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# Dismembering the Meat Industry Piece by Piece: The Value of Federalism to Farm Animals

Colin Kreuziger\*

In fact if one person is unkind to an animal it is considered to be cruelty, but where a lot of people are unkind to a lot of animals, especially in the name of commerce, the cruelty is condoned and, once large sums of money are at stake, will be defended to the last by otherwise intelligent people.<sup>1</sup>

## Introduction

The agribusiness industry raises and slaughters a staggering number of farm animals<sup>2</sup> each year in the United States for use as food.<sup>3</sup> The quality of life of farm animals has steadily deteriorated since the advent of the factory farm.<sup>4</sup> Farm animals frequently live in horrendous conditions,<sup>5</sup> endure severely inhumane treatment,<sup>6</sup> and suffer grotesque deaths.<sup>7</sup> Despite increasing evidence of severe animal abuse by the agribusiness industry, there is little to no protection of farm animals at the state or federal level.<sup>8</sup> Although the current legal regime offers little protection to any type of animal, farm animals occupy a particularly disfavored position in the legal hierarchy.<sup>9</sup>

Most critics argue that legislative action at the federal level is necessary to remedy the systemic abuses in the farmed-animal

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1. RUTH HARRISON, *ANIMAL MACHINES* 144-45 (1964).

2. For purposes of this article, the term "farm animals" refers to those animals raised for use as food.

3. See *infra* note 30 and accompanying text.

4. See *infra* notes 37-46 and accompanying text.

5. See *infra* notes 38-41 and accompanying text.

6. See *infra* notes 42-45 and accompanying text.

7. See *infra* note 46 and accompanying text.

8. See *infra* notes 49-65, 82-96 and accompanying text.

9. See *infra* Part II.

industry.<sup>10</sup> As a result, advocates for farm animals or other animals have frequently been associated with other political movements that tend to support a more active federal government.<sup>11</sup> This Article contends that more opportunities are available to farm animal advocates at the state and local levels.<sup>12</sup> Specific emphasis will be placed on the advantages of a piecemeal approach to such legislation and the benefits that could come to farm animal advocates from a more robust federalism.<sup>13</sup>

Part I catalogs the growing body of evidence indicating that the farmed-animal industry subjects farm animals to cruel treatment and farm animals suffer greatly as a result. In particular, farm animals suffer from the conditions of the farm animal environment, physical abuse, and inhumane slaughter methods.<sup>14</sup> Part II of this Article focuses on current federal, state, and local laws that purport to protect farm animals from human cruelty, and the deficiencies of these laws.<sup>15</sup> This section examines federal animal protection law,<sup>16</sup> as well as state anti-cruelty statutes.<sup>17</sup> In addition, Part II examines recent legislative attempts to protect farm animals at both the federal and state levels.<sup>18</sup> Part III presents an overview of the disparate approaches to securing better treatment for all animals with an emphasis on the distinction between the animal rights and animal welfare movements in the United States and the common ground between the two movements.<sup>19</sup> Part IV explores the potential of pursuing reform at both the federal and state levels.<sup>20</sup> This section features a comparative analysis of the practical, constitutional, and structural difficulties that advocates for social change face at the federal and state levels.<sup>21</sup>

Part V argues that farm animal advocates should focus their efforts on legislation at the state and local levels.<sup>22</sup> This section discusses the problems inherent in the current federal and state

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10. See *infra* note 128 and accompanying text.

11. See *infra* note 128 and accompanying text.

12. See *infra* Part V.

13. See *infra* Part V.B.

14. See *infra* notes 38-46 and accompanying text.

15. See *infra* Part II.

16. See *infra* Part II.A.1.

17. See *infra* Part II.B.1.

18. See *infra* Parts II.A.2, II.B.2.

19. See *infra* Part III.

20. See *infra* Part IV.

21. See *infra* Part IV.B.

22. See *infra* Part V.

legislative framework with respect to the problem of farm animal cruelty.<sup>23</sup> This section also argues that the animal rights and animal welfare movements need to coalesce around an incremental strategy in the legal arena.<sup>24</sup> Part VI assesses the potential pitfalls of pursuing legal reform at the state level.<sup>25</sup> Specifically, this section explores questions of federal preemption,<sup>26</sup> dormant Commerce Clause analysis,<sup>27</sup> and the reactionary use of state political mechanisms to stymie the growth of animal protection legislation.<sup>28</sup> Part VI will also consider the benefits of increased state autonomy to farm animal advocates.<sup>29</sup>

## I. The Development of the Factory Farm and Its Deleterious Effects on Farm Animals

The United States agribusiness industry slaughters billions of farm animals each year in order to produce vast quantities of food for United States residents.<sup>30</sup> Farmed animals make up the vast majority of all animals that humans interact with in the United States.<sup>31</sup> The popular image of agribusiness as one in which animals are raised on a pastoral farm is a fantastic illusion.<sup>32</sup> In the United States, large-scale, factory-style

23. See *infra* Part V.A.

24. See *infra* Part V.B.

25. See *infra* Part VI.

26. See *infra* Part VI.A.

27. See *infra* Part VI.B.

28. See *infra* Part VI.D.

29. See *infra* Part VI.C.

30. See Gary L. Francione, *Animals—Property or Persons?*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 109 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) [hereinafter ANIMAL RIGHTS] (stating “according to the U.S. Department of Agriculture, we kill more than 8 billion animals a year for food”); Note, *Challenging Concentration of Control in the American Meat Industry*, 117 HARV. L. REV. 2643, 2643 (2004) [hereinafter Note] (estimating that 9.5 billion animals are “raised and butchered each year”); see also R.R. Von Kaufman & Hank Fitzhugh, *The Importance of Livestock for the World's Poor*, in PERSPECTIVES IN WORLD FOOD AND AGRICULTURE 2004 149 (Colin G. Scanes & John A. Miranowski eds., 2004) (containing statistics that demonstrate that the U.S. produced 35 million metric tons of meat in 1997).

31. See David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House: Animals, Agribusiness and the Law: A Modern American Fable*, in ANIMAL RIGHTS, *supra* note 30, at 206 (demonstrating that farmed animals make up 98 percent of all animals “with whom humans interact in the United States”).

32. See DR. MICHAEL W. FOX, *AGRICIDE: THE HIDDEN CRISIS THAT AFFECTS US ALL* 1 (1986) (discussing the inaccurate perception of idyllic farms); Note, *supra* note 30, at 2643 (“[M]ost of the animals now raised for meat processors like Smithfield are confined in factory farms or feedlots that bear little resemblance to popular notions of ‘Heartland’ farms.”); C. DAVID COATS, *OLD MACDONALD’S FACTORY FARM: THE MYTH OF THE TRADITIONAL FARM AND THE SHOCKING TRUTH*

operations that raise high volumes of animals for slaughter have largely supplanted the traditional family farm.<sup>33</sup> As factory-style farms confine and raise more and more animals for the meat industry, the overall number of farms is dramatically reduced.<sup>34</sup> A decline of farming operations tends to occur in states that have less permissive regulatory environments with respect to factory farming.<sup>35</sup> Factory farms migrate to states with relatively permissive agribusiness regulations as corporate farmers recognize the cost savings available in such permissive jurisdictions.<sup>36</sup>

The result of the advent of the factory farm is a corresponding deterioration in the well-being of farm animals.<sup>37</sup> One of the specific consequences of this development is

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ABOUT ANIMAL SUFFERING IN TODAY'S AGRIBUSINESS 19 (1989) (explaining the stark difference between the farm animal life portrayed in children's books and the reality of factory farms).

33. See TERENCE J. CENTNER, *EMPTY PASTURES: CONFINED ANIMALS AND THE TRANSFORMATION OF THE RURAL LANDSCAPE* 31 (2004) ("The consolidation rampant within the production of animals has made it difficult to find a yeoman-family farmer."); JEFFREY MOUSSAIEFF MASSON, *THE PIG WHO SANG TO THE MOON: THE EMOTIONAL WORLD OF FARM ANIMALS* 236-37 (2003) (observing that four agribusiness firms "control 82 percent of beef, 75 percent of hogs and sheep, and half of chickens"); Christopher A. Novak, *Agriculture's New Environmental Battleground: The Preemption of County Livestock Regulations*, 5 *DRAKE J. AGRIC. L.* 429, 430 (2000) ("The modernization of the United States' agricultural industry has transformed once bucolic family farms into multi-national agricultural corporations."). But see Jim Chen & Edward S. Adams, *Feudalism Unmodified: Discourses on Farms and Firms*, 45 *DRAKE L. REV.* 361, 372 (1997) (arguing that "[a] trivial proportion—less than half of one percent—of all American farms are owned by nonfamily-owned corporations").

34. See CENTNER, *supra* note 33, at 19 ("Statistics show that the number of farms has dwindled by 50 percent since 1960."); Note, *supra* note 30, at 2645-51 (discussing horizontal and vertical integration in the meat industry and the corresponding decline in the number of farms raising animals). Centner also notes that certain individual states have seen a dramatic increase in the amount of farm animals while other states have seen substantial decline. CENTNER, *supra* note 33, at 22-23 (discussing the concentration of cattle in Kansas, Oklahoma, and Texas, hogs in North Carolina, and dairy cows in California, and the corresponding decline of production in other states).

35. See Steven C. Bahls, *Preservation of Family Farms—The Way Ahead*, 45 *DRAKE L. REV.* 311, 314 (1997) (arguing that corporate farming builds competitive strength in states with weaker anti-corporate farming legislation).

36. *Id.*

37. See Chris Mullin, *Why I Do Not Eat Meat*, in *THE MEAT BUSINESS: DEVOURING A HEALTHY PLANET* 61 (Geoff Tansey & Joyce D'Silva eds., 1999) ("The last 40 years have seen the principles of mass production introduced into the farmyard. In the name of the great god efficiency, production systems have been devised that inflict unspeakable suffering on calves, pigs, chickens and turkeys throughout their short and miserable lives."); COATS, *supra* note 32, at 20-22 (discussing the connection between factory farming and the corresponding increase in cruel treatment).

degradation of the physical environment in which farm animals live.<sup>38</sup> For example, most farm animals are confined in tiny spaces that severely restrict their freedom of movement.<sup>39</sup> In addition to cramped conditions, many farm animals are completely deprived of sunlight exposure.<sup>40</sup> The frequent results of such maltreatment

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38. See Holly Cheever, *Concentrated Animal Feeding Operations: The Bigger Picture*, 5 ALB. L. ENVTL. OUTLOOK 43, 45 (2000). Cheever states:

In the interests of increasing profit margins by cramming the maximal numbers of animals into the minimal amount of space, animals are denied the opportunity to go outside, to exist in their evolutionarily determined natural social groupings (note that all of the "food animal" species are intensely social beings), to eat a natural diet, and to follow their natural biorhythms and hormonal patterns for reproduction.

*Id.*

39. See *id.* at 45-46 (describing the physical environment that chickens and veal calves raised in intensive confinement endure). Pigs raised in intensive confinement usually are kept in cages so small that they cannot turn around. See CENTNER, *supra* note 33, at 32 (observing that a sow raised in a production barn has her movement "limited to several inches sideways or forward and back"); Steven J. Haverkamp, *Are Moderate Animal Welfare Laws and a Sustainable Agricultural Economy Mutually Exclusive? Laws, Moral Implications, and Recommendations*, 46 DRAKE L. REV. 645, 654 (1998) (observing that sows raised on factory farms "spend most of their lives in narrow metal crates barely larger than their bodies"). Chickens are also raised in extremely confined environments. See Nicole Fox, *The Inadequate Protection of Animals Against Cruel Animal Husbandry Practices Under United States Law*, 17 WHITTIER L. REV. 145, 152 (1995). Fox states that chickens used for egg production are

placed into cages which average 12-by-20 inches in size (with five chickens per cage). Researchers have found that the cage size necessary for five chickens to turn around with ease is at least sixteen by forty-one [sic] and a half inches. Therefore, it is impossible for the chickens to turn around with ease in the 12-by-20 inch cage.

*Id.* (citation omitted). Similarly, veal calves are raised in extremely confined physical environments. See Amy Mosel, *What About Wilbur? Proposing a Federal Statute to Provide Minimum Humane Living Conditions for Farm Animals Raised for Food Production*, 27 DAYTON L. REV. 133, 148 (2001) ("Hundreds of thousands of veal calves live chained in wooden crates so small they cannot walk, turn around or even move."). Dairy cattle are similarly confined in tiny spaces that severely limit their mobility. See COATS, *supra* note 32, at 53 ("[Many dairy cows] can only eat, lactate, and defecate. They can neither turn around, groom themselves, nor scratch an itch ...."). By contrast, beef cattle are usually not raised in intensive confinement for their entire lives. See *id.* at 71 (commenting that beef cattle often run freely on the range for six to eight months before being confined in feedlots); Barbara O'Brien, *Animal Welfare Reform and the Magic Bullet: The Use and Abuse of Subtherapeutic Doses of Antibiotics in Livestock*, 67 U. COLO. L. REV. 407, 421 (1996) (stating that beef cattle are usually allowed to graze for at least a year before they are transferred to feedlots). Conditions at the feedlot are similar to intensive confinement environments suffered by other animals. See COATS, *supra* note 32, at 72 (observing that "[a]nimals on feedlots are crowded together, denied exercise, and overfed so they gain weight fast").

40. See Mullin, *supra* note 37, at 61 (observing that most broiler chickens "never see daylight"); see also Thomas A. Decapo, *Challenging Objectionable Animal Treatment with the Shareholder Proxy Proposal Rule*, 1988 U. ILL. L. REV. 119, 124 (describing practice of confining chickens in total darkness to keep them from fighting one another); Mosel, *supra* note 39, at 146 (discussing practice of

are abnormal behaviors and illnesses not typically observed in farm animals.<sup>41</sup>

Although abnormal farm animal behaviors and illnesses might appear to represent a threat to the profitability of the agribusiness corporations that raise farm animals for use as food, the agribusiness industry compensates for these costs with a variety of practices that inflict suffering on farm animals in exchange for profit.<sup>42</sup> For example, it is cost efficient for chickens to be raised in environments that are conducive to illness and excessive pecking because chickens are injected with huge doses of antibiotics and debeaked to compensate.<sup>43</sup> These cruel practices surely would be considered torture if inflicted on a human or a companion animal.<sup>44</sup> In addition to the cruelty that farm animals suffer while living at the factory farm, they also suffer abuse while they are transported from the factory to the slaughterhouse.<sup>45</sup>

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raising chickens in total darkness to "keep them calm"). Pigs are also kept in total darkness for the vast majority of their short lives. See Betsy Tao, *A Stitch in Time: Addressing the Environmental, Health, and Animal Welfare Effects of China's Expanding Meat Industry*, 15 GEO. INT'L ENVTL. L. REV. 321, 343 (2003) (observing that in a typical total confinement setting pigs "do not see sunlight until the day they are taken to slaughter").

