Et Tu Lisa Jackson? An Economic Case for Why the EPA’s Sweeping Environmental Regulatory Agenda Hurts Animal Welfare on Factory Farms

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Over the last several years, animal protection groups have increasingly partnered with environmentalists to ratchet up the environmental regulation of factory farms. This alliance has manifested itself in two primary ways: first, leading animal protection groups have supported the bold activism of Lisa Jackson, the Administrator of the EPA, in seeking to lasso factory farms into compliance with environmental laws; and second, these groups have engaged in a litigation strategy of suing factory farms under environmental statutes.

The Article aims to challenge the popular wisdom among the animal protection community that increased collaboration with the environmental movement confers mutual benefits. On the contrary, it seems misplaced to view Jackson as a champion of animal welfare, and misguided to view the environmental movement as a reliable ally. Upon closer inspection, it appears that the animal protection movement and the environmental movement have divergent interests, and Jackson’s activism could in fact pose a great threat to animal welfare on factory farms.

The Article argues that each of the three major goals of the animal protection movement in the realm of the farmed animal industry may be undermined by increased environmental regulation. To the contrary, the EPA’s activism could fail to change consumption patterns, lead to a reduction of animal welfare, and empower big factory farms at the expense of small farmers. Lastly, the Article concludes that a better approach would be for the animal protection movement to focus its fire on state-level laws and/or ballot initiatives that directly enhance animal welfare.

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I. Introduction

After repeated defeats by the agriculture lobby over the past decade, and faced with the fact that the farmed animal industry is exempt from the major animal protection laws, it is understandable why the animal protection movement has sought to ally itself with the environmental movement to ratchet up the environmental regulation of factory farms.2

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1 This Article tends to use the term “animal protection” instead of “animal rights” or “animal welfare.” The term “animal protection” is more neutral than the others, and this approach allows one to avoid semantic quibbles and to sidestep the important, but largely irrelevant debate related to the spectrum of ideologies and movements at play. Since all of the relevant groups generally support increased legal protection for animals, “animal protection” is an appropriate term. For a brief discussion of the split between mainstream and radical groups, see Part IV. A. 1, infra.

Illustrating the growing trust and partnership between animal protection supporters and environmentalists, common cause has been found on the leading environmental issues of the day, such as global warming, Concentrated Animal Feeding Operation (CAFO) standards, and waste generated by factory farms. For example, the Humane Society of the United States (“Humane Society”), the largest animal protection organization in the country, has allied itself with environmental groups on many occasions in the fight against pollution from factory farms.

Wayne Pacelle, the CEO of the Humane Society, has endorsed this alliance, stating “We would be foolish and silly not to unite with people in . . . the environmental community . . . to try to challenge corporate agriculture.”

The alliance between the animal protection movement and environmental movement has manifested itself in two primary ways: first, leading animal protection groups have supported the bold activism of Lisa Jackson, the Administrator of the Environmental Protection Agency (EPA), in seeking to lasso factory farms into compliance with environmental statutes; and second, these groups have engaged in a litigation strategy of suing factory farms under environmental laws. Jackson may yet prove the hope that animal protection supporters have been waiting for; she has embarked on a sweeping regulatory agenda that promises to increase regulatory costs on factory farms. Against the backdrop of repeated failures to convince legislatures to improve the welfare of farmed animals, it is easy to view the aggressive moves taken by Jackson against the farmed animal industry as a sign of progress. Now that Jackson has waged a no-holds-barred battle against factory farms promising to rope them under stringent regulation, the hope is that she will become a savior to the stagnant animal protection cause and use her control to advance the currently pitiful welfare of farmed animals. Such hopes have congealed into a conventional wisdom that environmentalism and its cause are perfectly aligned with animal rights and its cause. Indeed, it seems that the Humane Society has thrown its weight behind the entire sweeping regulatory agenda of the EPA.

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6 See e.g., Humane Society Press Release, Greenhouse Gases, supra note 2 (noting that Humane Society joined a coalition of groups asking the EPA to regulate GHGs); Humane Society Press Release, Ammonia, supra note 2 (stating that Humane Society joined with environmental groups to petition the EPA to make an “endangerment finding” for ammonia gas under the Clean Air Act).

7 See generally De Anna Hill, supra note 2 (describing how animal protection groups have attempted to use four environmental statutes in court, including the Clean Air Act, Clean Water Act, Migratory Bird Treaty Act, and National Environmental Policy Act).


