

Adjudicating On-The-Track Outcomes in Kentucky: Why Horse Administrators Should Provide Competitors a Right to Review

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INTRODUCTION

Not often do horses with 65-to-1 odds win the Kentucky Derby.¹ Yet, that is precisely what occurred at 2019's first leg of the Triple Crown, colloquially known as the most exciting two minutes in sports.² On its own, Country House's victory represents one of the most unlikely Derby wins in the race's one-hundred-and-fifty-year history.³ The real controversy, however, stems from the fact that the thoroughbred Maximum Security crossed the finish line almost two lengths ahead of Country House.⁴

The owners of Maximum Security, the West family, unsuccessfully contested the outcome with the Kentucky Horse Racing Commission ("KHRC").⁵ They fared no better in federal

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¹ Francesca Paris, *Country House, A 65-1 Long Shot, Wins Kentucky Derby After Historic Disqualification*, NPR (May 4, 2019), <https://www.npr.org/2019/05/04/720315488/country-house-a-65-1-long-shot-wins-kentucky-derby-after-historic-disqualification#:~:text=The%20decision%20handed%20the%20victory,of%20favorites%20winning%20the%20derby> [https://perma.cc/PE9Q-UHUL].

² CHURCHILL DOWNS COMM'NS, *The Race* <https://www.kentuckyderby.com/history/the-race> [https://perma.cc/8YRZ-LUAM] (last viewed Feb. 1, 2020).

³ Steve Petrella, *Biggest long shots to beat the odds and win the Kentucky Derby*, SPORTING NEWS (May 4, 2019), <https://www.sportingnews.com/us/horse-racing/list/kentucky-derby-winners-odds-longshots-upsets-underdogs-best-horse-races/1byz6bk5v9ae81ksei8yym0ynd> [https://perma.cc/A9YP-VG7B].

⁴ Joe Drape, *Country House Wins Kentucky Derby After Maximum Security is Disqualified*, N.Y. TIMES (May 4, 2019),

<https://www.nytimes.com/2019/05/04/sports/kentucky-derby-live.html#:~:text=Down%20came%20Maximum%20Security%20and,apparent%20win%20at%20the%20Derby> [https://perma.cc/U39Q-W74H].

⁵ PAULICK REP., *Denied: Commission Rejects West's Appeal Over 'Arbitrary and Capricious' Derby DQ* (May 6, 2019), <https://www.paulickreport.com/news/triple-crown/wests-attorney-files-commission-appeal-over-arbitrary-and-capricious-derby-dq> [https://perma.cc/FV43-EY5D].

court.⁶ In August of 2020, the Sixth Circuit finally put an end to the matter, holding that, “Kentucky statutory law establishes no right of judicial review of the stewards’ call, which is otherwise barred by the applicable regulation.”⁷ Indeed, state administrative regulations require that such decisions made by racing stewards—essentially, horse racing referees who make the call at the track—be final and thus insulated from appeal.⁸ No court in the state of Kentucky has ever changed the outcome of a horse race by reversing a foul or assessing one where the stewards did not.⁹

Notwithstanding the regulation referred to above, horse racing is frequently the subject of lawsuits brought in Kentucky. In particular, drug testing violations, which can also provide grounds for a horse’s disqualification, are regularly challenged in court.¹⁰ The owner of Dancer’s Image, who was declared the winner of the 1968 Kentucky Derby on the day of the race, mounted an unsuccessful legal challenge after his horse was stripped of his title for failing a drug test.¹¹ However, judicial review of *procedural* violations in horse racing is not the focus of the present inquiry. Rather, this Note is concerned only with the prospect of adjudicating horse race outcomes in the event there is a *substantive* foul on the track during the race.

Recently in Canada, the outcome of a different derby was finally decided by a court of law. On the day of the 2017 British Columbia Derby, Chief-Know-It-All’s victory was upheld despite allegations of a foul during the race.¹² Almost a year later,

⁶ West v. Ky. Horse Racing Comm’n, 425 F. Supp. 3d 793, 797 (E.D. Ky. 2019) (trial court holding that “Kentucky’s regulations make clear that the disqualification is not subject to judicial review.”).

⁷ West v. Ky. Horse Racing Comm’n, 972 F.3d 881, 887 (6th Cir. 2020).

⁸ 810 Ky. Admin. Regs. 4:060(4)(2) (formerly 810 Ky. Admin. Regs. 1:017(4)(c)(2)).

⁹ Andrew Wolfson, *Could a court overturn Maximum Security’s DQ in Kentucky Derby? Don’t bet on it, lawyers say*, USA TODAY (May. 7, 2019).

¹⁰ Sarah Le Cain, *Horse Racing and the Courts: A Summary of the Relevant Case Law for June 2002 – June 2003*, ALBANY L. SCH., <https://www.albanylaw.edu/media/user/glc/caselaw0203.pdf> [https://perma.cc/P9DE-GLYD] (last viewed Feb. 3, 2020).

¹¹ Mark Story, *The crazy, sad story of Dancer’s Image: The other disqualified Kentucky Derby Winner*, LEXINGTON HERALD LEADER (May 12, 2019), <https://www.kentucky.com/sports/spt-columns-blogs/mark-story/article230235269.html> [https://perma.cc/3XTK-X34U].

¹² *Derby Echo? Two Years Later, Judge Changes Result Of Canadian Graded Stakes Race*, PAULICK REP. (Aug. 16, 2019, 12:12 PM), <https://www.paulickreport.com/news/the-biz/derby-echo-two-years-later-judge-changes->

however, an administrative tribunal reversed the decision and disqualified the horse.¹³ Chief-Know-It-All's owners then sued the horse racing commission in the Court of the Queen's Bench, which issued its decision in August 2019—two years after the race.¹⁴ Justice Ross reinstated Chief-Know-It-All as the second-place finisher.¹⁵

Other courts outside of Canada have likewise heard challenges to steward decisions regarding substantive race violations. In 2018, a Louisiana court reversed a decision handed down by the Louisiana State Racing Commission, reinstating Coalport as the winner of the 2014 Unbridled Stakes.¹⁶ Louisiana and Canadian law afford parties the right to appeal decisions rendered by their respective horse racing administrative agencies.¹⁷ As previously mentioned, the right to appeal such decisions does not exist in the state of Kentucky.¹⁸

This Note's inquiry is into the efficacy of Kentucky's administrative regime. Underlying the forthcoming analysis is the assumption that Kentucky's equine administrators are interested in the equitable resolution of all horse racing meets. In other words, this Note assumes that administrators want the winner of the race to be the horse that crosses the finish line first—absent any actionable violation.¹⁹ With that basic assumption in mind, consider the following questions as this Note proceeds. First, are stewards properly equipped to even make the right call? And second, to what extent are we, as horse racing

result-of-canadian-graded-stakes-race/ [https://perma.cc/RHW6-6UPV] [hereinafter "*Derby Echo?*"].

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Ramsey v. La. State Racing Comm'n*, 248 So. 3d 648, 650 (La. Ct. App. May 23, 2018).

¹⁷ La. Rev. Stat. Ann. § 49:964; *Rollingson Racing Stables Ltd. v. Horse Racing Alta.*, 2019 ABQB 632 (Aug. 13, 2019).

¹⁸ 810 Ky. Admin. Regs. 4:060(4)(2) (formerly 810 Ky. Admin. Regs. 1:017(4)(c)(2)).

¹⁹ *See* Ky. Rev. Stat. § 230.215 ("It is hereby declared the purpose and intent of this chapter in the interest of the public health, safety, and welfare, to vest in the racing commission forceful control of horse racing in the Commonwealth with plenary power to... regulate and maintain horse racing at horse race meetings in the Commonwealth of the highest quality and free of any corrupt, incompetent, dishonest, or unprincipled horse racing practices, and to regulate and maintain horse racing at race meetings in the Commonwealth so as to dissipate any cloud of association with the undesirable and maintain the appearance as well as the fact of complete honesty and integrity of horse racing in the Commonwealth.").

fans and thus stakeholders in the sport, willing to litigate steward decisions?

The first question is easier to answer if one disregards procedural violations, namely taking advantage of prohibited chemical substances. The use of performance-enhancing drugs, though an interesting and controversial topic,²⁰ is outside the scope of this paper. Left to analyze, then, is how exactly racing officials determine the order of finish after the horses leave the starting gate. In Kentucky, it might surprise some to know that the system is relatively old-school. At every official horse race in the state, three racing stewards, known as placing judges, are positioned at the finish line to observe and make a determination with their own eyes as to which horse won.²¹ Reference to replay—done with modern means—is permitted.²² But the Wests did not sue the KHRC because the Derby stewards miscalled a close finish; they sued because they believe the stewards mishandled an alleged foul as horses entered the final stretch of the race.²³

The racing officials disqualified Maximum Security after they determined that he, while leading the pack, drifted out of his lane and obstructed the path of the horses behind him.²⁴ Jockeys for Country House and Long Range Toddy brought the foul to the stewards' attention after the race.²⁵ Such substantive fouls can be alleged by a horse's jockey, trainer, owner, or any authorized agent thereof.²⁶ Alternatively, if the stewards themselves observe a foul, they may initiate an inquiry.²⁷

²⁰ Kevin Blake, *Let's Talk About Drugs in Racing*, THOROUGHBRED DAILY NEWS (July 26, 2016), <https://www.thoroughbreddailynews.com/lets-talk-about-drugs-in-racing/> [<https://perma.cc/23DK-FJ8V>].

