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Health and Welfare Preempted: How National Meat Association v. Harris Undermines Federalism, Food Safety, and Animal Protection

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HEALTH AND WELFARE PREEMPTED: HOW *NATIONAL MEAT ASSOCIATION V. HARRIS* UNDERMINES FEDERALISM, FOOD SAFETY, AND ANIMAL PROTECTION

*Marya Torrez**

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I. INTRODUCTION

In 2008, the Humane Society of the United States (HSUS) released an undercover video filmed at the Hallmark Meat Packing Company and Westland Meat Company (Hallmark/Westland) in Chino, California.¹ “The footage depicted nonambulatory cows being kicked, dragged, electrocuted, jammed with forklifts and sprayed in the nostrils with water to simulate drowning – in an effort to get them to stand up and walk to their slaughter.”² At least five inspectors from the U.S. Department of Agriculture (USDA) – the federal agency tasked with ensuring that food safety and animal welfare guidelines are followed – were present at the time.³ The video led to the shutdown of the plant and the largest meat recall in United States (US) history.⁴ It also led to increased awareness about the reality of our food supply. Americans were particularly outraged to learn that not only were animals too sick or injured to walk on their own being violently abused, but the facility involved was the second largest producer of beef for government food programs, including the national school lunch program, and programs for senior citizens and low-income families.⁵ Moreover, Westland had received the USDA award for supplier of the year in 2004-05.⁶

Such incidents (which as described below are far from isolated) would seem to provide evidence of USDA’s inability to protect the food supply or the animals that are part of it. Moreover, regulating public health and animal welfare has traditionally fallen within the purview of the states. However, in 2012, the United States Supreme Court, in *National Meat Association v. Harris*, overturned the Ninth Circuit Court of Appeals and struck down a California law passed in response to the Hallmark/Westland video that prohibited the slaughter for human consumption of animals who

1. See generally GINA TOMASELLI & PETER A. BRANDT, HUMANE SOC’Y OF THE U.S., PETITION TO THE UNITED STATES DEPARTMENT OF AGRICULTURE (2010) (on file with author) [hereinafter *HSUS Petition*].

2. Brief for the Am. Soc’y for the Prevention of Cruelty to Animals as Amicus Curiae Supporting Respondents at 19, *Nat’l Meat Ass’n v. Harris*, 132 S. Ct. 965 (2012) (No. 10-224) [hereinafter *ASPCA Brief*].

3. *HSUS Petition*, *supra* note 1, at 17

4. See David Cassuto, *Meat Animals, Humane Standards, & Other Legal Fictions*, L., CULTURE, & HUMAN. 1, 2 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2111455.

5. Pamela Vesilind, *Preempting Humanity: Why National Meat Ass’n v. Harris Answered the Wrong Question*, 65 ME. L. REV. 685, 691 (2013).

6. Shelley Barron, Comment, *California’s Continued Struggle Against Nonambulatory Animal Slaughter and the Limits of Federal Preemption: National Meat Association v. Brown*, 4 N.E.U.L.J. 259, 261 n. 10 (2012).

could not walk under their own power and required that they be immediately humanely euthanized.⁷

This Supreme Court opinion threatens to undermine animal welfare and public health in states that wish to enact greater protections than are available under federal law. Moreover, USDA's perpetual failure to protect animals or public health is apparent from the frequent incidents that continue to occur. In October of 2013, for example, Mercy for Animals, an animal advocacy nonprofit, released an undercover video showing "graphic footage of workers killing piglets by slamming them into the ground, castrating piglets and docking their tails with no painkillers" at a facility in Minnesota used to supply Walmart and other US retailers.⁸ In November of 2013, an animal advocacy organization, Compassion Over Killing, released an undercover video from Colorado showing dairy calves who were only a few days old "being violently dragged by their ears and legs, lifted by their tails, kicked, thrown, slammed, and flipped."⁹ Such incidents occur with alarming regularity and undercover videos obviously only document a small number of such abuses.¹⁰

This apparent disregard for the law not only impacts animals being raised for food, but the people who eat those animals. The results are evident in the occurrence of frequent foodborne illness outbreaks. During the government shutdown in October of 2013, the media drew attention to a major salmonella outbreak associated with Foster Farms chickens which sickened hundreds of people across the country.¹¹ Much of the attention concentrated on the fact that this outbreak occurred during a time when federal agencies responsible for keeping our food supply safe were significantly understaffed due to employee furloughs.¹² However, this

7. See *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 968-75 (2012).

8. Alicia Graef, *The True Cost of Walmart's Cheap Meat Exposed*, CARE2CAUSES (Nov. 5, 2013, 4:00 AM), <http://www.care2.com/causes/the-true-cost-of-walmarts-cheap-meat-exposed.html>.

9. Chris Time Steele, *Colorado Dairy Calf Facility May Face Animal Cruelty Charges*, EXAMINER, Nov. 14, 2013, <http://www.examiner.com/article/colorado-dairy-calf-facility-may-face-animal-cruelty-charges>.

10. See, e.g., Paul Walsh, *Undercover Video Alleges Abuse, Filth at Western Minn. Turkey Farm*, MINN. STAR TRIBUNE, Nov. 26, 2013; Tracy Reiman, *Lobsters Deserve Our Consideration, Too*, HUFFINGTON POST (Nov. 8, 2013, 12:25 PM), http://www.huffingtonpost.com/tracy-reiman/lobsters-deserve-our-cons_b_4174720.html.

11. See Michael Hiltzik, *Salmonella and the Shutdown: CDC Furloughs Harm Public Health*, L.A. TIMES, Oct. 10, 2013, <http://articles.latimes.com/2013/oct/10/business/la-fi-mh-salmonella-20131010>.

12. See *id.*; see also Connor Simpson, *There's a Major Salmonella Outbreak During a Government Shutdown*, THE WIRE, Oct. 8, 2013, <http://www.thewire.com>.

focus largely ignored the fact that such incidents occur with regularity even when government agencies are fully staffed.¹³

While the federal government has legitimate interests in promulgating laws and regulations to ensure food safety and animal welfare, federal law should create a floor under which states may not fall, but federal law should not serve as an impediment to states acting within their jurisdictions to protect their inhabitants in areas that have historically been reserved to them. The Supreme Court decision in *Harris* upsets this fundamental balance and places misplaced reliance on federal agencies that have proven time and again that they are not up to the task. Moreover, the decision limits the ability of states to develop their own conceptions of justice and moral evolution.

The first section of this article will detail the traditional roles of the states and the federal government in regulating animal welfare and public health, detailing how the issues at stake in *Harris* have traditionally been areas of state control. Part II will describe the California law and explain the decisions of the lower courts and the Supreme Court in the case. Part III will detail stakeholder attempts to have their positions advanced by USDA in the years before and after *Harris* and how the agency has failed to enforce and interpret federal laws in a way that protects public health or animal welfare. Finally, Part IV will discuss how Congress, while it could

com/national/2013/10/theres-major-salmonella-outbreak-during-fovemment-shutdown/70286/; Tarini Parti & Helena Bottemiller Evich, *Government Shutdown Worst-Case Scenario Realized: Salmonella Outbreak*, POLITICO (Oct. 8, 2013, 7:58 PM), <http://www.politico.com/story/2013/10/government-shutdown-salmonella-outbreak-98024.html>.

13. See, e.g., Ryan Arciero, *Trader Joe's Recalls: 26 Sick Prompts Recalls, E. coli Link to Packaged Wraps*, EXAMINER, Nov. 11, 2013, <http://www.examiner.com/article/trader-joe-s-recalls-26-sick-prompts-recalls-e-coli-link-to-packaged-wraps>; Laurent Belsie, *Beef Recall: E. coli Detected in Kansas Firm's Ground Beef*, CHRISTIAN SCI. MONITOR, Aug. 1, 2013, <http://www.csmonitor.com/Business/2013/0801/Beef-recall-E.coli-detected-in-Kansas-firm-s-ground-beef-video>; Kent Garber, *Just How Safe Is Our Meat?*, U.S. NEWS, Feb. 22, 2008, <http://www.usnews.com/news/national/articles/2008/02/22/just-how-safe-is-our-meat>; Associated Press, *Ground Beef Recall: 34,000 Pounds of Contaminated Beef in Six States*, CHRISTIAN SCI. MONITOR, Dec. 31, 2010, <http://www.csmonitor.com/Business/Latest-News-Wires/2010/1231/Ground-beef-recall-34-000-pounds-of-contaminated-beef-in-six-states>; Mike Stobbe, *Ground Beef Recall Linked to Illness in Five States*, CHRISTIAN SCI. MONITOR, Jan. 28, 2013, <http://www.csmonitor.com/Business/Latest-News-Wires/2013/0128/Ground-beef-recall-linked-to-illness-in-five-states>; see also Kat Kinsman, *Check Your Freezer: 22,737 lbs of Beef Recalled*, CNN EATOCRACY (Jun. 18, 2013, 8:30 PM), <http://eatocracy.cnn.com/2013/06/18/22737-pounds-of-beef-recalled-on-e-coli-fears/>.

remedy the situation to ensure that the state role is respected, has failed to do so and is instead taking steps that could move in the opposite direction.

II. BALANCING RIGHTS AND RESPONSIBILITIES BETWEEN CONGRESS AND THE STATES

The balance of federalism established in our constitutional system leaves to the states areas that cannot be or traditionally are not regulated by the federal government. For most of the nation's history, responsibility for public health and morality, including morality related to animal welfare, has rested with the states. The federal interest in animal welfare is much more recent, and efforts at the federal level are far from comprehensive. This section first lays out the traditional state role in regulating animal welfare and public health. Then, it discusses the more recent and limited role that Congress and federal agencies have played in protecting food safety and particularly animal welfare.

A. State Regulation of Animal Welfare from the Early 1800s to Present Day

Throughout the history of the US, states have had the legal authority to pass (or not) a large swath of laws dealing with humans' treatment of other animals.¹⁴ The first modern animal cruelty statute was passed in Maine in 1821, with New York passing a law in 1828.¹⁵ It was not until the 1990s and early twenty-first century, however, that most states adopted such provisions.¹⁶ With North Dakota passing a law in 2013, only one state lacks a felony animal cruelty provision.¹⁷ That state, South Dakota, is considering a provision in 2014.¹⁸ Nevertheless, these provisions continue to vary greatly and states continue to make differing decisions regarding what is right for their citizens. Despite this variation, courts have

14. See, e.g., *Nichia v. New York*, 254 U.S. 228, 230-31 (1920); *Sentell v. New Orleans & C. R. Co.*, 166 U.S. 698, 704 (1897); *DeHart v. Town of Austin*, 39 F.3d 718 (7th Cir. 1994).

15. GARY L. FRANCIONE, *ANIMALS AS PERSONS: ESSAYS ON THE ABOLITION OF ANIMAL EXPLOITATION* 33 (2008); Maneesha Deckha, *Welfarist and Imperial: The Contributions of Anticruelty Laws to Civilizational Discourse*, 65 AM. Q. 515, 518-19 (2013).

16. See BRUCE A. WAGMAN, SONIA WAISMAN & PAMELA D. FRASCH, *ANIMAL LAW: CASES AND MATERIALS* (3rd ed. 2010); ANIMAL LEGAL DEF. FUND, U.S. JURISDICTIONS WITH AND WITHOUT FELONY ANIMAL CRUELTY PROVISIONS, <http://aldf.org/resources/advocating-for-animals/u-s-jurisdictions-with-and-without-felony-animal-cruelty-provisions/> (last visited May 13, 2014).

