasoned that the statutes in *Granholm* explicitly differentiated in-state and out-of-state business, unlike the “facially neutral” statutes that Churchill was challenging.⁹⁹ The Fifth Circuit, therefore, affirmed the district court’s ruling that the TRA did not discriminate against or unduly burden interstate commerce.¹⁰⁰

3. *The Ultimate Upset*

While online horseplayers in Texas were unhappy to be cut out by the amended TRA, racetracks and horsemen were suffering from Texans’ ADW online wagers because they did not receive any revenue from the bets.¹⁰¹ For many Texas horse racing fans, ADW offered the luxury of partaking in the sport from the comfort of their living rooms.¹⁰² This was a particularly attractive feature because, according to long-time racing fans, the horse tracks do not have the same feel as they did years ago.¹⁰³ One fan opined that Lone Star Park had become “a restaurant with a racetrack,” explaining that the track charged outrageous prices for food and beverages, offered very limited handicap parking, and hosted a betting area akin to a “smoky pit.”¹⁰⁴

94. Rose, *supra* note 24, at 1178.

95. DeBenedetto, *supra* note 89.

96. See *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 433 (6th Cir. 2008).

97. See *Churchill Downs Inc. v. Trout*, 589 F. App’x 233, 236 (5th Cir. 2014).

98. See *Granholm v. Heald*, 544 U.S. 460, 473–74, 493 (2005).

99. *Churchill Downs*, 589 F. App’x at 237.

100. See *Churchill Downs Inc. v. Trout*, 979 F. Supp. 2d 746, 755 (W.D. Tex. 2013).

101. Paulick, *supra* note 43.

102. TEX. RACING COMM’N, *supra* note 13, at 12.

103. McPhate, *supra* note 5.

104. James Newberry, Comment to *A Texas-Sized Hole in the Betting Landscape*, *supra* note 43.

Another racing fan preferred to watch the races from home because of the commute to the track as well as the high prices.¹⁰⁵ “[W]ith no way to make a bet [from home], I won’t go out of my way to catch it live,” he reported.¹⁰⁶ “Then watching the big races on replay will lead to maybe not watching them at all and then one day I wake up and realize I’m no longer a racing fan.”¹⁰⁷

E. Spurred into Action: The Push for Historical Racing

During the period from 2004 to 2014, live races in Texas declined by 50%, live wagering decreased by 66%, and the number of foals bred in Texas was down 66%.¹⁰⁸ In June 2014, the TRC proposed “a lifeline for [the] struggling industry.”¹⁰⁹ In order to draw racing fans back to tracks in Texas, the TRC sought to bring a gambling machine known as “historical racing” or “instant racing” to six racetracks in the state.¹¹⁰ The games resemble slot machines and allow a user to view and place a bet on pre-recorded races that have all identifying information removed.¹¹¹

Historical racing was first introduced in 2000 at the Oaklawn racetrack in Arkansas, and it led to a resurgence of the struggling track.¹¹² Since then, six states have legalized historical racing machines—Arkansas, Idaho, Kentucky, Wyoming, Oregon, and Alabama.¹¹³ The introduction of historical racing helped the overall betting handle in these states.¹¹⁴

There was a huge push for historical racing among those in the horse industry.¹¹⁵ One Texas breeder reported that even the suggestion of historical

105. Ryan Driscoll, Comment to *A Texas-Sized Hole in the Betting Landscape*, *supra* note 43.

106. *Id.*

107. *Id.*

108. Ron Mitchell, *Historical Racing Takes Step Forward in Texas*, BLOODHORSE (June 11, 2014, 12:30 PM), <http://www.bloodhorse.com/horse-racing/articles/113689/historical-racing-takes-step-forward-in-texas>.

109. Eli Okun, *Texas Racing Commission Seeks Input on Controversial Technology*, TEX. TRIB. (June 10, 2014, 2:00 PM), <https://www.texastribune.org/2014/06/10/racing-commission-moves-forward-historical-racing/>.

110. McPhate, *supra* note 5.

111. Okun, *supra* note 109.

112. Anna M. Tinsley, *Instant Racing Saved Arkansas Horse Track: Is Texas Next?*, STAR-TELEGRAM (Dec. 6, 2014, 6:00 AM), <http://www.star-telegram.com/news/politics-government/article4314075.html>.

113. Andy Thornley, *US Historical Racing: An Instant Win?*, GBGC (Mar. 17, 2015), <http://www.gbgc.com/news/us-historical-racing-an-instant-win/>. Nebraska, New Hampshire, Maryland, New Jersey, and Texas have all tried to legalize historical racing. *Id.*

114. *See id.* Wyoming temporarily outlawed historical racing in 2005, leading to a significant drop in the state’s racing handle: \$24.8 million in 2005 to \$11.6 million in 2006. *Id.* The Red Mile racetrack in Kentucky debuted 902 historical racing machines in September 2015, and the betting handle was projected to be over \$300 million by the end of 2016. Janet Patton, *Six Months into Instant Racing, Red Mile Gambling Handle Rising Steadily*, LEXINGTON HERALD LEADER (Apr. 17, 2016, 12:13 PM), <http://www.kentucky.com/news/business/article72326197.html>.

