ONE-TRICK GENES? A LOOK AT THE LEGALITY OF BANNING ANIMAL CLONES FROM COMMERCIAL PROVING GROUNDS

Laura E. Peet

TABLE OF CONTENTS

I. Introduction ........................................................................................................................................... 566

II. Background ........................................................................................................................................... 567
   A. Cloning Technology, Applications, Regulation, and Discrimination .............................................. 567
      1. The Cloning Process ......................................................................................................................... 567
      2. The Products of Reproductive Cloning ............................................................................................. 568
      3. Commercial Reproductive Cloning Applications ............................................................................. 569
   B. Reproductive Cloning Regulation ....................................................................................................... 570
   C. Points of Animal Clone Discrimination .............................................................................................. 570
   D. A Legal Way to Stop Discrimination? Abraham & Veneklasen’s Strategy .......................................... 572
      1. Abraham and Veneklasen’s Claims Against AQHA ......................................................................... 572
      2. Rulings and Opinions on AQHA’s Motion for Summary Judgment .................................................... 573
      3. Jury Findings, Findings as a Matter of Law, and Overall Outcome .................................................. 574

III. Analysis ................................................................................................................................................. 577
   A. Applicability of the Antitrust Strategy ............................................................................................... 578
      1. Applying Antitrust Law in General; AQHA’s Vulnerabilities .............................................................. 578
      2. Lessons Learned: Applying Antitrust Strategy to Other Organizations ........................................... 579
   B. Other Potential Anti-discrimination Strategies .................................................................................... 583
   C. Policy Implications of Relying on the Antitrust Strategy .................................................................... 584

* J.D., University of Illinois College of Law, May 2015. B.S., Biology, Duke University, May 2008. B.S., Psychology, Duke University, May 2008. I would like to express my gratitude to the JLTP editors and staff for their diligence and camaraderie throughout the editing and publishing processes, and especially to my note editor, Bailey Ziegler, for her insightful comments and suggestions concerning this Note. I would also like to thank my family, particularly Susan and Gary Peet, my friends, particularly Alexis Dyschkat and Sierra Hennings, and my partner, Neill Poe, whose love, support, and encouragement have been the highlight of my law school career.
III. INTRODUCTION

While still prohibitively expensive for all but the fairly wealthy, cloning of privately owned animals is becoming cheaper and more commonplace by the year.\(^1\) Notably, this technology is not restricted to the much-publicized use of genetically resurrecting beloved pets; commercial enterprises have begun to realize, and capitalize on, other uses of animal cloning.\(^2\) One such use is the cloning of award-winning race and show horses for sale to prospective trainers and breeders.\(^3\)

But what happens when cloned animals are banned from their commercial proving grounds on account of the procedure that gave them life? A recent District Court case, Abraham & Veneklasen Joint Venture v. American Quarter Horse Association,\(^4\) reveals one potential way that commercial cloners can fight back: by bringing antitrust suits against the breed registries that ban clones.\(^5\) However, even if Abraham & Veneklasen is upheld on appellate review, the successful application of this strategy will be limited to very similar situations. So, are antitrust suits the best way to deal with anti-clone discrimination in the commercial arena? Or should commercial cloners and clone owners have legal recourse against discrimination even when the organizations banning clones cannot be said to have illegally restrained trade in their particular sector of the animal sport and show world?

This Note will explore the legal implications of banning cloned animals from registries and competitions, with special attention paid to the analysis of Abraham & Veneklasen Joint Venture v. American Quarter Horse Association, and discuss how, moving forward, animal cloners may be able to enjoin such

---

1. See Leslie J. Butler & Marianne McGarry Wolf, Economic Analysis of the Impact of Cloning on Improving Dairy Herd Composition, 13(2) J. OF AGRIBIOTECHNOLOGY MGMT. & ECON. 194, 194 (2010) (“While the potential for cloning animals has been realized for at least the last 25 years, it is only recently that sufficient advances have been made to allow the technology to advance to a stage where it is possible that widespread commercial applications of cloning may become a reality in the next few years.”); see generally Katrin Hinrichs, A Review of Cloning in the Horse, 52 AAEP PROC. 398, 400-401 (2006) (“Currently, companies have advertised horse cloning fees from $150,000 to $370,000; these will almost surely decrease over time as efficiency increases.”)


5. See id. (denying Defendant’s Motion for Summary Judgment in this case).
bans. Part II will provide background on the science and legality of cloning and clone discrimination, including how Abraham & Veneklasen Joint Venture won its antitrust battle against the American Quarter Horse Association’s exclusion of cloned horses from its registry. Then, Part III will analyze the applicability of the antitrust strategy to other cloned animal bans. It will also discuss the existence of other methods of fighting cloned animal discrimination and the policy implications of lifting or not lifting cloned animal bans where antitrust law does not apply. Next, Part IV will propose a recommendation concerning the possibility of providing legal recourse for aggrieved clone owners apart from the antitrust strategy. This Note will conclude briefly in Part V.

II. BACKGROUND

A. Cloning Technology, Applications, Regulation, and Discrimination

1. The Cloning Process

Cloning technology allows for the near-exact duplication of any organic material that develops according to the directions encoded within its genes. In other words, cloning anything from a single gene or a single cell to an entire organism will produce a genetically identical copy, or clone, of the original gene, cell, or organism. There are many different methods of cloning, some of which are natural reproductive processes, such as single-cell mitosis, and some of which are artificial but have already been employed by humans for centuries as agricultural reproductive processes, such as the use of cutting techniques to perpetuate grape varieties for wine, and the use of selective breeding techniques to increase milk yield in dairy cows. Modern artificial cloning is, of course, much more complicated and technology-driven, and it can be divided into three categories: gene cloning, reproductive cloning, and therapeutic cloning. This Note will focus on reproductive cloning, which is the technique used to produce clones of whole animals.

The first step of reproductive cloning is accomplished by removing the nucleus of a mature, or somatic, cell of the animal, or donor, to be copied and

---

7. Id.
8. Id.
10. See S. Brotherstone & M. Goddard, Artificial Selection and Maintenance of Genetic Variance in the Global Dairy Cow Population, 360 Phil. Trans. R. Soc. B: BIOLOGICAL SCI. 1479, 1479 (2005), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1569519/pdf/rstb20051668.pdf (noting that “[s]ince 1900, the milk yields of cows have been systematically recorded on a large proportion of dairy herds for the purposes of management and genetic improvement.”).
12. Id.
transferring it into a host egg cell from which the nucleus has been removed.\textsuperscript{13} This process, also known as Somatic Cell Nuclear Transfer (hereafter SCNT), is continued with the assistance of an electrical shock, which causes the now-complete egg cell to begin dividing as a normal egg cell would.\textsuperscript{14} The dividing cell is then allowed to develop into an early-stage embryo in a test-tube environment before emplacement in the womb of an adult female animal, which eventually births a clone that is genetically identical to its donor.\textsuperscript{15} Here, it is important to distinguish reproductive cloning from genetic modification, whereas the latter involves the artificial (human-induced) introduction of genetic change into an organism,\textsuperscript{16} in reproductive cloning “there is no manipulation of the animal; no genes are added, taken away or manipulated.”\textsuperscript{17}

