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# The Constitutionality of Claiming Jail

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## THE CONSTITUTIONALITY OF CLAIMING JAIL

*Paul E. Salamanca\**

Most pari-mutuel horse races in the United States are claiming races.<sup>1</sup> In such races, a track official stipulates a claim price, and any authorized person may buy any horse that runs in that race at that price.<sup>2</sup> This device discourages owners from running overqualified horses, which tends to ensure competitive fields. Say, for example, an official set a price of \$50,000 for a race. An owner who ran a \$60,000 horse in that race would stand a fair chance of picking up a good part of the purse, but he or she would also run a high risk of losing the horse to a claim for only five-sixths of its value.<sup>3</sup> Meanwhile, an owner who ran a \$40,000 horse in that same race would probably avoid a claim, but would also stand relatively little chance of picking up much of the purse, thereby wasting one of the horse's starts.<sup>4</sup> Claiming races thus cause fields to converge in quality, which tends to ensure competitive races. In fact, claiming races have this effect even if people are unaware of how they work, simply because people will see competitive races.<sup>5</sup> If people believe races are competitive, they will bet more,<sup>6</sup> which

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\* Wendell H. Ford Professor of Law, University of Kentucky College of Law. I am grateful to Chris Bradley, Zack Bray, Chris Frost, Brian Frye, John Garen, Henry Knight, Ron Mitchell, Kathy Moore, Doug Richards, and Max Stearns for their comments on this article. I was co-counsel to Jerry Jamgotchian in his petition for a writ of certiorari in *Jamgotchian v. Kentucky Horse Racing Commission*, 488 S.W.3d 594 (Ky. 2014), *cert. denied*, 137 S.Ct. 493 (2016).

<sup>1</sup> Christopher D. Hall, *Market Enforced Information Asymmetry: A Study of Claiming Races*, 24 ECON. INQUIRY 271, 272 (1986).

<sup>2</sup> See *id.* As Hall notes, “[t]his is a simplification. In some races, there are two or more claim prices available to owners ....”; *id.* n.3.

<sup>3</sup> See J. Shannon Neibergs & Patrick L. Vinzant, *Maximum Likelihood Estimates of Racehorse Earnings and Profitability*, 17 J. AGRIBUSINESS 37, 41 (1999) (“[A] higher class horse running in a lower class race has a high probability of being claimed at a lower [claiming price] than its potential; thus, the owner sacrifices terminal value and potential future purse earnings.”); Hall, *supra* note 1, at 274 (“[W]hen the track offers sufficiently large prizes, owners willingly enter horses worth more than the claim price. In anticipation of finding bargain horses, claimers collect information on horse prices and qualities.”).

<sup>4</sup> *Id.* at 39-41 (footnote omitted) (“Because of the very low probability of winning [a purse] and [having a horse claimed], while sacrificing [a start], a horse is not raced at a higher class than its ability.”).

<sup>5</sup> *Jamgotchian v. Kentucky Horse Racing Commission*, 488 S.W.3d 594, 613 (Ky. 2014) (“The hope, reasonably borne out by centuries of experience, is that, generally at least, the claiming rule will result in transparent, competitive races.”).

<sup>6</sup> Neibergs & Vinzant, *supra* note 3, at 38 n.2 (“The more even the field, the less

will generate more revenue for the track. Moreover, to the extent people *do* understand how claiming races work, they will be even more inclined to see them as competitive, because they will understand how the potential for claims monitors entries.<sup>7</sup>

From the perspective of many owners and claimants, however, a claiming race is merely a sale with low transaction costs, along with a chance for an owner to pick up part of a purse. Most importantly, the price is preset. Second, claimants do not have to travel from farm to farm to inspect horses. Instead, the horses are brought to the track, and even paraded before the race, allowing a brief inspection. Finally, claims are essentially “as is” transactions, with few grounds for rescission.<sup>8</sup> From this perspective, claiming races present an opportunity to augment—or reduce—one’s stable with the minimum of effort.<sup>9</sup>

This aspect of claiming races—a sale with low transaction costs—would be especially significant, from a commercial point of view, if horses were predictably worth more in one place than another. This phenomenon would largely arise if *purse*s were

variation in wagering odds between the horses most likely and least likely to win the race. An even field improves parimutuel wagering, because one horse will not dominate wagering patterns and the race results.”).

