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A Threat to State Control of Horse Racing**

by

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Corrupt Horse Racing Practices Act of 1980: A Threat to State Control of Horse Racing

BY EDWARD S. BONNIE*

INTRODUCTION

The Corrupt Horse Racing Practices Act was introduced in both the United States Senate¹ and United States House of Representatives² on May 1, 1980. Its introduction surprised few people in the racing industry. In the spring of 1979, a bill entitled the Drug Free Horse Racing Act was being circulated in Congress by representatives of the Humane Society of the United States.³ This bill provided the inspiration and tone for the Corrupt Horse Racing Practices Act, if not the technical sophistication needed to draft a suitable bill. Even before the circulation of the 1979 Act, persons close to the pulse of the horse racing industry could easily read the signs of mounting pressure from humane groups, certain state racing commissioners and other private interest groups within the industry for changes in the medication rules of most racing states.⁴

This Article will trace the reasons for the introduction of the

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¹ S. 2636, 96th Cong., 2d Sess. (1980).

² H.R. 7254, 96th Cong., 2d Sess. (1980).

³ This 1979 bill, although circulated in Congress, was never introduced.

⁴ The frustrations of those who earnestly believed that the "control medication" rules implemented by most of the racing states were allowing owners, trainers and veterinarians to subject horses to inhumane treatment burst on the national scene in a segment of the CBS television show *Sixty Minutes* on May 13, 1979. Harry Reasoner presided over the 16-minute segment which featured jockeys, racing commissioners, chemists, horsemen's representatives and trainers. The segment shows excerpts from patrol films which pictured horses and jockeys falling during races and served to showcase the highly emotional medication issue. This segment on *Sixty Minutes* became the focal point for humane groups, many divergent interests within the federal and state bureaucracies and the conflicting interests within the horse business.

Corrupt Horse Racing Practices Act, analyze some of the legal implications of the passage of such an act and comment on the legal and legislative responses to the introduction of the bill.

I. BACKGROUND

The horse racing industry in the mid-1970s produced an interesting situation. Owners and trainers were striving for more racing opportunities for their horses in order to close the gap between their expenses and revenue. Increasing racing opportunities also were seen to be beneficial to the states in terms of increased revenues. These factors combined to prompt many state racing commissions, in an effort to increase how often a horse could race, to allow the use of certain medications on horses so long as they were therapeutic and protected "the integrity of horse racing, [guarded] the health of the horse, [and safeguarded] the interests of the public and the racing participants."⁵

While rules proposed by the National Association of State Racing Commissioners⁶ (NASRC) accepted the use of drugs such as butazolidin (phenylbutazone)⁷ and lasix (furosemide)⁸ as acceptable medication to keep the horse "athlete" at the race track, such use of medication on horses was not universally accepted. Keene Daingerfield, a leading authority in the horse industry, wrote on the problem of medication in the industry in 1976:

It was already a problem that demanded solution in 1932, when Harry Anslinger and the Federal Narcotics Bureau swooped down on race tracks in Illinois and Michigan to begin a process which has, for all intents and purposes, virtually

⁵ NATIONAL ASSOCIATION OF STATE RACING COMMISSIONERS, MEDICATION GUIDELINES (1974). For a brief discussion of the guidelines as they now exist, see note 94 *infra*.

⁶ The NASRC is an organization comprised of members of state racing commissions throughout the United States. Although uniform rules drafted and proposed by NASRC are only suggestions to state racing commissions, they represent trends in the industry's view of itself. NASRC rules are only effective to the extent they represent a consensus of opinions of the state-appointed racing commissioners who regulate pari-mutuel wagering on thoroughbreds, trotters, quarter horses, greyhounds and any other kind of racing on which wagering is legalized.

⁷ Phenylbutazone (butazolidin) is an anti-inflammatory drug which reduces pain of arthritic conditions by reducing swelling, inflammation and local fever.

⁸ Lasix (furosemide) is a diuretic agent which increases the amount of urine a horse will excrete.

eliminated the stimulation of race horses As a direct consequence of the events of 1932, racing overreacted, chemists were kings and the NASRC adopted at one time a uniform medication rule which would have limited a trainer's medicine chest to a bar of castile soap. Hysteria abated somewhat over the years, but the standard appeared to remain, "if it shows up, it's against the rules."⁹

The controversy regarding whether medications should be used on horses at all, and if so, which ones, continued unresolved through the late 1970s. The emphasis seemed to be on what drug could be banned rather than on what, in the eyes of some racing administrators, was an equally important issue:

In the final analysis, isn't integrity more compromised—or eroded—by an ostrich-like attitude, than by facing problems squarely? If we are truly concerned with the image of racing, we must concentrate more on the accurate detection of stimulants, depressants and tranquilizers; on possible transgressions stemming from multiple wagering; and on realistic punishments for these offenses. We are playing into the hands of our enemies when we equate administration of an anti-inflammatory or an inert substance, such as polyeythelenglycol, with that of a drug which can be intended only as a stimulant. Personally, I am more fearful of the dangers of splitting entries than those of splitting samples.¹⁰

Notwithstanding the fact that the controversy over the 1968 Kentucky Derby¹¹ made the chemist's "positive" identification of forbidden substances a matter of public record for the first time (through a highly publicized series of hearings and court confrontations), state racing commissions have generally not stepped up their research efforts to identify even the hard narcotics, tranquilizers, stimulants and depressants being used on racehorses to affect their performance.

⁹ Daingerfield, *Guest Editorial*, 1976 THOROUGHBRED RECORD 700.