2. \textit{The Products of Reproductive Cloning}

Though the products of SCNT are genetically identical to their donor animals in terms of nuclear DNA, they will not necessarily grow up to be exact copies of their donor animals in terms of physical traits and behavior. This same phenomenon is observed in human identical twins, which are genetically identical but can usually be told apart by small differences in how they look and act even at a very young age.\textsuperscript{18} There are several mechanisms by which these differences may come about in cloned animals.\textsuperscript{19} In particular, epigenetics, or changes in gene activity that are not tied to DNA, dictate that organisms may have the same DNA and yet express that DNA in different ways in response to differing environmental factors such as stress, diet, treatment, and behavior.\textsuperscript{20} Additionally, differences in mitochondrial DNA, which is found outside the nucleus and in embryo culturing, may account for differences between clones and their donors.\textsuperscript{21}

Thus, though the main purposes of reproductive cloning are to preserve beneficial genetic coding from the donor animal and to produce animals with traits that are similar to those of their donors, clones cannot be expected to be carbon copies of their donor animals.\textsuperscript{22} This will likely be true even if the

\begin{itemize}
\item \textsuperscript{13} Id.
\item \textsuperscript{14} \textit{Somatic Cell Nuclear Transfer}, \textsc{Science Daily}, http://www.sciencedaily.com/articles/s/somatic_cell_nuclear_transfer.htm (last updated Sept. 21, 2014).
\item \textsuperscript{15} Nat’l Human Genome Research Inst., supra note 6.
\item \textsuperscript{18} University of Utah, \textit{Cloning Myths}, \textsc{Learn.Genetics}, http://learn.genetics.utah.edu/content/cloning/cloningmyths/ (last visited Oct. 2, 2014).
\item \textsuperscript{19} Hinrichs, supra note 1, at 400.
\item \textsuperscript{20} University of Utah, \textit{Epigenetics}, \textsc{Learn.Genetics}, http://learn.genetics.utah.edu/content/epigenetics/intro/ (last visited Oct. 2, 2014).
\item \textsuperscript{21} Hinrichs, supra note 1, at 400.
\end{itemize}
clone is raised in exactly the same environment as its donor animal, with the same resources; however, one might expect differences to be especially marked the more the clone’s upbringing is changed with respect to that of its donor animal.  

3. Commercial Reproductive Cloning Applications

Reproductive cloning has a variety of potential commercial applications.\(^\text{23}\) Commercial researchers in the medical field, for example, may use cloning to create genetically identical animals for use in drug and treatment testing (eliminating genetic variability makes pinpointing drug and treatment effects between groups much easier).\(^\text{24}\) Comparatively, agricultural concerns may be addressed by using cloning to increase the incidence of desirable traits such as high milk production or disease resistance in livestock, or at least to ensure that these traits are preserved.\(^\text{25}\) Finally, more specialized commercial firms may provide reproductive cloning services designed to provide copies of specific animals with either particular sentimental value (as in the case of dearly departed pets)\(^\text{26}\) or particular commercial value (as in the case of elite performance or breeding animals).\(^\text{27}\)

Despite its many potential commercial applications, reproductive cloning technology is currently inefficient, and thus expensive enough, to prevent widespread use.\(^\text{28}\) A horse clone, for example, will set the recipient back up to $150,000,\(^\text{29}\) a cow clone about $17,500,\(^\text{30}\) and a dog clone about $100,000.\(^\text{31}\) However, as elite sporting horses and bulls have the potential to be sold at tens

---

23. Id. at 26.
25. Id.
26. Id.
28. See generally Victoria Burnett, For a Prize Bull, Next Big Test is in Genetics Lab, N.Y. TIMES (Mar. 24, 2008), http://www.nytimes.com/2008/03/24/world/europe/24bull.html (discussing the marketability of fighting bull clones); Williams, supra note 3 (referring to several successful horse clone sales).
30. Although cloning promises great advantages for commerce and research alike, its outcome is not always certain due to high pregnancy losses and high morbidity and mortality during the neonatal period. Research into the mechanisms involved in the reprogramming of the nucleus is being conducted throughout the world in an attempt to better understand the molecular and cellular mechanisms involved in correcting these problems; see also S. L. Stice et al., Improvements in Nuclear Transfer Procedures Will Increase Commercial Utilization of Animal Cloning, 13 ASIA-AUTRALASIAN J. ANIMAL SCI. 856, 856 (2000), available at http://www.ajas.info/upload/pdf/13-118.pdf (“the procedures used in cloning (nuclear transfer) are still inefficient, thus limiting commercial applications of this technology.”).
31. Hincichs, supra note 1, at 400–401; Williams, supra note 3.
or even hundreds of thousands of dollars and certain beneficial genetic traits can drastically increase the financial viability of livestock, there are nevertheless currently enough potential buyers to keep commercial cloners in business. Furthermore, continued advances in cloning technology will lower cloning costs and make commercial cloning easier and increasingly accessible in the future.

B. Reproductive Cloning Regulation

Unlike human reproductive cloning—which has been banned in thirteen states, limited by restrictions on public funding in two additional states, hotly contested, and denied funding at the federal level—animal reproductive cloning has been left largely unregulated by United States law. The U.S. Food and Drug Administration (FDA), which has jurisdiction over animal reproductive cloning, does not restrict animal reproductive cloning at all. Rather, after an “intensive evaluation,” the FDA chose in 2008 to release a report concluding that “meat and milk from cow, pig, and goat clones and the offspring of any animal clones are as safe as food we eat every day.” Individual states, for their part, have also largely left animal reproductive cloning alone; they instead tend to focus their legislative attention on regulating specific aspects of the very different technology of genetic modification.

C. Points of Animal Clone Discrimination

In the absence of government regulation of animal reproductive cloning, certain animal breed associations have enacted their own cloning restrictions by banning clones from their registries. Up until August of 2013, the

33. See Burnett, supra note 28 (noting that fighting bulls can sell for close to $30,000); Williams, supra note 3 (describing several examples of horses worth hundreds of thousands of dollars).
35. Butler & Wolf, supra note 1, at 194; Hinrichs, supra note 1, at 400–01.
41. Id.
42. State Biotech Statutes, supra note 39.
43. See generally American Kennel Club, Rules Applying to Registration and Discipline, Chapter 3 § 2, Apr. 1, 2010 (“An American-bred dog is a dog whelped in the United States of America by reason of a mating
associations that control registration for the three most popular forms of horse racing—thoroughbred, standardbred, and quarter horse—all operated under rules banning the products of cloning from their registries. And although the American Quarter Horse Association was enjoined by the Federal District Court for the Northern District of Texas from refusing to register clones as a result of the lawsuit prompting this Note, both the United States Trotting Association, which controls standardbred registration, and the Jockey Club, which controls thoroughbred registration, are still free to do so. Clone discrimination is also evident in the dog world; for example, the American Kennel Club, which currently performs registry services for 178 different dog breeds, also refuses to register the products of cloning.