<sup>7</sup> See Hall, *supra* note 1, at 273 (“[Experts] advertise the honesty of races to bettors by claiming horses. The elegance of the system lies in its ability to reveal information obtained by experts whether or not they act on it directly.”). Hall also argues that the *absence* of claims can signal fraud, which will attract the track’s attention. Assume, for example, that a \$50,000 claiming race with a field of eight typically yields two claims, often for the same horse. Assume as well that an owner has surreptitiously switched a better horse for a poorer one, say, a \$75,000 horse for a \$50,000 one. Ordinarily, insiders would claim the horse, but difficulties arising from redocumenting a misdocumented horse would quite likely deter them from doing so. From this, Hall concludes that a relative dearth of claims may cause a track to investigate more closely. See *id.* at 275 (“To use a statistical analogy, the track looks at the residual of their estimation for the number of horses claimed in each race. Larger negative deviations signal increased probabilities of fraud.”). Hall goes on to argue that the threat of investigation, spurred by an absence of claims, itself acts to deter fraud. See *id.*

<sup>8</sup> See, e.g., *Fattorusso v. Urbanowicz*, 3 Misc. 3d 502, 504-05 (N.Y. Sup. Ct. 2004) (citations omitted) (“With the exception of the misrepresentation as to age or sex, the only other grounds for voiding a claim under the [New York] Racing and Wagering Board’s regulations is a positive test result for equine infectious anemia, a post-race blood or urine sample that tests positive for the use of unauthorized substances, or an unreported neuroectomy and an undisclosed pregnancy.”).

<sup>9</sup> Claiming races may also enable people to *start* a stable, or at least enter the business. See, e.g., Colm Greaves, *More Claiming Races Could Be Cure To Reduction in Horse Ownership*, IRISH EXAMINER (Jan. 9, 2016), [www.irishexaminer.com/sport/racing/more-claiming-races-could-be-cure-to-reduction-in-horse-ownership-375255.html](http://www.irishexaminer.com/sport/racing/more-claiming-races-could-be-cure-to-reduction-in-horse-ownership-375255.html) (describing the push for more claiming races in Ireland and noting that claiming races create “liquidity ... at the bottom end of a market that tends to be sluggish”).

predictably larger in one place than another. Assume, all other things being equal (e.g., the quality of the horses), that purses in State Y are predictably 20% higher than purses in State X. This may be attributable to State Y having a larger betting population or more wealth per capita than State X. Or it might be because purses in State Y are enhanced by a public subsidy, or by proceeds from casino gambling. Given the higher expected return per start in State Y, horses would, on the whole, be worth more there than in State X. This would create an incentive for entrepreneurs to buy horses in State X and take them to State Y, until the meets in State Y reached their capacity.<sup>10</sup> This opportunity for arbitrage between tracks, coupled with the low transaction costs of claiming races, would present an attractive option for both claimants and owners.<sup>11</sup> In fact, low transaction costs could cause many owners, particularly those who deal in small volumes, to rely heavily on claiming races to dispose of their inventory.<sup>12</sup>

For some owners, however, a claiming race might simply substitute an undesirable “liability rule” for a preferred “property rule.”<sup>13</sup> A comparison to eminent domain is apt. Assume my home has a fair market value of \$250,000. You offer to buy it from me for that amount. Because a “property rule” ordinarily protects property, I may refuse your offer and insist on more—not because the market value of my property exceeds \$250,000—by posit, it does not—but because my *subjective* value in the property exceeds that amount. If the government were to take my property by eminent domain, however, I could not hold out for my subjective price. Instead, assuming the government could show a “public

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<sup>10</sup> In fact, the location of the larger purses could shift from time to time. This model does not require vectors to be permanent, but merely predictable enough to encourage arbitrage.

<sup>11</sup> See Neibergs & Vinzant, *supra* note 3, at 38 (noting that claiming races “provide a racehorse market which allows investors to purchase/liquidate racehorse investments ....”).

