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Why American Animal-Protective Legislation Does Not Always “Stick” and the Path Forward

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In the United States, it is difficult to enact federal legislation, and legislation to protect animals is no exception. Since states have sovereignty over the property within their borders and animals are legally the property of humans, animal law reform generally occurs at the state or local level, if it occurs at all. However, not only is it difficult to pass animal-protective legislation at the state level, especially in the farmed animal context, many animal-protective laws do not “stick” after enactment. As a result, in addition to pursuing traditional legal reform in the form of legislative and regulatory reforms, lawyers in the US who are interested in animal protection have pursued alternative routes to reform, including corporate campaigns to encourage retailers to voluntarily embrace more rigorous animal husbandry standards in their purchasing policies. They have also begun representation of businesses that are attempting to provide alternatives to animal-based products.

Animal cruelty has long been recognized as a crime in the United States and, indeed, all fifty states have enacted criminal animal anticruelty statutes¹. However, every one of those states is the home to factory farms that are largely unregulated, on animal cruelty grounds, regarding the methods of production that have been banned elsewhere as cruel². How is this the case? American anti-cruelty statutes generally prohibit the infliction of unnecessary suffering on animals. They are not regulatory statutes and therefore are interpreted not through the promulgation of regulations by an administrative agency. Instead, they are enforced case by case by prosecutors, who decide which cases to bring; by judges, who decide which charges to sustain; and by juries, who decide which defendants to convict. To date, they have been interpreted in such a way that they are applied only to the infliction of intentional, severe suffering and only in cases where that suffering is inflicted gratuitously. Starving a cow or brutally beating a dog in anger, for instance, serve no justifiable purpose and thus may give rise to charges.

On the other hand, suffering experienced by animals in the service of what is considered a legitimate human goal is treated quite differently, and will not be subject to prosecution. Thus, confinement of a pig in a gestation crate, or forcing a calf to run at high speed and then roping her in a way that will slam her on to her back to provide entertainment at a rodeo, will not give rise to charges. Although some additional protections are provided to animals in some industries by the federal Animal Welfare Act (the efficacy of which is subject to sharp debate between those industries and animal advocates) the real point here is that not *all* animals are covered by that law, most notably, those that are raised for food³. Since 98 % of the animals used for any purpose in the US are raised for food⁴, this is a very substantial exemption.

Because anti-cruelty laws are often the only laws regulating the treatment of animals raised for food in most jurisdictions, the legal allowance within those laws for the “necessary” infliction of suffering and death and the very, very broad interpretation of “necessary,” means that the treatment of such animals is subject to very few legal constraints⁵. Moreover, in a majority of states, animals raised for food are also specifically exempted from the statutes in a very particular way⁶. In these states, the treatment of such animals is statutorily exempt from anti-cruelty laws as

long as it is the sort of treatment that is customary in the industry. Much of the suffering experienced by these animals is caused by housing systems, and husbandry practices, that are still entirely customary in the industry in the United States, such as the use of the gestation crate for pigs or the densely stocked battery cage for laying hens, or castration or tail docking without anesthesia⁷.

Even in the minority of states that do not have such statutory exemptions and where, theoretically, anti-cruelty laws could be open to interpretation to apply them more broadly, as criminal statutes, they are only enforceable by local prosecutors⁸. There is no civil enforcement, and animal advocates who are interested in pursuing such arguments are left with the daunting task of persuading a prosecutor in a rural county to bring a potentially precedent-setting case against a local business seeking to expand protections for animals.

For all these reasons, legal advocates for animals have needed to develop strategies other than pursuit of anticruelty statutory enforcement. Such advocates have, in some instances, turned to legislative efforts in various states to expand criminal anticruelty statutes with very specific provisions banning the use of certain practices or to enact non-criminal animal welfare laws doing the same. These efforts have met with some limited success. Subsequent to passage however, such state laws are readily challenged, often successfully.

Why is it that these laws, frequently seeking modest protections for animals that have been implemented in the E.U. for a number of years, do not always “stick?” We would posit that the answer to that question lies in the intricacy of the interaction between federal and state law, certain constitutional limitations on the power of the states, and, perhaps most importantly, a very American resistance to limitation of rights in private property, even in the name of progressive change, by way of legislation and regulation, rather than through market forces.

One major type of challenge to state legislation banning a certain practice is the claim that the law conflicts with one or more federal laws. Under the US federal system, states have a great deal of power to pass laws on a wide variety of matters, but if a federal law has been passed regarding the same subject, it may, as a matter of constitutional law under the Supremacy Clause of the US Constitution, preempt the state law and render it invalid. Stated very simply, the circumstances under which such preemption will occur are when Congress has expressly stated that the federal law will preempt state law, when there is an actual conflict between federal law and state law, and when federal regulation is so pervasive regarding the subject matter of the state law that it may be concluded that Congress intended to “occupy the field” of regulating this particular endeavor⁹. As one can imagine, due to the nature of the US legal system, in which the federal government and the state governments have robust bodies of law in wide-reaching areas of interest, preemption is a much-litigated area of law.

