2009

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THE DARK HORSE OF DRUG ABUSE: LEGAL ISSUES OF ADMINISTERING PERFORMANCE-ENHANCING DRUGS TO RACEHORSES

I. Introduction

"Could you imagine different human athlete drug policies for teams in different states in the National Football League or National Basketball Association?"

On June 22, 2007, the Kentucky Horse Racing Authority ("KHRA") searched the stables of trainer Patrick Biancone and found vials of cobra venom, a Class A drug. This was not the first time that horseracing authorities caught a prominent trainer with performance-enhancing drugs. National horseracing authorities are increasingly concerned with steroid abuse, thanks in part to the


2. See Marty McGee, Cobra Venom Said to be in Biancone Barn, ESPN.COM, July 4, 2007, http://sports.espn.go.com/sports/horse/news/story?id=2926083 [hereinafter McGee, Cobra Venom] (reporting on Biancone's pending hearing). Kentucky authorities searched Biancone's barn after one of his horses tested positive for a derivative of caffeine and a derivative of an inhalant, both banned substances from Kentucky horseracing. See id. Biancone denied that he put the cobra venom in the stable, but settled with the KHRA on the penalty: one-year suspension from racing in Kentucky beginning November 1, 2007, though he can still collect prize money from horses already entered under his name and can race in other states. See Trainer Barred, N.Y. TIMES, Oct. 19, 2007, at D4 (describing terms of Biancone's suspension). A Class A drug is defined as a drug that is likely to alter a horse's performance, has no therapeutic value and is not approved by the Food and Drug Administration. See 810 KY. ADMIN. REGS. 1:028 (2007).

3. See Leading Horse Trainers Todd Pletcher and Scott Lake Suspended for Illegal Drug Use, HORSE RACING NEWS, Jan. 5, 2007, http://www.horseracingnews.net/horse-racing-industry/leading-horse-trainers-todd-pletcher-and-scott-lake-suspended-for-drug-use.php [hereinafter Leading Horse Trainers] (describing several trainers accused of administering banned drugs to horses). In 2005, Rick Dutrow violated two rules on drugs in New York and the New York State Racing and Wagering Board suspended him for 120 days, which was later reduced to sixty days. See id. Bobby Frankel's horse tested positive for morphine in California in 2000, but Frankel's case was dismissed in 2006. See id. Steve Asmussen's horses failed a drug test in Louisiana and in New Mexico, each violation carrying a potential six-month suspension. See id. In 2006, Scot Lake was suspended for thirty days for a
unflattering attention from Congress on Major League Baseball. In fact, members of the National Thoroughbred Racing Association have approached the United States Congress with a model statute regulating steroid use in horseracing in order to deflect a blanket ban on steroids. Ultimately, however, each state's horseracing agency is responsible for regulating performance-enhancing drug use in horseracing.

Predicting how each of the individual state agencies will respond to the model statute is difficult because of their disparate treatment of violations. Additionally, horseracing agencies have gained a reputation for lax enforcement of their doping rules. Often the penalties are not enough to deter trainers, veterinarians and owners from administering illegal drugs to their horses, largely because of the stiff competition and enormous investments of time and money in racehorses.

drug violation in New York while he was serving a thirty-day suspension for drug violations in Delaware. See id.


5. See id. (reporting NTRA's lobbying of Congress). The National Thoroughbred Racing Association controlled the preemptive approach of Congress, hoping that news of steroid regulation within the horseracing industry would deflect Congressional meddling. See id.

6. See id. (noting that each horseracing state is responsible for its own regulations). Some states have already adopted regulations on steroids that will ban their use on race day. See id.

7. See id. (discussing how each state has varying sanctions for illicit drug use). Different state agencies differ in how long to ban steroids before a race, ranging from 45-120 days. See also Tom LaMarra, Cohesive Rules for Racehorse Steroids Sought, The Horse, Jan. 11, 2008, http://www.thehorse.com/ViewArticle.aspx?ID=11151 (reporting on view that regulations on steroids need to be national). Horses travel state to state to race in competitions, so a uniform rule that all states implement could focus more on the policy behind banning steroid use than on penalizing trainers. See id. Alan Foreman, CEO of the Thoroughbred Horsemen's Association, said, "I believe there is a growing sense [the horseracing industry] need[s] a coordinated approach." Id.

8. See Heller, supra note 1 (noting administration of drugs epogen and Lasix to horses was not always public); see also Leading Horse Trainers supra note 3 (listing several trainers with relatively light or no sanctions).

9. See Andrew Beyer, A Beyer's Guide for Racehorses, WASH. POST, June 3, 2003, D01 (examining investments in racehorses). Racehorses can sell at auction for more than a million dollars, and the average upkeep for a racehorse is between $30,000 and $50,000 per year. See id. Furthermore, the average earnings for an American racehorse are only about $16,000. See id.; see also John Worden, They Sue Horses, Don't They?: Understanding Equine Law, 26 SAN FRANCISCO ATT'Y 22, 22 (2000) (noting both owners and bettors invest significant amounts of money in horseracing). "In no other business pursuit are hundreds of thousands and even millions of dollars won, lost, awarded, and forfeited based on the extremely
This article will explore the history of performance-enhancing drugs in horseracing and evaluate the current status of horseracing drug statutes.10 Section II examines the different elements that affect drug usage in horseracing, including agencies, penalties, permissible drugs, betting and the model steroid rule.11 Section III proposes three different remedies to effectuate uniformity in implementing a steroid regulation and deterring drug use generally.12 Section IV concludes that the optimal solution requires the establishment of a national horseracing organization comprised of state agencies as members.13

II. BACKGROUND

Horseracing's permissive stance on gambling is unique in the sporting world.14 While this distinction has created a reputation for corruption, many people involved in horseracing have strived to shake that unfavorable image of the industry.15 Nevertheless, many owners and trainers view their racehorses as investments and will do anything to get ahead in the sport, including administering performance-enhancing drugs to their horses to gain a competitive advantage.16 Generally, people view the use of performance-enhancing drugs as both animal abuse and cheating, and thus state agencies ban the use of many drugs on horses and perform drug

mercurial nature of 1,200-pound investment vehicles running on legs more slender than the average human’s.” Id. Worden also reflects on the typical investor changing from middle class individuals to corporate entities. See id. Investors can even look to NASDAQ and NYSE for stocks dedicated to owning, racing and breeding horses. See id.

10. For a further discussion of the history of drugs in racing and a comparison of state regulations, see infra notes 14-85 and accompanying text.

11. For a further discussion of how the different elements of racing interact, see infra notes 14-85 and accompanying text.

12. For a further discussion of the constitutionality of agency regulation, see infra notes 86-167 and accompanying text.

13. For a further discussion of how the options compare, see infra notes 168-86 and accompanying text.


15. See Joe Drape, At the Derby, Racing Takes on Its Drug Problem, N.Y. TIMES, May 12, 2005, at A1 (comparing performance-enhancing drugs in horseracing to other sports). In sports like cycling and baseball, drug use does not directly affect fans' wallets. See id. In horseracing, however, people have bet billions of dollars on their favorites. See id. The former executive director of KHRA, Jim Gallagher, commented, "Now it's more important than ever we make people know that we are doing everything in our power to protect the integrity of the game." Id.

16. See id. Dr. Scot Waterman, executive director of the Racing Medication and Testing Consortium, said that only a "small percentage push [ ] the envelope" and administer performance-enhancing drugs to their horses. Id.; see also Beyer, supra note 9 (describing high costs and average low returns of owning racehorse).
tests both before and after the races, even searching the stables for drug paraphernalia. Moreover, trainers are held absolutely liable for any positive indication of drugs, though a horse that tests positive for performance-enhancing drugs after a race keeps its finishing place due to the nature of the parimutuel betting system.

This Section will detail the history of agency regulation of horseracing, including examining challenges to the agency scheme as a whole and inquiring why trainers are held absolutely liable for drugging their horses. Further, it will discuss the issue of sanctions imposed for drug violations. The following section discusses other permissible and impermissible drugs and their effects on racing. Additionally, this section explores the parimutuel betting system and its effect on penalties, followed by the model steroid rule proposed by the Racing Medication and Testing Consortium and the Association of Racing Commissioners International.