²¹ See 810 Ky. Admin. Regs. 2:040(4); 810 Ky. Admin. Regs. 2:020(6).

²² See Ky. Admin. Regs. 2:040(5).

²³ Michael McCann, *Maximum Security's Owners Race to Court Over Kentucky Derby DQ*, SPORTS ILLUSTRATED (May 15, 2019), <https://www.si.com/horse-racing/2019/05/15/maximum-security-lawsuit-owners-sue-over-kentucky-derby-dq> [<https://perma.cc/5JX6-VXXY>].

²⁴ Garrett Wymer, *Interference? Experts explain controversial Derby decision*, WKYT (May 5, 2019), <https://www.wkyt.com/content/news/Interference-Experts-explain-controversial-Derby-decision-509505861.html> [<https://perma.cc/G98R-A9PF>].

²⁵ *Id.*

²⁶ 810 Ky. Admin. Regs. 4:060(1)(1)(b) (formerly 810 Ky. Admin. Regs. 1:017(1)).

²⁷ 810 Ky. Admin. Regs. 4:060(1)(2).

Spotting a foul, however, can be difficult. Thoroughbreds regularly approach speeds of forty miles-per-hour.²⁸ For some perspective, the winner of the Kentucky Derby typically finishes the mile and a quarter race in roughly two minutes.²⁹ During those two minutes, which in 2019 were quite wet and sloppy due to weather,³⁰ three stewards are tasked with judging the conduct of around twenty horses and their riders who are moving at close to forty miles-per-hour.³¹ In this context, Barbara Borden, the chief steward of the KHRC, and her two counterparts decided Maximum Security's fate after reviewing the race for no more than twenty-two minutes.³²

Set aside for now the question of whether Maximum Security's disqualification was the correct call (more about that below). As fans and passive participants in the sport of horse racing, are we content with three stewards in twenty minutes deciding a contested Kentucky Derby—and its three-million-dollar purse³³—without the possibility of further review? In other words, should horse racing leave it all on the track?

The equine industry is not the only sport pondering such questions. The Houston Rockets, a National Basketball Association (“NBA”) franchise, audited their 2018 season-ending loss to the Golden State Warriors. The audit concluded that

²⁸ Linnea Zielinski, *How fast do Kentucky Derby horses run?*, METRO (May 2, 2019), <https://www.metro.us/how-fast-do-kentucky-derby-horses-run/> [<https://perma.cc/9PE9-UD7H>].

²⁹ *Id.*

³⁰ CHURCHILL DOWNS COMMC'NS, *The 145th Kentucky Derby Presented by Woodford Reserve Sets All-time Wagering Record as Country House Takes Home the 'Run for the Roses'*, CHURCHILL DOWNS (May 4, 2019), <https://www.kentuckyderby.com/horses/news/the-145th-kentucky-derby-presented-by-woodford-reserve-sets-all-time-wagering-record-as-country-house-takes-home-the-run-for-the-roses#:~:text=Oaks%20Results%20Racing%20by%20Woodford%20Reserve%20Sets%20All,the%20Run%20for%20the%20Roses'&text=LOUISVILLE%2C%20Ky.,Reserve%20over%20a%20sloppy%20track> [<https://perma.cc/75WH-ECUM>] [hereinafter “*The 145th*”].

³¹ Tracy Dopko, *Playing by the Rules: The Role of the Horse Show Steward*, HORSE SPORT (Oct. 26, 2016), <https://horsesport.com/magazine/miscellaneous/playing-by-the-rules-the-role-of-the-horse-show-steward/> [<https://perma.cc/WHP8-GKYM>].

³² Melissa Hoppert, *How Maximum Security Was Disqualified From the Kentucky Derby*, N.Y. TIMES (May 4, 2019), <https://www.nytimes.com/2019/05/04/sports/kentucky-derby-stewards-video-review.html#:~:text=%E2%80%94After%20a%20tense%20review%20period,around%20the%20final%20turn%20and> [<https://perma.cc/PL3A-PJRQ>].

³³ *The 145th*, *supra* note 30.

“[r]eferees likely changed the eventual NBA champion.”³⁴ There is also the now infamous pass interference no-call in the 2019 National Football Conference Championship, which New Orleans Saints fans—and other, less interested observers—believed deprived the team of a trip to the Super Bowl.³⁵ The National Football League (“NFL”) itself admitted the call was incorrect and promptly modified rules to allow for pass interference review, but not before several Saints fans sued the league over the no-call.³⁶

To be sure, there is considerable opposition to this kind of second-guessing in sports outcomes. In an admirable show of solidarity with the NFL, the Saints organization joined the league as a defendant in the foregoing lawsuit, citing a need “to be mindful not to open a virtual Pandora's box,” wherein sports decisions are increasingly litigated.³⁷ Which begs the question, months or even years as they wind their way through the courts? Not to mention the logistical nightmare of suspending payouts for hundreds of millions of dollars wagered on the Derby alone every year until the final review has taken place.³⁸ And at any rate, this is a sport! Fouls happen all the time—sometimes they go your way, sometimes they do not.³⁹ Quite reasonably, some are wary that going down this path will lead to sports becoming another cultural flashpoint, if it is not one already.⁴⁰ But these rationales are unlikely to satisfy Gary and Mary West, who may never again come so close to horse racing's highest mark. Simply put, the procedural shortcomings of the 2019 Kentucky Derby should be acknowledged.

Notwithstanding the legitimate criticisms of subjecting the Derby to further review, if making the right call is the

³⁴ Zach Lowe, Rachel Nichols, *Rockets audited '18 Game 7, say Finals bid taken*, ESPN (Apr. 29, 2019), https://www.espn.com/nba/story/_id/26634745/rockets-audited-18-game-7-say-finals-bid-taken [https://perma.cc/A8SK-RZLD].

³⁵ Eddie Pells, *Analysis: No call in sports is above being picked apart*, AP NEWS (May 9, 2019), <https://apnews.com/article/b5d3ddace4224c8f872d3fd79bee5b3b> [http://perma.cc/L4UT-NUV2].

³⁶ *Id.*

³⁷ ESPN NEWS SERVICES, *Saints join NFL against fan's 'no call' lawsuit*, ESPN (Aug. 8, 2019), https://www.espn.com/nfl/story/_id/27346931/saints-join-nfl-fan-no-call-lawsuit [https://perma.cc/FQ8H-4WW3].

³⁸ *The 145th*, *supra* note 30.

³⁹ Tim Wilkin, *Derby disqualification was the right call*, TIMES UNION (May 5, 2019), <https://www.timesunion.com/sports/article/Was-it-the-right-call-13819969.php> [http://perma.cc/85RS-UE4M].

⁴⁰ Pells, *supra* note 35.

fundamental interest of administrators, providing for just one more layer of review will produce more outcomes consistent with that interest and, accordingly, more faith in those outcomes. While this provision may come as a radical shock to Kentucky's own racing circuit, it is not without precedent in the industry at large.⁴¹ With those precedents in mind, as well as several other countervailing measures discussed below, a smooth transition to a more transparent and equitable system can be achieved in Kentucky's horse racing industry.

Part I of this Note will compare the administrative regimes of three different horse racing jurisdictions, through the study of three distinct races in each jurisdiction: the 2019 Kentucky Derby, the 2014 Louisiana Unbridled Stakes, and the 2017 Canadian Derby. In Kentucky, as alluded to above, the call made by KHRC officials on the day of the race is final.⁴² Louisiana and Alberta, Canada, however, provide for subsequent review not only in an administrative tribunal, but also in a court of law.⁴³ The survey will conclude that Kentucky should codify in administrative regulations the provision of one appeal to the KHRC. This would impute degrees of equity and thoroughness to the decision-making process that are currently missing, as is clear from the procedural shortcomings of the 2019 Kentucky Derby.

Part II of this Note will address the aforementioned criticisms directed at the possibility of more review. These criticisms include: increased litigation, attendant public distress, and the logistical problems posed by gambling. Discussion thereof will involve several suggestions to mitigate the extent to which any one of these issues would undermine the theoretical administrative review provision contemplated by this Note. This Note will conclude with some summary observations and thoughts about the future of horse racing in the state of Kentucky.

⁴¹ *Ramsey*, 248 So. 3d at 648; *Rollingson Racing Stables Ltd., v. Horse Racing Alta.*, 2019 ABQB 632 (Aug. 13, 2019).

⁴² 810 Ky. Admin. Regs. 4:060(1)(1)(b) (formerly 810 Ky. Admin. Regs. 1:017(1)).

⁴³ *La. Rev. Stat. Ann. § 49:964; Rollingson Racing Stables Ltd., v. Horse Racing Alta.*, 2019 ABQB 632 (Aug. 13, 2019).