California’s ban on foie gras production and sale is a recent example of an animal protection law that has been the subject of a preemption challenge¹⁰. In 2004, California enacted California Health & Safety Code § 25981, which prohibits the production of foie gras by force-feeding birds. In the early days of farmed animal advocacy, foie gras was seen as a particularly attractive target for animal protection advocates in the US. It is a luxury food, not eaten by the vast majority of Americans, who by and large have not only never heard of it, but cannot even pronounce it. It is produced by a method, force-feeding, that is not used for the production of other foods and which evokes a visceral distaste in many people. Moreover, the question of whether force feeding violates principles of animal welfare seems to many Americans to be a relatively simple, yes-or-no issue that is less prone to opening up the difficult discussions involved in, say, stocking density – how much space is enough space? Although the law ostensibly allowed producers to find a way to produce foie gras in a different way, which, had they done so, might have opened up the issue to arguments regarding where to draw the line between humane and inhumane, in reality, the

problem, and the requisite solution, appeared simple. If force-feeding is inhumane, then foie gras is inhumane, and should be banned.

Although the Code section was passed in the early days of farmed animal advocacy in the US, it did not take effect until 2012, after an 8 year delay, which, as noted, had been built into the law in order to give foie gras producers the opportunity to find a less inhumane way of producing foie gras¹¹. In 2012, the State's only foie gras producer ceased production and began looking for another state in which to produce foie gras. Another Health & Safety Code section prohibited the sale in California of any foie gras product produced by force-feeding birds¹². Since all foie gras (or, perhaps, virtually all foie gras¹³) is currently produced by way of force-feeding, the ban means that foie gras produced outside of California cannot be sold in California. The facial effect of both Code provisions is that foie gras produced anywhere in the world by way of force-feeding cannot be sold in California. Although the ban on *production* of foie gras was not challenged, the ban on *sale* was challenged in 2012 by vendors and restaurants seeking to protect the right to sell foie gras made outside of California. Chefs and restaurateurs defied the ban even as they challenged it legally by, for example, "giving away" foie gras on the top of an expensive salad or hamburger¹⁴. It is worth noting that independent of the delay before the law went into effect and the constitutional challenge discussed herein, during the time when the law was putatively active, it appears the sales ban was never enforced, even against those selling it outright.

In January of 2015, U.S. District Judge Stephen Wilson decided that California's ban on foie gras sales is pre-empted by the federal Poultry Products Inspection Act and barred its enforcement¹⁵. Judge Wilson's decision turned on whether a sales ban on a poultry product produced in a particular manner is an "ingredient requirement" under the Poultry Products Inspection Act. He found that Congress expressly intended to preempt state law as to "[m]arking, labeling, packaging, or ingredient requirements... [that] unduly interfere with the free flow of poultry products in commerce."¹⁶ He decided that in this case, federal law preempts California's sales ban because the ban has to do with the force feeding of birds, which is within the meaning of an "ingredient requirement" because the sales ban affects only foie gras made in a particular way. Judge Wilson rejected animal advocates' counter-argument that the ban "regulates a process rather than an 'ingredient' because it regulates the manner of producing the fattened bird livers rather than the use of a particular ingredient."¹⁷

The 9th Circuit reversed this decision on appeal in September of 2017. The three-judge panel found that there was no express preemption, no implied preemption, no preemption based on the "ingredient requirement" position taken by the lower court, and also that the California law was not preempted by the federal Poultry Products Inspection Act even if it functioned as a complete ban on foie gras¹⁸. This was certainly lauded as a victory by those seeking greater protection for animals, and justifiably so. However, the district court's decision still stands in practice, and foie gras still legally able to be sold in California as of the time of this writing. This is because the 9th Circuit decision does not take effect until a mandate is issued vacating the district court's injunction on the enforcement of the ban, and the petitioners are entitled to a stay of that mandate while the appeals process is ongoing. On October 10, 2017, the producer and restaurant petitioners submitted a petition for a rehearing on banc with the 9th Circuit, and then in December, the 9th Circuit stayed the order while the petitioners appeal to the U.S. Supreme Court.

This is not the first time federal preemption has played a prominent role in challenges to laws designed to improve animal welfare. In fact, Judge Wilson explicitly refers to the 2012 United States Supreme Court decision in *National Meat Association v. Harris*, which considered whether the Federal Meat Inspection Act preempted California's laws prohibiting the slaughter of nonambulatory animals for human consumption purposes and producing or selling meat from nonambulatory animals for purposes of human consumption¹⁹. While federal regulations prohibit

the slaughter of nonambulatory cattle, primarily because of fears of mad cow disease, California wished to extend that protection to other animals brought to slaughter and thus required humane euthanasia of such nonambulatory animals. These animals can be suffering from debilitating illnesses or unable to walk because of inhumane treatment and circumstances during confinement. The rationale behind the law was that prohibiting their slaughter and sale would potentially keep products from diseased animals out of the human food system and would incentivize better treatment of animals so that they would be ambulatory at the time of slaughter. For instance, raising animals on slatted floors makes it somewhat easier to hose down the facility but induces lameness, sometimes to the point that animals cannot walk. Inability to slaughter or sell the meat from such nonambulatory animals could have resulted in different, more humane flooring.