9 See e.g., Humane Society, Global Warming, supra note 2. For example, Wayne Pacelle praised Jackson’s efforts to regulate greenhouse gases under the Clean Air Act, stating “‘We are so appreciative that the EPA, under Lisa Jackson's new and strong leadership, is at long last moving forward to address the enormous threats posed by climate change.’” Id.
The wider animal protection community has cheered on the formation of this alliance, viewing it as a natural partnership between like-minded progressive movements, whose members often consider themselves supporters of both causes.\(^\text{10}\) Indeed, this partnership has appeared to receive a uniformly positive reception within the animal protection community, as evidenced by its prominent place in leading animal rights conferences,\(^\text{11}\) the glowing praise it has won from prominent animal rights intellectuals,\(^\text{12}\) and the encouraging treatment accorded by several law review articles.\(^\text{13}\)

\(^{10}\) See, e.g., Peter Singer, ANIMAL LIBERATION 8 (2d ed. 1990) (“If a being suffers there can be no moral justification for refusing to take that suffering into consideration. No matter what the nature of the being, the principle of equality requires that its suffering be counted equally with the like suffering ... of any other being.”); Christopher D. Stone, Should Trees Have Standing? Toward Legal Rights for Natural Objects, 45 S. CAL. L. REV. 450, 450 (1972) (“Originally each man had regard only for himself and those of a very narrow circle about him; later... ‘his sympathies became more tender and widely diffused, extending... finally to the lower animals.’”) (quoting Charles Darwin, Descent of Man 119-21 (2d ed. 1874)).


\(^{12}\) See e.g., 18th Annual Conference at Lewis & Clark, Using Environmental Laws to Crack Down on Animal Agriculture, http://www.lclark.edu/law/student_groups/student_animal_legal_defense_fund/animal_law_conference/current/program/ (providing a podcast of this discussion). For example, Kathy Hessler, professor of law and clinic director of the Center for Animal Law Studies at Lewis & Clark Law School, has enthusiastically called for climate change advocates and animal protection advocates to get together and combine their energies. Id.

However, there is scant evidence that any animals have benefitted from this alliance. In fact, some articles that are generally supportive of this approach offer strong reservations of its potential benefits to animals.  

Likewise, it is perhaps misplaced to view Jackson as a champion of animal welfare, and misguided to view the environmental movement as a true ally. On the contrary, many items on the EPA’s agenda, such as the regulation of CAFOs’ ammonia emissions, do not promise a clear benefit for farmed animals. Worse, Jackson’s activism could pose a great threat to animal welfare on factory farms; and consequently, the interests of the environmental movement may not be so closely aligned with the interests of the animal protection movement as it might appear.

This Article aims to challenge the popular wisdom among the animal protection community that increased collaboration with the environmental movement presents a win-win scenario that confers mutual political benefits and gives them a tactical advantage over the farmed animal industry. These sentiments, though well-intentioned, overlook the fact that in many cases enhanced environmental regulations do not benefit animal welfare. In the area of factory farming, a largely unregulated industry, just the opposite may be true. Indeed, the animal rights and environmental movements may be competitors for political capital in a zero-sum game. Contrary to popular wisdom, this Article will argue that the EPA’s sweeping environmental regulations may actually hurt animal welfare on factory farms.

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14 See e.g., Hill, supra note 2 (“Environmental law is feasible to use in litigation pertaining to animal cruelty, but the remedies ultimately may not be beneficial to the movement against animal cruelty.”).  
15 See Humane Society Press Release, Ammonia, supra note 2 (noting the Humane Society’s support for new ammonia regulations on factory farms). In justifying its support for new ammonia regulations, the Humane Society did not point to any direct benefit to farmed animals, but rather made a general statement that confinement of animals in tiny cages is cruel. Id.  
16 See e.g., Isaacs-Blundin, Esq., supra note 13 (discussing the benefits of using environmental statutes to advance the welfare of farmed animals).
Part II will provide some background on the plight of farmed animals on factory farms and the degree of animal welfare regulation of the animal agriculture industry. Part III will explore the nascent alliance between animal protection groups and environmentalists, and will detail the two primary ways in which this alliance has manifested itself—namely, the support for the EPA’s bold activism in ratcheting up environmental regulations of factory farms, and the litigation strategy of suing factory farms under environmental laws. Part IV will explore the three primary goals that animal protection groups hope to accomplish regarding factory farms, and will detail the reasons that animal protection groups have given for supporting increased environmental regulation of the farmed animal industry.

