RITUAL SLAUGHTER, FEDERAL PREEMPTION, AND PROTECTION FOR POULTRY: WHAT LEGISLATIVE HISTORY TELLS US ABOUT USDA ENFORCEMENT OF THE HUMANE SLAUGHTER ACT

By
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The one federal law that protects animals raised for food (farm animals) is the Humane Methods of Slaughter Act (HMSA), which, as its name implies, covers only the final moments of animals' lives. Beyond overall lax enforcement, the United States Department of Agriculture (USDA) has made three interpretive decisions, one with support from the Supreme Court, that have further harmed farm animals: First, USDA exempts the ritual slaughter process from oversight. Second, USDA has thus far refused to protect poultry, who represent more than 98% of slaughtered land animals. And third, USDA has argued, and the Supreme Court agreed, that the HMSA preempts state laws that would offer greater protection than USDA chooses to offer under the law.

In Part II of this Article, I discuss the importance of farm animal protection and offer a brief introduction to the Humane Slaughter laws that exist in the United States. In Part III, I discuss the legislative history of humane slaughter statutory protection. And in Part IV, I consider whether USDA's enforcement decisions with regard to ritual slaughter, poultry slaughter, and federal preemption of state law – which were backed by the Supreme Court – are supported by legislative history.

I conclude that: (1) USDA's refusal to regulate ritual slaughter in the 'ritual bubble' cannot be reconciled with legislative intent, as documented in the legislative history; (2) the Supreme Court's decision in National Meat, which told states that they cannot grant greater slaughterhouse protection to animals than is offered by USDA regulations, was neither contemplated by, nor the intent of, Congress when it incorporated humane slaughter into the Federal Meat Inspection Act (FMIA); and (3) although the district court was wrong to hold that HMSA 1958 intended to exclude poultry, such a decision by USDA is within its discretion, according to the legislative history.

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"Through their daily behavior, people who love [their] pets, and greatly care about their welfare, help ensure short and painful lives for billions of animals who cannot easily be distinguished from dogs and cats."

—Professor Cass Sunstein, *Dogs, Cats, and Hypocrisy*[1]

"Farm animals feel pleasure and sadness, excitement and resentment, depression, fear and pain. They are far more aware and intelligent than we ever imagined and, despite having been bred as domestic slaves, they are individual beings in their own right."

—Dr. Jane Goodall, *The Inner World of Farm Animals*[2]

I. INTRODUCTION

In 2002, the state of Florida became the first state to ban a standard animal agriculture practice when it amended its constitution to ban the use of "gestation crates,"[3] which are the body-sized crates used to confine more than 80% of gestating pigs in the United States.[4] In the crates, the animals cannot even turn around, so that their muscles

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[1] Cass R. Sunstein, *Introduction* to ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 3 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

[2] Jane Goodall, *Foreword* to AMY HATKOFF, THE INNER WORLD OF FARM ANIMALS 12–13 (2009).

[3] FLA. CONST. art. X, § 21.

[4] *Crammed into Gestation Crates: But America's Breeding Pigs Are Starting to Regain Their Freedom*, HUMANE SOC'Y U.S., http://www.humanesociety.org/issues/confinement_farm/facts/gestation_crates.html [https://perma.cc/VA5Y-6RQX] (accessed Jan. 19, 2018); Gustav W. Friedrich, *Opinion: End use of gestation crates for farm animals in New Jersey*, NJ.COM (Feb. 6, 2013, 6:08 AM), http://www.nj.com/times-opinion/

and bones atrophy, and they suffer severe physical and psychological harm from the stress.[5]

Since 2002, eight additional states have banned these crates, and a few other states have banned similar devices that are used for veal calves and egg-laying hens.[6] Additionally, a variety of major corporations have promised to phase out intensive confinement systems.[7] This piecemeal approach to farm animal welfare reform is necessary, because there are no federal laws that meaningfully reach farm animals.[8] The principal federal animal welfare law – the Animal Welfare Act – exempts farm animals altogether, so that on-farm animal welfare is left to the tender mercies of state governments and corporate bottom lines,[9] and this is despite the fact that 95% of Americans say they would like to see farm animals protected from abuse.[10]

The one federal law that protects animals raised for food (farm animals) is the Humane Methods of Slaughter Act (HMSA), which, as its name implies, covers only the final moments of animals' lives.[11] Beyond overall lax enforcement, the United States Department of Agriculture (USDA) has made three interpretive decisions, one with support from the Supreme Court, that have further harmed farm animals: First, USDA exempts the ritual slaughter process from oversight.[12] Second, USDA has thus far refused to protect poultry, who represent more than 98% of slaughtered land animals.[13] And third,

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index.ssf/2013/02/opinion_end_confinement_of_ges.html [http://perma.cc/L3CQ-HR9L] (accessed Jan. 19, 2018).

[5] *An HSUS Report: The Economics of Adopting Alternative Gestation Crate Confinement of Sow*, HUMANE SOC'Y U.S. 1, http://www.humanesociety.org/assets/pdfs/farm/economics_gestation_alternatives.pdf [https://perma.cc/PW8B-2LSS] (accessed Jan. 19, 2018); HUMANE SOC'Y U.S., *supra* note 4.

[6] *State Legislation: Animal Protection Legislation History*, FARM SANCTUARY, http://www.farmsanctuary.org/get-involved/federal-legislation/state-legislation/ [https://perma.cc/UB5J-PSKV] (accessed Jan. 19, 2018).

[7] HUMANE SOC'Y U.S., *supra* note 4.

[8] CASS R. SUNSTEIN, CONSPIRACY THEORIES & OTHER DANGEROUS IDEAS 87–89 (2014) ("The [food animal] exemption is the most important. Billions of animals are killed for food annually in the United States, with 24 million chickens and some 323,000 pigs slaughtered every day. . . . In short, the law might consider appropriate regulation of . . . (above all) farming to safeguard against unnecessary and unjustified animal suffering.").

[9] *Legal Protection for Animals on Farms*, ANIMAL WELFARE INST. https://awionline.org/sites/default/files/uploads/documents/FA-AWI-LegalProtections-AnimalsonFarms-110714.pdf [https://perma.cc/76WL-TZB5] (accessed Jan. 19, 2018).

[10] JAYSON L. LUSK ET AL., CONSUMER PREFERENCES FOR FARM ANIMAL WELFARE: RESULTS OF A NATIONWIDE TELEPHONE SURVEY 13 (Aug. 17, 2007).

[11] The Humane Methods of Slaughter Act is two laws: Humane Methods of Slaughter Act of 1958, Pub. L. No. 85-765, 72 Stat. 862 (1958) [hereinafter HMSA 1958] and Humane Methods of Slaughter Act of 1978, Pub. L. No. 95-445, § 5, 92 Stat. 1069 (1978) [hereinafter HMSA 1978].

[12] Enforcement of Humane Methods of Slaughter Act of 1958, 7 U.S.C. § 1906 (2012).

[13] *Petition to Issue Regulations Under the Poultry Products Inspection Act to Regulate Practices and Actions that Result in Adulterated Poultry Products*, FOOD SAFETY & INSPECTION SERV., https://www.fsis.usda.gov/wps/wcm/connect/e138fe1a-d380-42b2-

USDA has argued, and the Supreme Court agreed, that the HMSA preempts state laws that would offer greater protection than USDA chooses to offer under the law.[14]

In Part II of this article, I will discuss the importance of farm animal protection and offer a brief introduction to the Humane Slaughter laws that exist in the United States. In Part III, I will discuss the legislative history of humane slaughter statutory protection. And in Part IV, I will consider whether USDA's enforcement decisions with regard to ritual slaughter, poultry slaughter, and federal preemption of state law – which were backed by the Supreme Court – are supported by legislative history.

II. USDA'S HUMANE SLAUGHTER OVERSIGHT: FACTUAL AND LEGAL BACKGROUND

The vast majority of Americans eat animals, and for many, the idea that a chicken's suffering is worthy of ethical and legal concern might seem less than immediately obvious. In this section, I will discuss why I believe farm animals matter morally. I will then discuss the legal reality for farm animals, laying out the fact that although farm animals are worthy of concern, they have almost no legal protection at all.

A. Farm Animals: An Overview

In the seventeenth century, Renee Descartes argued that animals other than humans are, essentially, automatons – no different from clocks in their ability to think or feel pain.[15] When you cut them, they may bleed and scream out, but those are reactions no different than a clock ticking when being set in motion; like clocks, other animals do not feel pain.[16] Although Descartes probably believed his arguments, he also recognized their convenience: "Thus my opinion is not so much cruel to animals as indulgent to human beings – at least to those who are not given to the superstitions of Pythagoras – since it absolves them from the suspicion of crime when they eat or kill animals."[17]

Certainly eating animals becomes less objectionable if we deny them the capacity to feel pain, but Descartes went quite a bit further,

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88b7-f24a11ed7d7f/Petition-AWI-PPIA-121713.pdf?MOD=AJPERES [https://perma.cc/6WZ6-HZP5] (accessed Jan. 19, 2018). This percentage was calculated to include cattle, pigs, chickens, turkeys, and farmed fish, but not fish.

[14] Nat'l Meat Ass'n v. Harris, 565 U.S. 452, 461 (2012).

[15] A COMPANION TO DESCARTES 404, 411, 421 (Janet Broughton & John Carriero eds., 2008).

[16] PETER SINGER, ANIMAL LIBERATION: THE DEFINITIVE CLASSIC OF THE ANIMAL MOVEMENT 200 (First Harper Perennial ed. 2009).

[17] Broughton & Carriero, *supra* note 15, at 421. Pythagoras was pro-animal and a vegetarian; until the term "vegetarian" was coined in the 20th Century, vegetarians were called Pythagoreans. Tori Avey, *From Pythagorean to Pescatarian – The Evolution of Vegetarianism*, PBS (Jan. 28, 2014), http://www.pbs.org/food/blogs/the-history-kitchen/ [https://perma.cc/P4JL-JT4Z] (accessed Mar. 30, 2018).

cutting into live dogs without pain relief, or remorse.[18] A contemporaneous account of Descartes' philosophy and its practical effect is gruesome:

> They said the animals were clocks; that the cries they emitted when struck were only the noise of a little spring that had been touched, but that the whole body was without feeling. They nailed poor animals up on boards by their four paws to vivisect them and see the circulation of the blood which was a great subject of conversation.[19]

Although most readers will recoil at the heartlessness of Descartes and his acolytes, anyone who eats meat is – as Professor Sunstein and Dr. Goodall note in my opening epigraphs – contributing to a methodical system of cruelty that treats farm animals in ways that would warrant felony cruelty charges were dogs or cats similarly abused. Even as the federal government has added some protection for other animals through the Animal Welfare Act, and even as all fifty states have passed laws against cruelty to animals, farm animal protection has been virtually non-existent,[20] with the exception of a limited number of state laws that deal only with confinement so extreme that the practices in question destroy the animals' minds and bodies.[21]

Outside these limited state laws, a wide variety of horrific abuse is allowed to continue, including mutilations without pain relief, waste accumulation that keeps all of the animals in chronic and severe respiratory distress, and genetic manipulation that creates animals who have become such freaks of nature that they cannot even breed naturally.[22] As just one example, chickens have been bred to grow more than four times as quickly as they would normally, but their hearts,

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[18] Singer, *supra* note 16, at 201–02.