A. Horseracing Agencies

Each state regulates its own horseracing industry through specialized agencies, which in turn derive their power from that state’s legislature. The various state horseracing agencies have a

17. See Drape, supra note 15 (describing procedures at Kentucky Derby). For the first time in 2005, Derby winners were subject to a “super test,” which tested for hundreds of different substances. Id. Additionally, racing authorities tested the horses before the race for alkalizing agents, often called milkshakes. See id. Another example includes when authorities found vials of cobra venom in Biancone’s stables. See McGee, supra note 2 (reporting Biancone’s pending hearing).


19. For a further discussion of agencies regulating the horseracing industry, see infra notes 23-37 and accompanying text.

20. For a further discussion of penalties for drug violations, see infra notes 38-45 and accompanying text.

21. For a further discussion of what drugs are administered to horses, see infra notes 46-67 and accompanying text.

22. For a further discussion of parimutuel betting and the model steroid rule, see infra notes 68-85 and accompanying text.

23. See, e.g., 810 KY. ADMIN. REGS. 1:002 (setting out power of stewards of KHRA). “There really is no body of law dedicated exclusively to adjudicating disputes relating to horses and horseracing.” Worden, supra note 9, at 22 (providing overview of equine law).

24. See Worden, supra note 9, at 22 (using California law as example of regulation). Nonetheless Congress does have a hand in regulating the parimutuel betting scheme. See 15 U.S.C. § 3002-15 (2008) (defining parimutuel as “any system whereby wagers with respect to the outcome of a horserace are placed with, or in, a wagering pool conducted by a person licensed or otherwise permitted to do so under State law, and in which the participants are wagering with each other and not against the operator”).
number of similar responsibilities. They have the discretion to license trainers and owners to race. Furthermore, they can create new rules through specific procedures and penalize those licensees that do not comply with the agency’s rules, as determined in an administrative hearing. Agencies can also resolve disputes among licensees and employees.

State horseracing agencies wield vast power and, therefore, many individuals have challenged the agencies’ powers and their procedures as unconstitutional. Trainers have frequently brought unsuccessful challenges under the nondelegation doctrine, claiming that a state legislature unconstitutionally delegated its police power to the state agency. These challenges led to some contradictory conclusions; for example, the agencies appear to possess some police power, but they do not accord the same protections to trainers as citizens receive from police.

25. See, e.g., 810 Ky. ADMIN. REGS. 1:024 (setting out positions held and their respective responsibilities). Under this section, the agency’s commission is in charge of licensing; appointing a supervisor over parimutuel betting; hiring a commission veterinarian; maintaining a chemical laboratory for drug testing; making new rules and hiring an investigator and conducting investigations, among other responsibilities. See id.; accord 9 N.Y. COMP. CODES R. & REGS. tit. 9, § 4200-4204 (2008) (establishing powers reserved). This section of New York’s horseracing agency statute permits the agency to issue licenses to amend and make new rules, to punish violations, to appoint hearing officers and to resolve disputes. See id.

26. See, e.g., Md. CODE REGS. 09.10.01.25 (2008) (setting out licensing fees for different participants in horseracing). A number of different people need licenses in horseracing, including owners, trainers, jockeys, vendors, agents and other employees. See id.

27. See, e.g., 58 Pa. CODE § 163.6 (2008) (mandating procedures for violations of rules). Subsection (c) is rather broad in its discretionary power, stating, “The stewards may fine, suspend or rule off a person who, in their opinion, has acted to the detriment of racing or violated the rules.” Id.

28. See, e.g., ILL. ADMIN. CODE tit. 11, § 1424.350 (2008) (mandating procedure of termination notice). If the termination is otherwise lawful, the Board may resolve any continuing disputes regarding the employment. See id.

29. For a discussion of different constitutional challenges, see infra notes 29-34 and accompanying text.

30. See, e.g., McIlmurray v. Mich. Racing Comm’r, 343 N.W.2d 524, 526 (Mich. Ct. App. 1983) (holding that agency imposing fines on trainers for violating drug policy was within scope of agency authority). The court interpreted the statute in order to see what powers were specifically delegated to the agency. See id. at 526. “[A] state agency has no inherent power, and . . . any authority it has must come from the Legislature.” Id.

31. See McFarlin v. Florida, 405 So. 2d 255, 256 (Fla. Dist. Ct. App. 1981) (noting that state constitution prohibits agencies from issuing prison sentences). Thus, the legislature could delegate other forms of punishment, such as fines and suspension, but could not sentence violators of the statute to prison. See id. The facts in one Pennsylvania case resemble a police interrogation, but the court held that no Miranda warnings were necessary because the trainer was not a criminal defendant. See Bocachica v. Pa. Horse Racing Comm’n, 843 A.2d 450, 453 (Pa. Commw. 2009)
court reviewing the constitutionality of the Massachusetts horseracing agency found that the agency constitutionally exercises the police power of the state, but a court reviewing the Illinois horseracing agency held that a warrantless search of a jockey's care was permissible.32 Others have challenged horseracing agencies' procedures under the Due Process Clause, with modest success.33 Additionally, the United States Supreme Court has heard only one Equal Protection claim, relating to length of suspension.34

Procedurally, stewards usually make the initial decisions in these cases.35 If that decision is disputed, and the stewards decision is not binding under state regulation, the affected party can appeal to the Board or Commission.36 If the party is still dissatisfied, he or she can appeal to the state or federal appeals court, depending on the issue on appeal.37

B. Penalties

When a state agency detects banned drugs in a horse's system, the degree of penalty will differ depending on the state.38 The form of the penalties is usually the same – returning the purse, fines and suspension – but the degree of punishment can vary

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34. See Barry v. Barchi, 443 U.S. 55, 66 (1979) (holding indefinite suspension from racing without hearing is unconstitutional).

35. See McGee, supra note 2 (discussing legal path of Biancone's case).

36. See id.

37. See id.

38. See Heller, supra note 1 (arguing for national regulation of drugs in horseracing).
greatly across states. For instance, in Kentucky a trainer may be suspended for a second drug offense for three to five years, but in Maryland a trainer is only subject to a judge's or steward's discretion, with no guidelines whatsoever.

Furthermore, some states may uphold a trainer's suspension in another state, but many states choose to permit trainers to race even if they are suspended by another state's agency, removing incentive to adhere to the drug guidelines. Additionally, trainers are held absolutely liable when their horses test positive for banned performance-enhancing drugs. Some states penalize the veterinarian who prescribed the drug. Nonetheless, states like Kentucky declare that agency sanctions do not preclude licensees from punishment under the state's criminal code.

39. See, e.g., Md. Code Regs. 09.10.03.04, §§ E, G (2007) (listing possible sanctions). In Maryland, sanctions include disqualification of the horse, license suspension and “denial, forfeiture, and prompt return of a purse, sweepstakes, trophy, or any other reward received by the owner of a horse found to have carried a drug in its body during a race.” Id.

40. See 810 Ky. Admin. Regs. 1:028, § 4(1) (b) (2007) (describing penalties for second violation with Class A drug). Kentucky leaves the trainers the power to negotiate with KHRA, however, by allowing the payment of fines and forfeiture of purse money to reduce the suspension time. See id.

41. See Md. Code Regs. 09.10.03.04, § G (2007) (listing potential sanctions judges and stewards “may” order). Maryland further amplifies a judge's discretion to include repeat offenders. See id. § H.

42. See Leading Horse Trainers, supra note 3 (noting that trainer Scot Lake was suspended in New York while serving suspension in Delaware). But see Md. Code Regs. 09.10.03.04(H) (2007) (noting “an individual guilty of violating this regulation, or a comparable regulation of another racing jurisdiction, for the second time is considered a repeat offender”). Racing in other states is not the only missing deterrent – Biancone, suspended by KHRA for vials of cobra venom found in his stables, was permitted to collect prize money from the championships. See Trainer Barred, N.Y. Times, Oct. 19, 2007, at D4 (detailing trainer Patrick Biancone's suspension).

