

JUST SAY NEIGH: A CALL FOR FEDERAL REGULATION OF BY-PRODUCT DISPOSAL BY THE EQUINE INDUSTRY

By
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This article discusses the thousands of foals born each year that are bred for industrial purposes. These foals must then be disposed of as unwanted by-products of the equine industry. PMU mares are bred to collect urine rich with hormones used in the production of a drug to treat menopausal symptoms. Nurse mares are bred to produce milk to feed foals other than their own. If adoptive homes cannot be found quickly, both industries dispose of their equine by-products by slaughtering the foals, and sometimes the mares, for profit or convenience. This paper calls for an amendment to the Animal Welfare Act enabling the Department of Agriculture to regulate the PMU and nurse mare farms, and requiring both industries to responsibly dispose of these horses.

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I. INTRODUCTION

The equine industry is an economic giant that contributes over \$110 billion each year to the U.S. economy, provides 1.4 million full-

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time jobs, includes 6.9 million horses, involves 7.1 million Americans, and accounts for \$1.9 billion in tax revenue each year.¹ The industry is largely self-regulated by the more than fifty breed and color associations active in North America.² Common among association bylaws and regulations is humane treatment of horses.³

For several decades, the United States Government has attempted to protect horses and other animals, chiefly by passing three statutes: the Animal Welfare Act,⁴ the Wild Free-Roaming Horses and Burros Act,⁵ and the Horse Protection Act.⁶

The several states also have animal anti-cruelty statutes, many of which specifically protect horses, and some of which define horses as either livestock or pets.⁷

The Animal Welfare Act (AWA or “the Act”) originally only protected laboratory animals.⁸ Several amendments broadened the scope of this Act by adding protection for other types of animals and specifically preventing dog fighting.⁹ However, the Act does not protect horses used for anything other than research purposes.¹⁰ This article calls for further amendments to the Act to provide two additional protections: first, direct the United States Department of Agriculture (USDA) supervision over PMU and nurse mare farms, and second, protection for the mares used by the industries and the foals they produce.

In 1971, Congress enacted the Wild Free-Roaming Horses and Burros Act to protect American wild horses and burros regulated by the Department of the Interior (Interior).¹¹ For several years, Interior banned slaughter of these animals, but in 2004 one enterprising legislator slipped in an amendment to a general spending bill and lifted the

¹ *The Economic Impact of the Horse Industry in the United States* vol. 1, i (Am. Horse Council Found. 1996).

² M.E. Ensminger, *Horses and Horsemanship* 486 (6th ed., Interstate Publishers, Inc. 1990).

³ See e.g. Am. Paint Horse Assn., *2006 Official APHA Rule Book 2* (Am. Paint Horse Assn. 2006) (establishing a position statement supporting the humane treatment of all animals); Am. Quarter Horse Assn., *Official Handbook of Rules and Regulations* 9 (54th ed., Am. Quarter Horse Assn. 2006) (establishing a statement of policy that all animals shall be humanely treated); Appaloosa Horse Club, *2006 Official Handbook* 1 (Appaloosa Horse Club 2006) (committing to humane and responsible treatment of all animals).

⁴ 7 U.S.C. §§ 2131–2159 (2000); see 9 C.F.R. §§ 1.1–4.11 (2005) (for regulations promulgated by the Secretary of Agriculture pertaining to the AWA).

⁵ 16 U.S.C. §§ 1331–1340 (2000); see 36 C.F.R. §§ 222.20–222.36 (2005) (for regulations promulgated by the Secretary of Agriculture pertaining to the Act).

⁶ 15 U.S.C. §§ 1821–1831 (2000); see 9 C.F.R. §§ 11.1–12.10 (for regulations promulgated by the Secretary of Agriculture pertaining to the AWA).

⁷ See Pamela D. Frasch et al., *Animal Anti-Cruelty Statutes: An Overview*, 5 *Animal L.* 69 (1999) (for a state-by-state comparison of animal cruelty laws).

⁸ 7 U.S.C. §§ 2131–2159.

⁹ See e.g. Pub. L. No. 94-279, § 2, 90 Stat. 417 (1976) (prohibiting using animals that were moved in interstate commerce in fighting ventures).

¹⁰ 7 U.S.C. § 2132(g)(2).

¹¹ 16 U.S.C. §§ 1331–1340, 1331.

moratorium on slaughter.¹² As a result, scores of wild horses went to slaughter.¹³ The resulting public outcry and response by Congress not only reinstated the ban against slaughter of wild horses, but also banned equine slaughter in the United States altogether for a limited amount of time.¹⁴ Once the ban expires, horses not protected by any statute will again be slaughtered for human consumption.

The Horse Protection Act is specific to gaited horses that are “sored” by chemicals in order to give them an advantage in the show ring.¹⁵ The Act provides penalties for owners and trainers who participate in the practice.¹⁶ However, the Act does not protect horses other than gaited show horses.¹⁷

Yet, with all these protections in place, two sectors of the equine industry manage to gallop through a giant loophole in federal and state regulations and produce thousands of foals¹⁸ each year as unwanted by-products. These foals, and the mares which produce them, are the subject of this article.

This article first discusses the Animal Welfare Act and subsequent amendments thereto, with a focus on the treatment of horses. Next, the article examines the Wild Free-Roaming Horses and Burros Act and analyzes its impact on saving wild horses from slaughter. Third, the article studies the Horse Protection Act and how it has attempted to put an end to the practice of soring gaited horses. Efforts currently before Congress to make horse protections more permanent are also noted, followed by a look into the two main industries that rely on by-product foals for profit. The decline of these industries and the resulting horse overpopulation is also given great attention. Finally, the article offers recommendations for amending various animal protection statutes to better protect horses used in industry in the United States.

¹² James R. Carroll, *House Approves Measure Banning Wild Horse Sales; Program in West Is under Scrutiny*, *The Courier-Journal* (Louisville, Ky.) 1B (May 20, 2005) (available at <http://www.courier-journal.com/apps/pbcs.dll/article?AID=/20050520/NEWS0104/505200421>).

¹³ *Id.*

¹⁴ Pub. L. No. 109-97, § 798 (Jan. 7, 2005), 2006 U.S.C.C.A.N. 2166.

¹⁵ 15 U.S.C. §§ 1821–1831. For a more detailed description of the Horse Protection Act, see *infra* part II(C). For details on recent proposed amendments which would effectively ban the slaughter of horses for human consumption, see *infra* part II(D). A gait is the way or rhythm in which a horse moves its feet, such as a walk, trot, or canter. *Webster's Third New International Dictionary of the English Language Unabridged* 929 (Phillip Babcock Gove, Ph. D. ed., G. & C. Merriam Company 1971). There is a history of soring of Tennessee Walking Horses, in particular, to exaggerate their already unusual gait, producing more show and flash in the show ring. See Lafcadio H. Darling, *Legal Protection for Horses: Care and Stewardship or Hypocrisy and Neglect*, 6 *Animal L.* 105, 116–21, pt. IV(B) (2000) (discussing the HPA and the history of soring Tennessee Walking Horses).

¹⁶ 15 U.S.C. § 1825.

¹⁷ 15 U.S.C. § 1824(1).

¹⁸ Foals are baby horses. *Webster's Third New International Dictionary of the English Language Unabridged*, *supra* n. 15, at 880. Fillies are female foals, and stud colts or colts are male foals. *Id.* at 450, 850.

II. HISTORY OF FEDERAL EQUINE PROTECTION

Over the past few decades, Congress has attempted to protect wild horses and burros, gaited show horses, and most recently, horses slaughtered for human consumption. However, it has intentionally excluded all other horses used for any other purpose. The result is a loophole which allows mistreatment and slaughter of thousands of horses employed by two discreet equine industries in an effort to quickly and economically dispose of by-products of these industries. This section discusses the Animal Welfare Act, the Wild Free-Roaming Horses and Burros Act, the Horse Protection Act, and pending legislation.

A. *The Animal Welfare Act*

In 1966, the United States enacted what is commonly called the Animal Welfare Act (AWA).¹⁹ The stated purpose of the AWA was:

- (1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;
- (2) to assure the humane treatment of animals during transportation in commerce; and (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.²⁰

It authorized the Secretary of Agriculture "to regulate the transportation, sale, and handling of dogs, cats, [monkeys (nonhuman primate animals), guinea pigs, hamsters and rabbits] intended to be used in research or . . . for other purposes" and required licensing and inspection of dog and cat dealers and humane handling at auction sales.²¹

The statute underwent various amendments. The 1970 amendments expanded the list of animals covered by the AWA to include all warm-blooded animals intended for use in experimentation or exhibition, except horses not used in research and farm animals raised for food.²² The amended Act defined research facilities and exhibitors.²³ It exempted pet stores, purebred dog and cat shows, and agricultural exhibitions.²⁴ The amended Act further charged the Secretary of Agriculture with developing regulations for recordkeeping and humane care and treatment of animals in or during commerce, exhibition, experimentation, and transport.²⁵

In 1976, the House considered, but rejected an amendment that would have afforded humane treatment to horses destined for slaughter.²⁶ Congress amended the AWA, primarily refining previous regula-

¹⁹ 7 U.S.C. §§ 2131-5219.