115. McPhate, *supra* note 5. The TRC published the proposed historical racing rules in the Texas Register over a thirty-day period for public comment, and of the nearly 13,000 comments received, 76% of the public was in favor of the rules. TEX. RACING COMM’N, 2015 ANNUAL REPORT 18 (2016),

racing games enticed breeders to bring their horses back to Texas.¹¹⁶ The presidents of Texas's three Class 1 racetracks hailed the push for historical racing as "a move that would help resuscitate the struggling industry."¹¹⁷ In August 2014, the TRC voted 7–1 to approve the machines, with the idea that revenue produced by the historical racing machines would sweeten purses and "restore Texas racing back to the grandeur of bygone times."¹¹⁸

1. Not so Fast: The Texas Legislature's Response

Historical racing is highly controversial in the political sphere.¹¹⁹ Opponents of historical racing assert that the machines are an extension of slot-style gambling.¹²⁰ Historical racing has also been the target of lawsuits brought by Native American tribes that operate casinos in the state.¹²¹

Some state senators were displeased that the TRC tried to implement historical racing without involving the legislature.¹²² State Representative Matt Krause filed suit against the TRC, challenging the TRC's authority to approve historical racing terminals, but the suit was dismissed.¹²³ In November 2014, a coalition of bingo organizers and the Kickapoo Traditional Tribe of Texas filed suit against the TRC in Travis County, arguing that the historical racing rules exceeded the TRC's delegated authority under the TRA.¹²⁴ The Kickapoo Tribe, which operates the only legal casino in Texas, complained that allowing historical racing at racetracks in the state would harm its business.¹²⁵ The district court found that the historical racing rules exceeded the TRC's authority and were consequently

<http://www.txrc.texas.gov/agency/reports/AnnualRpt/AnnualReport2015.pdf>.

116. McPhate, *supra* note 5.

117. Dianna Wray, *Tough Times for the Texas Racing Commission with the Texas Legislature*, HOUSTONPRESS (May 1, 2015, 7:00 AM), <http://www.houstonpress.com/news/tough-times-for-the-texas-racing-commission-with-the-texas-legislature-7396081>.

118. McPhate, *supra* note 5; *see* Okun, *supra* note 109.

119. *See generally, e.g.*, *Appalachian Racing, LLC v. Family Tr. Found., Inc.*, 423 S.W.3d 726 (Ky. 2014) (discussing the challenge to historical racing in Kentucky as it complies with state law).

120. *See* Plaintiff's Original Petition and Application for Injunctive Relief at *12–13, *Am. Legion Dept. Tex. v. Tex. Racing Comm'n* (No. D-1-GN-14-003700), 2014 WL 4824323 (53rd Dist. Ct., Travis County, Tex. Sept. 16, 2014), at* 12–13. State lawmakers Lieutenant Governor Dan Patrick and Senator Jane Nelson oppose historical racing terminals, viewing the machines as an "expansion of Vegas-style gambling." McPhate, *supra* note 5.

121. *See, e.g.*, *Tex. Quarter Horse Ass'n v. Am. Legion Dep't Tex.*, 496 S.W.3d 175 (Tex. App.—Austin 2016, no pet.) (describing a suit brought by the Kickapoo Traditional Tribe of Texas); *see also* *Coeur D'Alene Tribe v. Denney*, 387 P.3d 761 (Idaho 2015) (detailing a suit brought by the Coeur D'Alene Tribe of Idaho).

122. Wray, *supra* note 117.

123. McPhate, *supra* note 5.

124. *See* *Am. Legion Dep't v. Tex. Racing Comm'n*, No. D-1-GN-14-003700 (53rd Dist. Ct., Travis County, Tex. Dec. 5, 2014), *available at* <http://www.lrl.state.tx.us/scanned/archive/2014/25916.pdf>.

125. Wray, *supra* note 117.

invalid.¹²⁶ A coalition of racetracks and horsemen appealed the ruling.¹²⁷ The appellate court dismissed the appeal (without disturbing the district court's ruling) for lack of subject-matter jurisdiction.¹²⁸

During the 84th legislative session, state senators threatened to withhold funding from the TRC, referring to it as a “‘rogue’ and ‘renegade’ agency.”¹²⁹ Despite the threat of funds being withheld, on August 25, 2015, the TRC rejected a motion to repeal the historical racing rules.¹³⁰ The Legislative Budget Board responded by withholding \$15.4 million allotted for the commission.¹³¹ The Legislative Budget Board gave the TRC until February 29, 2016 to repeal its historical racing bill.¹³² If the TRC did not comply, the budget board planned to halt all funding to the TRC, which would have shut down the TRC and forced racetracks to close across the state.¹³³

Due to the extreme pressure placed on the TRC, on February 18, 2016, the TRC voted 5–4 to repeal the historical racing laws.¹³⁴ The Legislative Budget Board approved full funding for the TRC through August 31, 2017.¹³⁵ No historical racing machines ever operated in Texas.¹³⁶

III. GOING THE DISTANCE

A. Keeping a Tight Rein: Texas's Authority to Regulate Gambling

Courts have repeatedly affirmed the proposition that the ability to regulate gambling falls squarely within a state's police power to protect the health, safety, and welfare of its citizens.¹³⁷ Online gambling is a new frontier

126. See *Am. Legion Dep't Tex.*, No. D-1-GN-14-003700, at *3.

127. See *Tex. Quarter Horse Ass'n v. Am. Legion Dep't*, 496 S.W.3d 175, 175 (Tex. App.—Austin 2016, no pet.).

128. See *id.* at 177.

129. Wray, *supra* note 117.

130. TEX. RACING COMM'N, 2015 ANNUAL REPORT, *supra* note 115, at 17. The commissioners voted 4–4 on the motion to repeal the historical racing bill; however, because the vote resulted in a tie, the motion did not pass and the historical racing rules remained on the books. *Id.* The proposal to repeal the historical racing rules was published for public comment. *Id.* at 18. The TRC received around 1,300 comments, and all but four opposed repealing the rules. *Id.*

131. McPhate, *supra* note 5. The political shutdown forced the TRC and racetracks to close on September 1, 2015; tracks reopened the following day after the Legislative Budget Board permitted the TRC to pay the administrative costs temporarily from its general fund. *Id.*

132. Jamie Lovegrove, *Texas Racing Commission Nixes Historical Racing*, TEX. TRIB. (Feb. 18, 2016, 12:00 PM), <https://www.texastribune.org/2016/02/18/texas-racing-commission-repeals-historical-racing/>.