17. ANIMAL LEGAL DEF. FUND, *supra* note 16.

18. Chet Brokaw, *Animal Cruelty Could Become Felony in South Dakota*, KSL, Jan. 7, 2014, <http://www.ksl.com/?nid=157&sid=28278493>.

continually recognized the authority of states to make these determinations. “For more than 100 years, across an eclectic landscape of state anti-cruelty provisions covering virtually every animal species, the courts have reaffirmed” the basic principle that “laws preventing cruel and inhumane treatment of animals fall squarely within the state’s inherent police power.”¹⁹

Animal protection laws are evidence of a changing moral landscape that differs state by state but that allows each state the freedom to determine the morality of its residents. While cockfighting and dogfighting, for example, were nearly universally accepted early in our history, today every state outlaws both, and these practices are nearly universally condemned.²⁰ At present, states and local jurisdictions are experimenting with broader and more specific laws related to animal welfare. In 2003, for example, Hollywood, California outlawed cat declawing.²¹ In 2013, the Los Angeles City Council voted to outlaw the use of bull hooks for elephants forced to perform in circuses.²² Certain state laws govern which animals are deemed acceptable to eat. For example, while Americans consumed horses until the 1970s,²³ a number of states have moved in recent years to prohibit the slaughter of horses for human consumption.²⁴ Certain states have also passed laws prohibiting the consumption of domestic cat and dog flesh.²⁵ More recently, five states have banned the use of shark fins for food.²⁶

19. *ASPCA Brief*, *supra* note 2, at 8

20. *Id.* at 18.

21. W. Hollywood Mun. Code, § 9.49.020 (2003); *see also* Cal. Veterinary Med. Ass’n. v. City of West Hollywood, 152 Cal. App. 4th 536, 542 (Cal. App. 2d 2007) (holding that the Hollywood ban was not preempted by state law).

22. *LA City Council Bans Use Of Bullhooks On Circus Elephants*, CBS LOS ANGELES, Oct. 23, 2013, <http://losangeles.cbslocal.com/2013/10/23/la-city-council-to-debate-use-of-elephant-hooks-at-circuses/>.

23. *Cavel Int’l, Inc. v. Madigan*, 500 F.3d 551, 552 (7th Cir. 2007).

24. *See* CAL. PENAL CODE § 598c (2011); 225 ILL. COMP. STAT. ANN. 635/1.5 (2007); MISS. CODE ANN. § 75-33-3 (1996); OKLA. STAT. ANN. tit. 2, § 6-192 (West 2013); TEX. AGRIC. CODE ANN. § 149-001 (1991).

25. *See* DEL. CODE ANN. tit. 11, § 1325A (2000); N.J. STAT. ANN. §§ 4:22-25.3 (2000); N.Y. AGRIC. & MKTS. LAW § 379 (McKinney 2003); N.Y. GEN. BUS. LAW § 399-aa (McKinney 2003).

26. CAL. FISH & GAME CODE § 2021(b) (2012); HAW. REV. STAT. ANN. § 188-40.7 (West 2010); 515 ILL. COMP. STAT. ANN. 5/5-30 (2013); OR. REV. STAT. ANN. § 498.257 (West 2011); OR. REV. STAT. ANN. § 509.160 (West 2012); WASH. REV. CODE ANN. § 77.15.770 (West 2011); *see also* Chinatown Neighborhood Ass’n v. Brown, 531 Fed.Appx. 761 (9th Cir. 2013) (not reported) (upholding the CA shark fin ban against a religious liberty challenge).

While laws protecting those animals that society continues to view as suitable mainly for food have been less prevalent (and most animal cruelty provisions exempt farmed animals), in recent years a number of states have taken steps to address some of the appalling practices that are a regular aspect of animal agriculture.²⁷ Many laws have taken aim at intensive confinement systems which make it impossible for animals to move, stretch, or turn around throughout their entire lives.²⁸ Nine states have passed bans on gestation crates for pregnant and nursing pigs.²⁹ Three states have prohibited battery cages for egg-laying hens.³⁰ And veal crates for calves have been outlawed in six states.³¹ Additionally, California and Rhode Island have prohibited the practice of tail docking – painful removal of animals' tails³² – and California has a law prohibiting the sale of foie gras, which requires force-feeding birds to abnormally enlarge their livers.³³ Moreover, state humane slaughter requirements often extend to species not covered by federal law.³⁴ According to Wayne Pacelle of

27. David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House: Animals, Agribusiness and the Law: A Modern Fable*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 206 (Cass R. Sunstein & Martha C. Nussbaum eds., 2005); see also Stephanie J. Engelsman, "World Leader" – *At What Price? A Look at Lagging American Animal Protection Laws*, 22 PACE ENVTL. L. REV. 329, 332 (2005); Craig A. Wenner, *Judicial Review and the Humane Treatment of Animals*, 86 N.Y.U. L. REV. 1630, 1631 (2011).

28. See, e.g., Amy Mosel, *What About Wilbur? Proposing a Federal Statute to Provide Minimum Humane Living Conditions for Farm Animals Raised for Food Production*, 27 U. DAYTON L. REV. 133, 146-49 (2001); Marya Torrez, *Combatting Reproductive Oppression: Why Reproductive Justice Cannot Stop at the Species Border*, 20 CARDOZO J. L. & GENDER 265, 265 (2014).

29. See ARIZ. REV. STAT. ANN. §§ 13-2910.07 to 13-2910.08 (2006); CAL. HEALTH & SAFETY CODE §§ 25990-25994 (2008); COLO. REV. STAT. §§ 35-50.5-101 to 103 (2008); FLA. STAT. § 10.21 (2002); ME. REV. STAT. ANN. tit. 7, §§ 4020, 1039 (2009); MICH. COMP. LAWS § 287.746 (2010); OH. ADMIN. CODE 901:12-8-01 (2011); OR. REV. STAT. ANN. § 600.150 (West 2008); R.I. GEN. LAWS § 4-1.1-3 (2013).

30. CAL. HEALTH & SAFETY CODE, §§ 25990-25994 (2008); MICH. COMP. LAWS § 287.746 (2010); R.I. GEN. LAWS § 4-1.1-3 (2013).

31. ARIZ. REV. STAT. ANN. §§ 13-2910.07 to 13-2910.08 (2006); CAL. HEALTH & SAFETY CODE §§ 25990-25994 (2008); COLO. REV. STAT. §§ 35-50.5-101 to 103 (2008); ME. REV. STAT. ANN. tit. 7, §§ 4020, 1039 (2009); MICH. COMP. LAWS § 287.746 (2009); R.I. GEN. LAWS § 4-1.1-3 (2012).

32. See JOHNS HOPKINS CTR. FOR A LIVABLE FUTURE, INDUSTRIAL FOOD ANIMAL PRODUCTION IN AMERICA: EXAMINING THE IMPACT OF THE PEW COMMISSION'S PRIORITY RECOMMENDATIONS 28 (2013) [hereinafter JOHNS HOPKINS].

33. CAL. HEALTH & SAFETY CODE § 25982 (2012); see also *Ass'n des Eleveurs de Canards et D'oies du Quebec v. Harris*, 729 F.3d 937 (9th Cir. 2013) (rejecting a challenge from producers against enforcement of the law).

34. Jeff Welty, *Humane Slaughter Laws*, 70 LAW & CONTEMP. PROBS. 175, 190-91 (2007).

HSUS, in the first six months of 2013, states passed more than seventy-five new laws aimed at governing our treatment of animals.³⁵ “As state anti-cruelty laws have evolved to meet changing community standards, the courts have kept pace by affirming that these expanded statutory protections are valid exercises of the police power.”³⁶

B. State Responsibilities for Protecting Public Health and the Food Supply

While the federal role in regulating food safety has been more extensive and comprehensive than that governing animal welfare, food safety responsibilities have similarly fallen mostly to the states. As stated in a report published by the George Washington School of Public Health and written by Stephanie David and leading food safety expert Michael Taylor:

[t]he starting point and most fundamental principle is that food safety falls squarely within the traditional and broad “police powers” to protect public health that are reserved to the states by the Constitution. There is thus no question that states, and in turn their local governments, are empowered and expected to protect the safety of the food supply within their boundaries. This includes the power to set and enforce their own food safety standards, even, as a general rule, if the standard is different from and more stringent than an applicable federal standard.³⁷

State and local agencies “investigate and contain illness outbreaks; conduct illness surveillance and monitor the food supply for contamination; inspect restaurants, grocery stores, and food processing plants; provide food worker and consumer education; and take regulatory action to remove unsafe or unsanitary products from the market.”³⁸ That does not mean that the federal role is not important or that concerns about uniformity across the states are irrelevant, and clearly Congress has the authority to preempt

35. Wayne Pacelle, *75 New Animal Welfare Laws, and Counting (Op-Ed)*, LIVE SCIENCE.COM, Aug. 2, 2013, <http://www.livescience.com/38632-75-new-animal-welfare-laws.html>.

36. *ASPCA Brief*, *supra* note 2, at 13.

37. MICHAEL R. TAYLOR & STEPHANIE D. DAVID, *STRONGER PARTNERSHIPS FOR SAFER FOOD: AN AGENDA FOR STRENGTHENING STATE AND LOCAL ROLES IN THE NATION’S FOOD SAFETY SYSTEM 22* (George Washington Univ. Dep’t. of Health Policy ed., 2009).

38. *Id.* at 6.

state law when necessary to achieve important national objectives. However, it does mean that courts should be reticent to overturn state laws that do not clearly serve as obstacles to the federal scheme. Given that our system of federalism preserves the rights of both states and the federal government, as explored in more detail below, courts should only find a state law preempted when there is a clear indication from Congress or a clear showing that the state and federal schemes cannot coexist.

Moreover, the treatment of animals intended for food and food safety issues are inexorably linked because the consumption of sick or injured animals is much more likely to be dangerous for humans. Animals that are too ill to walk or stand are more likely to be diseased.³⁹ Numerous diseases cannot be identified through the existing processes used to inspect animals.⁴⁰ Therefore, using inability to stand as a proxy for disease makes sense and states should be permitted to prohibit consumption of these animals.⁴¹ Moreover, disabled animals are more likely to track fecal matter and other contaminants into the food supply because they are laying in all the muck that healthier animals are simply walking through.⁴² As explained below, USDA has recognized these dangers, but getting the agency to invoke its enforcement authority has been a struggle.

C. Congressional Regulation of Farmed Animal Welfare

Contrary to the situation in the states where, as detailed above, legislation regarding the appropriate treatment of nonhuman animals has been extensive and goes back nearly two centuries, Congress' attention to animal welfare issues has been sporadic and recent. The Animal Welfare Act, which is the only federal law aimed at providing minimum welfare standards for animals, completely exempts farmed animals from its coverage.⁴³ There are only two federal laws focused on animals destined for slaughter for human consumption. As other commentators have

39. See Andrea M. Repphun, *Pigs-in-a-Blanket: How Current Meat Inspection Regulations Wrap America in False Security*, 16 DRAKE J. AGRIC. L. 183, 187 (2011); Greg Kaufmann, *Safe Meat Requires Humane Slaughter*, THE NATION, Mar. 5, 2010, <http://www.thenation.com/article/safe-meat-requires-humane-slaughter>.

40. See FOOD & NUTRITION BD., NAT'L ACAD. OF SCIENCES, CATTLE INSPECTION 2-4 (1991) [hereinafter CATTLE INSPECTION]; Justine Hinderliter, *From Farm to Table: How This Little Piggy Was Dragged through the Market*, 40 U.S.F. L. REV. 739, 742 (2006).