Part V will argue that each of the three major goals of the animal protection movement in the realm of industrial agriculture—namely, (1) to increase the cost of animal products, leading consumers to change consumption patterns and producers to decrease production levels, (2) to improve the lives of farmed animals, and (3) to help small farmers and hurt big factory farms—may be undermined by increased environmental regulation. To the contrary, the EPA’s activism could fail to change consumption patterns, lead to a reduction of animal welfare, and empower big factory farms at the expense of small farmers. This Part contends that the incoming regulatory assault from the EPA—promising to increase the cost of doing business for the farmed animal industry—and the nascent alliance with the environmental movement are not the good thing that animal protection supporters claim, and here is why: in this unregulated industry, the costs of increased environmental regulations may translate to worse treatment of animals.

Part VI suggests that a better approach for the animal protection movement would be to target state-level laws and/or ballot initiatives that directly enhance animal welfare. Finally, Part
VII concludes by urging the animal protection movement to abandon its misguided embrace of an alliance with the environmental movement, while there is still time to mitigate the damage.

II. Background on the State of Factory Farm Regulation Regarding Animal Welfare

This Part will describe the animal welfare laws on the books at the federal and state level as they pertain to farmed animals. First, this Part will discuss how the treatment of animals on factory farms is largely unregulated, noting that voluntary industry standards are the primary constraint on how the farmed animal industry can treat its animals—that is to say, they can do what they want without fearing legal consequences. Second, this Part will detail the lack of transparency in the world of animal welfare enforcement.

A. The Rapid Rise of Anti-Cruelty Laws

Animal cruelty laws have grown vigorously over the past thirty years, sweeping the nation on a tidal wave of public support. The animal protection movement has won a series of small victories through ballot initiatives, court rulings, and progressive legislation.17

These victories have come at both the federal and state levels. At the federal level, Congress has passed more than eighty animal protection statutes over the past five decades, such as the Animal Welfare Act (AWA).18 At the state level, although animal cruelty laws have a long


history dating back hundreds of years, such laws have only gained traction since the 1960s.\textsuperscript{19} Today, every state has an animal cruelty statute on the books, though these laws vary in what actions constitute “cruelty,” the level of punishment offered, and how “animal” is defined.\textsuperscript{20} In addition to animal cruelty laws, states have passed a plethora of statutes restricting animal fighting, puppy mills, and Internet hunting.\textsuperscript{21} However, instead of granting legal rights to animals, these laws have tended to only protect animals from needless suffering.\textsuperscript{22}

Nevertheless, the animal protection community is right to take pride in its many hard-fought victories, as it has succeeded in bringing the animal rights cause into the mainstream.\textsuperscript{23}

For example, the Humane Society has reported that 2009 was a milestone year for the cause of

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\item For example, in 1641 the Massachusetts colony enacted the “Body of Liberties,” which forbid “any tyranny or crueltie towards any bruite creature which are usuallie kept for man's use.” See Emma Ricaurte, Son of Sam and Dog of Sam: Regulating Depictions of Animal Cruelty Through the Use of Criminal Anti-Profit Statutes, 16 ANIMAL L. 171, 177 (2009); see generally Gerald Carson, MEN, BEASTS AND GODS: A HISTORY OF CRUELTY AND KINDNESS TO ANIMALS 71 (1972); David Favre & Vivien Tsang, The Development of Anti-Cruelty Laws During the 1800s, 1 DET. C.L. REV. 1 (1993). Likewise, in 1822 Maine adopted a law that provided “if any person shall cruelly beat any horse or cattle . . . he shall be punished” by both a fine and a month in jail. See Ricaurte, supra at 177, n.33 (noting that Maine’s anti-cruelty law reflected other laws of that period in that it only applied to commercial animals and not to domestic animals, such as dogs); Favre & Tsang, supra, at 8-9 (citing Me. Laws ch. IV, § 7 (1822)).
\item See Ricaurte, supra note 19, at 177; United States v. Stevens, 533 F.3d 218, 223 n.4 (3d Cir. 2008) (listing the animal cruelty laws in all fifty states); Animal Abuse and Neglect, http://www.humanesociety.org/issues/abuse_neglect/ (last visited May 15, 2011) (noting that forty seven states treat some types of animal abuse as felonies); Rebecca F. Wisch, Overview of State Cruelty Laws http://www.animallaw.info/topics/tabbed%20topic%20page/spuscruelty.htm (last visited May 15, 2011) (“[T]he term “animal” can be as broad under statutes to include “all living creatures” or as narrow to include only “vertebrates or mammals.”)
\item See Ritter, supra note 18, at 952 (citing figures on state legislation). Given this sweeping change in anti-cruelty laws, it is no surprise that the legal community’s interest in animal law has grown dramatically. Id. at n.2 (noting a tenfold increase in law school offerings since 2000, the growth of law journals dedicated exclusively to animal law, and the founding of animal law sections in state animal rights associations in 16 states).
\item See Ritter, supra note 18 at 952-53 (noting that the legal system has been the focus of efforts to advance animal rights to the point where the law has historically considered animals to be property), 954 (detailing lawful efforts to foster change, such as lobbying legislatures, civil disobedience, boycotts, demonstrations, and radical efforts to force change, including criminal acts of “‘vandalism, property destruction, and animal theft’”)
\end{itemize}
animal welfare on the state level, as evidenced by the 121 new animal protection laws enacted in state legislatures, setting a new record and surpassing the previous record number of 93 new laws set the previous year. But the celebration of this milestone must have tasted bittersweet, for the big villains in the modern story about animal abuse—the corporations profiting from the animal agriculture industry—have so far escaped justice and legal reprobation.