133. *Id.*

134. *Id.*

135. Paulick Report Staff, *Funding Restored for Texas Racing Commission*, PAULICK REP. (Feb. 26, 2016, 8:22 AM), <http://www.paulickreport.com/news/the-biz/funding-restored-to-texas-racing-commission/>.

136. TEX. RACING COMM'N, 2015 ANNUAL REPORT, *supra* note 115, at 18.

137. *Churchill Downs Inc. v. Trout*, 979 F. Supp. 2d 746, 754 (W.D. Tex. 2013).

that poses a multitude of regulatory challenges.¹³⁸ When new technology is introduced into an area that is already difficult to control, like gambling, the state has a greater incentive to regulate the conduct.¹³⁹

While Texas has historically permitted pari-mutuel betting on horse races throughout history, and has generated a state lottery since 1991, recent evidence reveals that Texas may be strengthening its opposition to gambling, including the state lottery and charitable bingo.¹⁴⁰ In the 83rd legislative session, the Texas Lottery underwent the sunset review process.¹⁴¹ The initial vote to reauthorize the lottery failed, but the house reconsidered the vote several hours later and the bill passed.¹⁴² The bill was again considered the following day, and an amendment was added to the bill that called for the establishment of a special joint committee of house and senate members to study eliminating the lottery and charitable bingo, suggesting unwillingness on the part of some Texas lawmakers to continue certain gambling practices within the State.¹⁴³

Due to the current political climate, implementing historical racing machines in Texas may not be the ultimate solution. Although they have been successfully introduced in other states, there is strong opposition to the games in Texas because of their resemblance to slot machines.¹⁴⁴ However, one thing is certain: the Texas Legislature has not afforded the racing industry the tools it needs to succeed or survive.¹⁴⁵

B. *An Industry Worth Saving*

The struggle for pro-racing legislation in Texas is an uphill battle, but it is imperative to many Texans. Horse racing has been “a part of the fabric of life in Texas for decades.”¹⁴⁶ The racing industry caters to patrons who

138. *Id.* “State regulators cannot physically inspect a website, employees cannot prevent minors from entering a viewing area that is virtual, and state law enforcement officials cannot as effectively ensure that races are not being used for improper purposes when the bettor can hide behind the anonymity offered by the internet.” *Id.* at 755.

139. *Id.*

140. See Ferrell Foster, *Christian Life Commission Final Report: 83rd Regular Legislative Session*, BAPTIST GEN. CONVENTION OF TEX. (July 26, 2013), <http://texasbaptists.org/news/clc-83rd-session-report>.

141. *Id.* The sunset review process is a regular assessment of a state agency or program that determines whether there is a continuing need for the agency. TEX. SUNSET ADVISORY COMM’N, SUNSET IN TEXAS 2015–2017, at 1 (2015–2017), <https://www.sunset.texas.gov/public/uploads/files/reports/Sunset%20in%20Texas.pdf>.

142. Foster, *supra* note 140.

143. *Id.* The bill passed in the senate and was signed by the governor. *Id.*

144. See Plaintiff’s Original Petition and Application for Injunctive Relief, *supra* note 120, at *12–13.

145. See generally Paulick, *supra* note 43 (discussing the restoration of the TRC’s funding by the budget board three days before the TRC’s funding was to expire).

146. TEX. RACING COMM’N, *supra* note 13, at 15.

deeply appreciate the sport.¹⁴⁷ If Texas racetracks close, “horse racing enthusiasts would have no choice but to spend their dollars in other states.”¹⁴⁸ Aside from being deeply rooted in Texas tradition, the racing industry contributes an estimated \$5.5 billion to the state’s economy, as well as 36,000 jobs.¹⁴⁹ In 2015, horse racing led to a total statewide economic output of \$1.4 billion and contributed \$945 million to the Texas gross domestic product.¹⁵⁰ That same year, Texas horse racing also supported \$689 million in labor income and provided 11,450 Texans with jobs.¹⁵¹ The livelihood of thousands of Texans depends on the survival of the racing industry.¹⁵²

1. *Giving Racing a Run for Its Money*

Despite the benefits and employment opportunities the racing industry provides for the state, favorable legislative progress has been practically nonexistent. The primary reason is that gaming matters have historically been hard to pass in Texas; after horse racing was abolished in the 1930s, pari-mutuel legislation was not passed until fifty years (and twenty-five consecutive legislative sessions) later.¹⁵³ Texas was also one of the last states to permit a state lottery and was only able to do so through a constitutional amendment.¹⁵⁴ Further, due to a mostly reliable and surging oil and gas industry, the Texas Legislature has not faced significant shortfalls in funding the state budget.¹⁵⁵ Therefore, state legislators have not been pressed to supplement the state budget with new sources of revenue.¹⁵⁶

Another reason for the absence of pro-racing legislation is that “the severe economic depression of the Texas horse industry apparently has yet to make a significant impression upon the majority of [Texas’s] elected officials.”¹⁵⁷ Outside money offered from casinos and gambling entities in bordering states has also obstructed the passage of pro-racing legislation.¹⁵⁸ It has been reported that several senators who opposed the passage of

147. *Id.*

148. Helzer, *supra* note 7.

149. TEX. RACING COMM’N, *supra* note 13.

150. TEX. A&M UNIV. EQUINE INITIATIVE, TEXAS EQUINE INDUSTRY STUDY: HOW HORSES AFFECT THE TEXAS ECONOMY 3 (2015).

151. *Id.* The Texas breeding industry, which is heavily impacted by horse racing, had a total economic output of around \$1 billion and supported 13,284 jobs in 2015. *Id.*