[19] Singer, *supra* note 16 (quoting NICHOLAS FONTAINE, MEMORIES POUR SERVIR A L'HISTOIRE DE PORT ROYAL (1756)).

[20] *See generally* David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable*, *in* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 205–19 (Cass. R. Sunstein & Martha C. Nussbaum eds., 2004) ("[I]t is not unfair to say that, as a practical matter, farm animals have no legal protection at all.").

[21] Bruce Friedrich, *The Cruelest of All Factory Farm Products: Eggs From Caged Hens*, HUFFINGTON POST (Mar. 16, 2013), http://www.huffingtonpost.com/bruce-friedrich/eggs-from-caged-hens_b_2458525.html [https://perma.cc/TA8Y-EQ6P] (accessed Jan. 19, 2018); Bruce Friedrich, *Why Governor Christie Should Stand for Pregnant Sows*, NAT'L REV. (Nov. 7, 2014), http://www.nationalreview.com/article/392262/ban-gestation-crates-bruce-friedrich [https://perma.cc/FQ32-G9UM] (accessed Jan. 19, 2018).

[22] *See, e.g.*, JONATHAN SAFRAN FOER, EATING ANIMALS (2009) (discussing why humans eat meat); *see also* Nicholas Kristof, *Abusing Chickens We Eat*, N.Y. TIMES (Dec. 3, 2014), http://www.nytimes.com/2014/12/04/opinion/nicholas-kristof-abusing-chickens-we-eat.html?ref=opinion [https://perma.cc/MKR2-3F2G] (accessed Jan. 19, 2018) ("These chickens don't run around or roost as birds normally do. They stagger a few steps, often on misshapen legs, and then collapse onto the excrement of tens of thousands of previous birds. It is laden with stinging ammonia that seems to eat away at feathers and skin [so that] the bellies of nearly all the chickens have lost their feathers and are raw, angry, red flesh. The entire underside of almost every chicken is a huge, continuous bedsore.").

lungs, and limbs cannot keep up.[23] University of Arkansas poultry scientists found that if a human baby were genetically manipulated to the same degree, she would weigh more than 650 pounds at just two months of age.[24] Veterinary Professor John Webster calls modern chicken production, "in both magnitude and severity, the single most severe, systematic example of man's inhumanity to another sentient species."[25]

But of course, we now know conclusively that Descartes' view is wrong and that, in fact, other animals can feel pain in the same way and to the same physiological degree as humans.[26] With regard to farm animals specifically, we know that in addition to the biological fact of similar physical pain, they can also suffer psychological and emotional pain.[27] As just a few examples of the ethological capacities of farm animals, chickens can delay gratification, learn from watching other chickens on television, figure out that hidden objects still exist, and understand how mirrors work.[28] Similarly, pigs are sociable animals with behavioral and cognitive complexity comparable to that of chimpanzees, our closest living relatives.[29] Summing up the research on farm animal ethology for her foreword to a book on the topic, primatologist Dr. Jane Goodall explained: "Farm animals feel pleasure and sadness, excitement and resentment, depression, fear and pain. They are far more aware and intelligent than we ever imagined . . . they are individual beings in their own right."[30]

If farm animals were a small percentage of the animals raised and killed in the United States, perhaps the issue of their treatment would

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[23] JACKY TURNER ET AL., THE WELFARE OF BROILER CHICKENS IN THE E.U., COMPASSION IN WORLD FARMING TRUST 2–7 (2005); Jacob Bunge, *How to Satisfy the World's Surging Appetite for Meat*, WALL STREET J. (Dec. 4, 2015), https://www.wsj.com/articles/how-to-satisfy-the-worlds-surging-appetite-for-meat-1449238059?mod=fromImagePromo [https://perma.cc/P5GK-JPE5] (accessed Mar. 30, 2018).

[24] R.F. Wideman et al., *Pulmonary Arterial Hypertension (Ascites Syndrome) in Broilers: A Review*, 92 POULTRY SCI. 64, 65 (2013), http://ps.oxfordjournals.org/content/92/1/64.full.pdftml [https://perma.cc/T4ZC-U7K2] (accessed Jan. 19, 2018).

[25] JOHN WEBSTER, ANIMAL WELFARE: A COOL EYE TOWARDS EDEN 156 (1995).

[26] Andrea Nolan, *Do Animals Feel Pain in the Same Way Humans Do?*, INDEPENDENT (July 7, 2015), http://www.independent.co.uk/life-style/health-and-families/features/do-animals-feel-pain-in-the-same-way-as-humans-do-10371800.html [http://perma.cc/R3S8-3UAV] (accessed Jan. 19, 2018).

[27] Jonathan Balcombe, *Yes, Animals Have Feelings*, LIVE SCI. (Dec. 10, 2014), https://www.livescience.com/49093-animals-have-feelings.html [https://perma.cc/M5FU-TE5N] (accessed Jan. 19, 2018).

[28] Nicholas Kristof, *Are Chicks Brighter Than Babies?*, N.Y. TIMES (Oct. 20, 2013), http://www.nytimes.com/2013/10/20/opinion/sunday/are-chicks-brighter-than-babies.html [http://perma.cc/9H2E-AM3U] (accessed Jan. 19, 2018).

[29] *See generally* Lori Marino & Christina M. Colvin, *Thinking Pigs: A Comparative Review of Cognition, Emotion, and Personality in Sus domesticus*, 28 INT'L J. COMP. PSYCHOL. (2015), http://escholarship.org/uc/item/8sx4s79c [https://perma.cc/EX98-YCRZ] (accessed Jan. 19, 2018) (providing that pigs are sociable and outperform chimpanzees on scientific tests of behavioral and cognitive complexity).

[30] Jane Goodall, *Foreword* to AMY HATKOFF, THE INNER WORLD OF FARM ANIMALS 12–13 (2009).

be inconsequential. However, in the United States alone, we slaughter close to nine billion land animals annually, which means that Americans eat more than 6,000 animals for every dog or cat euthanized in a shelter.[31] As lawyers David Wolfson and Mariann Sullivan note in their contribution to the collection of animal law essays collected by Professors Nussbaum and Sunstein,

> From a statistician's point of view, since farmed animals represent 98% of all animals (even including companion animals and animals in zoos and circuses) with whom humans interact in the United States, all animals are farmed animals; the number who are not is statistically insignificant.[32]

B. The Humane Slaughter Acts of 1958 and 1978

The two federal laws that are supposed to offer some protection to farm animals are the Humane Methods of Slaughter Act of 1958 (HMSA 1958) and the Humane Methods of Slaughter Act of 1978 (HMSA 1978).[33] The 1958 law declared it "to be the policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods"[34] and spelled out two forms of humane 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.[35]

The law also required that the federal government procure meat exclusively from slaughterhouses that were in compliance with the law, allowed USDA to set up an advisory committee to help with set-

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[31] *Pet Statistics*, ASPCA, https://www.aspca.org/animal-homelessness/shelter-intake-and-surrender/pet-statistics [https://perma.cc/F74M-SSHH] (accessed Jan. 19, 2018) (1.5 million animals euthanized annually in shelters); *see also Farm Animal Statistics: Slaughter Totals*, HUMANE SOC'Y U.S. (updated June 25, 2015), http://www.humanesociety.org/news/resources/research/stats_slaughter_totals.html [https://perma.cc/7DBL-GYAM] (accessed Jan. 19, 2018) (providing statistics for and trends of the number of animals slaughtered in the United States each year).

[32] Wolfson & Sullivan, *supra* note 20, at 4. *See generally* Bruce Friedrich, *When the Regulators Refuse to Regulate: Pervasive USDA Underenforcement of the Humane Slaughter Act*, 104 Geo. L.J. 197 (2015) (discussing the inadequacy of HMSA oversight).

[33] HMSA 1958; HMSA 1978.

[34] HMSA 1958 § 1.

[35] *Id.* § 2 (emphasis added).

ting regulations,[36] and exempted ritual slaughter from required compliance. This last provision is critical to this article:

> Notwithstanding any other provision of this Act, in order to protect freedom of religion, ritual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this Act. For the purposes of this section the term 'ritual slaughter' means slaughter in accordance with section 2(b).[37]

In 1978, Congress passed HMSA 1978, which incorporated most of HMSA 1958 into the Federal Meat Inspection Act (FMIA), replacing the procurement ban with USDA authority to hand down administrative and criminal sanctions against non-compliant plants.[38] It also banned the import into the United States of any meat from plants that were not operating in compliance with the Humane Methods of Slaughter Act.[39] Additionally, where HMSA 1958 was written to cover "other livestock" in addition to listed species, HMSA 1978 covers only a precise list of animals, and poultry are not on that list.[40] Critical to our discussion, though, the other livestock provision of HMSA 1958 was not repealed – it was just not incorporated into the FMIA – and it remains operative in the 1958 statute. Finally, although the HMSA does not have a preemption clause, the FMIA does, so when humane slaughter was incorporated into the FMIA, it adopted the preemption clause of its host bill,[41] though no one seemed to notice that effect of the law.[42]

In our final piece of humane slaughter history, the massive 2005 Farm Bill included an amendment to the FMIA that replaced the list of species that were protected from inhumane slaughter with the phrase, "amenable species," which is defined to include both the animals already covered ("cattle, sheep, swine, goats, horses, mules, and other equines")[43] and also "any additional species of livestock that the Secretary considers appropriate."[44] This amendment has had, thus

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[36] *Id.* § 4.

[37] *Id.* § 6.

[38] Pub. L. No. 95-445, § 5, Oct. 10, 1978, 92 Stat. 1069.

[39] *Id.*

[40] *Id.*

[41] 21 U.S.C. § 678 (2012).

[42] *See infra* Part IV.C (discussing a Supreme Court decision that vacated a California law banning the slaughter of sick or crippled pigs).

[43] Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, Pub. L. No. 109-97, 119 Stat. 2166 (2005). This addition was part of a ninety-page farm bill, and the legislative history is unclear on how it came to be inserted into the bill. The final two bills to come out of the House and Senate do not include this provision, and the provision was also not mentioned in either Committee Report. H.R. REP. NO. 109-102 (2005); S. REP. NO. 109-92 (2005). The final House committee hearings, which came after both of these reports, also do not discuss this provision. 151 CONG. REC. S8951 (daily ed. July 26, 2005) (statement of Sen. Sarbanes). While the Conference Report includes the language in the final bill, of course, there is no discussion of it. H.R. REP. 109-255 (2005).

[44] 21 U.S.C. § 601(w)(3) (2012).

far, no practical effect, since USDA has not yet promulgated a single regulation to protect another species with this authority.

III. LEGISLATIVE HISTORY OF HUMANE SLAUGHTER

The focus of this Article is what legislative history tells us about three key controversies with regard to USDA's interpretation of the Humane Slaughter Act: (1) whether USDA should refuse to apply the Act to the ritual slaughter process, called the 'ritual bubble' by the agency; (2) USDA's decision not to include poultry among other livestock in the HMSA 1958 law, thus leaving them with no federal legal protection at slaughter; and (3) USDA's support for federal preemption of state humane slaughter laws, which was upheld by the Supreme Court and which vacated a California law intended to stop the slaughter for human consumption of animals who are too sick or injured to walk.[45] Since we will be delving into the legislative history of these three decisions to see whether it supports USDA's interpretation, it is worth a preliminary detour into the question of why legislative history matters.

