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A STEP IN THE RIGHT DIRECTION OR SIDE-STEPPING THE ISSUE:
IS STATE REGULATION FOR FACTORY FARMING APPROPRIATE?

Cynthia Furmanek

I. Introduction

The typical American diet includes an abundance of chicken and eggs. Even products such as hot dogs, buffalo wings, casseroles, muffins, pancake mix, and pasta include chicken or eggs as ingredients.¹ As the demand for these products continues, most American farms have become large-scale enterprises in order to supply the 340 million layer chickens and 8.63 billion broiler chickens necessary to meet this need;² that amounts to 250 eggs and 60 pounds of boneless, trimmed, chicken meat per American per year.³ Smaller, more rural farms are unable to meet this local demand while also keeping costs competitively low.⁴ As a result large scale farms, have taken control of the industry by minimizing costs and increasing production.⁵

¹ Environmental Protection Agency, *Products from Poultry*, <http://www.epa.gov/agriculture/ag101/printpoultry.html> (last visited May 2, 2012).

² USDA National Agriculture Statistics Service, *Charts and Maps Poultry*, http://www.nass.usda.gov/Charts_and_Maps/Poultry/brlmap.asp (last visited May 2, 2012) [hereinafter USDA].

³ U.S. Poultry and Egg Association, http://www.uspoultry.org/economic_data (last visited May 2, 2012) (showing 56 pounds of chicken per capita in 2009); see also USDA Economic Research Service, *Poultry and Eggs: Background*, <http://www.ers.usda.gov/briefing/poultry/background.htm> (last visited May 2, 2012) [hereinafter Poultry and Egg Background] (estimating U.S. per capita consumption of eggs and egg products to be around 250 eggs per person annually).

⁴ Mathew Scully, *Dominion: The Power of Man, the Suffering of Animals, and the Call to Mercy* 270-72 (2002); see also Michael Pollan, *The Unnatural Idea of Animal Rights*, N.Y. Times, Nov. 10, 2002, at § 6.

⁵ USDA Economic Research Service, *The Transformation of U.S. Livestock Agriculture: Scale, Efficiency, and Risks*, <http://www.ers.usda.gov/Publications/EIB43/EIB43e.pdf> (last visited May 2, 2012) [hereinafter Transformation of Livestock Agriculture] (“the broiler industry improved its productivity greatly as its vertically integrated system of production was introduced in the 1950s and then refined through improvements in breeding, feed formulations, housing, and management practices.”).

In the modern poultry industry, “layer”⁶ and “broiler”⁷ chicken farmers, called producers, operate large scale farms. These producers then contract to sell their products to processors, such as Tyson Foods.⁸ Producers often have little market power, and as a result processors largely control the production of chickens by dictating their terms to the producers in business agreements.⁹ In fact, the four largest processors in the country are responsible for the production and slaughter of nearly half of all broiler chickens.¹⁰ Thus, these four processors govern the life of billions of chickens from hatching to slaughter and everything in between.¹¹ This system is known as factory farming.

To increase profits, processors typically require egg producers to engage in inhumane practices such as maceration and battery cages. A male chicken is useless to an egg producer and is usually automatically killed by maceration: a process where a one day old baby chick is ground alive to be processed as fertilizer. Female chickens have it worse by living a life of suffering in battery cages. Battery cages are wire cages 18-20 inches high and wide that are usually piled atop each other from floor to ceiling in a warehouse.¹² A laying hen will usually

⁶ Ohio Department of Agriculture, *Ohio Livestock Care Standards*, <http://www.agri.ohio.gov/LivestockCareStandards/docs/OLCS%20Poultry%20-%20Fact%20Sheet.pdf> (last visited May 2, 2012) [hereinafter Ohio Livestock Care Standards] (explaining that a layer chicken is a chicken bred to produce eggs).

⁷ *Id.* (explaining that a broiler chicken is a chicken bred to produce chicken meat).

⁸ USDA Economic Research Service, *U.S. Broiler Companies*, http://www.uspoultry.org/economic_data/docs/USBroilerCompanies.pdf (last visited May 2, 2012).

⁹ See generally Harvard Law Review, *Challenging Concentration of Control in the American Meat Industry*, 117 Harv. L. Rev. 2643 (2011) [hereinafter Challenging Concentration].

¹⁰ James M. MacDonald & Marvin L. Hayenga, *Concentration, Mergers, and Antitrust Policy*, <http://www.farmfoundation.org/news/articlefiles/816-macdonald.pdf> (last visited May 2, 2012); see also USDA, *Table 20*, http://www.agcensus.usda.gov/Publications/1997/Vol_1_Chapter_1_U._S._National_Level_Data/us-51/us1_19.pdf (last visited May 2, 2012).

¹¹ *Id.*

¹² Laura Moretti, *Inside the Egg Factories*, www.animalsvoice.com/moretti/?p=89 (last visited May 2, 2012).

live her entire life in such a cage with 4-8 other birds;¹³ hence a battery cage hen with a typical 32 inch wingspan will never be able to fully stretch her wings.¹⁴

Despite these typically deplorable conditions that processors impose on chickens to maximize profits, chickens are given no federal protection for their production or slaughter.¹⁵ Increasingly, states such as New Jersey, California, and Ohio are becoming more cognizant of the growing need for regulation in this field.¹⁶ The approach to state regulation of factory farming has varied wildly, with some states focusing on animal welfare and others on the protection of local farmers.

This paper will assert that regulation of factory farming should not be attempted at the state level but instead at the federal level, and should start by prohibiting battery cages and maceration. While a step in the right direction, state regulation of factory farming suffers from two major flaws: 1) the conflicting interests between the state's farm economy and animal welfare, as well as 2) interstate competition. Ultimately, federal regulation of factory farming will be necessary to prevent producers from moving to states which do not set livestock standards. New federal legislation should be enacted to prohibit the use of battery cages. To avoid constitutional concerns, such legislation should be tied to the environmental concerns which battery cages pose. Hence, Congress would have police power under the Interstate Commerce Clause and existing precedent¹⁷ to regulate these activities. Finally, the existing

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Nicole Fox, *The Inadequate Protection of Animals Against Cruel Animal Husbandry Practices Under United States Law*, 17 Whittier L. Rev 145, 145 (1995).

¹⁶ Neil Thapar, *Taking (Live) Stock of Animal Welfare in Agriculture: Comparing Two Ballot Initiatives*, 22 Hastings Women's L.J. 317, 317 (2011).

¹⁷ *Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981).

Humane Methods of Livestock Slaughter Act¹⁸ should be amended to include protection for chickens and prohibit maceration.