²⁰ 7 U.S.C. § 2131.

²¹ Pub. L. No. 89-544, §§ 1, 2(g), 4, 16, 12, 80 Stat. 350, 350-52 (1966).

²² Pub. L. No. 91-579, § 3(g), 84 Stat. 1560, 1561 (1970).

²³ 84 Stat. at 1560-61.

²⁴ *Id.* at 1561.

²⁵ Darling, *supra* n. 15, at 1562.

²⁶ H.R. Rpt. 94-801 (April 6, 1976).

tions on animal transport and commerce²⁷ and defining “carrier” and “intermediate handler.”²⁸ The amendment required health certification by a veterinarian prior to transport or sale.²⁹ The amendment also introduced and defined “animal fighting ventures” but exempted animals used in hunting waterfowl, foxes, and other game animals.³⁰

Congress amended the AWA again when it passed the Food Security Act of 1985 (FSA).³¹ Section 1752 clarified “humane care” by specifying standards for sanitation, housing, and ventilation; and directed the Secretary of Agriculture to establish regulations to provide exercise for dogs and an adequate physical environment “to promote the psychological well-being of primates.”³² The FSA concentrated on operative procedures during experimentation and established the Institutional Animal Care and Use Committee, describing its roles, composition, and responsibilities to the Animal and Plant Health Inspection Service (APHIS).³³

In 1990, Congress again amended the AWA with the Food, Agriculture, Conservation and Trade Act of 1990, protecting dogs and cats at shelters and other holding facilities before sale to dealers.³⁴ However, the 1990 amendment did not affect horses.

At no time has the statute protected horses used for anything besides research purposes. In fact, the statute specifically excludes horses used for anything but research purposes.³⁵ The AWA protects a dead hamster but not a live horse used for anything except research purposes. Horse owners may find that offensive, especially those owners who regard their horses as pets.³⁶

²⁷ Pub. L. No. 94-279, §§ 2(c)–12, 90 Stat. 417, 417–20 (1976).

²⁸ 90 Stat. at 418.

²⁹ *Id.* at 419.

³⁰ *Id.* at 422.

³¹ Pub. L. No. 99-198, § 1, 99 Stat. 1354, 1354 (1985).

³² 99 Stat. at 1645.

³³ *Id.* at 1645–48.

³⁴ Pub. L. No. 101-624, 104 Stat. 3359, 4930 (1990).

³⁵ The definitions section states:

The term “animal” means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet; but such term excludes (1) birds, rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research, (2) horses not used for research purposes, and (3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. With respect to a dog, the term means all dogs including those used for hunting, security, or breeding purposes

7 U.S.C. § 2132(g) (2000).

³⁶ See Bill Maxwell, *Americans Squeamish over Horse Meat*, St. Petersburg Times (St. Petersburg, Fla.) 17A (Sept. 4, 2002) (“Most of us see horses as pets, companions, playmates and beasts of burden.”); Megan Twohey, *Horse Owners Often Unaware of Cost, Care*, Lawrence Journal-World (Lawrence, Kan.) (May 23, 2004) (available at

B. The Wild Free-Roaming Horses and Burros Act

In 1959, Congress passed the so-called Wild Horse Annie Act,³⁷ which prohibited horse hunters from using aircraft and motor vehicles.³⁸ The Act was generally ineffective in preventing slaughter of these wild animals, and Congress later yielded to public pressure by passing the Wild Free-Roaming Horses and Burro Act (WFRHBA).³⁹ The WFRHBA was designed to protect wild horses and burros because they typify the national spirit.⁴⁰

Since 1971, the WFRHBA and its predecessor have attempted to protect wild horses and burros from slaughter.⁴¹ In 2004, however, Senator Conrad Burns (R-Mont.) sponsored and attached to a catch-all spending measure a legislative provision lifting a ban against selling these wild animals for slaughter.⁴² The measure allowed the government to sell “for slaughter some older and unwanted horses . . . captured during the periodic government roundups aimed at reducing the wild population.”⁴³ When the government resumed sales in March 2005, forty-one wild horses went to slaughterhouses.⁴⁴

In response to public outcry, the Bureau of Land Management (BLM) suspended sales, but decided after some consideration that sales should continue with what the BLM considers sufficient safeguards.⁴⁵ BLM allowed sales if buyers signed statements pledging to provide humane care for the animals and promising not to sell them for slaughter.⁴⁶

Several congressional representatives responded to Senator Burns’ legislation by introducing legislation of their own. They inserted an amendment to the agriculture appropriations bill that pre-

http://www2.ljworld.com/news/2004/may/23/horse_owners_often/) (“[M]any former urban dwellers . . . are buying horses because they view them as pets that look good in their new surroundings.”).

³⁷ Wild Horse Annie was a Nevada native who was dedicated to saving wild horses and burros. See Intl. Socy. for the Protec. of Horses & Burros, *Wild Horse Annie*, <http://www.ispmb.org/annie.shtml> (accessed Feb. 18, 2006).

³⁸ 18 U.S.C. § 47 (1959).

³⁹ 16 U.S.C. §§ 1331–1340; see also Darling, *supra* n. 15, at 109.

⁴⁰ Darling, *supra* n. 15, at 109 (“The wild and free-roaming horses and burros . . . belong to no one individual. They belong to all the American people. The spirit which has kept them alive and free against almost insurmountable odds typifies the national spirit which led to the growth of our Nation. They are living symbols of the rugged independence and tireless energy of our pioneer heritage.”) (quoting Sen. Rpt. 92-242 at 1 (June 21, 1971)).

⁴¹ 16 U.S.C. §§ 1331–1340.

⁴² Carroll, *supra* n. 12, at 1B.

⁴³ The population of wild horses and burros was estimated to be 33,000 across 10 Western states at the time the ban was lifted. Scott Sonner, *Horse-Slaughtering Law Alarms Activists: Lifting of 34-Year-Old Ban on Slaughter of Wild Horses in U.S. Concerns Conservationists*, <http://abcnews.go.com/US/wireStory?id=530694&CMP=OTCRSSFeeds0312> (Feb. 25, 2005) (no longer available).

⁴⁴ Carroll, *supra* n. 12, at 1B.

⁴⁵ *Id.*

⁴⁶ *Id.*

vented the USDA from using federal funds to pay for inspections of equine slaughterhouses or equines scheduled for slaughter for human consumption.⁴⁷ The measure passed the U.S. House of Representatives in June 2005 by a vote of 269-158 and passed the Senate by a 68-29 vote.⁴⁸ Since the slaughterhouses could not slaughter or sell uninspected meat, the measure effectively banned equine slaughter for human consumption.⁴⁹

The legislation was an amendment to a spending bill and, therefore, scheduled to begin October 2005, effective only for one fiscal year.⁵⁰ In committee, the ban was delayed by 120 days, reducing the already temporary ban to only eight months.⁵¹ President George W. Bush signed the bill into law November 10, 2005.⁵²

The U.S. hosts three equine slaughterhouses—two in Texas and one in Illinois.⁵³ According to the USDA, 58,736 horses were slaughtered for human consumption in the U.S. in 2004, resulting in approximately 13.6 million pounds of horse meat which was exported to Switzerland, Mexico, Japan, and the European Union.⁵⁴ The rider to the agriculture appropriations bill makes the future of the three U.S. equine slaughterhouses less certain, at least for the next few months. According to one authority, however, horse slaughter facilities can stay in business by paying for inspection services out of their own pockets.⁵⁵ The USDA has, in fact, announced that it will inspect the plants if the plant owners pay the inspection costs—effectively gutting the

⁴⁷ The amendment provided,

None of the funds appropriated or otherwise made available by this Act shall be used to pay salaries and expenses of personnel who implement or administer section 508(e)(3) of the Federal Crop Insurance Act (7 U.S.C. 1508(e)(3)) or any regulation, bulletin, policy or agency guidance issued pursuant to section 508(e)(3) of such Act for the 2007 reinsurance year. Effective 120 days after the date of enactment of this Act, none of the funds made available in this Act may be used to pay the salaries or expenses of personnel to inspect horses under section 3 of the Federal Meat Inspection Act (21 U.S.C. 603) or under the guidelines issued under section 903 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. 1901 note; Public Law 104-127).