¹⁰ *Id.*

¹¹ In the Kentucky Derby that year, Dancer's Image crossed the finish line first, ahead of Forward Pass. However, post-race drug testing revealed phenylbutazone in the urine of Dancer's Image, and the Kentucky State Racing Commission awarded first place money for the race to Forward Pass. These actions by the Racing Commission were held to be proper in *Kentucky State Racing Comm. v. Fuller*, 481 S.W.2d 298 (Ky. 1972).

At the same time that people from within the industry were expressing their concern, others were becoming involved in the medication debate. Organizations and individuals whose major interest was in protecting the well-being of animals became more aggressive and vocal in their resistance to the use of anti-inflammatory and analgesic drugs on horses. An example of this interest is the paperback book, *The Misuse of Drugs In Horse Racing*.¹² This book, which came to be known as the "yellow book" because of its distinctive yellow cover, became the Bible for those persons and organizations intent on removing all drugs from horse racing. Veterinarians at the annual meeting of the Association of Equine Practitioners in December of 1978, were urged by this author to heed the warnings expressed in the yellow book.¹³ Coincidentally, with the publication of the yellow book, groups representing both sides of the medication issue began appearing before state racing commissions and state legislatures presenting their views.¹⁴

The medication issue had been widely discussed and heavily argued when a *Sixty Minutes* segment focused on the use of medication at race tracks in May of 1979.¹⁵ During that same month, the bill referred to as the Drug-Free Horse Racing Act of 1979 was being circulated among members of the House of Representatives and the Senate.¹⁶ Leaders of American racing, most of whose interests were represented on the American Horse Council, immediately assembled and began an effort to develop an industry-wide consensus which would do two things: (1) eliminate the abuses of medication of horses, and (2) eliminate such

¹² R. BAKER, *THE MISUSE OF DRUGS IN HORSE RACING* (1978).

¹³ Address by Edward S. Bonnie, Association of Equine Practitioners Annual Meeting (Dec. 1978).

¹⁴ An example of these groups included local chapters of the Humane Society, which sought a change in the controlled medication rules that would prohibit all medication. Divisions of the Horsemen's Benevolent and Protective Association, an organization which represents most of the owners and trainers of thoroughbred horses in the United States, also appeared in opposition to the thrust of the humane interest groups.

¹⁵ The segment on medication and horse racing which appeared on *Sixty Minutes* on May 13, 1979 is discussed in note 4 *supra*. The humane groups involved in the medication issue at this time generally took credit for persuading the CBS television network to air the segment on *Sixty Minutes*.

¹⁶ Although that bill was never introduced in either body of Congress, it did inspire the Corrupt Horse Racing Practices Act of 1980.

abuses through action within the horse industry and state regulatory bodies.¹⁷

The actions of the humane groups in the 1970s culminated in the introduction of the bill now known as the Corrupt Horse Racing Practices Act of 1980 on May 1, 1980.¹⁸ No action was taken by the committees to which the bill was referred, and the bill was reintroduced in the House of Representatives in March of 1981 and in the Senate on April 29, 1981, without significant substantive changes.¹⁹ Since the bill's reintroduction and Senator Mathias' report and predictions with respect to the future of the bill,²⁰ every interest group in horse racing, including horse owners and trainers' groups, racing commissioners, racing chemists, veterinarians, humane groups and state legislative groups, have been hard at work trying to develop appropriate positions for the racing industry. What Senator Mathias referred to as a "small dark cloud on the horizon—the possibility of federal legislation on the problems of horse drugging"²¹ has become more than a "small dark cloud" and has demonstrated the abyss which separates wealthy horse owners and breeders from the one-horse owner, the well-to-do racing state from the less well-to-do, the showplace race tracks from the minor league operations and the wealthy states from those which closely scrutinize the budgets of every administrative agency (including racing commissions) and have no funds with which to improve their administrative efforts.

Medication issues have highlighted two threshold questions: (1) whether racing can be run by states or whether it needs federal intervention, and (2) "whether or not the interest groups within racing can compromise their views sufficiently to satisfy members of Congress that they need not extend the federal bureaucracy into horse racing in order to protect the horse racing participants and the public."²² The Senate held hearings on the

¹⁷ See AMERICAN HORSE COUNCIL, POSITION ON MEDICATION (June 5, 1979).

¹⁸ S. 2636, 96th Cong., 2d Sess. (1980); H.R. 7254, 96th Cong., 2d Sess. (1980).

¹⁹ S. 1043, 97th Cong., 1st Sess. (1981); H.R. 2331, 97th Cong., 2d Sess. (1981).

²⁰ Address by Senator Mathias, Jockey Club Round Table (Aug. 9, 1981).

²¹ *Id.*

²² *Id.*

Corrupt Horse Racing Practices Act on May 26, 1982.²³ House hearings on its version of the same bill were held on September 30, 1982.²⁴

II. THE FEDERAL-STATE RACING RELATIONSHIP

A. *The States' Traditional Role in Racing*

In the United States, twenty-nine states have pari-mutuel racing statutes permitting horse racing.²⁵ These statutes establish a racing commission, a regulatory agency which uses its own rules and administrative procedures or uses administrative procedures common to all state agencies.²⁶ Racing commissioners are appointed by the Governor²⁷ and have varying degrees of knowledge and skill in horse racing. Representatives of horse owners, jockeys and race tracks tend to have a strong influence on the view of each racing commission. The budgetary process for each racing commission has received increasing pressure and scrutiny from legislative subcommittees which are hard-pressed to find operating funds for agencies. Although every state racing commissioner wants to preserve his or her "turf," state racing commissions are finding it increasingly difficult to count on the kind of budgets which they need to protect the industry and the public. The medication issue is an example of this problem. Time and time again, racing commissioners are asked to provide funds

²³ *Corrupt Horse Racing Practices Act: Hearings on S. 1043 Before the Subcomm. on Criminal Law Justice, 97th Cong., 2d Sess.*, 128 CONG. REC. D680 (daily ed. May 26, 1982).