41. See Cheever, *supra* note 38, at 45 (arguing that intensive confinement results in "abnormal stereotypic and aggressive behaviors"). One striking example of such abnormal behavior is the tendency of intensively confined pigs to chew the tails and ears of other pigs. See COATS, *supra* note 32, at 33 (describing the biting of tails and ears by bored pigs as coping mechanisms). Another common example of abnormal behavior is excessive pecking by chickens that can eventually lead to the death of weaker chickens. See *id.* at 86 (observing that "overcrowding and extreme stress of the factory conditions are the real and direct causes" of this destructive pecking).

42. See O'Brien, *supra* note 39, at 410. Debeaking is a particularly brutal "surgery" that is performed without anesthesia. See COATS, *supra* note 32, at 85. Coats describes debeaking:

Debeaking is the cutting off of either the entire tip of the beak or the top half of the beak . . . . A worker jams the day-old chick's beak against a red-hot (1500° F—800° C) metal blade for about two seconds. Part of the beak is burnt off and the tissue that could regenerate the beak is destroyed.

*Id.*

43. See COATS, *supra* note 32, at 85.

44. See generally Mosel, *supra* note 39, at 146 (observing that in the production of eggs "[u]seless males are casually dumped into plastic garbage bags where they 'suffocate under the weight of other chicks dumped on top of them'" (quoting Fox, *supra* note 39, at 151)); Mullin, *supra* note 37, at 62 (describing castration of lambs, debeaking of chickens, and tail clipping of pigs). Perhaps the most extreme example of physical abuse in the form of neglect surfaces in the case of calves that are raised to be used as veal. See Mosel, *supra* note 39, at 148 (discussing the intentional starvation of calves to induce them to eat drug-laden feed that they instinctively reject). See generally COATS, *supra* note 32 (discussing cruel practices inflicted on pigs, dairy cows, veal calves, beef cattle, and chickens).

45. See Tao, *supra* note 40, at 344. Tao states:

USDA veterinarians have described a commonly accepted practice of

When they arrive at the slaughterhouse, farm animals are frequently slaughtered using inhumane methods such as stunning by electric shock and bleeding to death.<sup>46</sup> Within animal agriculture, increasingly cruel practices characterize the factory farm model.<sup>47</sup> This situation necessitates a survey of current and proposed legislation to determine if an adequate legislative framework exists for remedying animal abuse in the agribusiness industry.<sup>48</sup>

## II. Legislation Purporting to Protect Animals

### A. Federal Law

#### 1. The Current State of Federal Law

There is very little legislation at the federal level that protects farm animals.<sup>49</sup> There are four primary federal statutes

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transporting cattle in ninety to ninety-five degree weather, crammed on trailers with so little ventilation and for so long that some animals collapse from heat exhaustion. At the other extreme, cattle have also been transported in open trailers, in minus-fifty degree weather, factoring in wind-chill.

*Id.*; see also COATS, *supra* note 32, at 99 (observing that “more than 700,000 calves and cattle die each year due to transit-related injuries and diseases”).

46. See HELENA NORBERG-HODGE ET AL., FROM THE GROUND UP: RETHINKING INDUSTRIAL AGRICULTURE 27 (2001). Other cruel practices that are prevalent include dismemberment and scalding while animals are still alive. See Laurie Fulkerson, 2001 *Legislative Review*, 8 ANIMAL L. 259, 277 (2002) (discussing videotape showing cows in the state of Washington “being skinned and having their legs cut off, without having first been stunned”); Emilie Keturakis, 2002 *Legislative Review*, 9 ANIMAL L. 331, 333 (2003) (reporting that many farm animals are “frequently dismembered or scalded while still aware and conscious”); see also Tao, *supra* note 40, at 344 (observing that “high production speeds in the slaughterhouse often result in live pigs, supposedly stunned, being lowered into vats of scalding hot water to soften their skins”). Animals are frequently beaten by slaughterhouse employees when they refuse to be slaughtered easily. See GAIL A. EISNITZ, SLAUGHTERHOUSE: THE SHOCKING STORY OF GREED, NEGLECT, AND INHUMANE TREATMENT INSIDE THE U.S. MEAT INDUSTRY 130 (1997) (recounting interview with slaughterhouse employee indicating that cattle are beaten with “whips, chains, shovels, hoes, [and] boards” to get them to move within the slaughterhouse); SCULLY, *supra* note 39, at 283 (discussing conversations with slaughterhouse employees that confirm hogs are beaten frequently when they refuse to go quietly to slaughter). Chickens are still conscious when their throats are sliced and they bleed to death. *Id.* at 166 (observing that other industrialized nations render chickens unconscious before killing them while the practice in the United States is to paralyze rather than render chickens unconscious).

47. See *supra* notes 37-46 and accompanying text.

48. See *infra* Part II.

49. See Mosel, *supra* note 39, at 138-44 (arguing that federal law fails to protect farm animals); Jacqueline Tresl, *The Broken Window: Laying Down the Law for Animals*, 26 S. ILL. U. L.J. 277, 285 (2002) (“[T]here is one classification of animal



that deal directly with animal welfare. The Animal Welfare Act ("AWA")<sup>50</sup> is designed to protect animals that move in interstate commerce,<sup>51</sup> particularly animals used in experiments, exhibitions, or sold as companion animals.<sup>52</sup> The AWA specifically exempts farm animals from its purview.<sup>53</sup>

In addition to the AWA, the Twenty-Eight Hour Law<sup>54</sup> regulates the transportation conditions under which animals are moved as part of interstate commerce.<sup>55</sup> The Twenty-Eight Hour Law places a limit on the amount of time animals may be transported without "unloading" the animals for food, water, and rest.<sup>56</sup> However, animals may be confined for longer periods under certain circumstances.<sup>57</sup> In addition, any transporter of animals may apply in writing for an extension of the usual twenty-eight hour period.<sup>58</sup> In order to prove a violation of the Twenty-Eight

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that is denied most federal and state protection. That animal is the farm animal.").

50. 7 U.S.C. §§ 2131-2159 (2004).

51. See *id.* § 2131(2) (stating that one congressional policy objective of the Animal Welfare Act is "to assure the humane treatment of animals during transportation in commerce").

52. See *id.* § 2132(g) (defining the term "animal" as including dogs, cats, monkeys, guinea pigs, hamsters, rabbits, and other animals "intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet").

53. See *id.* When describing what is an "animal," the statute states such term excludes . . . other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber.

*Id.* See, e.g., Mosel, *supra* note 39, at 140-41 (noting that the Animal Welfare Act "specifically denies coverage to farm animals").

54. 49 U.S.C. § 80502 (2004).

55. See *id.* § 80502(a) (prescribing the amount of consecutive time that animals may be confined without rest); *id.* § 80502(b) (fixing requirements for humane unloading and feeding of animals that are being transported). By its terms, the statute does not regulate the conditions that farm animals live under on a daily basis. Fox, *supra* note 39, at 146.

56. See 49 U.S.C. § 80502(a)(1) (2004). Sheep may be confined for up to thirty-six consecutive hours under certain conditions. *Id.* § 80502(a)(2) ("Sheep may be confined for an additional 8 consecutive hours without being unloaded when the 28-hour period of confinement ends at night.").

57. See *id.* § 80502(a)(2)(A). Animals are allowed to be confined for "more than 28 hours when the animals cannot be unloaded because of accidental or unavoidable causes that could not have been anticipated or avoided when being careful." *Id.* Some commentators have suggested that the statute may still allow for inhumane transportation of farm animals. See, e.g., Laura G. Kniaz, *Animal Liberation and the Law: Animals Board the Underground Railroad*, 43 BUFF. L. REV. 765, 785-86 (1995) (questioning whether the Twenty-Eight Hour Law serves its purpose of humane transportation of animals).

58. See 49 U.S.C. § 80502(a)(2)(B) (2004) (allowing animals to be confined for "36 consecutive hours when the owner or person having custody of animals being transported requests, in writing and separate from a bill of lading or other rail

Hour Law, the U.S. Attorney General must prove knowing and willful violation of the law.<sup>59</sup> Many farm animals receive no protection from the Twenty-Eight Hour Law because it does not regulate the trucking industry, the major transporter of live animals in the United States, and it does not apply to animals that are shipped in *intrastate* commerce.<sup>60</sup>

A third federal statute, the Humane Methods of Livestock Slaughter Act ("HMLSA")<sup>61</sup> mandates that animals be slaughtered in a humane way, in part to alleviate "needless suffering."<sup>62</sup> The HMLSA also prescribes methods of slaughter that are deemed humane, such as a single blow or gunshot that renders the animal insensible to pain.<sup>63</sup> The HMLSA applies to a limited category of farm animals.<sup>64</sup> Penalties for violation of the HMLSA are limited and rarely imposed.<sup>65</sup>

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form, that the 28-hour period be extended to 36 hours").

59. See *id.* § 80502(d) (2004). According to this statute:

A rail carrier, express carrier, or common carrier (except by air or water), a receiver, trustee, or lessee of one of those carriers, or an owner or master of a vessel that knowingly and willfully violates this section is liable to the United States Government for a civil penalty of at least \$ 100 but not more than \$ 500 for each violation. On learning of a violation, the Attorney General shall bring a civil action to collect the penalty in the district court of the United States for the judicial district in which the violation occurred or the defendant resides or does business.

*Id.*

60. See Wolfson & Sullivan, *supra* note 31, at 208; David J. Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*, 2 ANIMAL L. 123, 129 (1996) ("Federal law only applies to the interstate transport of animals, not the transport of animals within a state.").

61. 7 U.S.C. §§ 1901-1907 (2004).

62. *Id.* § 1901.

63. *Id.* § 1902(a) ("[I]n 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 . . ."). The statute also deems methods of slaughter practiced by certain religions humane. *Id.* § 1902(b) (noting that slaughtering in accordance with Jewish traditions or "any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument and handling in connection with such slaughtering" are humane for purposes of the statute).

64. See *id.* § 1902(a) (listing animals to which the statute applies, including "cattle, calves, horses, mules, sheep, swine, and other livestock"); see also Fox, *supra* note 39, at 146 n.18 (noting that the HMLSA does not apply to poultry); Wolfson & Sullivan, *supra* note 31, at 208 ("[R]egulations promulgated pursuant to the [HMLSA] exempt poultry, the result of which is that over 95 percent of all farmed-animals . . . have no federal legal protection from inhumane slaughter.").

65. See Wolfson & Sullivan, *supra* note 31, at 208 (arguing that "significant penalties are never imposed" and attempts to promote enforcement have been futile under the HMLSA).

The Farm Security and Investment Act of 2002 ("FSIA")<sup>66</sup> was passed and signed into law that same year.<sup>67</sup> Although the original version of the FSIA contained some advances for farm animal protection, a number of these provisions were removed before the FSIA was signed into law.<sup>68</sup> The only remaining protection for farm animals in the FSIA is the Humane Slaughter Resolution.<sup>69</sup> This provision notes ineffective enforcement of the existing HMLSA and calls for better enforcement.<sup>70</sup>

Taken together, the four primary federal statutes that purport to protect animals have limited application to farm animals.<sup>71</sup> As a result, efforts to reform farm animal conditions have been undertaken in recent years by Congress.<sup>72</sup>

## 2. Recent Attempts to Strengthen Federal Animal Protection Law

The most recent attempt to pass federal legislation protecting farm animals was the Downed Animal Protection Act ("DAPA").<sup>73</sup> The DAPA required the humane treatment of downed animals raised for food production.<sup>74</sup> The DAPA passed the Senate in 2002

66. 7 U.S.C. § 1907 (2004).

67. See Keturakis, *supra* note 46, at 332.

68. See *id.* at 334 (describing the removal of the downed animal amendment that "would have prohibited the marketing and dragging of downed animals that are too sick or injured to walk and required these incapacitated animals to be humanely euthanized").

69. See *id.* at 333.

70. See *id.* at 334 ("The resolution calls for the complete enforcement of the Humane Slaughter Act, the resumption of tracking of violations that occur, and a report of the USDA's findings to Congress annually."). At least one article has interpreted the Humane Slaughter Resolution as an indication of the complete failure of the HMLSA to adequately protect farm animals. See Wolfson & Sullivan, *supra* note 31, at 208 ("This may be one of the few occasions where Congress has felt the need to, in effect, reenact an existing statute, though it did not increase the likelihood of compliance by requiring fines or other significant penalties for violations.").

71. See *supra* notes 49-70 and accompanying text.

72. See *infra* Part II.A.2.

73. Downed Animal Protection Act, S. 1298, 108th Cong. § 2 (2003) (as introduced); H.R. 2519, 108th Cong. § 2 (2003) (as introduced).