II. What is Factory Farming and Why Is It Bad?

A. How Farming Has Evolved to Meet the Demands

Factory farming started in the United States with the development of vitamins A and D in the 1920s.¹⁹ Such discoveries made it possible for farmers to keep livestock indoors by supplementing feed with vitamins to substitute for sunlight.²⁰ Farmers were able to decrease costs and increase profits by confining chickens to smaller spaces indoors rather than pay the costs of raising chickens outdoors which requires more upkeep.²¹ However intensive confinement led to problems such as cannibalistic behavior in chickens as well as the passage of diseases and infections between animals and their fecal matter.²²

With the development of antibiotics in the 1940s, these farmers were able to solve some the problems of livestock confinement by supplementing livestock feed with antibiotics.²³ At first such biomedical advances seemed to benefit the agricultural community by helping

¹⁸ Humane Methods of Livestock Slaughter Act, 7 U.S.C. § 1902-07 (2000).

¹⁹ In Defense of Animals, *Factory Farming Facts*, <http://www.idausa.org/facts/factoryfarmfacts.html> (last visited May 2, 2012) [hereinafter *Factory Farming Facts*]; see also Economic Research Service, *USDA Broiler Farms' Organization, Management, and Performance*, <http://www.ers.usda.gov/Publications/AIB748/> (last visited May 2, 2012) (“in the late 1940s, a set of new conditions emerged in the technological, market, and policy areas of broiler production that significantly lowered production costs, and allowed for increased sales.”).

²⁰ *Factory Farming Facts*, *supra* note 19.

²¹ USDA Economic Research Service, *Poultry Production in the United States*, <http://www.ers.usda.gov/publications/aib748/aib748b.pdf> (last visited May 2, 2012) (“In the 1940s, agricultural research brought new technologies to the poultry industry. Included were the introduction of new breeds for meat, better nutrition and disease control, better management of confined poultry, processes the correctly sexed chickens, and the candling of eggs.”).

²² *Id.*

²³ *Id.*

producers keep animals alive and healthy in confinement and decreasing the numbers of chickens lost to disease. However, this overuse of antibiotics has led to public health concerns.²⁴

Further biomedical and technological developments gradually altered what it meant to be a farmer. Mechanization and automation helped farmers decrease cannibalism through debeaking machines;²⁵ moreover, practices such as genetic selection²⁶ helped farmers create a bigger-breasted and more viable chicken.²⁷ For example, through the use of genetic selection and supplementation of feed with synthetic compounds farmers have now been able to nearly halve the amount of time required to raise a broiler chicken²⁸ and re-engineer the biological process as to enable a hen to lay twice as many eggs.²⁹

B. Factory Farming: How It Is Done

1. Laying Chickens

The life of a laying chicken inside the confines of a factory farm starts out not under the warmth of a mother hen's body, but in an incubator with dozens of other chicks and, sadly, it is

²⁴ Pew Comm'n on Indus. Farm Animal Prod., *Putting Meat on the Table: Industrial Farm Animal Production in America* 13 (2008) [hereinafter PEW], available at http://www.pewtrusts.org/our_work_report_detail.aspx?id=38442.

²⁵ Peter Singer, *In Defense of Animals* 105 (1991) ("Soon an automatic 'debeaking' machine was patented, and its use became routine.").

²⁶ *Id.* (explaining that this is typically done through inbreeding of chicken species).

²⁷ Transformation of Livestock Agriculture, *supra* note 5, at 23 ("The broiler industry improved its productivity greatly as its vertically integrated system of production was introduced in the 1950s and then refined through improvements in breeding, feed formulations, housing, and management practices. In 1955, when modern integrated broiler complexes were being introduced, it took 73 days to produce the average broiler, which weighed 3.1 pounds, and every 100 pounds of broiler production required 285 pounds of feed and 4 hours of labor. By 1980, it took 52 days to produce a broiler that weighed about 4 pounds, and every 100 pounds of broilers required 208 pounds of feed and 30 minutes of labor.").

²⁸ PEW, *supra* note 24, at 5 ("the change has been most dramatic in chickens: in 1950, it took 84 days to produce a 5-pound chicken whereas today it takes just 45 days.").

²⁹ Singer, *supra* note 22, at 105 ("The egg industry went to work on engineering their own specialized chicken—the 'layer' hen, who would turn out eggs and more eggs. Today's model lays twice as many eggs per year as did the 'all purpose' backyard chickens of the 1940s.").

the happiest time that many laying chickens will know.³⁰ On a factory farm that produces eggs, male chickens are unnecessary and, as a result, will be immediately killed just days after their birth by either being thrown in a bag and suffocating under the weight of the other chickens or by being tossed in a grinder alive to be processed as fertilizer.³¹

Female laying chickens are spared from this first test of survival but in some ways will suffer more than the male chicks by being forced to live a life of suffering in intensive confinement: their lives will be spent in battery cages with less space than a regular sheet of notebook paper and in a dimly lit room with poor ventilation.³² They will suffer boredom, frustration, and stress from intensive confinement-related problems³³ and within days of their hatching, they will be permanently mutilated by having most of their beak removed.³⁴

Chickens in battery cages are intensively confined which causes unnatural cannibalism among the chickens. These chickens peck at each other with their beaks in an attempt to maim or kill.³⁵ Much like that of other animals, chickens establish a pecking order; however, this natural pecking order becomes impossible as a result of the coops being so numerous and in such a small amount of space.³⁶ Due to the cannibalistic behavior among these stressed chickens, female chickens are debeaked within days of their birth without anesthesia, usually by a hot blade or electric shear.³⁷ Despite claims that the birds do not feel pain during this process, it has

³⁰ Amy Blunt Achor, *Animal Rights: A Beginner's Guide* 78 (1992).

³¹ Peter Singer, *Animal Liberation* 99 (2d ed. 1990); *see also* Singer, *supra* note 25, at 107 (“large-scale hatcheries have moved toward the use of gas asphyxiation or ‘macerators,’ which grind up the live chicks at high speeds.”).

³² Karl Weber, *Food, Inc.: How Industrial Food is Making Us Sicker, Fatter, and Poorer and What You Can Do About It* 62 (2010).

³³ *See generally* Simonsen, *infra* note 41.

³⁴ *See generally* Achor, *supra* note 24.

³⁵ *See generally* Achor, *supra* note 24; *see also*, F.D. Thornberry, W.O. Cawley & W.F. Krueger, *Debeaking: Laying Stock to Control Cannibalism* 3 (1975).

³⁶ *See* Singer, *supra* note 25, at 100.

³⁷ *Id.* at 107.

been well-documented by scientific researchers that the birds feel excruciating pain throughout this process and they believe that it is akin to the pain felt by human amputation.³⁸

Not only do battery cages cause cannibalism among the birds but also frustration, boredom and stress.³⁹ Natural behaviors such as walking, flying, spreading wings, and grooming through dustbathing, are all impossible in a battery cage.⁴⁰ Lack of dust for dustbathing can lead to feather loss, just one of many physical manifestation of the internal torment these chickens feel.⁴¹ Furthermore, because the cages are made from wire and are stacked on top of one another, chickens live not on a hard surface, but on a wire mesh. Stepping and sleeping on wire mesh causes friction and leads to sores;⁴² yet another physical ailment which is considered acceptable. Excrement removal also becomes a problem in tightly-confined spaces. Chicken excrement is largely uncontrolled in such an environment and leads to health problems in chickens.⁴³ The mortality rate for chickens in factory farms is high and they lose 10-15 percent of chickens due to the stress of these conditions.⁴⁴

A laying chicken will spend its entire short life in this battery cage without ever seeing the light of day.⁴⁵ In two years, when the chicken is spent and can no longer produce eggs, it will be transported to a slaughterhouse to be killed.⁴⁶

2. Broiler Chickens

³⁸ J. Breward & M. Gentle, *Neuroma Formation and Abnormal Afferent Nerve Discharges After Partial Beak Amputation (Beak Trimming) in Poultry*, 41 *Experientia* 1132, 1134 (1985).