²⁴ *Corrupt Horse Racing Practices Act: Hearings on H.R. 2331 Before the Subcomm. on Criminal Law Justice, 97th Cong., 2d Sess.* 128 CONG. REC. D1311 (daily ed. Sept. 30, 1982).

²⁵ These states are Arizona, Arkansas, California, Colorado, Delaware, Florida, Idaho, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Washington, West Virginia and Wyoming. In addition to the 29 states listed above, pari-mutual wagering on horse races has just received voter approval in Minnesota and Oklahoma.

²⁶ See, e.g., CAL. BUS. & PROF. CODE § 19420 (West 1964); KY. REV. STAT. ANN. § 230.220 (Bobbs-Merrill Cum. Supp. 1980) [hereinafter cited as KRS]; N.J. STAT. ANN. § 5:5-22 (West 1973).

²⁷ See, e.g., CAL. BUS. & PROF. CODE § 19421 (West Supp. 1981); KRS § 230.220 (Cum. Supp. 1980); N.J. STAT. ANN. § 5:5-23 (West 1973).

for the detection of illegal drugs in horses and to study the pharmacological effects of drugs on horses. With only certain exceptions,²⁸ state legislatures and commissions have found little money to perform these tasks.

The quality of racing in each state varies as much as the economies of these states. The economic viability of racing in a given state is directly proportional to its demographics. The more people and industry, the more betting that will occur; thus, more money finds its way into the racing industry and its administrative agencies, thereby providing greater degrees of protection for the industry and its participants.

The rules for racing in New York or California, where the population demographics are imposing, or in Arkansas, which is an island of racing in a sea of non-racing and has only a limited number of racing days, are peculiarly susceptible to tough medication rules and their enforcement. Curiously enough, California is one of the leading proponents of "controlled medication."²⁹ Arkansas and New York are just as opposed to this practice.

Since race tracks have traditionally exerted tremendous influence on the decisions of state racing commissions and have underwritten substantially all the costs of chemical testing for prohibited drugs, as well as veterinarian inspection of horses, race tracks are loathe to give up their power position at the state level for a mere chance at controlling the federal bureaucracy in the same fashion. Horse groups have the same worries. The state racing commissioners see in the Corrupt Horse Racing Practices Act the death knell of their responsibilities and powers. Basic to the analysis of this issue is the question: Can the states regulate their individual problems better than a federal rule which mandates one position for all states regardless of their economic ability to subscribe to and enforce that rule? A corollary to this question is whether racing can or should exist which compromises in any significant manner the principle of "hay, oats and water" for all horses. A study commissioned by The Jockey Club in 1974 in-

²⁸ The major exceptions to this general rule are New York, Kentucky, California and Ohio.

²⁹ California is a distinct economic area which is self-sustaining with respect to horse population and large daily pari-mutuel handle and, thus, is largely uninfluenced and unaffected by other states' racing policies.

licated that seventeen out of ninety-four race tracks would go out of business by 1984.³⁰ This prediction is coming true even without any increased costs for drug testing and research and without federal intervention. The delicate condition in which the racing industry finds itself could be seriously affected by any additional economic burdens placed upon it.

B. *Precedents for Federal Involvement in Horse Protection*

In 1970, the Horse Protection Act³¹ was passed. This Act, as amended in 1976,³² was directed at the cruel and inhumane practice of "soring" horses in horse shows or sales,³³ which refers to a variety of methods and devices used to cause pain or inflammation in an effort to make the horse perform better. Soring became increasingly prevalent and flagrant during the 1960s. State and local laws and the industry's internal regulations did not, in the opinion of many interest groups,³⁴ adequately deal with the problem. Congress found that the practice of soring horses for the purposes of affecting their natural gait was cruel and inhumane³⁵ and that the movement of such horses in commerce adversely affected and burdened such commerce.³⁶ Congress further found that sored horses which moved in commerce competed unfairly with unsored horses.³⁷ The United States Department of Agriculture was delegated the authority and the responsibility for inspecting³⁸ and reporting violations of the law.³⁹ Both criminal⁴⁰ and civil penalties⁴¹ were specified in the Act and the

³⁰ THE JOCKEY CLUB, *THE FUTURE OF THOROUGHBRED RACING IN THE UNITED STATES* (1974).

³¹ 15 U.S.C. §§ 1821-31 (1976).

³² Act of July 13, 1976, Pub. L. No. 94-360 § 3; 1976 U.S. CODE CONG. & AD. NEWS (90 Stat.) 915.

³³ 15 U.S.C. § 1822(1) (1976).

³⁴ Among these interest groups were the Humane Society and the American Horse Protection Association.

³⁵ 15 U.S.C. § 1822(1) (1976).

³⁶ *Id.* § 1822(3).

³⁷ *Id.* § 1822(2).

³⁸ *Id.* § 1823(e).

³⁹ *Id.* § 1826.

⁴⁰ *Id.* § 1825(a).

⁴¹ *Id.* § 1825(b).