43. See, e.g., Md. Code Regs. 09.10.03.04(F) (2007) (“[A] trainer is the absolute insurer of, and responsible for, the condition of each horse the trainer enters into a race, regardless of the acts of third parties”); see also Joe Drape, Suspension Sends Message at Breeders’ Cup, N.Y. Times, Oct. 24, 2007, at D1 (reporting on trainer Patrick Biancone's suspension). Even a polygraph test and vehement denials could not save Biancone from a one-year suspension by KHRA after vials of cobra venom were found in his stable. See id.

44. See, e.g., 810 Ky. Admin. Regs. 1:028, § 2(4) (2007) (listing licenses that may be suspended for violations). KHRA has the authority to suspend licenses of owners, trainers and veterinarians. See id.

45. See 810 Ky. Admin. Regs. 1:028, § 2(10) (2007) (noting that administrative sanction does not preclude criminal prosecution). “An administrative action or the imposition of penalties pursuant to this administrative regulation shall not constitute a bar or be considered jeopardy to prosecution of an act that violates the criminal statutes of Kentucky.” Id.
C. Permissible and Impermissible Drugs

Not all drugs are banned from horseracing.46 Many different drugs have therapeutic qualities that will not affect the performance of the horse.47 Some of these drugs are classified as non-steroidal anti-inflammatory drugs ("NSAIDs").48 The two most widely used and popularly known permissible drugs are furosemide, better known as Lasix, and phenylbutazone, an NSAID commonly known as Bute.49

Lasix is administered to a horse that has excessive bleeding in its lungs.50 This bleeding, a condition known as exercise-induced pulmonary hemorrhage, is caused by the horse’s inner organs becoming out of rhythm with the rest of the body.51 While running, the horse’s intestines slam against its diaphragm and lungs, causing the lungs to bleed.52 Because it prevents such bleeding in the lungs, Lasix is arguably a performance-enhancing drug.53 To help counteract the argument that Lasix enhances performance, racing clubs tell bettors on the program whether a horse is on Lasix and how many races the horse has run on Lasix.54 Further complicating

46. See, e.g., Wash. Admin. Code § 260-70-650 (2007) (describing permitted uses of furosemide). Furosemide is better known as Lasix. See Dr. Joseph C. O’Dea, A Trail of Blood, Thoroughbred Times, Apr. 11, 1995, http://www.thoroughbredtimes.com/horse-health/1995/April/11/A-trail-of-blood—.aspx (describing effects of Lasix on horses). Under Washington’s statute, trainers and veterinarians can administer Lasix to the horses prior to a race if the horse is placed on the official bleeder list. See Wash. Admin. Code § 260-70-650 (2007). The limitations, however, include that Lasix must be administered intravenously and under 500 mg. See id. Furthermore, the trainer must file a particular form with the official veterinarian that includes the horse’s number, the dosage, the signature of the veterinarian who administered the drug and the signature of the trainer. See id. Otherwise, the horse will be scratched from the race. See id.


48. See id. at 1:018(4) (permitting NSAIDs phenylbutazone, flunixin and ketoprofen). These drugs, however, are only permitted at a certain concentration on race day. See id.

49. See id. (noting two most common NSAIDs).

50. See O’Dea, supra note 46 (describing in detail effects of Lasix on horses).

51. See id. (explaining why horses’ lungs bleed during strenuous exercise). The natural rhythm of breathing is tied to the horse’s stride: inhalation occurs when the front feet hit the ground, and exhalation occurs when the front feet leave the ground. See id.

52. See id. Another way to prevent bleeding is keeping the horse from eating hay six to twelve hours prior to racing. See id.

53. See id. (discussing Lasix’s effectiveness).

54. See Heller, supra note 1 (identifying effect on bettors when positive drug results are hidden). Thus, a handicapper may see a horse with a losing record that is running on Lasix for the first time and decide that the horse is a good bet; the bleeding may have been preventing the horse from running at its full potential. See id. Racetracks, however, did not always require this disclosure. See id.
the controversial use of Lasix is the fact that the drug also functions as a diuretic and thus could be used to flush out evidence of other drugs in the horse’s system.55

Alternatively, Bute is an anti-inflammatory drug that does not affect a horse’s performance beyond relieving its pain.56 Bute is extremely common, but long-term usage could lead to ulcers, which can result in a loss of appetite and weight, as well as gastrointestinal bleeding.57

While Lasix and Bute are permissible in horseracing, hundreds of other drugs are not.58 The Racing Commissioners International Uniform Classification of Foreign Substances classifies drugs according to their potential to influence the horse’s performance.59 The KHRA drug schedule, often considered the most permissive for drug use, classifies nearly four hundred drugs as Class A.60 Class A drugs are defined as “those that have no legitimate therapeutic [value] and have not been approved for use in the horse [by] the U.S. Food and Drug Administration. . . . Their potential to influence performance is high. . . .”61 Such drugs include chloroform, cocaine, codeine, diamorphine (heroin), lithium, morphine and snake venoms.62 Other drugs are further broken down into B, C and D classes, all of which carry different penalties when found in a


56. See id. (describing effects of Lasix and Bute). Kelly also points out that many banned drugs will not show up on drug tests. See id. Eventually, Kelly decided to stop working at racetracks because, among other reasons, he cared more about healing horses than about getting a horse through “one more race.” See id.


59. See id. (listing drugs in different classes according to potential to alter horse’s performance and therapeutic effect on horse).

60. See id. (listing Class A drugs).

61. Id. (defining Class A drugs).

62. See id. (setting out hundreds of drugs under Class A).
horse’s system.\textsuperscript{63} Interestingly, the four most commonly used steroids – boldenone, stanozolol, nandrolone and testosterone – are not classified and thus not prohibited.\textsuperscript{64}

While many drugs are banned, relatively few tests exist to test the horses for those drugs.\textsuperscript{65} As a result, trainers may have little incentive to keep their horses free from performance-enhancing drugs when they know they cannot and will not be caught.\textsuperscript{66} Conversely, the tests that do exist are unreliable and frequently result in false positives that unnecessarily penalize innocent trainers and owners.\textsuperscript{67}

\begin{footnotesize}
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\item See id. (listing different classifications of hundreds of drugs). Class B drugs are defined as “those that may have a legitimate therapeutic indication in the equine athlete but also have a high potential to influence performance.” \textit{Id.} Class C drugs are defined as having therapeutic value to the horse and a low potential to affect its performance. See id. Class D drugs are therapeutic drugs that have restricted concentration limits. See id.; see also 810 Ky. ADMIN. REGS. 1:028 (2007) (setting out penalties according to drug violation).

\item See Kentucky Horse Racing Authority Uniform Drug and Medication Classification Schedule, supra note 58 (classifying drugs). As the statute currently stands, KHRA permits use of any steroid because none are classified on the drug schedule. See id.; see also Leslie Deckard, Kentucky Moves to Regulate Racehorse Steroids, THE HORSE, Dec. 18, 2007, http://www.thehorse.com/ViewArticle.aspx?ID=1100 3&nID=17 (reporting KHRA’s support for regulating anabolic steroids). The model rule does not propose a complete prohibition, but rather a limitation of the four steroids mentioned, but the horse must still stay below certain urine concentration levels. See id.

\item See Heller, supra note 1 (discussing effect of illegal drug use on bettors). Heller uses the Class B drug epogen as his example. See id. The “breakthrough” test for epogen only tests for anti-bodies, which may naturally be in the horse’s system or linger far beyond the drug use, up to 120 days. See id.

\item See id. (describing events after horses test positive for epogen). Because the test was new, and many states did not use it, trainers could get away with administering the drug as they could not be caught through a blood or urine test of the horse. See id. Furthermore, when horses were testing positive for epogen, the names of the horses and their trainers were not published. See id. Heller analyzes the unpublished use of epogen to the early use of Lasix, which only recently started appearing on racing programs. See id. An alternative theory as to why positive drugs tests do not come to light is the perception that the horseracing industry is declining. See Handle Numbers Fall in Maryland in 2007, THOROUGHBRED TIMES, Jan. 3, 2008, http://www.thoroughbredtimes.com/racing-news/2008/January/ 03/Handle-numbers-fall-in-Maryland-in-2007.aspx (reporting annual average decrease in Maryland as 6.5%); see also Paul Post, NYC OTB Could Close in June, THOROUGHBRED TIMES, Jan. 23, 2008, http://www.thoroughbredtimes.com/nationalnews/2008/January/23/NYC-OTB-could-close-in-June.aspx (reporting lack of state funding as part of New York City Off-Track Betting’s impending failure). Should New York City Off-Track Betting shut down, New York State Breeders and Development Fund would miss 42% of its revenues for awards. See id.