³⁹ Peter Singer & Jim Mason, *The Way We Eat: Why Our Food Choices Matter* 106 (2006).

⁴⁰ Singer, *supra* note 19, at 116.

⁴¹ H.B. Simonsen et al., *Effect of Floor Type and Density of the Integument of Egg Layers* 2206 (1980).

⁴² *Id.*

⁴³ See Singer, *supra* note 19, at 117.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See David DeGrazia, *Moral Vegetarianism from a Very Broad Basis* 151 (2009).

The life of a broiler chicken is in many ways just as cruel as the life of laying chicken. Broilers are genetically engineered from the outset to have larger breasts and grow larger in a shorter amount of time.⁴⁷ For example, in 1955 an average broiler weighed 3.1 pounds and matured in approximately 73 days; the modern chicken requires only 52 days to develop into an even larger, 4 pound chicken.⁴⁸ This unnatural enlargement of chickens causes problems for them including chronic pain secondary to bone calcification⁴⁹, heart failure from an enlarged heart⁵⁰, and inability to walk due to the increased weight in the breasts.⁵¹ Broiler chickens, while not confined to cages, are also deprived of fresh air and free space. Two feet is considered a large amount of space for a broiler chicken to have throughout its life.⁵² The excrement and air conditions are equally bad and sometimes worse for broiler chickens than laying chickens.⁵³

Finally, the slaughter of a broiler chicken is brutal. These chickens are violently ripped from the producer's farm by workers who are paid by their loading rate⁵⁴ and who have no concern for handling; the chickens are often grabbed by the handful—four or five at a time.⁵⁵ After the chickens have been loaded into trucks, their trip from the producer's farm to the processor's plant can be grueling, especially in harsh weather and lasting up to ten hours.⁵⁶

⁴⁷ See generally Transformation of Livestock Agriculture, *supra* note 5.

⁴⁸ *Id.*

⁴⁹ Mark H. Bernstein, Without a Tear: Our Tragic Relationship with Animals 111-112 (2004) [hereinafter Without a Tear] (“the broiler chicken industry has a simply goal: to maximize the birds’ weight and minimize production time...unnaturally rapid growth causes a host of problems. Since bone calcification cannot keep up with the growth rate, broiler chickens commonly suffer skeletal abnormalities. Legs become bowed and twisted, bones fracture and fissure, vertebra become dislocated, and cartilage grows in the lower back and protrudes against the spinal cord. As a result, broiler chickens are in chronic pain.”).

⁵⁰ *Id.* (“the most common process for heart failure among broilers occurs in a disease called ascites, or pulmonary hypertension syndrome.”).

⁵¹ *Id.* at 112 (“broilers are crippled before slaughter, their weight being too much for their immature skeletons.”).

⁵² LSU Ag Center, The Broiler Project 1, available at <http://www.lsuagcenter.com/NR/rdonlyres/91B79988-CCCB-4C24-8FDA-0A2FB226A2A2/3861/pub2897BroilerProject4.pdf>.

⁵³ See Without A Tear, *supra* note 49.

⁵⁴ *Id.* at 113.

⁵⁵ *Id.*

⁵⁶ *Id.* at 114.

At the slaughterhouse, chickens are hoisted up on running conveyor belts, submerged in a “stun bath”⁵⁷ to render them senseless, forced to run their throat through a blade, and finally dunked into a tank of scalding water to remove their feathers.⁵⁸ While this system is designed to have the chicken rendered unconscious in the stun bath and killed by the blade prior to being scalded in a tank, researchers have found that many chickens reach the scalding tank while still alive and conscious.⁵⁹ In practice, these methods are often ineffective and in some cases it can take several attempts before the animal is killed.⁶⁰ There are countless documented cases of animals being slaughtered, scalded, and tortured alive.⁶¹

C. Other Associated Problems

In addition to these animal welfare problems, this type of intensive-confinement farming causes other unconscionable problems for public health and the environment.⁶² Chicken farming is particularly problematic for the environment; the use of battery cages supplies a breeding ground for bacteria and the disposal of large amounts of chicken excrement leads to groundwater pollution.

Tightly confining animals and their fecal matter creates a breeding ground for bacteria and viruses. The potential evolution of novel bacteria and viruses creates a prospective problem for our future. Just a few of the many public health concerns that this farming can lead to

⁵⁷See HSUS, *infra* note 59, at 114 (noting that the most common stun bath is submersion of the chickens head under an electrically-charged current)(“despite having been named “stun baths,” these baths probably do not render the bird unconscious... although stunning is supposed to render the bird unconscious for subsequent slaughterhouse operations, the electrical shock frequently just immobilizes it.”).

⁵⁸*Id.* at 114-155.

⁵⁹*Id.*

⁶⁰*Id.*

⁶¹*Id.* at 114 (noting that sometimes instead of cutting both jugular veins, only one vein is cut and estimating that 4 million broiler chickens are plunged into scald tanks conscious every day in the United States. Also noting that we know that the birds were alive when they were submerged in the scalding process because of the redness of their skin).

⁶²See generally PEW, *supra* note 24.

includes: pathogen transfer, infectious disease, food-borne infection, generation of novel viruses, feed and pathogen risk, nontherapeutic antimicrobial use and resistance, and health concerns for workers in these farms.⁶³

Additionally, there are detrimental environmental impacts from factory farming including the creation of greenhouse gases and water pollution.⁶⁴ While the production of greenhouse gases is particularly problematic, it can be largely attributed to livestock farming and not chickens.⁶⁵ Still, intensively confined chicken farms pose a serious threat to the environment through groundwater contamination.⁶⁶ The reason for this is that chickens that are tightly confined create a lot of excrement—too much for the nearby soil to absorb all of the nutrients.⁶⁷ Yet the most common method of disposal for this manure is untreated application to the ground.⁶⁸ As a result, nearby groundwater often contains harmful amounts of nitrogen and phosphorous,⁶⁹ and other waterborne chemical contaminants such as pesticides, heavy metals, antibiotics, and hormones.⁷⁰ Excess amounts of nitrogen can lead to hyperthyroidism, insulin-dependent diabetes, adverse reproductive outcomes, and neurodevelopmental defects.⁷¹ In fact,

⁶³ *Id.* at 11.

⁶⁴ See PEW, *supra* note 24, at 23.

⁶⁵ *Id.* at 27 (“greenhouse gas emissions from all livestock operations account for 18% of anthropogenic greenhouse gas emissions, exceeding those from the transportation sector.”).