The law was challenged by pig producers, who claimed that California's laws were preempted by the Federal Meat Inspection Act ("FMIA")²⁰. Pig producers may have felt particularly aggrieved by the law since, because of their size and the minimal movement that they are afforded in standard pig production, pigs are particularly subject to lameness by the time they are sent to slaughter and the law had the potential to limit the slaughter of a significant number of pigs who were lame, but not necessarily diseased, and thus have a notable financial effect on the industry. The pig producers received an initial victory when the Federal District Court agreed with them²¹, but that decision was overturned on appeal to the 9th Circuit appellate court. The 9th Circuit decided that the California law was not regulating inspection or slaughter, which are regulated by the FMIA and therefore cannot be subjected to contrary regulation by the states²². Instead, the court found, the law merely addressed "the kind of animal that could be slaughtered," which was not regulated by the federal law and thus subject to regulation by the states.

The case was then accepted for review by the Supreme Court, which duly rejected the 9th Circuit's characterization of the law, deciding that the Federal Meat Inspection Act, "sweeps [so] widely" that preemption applies even when state laws are merely additional or different, even though not actually inconsistent with, the FMIA requirements²³. The Supreme Court noted that the FMIA regulates the production and distribution of meat products and expressly allows for the slaughter, distribution, and sale of nonambulatory animals in defined circumstances. The FMIA also contains an "express preemption" provision, which explicitly prohibits states from creating additional or different requirements from FMIA requirements.

The Supreme Court rejected other arguments that would have kept the California laws alive. One argument, that California's laws were directed at humane treatment and not food safety or slaughter provisions, was rejected because the FMIA contains some provisions that pertain to humane treatment²⁴. The Court also rejected the argument that California's laws deal with animals who are *not* going to be turned into meat while the FMIA regulates animals who *are* going to be turned into meat²⁵. As an illustration, the Court pointed to an instance where the FMIA did, in fact, regulate animals who were not going to be turned into meat, i.e., the FMIA prohibition of sales of meat from pigs infected with hog cholera. In other words, the combined effect of a broad express preemption clause with statutory provisions and regulations that affect meat production processes, food safety, and humane treatment resulted in an invalidation of California's laws.

It should be noted that, while federal preemption arises frequently as a challenge to animal-protective state laws, it is not always a successful argument. For instance, it arose in the context of a California law prohibiting the sale in California of products made from kangaroo skin or meat²⁶. The law was challenged by Adidas, which sought to import shoes made with kangaroo skin²⁷. The law was defended by an animal protection organization, which sought to prevent harm to kangaroos by, among other things, further development of a market in kangaroo skins. Adidas argued that California's law was preempted by federal wildlife laws. The California Supreme Court upheld the ban, holding that federal laws in that instance were meant to create incentives for other

countries such as Australia to protect certain species but also left room for states to further protect species of wildlife²⁸.

While this litigation was successful for animal advocates, and for kangaroos, they nevertheless ultimately lost when Adidas prevailed on legislators to change the law such that its products would not be prohibited for sale in California²⁹. Prevailing on a preemption challenge may be necessary but not sufficient for protecting animals. Successes in the courts are often vulnerable to being overturned in legislatures, where agricultural or commercial lobbies frequently have more sway than animal advocates.

Similar results may occur when changes favoring animals are made at a regulatory level, as well as at a legislative level. For many years, the United States Department of Agriculture, which administers the federal Animal Welfare Act³⁰, interpreted the word “animal” to simply exclude rats, mice and birds³¹. Since these animals constitute the overwhelming majority of animals used in research, this exclusion had the effect of vastly reducing the number of research animals regulated by the Act’s provisions³². A lawsuit was brought by animal advocates in which the court indicated, in a preliminary decision on a motion to dismiss, that it was disposed to hold that it was not within the agency’s purview to interpret the statute to exclude whole species of animals from the definition of “animal”.³³ The USDA, perhaps realizing that its argument was a weak one and that it was unlikely to ultimately prevail, decided not to litigate any further and agreed to commence rulemaking regarding a modification of the definition that excluded rats, mice and birds. As in the kangaroo case, however, this victory for the plaintiffs was a Pyrrhic one. Congress immediately attended to the voices of the pharmaceutical and medical research lobbies and modified the Animal Welfare Act itself to exclude rats, mice and birds bred for research³⁴.

Another type of federal/state controversy involving animals arose in the aftermath of voter approval of a ballot measure in California affording certain agricultural animals a defined minimum space allotment and thereby intended to effectively prohibit veal crates, sow gestation crates, and battery cages.³⁵ Ballot measures, which are permitted in about half the states, allow advocates for a particular cause to place a proposed law directly on the ballot for voter approval, thus bypassing the legislature. The requirements for doing so vary from state to state, but generally provide that advocates must gather a very large number of signatures in support of the measure before it will be put before the voters. Advocates generally use ballot measures when they have not been successful in achieving reform through state legislatures but believe that they have the support of the general population.³⁶ Animal advocates were under the impression that state legislatures were unduly influenced by powerful agricultural lobbies regarding better treatment of farmed animals and that the average person would agree that the most intensive confinement systems should be eliminated.