The touchstone of judicial review of administrative action is statutory purpose, which is often framed by courts with the shorthand, 'congressional intent,'[46] and courts will frequently discern this intent (or purpose) by examining legislative history. In recent years, this method has become controversial, with some judges disdaining legislative history as "often murky, ambiguous, and contradictory . . . . [and likely to] give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text."[47] Of course, statutory text often suffers from precisely these problems as well, and so courts will generally recognize that consideration of legislative history is appropriate where the text of the statute appears not to align with congressional intent.[48]

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[45] *Nat'l Meat Ass'n*, 565 U.S. at 455; Levine v. Vilsack, 587 F.3d 986, 987 (9th Cir. 2009); Jones v. Butz, 374 F. Supp. 1284, 1291 (S.D.N.Y. 1974).

[46] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984) ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter . . . .").

[47] Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568–69 (2005).

[48] Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 455 (1989) ("Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees . . . seems inconsistent with Congress' intention, since the plain-meaning rule is 'rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.'" (citing Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 n.4 (1928))); *see also* Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991) ("Legislative history materials are not generally so misleading that jurists should never employ them in a good-faith effort to discern legislative intent. Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past. We suspect that the practice will likewise reach well into the future.") (citation omitted); *Pub. Citizen*, 491 U.S. at 453 n.9 ("[C]ountless opinions of this

Indeed, the formative case that set the precedent for all judicial review of administration action since, *Chevron v. NRDC*,[49] involved all six deciding justices delving deeply into the legislative history of whether the Congress that passed Clean Air Act amendments with regard to "stationary sources" had a clear intent for administrative interpretation of that phrase:

> Based on the examination of the legislation and its history which follows, we agree with the Court of Appeals that Congress did not have a specific intention on the applicability of the bubble concept in these cases, and conclude that the EPA's use of that concept here is a reasonable policy choice for the agency to make.[50]

It went without saying that legislative history was an appropriate place for inquiry, and most courts have continued to avail themselves of such materials.

There is some debate about what sources of legislative history are most authoritative, and courts often delve into all of the history without much clarity about weighting.[51] However, where courts do discuss weight of authority in the context of legislative history, they will generally see committee reports as most useful in discerning legislative intent.[52] That said, Professor Nourse has noted that the views of bill authors and "[t]extual amendments and statements directly related to

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Court . . . have rested on [legislative history] . . . . [I]t [does not] strike us as in any way 'unhealthy' or undemocratic to use all available materials in ascertaining the intent of our elected representatives, rather than read their enactments as requiring what may seem a disturbingly unlikely result, provided only that the result is not 'absurd.' Indeed, the sounder and more democratic course, the course that strives for allegiance to Congress' desires in all cases, not just those where Congress' statutory directive is plainly sensible or borders on the lunatic, is the traditional approach we reaffirm today."). Even Justice Scalia would have looked to legislative history where the text leads to an "absurd" result: "I think it entirely appropriate to consult all public materials, including the . . . legislative history of its adoption, to verify that what seems to us an unthinkable disposition was indeed unthought of . . . ." Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

[49] *Chevron*, 467 U.S. at 842 n.9 (1984).

[50] *Id.* at 845.

[51] *See generally, e.g., Pub. Citizen*, 491 U.S. at 440 (reviewing legislative history to determine that public interest groups had standing to sue); *Green*, 490 U.S. at 504 (analyzing legislative history to determine the meaning of "defendant" in the Federal Rules of Evidence); *Chevron*, 467 U.S. at 837 (delving into legislative history with a focus on relevance and no discussion of whether a historical statement was more or less authoritative based on its province).

[52] *See, e.g.*, Garcia v. United States, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.' We have eschewed reliance on the passing comments of one Member and casual statements from the floor debates. In *O'Brien*, we stated that Committee Reports are 'more authoritative' than comments from the floor, and we expressed a similar preference in *Zuber.*") (citation omitted).

text are the best legislative history, whether they are uttered on the floor or in a committee report."[53]

IV. HMSA ENFORCEMENT & LEGISLATIVE HISTORY

Since the original HMSA was passed in 1958, there have been three court battles with regard to USDA oversight of the law: First, there was a court challenge to the ritual exemption, which argued that the exemption violated the Establishment Clause of the U.S. Constitution.[54] Second, there was a challenge to USDA's decision to exempt birds from coverage under the law.[55] And third, there was a preemption challenge to a California law that banned the slaughter of sick and crippled pigs for human consumption, because USDA continues to allow the slaughter and consumption of such animals.[56]

Each of these USDA interpretations of the law has resulted in shocking cruelty to animals. For example, because USDA refuses to regulate ritual slaughter, workers can saw away at animals' throats and rip the tracheas out of fully conscious animals.[57] Because USDA exempts birds from regulatory protection, there is no federal recourse even for egregious abuse such as blowing up animals with homemade pipe bombs, throwing them against walls, or piling them on the floor and jumping up and down on them.[58] And because USDA refuses to require euthanasia for all animals who arrive for slaughter too sick or injured to walk, it remains legal to push animals around parking lots with construction equipment and to shock them with electric prods in order to try to force them to stand and walk to slaughter.[59] Such decisions have extraordinary consequences, not only for the abused animals, but also by coarsening those who work with them.[60]

A. Ritual Slaughter & Jones v. Butz

First, I will consider the ritual slaughter exemption to the FMIA and USDA's creation of a ritual bubble in which USDA inspectors exer-

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[53] Victoria Nourse, *Floor Amendments and Debate*, *in* Materials on Congressional Procedure 1.

[54] *Jones*, 374 F. Supp. at 1291.

[55] *Levine*, 587 F.3d at 987.

[56] *Nat'l Meat Ass'n*, 565 U.S. at 455.

[57] *See* discussion *infra* Section IV.A.1 (discussing the history of the ritual exemption in the FMIA).

[58] PETA, *Thousands of Chickens Tortured by KFC Supplier*, KY. FRIED CRUELTY, http://www.kentuckyfriedcruelty.com/u-pilgrimspride.asp [https://perma.cc/85XZ-ZWC5] (accessed Jan. 19, 2018); Mercy for Animals, *Watch: Perdue Workers Caught on Hidden Camera Stomping Birds to Death*, YOUTUBE (Dec. 9, 2015), https://www.youtube.com/watch?time_continue=26&v=05h2hNi1S1g [https://perma.cc/CB2S-UWGM] (accessed Jan. 19, 2018).

[59] *See* discussion *infra* Section IV.C.1 (discussing the procedural history of *Nat'l Meat Ass'n*).

[60] *See generally* TIMOTHY PACHIRAT, EVERY TWELVE SECONDS: INDUSTRIALIZED SLAUGHTER AND THE POLITICS OF SIGHT (James C. Scott ed., 2011) (discussing the author's work in a Nebraska slaughterhouse and its effect on him and the other workers).

cise no oversight. In this section, I will lay out the history of the ritual exemption, how it is applied, discuss its application by USDA, and consider whether USDA's protocols comport with legislative intent, as discerned through an examination of the legislative history of both HMSA 1958 and HMSA 1978.[61]

1. Background: Jones v. Butz *& Ritual Slaughter Oversight*

In *Jones v. Butz*, plaintiffs argued that the HMSA's ritual slaughter exemption "had a religious purpose – the protection of a religious belief – and therefore violated the Establishment Clause."[62] The Supreme Court applied the test devised in *Lemon v. Kurtzman*—"the *Lemon* test," which dictates that, with a few exceptions, a law first, "must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[63]

In deciding against the plaintiffs, the Court refused to consider the entanglement prong, because in 1974, there was no entanglement: "The governmental functions involved have no connection with any religious practices."[64] But circumstances have changed since that decision: originally, USDA had no authority to enforce methods of slaughter under the 1958 Act, and so the regulations that applied from 1959-1979 included no enforcement mechanism at all.[65] As we discussed above, however, Congress amended the law in 1978, granting authority to regulate. Despite comments asking USDA for more oversight of ritual slaughter, the agency declined, stating that its humane slaughter rules did not apply.[66]

More than twenty years later, USDA very briefly promulgated ritual slaughter oversight guidance, stating in October 2003 that:

> Inspection program personnel may act under section 1902(b) of HMSA if, after the animal's throat is cut, it struggles or bellows for an extended period of time or otherwise exhibits consciousness, or if the act of slaughter includes throat sawing, hacking, or multiple slicing of the neck with a sharp instrument.[67]

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[61] *See generally* Bruce Friedrich, *Ritual Slaughter in the "Ritual Bubble": Restoring the Wall of Separation Between Church and State*, 17 VT. J. ENVTL. L. 222, 222–53 (2015) (discussing the USDA's decision to create the ritual bubble, as well as a detailed history of that decision).

[62] *Jones*, 374 F. Supp. at 1291.

[63] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (internal citations omitted).

[64] *Butz*, 374 F. Supp. at 1293.

[65] HMSA 1958.

[66] Humane Slaughter Regulations, 44 Fed. Reg. 68809, 68812 (Nov. 30, 1979) (to be codified at 9 C.F.R. pts. 301, 304, 305, 313, 327, 335, 390, 391) (providing that the HMSA "specifically exempts certain ritual slaughter and the handling or other preparation of livestock for such ritual slaughter from its requirements. The regulations are therefore similarly inapplicable to such ritual slaughter and handling.").

[67] FSIS Directive 6900.2, Humane Handling and Slaughter of Livestock (U.S.D.A. 2003), https://web.archive.org/web/20040727111736/http://www.fsis.usda.gov/OPPDE/

As we will see in the next section, USDA was not making this scenario up; this precise and gruesome scene was actually happening in Iowa,[68] and it appears that USDA personnel realized that such activities violate the law. Indeed, the agency explained that "[s]uch incidents are examples of noncompliance because either the cut of the carotid arteries is not instantaneous and simultaneous, or the animals do not lose consciousness by anemia of the brain."[69] USDA realized that it was charged with enforcing both part (a) and part (b) of section 2 of HMSA 1958, and that the practices described very clearly cannot be reconciled with section 2(b) of the Act.

But the agency very quickly reversed itself, amending the directive the following month. The sole change from the guidance was to "clarify the instructions in Part V, Ritual Slaughter of Livestock."[70] That clarification removed the language just quoted and created a ritual bubble in which USDA personnel "are not to interfere in any manner with the preparation of the animal for ritual slaughter, including the positioning of the animal, or the ritual slaughter cut and any additional cuts by or under the supervision of the religious authority to facilitate bleeding."[71] Thus, the USDA decided that it is legal if, in the slaughter process, an animal "struggles or bellows for an extended period of time or otherwise exhibits consciousness, or if the act of slaughter includes throat sawing, hacking, or multiple slicing of the neck with a sharp instrument."[72]

Basically, USDA decided not to enforce half of the humane slaughter law after all. Additionally, some ritual slaughter plants allow for stunning, and where stunning is allowed, USDA inspectors will en-

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rdad/FSISDirectives/6900.2Rev1.pdf [https://perma.cc/T4XL-Q8BP] (accessed Jan. 19, 2018).

[68] *See* discussion *infra* notes 77–81 and accompanying text (discussing an undercover investigation which revealed cows in kosher slaughterhouses "staggering and bellowing in seeming agony long after their throats were cut.").

[69] FSIS Directive 6900.2, Humane Handling and Slaughter of Livestock (U.S.D.A. 2003).