74. See Emilie Clermont, 2003 *Legislative Review*, 10 ANIMAL L. 363, 367-70 (2004) (noting that the Downed Animal Protection Act "requires the Secretary of Agriculture to promulgate regulations to provide humane treatment, handling, and disposition of downed livestock, including a requirement that such animals be immediately and humanely euthanized"). Downer animals are those animals that have become so sick as a result of intensive confinement that they can no longer stand. See O'Brien, *supra* note 39, at 408 n.9 ("Downers are animals too sick to walk unaided to slaughter."). Downer animals are frequently subjected to completely inhumane treatment. See Clermont, *supra*, at 368-69. Clermont states:

Downed animals are routinely pushed with tractors or forklifts, kicked,

and 2003, but it was not signed into law, due to pressure from the White House.<sup>75</sup>

In 2001, Senators Patrick Leahy and Peter Fitzgerald introduced the Leahy-Fitzgerald Forced Molting Amendment to the Senate Agricultural Appropriations Bill.<sup>76</sup> The Senators designed the amendment to discourage the use of eggs produced through the use of forced molting.<sup>77</sup> The Senate ultimately rejected the amendment.<sup>78</sup>

Analysis of recent attempts to reform certain cruel practices indicates that federal animal protection legislation as applied to most farm animals is limited.<sup>79</sup> In addition, it is clear that federal law treats animals as mere articles of commerce.<sup>80</sup> An examination of state legislation pertaining to animal cruelty reveals a similar lack of application to farm animals.<sup>81</sup>

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dragged with chains, prodded with electric shocks in efforts to move them at auction and slaughterhouse facilities . . . . Additionally, sick or injured downer animals are left to suffer for hours or days without proper food, water, or veterinary care.

*Id.*

75. See Clermont, *supra* note 74, at 370.

76. See Fulkerson, *supra* note 46, at 279 (reporting that in 2001 “Senators Patrick Leahy (D-VT) and Peter Fitzgerald (R-IL) introduced an amendment to the Senate Agricultural Appropriations Bill, S. 1191, which would curb the cruel practice of forced molting . . .”).

77. See *id.* (observing that the Amendment would have barred the USDA “from purchasing eggs for the Federal School Lunch Program from producers that engage in the practice [of forced molting]”). Forced molting involves starving chickens so that they lay more eggs. See Tao, *supra* note 40, at 343 (describing the “accepted industry practice” of starving egg-laying chickens “to make them enter the next laying cycle”).

78. See Fulkerson, *supra* note 46, at 280 (“[T]he House version of the Bill, H.R. 2330, passed in both the House and the Senate, and was signed into law on November 28, 2001. The House version did not include the amendment.” (citation omitted)).

79. See *supra* notes 73-78 and accompanying text.

80. See 7 U.S.C. § 2131 (2004) (characterizing animals as articles of commerce); *id.* § 1901 (referring to livestock as “products”). As another example, the Twenty-Eight Hour Law is part of Title 49 of the United States Code, which regulates transportation of goods across interstate lines. See 49 U.S.C. § 80502 (2004). The agribusiness industry also uses language designed to obscure its exploitation of farm animals. See Corwin R. Kruse, *Baby Steps: Minnesota Raises Certain Forms of Animal Cruelty to Felony Status*, 28 WM. MITCHELL L. REV. 1649, 1651 n.10 (2002) (arguing that “animal-use industries . . . use impersonal terms such as ‘crops,’ ‘tools,’ or ‘resources’ to refer to animals and speak of their killing euphemistically (e.g., ‘harvesting’)”).

81. See *infra* Part II.B.

## B. State Law

### 1. State Anti-Cruelty Legislation

Every state has some version of an anti-cruelty statute that is purportedly designed to protect animals from human cruelty.<sup>82</sup> Anti-cruelty statutes directly protect certain animal interests.<sup>83</sup> Punishments for violations of these statutes vary,<sup>84</sup> with the majority of states electing to treat certain violations of their anti-cruelty statutes as felonies.<sup>85</sup> Most states exempt farm animals from the protection of their anti-cruelty laws.<sup>86</sup> This is accomplished via legislation by exempting farm animals from the definition of "animal,"<sup>87</sup> or by exempting animal husbandry practices from the operation of a state's anti-cruelty statute.<sup>88</sup>

82. See Pamela D. Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 ANIMAL L. 69, 69 (1999) ("Every state has an animal anti-cruelty statute."); Paula J. Frasso, *The Massachusetts Anti-Cruelty Statute: A Real Dog—A Proposal for a Re-draft of the Current Law*, 35 NEW ENG. L. REV. 1003, 1010 (2001) ("All fifty states have enacted some form of a criminal statute to protect animals, either mandating minimum levels of care that need to be provided or prohibiting certain types of acts.").

83. See David Favre, *Integrating Animal Interests into Our Legal System*, 10 ANIMAL L. 87, 92-93 (2004) ("Unlike Congress, states can and have created laws protecting the interests of animals . . . . There is no similar law that prohibits an owner of other types of property from harming that property."). Some commentators contend that the main purpose of anti-cruelty statutes is the protection of human interests rather than animal interests. See, e.g., Kruse, *supra* note 80, at 1661 (arguing that anti-cruelty laws in Minnesota have primarily focused on "human morality rather than animal suffering").

84. See Amie J. Dryden, *Overcoming the Inadequacies of Animal Cruelty Statutes and the Property-Based View of Animals*, 38 IDAHO L. REV. 177, 178 (2001) (noting wide variation in punishment under state anti-cruelty statutes); Frasch et al., *supra* note 82, at 69 (noting that some states treat a violation as a misdemeanor while others treat a violation as a felony).

85. Compare Frasch et al., *supra* note 82, at 69 (observing that twenty-three states provide for felony anti-cruelty prosecutions) with Clermont, *supra* note 74, at 388 (finding that, only four years later, forty-one states have felony anti-cruelty legislation).

86. See Wolfson & Sullivan, *supra* note 31, at 212 (observing that "the farmed-animal industry has persuaded the majority of state legislatures . . . to simply exempt all 'accepted,' 'common,' 'customary,' or 'normal' farming practices"). Recent years have seen a growing number of states enacting some form of exemption for farm animal practices from state anti-cruelty statutes. See *id.* ("Since 1990, fourteen states have joined the growing majority of jurisdictions that have enacted such amendments [to exempt farm animal practices from criminal animal cruelty statutes].").

87. See Frasch et al., *supra* note 82, at 78 (reporting that Iowa and Utah specifically exclude farm animals from their anti-cruelty statute's definition of "animal"); O'Brien, *supra* note 39, at 408 (noting that "some statutes exclude farm animals altogether from the definition of 'animal'").

88. See Frasch et al., *supra* note 82, at 77 (noting that thirty states exempt

Where the legislature has not exempted farm animals from coverage under an anti-cruelty statute, the state has usually allowed the farming industry to define what "cruelty" means.<sup>89</sup> Where statutes do not exempt farm animals explicitly from the protection of anti-cruelty laws, courts have implicitly exempted farm animals from such protection.<sup>90</sup> "[T]here are no state [anti-cruelty] statutes that specifically protect *farm* animals and loopholes and exceptions in existing laws allow farm animals to remain unprotected."<sup>91</sup>

In addition to the definitional problems discussed above, cases involving animal cruelty are rarely prosecuted.<sup>92</sup> Where animal cruelty cases are prosecuted, they usually involve companion animals.<sup>93</sup> Animal cruelty convictions are difficult to

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"commonly accepted animal husbandry practices"); Wolfson & Sullivan, *supra* note 31, at 212 n.20 (listing twenty-six states that exempt "all customary farming practices," and five states that provide varying exemptions for certain industry practices).

89. See Laura J. Ireland, *Canning Canned Hunts: Using State and Federal Legislation to Eliminate the Unethical Practice of Canned "Hunting,"* 8 ANIMAL L. 223, 238-39 (2002) ("State legislatures have left the task of defining 'common' or 'normal' husbandry practices to the industries themselves."); Wolfson & Sullivan, *supra* note 31, at 215 ("State legislatures have endowed the farmed-animal industry with complete authority to define what is, and what is not, cruelty to the animals in their care."). For example, some states allow schools to define what a customary farming practice is. See *id.* at 213 (stating that Tennessee defines a customary farming practice as "whatever a 'college of agriculture or veterinary medicine' says it is"). Wolfson and Sullivan note that allowing the industry to define what constitutes criminal conduct is unheard of in criminal law. See *id.* at 215 ("The customary farming exemptions . . . are a unique legal development in that they delegate criminal enforcement power to the industry itself. It is difficult to imagine another non-governmental group possessing such influence over a criminal legal definition . . .").

90. See Francione, *supra* note 30, at 118 (arguing that "courts have held consistently that animals used for food may be mutilated in ways that unquestionably cause severe pain and suffering").

91. Mosel, *supra* note 39, at 139.

92. See Jennifer H. Rackstraw, *Reaching for Justice: An Analysis of Self-Help Prosecution for Animal Crimes*, 9 ANIMAL L. 243, 245-46 (2003) (cataloging research demonstrating that a disproportionately small number of reported cruelty cases are prosecuted); see also Frasch et al., *supra* note 82, at 69-70. Frasch observes that

[t]here is anecdotal evidence . . . to indicate that some prosecutors are less likely to charge or prosecute animal cruelty compared to other violent crimes, except in the most extreme cases. This apparent reluctance to prosecute stems from many factors including: real or perceived limited resources; inexperienced staff; incomplete or botched investigations; pressure from the community to focus on other crimes; and personal or political bias against taking animal abuse seriously as a violent crime.

*Id.*; *DA Declines to File Charges in California Wood Chipper Case*, The Humane Society of the United States (reporting failure of San Diego County District Attorney to prosecute owners of egg farm who killed thousands of live chickens by "throwing them into wood chippers") (on file with author).

93. See *Remarks: The Legal Status of Nonhuman Animals*, 8 ANIMAL L. 1, 6

obtain because they are often criminal charges that require proof of a mens rea element.<sup>94</sup> A conviction under a state animal cruelty statute does not usually result in a substantial penalty for the criminal.<sup>95</sup> Finally, most states do not protect farm animals through the use of regulatory legislation, with the exceptions noted below.<sup>96</sup>

## 2. Recent Attempts to Strengthen State Farm Animal Protection Through the Use of Regulatory Legislation

Recent years have seen the introduction and passage of a number of pieces of regulatory legislation that protect farm animals in some way.<sup>97</sup> The most significant development in 2004 at the state level was California's new ban on the sale and production of foie gras in the state.<sup>98</sup> New York has similar

(2002) (commenting that most prosecutions are only in cases of egregious abuse of companion animals); Wolfson, *supra* note 60, at 131 ("[E]nforcement is largely directed at dogs, cats, and horses rather than animals raised for food or food production."). There are occasional prosecutions of farm animal owners. See Julian Guthrie, *Custody Fight Looms over Seized Sheep*, S.F. CHRON., Feb. 20, 2004, at A21 (describing attempt to prosecute man who had kept sheep in a junkyard).

94. See Francione, *supra* note 30, at 118. An excellent example of the difficulty of securing a conviction under criminal anticruelty statutes can be found in a New Jersey case that involved prosecution of an agribusiness firm for discarding live chickens in trash cans. See SCULLY, *supra* note 39, at 285 (reporting that ISE America's conviction for animal cruelty was overturned because the state could not prove that the workers intentionally neglected the birds); Lori Montgomery, *Activists Accuse Egg Farm of Cruelty*, WASH. POST, June 6, 2001, at B5 (observing that ISE America's misdemeanor conviction and \$564 fine "were overturned when a judge found insufficient evidence that farm workers had maliciously neglected the birds").

95. See Francione, *supra* note 30, at 118 (stating that "many animal welfare laws have wholly inadequate penalty provisions"). Despite this assessment, states are increasingly creating felony anti-cruelty legislation. See Clermont, *supra* note 74 at 388 ("Kentucky, Nebraska, West Virginia and Wyoming became the thirty-eighth, thirty-ninth, fortieth, and forty-first states to have felony anti-cruelty legislation on the books. Similar legislation failed in Arkansas, Hawaii, and Kansas." (citation omitted)).

96. See *infra* Part II.B.2.

97. See *infra* notes 98-105 and accompanying text.

98. See 2004 Cal. Adv. Legis. Serv. 904 (Deering). The California statute prohibits persons from

force feeding a bird for the purpose of enlarging the bird's liver beyond normal size, or hir[ing] another person to do so . . . . [A] product may not be sold in California if it is the result of force feeding a bird for the purpose of enlarging the bird's liver beyond normal size.

*Id.*; Patricia Leigh Brown, *Is Luxury Cruel? The Foie Gras Divide*, N.Y. TIMES, Oct. 6, 2004, at F10 (reporting that "[a]nimal rights groups called the signing [of the bill banning the sale and production of foie gras] a major victory for the ducks and geese"). Foie gras is a "food" that is produced by force-feeding ducks and geese by means of a mechanical tube inserted in the esophagus that enlarges the liver of the animals to monstrous sizes. See *id.* (explaining that animal rights activists object

legislation pending.<sup>99</sup> In addition, a number of states saw the introduction of bills that would regulate the confinement of such animals as pigs<sup>100</sup> and calves.<sup>101</sup> Bills concerning horse slaughter<sup>102</sup> and tail docking were also considered.<sup>103</sup> The most radical proposal recognized the sentient status of farm animals and demanded that they be treated humanely and with respect.<sup>104</sup> In 2002, Florida voters approved an initiative that banned the use of gestation crates for sows.<sup>105</sup> In sum, animal advocates have

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to foie gras "because it is made by force-feeding ducks and geese to create creamy, fat-engorged livers"); Holly Anne Gibbons, *Origins of Animal Law: Three Perspectives*, 10 ANIMAL L. 8, 10 n.13 (2004) (describing foie gras as "a 'delicacy' produced from the grotesquely enlarged livers of ducks and geese who were cruelly force-fed"). The California ban on foie gras does not take effect until 2012. See 2004 Cal. Adv. Legis. Serv. 904 (Deering). The California statute declares:

No civil or criminal cause of action shall arise on or after January 1, 2005, nor shall a pending action commenced prior to January 1, 2005, be pursued under any provision of law against a person or entity for engaging, prior to July 1, 2012, in any act prohibited by this chapter.

*Id.*

99. See S. 2083, 2005-06 Reg. Sess. (N.Y. 2005), available at <http://assembly.state.ny.us/leg/?bn=s2083> (last visited Mar. 29, 2005) (proposing a bill that makes it unlawful to force-feed an animal "effectively banning the force-feeding of geese for the production of foie gras").

100. See S.B. 470, 2005 Leg., (Md. 2005) (proposing a ban on confinement or tethering of a pig during the "pre-birthing period"); H.R. 2199, 22nd Leg. (Haw. 2004), available at <http://capitol.hawaii.gov/session2004/status/HB2199.asp> (last visited Mar. 29, 2005) (proposing a bill that prohibits confining or tethering calves or pigs "in such a way that prevents [them] from turning around in a complete circle without touching any side of the enclosure, lying down in full lateral recumbency, or grooming [themselves] completely").