These registry bans can have a huge impact on commercial reproductive cloning for the breeds that they represent. Since cloning is so expensive, clones must sell for tens, if not hundreds, of thousands of dollars—prices at which only the most elite performance and breeding animals are valued—in order for commercial cloners to make a profit on their animal reproductive cloning operations. However, registry bans mean that clones and their offspring are ineligible to compete in events that require breed association registration—the very events that make performance animal ownership a potentially profitable venture. Thus, buyers concerned with profitability are unlikely to seek out, much less pay top dollar for, clones and their offspring affected by breed association bans because the earning potential of those clones and their offspring, no matter their quality, will be at least diminished and at most rendered absolutely nonexistent by the bans.

In contrast, clones bred to compete in events that either do not require specific breed association registration or require registration with associations which took place in the United States of America:); The Jockey Club, The American Stud Book Principal Rules and Requirements, § V–I–D, 2013 (“[A]ny foal resulting from or produced by the processes of Artificial Insemination, Embryo Transfer or Transplant, Cloning or any other form of genetic manipulation not herein specified, shall not be eligible for registration”); United States Trotting Association, USTA Rule Book, § 26.29, 2013 (“A foal resulting from the process known as ‘cloning’ shall not be eligible for registration.”).


46. American Kennel Club, Rules Applying to Registration and Discipline, Chapter 3 § 2, Apr. 1, 2010.


48. See generally The Real Cost of Owning a Show Horse, BLOOMBERG (Aug 1, 2012), http://www.bloomberg.com/consumer-spending/2012-08-01/the-real-cost-of-owning-a-show-horse.html#slide2 (describing the most expensive performance horses as those with champion heritages, registered by world-recognized breeding associations); Robert Frank, Thoroughbred Prices are Back on the Mend, CNBC (May 3, 2013), http://www.cnbc.com/id/100705514 (reporting average prices for racing thoroughbreds ranging from just over $60,000 to less than $113,000 over the last ten years).


that do not discriminate against clones will, theoretically, have exactly the same earning potential as their non-clone counterparts; and evidence of the legitimacy of this theory has appeared in recent years. For example, horse clones bred for eventing, dressage, and hunter-jumper performance are not restricted from international events like the Olympics—as the Federation Equestre Internationale, the governing body for such events, does not forbid participation by “clones or their progenies”51—and thus these types of clones have begun selling successfully.52 Similarly, domestic, non-breed-specific western-saddle event associations like the American Cutting Horse Association and the Professional Rodeo Cowboys Association have never restricted clones from competition, and thus horses bred to perform or compete in these events have been selling, as well, for years now.53

D. A Legal Way to Stop Discrimination? Abraham & Veneklasen’s Strategy

In April of 2012, Gregg Veneklasen, a Texas-based veterinarian and the most prolific individual cloner of horses worldwide,54 and his business partner Jason Abraham decided to challenge the American Quarter Horse Association’s (hereafter AQHA) ban on clone registration.55 Working with ViaGen, the company that owns the patent on its particular horse cloning technique, Veneklasen and Abraham have been successfully producing clones of several different breeds of horses, including quarter horses, since 2007, only two years after the birth of the very first North American horse clone at Texas A&M’s Equine Embryo Laboratory.56 Recognizing that they stood to make far more money on their high-quality quarter horse clones if those clones could be registered with AQHA, the keeper of the world’s largest horse registry and thus responsible for determining eligibility for competition in thousands of events and millions of dollars of prize money, Veneklasen and Abrahamson took their fight against clone discrimination to federal court.57 Their legal

51. FEI Spring Bureau Meeting Update, FEI (June 18, 2012), http://www.fei.org/news/fei-spring-bureau-meeting-update; see also Kastalia Medrano, Cloned Horses Coming to the Olympics?, NAT’L GEOGRAPHIC (Aug. 3, 2012), http://news.nationalgeographic.com/news/2012/08/120808-cloned-horses-clones-science-london-olympics-2012-equestrian/ (relating that the FEI reversed its 2007 decision to ban cloned horses based on its reconsideration of the question of whether cloning yields an unfair competitive advantage). The FEI’s 2012 reversal was borne of its determination that the ability to clone a horse did not grant the cloner an unfair competitive advantage for two main reasons: cloning does not guarantee a product that is physically identical to its donor animal, and cloning does not control for differences in upbringing and training, which are still extremely important in determining how any given animal will perform in competitions. Id. The fact that cloning fees have decreased since the FEI instituted its ban in 2007, allowing more competitors to benefit from the technology, was also likely a factor in the FEI’s 2012 reversal. Id.
52. See generally Pippa Cuckson, Clone of “Best Ever Horse” Gem Twist is Bought by Olympic Show Jumping Owner, TELEGRAPH (Jul. 7, 2012), http://www.telegraph.co.uk/sport/olympics/equestrianism/9383567/Clone-of-best-ever-horse-Gem-Twist-is-bought-by-Olympic-show-jumping-owner.html (reporting the sale of a show-jumper clone just after the FEI announced that it would not bar clones from Olympic competition).
53. See generally Overton, supra note 49 (detailing breeding and sales of western performance horses).
54. Williams, supra note 3.
56. Williams, supra note 3.
57. Complaint, Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass’n, No. 2:12-CV-103-J,
strategy was to claim violations by AQHA of federal and Texas state antitrust laws against conspiracy and abuse of monopoly power.58

1. Abraham and Veneklasen’s Claims Against AQHA

In their original complaint to the Federal District Court for the Northern District of Texas, Abraham and Veneklasen alleged three counts of antitrust violations by AQHA based on AQHA’s enforcement of Rule 227(a) (now known as REG106.1),59 which states that

Horses produced by any cloning process are not eligible for registration. Cloning is defined as any method by which the genetic material of an unfertilized egg or an embryo is removed and replaced by genetic material taken from another organism, added to/with genetic material from another organism or otherwise modified by any means in order to produce a live foal,60

and Rule 227(a)’s counterpart Rule 203, which forbids registration of any offspring of unregistered horses (including, of course, clones).61 In Count One of their First Amended Complaint, Abraham and Veneklasen alleged that AQHA’s decision to refuse to register the products of cloning under Rule 227 represented an agreement to unreasonably restrain trade under Section 1 of the Sherman Antitrust Act.62 In Counts Two and Three of the same document, they alleged that AQHA’s refusal to register clones and their progeny under Rule 227 also comprised a monopolization (Count Two) and attempted monopolization (Count Three) in violation of Section 2 of the same Act.63 Finally, in Count Four of their First Amended Complaint, Abraham and Veneklasen alleged similar violations of Section 15.05 of the Texas Business and Commercial Code, Texas’s practically identical, state law analog of the Sherman Antitrust Act.64

Abraham and Veneklasen supported their claims with an extensive facts section.65 As background, they outlined AQHA’s policy statement, which includes a commitment to “enhance and encourage American Quarter Horse ownership and participation, and [to strive] to generate growth of AQHA membership via the marketing, promotion, advertising and publicity of the American Quarter Horse[,]” and recounted AQHA’s history of revising its rules to allow registration of horses produced via new breeding technology,