[70] FSIS Directive 6900.2, rev. 1, Humane Handling and Slaughter of Livestock (U.S.D.A. 2003), https://web.archive.org/web/20040727111736/http://www.fsis.usda.gov/OPPDE/rdad/FSISDirectives/6900.2Rev1.pdf [https://perma.cc/882V-DVHL] (accessed Jan. 19, 2018).

[71] FSIS Directive 6900.2, rev. 2, Humane Handling and Slaughter of Livestock (U.S.D.A. 2011) http://www.fsis.usda.gov/wps/wcm/connect/2375f4d5-0e24-4213-902d-d94ee4ed9394/6900.2.pdf?MOD=AJPERES [https://perma.cc/DVK7-6WJX] (accessed Jan. 19, 2018); *see also* FOOD SAFETY & INSPECTION SERV., LIVESTOCK SLAUGHTER INSPECTION TRAINING: HUMANE HANDLING OF LIVESTOCK AND GOOD COMMERCIAL PRACTICES IN POULTRY 6-4 (2014), http://www.fsis.usda.gov/wps/wcm/connect/f01f41d1-bc55-42f3-8880-991814f35533/LSIT_HumaneHandling.pdf?MOD=AJPERES [https://perma.cc/X2SM-XEXN] (accessed Jan. 19, 2018) ("The ritual slaughter cut and the handling and restraint that immediately precedes that cut is often called the 'ritual bubble'. . . . Agency personnel don't enforce humane handling regulations within that 'ritual bubble'.").

[72] FSIS Directive 6900.2, *supra* note 67.

force humane stunning regulations.[73] Of course, this puts religious authorities in complete control of how they are supposed to follow the law.[74] And if an inspector witnesses egregious cruelty? "[I]f you see something during the 'ritual bubble' that concerns you, contact your immediate supervisor and the District Veterinary Medical Specialist (DVMS) for guidance on what action can be initiated."[75]

What an inspector's supervisor or the DVMS can do is not addressed.[76]

The creation of the ritual bubble creates an opening for almost unimaginable cruelty, as documented in 2004, when PETA released undercover video that, as the *New York Times* explained, documents "cows in a major kosher slaughterhouse in Iowa staggering and bellowing in seeming agony long after their throats were cut."[77] Specifically, the video showed that:

> Immediately after the shochet, or ritual slaughterer, has slit the throat, another worker tears open each steer's neck with a hook and pulls out the trachea and esophagus. The drum rotates, and the steer is dumped on the floor. One after another, animals with dangling windpipes stand up or try to; in one case, death takes three minutes.[78]

Although the conservative and reform wings of Judaism lined up to condemn the abuse,[79] "representatives of the Orthodox Union, the

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[73] *See* FSIS Directive 6900.2, rev. 2, *supra* note 71, at 15–16 ("For those animals that are ritually slaughtered, stunning effectiveness will not be evaluated, unless stunning methods (9 CFR 313) are an accepted part of that religious slaughter protocol and are inhumanely applied before or after the ritual slaughter cut."); *see also* FOOD SAFETY & INSPECTION SERV., LIVESTOCK SLAUGHTER INSPECTION TRAINING: HUMANE HANDLING OF LIVESTOCK AND GOOD COMMERCIAL PRACTICES IN POULTRY, *supra* note 71, at 30-16 ("When you perform your humane verification activities in a ritual slaughter situation, you will observe all HAT categories except stunning effectiveness. An exception to this is if stunning methods are an accepted part of that religious slaughter protocol."). USDA appears to see the ritual slaughter exemption as primarily a stunning exemption; so if a ritual plant allows stunning, stunning efficacy will be regulated.

[74] FSIS Directive 6910.1, rev. 1, District Veterinary Medical Specialist–Work Methods, 8 (U.S.D.A. 2009), http://www.fsis.usda.gov/wps/wcm/connect/fefdbb5b-e7d4-49a6-88e0-85890dff6cbe/6910.1Rev1.pdf?MOD=AJPERES [https://perma.cc/2ZEM-77KS] (accessed Jan. 19, 2018) ("If the establishment conducts ritual slaughter, the DVMS is to assess the establishment procedures to determine whether they are in conformance with the appropriate dietary laws and the Humane Methods of Slaughter Act.").

[75] FOOD SAFETY & INSPECTION SERV., DISPOSITION/FOOD SAFETY: HUMANE HANDLING OF LIVESTOCK AND GOOD COMMERCIAL PRACTICES IN POULTRY 4 (2014).

[76] *Id.* Although it is beyond the scope of this paper, it seems clear based on this level of entanglement – the USDA has handed enforcement protocol decisions to religious authorities – that USDA's ritual slaughter bubble would fall to a Constitutional challenge.

[77] Donald G. McNeil, Jr., *Videotapes Show Grisly Scenes at Kosher Slaughterhouse*, N.Y. TIMES (Nov. 30, 2004), http://www.nytimes.com/2004/11/30/national/30cnd-kosh.html?_r=0http://www.nytimes.com/2004/11/30/national/30cnd-kosh.html?_r=0 [https://perma.cc/W3WT-7M53] (accessed Jan. 19, 2018).

[78] *Id.*

[79] AARON S. GROSS, THE QUESTION OF THE ANIMAL AND RELIGION: THEORETICAL STAKES, PRACTICAL IMPLICATIONS 35 (2014).

leading organization that certifies kosher products, said that while the pictures were not pretty, they did not make the case that the slaughterhouse is violating kosher law."[80] Similarly,

> the leadership of all of America's halakhic forms of Judaism—modern Orthodoxy, Haredi Orthodoxy, and the Conservative movement—have, since [PETA's investigation of Agriprocessors] . . . emphasized publicly that any degree of cruelty, no matter how egregious, has no impact on the kosher status of the meat.[81]

2. The 'Ritual Bubble' and Legislative History

USDA's refusal to protect animals from cruelty in the ritual bubble cannot be reconciled with the plain meaning or the legislative history of the HMSA.

a. Plain Meaning

First, the statutory purpose of the act, as spelled out in the text, is to "prevent[ ] the inhumane slaughtering of livestock."[82] USDA has both administrative and criminal penalties available for any plant found to be slaughtering animals inhumanely.[83] Although "ritual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this Act," ritual slaughter is clearly defined as "slaughter in accordance with section 2(b),"[84] which defines "ritual slaughter" as "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*."[85]

On the one hand, one could simply read the words "ritual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this Act," and conclude that USDA has no authority in the ritual bubble. But can that be reconciled with an Act that has as its purpose to "require[e] that meat inspected and approved under such Act be produced only from livestock slaughtered in accordance with humane methods?"[86] Could it be that if a ritual authority decided to stick a white-hot poker into each animal's eye as a

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[80] McNeil, *supra* note 77.

[81] Gross, *supra* note 79; *see also id.* at 42 ("[OU experts concluded] that these procedures meet all OU standards to the highest degree, and that the shochtim (rabbinic slaughterers) are all highly proficient, skilled and knowledgeable.").

[82] HMSA 1978 § 2.

[83] *See* discussion *supra*, Part II.B (providing that HMSA 1978 granted USDA authority to hand down administrative and criminal sanctions against non-compliant plants).

[84] HMSA 1978 § 6.

[85] HMSA 1958 § 2(b) (emphasis added).

[86] HMSA 1978.

part of the ritual process, nothing in the Humane Slaughter Act would allow USDA to take prohibitive action?

Fortunately not, because the Act precisely defines acceptable ritual slaughter: "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."[87] If Congress wanted a total exemption for religious slaughter, there would have been no reason for any of the statutory text after the phrase "religious faith" in section 2(b). Furthermore, the final line of section 6, which defines ritual slaughter as "slaughter in accordance with section 2(b)," would be entirely superfluous. What work do either of these clearly expressed portions of the Humane Slaughter Act do if USDA's interpretation is correct?

Put another way, the current ritual bubble interpretation of USDA would allow religious authorities to use a dull blade instead of a "sharp instrument," and would allow any slaughter method at all, regardless of whether animals die by "simultaneous and instantaneous severance of the carotid arteries." Thus, USDA's interpretation cannot be reconciled with the plain meaning of the text unless key portions of the text are ignored entirely.

b. Legislative History

This plain language is confirmed by the legislative history. No topic was more hotly contested in discussion of HMSA 1958 than ritual slaughter, which took up far more time and attention than any other issue.[88] The most important points for our purposes are: first, that it was critical to the Congress that passed the Act that the science clearly showed that ritual slaughter actually is humane, which was codified in the congressional findings of section 2; and second, that Congress explicitly amended section 6 of the HMSA to define ritual slaughter with specific reference to the precise method detailed in section 2(b) of the bill.[89]

c. The Understanding of Congress

First, the critical finding of Congress was that ritual slaughter, as defined and discussed, was humane, based on the scientific evidence. As bill author Senator Hubert Humphrey explained, "[T]here is no denial that there was presented before the committee testimony that the method of slaughtering, *as described in subsection (b) of section 2*, falls within the modern definition of humane slaughtering."[90] Thus, the exemption was a contingent factual assumption. The 1958 Congress

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[87] 7 U.S.C. § 1902 (2012).

[88] 85 CONG. REC. 15368–15417 (1958).

[89] 7 U.S.C. § 1902 (2012) ("[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 . . . .").

[90] 85 CONG. REC. 15405 (1958) (emphasis added).

found, based on extensive evidence, that ritual slaughter was humane.[91] The overall concern about humane slaughter, however, suggests that if that evidence were wrong – if in fact the methods were not humane – Congress would not have defined ritual slaughter as humane under the act or allowed for the section 6 ritual exemption.

To wit, Congress considered over and over again the humaneness of ritual slaughter. All three reports, both floor debates, and all three hearings recount detailed claim upon detailed claim that ritual slaughter is humane, with no contradictory claims at all. That finding of the Congress was explicitly placed into the actual legislation, with a description of precisely what is considered to be ritual slaughter.[92] The first Senate Report is typical:

> The kosher method of slaughter is based on Jewish principles of humane treatment of animals, must be administered by a person of proven skill and moral character, and produces immediate unconsciousness. Leo Pfeffer, counsel, American Jewish Congress, after reciting examples of Jewish law and tradition as to the proper treatment of animals, described the Jewish method of slaughter as follows: 'The method of Jewish slaughtering, commonly known as schehitah, is by a single cut of the neck. The knife is set to extreme sharpness—sharper than any surgical knife, with a perfect edge, free from the slightest notch or flaw, and minutely examined by a specific method for any unevenness immediately before each slaying. The one swift movement of the knife severs the trachea, esophagus, carotid arteries, and jugular vein. This insures practically instantaneous unconsciousness.[93]

We can see echoes of this precise language in the statutory definition of what, precisely, Congress found to be humane – a sharp knife and instantaneous severing of both carotid arteries.[94]

According to bill supporter Representative Roosevelt, section 2(b) was not an exemption from regulation for ritual slaughter, but was simply a reiteration that ritual slaughter was found to be humane:

> H.R. 8308 does not exempt religious slaughter, which would imply that the ritual is actually inhumane but that Congress will allow it to continue nonetheless. Instead, the bill specifically defines compliance with the policy of the act in two instances, one being practices performed in conformity with an established religious faith. Because there are two declarations of what is humane, it does not follow that one of them is an exception. The section merely makes doubly sure that ritual slaughter can never be construed as anything but that which the bill declares it to be, a humane practice.[95]

The House Committee report states quite specifically that ritual slaughter is not an exemption from humane slaughter: "[The ritual slaughtering] provision does not authorize any exemption or exception

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[91] *Id.*

[92] HMSA 1958 § 2 ("Either of the following two methods of slaughtering and handling are hereby found to be humane . . . .").