I. THREE RACES IN THREE DIFFERENT JURISDICTIONS

A. 2019 Kentucky Derby

Gary and Mary Wests' undefeated three-year-old thoroughbred, Maximum Security, had the second best odds to win the 2019 Kentucky Derby.⁴⁴ A replay of the race shows that the horse ran at the front of the pack for essentially the entire race.⁴⁵ The foul for which Maximum Security was ultimately disqualified occurred just before the horses passed the mile marker, right as the pack made the final turn down the home stretch.⁴⁶ At that point, Maximum Security drifted to the right from his inside position at the post, causing a domino effect whereby the adjacent horses—War of Will, Long Range Toddy, Bodexpress, and Country House in that order—were forced right and out of their lanes.⁴⁷ Then, after a brief neck and neck sprint with Country House and Code of Honor, Maximum Security coasted to a comfortable victory.⁴⁸

The foul went unnoticed by the patrol judges,⁴⁹ the stewards stationed along the track to observe and report such fouls.⁵⁰ Rather, the jockeys of Country House and Long Range Toddy objected following the race.⁵¹ The regulation providing for the foul that disqualified Maximum Security reads:

A leading horse if clear is entitled to any part of the track. *If a leading horse or any other horse in a race swerves or is ridden to either side so as to interfere with, intimidate, or impede any other horse or jockey, or to cause the same result, this action shall be deemed a foul.* If a jockey strikes

⁴⁴ CBS SPORTS, *Kentucky Derby odds, picks 2019: Game Winner, Roadster, Improbable predictions from top horse racing insider* (May 4, 2019), <https://www.cbssports.com/general/news/kentucky-derby-odds-picks-2019-game-winner-roadster-improbable-predictions-from-top-horse-racing-insider/> [<http://perma.cc/JN3P-GSDW>].

⁴⁵ NBC SPORTS, *Kentucky Derby 2019 (FULL RACE) ends in historic finish*, YOUTUBE (May 4, 2019), https://www.youtube.com/watch?v=Ci_ychn7ga0 [<http://perma.cc/4JQE-22BE>].

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Hoppert, *supra* note 32.

⁵⁰ *See* 810 Ky. Admin. Regs. 2:040(4); 810 Ky. Admin. Regs. 2:020(6).

⁵¹ Wymer, *supra* note 24.

another horse or jockey, it is a foul. If in the opinion of the stewards a foul alters the finish of a race, an offending horse may be disqualified by the stewards.⁵²

Maximum Security, the leading horse at the time of the foul, was thus entitled to “any part of the track” so long as he was “clear.” In order to be “clear,” Maximum Security had to be at least one length ahead of the next closest horse.⁵³ A replay of the race clearly shows that Maximum Security was not clear at the time he swerved.⁵⁴

The three racing officials who conducted the review at Churchill Downs released only a brief statement.⁵⁵ In pertinent part, the chief steward for the KHRC, Barbara Borden, announced:

We had a lengthy review of the race. We interviewed affected riders. We determined that [Maximum Security] drifted out and impacted the progress of Number 1 [War of Will], in turn, interfering with the 18 [Long Range Toddy] and 21 [Bodexpress]. Those horses were all affected, we thought, by the interference. Therefore, we unanimously determined to disqualify [Maximum Security] and place him behind the 18, the 18 being the lowest-placed horse that he bothered, which is our typical procedure.⁵⁶

Just like that, the winner of the one hundred and forty-fifth Kentucky Derby was no longer Maximum Security; it was Country House, for whom a two-dollar bet to win paid over one hundred and thirty dollars.⁵⁷

⁵² 810 Ky. Admin. Regs. 4:040(12) (formerly 810 Ky. Admin. Regs. 1:017(2) (emphasis added).

⁵³ *Id.*

⁵⁴ NBC SPORTS, *supra* note 45.

⁵⁵ CHURCHILL DOWNS COMMC'NS, *Stewards Statement* (May 5, 2019), <https://www.churchilldowns.com/racing-wagering/news/transcript-of-kentucky-horse-racing-commission-stewards-statement> [<https://perma.cc/G74R-S9VN>] [hereinafter “*Stewards Statement*”].

⁵⁶ *Id.*

⁵⁷ Drape, *supra* note 4.

As already mentioned above, the stewards in fact took only twenty-two minutes to review the race,⁵⁸ and in short order the Wests joined the ranks of countless others who have come so close but failed to reach Derby stardom. The Wests promptly made an appeal to the KHRC, which promptly declined to hear it pursuant to the aforementioned regulation insulating stewards' decisions from appeal.⁵⁹ In Kentucky, state law gives the Commission essentially complete discretion to conduct all matters related to the equine industry, and as administrative regulations exist currently, the Commission is under no obligation to hear appeals.⁶⁰ Admittedly, many commentators have lent their support to the stewards' decision.⁶¹ But the consensus is not unanimous, and several disinterested observers have opined that the stewards' decision was indeed the wrong one.⁶² The arguments fall roughly into two camps, one equitable and the other technical.

The equitable argument is essentially that Maximum Security did in fact commit a foul, but not one that warranted disqualification given the circumstances. That is, Maximum Security was one of the favorites on horseracing's biggest day of the year, for the most part he ran a clean race, and his victory—

⁵⁸ Hoppert, *supra* note 32.

⁵⁹ PAULICK REP., *supra* note 5; 810 Ky. Admin. Regs. 4:060(4)(2) (formerly 810 Ky. Admin. Regs. 1:017(4)(c)(2)).

⁶⁰ See KY. REV. STAT. § 230.260; 810 Ky. Admin. Regs. 4:060(4)(2) (formerly 810 Ky. Admin. Regs. 1:017(4)(c)(2)).

⁶¹ See Katherine Terrell, *What in the world happened at the 2019 Kentucky Derby*, ESPN (May 4, 2019), https://www.espn.com/horse-racing/story/_/id/26672380/what-world-happened-2019-kentucky-derby [<https://perma.cc/X8BM-P74X>]; See also Andrew Cohen, *The Kentucky Derby Decision Might Avert Disaster*, THE ATL. (May 6, 2019) <https://www.theatlantic.com/ideas/archive/2019/05/kentucky-derby-decision-may-avert-disaster/588814/> [<https://perma.cc/N4VU-SK9F>].

⁶² Dan Wolken, *Opinion: Maximum Security was robbed at Kentucky Derby, yet another black eye in horse racing*, USA TODAY (May 4, 2019), <https://www.usatoday.com/story/sports/columnist/dan-wolken/2019/05/04/kentucky-derby-2019-maximum-security-robbed-racing-takes-another-hit/1105796001/> [<https://perma.cc/V4BK-Y76S>] (highly critical of the stewards' decision); Gentry Estes, *The best argument against Maximum Security's Derby disqualification*, COURIER J. (May 8, 2019), <https://www.courier-journal.com/story/sports/horses/kentucky-derby/2019/05/08/kentucky-derby-disqualification-2019-did-maximum-security-foul-affect-race-outcome/1130710001/> [<https://perma.cc/23XF-JDGT>] (highly critical of the stewards' decision); Mary Papenfuss, *New Video Raises Questions About The Kentucky Derby Disqualification*, HUFFPOST (May 12, 2019), https://www.huffpost.com/entry/maximum-security-kentuck-derby-new-video_n_5cd76df1e4b0705e47dd5948 [<https://perma.cc/6C3D-UA47>].

by nearly two lengths, no less—should have stood.⁶³ Some have emphasized the fact that horseracing is a contact sport, in which horses regularly bump each other and stewards routinely miss calls or decline to assess them.⁶⁴ Moreover the Derby, which has a reputation as a “rough” race historically,⁶⁵ is ran with twenty horses rather than the typical fourteen at similarly high-stakes contests.⁶⁶ Critics opined that the optics of having a Derby “stolen” from the favorite was the last thing the sport needed.⁶⁷

The decision was particularly disappointing for some given the largely negative press garnered by the equine industry recently, stemming mostly from an uptick in thoroughbred deaths.⁶⁸ The Kentucky Derby is supposed to be horse racing’s shining moment on the year, where the sport and pop culture merge briefly on the first Saturday of every May to celebrate the world’s finest equine athletes.⁶⁹ Indeed, the week leading up to

⁶³ Andrew Beyer, *The Kentucky Derby decision was a bad one*, THE WASH. POST (May 6, 2019), https://www.washingtonpost.com/sports/the-kentucky-derby-decision-was-a-bad-one-country-house-never-had-a-chance-of-winning/2019/05/06/59a584b4-701c-11e9-8be0-ca575670e91c_story.html [https://perma.cc/T7PQ-YM4T].

⁶⁴ *Id.*

⁶⁵ Art Wilson, *In this year’s Kentucky Derby, there was a whole lotta bumpin’ goin’ on*, L. A. DAILY NEWS (May 12, 2017), <https://www.dailynews.com/2017/05/12/in-this-years-kentucky-derby-there-was-a-whole-lotta-bumpin-goin-on/> [https://perma.cc/TU5B-GA74].

⁶⁶ Jason Frakes, *Are 20 Horses too many for the Kentucky Derby? It Depends on who you ask*, USA TODAY (May 10, 2019, 8:40 AM), https://www.usatoday.com/story/sports/horseracing/2019/05/10/kentucky-derby-20-horses-too-many-race-churchill-downs/1162179001/?utm_source=feedblitz&utm_medium=FeedBlitzRss&utm_campaign=usatodaycomsports-topstories [https://perma.cc/5VKR-P54D].