58. Id.
61. Id.
63. Id. at ¶¶ 49–55.
64. Id. at ¶¶ 56–57.
65. See id. at ¶¶ 14–24 (outlining facts on which Abraham and Veneklasen based their claim).
such as artificial insemination.\textsuperscript{66} They then included a review of cloning technology and its potential benefits to quarter horses and their owners, such as the reduction or elimination of undesirable genetic traits from the breed’s gene pool.\textsuperscript{67} As more direct support for their antitrust claims, Abraham and Veneklasen also described in detail AQHA’s significant power in the national quarter horse market, recounting AQHA’s extensive industry affiliations and control over eligibility for thousands of national and international races, show events, and other award and incentive programs representing, in aggregate, millions of dollars of available prizes and various other kinds of funding for registered quarter horse owners.\textsuperscript{68} Finally, Abraham and Veneklasen outlined the harms done by AQHA to consumers via its exclusion of clones and their progeny from these events and other benefits, claiming that AQHA’s exclusion restricts competition and decreases overall quarter horse output, thereby driving up prices of registry-eligible horses, significantly depressing the value of clones and their offspring, and suppressing the use of a technology that has the potential to benefit both individual consumers and the quarter horse breed as a whole.\textsuperscript{69}

2. \textit{Rulings and Opinions on AQHA’s Motion for Summary Judgment}

After submission of complaint and response, AQHA moved for summary judgment on all counts.\textsuperscript{70} In responding to AQHA’s Motion, District Judge Mary Lou Robinson recognized and considered three distinct claims within Abraham and Veneklasen’s Complaint, ultimately denying summary judgment for AQHA on claims of conspiracy and monopolization in violation of Sections 1 and 2, respectively, of the Sherman Antitrust Act and granting summary judgment for AQHA on the claim of attempted monopolization in violation of Section 2 of the same Act.\textsuperscript{71} As the Texas state law implicated by Abraham and Veneklasen’s third count is practically identical to federal antitrust law, Judge Robinson determined that no additional consideration of the claims contained within this count was necessary.\textsuperscript{72}

In considering Abraham and Veneklasen’s Section 1 conspiracy claim against AQHA, Judge Robinson applied the Supreme Court-mandated two-step analysis of “(1) whether [the arrangement in question] is a contract, combination, or conspiracy; and (2) whether the contract, combination, or conspiracy unreasonably restrains interstate or foreign trade.”\textsuperscript{73} Despite AQHA’s protests that they are not subject to conspiracy assertions because their Stud Book Registration Committee (SBR Committee), which makes

\begin{itemize}
  \item \textsuperscript{66} Id.
  \item \textsuperscript{68} Id.
  \item \textsuperscript{69} Id.
  \item \textsuperscript{71} Id.
  \item \textsuperscript{72} Id. at *7.
  \item \textsuperscript{73} Id. (citing Am. Needle, Inc., v. Nat’l Football League, 560 U.S. 183 (2010)).
\end{itemize}
AQHA rule recommendations to AQHA’s potentially-acquiescent Board of Directors, was not named by Abraham and Veneklasen as a defendant and because the alleged conspirators within AQHA belong to and share a single entity’s interests, Judge Robinson ruled that there was enough evidence of a conspiracy within AQHA to potentially satisfy step one. This is because AQHA’s SBR Committee is made up of individual quarter horse breeders, racers, and showers who stand to benefit from the exclusion of competitors, and under federal law such an association may be considered a conspiracy even if individual members are not named as defendants; and because the individual members of the SBR Committee, some of whom reportedly expressed an interest in excluding clones in order to avoid competing against them, do not necessarily represent the interests of AQHA as a whole and have also potentially deprived the quarter horse marketplace of the “potential independent centers of decision making” that clone owners and breeders represent, ensuring that single-entity protection is not available to AQHA under federal law. Since AQHA did not address it, Judge Robinson did not specifically analyze AQHA’s actions as to step two of the conspiracy analysis in denying summary judgment to AQHA here. In considering Abraham and Veneklasen’s Section 2 monopolization claim against AQHA, Judge Robinson compared AQHA and its enforcement of Rule 227 against the Supreme Court’s 2-element monopolization test: “(1) possession of monopoly power in the relevant market and (2) ‘the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.’” Only the second element was at issue in this case, and Judge Robinson again found that a fact finder could side with Abraham and Veneklasen on the subject because enough evidence exists to show that AQHA controls a market where “[no] other quarter horse association of comparable stature exists” and meaningful participation in that market is dependent upon AQHA sanction; and that by excluding certain horses from registration AQHA has and maintains monopoly power over the economic viability of each quarter horse in that market. Further, Judge Robinson found insufficient AQHA’s argument that, exercise of monopoly power notwithstanding, registration rules regarding clones are necessary for breed definition and industry coherence; this was mainly because clones of registered horses are largely physically and genealogically indistinguishable from registered horses, and thus any

74. Id. at *3.
75. Id. at *3 (citing Am. Needle Inc., 560 U.S. at 200; Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988); N. Tex. Specialty Physicians v. FTC, 528 F.3d 346, 356 (5th Cir. 2008)).
78. Id. at *5 (citing Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004)).
79. Id.
80. Abraham & Veneklasen Joint Venture, 2013 WL 2297104, at *6 (quoting Hatley v. Am. Quarter Horse Ass’n, 552 F.2d 646, 654 (5th Cir. 1977)).
restriction based on cloning is better described as a reproductive limitation, not a particular point of breed definition.\(^81\)

Thus, Abraham and Veneklasen’s only claim to falter at the summary judgment level was their Section 2 attempted monopolization claim.\(^82\) Judge Robinson granted summary judgment for AQHA as to this claim simply because Abraham and Veneklasen made no necessary showing of “intentional near-acquisition of monopoly power[;]” instead, the only evidence available to the court pointed to AQHA’s past achievement and current maintenance of said monopoly power.\(^83\)

3. **Jury Findings, Findings as a Matter of Law, and Overall Outcome**

Pursuant to denial of summary judgment for AQHA, on August 12, 2013, a jury found AQHA guilty of violating Sections 1 and 2 of the Sherman Antitrust Act and that Abraham and Veneklasen had been damaged by these violations, but it did not award damages.\(^84\) Abraham and Veneklasen had sought a permanent injunction of AQHA’s exclusion of clones under §16 of the Clayton Act and its corresponding Texas state law, which both provide that “[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws[.]”\(^85\) They also sought damages under section 4 of the Clayton Act and its corresponding Texas state law, which both provide that “[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney’s fee.”\(^86\) After conducting a hearing on equitable relief, Judge Robinson granted Abraham and Veneklasen’s first request by ordering that AQHA amend its rules and begin registering clones and their offspring and granted the Plaintiffs’ second request, in part, by awarding them “reasonable and necessary attorney’s fees.”\(^87\)

Most significant to future litigation, Judge Robinson, as part of her determination of equitable relief, also found the following as a matter of law: AQHA is a trade association and its members acted in concert, not as a single entity, to restrict registration; AQHA “has unique access to a business element essential to effective competition, so that registration is necessary for Plaintiffs

---

81. *Id.*
82. *Id.* at ¶7.
83. *Id.* at ¶6.
87. Final Judgment, supra note 84.
to compete effectively in the market;” the market AQHA operates on (that of elite quarter horses) is a valid antitrust market, and “AQHA ‘willfully’ acquired or maintained monopoly power” over that market by “engaging in anticompetitive conduct[,]” that AQHA thus violated Sections 1 and 2 of the Sherman Antitrust Act; and that AQHA’s violations were a material cause of injury to the Plaintiffs’ business or property, thus entitling Abraham and Veneklasen to injunctive relief.  