Department of Justice was given jurisdiction to prosecute wilful violations of the law.⁴² An interesting aspect of the Horse Protection Act is section 1829,⁴³ which states that the passage of the Act was not intended to occupy the field to the exclusion of any state laws on the same subject matter unless there is a direct and positive conflict.⁴⁴ The intent of Congress was to establish concurrent jurisdiction with the states over the issue of horse soring.⁴⁵ Modest sums of money were appropriated by Congress to carry out the purpose of this law in 1970.⁴⁶ These funds increased substantially in 1976.⁴⁷ To date, no reported case has challenged the interstate aspect of this law or any of its substantive provisions.⁴⁸

There are precedents in this country for federal involvement in racing itself. In 1978, the Interstate Horse Racing Act⁴⁹ was passed to regulate interstate commerce with respect to pari-mutuel wagering on horse racing.⁵⁰ The main purpose of the Act was

⁴² *Id.* § 1826.

⁴³ In full, 15 U.S.C. § 1829 (1976) provides:

No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any state on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together. Nor shall any provision of this chapter be construed to exclude the Federal Government from enforcing the provision of this Chapter within any State, whether or not such State has enacted legislation on the same subject, it being the intent of Congress to establish concurrent jurisdiction with the States over such subject matter. In no case shall any such State take any action pursuant to this section involving a violation of any such law of that State which would preclude the United States from enforcing the provisions of this chapter against any person.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ The amount to be spent in carrying out the law was not to exceed \$100,000 annually. See S. 2543, 91st Cong., 2d Sess. § 12, 1970 U.S. CONG. & AD. NEWS 1638 (1970).

⁴⁷ The amendment increased the appropriation to \$500,000 annually. See 15 U.S.C. § 1831 (1976).

⁴⁸ Although not challenged, the Act did activate those breed and discipline groups in the industry which could be affected by its provisions. Much of the emphasis of these groups was an attempt to get the proper language into the rules and regulations of the Act, the drafting of which is the prerogative of the Secretary of Agriculture. See 15 U.S.C. § 1828 (1976). These rules and regulations may be found at 9 C.F.R. §§ 11.1-12.10 (1982).

⁴⁹ 15 U.S.C. §§ 3001-07 (Supp. 1980).

⁵⁰ *Id.* § 3001(a)(2)-(3) & (b) (Supp. 1980).

to maintain stability of the horse racing industry.⁵¹ Congress found that the states still had the primary responsibility for determining what forms of gambling could legally take place within their borders,⁵² but that the federal government needed to prevent interference by one state with the gambling policies of another. In addition, Congress found that it should protect identifiable national interests⁵³ and regulate interstate commerce with respect to wagering on horse racing in order to further the horse racing and legal off-track betting industries in the United States.⁵⁴ Sanctions for a violation of the Act are in the form of liquidated civil damages.⁵⁵

That the racing industry would react negatively to the thought of federal intervention in medication issues within the pari-mutuel industry is interesting in light of its enthusiasms for and acceptance of the Interstate Horse Racing Act of 1978. Admittedly, the problem of interstate gambling is a classic interstate commerce activity and, therefore, easily lends itself to federal regulation. However, the purposes behind the Interstate Horse Racing Act of 1978 and the Corrupt Horse Racing Practices Act of 1980 are essentially the same: to maintain the stability of the horse racing industry.⁵⁶

C. *Precedents for Federal Non-Involvement in the Horse Business*

Effective April 17, 1973, the National Labor Relations Board (NLRB) adopted a "rule" that it would not assert jurisdiction over the horse racing industry.⁵⁷ This "rule" followed a long series of cases in which the NLRB refused to assert jurisdiction

⁵¹ *Id.*

⁵² *Id.* § 3001(a)(2).

⁵³ *Id.*

⁵⁴ *Id.* § 3001(b).

⁵⁵ *See id.* § 3005. Criminal penalties were considered for the Act but received strong objections from groups within the racing industry and from the off-track betting industry. The Act as passed does not include criminal penalties. The criminal sanctions in the Corrupt Horse Racing Practices Act are sure to be similarly attacked.

⁵⁶ *Compare* 15 U.S.C. § 3001(a)(2)-(3) and (b) (Supp. 1980) with S. 1043, 97th Cong., 1st Sess. § 2 (1981).

⁵⁷ NLRB, RULES & REGULATIONS O.R. § 103.3 (Series 8 as amended 1979).

over the industry.⁵⁸ The general basis upon which jurisdiction was not asserted over the racing industry is as follows:

(1) The effect of labor disputes is not substantial enough to warrant jurisdiction although operations in the racing industry “affect commerce;”⁵⁹

(2) The various employees and other participants are licensed and highly regulated by the individual states,⁶⁰ and

(3) Regulation of labor’s disputes should be left to the states because of their interests in uninterrupted operations at race tracks and the revenues derived from them.⁶¹

The rationale of the NLRB has been summarized as follows:

Horseracing as it now exists is a state-created monopoly, subject as such to extensive local regulation. Practically every individual working at a track, including grooms and exercise boys, the employees involved in these proceedings, must be licensed by state regulatory authorities. Because of the important revenue derived from racing activities, state governments have a strong interest in insuring uninterrupted operations at race tracks. This interest extends not only to the tracks but to the owners and trainers of horses without whom tracks could not operate. Consequently, unless the hands of state authorities are tied, no labor dispute in this industry is likely to be permitted to last sufficiently long to interfere seriously with interstate commerce. We believe that, because of the unique nature of the racing industry, the regulation of labor matters governing employees should be left to the states, which under Section 14(c)(2) are in a position to assume jurisdiction if the Board declines to do so *The fact that the employees involved move across state lines is not alone sufficient to justify the Board in asserting jurisdiction.* It still remains true, in our opinion, that a labor dispute in this industry is not likely to have very serious repercussions on interstate commerce, and it is the latter factor which is determinative of a decision whether

⁵⁸ See *Yonkers Raceway, Inc.*, 196 NLRB 373 (1972); *Centennial Turf Club, Inc.*, 192 NLRB 698 (1971); *Walter A. Kelly*, 139 NLRB 744 (1962); *Meadow Stud, Inc.*, 130 NLRB 1202 (1961); *Hialeah Race Course, Inc.*, 125 NLRB 388 (1959); *Pinkerton’s National Detective Agency*, 114 NLRB 1363 (1955); *Los Angeles Turf Club, Inc.*, 90 NLRB 20 (1950).