[93] S. REP. NO. 2617, at 7–8 (1956).

[94] 7 U.S.C. § 1902 (2012).

[95] 104 CONG. REC. 1662 (1958) (statement of Rep. Roosevelt) (emphasis added).

to the requirement of humane slaughter. It is a direct legislative finding that the ritualistic practices of any established religious faith are humane—*but only when the slaughter is actually a part of such practices and requirements*."[96] This understanding is confirmed by both the February 1958 house debate on the bill[97] and by the July 1958 Senate debate on the bill,[98] as well as all three sets of hearings,[99] none of which included any sense that ritual slaughter would be exempted from humane slaughter oversight requirements, and all of which discuss ritual slaughter as humane, but only when it is done as described to Congress in hearings and codified in section 2(b).[100]

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[96] H.R. REP. No. 85-706, at 4 (1957) (emphasis added).

[97] 104 CONG. REC. 1654 (1958) (statement of bill sponsor Rep. Poage) ("I would always feel that we should be extremely careful not to interfere with any citizens' religious beliefs, but ritualistic slaughtering is as I see it, *when actually carried out in compliance with the Mosaic law* one of the most humane methods yet devised. The bill, therefore, was changed to recognize ritualistic slaughtering as of itself humane.") (emphasis added); *id.* at 1663 (statement of Rep. Multer) ("[T]he Jewish method of slaughter of animals . . . . *is done by one swift stroke which instantaneously severs both the jugular vein and the carotid arteries, immediately insensitizing the animal*.") (emphasis added).

[98] 104 CON. REC. 15,391 (1958) (statement of bill sponsor Sen. Javits) ("[I]t was demonstrated that the methods of slaughter which are called Shehitah, or Kosher slaughter, represent humane methods of slaughter which have been developed through the centuries with the greatest ritualistic care, and with careful attention to the character as well as the qualifications of those who engage in the practice, and who have a training which is equivalent to that of the Rabbinate, and who in many cases are themselves rabbis."); *id.* (statement of bill author Sen. Humphrey) ("A substantial body of evidence was presented . . . . Not only is such a procedure accepted as a humane method of slaughter, but it is so established by scientific research.").

[99] *See Humane Slaughtering of Livestock and Poultry: Hearings Before the S. Subcomm. on Agric. and Forestry*, 84th Cong. 143 (1956) (statement of Leo Pfeffer, Associate General Counsel of the American Jewish Congress) ("The implication given by this exemption is that Jewish slaughtering is not a humane method of slaughtering but is nevertheless exempted for reasons not specified in the bill. This we believe to be incorrect and defamatory of the Jewish people. We contend that all scientific evidence establishes that Jewish slaughtering is humane slaughtering. Our proposal, therefore, would define the various humane methods of slaughtering and would include in that definition slaughtering according to the requirements of the Jewish religious faith. Our proposal would bar all slaughtering except such slaughtering as defined by the act to be humane."); *Humane Slaughter: Hearings Before the H. Subcomm. on Livestock and Feed Grains of the Comm. on Agric.*, 85th Cong. 38–45 (1957) (statement of Rabbi Isaac Lewin, Member of the Executive Committee of the Union of Orthodox Rabbis of the United States and Canada, and Professor at Yeshiva Univeristy, New York; Accompanied by Rabbi Pincas Teitz) (providing a list of endorsements of ritual slaughter as humane); *Humane Slaughtering of Livestock: Hearing on H.R. 8308 Before the S. Comm. on Agric. and Forestry*, 85th Cong. 151 (statement of Rabbi Isaac Lewin, Member Executive Committee, Union of Orthodox Rabbis of the United States and Canada, New York, N.Y.) ("The cutting of the throat is done so quickly and skillfully that the feeling of pain as a result of the cut is improbable. At the most, any pain felt would be momentary, for the animal must quickly pass into unconsciousness from inadequate blood supply to the brain.").

[100] 104 CONG. REC. 1663 (1958) (letter by Hon. Leo Pfeffer); 104 CONG. REC. 15,398 (1958) (statement of Sen. Humphrey); *Humane Slaughtering of Livestock and Poultry: Hearing Before the S. Subcomm. on Agric. and Forestry*, 84th Cong. 143 (1956) (state-

Based on the importance to the Congress that passed the law that ritual slaughter would be humane, of course they wanted to ensure that ritual slaughter – in practice – actually follows the procedure that was so consistently laid out and discussed as justification for defining it as such.[101] Indeed, at no point does anyone suggest that ritual slaughter should be exempted from the law despite being inhumane. Clearly, Congress did not envision an "anything goes" regime, but rather simply wanted to ensure that the ritual cut – as defined in the law itself, and the topic of *all* the discussion of humane slaughter – was protected as humane.[102]

Again and again, members of Congress stress that ritual slaughter is not exempted, but rather that ritual slaughter is humane – but only when it is carried out according to the precise definition of ritual slaughter in section 2(b), just like conventional slaughter is only humane when carried out according to the definition in section 2(a).[103]

d. The Final-Moments Amendment to Section 6

To clarify the above point, it is important to note the change in section 6 of the legislation, which was changed from an exemption for ritual slaughter generally to an exemption only for ritual slaughter as described in section 2(b). Thus, the statutory history makes it quite clear that an absolute religious exemption was considered and rejected; Congress changed the bill from the absolute exemption proposed by Senator Humphrey to one that references section 2(b) as the only and limited method of ritual slaughter found by Congress to be humane.[104]

There were just two committee hearings that considered H.R. 8308, the bill that became the Humane Slaughter Act – one for the House in 1957 and one for the Senate in 1958.[105] Notably, the bills, as they were reported out of committee, either included no section 6 (the ritual exemption), or they included a section 6 that did not define hu-

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ment of Leo Pfeffer, associate general counsel of the American Jewish Congress); *Humane Slaughter: Hearings Before the H. Subcomm. On Livestock and Feed Grains of the Comm. on Agric.*, 85th Cong. 35–48 (1957) (statement of Rabbi Isaac Lewin, Member of the Executive Committee of the Union of Orthodox Rabbis on the United States and Canada, and Professor at Yeshiva Univeristy, New York; Accompanied by Rabbi Pincas Teitz); *Humane Slaughtering of Livestock*: *Hearing on H.R. 8308 Before the S. Comm. on Agric. and Forestry*, 85th Cong. 150 (statement of Rabbi Isaac Lewin, Member Executive Committee, Union of Orthodox Rabbis of the United States and Canada, New York, N.Y.).

101 *Humane Slaughtering of Livestock: Hearing on H.R. 8308 Before the S. Comm. on Agric. and Forestry*, 85th Cong. 150 (1958) (statement of Rabbi Isaac Lewin, Member Executive Committee, Union of Orthodox Rabbis of the United States and Canada, New York, N.Y.).

102 104 CONG. REC. 1663 (1958) (statement of Hon. Leo Pfeffer).

103 *Id.*

104 104 CONG. REC. 1663 (1958) (letter by Hon. Leo Pfeffer); 104 CONG. REC. 15,398 (1958) (statement of Sen. Humphrey).

105 H.R REP. No. 85-706 (1957); S. REP. NO. 85-1724 (1958).

mane slaughter with reference to section 2. The original House version of H.R. 8308, reported out of committee in July 1957, includes none of the section 2(b) language that precisely defines ritual slaughter by reference to a sharp knife and swift death, and also includes no section 6 ritual exemption from the law at all.[106] The Senate Report version of the bill includes the precise definition of ritual slaughter from section 2(b), but does not define the ritual slaughter exemption with reference to that definition.[107] Instead, that version of the bill declares "'[n]othing in this Act shall be construed to prohibit, abridge, or in any way hinder the religious freedom of any person or group to slaughter and prepare for the slaughter of livestock in conformity with the practices and requirements of his religion.'"[108] That was the precise language of section 6 that was subsequently discussed in the House debate on the bill (which included no discussion of the final section 6 at all[109]), and for the first forty-three of forty-seven pages of the Senate debate.[110]

To make it perfectly clear that Congress was not endorsing an 'anything goes' protocol for ritual slaughter, this version was changed[111] to define explicitly what acceptable ritual slaughter would entail: "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."[112] There was no debate on this precise language at all, though Senator Humphrey – who had previously argued that his section 6 represented a blanket exemption for ritual slaughter[113] – opposed the change and voted against it.[114] Without debate or discussion, the House voted to accept the Senate bill with the new language.[115]

Clearly, there is a precise prescription of what humane ritual slaughter requires every bit as much as the explanation of what humane secular slaughter requires. In both cases, USDA has a law to enforce; the ritual bubble of nonenforcement, thus, makes no sense.

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106 H.R REP. No. 85-706 (1957).

107 S. REP. NO. 85-1724 (1958).

108 *Id.* at 8. The Committee actually recommended a research bill, but the bill as debated can be reviewed in strike-through.

109 104 CONG. REC. 1654, 1658, 1663 (1958) (letter by Hon. Leo Pfeffer).

110 104 CONG. REC. 15377, 15413 (1958).

111 104 CONG. REC. 15414–15415 (1958).

112 HMSA 1958 § 2(b).

113 10485 CONG. REC. S15,373, 15,375 (daily ed. July 29, 1958).

114 104 CONG. REC. 15,415 (1958) (The amendment passed 44-38, with 14 not voting).

115 104 CONG. REC. 17,427 (House Concurrence) ("Page 6, strike out lines 13 to 17, inclusive, and insert: 'SEC. 6. Nothing in this act shall be construed to prohibit, abridge, or in any way hinder the religious freedom of any person or groups. Notwithstanding any other provision of this act, in order to protect freedom of religion, ritual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this act. For the purposes of this section the term 'ritual slaughter' means slaughter in accordance with section 2(b).'").

Nothing in HMSA 1978 calls into question this analysis.[116] Ritual slaughter was not a significant topic of the HMSA 1978 legislative history, because it did not change anything about ritual oversight.[117] In the most recent record in the legislative history, bill author and key sponsor Senator Bob Dole makes clear the reason for the religious exemption: "The bill also restates the 1958 act's exemption of ritual slaughter in order to protect the free exercise of religion. The Jewish and other religions rely on this exemption to assure a continuing supply of meat slaughtered according to religious requirements."[118] The key point here is that ritual requirements do not require a ritual bubble – there is, of course, a statute to enforce. And so, Senator Dole's statement aligns with the above – there is not an anything goes attitude; the goal of both Humane Slaughter Acts is to ensure that ritual slaughter *as defined in the Act* is not prohibited.[119]

The court in *Butz* agrees with the above analysis, finding that there was no Establishment Clause violation in the Humane Slaughter Act in part because there was no religious exemption from humane slaughter requirements.[120] The court explains that "plaintiffs contend that the provisions of the Act (sections 2(b) and 6) constitute an exemption from the application of subdivision (a), an act of cruelty to the animal so slaughtered, and a violation of the Religion Clauses of the First Amendment."[121] However, says the court,

> Congress did not create a religious preference, nor did it create an exception to any general rule. The intervenors have made a persuasive showing that Jewish ritual slaughter, as a fundamental aspect of Jewish religious practice, was historically related to considerations of humaneness in times when such concerns were practically non-existent.[122]

True enough – and it does kosher consumers and animals a disservice to behave as though Congress gave USDA nothing to enforce.