B. Description of Animal Welfare on Factory Farms

For a movement reeling from a string of defeats at the hands of the farmed animal industry and unable to gain any traction, these achievements provided a welcome relief. Yet, the fact remains that over 9.5 billion animals are slaughtered every year for the sake of food production, and their lives are nasty, brutish, and short. The ghastly treatment of animals on factory farms has been well-documented elsewhere. In brief, the Humane Society has identified the six worst practices in the farmed animal industry as including (i) the long-distance transport of animals without food or protection from temperature extremes; (ii) the electric stunning of birds before slaughter without rendering them insensible to pain; (iii) the confinement of ninety-five percent of egg-laying hens in small battery cages; (iv) the unnaturally fast growth of birds; (v) the forced molting of hens; (vi) the debeaking of male chicks.

25 See Stathopoulos, supra note 13, at 412 (listing the standard industry practice of extreme confinement of animals).
26 See e.g., David N. Cassuto, Bred Meat: The Cultural Foundation of the Factory Farm, 70-Wtr LAW & CONTEMP. PROBS. 59, 64 (2007) (“Egg producers must be female, so all male chicks are destroyed shortly after birth. . . . Debeaking involves using a hot blade to slice off the beak of a young chick. This procedure involves no anesthesia and is quite painful. . . . Forced molting involves the abrupt withdrawal of food. The sudden starvation “shocks the hen” and shuts down reproduction. The post-molten period results in high reproduction.”); Michael C. Appleby, LONG DISTANCE TRANSPORT AND WELFARE OF FARM ANIMALS (CAB Int’l 2008); David Kirby, ANIMAL FACTORY: THE LOOMING THREAT OF INDUSTRIAL PIG, DAIRY, AND POULTRY (St. Martin’s Press 2010); Barbara O’Brien, Student Author, Animal Welfare Reform and the Magic Bullet: The Use and Abuse of Subtherapeutic Doses of Antibiotics in Livestock, 67 U. COLO. L. REV. 407 (1996); David J. Wolfson, BEYOND THE LAW: AGROBUSINESS AND THE SYSTEMIC ABUSE OF ANIMALS RAISED FOR FOOD OR FOOD PRODUCTION (Farm Sanctuary, Inc. 1999).
(v) the forced feeding of geese for foie gras; and (vi) the confinement of pregnant pigs in gestation crates, so small that the pigs cannot even turn around.27

C. Regulation of Animal Welfare on Factory Farms

1. Largely Unregulated

Perhaps one of the reasons why animal protection groups have been so eager to find allies in its struggle to reign in the worst abuses of factory farms is that, in striking contrast to the many victories the animal protection cause has won in passing anti-cruelty laws across the nation, the powerful agri-business lobby has been able to stifle any meaningful reforms at the federal level designed to improve animal welfare.28 The most notable aspect of federal laws regarding the welfare of farmed animals is that they are largely irrelevant.29 Neither of the two pertinent federal statutes, the Humane Slaughter Act (HSA) and the Twenty-Eight Hour Law, afford meaningful protection to farmed animals.30

Why has success in advancing animal welfare eluded its supporters on the national level? The answer is that formidable interests stand in the way of the enactment of laws to protect farmed animals from abuse. The lobbying efforts of animal protection groups have been hopelessly outgunned by the powerful and well-funded agri-business lobby, which has been

29 See Wolfson & Sullivan, supra note 28, at 207 (discussing the perplexing lack of federal involvement in animal agriculture regulation), 207-08 (noting that while two federal laws govern some aspects of animal welfare—the Humane Slaughter Act and the Twenty-Eight Hour Law—both are toothless for a variety of reasons).
30 Id. at 207-09.
remarkably successful in marshaling legislative support for keeping itself largely unregulated.\footnote{See id., at 207; Frank B. Cross, The Judiciary and Public Choice, 50 Hastings L.J. 355, 363 (1999) (“The costs of lobbying Congress may be well beyond the capacity of the average individual or small group, and effective lobbying may exceed the resources of broad-based public interest groups.”).}

This discrepancy in power politics has spelled doom for any meaningful animal welfare reforms at the national level.\footnote{See Kreuziger, supra note 28, at 398.} Alas, the factory farm industry remains the elusive white whale; its thick skin has repelled every spear thrown by the animal protection movement. Unable to make any progress on the federal level, animal protection supporters did not give up, but rather started searching intently for alternatives and allies.