⁵⁹ 196 NLRB at 373; 192 NLRB at 698; 129 NLRB at 747; 125 NLRB at 390.

⁶⁰ 192 NLRB at 698; 139 NLRB at 747; 125 NLRB at 390-91.

⁶¹ 139 NLRB at 747.

to assert jurisdiction. Moreover, the employees involved are already licensed and regulated by every state in which they work. To subject other aspects of their relationship to possible multistate regulation would therefore be merely to follow a pattern which already exists and to which the employers presumably have accommodated themselves. *Finally, the Board's declination of jurisdiction is not irrevocable. If the Board's expectations are not realized, it will not hesitate to reconsider its policy in this area.*⁶²

So, Congress, federal agencies and the racing industry all appear to be dancing to different tunes on different days of the week. Although the legal profession can logically and plausibly trace distinctions for the differences in approach depending upon the issue, the threshold issues appear to be economic and political rather than legal.⁶³

III. THE BILL ITSELF

The Corrupt Horse Racing Practices Act of 1980 talks tough and is tough. It finds that the practice of drugging or numbing a race horse prior to a horse race corrupts the integrity of the sport,⁶⁴ promotes criminal fraud,⁶⁵ misleads the wagering public and horse purchasers,⁶⁶ poses an unreasonable risk of serious injury to riders,⁶⁷ is cruel and inhumane to the horse⁶⁸ and that such

⁶² *Id.* (footnotes omitted; emphasis added).

⁶³ Until recently, it may have been arguable whether the proposed Corrupt Horse Racing Practices Act of 1980 exceeded congressional power under the commerce clause of the United States Constitution because it directly displaced the state's freedom to structure integral operations in areas of traditional state governmental functions. *See* U.S. CONST. art. 1, § 8, cl. 3; U.S. CONST. amend. X. However, in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), the United States Supreme Court held that a tenth amendment challenge to the Surface Mining and Reclamation Act of 1977 failed for lack of a showing that the challenged statute regulates the "states as states." The Court in *Hodel* clearly stated that legislation aimed at the activities of private individuals and businesses, without requiring the states to expend any state funds or participate in the federal regulatory program, is immune from a tenth amendment challenge. *See id.* at 283-93.

⁶⁴ S. 1043, 97th Cong., 1st Sess. § 2(1)(A) (1981).

⁶⁵ *Id.*

⁶⁶ *Id.* § 2(1)(B).

⁶⁷ *Id.* § 2(1)(C).

⁶⁸ *Id.* § 2(1)(D).

acts adversely affect and burden interstate commerce.⁶⁹

The bill prohibits the administration of any substance "foreign" to the natural horse prior to a race.⁷⁰ It requires pre-race blood testing of all horses in all races,⁷¹ a physical examination of each horse one hour before a race,⁷² and the analysis of urine and blood samples taken after every race,⁷³ as well as the storing of frozen samples for future analysis.⁷⁴ There are criminal⁷⁵ and civil⁷⁶ penalties, including prison terms for trainers, race track operators and, under certain circumstances, even an owner who isn't near the horse at the time in question. The fines range up to a maximum of \$10,000 for a first offense⁷⁷ and up to \$25,000 for subsequent convictions.⁷⁸

The disqualification provisions are just as onerous, with offenders being disqualified from entering horses in races for substantial periods of time for the first offense⁷⁹ and five years for a second.⁸⁰ Horses involved in drugging cases also are given substantial suspensions.⁸¹ Responsibility for enforcement is given to the Administrator of the Drug Enforcement Administration (DEA) of the Department of Justice.⁸² Unlike the Horse Protection Act which now has an annual budget of only \$500,000,⁸³ the initial appropriation for the Corrupt Horse Racing Act is \$5 mil-

⁶⁹ *Id.* § 2(2).

⁷⁰ Drugging or numbing of a horse with the belief it will be entered in a race is prohibited. *Id.* § 3(2). "Drugging" is defined as the administering of a substance foreign to the natural horse prior to the start of a race. *Id.* § 1(2). Entering a horse in a race knowing it has been drugged or numbed is also prohibited. *Id.* § 3(1).

⁷¹ *Id.* § 5(a)(1).

⁷² *Id.* § 5(a)(2).

⁷³ *Id.* § 5(a)(3).

⁷⁴ *Id.* § 5(a)(5).

⁷⁵ *Id.* § 4(a).

⁷⁶ *Id.* § 4(c).

⁷⁷ *Id.* § 4(a)(1)(A).

⁷⁸ *Id.* § 4(a)(1)(B).

⁷⁹ The disqualification period for a first offense may be up to one year. *Id.* § 4(b)(1).

⁸⁰ *Id.* § 4(b)(2).

⁸¹ *Id.* § 4(d). Suspension of horses is for six months for the first infraction and for up to 12 months for subsequent infractions. *Id.* § 4(d)(1).