\item See Heller, supra note 1 (describing how epogen is produced naturally in horses and can linger in horse’s system for up to 120 days); see also Worden, supra note 9, at 25 (describing drug testing as “hot area of equine law”). According to Worden, the only defense to a positive drug test is to prove that the test was wrong. See id. For example, a positive drug test could easily be the result of the horse grazing among poppies. See id. Not only is the purse money forfeited, but the
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D. Parimutuel Betting

The system for gambling on horseracing is called parimutuel. The system is designed to reduce corruption by determining a payout based on how much money was bet on each horse, thus forcing gamblers to bet against each other. The stakes fluctuate and are re-calculated with each new bet until the race begins. Thus, a particular horse’s odds reduce as more money is placed on it, but the odds of every other horse in that same race increase.

trainer’s reputation is damaged as well, and the owners want good answers as to why their winning investment is suddenly lost. See id.

68. See 15 U.S.C. § 3002(13) (2008) (defining parimutuel as “any system whereby wagers with respect to the outcome of a horserace are placed with, or in, a wagering pool conducted by a person licensed or otherwise permitted to do so under State law, and in which the participants are wagering with each other and not against the operator”). Congress issued this regulation through its power under the Commerce Clause. See U.S. CONST. art. I, § 8, cl. 3.


70. See, e.g., ILL. ADMIN. CODE tit. 11, § 300.10 (2008) (prohibiting betting after race starts).

71. See Groetzinger v. Comm’r of Internal Revenue, 82 T.C. 793 n.24 (comparing parimutuel betting on dogs with investing in stock exchange).

The parimutuel system in effect performs the same function as the stock exchange in coordinating the transactions of these independent bettors. By placing a bet, the gambler is simultaneously “purchasing” a chance on one horse, and “selling” to another bettor a chance on the other dogs. The “price” of these various chances is reflected by the constantly changing “odds” on the different dogs, which is simply a method of expressing, in quantitative terms, the aggregate preferences of the pool of bettors. In this sense, the “odds board” at the track plays the role of the ticker tape on the floor of the stock exchange.

Id. While the system is effective in reducing corruption when implemented correctly, problems arise when “glitches” permit gamblers to bet on a horse after the race has already started. See Ed Martin, Commentary: Past Posting, Blood Horse, Jan. 8, 2008, http://opinions.bloodhorse.com/viewstory.asp?id=43028 (describing gambler who admitting to wagering after race began on multiple occasions). Apparently, betting pools are not entirely secure; evidence shows multiple states have issues with bettors placing wagers after the race begins, including Louisiana, Kentucky, New York and Texas. See id. This simplistic overview may give the impression that the parimutuel betting system is easy, but betting on horses can be as complicated as the gambler chooses to make it; for instance, the simpler types of bets a person may lay down include: to win, to place or to show, which only requires the bettor to pick one horse and place money on whether the horse will come in first, second or third. See ILL. ADMIN. CODE tit. 11, § 301.20 (2008) (defining win); id. § 301.30 (defining place); id. § 301.40 (defining show). Alternatively, the bettor may wish to place an exacta, trifecta or superfecta, all of which require the bettor to pick multiple horses that will finish in the specific order the bettor chooses. See id. § 305.10 (defining perfecta/exacta betting); id. § 306.10 (defining trifecta betting); id. § 311.10 (defining superfecta betting). Further complicating matters, a bettor may choose a quinella or box, which permits the bettor to choose multiple horses to finish in any order. See id. § 304.10 (defining quinella betting). Furthermore, if the bettor is spending the day at the track, the bettor may choose to place a double, triple or sweep bet, which is betting on the winners of two, three or four (or more) successive races, respectively. See id. § 303.10 (defining “Daily
The parimutuel betting system makes gamblers bet against each other, and because of the potential for bets to last several races, disqualifying a horse after it has raced could pose serious problems to the system and leave gamblers out of both luck and money.\textsuperscript{72} Thus, when a horse is disqualified after a race, the betting remains unaffected, and the horse may keep its place in terms of pay-outs.\textsuperscript{73} The remaining penalties, then, are withholding purse money, fining the necessary parties and suspending those liable for the infraction – all penalties that focus on punishing the horse’s owners, trainers and veterinarians.\textsuperscript{74}

E. Model Steroid Rule

Iowa was the first state to ban steroids in horseracing in 2007.\textsuperscript{75} Thus, many trainers used anabolic steroids to enhance the performance of their horses in racing.\textsuperscript{76} The horseracing industry, however, is increasingly concerned with public perception of the use of steroids in racing.\textsuperscript{77} Many states are taking steps to ban steroids, Double” bets); id. § 308.90 (defining “Pick 3 Pools”); id. § 308.10 (defining “Pick” betting choosing first-place finisher in designated number of races). Illinois permits many other ways to bet, such as the “supertrifecta,” which “requires selection of the first three finishers, in their exact order, in the first of two designated contests and the first four finishers, in exact order, in the second of two designated contests.” Id. § 309.10.


\textsuperscript{73} See generally ILL. ADMIN. CODE tit. 11, § 300 (2008) (omitting penalties on bettors). When a horse is “scratched” before a race or does not otherwise start, however, the wagers are refunded. See id. § 300.70.

\textsuperscript{74} See 810 KY. ADMIN. REGS. 1:028 § 4 (2007) (establishing potential penalties for positive drug test depending on class of drug and previous violations). KHRA has the authority to negotiate with the trainer, however, on the final penalty. See id. For instance, KHRA has the discretion to determine a trainer’s suspension, and the trainer may offer to pay a larger fine or forfeit purse money won in return for a shorter suspension. See id.

\textsuperscript{75} See Bill Finley, Horse Racing Officials Move Toward Steroid Ban, N.Y. TIMES, Feb. 28, 2007, at D1 (reporting horseracing authorities’ interest in steroid regulation).

\textsuperscript{76} See id. (noting that steroid use was not illegal, but rather part of competition). In fact, every other country with horseracing bans steroids. See Matt Hegarty, Medication and Testing Panel Sets Steroids Timeline, ESPN.COM, Feb. 1, 2008, http://sports.espn.go.com/sports/horse/news/story?id=3225880 (noting lack of uniform regulation of steroids in U.S. horseracing). Other countries’ bans on steroids, however, may be due to their eating habits. See Vicki Mabrey, Horse Slaughter Industry May Be on Its Last Legs: Congress to Consider Outlawing Practice of Killing Horses for Meat, ABC NEWS, Sept. 6, 2006, http://abcnews.go.com/Nightline/story?id=2396197&page=1 (reporting that many horses slaughtered in U.S. are shipped to Europe and Asia for human consumption). “The anti-horse slaughter movement was galvanized when the 1986 Kentucky Derby winner, Ferdinand, was killed and eaten in Japan.” Id.

\textsuperscript{77} See Finley, supra note 75 (summarizing overall impression of drugs in sports). The medical director for the California Horse Racing Board, Dr. Rick
but the lack of uniformity between different agencies makes a blanket ban on these drugs difficult.  

As it stands, the model statute developed by the Racing Medication and Testing Consortium ("RMTC") and the Association of Racing Commissioners International ("ARCI") will ban all but four anabolic steroids: stanozolol, boldenone, nandrolone and testosterone. These four drugs, however, must still be under a certain threshold concentration limit in the horse's blood or urine. The problem with testing for these steroids, though, is that three out of the four naturally occur in a horse's system. Thus, finding a logical threshold level, an efficient test and a reasonable number of days before a race when the drugs may be administered, are far more daunting tasks than many realize.