101. See Assem. B. No. 732, 2003-04 Reg. Sess. (Cal. 2003) (proposing a bill that prohibits confining or tethering calves so that they are "unable to turn around freely, lie down with their legs and neck outstretched, or groom themselves" and sets penalties of up to one year imprisonment and a fine of up to \$1,000); H.R. 2199, 22nd Leg. (Haw. 2004); Assem. No. 329, 211th Leg., 2004 Sess. (N.J. 2004) (requiring that calves raised for veal have enough room to turn around, lie down, and groom, and that they be fed a diet sufficient in iron and fiber).

102. See H.B. 1171, 94th Gen. Assemb., (Ill. 2005), available at <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=1171&GAID=8&DocTypeID=HB&LegId=15911&SessionID=50&GA=94> (last visited Mar. 29, 2005) (proposing a bill that makes it unlawful to slaughter horses for human consumption or to possess, import, export, sell, buy, or give away horse meat for human consumption).

103. H.B. 678, 2003-04 Sess. (Vt. 2004) (citing a now-dead bill that required the state veterinarian to study scientific literature on the tail docking of dairy cows and determine whether the practice lacks significant benefit, and, if so, requiring the state veterinarian to actively discourage it, except in cases where it is necessary for the health of a cow).

104. See H.R. 1669, 23rd Leg. (Haw. 2005), available at <http://www.capitol.hawaii.gov/session2004/status/HB1669.asp> (proposing a bill recognizing farm animals as sentient beings who should be protected and treated with respect).

105. See Joseph Lubinski, *The Cow Says Moo, the Duck Says Quack, and the Dog*



been active at the state level in proposing and sometimes passing legislation that offers some measure of protection to farm animals.<sup>106</sup> However, farm animals remain outside of the purview of most state legislation that purports to protect animals.<sup>107</sup>

State and federal legislation remain largely unconcerned with the plight of farm animals.<sup>108</sup> Given this indifference, a number of organizations respond to the problem of cruel farmed-animal practices in a variety of ways.<sup>109</sup>

### III. The Great Divide: Abolition or Regulation?

#### A. Differences in Ideology: Animal Rights vs. Animal Welfare

Advocates for animals are generally split into two camps: animal rights activists and animal welfare activists.<sup>110</sup> As the name suggests, animal rights supporters seek to grant rights to non-human animals.<sup>111</sup> Accordingly, animal rights theorists and activists generally advocate a non-property legal status for animals.<sup>112</sup> Proponents of animal rights tend to reject any

*Says Vote! The Use of the Initiative to Promote Animal Protection*, 74 U. COLO. L. REV. 1109, 1129 n.130 (2003).

106. See *supra* notes 98-105 and accompanying text.

107. See *supra* Part II.B.1. Ironically, the application of early anti-cruelty statutes was usually limited to farm animals. See Kruse, *supra* note 80, at 1660 (discussing *United States v. Gideon*, 1 Minn. 226 (1856), in which the Supreme Court of Minnesota held that the anti-cruelty laws of the territory of Minnesota did not apply to the shooting of a dog because it was not a "commercially valuable" animal).

108. See *supra* notes 49-107 and accompanying text.

109. See *infra* Part III.A.

110. See GARY L. FRANCIONE, *RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT* 25-27 (1996) (comparing the arguments of animal welfarists and animal rights advocates); Ruth Payne, *Animal Welfare, Animal Rights, and the Path to Social Reform: One Movement's Struggle for Coherency in the Quest for Change*, 9 VA. J. SOC. POL'Y & L. 587, 593 (2002) (identifying animal rights and animal welfare as the two main branches of modern activism on behalf of animals).

111. See Tresl, *supra* note 49, at 278 ("An animal rights activist believes animals should be granted rights separate and apart from humans.").

112. See, e.g., Francione, *supra* note 30, at 108 (arguing that the only way for humans to secure humane treatment for animals is to grant animals the right not to be treated as the property of humans); Thomas G. Kelch, *Towards a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 532 (1998) (arguing that the property status of animals needs to be abolished and the common law is the proper mechanism to accomplish this change). But see Favre, *supra* note 83, at 90 (arguing that the pursuit of a non-property status for animals is "unwise and unnecessary"). Favre believes that animals would be better served by a new quasi-property classification. See David Favre, *Equitable Self-Ownership for Animals*, 50

instrumental use of animals for human purposes.<sup>113</sup> This usually includes the use of animals for food purposes; the animal rights position thus implicitly (if not explicitly) seeks the ultimate abolition of the "meat" industry.<sup>114</sup> In addition, some proponents of the animal rights perspective argue that the animal welfare ideology results in enhanced exploitation of non-human animals.<sup>115</sup> As a consequence, some animal rights activists discourage litigation in favor of the pursuit of other non-legal goals.<sup>116</sup>

By contrast, the animal welfare position seeks to lessen the suffering of non-human animals exploited by humans for various purposes.<sup>117</sup> Accordingly, the animal welfare movement does not advocate for the abolition of the meat industry or other exploitative uses of animals; it merely works to alleviate the most egregious examples of animal suffering.<sup>118</sup> The main distinction between rights-oriented animal advocates and animal welfare advocates is the latter's tolerance of practices that exploit animals for human benefit and the former's complete rejection of such exploitation.<sup>119</sup> The most significant distinction in legal strategy is the animal right emphasis on the abolition of the property status of non-human animals versus the animal welfarist acceptance of

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DUKE L.J. 473, 476 (2000) (arguing that animal interests can be accommodated within the current legal regime by "transferring the equitable title of an animal to the animal, creating for the animal a limited form of self-ownership"). See generally Robert Garner, *Political Ideology and the Legal Status of Animals*, 8 ANIMAL L. 77 (2002) (arguing that advances toward animal rights can be made without eliminating the property status of animals).

113. See Tresl, *supra* note 49, at 279 ("Activists have two goals: (1) to end all use of animals and (2) to move away from animals being considered property owned by people."). See generally TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* (1983) (espousing a theory of animal rights that rejects use of animals by humans).

114. See, e.g., REGAN, *supra* note 113, at 331-53.

115. See FRANCIONE, *supra* note 110, at 229-30 (lambasting animal welfare movement for "marching backwards" on issues related to animal protection).

116. See Payne, *supra* note 110, at 615 (summarizing arguments of certain animal rights activists who believe that spending money on litigation rather than on other goals is not money well spent).

117. See *id.* at 595 ("In general, the goal of the animal welfare movement is to prevent animals from suffering needlessly, and thereby to improve the quality of animal lives. This goal can be achieved, then, through measures designed to alleviate the suffering of animals in all settings in which humans interact with them.").

118. See FRANCIONE, *supra* note 110, at 7-12 (discussing the drive of animal welfare groups to enact legislation that protects animals rather than eradicates their usage by humans).

119. See, e.g., Payne, *supra* note 110, at 597 ("[The Animal rights movement], therefore, is not content just to improve the conditions under which animals live, but rather seeks to alter human conceptions of animals altogether.").

property status for non-human animals.<sup>120</sup> As a result, animal welfare proponents are likely to pursue litigation seeking enforcement of existing animal protection statutes rather than attempting to substantially change existing law.<sup>121</sup> Proponents of the animal welfare approach argue that media attention generated by litigation is one of the primary benefits of an incremental litigation strategy.<sup>122</sup>

Although there are many differences of opinion between animal rights activists and animal welfare activists, there is a substantial amount of common ground.<sup>123</sup> Many advocates of animal rights acknowledge the need for gradual reform of the legal system.<sup>124</sup> Both groups acknowledge that public support is critical to make progress in protecting animals and to achieve reform.<sup>125</sup> Animal welfare and animal rights activists share the conviction that animals have interests that should be honored and respected.<sup>126</sup> Both groups recognize that reform in the area of animal law is likely to be gradual.<sup>127</sup>

Most commentators, whether animal welfare or rights advocates, appear to favor a federal solution to the problem of

120. See FRANCIONE, *supra* note 110, at 9-10 (arguing that animal welfarism views animals as property).

121. See Payne, *supra* note 110, at 603 ("[M]uch of the litigation undertaken by the animal welfare movement has aimed to better enforce laws that already exist rather than create new laws.").

122. See *id.* at 610-11 (articulating the argument that court cases revolving around existing animal protection law may generate public awareness and increased funding for animal advocacy groups).

123. See HELENA SILVERSTEIN, UNLEASHING RIGHTS: LAW, MEANING, AND THE ANIMAL RIGHTS MOVEMENT 36-37 (1996) (arguing that advocates for animals have achieved consensus on many issues); Tresl, *supra* note 49, at 279 (noting the "shared opposition to 'hunting, trapping, fur wearing, intensive animal agriculture, and animal experimentation'" between animal rights and welfare groups).

124. See, e.g., Steven M. Wise, *Animal Rights, One Step at a Time*, in ANIMAL RIGHTS, *supra* note 30, at 27 ("I believe that legal rights for nonhuman animals will be achieved one step at a time."); Favre, *supra* note 83, at 90-91 (advocating gradual reform in the animal law area); Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 392-95 (2003) (suggesting a gradual approach to promotion of animal rights and welfare). But see FRANCIONE, *supra* note 110, at 229-30 (arguing that "gains" made by the animal welfare movement undermine the pursuit of animal rights). It is important to note that Francione also recognizes the need for incremental change, albeit incremental change that is far less incremental than the kinds of reforms suggested by animal welfare advocates. See *id.* at 189 (arguing that incremental approaches are possible for animal rights activists and that such approaches must reject the notion of animals as property).

125. See Payne, *supra* note 110, at 631.

126. See *id.* at 594-96.

127. See, e.g., Wise, *supra* note 124, at 27 (observing the likelihood of gradual change in the legal status of non-human animals).

farm animal mistreatment.<sup>128</sup> Commentators have generally argued that Congress should use its Commerce Clause<sup>129</sup> power to enact a federal statute that protects farm animals.<sup>130</sup> Both animal rights and animal welfare lobbying groups are small in number and have far less funding to pursue legislative change than other lobbying groups.<sup>131</sup> As a result, the attitude of the general public is of vital importance in determining how to pursue reform.<sup>132</sup>

### B. Public Support for Animal Protection

There appears to be widespread support in the general public for limited animal welfare measures.<sup>133</sup> One striking example of this is the growing popularity of organic and free-range animal products.<sup>134</sup> Animals raised by the organic and free-range

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128. See SCULLY, *supra* note 39, at 391 (proposing a federal "Humane Farming Act" to counter the abuses rampant in the agribusiness industry); Mosel, *supra* note 39 (arguing that a federal statute should be enacted that would give greater protection to farm animals); Wolfson, *supra* note 60, at 149 (suggesting federal legislation to protect farm animals); see also Tao, *supra* note 40, at 353-54 (calling for federal legislation and a new federal agency to enforce regulations). It appears that animal advocates are also loosely associated with the Democratic Party, which tends to favor a more active federal government in addressing a variety of policy concerns. See *Humane USA Endorses John Kerry For President*, Humane USA, at [http://humaneusa.org/article.asp?article\\_key=109&n=3](http://humaneusa.org/article.asp?article_key=109&n=3) (last visited Mar. 23, 2005) (endorsing Democrat John Kerry for President). Humane USA is "the nation's first major political action committee devoted to the task of electing humane-minded candidates to public office at the federal and state levels." *About Us*, Humane USA, at <http://humaneusa.org/about/index.asp> (last visited Apr. 2, 2005).

129. U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have the Power . . . to regulate Commerce . . . among the several States.").

130. See Fox, *supra* note 39, at 168-69; Mosel, *supra* note 39, at 184 (suggesting that Congress has authority under the Commerce Clause to regulate factory farming). Regulation of factory farms may be permissible either directly under the Commerce Clause or using the aggregation standard announced in *Wickard v. Fillburn*, 317 U.S. 111 (1942). See Fox, *supra* note 39, at 168; Mosel, *supra* note 39, at 184 (discussing application of aggregation standard in the context of factory farming regulation). Fox also suggests that factory farms might be subject to regulation due to their anti-competitive effect. See Fox, *supra* note 39, at 169 (arguing that regulation of factory farms is analogous to the lumber industry regulation held to be allowable in *United States v. Darby*, 312 U.S. 100 (1941)).

131. See Megan A. Senatori, *The Diverging Paths of Animal Activism and Environmental Law*, 8 WIS. ENVTL. L.J. 31, 44 (2002) ("[T]he disparity in budgets and power between animal organizations and corporate or other lobbying groups places animal activists at a distinct disadvantage.").

132. See *infra* Part III.B.

133. See Cass R. Sunstein, *Introduction: What Are Animal Rights?*, in ANIMAL RIGHTS, *supra* note 30, at 3, 5 ("Many of the goals of animal welfare groups receive broad popular approval."); Francione, *supra* note 30, at 109 ("Two-thirds of Americans polled by the Associated Press agree with the following statement: 'An animal's right to live free of suffering should be just as important as a person's right to live free of suffering . . .'").

134. See Carter Dillard, *False Advertising, Animals, and Ethical Consumption*,

industries are typically treated in a more humane fashion than animals raised in "conventional" agribusiness environments.<sup>135</sup>

Conversely, there appears to be little popular support for the animal rights perspective.<sup>136</sup> However, awareness of animal rights issues appears to be increasing, as younger generations increasingly adopt vegetarian or vegan lifestyles<sup>137</sup> or eat increasing amounts of vegetarian or vegan food.<sup>138</sup> It is equally clear that the general public does not support the abolition of meat consumption or production at any time in the near future.<sup>139</sup> Given the relative reticence of the voting public to institute widespread change, along with the limited resources of animal advocacy organizations, it is important to consider the costs and benefits of pursuing progressive legislative reform at both the state and federal levels.<sup>140</sup>

10 ANIMAL L. 25, 26 n.2 (2004) (citing studies indicating that United States citizens are willing to pay more for food that is "humanely raised"); Frank J. Miskiel, *Voluntary Labeling of Bioengineered Food: Cognitive Dissonance in the Law, Science, and Public Policy*, 38 CAL. W. L. REV. 223, 223 n.2 (2001) (describing the growing popularity of organic foods).