41. Repphun, *supra* note 39, at 187.

42. Nat'l Meat Ass'n v. Brown, No. CV-F-08-1963, 2009 WL 426213 (E.D. Cal. Feb. 19, 2009); Repphun, *supra* note 39, at 187.

43. 7 U.S.C. § 2132(g) (2013).

explained in detail, these laws are woefully deficient.⁴⁴ “Congress has addressed humane slaughter three times in [more than] fifty years.”⁴⁵

The first law regulating animal slaughter is the so-called “Twenty-Eight-Hour Law,” enacted in 1877, which prohibits confining animals “in a vehicle or vessel for more than 28 consecutive hours without unloading the animals for feeding, water, and rest.”⁴⁶ Even these provisions are avoidable in certain circumstances.⁴⁷ Moreover, the law exempts birds from its protections⁴⁸ and, until 2006, was not interpreted to apply to trucks, the primary modern method of animal transportation.⁴⁹

The only other federal law governing the treatment of animals used for food is the Humane Methods of Slaughter Act (HMSA). HMSA was passed in 1958 “following intense and broad-based public concerns about cruelty and abuse of livestock in meat-packing plants,”⁵⁰ over significant opposition from the animal agriculture industry and USDA.⁵¹ Congress’ primary concern in passing the law was treatment of slaughterhouse employees, not animals.⁵²

The HMSA requires that “in the case of cattle, calves, horses, mules, sheep, swine, and other livestock, all animals are rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut.”⁵³ The law also provides that ritual slaughter carried out as part of the Jewish or Muslim faith is *ipso facto* considered humane.⁵⁴ Despite consistent efforts by animal advocacy organizations for an alternative interpretation, the HMSA has been interpreted not to apply to birds despite the fact that they represent more than ninety percent of the animals

44. See, e.g., Cassuto, *supra* note 4, at 2; Vesilind, *supra* note 5, at 691.

45. Welty, *supra* note 34, at 188.

46. 49 U.S.C. § 80502 (1994).

47. 49 U.S.C. § 80502(a)(2), (c) (1994).

48. See 9 C.F.R. §§ 89.1-89.5 (2006); Wenner, *supra* note 27, at 1643.

49. See generally ANIMAL WELFARE INST., LEGAL PROTECTIONS FOR FARM ANIMALS DURING TRANSPORT (2010).

50. LISA SHAMES, GOV’T ACCOUNTABILITY OFFICE, GAO-08-686T, HUMANE METHODS OF HANDLING AND SLAUGHTER: PUBLIC REPORTING ON VIOLATIONS CAN IDENTIFY ENFORCEMENT CHALLENGES AND ENHANCE TRANSPARENCY 4 (2008).

51. Welty, *supra* note 34, at 185.

52. Cassuto, *supra* note 4, at 4.

53. 7 U.S.C. § 1902(a) (1958).

54. 7 U.S.C. §§ 1902(b) - 1906 (1958).

slaughtered for food in the US.⁵⁵ USDA is tasked with issuing regulations implementing the Act.⁵⁶

Though passed in 1958, there was no requirement providing for HMSA enforcement until it was incorporated into the Federal Meat Inspection Act in 1978.⁵⁷ Since that time, federal meat inspectors have had responsibility and authority for enforcing the HMSA. However, as explained more thoroughly below, this responsibility remains secondary. Therefore, unlike at the state level, where animal protection laws are extensive, there is no comprehensive federal scheme regulating treatment of animals, particularly those intended for food.

D. Public Outcry and the History of the Federal Meat Inspection Act

The Federal Meat Inspection Act (FMIA) was enacted in 1907 following a public awakening not unlike the one resulting from the Hallmark/Westland video. At the turn of the twentieth century, Upton Sinclair aimed to draw attention to the evils of capitalism and the appalling work conditions in the animal agriculture industry. While employment conditions were and continue to be a significant problem in animal agriculture,⁵⁸ Sinclair's book, *The Jungle*, instead caught the public's attention to the appalling food safety issues.⁵⁹ Although *The Jungle* is fictional, it highlighted what was happening in the nation's slaughterhouses and led to nationwide responses.

Congress reacted by passing the FMIA. The FMIA's stated purpose is to protect public health and welfare by "assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged."⁶⁰ The FMIA requires federal inspectors to be placed in slaughterhouses and other animal processing plants across the country.⁶¹ Slaughterhouses are not permitted to operate without federal

55. See generally *Levine v. Conner*, 540 F. Supp. 2d 1113 (N.D. Cal. 2008); see also Cassuto, *supra* note 4, at 4; Welty, *supra* note 34, at 198.

56. 7 U.S.C. § 1904(b) (1958).

57. Vesilind, *supra* note 5, at 690.

58. See, e.g., PATRICIA A. CURTIS, GUIDE TO US FOOD LAWS AND REGULATIONS 147 (2013); DAVID NIBERT, ANIMAL RIGHTS/HUMAN RIGHTS: ENTANGLEMENTS OF OPPRESSION AND LIBERATION 112 (2002); ERIC SCHLOSSER, FAST FOOD NATION 173-76 (2002); Torrez, *supra* note 28.

59. See Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965, 968 (2012); Roger Roots, *A Muckraker's Aftermath: The Jungle of Meat-Packing Regulation after a Century*, 27 WM. MITCHELL L. REV. 2413 (2000); Vesilind, *supra* note 5, at 689.

60. 21 U.S.C. § 602 (1967).

61. 9 C.F.R. § 302.3 (2010).

inspectors present.⁶² The FMIA has been amended on a number of occasions.⁶³ In 1957, Congress passed the Poultry Product Inspection Act to extend the law to bird slaughter and processing.⁶⁴ In 1967, Congress passed the Wholesome Meat Act and in 1968, the Wholesome Poultry Act, to ensure that the same standards applied to intrastate and foreign animal processing as applied to interstate facilities.⁶⁵

The FMIA does contain express preemption language. Specifically it states that “[r]equirements within the scope of this chapter with respect to *premises, facilities and operations* of any establishment [covered by the act] which are in addition to, or different than those made under this chapter may not be imposed by any State.”⁶⁶ However, the law also includes a savings clause, stating that “[t]his chapter shall not preclude any State . . . from making requirements or taking other action, consistent with this chapter, with respect to any other matters regulated under this chapter.”⁶⁷

Moreover, the FMIA contains an entire provision specifying that states may create their own animal slaughter regimes for intrastate meat as long as they provide at least as much protection as federal law. Additionally, the “legislative history of the 1967 amendments indicates a strong emphasis on the baseline nature of the federal program’s requirements [and] the congressional reports to the 1967 amendments discuss at length the important cooperative relationship between the federal government and state governments in the field of meat inspection.”⁶⁸ Taken together, these provisions, along with the traditional state role in regulating animal treatment and public health, seem to make clear that Congress wanted to create a federal floor under which states could not fall, but not a federal ceiling above which states were prohibited from acting.

Under the law, the Food Safety and Inspection Service (FSIS) within USDA has responsibility for inspecting animals before and after slaughter, monitoring slaughter, and processing operations for cleanliness, and enforcing related food safety regulations.⁶⁹ “FSIS is mandated to visually examine every carcass passing through slaughter plants – including over 8 billion chickens and 125 million head of livestock – and to inspect the

62. *Id.*

63. CURTIS, *supra* note 58, at 76.

64. *Id.* at 77.

65. *Id.*

66. 21 U.S.C. § 678 (1967) (emphasis added).

67. *Id.*

68. Barron, *supra* note 6, at 266.

69. See CURTIS, *supra* note 58, at 75-76.

several thousand processing plants daily.”⁷⁰ FSIS regulations regarding most nonambulatory animals require that they be separated from other animals.⁷¹ After slaughter, they are to be inspected for a determination regarding whether their flesh is safe to eat.⁷² “[F]ederal regulations allow disabled livestock to be subjected to electric prodding, and they may be pulled or dragged on the ground with ‘forklift or bobcat-type vehicles’ so long as they have been ‘stunned.’”⁷³

Therefore, while states have legislated extensively in these areas over a period of nearly two centuries, federal legislation has been more recent and less comprehensive. This history was the legal backdrop that the courts confronted in addressing the challenge to the California law governing treatment of nonambulatory animals.

III. THE ROAD TO *NATIONAL MEAT ASSOCIATION V. HARRIS*

Food safety and animal welfare laws and regulations have often been responses to incidents that provide small windows into the reality of our food supply and, in particular, how animals are turned into food. The release of the Hallmark/Westland video was one of these moments. This section provides a brief overview of the California legislature’s attempt to respond to the Hallmark/Westland video, the industry challenge to that response, and an overview of preemption challenges under the FMIA at the time. Secondly, it discusses the treatment by the courts of that challenge and demonstrates how the Supreme Court decision striking down the law undermines traditional preemption law and the state role in legislating in the areas of animal welfare and public health.

A. California Versus the National Meat Association: Undermining Attempts to Protect Public Health and Animal Welfare

In response to the Hallmark/Westland video and the subsequent revelations described in the introduction, California legislators decided to strengthen an existing state law regulating the treatment of animals designated for slaughter.⁷⁴ “[Animals] that become downed before or upon

70. TAYLOR & DAVID, *supra* note 37, at 12.

71. 9 C.F.R. § 309.2 (2007).

72. *Id.*

73. Vesilind, *supra* note 5, at 691; *see also* 9 C.F.R. § 313.2(d)(2) (2012); FOOD SAFETY & INSPECTION SERV., HUMANE HANDLING OF DEAD LIVESTOCK, FSIS DIRECTIVE 6900.2 (1992), *available at* <http://www.fsis.usda.gov/wps/wcm/connect/2375f4d5-0e24-4213-902d-d94ee4ed9394/6900.2.pdf?MOD=AJPE RES>.

74. *See Hearing on A.B. 2098 Before the Assembly Comm. on Pub. Safety, 2007-08 Regular Session (Cal.)* (statement of Paul Krekorian, Member, Assembly Comm. on

arrival at the slaughterhouse are denied medical care, food, and water, and they are left to suffer for hours or days until they make it to slaughter or ultimately die.”⁷⁵ As explained by the American Society for the Prevention of Cruelty to Animals in an *amicus* brief to the Supreme Court in *Harris*:

[b]y preventing the well documented and grossly inhumane handling of animals that are too sick or disabled to stand and walk to their deaths, [the California law] is an integral element of California’s anti-cruelty penal scheme, which like other state anti-cruelty laws, has expanded to better reflect evolving community sensibilities and to adapt to a growing social and scientific awareness of animals’ capacity for pain and suffering.⁷⁶

When the law was scheduled to go into effect, however, the National Meat Association (NMA), an industry trade association, challenged the constitutionality of the law as applied to pig processors.⁷⁷ The challenged provisions included the following:

- (a) No slaughterhouse, stockyard, auction, market agency, or dealer shall buy, sell, or receive a nonambulatory animal.
- (b) No slaughterhouse shall process, butcher, or sell meat or products of nonambulatory animals for human consumption.
- (c) No slaughterhouse shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal.⁷⁸

NMA argued that the law was preempted by federal law, violated the Commerce Clause of the US Constitution, and was unconstitutionally vague.⁷⁹ The courts only addressed NMA’s preemption argument in deciding its motion for a preliminary injunction. Several animal advocacy organizations – HSUS, Farm Sanctuary, the Humane Farming Association

Pub. Safety), available at ftp://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2051-2100/ab_2098_cfa_20080328_144343_asm_comm.html.