⁶⁷ See Dan Wolken, *Opinion: Maximum Security was robbed at Kentucky Derby, yet another black eye in horse racing*, USA TODAY (May 4, 2019), <https://www.usatoday.com/story/sports/columnist/dan-wolken/2019/05/04/kentucky-derby-2019-maximum-security-robbed-racing-takes-another-hit/1105796001/> [https://perma.cc/V4BK-Y76S] (“It’s bad enough that a large segment of the general public thinks horse racing is a sport rife with animal cruelty, trainers trying to cheat drug tests and racetracks that are squeezing bettors by taking between 15 and 24 percent of every dollar bet for the house. Now, even the sport’s showcase event can’t avoid contributing to horse racing’s woes.”).

⁶⁸ See Josh Peter, *This Horse was one of 23 who died at Santa Anita and left many Unanswered Questions*, USA TODAY (May 3, 2019, 5:26 PM), <https://www.usatoday.com/story/sports/horseracing/2019/05/03/kentucky-derby-where-accountability-horse-racing-deaths/3634549002/> [https://perma.cc/BA3M-7DDH] (explaining that Santa Anita racing track in California alone reported 23 deaths during its spring meet causing animal rights activist to gather outside Santa Anita Park).

⁶⁹ See generally, Melissa Hoppert, *It’s Kentucky Derby Day: Horses, Spectacle and Romance*, N.Y. TIMES (May 5, 2017), <https://www.nytimes.com/2017/05/05/sports/kentucky-derby-2017.html> [https://perma.cc/QH9M-ZWCC] (discussing the significant events and memorable traditions of the Kentucky Derby).

the race is basically one big “horse-themed party.”⁷⁰ For some, the disqualification did away with all of that. Not only was it anticlimactic, it also foreclosed the possibility of a Triple Crown Winner in 2019, as Country House was not expected to be a contender in either the Preakness or the Belmont.⁷¹ Which is all to say, why didn’t the stewards just let Maximum Security win?

The first technical argument is that Maximum Security, if he committed a foul at all, did so only after he was fouled by War of Will in the first place.⁷² This argument was proffered by Luis Saez, Maximum Security’s jockey,⁷³ who makes several compelling points; primarily, that Tyler Gaffalione was riding War of Will too aggressively and without due regard for Maximum Security’s space.⁷⁴ In a filing with the KHRC, Saez’s attorney created a video with commentary and visual effects that provides a very thorough understanding of what transpired as the horses turned for home with Maximum Security at the front.⁷⁵ In the video, just as clearly as one sees Maximum Security drift from the rail, one also sees that right before he drifts, War of Will increasingly crowds his backside.⁷⁶ It is also clear that War of Will in fact made contact more than once with Maximum Security, arguably “spooking” the horse and perhaps causing him to swerve.⁷⁷ Unclear is the extent to which the three racing stewards observed this contact, which is not necessarily a foul. At any rate, Saez appears to be arguing that, if the stewards

⁷⁰ See *id.* (“Highlights include the Taste of the Derby, a foodie’s dream as North American racetracks are represented by chefs from each area; Unbridled Eve, a traditional gala at the Galt House Hotel; the celebrity-filled Barnstable Brown party, hosted by the Wrigley’s Doublemint twins Patricia Barnstable Brown and Priscilla Barnstable; and the Fillies and Stallions Derby Eve party, where athletes and actors swap moves with whip-toting dancers dressed as jockeys.”).

⁷¹ See Gill Clark, *Preakness 2019: Known Odds, Schedule and Country House Predictions*, BLEACHER REP. (May 6, 2019).

⁷² See Bob Ehalt, *West Believes Tapes Tell a Different Tale about DQ*, BLOODHORSE (May 7, 2019), <https://www.bloodhorse.com/horse-racing/articles/233549/west-believes-tapes-tell-a-different-tale-about-dq> [<https://perma.cc/X9CP-Q9FZ>]; See also Papenfuss, *supra* note 62.

⁷³ See Papenfuss, *supra* note 62.

⁷⁴ See Bob Ehalt, *West Believes Tapes Tell a Different Tale about DQ*, BLOODHORSE (May 7, 2019), <https://www.bloodhorse.com/horse-racing/articles/233549/west-believes-tapes-tell-a-different-tale-about-dq> [<https://perma.cc/X9CP-Q9FZ>].

⁷⁵ See Papenfuss, *supra* note 62.

⁷⁶ *Id.*

⁷⁷ *Id.*

saw what the video conveys, perhaps their decision-making process would have been altered.⁷⁸

The second, and more persuasive, technical argument is that even if Maximum Security committed a foul, it did not warrant disqualification because the finish of the race was not altered.⁷⁹ Recall that the regulation governing fouls provides that, “[i]f in the opinion of the stewards a foul alters the finish of a race, an offending horse *may* be disqualified by the stewards.”⁸⁰ Andrew Beyer, a renowned handicapper with decades of experience,⁸¹ concedes that Maximum Security indeed committed a foul on War of Will, but with the caveat:

War of Will recovered quickly and resumed his chase of the leader. He had a virtually clear path ahead of him and a quarter mile to catch the front-runner. He accelerated and got within a length of Maximum Security, but the leader repulsed his bid, and in the final sixteenth of a mile War of Will ran out of gas. He faded to finish eighth. Without the trouble, he might have finished fifth. *He would not have won.*⁸²

Important for Beyer, the only horse that Maximum Security proximately interfered with was War of Will—not Country House.⁸³ The brief statement released by the stewards seemingly supports this observation to the extent it identifies Maximum Security’s interference with respect only to War of Will and Bodexpress.⁸⁴ Leading one observer to commentate that, “stewards disqualified the best horse over an incident that impacted two also-rans while giving the victory to another horse

⁷⁸ *Id.*

⁷⁹ Beyer, *supra* note 63.

⁸⁰ 810 Ky. Admin. Regs. 4:040(12) (formerly 810 Ky. Admin. Regs. 1:016(12) (emphasis added)).

⁸¹ Gentry Estes, *The best argument against Maximum Security’s Derby disqualification*, COURIER J. (May 8, 2019), <https://www.courier-journal.com/story/sports/horses/kentucky-derby/2019/05/08/kentucky-derby-disqualification-2019-did-maximum-security-foul-affect-race-outcome/1130710001/> [<https://perma.cc/23XF-JDGT>].

⁸² Beyer, *supra* note 63.

⁸³ *Id.*

⁸⁴ *Stewards Statement*, *supra* note 55.

who was never going to win on his own.”⁸⁵ In other words, the foul did not affect the outcome of the race—Maximum Security would have won regardless.

The stewards contend that their review was “thorough and lengthy.”⁸⁶ This Note disagrees. To reiterate, the decision was returned in twenty-two minutes,⁸⁷ and the stewards did not even spot a foul initially.⁸⁸ Moreover, they declined to question Chris Landeros, Bodexpress’s jockey,⁸⁹ despite his position between War of Will and Country House at the time their jockeys alleged fouls.⁹⁰ Nor did they question Tyler Gaffalione, War of Will’s jockey and the only rider proximately affected by Maximum Security’s swerve.⁹¹ The stewards interviewed only Louis Saez, Maximum Security’s jockey, and the two riders who claimed foul in the first place, Jon Court of Long Range Toddy and Flavien Pratt of Country House.⁹² They did not take any questions from the media or even meet with the Wests, who claimed they were utterly shocked by the decision.⁹³ This twenty-two minute review was neither “thorough” nor “lengthy.”

Unfortunately for the Wests, administrative review could have remedied many of these shortcomings. A KHRC tribunal could call witnesses and gather evidence as it conducted a proper

⁸⁵ Dan Wolken, *Opinion: Maximum Security was robbed at Kentucky Derby, yet another black eye in horse racing*, USA TODAY (May 4, 2019), <https://www.usatoday.com/story/sports/columnist/dan-wolken/2019/05/04/kentucky-derby-2019-maximum-security-robbed-racing-takes-another-hit/1105796001/> [<https://perma.cc/V4BK-Y76S>]; Greg Cote, *Why Kentucky Derby is shamed, stained by Maximum Security disqualification*, THE MIA. HERALD (May 6, 2019), <https://www.miamiherald.com/sports/spt-columns-blogs/greg-cote/article230068864.html> [<https://perma.cc/ZD2V-UZ3S>] (“Notably, Country House, the horse given the win, was barely if at all affected by Maximum Security’s movement.”).

⁸⁶ *Stewards Statement*, *supra* note 55.

⁸⁷ Hoppert, *supra* note 32.

⁸⁸ Wymer, *supra* note 24.

⁸⁹ Frank Angst, *KY Stewards’ Report: Prat’s Objection Came From Track*, BLOODHORSE (May 9, 2019), <https://www.bloodhorse.com/horse-racing/articles/233593/ky-stewards-report-prats-objection-came-from-track> [<https://perma.cc/G3N9-DCWD>].

⁹⁰ NBC SPORTS, *supra* note 45.

⁹¹ Bill Finley, *Gaffalione: Stewards Never Spoke to Me*, THOROUGHBRED DAILY NEWS (May 5, 2019), <https://www.thoroughbreddailynews.com/gaffalione-stewards-never-spoke-to-me/> [<https://perma.cc/AL2L-3SPG>]

(“They never spoke to me. To be honest, I thought there’d be an inquiry. I was surprised there wasn’t.” Tyler Gaffalione on the post-Derby stewarding.)