<sup>12</sup> Although the Law of One Price would seem to suggest that a horse’s value would be the same everywhere, the logistical cost of moving a horse to another state and racing (or selling) it there could prove too high for many owners whose operations are limited in geographic scope or volume. Unlike a small-volume owner, an arbitrageur with operations in many states could enjoy economies of scale with respect to logistical costs. See generally Salem Rashid, *The “Law” of One Price: Implausible Yet Consequential*, 10 Q. J. AUSTRIAN ECON. 79, 84 (2007) (describing the challenges of arbitraging between two stores with different prices for rice).

<sup>13</sup> See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) (noting “three types of entitlements—entitlements protected by property rules, entitlements protected by liability rules, and inalienable entitlements”).

purpose” for the taking,<sup>14</sup> a court would condemn my land and the government would be *liable* to me for its fair market value, which is \$250,000. A “liability rule” would thus replace a “property rule.” A claiming race might operate similarly, albeit without quite the coercive aspect of eminent domain. If a track sets a claim price for a race at \$50,000, and I enter my horse in that race, then you may buy my horse at that price, independent of whatever subjective value I may attach to it. I do retain the option of not entering my horse in a claiming race at all, but my horse would stand little chance of earning money if I withheld it from claiming races.

As a strictly commercial matter, of course, rational owners would want to sell their horses at market price. To the extent commercial considerations control, they would not object to losing their horses in claiming races. On the other hand, commercial considerations might not control. More particularly, owners might prefer to keep their horses, if the subjective value they attach to them exceeds their market value. That is, they might prefer to “leave money on the table” in exchange for the utility of continuing to own a horse. The evidence is substantial that many people enter the horse industry not to make money, but as a hobby. For them, a sale at market price would not be ideal, because market price would not capture the subjective value they attach to their horses.

We can thus see the dilemma that such owners face. They want to enter their horses in claiming races, because most races are claiming races, and the only way to win money in a claiming race is to enter it. But such races can trigger sales at something approximating market price. This puts them in a bind. If they try to preserve the subjective value of their horses by running them in races for which they are demonstrably *underqualified*, they will see inadequate return. If they seek return, however, by running their horses in races for which they are *qualified*, their horses may be claimed at something approximating market price, and they will lose their subjective value.

Finally, for purposes of this paper, we can consider claiming races from tracks’ perspectives. Tracks want as many horses as possible at their meets. Specifically, they want relatively large fields, a large number of races per day, and they want horses to be sorted—one way or another—into fields of

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<sup>14</sup> See *Kelo v. City of New London*, 545 U.S. 469, 480 (2005).

roughly even quality. For tracks, claiming races consequently present something of a double-edged sword: a seemingly effective and inexpensive way to ensure even fields, but also a device that enables arbitrageurs to raid stables if purses are consistently larger somewhere else.

Enter claiming jail, which appears to respond to—and thus confirm—this dynamic of arbitrage. Of the approximately thirty-eight states that allow parimutuel horse racing,<sup>15</sup> approximately twenty-seven impose this restriction.<sup>16</sup> Under this rule, an individual who claims a horse is precluded from taking the horse to another track, or another state, for a certain period of time. Section (b) of Kentucky’s “Article 6,” for example, provides that:

Unless the stewards grant permission for a claimed horse to enter and start at an overlapping or conflicting meeting in Kentucky, a horse shall not race elsewhere until the close of entries in the meeting at which it was claimed.<sup>17</sup>

In other words, if a person claims a horse in Kentucky, he or she may not race it outside the Commonwealth for the duration of the meet at which the claim was made.

We can fairly easily see how claiming jails would protect tracks from arbitrage, and, perhaps, owners who attach a high subjective value to their horses. By forbidding claimants to run a claimed horse outside a meet, rules like Article 6 tend to ensure that a track’s stables will remain full, regardless if the impetus to buy horses and take them elsewhere is strong.

And, not surprisingly, tracks typically defend claiming jail in precisely these terms. In *Jacobson v. Maryland Racing Commission*,<sup>18</sup> for example, a steward testified that, because of entrepreneurial activity, some of their very best Maryland bred horses were being claimed and that they were being raided, that these horses were going out of our state which, in effect, would have some economic impact on racing in Maryland, because we were

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<sup>15</sup> See *Jamgotchian v. Kentucky Horse Racing Commission*, 488 S.W.3d 594, 599 (Ky. 2014).