H.R. Conf. Rpt. 109-255, §§ 793–794 (Oct. 26, 2005).

⁴⁸ Humane Socy. of the U.S., *Victory for American Horses!* https://community.hsus.org/humane/notice-description.tcl?newsletter_id=3628842 (Sept. 20, 2005) (discussing the Senate's passage of the amendment); Humane Socy. of the U.S., *Horse Slaughter Amendment Passes U.S. House!* https://community.hsus.org/humane/notice-description.tcl?newsletter_id=3374815 (June 8, 2005) (discussing the House's passage of the amendment).

⁴⁹ 21 U.S.C. § 603 (2000).

⁵⁰ U.S. Federal News, *Rep. Spratt Hails Senate Passage of Amendment to End Horse Slaughter* (Sept. 23, 2005) (available at 2005 WLNR 15549462).

⁵¹ 151 Cong. Rec. H9391 (daily ed. Oct. 28, 2005).

⁵² Pub. L. No. 109-97, 119 Stat. 2120 (2005).

⁵³ Mary Jacoby, *Why Belgians Shoot Horses in Texas for Dining in Europe*, Wall St. J. A1 (Sept. 21, 2005).

⁵⁴ *Id.*

⁵⁵ Karen Ogden, *Horse Slaughter Ban*, Great Falls Trib. (Great Falls, Mont.) A1 (Oct. 29, 2005).

legislation.⁵⁶ If the plants do stay open, they will pass the costs of inspection along to the horse sellers.⁵⁷ Even if the U.S. plants were to close, horse owners could still ship their horses to Canada or Mexico for slaughter.⁵⁸

C. *The Horse Protection Act*

Congress came to the aid of gaited⁵⁹ show horses in 1970 by passing the Horse Protection Act (HPA).⁶⁰ Although its name is generic, the HPA addresses the issue of “soring,” a practice used on gaited horses to make their already unusual gait more pronounced.⁶¹ Owners, trainers, and exhibitors who participate in soring lacerate, burn, apply chemicals to, or insert screws into a horse’s legs or feet.⁶² Promulgation of necessary regulations and enforcement of the Act are delegated to the USDA.⁶³

The Animal Care division of the USDA enforces the HPA by overseeing the Designated Qualified Person (DQP) program.⁶⁴ USDA-certified horse industry organizations or associations train DQPs to detect sored horses.⁶⁵ The DQPs are responsible for barring from shows any horse that does not meet HPA regulations.⁶⁶ Animal Care personnel also conduct random, unannounced inspections at horse shows and sales.⁶⁷ Punishment for violating the HPA includes criminal or civil penalties such as: up to two years in prison, fines of up to five thousand dollars, and disqualification for one or more years from showing or exhibiting horses or selling them through auction sales.⁶⁸ A trainer who violates the HPA can also be disqualified for life.⁶⁹

⁵⁶ National Geographic News, *Horse Slaughter Continues in U.S., Despite Recent Law*, http://news.nationalgeographic.com/news/2006/02/0208_060208_horse_meat.html (Feb. 8, 2006).

⁵⁷ Ogden, *supra* n. 55, at A1.

⁵⁸ See Socy. for Animal Protective Legis., *Frequently Asked Questions about Horse Slaughter*, <http://www.saplonline.org/Legislation/ahspa/faq.htm> (accessed Jan. 31, 2006) (details on horse slaughter); Animal Welfare Inst., *Betraying Our Equine Ally*, http://www.awionline.org/othercampaigns/horse_slaughter.htm (accessed Jan. 31, 2006) (more details on horse slaughter).

⁵⁹ See *supra* n. 15 (for information on gaits and soring).

⁶⁰ 15 U.S.C. §§ 1821–1831.

⁶¹ 15 U.S.C. § 1821(3)(A)–1821(3)(D).

⁶² *Id.*; Darling, *supra* n. 15, at 111.

⁶³ 15 U.S.C. §§ 1821–1831.

⁶⁴ USDA, *Horse Protection Act Information*, <http://www.aphis.usda.gov/ac/hpainfo.html> (accessed Jan. 28, 2006).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

D. Pending Legislation

On February 1, 2005, Representative John Sweeney (R-NY) introduced H.R. 503, an amendment to HPA, “to prohibit the shipping, transporting, moving, delivering, receiving, possessing, purchasing, selling, or donation of horses and other equines to be slaughtered for human consumption, and for other purposes.”⁷⁰ On February 25, 2005, the bill was referred to the House Subcommittee on Commerce, Trade and Consumer Protection.⁷¹

On October 25, 2005, Senator John Ensign (R-NV) introduced S.1915, an amendment to the Horse Protection Act,⁷² titled the Virgie S. Arden American Horse Slaughter Prevention Act,⁷³ and having an identical purpose to the amendment proposed by Representative Sweeney in February of 2005. On the same day, the measure was referred to the Committee on Commerce, Science, and Transportation.⁷⁴ These two bills propose a permanent ban on horse slaughter, rather than the temporary and ineffective measure affected by the appropriations bill amendment.

III. SOURCES OF BY-PRODUCT FOALS

Two commercial endeavors in particular create thousands of by-product foals. The PMU mare industry and the nurse mare farm industry produce cast-off foals with dubious benefits other than increased profits for participants. This section provides a background of these industries.

A. History of the PMU Mare Industry

Around 1940, pharmaceutical companies began looking for ways to assist menopausal women with the normal symptoms of menopause—hot flashes, night sweats, and progressing osteoporosis.⁷⁵ Wyeth Pharmaceuticals placed itself at the top of the ladder when it discovered conjugated estrogen.⁷⁶ In 1942, Wyeth began selling Premarin to treat menopausal symptoms and remains the sole seller of this drug, even though its patent expired years ago.⁷⁷ The drug derives its name from its main ingredient, *pregnant mare’s urine*, and is a

⁷⁰ The Library of Congress, *H.R.503*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR00503:@@X> (accessed Jan. 30, 2005).

⁷¹ *Id.*

⁷² 151 Cong. Rec. S11823-01 (daily ed. Oct. 25, 2005).

⁷³ The Library of Congress, *S.1915*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN01915:@@L&summ2=m&> (accessed Jan. 30, 2005).

⁷⁴ *Id.*

⁷⁵ Leila Abboud, *Raging Hormones: How Drug Giant Keeps a Monopoly on 60-Year-Old Pill*, Wall St. J. A1 (Sept. 9, 2004).

⁷⁶ *Id.*

⁷⁷ *Id.*

major money-maker for Wyeth.⁷⁸ In the twelve months prior to June 30, 2004, Premarin made Wyeth \$841 million,⁷⁹ down some from its billion dollar gross profit just a few years before.⁸⁰ Between 2000 and 2003, sales of Premarin and its related products topped \$2 billion.⁸¹ The Premarin brand includes Prempro, Premphase, Prempac, and Premelle, and is made from conjugated estrogens extracted from urine produced by pregnant mares.⁸² Wyeth contracts with PMU farmers in Canada and the United States who operate farms for the specific purpose of extracting the urine.⁸³

Detractors of Premarin assert that the PMU mares are bred each summer, and for the last six months of the pregnancy⁸⁴ the mares are kept in stalls and wear a device “that resembles a rubber diaper crossed with a drain hose.”⁸⁵ The mares remain in fixed positions and get little exercise.⁸⁶ The urine-collection bags strapped over the mares’ urethras are bulky and may lead to infected sores and leg chafing.⁸⁷ According to the Massachusetts Society for the Prevention of Cruelty to Animals, the PMU farmers limit the mares’ water intake to make the urine more concentrated.⁸⁸ The practice leads to widespread renal

⁷⁸ *Premarin.org: The Beginning of the End?* “What is Premarin(e)?” <http://www.premarin.org> (updated Nov. 9, 2003).

⁷⁹ Abboud, *supra* n. 75, at A1.

⁸⁰ *Id.* at A1 chart.

⁸¹ *Id.*

⁸² *Premarin.org: The Beginning of the End?* *supra* n. 78, at “What is Premarin(e)?” <http://www.premarin.org>.

⁸³ Humane Socy. of the U.S., *The Facts About Premarin*, http://www.hsus.org/pets/issues_affecting_our_pets/equine_protection/the_facts_about_premarin.html (accessed Jan. 29, 2006).