Thus, with a single suit, Abraham and Veneklasen won a significant victory for themselves and for owners and potential owners of quarter horse clones nationwide. Though the jury awarded no monetary damages, the injunction preventing AQHA from denying owners the ability to register clones and their progeny will be worth infinitely more in potential prize money, sales, and breeding fees to the Plaintiffs and their fellow quarter horse cloners than any single monetary award could be. As such, if upheld, it should spur much more cloning activity than there would be if no such injunction were in place.

III. ANALYSIS

It is unlikely that Veneklasen and Abraham chose the defendant for their antitrust suit randomly. As cloners of several different breeds subject to registration bans, these plaintiffs might also have sued a number of other breeding associations, including the Jockey Club, which controls the domestic registration of the thoroughbred (perhaps the most well-known type of racehorse in America due to its involvement in the Triple Crown). However, if the Abraham & Veneklasen decision holds up on appeal, the AQHA is not the only non-profit breeding registry against which similar antitrust arguments may work to halt discrimination against otherwise-commercially viable, competitive animal clones. Based on availability of competing registries, rule board composition, and rule history and availability of other evidence tending to prove or disprove economic motivation over breed welfare or other non-economic concerns in rulemaking, certain other registries with the power to bar animals from competition could be vulnerable to similar anti-discriminatory injunctions. This Section will explore such vulnerabilities to antitrust

88. Findings of Fact and Conclusions of Law, supra note 84, at 2–3.  
89. This is, of course, assuming that the decision holds up on appeal. AQHA filed its notice of appeal on September 23, 2013, and, upon its subsequent motion, was granted a stay of equitable relief allowing it to continue to enforce its ban on clones pending the outcome of the appeal. AQHA Cloning Lawsuit Resources, AQHA. https://www.aqha.com/AQHA-Cloning-Lawsuit-Resources.aspx (last visited Oct. 2, 2014). Therefore, Abraham, Veneklasen, and similarly-situated participants in the quarter horse market will not be able to reap the full benefits of Abraham and Veneklasen’s victory until (and if) AQHA loses on appeal.  
90. See Williams, supra note 3, at 7 (“Veneklasen has cloned a variety of breeds of horses from a number of disciplines—Quarter Horses, Thoroughbreds, Arabians, Paso Finos, cutters, polo ponies, barrel horses, racehorses, bucking broncs just to name a few.”).  
litigation, then it will move on to examine other possible anti-discrimination strategies available to plaintiffs unable to apply the antitrust strategy. It will conclude with an analysis of the policy implications of allowing or disallowing clone participation in the competitive animal market, which will bear on the need (or lack thereof) for additional anti-discrimination strategies.

A. Applicability of the Antitrust Strategy

1. Applying Antitrust Law in General; AQHA’s Vulnerabilities

The Sherman Antitrust Act, which comprises the first seven sections of Title XV of the United States Code, was enacted in 1890 to prohibit anticompetitive business practices; it was then and still is applied by federal courts today to protect free and unfettered competition . . . on the premise that unrestrained interaction of competitive forces will yield the best allocation of economic resources of the country, the lowest prices, the highest quality and greatest material progress, while at the same time providing environment conducive to preservation of democratic political and social institutions.\(^93\)

The Clayton Act, also part of Title XV, allows private parties to sue for and gain injunctive relief against such anticompetitive practices.\(^94\) Thus, in order to be granted an anti-discriminatory injunction that will force registries to accept cloned animals based on federal antitrust law, plaintiffs must sue under the Clayton Act and prove an antitrust violation by the discriminating party under the Sherman Act.\(^95\) More specifically, plaintiffs must prove the discriminating party’s perpetration of either an anticompetitive conspiracy under Section 1 of Act, which declares illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.”\(^96\) Alternatively, they must prove a monopolization or attempted monopolization under Section 2 of the Act, which criminalizes action to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States.”\(^97\)

As noted above, a Section 1 conspiracy claim is analyzed under the Supreme Court-mandated two-step test of “(1) whether [the arrangement in question] is a contract, combination, or conspiracy; and (2) whether the contract, combination, or conspiracy unreasonably restrains interstate or foreign trade.”\(^98\)

As to step one, though an association like the AQHA cannot be a competitor against its members and thus cannot be said to conspire directly with those members, it may nevertheless be deemed a co-conspirator in violation of antitrust law if it “assists, facilitates, or arguably even just acquiesces in anti-competitive behavior by [its] members.” Further, an association that is unaware of anticompetitive conduct amongst its members may still be held accountable if officials, who may be said to be agents of the association, undertook such conduct. In Abraham and Veneklasen’s case, the AQHA was vulnerable to conspiracy claims under either of these theories. At the very least, the association could be said to have acquiesced in allowing members of its SBR committee, who themselves are owners, breeders, and showers/racers of quarter horses (and thus are individual economic competitors in the quarter horse market that the AQHA’s registry rules impact), to determine those rules.

As to step two of conspiracy analysis, plaintiffs must prove an agreement between competitors that does not merely restrain competition as part of mere regulation but also unreasonably suppresses or destroys competition based on an examination of “the facts peculiar to the business to which the restraint is applied.” In Abraham and Veneklasen’s case, the AQHA’s SBR committee members, by effectively agreeing to exclude an entire class of competitors (owners of cloned quarter horses like Abraham and Veneklasen) from events requiring AQHA registration, opened the AQHA up to a determination that the requirements of this step had also been met. Evidence of the AQHA’s rulemaking history and motivations revealed in Abraham and Veneklasen’s complaint and over the course of the jury trial also probably bolstered Abraham and Veneklasen’s case for the unreasonable nature of the AQHA’s initiation and refusal to lift its ban on clones. In particular, the AQHA’s history of relaxing its breed definition and breeding method-based rules in the face of advancements in breeding technology that produce results similar to those of cloning and evidence that a particular SBR committee member had rallied against the “immorality” of cloning and had made “references to the anticompetitive effects” of the ban in convincing other SBR committee members to reject requests to lift the ban were likely quite damaging to the AQHA’s case.

A Section 2 monopolization claim is similarly analyzed via the Supreme Court’s two-step test of whether the plaintiff has shown “(1) possession of monopoly power in the relevant market and (2) ‘the willful acquisition or maintenance of that power, as distinguished from growth or development as a...
consequence of a superior product, business acumen, or historic accident.”

As to step one, monopoly power is defined as “the power to control prices or exclude competition” in a certain, relevant market. To be said to have a monopoly, a party must have more power over its relevant market than is required under Section 1 in order for that party to have restrained trade; rather, the monopolizing party must be said to control something like two-thirds or more of the relevant market. This step was not at issue in Abraham & Veneklasen because AQHA did not assert a lack of monopoly, likely, despite the high standard for monopoly, AQHA realized that the lack of any competing domestic or international quarter horse registry, coupled with AQHA’s established ties to thousands of competitive quarter horse events, would seriously undermine any arguments against AQHA’s having the power to control prices or exclude competition from at least two-thirds of the elite quarter horse market.