⁹² *Id.*

⁹³ Greg Cote, *Why Kentucky Derby is shamed, stained by Maximum Security disqualification*, THE MIA. HERALD (May 6, 2019), <https://www.miamiherald.com/sports/spt-columns-blogs/greg-cote/article230068864.html> [<https://perma.cc/ZD2V-UZ3S>].

inquiry. Thereafter, the tribunal could have issued a final decision that presumably would not have such glaring factual omissions as the stewards' report. Here, the inquiry was inadequate and, unsurprisingly, the decision has proven quite controversial. Suffice to say, disqualifying a Derby winner in a six-sentence statement issued twenty minutes after the race is not the way such substantive fouls, under these circumstances, should be dealt with in the future.

B. 2017 Canadian Derby

On August 19, 2017, in western Canada's preeminent thoroughbred race, Chief-Know-It-All finished first, in between and just barely ahead of Trooper John and Double Bear, who dead heated for second.⁹⁴ Controversy ensued shortly thereafter. Although no racing steward called a foul, both Double Bear's trainer and jockey filed an objection immediately after the race.⁹⁵ They alleged interference by Chief-Know-It-All; specifically, they alleged that Chief-Know-It-All made illegal contact with Double Bear as the horses rounded the final turn for the home stretch.⁹⁶ A video replay appears to confirm as much.⁹⁷ However, the stewards declined to take action on the day of the race.⁹⁸ They found the contact to be merely "incidental," thereby disallowing the claim of foul and affirming Chief-Know-It-All's victory.⁹⁹

That victory stood for nearly a year, pending an appeal to Horse Racing Alberta filed by Double Bear's owner, Sycamore Stables (Sycamore).¹⁰⁰ Unlike that of Kentucky, Alberta's administrative regime provides parties to horse racing events the right to appeal a "ruling" or "direction" given by a racing

⁹⁴ THE CANADIAN PRESS, *Double Bear for the win: Judge rules horse champion of 2017 Canadian Derby*, CANADIAN BROAD. CORP. (Aug. 16, 2019, 6:55 AM), <https://www.cbc.ca/news/canada/edmonton/edmonton-horse-derby-court-1.5249393> [<https://perma.cc/ZM62-8XTN>].

⁹⁵ *Rollingson Racing Stables Ltd. v. Horse Racing Alta.*, 2019 ABQB 632 at para. 56 (Aug. 13, 2019).

⁹⁶ *Id.* at para. 9.

⁹⁷ Colette Derworiz, *Hold your horses: Alberta court hears details of fight over disqualified horse in Canadian Derby*, GLOB. NEWS (May 8, 2019, 6:18 AM), <https://globalnews.ca/news/5253082/2017-canadian-derby-winner-review/> [<https://perma.cc/9UUB-HD3Z>].

⁹⁸ *Id.*

⁹⁹ PAULICK REP., *supra* note 12.

¹⁰⁰ *Rollingson Racing Stables Ltd.*, 2019 ABQB 632 at para. 9.

official.¹⁰¹ Thus, Double Bear and Sycamore had at their disposal precisely what was denied to the West family—an opportunity to challenge the racing stewards’ decision on the day of the race. In Alberta, the Horse Racing Appeal Tribunal is vested with the power to affect numerous remedial measures, including a change to any decision rendered by the stewards.¹⁰² Moreover, the tribunal is empowered to hear evidence.¹⁰³ The standard of review is reasonableness; that is, the Appeal Tribunal may alter a decision only if it determines the stewards’ decision to have been unreasonable.¹⁰⁴ Note the limited scope of judicial review here; a reasonableness standard, as opposed to *de novo* review, protects the proper deference due to the stewards as experts and first-hand witnesses of the race.¹⁰⁵

At any rate, the three-member Appeal Tribunal found the racing stewards’ decision to be unreasonable. On June 30, 2018, the tribunal concluded in their decision:

The Appeal is allowed and the horse Double Bear did suffer an interference by Chief-Know-It-All which caused the horse not to win first place. Since the horse finished in second place in a dead heat with the horse Trooper John, therefore in accordance with the rules, both horses shall be first place horses and Chief-Know-It-All is disqualified from the race.¹⁰⁶

Thus, nearly a year after the race, the 2017 Canadian Derby was decided as having two new co-winners: Double Bear and Trooper John.¹⁰⁷ However, Rollingson Stables (Rollingson), which owns Chief-Know-It-All, still had a right to further review in the Court

¹⁰¹ Horse Racing Alberta Act, R.S.A. 2000, c H-11.3, sec. 24.

¹⁰² *Id.* at sec. 26.

¹⁰³ Rollingson Racing Stables Ltd. v. Horse Racing Alta., 2019 ABQB 632 at para. 57 (Aug. 13, 2019).

¹⁰⁴ *Id.* at para. 55.

¹⁰⁵ *Id.* at para. 54.

¹⁰⁶ *Id.* at para. 15.

¹⁰⁷ *Id.*

of the Queen's Bench,¹⁰⁸ Alberta's trial court of general jurisdiction.¹⁰⁹ So, just like the Wests, Rollingson sued.¹¹⁰

Rollingson, Sycamore, and the Horse Racing Alberta Appeal Tribunal were all parties to the suit.¹¹¹ The former sought the nullification of the Appeal Tribunal's judgment and reinstatement of the stewards' decision—that Chief-Know-It-All won the 2017 Canadian Derby.¹¹² Sycamore crossclaimed that the Appeal Tribunal should have made Double Bear alone the winner, rather than declaring him co-winner with Trooper John.¹¹³ In an opinion rendered by Justice J.M. Ross on August 13, 2019, the Court of the Queen's Bench gave judgment for Sycamore.¹¹⁴ Thus, nearly two years after the running of the 2017 Canadian Derby, Alberta's provincial court of general jurisdiction held that Double Bear finished first, Chief-Know-It-All finished second, and Trooper John finished third.¹¹⁵

The facts and technical arguments considered in that opinion are of minor importance for this Note. Rather, the 2017 Canadian Derby, and its related administrative and judicial actions, simply represent an alternative to the current administrative procedures in the state of Kentucky. Had the 2019 Kentucky Derby ran under an administrative regime like that of Alberta, Canada, the West family would have had standing to challenge Maximum Security's disqualification in two forums; the first, in an administrative court like Horse Racing Alberta's Appeal Tribunal; and the second, in a judicial court of general jurisdiction like the Court of the Queen's Bench. This is not to suggest that Alberta's provision of a right to review racing decisions is better in all respects, or even that this Derby was ultimately handled in the most equitable fashion. Instead, for now consider the 2017 Canadian Derby as merely an example of how the Wests and other similarly situated parties could

¹⁰⁸ Horse Racing Alberta Act § 27(2).

¹⁰⁹ Jurisdiction & Governance, COURT OF QUEEN'S BENCH OF ALTA., <https://albertacourts.ca/qb/about/jurisdiction-and-governance> [<https://perma.cc/R3J2-LXU3>] (last viewed Feb. 3, 2020).

¹¹⁰ Rollingson Racing Stables Ltd. v. Horse Racing Alta., 2019 ABQB 632 at para. 2, 3, 8 (Aug. 13, 2019).

¹¹¹ *Id.*

¹¹² *Id.* at para. 16.

¹¹³ *Id.*

¹¹⁴ *Id.* at para. 85.

¹¹⁵ *Id.*

theoretically challenge horse race outcomes. Another example comes from Louisiana.

C. 2014 Louisiana Unbridled Stakes

The number seven horse, Coalport, crossed the finish line first at the 2014 Unbridled Stakes in Bossier Parish, Louisiana, but there was an objection by racing officials immediately after the race.¹¹⁶ Likewise, the jockey of the second-place horse, Benwill, filed his own objection.¹¹⁷ Louisiana Downs' stewards went to the monitors to review whether Coalport fouled Benwill in the home stretch.¹¹⁸ As the leader and second place horses, respectively, stewards inquired whether Coalport leaned into Benwill's lane, obstructing the latter's path, and altering the race.¹¹⁹ A video replay confirms that the two horses ran increasingly close to one another as they neared the finish line.¹²⁰ Further, it appears Coalport was drifting into Benwill's lane to some extent; however, the alleged foul was not readily apparent to this author, and the race commentator himself made no such observations during the race.¹²¹ For some perspective, Maximum Security's drift in the Kentucky Derby was far more obvious to the naked eye.¹²²

At any rate, Louisiana Downs' stewards assessed a foul,¹²³ essentially the same foul for which Maximum Security was disqualified in the Kentucky Derby.¹²⁴ They determined that Coalport in fact drifted into Benwill's lane, "and that, but for the foul, Benwill would have won the race."¹²⁵ Accordingly, Coalport was demoted to second, and Benwill became the winner of the

¹¹⁶ *Ramsey*, 248 So. 3d at 650.

¹¹⁷ *Id.*

¹¹⁸ Elizabeth Alt, *Court ruling reinstates 2014 Unbridled Stakes race winner at Louisiana Downs*, LA. REC. (June 5, 2018), <https://louisianarecord.com/stories/511443932-court-ruling-reinstates-2014-unbridled-stakes-race-winner-at-louisiana-downs> [<https://perma.cc/WWZ3-D5R2>].