In 2008, farmed animal advocates were successful in gathering the requisite signatures for the proposed law regarding housing and the measure went on the ballot to be voted on by the electorate at large.³⁷ It was duly approved by 63.5% of California voters.³⁸ Proposition 2, as it was known, was worded in a positive fashion, rather than as a prohibition, and thus required, with exceptions that are not relevant here, that confined animals have enough room to fully stand up, turn around, lie down, and spread their wings (in the case of egg-laying hens) or fully extend their limbs (in the cases of veal calves and gestating sows). While such language appears to effectively prohibit gestation crates and veal crates, the egg industry asserted that this language was unclear as to whether cages were prohibited for laying hens and, if they were not, how densely stocked a cage could be in order to allow the hens within it to stand up, turn around, lie down and spread their wings. Thus, in 2012 litigation was brought by egg producers regarding whether Prop 2 was unconstitutionally vague, specifically regarding what type of caging would be adequate to comply with the law.³⁹ Animal advocates prevailed in that litigation on February 4, 2015, when a federal

appellate court found that “a person of reasonable intelligence can determine the dimensions” of Prop 2-compliant housing.⁴⁰ However, that did not end the controversy or litigation connected to Prop 2.

After the ballot initiative had passed in 2008, a law was passed by the California legislature in 2010 that prohibited the sale in California of eggs laid by hens housed in a way that was not compliant with the standards set forth in Prop 2 even though those hens were housed in *other* states where there were no requirements regarding the stocking density of laying hens.⁴¹ According to the Pew Charitable Trusts, about 95% of eggs produced in the United States come from hens confined in cages that provide less space per hen than an 8 ½ “ by 11” piece of paper.⁴² California consumes approximately 9 billion eggs per year but produces only about 5 billion.⁴³

California legislators were no doubt concerned that California’s regulation of the space that must be provided to laying hens would harm in-state producers, since they would be forced to compete with out-of-state producers, who would be able, through their use of crowded cages, to produce eggs more cheaply for sale in California than could California producers. Thus, the rationale for the law was to prevent California’s egg industry from being put out of business or forced to move to other states by an inability to compete. The ban on out-of-state eggs produced from battery-caged hens removed the advantage that out of state producers would otherwise hold. It was also presumably in accord with the wishes of California voters, who, in voting for Proposition 2, surely had no reason to want to fill California supermarkets with eggs laid by hens who were not subject to its protections merely because were not housed within California.

Six states filed suit in 2014, claiming that this law regulating the production method for eggs imported into California is unconstitutional because the Commerce Clause of the United States Constitution prohibits states from unduly burdening interstate commerce, even in the absence of any federal regulation of the specific challenged commercial activity.⁴⁴ Egg producers in Missouri, one of the states challenging California’s law, export to California about 1/3 of the eggs produced in Missouri. The argument was that being forced to comply with California’s requirements in order to continue those transactions was a violation of the constitutional rights of Missouri’s egg farmers.

The States lost at the federal District Court level, though not on the merits.⁴⁵ Instead, the judge decided that the States lacked standing to pursue the claim, i.e., they were not the appropriate injured party. In the Court’s view, the States could not bring a lawsuit on behalf of egg farmers doing business in their state because they were actually representing only those egg producers that intended not to comply with California’s laws and were not representing all egg producers in the State. That decision was appealed to the 9th Circuit, which in 2016 upheld the district court’s decision finding the plaintiffs lacked standing, but dismissed the complaint without prejudice in order for the plaintiffs to have the opportunity to allege post-effective-date facts to support a standing argument.⁴⁶ In early 2017, the 9th Circuit filed an order and amended opinion largely consistent with the 2016 opinion. In March of 2017, the petitioner states sought review by the U.S. Supreme Court. Two additional lawsuits of note were filed in 2017. In December 2017, 13 states, five of which are also plaintiffs in the *Missouri v. Harris* case, filed a complaint seeking direct Article III original jurisdiction review by the U.S. Supreme Court as a conflict between states.⁴⁷ This complaint makes very similar arguments to *Missouri v. Harris*, but appears to focus more heavily on economic impact, and uses detailed economic research to do so. Second, a week later, on December 11, 2017, 13 states, ten of which are also plaintiffs in *Missouri v. California*, filed a complaint also seeking direct Supreme Court review, also making a similar Article III original jurisdiction argument.⁴⁸ The defendant here is the state of Massachusetts, and the claim is over a Massachusetts law that is similar to the California law at issue in the other actions. It passed as part of a voter-approved ballot measure in late 2016 but is not set to go into effect until 2022. The

Massachusetts law covers calves and pigs as well, but otherwise is an analogous sales ban requiring certain space restrictions. The arguments made in this case also closely parallel the other cases.

As is clear from these examples, legislation to protect animals exploited for commercial purposes is subject to constitutional challenge in the federal courts. Accordingly, progress in passing legislation that will actually “stick” is slow.