152. TEX. RACING COMM’N, *supra* note 13.

153. Paulick, *supra* note 7.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. See Paulick Report Staff, *Galloway Calls Out Texas Politicians in ‘Final’ Column*, PAULICK REP. (Dec. 28, 2015, 10:00 AM), https://www.paulickreport.com/news/the-biz/galloway_calls_out_texas_politicians_in_final_final_column.

historical racing in Texas received substantial campaign contributions from casinos and gambling entities in bordering states.¹⁵⁹

C. Putting 'Lone' in Lone Star State

Today, Texans can stream Netflix, movies, and on-demand sports from the comfort of their living rooms. Innovative technology and Internet access has transformed all types of gaming and has targeted new audiences.¹⁶⁰ Racing, like any other industry, must evolve with technology in order to survive.¹⁶¹ Horse racing today is also combatting a serious branding problem in every state.¹⁶² A Jockey Club study revealed that the average racing fan is fifty-one-years old.¹⁶³ The study also revealed that younger, would-be racing fans felt that betting was too complicated, and 43% said that the bathrooms at the track were “icky.”¹⁶⁴

The 2000 amendment of the IHA to include electronic media provided racing fans with a more convenient way to put \$2 on the nose of their favorite four-legged athlete.¹⁶⁵ There are even websites that specifically cater to casual players who may be unfamiliar with the intricacies of wagering.¹⁶⁶ These sites have attracted new, younger bettors to the sport, and the money wagered is fed back into purses and racetracks.¹⁶⁷ In 2014, due to the allowance of digital betting, wagering across the nation saw a 1.2% increase—the first time wagering had increased in decades.¹⁶⁸

Of the top fifteen states ranked by the total prize money offered in Thoroughbred races, Texas (ranked fifteenth) is the only state that relies solely on pari-mutuel wagering at the racetrack to fund all of its purse money.¹⁶⁹ The top four states on the list—California, New York,

159. *See id.* (reporting that anti-horse racing state senators accepted contributions from the Kickapoo Indian Tribe and the owner of the Golden Nugget casino in Louisiana).

160. MINN. RACING COMM'N, REPORT TO GOVERNOR DAYTON AND THE MINNESOTA LEGISLATURE 13 (2015), <https://www.mrc.state.mn.us/wp-content/uploads/2016/03/MinnesotaRacingCommission2015ReportToGovernor.pdf>.

161. *See id.*

162. *See* Pandell, *supra* note 73 (“If you think of racetrack regulars as old dudes chomping on cigars, you’re not that far off.”); *see also* Flake, *supra* note 4 (describing hard-core racetrack fans as “grizzled regulars with nicotine-stained fingertips and marked-up *Racing Forms* who hover around the betting windows”).

163. Pandell, *supra* note 73. The Jockey Club is the major national breed registry for Thoroughbreds. TEX. RACING COMM'N, *supra* note 13, at 8.

164. Pandell, *supra* note 73.

165. *See id.* (describing how new gambling sites make betting on horses easier and more attractive).

166. *Id.* Websites that target casual players simplify the information available to the bettor. *Id.* For instance, players only see the horse’s odds and a few details about its record, and nothing about the trainer or the jockey. *Id.*

167. *Id.* One popular site revealed that 90% of its users were not regular horseplayers, and the average user was 40 years old. *Id.*

168. *Id.*

169. TEX. RACING COMM'N, TEXAS RACING COMMISSION STRATEGIC PLAN: FISCAL YEARS 2013–2017, at 20 (2012) [hereinafter TEX. RACING COMM'N STRATEGIC PLAN], <https://texashistory.unt.edu/ark:>

Pennsylvania, and Louisiana—all utilize online ADW.¹⁷⁰ Leveraging technological innovation in this manner—bringing the racetrack to the bettor—has proven to be very successful.¹⁷¹

D. The Front Runner: Considerations for Authorizing Advance Deposit Wagering

Today, a staggering 88% (or almost \$10 billion of the total United States pari-mutuel handle) of horse racing bets in the United States are placed at locations outside of the host track, including through ADW.¹⁷² This industry shift emphasizes the importance of off-track wagering channels.¹⁷³ By restricting pari-mutuel wagering to the premises of a licensed racetrack, Texas is falling behind in the race.

It is uncontested that ADW raises significant revenue. One online “hub network,” made up of many ADW firms, drew in \$2 million in amounts wagered its first year—twelve years later, in 2012, the amount wagered through the hub was \$2.24 billion.¹⁷⁴ Because horsemen and tracks in Texas do not reap the benefits of pari-mutuel wagers placed online, the in-state racing industry suffers considerably because it does not receive a share of those wagers.¹⁷⁵ Further, account holders are blocked by ADW providers from betting on races in a state that has not authorized ADW.¹⁷⁶ In effect, a state that does not permit ADW may lose millions of dollars in pari-mutuel handle by forcing it out of state to competing racetracks.¹⁷⁷ Some states, such as Texas and Nebraska, have increased the prosecution of illegal ADW websites to counter this problem.¹⁷⁸ While this has helped somewhat, the racetracks and horsemen continue to lose revenue available to competing interests in states where ADW is authorized, and the state’s racing industry “has been placed on an uneven footing with its counterparts in other states.”¹⁷⁹

/67531/metaph531945/m1/2/?q=pari-mutuel. Texas is one of only eight states that does not draw funding from either ADW or off-track betting (OTB)—and, of these states, Texas is the only state expected to hold year-round circuits for horse racing. TEX. RACING COMM’N, TEXAS ADVANCED DEPOSIT WAGERING 3 (2010) [hereinafter TEXAS ADVANCED DEPOSIT WAGERING], http://www.txrc.texas.gov/agency/meetings/materials/StudyCommittee_AccountWagering_10-06-10.pdf.