⁸⁴ Ensminger, *supra* n. 2 at 156. The average gestation period for a foal is 336 days. *Id.*

⁸⁵ M.R. Montgomery, *Horses Pay a High Price in the Making of Premarin, the Hormone Treatment for Women*, Boston Globe D1 (Jan. 8, 1997).

⁸⁶ Kinship Circle, *The “P” in Premarin Stands For*, http://www.kinshipcircle.org/fact_sheets/PInPremarinStandsFor.pdf (accessed January 29, 2006).

⁸⁷ *Id.*

⁸⁸ *Id.* Ten states and the District of Columbia classify water deprivation as cruelty to animals, including North Dakota, the location of most of the United States’ PMU farms. See Conn. Gen. Stat. Ann. § 53-247(a) (West 2001) (stating that “any person who . . . fails to supply any such animal with . . . water . . . shall be fined”); D.C. Code Ann. § 22-1001(a) (LEXIS 2001) (stating that “whoever . . . unnecessarily fails to provide the same [animal] with proper food, drink . . . shall . . . be punished”); Kan. Stat. Ann. § 21-4310(a)(3) (1995) (stating that “cruelty to animals is . . . having physical custody of any animal and failing to provide potable water . . . as is needed for the health or well-being of such kind of animal”); Mont. Code Ann. § 45-8-211(1)(c)(i) (2005) (stating that “a person commits the offense of cruelty to animals . . . by failing to provide an animal in the person’s custody with food and water”); N.D. Cent. Code § 36-21.1-02(2) (2004) (stating that “no person may deprive any animal . . . of necessary food, water, or shelter”); Ohio Rev. Code Ann. § 959.13(A)(1) (West 1993) (stating that “no person shall . . . confine an animal without supplying it . . . with a sufficient quantity of good wholesome food and water”); Tenn. Code Ann. § 39-14-202(a)(2) (2003) (stating that “a person commits an offense [of cruelty to animals] who intentionally or knowingly fails unreasonably to provide necessary food, water”); Vt. Stat. Ann. tit. 13, § 352(4) (1998) (stating that “a

and liver disorders.⁸⁹

Even though the drug is effective for millions of women,⁹⁰ even Wyeth does not know exactly what it contains.⁹¹ Despite the mystery, “Premarin is the most frequently prescribed estrogen replacement drug today. Prescribing Premarin for estrogen deficiency has evolved over the years as a Pavlovian response without any thought to individual treatment.”⁹² Most of the compounds in Premarin are foreign to a human female’s body and are not produced by the human ovary.⁹³

Wyeth has successfully fought efforts of rival drug companies to make an equivalent generic drug. Nearly two decades ago, Barr Laboratories began its attempt to market a generic equivalent which has yet to reach the marketplace.⁹⁴ The Food and Drug Administration (FDA) apparently yielded to heavy lobbying by Wyeth and ruled that any company wishing to manufacture a generic equivalent would have to start with pregnant mare urine to insure actual equivalency.⁹⁵ Barr Laboratories found several suppliers of mare urine, none of which could answer the critical question of how to extract the conjugated estrogen from the urine and convert it into powder, a procedure Wyeth calls the Brandon Process.⁹⁶ Barr finally discovered Natural Biologics, Inc., a small Minnesota company, which claimed to have discovered the secret of turning urine into powder.⁹⁷ Barr Laboratories tested the powder and found it acceptable.⁹⁸

person commits the crime of cruelty to animals if the person deprives an animal . . . of adequate food, water”); Wash. Rev. Code Ann. § 16.52.205(2) (West Supp. 2006) (stating that “a person is guilty of animal cruelty . . . when . . . he or she . . . dehydrates . . . an animal”); W.Va. Code § 61-8-19(a) (2005) (stating that “if any person cruelly . . . withholds . . . water . . . he or she is guilty of a misdemeanor”); Wyo. Stat. Ann. § 6-3-203(b) (2005) (stating that “a person commits cruelty to animals if he . . . unnecessarily fails to provide it with the proper food, drink”); Christine Davis, *Women Work Together to Help Rescue Horses*, Palm Beach Post (Palm Beach, Fla.) NP6 (May 12, 2004) (“The horse breeders, called PMU ranchers, are located in the Prairie Provinces of Canada and in North Dakota close to the Wyeth-Ayerst plant.”).

⁸⁹ Kinship Circle, *supra* n. 86, at http://www.kinshipcircle.org/fact_sheets/PInPremarinStandsFor.pdf.

⁹⁰ Abboud, *supra*, n. 75, at A1.

⁹¹ *Id.*

⁹² Phillip O. Warner, M.D., *Estrogen Substitutes Aren’t All the Same*, 143 N.Y. Times A14 (Nov. 21, 1994).

⁹³ *Id.* Warner includes the contention by People for the Ethical Treatment of Animals (PETA) that 65,000 foals born to the impregnated mares are slaughtered each year as a by-product of the pregnancies. *Id.*

⁹⁴ Abboud, *supra* n. 75, at A1.

⁹⁵ *Id.*

⁹⁶ This process is called the Brandon Process because all extraction and conversion is done by Ayerst Organics, Ltd., a Wyeth subsidiary, at its plant in Brandon, Manitoba, Canada. See *Wyeth v. Natural Biologics, Inc.*, 395 F.3d 897, 899 (8th Cir. 2005) (providing that Wyeth manufactures natural conjugated estrogens using the Brandon Process); *Premarin.org: The Beginning of the End?* *supra* n. 78, at “What is Premarin(e)?” <http://www.premarin.org>, (noting that Ayerst Organics Ltd., a subsidiary of Wyeth Inc., is “the world’s *only* producer of PMU”) (emphasis in original).

⁹⁷ Abboud, *supra* n. 75, at A1.

⁹⁸ *Id.*

Barr then ran into a major legal glitch. Wyeth had already sued Natural Biologics, claiming that Natural Biologics stole trade secrets.⁹⁹ According to Wyeth, Natural Biologics' president, David Saveraid, enlisted a former Wyeth chemist who was critical to the Brandon Process.¹⁰⁰ The trial court entered 146 non-confidential findings of fact and 55 non-confidential conclusions of law, the crux of which was that Saveraid had obtained his information illegally.¹⁰¹ The court permanently enjoined Natural Biologics from making or selling estrogens extracted from urine.¹⁰² On appeal, Natural Biologics argued that the trial court erred in finding that the Brandon Process was a legitimate trade secret.¹⁰³ The court held that, under the totality of the circumstances, the trial court did not err in finding that the Brandon Process was a trade secret¹⁰⁴ and upheld the permanent injunction.¹⁰⁵

In addition to instituting cases in federal court to protect its trade secrets and successfully defending anti-trust actions,¹⁰⁶ Wyeth found itself fighting on another battlefield.¹⁰⁷ In the late 1990s, healthcare providers began questioning the use of hormone replacement therapy (HRT).¹⁰⁸ Decades earlier the pharmaceutical industry and the healthcare profession had redefined menopause—a natural part of every woman's life once she reaches middle age—and clinically termed it estrogen deficiency disease.¹⁰⁹

To treat the "disease," doctors ordered hormone replacement therapy. Short-term use was effective and safe, and women could taper off the treatment after three to five years.¹¹⁰ Since short-term use was effective and profitable, pharmaceutical companies took the treatment to new lengths and launched what they called an educational campaign (which manifested in an advertising campaign) targeted at women and the healthcare profession.¹¹¹ Jumping onto the band-

⁹⁹ *Id.*; *Wyeth v. Natural Biologics, Inc.*, 2003 U.S. Dist. LEXIS 17713 at ¶ 2 (D. Minn. Oct. 2, 2003).

¹⁰⁰ Abboud, *supra* n. 75, at A1.

¹⁰¹ *Wyeth*, 2003 U.S. Dist. LEXIS 17713 at ¶¶ 1–79, 33.

¹⁰² *Id.* at 74; *see also* Abboud, *supra* n. 75, at A1.

¹⁰³ *Wyeth*, 395 F.3d at 899.

¹⁰⁴ *Id.* at 900.

¹⁰⁵ *Id.* at 903.

¹⁰⁶ *See e.g. J.B.D.L. Corp. v. Wyeth*, 2005 U.S. Dist. LEXIS 11676 (June 13, 2005) (Wyeth's success at limiting a competitor's market share in the hormone replacement therapy market and resultant ability to raise prices of its own products was not a violation of the Sherman Act.). Of note, the competitor was Duramed Pharmaceuticals, manufacturer of Cenestin, another conjugated estrogen product. *Id.*; *but see Ferrell v. Wyeth-Ayerst, Labs., Inc.*, 2004 U.S. Dist. LEXIS 15127 (D. Ohio 2004) (Wyeth's ability to limit a competitor's market share did not preclude an unjust enrichment action.).