Although, as noted, there are federal laws regulating slaughter (although these laws exclude poultry, which have been the subject of many of these legal actions), there are no federal laws regulating the amount of space that animals raised for food must be afforded during their lives and, therefore, when such laws have been enacted in the states, they have not been subject to federal preemption. The first few of these laws, in Florida, Arizona and, as described above, California, affording more space for either gestating pigs, veal calves or laying hens, or some combination of those three, were passed by ballot initiative.⁴⁹ Following these successes, the Michigan, Washington, and Oregon legislatures enacted laws that require more space for egg-laying hens,⁵⁰ and Ohio has banned the adoption or use of newly constructed battery cages.⁵¹ Other states, including Colorado, Kentucky, Maine, Michigan, Ohio, Oregon, and Rhode Island, have passed laws that effectively ban the gestation crate or the veal crate.⁵² As each state passes state laws that track other states’ laws, which have been tested through constitutional challenges, the United States as a whole could develop a more animal-protective legal environment. These efforts continue – animal advocates are currently seeking to put a measure on the ballot in California in 2018, which would add to and strengthen the requirements of Proposition 2, and which would be similar to the Massachusetts law discussed *supra*.⁵³ However, there are roadblocks for this approach. Even in states that have passed such laws through state legislatures, it has often been under threat of a ballot initiative, and half the states do not have such a ballot initiative process. The laws are not necessarily identical, creating problems for the industry, which may have to deal with a patchwork of varying requirements. Moreover, some of those in the industry that do not want to comply with such laws have moved to states that are considered safe from progressive animal laws, such as Idaho,⁵⁴ or they were already located there to begin with, such as Iowa and many southern states. It is also worth noting the successful items of state legislation have all been production bans within the relevant states. When states attempt to enact sales bans within their states, which are much more impactful for the animals, these bans draw legal challenges, as discussed *supra*.

Moreover, attempts at federally regulating the welfare of farmed animals have not been successful. Even with the support of the egg industry, a federal bill that would have adopted an enriched cage system nation-wide was repeatedly unsuccessful in Congress, apparently due to strong opposition from other sectors of animal agribusiness, who quite openly admit that they fear that federal regulation of space requirements for the egg-laying hen will lead inexorably to federal regulation of the housing systems for other animals.⁵⁵

Therefore, while animal advocates have seen some progress, there have also been many frustrations, and, as a result, animal advocates have developed alternative approaches to legislation to advance animals’ interests. The most successful approach to date has been the active pursuit of private agreements with food retailers, such as grocers and fast food restaurants. In these agreements, these retailers commit to requiring, or at least strongly encouraging, their suppliers to adopt increasingly humane standards. Interestingly, one of the areas in which this approach first began was the sale of foie gras, which was the subject of a number of agreements with restaurants to refrain from selling it. Most notably, in 2007, chef and restaurateur Wolfgang Puck agreed not to sell it in his numerous upscale restaurants.⁵⁶

Since then, private agreements have arguably become the primary focus of welfare reform efforts for farmed animal advocates in the US. For instance, The Humane Society of the United States entered an agreement with McDonald’s that its suppliers would phase out gestation crates.⁵⁷

Since big retailers such as McDonald's already conduct regular audits of their suppliers, the existence or absence of gestation crates in violation of such agreements at the suppliers' facilities should be easy to detect. Getting such agreement from big retailers whose market share would make a difference to large numbers of animals is important and sometimes difficult.

These types of reforms are also reaching chickens. Recently, McDonald's followed the lead of Burger King, Nestle, Sodexo, Aramark, Heinz, Starbucks, and Compass Group, in agreeing to require that their suppliers would phase in the use of cage-free housing for their egg-laying hens.⁵⁸ McDonald's announcement included a firm timeline of 10 years. Considering the paucity of cage-free eggs produced in the US currently, and the enormous buying power of these retailers, this will mean a sea change in the way that egg producers do business.

While such agreements could make important and significant changes in the housing systems used by animal agriculture if retailers actually comply with the agreements they make, such agreements are unlikely to achieve all of the improvements that animal advocates seek regarding the treatment of farmed animals. Inhumane practices that are more difficult to detect, such as castration without anesthesia, may be less amenable to policing by retailers. Moreover, the agreements will only reach those sectors of animal agribusiness that are governed by these particular retailers, whereas legal changes would cover the industry as a whole. However, in the difficult legal environment of the US, changing the practices of existing large-scale businesses that impact a large number of animals can not only have a faster positive effect than attempting to pass laws, it can also prepare the ground for subsequent legislation. If suppliers are no longer invested in keeping gestation crates, for instance, they will be less likely to contest legislation that strictly limits or eliminates them. In this way, the law would follow the lead of industry, and perhaps make sure that progressive changes were applied industry-wide, rather than just by a few major suppliers.