⁶⁶ See Natural Resources Defense Council, *America’s Animal Factories: How States Fail to Prevent Pollution from Livestock Waste*, <http://devstaging.win.nrdcdev.org/water/pollution/factor/stala.asp> (last visited May 2, 2012) (“the vast amount of chicken manure applied as fertilizer in Alabama’s biggest poultry growing counties pose a contamination threat to groundwater and potentially drinking water.”); see also PEW *supra* note 24, at 29 (“the large concentration of animals on the typical industrial farm presents a major waste management problem. The volumes of manure are so large that traditional land disposal methods can be impractical and environmentally threatening.”).

⁶⁷ *Id.* at 23 (“Application of untreated animal waste on cropland can contribute to excessive nutrient loading, contaminate surface waters, and stimulate bacteria and algal growth and subsequent reductions in dissolved oxygen concentrations in surface waters.”).

⁶⁸ *Id.*

⁶⁹ *Id.* (“animal farming is estimated to account for...more than 30% of the nitrogen and phosphorous loading in the nation’s drinking water resources.”).

⁷⁰ *Id.* (“Antibiotics are used not only to prevent and treat bacterial infections for animals held in close quarters, but also as growth promoters. Pharmaceuticals, such as tylosin...decays rapidly in the environment but persists in surface waters of agricultural watersheds.”).

⁷¹ *Id.* at 25.

groundwater pollution has become such a concern that some states have sued the poultry industry, including Tyson Foods, over these environmental concerns.⁷²

III. Lack of Federal Regulation of Factory Farming Procedures

Factory farms producing eggs and chicken have been able to evade federal regulation as there are currently no federal laws protecting poultry for either farming practices or experimentation. Furthermore, federal tax schemes protect factory farming by making large scale farming practices more economically advantageous.⁷³ Hence, federal laws not only allow such abuses to occur but also help processors maximize profits and squeeze out smaller scale, independently-run farming operations.

There are currently only two laws regulating farm animal husbandry practices.⁷⁴ However these laws are incomprehensive in scope and therefore insufficient to protect farm animals, especially poultry, from the majority of abuses that they suffer. These laws are the Federal Humane Methods of Livestock Slaughter Act⁷⁵ and the Animal Welfare Act.⁷⁶ Neither of these acts governs the treatment of farms animals during production and both of these acts specifically exclude poultry.

The Federal Humane Methods of Livestock Slaughter Act governs only the slaughter of certain farm animals and does not protect these animals from inhumane treatment during production. Thus the law does not govern the inhumane treatment of animals throughout the vast

⁷² *Oklahoma, Arkansas Poultry Industry Continue Court Battle Over Water Pollution*, Circle of Blue, October 27, 2009, available at <http://www.circleofblue.org/waternews/2009/world/oklahoma-arkansas-poultry-industry-continue-court-battle-over-water-pollution/>.

⁷³ See generally Eden Grey, *Changing the Tax System to Effect Humane Treatment of Farm Animals*, 3 J. Animal L. 159 (2006).

⁷⁴ Nicole Fox, *The Inadequate Protection of Animals Against Cruel Animal Husbandry Practices Under United States Law*, 17 Whittier Law Review 145, 145 (1995).

⁷⁵ Humane Methods of Livestock Slaughter Act 7 U.S.C. § 1902-07 (2000).

⁷⁶ Animal Welfare Act 7 U.S.C. § 2131-2156 (1994).

majority of their life, such as intensive confinement and mutilation. Instead this law requires only that processors of meat use rapid and effective methods during slaughter:

No method of slaughtering or handling in connection with slaughtering shall be deemed to comply with the public policy of the United States unless it is humane. Either of the following two methods of slaughtering and handling are hereby found to be humane:

(a) in the case of cattle, calves, horses, mules, sheep, swine, and other livestock, all animals are rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut; or

(b) by slaughtering in accordance with the ritual requirements of the Jewish faith 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.⁷⁷

Further, as incomprehensive as this law is for the humane treatment of farm animals, it does not even apply to poultry, including both layer and broiler chickens, as they are specifically exempted from the definition of “animal.”⁷⁸ Thus, the Humane Methods of Livestock Slaughter Act insufficiently protects farm animals, especially poultry. Hence, large-scale farmers violate no federal laws by tossing live baby chicks in a grinder to be killed.

The Federal Animal Welfare Act is equally troubling. The primary purpose of the Animal Welfare Act is to “provide for the licensing of dogs and the *humane and proper treatment of animals.*”⁷⁹ On its face, this law seems to provide the appropriate type of federal legislation needed to create humane standards for farm animals; however, it specifically exempts, “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

⁷⁸ Humane Methods of Livestock Slaughter Act 7 U.S.C. § 1902-07 (2000).

⁷⁹ Me. Rev. Stat. tit. 7, § 3902 (emphasis added).

management, or production efficiency, or for improving the quality of food or fiber.”⁸⁰ Thus the Animal Welfare Act does nothing to protect any farm animals from either experimentation or production for agricultural purposes.

While not specifically intended for this purpose, federal antitrust laws somewhat regulate factory farming but suffer from enforcement problems.⁸¹ The Packers and Stockyards Act (PSA) was enacted in 1921 in response to the Federal Trade Commission’s investigation finding that the five largest meatpacking companies had been secretly fixing prices and conspiring to divide up the market and sharing information to keep down the price paid for cattle.⁸² Specifically, the PSA prohibits “engag[ing] in any course of business or do[ing] any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce.”⁸³ However, the modern meat industry is still largely consolidated,⁸⁴ and this legislation has failed in protecting small farmers because of insufficient and ineffective enforcement.⁸⁵ Animal welfare advocates suggest interpreting the PSA broadly to effectuate change by allowing small farmers to bring claims and open up public transparency on this issue.⁸⁶

Therefore, effective federal regulation of factory farming does not currently exist. In fact, it seems that in some ways, factory farms have been able to benefit from the lack of

⁸⁰ Me. Rev. Stat. tit. 7, § 3972

⁸¹ See generally Challenging Concentration, *supra* note 9.

⁸² Eric Schlosser, Fast Food Nation: The Dark Side of the All-American Meal 136-37 (2002).

⁸³ 7 U.S.C. § 192(e) (2000); see also 7 U.S.C.A. § 192 (West) (“It is unlawful to engage in or use any unfair, unjustly discriminatory, or deceptive practice; or make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect, or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect.”).

⁸⁴ See MacDonald, *supra* note 10, at 189 (“the 4 largest processors handled 49 percent of all 1998 broiler slaughter”).

⁸⁵ See Challenging Concentration, *supra* note 9, at 2657.