Furthermore, RMTC is pushing for uniform regulations across states. Much of the pressure for national standards on steroid use

Arthur, said, "We want a sport where what you see is what you get . . . . I think that's what the public wants. People say steroids don't make horses run faster. I'm not convinced . . . and I don't think the public is convinced . . . ."  

78. See Tom LaMarra, Racing Group Endorses Deadline for Steroid Rule Adoption, The Horse, Feb. 1, 2008, http://www.thehorse.com/ViewArticle.aspx?ID=11253 [hereinafter LaMarra, Racing Group Endorses Deadline] (noting Delaware, Indiana and Pennsylvania will begin testing in late winter or early spring). Part of the problem with staggered implementation of steroid bans across states is that horses regularly travel between states to race. See id. Thus, a trainer may be penalized in one state but not in another for acting in the exact same manner. See id.; see also Hegarty, supra note 76 (reporting desire for Jan. 1, 2009 implementation of steroid regulations).

79. See LaMarra, Racing Group Endorses Deadline, supra note 78 (reporting types of steroids permitted in model rule). The Federal Drug Administration has approved the use of all four steroids. See id.

80. See id. (observing RMTC's funding of research to better provide realistic threshold levels).

81. See id. (noting which steroids naturally occur in horses). "Nandrolone and boldenone are naturally occurring in intact males, and testosterone is naturally occurring in all horses."  

82. See Tom LaMarra, Model Rule on Steroid Use Blasted, The Horse, Jan. 26, 2008, http://www.thehorse.com/ViewArticle.aspx?ID=11223 (reporting view that model rule provides arbitrary link between threshold levels and withdrawal times). Some critics are more vociferous about their opinions, such as Dr. Steven Barker, a chemist for the Louisiana Racing Commission, who said, "The model rule as drafted is an embarrassment . . . . The group that put this together should be taken out and beaten. What we've heard is an awful lot of misinformation and mythology."  

83. See LaMarra, Racing GroupEndorses Deadline, supra note 78 (noting RMTC's wish for uniform adoption of rule across states). Lamarra reports: The RMTC and RCI recommend a $500 fine and disqualification of the horse for the first violation; a $1,000 fine, disqualification, and a 15-day trainer suspension for the second violation in a 365-day period; and a $2,500 fine, disqualification, and 30-day trainer suspension for the third violation in a 365-day period.
in horseracing is due to the Congressional hearings on steroids in Major League Baseball. Fearing a blanket ban, horseracing officials from the National Thoroughbred Racing Association ("NTRA") have approached Congress with a model rule in hopes of staving off federal interference.

III. Analysis

Horseracing's self-regulating state agencies, the nature of the parimutuel betting system and discretionary penalties combine to create a troubling setting for drug regulation. The solution to this increasingly urgent problem, however, need not be equally complex. This article proposes three options to regulate and deter the use of performance-enhancing drugs in horseracing on a national scale. The first potential solution, which is based on each state's resistance to national regulations, is to impose heftier penalties with sanction guidelines for the agencies, as well as subjecting violators to criminal prosecution. The second proposed solution, a compromise between keeping state independence and adhering to a national standard, is to create a national organization analogous to that of the National Collegiate Athletic Association ("NCAA"). The third possible solution, and the solution that the horseracing industry fears most, is to leave regulation entirely to Congress.

84. See id. (reporting on increased publicity of steroids in professional sports).
85. See id. President and chief executive officer of the NTRA, Alex Waldrop, thinks self-regulation is the answer to the steroids issue. He stated, "[g]iven the scrutiny of anabolic steroids by the media and Congress, and the consequential negative perception of these drugs by the public, the horse racing industry must take initiative on its own volition to properly and uniformly regulate the use of anabolic steroids in racehorses this year." Id.
86. For a further discussion of the complex problems associated with drugs in horseracing, see supra notes 13-83 and accompanying text.
87. For a further discussion of different legal problems, see supra notes 14-82 and accompanying text.
88. For a further discussion of different legal solutions, see infra notes 92-167 and accompanying text.
89. For a further discussion of potential penalties to deter the use of performance-enhancing drugs without going to a national standard, see infra notes 92-122 and accompanying text.
90. For a further discussion of potentially creating a national organization with authority to oversee horseracing, see infra notes 123-50 and accompanying text.
91. For a further discussion of leaving regulation of performance-enhancing drugs in horseracing to Congress, see infra notes 151-167 and accompanying text.
A. Guidelines and Criminal Sanctions

As noted above, state agencies vary on the severity of penalties levied for horse doping.\textsuperscript{92} Furthermore, horseracing agencies tend to have a considerable amount of discretion in implementing their statutes.\textsuperscript{93} When added to the fact that some states do not recognize other states’ suspensions, trainers often have little incentive to follow the rules.\textsuperscript{94} Additionally, there are other factors that mitigate deterrence. For instance, the trainers may still collect prize money.\textsuperscript{95} Or, more cynically, the trainers are only a phone call away from administering advice to the new trainer, making the suspension completely useless because of the difficulties of enforcing it.\textsuperscript{96}

On the other hand, a trainer’s absolute liability under state statutes is relatively harsh.\textsuperscript{97} As the absolute insurer, the trainer is theoretically vulnerable to corruption and abuse.\textsuperscript{98} Stables are generally well-guarded at the Triple Crown races – Preakness Stakes, Kentucky Derby and Belmont Stakes – where the most thorough drug tests are administered, but it only takes one empty vial to make a trainer liable for impermissible drugs; if drugs are found in the stables, it can create the presumption that the horse raced with the drug in its system.\textsuperscript{99} Under this standard, the horseracing industry is concerned about combating the prevalence of steroids by imposing increasingly harsher penalties on violators – such as Pat-

\textsuperscript{92} See Heller, supra note 1 (arguing for national regulations of drugs in horseracing).
\textsuperscript{93} See Md. Code Regs. 09.10.03.04, §§ E, G (2007) (permitting agency discretion to determine appropriate sanction).
\textsuperscript{94} See Leading Horse Trainers, supra note 3 (listing several trainers with no or relatively light sanctions after violating drug regulations).
\textsuperscript{95} See Trainer Barred, supra note 2 (noting terms of Biancone’s suspension include potential to continue collecting prize money).
\textsuperscript{96} See Press Release, California Horse Racing Board, Committee Takes Hard Line on Drugs, Penalties, (Jan. 11, 2007), available at http://www.chrb.ca.gov/press_releases/2007_01_11_press_release.pdf (reporting tightened controls on anabolic steroids and clenbutrol in California). CHRB Chairman Richard B. Shapiro said, "[w]e cannot simply allow a suspended trainer to train over the phone. . . . A suspension must have meat on the bone and be truly punitive and costly to anyone receiving one." Id.
\textsuperscript{97} See, e.g., Md. Code Regs. 09.10.03.04, § F (2007) (holding trainer as "absolute insurer of, and responsible for, the condition of each horse the trainer enters in a race").
\textsuperscript{98} See id. (holding trainer absolutely liable "regardless of the acts of third parties").
\textsuperscript{99} See McGee, Cobra Venom, supra note 2 (reporting Biancone’s suspension for vials of cobra venom in stables). While Biancone’s horses tested positive for derivatives of caffeine and an inhalant, both banned by KHRA, the focus of his suspension was the cobra venom in his stables. See id.
rick Biancone – with the hope of discouraging other potential violators.\textsuperscript{100}

Despite this liability, and because of the enormous pressures trainers face, the risks inherent in using impermissible drugs may outweigh the risk of getting caught and receiving a sanction.\textsuperscript{101} Most notably, a sanction is not guaranteed; the horse must first fail a drug test, and often the trainer can argue that the drug was naturally in the horse’s system or that the test result was incorrect.\textsuperscript{102} Overriding the deterrence, however, is the unbelievable pressure trainers sustain by controlling owners’ extraordinary investments.\textsuperscript{103} Moreover, trainers face stiff competition, and the average pay-out is very low.\textsuperscript{104} Therefore, if trainers wish to keep their jobs secure, they will do everything within their power to make their horses winners.\textsuperscript{105}