Moreover, by encouraging retailers, and therefore producers, to adopt less inhumane practices, advocates may have found an additional legal opportunity. While some retailers and producers will enter into agreements and abide by them, there is an inevitable temptation, as humane treatment becomes more important to the consumer, to exaggerate the extent of their compliance and humane treatment of animals. Thus, in addition to procuring agreements that retailers' suppliers will use more humane methods, animal advocates have used truth-in-advertising laws to address falsely advertised claims of humane treatment of animals. For instance, United Egg Producers ("UEP") was sued when member producers labeled their cartons "Animal Care Certified" and advertised that hens received care they did not receive.⁵⁹ Compassion Over Killing, an animal protection organization focused on farm animals, conducted laborious investigations to uncover the real condition of hens owned by "Animal Care Certified" producers.⁶⁰ Ultimately, a settlement was reached between the UEP and the 16 state attorneys general offices and the District of Columbia attorney general's office, which had brought the claim.⁶¹ According to Compassion Over Killing, March 31, 2006 was supposed to be the last day that cartons could be labeled "Animal Care Certified." Yet on February 20, 2008, Compassion Over Killing and a New Jersey consumer (of eggs) filed suit against UEP and an egg producer in New Jersey for continuing use of the "Animal Care Certified" cartons.⁶² Unfortunately, even successful lawsuits have limited value, if reducing misleading consumer information is important.

Other consumer protection litigation includes two lawsuits brought against Perdue, one of the United States largest poultry producers, by the Humane Society of the United States regarding a label on some of its chicken packaging stating that its birds were "humanely raised."⁶³ After preliminary decisions were issued in the cases, the case was settled with Perdue agreeing to remove the wording from its label.⁶⁴

Another recently filed consumer protection lawsuit involves an action against the upscale grocer, Whole Foods, asserting that its claims regarding the improved welfare of its meat and poultry products were deceptive, such as a sign posted in the poultry department stating that the animals were “cage free.”⁶⁵ While there is no dispute that that is true, the lawsuit points out that all chickens and other birds raised for meat are raised in crowded warehouses, not in cages. To imply that “cage free” is an improvement over standard practice is, the plaintiffs argue, deceptive to the consumer who is paying a premium for what he or she believes is humane treatment.

As it becomes more accepted that humane treatment is a marketable feature for animal-derived foods, it is likely that such lawsuits will become an increasingly important part of the legal landscape shaping the treatment of farmed animals in the US. Their effectiveness in bringing the truth to consumers, however, is limited. The likely resolution in these cases is that the producer will be required to remove the deceptive label but not required to actually inform consumers of how the animals were raised. Indeed, as part of the settlement in the egg case, UEP members may label their cartons “United Egg Producers Certified,” even though it would be a mistake for consumers to believe that the hens who laid those eggs were treated more humanely than hens were treated previously.⁶⁶ Labels have become increasingly confusing and misleading, making this strategy for protecting animals less likely to result in significant gains in humane treatment of animals.⁶⁷

In addition to these time-consuming, problem-filled strategies, a large number of animal advocates in the US work to promote veganism rather than to regulate animal agriculture. This is due not only to the aforementioned difficulties in enacting legislation, withstanding challenges to enacted legislation, procuring agreements with food retailers, and contesting misleading labeling, but to sometimes sharply differing attitudes amongst advocates regarding the most effective strategy in reducing animal suffering. It may also be due to a particularly strong American enthusiasm for market-based, rather than regulatory, solutions.

As a result, one role for attorneys interested in protecting animals is the representation of vegan businesses. The rationale for such attorneys is that, if vegan businesses gain greater market share, the number of animals exploited in agribusiness should decrease. Such businesses are often sorely in need of legal help in negotiating a regulatory landscape that was constructed to protect consumers from adulterated food, but did not take into account the potential for alternative foods that are formulated or produced in ways that were not anticipated when the regulations were written. This type of legal work has many applications and will be keeping more lawyers busy as more vegan replacements for traditional products enter the market.⁶⁸

References

1. David J. Wolfson & Mariann Sullivan, *Foxes in the Henhouse—Animals, Agribusiness, and the Law: A Modern American Fable*, in *Animal Rights: Current Debates and New Directions* 205, 209-12 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).
2. *Id.*
3. 7 U.S.C. 2132(g)(3) (2014); David J. Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*, 2 *Animal L.* 123, 125 (1996).
4. Wolfson & Sullivan, *supra* note 1, at 206.
5. *Id.* at 209, 211.
6. *Id.* at 212-215.
7. While such standard practices exempt huge swaths of suffering from coverage by and prosecution under state animal cruelty laws, progress has been made in pushing the limits of what constitutes standard practices, and in seeking prosecution where a colorable claim can be made that the practice is not covered by the exemption. In 2017, it appears the first-ever conviction was obtained (through a plea agreement with the prosecution) for a standard farming practice. Advocacy group Compassion Over Killing conducted an investigation of a Tyson broiler breeding facility which documented the practice of “boning” – manual insertion of a plastic rod into the beaks of male breeder birds in order to block them from accessing high-nutrient feed given to the breeding females, because these birds

were kept intentionally underfed due to their genetic propensity for extreme growth. After the investigation and its publicity, many major broiler corporations, including Tyson, agreed to either end the practice of boning or said they already did not engage in it. The case was prosecuted by a specialized prosecution department in the Virginia Office of the Attorney General called the Animal Law Unit. Among the prosecutor's animal cruelty charges in this case was one on boning, which was resolved by a guilty plea. This is despite Va. Code Ann. §3.2-6570, which exempts animals involved in "farming activities" which are activities consistent with standard husbandry practices. [VICTORY: COK Video of Cruelty to Chickens Prompts Groundbreaking Charges & Convictions](#), Compassion Over Killing, August 29, 2017.