<sup>16</sup> See *id.* at 614 n.13.

<sup>17</sup> 810 KY. ADMIN. REGS.1:015, §1(6)(b) (2007).

<sup>18</sup> *Jacobson v. Maryland Racing Comm’n*, 274 A.2d 102 (Md. 1971).

losing our better Maryland bred horses, and as you undoubtedly know ... the handle [the amount of money bet daily on the races at a meet] will vary with the quality of the horses that are run at the race meeting.<sup>19</sup>

Similarly, the president of Churchill Downs, in support of a more aggressive version of Article 6 in Kentucky, reportedly “cited the number of horses claimed at the Keeneland spring meet and the current Churchill meet that ran back at tracks outside Kentucky as examples of how the present claiming game restricts field sizes in the Bluegrass state.”<sup>20</sup> “It’s hard for us to watch other states pass rules,” he said, “where they are guarding the horses in their state so people don’t go and claim them and run them in other places .... We’ve got to do something about it to assist the field sizes.”<sup>21</sup>

Claiming jail may also protect owners’ subjective valuation of horses, to the extent it raises the opportunity cost of claiming a horse. If an entrepreneur claimed a horse at a track with meager purses, but had to run the horse at that track for the duration of the meet because of claiming jail, he or she would lose the additional expected return from larger purses elsewhere. At the margin, this would have a dampening effect on demand for horses in claiming races at that track, shifting the demand curve downward and to the left for would-be claimants.<sup>22</sup> This would provide some measure of protection to owners who do not want their horses claimed. Of course, this same dynamic would actually *hurt* owners who seek to liquidate their inventories in claiming races, by depressing demand.

It would be difficult not to see interference with interstate commerce in the concept of claiming jail. A rule like Article 6 draws a line (around the track, or at a state’s borders) and hoards a benefit (i.e., access to the claimed horse for the purpose of racing).<sup>23</sup>

It is therefore identical in concept to innumerable

<sup>19</sup> *Jacobson*, 274 A.2d at 104-05 (brackets and ellipses original).

<sup>20</sup> Ron Mitchell, *Draft Claiming, Scratch Rules Approved by Kentucky Authority*, BLOODHORSE (June 19, 2007), <https://www.bloodhorse.com/horse-racing/articles/159457/draft-claiming-scratch-rules-approved-by-kentucky-authority>.

<sup>21</sup> *Id.* (quoting Steve Sexton, president of Churchill Downs) (internal quotations removed).

<sup>22</sup> See GREGORY N. MANKVIEW, *PRINCIPLES OF MICROECONOMICS* 71 (6th ed. 2012) (“[M]arket demand depends on the number of ... buyers.”).

<sup>23</sup> To put the matter in economic terms, claiming jail would depress the arbitrageurs’ function of re-allocating horses in proportion to purse size.

restrictions that courts have subjected to close scrutiny for their discriminatory treatment of interstate commerce. In fact, even if a state like Kentucky has a non-protectionist *justification* for a rule like Article 6, as Justice Stewart noted in *Philadelphia v. New Jersey*, “the evil of protectionism can reside in legislative *means* as well as legislative ends.”<sup>24</sup> To exclude the possibility that a rule’s explicitly discriminatory *means* have been chosen to serve discriminatory *ends*, courts will typically ask whether it serves a legitimate (non-protectionist) purpose, and whether the state lacks a reasonable non-discriminatory alternative.

Upon examination, however, these rules seem to lack non-protectionist rationales. Indeed, the evidence seems replete that states adopt them *precisely* to protect tracks from raiding (and perhaps some owners as well).<sup>25</sup> To be sure, raiding appears to be an inevitable byproduct of: (1) claiming races, which are virtually unavoidable in parimutuel horse racing; and (2) substantial variations in purse sizes, which predictably arise from various economic, political, demographic, and geographic factors. But claiming *races* and claiming *jail* do not have to coexist. States are often mismatched in terms of natural or economic advantages, but the Supreme Court has largely, if not universally, rejected attempts by states to sequester their resources, in the interest of promoting a national economy. Thus, to defend rules like Article 6 against attack, states need to explain the necessity of claiming *jail*, not claiming *races*.