135. Benjamin N. Gutman, *Ethical Eating: Applying the Kosher Food Regulatory Regime to Organic Food*, 108 YALE L.J. 2351, 2359-60 (1999) (contrasting the relatively humane treatment of livestock in the organic industry with the intensive confinement methods used by mainstream agribusiness).

136. See Dennis T. Avery, *Intensive Farming and Biotechnology: Saving People and Wildlife in the 21st Century*, in THE MEAT BUSINESS: DEVOURING A HEALTHY PLANET 16 (Geoff Tansey & Joyce D'Silva eds., 1999) (observing that "[o]nly about 0.2 percent of Americans are vegans"); Francione, *supra* note 30, at 109 ("[O]ur actual treatment of animals stands in stark contrast to our proclamations about our regard for [animals'] moral status").

137. See SCULLY, *supra* note 39, at 391 (noting that in the United States, "[s]eventeen million people are already vegetarians, most of them teenagers and college students whose influence in the world has yet to be felt"); Havercamp, *supra* note 39, at 649 n.15 (citing figures that "put the number of vegetarians at roughly 12.4 million and growing"). It is also important to note that not all vegetarians or vegans adopt such a lifestyle because of concerns for animal well-being. See *id.* (observing that "[w]hile nearly half of the vegetarians polled attribute their eating manner to health concerns, other vegetarians' choice of food was attributable to ethical concerns, including beliefs about animal welfare").

138. See Havercamp, *supra* note 39, at 650 n.15 (reporting that "nearly 15% of college students in the United States 'eat vegetarian' daily"); *One Out of Every Four College Students Wants Vegan Meals According to ARAMARK Nationwide Survey; Campuses Across Country Offer 'Vegan' this Fall*, BUS. WIRE, Oct. 19, 2004 (reporting that in a survey of 100,000 college students conducted by food service giant Aramark, "nearly a quarter said finding vegan meals on campus was important to them").

139. See Avery, *supra* note 136, at 17 ("Today, there is no major visible global trend toward vegetarian or vegan diets. Nor is there any major global campaign that seems likely to produce such a trend.").

140. See *infra* Part IV.

#### IV. Achieving Progressive Legislative Change

##### *A. Moving Forward: Is Progressive Change More Typical at the State Level or the Federal Level?*

Historically, progressive change in the United States has frequently been initiated at the state or local level.<sup>141</sup> Some of the most notable advances in the area of human rights, including the abolition of slavery, the civil rights movements, and the progressive movement, started at the state or local level.<sup>142</sup> By contrast, the federal government has regularly created regressive legislation or simply failed to enact progressive legislation contemporaneously with the states.<sup>143</sup> In the absence of federal legislation or in addition to federal legislation, individual states have historically passed their own legislation that is more progressive than the prevailing national norm.<sup>144</sup> Similarly, certain state courts grant greater rights to their citizens in certain circumstances than the federal government is willing to recognize.<sup>145</sup> Despite the progressive tendency in certain

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141. See Michael S. Greve, *Business, the States, and Federalism's Political Economy*, 25 HARV. J.L. & PUB. POL'Y 895, 904 (2002) (discussing Progressive-era reforms such as child labor laws, social and health insurance, and health and safety regulations enacted at the state level that predated similar federal legislation).

142. See Ernst A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1287-88 (2004).

143. See, e.g., Stephen Clark, *Progressive Federalism? A Gay Liberationist Perspective*, 66 ALB. L. REV. 719, 736 (2003) (arguing that individual states and municipalities have enacted progressive legislation with respect to gay rights issues in spite of a lack of similarly progressive federal legislation); *id.* at 738-39 (contending that individual states created progressive legislation during the abolition movement of the nineteenth century and the civil rights movement of the 1960s while the federal government sought to protect the institution of slavery and lagged behind certain states in banning discrimination).

144. See *id.* at 720-21 (discussing the relatively progressive legislation of certain states and municipalities on the issue of gay rights); Deborah J. Merritt, *Federalism as Empowerment*, 47 FLA. L. REV. 541, 545-46 (1995) (cataloging progressive state legislation enacted during the Reagan era).

145. See, e.g., *N.J. Coalition Against War in the Middle East v. J.M.B. Realty Corp.*, 650 A.2d 757 (N.J. 1994) (holding that a shopping mall is a public place and protestors have a free speech right under state constitution to protest at mall); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992) (decriminalizing homosexual sodomy in the state of Kentucky eleven years before the Supreme Court decriminalized homosexual sodomy). *But see* *State v. Smith*, 725 P.2d 894 (Or. 1986) (concluding the state constitutional right to remain silent provides less protection than federal protection). It is important to note that state courts have a pronounced tendency to follow federal court interpretation of constitutional language. See Michael E. Solimine & James L. Walker, *Federalism, Liberty, and Constitutional Law*, 23 OHIO N.U. L. REV. 1457, 1459 (1997) (arguing that state court judges tend to follow federal precedent in individual rights cases). State court

individual states, these states are limited by the tendency of businesses to relocate to states with less stringent regulation.<sup>146</sup> As a consequence, progressive federal legislation and court doctrine has frequently developed in response to progressive developments at the state and local level.<sup>147</sup>

States continue to pass progressive legislation in policy areas where the federal government is reluctant to act.<sup>148</sup> For example, in addition to its ban on the production and sale of foie gras,<sup>149</sup> California also recently legalized the use of medical marijuana.<sup>150</sup> Furthermore, many states enacted progressive legislation directed at protecting homosexuals,<sup>151</sup> and a number of states moved strongly to alleviate gender discrimination.<sup>152</sup> Certain state courts

decisions granting more expansive rights than their federal counterparts are thus the exception, not the rule. See *id.* ("A case using state law to rise above the federal floor is a comparatively rare event.").

146. See Greve, *supra* note 141, at 904 (contending that Progressive experiments in the individual states were limited by the "threat that business might exit to more hospitable jurisdictions"). This argument is frequently referred to in legal literature as "the race to the bottom." See *id.* A number of commentators have questioned the validity of the race to the bottom theory in a variety of contexts. See, e.g., Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 684 (2002) (arguing that states do not compete for incorporations and the race to the bottom theory is inapplicable to corporate law); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992) (questioning the applicability of race to the bottom theory to environmental regulation). But see Kirsten H. Engel, *State Environmental Standard-Setting: Is There a "Race" and Is It to the "Bottom"?*, 48 HASTINGS L.J. 271, 278-80 (1997) (arguing that race to the bottom theory is supported by empirical evidence in the area of environmental regulation).

147. See Greve, *supra* note 141, at 904 (arguing that individual states with progressive laws lobbied the national government to pass similar legislation in order to minimize the threat that business might move to more hospitable jurisdictions).

148. See Young, *supra* note 142, at 1278 ("On issues ranging from gay marriage to physician-assisted suicide to environmental protection, individual states have staked out 'progressive' positions . . .").

149. See *supra* note 98 and accompanying text.

150. See Young, *supra* note 142, at 1303 (discussing the legalization of medical marijuana in California for some purposes).

151. See Clark, *supra* note 143, at 734-35. Clark reports:

Three-quarters of the states have decriminalized private, consensual gay sex. Over half the states, including the District of Columbia, have enacted hate crimes laws that include sexual orientation. Approximately one quarter of the states have enacted gay-inclusive civil rights laws that ban private-sector employment discrimination, as have more than 140 municipalities. Furthermore, a small but growing number of states has even recognized same-sex domestic partners for at least some purposes.

*Id.* (citations omitted).

152. See Wolfgang P. Hirczy de Mino, *Does an Equal Rights Amendment Make a Difference?*, 60 ALB. L. REV. 1581, 1582 (1997) (noting that many states passed Equal Rights Amendments in the 1970s while the Equal Rights Amendment to the

also moved to offer greater protection or rights than the protection or rights granted by federal courts.<sup>153</sup> Increasingly, rights activists are successfully taking their fight to the individual states in lieu of the federal government.<sup>154</sup> The history of progressive change in the United States and current trends indicate that individual states and local municipalities are more receptive to political and social reformers than the federal government.<sup>155</sup>

## *B. Practical, Structural, and Constitutional Issues Related to Affecting Legislative Change*

### 1. Changing Federal Law

It is notoriously difficult for a small interest group to effectuate change at the federal level.<sup>156</sup> Any small interest group faces two primary obstacles in attempting to change federal law to address the needs of the interest group. First, Congress is an inherently majoritarian institution.<sup>157</sup> Second, other interest groups, primarily business lobbying groups, usually oppose small interest groups.<sup>158</sup> Groups that oppose proposed reform are

U.S. Constitution failed); *see also* *Guard v. Jackson*, 940 P.2d 642, 643-44 (Wash. 1997) (holding that judicial scrutiny of gender classifications under the Washington Equal Rights Amendment is more stringent than strict scrutiny).

153. *See, e.g., Goodrich v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding unconstitutional under state constitution the denial of benefits of marriage to couple solely on the basis of sexual orientation).

154. *See* Clark, *supra* note 143, at 723-27 (describing efforts of gay rights activists in Washington D.C. to secure progressive legislation); Young, *supra* note 142, at 1278 (discussing efforts of activists opposed to the "War on Terror" at the state and local level); *see also supra* note 98 and accompanying text (noting victory of animal rights groups in passage of ban on production and sale of foie gras).

155. *See supra* notes 141-154 and accompanying text.

156. *See, e.g., Norman R. Williams II, Rising Above Factionalism: A Madisonian Theory of Judicial Review*, 69 N.Y.U. L. REV. 963, 978 (1994) ("While interest groups with small, cohesive memberships and narrowly defined interests can overcome organizational impediments, the size and limited legislative agenda of these groups prevent them—almost by definition—from possessing broad legislative influence at the federal level.").

157. *See, e.g., Michelle Johnston, The Supreme Court, Public Opinion, and the Sentencing of Sexual Predators*, 8 S. CAL. INTERDISC. L.J. 39, 75 (1998) (observing that all three branches of the federal government are essentially majoritarian institutions). *But see* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 32 (1991) (noting the plethora of literature suggesting that there exists "a systematic bias in lawmaking that benefits small groups at the expense of large groups with more votes"); Lee Anne Fennell, *Death, Taxes, and Cognition*, 81 N.C. L. REV. 567, 594-95 (2003) (questioning whether congressional legislation actually follows majoritarian preferences).

158. *See* Jimena Uralde, *Congress' Failure to Enact Animal Welfare Legislation for the Rearing of Farm Animals: What is Truly at Stake?*, 9 U. MIAMI BUS. L. REV.



frequently large and powerful lobbying groups at the federal level.<sup>159</sup> Finally, the cost of pursuing federal legislation may be too expensive for many small interest groups to afford.<sup>160</sup>

In addition to such practical impediments, small interest groups may also encounter constitutional difficulty in achieving legislative change at the federal level. In order to pass any regulatory statute, Congress must find a specific clause in the Constitution that would empower it to regulate the subject of the law.<sup>161</sup> Congress frequently relies on the Commerce Clause,<sup>162</sup> but future reliance on that power to enact progressive legislation may be problematic given the Supreme Court's recent contraction of federal power under the Commerce Clause.<sup>163</sup> In particular, federal criminal statutes may not be easily sustained by the

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193, 214 (2001) ("Strong opposition from animal producers to any attempt to extend protection to farm animals remains likely, since agribusiness has an important stake in maintaining the current husbandry practices." (citation omitted)); *see also* O'Brien, *supra* note 39, at 427 (noting the likely opposition of agribusiness to any proposed changes of animal husbandry practices by statute).

159. *See* Miguel Montana-Mora, *International Law and International Relations Cheek to Cheek*, 19 N.C. J. INT'L L. & COM. REG. 1, 36 (1993) ("We have all heard of the legendary power of farm lobbies. In the United States, agribusiness interests are very well organized to influence political decisions. Congressmen receive financial contributions from farm lobbyists, and also receive the support of specialized newspapers during the elections."); *see also* Cheever, *supra* note 38, at 45 (noting the power of the agribusiness lobby in avoiding enforcement of animal welfare statutes); Bruce Barcott, *Seeds of Discord: Bruce Barcott on the Battle to Stop Genetically Modified Seeds From Overrunning Organic Farms*, LEGAL AFFAIRS, Jan./Feb. 2003, at 60 ("Agribusiness employs some of the most powerful lobbyists on Capitol Hill.").

160. *See* Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355, 363 (1999) ("The costs of lobbying Congress may be well beyond the capacity of the average individual or small group, and effective lobbying may exceed the resources of broad-based public interest groups.").

161. *See* United States v. Morrison, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution."); Jeff L. Massey, *Swanson Mining Reconsidered: Is Section 7 of the Wild and Scenic Rivers Act Constitutional Under the Supreme Court's New Commerce Clause Jurisprudence?*, 8 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 95, 98 (2001) ("[E]very law enacted by Congress must stem from one of the limited powers enumerated in the Constitution.").

162. *See* Christy H. Dral & Jerry J. Phillips, *Commerce by Another Name: The Impact of United States v. Lopez and United States v. Morrison*, 68 TENN. L. REV. 605, 605 (2001) ("Until recently, it seemed established that the Commerce Clause provided an extremely broad and expansive grant of power to Congress."); Edward P. Noonan, *The ADEA in the Wake of Seminole*, 31 U. RICH. L. REV. 879, 899 (1997) ("Congress frequently uses the Commerce Clause to legislate in social areas.").

163. *See, e.g., Morrison*, 529 U.S. 598 (striking down the Violence Against Women Act enacted under Commerce Clause authority); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act enacted under Commerce Clause authority).

Supreme Court.<sup>164</sup> A non-criminal, regulatory statute has a better chance at surviving judicial scrutiny than a federal criminal statute,<sup>165</sup> but there is some suggestion that even regulatory statutes aimed at certain industries might be struck down by the current Supreme Court.<sup>166</sup> Finally, it is important to recall that the commerce power ostensibly allows Congress to regulate articles of commerce only; Congress has no general police power that it can rely upon to enact legislation.<sup>167</sup>

## 2. Changing State Law

State government offers a very different framework in which small interest groups can operate. State legislative power is presumed to be plenary.<sup>168</sup> A state legislature is free to enact *any* statute that it chooses, subject to limitations contained in the state and federal constitutions.<sup>169</sup> A state legislature can theoretically rely on its police power<sup>170</sup> to enact a broad array of statutes,

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164. See, e.g., *Morrison*, 529 U.S. at 610 (striking down criminal statute criminalizing violence against women because of the noneconomic activity that was being regulated); *Lopez*, 514 U.S. at 560 (striking down a statute criminalizing possession of guns near school zones because of the noneconomic activity that was being regulated).