B. Poultry Slaughter & Levine v. Vilsack

Next, I will consider the USDA's decision to exempt poultry from humane slaughter protection. In this section, I will lay out the history of the USDA's decision, discuss a court case in which the exemption was challenged, explain the effect on animals of the exemption, and finally, dive into whether USDA's decision to exempt birds from hu-

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116 21 U.S.C. § 601 (2012).

117 *Id.*

118 124 CONG. REC. 24,580 (1978).

119 Although discussion often uses shorthand, saying that ritual slaughter is exempted from bill requirements, that is only ritual slaughter as defined in § 2(b), not all aspects of oversight of the slaughter process.

120 *Jones*, 374 F. Supp. at 1291.

121 *Id.* at 1290.

122 *Id.* at 1291.

mane slaughter oversight can be reconciled with the legislative history.[123]

1. Background: Levine v. Vilsack *& the Poultry Exemption from HMSA*

As discussed above, the Humane Slaughter Act of 1958 requires that "cattle, calves, horses, mules, sheep, swine, and other livestock" be treated humanely throughout the slaughter process.[124] In *Levine v. Vilsack*, the Humane Society of the United States (HSUS), et al., challenged a Federal Register notice in which USDA stated "there is no specific federal humane handling and slaughter statute for poultry."[125] HSUS suggested:

> [that by] informing slaughterhouses and the public that [HMSA 1958's] protections . . . do not extend to chickens, turkeys, and other poultry species . . . has violated the HMSA of 1958, abused its discretion, and acted arbitrarily and capriciously and not in accordance with law, in violation of the [Administrative Procedure Act].[126]

Specifically, plaintiffs argued that "other livestock" should include poultry, based primarily on dictionary definitions of "livestock" circa 1958.[127] HSUS argued that Congress' intent was indeed clear and that it could be determined by the "plain language of the Act," which dictated that "other livestock" should include poultry, based on the universal inclusion of poultry as "livestock" in dictionaries circa 1958, when the Act was passed: "Congress's choice of words is the beginning and the end of the *Chevron* analysis—the term 'livestock,' as defined at the time the statute was enacted, means 'domestic animals used or raised on a farm.'"[128]

The government replied with a slate of dictionaries and contemporaneous sources, indicating that livestock often excluded poultry, and going on to argue that Congress explicitly exempted poultry from the bill by its decision not to include them.[129] The district court found ambiguity in the definition of livestock, but was convinced by the legislative history that poultry should be excluded, in large part because previous versions of the bill had included poultry as a separate category, but that the final version did not.[130]

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123 *See* Bruce Friedrich, *Still in the Jungle: Poultry Slaughter and the USDA*, 23 N.Y.U. ENVTL. L.J. 245 (2015) (analyzing USDA's decision to exempt birds from the HMSA, as well as the court battle that focused on that decision).

124 HMSA 1958 § 2.

125 *Id.*

126 Plaintiffs' Combined Brief in Support of Motions to Dismiss at 10, *Levine* (No. 3:05-CV-04764-MHP), American Bison v. Bush (N.D. Cal. June 5, 2006) (No. 3:05-CV-05346-MHP).

127 *Vilsack*, 587 F.3d at 987–88 (citation omitted).

128 Plaintiffs' Motion for Summary Judgment at 12, *Levine* (No. C-05-4764 MHP).

129 Levine v. Conner, 540 F. Supp. 2d 1113, 1116 (N.D. Cal. 2008).

130 *Id.* at 1119.

The Ninth Circuit did not fully consider these arguments, leaving the door open with regard to whether other livestock could include poultry, but ruled against the plaintiffs on standing grounds.[131] Because HMSA 1958 no longer had an enforcement mechanism, the court held that plaintiffs had not proven redressability, because redressability would depend on a chain of events that were purely speculative.[132] Specifically, the court felt that improved conditions for poultry would require that USDA include them in the FMIA under its authority to add "any additional species of livestock that the Secretary considers appropriate,"[133] a 2005 addition to the FMIA.[134]

The history of USDA's decision is significantly less robust than the history of its position on ritual slaughter, since USDA has never chosen to include poultry in the HMSA. Plaintiffs in *Levine* were suing based on the latest iteration of an almost forty-year-old policy.[135] The USDA's decision has almost unfathomable importance for animals in terms of both the number of individuals affected and the severity of their suffering. First, we should note that more than 98% of slaughtered animals are poultry; the average non-vegetarian American eats dozens of birds per year, for a total bird consumption toll of almost nine billion individual animals slaughtered and consumed annually in the United States alone.[136] Second, most aspects of what happens to poultry would be illegal if they were protected by the HMSA, which prohibits any processing of animals until after they are rendered in-

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131 *Levine*, 587 F.3d at 992–97.

132 *Id.* at 995.

133 Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, Pub. L. No. 109-97, 119 Stat. 2120, 2166 (2005). This addition was part of a ninety-page farm bill, and the legislative history is unclear on how it came to be inserted into the bill. The final two bills to come out of the House and Senate do not include this provision, and it was also not mentioned in either report. H.R. REP. NO. 109-102 (2005); S. REP. NO. 109-92 (2005). The final House committee hearings, which came after both of these reports, also do not discuss this provision. H.R. REP. NO. 109-188 (2005). While the Conference Report includes the language in the final bill, of course, there is no discussion of it. H.R. REP. NO. 109-255, (2005).

134 *Levine*, 587 F.3d at 990*; see supra* Part II.B (discussing the 1958 and 1978 HSMA). Although beyond the scope of this Paper, it is clear – and the court in *Levine* says as much – that the 2005 amendment to the FMIA could be used, at USDA's discretion, to include poultry. But it has clearly chosen not to do so, and the point of this analysis is to examine the legislative history of HMSA 1958 to discern the intent of that Congress with regard to humane slaughter protection for poultry.

135 HMSA 1958, §§ 1–7.

136 There are almost 9 billion birds slaughtered, versus about 150 million mammals. *See* U.S. DEP'T OF AGRIC., NAT'L AGRIC. STATS. SERV., POULTRY SLAUGHTER: 2014 SUMMARY 4–5 (Feb. 2015), http://usda.mannlib.cornell.edu/usda/nass/PoulSlauSu//2010s/2015/PoulSlauSu-02-25-2015.pdf [https://perma.cc/2U5F-YQPK] (accessed Jan. 19, 2018) (providing the total number of birds slaughtered in 2014); U.S. Dep't of Agric., Nat'l Agric. Statistics Serv., Livestock Slaughter – 2013 Summary 6 (Apr. 2014), http://usda.mannlib.cornell.edu/usda/nass/LiveSlauSu//2010s/2014/LiveSlauSu-04-21-2014.pdf [https://perma.cc/KA64-UEMY] (accessed Jan. 19, 2018) (providing the total number of livestock slaughtered in 2013).

sensible to pain.[137] Specifically, the birds are dumped out of crates, snapped into shackles, shocked with electricity, and then they have their throats sliced open.[138] The electrical shocking serves to render the birds easier to slaughter, not to render them insensitive to pain. There is evidence that most or all of the animals are conscious through the entire process.[139] And this is a description of the inherent cruelty in the poultry industry; as *New York Times* columnist Nicholas Kristof accurately explained, "[t]orture a single chicken and you risk arrest. Abuse hundreds of thousands of chickens for their entire lives? That's agribusiness."[140]

Introduce workers and things get even worse. As Dr. Stan Painter, a multi-decade USDA inspector explained to *The Washington Post* for a front page article in 2013, "[Workers] are literally throwing the birds into the shackles, often breaking their legs as they do it . . . . They are working so fast, they sometimes get just one leg in the shackles. When that happens, the chickens aren't hanging right. . . . They don't get killed, and they go into the scald tank alive."[141] Similarly, undercover investigations by humane groups have documented cruelty that would shock the conscious of any person.[142] None of this can be prosecuted federally, because USDA has chosen not to protect poultry from abuse.

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137 HMSA of 1958 § 2.

138 Sara J. Shields & A.B.M. Raj, *A Critical Review of Electrical Water-Bath Stun Systems for Poultry Slaughter and Recent Developments in Alternative Technologies*, 13 J. APPLIED WELFARE SCI. 281, 283 (2010).

139 *See, e.g.*, EFSA Panel on Animal Health and Welfare (AHAW), *Scientific Opinion on Electrical Requirements for Poultry Waterbath Stunning Equipment*, 12 EFSA J. 2 (2014), http://www.slideshare.net/charmkey5/efsa-opinion-on-waterbath-stunning [https://perma.cc/CZ4C-DG59] (accessed Jan. 19, 2018) (finding that chickens were still conscious after being shocked by the level of voltage customarily used prior to slaughter).

140 Kristof, *supra* note 22.

141 Kimberly Kindy, *USDA Plan to Speed Up Poultry-Processing Lines Could Increase Risk of Bird Abuse*, WASH. POST (Oct. 29, 2013), http://www.washingtonpost.com/politics/usda-plan-to-speed-up-poultry-processing-lines-could-increase-risk-of-bird-abuse/2013/10/29/aeeffe1e-3b2e-11e3-b6a9-da62c264f40e_story.html [https://perma.cc/C8EW-44RA] (accessed Jan. 19, 2018) (quoting Dr. Stan Painter).

142 *See, e.g.*, Compassion Over Killing, *Amid Pending North Carolina Ag-Gag Bill, New COK Video Uncovers Horrific Abuse to Birds at Mountaire Farms Chicken Slaughterhouse*, http://cok.net/inv/mountaire/ [https://perma.cc/N2VY-ELGM] (accessed Jan. 19, 2018) (discussing cruelty at a North Carolina farm); *Exposed: Tyson Workers Torturing Birds, Urinating on Slaughter Line,* PETA (2017), http://www.peta.org/action/action-alerts/tyson-workers-torturing-birds-urinating-slaughter-line/ [https://perma.cc/9MLH-G4WT] (accessed Jan. 19, 2018) (discussing the results of an undercover operation that found instances of cruelty); PETA, *If This is the Best, What is the Worst?*, KENTUCKY FRIED CRUELTY, http://www.kentuckyfriedcruelty.com/u-georges.asp [https://perma.cc/Q3GA-UNP7] (accessed Jan. 19, 2018) (describing cruelty to poultry); *Minnesota Hen Slaughter Exposé: Birds Abused, Scalded Alive Daily*, HUMANE SOC'Y U.S. (Jan. 5, 2015), http://www.humanesociety.org/news/press_releases/2015/01/minnesota-hen-investigation010514.html [https://perma.cc/AY6Y-YTZE] (accessed Jan. 19, 2018) (describing instances of cruelty on a Minnesota farm); Mercy for Animals, *SHOCKING! Chick-fil-A Suppliers Caught on Hidden-Camera Torturing Animals*, YOUTUBE (Nov. 19, 2014), https://www.youtube.com/watch?v=7cHbi_IRYpo [https://perma.cc/VF4E-

2. The HMSA Bird Exemption and Legislative History

What does the legislative history have to say about the poultry exemption? Or, put slightly differently, was HSUS right that poultry was intended by Congress to be included among other livestock in the HMSA?