8. Wolfson at 210.
9. See Caleb Nelson, Preemption, 86 Va. L. Rev. 225, 225-229 (2000). For a description of different types of federal preemption challenges applied in animal law contexts, see generally Taimie L. Bryant, *False Conflicts Between Animal Species*, in *Animal Law and the Courts: A Reader* 264-97 (Taimie L. Bryant, Rebecca J. Huss & David N. Cassuto eds., 2008).
10. For background on the battle to ban foie gras production, see Taimie L. Bryant, *Trauma, Law, and Advocacy for Animals*, 1 J. Animal L. & Ethics 83-93 (2006).
11. *Id.* at 91-92.
12. Cal. Health & Safety Code § 25982.
13. Dan Barber, [The Farmer Who Makes 'Ethical' Foie Gras](#), TheGuardian.com, Jan. 18, 2015,
14. Defiant Chefs Fight Foie Gras Ban; Activists Raid Farm, KGO-TV (San Francisco, Cal.), Feb. 2, 2012, <http://abclocal.go.com/story?section=news/iteam&id=8529529>; Hermosa Beach Restaurant Serves Foie Gras in Defiance of State Ban, CBS Los Angeles, Jul. 5, 2012, <http://losangeles.cbslocal.com/2012/07/05/hermosa-beach-restaurant-serves-foie-gras-in-defiance-of-state-ban/>
15. Association des Éleveurs de Canards et D'Oies du Québec v. Harris, 79 F. Supp. 3d 1136, 1146-48 (C.D. Cal. 2015).
16. *Id.* at 1144.
17. *Id.* at 1145.
18. Association des Éleveurs de Canards et D'Oies du Québec v. Becerra, 870 F.3d 1140 (9th Cir. 2017).
19. Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965 (2012); Cal. Penal Code § 599f.
20. 21 U.S.C. § 601 et seq., § 678.
21. Nat'l Meat Ass'n v. Brown, No. 09-15486, 2009 WL 426213 (C.D. Cal. Feb. 19, 2009).
22. Nat'l Meat Ass'n v. Brown, 599 F.3d 1093, 1098-1102 (9th Cir. 2010).
23. Nat'l Meat Ass'n v. Harris, 123 S. Ct. at 970, 970-73.
24. *Id.* at 974.
25. *Id.* at 973-74.
26. Cal. Penal Code § 6530, subd. (a) (prohibiting possession, sale, or importation for commercial purposes of dead bodies or body parts of kangaroos among other international wildlife species).
27. See Bryant, *False Conflicts*, *supra* note 8, at 264-65.
28. Viva! International Voice for Animals v. Adidas Promotional Retail Operations, Inc., 41 Cal. 4th 929, 162 P.3d 569 (Cal. 2007).
29. Cal. Penal Code § 6530, subd. (c); 2007 Cal. Legis. Serv. Ch. 576 (S.B. 880) (West) (adding subd. (c), exempting use of kangaroo parts harvested legally under Australian, United States federal, and international law).
30. 7 U.S.C. § 2131 et seq.; 80 Stat. 350; P.L. 89-544 (1966).
31. See Henry Cohen, *The Animal Welfare Act*, 2 J. Animal L. 13, 19, 19 n.66 (2006).
32. *Id.* at 19 (noting that rats and mice represent 90-95% of animals used in research).
33. *Alternative Research and Development Foundation v Glickman*, 101 F. Supp. 2d 7 (D.D.C. 2000).
34. See Cohen, *supra* note 30, at 19, 19 n.64, 20; Farm Security and Rural Investment Act of 2002, [Pub. L. No. 107-171, § 10301, 116 Stat. 491 \(2002\)](#); [7 U.S.C. § 2132\(g\)](#).
35. Prevention of Farm Animal Cruelty Act, § 3, 2008 Cal. Stat. A-318 (effective 2015) (codified as amended at Cal. Health & Safety Code [§ 25990 \(West 2010\)](#)) (California's Proposition 2 of 2008).
36. See, e.g., Center for Governmental Studies, *Democracy by Initiative: Shaping California's Fourth Branch of Government* 89-90 (2d ed. 2009); [Initiative Process](#), Participedia, Jun. 2, 2010.
37. See Wikipedia editors, [California Proposition 2](#) (2008), Wikipedia.
38. *Id.*; Carla Hall, [Measure to Provide Better Treatment of Farm Animals Passes](#), L.A. Times, Nov. 5, 2008; [Statement of Vote](#), November 4, 2008, General Election, Cal. Secretary of State.
39. Cramer v. Harris, No. 2:12-CV-03130-JFW-JEM (C.D. Cal. Apr. 10, 2012),
40. Carla Hall, [Egg-Laying Hens in California Win Another Court Battle](#), L.A. Times, Feb. 4, 2015; Cramer v. Harris, 591 Fed. Appx. 634, 2015 WL 452365 (9th Cir. 2015).
41. The law concerns only eggs sold in the shell and not eggs sold in baked goods or other products. See Lindsay Barnett, [Gov. Schwarzenegger Signs Bill to Require Out-of-State Egg Producers to Comply with Proposition 2 Space Requirements for Egg-Laying Hens](#), L.A. Times, Jul. 8, 2010; Cal. Health & Safety Code § 25995 et seq. (West 2012); [Bill Number: AB 1437 Chaptered](#), Official California Legislative Information, Jul. 6, 2010.