Another possible preclusion to effective deterrence could be that agencies feel pressured to remain lax on trainers so that horseracing can stay alive in its currently declining situation.\textsuperscript{106} State agencies enjoy their power and wish to regulate their own indus-

\begin{footnotesize}
100. See Drape,\textit{ Suspension Sends Message, supra} note 43 (explaining reasoning behind Biancone’s suspension). Discussing the extensive preventative measures utilized by the industry to combat prohibited drug use, President of the Breeders’ Cup Limited, Greg Avioli, stated, “Part of this is to shock and awe the cheaters . . . . When they see the level of security and how serious we are about deterring illegal medications, we believe there will be a prophylactic effect.” \textit{Id.}

101. See Beyer, \textit{supra} note 9 (reflecting on costs of investing in racehorses); see also \textit{Leading Horse Trainers, supra} note 3 (noting several trainers suspended for drug violations). Trainers have traditionally faced light penalties for drug violations, such as Rick Dutrow, who was suspended for only sixty days for two drug violations. \textit{See id.} Another example is Bobby Frankel, whose morphine violation was pending for six years before it was dropped without penalty. \textit{See id.}

102. See Worden, \textit{supra} note 9 (describing common issues in litigating equine law). “The only real defense is to show that the test was wrong and that the controlled substance was actually not there.” \textit{Id.} Thus, when a horse fails just one test of hundreds administered after a race, the purse is forfeited and often leads to litigation. \textit{See id.}

103. \textit{See id.} (noting owners’ frustration when their horses test positive for illegal substances); see also Beyer, \textit{supra} note 9 (noting that racehorses may sell for over one million dollars, with average upkeep costing between $30,000 to $50,000).

104. See Beyer, \textit{supra} note 9 (comparing investments and actual earnings of average racehorse). The average earnings for an American racehorse are about $16,000, when upkeep alone averages twice that amount. \textit{See id.}

105. See Worden, \textit{supra} note 9 (commenting on owners’ impatience when purse money is forfeited from positive drug tests). Worden ominously writes, “[T]he owner who is forced to give back the purse . . . generally demands an explanation from his or her trainers, and sometimes demands more.” \textit{Id.}

106. See \textit{Handle Numbers Fall in Maryland in 2007, supra} note 66 (reporting decrease of six and one half percent); see also Post, \textit{supra} note 66 (noting lack of state funding as part of New York City Off-Track Betting’s impending failure).
\end{footnotesize}
tries independently, as is evidenced by their quick lobbying of Congress to allow the horseracing industry to regulate its own steroids without federal interference.107 Nevertheless, if state agencies wish to continue self-regulating, they must enhance and enforce their policies on drug use.108

This can only be accomplished if the industry institutes one of several different reforms. First, states need to reign in agency discretion in administering sanctions.109 Kentucky's KHRA statute is a useful model for these reforms because it outlines specific limits to the penalties, including minimum suspensions and fines.110 The problem with the KHRA statute, though, is that the agency may still negotiate with the trainer to reduce the suspension by increasing the trainer's fines.111 This broad discretion essentially allows trainers to buy themselves out of a suspension.112

As a result, agency discretion and potential for trainer negotiations do not effectively ensure enforcement of the regulations, but a guideline setting concrete minimum and maximum penalties for different violations could serve as a potent deterrent for trainers considering drugs to enhance their horses' performance.113 States would also have to respect and uphold one another's sanctions in order to make the punishment effective.114

Setting guidelines alone, however, may be too harsh when horse trainers face absolute liability and when current drug tests often show false positives.115 Such a problem could be overcome if

107. See LaMarra, Racing Officials, supra note 4 (reporting on industry officials meeting with Congressmen).
108. For a further discussion of different state regulations on performance-enhancing drugs, see supra notes 38-45 and accompanying text.
111. See id. § 4(1)(a)(2) (permitting agency to reduce suspension if licensee pays fine or forfeits purse money).
112. See id. Purse money is not automatically forfeited in this section but may be offered as a way to reduce suspension. See id.
113. For a further discussion of incentives to use performance-enhancing drugs, see supra note 9 and accompanying text. See also LaMarra, Model Rule on Steroid Use Blasted, supra note 82 (describing need for uniform penalties and thresholds for steroid use).
114. See Leading Horse Trainers, supra note 3 (noting trainer suspended in New York while already suspended in Delaware).
115. See, e.g., Md. Code Regs. 09.10.03.04, (F) (2007) (holding trainer as "absolute insurer of, and responsible for, the condition of each horse the trainer enters into a race, regardless of the acts of third parties."); see LaMarra, Racing Group Endorses Deadline, supra note 78 (noting three out of four anabolic steroids occur naturally in horses).
the industry reduced the trainers’ liability to strict liability, because this would afford a trainer some defenses in order to escape sanctions altogether when the trainer has evidence of his innocence.  

Another option that may stand alone or in addition to those proposed is subjecting trainers to criminal prosecution more often. Because the agency penalties are considered civil, trainers are still theoretically vulnerable to criminal penalties after facing agency sanctions. If agency statutes compelled judges to turn over egregious violations that would constitute animal abuse, perhaps trainers would be less likely to dabble in prohibited drugs in order to avoid a criminal record.

These possibilities for reform in drug regulation are not optimal, however, because without national standards a trainer may escape sanctions in a state with less stringent standards but get penalized the next week for administering to his horse in exactly the same way. This is not an effective regulation of drugs, and it may only serve to keep trainers from traveling to states with stricter drug policies. Without the adoption of a national standard or authority, however, specific penalty guidelines and harsher sanctions remain the best solution for reducing performance-enhancing drugs in the horseracing industry.

B. Creating a National Authority

Harsher penalty enforcement by each state does not solve the problem of uniformity among states, therefore a national organization directly in charge of all drug regulation provides the best remedy to ensure that states do not have varying degrees of penalties.

116. See LaMarra, Racing Group Endorses Deadline, supra note 78 (noting three out of four anabolic steroids occur naturally in horses); see also Worden, supra note 9 (noting horses grazing in poppies may test positive for morphine). Worden also stated that proving a test incorrect is a trainer’s only defense to a positive drug test. See id.


118. See id.


120. See LaMarra, Racing Group Endorses Deadline, supra note 78 (noting trainers’ fear that staggered implementation of steroid ban may result in inconsistent penalties).

121. See id. (discussing effect of differing drug regulations across states).

122. For a further discussion of the benefits of national standards, see infra notes 123-50 and accompanying text.
for the same offense.\textsuperscript{123} A national organization overseeing horseracing could provide more than just uniform implementation of drug regulations.\textsuperscript{124} The organization could also create a national horseracing license, thereby enforcing penalties nationally.\textsuperscript{125} Furthermore, the new organization could unify various persuasive organizations that specialize in particular interests, including a committee dedicated to developing more accurate drug testing procedures, withdrawal times and publication issues.\textsuperscript{126} Finally, a national organization could mitigate pressure on agencies from entities with competing interests.\textsuperscript{127}

While some may consider the National Football League or National Basketball Association as primary examples in national regulation of sports, the NCAA may provide a better model.\textsuperscript{128} The NCAA is an unincorporated organization composed of nearly 1,000 voluntary members, which are four-year college institutions with competitive athletic programs.\textsuperscript{129} The NCAA has a central authority in the Management Council, which can create committees dedicated to specific programs.\textsuperscript{130} Moreover, the organization has legislation that applies to all schools in a variety of different matters, such as eligibility, recruiting, transfers and admissions.\textsuperscript{131} A committee separate from the Management Council enforces the legislation.\textsuperscript{132}

An easy way to entice states to participate in a national horseracing program is the promise of representation, which the NCAA model offers by according voting authority to representatives of its member institutions.\textsuperscript{133} In its democratic design, an initial proposal to adopt or amend NCAA bylaws first passes through the Man-

\textsuperscript{123} For a further discussion of possible remedies besides creating a national horseracing organization, see supra notes 92-122 and accompanying text; see also infra notes 151-67 and accompanying text.

\textsuperscript{124} See Heller, supra note 1 (arguing for national regulations in horseracing).

\textsuperscript{125} For a further discussion of a national license and national penalties, see infra notes 137-39 and accompanying text.