165. See Jim Chen, *Filburn's Legacy*, 52 EMORY L.J. 1719, 1756 (2003) ("Even advocates of a more constrained view of the Commerce Clause concede that the constitutional definition of 'commerce' 'includes . . . the production of . . . merchandise through activities such as manufacturing, farming, and mining.'" (quoting Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 108 (1999))).

166. See *id.* at 1751 (noting Justice Thomas's concurrence that appears to advocate a return to prior Commerce Clause jurisprudence, "perhaps by restoring a narrow definition of 'commerce' distinct from agriculture, manufacturing, and other activities").

167. See *Lopez*, 514 U.S. at 564 (criticizing the idea that the federal government has a general police power); M. Todd Scott, *Kidnapping Federalism: United States v. Wills and the Constitutionality of Extending Federal Criminal Law into the States*, 93 J. CRIM. L. & CRIMINOLOGY 753, 763-64 (2003) (explaining Congress's federal police power as a portion of Congress's authority to regulate commerce).

168. See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 7 (1998) ("[S]tate governments have historically been understood to possess plenary legislative powers."); Robert F. Williams, *On the Importance of a Theory of Legislative Power Under State Constitutions*, 15 QUINNIPIAC L. REV. 57, 58-60 (1995) (noting the plenary character of state legislative power and the historical bases of the doctrine).

169. See TARR, *supra* note 168, at 7-8 (observing the relative lack of limitation on state legislative power). See generally Williams, *supra* note 168.

170. See Raymond Ku, *Swingers: Morality Legislation and the Limits of State Police Power*, 12 ST. THOMAS L. REV. 1, 28-29 (1999) (discussing the different definitions offered to explain the police power of the states and how the police power doctrine is an inherently troubling concept). The police power is frequently described as the power to regulate for the purpose of protecting or preserving public

including animal cruelty laws.<sup>171</sup>

States are also the traditional site of enforcement of the criminal law.<sup>172</sup> This allows states the power to issue moral condemnation of certain acts by making it a crime to commit those acts.<sup>173</sup> Criminal law can be a powerful tool in shaping public attitudes about the acceptability of certain behaviors.<sup>174</sup> Moreover, individuals protected by the criminal law are elevated to a legal status above that of mere property.<sup>175</sup>

In addition to the relative ease of enacting legislation at the state level, state constitutions frequently allow ways to circumvent a recalcitrant legislature.<sup>176</sup> For example, many states allow constitutional amendments through the initiative.<sup>177</sup> In addition,

health, safety, or morals. See, e.g., *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991) (plurality opinion). However, some commentators have contended that the state police power does not allow the state to regulate solely on the basis of morality. See, e.g., Ku, *supra*, at 28-29 (1999) (arguing that the police power does not extend to "protection of morals alone"). *Contra* Miranda Oshige McGowan, *From Outgroup to Ingroup: Romer, Lawrence, and the Inevitable Normativity of Group Recognition*, 88 MINN. L. REV. 1312, 1313 (2004) (contending that "moral distaste" still constitutes a rational basis upon which a state may base statutory regulation of activity).

171. See M. Varn Chandola, *Dissecting American Animal Protection Law: Healing the Wounds with Animal Rights and Eastern Enlightenment*, 8 WIS. ENVTL. L.J. 3, 7 (2002) (discussing use of police power to enact animal cruelty laws).

172. See, e.g., *Lopez*, 514 U.S. at 561 (arguing that certain policy areas, including criminal law enforcement, have historically been within the province of the individual states).

173. See Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 206 (1996) (arguing that the layperson views criminal liability as equivalent to "moral condemnation").

174. See *id.* at 208 (contending that the existence of a separate regime of criminal law allows the government to effectively communicate that certain behaviors are morally unacceptable); Natalie Loder Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 WM. & MARY L. REV. 263, 276-77 (1987) (articulating the arguments of theorists who contend that criminal punishment can be a powerful tool for the state to teach citizens why certain actions are morally wrong).

175. See Richard M. Lebovitz, *The Accordion of the Thirteenth Amendment: Quasi-Persons and the Right of Self-Interest*, 14 ST. THOMAS L. REV. 561, 573 (2002) (arguing that slaves in the antebellum period were regarded as moral persons as opposed to property because slaves were "protected by criminal law against the violence of others").

176. See generally Lubinski, *supra* note 105 (discussing the use of the initiative and referendum when state legislatures are not responsive to constituent concerns).

177. See TARR, *supra* note 168, at 25 (reporting that sixteen states allow constitutional amendment through a process of citizen proposal directly to the voters). The initiative should be distinguished from the referendum, another example of "direct democracy." Lubinski, *supra* note 105, at 1109. The scholar argues:

many states allow citizens to propose legislation and submit it directly to the people for a vote.<sup>178</sup> State legislative processes offer more varied avenues to reform than parallel federal processes.<sup>179</sup> Despite this feature, reform at the state level is also subject to certain limitations that are specific to state legislation.<sup>180</sup>

*C. The Relationship Between State and Federal Law:  
Federal Preemption and the Dormant Commerce Clause*

1. Federal Preemption

An important limitation on the power of state legislatures is federal preemption.<sup>181</sup> The federal government has the constitutional power to preempt certain state laws.<sup>182</sup> Federal preemption is traditionally analyzed in one of three categories: express preemption,<sup>183</sup> field preemption,<sup>184</sup> and conflict preemption.<sup>185</sup> If a federal court finds that a state law is preempted by federal law or policy, it invokes the Supremacy

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The initiative gives a group of citizens the ability to propose legislation and have that legislation voted on directly by the people . . . . [T]he referendum allows the citizenry to have the final word on whether a bill passed by the legislature becomes (or remains) law by requiring popular approval before the measure is given legal effect.

*Id.* Lubinski also notes that the initiative has been used to promote anti-animal legislation. See *id.* at 1141-42 (discussing successful attempts to enact constitutional amendments protecting the right to hunt and imposition of super-majority requirement to pass animal protection legislation in Utah).

178. See Lubinski, *supra* note 105, at 1113 n.22 (observing that twenty-four states "have some form of initiative and/or statutory referendum system").

179. Compare notes 176-178 and accompanying text with *supra* notes 73-80 and accompanying text.

180. See *infra* Part IV.C.

181. See Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1313-14 (2004) ("Narrowing the circumstances of federal preemption leaves more room for state and local governments to act.").

182. See Susan J. Stabile, *Preemption of State Law by Federal Law: A Task for Congress or the Courts?*, 40 VILL. L. REV. 1, 4 (1995) ("Preemption is the power of the federal government to supplant state law with respect to matters the federal government has the power to regulate under the Constitution.").

183. See Christi R. Martin, *Preemption in the Age of Local Regulatory Innovation: Fitting the Formula to a Different Kind of Conflict*, 70 TEX. L. REV. 1831, 1833 (1995) ("[F]ederal law may be found to preempt state law based on an explicit expression of congressional intent.").

184. See *id.* at 1833-34 ("[C]ourts may . . . find that Congress has indicated an intent to occupy an entire field of regulation.").

185. See *id.* at 1834 ("[C]ourts may find preemption when a state or local law actually conflicts with the federal law . . . .").

Clause<sup>186</sup> and invalidates the state law.<sup>187</sup>

Congress also possesses the specific power to preempt state criminal law.<sup>188</sup> However, preemption of state criminal laws is relatively rare.<sup>189</sup> This is due in large part to the fact that federal preemption of a state criminal law can occur only when the criminal law violates both state and federal criminal law.<sup>190</sup> Challenges to state economic regulations are a more typical example of preemption litigation.<sup>191</sup> The current Supreme Court seems quite receptive to preemption challenges brought by business interests.<sup>192</sup> Preemption conflicts are increasingly likely as rights activists are successful at the state and local level.<sup>193</sup> Expansive interpretation of the scope of federal preemption doctrine results in decreased authority for state legislatures.<sup>194</sup>

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186. U.S. CONST. art. VI, cl. 2. This section of the Constitution states: This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

*Id.*

187. See Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 342-43 (1997) (describing the constitutional basis for invalidation of state laws that conflict with federal law or policy).

188. See Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 88 (1996) ("[T]he federal government can expressly preempt state criminal laws if it so desires.").

189. See *id.* (observing that neither express nor implied preemption of state criminal laws is common); Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 997 (1995) ("[T]he contemporary expansion of federal jurisdiction has not been accompanied by preemption of existing state criminal laws.").

190. See Kurland, *supra* note 188, at 82 ("A 'preemption' issue arises when a state prosecution is commenced by a state prosecutor for a violation of state law and the alleged act also violates a federal criminal law.").

191. See Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741, 753 (2000) ("[T]he typical contemporary preemption action involves an effort by business to strike down a state regulatory statute as inconsistent with federal regulation.").

192. See Chemerinsky, *supra* note 181, at 1327 (arguing that the Supreme Court generally strikes down state laws challenged on preemption grounds by business interests).

193. See Martin, *supra* note 183, at 1832-33 (arguing that preemption conflicts are more likely because state and local governments are increasingly addressing progressive, national, and international issues).

194. See Friedman, *supra* note 187, at 343 (describing preemption as a way for Congress to "displace state lawmaking power in any area in which Congress has regulatory authority").

## 2. The Dormant Commerce Clause

A less obvious limitation on the power of states to enact legislation is the dormant Commerce Clause. Federal courts utilize this doctrine to invalidate state laws that interfere with unexpressed power reserved to Congress by the Commerce Clause.<sup>195</sup> In short, modern dormant Commerce Clause jurisprudence functions to invalidate state laws that discriminate against interstate commerce.<sup>196</sup> The Supreme Court analyzes dormant Commerce Clause challenges to state legislation in two steps.<sup>197</sup> First, the Court asks whether the challenged state legislation facially discriminates against interstate commerce.<sup>198</sup> If so, the law is presumptively invalid and subject to strict scrutiny.<sup>199</sup> If the state law is not discriminatory on its face, the Court attempts to balance the burden on interstate commerce that is created by the state law against the state's interest in enacting the law.<sup>200</sup>

The dormant Commerce Clause is used to invalidate a variety of state legislation that purportedly interferes with interstate commerce.<sup>201</sup> Federal courts engaged in the analysis of facially neutral state laws have struck down solid waste disposal regulations,<sup>202</sup> restrictions on the length of trailers,<sup>203</sup> and anti-

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195. *See id.* at 347 ("Under the dormant Commerce Clause courts strike down state enactments on the ground that they interfere with the concerns underlying the Commerce Clause, despite the fact that Congress has been completely silent on the subject.").

196. *See id.* at 350 (arguing that the Supreme Court seeks to invalidate state legislation that is protectionist in nature).

197. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (splitting the dormant Commerce Clause analysis into two parts) (citing *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

198. *See id.* at 390.

199. *See id.* at 392 (holding that "[d]iscrimination against interstate commerce in favor of local business or investment is *per se* invalid"); Friedman, *supra* note 187, at 350-51 ("Discriminatory, or protectionist, legislation is *per se* invalid.").

200. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (holding "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits"); Friedman, *supra* note 187, at 351 ("Second, if a state law does not discriminate against interstate commerce, then the courts look further to ensure that the burdens on commerce do not outweigh the benefits to the state of regulating.").

201. *See Friedman, supra* note 187, at 353-58 (cataloging recent dormant Commerce Clause cases that have invalidated state legislation).

202. *See Carbone*, 511 U.S. 383 (invalidating local ordinance requiring all solid waste to be processed at a designated transfer station before leaving the municipality).

203. *See Kassel v. Consol. Freightways*, 450 U.S. 662 (1981) (striking down Iowa

corporate farming statutes<sup>204</sup> as impermissible state legislation that discriminated against interstate commerce. Criminal laws tend to be less susceptible to dormant Commerce Clause challenge than economic regulations.<sup>205</sup> Despite this general tendency, federal courts have utilized the dormant Commerce Clause to strike down certain state criminal laws.<sup>206</sup>

One of the primary factors in dormant Commerce Clause analysis of facially neutral laws is evidence of a discriminatory purpose.<sup>207</sup> Federal courts examine statements by state officials and lobbying groups to probe for evidence of discriminatory purpose.<sup>208</sup> In addition, discriminatory effects on out-of-state commerce usually accompany discriminatory purposes and tend to tip the balance against the challenged state regulation.<sup>209</sup> Recent

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law limiting the length of double tractor-trailers driven on interstate highways in Iowa).

204. See *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583 (8th Cir. 2003), *cert. denied*, 124 S. Ct. 2095 (2004) (invalidating South Dakota constitutional amendment prohibiting certain corporations from owning farmland and engaging in farming in South Dakota); Christy Anderson Brekken, *South Dakota Farm Bureau, Inc. v. Hazeltine: The Eighth Circuit Abandons Federalism, Precedent, and Family Farmers*, 22 LAW & INEQ. 347, 362 (2004).

205. See Laura Ann Forbes, *A More Convenient Crime: Why States Must Regulate Internet-Related Criminal Activity Under the Dormant Commerce Clause*, 20 PACE L. REV. 189, 204 (1999) (contending that "though incidental burdens may be placed on interstate commerce during the course of enforcement, such burdens may be both permitted and inevitable when a state legislates in the name of the health and safety of its people"); Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 921-22 (2002) (arguing that the dormant Commerce Clause limits states more strictly in the area of commerce than in criminal law).