¹¹⁹ *See id.*

¹²⁰ *Ramsey*, 248 So. 3d at 652.

¹²¹ Lynn Roberts, *At the Races*, BLOODHORSE (Sept. 6, 2014), <https://photos.bloodhorse.com/AtTheRaces-1/At-the-Races-2014/i-V75Z3P2> [<https://perma.cc/2CEH-ESNX>].

¹²² NBC SPORTS, *supra* note 45.

¹²³ *Ramsey*, 248 So. 3d at 650.

¹²⁴ La. Admin. Code tit. 35 V.7901.

¹²⁵ *Ramsey*, 248 So. 3d at 650.

2014 Unbridled Stakes.¹²⁶ The Ramsey family, who own Coalport, filed an appeal with the Louisiana State Racing Commission (the “Commission”) shortly thereafter.¹²⁷ In Louisiana, state administrative code allows “any person penalized or disciplined by the stewards” to appeal such decisions to the Commission.¹²⁸ The Commission is required to review the stewards’ decision under a preponderance of the evidence standard, although in this case the Commission applied an incorrect standard of review (as discussed below).¹²⁹ Ultimately, the Commission affirmed the stewards’ decision.¹³⁰

The Ramsey family still had one means of recourse available; the Louisiana Administrative Procedure Act (“LAPA”), which controls the judicial review of state administrative decisions and provides six distinct grounds on which a Louisiana trial court may reverse the decision of an administrative agency¹³¹—here, that of the Commission. Under the LAPA, one of the grounds on which a trial court may affirm or modify an administrative decision is if such is “not supported and sustainable by a preponderance of evidence.”¹³² In deciding the Ramseys’ appeal, the 26th Judicial District Court of Louisiana invoked that provision when it reversed the decision of the Commission.¹³³ The court determined that not only did the Commission apply an erroneously deferential standard to their review of the stewards’ decision to disqualify Coalport, but also, the evidence “was insufficient to support a finding that Coalport’s foul of Benwill altered the outcome of the race.”¹³⁴ Accordingly, the trial court reversed the Commission’s decision and reinstated Coalport as the winner of the 2014 unbridled Stakes.¹³⁵

¹²⁶ *Id.*

¹²⁷ *See Ramsey*, 248 So. 3d at 648.

¹²⁸ La. Admin. Code Tit. 35 § V.8301.

¹²⁹ *Ramsey*, 248 So. 3d at 653.

¹³⁰ *Id.* at 650.

¹³¹ La. Rev. Stat. Ann. § 49:964(G).

¹³² La. Rev. Stat. Ann. § 49:964(G)(6).

¹³³ *Ramsey*, 248 So. 3d at 650.

¹³⁴ *Id.*

¹³⁵ *Id.*

The order was affirmed on appeal to the Second Circuit Court of Appeal of Louisiana,¹³⁶ whose opinion provides an insightful example of how a court of law may retrospectively adjudicate the allegation of a substantive foul in horse racing:

While Coalport did foul Benwill, such did not alter the outcome of the race. This is due primarily to the relative speeds of the horses and the proximity of the foul's occurrence to the location of the finish line. Benwill was gaining on Coalport at the end of the race, but not at a fast enough rate to overtake him before the finish line, even had the foul not occurred. The videos of the race show that the foul occurred very close to the finish line, thus limiting its effect to such a degree that it did not and could not have caused a change in the outcome of the race.¹³⁷

Coalport's victory is now final.¹³⁸ Note that this opinion was rendered almost four years after the Unbridled Stakes was run in 2014. Per Louisiana administrative regulations,¹³⁹ the \$75,000 total purse for the race was suspended for the duration of the Ramseys' appeal.¹⁴⁰

D. Louisiana and Alberta as a Model for Kentucky

As an initial matter, note that Louisiana's model for reviewing horse race outcomes is essentially the same as Alberta's. In either jurisdiction, racing stewards represent the first layer of review; the administrative tribunals of the executive agencies charged with governance, Horse Racing Alberta and the Louisiana State Racing Commission, represent the second layer of review; and lastly, the courts offer an additional layer of review. Of course, in Kentucky, at least with respect to

¹³⁶ *Id.*

¹³⁷ *Id.* at 652.

¹³⁸ *Id.*

¹³⁹ La. Admin. Code Tit. 35 § V.8301.

¹⁴⁰ Melody Brumble, *Appeals court says 'nay' to 2014 horse race challenge*, KTBS (May 23, 2018), https://www.ktbs.com/news/appeals-court-says-nay-to-horse-race-challenge/article_1930522a-5ece-11e8-b6d9-e3ca1a418547.html [https://perma.cc/S5LH-6LQY].

substantive fouls called, the stewards have the first and last say.¹⁴¹ Thus, in either Alberta or Louisiana, an aggrieved party potentially has two additional opportunities to seek recourse after the running of a race. Put differently, those two jurisdictions provide two more opportunities for a given horse race to be resolved correctly—which this Note assumes to be the KHRC’s goal with respect to any competition. As this Note will show, elements of the Canadian and Louisiana administrative regimes could be effectively integrated in Kentucky’s own model.

To be fair, Louisiana’s Unbridled Stakes and the Canadian Derby are quite different affairs from the Kentucky Derby. The quality of the thoroughbreds, the attendant stakes, and public scrutiny of either race pale in comparison to Churchill Downs’ run for the roses. However, that does not mean Kentucky’s administrative regime cannot benefit from certain changes consistent with the Louisiana and Alberta models discussed herein. This Note argues that, for the following reasons, such changes should be seriously considered in the state of Kentucky.

First, providing for an administrative appeal—i.e. at the Horse Racing Alberta or Louisiana State Racing Commission level—would not require new legislation out of Frankfort. As mentioned above, Kentucky state law vests in the KHRC, an executive agency, essentially complete autonomy to set rules and governance standards on the state’s horse racing tracks.¹⁴² Presumably, this authority extends to the creation of an administrative tribunal. Meaning, the provision of an administrative appeal could be done without politics playing a role; in other words, the Board of the KHRC could put change in motion without anyone having to convince a legislative majority of the state’s lawmakers, as well as the governor, to make new law.

Second, as evidenced in Alberta and Louisiana, horse racing participants’ access to administrative review is by no means unheard of. The KHRC, as custodian of the world’s preeminent equestrian hub, would almost certainly be highly scrutinized for ushering in any momentous changes to its horse racing regime—not to mention one so controversial for which this Note advocates. But the administrative regimes of Louisiana and

¹⁴¹ 810 Ky. Admin. Regs. 4:060(4)(2) (formerly 810 Ky. Admin. Regs. 1:017(4)(c)(2)).

¹⁴² Ky. Rev. Stat. § 230.260 (Lexis).

Alberta, as potential models for Kentucky, should temper some of this scrutiny. Kentucky would not be navigating uncharted waters (if you will), but rather adopting an administrative mode that is already pervasive in North American horse racing.

Third and equally important, administrative review has the potential to enhance public confidence in the disposition of controversial horse racing outcomes. The provision of administrative review will mean little (if anything) for uncontested finishes; if racing officials make no objections, and parties to the race allege no fouls, then administrative review will not be activated, and the stewards of the race will have the first and last say on its disposition.

However, where finishes are contested, administrative review will remedy all of the major shortcomings on the stewards' behalves witnessed at the 2019 Kentucky Derby. That is, an administrative tribunal's decision will not be as time sensitive—the tribunal presumably could take longer than twenty-two minutes¹⁴³ to render its decision. Additionally, the tribunal could avail itself of all of the facts—which Churchill Downs' stewards manifestly did not do when they declined to interview both War of Will's and Bodexpress' jockeys.¹⁴⁴ At bottom, the question is this: if and when there is another situation like the 2019 Kentucky Derby, do Kentuckians want to see it handled differently? This author believes, at the very least, it is a discussion worth having. If Louisiana and Alberta can review their horse races, Kentucky administrators can too.

II. COUNTER ARGUMENTS AND ALTERNATIVE POSSIBILITIES FOR DISPUTE RESOLUTION

A. *Skepticism Directed at Administrative Change*

Skeptics of the administrative change argued for herein focus on three primary issues: the increase in litigation that will accrue

¹⁴³ Hoppert, *supra* note 32.

¹⁴⁴ Angst, *supra* note 89; Bill Finley, *Gaffalione: Stewards Never Spoke to Me*, THOROUGHBRED DAILY NEWS (May 5, 2019), <https://www.thoroughbreddailynews.com/gaffalione-stewards-never-spoke-to-me/> [https://perma.cc/AL2L-3SPG].

as a result of making steward decisions appealable;¹⁴⁵ the public distress that might accompany the prolonged disposition of a high stakes race;¹⁴⁶ and various problems posed by how prevalent gambling is in Kentucky's equine industry.¹⁴⁷ Although these considerations are indeed valid, the extent to which any of their negative effects may come to bear is entirely speculative.