75. Repphun, *supra* note 39, at 202.

76. *ASPCA Brief*, *supra* note 2, at 2.

77. *Nat’l Meat Ass’n v. Brown*, 599 F.3d 1093, 1097 (9th Cir. 2010).

78. CAL. PENAL CODE § 599f (2008).

79. *Brown*, 599 F.3d at 1097.

and the Animal Legal Defense Fund – intervened in the case on behalf of the state.⁸⁰

Although, under the Supremacy Clause of the US Constitution, Congress may supersede state law through any act it is constitutionally permitted to pass, courts are generally reticent to find that state law has been preempted without a clear mandate from Congress. The:

enumeration of powers in Article I, reinforced by the Tenth Amendment, make clear the intent to preserve the authority of States, thereby “assur[ing] a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; increas[ing] opportunity for citizen involvement in democratic processes; [and] allow[ing] for more innovation and experimentation in government.”⁸¹

The value of not carelessly overriding state law is particularly at play in areas where states have traditionally governed and where the federal role has been minimal, and numerous Supreme Court and lower court cases have preserved state prerogatives in the face of federal preemption claims in these areas.⁸² As the Supreme Court has explained:

because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has “legislated . . . in a field which the States have traditionally occupied,” . . . we “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purposes of Congress.”⁸³

This is particularly the case when federal laws include a savings clause, specifically retaining an amount of state jurisdiction over the issue. “Many federal public health and environmental statutes include savings clauses.

80. *Id.*

81. Brief for Professors of Preemption Law as Amici Curiae Supporting Respondents at 16, *Nat’l Meat Ass’n v. Harris*, 132 S. Ct. 965 (2012) (No. 10-224) [hereinafter *Professors’ Brief*] (internal citations omitted).

82. Sandra Zellmer, *Preemption by Stealth*, 45 HOUS. L. REV. 1659, 1660 (2009).

83. *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996).

intended to leave ample room for state law to provide increased protection above the federal regulatory floor.”⁸⁴

There are two types of preemption:

[t]here is express preemption where federal law explicitly preempts state law. There is implied preemption where federal law was intended to occupy the legislative field or where state law conflicts with federal law, either because it’s impossible to comply with both laws or because state law stands as an obstacle to accomplishing the purposes of federal law. In either case, there’s a strong presumption against preemption, especially when the state law deals with matters like health and animal welfare, which have historically been regulated by states.⁸⁵

Whether the presumption against preemption must always be applied, particularly in situations where a law has an express preemption provision, however, has been at matter of debate at the Supreme Court in recent years.⁸⁶

Courts hearing cases under the provision of the FMIA at stake in *Harris* have been generally unwilling to find state laws preempted. The cases most analogous to *Harris* have been those dealing with prohibitions on horse slaughter. In *Empacadora de Carnes de Fresnillo v. Curry*, slaughterhouse owners challenged a Texas law outlawing the slaughter of horses for human consumption.⁸⁷ Holding in favor of the state, the Fifth Circuit stated, “[w]e can find no indication that Congress intended to prevent states from regulating the types of meat that can be sold for human consumption. . . . FMIA’s preemption clause is more naturally read as being concerned with the methods, standards of quality, and packaging that slaughterhouses use.”⁸⁸

Similarly, in *Cavel v. Madigan*, the only remaining US horse slaughter facility challenged an Illinois law that prohibited the slaughter of horses, as well as the import or export of horse flesh for human

84. Zellmer, *supra* note 82, at 1660.

85. *Brown*, 599 F.3d at 1097 (internal citations omitted).

86. See, e.g., *Professors’ Brief*, *supra* note 81, at 20; William Funk, *Judicial Deference and Regulatory Preemption by Federal Agencies*, 84 TUL. L. REV. 1233, 1234 (2010).

87. *Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry*, 476 F.3d 326, 329 (5th Cir. 2007).

88. *Id.* at 333.

consumption.⁸⁹ The Seventh Circuit, in an opinion by Judge Richard Posner, rejected the argument that the law was preempted by the FMIA explaining that, “[g]iven that horse meat is produced for human consumption, its production must comply with the [FMIA]. But if it is not produced, there is nothing, so far as horse meat is concerned, for the Act to work upon.”⁹⁰

Likewise, in *Chicago-Midwest Meat Association v. Evanston*, the Seventh Circuit held that local ordinances providing for inspection of meat delivery vehicles were not preempted. “Far from intending to preempt the entire field of meat inspection, Congress actually designed the Act to ‘protect the consuming public from meat and meat food products that are adulterated or misbranded and to assist in efforts by State and other Government agencies to accomplish this objective.’”⁹¹ And in *Physicians Committee for Responsible Medicine v. McDonald’s*, the California Court of Appeal held that requirements that restaurants warn consumers about the carcinogenic risk of consuming chicken flesh were not preempted.⁹² These cases stand in contrast to cases challenging labeling requirements different than those imposed under the FMIA, which have been held to be preempted.⁹³ This was the legal framework that the courts confronted in hearing NMA’s challenge to the California law.

B. California Versus the National Meat Association in the Courts

The district court found that the state law was expressly preempted by federal law and granted NMA’s motion for a preliminary injunction.⁹⁴ While California argued that the FMIA did not prohibit states from making determinations regarding which animals may be slaughtered, the court rejected this argument, finding that disabled pigs are not a “type of animal” and that California’s attempts to prohibit their consumption and ensure that they be humanely euthanized ran afoul of federal law.⁹⁵

The Ninth Circuit reversed the district court, explaining that:

89. See *Cavel Int’l, Inc. v. Madigan*, 500 F.3d 551, 551 (7th Cir. 2007).

90. *Id.* at 554.

91. *Chi.-Midwest Meat Ass’n v. Evanston*, 589 F.2d 278, 282 (7th Cir. 1978) (citing 21 U.S.C. § 661(a)).

92. *Physicians Comm. for Responsible Med. v. McDonald’s Corp.*, 187 Cal. App. 4th 554 (Cal. App. 2d Dist. 2010).

93. See *Jones v. Rath Packing*, 430 U.S. 519, 543 (1977); Brief in Opposition for the Non-State Respondents at 4-5, *Nat’l Meat Ass’n v. Harris*, 132 S. Ct. 965 (2012) (No. 10-224); Barron, *supra* note 6 at 260.

94. *Nat’l Meat Ass’n v. Brown*, No. CV-F-08-1963, 2009 WL 426213, at *24 (E.D. Cal. Feb. 19, 2009).

95. *Id.* at *25.

[the FMIA] preempts state regulation of the “premises, facilities and operations” of slaughterhouses, and [the California law] deals with none of these. . . . Regulating what kinds of animals may be slaughtered calls for a host of practical, moral and public health judgments that go far beyond those made in the FMIA. These are the kinds of judgments reserved to the states.⁹⁶

According to the Ninth Circuit, the FMIA’s express preemption provision did not reach decisions regarding animals that never make it to slaughter because the purpose of the law is to ensure that those animals who *are* slaughtered for human consumption are safe to eat.⁹⁷ Moreover, nothing in the California law made it impossible to comply with both federal and state law. Given the state’s traditional role in regulating health and animal welfare, there was no reason to interfere with the state’s attempts to protect disabled animals and public health. The Ninth Circuit relied largely on the horse slaughter cases discussed previously.

In the Supreme Court, the parties and numerous *amici curiae* laid out arguments as to why the Court should uphold or reverse the Ninth Circuit decision. According to NMA, federal law already provided a comprehensive scheme regarding what to do with nonambulatory animals, and there was no room for California to act. In its brief to the Supreme Court, the Association argued that the “FMIA’s preemption provision shows the ‘clear and manifest’ intent of Congress that federal law alone sets the standards for slaughterhouse operations.”⁹⁸ NMA went on to state that “Congress . . . made it very clear that this federal system was to set the exclusive standards for slaughter-house operations.”⁹⁹ NMA further argued that the presumption against preemption should not apply.¹⁰⁰

In an *amicus curiae* brief on behalf of NMA, the US Solicitor General argued that it was necessary to find that state law was preempted in order to ensure “that FSIS inspectors and veterinarians will have an adequate opportunity to conduct the FMIA-required ante-mortem inspection of nonambulatory animals.”¹⁰¹ The US further argued that a finding of

96. Nat’l Meat Ass’n v. Brown, 599 F.3d 1093, 1098-99 (9th Cir. 2010).

97. *Id.* at 1099.

98. Brief for Petitioner at 21, Nat’l Meat Ass’n v. Harris, 132 S. Ct. 965 (2012) (No. 10-224).

99. *Id.* at 23.

100. *Id.* at 25.

101. Brief for the United States as Amici Curiae Supporting Petitioner at 15, Nat’l Meat Ass’n v. Harris, 132 S. Ct. 965 (2012) (No. 10-224).

preemption would prevent “state interference [with] the federal inspectors who work at slaughterhouses.”¹⁰² The US ultimately concluded that “[u]nwarranted intrusion by state law could hamstring FSIS inspectors in the discharge of their duties.”¹⁰³

Numerous *amici*, as well as the state and non-state respondents, laid out various reasons that the Supreme Court should uphold the Ninth Circuit Decision. Preemption law professors argued that:

[w]hich animals a State chooses for ethical reasons to exclude from being slaughtered and processed into meat falls outside the federal government’s interest in inspecting the animals that *will* be sold as meat for human consumption. And federal law does not require state law determinations as to what animals are suitable for slaughter to be left at the slaughterhouse gates. . . .

Federal law expressly contemplates an active state role in regulating the meat industry, even as it more jealously guards the federal inspection process of animals bound for slaughter. California’s prohibition on the slaughter of non-ambulatory animals is consistent, even supportive, of the balance struck by federal law, since it deals with which animals may be slaughtered and sold as meat, as opposed to how animals bound for slaughter should be inspected. Indeed, interpreting the FMIA to require displacement of California’s determination that non-ambulatory animals are excluded for ethical reasons from the slaughtering process would upset the federal-state balance contemplated by the FMIA, turning preemption principles on their head.¹⁰⁴

Other *amici* arguing against preemption included six consumer groups and fourteen states.¹⁰⁵ Two veterinarians disputed the claims made by NMA

102. *Id.*

103. *Id.* at 34.

104. *Professors’ Brief, supra* note 81, at 4, 6-7

105. *See, e.g.*, Brief for Public Citizen, AARP et al. as Amici Curiae Supporting Respondents, *Nat’l Meat Ass’n v. Harris*, 132 S. Ct. 965 (2012) (No. 10-224); Brief for the States of Alaska, Illinois et al. as Amici Curiae Supporting Respondents, *Nat’l Meat Ass’n v. Harris*, 132 S. Ct. 965 (2012) (No. 10-224).

and the US Solicitor General that California's law would make meat less safe.¹⁰⁶

Nevertheless, in a terse, fourteen-page, unanimous opinion written by Justice Elena Kagan, the Court reversed the Ninth Circuit and held that the California law was preempted by the FMIA. While the opinion includes little analysis of the relevant laws and no analysis of preemption law or discussion of the traditional state role in regulating animal welfare and food safety, the Court held that the FMIA clearly preempted the California law. According to the Kagan, the FMIA's preemption clause:

prevents a State from imposing any additional or different – even if non-conflicting – requirements that fall within the scope of the Act and concern a slaughterhouse's facilities or operations. And at every turn [the California law] imposes additional or different requirements on swine slaughterhouses. . . . California's statute substitutes a new regulatory scheme for the one the FSIS uses.¹⁰⁷

Moreover, the Court rejected the arguments accepted by the Ninth Circuit that states were free under the FMIA to prohibit the slaughter of certain animals. As stated by the Court:

[t]he FMIA's scope includes not only "animals that are going to be turned into meat," but animals on a slaughterhouse's premises that will never suffer that fate. . . . [O]ne vital function of the Act and its regulations is to ensure that some kinds of livestock delivered to a slaughterhouse's gates will not be turned into meat. Under federal law, nonambulatory pigs are not among the excluded animals.¹⁰⁸

The Court went on to hold that, while this analysis makes clear that the requirements under the California law were different than those of the FMIA, they did not fall outside of the FMIA's scope.¹⁰⁹

The Court also rejected arguments made by the respondents that certain aspects of the law – those governing treatment of animals prior to

106. See generally Brief for Tim Blackwell, D.V.M. and Kristie Mozzachio, D.V.M. as Amici Curiae Supporting Respondents, *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965 (2012) (No. 10-224).