170. TEX. RACING COMM’N, *supra* note 13, at 20.

171. *See id.* at 25.

172. MINN. RACING COMM’N, *supra* note 160, at 7.

173. Stubblefield, *supra* note 72, at 350.

174. Nancy Smith, *Florida Race Tracks Are Ripping Off the State for Untold Millions in Tax Revenue*, SUNSHINE ST. NEWS (Feb. 22, 2016, 7:30 AM), <http://www.sunshinestatenews.com/story/florida-race-tracks-ripping-state-untold-millions-lost-tax-revenue>.

175. *See* TEX. RACING COMM’N, *supra* note 13, at 12–13.

176. ROSE & OWENS, *supra* note 73, at 40.

177. MINN. RACING COMM’N, *supra* note 160, at 9.

178. *See, e.g.*, Senator Heath Mello, *Horse Racing Wager Clarification Bill Stalls*, UNICAMERAL UPDATE (Jan. 16, 2014), <http://update.legislature.ne.gov/?p=14116>.

179. MINN. RACING COMM’N, *supra* note 160, at 9.

The IHA expressly allows pari-mutuel betting across state borders, so long as both the state in which the patron places the bet and the state in which the bet is accepted authorize ADW.¹⁸⁰ States have broad authority and discretion over how to administer ADW.¹⁸¹ There are some concerns that arise with ADW that must be addressed by the state: ensuring that the bettor is of legal gambling age, monitoring and implementing ADW, protecting the state's racing industry from unauthorized ADW providers, and dividing the revenues from ADW.¹⁸² States that have legalized ADW have already successfully implemented safeguards to address these problems, and Texas could utilize these existing solutions to legalize ADW.¹⁸³

1. Ensuring that the Bettor Is of Age

In *Churchill Downs Inc. v. Trout*, a case in which the ADW operator sued the TRC for allegedly violating the Dormant Commerce Clause, the court addressed one of the greatest potential problems that online gaming presents—the difficulty of ensuring that bettors are of legal gambling age.¹⁸⁴ Some states have solved this matter by requiring a patron to set up an ADW account in person at the racetrack before they can wager through the system.¹⁸⁵ This ensures that only persons of an appropriate age may obtain an ADW account in the state.¹⁸⁶ In order to prevent family or friends of the account holder from utilizing someone else's information and participating illegally, a state may utilize various technologies for identity and age verification purposes for ADW participants.¹⁸⁷ There is software available that asks a series of questions to the participant and then matches the personal information obtained with government databases in order to properly identify the subject and his or her age.¹⁸⁸

2. The Running Mate: Advance Deposit Wagering Operators

States that authorize ADW may also implement licensing processes to ensure that the entities conducting the wagering are appropriately reviewed

180. Rose, *supra* note 24, at 1171.

181. See *id.* at 1171 n.50 (explaining that the 2000 amendment to the IHA “led to some bizarre [state] laws”).

182. See *infra* Sections III.D.1–4 (addressing several states' solutions to ADW concerns).

183. See generally Sections III.D.1–4 (analyzing different approaches to ADW regulation among several states).

184. *Churchill Downs Inc. v. Trout*, 979 F. Supp. 2d 746, 755 (W.D. Tex. 2013).

185. See, e.g., IOWA RACING & GAMING COMM'N, *supra* note 75, at 68. Iowa further proposes that the legislature should create laws that would criminalize the unauthorized gaming of a minor, as well as the act of aiding a minor to illegally access gaming accounts. *Id.*

186. See generally *id.*

187. *Id.*

188. *Id.*

and monitored.¹⁸⁹ California—the highest-ranking state in terms of purse size for Thoroughbred races—currently utilizes four authorized ADW websites, in addition to satellite and mini-satellite ADW wagering facilities.¹⁹⁰ Likewise, in Washington, an ADW operator must have an agreement, approved by the state racing commission, with a licensed Class 1 racing association to be authorized to conduct ADW in the state.¹⁹¹ The statute therefore treats an online wager as if it was physically placed at the racetrack, and the ADW revenue directly benefits the in-state tracks.¹⁹² California's ADW law does not operate this way, and the state has faced problems related to track patrons betting through their mobile devices, rather than through the racetrack, because the racetracks do not receive a portion of those wagers.¹⁹³

Iowa operates similarly to the Washington ADW system, but it only has one licensed ADW provider.¹⁹⁴ There is evidence that, because Iowa only has one licensed ADW provider, the ADW market, which is purportedly \$10 to \$20 million a year, cannot reach its full potential—the 2015 ADW forecast was only \$2 million.¹⁹⁵ Even with an unsatisfactory ADW projection, Iowa's racetracks and horsemen still benefit from ADW revenue.¹⁹⁶

3. *Out of the Running: Unauthorized Advance Deposit Wagering Entities*

In most ADW-authorized states, any unauthorized ADW entities are forbidden to accept wagers from in-state citizens, and in-state citizens are forbidden to place ADW wagers with any unauthorized providers.¹⁹⁷ An unauthorized ADW entity that illegally accepts bets from states' citizens poses a huge problem to the horse racing industry within that state.¹⁹⁸ A state may encounter this problem whether it authorizes ADW or not. For example, after the New York Racing and Wagering Board discovered that the state was losing roughly \$200 million a year by not regulating out-of-state ADW providers similarly to in-state providers, the New York legislature enacted

189. TEX. RACING COMM'N STRATEGIC PLAN, *supra* note 169, at 25. This authority is typically delegated to the state's racing commission. *See, e.g.*, MINN. STAT. ANN. § 11 (West 2016).