First, the West's lawsuit suggests that there will be an appetite to sue over contested finishes in high stakes races if state law affords parties such a right. But this Note is not advocating for a change to state law; this Note is advocating for a limited change to Kentucky's administrative regulations—the provision of one appeal conducted by the KHRC. Thus, under the change proposed herein there will be no greater right to sue in the state's courts of general jurisdiction than there is currently. At any rate, the lack of Louisiana case law invoking the administrative regulation providing for horserace appeals should be encouraging; Louisiana's regime has included a review provision since 1971,¹⁴⁸ suggesting that even though such administrative review is available, it's not necessarily being litigated.

The second issue can be properly framed with a question: do Kentuckians want to decide a Derby, or any other horse race for that matter, weeks, months, or even years after it is run? This Note readily concedes that such a proposition is highly undesirable. The Kentucky Derby is known as the most exciting two minutes in sports, not the most exciting two minutes plus however long it takes to actually resolve the race pending appeal. The prospect of having lengthy appeals following any number of horse races would no doubt alter the essence of the sport; for example, gamblers might be deterred, or the winner's circle might become an afterthought.

Which is why this Note is proposing such a limited change to Kentucky's administrative regime; properly tailoring the

¹⁴⁵ Angst, *supra* note 89; Bill Finley, *Gaffalione: Stewards Never Spoke to Me*, THOROUGHBRED DAILY NEWS (May 5, 2019), <https://www.thoroughbreddailynews.com/gaffalione-stewards-never-spoke-to-me/> [<https://perma.cc/AL2L-3SPG>].

¹⁴⁶ Pells, *supra* note 35.

¹⁴⁷ Michael Shapiro, *Report: Kentucky Derby Sets Record with \$165.5 Million in Bets*, SPORTS ILLUSTRATED (May 6, 2019), <https://www.usnews.com/news/politics/articles/2019-05-09/analysis-no-call-in-sports-is-above-being-picked-apart?context=amp> [<https://perma.cc/SHT6-4FU2>].

¹⁴⁸ La. Admin. Code Tit. 35 § V.8301.

provision of administrative appeals will mitigate the extent to which the public may be distressed by the prolonged disposition of a horse race. The KHRC could allow appeals to be filed *only* on the day of the race—that would in essence create a statute of limitations on when additional inquiries could be set in motion. Moreover, the KHRC’s appellate tribunal could be required to resolve any appeal in a highly expedited fashion. Lastly, the KHRC’s disposition of the appeal could be made final—just like the stewards’ decision under current regulations.¹⁴⁹ Simple measures such as these would limit the amount of controversy that could arise from an appeal.

Third and lastly, insofar as gambling is intertwined with the equine industry poses numerous challenges to the provision of administrative appeals proposed by this Note. As hinted at above, one might reasonably expect gamblers, whether habitual or sporadic, to forgo placing bets in apprehension of their money wagers being stuck in administrative limbo until an appeal is resolved. Not only does this mean a decrease in the public’s investment in the sport and enthusiasm therefor, it also indicates less revenue for racetracks.

From a logistical perspective, the problems posed by gambling are no less imposing. Over \$165 million was wagered on the 2019 Kentucky Derby, a record for the race.¹⁵⁰ An appeal would almost certainly require suspending a percentage (if not all) of the payouts of those wagers—how would Churchill Downs even know what to payout if the order of finish is not final? On the other hand, the massive wagers that would be most problematic to suspend—like the tens of millions wagered on a favorite at the Derby—are few and far between; suspending payouts on a contested finish for a weekday maiden, for example, would not turn that many heads because there is simply not as much money at stake. To be fair, the gambling issue is outside the scope of the Note and beyond the expertise of this author. A more thorough understanding of how wagers would be affected by the provision of administrative review is absolutely key to ushering in the change for which this Note argues.

¹⁴⁹ 810 Ky. Admin. Regs. 4:060(4)(2) (formerly 810 Ky. Admin. Regs. 1:017(4)(c)(2)).

¹⁵⁰ Shapiro, *supra* note 147.

B. Alternative Possibilities for Dispute Resolution

Setting aside the administrative changes proposed above, this Note also contemplates three alternative possibilities for affecting (or not) contested horse racing finishes like that of the 2019 Kentucky Derby. First, plaintiffs similarly situated to the Wests can choose to file causes of action in tort; second, arguments have been made for modifying what constitutes a disqualifiable foul; and third, leaving Kentucky's regulatory regime as is.

First, some horse racing plaintiffs have made claims in tort for "negligent interference with prospective economic advantage."¹⁵¹ In *Youst*, a harness race,¹⁵² the rider of The Thilly Brudder drove the horse into Bat Champ's path, thereby obstructing him.¹⁵³ The horses finished in second and sixth, respectively, but the stewards assessed a foul.¹⁵⁴ The Thilly Brudder was disqualified, moving Bat Champ into fifth place and securing him a \$5,000 purse.¹⁵⁵ Nonetheless, Bat Champ's owner sued under the theory that but for The Thilly Brudder's interference, Bat Champ would have placed higher in the race and taken home a larger prize as a result.¹⁵⁶ The court thus framed the issue, "[i]s a racehorse owner entitled to tort damages when the harness driver of another horse negligently or intentionally interferes with the owner's horse during a race, thereby preventing the owner from the chance of winning a particular cash prize?"¹⁵⁷ The Supreme Court of California went on to decide there was no such entitlement.¹⁵⁸

Legally, maintaining a cause of action for interference with prospective economic advantage requires "proof that it is reasonably *probable* that the lost economic advantage would have been realized but for the defendant's interference."¹⁵⁹ The *Youst*

¹⁵¹ *Youst v. Longo*, 43 Cal. 3d 64, 68 (Ca. Sup. Ct. 1987).

¹⁵² Admin, *10 Things You Need to Know About Harness Racing*, INSIDE TRACK (Mar. 21, 2018) <https://insidetrackblog.com/10-things-you-need-to-know-about-harness-racing/> [<https://perma.cc/J3PZ-RRUC>].

¹⁵³ *Youst*, 43 Cal. 3d at 68.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 76.

¹⁵⁷ *Id.* at 64.

¹⁵⁸ *Id.* at 67.

¹⁵⁹ *Youst*, 43 Cal. 3d at 71.

court did not find the requisite proof alleged in the plaintiff's complaint, only "alleg[ations] in conclusory terms that defendant's wrongful interference resulted in a lost 'opportunity' to finish higher in the money."¹⁶⁰ The court held:

It was not reasonably *probable*, on the facts alleged, that Bat Champ would have finished in a better position. Indeed, we may take judicial notice of the impossibility of predicting such matters; the winner of a horserace is not always the leader throughout the race for a horse can "break the pack" at any point in the race, even as a matter of strategy. Further, many races are won by a "nose." Thus, no cause of action exists for interference with this horseracing event.¹⁶¹

Note the justices' reservations about invoking tort liability in the context of a horse race. In resolving the case, the court adopted the positions of the Restatement of Torts and an old case from Kansas.¹⁶² At bottom, the "chance to win a prize purse at a trotting horserace was too speculative to support tort liability."¹⁶³

It is worth mentioning the court's lengthy commentary on the policy rationales adverse to the imposition of tort liability under the circumstances of *Youst*. The opinion provided:

If the tort of interference were recognized in the context of a sporting competition, virtually no such event would take place without a tort claim from some losing competitor seeking to recover his supposed *economic* loss; a player's every move would be highly scrutinized for possible use in the courtroom. Placing this type of additional pressure on competitors could seriously harm competitive sports.¹⁶⁴

¹⁶⁰ *Id.* at 77.

¹⁶¹ *Id.*

¹⁶² See *Western Union Tel. Co. v. Crall* (1888) 39 Kan. 580 [18 P. 719]; see also RESTATEMENT (SECOND) OF TORTS, § 774B, special note, pp. 59–60 (AM. LAW INST. 1979).

¹⁶³ *Youst*, 43 Cal. 3d at 77–78.

¹⁶⁴ *Id.*

The court's intuition seems correct; the volume of litigation over sporting competitions would surely balloon if plaintiffs could successfully avail themselves of arguments like that proffered by the *Youst* petitioners. Further, the court sees no reason why such an argument could not be extended to sporting events beyond horse racing. The court's aversion to invoking tort liability seems to echo claims made by modern commentators that sports should not become another cultural flashpoint.¹⁶⁵

Second, stakeholders of the sport have argued for modifying what constitutes a foul on North American horse racing tracks.¹⁶⁶ In the aftermath of the 2018 Saratoga Racecourse's¹⁶⁷ summer meet, the Thoroughbred Idea Foundation ("the Foundation") thought critically about the capacity stewards have to affect the outcome of any given race.¹⁶⁸ One commentator had this to say about the officiating that year:

It is not hyperbole to suggest the inconsistency from the stewards at this Saratoga meet was among the worst ever seen. It's not even a stretch to make that claim. It's a valid position...Forget about the demonstrable evidence that what was a foul one day was not another day. No one knew from race to race what an actionable foul was. It felt like the goal-posts were always moving.¹⁶⁹

With such frustration in mind, the Foundation set about reviewing the philosophy behind how interference is adjudicated in North American horse races, identified by the International Federation of Horseracing Authorities ("IFHA") as "Category 2."¹⁷⁰ The Foundation's review concluded that a transition from a Category 2 to a Category 1 philosophy would remedy the inconsistent officiating many see as plaguing the sport.¹⁷¹

¹⁶⁵ Eddie Pells, *supra* note 35.