⁸² Authority under the Act is given to the "Administrator," see *id.* § 4(g), which is defined as the Administrator of the Drug Enforcement Administration, Department of Justice. *Id.* § 1(1).

⁸³ See 15 U.S.C. § 1831 (Supp. 1980).

lion.⁸⁴ After the second year, the DEA is directed to assess tracks a fee for each day of racing in order to provide funds for enforcement and research⁸⁵ with the DEA given full authority to set the fee schedules.⁸⁶ Tracks are required to provide facilities and will be subject to many requirements which will be determined by the DEA.⁸⁷

The legislation provides that the Administrator may exempt any state from the operation of the Act if there is a finding that the state has enacted and put into operation a "comparable program to prohibit the drugging and numbing of race horses."⁸⁸ In determining whether the state program is comparable, the Administrator will examine the practices prohibited by state law, the inspections and tests required and the penalties imposed.⁸⁹

The political climate in Washington⁹⁰ makes any detailed, technical analysis of the bill difficult. The discussion before the Judiciary and Commerce Committees of the House and Senate on such complicated issues as the quantitative and qualitative chemical analysis of urine and blood and the pharmacological effects of certain therapeutic drugs which groups in the racing industry believe should be permitted in horses will be difficult. In addition, the votes of members of these subcommittees who have no racing in their states are "throw aways." A practical consideration to be remembered is that a great many more bettors vote than do members of the industry. To the extent that bettors may feel they have been "stiffed" at the track and that horse drugging may be at the bottom of it, the industry's ability to get the ear of Congress is made more difficult.

As of the date of this writing, few, if any, interest groups in the industry have focused on the many legal or administrative is-

⁸⁴ S. 1043, 97th Cong., 1st Sess. § 9 (1981).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* § 5(d).

⁸⁸ *Id.* § 7.

⁸⁹ *Id.*

⁹⁰ Among the activities in Washington concerning this bill have been repeated presentations of the *Sixty Minutes* segment on drugging in the horse racing industry, discussed in note 4 *supra*, and press conferences held in the Capital by members of the Board of the American Horse Protection Association and the Coalition for Drug-Free Horse Racing.

sues involved in federal intervention in racing. No one has questioned the government's staff capacity to detect the use of drugs in horse racing or its ability to solve problems in the industry. Many issues must be answered: Should the federal Administrator work jointly with the state racing officials and disqualify state licensed individuals for federal, criminal and civil violations? Should there be state licenses with state suspension and revocation procedures as well as federal? What about joint responsibility, joint control or the possibility of a bureaucratic nightmare?

The enforcement problems of a rule which bans "any substance foreign to the natural horse" has been addressed. A Florida court has already declared a similar portion of the new Florida medication rule unconstitutional.⁹¹ Again, will the courthouse or Congress be the effective battleground on this bill?

IV. INDUSTRY REACTION TO THE BILL

Within thirty days after the distribution by lobbyists for the Humane Society of the United States and other humane groups of their "draft bill" to members of Congress in May of 1979, the American Horse Council called a meeting among leaders of all segments of racing and adopted a position on the medication of race horses.⁹² This action by the American Horse Council provided the necessary leadership for the horse industry to reach its own solution to the pressing problem of medication abuses. Since that summer meeting in Washington in 1979, a wide variety of other horse interest groups⁹³ have spent weeks and months developing their own positions on the medication issue and negotiating with the other interest groups in an effort to develop a consensus which would forestall the congressional hearings or effec-

⁹¹ See *Simmons v. Division of Pari-Mutuel Wagering*, 412 So. 2d 357 (Fla. 1982). For a discussion of the *Simmons* decision, see text accompanying notes 98-106 *infra*.

⁹² See AMERICAN HORSE COUNCIL, POSITION ON MEDICATION (June 5, 1979).

⁹³ Besides the American Horse Council, other horse interest groups which have developed positions on the medication issue include the National Association of State Racing Commissioners, the Thoroughbred Owners and Breeders Association, the American Association of Equine Practitioners, the Jockeys' Guild, the Thoroughbred Racing Association, the American Quarter Horse Association, the United States Trotting Association, the Harness Horsemen's International and the Horsemen's Benevolent and Protective Association.

tively answer the questions raised.

The interest groups with both the greatest responsibility for racing medication rules and the most to lose if federal intervention becomes a reality are the state racing commissions. These groups have demonstrated their inability to develop sufficient financial resources to fund racing laboratories capable of finding the drugs which even the "permissive" medication rules forbid. On the other hand, the NASRC has taken aggressive action to develop medication guidelines for adoption by each of its twenty-nine states.⁹⁴ These minimum guidelines, if adopted by all the individual state commissions, would meet Senator Mathias' criteria for non-federal intervention.⁹⁵ Unfortunately, several states which passed the basic NASRC rule forbidding "any substance foreign to the natural horse" have left out detailed requirements for racing soundness examinations, drug testing and quality assurance programs, race track safety requirements, split sample requirements and pre-race blood tests.

To date, only the New York rules⁹⁶ comply generally with the guidelines set out by the NASRC and include pre-race blood testing and a limited quality assurance program. Arkansas has a medication rule which adheres to NASRC guidelines,⁹⁷ but it does not have pre-race blood testing or a quality assurance program.

The states are in a difficult situation. Medication rules, regardless of their strictness, are valueless to achieve the end desired by the NASRC or the Corrupt Horse Racing Practices Act

⁹⁴ See NATIONAL ASSOCIATION OF STATE RACING COMMISSIONERS, MEDICATION GUIDELINES (1981). Under the NASRC Guidelines, "[n]o horse participating in a race shall carry in its body any foreign substance" *Id.* at rule 1.03. "Foreign substances" is defined as "all substances except those which exist naturally in the untreated horse at physiological concentration." *Id.* at rule 1.02(b).