107. *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 970 (2012).

108. *Id.* at 973-74.

109. *Id.* at 974.

their arrival at the slaughterhouse and those prohibiting the sale of their flesh after they are processed by the slaughterhouse – fell outside the scope of the FMIA.¹¹⁰ Moreover, the Court presumed that, because FSIS inspectors are tasked with enforcing the HMSA, that humane slaughter considerations are similarly subsumed by the FMIA, despite the fact, as detailed above, the HMSA provisions are incredibly limited.¹¹¹

As noted above, analysis of preemption law was nonexistent and the Supreme Court did not discuss the presumption against preemption or the savings clause in the FMIA. While this opinion seemed to fly in the face of traditional preemption law, legal scholar Sandra Zellmer has documented how the Rehnquist and Roberts Courts in particular have frequently used preemption law to find in favor of corporations and against states and individuals, noting that:

in relatively few of the recent cases have the Rehnquist or Roberts Courts actually delved into congressional purposes underlying a particular statute in any depth; . . . [nor] has the Court considered the impact of preemption on cooperative federalism objectives or the relative competence of different levels of government to solve societal problems. Rather, . . . preemption cases exhibit a type of “faux textualism in which the Court invokes the alleged plain meaning of two wholly ambiguous words” in a statutory clause to reach antiregulatory results.¹¹²

Moreover, “recent Supreme Court cases reveal a pattern of increasingly hostile reception of savings clauses.”¹¹³ According to Professor Zellmer, in preemption cases, the justices do not generally line up along typical ideological lines, and:

[a]s a result, Supreme Court opinions seem to oscillate between a love of federalism, which would suggest a restrictive view of preemption, and an aversion to state interference with federal programs. It is tempting to surmise that the preemption cases are not about federalism at all but rather reflect promarket, antiregulatory goals.¹¹⁴

110. *Id.* at 971-73.

111. Cassuto, *supra* note 4, at 2; Deckha, *supra* note 15, at 531-32.

112. Zellmer, *supra* note 82, at 1669-70 (internal citations omitted).

113. *Id.* at 1660.

114. *Id.* at 1670 (internal citations omitted).

Unfortunately, in *Harris*, all the justices were able to coalesce around an anti-federalism, pro-federal regulation position.¹¹⁵

This understanding of the balance between federal and state laws jeopardizes human and nonhuman health and limits the openings for states to act to protect their residents. As stated by the intervenors in *Harris*, giving the FMIA broad preemptive effect in an area traditionally left to the states, has “the perverse effect of turning the food safety sword Congress created with the enactment of the FMIA into a shield against any and all meat safety reform efforts by the States.”¹¹⁶

While the actual holding in *Harris* is relatively narrow since most state laws do not directly govern the slaughter of animals, and therefore would not fall under the purview of the FMIA, the potential harm of the holding and the Supreme Court’s willingness to allow federal agencies to control areas of traditional state control even when their ability to do so is woefully inadequate has far reaching implications. Moreover, David Cassuto has pointed out that the opinion conflates animals and meat, treating live animals as though they are already meat,¹¹⁷ which has potential implications for any number of laws attempting to improve the conditions under which animals are raised for food. Furthermore, other commentators have noted that the Supreme Court could potentially strike down laws impacting agriculture products from other states as violative of the dormant commerce clause.¹¹⁸ And, in fact, in February 2014, Missouri sued California claiming that California’s prohibition on the sale of eggs from chickens kept in battery cages violates the Commerce Clause.¹¹⁹

While the Supreme Court presumes that federal law provides a modicum of protection for farmed animals, other commentators have demonstrated that this presumption is false.¹²⁰ As a result, “the only hope for legal protections is at the state level.”¹²¹ The Court’s assumption regarding humane slaughter in particular raises concerns about the state humane slaughter laws that apply to species not protected under federal law. “Unless Congress’s preemption power over state animal welfare law is

115. See generally *Harris*, 132 S. Ct. at 965.

116. Brief for Defendant-Intervenor-Appellants at 16-17, *Nat’l Meat Ass’n v. Harris*, 132 S. Ct. 965 (2012) (No. 10-224), 2009 WL 2610229.

117. Cassuto, *supra* note 4, at 3, 12.

118. Sean P. Sullivan, *Empowering Market Regulation of Agricultural Animal Welfare through Product Labeling*, 19 *ANIMAL L.* 391, 400 (2012).

119. See David A. Lieb, *Missouri AG Challenges California Egg Law*, ASSOCIATED PRESS, Feb. 4, 2014, <http://bigstory.ap.org/article/missouri-ag-challenges-california-egg-law>.

120. See Wolfson & Sullivan, *supra* note 27, at 206-07.

121. *Id.* at 208.

challenged, the federal government will retain an unchecked authority to suppress legislative expressions of our moral and ethical values, by defining and enforcing artificial limits to our humanity.”¹²² This interpretation of the law is particularly problematic given the inability of USDA to adequately protect animals or the food supply as addressed in the next section.

IV. THE FEDERAL REGULATORY LANDSCAPE BEFORE AND AFTER *NATIONAL MEAT ASSOCIATION V. HARRIS*

Rather than interpreting the FMIA as creating a federal floor, the Supreme Court in *Harris* interpreted the law as creating a federal ceiling under which all states and their residents are forced to fall regardless of their own moral understandings and wishes. This interpretation undermines that traditional state role in regulating animal welfare and impedes state moral progress, halting legal innovation at a truncated level. Moreover, the decision endangers public health by preserving authority for protecting food safety in the hands of USDA.

Over the years, animal agriculture opponents and food safety proponents have continually urged better regulation at the federal level. While FSIS has made some modifications to its regulations over the years, those changes have been few and far between despite numerous failures to protect either food safety or animal welfare. The agency has been most willing to make changes following a major incident such as the release of the Hallmark/Westland video, but once public scrutiny focuses elsewhere, it falls back to its ineffectual position. This section details the efforts of competing stakeholders to compel the USDA to act to enforce existing laws over the years since the passage of the FMIA and HMSA and surveys the abject failure of the USDA to protect animal welfare or the safety of the food supply in the years both before and after *Harris*.

A. FSIS Regulation of Food Safety and Animal Welfare

Cassuto has detailed how the expectations on FSIS inspectors make it nearly impossible for them to succeed in adequately inspecting animals, noting that:

[w]e know that in 2010, 9,000 inspectors inspected 147,000,000 animals. That means that each inspector inspected an average of approximately 16,330 animals. If every inspector works forty-eight weeks a year, five days

122. Vesilind, *supra* note 5, at 704.

per week, eight hours per day, and if we assume that all they do is live inspect animals, then this would mean that each of them inspects slightly more than eight animals per hour. That might seem possible if ante-mortem inspections were all they did. But it is not all they do. Furthermore, even if it were all they did, this hourly inspection rate does not align with the hourly kill rate at a slaughterhouse.¹²³

This is particularly problematic because the inspection regime relies largely on visual examination of animals before and after slaughter. The agency has been reluctant to alter the FSIS inspection system since the law was passed in 1907 despite the fact that the methods employed have more to do with meat quality (how the meat appears and tastes to consumers) and less to do with meat safety (whether the meat is infected with pathogens).¹²⁴ For years, the agency was largely unwilling to adopt new testing requirements, and faced vehement opposition from the animal agriculture industry when it has attempted to do so.

After a major E. coli outbreak in 1993, USDA made one of the only significant changes to the food safety regulatory regime in the last century.¹²⁵ Between 1998 and 2000, FSIS phased in a pilot program, applying the Hazard Analysis and Critical Control Point (HACCP) system, for certain chicken, turkey, and pig facilities.¹²⁶ “Upon the announcement of testing for microbial pathogens, the meat industry fought back and filed suit to enjoin the USDA from requiring testing, claiming that the USDA did not have the regulatory authority and that the regulations were arbitrary and capricious.”¹²⁷ While the court challenge was unsuccessful,¹²⁸ industry did succeed in getting the agency to weaken the regulations to place primary responsibility on consumers for cooking meat thoroughly to kill pathogens.¹²⁹

123. Cassuto, *supra* note 4, at 5.

124. See CATTLE INSPECTION, *supra* note 40, at 8-10.

125. Hinderliter, *supra* note 40, at 744-45; Sharlene W. Lassiter, *From Hoof to Hamburger: The Fiction of a Safe Meat Supply*, 33 WILLAMETTE L. REV. 411, 453 (1997).

126. See GOV'T ACCOUNTABILITY OFFICE, GAO-13-775, FOOD SAFETY: MORE DISCLOSURE AND DATA NEEDED TO CLARIFY IMPACT OF CHANGES TO POULTRY AND HOG INSPECTIONS 2 (2013) [hereinafter GAO-13-775]; Hinderliter, *supra* note 40, at 745.

127. Brian Daluiso, “*Is the Meat Here Safe?*” *How Strict Liability for Retailers Can Lead to Safer Meat*, 92 B.U. L. REV. 1081, 1093 (2012).

128. *Tex. Food Indus. Ass'n v. Espy*, 870 F. Supp. 143, 144 (W.D. Tex. 1994).

129. Daluiso, *supra* note 127, at 1094.

While the HACCP system is seemingly an improvement over the previous system because it relies on science, rather than the traditional “poke and sniff” method and has been lauded by the agency,¹³⁰ it has a number of major drawbacks. For one thing, the system is largely implemented by industry. It removes FSIS inspectors from slaughterhouse processing lines and relies on them primarily to review industry records.¹³¹ Moreover, the HACCP system cannot detect bovine spongiform encephalopathy (BSE) – commonly known as mad cow disease – which is always deadly when contracted by humans (and cows if they live that long).¹³² In response to concerns expressed by Consumers Union and other consumer groups, USDA agreed to engage in some testing for BSE.¹³³ However, the agency refused to engage in comprehensive testing such as is done in other countries.¹³⁴

Enforcement of animal welfare requirements has been even less substantial. While the agency has issued numerous regulations related to its food safety duties, the regulations enforcing the HMSA are minimal and fill only six pages in the Code of Federal Regulations.¹³⁵ Acceptable methods of slaughter under the regulations include carbon dioxide, captive bolt, gunshot, and electric current.¹³⁶ Calls for USDA to more fully enforce the law to protect animals have similarly been rejected. This is not surprising, perhaps since the agency opposed the law from the beginning and has often been more concerned with keeping the animal agriculture industry happy than with vigorously enforcing federal laws. These issues have led other commentators to conclude that experience has shown:

the difficulty of asking inspectors to serve two masters (food safety and animal welfare). Improving enforcement of the HMSA will . . . be difficult so long as enforcement responsibility remains with the FSIS. A further problem with asking the FSIS to enforce the HMSA is that the FSIS tries to work cooperatively with industry. FSIS inspectors may be reluctant to compromise their relationships with slaughterhouse management . . . in

130. See generally Karen L. Hulebak & Wayne Schlosser, *Hazard Analysis and Critical Control Point (HACCP) History and Conceptual Overview*, 22 RISK ANALYSIS 547 (2002); FOOD SAFETY INSPECTION SERV., U.S. DEP’T OF AGRIC., HACCP-BASED INSPECTION MODELS PROJECT, <http://www.fsis.usda.gov/wps/portal/fsis/topics/regulatory-compliance/haccp/haccp-based-inspection-models-project/history-HIMP> (last visited May 14, 2014).