206. See *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997) (striking down New York criminal law banning dissemination of child pornography through the Internet on dormant Commerce Clause grounds); see also Sandra Tozzini, *Hair Today, Gone Tomorrow: Equine Cosmetic Crimes and Other Tails of Woe*, 9 ANIMAL L. 159, 175-77 (2003) (discussing the invalidation of state criminal laws banning horse docking on dormant Commerce Clause grounds). Horse docking is a "surgical procedure in which a horse's tail bone is cut, resulting in a shortened, or bobbed, tail." *Id.* at 161. Docking has certain negative effects on the well-being of a horse. See *id.* at 161-62 ("Horses with shortened tails cannot effectively swat at flies and other insects, thus tail docking deprives the horse of its natural flyswatter. Horses also use their tails to communicate a range of emotions such as excitement, submission, illness, anxiety, or anger." (citation omitted)).

207. See Brekken, *supra* note 204, at 362 (implying that a finding of discriminatory purpose in conjunction with discriminatory effect can serve to invalidate a facially neutral state law).

208. See, e.g., *Kassel*, 450 U.S. at 677 (analyzing statements of Iowa's governor and concluding that the law had discriminatory purpose); *Hazeltine*, 340 F.3d at 593-95 (analyzing statements of lobbying groups and individuals and concluding that purpose of amendment was discriminatory).

209. See Brekken, *supra* note 204, at 363 ("Where the court has found discriminatory purpose, the cases are fact specific and evidence of discriminatory

history indicates that federal courts deploy the dormant Commerce Clause aggressively against regulatory legislation that is arguably non-discriminatory in nature.<sup>210</sup> As in the area of federal preemption, an expansive reading of the dormant Commerce Clause results in substantial limitations on the legislative power of states.<sup>211</sup>

## V. The Pursuit of Farm Animal Reform at the State Level: An Efficient Use of Limited Resources

### A. Problems with Current Legislation

#### 1. Shortcomings in Federal Legislation

At the present time, the agribusiness industry is inflicting various forms of cruelty upon farm animals.<sup>212</sup> This cruelty falls into three primary categories: cruelty in the physical conditions under which farm animals live;<sup>213</sup> inhumane treatment of farm animals, including physical abuse;<sup>214</sup> and inhumane slaughter of farm animals.<sup>215</sup> Each of the federal laws that relate to animal protection is severely limited in its ability to protect farm animals.<sup>216</sup> The Animal Welfare Act specifically excludes farm animals from its coverage and is therefore worthless in protecting them.<sup>217</sup> The Twenty-Eight Hour Law fails to protect most farm animals transported in the United States because it does not apply to the trucking industry, the major transporter of farm animals in the United States.<sup>218</sup> For the limited number of farm animals that are protected, the Twenty-Eight Hour Law only protects animals

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effect is highly relevant to the conclusion of the court.”).

210. *Id.* at 207 (analyzing the Eighth Circuit’s aggressive invalidation of South Dakota’s anti-corporate farming amendment); Friedman, *supra* note 187, at 358 (arguing that recent dormant Commerce Clause decisions reflect a tendency towards requiring national uniformity).

211. See Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL’Y 395, 396 (1998) (arguing that the Supreme Court possesses the ability, through its dormant Commerce Clause jurisprudence, to allow the individual states broad or minimal powers to regulate interstate commerce).

212. See *supra* notes 37-46 and accompanying text.

213. See *supra* notes 38-41 and accompanying text.

214. See *supra* notes 42-45 and accompanying text.

215. See *supra* note 46 and accompanying text.

216. See Fox, *supra* note 39, at 146-47 (discussing the deficiencies of federal animal protection statutes).

217. See *supra* note 53 and accompanying text.

218. See *supra* note 60 and accompanying text.



while they are in transport;<sup>219</sup> it does nothing to alleviate the living conditions,<sup>220</sup> physical abuse,<sup>221</sup> or inhumane slaughter of animals.<sup>222</sup> Finally, the law allows animals to be confined without food, water, or rest for amounts of time that are not humane.<sup>223</sup>

The Humane Methods of Livestock Slaughter Act also suffers from critical deficiencies.<sup>224</sup> First and foremost, the Act does not cover poultry; poultry constitute the majority of animals raised for slaughter in the United States.<sup>225</sup> The Act does not provide for any fines for violation of the statute, and there are no provisions for private enforcement of the law.<sup>226</sup> Furthermore, enforcement of the Act is virtually non-existent.<sup>227</sup>

## 2. Deficiencies in State Legislation

Unfortunately for farm animals, the cruelty that is routinely inflicted upon them has not been mitigated by state governments.<sup>228</sup> In most states, anti-cruelty legislation is useless for protecting farm animals.<sup>229</sup> First, the majority of statutes provide loopholes to farmers that eviscerate the protection of the statute with respect to farm animals.<sup>230</sup> Second, most states choose to prosecute animal cruelty cases very rarely.<sup>231</sup> When animal cruelty cases are prosecuted, they usually do not involve farm animal mistreatment.<sup>232</sup> Because anti-cruelty statutes are part of the criminal law, it is difficult to secure a conviction.<sup>233</sup> In the unlikely event that a farm animal owner is convicted, the penalties for violation of an anti-cruelty statute are frequently

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219. See *supra* note 55 and accompanying text.

220. See *supra* notes 37-41 and accompanying text.

221. See *supra* notes 42-45 and accompanying text.

222. See *supra* note 46 and accompanying text.

223. See *supra* notes 56-59 and accompanying text.

224. See Wolfson & Sullivan, *supra* note 31, at 207-08 (attacking the ineffectiveness of the Humane Slaughter Act).

225. See *supra* note 64 and accompanying text.

226. See *supra* note 65 and accompanying text.

227. See *supra* note 65 and accompanying text.

228. See *infra* notes 86-96 and accompanying text.

229. See Wolfson & Sullivan, *supra* note 31, at 209-12 (describing the ineffectiveness of state anti-cruelty statutes).

230. See *supra* notes 86-91 and accompanying text.

231. See *supra* note 92 and accompanying text.

232. See *supra* note 93 and accompanying text (showing that, when prosecuted, animal cruelty cases usually involve companion animals).

233. See *supra* note 94 and accompanying text (describing the difficulties in obtaining convictions in animal cruelty cases).

minimal and thus are an ineffectual deterrent.<sup>234</sup> In light of the deplorable cruelty that farm animals endure and the paucity of state or federal legislation that protects farm animals, reform in this area is sorely needed.

*B. Potential Legislation to Protect Farm Animals: The Value of a Piecemeal Approach*

Farm animal advocates should pursue an incremental strategy that emphasizes animal interests as unique and worthy of human respect independent of the economic consequences. An emphasis on the animal rights position is essential in this area because traditional welfare legislation has not provided for sufficient protection of farm animals.<sup>235</sup> Specifically, the strategy of encouraging "humane" treatment of farm animals has resulted in little real progress for farm animals.<sup>236</sup> Despite the promulgation of various state and federal statutes that purport to secure humane treatment for animals, farm animals remain largely untouched by the current regulatory regime.<sup>237</sup> This is, in part, because farm animals are viewed as property.<sup>238</sup> Accordingly, farm animal advocates should seek the abolition of the property status of animals, not merely humane treatment of farm animals.<sup>239</sup>

Animal rights advocates must also recognize that such wholesale change in the law of the United States and the individual states is not likely to occur in the near future, given public opinion about animal rights<sup>240</sup> and the relative strength of the agribusiness lobby.<sup>241</sup> Rather than cease attempts at litigation and legislative reform,<sup>242</sup> animal rights advocates should focus their attention on pressing for legislation and court decisions that acknowledge animals as more than mere pieces of property.<sup>243</sup> An

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234. See *supra* note 95 and accompanying text.

235. See *supra* note 115 and accompanying text (showing the existing criticism of animal welfare ideology).

236. See *supra* notes 212-234 and accompanying text.

237. See *supra* notes 212-234 and accompanying text.

238. See *supra* note 113 and accompanying text.

239. See *supra* notes 112-116 and accompanying text (describing the benefits of non-property approach).

240. See *supra* note 136 and accompanying text (showing that there is little popular support for animal rights).

241. See *supra* note 159 and accompanying text.

242. See *supra* note 116 and accompanying text (stating that animal rights activists discourage litigation as enhancing exploitation of animals).

243. See *supra* notes 111-114 and accompanying text (noting that animal rights ideology generally advocates for a non-property legal status for animals).

excellent example of such legislation is the unsuccessful bill in Hawaii that would have recognized farm animals as sentient beings.<sup>244</sup> Similarly, anti-cruelty legislation that specifically protects farm animals from cruelty would acknowledge, as do current anti-cruelty statutes that apply to companion animals,<sup>245</sup> that animals have interests that must be respected regardless of the economic consequences to humans. Specifically, farm animal advocates should begin actively pursuing legislation that more effectively criminalizes cruelty to farm animals.

Admittedly, these suggested reforms do not grant farm animals rights or completely destroy their status as property. However, such legislation conveys to the general public the law's determination to regard animals as having legitimate interests that must be taken into account. In particular, criminal laws that punish cruelty to farm animals hold the potential to cement the status of farm animals as beings that are worthy of moral consideration.<sup>246</sup> Ultimately, incremental steps can be useful for instilling the non-property or quasi-property status of animals in the public consciousness. Such steps could be the first on the long road to the ultimate abolition of the property status of farm animals.<sup>247</sup> In addition, incremental reform may also improve the lives of farm animals that continue to be exploited by the agribusiness industry.<sup>248</sup> Incremental reform presents a realistic opportunity for farm animal advocates to accomplish goals and improve the lives of farm animals. An analysis of the governmental framework that reformers must confront is necessary to determine whether farm animal advocates should commit their limited resources to pursuit of change at the federal or state level.<sup>249</sup>

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244. See *supra* note 104 and accompanying text.

245. See *supra* note 93 and accompanying text (referring to the use of anti-cruelty statutes to prosecute animal cruelty to companion animals).

246. See *supra* notes 173-174 and accompanying text (listing scholarly support for the proposition that criminalization of certain conduct sends a message of moral reprehensibility of proscribed conduct).

247. See *supra* note 124 and accompanying text (referring to support by some advocates of animal rights of the gradual reform of the legal protection of animals).

248. See *supra* note 118 and accompanying text (stating that the efforts of animal welfare activists do not relieve all animal suffering).

249. See *infra* Part V.C.

C. *The State Legal System is a Preferable Forum to Pursue Reform*

1. *State Legislation Presents Fewer Constitutional Obstacles to Change*

Pursuing incremental reform that seeks to eradicate the property status of farm animals at the state level is preferable to the pursuit of change at the federal level because state law presents fewer structural obstacles to such change than does federal law.<sup>250</sup> First, state legislators are not as limited as their federal counterparts in their authority to promulgate law that would protect farm animals.<sup>251</sup> This is due to the fact that a state legislature has plenary authority to enact statutes<sup>252</sup> through the exercise of the police power.<sup>253</sup> This power is significant because it means that a state legislature can protect farm animals directly.<sup>254</sup> Using their criminal authority, states can directly address the morality of farm animal cruelty without facing the charge that the adopted legislation is outside of their constitutional authority.<sup>255</sup>

By contrast, federal legislators always need to search for a constitutional provision that will enable them to regulate the treatment of farm animals.<sup>256</sup> The obvious choice is the Commerce Clause, but reliance on it may be problematic given the Supreme Court's recent contraction of federal power under the Commerce Clause.<sup>257</sup> Thus, a federal criminal statute that punishes cruel animal husbandry is unlikely to be sustained by the U.S. Supreme Court.<sup>258</sup> A regulatory statute aimed at protecting farm animals would certainly have a better chance of surviving judicial scrutiny,<sup>259</sup> but even a regulatory statute might not be sustained.<sup>260</sup> The continued treatment of farm animals as mere

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250. See *supra* notes 156-179 and accompanying text (describing the advantages of pursuing changes in animal protection through state legislation).

251. See *supra* notes 168-180 and accompanying text.

252. See *supra* notes 168-169 and accompanying text.

253. See *supra* notes 170-171 and accompanying text (describing the scope of state police power).

254. See *supra* note 83 and accompanying text.

255. See *supra* notes 172-174 and accompanying text.

256. See *supra* note 161 and accompanying text.

257. See *supra* notes 163-166 and accompanying text.

258. See *supra* note 164 and accompanying text (showing that the Supreme Court is unlikely to uphold a state criminal statute absent implication of economic activity).

259. See *supra* note 165 and accompanying text.

260. See *supra* note 166 and accompanying text.

objects of property<sup>261</sup> shows the need for constitutional authority and prevents Congress from treating farm animals as living beings that have their own interests.

State governments have always assumed the bulk of criminal prosecution function, so they are also better suited for this task.<sup>262</sup> This authority enables states to punish the individuals responsible for farm animal abuse, and the criminal law holds the potential to stigmatize cruel farm animal husbandry practices.<sup>263</sup> The use of criminal law to prosecute farm animal cruelty also may change the general view that farm animals are mere property.<sup>264</sup> By contrast, the federal government has no general police power and no general criminal jurisdiction.<sup>265</sup> This is a major structural shortcoming that serves to hinder any federal efforts to recognize farm animals as anything more than articles of commerce.

## 2. Passage of Federal Legislation that Substantially Protects Farm Animals Is Unlikely

In addition to structural problems at the federal level, farm animal advocates also face political obstacles at the federal level. The political reality in the United States is that non-property status for farm animals is simply not popular at the present time.<sup>266</sup> Compounding the problem, groups that lobby on behalf of animal interests are few and relatively underfunded.<sup>267</sup> Agribusiness groups, the likely opponents of farm animal reform, are large, powerful, and well-funded.<sup>268</sup> Because of these factors, farm animal advocates, particularly proponents of animal rights, have little chance of success at the national level.<sup>269</sup>

Conversely, the general public seems somewhat receptive to the idea of animal welfare measures.<sup>270</sup> However, the population of certain states may be far more receptive to the idea of a non-

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261. See *supra* notes 80, 161-166 and accompanying text (describing how the limited scope of federal powers affects the prospects of federal protection of animal rights).

262. See, e.g., *supra* note 172 and accompanying text.

263. See *supra* notes 173-174 and accompanying text (describing how the limited scope of federal powers affects the protection of animal rights).