Every horse entered to race must be examined by a veterinarian for racing soundness and health on race day, not later than two hours before post time of the first race. *Id.* at rule 1.06. Every horse which suffers a breakdown must undergo a postmortem examination. *Id.* at rule 1.07.

⁹⁵ Senator Mathias' criteria for non-federal intervention is set forth in text accompanying note 22 *supra*.

⁹⁶ See NEW YORK STATE RACING AND WAGERING BOARD, THOROUGHBRED RULES pts. 4012 and 4043 (1982).

⁹⁷ See ARKANSAS STATE RACING COMMISSION, RULES AND REGULATIONS GOVERNING HORSE RACING IN ARKANSAS rules 1215-18 (1980).

unless monitored by appropriate quality assurance and testing programs. Without such monitoring, any rule restricting the use of medication on horses will only penalize the honest owner, trainer and veterinarian. Because of the enormous cost of bringing racing laboratories up to acceptable levels of competence, most racing states have been reluctant to adopt the quality assurance program and rule recommended by the NASRC. Unfortunately, even the NASRC quality assurance program will not adequately monitor the ability of the state testing laboratories.

Needless to say, the pre-race veterinary examination and race track safety rules which will require substantial financial commitments by race tracks have received less than favorable acceptance at the state level. The lack of consensus within the racing industry has been demonstrated in a number of ways:

(1) Failure to pass the complete NASRC medication guideline package;

(2) Legal attacks on the NASRC recommended guidelines;

(3) Legislative action at the state level, including legislative resistance to rule change recommendations by racing commissions;

(4) Legislatively described medication rules and legislatively decreed and mandated drug research fundings, and

(5) State executive orders returning racing commission rules for further study.

Among the legal attacks on medication rules based upon the NASRC guidelines, a Florida decision⁹⁸ interpreting the new Florida medication rule⁹⁹ is the most significant ruling because it

⁹⁸ *Simmons v. Department of Pari-Mutuel Wagering*, 407 So. 2d 269 (Fla. Dist. Ct. App. 1981), *aff'd*, 412 So. 2d 355 (Fla. 1982). In affirming the intermediate appeals court's decision, the Florida Supreme Court expressly adopted the reasoning of the lower court. *See* 412 So. 2d at 359. Therefore, references to the case will be to the opinion of the Florida District Court of Appeals.

⁹⁹ The statute involved was FLA. STAT. ANN. § 550.241 (West Supp. 1981), which provides in part:

(1) The racing of an animal with any drug, medication, stimulant, depressant, hypnotic, narcotic, local anesthetic, or any drug-masking agent or any substance foreign to the natural horse or dog is prohibited Rules may be promulgated which identify:

(a) Unacceptable levels of substances existing naturally in the untreated dog or horse but at abnormal physiological concentrations; or

bears specifically on the definition of substances forbidden by the Corrupt Horse Racing Practices Act.

In *Simmons v. Department of Pari-Mutuel Wagering*,¹⁰⁰ Florida's medication rule¹⁰¹ was challenged as authorizing an unconstitutional taking of property without just compensation, as being an invalid exercise of police power because it was not rationally related to the purpose of regulating racing, as being an improper delegation of legislative authority to the Division of Pari-Mutuel Wagering and as being too vague. The court found the prohibition of racing an animal while drugged to be rationally related to the prevention of the drugging of race horses, a valid state purpose,¹⁰² and that the prohibition was a reasonable means to achieve that purpose.¹⁰³ However, the court held that the prohibition of "any substance foreign to the natural horse or dog" not to be rationally related to the purpose and thus unconstitutional.¹⁰⁴ The court explained its holding as follows:

To prohibit "any substance foreign to the horse" is to prohibit everything, the helpful and the harmful, the beneficial and the detrimental, the benign or the deleterious. When measured against the articulated reasons for the enactment of the statute, that part of the statute banning *any* foreign substance cannot be said to bear a fair and substantial relationship to the objectives sought.¹⁰⁵

The court in *Simmons* found the remainder of the drug rule passed by the Division of Pari-Mutuel Wagering to be valid.¹⁰⁶ These validated portions of the rule, however, did not represent any change in the pre-existing prohibitions against medication. The "any foreign substance" did represent such a change, and it

(b) Acceptable levels of trace elements or innocuous substances in test samples.

¹⁰⁰ 407 So. 2d at 269.

¹⁰¹ FLA. STAT. ANN. § 550.241 (West Supp. 1981). The pertinent part of the statute is set out in note 99 *supra*.

¹⁰² 407 So. 2d at 270.

¹⁰³ *Id.* at 271.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 271-72.

¹⁰⁶ *Id.* at 272.

was held unconstitutional. While trial courts in Arizona,¹⁰⁷ Illinois¹⁰⁸ and Ohio¹⁰⁹ have affirmed the validity of language similar to the language found unconstitutional in *Simmons*, none have dealt with the same specific issues. *Simmons* represents the only decision by a state's highest court involving an interpretation of language contained in the Corrupt Horse Racing Practices Act of 1980, and places the validity of the definition of forbidden substances within the Act in serious question.