131. See Hinderliter, *supra* note 40, at 746; Lassiter, *supra* note 125, at 445-46.

132. See Hinderliter, *supra* note 40, at 750.

133. *Id.* at 752.

134. *Id.* at 793.

135. Welty, *supra* note 34, at 188.

136. 9 C.F.R. § 313 (1988).

order to promote humane slaughter, an issue that is peripheral to their core purpose.¹³⁷

Moreover, placing responsibility for HMSA enforcement with FSIS inspectors is simply out of touch with how slaughterhouses operate. For example:

[t]he way the plants are physically laid out, meat inspection is way down the line. A lot of times, inspectors can't even see the slaughter area from their stations. It's virtually impossible for them to monitor the slaughter area when they're trying to detect diseases and abnormalities in carcasses that are whizzing by. Furthermore, meat inspection is increasingly technical. Inspectors are scientists, trained to conduct chemical and bacteriological tests prior to approving meat. Conducting humane-slaughter inspections is a very different type of work, for which meat inspectors receive little training.¹³⁸

Animal advocacy organizations have petitioned USDA on numerous occasions to adequately enforce the law. As noted in an Animal Welfare Institute petition last year, the regulations implementing HMSA have only been modified twice in the last two decades, and neither amendment was intended to result in more humane treatment of animals.¹³⁹ "In 1994, USDA amended the regulations to permit use of carbon dioxide to kill – and not merely stun – pigs."¹⁴⁰ Then, ten years later, "USDA added an amendment to prohibit use of penetrating captive bolt devices that inject air into the cranial cavity of cattle due to the findings of a risk assessment on [BSE]."¹⁴¹

USDA has been similarly reticent to prohibit disabled animals from entering the food supply despite ongoing pressure from animal advocacy and consumer organizations. Following revelations that a cow with BSE had entered the US food supply in 2003, the agency engaged in initial efforts to prohibit disabled cows from being slaughtered for human

137. Welty, *supra* note 34, at 197.

138. *Id.* at 195 (quoting USDA Meat Inspector Dave Carney).

139. DENA JONES, ANIMAL WELFARE INST., PETITION FOR RULEMAKING TO THE UNITED STATES DEPARTMENT OF AGRICULTURE 8 (2013) (on file with author).

140. *Id.*

141. *Id.*

consumption.¹⁴² However, after issuing a rule, “USDA issued Notice 5-04, which instructed inspectors to allow downed cattle to be slaughtered for human consumption if they initially appeared otherwise healthy but then collapsed in the slaughter plant itself due to an acute injury.”¹⁴³ USDA itself has recognized that “underlying diseases are often undetectable and may make an animal disoriented, weak, or uncoordinated, thereby predisposing the animal to injury.”¹⁴⁴ It was not until 2009, after the Hallmark/Westland video, that USDA finally entirely prohibited the slaughter of adult nonambulatory cows for human consumption.¹⁴⁵ The agency, nevertheless, maintained exceptions for calves and for all other animals.¹⁴⁶

In 2013, in response to an HSUS petition, the agency stated its intention to issue a proposed rule that would extend the ban to calves being raised for veal.¹⁴⁷ That decision was precipitated by the release of an undercover video from Vermont showing abuse of disabled calves over a six-week period in front of USDA inspectors.¹⁴⁸ The video included film of “employees skinning and decapitating conscious veal calves, [who were] about 1-week old.”¹⁴⁹ The agency has not indicated, however, when it will issue the proposed rule stating, “[b]ecause our resources for regulatory development are limited, . . . the Agency is unable at this time to project when it will initiate rulemaking.”¹⁵⁰ Unfortunately, also last year, the agency again rejected calls to prohibit other disabled animals from entering the food supply. In response to a petition from Farm Sanctuary, the agency

142. See generally Prohibition of the Use of Specified Risk Materials for Human Food, 69 Fed. Reg. 1862 (Jan. 12, 2004) (interim final rule and request for comments); *HSUS Petition*, *supra* note 1, at 13-14.

143. *HSUS Petition*, *supra* note 1, at 14.

144. *Id.*; see also 9 C.F.R. § 309.3(e) (revised 2004); Prohibition of the Use of Specified Risk Materials for Human Food, 69 Fed. Reg. 1870 (Jan. 12, 2004) (interim final rule and request for comments).

145. See generally Requirements for the Disposition of Cattle that Become Non-Ambulatory Disabled Following Ante-Mortem Inspection, 74 Fed. Reg. 11,463 (Mar. 18, 2009) (final rule).

146. 9 C.F.R. § 309.13(b) (2007).

147. Letter from Alfred Almanza, Administrator, Food Safety Inspection Serv., to Gina Tomaselli & Peter Brandt, Humane Soc’y of the U.S. (Mar. 13, 2013) (on file with author) [hereinafter *FSIS Response to HSUS*]; Press Release, The Humane Soc’y of the U.S., USDA Moves to Ban Slaughter of Downer Veal Calves Too Sick or Injured to Walk (Mar. 19, 2013), available at http://www.humanesociety.org/news/press_releases/2013/03/usda-downer-veal-calves-slaughter-ban-031913.html.

148. *HSUS Petition*, *supra* note 1, at 31-37.

149. LISA SHAMES, GOV’T ACCOUNTABILITY OFFICE, GAO-10-203, HUMANE METHODS OF SLAUGHTER ACT: WEAKNESSES IN USDA ENFORCEMENT 1 (2010).

150. *FSIS Response to HSUS*, *supra* note 147.

stated, “FSIS has concluded that its existing regulations are effective in ensuring that pigs, sheep, goats, and other livestock are handled humanely at slaughter and that diseased livestock do not enter the human food supply.”¹⁵¹ However, as explained in detail below, nothing could be further from the truth.

B. Continuing FSIS Failure to Protect Animals or Public Health

As noted above, the US Solicitor General and industry representatives argued in *Harris* that state laws were unnecessary because federal law and regulations already fully protect public health and animal welfare. However, the reality shows that this confidence is misplaced. Abuse of animals in slaughterhouses and foodborne illness continue to be enormous problems in the US, and USDA shows no signs of acting to remedy these issues.

Numerous audits and investigations have revealed that USDA fails to enforce its own regulations and puts industry interests ahead of those of the public time and again. “According to USDA records, the Agency has permitted downed animals with serious conditions and illnesses, such as gangrene and hepatitis, to enter the food supply.”¹⁵² Last year, a USDA Office of the Inspector General (OIG) audit investigating pig slaughterhouses found that FSIS’ “enforcement policies do not deter swine slaughter plants from becoming repeat violators of the [FMIA]. As a result, plants have repeatedly violated the same regulations with little or no consequence.”¹⁵³ The audit also found that some inspectors did not perform adequate post-mortem and sanitation inspections,¹⁵⁴ and that FSIS failed to ensure humane handling of animals.¹⁵⁵

During their limited inspection, the auditors witnessed a number of egregious violations. For example, they saw numerous pigs who were still conscious after being stunned – either by bolts or by carbon dioxide – and employees failing to take steps to immediately re-stun the pigs.¹⁵⁶ One pig “was able to right its head, make noise, kick, and splash water in reaction to

151. Letter from Alfred Almanza, Administrator, Food Safety Inspection Serv., to Kathy Hessler, Animal Law Clinic, Lewis & Clark Law School (Mar. 13, 2013) (on file with author).

152. Repphun, *supra* note 39, at 184

153. OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF AGRIC., FOOD SAFETY AND INSPECTION SERVICE – INSPECTION AND ENFORCEMENT ACTIVITIES AT SWINE SLAUGHTER PLANTS, AUDIT REPORT 24601-0001-41 4 (2013) [hereinafter AUDIT REPORT 24601-0001-41].

154. *Id.* at 12.

155. *Id.* at 22.

156. *Id.* at 23-24.

being placed in a scalding tank.”¹⁵⁷ The auditors also witnessed abuse of a disabled pig.¹⁵⁸ In addition to HMSA violations, the auditors witnessed numerous food safety violations including fecal matter and abscesses on pigs that had been cleared for human consumption, and the presence of cockroaches and other “pests.”¹⁵⁹

FSIS inspectors failed to take appropriate action following these incidents despite the fact that many facilities were repeat offenders. The auditors theorized that actual violations were likely more extensive since those they witnessed occurred with the knowledge that they were present.¹⁶⁰ “Only 0.0006 [percent] of the NRs [noncompliance records issued by FSIS inspectors] resulted in a suspension” including those that were for egregious violations and in no instances did FSIS withdraw inspection, which has the effect of shutting down the facility.¹⁶¹ These findings are consistent with numerous OIG and Government Accountability Office (GAO) investigations over the years that have found that USDA fails to adequately enforce the laws and regulations governing both food safety and treatment of animals.¹⁶²

Moreover, efforts by inspectors to actually do their jobs have been impeded by USDA. In 2010, Dr. Dean Wyatt, an FSIS veterinarian testified before Congress regarding his efforts:

to shut down Seaboard Farms, a hog slaughtering and processing plant in Oklahoma, for numerous egregious violations, including pigs “shackled on the slaughter line” while “awake and kicking rapidly” and “being stuck with a knife.” Another had its throat slit. Partitions were erected

157. *Id.* at 24.

158. *Id.* at 25.

159. *Id.* at 6-8.

160. *Id.* at 12.

161. *Id.* at 5.

162. *See, e.g.* GOV'T ACCOUNTABILITY OFFICE, GAO-04-247, HUMANE METHODS OF SLAUGHTER ACT: USDA HAS ADDRESSED SOME PROBLEMS BUT STILL FACES ENFORCEMENT CHALLENGES, (2004); OFFICE OF INSPECTOR GEN., U.S. DEP'T OF AGRIC., AUDIT 24601-0003-CH, FOOD SAFETY AND INSPECTION SERVICE USE OF FOOD SAFETY INFORMATION SYSTEMS (2004); OFFICE OF INSPECTOR GEN., U.S. DEP'T OF AGRIC., AUDIT 24601-07-HY, ISSUES IMPACTING THE DEVELOPMENT OF RISK-BASED INSPECTION AT MEAT AND POULTRY PROCESSING ESTABLISHMENTS (2007); OFFICE OF INSPECTOR GEN., U.S. DEP'T OF AGRIC., AUDIT 50601-0001-23, USDA CONTROLS OVER SHELL EGG INSPECTIONS (2012); OFFICE OF INSPECTOR GEN., U.S. DEP'T OF AGRIC., GREAT PLAINS REGION, AUDIT REPORT: EVALUATION OF FSIS MANAGEMENT CONTROLS OVER PRE-SLAUGHTER ACTIVITIES, REPORT NO. 24601-0007KC (2008); SHAMES, *supra* note 50; SHAMES, *supra* note 149.

so that inspectors couldn't view off-loading of livestock from trucks after Wyatt and other inspectors had observed pigs "being crushed" and trampled.