⁸⁶ *Id.*

meaningful federal regulation and legislation.⁸⁷ Recent federal tax relief measures seem to benefit large-scale farmers; these laws concern increased immediate expensing provisions for capital purchases and therefore benefit farms with heavy investments in capital assets, such as factory farms.⁸⁸ Reforming the federal tax structure to benefit smaller farms with more humane practices, such as taxing the use of battery cages, may provide a substantial incentive for factory farms to stop inhumane practices.⁸⁹

This lack of federal regulation and conversely preferential treatment to factory farms can be largely attributed to the fact that many private groups profit from the U.S. poultry market and can strongly lobby Congress to maintain the status quo.⁹⁰ The lobbyists are able to assert that the current system of chicken and egg production is beneficial to U.S. consumers by providing affordable meat and egg products and this industry as a whole is extremely important to the U.S. economy. It even helps the U.S. balance of trade: in 2009, the U.S. exported 6,962 million pounds of broiler meat to other countries.⁹¹ Furthermore, egg exports in the same year totaled 12.2 million dozen.⁹² Undoubtedly and ironically, part of the reason that the U.S. has been able

⁸⁷ Steve Lustgarde, *The High Price of Cheap Food: Consumers and Family Farms Are Losers As Factory Farms Take Over*, 205 *Vegetarian Times* 72, 73 (1994).

⁸⁸ Grey, *supra* note 80, at 168 (“Commercial farms, who already invest heavily in capital assets, stand to benefit exceedingly from these legislative changes...without restrictions on which capital investments receive preferential treatment under this legislation, farms will likely choose investment which allow for higher volume and faster production at a lower cost.”).

⁸⁹ *Id.* at 170 (“the government can create a tax credit for purchases of equipment and erection of buildings which further humane treatment...the government can grant an increased level of immediate expensing for capital investments which further humane treatment of farm animals...an excise tax can be levied on purchases of inhumane equipment, such as battery cages...trade and business expense deductions can be denied or limited for the maintenance costs of inhumane equipment and for the purchase of growth producing hormones and non-therapeutic antibiotics.”).

⁹⁰ Colin Kreuziger, *Dismembering the Meat Industry Piece by Piece: The Value of Federalism to Farm Animals*, 23 *Law & Ineq. J.* 363, 385 (2005).

⁹¹ Richard Stillman, *Poultry Production Expected To Decline in 2009* 5 (2009).

⁹² *Id.*

to thrive in this international market is due to the fact that many other developed countries have banned the inhumane practices used by most large-scale farmers.⁹³

IV. State Regulation of Factory Farming

State regulation of factory farming is a relatively new phenomenon and therefore somewhat rare. While all states have enacted anti-cruelty statutes,⁹⁴ over half of all anti-cruelty statutes exempt farm animals from their anti-cruelty laws. Furthermore, many state laws specifically allow animal husbandry practices such as battery cages and debeaking in the confinement of chickens.⁹⁵ As awareness of the inhumane treatment of farm animals increases, progressive states have begun to set more humane standards for the care of livestock.⁹⁶ While some states have been effective in eliminating some inhumane practices, others seem to have made it their purpose to enact, if necessary, laws to protect the status quo. Set below is a sampling of legislation and litigation in states which have been on the forefront of advancing the welfare of livestock.

1. New Jersey

⁹³ See Singer, *supra* note 25, at 175 (“This method of keeping hens has been banned in Switzerland and Austria and is being phased out by the entire European Union. Germany passed a five-year phase out of battery cage use which will make them illegal by 2007, and the European Union has a ten-year phase out to end in 2012”).

⁹⁴ See generally Pamela D. Frasch, Stephan K. Otto, Kristen M. Olsen, & Paul A. Ernest, *State Animal Anti-Cruelty Statutes: An Overview*, 5 *Animal L.* 69, 75-79 (1999).

⁹⁵ *Id.* at 76 (Specifically noting 30 States which exempt animal husbandry practices: Arizona, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, New Jersey, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming).

⁹⁶ See generally Thapar, *supra* note 16; see also Craig A. Wenner, *Judicial Review and the Humane Treatment of Animals*, 86 *N.Y.U. L. Rev.* 1630, 1639 (2011) (“In general, legislatures are paying greater attention to commercial husbandry practices, evidenced by the recent expansion of many state-agency mandates.”).

In 1996, New Jersey became the first state⁹⁷ to have an agency, the Department of Agriculture, proscribe statewide standards for the care of livestock.⁹⁸ Prior to this amendment, the Legislature had left animal welfare to the New Jersey Society for the Prevention of Cruelty to Animals (NJSPCA).⁹⁹ However despite the six month timeline proscribed by the legislature, it took nearly ten years for the Department of Agriculture to come up with these standards¹⁰⁰ and when they did, private animal welfare groups attacked the standards as protecting the status quo.¹⁰¹ These animal welfare groups, including the NJSPCA, attacked several provisions in court, including the definition of “humane” and exemptions for “routine husbandry practices.”¹⁰² The case was litigated in the New Jersey Supreme Court in 2010; the primary issue did not question the humanity of the standards,¹⁰³ but rather “whether the agency in question did or did not carry out the function assigned to it by the Legislature.”¹⁰⁴

The definition of “humane” as proscribed by the State Department of Agriculture includes the following description: “marked by compassion, sympathy, and consideration or the welfare of animals.” While on its face, this definition seems altruistic, within each species-specific section exemptions have been inserted for “routine husbandry practices.” Thus despite the terminology “marked by compassion,” such a standard, in practice, actually permits the use

⁹⁷ Thapar, *supra* note 16, at 1639 (“New Jersey appears to be the first state to broadly delegate powers to the state agricultural agency, mandating the creation of regulatory standards for farm animals.”).

⁹⁸ N.J. Stat. Ann. § 4:22-16.1 (West).

⁹⁹ *New Jersey Soc. for Prevention of Cruelty to Animals v. New Jersey Dept. of Agric.*, 196 N.J. 366, 955 A.2d 886 (2008) [hereinafter *NJSPCA v. DOA*].

¹⁰⁰ *Id.* at 891 (“Notwithstanding the six month time frame within which the Department was directed to act, regulations designed to implement this statutory mandate were not drafted and published as proposed regulations for public comment until 2003.”).

¹⁰¹ *Id.*

¹⁰² *Id.* at 381 (“[respondents] argue that the regulations by relying on ‘routine husbandry practices’ definition, created a safe harbor that cannot be sustained”).

¹⁰³ *Id.* at 371 (“in the end, our focus is not upon, nor would it be appropriate for us to address, whether we deem any of the specifically challenged practices to be, objectively, humane.”).

¹⁰⁴ *Id.* at 372.

of debeaking and intensive confinement methods, such as battery cages since such practices have been deemed to be “routine.”

Professors Mariann Sullivan and David Wolfson, in addressing the New Jersey standards,¹⁰⁵ argue that part of the problem with state agency-proscribed standards rests in their definition of “humane” practices. Such definitions of “humane” typically rely solely on physiological evidence such as blood markers.¹⁰⁶ By limiting the definition to scientific markers, these definitions fail to include feelings which cannot be comprehended by physiological symptoms, feelings such as suffering. Hence, such standards support animal suffering through their limiting definitions of key terms such as “humane.”