In a world without claiming jail, arbitrageurs quite likely *would* raid tracks with relatively small purses, until tracks with relatively large purses reached their fill of horses. At that point, the market would find a new equilibrium. The best horses would be allocated to the best purses, and so on, down the line. The demand curve for horses in claiming races at tracks with relatively small purses would shift back upward and to the right, returning to where it would be in the absence of the added cost of claiming jail. As part of this new equilibrium, horses appropriate to the purses in any given state would race in that state. Arbitrage would continue, but only as a function of economies of scale.<sup>26</sup> The market would work, and the Balkanization would end.

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<sup>24</sup> *Philadelphia v. New Jersey*, 437 U.S. 617, 626 (1978) (emphasis added).

<sup>25</sup> See *generally supra* notes 18-21 (including the accompanying text).

<sup>26</sup> See *supra* note 12.

It is an interesting question, however, as to whether tracks would adopt claiming jail on their own—that is, make it a condition of running horses there.<sup>27</sup> Purely private policies would not implicate the Commerce Clause. If owners on the whole wanted to sell their horses in claiming races, they would try to avoid tracks with claiming jail, to avoid any distortions to the demand curve that it might cause. Tracks might defend their policy on the ground that they should be compensated, through the device of claiming jail, for facilitating sales with low transaction costs. In response, owners might argue that they *do* compensate tracks for performing this service, by bringing their horses to the track to race.

Notwithstanding claiming jail's fairly obvious interference with interstate commerce, attacks on the device have had mixed success in the courts. In *Jamgotchian v. Kentucky Horse Racing Commission*,<sup>28</sup> for example, the Supreme Court of Kentucky upheld Kentucky's version of claiming jail against constitutional attack, classifying Article 6 as “not protectionist in intent,”<sup>29</sup> and declining to decouple claiming races from claiming jail. In other words, the Court insisted that protecting tracks from the vulnerability that claiming races create cannot practically be separated from claiming races themselves. As Justice Hughes wrote for a unanimous Court:

[T]he Commission has compelling reasons—racing integrity reasons, if you will—that have nothing to do with Kentucky tracks' competition with out-of-state businesses for adopting some form of claiming

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<sup>27</sup> In California, which currently does not have a public version of claiming jail, at least one track is reported to have a private one. See Jeremy Balan, *CHRB Discusses 'Jail-Time' Claiming Rule Change*, BLOODHORSE (July 20, 2017) <https://www.bloodhorse.com/horse-racing/articles/222671/chrb-discusses-jail-time-claiming-rule-change> (“Del Mar has a house rule (45-day wait period or the end of the meet), and Santa Anita racing secretary Rick Hammerle said the Arcadia track will work to install a similar house rule for its fall meet to keep the circuit's rules consistent.”). Nevertheless, the California Horse Racing Board (CHRB) appears to support a public rule. See *id.* (quoting CHRB spokesman Mike Marten) (“A house rule can take action (with) stabling privileges when they come around again, but ... there is much greater authority in a (CHRB) rule than a house rule,” Marten said. “It has a longer reach than a house rule.”).

<sup>28</sup> *Jamgotchian v. Kentucky Horse Racing Comm'n*, 488 S.W.3d 594 (Ky. 2014).

<sup>29</sup> *Id.* at 615; see also *id.* at 605 n.7 (describing “Article 6's ‘discrimination’ against out-of-state racetracks” as “more apparent than real”); *id.* at 610 (“Notwithstanding a modicum of discrimination, Article 6 is part of a larger, non-discriminatory racing regulation, not a trade regulation ....”).

rule that balances the risks/rewards to owners and potential purchasers, and thus has independent reason for as efficient a rule as experience with it can devise.<sup>30</sup>

As suggested above, this horse quite likely will not run. The majority of parimutuel horse races must likely be claiming *racers*, but claiming *jail* simply protects tracks—and perhaps some owners—from the threat of competition from tracks with larger purses elsewhere. Such an economic discrepancy can no more justify claiming jail than a state’s advantage in producing a commodity at low cost can justify a tariff against that state’s products.<sup>31</sup>