Time and again, Wyatt's supervisors sided with Seaboard, even telling him to "drastically cut back" on time spent on humane handling enforcement, and that "there was no way he could have seen" what he reported.¹⁶³

After Wyatt was transferred to another plant, he continued to face similar issues. For example:

[a]t Bushway Packing, Wyatt witnessed calves one to seven days old arriving by truck after being shipped for ten hours or more, unable to walk due to injury or weakness. He saw them dragged down unloading ramps by a hind leg, dragged through holding pens, even thrown like a football. Wyatt suspended operations three times, but each time the district office allowed the plant to reopen. After the owner complained that Wyatt "was harassing him," Wyatt was ordered to attend training for *new* public health veterinarians, which took him out of the plant for three weeks.¹⁶⁴

Other whistleblowers have told comparable stories.¹⁶⁵

USDA's inability to keep the food supply safe is apparent in the high rates of foodborne illness, most of which are the result of animal-based foods.¹⁶⁶ According to the Centers for Disease Control and Prevention (CDC), every year nearly fifty million people become sick from foodborne

163. Kaufmann, *supra* note 39.

164. *Id.*

165. See Mike McGraw, *Animal Abuse Persists at Some Slaughter Plants*, KANSAS CITY STAR, June 28, 2013, <http://www.kansascity.com/2013/06/28/4320072/animal-abuse-persists-at-some.html>.

166. See GAO-13-775, *supra* note 126, at 1; John A. Painter et al., *Attribution of Foodborne Illnesses, Hospitalizations, and Deaths to Food Commodities by Using Outbreak Data, United States, 1998-2008*, 19 EMERGING INFECTIOUS DISEASES 407 (2013); Roots, *supra* note 59, at 2422; Gretchen Goetz, *11 Years of Data Show Poultry, Fish, Beef Have Remained Leading Sources of Food-Related Outbreaks*, FOOD SAFETY NEWS, June 28, 2013, <http://www.foodsafetynews.com/2013/06/20-years-of-foodborne-illness-data-show-poultry-fish-beef-continue-to-be-leading-sources-of-outbreaks/>.

illness; 128,000 of those are hospitalized and 3000 die.¹⁶⁷ The nationwide costs associated with foodborne illness are estimated to be between \$51 and nearly \$80 billion annually.¹⁶⁸ Headlines related to foodborne illness seem to appear nearly every day.¹⁶⁹

Evidently, USDA's methods of preventing foodborne illness are failing; the agency's attempts to address outbreaks once they occur have been similarly unsuccessful. There are numerous issues related to addressing foodborne illness outbreaks, one being that USDA relies largely on voluntary recalls once a foodborne illness associated with meat or eggs is discovered. Past experience has shown that such recalls are largely unsuccessful and that the majority of tainted food is never removed from the marketplace.¹⁷⁰

While USDA has continually promised to change and be more vigilant about enforcing the law, in fact, rather than strengthening the regulatory regime and oversight of slaughterhouses in the face of the numerous failures documented by GAO and OIG, USDA has taken steps to provide less oversight by establishing regimes that allow for self-regulation by industry through the HACCP program detailed above. Not surprisingly, the recent OIG audit found that this program has not been adequately monitored and has failed to result in safer food or better treatment of animals. According to the auditors, HACCP plants "have fewer FSIS inspectors, and processing lines are allowed to operate at higher speeds than in traditional plants because plant employees – rather than FSIS inspectors – sort out diseased carcasses and parts before they reach FSIS inspectors for final determination of wholesomeness."¹⁷¹ Despite the fact that only thirty of 6300 pig slaughter facilities nationwide are HACCP facilities,¹⁷² the OIG auditors found that:

3 of the 10 plants cited with the most NRs from FYs 2008 to 2011 were [HACCP] plants. In fact, the swine plant with the most NRs during this timeframe was a [HACCP]

167. CTRS. FOR DISEASE CONTROL & PREVENTION, CDC 2011 ESTIMATES: FINDINGS, <http://www.cdc.gov/foodborneburden/2011-foodborne-estimates.html> (last visited May 15, 2014).

168. Robert L. Scharff, *Economic Burden from Health Losses Due to Foodborne Illness in the United States*, 75 J. FOOD PROTECTION 123, 130 (2012).

169. See *Foodborne Illness Outbreaks*, FOOD SAFETY NEWS, Mar. 28, 2014, <http://www.foodsafetynews.com/sections/foodborne-illness-outbreaks/>.

170. *Meat Recalls*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/meat/safe/recalls.html>; SOCIALLY RESPONSIBLE AGRIC. PROJECT, FOOD RECALL DATA, <http://www.sraproject.org/2009/04/fsis-2/> (last visited May 15, 2014).

171. AUDIT REPORT 24601-0001-41, *supra* note 153, at 17.

172. *Id.* at 1.

plant—with nearly 50 percent more NRs than the plant with the next highest number. This occurred because of FSIS' lack of oversight.¹⁷³

FSIS agreed with this assessment stating that it would “complete an evaluation of [HACCP] market hog establishments. . . . Such an evaluation may support rule-making to amend regulations to make an inspection system informed by the market hog [HACCP] pilot permanent. FSIS will complete this evaluation and determine if a permanent program is warranted.”¹⁷⁴ However, as noted above, this audit was only one of many going back at least a decade and finding similar noncompliance. Thus far, the agency has failed to make the promised changes.

More recently, USDA has come under fire by consumer groups for its plans to expand the system and greatly reduce the number of FSIS inspectors in chicken and turkey facilities.¹⁷⁵ According to the *Washington Post*, “[n]early 1 million chickens and turkeys are unintentionally boiled alive each year in U.S. slaughterhouses, often because fast-moving lines fail to kill the birds before they are dropped into scalding water.”¹⁷⁶ The new proposal, allowing “poultry companies to accelerate their processing lines, . . . would also make the problem of inhumane treatment worse, according to government inspectors and experts in poultry slaughter.”¹⁷⁷ In September of 2013, GAO released a report criticizing the agency for not providing accurate information to the public regarding the success of the pilot program.¹⁷⁸ While the release of the report resulted in significant criticism of the agency and the program,¹⁷⁹ USDA has indicated that it, nevertheless, plans to move forward.¹⁸⁰

173. *Id.* at 17.

174. *Id.* at 19.

175. See Kimberly Kindy, *USDA Plan to Speed up Poultry-Processing Lines Could Increase Risk of Bird Abuse*, WASH. POST, Oct. 29, 2013, <http://www.washingtonpost.com/politics/usda-plan-to-speed-up-poultry-processing-lines-could-increase-risk-of-bird-abuse>; Tom Philpott, *USDA Ruffles Feathers With New Poultry Inspection Policy*, MOTHER JONES, Apr. 24, 2013, <http://www.motherjones.com/tom-philpott/2013/04/usda-inspectors-poultry-kill-lines-chicken>; Press Release, Food & Water Watch, *Privatized Meat Inspection Experiment Jeopardizes Food Safety* (Mar. 7, 2012), available at <http://www.foodandwaterwatch.org/pressreleases/privatized-meat-inspection-experiment-jeopardizes-food-safety>.

176. Kindy, *supra* note 175.

177. *Id.*

178. GAO-13-775, *supra* note 126.

179. *GAO Report Questions USDA Plans to Change Poultry Inspection Program*, FOOD SAFETY NEWS, Sept. 4, 2013, <http://www.foodsafetynews.com/2013/09/gao-report-questions-validity-of-usda-poultry-inspection-program>; Kindy, *supra* note 175;

There is little evidence that anything is likely to change in the near future. According to a report from the Johns Hopkins Center for a Livable Future, food safety “regulatory agencies in the [Obama] administration have acted regressively in their decision-making and policy-setting procedures.”¹⁸¹ The report goes on to state that, “[w]hile a few federal initiatives that held promise were initially promoted, pushback from the agricultural industry has resulted in the dropping or significant weakening of these approaches. Consequently, it is not expected that measurable changes in rates of foodborne illness resulting from contaminated animal products will be observed.”¹⁸²

For decades, numerous commentators, including the author of this article,¹⁸³ have pointed to USDA’s inability to adequately carry out its conflicting duties to protect public health and to advance agricultural product consumption and have explored alternative options to ensure a safer food supply.¹⁸⁴ The Supreme Court decision in *Harris* exacerbates these issues and places states in an untenable situation, unable to act to protect their residents. Congress could remedy this situation by clarifying the reach of the federal law and the specific limits of its preemptive effect. However, as detailed in the next section, not only has Congress failed to strengthen the state role, it is considering steps that could move in the opposite direction, further threatening the food supply, and undermining state initiatives to require better treatment of animals.

Robert Roos, *GAO: USDA Took Shortcuts in Poultry Inspection Plan*, CTR. FOR INFECTIOUS DISEASE RES. & POL’Y, Sept. 4, 2013, <http://www.cidrap.umn.edu/news-perspective/2013/09/gao-usda-took-shortcuts-poultry-inspection-plan>; Joe Whitworth, *Senators Legislation Push Follows GAO Criticism of USDA Poultry Inspection Plans*, FOOD QUALITY NEWS, Sept. 13, 2013, <http://www.foodqualitynews.com/Legislation/Senators-legislation-push-follows-GAO-criticism-USDA-poultry-inspection-plans>.

180. Jerry Hagstrom, *USDA Will Not Withdraw Poultry Rule*, AGWEEK, Sept. 9, 2013; <http://www.agweek.com/event/article/id/21620/>.

181. JOHNS HOPKINS, *supra* note 32, at 46.

182. *Id.* at 16.

183. Marya Torrez, *Meatless Monday: Simple Public Health Suggestion or Extremist Plot?*, 28 J. ENVTL. L. & LITIG. (forthcoming 2014).

184. See generally, e.g., Daluiso, *supra* note 127; Lassiter, *supra* note 125; Tania Rice, *Letting the Apes Run the Zoo: Using Tort Law to Provide Animals with a Legal Voice*, 40 PEPP. L. REV. 1103 (2013); Sullivan, *supra* note 118; Diana Winters, *Not Sick Yet: Food-Safety-Impact Litigation and Barriers to Justiciability*, 77 BROOK. L. REV. 905 (2012).

V. CONGRESS' ROLE IN REMEDYING OR EXACERBATING THE PROBLEMS

Preemption law is entirely a matter of congressional intent.¹⁸⁵ Therefore, Congress has the authority to reverse the Court's decision in *Harris* and restore the state role in regulating animal welfare and food safety. Given USDA's inability or unwillingness to enforce existing food safety and animal welfare provisions and the Supreme Court's willingness to cede authority to that agency at the purported behest of Congress, Congress needs to clarify the preemption provision in the FMIA and act to protect the food supply and farmed animals. "[B]ecause preemption does such violence to states' interests, the respect for those interests inherent in our concept of federalism demands that Congress knowingly take such action."¹⁸⁶

Unfortunately, Congress' attempts to strengthen the state role or existing federal laws have largely failed.¹⁸⁷ There have seemingly been no efforts to overturn the Court's decision in *Harris*, and the unanimity of the Court's decision leaves little opening for changes in the near future. The commercial agriculture industry spends millions of dollars to ensure that this is the case. According to the Center for Responsive Politics, agribusiness, including animal agriculture, spent more than \$600 million since 1990 to ensure that their interests are represented in Congress and federal agencies, including almost \$80 million in the 2012 election cycle and more than \$15 million already for the 2014 cycle.¹⁸⁸

One of Congress' few attempts to strengthen the HMSA occurred in 2001 in response to a *Washington Post* story "chronic[ing] horrifying violations of the HMSA in Washington State and elsewhere, including cattle being butchered while still fully conscious. It reported that the USDA rarely took significant enforcement action, even at slaughterhouses where repeated violations of the HMSA had occurred."¹⁸⁹ What resulted was "sense of Congress" language in the Farm Security and Rural Investment Act of 2002 stating that the USDA should enforce the existing law.¹⁹⁰ Obviously, that is something USDA was already required to do. A

185. See generally *Cipollone v. Liggett Group*, 505 U.S. 504 (1992); *Medtronic v. Lohr*, 518 U.S. 470 (1996); *Retail Clerks v. Schermerhorn*, 375 U.S. 96 (1963).