Although domestic anti-cruelty laws have been passed governing individual citizens’ treatment of animals, they contain large exceptions and generally exempt the production of animals as food.\footnote{See Wolfson & Sullivan, supra note 28, at 210-11, 224.} However, since the vast majority of animals are used in the production of food, anti-cruelty laws are actually quite narrow in scope.\footnote{See Cass R. Sunstein, Introduction: What Are Animal Rights?, in Animal Rights: Current Debates and New Directions (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004) (noting that such laws also generally exempt the use of animals for medical or scientific purposes); Wolfson & Sullivan, supra note 28, at 210-11 (“Through a contrast of laws in the United States and Europe, one gains a true appreciation of the extent to which legislatures in the United States have abdicated their responsibilities.”).} Thus, the farmed animal industry has been able to propagate large-scale abuse without regulation or reprimand, a cruel irony considering the nearly unfathomable suffering of many farmed animals.\footnote{See e.g., Cassuto, Bred Meat, supra note 26, at 64 (describing the practices of debeaking, molting, etc.).}

Instead, the farmed animal industry’s treatment of animals is largely governed by voluntary guidelines promulgated by each industry.\footnote{See Wolfson & Sullivan, supra note 28, at n.75. For example, the United Egg Producers (UEP) issued guidelines in 1999 relating to the conditions for egg-laying hens. The UEP guidelines seemed to modestly enhance the welfare of these hens by, among other things, increasing cage space per hen. Id.} Moreover, some restaurant chains have instituted voluntary supplier guidelines for animal welfare, monitored by an audit program.
overseen by a third-party verifier. However, animal protection groups have criticized these standards for not adequately preventing cruelty to animals and for being purely voluntary, thereby failing to act as a sufficient constraint on behavior. In addition, these standards are criticized for failing to improve animal well-being—for example, by failing to address concerns related to freedom of movement, close confinement, and slaughter practices.

Notably, there is a trend towards greater regulation at the state level, but these advances have come almost exclusively through ballot initiatives, and only in states where this is an option.

2. Lack of Transparency

The problematic features of the current legal system governing animal welfare—namely, a lack of meaningful regulations and widespread cruel practices—are exacerbated by a general lack of transparency. Although some firms have agreed to put real-time videos in their factories,
most factory farms are enshrouded in a cloud of secrecy. Finally, a trend has developed in many states to restrict the taking of pictures or videos of farming areas.

III. The Alliance Between Animal Protection Groups and Environmentalists

The ascension of Lisa Jackson, a tough new cop on the environmental beat, coincided with a growing interest within the animal protection community to seek out creative ways to break through the persistent inaction in Congress, manifesting in two forms: (1) support for the bold activism of Lisa Jackson and (2) the pursuit of a litigation strategy involving suing factory farms under environmental laws. This Part will first trace the bold campaign of the EPA, under Jackson’s leadership, to increase the environmental regulation of industrial agriculture. Then, this Part will discuss the established litigation strategy of animal protection groups to sue under environmental laws.

A. Support for the EPA’s Increased Environmental Regulation of Industrial Agriculture

In 2008, a new hope for animal welfare arose from the storm-battered city of New Orleans, embodied by Lisa Jackson, the bold new leader of the EPA, to crack down on the evils of the farmed animal industry. Like the abandoned puppies the Humane Society has sworn to protect, the animal protection movement has virtually no federal laws to shelter it from the storms; so when the word went around that Jackson was taking the fight to factory farms, ears started perking up within the animal protection community.