\textsuperscript{126} For a further discussion of subcommittees in a national horseracing organization, see infra notes 140-41 and accompanying text.

\textsuperscript{127} For a discussion of how a national organization could relieve pressure on agencies, see infra notes 142-45 and accompanying text.

\textsuperscript{128} See Heller, supra note 1 (pondering result if other professional sports lacked national drug regulations).

\textsuperscript{129} See Tarkanian, 488 U.S. at 183 (describing members of NCAA).

\textsuperscript{130} See id. (noting different powers of Council).

\textsuperscript{131} See id. (cataloging actions NCAA oversees and regulates).

\textsuperscript{132} See id. (describing enforcement of regulations).

\textsuperscript{133} See Martin, supra note 1, at 107-09 (discussing member institutions' powers within NCAA).
agement Council, which then may forward it to members for their reactions and suggestions.\textsuperscript{134} Then the Management Council sends the proposal to the Board of Directors for approval.\textsuperscript{135} Should the Board reject it – or adopt it in spite of member disapproval – the members have an opportunity to override the Board’s decision with a five-eighths majority vote at the annual NCAA Convention.\textsuperscript{136}

Like the NCAA, states could become voluntary members of the national organization.\textsuperscript{137} Trainers, owners and veterinarians that seek uniformity could pressure their states into becoming members, and once some states join, many others would likely follow suit.\textsuperscript{138} Once states become members, the organization subsequently could create uniform licensing procedures so that violations of regulations could be uniformly enforced.\textsuperscript{139}

Additionally, the organization would also create subcommittees, which could unify and empower current persuasive horseracing authorities such as the Thoroughbred Horse Association, Horsemen’s Benevolent & Protective Association, United Thoroughbred Trainers of America and American Quarter Horse Association.\textsuperscript{140} Moreover, a committee resembling RMTC could guide drug research and propose new tests, withdrawal periods and mandatory publication when horses are administered certain drugs.\textsuperscript{141}

\begin{enumerate}
\item See id. at 108 (noting procedure for amendments and creating new bylaws).
\item See id. (cataloging steps in creation of new rules of amendments to existing rules).
\item See id. at 108-09 (describing how voting members may override Board of Directors in NCAA).
\item See Tarkanian, 488 U.S. at 183 (noting that choosing to join NCAA means accepting NCAA regulations).
\item See LaMarra, Racing Group Endorses Deadline, supra note 78 (noting RMTC’s wish for uniform adoption of rule across states).
\item See Tarkanian, 488 U.S. at 183 (describing how NCAA’s Committee on Infractions has power to suspend members in violation of NCAA bylaws). To stay analogous to the NCAA, a national horseracing organization could force member states to uphold other members’ suspensions; if a state refused, the organization could suspend or revoke the state’s membership. See id.
\item See id. (noting power of NCAA’s Council to create subcommittees); see also LaMarra, Racing Officials, supra note 4 (indicating several national agencies have influence over state laws).
\item See LaMarra, Model Rule on Steroid Use Blasted, supra note 82 (reporting view that model steroid regulation provides arbitrary link between threshold levels and withdrawal times); see also Heller, supra note 1 (noting bettors until recently remained ignorant of whether horses were on Lasix, which is arguably performance-enhancing drug). Heller also notes that many drugs lack an accurate test. See id.
\end{enumerate}
Finally, a national horseracing organization with actual authority could remove pressure from state agencies dealing with the various competing interests of the state, the trainers and the track owners.\textsuperscript{142} Without the pressure of acting as a police power, state agencies could focus on racing venues, revenues and generating interest in what is perceived as a dying sport.\textsuperscript{143}

Furthermore, based on the NCAA model, the individual state agencies would not forfeit all their power.\textsuperscript{144} Rather, they would act as representatives in a larger organization, with the ability to advance their own interests.\textsuperscript{145} Horseracing could shed corruption, whether real or perceived, because the public would note that a national organization is far more difficult for political entities powerful in one state to penetrate when the organization's interest must account for many different states.\textsuperscript{146}

Thus, a national horseracing organization based on the NCAA structure provides the best of both worlds, as it would allow the state agencies to retain their power while also implementing uniform rules, not the least of which would be performance-enhancing drug regulations.\textsuperscript{147} The other uniform implementation option - leaving the problem to Congress - would completely remove all power from the states.\textsuperscript{148} Additionally, any regulations in place would be far more difficult to amend or repeal if necessary.\textsuperscript{149} Furthermore, Congress' priorities would focus on the voting citizens and their perceptions of horseracing rather than what is in the best interest of the industry.\textsuperscript{150}

\textsuperscript{142} See, e.g., Handle Numbers Fall in Maryland in 2007, supra note 66 (reporting decrease of six and one half percent); see also Post, supra note 66 (noting lack of state funding as part of New York City Off-Track Betting's impending failure).

\textsuperscript{143} For a further discussion of agencies' police powers, see supra notes 23-37 and accompanying text. See also Handle Numbers Fall in Maryland in 2007, supra note 66 (reporting decrease of six and one half percent); Post, supra note 66 (noting lack of state funding as part of New York City Off-Track Betting's impending failure).

\textsuperscript{144} See Martin, supra note 1, at 108-09 (describing NCAA members' voting powers).

\textsuperscript{145} See id.

\textsuperscript{146} See Finley, supra note 75, at D1 (quoting medical director for California Horse Racing Board who noted public reaction to steroids in sports).

\textsuperscript{147} See Martin, supra note 1, at 108-09 (discussing NCAA members' voting powers); see also Tarkanian, 488 U.S. at 183 (describing national implementation of NCAA regulations).

\textsuperscript{148} For a further discussion of consequences of a congressional decision to regulate steroids in horseracing, see infra notes 151-67 and accompanying text.

\textsuperscript{149} For a further discussion of passing new rules or amending existing rules under a congressional statute, see infra notes 164-67 and accompanying text.

\textsuperscript{150} For a further discussion of whose interests Congress would reflect in a statute, see infra notes 158-167 and accompanying text.
C. Congressional Oversight

Even though individuals in the horseracing industry have heated opinions about the model steroid rule, they all seem to agree that a congressional statute regulating steroid use would be insufferable.151 What the industry seems to fear most is an outright ban on all steroid use.152 Resistance to a ban in horseracing stems from steroids’ valuable therapeutic properties for injured horses.153 This concern has led members of the NTRA to approach Congress directly with the model steroid rule.154

The industry’s fear is a valid apprehension, considering the spotlight on steroids in Major League Baseball and the public’s clear disapproval of such use in professional sports.155 Congress already has partially regulated betting on horses under the Commerce Clause and thus may use this same power to regulate steroid use, as horses are constantly crossing state lines to race.156 While so far the public has concentrated its disdain for steroid use among baseball players, Congress could just as easily bring racehorses into the spotlight as well.157

This industry apprehension of regulation assumes, however, that Congress would ban steroids outright.158 Considering steroids’

151. See LaMarra, Model Rule on Steroid Use Blasted, supra note 82 (noting view that model steroid regulation does not relate threshold levels to withdrawal times); see also LaMarra, Racing Officials, supra note 4 (reporting on horseracing officials meeting with Congressmen to discuss model steroid rule).
152. See LaMarra, Racing Officials, supra note 4 (noting fear of “blanket prohibition” on steroids in horseracing).
153. See Hegarty, supra note 76 (discussing steroids’ potential therapeutic effects). “U.S. veterinarians and trainers have said that the drugs have therapeutic uses to help horses recover from exercise and restore appetite, although other legal drugs — and rest — can also achieve the same effect.” Id.
154. See LaMarra, Racing Officials, supra note 4 (reporting racing officials’ impressions after meeting with Congress).
155. See id. (“An impending Congressional hearing on steroid use in Major League Baseball — and the possibility the inquiry could expand to other sports — has led the Thoroughbred racing industry to take preemptive action on Capitol Hill.”).
156. See U.S. Const. art. 1, § 8, cl. 3; 15 U.S.C. § 3002(13) (2008) (defining parimutuel); see also Hegarty, supra note 75 (discussing fear of staggered implementation of model steroid rule due to horses traveling state to state).
157. See LaMarra, Racing Officials, supra note 4 (noting fear of congressional ban on steroids in horseracing). NTRA chief executive officer, Alex Waldrop, said in response as to whether horseracing would become part of the congressional steroids discussion, “Is it a possibility? No question. Clearly steroid use is something Congress is concerned about in all professional athletics. Do I think we’ll be called [to testify]? It’s hard to say, but I think we impressed them . . . .” Id.
158. See id. (reporting fear of blanket prohibition). “The word to [the racing industry] is to act, or Congress will act forcefully . . . . A blanket prohibition would not be practical for our industry.” Id.
obvious therapeutic value to injured horses, however, Congress is unlikely to ban medical uses of the drugs.\textsuperscript{159} In fact, congressional oversight could save the horseracing industry from spending resources on the development of testing procedures and reasonable withdrawal times if federal funding financed the research.\textsuperscript{160} Additionally, congressional oversight would have the some of the same benefits as a national organization.\textsuperscript{161} A federal statute would resolve the problem of uniformity.\textsuperscript{162} It could further remove pressure from state agencies trying to balance the competing interests of limiting steroid use of the state and the industry.\textsuperscript{163}