There is a surprising dearth of legislative history on the question of whether other livestock included poultry, relative to the extensive discussion of the ritual slaughter ban. Let's start with the history of bill text; there were ten different humane slaughter bills introduced in the 85th Congress before the bill that became the Humane Slaughter Act;[143] three had been introduced in the previous Congress.[144] Of the thirteen bills that preceded the bill that was finally adopted, all thirteen protected poultry, and all thirteen distinguished explicitly between livestock and poultry, both in their prefatory bill explanation and in the text of the bills.[145] For example, the final two bills were held to "require the use of humane methods in the slaughter of livestock and poultry in interstate or foreign commerce."[146]

The district court in *Levine v. Connor* looked at this history and found it dispositive, holding that Congress' decision to remove poultry from explicit protection represented a considered decision by Congress not to protect them, under the canon of statutory construction that

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6Q4N] (accessed Jan. 19, 2018) (providing a video of poultry cruelty); *The Video the Poultry Industry Doesn't Want You to See*, GORY FOOD SERV., http://www.goryfoodservice.com [https://perma.cc/X57G-YF9P] (accessed Jan. 19, 2018) (describing instances of poultry cruelty).

143 H.R. 176, 85th Cong. (introduced in House, Jan. 3, 1957); H.R. 2880, 85th Cong. (introduced in House, Jan. 14, 1957); H.R. 3029, 85th Cong. (introduced in House, Jan. 16, 1957); H.R. 3049, 85th Cong. (introduced in House, Jan. 16, 1957); S. 1213, 85th Cong. (introduced in Senate, Feb. 14, 1957); S. 1497, 85th Cong. (introduced in Senate, Mar. 2, 1957); H.R. 5671, 85th Cong. (introduced in House, Mar. 6, 1957); H.R. 5820, 85th Cong. (introduced in House, Mar. 11, 1957); H.R. 6422, 85th Cong. (introduced in House, Mar. 27, 1957); H.R. 6509, 85th Cong. (introduced in House, Mar. 29, 1957).

144 S. 1636, 84th Cong. (Reported in Senate, July 16, 1956); H.R. 8540, 84th Cong. (introduced in House, Jan. 17, 1956); H.R. 9603, 84th Cong. (introduced in House, Feb. 28, 1956).

145 S. 1636, 84th Cong. (Reported in Senate, July 16, 1956); H.R. 8540, 84th Cong. (introduced in House, Jan. 17, 1956); H.R. 9603, 84th Cong (introduced in House Feb. 28, 1956); H.R. 176, 85th Cong. (introduced in House, Jan. 3, 1957); H.R. 2880, 85th Cong. (introduced in House, Jan. 14, 1957); H.R. 3029, 85th Cong. (introduced in House, Jan. 16, 1957); H.R. 3049, 85th Cong. (introduced in House, Jan. 16, 1957); S. 1213, 85th Cong. (introduced in Senate, Feb. 14, 1957); S. 1497, 85th Cong. (introduced in Senate, Mar. 2, 1957); H.R. 5671, 85th Cong. (introduced in House, Mar. 6, 1957); H.R. 5820, 85th Cong. (introduced in House, Mar. 11, 1957); H.R. 6422, 85th Cong. (introduced in House, Mar. 27, 1957); H.R. 6509, 85th Cong. (introduced in House, Mar. 29, 1957).

146 H.R. 6422, 85th Cong. (introduced in House, Mar. 27, 1957); H.R. 6509, 85th Cong. (introduced in House, Mar. 29, 1957).

Congress would not "*sub silento* enact statutory language that it has earlier discarded in favor of other language."[147]

The argument is persuasive on its face, but there is significant legislative history that points against this interpretation, and nothing more to support it. Perhaps most critically, the final version of the bill to be reported out of a committee does not explicitly include poultry, but it does define the term "livestock": "As used in this Act, the term 'livestock' shall be deemed to include poultry."[148] This is the only definition of livestock in any version of H.R. 8308, it includes poultry, and it was missed or ignored by the district court.[149]

This version of the bill resembles the final version in all critical particulars. Like the law, this bill purports "[t]o establish, the use of humane methods of slaughter of livestock as a policy of the United States"[150] and declares it "to be the policy of the United States that the slaughtering of livestock and the handing of livestock in connection with slaughter be carried out by humane methods."[151] In neither of those instances is poultry mentioned explicitly. However, the title of the bill is: "A bill to promote and encourage humane slaughtering of livestock and poultry,"[152] and the Senate Report on the bill declares that it "is designed to bring about the use of humane methods in all livestock and poultry slaughter operations in the United States."[153] This is the version reported out by the Senate Committee on Agriculture and Forestry, and it is the final version of the bill before it was debated and finalized by the Senate.

The definition of livestock that includes poultry was removed from the final bill,[154] and that is obviously meaningful. However, the fact that the bill's definition of livestock ever included poultry means, at the very least, that Congress understood that livestock could include poultry. So they knew there could be confusion, and yet the final bill did not explicitly exclude poultry from the definition of livestock, which seems like the obvious decision if they wanted to ensure that poultry would not be protected.

And so it is. The House bill as passed did not explicitly include poultry, but the evidence closest to the House text – the twenty-three pages of floor debate – includes an exchange indicating that – at the very least – there was an understanding by some members that it could.[155] Specifically, Representative Hoffman, a bill opponent, notes

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147 *Levine*, 540 F. Supp. 2d at 1119 (quoting Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 442–43 (1987)).

148 H.R. 8308, 85th Cong. (as reported in Senate, June 18, 1958).

149 *Levine*, 540 F. Supp. 2d at 1119.

150 *Id.* at 1.

151 *Id.* at 6–7.

152 *Id.* at 9.

153 104 CONG. REC. 15,373 (1958).

154 *See generally* HMSA 1958 (providing a definition of livestock not including poultry).

155 104 CONG. REC. 1659 (1958).

that livestock "includes chickens and turkeys . . . I quote Webster's definition of livestock: 'domestic animals used or raised on a farm-especially those kept for profit.' Now, chickens and turkeys are livestock."[156] However, Representative Hoffman was speaking in opposition to the bill and so his claims could be seen as 'cheap talk,' designed to sway others to bill opposition.[157] That said, this is nevertheless the sole dictionary definition of livestock in the entire legislative record, and despite this clear sign of confusion on the issue, no definitional clarification was added to the bill.

Finally, and perhaps most critically, the bill's author and most authoritative proponent, Senator Hubert Humphrey, believed that it could include poultry. In the Senate debate prior to the House acceptance of the Senate's bill, Senator Humphrey explains to bill opponent Senator Young, that the USDA has the discretion to include poultry.[158]

> Mr. YOUNG. A turkey is much more sensitive than a hog. Why does not the bill apply to turkeys?
>
> Mr. HUMPHREY. It can, under section 4, if the Secretary of Agriculture so designates.
>
> Mr. YOUNG. Why does not the bill spell that out?
>
> Mr. HUMPHREY. No; we do not go that far. This is a peculiar situation. The proponents of what I call an effective bill are accused, on the one hand, of going too far, and, on the other hand, of not going far enough. The bill is a mild and modest beginning in the field of humane slaughter.[159]

Representative Hoffman also pointed out that the bill's established commission of experts included a representative of the poultry industry, which would be an odd decision if there were no possibility that poultry would be included in the bill;[160] notably, that provision remained in the final version of the law, as passed and implemented.[161] It is hard to imagine why Congress would have chosen to include a poultry industry representative among the experts to consult on the bill if there were no possibility that poultry would be covered under the term "livestock."

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156 *Id.*

157 *See* Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70 (2012) (reviewing various paradigms for the interpretation of legislative history). The "signaling" theory proposes that by distinguishing "cheap talk" from "costly signals" a more correct meaning of the bill can be derived from the legislative history. *Id.* "Cheap talk" is exaggerated speech that tries to weaken support for the bill by polarizing it and making it less attractive to the moderate voters the bill needs to pass. *Id.*

158 104 CONG. REC. 15,376 (1958).

159 *Id.*

160 *Id.* at 1655.

161 Pub. L. No. 85-765 § 5, 72 Stat. 863 (1958) (codified at 7 U.S.C § 1905) (repealed 1978).

If Congress wanted to ensure that poultry would be excluded, it would have taken note of the discussion in both the House and Senate debates, the fact that dictionaries of the time included them (as noted in the House debate), the fact that the only version of the final bill to include a definition of "livestock" included poultry within that definition, and the fact that the final bill includes a poultry industry executive among the experts advising the USDA on matters related to the bill. So while it is odd that the reasons for removing the explicit reference to poultry are nowhere to be found in the legislative history, there was clearly an understanding that – at the very least – livestock could include poultry, if the USDA decided to include them.

As noted above, the district court disagreed with this conclusion, finding that "the legislative history strongly demonstrates unambiguous congressional intent that livestock, as used in HMSA, does not include poultry."[162] The court used the rejection of bills that explicitly included poultry as its primary reason for finding unambiguous exclusion, finding this argument to be overwhelming.[163] Remarkably, the court did not even attempt to explain what other livestock might mean or why that phrase is in the final bill, why Congress would not clear up the ambiguity if it intended to exclude poultry – especially considering the many exchanges to indicate that they could be included – or how the law's author and chief sponsor got it wrong. And on the issue of why the Congress put a representative of the poultry industry onto the advisory panel, the court rightly noted that a "persuasive reason for the presence of a member of the poultry industry on the committee may have been the industry's interest in protecting itself from regulation by the Act . . . ."[164] Yes, which proves that USDA has discretion to include them. In any event, the Ninth Circuit granted that the question was a close one,[165] even as it did not decide the issue, since it ruled against the plaintiffs on standing grounds. If USDA wants to ensure that we are a country that protects animals from inhumane slaughter, it should extend protection to poultry in regulation, using this discretionary authority.

C. Federal Preemption & National Meat Association v. Harris

Finally, I will consider the Supreme Court's decision to vacate a California law banning the slaughter of pigs who were too sick or crippled to walk. Here, I will discuss that decision, the legal standard for preemption, and whether the Court's decision was correct, given con-

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[162] *Levine*, 540 F. Supp. 2d at 1120 (2008).

[163] *Id*. at 1119.

[164] *Id.* at 1120.

[165] *Vilsack*, 587 F.3d at 989 (2006) ("The HMSA of 1958 did not define the terms 'livestock' or 'other livestock.' Congressional debate revealed views favoring both interpretations advanced here – one that would include chickens, turkeys and other domestic fowl within its expanse and one that would preclude such inclusiveness.").

gressional intent as discerned through a close review of legislative history.

1. Background: National Meat *& Federal Preemption of State Law*

In *National Meat Association v. Harris,* the meat industry plaintiffs sued to overturn a California law banning the slaughter and consumption of pigs who were too sick or injured to walk.[166] Plaintiffs argued that the FMIA's express preemption clause required that California's law, which had different requirements for the treatment of sick and crippled pigs, must fall to USDA regulations.[167]

The Ninth Circuit held that the California law applied to animals before they arrived at the slaughterhouse, dictating that sick and crippled animals could not be sold.[168] Following Fifth and Seventh Circuit holdings against FMIA preemption of horse slaughter bans, the court held that the law had nothing to do with slaughterhouse grounds and thus did not conflict with the FMIA: "[T]he FMIA establishes inspection procedures to ensure animals that are slaughtered are safe for human consumption, but this doesn't preclude states from banning the slaughter of certain kinds of animals altogether."[169]

The Supreme Court unanimously reversed, noting that the law did in fact reach animals who became so sick or crippled in transit or on slaughterhouse grounds that they could not walk:

> The FMIA regulates slaughterhouses' handling and treatment of nonambulatory pigs from the moment of their delivery through the end of the meat production process. California's [law] endeavors to regulate the same thing, at the same time, in the same place – except by imposing different requirements. The FMIA expressly preempts such a state law.[170]

Putting animals who are too sick or injured to walk through the slaughter process is inhumane, and so a coalition of eight animal protection organizations, including Mercy For Animals and the ASPCA, filed a petition for rulemaking demanding that USDA ban the practice, arguing that to refuse to do so would violate the agency's statutory obligations under the HMSA.[171] In their petition, the groups argue that allowing slaughterhouses to process sick and crippled pigs: (1)

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166 *Nat'l Meat Ass'n*, 565 U.S. at 455.