Monopoly power is not, by itself, unlawful; the addition of conduct of the type described in step two is required for monopoly holders to be in violation of the Sherman Act. To meet the requirements of step two, plaintiffs must prove that defendants acted in a specific way in order to achieve or maintain the monopoly described in step one. In Abraham and Veneklasen’s case, as Judge Robinson noted, since the AQHA effectively provided the definition for what a competitive quarter horse is, it could have been said at least to be acting in order to maintain its monopoly over the economically-viable quarter horse market by refusing to redefine the breed to admit clones.

2. Lessons Learned: Applying Antitrust Strategy to Other Organizations

In terms of exposure to successful antitrust suit, the AQHA’s downfall can be summarized in terms of three factors: first, existence of competing registries; second, rule board composition; and third, rule history and availability of any other evidence tending to prove or disprove that individual rule makers were more motivated by anticompetitive economic factors than by breed welfare or other concerns affecting all within-breed competitors equally. The first and second factors provide the basic prerequisites to suit under Section 2 and Section 1, respectively, where registry organizations are concerned. Indeed, if the AQHA had any meaningful competition in the business of quarter horse registration, it could not be said to have had a

---

110. Id. at *6 (quoting Hatley v. Am. Quarter Horse Ass’n, 552 F.2d 646, 654 (5th Cir. 1977)).
112. See Abraham & Veneklasen Joint Venture, 2013 WL 2297104, at *5 (“Plaintiffs’ monopolization claim turns on whether the AQHA maintained its monopoly power by refusing to register clones.”).
113. Id. at *6.
monopoly over the quarter horse market, thereby precluding a successful Section 2 claim; or, if the AQHA’s rule and advisory boards had not been made up of individuals who themselves could be termed competitors in the quarter horse market, could it have been said to have engaged in an anticompetitive conspiracy of the sort Section 1 proscribes. The third factor provides the rest of the plaintiff’s ammunition against discrimination, perhaps most useful after the summary judgment stage of litigation. If the AQHA could have shown that it instituted and maintained its ban on clones strictly for the well-being and coherence of the quarter horse breed—or, in other words, for the well-being of the quarter horse industry as a whole—a jury might have been persuaded that any restraint in trade that it engendered was incidental and not unreasonable, and thus not in violation of antitrust laws.

Though the AQHA may have been Abraham and Veneklasen’s best candidate for antitrust suit, there are other animal organizations that may potentially be vulnerable to similar suits; a look at those organizations using the three-factor analysis outlined in the preceding paragraph should reveal those vulnerabilities. For example, the Jockey Club, a non-profit organization that provides registry services for domestic thoroughbred horses and the second-largest breed-specific registry in the U.S. (after the AQHA), is one such organization that has also banned cloned horses from its registry. Like the AQHA, the Jockey Club has no significant domestic competitors where registration of its particular breed is concerned, and it is thus similarly responsible for determining the eligibility of horses for thousands of breed-specific competitive events worth hundreds of millions of dollars in aggregate. Additionally, the Jockey Club’s rulemaking board similarly consists, at least partially, of individuals who are owners and breeders and thus are competitors in the market for their particular breed. Therefore, the Jockey Club is at least vulnerable to antitrust suits as far as the first two factors

114. See generally id. at *7 (“Matters of breed coherence and the competitive effects of Rule 227(a) can best be dealt with at trial . . . .”).


discussed previously are concerned.

However, turning to the third factor of evidence of rule motivation, the Jockey Club may be somewhat less vulnerable to a successful antitrust suit than was the AQHA. Unlike the AQHA, the Jockey Club has steadfastly refused to amend its registry rules as breeding technology advances.\(^\text{122}\) Whereas the AQHA has made exceptions for new technologies like artificial insemination and embryo transplant,\(^\text{123}\) making their refusal to make a further exception for the next step in breeding advancement seem less reasonable, the Jockey Club has never altered its original ban on any horse that was not conceived by “live cover,” or natural mating.\(^\text{124}\) Similarly, an antitrust suit against the United States Trotting Association (USTA), which controls domestic registry of standardbred horses and has a history of promulgating rules specifically meant to preserve genetic diversity for the good of the breed as a whole,\(^\text{125}\) may be equally untenable solely based on this third factor. Therefore, even if organizations look like monopolies or ostensibly act to control the market for their breeds as the AQHA did, unless prospective plaintiffs are able to turn up other (generally not readily available) evidence of anticompetitive economic motive for discriminatory rulemaking, suits against other breeding organizations like the Jockey Club and the USTA will be potentially much more difficult to win than was Abraham and Veneklasen’s suit against the AQHA.

Still less vulnerable to antitrust suit are organizations like the American Kennel Club (AKC)—which, as previously noted, currently provides registry services for 178 different canine breeds—that do not meet antitrust claim requirements where one of the first two factors of analysis are concerned. Though the AKC arguably exerts control over much of the market for purebred show dogs in a fashion similar to the AQHA’s control over the market for quarter horses,\(^\text{126}\) it distinguishes itself from competitor-controlled

---

122. See Scot Gillies, Live Cover vs. Artificial Insemination in Thoroughbred Breeding—Why The Jockey Club Has It Right, BLOOD-HORSE (May 6, 2009, 4:02 PM), http://cs.bloodhorse.com/blogs/scot/archive/2009/05/06/live-cover-vs-artificial-insemination-in-thoroughbred-breeding-why-the-jockey-club-has-it-right.aspx (“The Jockey Club is a conservative organization that is wary of change. In this, it reflects the attitude of most Thoroughbred industry professionals who see the sport as one of tradition and heritage that should not be changed without compelling proof that change would bring improvement.”); see also The American Stud Book Principal Rules and Requirements, Jockey Club Registry, https://www.registry.jockeyclub.com/registry.cfm?page=tjc RuleBook (last visited Oct. 2, 2014) (“[A]ny foal resulting from or produced by the processes of Artificial Insemination, Embryo Transfer or Transplant, Cloning or any other form of genetic manipulation not herein specified, shall not be eligible for registration.”).


125. See Chris Wittstruck, Breed Registry or Copy Center?, U.S. TROTTING ASSN’N NEWS (Sep. 2, 2013), http://xwebapp.astrotting.com/absolutenm/templates/article.aspx?articleid=55416&zoneid=29 (referring to several restrictions placed on standardbred breeding by the USTA Rule Book, including one limiting the number of mares allowed to be bred to a single stallion).