The New Jersey Supreme Court ultimately found that some of the Department of Agriculture’s standards for “routine husbandry practices” were arbitrary and capricious and remanded them to the Department of Agriculture to create more specific definitions of some terms.¹⁰⁷ It also found that the word “humane” actually does incorporate more than just scientific evidence; nevertheless, it proved unwilling to incorporate social values, such as feelings of suffering, into the definition. Thus, the Supreme Court of New Jersey did help advance animal welfare, but not by much and these standards continue to protect the interests of farmers over animal welfare.

Current amendments to the standards set by the Department of Agriculture include the following for poultry keeping: “Constructed shelters shall be of sufficient size to provide

¹⁰⁵ Mariann Sullivan & David J. Wolfson, *If It Looks Like a Duck. New Jersey, the Regulation of Common Farming Practices, and the Meaning of “Humane,” in Animal Law and the Courts: A Reader* 94, 115 (Taimie L. Bryant, Rebecca J. Huss & David N. Cassuto eds., 2008).

¹⁰⁶ Wenner, *supra* note 79, at 1630.

¹⁰⁷ *NJSPCA v. DOA.*, *supra* note 99, at 401 (“by adopting a definition of exceptional breadth, by failing to create an adequate record in support of this decision, and by implicitly permitting techniques that cannot meet the statutory mandate to base its regulations on a determination about what is humane, the Department has adopted regulations that are arbitrary and capricious.”).

adequate space for each bird seeking shelter within to stand, lie down, get up, walk, spread its wings, move its head freely, turn around and rest.”¹⁰⁸ While these standards would seemingly prohibit battery cages, nowhere in the standards do they require that all birds be able to spread their wings at the same time. As such, these standards still allow for some of the worst common abuses to continue and local farmers are protected from the expense of having to reinvest in new equipment.

2. California

California has made the biggest strides in the animal welfare movement with respect to farm animals, but it has come at a significant economic cost. In 2008, California voters passed Proposition 2 an amendment to the California Health and Safety Code¹⁰⁹ requiring that: “a person shall not tether or confine any covered animal, on a farm, for all or the majority of any day, in a manner that prevents such animal from: (a) Lying down, standing up, and fully extending his or her limbs; and (b) Turning around freely.”¹¹⁰

Proposition 2 has been praised by animal rights activists for several reasons. First, unlike the New Jersey standards which allow loopholes for processors to continue to utilize intensive confinement methods, this law specifically prohibits battery cages.¹¹¹ Also, the law deters cruel treatment of animals through the availability of criminal enforcement.¹¹² Finally, the law

¹⁰⁸ N.J. Admin. Code 2:8-4.4

¹⁰⁹ 2008 Cal. Legis. Serv. Prop. 2 (Proposition 2).

¹¹⁰ Cal. Health & Safety Code § 25990.

¹¹¹ *Id.* (“‘Enclosure’ means any cage, crate, or other structure (including what is commonly described as a ‘gestation crate’ for pigs; a ‘veal crate’ for calves; or a ‘battery cage’ for egg-laying hens) used to confine a covered animal.”).

¹¹² *Id.* (“Enforcement. Any person who violates any of the provisions of this chapter is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not to exceed one thousand dollars (\$1,000) or by imprisonment in the county jail for a period not to exceed 180 days or by both such fine and imprisonment.”).

specifically does not preempt local ordinances or other laws seeking to provide greater animal welfare protection.¹¹³

While this law will not take full effect until 2015, allowing six years for phase-out of the battery cage systems, researchers estimate that the economic effect of this law will be to increase production costs by 20 percent.¹¹⁴ It has been suggested that some egg producers will move to other states to avoid these extra costs of production.¹¹⁵ This law is particularly important for chicken's rights activists as California is the seventh-largest producer of poultry and eggs in the United States.¹¹⁶

3. Ohio

Ohio has taken a more moderate approach to regulating factory farming by addressing the economic concerns. Ohio constitutes one of the top five egg-producing states in America and is heavily invested in the egg production industry.¹¹⁷ As such, Ohio stood to lose economically with the passage of a Proposition 2-type law. With that in mind, Issue 2 was enacted in 2010 creating a Livestock Care Standards Board.¹¹⁸ On its face, Issue 2 appeared to advance animal rights through the creation of statewide standards governing livestock handling and care; however critics noted that the Board effectively promoted the factory farming model with their standards by allowing “beak conditioning,” battery cages, and even maceration.¹¹⁹

¹¹³ *Id.* (“The provisions of this chapter are in addition to, and not in lieu of, any other laws protecting animal welfare, including the California Penal Code. This chapter shall not be construed to limit any state law or regulations protecting the welfare of animals, nor shall anything in this chapter prevent a local governing body from adopting and enforcing its own animal welfare laws and regulations.”).

¹¹⁴ Sumner, Daniel A. et al., *Economic Effects of Proposed Restrictions on Egg-laying Hen Housing in California*, University of California Agricultural Issues Center 3 (2008).

¹¹⁵ *Id.* at 3.

¹¹⁶ USDA, NASS Census of Agriculture State Profile (2010), available at http://www.nass.usda.gov/Statistics_by_State/Ag_Overview/AgOverview_CA.pdf.

¹¹⁷ See Poultry and Eggs Background, *supra* note 3 (noting that the top five egg-producing states are Iowa, Ohio, Pennsylvania, Indiana and Texas).

¹¹⁸ R.C. § 904.02.

¹¹⁹ See Ohio Livestock Care Standards, *supra* note 6.

In response to the passage of Issue 2, the Humane Society of the United States (HSUS) threatened to pursue a ballot initiative.¹²⁰ However in an agreement with Ohio governor Ted Strickland, HSUS dropped the ballot initiative in exchange for, among other things, Ohio's promise to put a moratorium on permits for new battery cages.¹²¹ Thus, Ohio represents a middle ground where economic interests and to some degree, chickens, are protected.

Hence state regulation of factory farming thus far has resulted in various types of laws, each with its own advantages and disadvantages. California has made the greatest strides in animal welfare with Proposition 2 specifically prohibiting battery cages and allowing for criminal enforcement. However, California will suffer economically as layer producers look to other states to avoid a 20% increase in the cost of production. Other states, such as New Jersey, have adequately protected in-state farmers but have made very little advancement in animal welfare. Finally, Ohio represents a more moderate approach by mostly protecting farmers from having to reinvest in cage-free chicken raising, but also limiting the future use of battery cages in Ohio.

Author's Suggestions

1. Which practices should be prohibited?

While the modern factory farm model poses numerous threats to animal welfare, changing the system will not be easily or quickly accomplished. The industry is heavily invested in inhumane practices with the purchases of production warehouses, battery cages, and debeaking and maceration machines. To limit the inevitable economic downfall that would result from the prohibition of such practices, the factory farming model should be changed gradually and

¹²⁰ Stewart Doan, *Ohio Livestock Groups, HSUS Strike Deal on Ballot Initiative*, Agri-Pulse, available at http://agri-pulse.com/20100701S_HSUS_livestock_Ohio.asp.