¹⁶⁶ THOROUGHBRED IDEA FOUND., TIF REPORTS: CHANGING THE RULES CONSISTENCY IN THE ADJUDICATION OF NORTH AMERICAN RACING IS POSSIBLE WITH A SHIFT TO THE CATEGORY 1 PHILOSOPHY 1 (2018).

¹⁶⁷ *Saratoga*, N.Y. RACING ASSOC., <https://www.nyra.com/saratoga/> [<https://perma.cc/FS4Q-LWWQ>] (last viewed Feb. 2, 2020).

¹⁶⁸ THOROUGHBRED IDEA FOUND., *supra* note 166.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1.

Fundamentally, Category 2 jurisdictions are more punitive than Category 1. Under the first scheme, the offending horse is disqualified if the stewards determine his foul altered the finish of the race, regardless of whether the offended horse would have placed higher than the offender but for the foul.¹⁷² Under the latter scheme, the offending horse is disqualified *only* if the offended horse would have placed higher but for the foul.¹⁷³ In other words, the offending horse has to gain an advantage in order to be disqualified under Category 1. According to the Foundation, Canada and the United States are the only two racing jurisdictions in the world that employ a Category 2 philosophy of interference.¹⁷⁴

One of the Foundation's primary concerns with Category 2 is the philosophy's effect of demoting "clear-cut winners" whose interference had a negligible impact on the race.¹⁷⁵ Note how similar this concern is to the injustice many commentators attributed to the stewards' resolution of the 2019 Kentucky Derby.¹⁷⁶ As early as 2018, the Foundation was contemplating the "outrage" that would follow such application of the Category 2 philosophy in a race as prominent as the Kentucky Derby.¹⁷⁷ As mentioned above, North America remains the lone Category 2 outlier in the world of horse racing; in the last ten years alone, Japan, France, Germany, and Panama have all made the switch to Category 2.¹⁷⁸ Interestingly, Japan's transition to Category 1 was prompted in part by widespread negative feedback garnered by the demotion of the 2010 Japan Cup's winner, Buena Vista.¹⁷⁹

To be sure, both categories have their shortcomings. Critics of Category 1 attack it for not prioritizing safety; the argument is that the "anything goes" attitude of the philosophy acts as an insufficient deterrent for bad jockeying.¹⁸⁰ On the other

¹⁷² *Id.* at 2; 2019 ROAP Point of Emphasis, RACING OFFICIALS ACCREDITED PROGRAM, <https://www.horseracingofficials.com/2019-roap-points-emphasis> [<https://perma.cc/WK4H-JEFW>] (last viewed Feb. 2, 2020).

¹⁷³ THOROUGHBRED IDEA FOUND., *supra* note 166, at 2; 2019 ROAP Point of Emphasis, RACING OFFS. ACCREDITED PROGRAM, <https://www.horseracingofficials.com/2019-roap-points-emphasis> [<https://perma.cc/WK4H-JEFW>] (last viewed Feb. 2, 2020).

¹⁷⁴ THOROUGHBRED IDEA FOUND., *supra* note 166, at 2.

¹⁷⁵ *Id.* at 9.

¹⁷⁶ Andrew Beyer, *supra* note 63.

¹⁷⁷ THOROUGHBRED IDEA FOUND., *supra* note 166, at 6.

¹⁷⁸ *Id.* at 9–10.

¹⁷⁹ *Id.* at 9.

¹⁸⁰ Bill Heller, *Is a Foul a Foul?*, TRAINER 53 (2019), 22–28.

hand, Category 1 proponents laud the philosophy’s emphasis on rewarding the “best horse” and not assessing penalties for interference that has no effect on the outcome of the race.¹⁸¹ This is certainly the position of many commentators with respect to the 2019 Kentucky Derby. The argument goes that Maximum Security, one of the favorites, was the best horse on the day of the race and his victory should have stood; notwithstanding the interference, because it had no effect on the outcome of the race—Maximum Security would have won whether or not he bumped War of Will on the last turn.¹⁸² While this Note has declined to take any such position on the facts of the 2019 Kentucky Derby, the Author readily concedes that this interpretation of events is a reasonable one. That is, were the 2019 Kentucky Derby run in a Category 1 jurisdiction, it seems quite possible that Maximum Security’s victory would have stood.

Third and lastly, as stakeholders of Kentucky’s horse racing tradition, we have the option of doing absolutely nothing to amend the way fouls are adjudicated on the state’s race tracks. This option will appeal to those who believe that the Board of Stewards got the call right on the day of the race; that the replay clearly shows catastrophe was narrowly avoided, no thanks to the careless driving of Maximum Security by Louis Saez;¹⁸³ and that a foul is a foul, and this particular foul exists for good reason.¹⁸⁴ At least for Country House’s trainer, Bill Mott, there is no question that Maximum Security deserved to be disqualified: “If it was a maiden claimer on a weekday, the winner would come down, and it’s not supposed to matter—the Kentucky Derby or whatever it is. There’s a couple of riders that nearly clipped heels and went down in there.”¹⁸⁵ It has been almost a year since Maximum Security’s disqualification.¹⁸⁶ Perhaps it is best to let sleeping dogs lie.

Of course, that is not the position of this Note, even considering the issues posed by providing a right to review or the

¹⁸¹ THOROUGHBRED IDEA FOUND., *supra* note 166, at 9.

¹⁸² Andrew Beyer, *supra* note 63; Gentry Estes, *supra* note 81; Dan Wolken, *supra* note 85.

¹⁸³ Mary Papenfuss, *supra* note 62.

¹⁸⁴ Garrett Wymer, *supra* note 24.

¹⁸⁵ Jacob Bogage, *Kentucky Derby 2019: Why were objections raised after Maximum Security’s finish?*, THE WASHINGTON POST (May 4, 2019), <https://www.washingtonpost.com/sports/2019/05/05/kentucky-derby-why-were-objections-raised-after-maximum-securitys-finish/> [https://perma.cc/PL53-PA6Z].

¹⁸⁶ Francesca Paris, *supra* note 1.

other interesting possibilities for resolving contested horse races. The amendments to Kentucky's administrative regime for which this Note argues have the potential to increase transparency in the review process; improve public confidence in contest outcomes; and help stewards with what should be everyone's goal—making the right call.

III. CONCLUSION

The most fundamental question underlying this Note is straightforward: should horse racing participants be afforded a right to review the disqualification of their horses in contested finishes? This Note submits that participants should indeed have such a right. With the shortcomings of the 2019 Kentucky Derby in mind, as well as the success of other administrative regimes with review provisions, it is clear that the KHRC's regulatory framework is wanting.

Recall that Maximum Security, who won the race by almost two lengths,¹⁸⁷ was the favorite on the day of the Kentucky Derby;¹⁸⁸ that the crowded field of horses at Churchill Downs ran on a track that was wet and sloppy;¹⁸⁹ and that three stewards made the decision to disqualify after reviewing the three million dollar contest¹⁹⁰ for a total of twenty-two minutes¹⁹¹ and without even interviewing all of the participants involved.¹⁹² The KHRC then threw out the appeal filed by the Wests no more than two days after the race, citing Kentucky's state administrative regulation prohibiting review of racing stewards' on-the-track decisions.¹⁹³

This Note contemplated alternative administrative regimes in Canada and Louisiana, certain elements of which have

¹⁸⁷ Drape, *supra* note 4.

¹⁸⁸ Action Network Staff, *Updating 2019 Kentucky Derby Odds: Improbable, Maximum Security Co-Favorites*, ACTION NETWORK (May 4, 2019), <https://www.actionnetwork.com/horse-racing/2019-kentucky-derby-odds-favorite-longshots-game-winner-morning-line> [<https://perma.cc/MB6B-XBN5>].

¹⁸⁹ *The 145th*, *supra* note 30; Wilson, *supra* note 65.

¹⁹⁰ *The 145th*, *supra* note 30.

¹⁹¹ Hoppert, *supra* note 32.

¹⁹² Angst, *supra* note 89; Bill Finley, *Gaffalione: Stewards Never Spoke to Me*, THOROUGHBRED DAILY NEWS (May 5, 2019), <https://www.thoroughbreddailynews.com/gaffalione-stewards-never-spoke-to-me/> [<https://perma.cc/AL2L-3SPG>].

¹⁹³ PAULICK REP., *supra* note 5; 810 Ky. Admin. Regs. 4:060(4)(2) (formerly 810 Ky. Admin. Regs. 1:017(4)(2)).

the potential to mitigate many of the foregoing problems. Namely, providing horse racing participants the right to review their horse's disqualification would increase the transparency of the decision-making process; increase public confidence in the outcomes; and afford racing officials the best opportunity to make the correct call.

The upshot here is that Maximum Security is only the second Derby winner to ever be disqualified in the race's one-hundred-and-fifty-year history, and the first for a substantive violation.¹⁹⁴ Perhaps it is safe to assume that the Kentucky Derby will not be so controversial in the coming years. But the novelty of 2019's running should not be grounds for complacency. Failure to make the administrative changes argued for above, will only make it more likely in the future that stewards similarly mishandle horse racing contests.

¹⁹⁴ Story, *supra* note 11.