41 See Helena Bottemiller, Q&A with Temple Grandin, FOOD SAFETY NEWS, June 22, 2010, http://www.foodsafetynews.com/2010/06/qa-with-temple-grandin/ (describing as a rare exception the example of Cargill, which has put video auditing in all their pork and beef plants).
Many in the animal protection movement cheered on Jackson as she braved the fierce political headwinds and pressed forward with an ambitious regulatory agenda to reign in the environmental degradation generated on factory farms.\textsuperscript{44} She is perceived as the standard bearer in a great common cause: regulating the farmed animal industry that has thus far breezily swatted away animal rights activists like harmless flies in the contest of political influence with Congress.\textsuperscript{45} Under the helm of Jackson, the EPA has aggressively sought to regulate the environmental damage wrought by factory farms by issuing or proposing to issue stringent regulations promising to impose significant regulatory costs on the agriculture industry.\textsuperscript{46}

Specifically, Jackson has raised the stakes with a half-dozen actions that could potentially impose substantial burdens on the farmed animal industry, including dust regulation,\textsuperscript{47} efforts to abolish the phosphorus index,\textsuperscript{48} reporting requirements under the Comprehensive Environmental


\textsuperscript{45} See Kreuziger, supra note 28, at 363.


\textsuperscript{47} See e.g., Gabriel Nelson, Pre-emptive Attacks on Dust Rules Draw Rebuke From EPA, N.Y. TIMES, Feb. 25, 2011, http://www.nytimes.com/gwire/2011/02/25/25greenwire-pre-emptive-attacks-on-dust-rules-draw-rebuke-66421.html (discussing a draft version of a new policy memo to regulate coarse particles, which critics say could double or triple the number of areas that violate the standard); Henry J. Reske, Obama's EPA Moves to Regulate Dust, NEWSMAX, May 23, 2011, http://www.newsmax.com/InsideCover/epa-dust-farmers-regulation/2011/05/23/id/397445 (describing a letter written from over 100 members of Congress to Lisa Jackson, noting that if “implemented, the proposed standards could subject farmers, livestock producers, and industry to burdensome regulations which could result in fines amounting to $37,500 a day for violations.”).

\textsuperscript{48} See Press Release, NCBA Defends Cattle Ranchers During Forum on EPA Regulations (2010), http://growinggeorgia.com/animalag/824-ncba-defends-cattle-ranchers-during-forum-on-epa-regulations (describing the irate testimony of a representative of the National Cattlemen’s Beef Association regarding a potential move by the EPA to eliminate the phosphorous index). The phosphorous index “is a tool used by cattle producers to assess the appropriateness of applying manure to land near our waters.” Id. Although currently the phosphorus index is different in every state, the ranchers are concerned that the Obama Administration is developing a burdensome national standard. Id.
Response, Compensation, and Liability Act (CERCLA) and the Emergency Planning and Community Right-to-Know Act (EPCRA), and CAFO regulation under the Clean Water Act. Additionally, the EPA has taken action to put the Chesapeake Bay region on a “pollution diet” and restrict the area’s high nutrient pollution levels that have created a “dead zone” underneath the bay. Finally, the EPA is currently considering a petition to regulate ammonia emissions from CAFOs under the Clean Air Act. All of these regulations promise to reach deep into the pockets of big agriculture. However, there is one potential action that singularly strikes fear into the hearts of the farmed animal industry: greenhouse gas regulations.


50 See id. However, the EPA’s ability to regulate discharges from CAFOs was dealt a serious blow in March of 2011 when the United States Court of Appeals for the Fifth Circuit ruled that the EPA exceeded its authority by issuing regulations that required CAFOs to apply for a National Pollutant Discharge Elimination System (NPDES) permit. The Circuit Court also struck down the 2008 Rule’s imposition of liability upon CAFOs for failing to apply for a permit—regardless of whether they discharged pollutants to federally regulated waters. See Alexander M. Bullock & Stewart D. Fried, Fifth Circuit Vacates Portions of EPA’s CAFO Rule Non-Discharging CAFOs Have No Duty to Apply for NPDES Permits (2011), http://www.kilpatricktownsend.com/en/Knowledge_Center/Alerts_and_Podcasts/Legal_Alerts/2011/03/Fifth_Circuit_Vacates_Portsions_of_EPAs_CAFO_Rule_NonDischarging.aspx. Although this case represents a big victory for large pork and poultry producers, the language of the opinion did leave some room for enforcement actions against “discharges” of dust, feathers, etc. issued from ventilation fans in CAFO barns. Id.


52 Humane Society Press Release, Ammonia, supra note 2.

The EPA has laid the groundwork to regulate greenhouse gas (GHG) emissions that contribute to climate change under the Clean Air Act. In May 2010, the EPA issued the final GHG Tailoring Rule, which did a number of things. First, the EPA sought to phase-in GHG regulations incrementally, establishing thresholds for GHG emissions that require permits under the Prevention of Significant Deterioration (PSD) rules and Title V. Second, the EPA chose to temporarily leave small emitters alone, and provided that sources emitting less than 50,000 tons of GHGs per year are not required to obtain GHG permits before 2016. Although the EPA has not yet imposed GHG regulations on the agriculture industry, it has commenced certain monitoring and reporting requirements that tend to indicate the agency is laying the groundwork to regulate them in the near future. For example, the EPA has taken some preliminary steps towards regulating nonpoint source pollution, and has begun to monitor the waste products from factory farms.