126. See Michael D. Lemonick, A Terrible Beauty, TIME (June 24, 2001), http://content.time.com/time/magazine/article/0,9171,163404,00.html (“While the club is not the only dog registry in the country, it is certainly the biggest, best known and most powerful. It is because of this power that the AKC has been largely
organizations like the AQHA by excluding from its rulemaking body anyone who could be said to be an individual competitor in the show dog market.\textsuperscript{127} Specifically, the AKC’s bylaws explicitly prohibit individuals like trainers, handlers, breeders, and resale brokers from being elected as AKC Delegates or members of the AKC Board of Directors.\textsuperscript{128} Due to this competitor-exclusive method of rule board construction, the AKC and any other similarly structured organization are at the very least facially invulnerable to a Section 1 conspiracy claim. Further, despite its power in the dog show world, the AKC is also far less vulnerable to a Section 2 monopoly-based claim than was the AQHA on the basis that, unlike the AQHA, the AKC is made up of hundreds of smaller “member” clubs which must establish themselves prior to AKC membership and which could break away from the AKC and become independent again at will.\textsuperscript{129}

If competitive animal breed registry powerhouses like the Jockey Club, the USTA, and the AKC are significantly less vulnerable to antitrust suit than was the AQHA—which is in the process of appealing the decision that found it so vulnerable\textsuperscript{130}—then the antitrust strategy for enjoining animal clone bans by registry organizations is far from a panacea for discrimination.

\textbf{B. Other Potential Anti-discrimination Strategies}

Using the analysis of the previous Subsection, it can be determined that, even should the \textit{Abraham & Veneklasen} decision be upheld on appeal, clone owners seeking to register their animals with organizations that currently ban clones and their progeny will not, in most cases, be able to rely on the antitrust strategy to win the sort of anti-discriminatory injunction that Abraham and Veneklasen did against the AQHA. And, unfortunately for clone owners, failing a clear showing of an antitrust violation, it will be very difficult to successfully seek anti-discriminatory injunctions against private, voluntary associations like the AQHA, in large part because they will have to pass muster under another kind of analysis: whether the plaintiff’s case contains the sort of elements that will move a court to contravene the “Doctrine of Judicial Non-Intervention.”\textsuperscript{131}

Texas courts, in particular, have cited the doctrine of judicial non-
intervention when declining to “interfere with the internal management of a voluntary association” unless the actions of the organization are illegal, against some public policy, arbitrary, or capricious. Other courts also frequently exercise this general principle of judicial non-intervention, largely based on the theory that judges are not well equipped to manage disputes involving the interpretation of a private organization’s rules.

Under this principle, unless an antitrust violation is clear, an aggrieved clone owner will not be able to persuade a judge to enjoin a private organization’s ban on clones unless such a ban constitutes another type of criminal violation, violates public policy, or is otherwise unreasonable. To make matters worse for clone owners, even if the discriminatory actions of a breed registry organization fit into one of the aforementioned categories, a clone owner will only be able to secure an injunction based on those actions if he or she has standing to sue (such as, perhaps, standing attendant to breach of contract in the case of a registry organization member who believes that the organization’s ban of his cloned animal is a misapplication of its rules), since, on its own, “animal clone discrimination” is not currently adequate grounds for relief in any federal or state court. Thus, if nothing is done to provide stand-alone legitimacy to such a claim, clone owners whose animals are subjected to breed registry bans by organizations not vulnerable to antitrust litigation will only have legal recourse against those organizations under very rare, narrow circumstances described above.

C. Policy Implications of Relying on the Antitrust Strategy

Not providing further legal recourse for owners of clones banned from their commercial proving grounds could have myriad implications on the competitive animal world and the larger arenas of animal husbandry, ethics, and biotechnology. Both proponents and critics of banning animal clones from competition and of cloning in general make strong points on the issue; this Subsection will discuss the most significant of those points.

The possible detrimental impacts of allowing clones and their products to compete tend to focus on three main concerns: the possibility that overuse of cloning will stifle genetic diversity and improvement in any breed to which it is applied, the potential for cloning to lead to animal suffering and abuse. As the AQHA has argued, allowing registration of clones has the potential to

---


135. See Craig, supra note 131, at 175–76 (summarizing arguments against animal cloning).
encourage making “Xerox copies” of successful animals at the cost of genetic improvement via breeding; such practice could also entrench known and unknown genetic diseases already present in otherwise-successful breeding lines. Nonetheless, the detrimental effects of narrowing a breed’s gene pool through overuse of cloning instead of breeding might not be observable for several generations, the practice could ultimately prove extremely dangerous, if not fatal, to entire breeds if carried too far. Lifting bans on clone registration and providing financial incentive to prospective owners of competitive animals to buy clones of the same few high-earning individuals could provide the impetus to go that far.

More immediately worrisome than the narrowing of genetic pools due to overuse of cloning is the potential for commercial cloning to cause the suffering and abuse of cloned animals. Because animal cloning is a complicated and still relatively new technology, it is still very difficult to do correctly, and even the most conscientious of cloning organizations may expect to observe unforeseen and often harmful anomalies in their products. Among the issues cloners have attributed to cloning various species are: low success rate of cloning in general, unexpected gene expression in clones, and myriad health concerns in clones, including various infections, structural abnormalities, systems dysfunction and failure, and even premature death. These difficulties would be exacerbated if inexperienced commercial cloners were incentivized by the lifting of registry bans to attempt hasty or low-budget cloning operations, where surrogate mother and clone health, safety, and comfort would likely be sacrificed as cloners tried to make up for lack of quality and care in operations by mass-producing clones in the hopes that one or two individuals out of many would be defect-free.


Consider, then, the natural progression of the cloning phenomenon. Assume 8 cloned horses that are the exact replicas of Rainbow Blue (RB) make the races. RB1 and RB2 are consistent breakers; RB3 is a fractious gate horse; RB4 and RB5 have chronic respiratory issues; RB6 contracted mild laminitis, but recovered; RB7 is a cribber; RB8 retired with a record of 19-1-1 from 22 starts and earned a few million dollars. In the breeding realm, each of these mares would eventually have a date with one or more stallions. In the cloning realm, only RB8 is cloned, and cloned repetitive times. In multiple series, this game of survivor eventually would pyramid the breed into only a handful of selected Standards. Once traditional breeding, and the diversity it produces, dies, there’s no getting it back.

137. See David M. Hillis, Inbreeding, Line Breeding, and Outcrossing in Texas Longhorns, DOUBLE HELIX RANCH, http://doublehelixranch.com/defects.html (last visited Oct. 2, 2014) (“All organisms, including the very best...in any breed, are expected to have some rare, deleterious, recessive alleles at some of their genetic loci[,]” having too many animals with the same or very similar genetic codes in a population will almost always cause the fitness of that population to suffer).


139. Craig, supra note 131, at 276.

140. See Hawthorne, supra note 138 (speculating that an organization providing commercial dog cloning services for one-fifth of BioArts International’s prices is likely doing so without regard for ethical treatment of their animals).
However, these concerns only provide half of the policy story. In contrast, critics of registry bans and proponents of animal cloning in general are quick to note several potential benefits of the increased incentive to clone that providing a cure-all method of enjoining registry bans would create. The most significant of these benefits are improved ability to select for beneficial genetic traits, extended ability to preserve beneficial traits and entire genetic codes, and encouragement of scientific advancement.