In support of its approach, the Supreme Court of Kentucky differentiated, or attempted to differentiate, between two types of claimants: (1) those who merely want to serve as a monitor on opportunistic behavior; and (2) those who want to augment their inventory.<sup>32</sup> “The claiming rule’s overbreadth,” wrote Justice Hughes, “means that the claiming rule itself is subject to ‘abuse’ by claimants who take advantage of it to claim not just patently and inappropriately valued horses, but other horses as well.”<sup>33</sup>

One might, perhaps, illustrate this point as follows. Imagine that a \$50,000 horse ran in a \$40,000 claiming race, and someone claimed it. That claim, according to Justice Hughes, would not be “abusive,” because the horse was in fact worth more than the claim price. Now imagine that a \$40,000 horse ran in the same race, and someone claimed it. According to Justice Hughes, that claim would be “abusive,” even if that same horse would be worth \$50,000 in a state with larger purses.

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<sup>30</sup> *Jamgotchian*, 488 S.W.3d at 615. For an opinion upholding Pennsylvania’s claiming jail against constitutional attack, see *Jamgotchian v. State Horse Racing Comm’n*, 269 F.Supp.3d 604, 616 (M.D. Pa. 2017) (applying the test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (“The burden on commerce, if any, is incidental and reasonably restrained to benefit the local horse racing industry.”)). The *Pike* test is ordinarily reserved for laws that do not discriminate against interstate commerce, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 461 (5th ed. 2015), and would therefore seem inappropriate as a test for claiming jail. Cf. *Jacobson v. Maryland Racing Commission*, 274 A.2d 102, 107 (Md. 1971) (upholding Maryland’s claiming jail against attack on grounds that it violated due process).

<sup>31</sup> See *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994).

<sup>32</sup> See *Jamgotchian*, 488 S.W.3d at 613.

<sup>33</sup> *Id.*

Justice Hughes' argument has strong intuitive appeal, but it suffers from two significant flaws. First, it does not so much *disprove* protectionism as identify the class of individuals against whom the rule is intended to operate. Second, and perhaps more fundamentally, it assumes that an inherently mercenary device like claiming races will operate effectively if mercenary motives are muted. Analysis would appear to suggest, however, that the device would work less well to the extent demand were artificially suppressed.

Although the Supreme Court of the United States denied review in *Jamgotchian v. Kentucky Horse Racing Commission*, the United States District Court for the Southern District of Indiana recently struck down Indiana's version of claiming jail in another action brought by the same individual.<sup>34</sup>

The court's analysis on the question of interference with interstate commerce was brief, but nevertheless emphatic:

Applying the strict scrutiny standard, the Defendants have not shown that [Indiana's claiming jail] advances a legitimate local purpose that cannot adequately be served by reasonable nondiscriminatory alternatives. Rather, they evince the type of economic protectionism that the dormant Commerce Clause is designed to prevent.<sup>35</sup>

If Indiana appeals this decision, we should see this issue in the Seventh Circuit before long.<sup>36</sup>

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<sup>34</sup> See *Jamgotchian v. Indiana Horse Racing Comm'n*, No. 1:16-cv-2344-WTL-TAB, slip op. at 7 (S.D. Ind. Sept. 20, 2017). Query whether the non-existence of claiming jail in Indiana (at least for now) will encourage owners in Kentucky to enter their horses in claiming races there, instead of in Kentucky, which retains claiming jail (at least for now). As noted earlier, if owners on the whole wanted to sell their horses in claiming races, they would try to avoid tracks with claiming jail.

<sup>35</sup> *Id.*, slip op. at 6-7.

<sup>36</sup> In 2003, the Attorney General of California rendered an opinion that tends to suggest that claiming jail violates the federal Constitution. See Letter from Bill Lockyer to Roy C. Wood, Jr., Executive Director of the California Horse Racing Board (Sept. 8, 2003). Although California subsequently withdrew its claiming jail rules, it appears to be contemplating their reinstatement. See Balan, *supra* note 27.