¹⁰⁷ Susan Love, *Sometimes Mother Nature Knows Best*, 146 N.Y. Times A25 (Mar. 20, 1997).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

wagon, the American College of Obstetrics and Gynecology recommended that “every postmenopausal woman should be on ‘replacement’ hormones for the rest of her life unless she [had] a compelling medical reason not to be.”¹¹² Susan Love, M.D. argued, however, that the recommendation was based on inadequate scientific evidence and that synthetic hormones do not replace anything; they merely add something to a woman’s body that would not be there naturally.¹¹³

Once the drug industry focused on menopause, it employed celebrities such as Julie Andrews and Lauren Hutton to advertise its products.¹¹⁴ Unfortunately for consumers, long-term HRT increases a woman’s risk of breast cancer.¹¹⁵ To combat the risk of cancer that its product created, Wyeth added Prempro, a combination of estrogen and progestin (progestigen), to its lineup.¹¹⁶ While combining estrogen and progestin can reduce the risk of endometrial cancer, failure to add progestin to HRT increases the risk of endometrial cancer.¹¹⁷ Together Prempro and Premarin constitute about two-thirds of the U.S. HRT market.¹¹⁸ In addition to studies showing hormones heightened the risk of breast cancer came studies showing that Premarin did less to fight osteoporosis than Wyeth first promised, and might raise a woman’s short-term risk of a heart attack.¹¹⁹

The Women’s Health Initiative clinically studied Prempro, but halted the study in 2002 when it found the medication increased the risk of breast cancer, heart disease, stroke, and pulmonary embolism.¹²⁰ Later results showed twice the rate of dementia in older users as in non-users.¹²¹ As a result of the bad publicity, Premarin sales fell thirty-one percent in 2003.¹²²

The lessened demand for urine was both good and bad news for the horses. Faced with the equivalent of a corporate reduction in force, thousands of mares needed new homes.¹²³ Rescue organizations scrambled to place the mares and their foals to prevent them from go-

¹¹² *Id.*

¹¹³ Love, *supra* n. 107, at A25.

¹¹⁴ Pamela Sherrid, *Will Boomer Women Defy Menopause*, 129 U.S. News & World Rpt. (D.C.) 70 (Sept. 11, 2000).

¹¹⁵ WebMD, *Hormone Therapy and the Risks of Breast and Endometrial Cancers*, “Weighing cancer risks for women who still have a uterus,” http://www.webmd.com/hw/health_guide_atoz/hw227955.asp?navbar=hw228619 (last updated April 07, 2005).

¹¹⁶ Sherrid, *supra* n. 114, at 70.

¹¹⁷ WebMD, *supra* n. 115, at http://www.webmd.com/hw/health_guide_atoz/hw227955.asp?navbar=hw228619.

¹¹⁸ Sherrid, *supra* n. 114, at 70.

¹¹⁹ Geoffrey Cowley & Karen Springen, *Reconsidering HRT*, Newsweek 71 (April 29, 2002).

¹²⁰ Adair Lara, *The Risks of Relief*, San Francisco Chronicle E1 (Jan. 18, 2004).

¹²¹ *Id.*

¹²² Barry Shlachter, *Fate of Mares Sparks Equine Controversy*, Ft. Worth Star-Telegram 1C (Feb. 17, 2004).

¹²³ *Id.*

ing to slaughter.¹²⁴ Many ranchers think of horses as productive livestock rather than pets or companion animals, and when the ranchers involved in the PMU slowdown could not sell the urine they simply sold the horses to the highest bidder.¹²⁵ Often, that was the slaughterhouses.¹²⁶

Rescue organizations received some help from Wyeth itself, which set aside \$3.7 million to subsidize transport.¹²⁷ However, transport is not the only issue. The horses needed feed, farrier services,¹²⁸ a place to live, and possibly veterinary care. In a market where 35,000 foals are produced per year, and the recreational market absorbs only 7,000 to 8,000,¹²⁹ rescue organizations face an uphill battle. Foster families can sponsor horses by contributing money to the rescue farms to pay for care and feeding.¹³⁰ Adoptive families usually pay several hundred dollars for a horse.¹³¹ That helps cover some of the costs,¹³² but if Premarin use continues to decline, more horses will go to slaughter if they cannot find homes.¹³³

B. *The Nurse Mare Farm Industry*

At nurse mare farms, the future is just as bleak for the thousands of nurse mare foals born each year.¹³⁴ A nurse mare foal is a foal which

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* Further, negative publicity affecting ranchers in North Dakota prompted the state to pass an anti-disparagement law, largely to protect the PMU ranchers. See Jennifer J. Mattson, *North Dakota Jumps on the Agricultural Disparagement Law Bandwagon by Enacting Legislation to Meet a Concern Already Actionable under State Defamation Law and Failing to Heed Constitutionality Concerns*, 74 N.D. L. Rev. 89, 106 (1998) (noting that the North Dakota Equine Ranching Association was responsible for getting the law passed).

¹²⁷ Shlachter, *supra* n. 122, at 1C. The North American Equine Ranching Information Council exists to diffuse some of the controversies involved in PMU ranching. See generally North American Equine Ranching Information Council, *North American Equine Ranching Council*, <http://www.naeric.org> (accessed Feb. 19, 2006) (The NAERIC website contains information espousing the humaneness of the PMU mare industry.).

¹²⁸ A farrier cares for horses' feet. *Webster's Third New International Dictionary of the English Language Unabridged*, *supra* n. 15, at 824.

¹²⁹ Carolyn Battista, *Rescuing Foals (and Earning Wings)*, 153 N.Y. Times 14CN (Mar. 7, 2004).

¹³⁰ *Id.* Foster families do not take the horses home, choosing instead to contribute to the rescue farms. Last Chance Corral, *Ways to Help*, http://www.lastchancecorral.org/foal_rescue/WaystoHelp.htm (accessed Feb. 19, 2006). Adoptive families actually adopt the horses and care for them on their own property or pay board at a stable or facility other than the rescue farm. *Id.*

¹³¹ See e.g. Spring Hill Horse Rescue, *PMU Foals*, <http://www.springhillrescue.com/pmu.shtml> (accessed Feb. 19, 2006) (The fee is \$550 to \$650 for pre-registered adopters.); Indiana Horse Rescue, *Adoption*, <http://www.indianahorserescue.com/Adoption/adoption.htm> (accessed Feb. 19, 2006) (The fee is \$250, \$550, or \$750, depending on the horse's size, condition, and ability.).

¹³² Battista, *supra* n. 129, at 14CN.

¹³³ *Id.*

¹³⁴ See James Walker, *Horse Savior*, *Norwich Bulletin* (Norwich, Conn.) A1 (July 9, 2004) (stating that "[t]here are about 2,000 orphans produced every year," referring to

is born so that its mother comes into milk so the mare can nurse another mare's baby.¹³⁵ The foals are a by-product of the mare milk industry.¹³⁶ The concept is simple. An owner or trainer of a money-making racing mare wants to breed the mare for a foal.¹³⁷ However, he does not want the mare off the track for the four months it takes to nurse a foal to weaning age so he breeds a second mare for the use of its milk only.¹³⁸ As soon as the racing mare's foal is born, the foal is taken from its mother and put on the nurse mare, leaving the nurse mare's foal as an unwanted by-product.¹³⁹ If nurse mare foals cannot be promptly adopted, they are killed.¹⁴⁰

This practice is a direct result of the rules and requirements promulgated by The Jockey Club, the organization which keeps the registry of Thoroughbred horses and sets the rules that determine which horses may be registered.¹⁴¹ According to The Jockey Club rules, an owner cannot register a foal unless the stallion physically bred with the mare, and the foal was gestated in and delivered from the body of the same broodmare in which the foal was conceived.¹⁴² No foal produced by artificial insemination, embryo transfer, or transplant can be registered.¹⁴³ However, the rules do not require the broodmare to nurse the foal.¹⁴⁴ The consequence of these rules is that thousands of nurse mare foals are constructively orphaned each year when they are weaned from their mothers at only one or two days of age so that the racing mares can either get back onto the track or be rebred to a stallion under the Jockey Club rules.¹⁴⁵

Detractors call the practice the "dirty little secret" of the racing industry.¹⁴⁶ Nurse mare owners not only make money when they lease mares to the racing industry, they also sell the foals to rescue organi-

nurse mare foals) (quoting the owner of the nonprofit horse rescue The Last Chance Corral, Victoria Gross).