In counterpoint to the argument that allowing clones to compete will ultimately cause a dangerous narrowing of the gene pool for cloned breeds, proponents of lifting registry bans and of cloning in general point out that increased use of cloning may actually improve breed gene pools. This is because cloning technology provides a way for animal owners to store and pass on desirable genetic material of animals that otherwise would not be able to breed, such as castrated males or animals too old to reproduce. Including the genetic makeup of these otherwise-sterile animals in the pool of genes eligible to be passed on could actually increase the genetic diversity in a breed. Further, it could also better enable owners to select against genetic disease and other detrimental traits when producing new animals.

The same cloning technology that allows for improved genetic diversity also allows for extended preservation of desirable and beneficial genetic codes. In essence, storage of genetic material for cloning may act as a form of insurance for breeders and owners who have put large amounts of time, money, and energy into the selection and expression of certain genetic qualities in their individual animals or even entire herds. Incentivizing the use of cloning by lifting registry bans would have the collateral effect of incentivizing storage of genetic material, which, in the case of an unexpected death or accident, would better enable owners to recoup their investments and would benefit breeds as a whole by preserving elements of genetic diversity that might otherwise be lost.

Finally, as proponents of cloning in general point out, increased cloning may translate to increased opportunity for scientific inquiry and advancement.

141. See Craig, supra note 131 at 276–77 (summarizing arguments in favor of animal cloning).
143. See First Amended Complaint ¶¶ 7–8, Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass’n, No. 2:12-CV-103-J, 2012 WL 1435710 (N.D. Tex. Aug. 22, 2013). Through cloning, a genetically identical horse now can stand as a breeding animal and provide offspring that will further enhance the breed. Cloning also provides the option to produce offspring from genetically clean superior horses that cannot reproduce: a) mares or stallions that were injured or died young before recognition of their valuable genes or that can no longer produce, and b) horses that were gelded and proved themselves to be superior performers would be given the opportunity to pass on their genetics. Breeding the best possible stock improves the overall health and disease resistance of animal populations.
144. Id.
145. Viagen Equine Benefits, supra note 142 (“Cloning also offers a kind of insurance. The impact of injury or loss of a popular stud is greatly reduced if another stud with the same genes is available.”)
146. Id.; see also Dawnwink, The Blizzard that Never Was – and its Aftermath on Cattle and Ranchers, WORDPRESS (Oct. 8, 2013), http://dawnwink.wordpress.com/2013/10/08/the-blizzard-that-never-was-and-its-aftermath-on-cattle-and-ranchers/ (“In addition to the financial loss, when a rancher loses an animal, it is a loss of years, decades, and often generations within families, of building the genetics of a herd.”).
that may have far-reaching benefits.\footnote{See generally Monica Amarello, \textit{Advances in Equine Cloning May Aid Insight into Human Diseases}, \textit{EUREKALERT!} (Feb. 15, 2004), http://www.eurekalert.org/pub_releases/2004-02/aat-aie020504.php (noting that observations made in the course of animal cloning could further the study of human biology and diseases).} Observations made over the course of animal cloning could even have applications in the study of human biology and disease.\footnote{\textit{Id.}} Further, increased financial incentive to perform commercial cloning could lead to increased private funding for cloning research and the kind of technological improvement that will make cloning safer and more reliable, possibly ameliorating or, eventually, even completely negating the formidable concern that increased incentive to clone commercially will lead to mistreatment and abuse of animals involved in cloning.

In sum, there are strong, complicated, and often highly technical policy arguments both for and against creating a new method of enjoining anti-clone discrimination by breed organizations. It will be a difficult task to parse all of the factors that inform these policy concerns to determine whether such a method is necessary, or even whether it would do more good than harm.

\section*{IV. RECOMMENDATION}

\subsection*{A. Current Challenges – Are Other Anti-discrimination Options Necessary?}

The antitrust strategy is far from an effective legal cure-all for clone-based discrimination. Further, there are currently limited viable legal options for fighting such discrimination; and, because they must pass muster under the Doctrine of Judicial Intervention and be based on standing to sue outside of a claim of anti-clone discrimination, those options are so narrow in potential application as to be unusable in most situations. Thus, if clone owners are to be guaranteed the ability to enjoin the kinds of registry bans that exclude animal clones from their commercial proving grounds, a new type of legal recourse must be provided to them.

However, before steps are taken to provide that new legal recourse—perhaps legislation creating new grounds for relief, or even legislation criminalizing registry bans of cloned animals, the particulars of which are beyond the scope of this Note—one must consider the challenge of determining the effects of lifting registry bans beyond its effects on the pocketbooks and property rights of clone owners. And, given conflicting policy concerns informing possible wide-ranging effects, for the time being the best entities to make and act on those determinations are not context-ignorant legislators or potentially selfish individual competitors, but the organizations most familiar with the particulars of animal competitions and breeding and most incentivized to act in the best interest of their breeds and industries as a whole: breed registry organizations.
B. Relying on Breed Registries Kept in Check by the Antitrust Strategy

Due to the conflicting policy concerns discussed in Section III, it is not yet clear that aggrieved clone owners should be provided legal recourse against anti-clone discrimination by breed organizations outside of the antitrust strategy. Rather, given the uncertain providence of cloning technology and its use by commercial entities at this time, it is best to continue to allow breed organizations the ability to revise their rules based on available information and what they feel is best for their breed and their industry as a whole. Indeed, as one scholar notes, “rules [banning clones from registries] are subject to change if the industry feels it is in their best interest.”149 However, this strategy can only be expected to yield results that really are best for competitive animal breeds and their industries if individual rule-makers within registries are dissuaded or enjoined from basing rules on their own, selfish concerns as individual competitors instead of basing them on farther-reaching, whole-breed or whole-industry, concerns.

Therefore, though it will likely not immediately benefit the many competitive animal clone owners whose animals are currently still subject to registry bans, relying on the antitrust strategy (if it holds up on appeal) as the sole method of fighting anti-clone discrimination by breed registry organizations is the best course of action at this time. Until further research and improvement in cloning technology proves that animal cloning is more of a boon to the competitive animal industry and society at large than it is a potential detriment, the antitrust strategy will at least provide an effective, if narrow, means to enjoin clone banishment that is not based on the best interest of the industry. In the alternative, the success of the antitrust strategy in Abraham & Veneklasen should at least provide a strong incentive for registries to reorganize or restructure their governing bodies such that those individuals who have the most selfish interest in banning clones—fellow competitors—will not have the power to decide what animals are allowed to register or compete, leaving breed registry rule-makers better able to consider, without personal bias, which course of action really will be in the best interest of their breed and the industry as a whole.

V. CONCLUSION

Under current law, there are few feasible legal means for commercial animal cloners and clone owners to combat discrimination by breed registries and competitions. However, if it holds up on appeal, Abraham & Veneklasen Joint Venture v. American Quarter Horse Association150 shows that the Sherman Antitrust Act and its state law analogues can provide both an effective, if narrow, means to enjoin clone banishment and a strong incentive for registries and competitions to reorganize such that those who have the most

149. Hinrichs, supra note 1, at 401.
selfish interest in banning clones—fellow competitors—will not have the power to decide what animals are allowed to register or compete. Conflicting policy concerns dictate that, for now, no further means of enjoining anti-clone discrimination need be devised or enforced.