186. Funk, *supra* note 86, at 1256.

187. Repphun, *supra* note 39 at 198.

188. CTR. FOR RESPONSIVE POLITICS, AGRIBUSINESS: LONG-TERM CONTRIBUTION TRENDS, <http://www.opensecrets.org/industries/totals.php?cycle=2012&ind=A> (last visited May 15, 2014)

189. Welty, *supra* note 34, at 187.

190. *Id.*

number of attempts to specifically address the issue of disabled animals beginning as early as 1992 have similarly failed.¹⁹¹

Unfortunately, in recent years members of Congress have made efforts to move in the reverse direction, further undermining the ability of states to protect their residents. According to Johns Hopkins, “the House of Representatives has stepped up the intensity of its attacks on avenues for reform and stricter enforcement of existing regulations, paving the way for industry avoidance of scrutiny and even deregulation, masked as protection of the inappropriately termed ‘family farmer.’”¹⁹²

As this is being written, the latest version of the Federal Agriculture and Risk Management (FARM) Bill of 2014 was being finalized.¹⁹³ The FARM Bill is a massive piece of legislation that deals with numerous aspects of the US food supply, including crop subsidies for farmers, incentives for organic and local food production, benefits for low income families, and much more.¹⁹⁴ The House passed an amendment to the bill, introduced by Steve King of Iowa, that would have prohibited states from enforcing laws that require “agricultural products” to comply with requirements that are different than those imposed by federal law or the law of the state the product comes from.¹⁹⁵ King is known as an avid opponent of animal welfare protections and has, for instance, recently opposed efforts to prohibit adults from taking children to dogfights, as well as a provision requiring protection for companion animals in disasters.¹⁹⁶

King’s amendment would extend the reach of *Harris* and further undermine state laws that aim to improve animal welfare. As explained by Bruce Friedrich of Farm Sanctuary, “King’s amendment will create a race to the regulatory bottom on issues from consumer protection to fire safety to animal welfare by dictating that no state can require any condition on the

191. See, e.g., Downed Animal Protection Act of 1992, H.R. 5680, 102d Cong. (1992); Downed Animal Protection Act, H.R. 453, 105th Cong. (1997); Downed Animal Protection Act, H.R. 2519, 108th Cong. (2003); Downed Animal and Food Safety Protection Act, H.R. 661, 110th Cong. (2007); Downed Animal and Food Safety Protection Act, H.R. 3704, 112th Cong. (2011).

192. JOHNS HOPKINS, *supra* note 32, at 46

193. Agriculture Reform, Food, and Jobs Act of 2013, S. 954, 113th Cong. (2013).

194. RALPH M. CHITE, CONG. RESEARCH SERV., R43076, THE 2013 FARM BILL: A COMPARISON OF THE SENATE-PASSED (S. 954) AND HOUSE-PASSED (H.R. 2642, H.R. 3102) BILLS WITH CURRENT LAW (2013), available at <http://www.fas.org/sgp/crs/misc/R43076.pdf>.

195. Federal Agriculture Reform and Risk Management Act of 2013, H.R. 2642, 113th Cong. § 11312 (2013).

196. See Nicole Greenstein, *King Farm Bill Amendment Angers Animal Advocates*, TIME, Aug. 17, 2013, <http://swampland.time.com/2013/08/17/kin-farm-bill-amendment-angers-animal-advocates/>.

sale of any agricultural product that falls even one step above that of the least restrictive state.”¹⁹⁷ The National Conference of State Legislatures expressed similar concerns,¹⁹⁸ as did certain members of Congress, stating in a letter to House Agriculture Committee ranking member Collin Peterson – who indicated his support for the amendment¹⁹⁹ – that it “has the potential to repeal a vast array of state laws and regulations covering everything from food safety to environmental protection to child labor to animal welfare.”²⁰⁰

Fortunately, in January of 2014, this amendment was removed in conference between the House and Senate and thus was not included in the version of the bill ultimately enacted.²⁰¹ However, if such a provision was enacted into law, it could extend the holding in *Harris* to innumerable other state laws including those mentioned above that restrict the use of gestation crates for pigs, battery cages for hens, and confinement pens for calves. At the same time, another bill has been introduced in Congress that could similarly undermine the efforts of California and other states to provide better protections for hens. Amendments to the Egg Products Inspection Act “would prevent states and localities from adopting requirements that

197. Bruce Friedrich, *Farm Bill Could Overturn Dozens of State Laws. Why Does Tea Party Darling Steve King Want to Centralize Power in Washington?*, HUFFINGTON POST GREEN BLOG (Sept. 26, 2013, 8:32 AM), http://www.huffingtonpost.com/bruce-friedrich/steve-king-the-tea-party-_b_3969209.html?utm_hp_ref=green; see also Kathleen Parker, *Steve King's Inhumane Farm Bill Measure*, WASH. POST, Aug. 20, 2013, <http://www.washingtonpost.com/opinions/kathleen-parker-steve-kings-inhumane-farm-bill-measure>; Laura Sesana, *The King Amendment to the Farm Bill Threatens State's Rights*, WASH. TIMES, Sept. 28, 2013, <http://communities.washingtontimes.com/neighborhood/world-our-backyard/2013/sep/28/king-amendment-farm-bill-threatens-states-rights/>; Leighton Woodhouse, *Steve King's Farm Bill Amendment Hurts Animals - and California Farmers*, THE HILL'S CONGRESS BLOG (Sept. 5, 2013, 1:00 PM), <http://thehill.com/blogs/congress-blog/economy-a-budget/320449-steve-kings-farm-bill-amendment-hurts-animals-and-california-farmers>.

198. Letter from Terie Norelli & Bruce Starr, Nat'l Conference of State Legislatures, to Debbie Stabenow, Chair, Senate Agric., Nutrition & Forestry Comm., Frank Lucas, Chair, House Agric. Comm., Thad Cochran, Ranking Member, Senate Agric., Nutrition & Forestry Comm., & Collin Peterson, Ranking Member, House Agric. Comm. (Aug. 5, 2013) (on file with author).

199. “*Tired of States Doing this Crap*”: *Collin Peterson Backs Steve King's Scary Farm Bill Amendment*, BLUESTEM PRAIRIE, Aug. 26, 2013, <http://www.bluestempairie.com/bluestempairie/2013/08/tired-of-states-doing-this-crap-collin-peterson-backs-steve-kings-scary-farm-bill-amendment.html>.

200. Letter from Members of Congress, to Collin Peterson, Ranking Member, House Comm. on Agric. (Aug. 2, 2013) (on file with author).

201. See Michael Doyle, *Farm Bill Deal Keeps California Rules Intact*, SACRAMENTO BEE (Jan. 27, 2014, 5:55 PM), <http://blogs.sacbee.com/capitolalert/latest/2014/01/farm-bill-deal-keeps-california-rules-intact.html>.

exceed those outlined in the legislation regarding minimum floor space and enrichments for egg-laying hens.”²⁰²

Therefore, while Congress could reverse the damage done by the Supreme Court in *Harris* and restore the state role in regulating public health and animal welfare, it instead seems to be moving in the reverse direction, further undermining the important state function in these areas. For the time being, states are left impotent to protect their residents or to legislate their own vision of justice or moral progress when it comes to other animals.

VI. CONCLUSION

The incidents detailed in the introduction are just a few of the innumerable instances of animal cruelty that are caught on tape every year, often in front of USDA inspectors. And clearly, undercover investigations only reveal a small portion. Moreover, at the same time that states are being impeded in their ability to pass laws protecting animals, a number of states are passing laws that make it illegal to gather the types of videos that often serve as the only means of knowing what is occurring in our nation’s slaughterhouses and factory farms.²⁰³

Our evolving conception of justice should be allowed to continue with states operating at very different places on a moral continuum until the time that the nation as a whole is prepared to adopt different conceptions of morality. That does not mean that Congress cannot adopt a federal floor under which states should not be permitted to fall below, but it should not create a federal ceiling effectively halting state innovation and requiring states to act contrary to their moral convictions. For the time being, states like California are in an untenable situation. While either the Supreme Court or Congress could remedy this situation, neither appears likely to do so. USDA continues to fail to protect the food supply and the animals that are a part of it, and states are prohibited from acting.

Legal scholar Maneesha Deckha has detailed how, throughout Western history, animal protection measures have been utilized to condemn the activities of marginalized populations while the comparable activities of

202. JOHNS HOPKINS, *supra* note 32, at 26.

203. See Sara Lacy, *Hard to Watch: How Ag-Gag Laws Demonstrate the Need for Federal Meat and Poultry Industry Whistleblower Protections*, 65 ADMIN. L. REV. 127, 128-29 (2013); AM. SOC’Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, <http://www.asPCA.org/fight-cruelty/advocacy-center/ag-gag-whistleblower-suppression-legislation> (last visited May 15, 2014).

mainstream groups have gone uncriticized.²⁰⁴ While numerous ways we treat other animals are now nearly universally condemned, the daily torture of the billions of animals that are killed each year for food goes largely unassessed. This dynamic was likely at play in the Supreme Court's decision in *Harris*. While other courts had little difficulty upholding laws banning the slaughter of horses, the Supreme Court justices were unwilling to extend that rationale to the slaughter of animals whose consumption is readily accepted as normal and appropriate by most Americans. Attorney Matthew Liebman has discussed how this reality makes creative advocacy for animals in the courts difficult.²⁰⁵

Our history regarding animals indicates evolving conceptions of justice that are radically different state by state. While many people may find laws aimed at protecting farmed animals absurd – just as most Americans found laws banning dogfighting absurd a century ago – that does not mean that those Americans who want to pass such laws should be prevented from doing so. Rather, this is precisely why these issues need to be left to the purview of the states, allowing states to serve as laboratories for the evolving moral compass of the country. As the Supreme Court stated recently in *United States v. Windsor*, striking down the federal Defense of Marriage Act, “[t]he dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other.”²⁰⁶ The same is true for our treatment of other animals.

204. Deckha, *supra* note 15, at 515; see also Maneesha Deckha, *Toward a Postcolonial, Posthumanist Feminist Theory: Centralizing Race and Culture in Feminist Work on Nonhuman Animals*, 27 HYPATIA 527, 538 (2012). For example, Americans readily condemn dogfighting, cockfighting, and shark finning, which are associated with African-Americans, Latin Americans, and Asians respectively.

205. See generally Matthew Liebman, *Who the Judge Ate for Breakfast: On the Limits of Creativity in Animal Law and the Redeeming Power of Powerlessness*, 18 ANIM. L. 133 (2011).

206. *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013).