¹³⁵ Last Chance Corral, *What are Nurse Mare Foals?* http://www.lastchancecorral.org/foal_rescue/foal_rescue.html (accessed Jan. 29, 2006).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Ensminger, *supra* n. 2, at 421.

¹⁴² The Jockey Club, *Principal Rules and Requirements of the American Stud Book*, "Section V: Rules for Registration, Genetic Typing and Parentage Verification," § 1.D, <http://www.jockeyclub.com/registry.asp?section=3>; *select* Rules for Registration, Genetic Typing and Parentage Verification (accessed Jan. 28, 2006) ("A natural gestation must take place in, and delivery must be from, the body of the same broodmare in which the foal was conceived.")

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Last Chance Corral, *supra* n. 135, at http://www.lastchancecorral.org/foal_rescue/foal_rescue.html.

¹⁴⁶ Walker, *supra* n. 134, at A1.

zations.¹⁴⁷ The foals cost the rescue organizations about four hundred dollars each, and the organizations then charge adoptive families an adoption fee to cover the purchase fee, but not the other costs involved.¹⁴⁸ In particular, the industry does not take into account the significant emotional costs of early weaning to the mares and foals.¹⁴⁹

IV. JUDICIAL TREATMENT OF SELF-REGULATED INDUSTRIES

Self-regulation in the nurse mare farm industry has resulted in the deaths of innumerable horses¹⁵⁰ since the Jockey Club rules prohibiting the transfer of embryos to a surrogate mare create the demand for the industry. Nurse mares might benefit from judicial intervention, but courts have refrained from interfering with self-regulated voluntary associations.¹⁵¹ Two cases brought against the American Quarter Horse Association (AQHA) in Texas illustrate the bounds of voluntary associations' autonomy.

In 1990, Ken Burge sued the AQHA because it cancelled his horse's registration certificate.¹⁵² After Burge purchased Just A Freckle from the previous registered owner, the AQHA investigated a complaint concerning illegal white markings on the animal.¹⁵³ The AQHA requested photographs then conducted a physical examination of the stallion.¹⁵⁴ The Executive Committee found that the depiction of white markings on the registration application was inaccurate and that the horse's white markings extended beyond those allowable for registration.¹⁵⁵ The court refused to order the AQHA to reinstate the

¹⁴⁷ Amy Bauer, *Orphan Foal Adopted*, Topeka Capital-Journal (Topeka, Kan.) 1-2 (June 19, 2003) (available at 2003 WLNR 6903311).

¹⁴⁸ *Id.*

¹⁴⁹ See Heather Smith Thomas, *Emotional Pain of Separation*, <http://www.thoroughbredtimes.com/search/searchdetail.asp?Section=&RecordNo=54461> (accessed Oct. 12, 2005) (no longer available) (advising against weaning before the foal is at least four months old).

¹⁵⁰ Last Chance Corral, *supra* n. 135, at http://www.lastchancecorral.org/foal_rescue/foal_rescue.html.

¹⁵¹ See *Burge v. Am. Quarter Horse Assn.*, 782 S.W.2d 353, 355 (Tex. App. 7th Dist. 1990) (refusing to interfere with AQHA's policies); *Harden v. Colonial Country Club*, 634 S.W.2d 56, 59 (Tex. App. 2d Dist. 1982) ("[I]t is the right of a private, non-profit organization to manage, within legal limits, its own affairs without interference from the courts."); *Hoey v. San Antonio Real Estate Board*, 297 S.W.2d 214, 217 (Tex. App. 4th Dist. 1956) ("So long as such governing bodies do not substitute legislation for interpretation, do not transgress the bounds of reason, common sense, fairness, do not contravene public policy, or the laws of the land in such interpretation and administration, the courts cannot interfere.") (quoting *Bhd. of R.R. Trainmen v. Price*, 108 S.W.2d 239, 241 (Tex. App. 1st Dist. 1937)); *Bhd. of R.R. Trainmen*, 108 S.W.2d at 241 ("Courts are not disposed to interfere with the internal management of a voluntary association.").

¹⁵² *Burge*, 782 S.W.2d at 354.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

registration certificate because the court would not interfere with the AQHA's internal decisions.¹⁵⁶

It is well established that the Texas courts will not interfere with the internal management of voluntary associations so long as the governing bodies of such associations do not substitute legislation for interpretation and do not overstep the bounds of reason or violate public policy or the laws of this state while doing so.¹⁵⁷

The law remained well established in Texas until Kay Floyd filed her lawsuit,¹⁵⁸ handed the AQHA a rare legal defeat,¹⁵⁹ and effected a substantive change in the AQHA rules.

Floyd owned a 1977 AQHA mare named Havealena and a 1973 AQHA stallion named Freckles Playboy.¹⁶⁰ Floyd bred the two during the 1995 breeding season, resulting in an embryo in Havealena which was transferred to a recipient mare.¹⁶¹ The breeding produced a bay colt named Hummer, born February 21, 1996.¹⁶² At no time during 1996 did Floyd attempt to register Hummer with the AQHA, because she believed that Hummer would suffer from cryptorchidism,¹⁶³ as did five other colts from the same pairing.¹⁶⁴ During the same 1995 breeding season, Floyd bred Havealena and Freckles Playboy again, and Havealena carried the foal herself.¹⁶⁵ Mini Play, a bay filly, was born May 15, 1996, and Floyd registered the filly with the AQHA on August 1, 1996.¹⁶⁶

¹⁵⁶ *Id.* ("The AQHA, we believe, has the right to manage, within the legal limits, its own affairs without interference from the courts.")

¹⁵⁷ *Id.* at 355.

¹⁵⁸ *Floyd v. Am. Quarter Horse Assn.*, No. 87,589-C, (Tex. Dist. Ct. 251st Dist. May 16, 2002). Six individuals filed the lawsuit in their individual capacities as horse owners, and some filed also doing business as other entities. Pl. Sec. Amend. Original Pet., 11, *Floyd v. Am. Quarter Horse Assn.*, No. 87,589-C, (Tex. Dist. Ct. 251st Dist. May 16, 2002) (copy on file with *Animal L.*). Each plaintiff was an AQHA member and each had "either produced, acquired, sold, or traded at least one horse which is the result of a second embryo transfer and which horse [was] refused registration by the American Quarter Horse Association solely because the horse was the result of a second embryo transfer." *Id.*

¹⁵⁹ See e.g. *Hatley v. Am. Quarter Horse Assn.*, 552 F.2d 646, 649 (5th Cir. 1977) (Plaintiffs had no claim under the Sherman Act where reasonable rules of the registering association were not misused.); *Adams v. Am. Quarter Horse Assn.*, 583 S.W.2d 828, 831 (Tex. App. 7th Dist. 1979) (Owners are bound by AQHA's interpretation of its own rules.).

¹⁶⁰ Pl.'s Second Amend. Original Pet. ¶ 11.01, *Floyd v. Am. Quarter Horse Assn.*, No. 87,589-C.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* Cryptorchidism is a medical condition where one or both of a stallion's testicles are retained in his flank or the belly. Ruth B. James, *How to Be Your Own Veterinarian (Sometimes)* 100 (Alpine Press 1990). Removing the testicles requires major surgery. *Id.* The problem is hereditary and should absolutely rule out the stallion as a breeding prospect. *Id.*

¹⁶⁴ Pl.'s Second Amend. Original Pet. ¶ 11.01, *Floyd v. Am. Quarter Horse Assn.*, No. 87,589-C.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

More than a year later, Floyd discovered that Hummer was not cryptorchid, and Floyd attempted to register Hummer with the AQHA. She offered to surrender Mini Play's registration papers in return.¹⁶⁷ The AQHA refused, even though Floyd was willing to pay a late registration fee of one thousand dollars per the AQHA rules and withdraw Mini Play's registration.¹⁶⁸ Floyd filed suit to force the AQHA to comply with her request.¹⁶⁹

Plaintiffs alleged that the embryo transfer rule was a violation of the Texas Free Enterprise and Antitrust Act¹⁷⁰ because it was a horizontal restraint of trade, had an adverse economic effect on consumers, was facially anti-competitive in that it unreasonably limited the production of horses out of mares, and there was no reasonable or justifiable purpose or basis for the rule.¹⁷¹ On October 9, 2000, the court heard arguments in support of Plaintiffs' Motion for Partial Summary Judgment and the AQHA's Motion for Summary Judgment to consider:

(1) [whether AQHA] Rule 212(a) [was] anti-competitive . . . (2) If so, [whether] the effect . . . of the Rule [was] so pernicious, and the lack of any redeeming virtue so conclusively presumed that the restraint [was] unreasonable *per se*, thereby obviating the necessity for inquiry as to the precise harm . . . or the reasons for . . . the rule. (3) And if the Rule [was] not *per se* unreasonable, [whether] after application of the "Rule of Reason" test . . . the Rule constitute[d] an unreasonable restraint of trade.¹⁷²

¹⁶⁷ *Id.* at ¶ 11.02. Ms. Floyd offered this because, at the time, the AQHA Rules only allowed one registration per year per stallion-mare pairing, including only one registration for an embryo transfer foal. Am. Quarter Horse Assn., *Official Handbook of Rules and Regulations*, § 212(a), 54 (Am. Quarter Horse Assn. 2002) (on file with *Animal L.*).