New medication rules which were designed to head off any federal intervention prompted by the Corrupt Horse Racing Practices Act of 1980 were not successful for other reasons in Kentucky and California. The proposed rules in both states generally followed the NASRC guidelines, and both were rejected by the legislative subcommittees charged with the responsibility of reviewing all regulations filed by an administrative agency.¹¹⁰ The rejection of the proposed rules in Kentucky prevented a change in Kentucky's medication rules as of 1982.¹¹¹ In addition, the Kentucky legislature in 1982 passed an omnibus racing bill.¹¹² One of its provisions¹¹³ establishes a panel of experts to advise the racing Commission on medication regulations.¹¹⁴ Another provides that funds from one-tenth of one percent of the total handle, deducted from the state's share of the takeout, be di-

¹⁰⁷ See *Arizona Div., Horsemen's Benevolent and Protective Ass'n v. Arizona*, No. C444265 (Super. Ct. of Maricopa Co.).

¹⁰⁸ See *Horsemen's Benevolent and Protective Ass'n v. Racing Bd.*, No. 81-L-3268 (Cook Cir. Ct. 1981).

¹⁰⁹ See *Horsemen's Benevolent and Protective Ass'n v. Ohio State Racing Comm.*, 81-AP-638 (Franklin County Ct. App. 1981).

¹¹⁰ In Kentucky, the body charged with that responsibility is the Administrative Regulation Review Subcommittee. See 1 KY. ADMIN. REGS. 1:010(5) (1982).

¹¹¹ The constitutionality of such action by a legislative subcommittee in Kentucky has been drawn into question by a recent decision of the Franklin Circuit Court. In *Legislative Research Comm. v. Brown*, No. 82-CI-0780 (Franklin Cir. Ct. Nov. 3, 1982), the granting to the legislative branch of the power to review proposed regulations of executive administrative agencies was held to be unconstitutional as violating the separation of powers between those branches of government. The case has been appealed directly to the Kentucky Supreme Court. See *Legislative Research Comm. v. Brown*, No. 82-CI-0780 (Franklin Cir. Ct. Nov. 3, 1982), *appeal docketed*, No. 82-SC-896 (Ky. Nov. 15, 1982).

¹¹² 1982 Ky. Acts ch. 100.

¹¹³ KRS § 230.265(1) (Interim Supp. 1982).

¹¹⁴ *Id.* § 230.265(2).

rected to medication research and development.¹¹⁵ The expert panel is to report to the 1984 General Assembly any needed changes in Kentucky's medication rules.¹¹⁶ The passage of this bill raises many questions, including whether it prohibits any interim changes in Kentucky medication rules and whether it is an illegal attack on the executive branch's rule-making authority.

Several years ago, New York, sensing the serious problems racing had with respect to the positive identification of drugs in horses, adopted its own quality assurance and research program.¹¹⁷ Its budget for drug testing, laboratory expenses, research and sample collection in 1981 was \$2,779,772.¹¹⁸ Its testing laboratory and research center at Cornell University has provided much of the test confirmation work for other states. Unfortunately, New York's attention to this issue has not been uniformly accepted.

The remaining racing states, for a variety of reasons, many of which are economic, cannot afford to have a full testing program, or the race tracks or horse owners cannot afford to race under the stringent requirements of the NASRC guidelines. So the dialogue between horse owners, race tracks, horse organizations and racing commissions goes on under the continuing threat of hearings and ultimate passage of the Corrupt Horse Racing Practices Act.

CONCLUSION

As each month and year since the spring of 1979 has passed, the pendulum which swung to permit the use of any medication on horses up to race day in the twenty-nine racing jurisdictions has swung back to a "hay, oats and water" rule. All of the states and interest groups have recognized that racing's future as a state

¹¹⁵ *Id.* § 230.265(3). Based upon the total handle in Kentucky during recent years, this amount would be over \$200,000 annually.

¹¹⁶ *Id.* § 230.265(2).

¹¹⁷ New York's program is outlined in NEW YORK STATE RACING AND WAGERING BOARD, DRUG TESTING AND RESEARCH PROGRAM (1981).

¹¹⁸ Expenditures for similar work by other racing states show a wide variance in dollars allocated to prohibit the illegal medication of horses, regardless of the size of the racing industry in a given state. See National Ass'n of State Racing Comm'rs, Bulletin Vol. 48, No. 36 (Sept. 9, 1982).

oriented and operated industry is in jeopardy unless they can compromise their differences on medication issues in a fashion which will satisfy congressional representatives. None of the groups is optimistic enough to believe that any of their compromises will be acceptable to the coalition of humane groups.

A few conclusions can be distilled from the intra-industry struggles of the last two years. The racing industry does not want federal legislation in the area of racing medication. Racing medication will not be resolved on a uniform national basis. States and the horse owners and tracks within the states have such dramatically different economic positions that the ability to persuade all states to adopt the same rule is an exercise in futility. If a federal medication rule such as that embodied in the Corrupt Horse Racing Practices Act of 1980, was enforced, the increased costs would mean the demise of many medium and small race tracks within each state. Even without considering the substantial increases in the costs to race tracks occasioned by DEA enforcement of the Act, the rule proposed by the Corrupt Horse Racing Practices Act is unenforceable and would only serve to promote the interests of those participants in racing who would cheat the public and each other by using undetectable drugs on horses to affect their performance in races.

Finally, the spectre of federal intervention has forced the diverse interests and views in the racing industry to moderate their positions in an effort to reach a consensus on a medication rule which can be presented to Congress as an acceptable means of protecting the horse, the public, jockeys and the integrity of the industry. Some states will desire to impose more stringent rules, but most, if not all, states will have to accept a minimum rule. If the danger is apparent enough, the parties will forge a compromise measured by what each party has to lose by federal intervention.