Unlike a national organization, however, a federal statute would remove all power from the agencies.\textsuperscript{164} Agencies would no longer possess any voting rights.\textsuperscript{165} Instead, they would have to lobby congressional representatives – who presumably would not share the same expertise and understanding of leaders of a national horseracing organization – in order to amend the steroid rule.\textsuperscript{166} Furthermore, Congress remains focused on public perception more than the actual needs of the industry, thus rendering policy changes even more difficult.\textsuperscript{167}

\textsuperscript{159} See Hegarty, supra note 76 (noting veterinarians’ and trainers’ opinions on therapeutic effects of steroids). The article also noted, however, that other legal drugs and rest would benefit the horse in the same manner. See id.

\textsuperscript{160} See id. (reporting RMTC’s funding research on steroids testing and withdrawal times).

\textsuperscript{161} For a further discussion of benefits arising out creating a national horseracing organization, see supra notes 123-50 and accompanying text.

\textsuperscript{162} See Heller, supra note 1 (arguing for national regulations in horseracing).

\textsuperscript{163} See, e.g., Handle Numbers Fall in Maryland in 2007, supra note 66 (reporting decrease of six and one half percent); see also Post, supra note 66 (noting lack of state funding as part of New York City Off-Track Betting’s impending failure).

\textsuperscript{164} For a further discussion of how state agencies could retain some power in a national organization, see supra notes 123-50 and accompanying text.

\textsuperscript{165} For a further discussion of how state agencies could retain voting rights in a national organization, see supra notes 123-50 and accompanying text.

\textsuperscript{166} See LaMarra, Racing Officials, supra note 4 (reporting horseracing industry officials lobbying on Capitol Hill to prevent Congress from regulating steroid use in horseracing).

\textsuperscript{167} See Hegarty, supra note 76 (noting Waldrop’s fear of Congressional oversight on steroids in horseracing). Considering that the horseracing industry is concerned about the possibility of a federal statute to start lobbying Congress as a preventative measure, it must also realize the difficulties of convincing Congress to make any changes once Congress passes a statute. See id. As Waldrop said, “Given the scrutiny of anabolic steroids by the media and Congress, and the consequential negative perception of these drugs by the public, the horse racing industry must take initiative on its own volition to properly and uniformly regulate the use of anabolic steroids in racehorses this year.” Id.
IV. Conclusion

The horseracing industry has had its share of performance-enhancing drug problems, but only recently has the industry decided to seriously address the prevalence of steroids.168 Thanks to Major League Baseball's steroid debacle, horseracing authorities are not only working on a model steroid rule, but are also cracking down on the use of other prohibited drugs.169

Horseracing's recent history of enforcement of drug regulations serves as an indicator for how the current model steroid rule will fare.170 The recent Biancone affair signals the beginning of serious enforcement of all drug regulations.171 Furthermore, the industry's aggressive approach to Congress demonstrates its seriousness about limiting steroid use in horses.172

The industry's desire to eradicate its drug problem, however, depends solely on the cooperation of each state's horseracing agency.173 This dependency creates problems of cooperation, uniformity, enforcement and research.174 To face these issues, each state could agree to pass the same steroid rules and penalties, but this does not mean the rules will be uniformly enforced.175 Coordinating all the states to pass the same steroid statute at the same time is unlikely at best, impossible at worst.176 State agencies may counteract this issue by implementing other measures for deterrence, but ultimately each state is left to develop its regulations without regard to any other state.177

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168. For a further discussion of trainers receiving sanctions for performance-enhancing drugs other than steroids, see supra note 3 and accompanying text.
169. For a further discussion of the effect of congressional interest in steroids in professional baseball on the horseracing industry, see supra note 4 and accompanying text. See also Drape, supra note 43 (describing Biancone suspension as example to other trainers).
170. For examples of enforcement of drug regulations, see supra notes 38-45 and accompanying text.
171. See Trainer Barred, supra note 2 (describing Biancone's sanction for discovery of vials of cobra venom in his barn).
172. See LaMarra, Racing Officials, supra note 4 (reporting meeting between Congressmen and horseracing officials on steroid use in horses).
173. For a discussion on the power of state agencies to regulate horseracing within its states, see supra notes 23-37 and accompanying text.
174. For a further discussion of the problems presented by lack of a national organization presents, see supra notes 86-91 and accompanying text.
175. For a further discussion of state agencies' discretion in enforcing drug regulations, see supra notes 23-37 and accompanying text.
176. See Hegarty, supra note 76 (detailing lack of uniformity across states in regulating steroids administered to horses).
177. For a further discussion of other methods to deter drug use without national standards, see supra notes 92-122 and accompanying text.
Thus, the optimal remedy is to create a national organization based on the NCAA model.\textsuperscript{178} In this type of organization, the state agencies could still retain their power while implementing the same rules uniformly.\textsuperscript{179} This would also provide a singular approach to both research and enforcement.\textsuperscript{180} Perhaps most importantly, the organization would have the horseracing industry’s best interests at heart.\textsuperscript{181}

Should Congress choose to intervene in steroid use across all professional sports, the state agencies would not have any power, except to petition Congress for change.\textsuperscript{182} The horseracing industry fears an outright ban on steroids, but this is unlikely considering steroids’ therapeutic effects are common knowledge.\textsuperscript{183} While a federal statute would solve the problem of uniformity, it would also be antithetical to the industry’s needs, as Congress remains more concerned with the general public.\textsuperscript{184}

Therefore, considering the ineffectiveness of prohibiting performance-enhancing drugs through various statutes among states, the most practical remedy is to create a national organization where states are members.\textsuperscript{185} Doing so would relieve the industry of its two concerns: uniform enforcement and keeping Congress out of its stables.\textsuperscript{186}

\textit{Kimberli Gasparon}\textsuperscript{*}

\textsuperscript{178} For a further discussion of the benefits to creating a national horseracing organization in which state are members, see supra notes 123-50 and accompanying text.

\textsuperscript{179} For a further discussion on how legislation within a national organization could work based on the NCAA model, see supra notes 123-50 and accompanying text.

\textsuperscript{180} For a further discussion of benefits to having a national horseracing organization, see supra notes 123-63 and accompanying text.

\textsuperscript{181} For a detailed comparison between a theoretical national organization’s interests and Congress’s interests, see supra notes 164-84 and accompanying text.

\textsuperscript{182} For a further discussion of the consequences should a federal statute regulating steroid use in horseracing go into effect, see supra notes 151-67 and accompanying text.

\textsuperscript{183} For a further discussion of why Congress would unlikely prohibit all steroids in horseracing, see supra note 157 and accompanying text.

\textsuperscript{184} For a further discussion of Congress’s interests, see supra note 167 and accompanying text.

\textsuperscript{185} For a further discussion of the benefits of a national horseracing organization, see supra notes 123-50 and accompanying text.

\textsuperscript{186} For a detailed comparison of the effects of a federal statute versus a national organization, versus no national statute at all, see supra notes 168-86 and accompanying text.

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