¹⁶⁸ Pl.'s Second Amend. Original Pet. ¶ 11.02, *Floyd v. Am. Quarter Horse Assn.*, No. 87,589-C.; Am. Quarter Horse Assn., *Official Handbook of Rules and Regulations*, 63 (Am. Quarter Horse Assn. 2006) (available at <http://www.aqha.com/association/registration/pdf/06registrationrules.pdf>).

¹⁶⁹ Pl.'s Second Amend. Original Pet. ¶ 6.01, *Floyd v. Am. Quarter Horse Assn.*, No. 87,589-C, (Tex. Dist. Ct. 251st Dist. May 16, 2002).

¹⁷⁰ Tex. Bus. & Commerce Code Ann. § 15.05 (2002).

¹⁷¹ Pl.'s Second Amend. Original Pet. ¶¶ 6.01–6.03, *Floyd v. Am. Quarter Horse Assn.*, No. 87,589-C.

¹⁷² Ltr. from Hon. Patrick A. Pirtle, J. Presiding, to Robert E. Garner, Atty. for Pls., & D. Barry Stone, Atty. for Defs., *RE: Cause No. 87,589-C; Kay Floyd, et al. v. American Quarter Horse Association; In the 251st District Court; Potter County, Texas*, 2 (Dec. 15, 2000) (copy on file with *Animal L.*) (emphasis in original). *Standard Oil of N.J. v. U.S.*, 221 U.S. 1, 66 (1911), interprets the Sherman Act to require a "rule of reason." The "rule of reason" requires assessment of facts particular to the business:

Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint, and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant

The AQHA argued at the hearing that the Rule protected smaller breeders by placing them in the same position as larger breeders with greater financial resources.¹⁷³ The Court found that argument “disingenuous” because “the *effect* of the rule is to limit the number of registered quarter horses, thereby reducing the competition of supply, thereby keeping prices high for the protection of producers.”¹⁷⁴ The court held the Rule was “an anti-competitive restraint adopted for purposes of limiting the supply of registered quarter horses.”¹⁷⁵

On January 19, 2001, the court entered an Interlocutory Order granting Plaintiffs’ Motion for Partial Summary Judgment, holding that Rule 212(a) was an anti-competitive restraint of trade, but that the Rule was not per se a violation under the Texas Free Enterprise and Antitrust Act.¹⁷⁶ After the AQHA moved for reconsideration, the court withdrew in part the Interlocutory Judgment because it had based its ruling on summary judgment evidence rather than “a full and complete analysis of all relevant factors”¹⁷⁷ Plaintiffs deposed the people identified by the AQHA as having knowledge of relevant facts¹⁷⁸ and then filed their Second Motion for Partial Summary Judgment, arguing that the AQHA had failed to raise any genuine issue of material fact.¹⁷⁹ The court heard oral argument in November of 2001 and reinstated its ruling that the embryo transfer rule was an unreasonable restraint of trade violating the Texas Free Enterprise and Antitrust Act.¹⁸⁰

As a result of the ruling, the AQHA settled with Kay Floyd and amended its rule to allow registration of all embryo transfer foals.¹⁸¹ The court entered an order of dismissal with prejudice, vacating all previous orders.¹⁸² Even though the case has no precedential value, it

facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Chicago Board of Trade v. U.S., 246 U.S. 231, 238 (1918).

¹⁷³ Ltr., *supra* n. 172, at 2.

¹⁷⁴ *Id.* (emphasis in original).

¹⁷⁵ *Id.* at 3.

¹⁷⁶ Interlocutory Judm., ¶¶ 2–4, *Floyd v. Am. Quarter Horse Assn.*, No. 87,589-C (Tex. Dist. Ct. 251st Dist. May 16, 2002) (copy on file with *Animal L.*).

¹⁷⁷ Ltr. from Hon. Patrick A. Pirtle, J. Presiding, to Robert E. Garner, Atty. for Pls., and D. Barry Stone, Atty. for Defs., *RE: Cause No. 87,589-C; Kay Floyd, et al. v. American Quarter Horse Association; In the 251st District Court; Potter County, Texas*, 2 (Sept. 14, 2001) (copy on file with *Animal L.*).

¹⁷⁸ Pl.’s Sec. Mot. for P.S.J., *Floyd v. Am. Quarter Horse Assn.*, No. 87,589-C (Tex. Dist. Ct. 251st Dist. May 16, 2002) (copy on file with *Animal L.*).

¹⁷⁹ *Id.*

¹⁸⁰ Ltr. from Hon. Patrick A. Pirtle, J. Presiding, to Robert E. Garner, Atty. for Pls., and D. Barry Stone, Atty. for Defs., *RE: Cause No. 87,589-C; Kay Floyd, et al. v. American Quarter Horse Association; In the 251st District Court; Potter County, Texas*, 2 (May 16, 2002) (copy on file with *Animal L.*).

¹⁸¹ Or. of Dismissal with Prejudice, *Floyd v. Am. Quarter Horse Assn.*, No. 87,589-C (Tex. Dist. Ct. 251st Dist. May 16, 2002) (copy on file with *Animal L.*).

¹⁸² *Id.*

does signal the willingness of at least one Texas court to look past the sanctity of self-regulation and force a rule change when the rule directly conflicts with state law.

From the beginning of the litigation, the AQHA had relied on *Hatley v. Am. Quarter Horse Assn.* for the proposition that an industry trade association rule is not an unreasonable restraint of trade.¹⁸³ The court distinguished *Hatley* from the case before it on the grounds that the rule “sought to define the breeding process” rather than to “define the breed.”¹⁸⁴

Similarly, the Jockey Club is seeking to define the breeding process through its regulations against artificial insemination and embryo transplant or transfer that give rise to the nurse mare farm industry. Research reveals no case against the Jockey Club making the same arguments that Floyd made against the AQHA, and whether a Jockey Club member is willing to navigate these choppy legal waters is a mystery. Therefore, it is unlikely that the nurse mare industry will be curtailed by judicial means.

V. LEGISLATION AND FUNDING

Since courts are painfully reluctant to interfere with self-regulated industries, and self-regulation results in inhumane practices against animals, legislation is an obvious solution. Because several states already have PMU mare or nurse mare farm industries, a patchwork of state regulations would result in incomplete mitigation. The federal government is no stranger to regulation and is the logical choice to enact the needed legislation. Indeed, the USDA already inspects and regulates facilities covered by the Animal Welfare Act¹⁸⁵ and monitors and inspects facilities and organizations covered by the Horse Protection Act.¹⁸⁶

Fixing the PMU and nurse mare farm problem does not require a mass of additional legislation. Instead, the Animal Welfare Act could be amended by simply deleting the phrase “horses not used for research purposes”¹⁸⁷ to include within the AWA all horses employed or produced by the PMU and nurse mare farm industries.

If Congress protects these mares and foals, the question becomes who should provide money to care for the mares and foals until ranches or rescue organizations can locate adoptive homes. Regarding PMU horses, a rancher who has lost his livelihood because he can no longer sell urine to Wyeth will have no funds with which to care for the animals. Rescue organizations are already strapped for funds.¹⁸⁸ One

¹⁸³ Ltr., *supra* n. 172, at 2.

¹⁸⁴ *Id.* at 3.

¹⁸⁵ 7 C.F.R. § 1.131 (2005); 9 C.F.R. § 1.1 *et seq.*

¹⁸⁶ 9 C.F.R. § 11.1 *et seq.*

¹⁸⁷ *Id.*

¹⁸⁸ *See e.g.* Last Chance Corral, *Wish List*, <http://www.lastchancecorral.org/donations/WishList.htm> (accessed Feb. 19, 2006) (“Now more than ever, we need your help.”)

source of money could be Wyeth itself. However, requiring Wyeth to provide all funding might cause it to move all of its operations to Canada, bypassing the regulations altogether and completely defeating the purpose behind amending the Act.