¹²¹ *Id.*

provide phase out periods. California's Proposition 2 can serve as a guide: prohibiting only battery cages and giving producers six years to phase these cages out. Such a law may be the most practical solution in the short term.

The prohibition of battery cages is a good place to start. Indeed, while nearly all husbandry practices of chickens are inhumane, intensive confinement may be the most abusive.¹²² Furthermore, prohibiting battery cages is an easier law to enforce than a law which requires producers to give chickens enough space in the cages to spread their wings; such a law—like New Jersey's— would require an enforcer to go into each cage and check to make sure that the chickens have space to spread their wings. Hence, prohibition of battery cages may be the single most practical and effective method of protecting chickens initially.

2. The Problems with State Regulation

State regulation suffers from a variety of problems. The two most obvious problems are the conflicting interests that exist in many states and the possibility of interstate competition; there is always the fear among policymakers that if their state prohibits an inhumane poultry practice, in-state processors and producers will simply move to a different state which allows that cruel and inhumane practice.

A. State's Conflicting Interests Make It Unlikely That They Will Enact an Animal Welfare Law Which Specifically Prohibits Inhumane Practices

¹²² See Singer, *supra* note 25, at 177 (“While virtually every aspect of commercial egg industry is inhumane, the intensive overcrowding of hens in the battery cage system may be the most abusive.”).

State animal welfare laws which specifically prohibit inhumane poultry practices are unlikely to be enacted in the vast majority of states. The reason for this is that many states are heavily invested in the poultry industry and will likely weigh economic interests over animal welfare.

While California's prohibition of battery cages has been a step in the right direction for animal welfare, it has come at a huge economic cost. One study estimates that the number of jobs that will be lost in California as a result of Proposition 2 is approximately 6,000.¹²³ Furthermore, the loss of the egg industry will also affect the overall economy; the loss of egg sales alone will cost the state approximately \$370 million—a figure which does not account for the upstream and downstream effects.¹²⁴ States which are even more heavily invested in egg production stand to lose even more.¹²⁵

Policymakers will likely resist enacting a law which would require their local farmers to reinvest in new equipment, increase their production costs by 20%, and result in a significant loss of economic activity. In fact, California's Proposition 2 was not the work of legislatures but rather the public through a ballot proposal. It is possible that states which have initiative and referendum will be more likely to enact true animal welfare laws as animal welfare groups like the SPCA and HSUS continue to use this political process to effectuate change. However, even in those states, the legislature can resist animal welfare ballot proposals through the creation of their own standards and convincing the public that their standards are designed to protect animals.

¹²³ See Tweeten *infra* note 131, at 3 (“The elimination of most of the California egg industry would have broader economic implications. The loss of about 3,000 jobs in the industry would be multiplied by a factor of about 0.9 to imply a statewide loss of jobs of about 5,750 jobs. The loss in overall economic activity in the state is also larger than the gross [egg] sales of about \$370 million in 2007 because of the ripple effects that affect upstream and downstream industries.”).

¹²⁴ *Id.*

¹²⁵ *Id.* at 5 (“Applying the latter percentage to the available estimate of jobs in California, Ohio's loss from Prop 2-type legislation would total 7,928 jobs and associated income.”).

Ohio's board-created standards reflect this problem. Ohio is an initiative and referendum state¹²⁶ which relies heavily on the poultry industry for jobs.¹²⁷ Therefore, Ohio had a political system in place for citizens/organizations to create a Proposition 2-type law but would have suffered economically if such a law were enacted. Hence while Issue 2's alleged purpose was to establish standards for "the care and well-being of livestock and poultry," it was subsequently revealed that the real purpose of the law was to "preempt attempts by groups outside the state to impose standards on livestock and poultry production in the state".¹²⁸ Thus, it is not a surprise that the Ohio standards reflect, above all, an interest in protecting the local farm economy.

B. Inhumane Practices Will Likely Still Exist Because of Interstate Competition

Even if a state prohibited all inhumane practices despite the economic costs, animal welfare activists still face a dilemma: those inhumane practices can be legally moved to another state. In fact, it is likely that as a result of California's ban on battery cages, almost all animal producers and processors will move to other states to avoid the requisite 20% increase in cost of production and other associated costs.¹²⁹ Addressing this concern for Ohio, one author writes, "Other states would gain jobs and income at Ohio's expense as animal products consumed in Ohio would be produced elsewhere. Those products would be produced using current practices, so overall animal welfare would be unaffected."¹³⁰

¹²⁶ Initiative & Referendum Institute, *Statewide Initiative and Referendum*, http://www.iandrinstute.org/statewide_i&r.htm (last visited May 2, 2012).

¹²⁷ See USDA, *supra* note 2 (estimating Ohio's broiler production to be approximately 59,600,000).

¹²⁸ Lindsay Vick, *Confined to a Process: The Preemptive Strike of Livestock Care Standards Boards in Farm Animal Welfare Regulation*, 18 *Animal L.* 151, 151 (2011).

¹²⁹ See Tweeten, *infra* note 131, at 3 ("Our analysis [of Proposition 2 regulations applied to California agriculture] indicates that the expected impact would be the almost complete elimination of egg production in California within the six-year adjustment period.").

¹³⁰ *Id.*

States which try to combat interstate competition through legislation face constitutional problems. California recently considered enacting a law prohibiting the sale of eggs and meat created under inhumane conditions.¹³¹ This law would decrease sales for producers and processors of inhumanely-raised eggs and meat by prohibiting them from profiting in California. While this decrease in sales might be enough of an incentive for processors to move away from inhumane practices, it poses constitutionality concerns: such a law would inhibit interstate commerce and as such would probably be ruled as a violation of state power.¹³² Thus, animal welfare cannot be moved forward without a prohibition of inhumane practices in all states.

3. Federal Regulation Is Appropriate

If the individual states are unable to protect animals for fear of producers moving to different states, than federal laws should protect animals throughout the nation. Indeed, such laws have been implemented in a number of other countries including Switzerland and all of the countries in the European Union.¹³³

However the federal government probably lacks police power to regulate animal welfare concerns under the U.S. Constitution.¹³⁴ This argument is based on the fact that Congress' law-making abilities under the Commerce Clause are limited to those concerns which impact interstate commerce; those federal laws which do govern animal welfare in the farming industry—such as the Humane Methods of Livestock Slaughter Act— are aimed at protecting

¹³¹ Luther Tweeten, *The Economics of Animal Welfare Regulations Proposed for Ohio* (June 18, 2009), http://oema.osu.edu/CAFO/animalwelfare_tweeten.pdf (“California has proposed trade barriers to egg imports from other states. Such barriers seem unachievable because they conflict with the interstate commerce clause of the U.S. Constitution and likely would be ruled unconstitutional.”).

¹³² *Id.*

¹³³ See Singer, *supra* note 25, at 100.