The farmed animal industry is a big emitter of GHGs, so the industry would have a lot to lose by the imposition of stringent climate change regulations. Specifically, the Food and Agriculture Organization (FAO) of the United Nations (UN) has reported that the animal

56 See Fact Sheet, Clean Air Act, supra note 54.
agriculture sector is responsible for approximately 18% of greenhouse gas (GHG) emissions. Consequently, should the EPA decide to impose regulations of GHG emissions, the agriculture industry would undoubtedly shoulder a large portion of the burden.

It is small wonder that the EPA’s bold regulatory campaign has greatly alarmed the powerful agriculture industry and has made more than a few enemies in Congress. Members of the agri-business industry have taken to issuing dire statements—for example, one representative of the Virginia Farm Bureau Federation stated in a congressional hearing that “[t]he EPA proposals are overwhelming to farmers and ranchers, and they are creating a cascade of costly requirements that are likely to drive individual farmers to the tipping point.”

In spite of this alarmist rhetoric, or perhaps because of it, the animal protection community has generally cheered on the EPA’s efforts to regulate the agriculture industry. In addition to strongly supporting the EPA’s aggressive regulatory campaign, animal protection groups have built alliances with environmental groups by joining petitions requesting that the


60 On February 9th, Lisa Jackson— the new Obama appointed administrator of the Environmental Protection Agency (EPA)—was summoned to the Republican-led House Energy and Commerce Committee to field questions about the EPA’s recent activism in attempting to regulate greenhouse gas (GHG) emissions via the Clean Air Act. See Broder, supra note 44. House Republicans were understandably piqued that Jackson had dared to challenge their allies in the oil industry, and put her under fire for seeking to end the excessive permissions granted to corporate energy interests during the late Bush years. See Landis-Marinello, supra note 54, at 147. Although Jackson ended up upstaging the congressmen and winning the day, the newly empowered GOP may yet have the last laugh if they succeed in legislating broad reductions in the EPA’s powers—not to mention its budget. See Broder, supra note 44. But the GOP not only seeks to slash EPA enforcement funding, it also seeks take away the EPA’s authority to regulate greenhouse gases under the Clean Air Act. Id.

61 See Testimony of Wilmer Stoneman, supra note 50.

62 See e.g., Humane Society, Global Warming, supra note 2 (noting that Wayne Pacelle praised Jackson’s efforts to regulate greenhouse gas emissions).
EPA expand its environmental regulation of factory farms.\textsuperscript{63} For example, the Humane Society recently partnered with the Sierra Club to petition the EPA to begin regulating ammonia emissions from CAFOs.\textsuperscript{64}

B. Litigation Strategy of Suing Factory Farms Under Environmental Laws

The second way that animal protection groups have allied themselves with environmentalists is by engaging in a litigation strategy of suing factory farms under environmental laws.\textsuperscript{65} For example, the Humane Society has collaborated with leading environmental groups to enforce existing environmental laws, thereby taking an active watchdog role over factory farms’ compliance with such laws.\textsuperscript{66} This strategy accords with one of the primary goals of the animal protection movement in the realm of the farmed animal industry: to force the farmed animal industry to pay the “hidden costs” (or externalities) of producing billions of animals for slaughter and consumption every year.\textsuperscript{67}

\textsuperscript{64} See Humane Society Press Release, Ammonia, supra note 2. The coalition of 20 national, state, and local organizations consisted of a diverse set of environmental protection, public health, and rural economies and communities. \textit{Id.} Notably, the Humane Society appeared to be the only animal protection organization among the group, perhaps with the exception of the Socially Responsible Agricultural Project, which opposes factory farms partly based on concerns over animal health. See \textit{About Factory Farms by the Socially Responsible Agricultural Project}, available at http://www.sraproject.org/factoryfarms/ (last visited May 5, 2011).
\textsuperscript{65} See \textit{e.g.}, Isaacs-Blundin, supra note 13.
For example, in March 2007, the Humane Society sued the Hudson Valley Foie Gras farm for violating the Clean Water Act. Forcing this company to comply with the Clean Water Act would require it to obtain a permit, and as a condition of granting such a permit, the EPA may demand a reduction in waste produced at the facility. However, the particular abhorrent practice in question—the painful force-feeding of ducks—would not be impacted, and therefore it is not clear what benefit, if any, would accrue to the ducks. One is left with the conclusion that although environmental law can help animal protection groups get into court, “the remedies ultimately may not be beneficial to the movement against animal cruelty.”