190. TEX. RACING COMM'N STRATEGIC PLAN, *supra* note 169, at 20; *see California Bill Analysis: Hearing on A.B. 2215 Before the Assembly Comm. on Appropriations* (2010), ftp://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_2201-2250/ab_2215_cfa_20100511_154026_asm_comm.html. Of the \$4 billion wagered in California from 2008 to 2009, \$2.3 billion was the result of ADW. *Id.*

191. S. Res. 6481, 58th Leg., 3d Spec. Sess. (Wash. 2003). Washington currently has eight licensed ADW operators that conduct business in the state. *Advance Deposit Wagering Locations*, WASH. HORSE RACING COMMISSION, <http://www.whrc.wa.gov/?page=200> (last visited Oct. 5, 2017).

192. *See* S. Res. 6481, 58th Leg., 3d Spec. Sess. (Wash. 2003).

193. *See* Jeremy Balan, *CHRB, ADWs Clash at Committee Meeting*, BLOODHORSE (Dec. 15, 2016), <http://www.bloodhorse.com/horse-racing/articles/218407/chrb-adws-clash-at-committee-meeting>.

194. IOWA RACING & GAMING COMM'N, *supra* note 75, at 44.

195. *Id.*

196. *See* S. Res. 6481, 58th Leg., 3d Spec. Sess. (Wash. 2003).

197. *See, e.g., id.*

198. TEX. RACING COMM'N, *supra* note 13, at 13.

legislation that requires multi-jurisdictional ADW providers to pay regulatory and statutory fees to New York's horsemen and breeders.¹⁹⁹

Similarly, Minnesota's ADW law contains provisions to fine any "person" who accepts an unauthorized pari-mutuel wager.²⁰⁰ Any money collected through the fines is deposited in the state treasury, credited to the racetracks, and apportioned to the racing commission to support "racehorse adoption, retirement, and repurposing."²⁰¹ Currently, if a Texas resident wagers on a Texas race through an unauthorized ADW provider, Texas horsemen and racetracks receive nothing.²⁰² Legalizing and regulating ADWs would mandate an appropriate contribution to the Texas racing industry.²⁰³

4. *Dividing the Pool: Distribution of Advance Deposit Wagering Revenue*

ADW websites are operated by legitimate public companies that retain a small percentage of all wagers placed through the site and pay the remainder, known as a "source marketing fee," back to the state racetracks and horsemen.²⁰⁴ The state may negotiate the percentage of online wagers that the ADW operator will retain or set the rate at a certain percentage and conduct business with willing providers.²⁰⁵ The state legislature may then distribute the payment of source marketing fees however it deems appropriate.²⁰⁶ For these reasons, ADW is a favorable source of revenue for the state.²⁰⁷

Minnesota's distribution scheme for source marketing fees is as follows: 100% of the fees are paid to a licensed racetrack; of the total fees received by a track, 50% must be allocated for breeders' purses and awards; the remaining 50% is used to fund purses and pay out in-state horsemen.²⁰⁸ Minnesota also charges an ADW operator \$10,000 to obtain an initial license fee, an additional \$2,500 annual fee thereafter, and mandates that 1% of all money wagered through ADW goes to the state treasury.²⁰⁹ As the most recent state

199. MINN. RACING COMM'N, *supra* note 160, at 9.

200. MINN. STAT. ANN. § 240.131 (West 2016).

201. *Id.* § 240.22; Tom LaMarra, *New Minnesota Law Authorizes Account Wagering*, BLOODHORSE (June 9, 2016, 10:52 AM), <http://www.bloodhorse.com/horse-racing/articles/212307/new-minnesota-law-authorizes-account-wagering>.

202. TEXAS ADVANCED DEPOSIT WAGERING, *supra* note 169, at 6.

203. TEX. RACING COMM'N, *supra* note 13, at 14.

204. TEXAS ADVANCED DEPOSIT WAGERING, *supra* note 169, at 2.

205. *See, e.g.*, Balan, *supra* note 193 (explaining that California is attempting to negotiate the ADW takeout with providers at 1.5%).

206. *See, e.g.*, MINN. STAT. ANN. § 240.131 (West. 2016).

207. *See U.S. Justice Department Opinion on Internet Gaming: What's at Stake for Tribes?*, *supra* note 71, at 22 ("Every State looks at gambling as a painless tax. They are all desperate for revenue.").

208. *See* MINN. STAT. ANN. § 240.10 (West 2016); LaMarra, *supra* note 201.

209. LaMarra, *supra* note 201. In addition, one quarter of 1% of all money wagered through ADW goes to support breeders' funds. *Id.*

to authorize ADW, Minnesota's law is expected to "provide incentives for additional jobs and millions of dollars of direct and indirect economic impact . . . that will help ensure the long-term health of the Minnesota racing industry."²¹⁰

5. *Neck-and-Neck: Distinguishing Advance Deposit Wagering from Other Forms of Gambling*

Opponents of ADW argue that the legalization of ADW could "expand the footprint of gaming in Texas, which is the hallmark defense of the anti-gaming advocates in Texas."²¹¹ This argument is supported by the Western District of Texas's holding in *Churchill Downs* that the state has a compelling interest in restricting Internet gambling.²¹² Nevertheless, authorizing ADW in Texas would not *expand* gambling; rather, it would be a transformation of pari-mutuel wagering to a digital era that would directly benefit both the State and the industry.²¹³

ADW critics suggest it is akin to online casino gambling.²¹⁴ Online gambling is distinct from ADW, however, in that ADW is authorized solely for pari-mutuel wagering on horse races pursuant to the IHA.²¹⁵ There are other noteworthy differences between pari-mutuel wagering and casino gambling.²¹⁶ In pari-mutuel wagering, all of the wagered money goes into a pool; after the race, those who bet on the winning horse get the money in the pool, divided amongst themselves, minus a percentage that goes to the racetrack and the purse.²¹⁷ "[N]either the [race]track nor the state has any stake in the outcome of the race . . . [because each] will receive the same share . . . no matter which horse wins" the race.²¹⁸ By contrast, in casino-style gambling, the player is betting against the house, which may create an incentive for the house to cheat.²¹⁹ Further, the outcome of a horse race can be independently verified, making pari-mutuel wagering a more reliable form of gambling.²²⁰ The distinction between pari-mutuel wagering and other

210. *Id.*

211. Paulick, *supra* note 7.

212. *See Churchill Downs Inc. v. Trout*, 979 F. Supp. 2d 746, 755 (W.D. Tex. 2013).