264. See *supra* note 175 and accompanying text.

265. See *supra* note 167 and accompanying text.

266. See *supra* note 136 and accompanying text.

267. See *supra* note 131 and accompanying text.

268. See *supra* note 159 and accompanying text.

269. See *supra* notes 156-160 and accompanying text.

270. See *supra* notes 133-135 and accompanying text.

property status for animals than others.<sup>271</sup> The level of agribusiness influence varies from state to state.<sup>272</sup> In addition, the cost of pursuing legislation at the state and local level is substantially less than the cost of pursuing legislation at the federal level.<sup>273</sup>

As a consequence of the receptiveness of certain state populations, a relative lack of agribusiness influence in such states, and the relatively low cost of pursuing legislation at the state level, nearly all progressive legislation directed at farm animals that has passed in recent years occurred at the state level.<sup>274</sup> Due to the relative strength of agribusiness in certain states, progressive farm animal legislation is far more successful in some states than in others.<sup>275</sup> But the prospect of state-by-state reform remains attractive because it is less expensive for farm animal advocacy organizations to pursue, and it allows advocacy groups to focus their limited resources on states that may be ready to embrace reform.

### 3. State Law Presents Mechanisms for Circumvention of Recalcitrant Legislatures

Many states have the possibility to utilize direct democracy mechanisms to force change when agribusiness interests block change at the state legislature.<sup>276</sup> When managed properly, farm animal advocates can harness the power of direct democracy to create legislation or constitutional amendments that protect farm animals.<sup>277</sup> Specifically, farm animal advocates have utilized the initiative to pass a constitutional amendment that recognized the interests of certain farm animals.<sup>278</sup> In addition to its use in passing constitutional provisions, the initiative can result in the passage of ordinary legislation that benefits farm animals as

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271. See *supra* notes 98, 104-105 and accompanying text.

272. See *supra* note 34 and accompanying text.

273. See *supra* note 160 and accompanying text.

274. Compare *supra* notes 73-78, with *supra* notes 97-106 and accompanying text (comparing the difficulty in passing federal animal protection laws with the reduced obstacles in previous state legislative advocacy relating to farm animals).

275. See *supra* notes 87-96 and accompanying text. It should also be noted that states with the least agribusiness influence may be the states with a relatively low number of farm animals. See *supra* note 34 and accompanying text. Reforms in such states may be of less practical importance than similar reforms in jurisdictions with a heavier concentration of agribusiness interests.

276. See *supra* notes 176-178 and accompanying text.

277. See *supra* note 176 and accompanying text.

278. See *supra* note 105 and accompanying text.

well.<sup>279</sup>

Neither of these options is available at the federal level. As a result, when agribusiness interests successfully block the passage of legislation that benefits farm animals, farm animal interest groups cannot resort to other methods of legislative enactment. Considering the strength of the national agribusiness lobby,<sup>280</sup> this is a very real limitation on the power of farm animal advocates to press for progressive legislation. Given the differing mechanisms for passing legislation and constitutional amendments at the state and federal level, individual states present more fertile ground for farm animal advocate groups without the organizational capacity to effectively pass legislation at the federal level.<sup>281</sup>

#### 4. State Governments Have Traditionally Been Leaders in Innovation and They Continue to Be Today

There is a stronger possibility of reform at the state level because certain states have always been historically responsible for pioneering policies that were incapable of passage at the federal level.<sup>282</sup> Similarly, certain individual states continue to pass legislation that is significant because it insists that farm animals have interests that must be considered.<sup>283</sup> These states are breaking new ground in considering or passing legislation that benefits farm animals in a manner similar to that seen with other progressive social movements.<sup>284</sup> These states have the potential to become harbingers of a more progressive policy towards farm animals in all of the states, and ultimately at the federal level as well.<sup>285</sup> Once progressive states legislate on behalf of animals, they can move in the direction of lobbying for a federal standard that minimizes the risk of business flight to jurisdictions that are more tolerant of animal cruelty.<sup>286</sup>

By way of comparison, the federal government's record has been lackluster in promoting the interests of farm animals.<sup>287</sup> The federal government's continued inability and unwillingness to protect farm animals has much to do with the constitutional

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279. See *supra* note 178 and accompanying text.

280. See *supra* note 159 and accompanying text.

281. See *supra* note 156 and accompanying text.

282. See *supra* notes 141-145 and accompanying text.

283. See *supra* notes 97-106, 148-153 and accompanying text.

284. See *supra* notes 141-142 and accompanying text.

285. See *supra* note 147 and accompanying text.

286. See *supra* notes 146-147 and accompanying text.

287. See *supra* Part II.A.

limitations on Congress.<sup>288</sup> In addition, the difficult legislative and constitutional obstacles to passing legislation that protects farm animals prevents Congress from acting decisively in this policy area.<sup>289</sup> As in the past, Congress is likely to be a follower, not a leader, in recognizing and expanding farm animal rights.<sup>290</sup>

The prospect of success at the state level should encourage farm animal advocates to direct their efforts at state and local governments. In addition, farm animal advocates should consider the impact that the relative distribution of power between federal and state governments will have on their efforts to pursue reform.<sup>291</sup>

## VI. The Potential Shortcomings of Reliance on State Legislation to Protect Farm Animals

### A. Preemption by the Federal Government

Although it appears that farm animal advocates have a better chance of success if they concentrate their efforts at the state level,<sup>292</sup> there are a number of possible shortcomings with this strategy. Perhaps the most dangerous scenario involves the possibility of preemption by the federal government.<sup>293</sup> If farm animal advocates are too successful at the state level, they may incur the wrath of the agribusiness lobby.

Agribusiness interests can pursue federal legislation that preempts state law protecting farm animals. Whether state legislation is criminal or regulatory in nature, federal law can preempt state legislation.<sup>294</sup> If a regressive federal law was passed in the area of farm animal treatment, a preemption challenge by agribusiness interests to a state regulatory law that protects farm animals would have an excellent chance of success.<sup>295</sup>

However, this risk is mitigated by the fact that federal preemption of state criminal law is substantially less frequent than federal preemption of state regulatory legislation.<sup>296</sup> In

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288. See *supra* notes 256-261 and accompanying text.

289. See *supra* notes 256-261 and accompanying text.

290. See *supra* note 147-148 and accompanying text.

291. See *infra* Parts VI.A-D.

292. See *supra* Part VI.C.

293. See *supra* Part IV.C.1.

294. See *supra* note 188 and accompanying text.

295. See *supra* note 192 and accompanying text.

296. See *supra* note 191 and accompanying text.



addition, preemption of a particular state regulation does not foreclose the possibility that state anticruelty laws directed at agribusiness would survive a preemption challenge.<sup>297</sup> Finally, if preemption of a state statute occurred because of express or conflict preemption, an individual state could attempt to craft a regulatory scheme that circumvents the preemptive federal law.

### *B. Dormant Commerce Clause Challenges*

In addition to the problem of federal preemption, efforts to reform state farm animal protection law may face dormant Commerce Clause challenges. Business interests may challenge a law that regulates the farmed-animal industry on the grounds that the law discriminates against interstate commerce.<sup>298</sup> Specifically, any farm animal law reform motivated in part by the desire to disadvantage out-of-state businesses may lead a federal court to conclude that the law is motivated by a discriminatory purpose and invalidate it.<sup>299</sup> Similarly, if a statute or amendment predominantly affects out-of-state interests, a court may also infer discriminatory purpose.<sup>300</sup> The result could be the invalidation of progressive state legislation that is facially neutral.<sup>301</sup>

Farm animal advocates must guard against this possibility by choosing their allies and their words carefully. They can lessen the chance of invalidation by distancing themselves from organizations or statements that avow or imply a desire to disadvantage out-of-state interests.<sup>302</sup> Farm animal advocates should reiterate that any regulatory legislation is designed only to benefit farm animals; any discriminatory effects on interstate commerce must be characterized as purely coincidental or simply not addressed at all to avoid the appearance of discriminatory purpose.<sup>303</sup>

Furthermore, farm animal advocates can seek to avoid dormant Commerce Clause invalidation by advocating the passage of criminal laws rather than regulatory laws. Reformation of an existing state anti-cruelty statute is far less susceptible to dormant Commerce Clause challenges than attempts to achieve

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297. See *supra* notes 189-190 and accompanying text.

298. See *supra* note 204 and accompanying text.

299. See *supra* note 207 and accompanying text.

300. See *supra* note 209 and accompanying text.

301. See *supra* notes 202-204 and accompanying text.

302. See *supra* note 208 and accompanying text.

303. See *supra* note 209 and accompanying text.

reform through regulatory methods.<sup>304</sup> However, farm animal advocates must remain cognizant of the potential for dormant Commerce Clause challenges even when criminal laws are at issue, to limit the potential of dormant Commerce Clause invalidation.<sup>305</sup>

*C. Farm Animal Advocates Should Support Efforts to Limit the Scope of Federal Authority*

Farm animal advocates face a limited threat from federal preemption and dormant Commerce Clause doctrine.<sup>306</sup> Accordingly, they should support efforts to limit the scope of federal preemption doctrine that could potentially destroy gains at the state level.<sup>307</sup> For the same reason, farm animal advocates should support efforts to limit the scope of the dormant Commerce Clause doctrine.<sup>308</sup> Contraction of federal authority in these doctrinal areas reduces limitations on the authority of state legislatures.<sup>309</sup> Increased potential for regulatory reform allows farm animal advocates greater leeway to pursue incremental reform at the state level.

*D. Reactionary Activity at the State Level*

In addition to potential problems at the federal level, it is always possible that progressive activity in one state will lead to regressive activity in other states.<sup>310</sup> Anti-animal groups have successfully pursued legislation that attempts to prospectively curtail progressive efforts at the state level.<sup>311</sup> These groups have used some of the same mechanisms that allow animal advocates to pursue meaningful change, including direct-democracy tactics like the initiative.<sup>312</sup>

Certain states can and have created economic incentives for agribusiness to relocate to their state in the form of more permissive regulatory environments.<sup>313</sup> As a consequence, the states that have the most permissive laws for agribusiness tend to

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304. See *supra* note 205 and accompanying text.

305. See *supra* note 206 and accompanying text.

306. See *supra* Parts VI.A-B.

307. See *supra* Part VI.A.

308. See *supra* Part VI.B.

309. See *supra* notes 194, 211 and accompanying text.

310. See *supra* note 146 and accompanying text.

311. See *supra* note 177 and accompanying text.

312. See *supra* note 177.

313. See *supra* note 35 and accompanying text.

attract factory farms that are prone to promulgating abusive farm animal environments.<sup>314</sup> To some extent, this situation resembles yet another "race to the bottom,"<sup>315</sup> in which certain states attempt to gut their farm animal regulations in an attempt to draw agribusiness interests to their states.

The possibility of a "race to the bottom" with respect to farm animal protection is weakened by the fact that, historically, competition at the state level has led to federal intervention that sets a relatively progressive national floor.<sup>316</sup> Even in the event that a "race to the bottom" would occur, it might still benefit farm animals in the long run if competition among states leads to a more progressive federal standard.<sup>317</sup> Furthermore, the imposition of a federal baseline of protection would not necessarily preclude individual states from pursuing more stringent regulations or criminal laws.<sup>318</sup>

## Conclusion

The problem of inhumane treatment of farm animals is of growing concern to farm animal advocates and the public at large.<sup>319</sup> Despite this concern, there is little state or federal legislation that regulates the abuse of farm animals<sup>320</sup> and the legislation that does purport to regulate farm animal living conditions is woefully inadequate.<sup>321</sup> The political reality that farm animal advocates face necessitates a piecemeal approach to progressive farm animal legislation.<sup>322</sup>

For farm animal advocates, pursuit of action at the state level appears to be preferable to pursuit of action at the federal level.<sup>323</sup> The broad regulatory and criminal power that the individual states possess is far more suitable to solving the problems faced by farm animal advocates than the limited constitutional authority that the federal government enjoys.<sup>324</sup> Certain individual states are far more likely to support reform

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314. See *supra* Part I.

315. See *supra* note 146 and accompanying text.

316. See *supra* note 147 and accompanying text.

317. See *supra* note 147 and accompanying text.

318. See *supra* notes 148-153 and accompanying text.

319. See *supra* notes 133-135 and accompanying text.

320. See *supra* Part II.

321. See *supra* Part V.A.

322. See *supra* Part V.B.

323. See *supra* Part V.C.

324. See *supra* Part V.C.1.

efforts by farm animal advocates than the federal government.<sup>325</sup> Many states offer animal advocates opportunities to put issues directly to the voting public when agribusiness interests block change at the state legislature.<sup>326</sup> Historically and to date, certain individual state and local governments have been the true pioneers in advancing progressive legislation.<sup>327</sup>

The ultimate pursuit of animal rights and recognition of animals as more than mere property can be better advanced at the state level because of the state power to enact general criminal laws pursuant to their respective police powers.<sup>328</sup> By contrast, continued reliance on the federal government can only lead to the continued treatment of farm animals as mere articles of commerce.<sup>329</sup> Accordingly, farm animal advocates should insist on a stronger judicial conception of federalism that allows for more state autonomy and less federal intervention.<sup>330</sup>

Pursuit of change at the state level is not without its perils for animal advocates. Agribusiness has a vested interest in passing federal law that preempts progressive state legislation in the area of farm animal regulation.<sup>331</sup> Similarly, agribusiness interests may challenge state legislation as violative of the dormant Commerce Clause.<sup>332</sup> Agribusiness interests can also utilize the unique features of state governments to their advantage.<sup>333</sup> Finally, progressive state legislation could provoke a "race to the bottom" in certain states with laws sympathetic to agribusiness interests.<sup>334</sup>

Despite the potential fallout from action at the state level, the potential benefits of the pursuit of reform at the state level outweigh the potential costs. Activism at the state level offers the best hope for animal welfare and rights activists alike to advance their agenda, dismantle the meat industry piece by piece, and ultimately eradicate the striking inequalities that persist in the treatment of farm animals.

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325. *See supra* notes 271-272 and accompanying text.

326. *See supra* Part V.C.3.

327. *See supra* Part IV.A.

328. *See supra* notes 262-263 and accompanying text.

329. *See supra* note 265 and accompanying text.

330. *See supra* Part VI.C.

331. *See supra* Part VI.A.

332. *See supra* Part VI.B

333. *See supra* notes 311-312 and accompanying text.

334. *See supra* notes 313-315 and accompanying text.