The racing industry could bear the cost of caring for the nurse mare foals until the farms or rescue organizations can find homes for them.¹⁸⁹ Nurse mare farm operators who make their livings leasing out mares to the race horse owners could argue that since they derive a part of their livelihood from selling by-product foals to rescue organizations,¹⁹⁰ the new government regulations requiring them to pay for the upkeep of the foals rather than selling them are unfair. This might cause them to ship the foals to Mexico or Canada for slaughter without ever contacting the rescue organizations. Unless the USDA keeps close tabs on these nurse mare farms, the farms might bypass the intent of the legislation and ensure a violent and senseless end to the lives of the foals produced by the industry. Instead, to ensure that the horses are protected, Congress should set aside monies to aid rescue organizations to provide for food, farrier care, and veterinary services until adoptive homes can be located, and to assist in transporting the foals to their new homes.

Should the USDA argue that it has insufficient funding to take on the initial responsibility, proponents of the amended Act might point out that agriculture is one of the largest beneficiaries of pork-barrel politics each year.¹⁹¹ According to Citizens Against Government Waste, in 2005 the USDA requested \$3 million for special research grants through the Cooperative State Research Education and Extension Service (CSREES), but by the time Congress was through, it had added \$121 million for CSREES projects, or 3,933% more than the budget request.¹⁹² Millions of dollars in pork barrel earmarks were included in the final appropriations.¹⁹³ In its *Prime Cuts* feature, Citizens Against Government Waste identified billions of dollars the USDA could save annually including over a billion dollars that the De-

The economy is down, and so are donations and grants. Foundations keep their money invested and like many individuals, have been dramatically affected. Most have cut back on giving and many limited [their] previously national considerations to local ones.”).

¹⁸⁹ The economic reach of the horse racing industry is great. In 2004, over \$1 billion in thoroughbred horses were sold at auction. National Thoroughbred Racing Association, *NTRA Annual Report to Membership 2* (National Thoroughbred Racing Association 2005) (available at http://www.ntra.com/content/AnnualReport04_05.pdf).

¹⁹⁰ Last Chance Corral, *supra* n. 135, at http://www.lastchancecorral.org/foal_rescue/foal_rescue.html.

¹⁹¹ See Ernest C. Pasour, Jr. & Randall R. Rucker, *Plowshares & Pork Barrels: The Political Economy of Agriculture* (Independent Institute 2005) (providing an in depth look at how the USDA has taken advantage of pork barrel spending since 1860 and is arguably the most entrenched of all federal agencies).

¹⁹² Citizens Against Government Waste, *2005 Pig Book Summary*, http://www.cagw.org/site/PageServer?pagename=reports_pigbook2005 (accessed Jan. 31, 2006).

¹⁹³ *Id.*

partment could save by reforming milk marketing orders and deregulating milk prices.¹⁹⁴

The inadequate funding argument has already failed the USDA in court and resulted in greater protection for species under the Animal Welfare Act.¹⁹⁵ In 1992, several plaintiffs, including individuals and animal welfare groups, sued the USDA alleging violations of the Animal Welfare Act.¹⁹⁶ The groups wanted the USDA to amend its regulations implementing the AWA in order to define rats, mice, and birds as “animals” under the AWA.¹⁹⁷ The AWA charged the Secretary of Agriculture “with promulgating regulations prescribing standards for the proper treatment of animals.”¹⁹⁸ The AWA and the regulations explicitly excluded rats, mice, and birds from the AWA’s reach.¹⁹⁹ In 1985, Congress amended the AWA to remove the restrictions, and several groups suggested that the USDA should drop the exclusion of rats, mice, and birds, but the agency refused to make the change.²⁰⁰ Two animal welfare organizations petitioned the USDA for a rulemaking to amend the regulation, but the USDA denied the petition.²⁰¹

Plaintiffs then filed suit seeking a declaratory judgment and an injunction preventing USDA from excluding rats, mice, and birds by regulation when the AWA itself did not make such exclusion.²⁰² The Secretary of Agriculture argued that Congress provided absolute discretion to the USDA to define “animal” any way it chose, but the court disagreed.²⁰³ “[T]his provision limits the Secretary’s discretion to determining whether a warm-blooded animal is used, or intended for use for those purposes specified in the definition,” but not to determine whether the fauna used for those purposes are “animals” within the AWA.²⁰⁴

After reviewing the three purposes of the AWA,²⁰⁵ the Court held that exclusion of rats, mice, and birds served none of the AWA’s purposes, but their inclusion in the definition of “animal” ensured that those species would be humanely cared for during research.²⁰⁶ The Secretary argued that the department “considered the number of animals involved, the resources available, and the approximate cost of

¹⁹⁴ Citizens Against Government Waste, *Prime Cuts Agriculture Section*, <http://www.cagw.org/site/FrameSet?style=User&url=http://publications.cagw.org/prime/primecuts.php3>; *select* Department of Agriculture, *click on* Submit (accessed Jan. 31, 2006).

¹⁹⁵ *Animal Leg. Def. Fund v. Madigan*, 781 F.Supp. 797, 802, 805–06 (D.D.C. 1992).

¹⁹⁶ 7 U.S.C §§ 2131–2159.

¹⁹⁷ *Animal Leg. Def. Fund*, 781 F. Supp. at 797.

¹⁹⁸ *Id.* at 799.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* (citing 54 Fed. Reg. 10,823 to 10,824 (1989)).

²⁰¹ *Id.* at 799.

²⁰² *Id.*

²⁰³ *Animal Leg. Def. Fund*, 781 F. Supp. at 800.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 801.

²⁰⁶ *Id.*

regulation.”²⁰⁷ The Court found that including rats, mice, and birds in the definition of “animal” under the AWA would “impose affirmative obligations on researchers and others to treat the animals humanely without requiring any action from the agency.”²⁰⁸

The Secretary also argued that the USDA Animal and Plant Health Inspection Service (APHIS) had insufficient funds and personnel to implement enforcement of regulations covering the rats, mice, and birds.²⁰⁹ The court found that argument unpersuasive.²¹⁰ APHIS failed to consider that the regulations would benefit researchers by insuring that the animals were humanely treated, “avoid[ing] duplication of research experiments, and consider[ing] alternatives to animal usage.”²¹¹ More important to the court, however, was APHIS’s failure to request more resources with which to do its job.²¹²

While the district court’s decision was overturned on appeal due to lack of standing,²¹³ the district court ruled that the agency’s monetary decision to exclude rats, mice, and birds by regulation when Congress did not exclude them by statute was “arbitrary and capricious.”²¹⁴ Congress’s intentional statutory exclusion of horses used for anything other than research is similarly arbitrary and capricious. If Congress is truly interested in animal welfare, then it must protect foals born as unwanted by-products.

VI. CONCLUSION

Congress should amend the Animal Welfare Act and omit the phrase “excluding horses not used for research purposes” or, at the least, include horses operated by or born to the PMU and nurse mare farm industries. The Secretary of Agriculture should then promulgate regulations governing disposal of the foals born to the PMU and nurse mare farm industries.

Congress has stopped funding USDA inspections of horse slaughterhouses,²¹⁵ and slaughter of wild horses for human consumption is

²⁰⁷ *Id.* at 803 (citing Def.’s Mot. S.J., Ex. A, Crawford Decl. at ¶ 4–12).

²⁰⁸ *Animal Leg. Def. Fund*, 781 F.Supp.at 803.

²⁰⁹ *Id.* at 804.

²¹⁰ *Id.*

²¹¹ *Id.* at 805.

²¹² *Id.* at 805 n. 5 (“The agency’s argument that it lacks the resources to implement these regulations might be more convincing if the agency sought more resources to pursue its mandate. In fact, the plaintiffs have shown that the agency intentionally sought funding decreases and one year requested that its Animal Welfare Program be eliminated. This evidence suggests that the agency may have lost sight of its Congressional mandate under the Act. A member of the President’s Cabinet charged with executing the law should not be a prisoner of his own bureaucracy and allowed to argue that his own failure to request funding to comply with an Act of Congress is a proper excuse for his failure to pursue his statutory obligations.”) (citation omitted).

²¹³ *Animal Leg. Def. Fund v. Espy*, 23 F.3d 496, 498 (D.C. Cir. 1994).

²¹⁴ *Animal Leg. Def. Fund*, 781 F.Supp. at 804.

²¹⁵ Pub. L. No. 109-97 at § 794, 119 Stat. at 2164.

illegal.²¹⁶ Foal slaughter as by-product disposal is legal and will remain so until Congress changes the law. Preventing that slaughter through protective legislation is the humane and decent thing to do.

²¹⁶ 16 U.S.C. § 1338(a)(4).