213. *See The Legal and Financial Impact of the Interactive/Account Wagering Bill on the State and Beyond*, 6 INTELL. PROP. L. BULL. 50, 51 (2001) ("The [ADW] bill would not seem to contribute significantly to the expansion of such gambling, but rather it would ensure that revenues derived from California residents engaged in that existing activity is used to support and fund the regulation of the horse racing industry . . .").

214. *See generally* Curtis, *supra* note 3.

215. Marie-Cecile O. Tidwell et al., *Gambling Modes and State Gambling Laws: Changes from 1999 to 2011 and Beyond*, 19 GAMING L. REV. & ECON. 13 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5012365/>.

216. *See* Curtis, *supra* note 3, at 6.

217. *Id.*

218. *Id.*

219. *Id.*

220. *See* ROSE & OWENS, *supra* note 73, at 38.

forms of gambling has been recognized by many states, including Texas—as evidenced by Texas’s historical acquiescence to pari-mutuel betting, unlike other forms of gaming.²²¹ In the words of one horseman, “Placing artificial restrictions on horse racing over misplaced concerns by a small but vocal segment of Texans about ‘expanded gambling’ is like shutting down the state’s cattle business because it offends some vegetarians.”²²²

IV. A HANDS-DOWN WIN

Allowing ADW will revitalize the Texas racing industry. Texas’s current restrictions on pari-mutuel wagering are out of step with current federal law and the laws of almost every other horse-racing state.²²³ By mandating that purses be funded solely by pari-mutuel wagers, “Texas tracks [simply] cannot compete with the [higher] purse levels offered” in surrounding states.²²⁴ As such, it is only a matter of time until Texas racing is put out to pasture.

The prohibition on ADW in Texas is not only outdated, it is largely unenforceable due to the technological and communication developments of this century.²²⁵ Additionally, the ban on ADW in Texas has likely encouraged Texans to find ways around it, which not only hurts the in-state horsemen and racetracks, but also the state, as it cannot collect taxes on the wagers.²²⁶ Wagering through ADW today is rampant, and the strict provisions of the TRA leave no opportunity for Texas tracks or horsemen to benefit.²²⁷ Legalizing ADW would diminish the illegal pilfering of the wagering dollar and direct the money back to Texas horsemen and tracks.²²⁸

Another concern with the ADW restriction is that not all Texans are afforded an opportunity to wager.²²⁹ Racing fans who live far from a track or who are physically unable to travel are deprived of the opportunity to wager.²³⁰ ADW provides a convenient and innovative option for racing fans

221. See *supra* Sections II.A–B (discussing Texas’s historical treatment of pari-mutuel betting as a unique and often legal form of gaming). But see Tidwell et al., *supra* note 215, at 17 (stating that Georgia, Mississippi, Hawaii, Utah, and Vermont include pari-mutuel horse racing as gambling).

222. Bill Shanklin, *The Perplexing Situation in the Lone Star State (Part II)*, HORSE RACING BUS. (Feb. 13, 2015), <http://www.horseracingbusiness.com/the-perplexing-situation-in-the-lone-star-state-part-ii-11933.htm>.

223. See MINN. RACING COMM’N, *supra* note 160, at 9. As of 2011, twenty-eight states expressly allowed ADW, a 300% increase since 1999. Tidwell et al., *supra* note 215, at 21.

224. TEX. RACING COMM’N, *supra* note 13, at 10.

225. Shanklin, *supra* note 222. For example, a Texan could call a friend in an ADW-authorized state and have the friend place his bet. *Id.* Or the Texan could (illegally) place a wager with an offshore ADW provider with very little risk of prosecution. *Id.*

226. See *id.*

227. TEX. RACING COMM’N, *supra* note 13, at 15.

228. See *id.*

229. Shanklin, *supra* note 222.

230. *Id.*

to participate in the sport without having to commute to the track.²³¹ ADW operators offer customers multiple ways to wager, including live operators, online platforms, and mobile platforms.²³² Legalizing ADW would grant all Texans a chance to participate in the sport, attract new horseplayers, and place the Texas racing industry in the twenty-first century.²³³

The TRC's sunset review process yielded a proposal to authorize ADW.²³⁴ The TRC estimated that legalizing ADW in the state could bring "as much as [an additional] \$2.5 million in . . . purses and \$4.6 million in . . . revenue to the [race]tracks."²³⁵ Additionally, the state would receive income and tax revenues from wagers placed through ADW.²³⁶ Although the Texas Legislature receives regular funding from the oil and gas industry, the past few years have shown that the industry is unreliable.²³⁷ The Texas Legislature should actively implement new sources of revenue to fund the state budget before it is forced to do so due to a lack of funds. As an executive at one of the largest ADW operating companies stated, "Texas is the best market in the country in terms of number of customers and amount wagered."²³⁸ Further, the TRC has stated that, should the legislature authorize ADW in Texas, the agency is fully capable to license and audit the ADW systems.²³⁹

For these reasons, the Texas Legislature should amend the TRA to permit ADW and provide for source marketing fees to be shared between Texas racetracks, horsemen, and breeders by authorized ADW operators conducting business in the state.²⁴⁰ First, the legislature should amend or remove the "[w]agering inside enclosure" provision of the TRA.²⁴¹ Specifically, the text of § 11.04 of the TRA should be amended to remove any requirement that a person be inside the enclosure where a race takes place in order to wager.²⁴² Next, the legislature should add a new section to the TRA that authorizes and regulates ADW. Texas could adopt statutory language similar to Washington's, which states:

231. See TEX. RACING COMM'N, *supra* note 13, at 14.

232. *Id.* at 15.