42. Marsha Mercer, [Interstate Egg Fight Erupts over Cramped Hen Cages](#), The Pew Charitable Trusts, Nov. 4, 2014.
43. Dan Flynn, [Egg-Producing States File Appeal over California's Proposition 2](#), Food Safety News, Mar. 9, 2015.
44. Missouri v. Harris, 58 F. Supp. 3d 1059 (E.D. Cal. 2014).
45. *Id.* at 1076-77.
46. State of Missouri ex rel. Koster v. Harris, No. 14-17111 (9th Cir. 2016).
47. State of Missouri v. State of California, [Motion for Leave to File Bill of Complaint](#), Bill of Complaint, and Brief in Support, Dec. 4, 2017.
48. [State of Indiana v. State of Massachusetts, Motion for Leave to File Bill of Complaint](#), Bill of Complaint, and Brief in Support, Dec. 11, 2017.
49. Lars Johnson, *Pushing NEPA's Boundaries: Using NEPA to Improve the Relationship between Animal Law and Environmental Law*, 17 N.Y.U. Envtl. L.J. 1367, 1376 (2009).
50. Mercer, *supra* note 41.
51. *Id.*
52. [Veal Crates: Unnecessary and Cruel](#), Humane Society of the United States, Feb. 22, 2013; Lindsay Patton, [9 States That Have Banned Cruel Gestation Crates for Pigs](#), One Green Planet, Jan. 27, 2015.
53. This ballot initiative, called the Prevention of Cruelty to Farm Animals Act, would supplement and modify the Proposition 2 language from 2012 the sales ban put into place by AB 1437 to clarify space requirements for egg-laying hens, add liquid eggs into the coverage of products, and include veal calves and breeding pigs, and includes a sales ban on all of these products within California. [Prevention of Cruelty to Farm Animals Act](#).
54. Twilight Greenaway, [Forget Potatoes: Idaho Now Grows CAFOs](#), Grist, Aug. 26, 2011.
55. Dave Warner, [NPPC Opposes Federal Farm Takeover Bill](#), Nat'l Pork Producers Council, Jan. 23, 2012.
56. [Chef Wolfgang Puck Bans Foie Gras](#), Wash. Post, Mar. 23, 2007.
57. Stephanie Strom, [McDonald's Set to Phase Out Suppliers' Use of Sow Crates](#), N.Y. Times, Feb. 13, 2012.
58. Stephanie Strom, [McDonald's Plans a Shift to Eggs From Only Cage-Free Hens](#), N.Y. Times, Sept. 9, 2015; Geoffrey Mohan, [McDonald's Move to Cage-Free Eggs Is a Tipping Point for the Industry](#), L.A. Times, Sept. 29, 2015.
59. ["Animal Care Certified" Eggs Exposed. Compassion Over Killing](#), (last visited Jan. 26, 2016).
60. *Id.*
61. [Egg Industry Settles Hen Care Dispute](#), Pacific Business News, Sept. 21, 2006.
62. [Animal Advocates Bring Lawsuit Against United Egg Producers and New Jersey Egg Factory Farm for Consumer Fraud](#), PR Newswire, Feb. 20, 2008, <http://www.prnewswire.com/news-releases/animal-advocates-bring-lawsuit-against-united-egg-producers-and-new-jersey-egg-factory-farm-for-consumer-fraud-57031547.html>.
63. [Second Class Action Lawsuit Filed Challenging Perdue's "Humane" Claims](#), Humane Society of the United States, Oct. 24, 2013.
64. [Perdue Will Remove Its "Humanely Raised" Label to Settle HSUS Lawsuits](#), Food Safety News, Oct. 14, 2014.
65. [Whole Foods' Poultry Raising Practices Called into Question in New Class Action Lawsuit](#), The California Crow, May 7, 2015 (identifying the case in question as *Mirzaie, et al. v. Whole Foods*, Case No. BC 575935), a class action suit brought in California).
66. Jane Lear, [Jane Says: Here's How to Unscramble Egg Carton Labels](#), TakePart, Apr. 3, 2014.
67. *Id.*
68. See Taimie Bryant, *Social Psychology and the Value of Vegan Business Representation for Animal Law Reform*, forthcoming in Michigan State Law Review.

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