¹³⁴ See Thapar, *supra* note 12, at 330.

the economic value of the animal and not the humane treatment of it.¹³⁵ Thus, the federal government may not have police power to enforce a federal statute aimed at protecting the welfare of animals.¹³⁶

Federal animal welfare laws which have the sole intention of protecting the rights of animals, notwithstanding their effects on commerce, may in fact be vulnerable to Constitutional attacks for lack of police power. Traditional methods of police power, such as the Interstate Commerce Clause, may be inapplicable when the concerns over the production of interstate goods relate to animals. In *United States v. Darby Lumber Company*,¹³⁷ the Supreme Court held that Congress had the power to regulate aspects of industrial production to suppress interstate competition. There, the court reviewed a federal law which excluded from interstate commerce, goods that were not produced in accordance with prescribed standards. While such a holding appears to give power to Congress to enact federal legislation which excludes inhumanely created animal products from interstate commerce, this same analysis may not apply to substandard conditions imposed on animals. Specifically, the standards prescribed in *Darby* were intended to set minimum and maximum hours for employees; farm animals have traditionally not been accorded an economic value, other than the value for human consumption. Hence the relationship between animal welfare and interstate commerce might be considered specious. It is likely that Congress does not have police power under this argument.

¹³⁵ *Id.* at 329 (“the federal government treats animals as articles of commerce. This conception of animals, as nothing more than widgets with economic value, is reflected in the language of federal laws on animal welfare, which is targeted to protecting the value of the animal in commerce and not to prevent cruelty.”).

¹³⁶ *Id.* at 330 (noting that “federal government lacks explicit authority to regulate under any police power, any federal criminal statute may not have a constitutional basis and might therefore be vulnerable to a court challenge.”).

¹³⁷ *United States v. Darby*, 312 U.S. 100, 61 S. Ct. 451, 85 L. Ed. 609 (1941).

However this is not to say that federal animal welfare laws cannot exist while also protecting other vital resources, such as the environment. Indeed, animal welfare activists may still find solace under the power of the Interstate Commerce Clause. Instead of focusing on animal rights, however, federal laws seeking to prevent animal suffering should be worded to focus on the environmental problems produced by intensive confinement practices.

The Supreme Court has previously held that in-state environmental dangers may be subjected to Congressional remedial legislation via the Interstate Commerce Clause. In *Hodel v. Virginia Mining and Reclamation Association*,¹³⁸ for example, the court upheld federal regulation of surface or strip coal mining operations with the findings that surface coal mining causes water pollution and flooding navigable streams. The court found that Congress could regulate the conditions under which goods shipped in interstate commerce are produced when that, in itself, affects interstate commerce. Thus, commerce clause power permits federal regulation of activities causing air or water pollution, or other environmental hazards that may have ultimate effects in more than one state.

The well-documented connection between current intensive confinement practices and water pollution will give Congress the authority to ban such intensive confinement methods. In the PEW commissions report,¹³⁹ the committee noted the serious threats that battery cages and other intensive confinement methods pose to groundwater and our health.¹⁴⁰ The ground application of large amounts of animal excrement resulting from intensive confinement methods causes

¹³⁸ 452 U.S. 264 (1981).

¹³⁹ See PEW, *supra* note 24, at 58 (“The concentrated animal waste and associated possible contaminants from [factory farming] systems pose a substantial environmental problem for air quality, surface and subsurface water quality, and the health of workers, neighboring residents and the general public”).

¹⁴⁰ *Id.* at 23 (“The rapid ascendance of [factory farms] has produced unintended and often unanticipated environmental and public health concerns... Today over a million people are estimated to take their drinking water from groundwater that shows moderate or severe contamination with nitrogen-containing pollutants, mostly due to the heavy use of agricultural fertilizers and high rates of application of animal waste.”).

water pollution which is both harmful and far-reaching.¹⁴¹ Therefore, the use of intensive confinement methods should be banned through the creation of a new federal law which focuses on the impacts to the environment.

However, such a law should be worded carefully to prevent processors and producers from circumventing the new legislation. If producers and processors can simply alter their excrement removal methods to alleviate the environmental concerns while still continuing with inhumane methods of production and slaughter, animals will still suffer. Thus, a new federal law should specifically ban the use of intensive confinement methods and carefully define intensive confinement methods as to include battery cages. Such a law would be justified as the connection between intensive confinement methods and the resulting environmental problems is undeniable.¹⁴²

Finally, as the Humane Methods of Livestock Slaughter Act has already been implemented, it should be extended to apply to poultry. Such an extension would prevent maceration of day-old chicks. These guidelines could serve as a baseline standard for animal rights until future strides in animal welfare legislation are possible.

IV. Conclusion

¹⁴¹ *Id.* at 25 (“Agricultural runoff laden with chemicals (synthetic fertilizers and pesticides) and nutrients is suspected as a major culprit responsible for many ‘dead zones’ in both inland and marine waters, affecting an estimated 173,000 miles of US waterways.”); *see also* Gregory W. Blount et al., *The New Nonpoint Source Battleground: Concentrated Animal Feeding Operations*, 5 Alb. L. Envtl. Outlook 27, at 27.

¹⁴² Statement of Michael Cook, Director, Office of Wastewater Management, and Elaine Stanley, Director, Office of Compliance, U.S. Environmental Protection Agency, before the Subcommittee on Livestock, Dairy and Poultry and the Subcommittee on Forestry, Resource Conservation, and Research of the Committee on Agriculture, U.S. House of Representatives, May 13, 1998; *see also* Gregory Blount, *supra* note 141, at 27 (noting that the factory farm effects can be felt over 35,000 river miles in twenty-two states).

The current system of factory farming of chickens in the U.S. is a travesty. The inhumane methods which the U.S. subjects *billions* of broiler and layer chickens to each year are strictly prohibited in other developed countries. Through its lack of federal legislation and its support of large-scale producers and processors in tax legislation, the Federal government is complicit in the inhumane treatment and slaughter of billions of innocent animals.

State regulation of factory farming is largely inappropriate for two main reasons: 1) the conflicting interests between some state economies and animal welfare and 2) interstate competition which may drive producers and processors to states which have more relaxed standards of production and slaughter. Many states rely on inhumane, intensive confinement systems to support their economy and cannot be trusted to adequately represent the welfare of animals. While some states, such as California, have been able to successfully implement animal welfare laws into their existing statutes, the economic consequences could prove too much for chicken producers who may choose to relocate to states with more relaxed standards.

Therefore, federal regulation of animal rights is advisable. Such regulation is constitutional under the Interstate Commerce Clause if the regulation focuses on the environmental impacts of factory farming, such as groundwater contamination. As an important first step, such legislation should specifically prohibit the use of battery cages and provide penalties for violations of the law. Soon afterwards, prohibitions with respect to debeaking, poorly ventilated factories, genetic selection which cause painful health problems for animals, and inhumane handling processes should be addressed.

Finally, the Humane Methods of Slaughter Act should be amended to cover the slaughter of poultry and prevent common killing methods such as maceration. While the economic impact

may be severe for some farmers, a phase out period-- such as the six year period suggested by California-- may help local farmers deflect some of the costs of switching to more humane methods. Such legislation would only be a beginning to eventually restoring farming to the healthy, sustainable and humane ways of raising farm animals in the past.