233. *Id.*; see *supra* text accompanying notes 166–68 (recognizing that online wagering has attracted new bettors to the sport).

234. TEX. RACING COMM'N STRATEGIC PLAN, *supra* note 169, at 25.

235. TEX. RACING COMM'N, *supra* note 13, at 15.

236. See, e.g., MINN. STAT. ANN. § 240.131 (West 2016) (proscribing that a regulatory fee of 1% of all amounts wagered by ADW will be paid to the state).

237. See Dale Craymer, *Oil Price Drop a Drag on Texas Economy*, MY SAN ANTONIO (May 1, 2016, 12:00 AM), <http://www.mysanantonio.com/opinion/commentary/article/Oil-price-drop-a-drag-on-Texas-economy-7384528.php>.

238. TEX. RACING COMM'N, *supra* note 13, at 12.

239. TEX. RACING COMM'N STRATEGIC PLAN, *supra* note 169, at 25–26.

240. See *id.* at 10; TEX. RACING COMM'N, *supra* note 13, at 14.

241. See Texas Racing Act, TEX. REV. CIV. STAT. ANN. art. 179e, § 11.04 (West 2015).

242. See *id.*

(1) The horse racing commission may authorize advance deposit wagering to be conducted by:

(a) A licensed class 1 racing association operating a live horse racing facility; or

(b) The operator of an advance deposit wagering system accepting wagers pursuant to an agreement with a licensed class 1 racing association. The agreement between the operator and the class 1 racing association must be approved by the commission.²⁴³

By requiring an ADW operator to be in an agreement with a Class 1 racetrack, any ADW placed in Texas would operate as if it were physically placed at a Texas racetrack. This would ensure that the key patrons of live racing, such as the horsemen and track operators, would be indifferent to the method by which a wager is placed.²⁴⁴ Regulating ADW in this manner would also prevent major ADW companies from “poaching” a large cut of a track’s purse money because the wager would be treated as if it were placed on the premises, and thus feed directly into the track’s purses.²⁴⁵ Further, mandating an agreement between an ADW operator and a Class 1 racetrack affords track patrons the choice to wager directly from their mobile devices.²⁴⁶ This would allow Texans to relish the racetrack experience without the inconvenience of waiting in lines or traversing to designated areas to place a wager.

Additionally, the Texas Legislature should add regulations to the new section of the TRA that read:

A system of advance deposit wagering located outside or within this state may not accept wagers from residents or other individuals located within this state, and residents or other individuals located within this state are prohibited from placing wagers through advance deposit wagering systems, except with an entity authorized to conduct advance deposit wagering under subsection (1) of this section.²⁴⁷

This statutory language would confine the ADW market in Texas to solely benefit racetracks within the state. Additionally, it would allow online account holders from across the nation, and even the world, to bet on Texas races and thus directly support the Texas racing industry and enhance the state’s economy.²⁴⁸

243. S. Res. 6481, 58th Leg., 3d Spec. Sess. (Wash. 2003).

244. See Scharz, *supra* note 1.

245. See *id.*

246. See Balan, *supra* note 193.

247. S. Res. 6481, 58th Leg., 3d Spec. Sess. (Wash. 2003).

248. See *New Minnesota ADW Law to Boost Business at Canterbury*, *supra* note 59.

Finally, the legislature should add subsections to the ADW section of the TRA to address the method by which account holders are approved and monitored, specify a payment and distribution scheme for source market fees, allocate any payments to be made to the state, and address the enforcement of ADW operations in Texas.²⁴⁹ In order to dissuade ADW operators from accepting unauthorized wagers, Texas should provide for fines to be imposed upon the acceptance of any unauthorized pari-mutuel wager.²⁵⁰ As has now happened in Minnesota, “if the state is willing to give it a ‘leg up,’ [Texas] racing has the potential to catapult into the upper tier on the national racing scene.”²⁵¹

V. STAYING IN THE MONEY

Since the Texas Legislature first authorized pari-mutuel wagering in 1905, the racing industry in Texas has proven to be a resilient industry.²⁵² Faced with a myriad of challenges throughout history, the racing industry and Texas horsemen have persevered.²⁵³ Despite the current state of horse racing in Texas, the Texas racing industry presents a wealth of untapped opportunities that, if utilized, would enhance the state’s economy and provide jobs in Texas.²⁵⁴

Legalizing ADW would grant an opportunity for countless Texans to participate in horse racing and attract a new, younger fan base to the sport that the industry desperately needs.²⁵⁵ ADW would also supply a desperately needed economic stimulus to the Texas racing, breeding, and agricultural industries.²⁵⁶ Finally, supplementing Texas racing purses with ADW revenues would allow many breeders and trainers to bring their horses back to Texas.²⁵⁷ Images of crowded grandstands, buzzing with excitement as fans place their bets and watch in eager anticipation as a pack of regal Thoroughbreds blaze down the home stretch of the racetrack are a staple of Texas history—but, with help from the legislature, it could be a vision for Texas’s future as well.

249. See MINN. STAT. ANN. § 240.131 (West 2016).

250. See *id.* at 829–30 (allowing the Minnesota Racing Commission to fine those who participate in unauthorized pari-mutuel betting).

251. See MINN. RACING COMM’N, *supra* note 160, at 13.

252. See *supra* Part II.

253. See *supra* Part II.

254. See *supra* Part IV.

255. See *supra* Section III.C.

256. See *supra* Part IV.

257. See *supra* Section II.C.