167 *Id.*; *see* 21 U.S.C. § 678 ("Requirements within the scope of this chapter with respect to premises, facilities and operations of any establishment at which inspection is provided under subchapter I of this chapter, which are in addition to, or different than those made under this chapter may not be imposed by any State . . . .").

168 Nat'l Meat Ass'n v. Brown, 599 F.3d 1093, 1098 (9th Cir. 2010).

169 *Id.*

170 *Nat'l Meat Ass'n*, 565 U.S. at 460 ("Where under federal law a slaughterhouse may take one course of action in handling a nonambulatory pig, under state law the slaughterhouse must take another.").

171 Petition for Rulemaking at 2, Farm Sanctuary et al. v. Vilsack, U.S.D.A. (June 3, 2014), http://www.fsis.usda.gov/wps/wcm/connect/5faaea60-31ed-4f28-996a-98ca9097b013/Petition-FarmSantuary-060314.pdf?MOD=AJPERES [https://perma.cc/A938-4TDQ] (accessed Jan. 19, 2018). Notably, I wrote and filed this petition.

"creates an incentive for slaughter establishments to inhumanely force [crippled] pigs to rise"; (2) "allows establishments to inhumanely hold suffering sick and injured pigs . . . for hours to see if they will rise"; (3) "creates an incentive for producers to hold animals even if they are sick or injured, and then to send these weakened animals to slaughter, rather than euthanizing them on the farm"; (4) "contradicts the judgment of [the Agricultural Marketing Service," which] prohibits purchasing meat from [Nonambulatory Disabled] pigs"; and (5) "creates an incentive to inhumanely transport and handle pigs."[172] According to industry estimates, approximately 500,000 sick and crippled pigs are slaughtered annually, every one of them supposedly protected from abuse by the HMSA.[173]

2. Preemption Analysis and Legislative History

Did the Supreme Court make the right call? Notably, neither the Ninth Circuit nor the Supreme Court discussed legislative history or how it came to be that state humane slaughter laws would be preempted by the FMIA.

And yet preemption analysis, as with all judicial review, is supposed to hinge on congressional intent.[174] Courts are supposed to find preemption only where "that was the clear and manifest purpose of Congress."[175] Even where "federal law contains an express preemption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains."[176] In figuring out what Congress intended, courts will look to the language of the preemption clause, statutory framework, and the "structure and purpose of the statute as a whole."[177] And courts will go beyond the text in order to achieve a "reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law."[178]

So what does congressional intent have to say about federal preemption of state humane slaughter laws? There was nothing in HMSA 1958 to preempt state laws.[179] And there was also nothing explicit in the HMSA of 1978 that would preempt state laws.[180] As noted above, preemption of state laws came through the incorporation of humane

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172 *Id.* at 19, 20.

173 *Id.* at 25.

174 Medtronic, Inc. v. Lohr, 518 U.S. 470, 494 (1996) ("the purpose of Congress is the ultimate touchstone in every pre-emption case") (internal brackets and quotations omitted); *see also* Wisc. Pub. Intervenor v. Mortier, 501 U.S. 597, 604 (1991) ("The ways in which federal law may pre-empt state law are well established and in the first instance turn on congressional intent.").

175 Arizona v. Inter Tribal Council of Arizona, Inc., 133 S. Ct. 2247, 2256 (2013) (internal quotations omitted).

176 Altria Grp., Inc., v. Good, 555 U.S. 70, 76 (2008).

177 *Medtronic, Inc.*, 518 U.S. at 486.

178 *Id.* at 486.

179 HMSA 1958.

180 HMSA 1978 §§ 2(b), 3, 4(a)–(c), 5.

slaughter into the FMIA, which preempts "[r]equirements within the scope of this chapter . . . which are in addition to, or different than those made under this chapter . . . ."[181] When the preemption clause was written, the scope of FMIA – and congressional intent for the Act – focused exclusively on meat adulteration and labeling.[182] Even now, there are just two sentences in the entire twenty-six-page Act that refer to humane treatment.[183]

So what did the Congress that passed FMIA 1978 have to say about the critical issue of removing authority over animal protection from the states, a traditional state concern under their police powers?[184] Nothing at all, it turns out. Over the committee reports from the House and Senate, the entirety of the House and Senate floor debate, and almost 100 pages of committee hearings, the concept of preemption does not come up a single time.[185] There is no contemplation whatsoever of preemption as an effect of incorporating humane slaughter into the FMIA.[186] It seems clear that if Congress intended and wanted federal preemption of state laws, someone would have mentioned it. Additionally, considering the tendency of Congress to at least debate states' rights concerns when they are at issue, the fact that not a single member noted the issue is strong indication that it was not contemplated.

As Professor Nourse has noted, "[f]or a federal law to preempt a state law, the court must find that Congress said so explicitly – that it was paying attention to the issue and said the federal government's

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181 21 U.S.C. § 678 (2012).

182 *See id.* § 602 ("It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged."); *see also id.* § 661(a) ("It is the policy of the Congress to protect the consuming public from meat and meat food products that are adulterated or misbranded and to assist in efforts by State and other Government agencies to accomplish this objective.").

183 *See id.* § 603(b) ("Humane methods of slaughter. For the purpose of preventing the inhumane slaughtering of livestock, the Secretary shall cause to be made, by inspectors appointed for that purpose, an examination and inspection of the method by which amenable species are slaughtered and handled in connection with slaughter in the slaughtering establishments inspected under this chapter."); *see also id.* § 610(b) ("No person, firm, or corporation shall, with respect to any cattle, sheep, swine, goats, horses, mules, or other equines, or any carcasses, parts of carcasses, meat or meat food products of any such animals . . . slaughter or handle in connection with slaughter any such animals in any manner not in accordance with the Act of August 27, 1958 (72 Stat. 862; 7 U.S.C. 1901–1906).").

184 Notably, until 1958 all slaughterhouse animal welfare regulation was under state authority, and until 1978, states still were the only government entities with enforcement powers against slaughterhouses. Oversight remains dual, with states in control of more slaughterhouses than the federal government. *See* Bruce Friedrich, *When the Regulators Refuse to Regulate: Pervasive USDA Underenforcement of the Humane Slaughter Act,* 104 GEO. L.J. 198, 202 (2015) (providing that federal legal authority was created to address slaughterhouse animal welfare in 1958, but Congress did not include any enforcement mechanism until HMSA 1978).

185 H.R. REP. NO. 95-1336 (1978); S. REP. NO. 95-1059 (1978).

186 H.R. REP. NO. 95-1336 (1978); S. REP. NO. 95-1059 (1978).

law should prevail."[187] Recall that it is "the policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods,"[188] and that the entire goal of HMSA 1978 was to ensure stronger humane slaughter enforcement. Then consider that in the United States, there are more than twice as many slaughterhouses that are not federally inspected than slaughterhouses that are.[189] Can it possibly be true that Congress intended that with more than twice as many non-inspected as inspected plants, federal law should still preempt state law? Not without a far more explicit statement to that effect – such an understanding cannot possibly be reconciled with "[a] reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law."[190]

Notably, the argument that Congress did not intend humane slaughter preemption was not considered by the district court,[191] Ninth Circuit,[192] or Supreme Court.[193] Precedent on this issue is clear: "[W]hen legislation 'affects the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'"[194] Of course, it is impossible to argue that the preemption clause of the FMIA was intended by the Congress that enacted it to preempt state humane slaughter laws, since the FMIA at that time had nothing to do with humane slaughter. From there, we ask whether the Congress that incorporated humane slaughter into the FMIA considered and intended to preempt state laws in this area. As discussed above, there was no clear statement of legislative intent in favor of federal preemption of state humane slaughter laws and no indication that Congress faced or intended to bring into effective preemption of state legislation of humane slaughter. In short, the Supreme Court appears not to have considered this argument, and thus it came to the wrong conclusion.

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187 Nourse, *supra* note 53, at 3*; see supra* Part IV.C.1 (discussing preemption of a California livestock law).

188 7 U.S.C. § 1901 (2012).

189 *See* U.S. DEP'T OF AGRIC., LIVESTOCK SLAUGHTER 2013 SUMMARY 66 (2014) ("There are approximately 800 livestock slaughter plants in the United States operating under Federal Inspection and over 2,000 Non-Federally Inspected (State-inspected or custom-exempt) slaughter plants.").

190 *Medtronic*, 518 U.S. at 486.

191 Nat'l Meat Ass'n v. Brown, No. CV-F-08-1963 LJO DLB, 2009 WL 426213 (E.D. Cal. Feb. 19, 2009).

192 *Brown*, 599 F.3d at 1095.

193 *Nat'l Meat Ass'n*, 565 U.S. at 455.

194 Bond v. U.S., 134 U.S. 2080, 2089 (2014) (quoting U.S. v. Bass, 404 U.S. 336, 349 (1971)).

V. CONCLUSION

The critical insight of this article is that almost sixty years after USDA declared it "to be the policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods,"[195] the executive and the courts have created a regime in which neither the agency nor the states are acting to carry out that policy prescription. If a Congress of sixty years ago could recognize the problems of inhumane slaughter, how can it be that the agency charged with enforcing the law is incapable of acting on that principle today?

More specifically, I have documented that: (1) the USDA's refusal to regulate ritual slaughter in the ritual bubble cannot be reconciled with legislative intent, as documented in the legislative history; and (2) the Supreme Court's decision in *National Meat,* which told states that they cannot grant greater slaughterhouse protection to animals than is offered by USDA regulations, was not contemplated by or the intent of Congress when it incorporated humane slaughter into the FMIA. Finally, although the district court was wrong to hold that HMSA 1958 intended to exclude certain livestock, such a decision by USDA is certainly within its discretion, according to the legislative history.

We have progressed in our understanding of other animals far beyond Descartes' view that animals feel no more than ticking clocks, so that we now know conclusively that animals are individuals with the same capacity to feel pain as human beings. Additionally, they have feelings and interests – they are more like human beings than they are unlike us, as Jane Goodall noted in her epigraph to this article. And yet the law has not kept up, least of all with regard to our treatment of farm animals.

Professor Sunstein declared that "in the long run, our willingness to subject animals to unjustified suffering will be seen as a form of unconscionable barbarity—not the same as, but in some ways morally akin to, slavery and the mass extermination of human beings."[196] When Professor Sunstein's vision comes to fruition, USDA's allowance of gruesome cruelty to animals, justified by courts that have ignored legislative history, will be one example of those who looked the other way while the barbarity was perpetrated.

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[195] Pub. L. No. 85-765 § 1, 72 Stat. 862 (1958) (codified at 7 U.S.C § 1901).

[196] Cass R. Sunstein, *The Rights of Animals*, 70 UNIV. CHI. L. REV. 387, 401 (2003).