IV. Why Do Animal Protection Groups Support Increased Environmental Regulation of Industrial Agriculture?

This Part first discusses the split between mainstream animal protection groups and more radical animal protection groups. Then, this Part explores the three primary goals that animal protection groups hope to accomplish regarding factory farms. Finally, this Part details the reasons that animal protection groups give for supporting increased environmental regulation of industrial agriculture.

A. What Are the Goals of Animal Protection Groups Regarding Industrial Agriculture?

1. Big Split Between Mainstream/Moderate Groups and Radical Groups

As a threshold matter, the animal protection movement is comprised of a spectrum of ideologies, with various factions disagreeing on goals and tactics. For purposes of this Article, it

68 See Hill, supra note 2, at 28. These ducks are forced-fed large amounts of food with the purpose of abnormally expanding their liver, which makes for a tasty dish. Id.
69 Id. at 29.
70 Id.
71 Id., at 39.
is necessary to define the goals of the animal protection movement in order to analyze whether such goals are achieved by certain strategies—for example, the support for increased environmental regulation on a national level.\textsuperscript{72} Thus, it is necessary to define these goals clearly. As a general matter, radical groups have less credibility because their views are not widely shared and their goals tend to be unrealistic.\textsuperscript{73} Thus, it is more useful to analyze the goals of mainstream animal welfare groups that seek to reform animal agriculture by working within the system to effect change.\textsuperscript{74} Among these, the Humane Society is the powerhouse and dwarfs the others in revenues, net assets, and political influence.\textsuperscript{75} As a result, this Article tends to focus on the positions of Humane Society as representing the mainstream animal welfare movement.

\textsuperscript{72} For a good discussion of the arguments of animal rights supporters and their animal welfare counterparts, see generally Gary L. Francione, THE ANIMAL RIGHTS DEBATE: ABOLITION OR REGULATION (Columbia Univ. Press 2010); Tom Regan, THE CASE FOR ANIMAL RIGHTS (Univ. of Cal. Press 2004); Gary L. Francione, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT (Temple Univ. Press 2006).

\textsuperscript{73} People of the Ethical Treatment of Animals (PETA) is the largest animal rights (as opposed to welfare) organization in the United States, with more than two million members, and yearly revenues of $35,282,146. See People for the Ethical Treatment of Animals by Charity Navigator, http://www.charitynavigator.org/index.cfm?bay=search.summary&orgid=4314 (last visited Aug. 15, 2011). However, PETA directly advocates the abolition of animal agriculture and promotes switching to veganism. Id.; See e.g., Activists Share Anti-Agriculture Agenda at Conferences (2010), available at http://www.cattlenetwork.com/templates/newsarchive.html?sid=cn&cid=1209376 (quoting Bruce Friedrich, with PETA, who stated "The point at which society moves towards our views is a point where we are significantly closer to the vegan world that we are all working toward."); Animals Used for Food, http://www.peta.org/issues/animals-used-for-food/default2.aspx (last visited Aug. 15, 2011). This means PETA is less committed to working within the system to effect change than more mainstream groups like the Humane Society, and therefore its tactics are more oriented towards public relations campaigns, and less towards the type of litigation strategy discussed in this Article. As a result, they are less relevant to the tactical alliance with environmental groups.

\textsuperscript{74} Such animal welfare organizations that target factory farms include Farm Sanctuary, Animal Legal Defense Fund, Animal Welfare Institute, Humane Society of the United States, Humane Farming Association, and In Defense of Animals.

\textsuperscript{75} The Humane Society of the United States has eleven million members, $101,681,180 of revenues (in 2009), and $160,511,563 in net assets. See The Humane Society of the United States by Charity Navigator, http://www.charitynavigator.org/index.cfm?bay=search.summary&orgid=3848 (last visited Aug. 15, 2011); About Us, http://www.humanesociety.org/about/ (last visited May. 15, 2011). In comparison, the second best funded organization focusing on farmed animal welfare is Farm Sanctuary with $6,254,245 of revenues in 2009. See Farm Sanctuary by Charity Navigator,
2. Goals of Mainstream Animal Protection Groups

This Part will discuss the goals of mainstream animal protection groups. At the highest level of abstraction, mainstream animal protection groups would like to help farmed animals by improving their welfare and reducing the amount of animals that are slaughtered every year for food. These broad aspirations are promoted by three narrower (and interrelated) goals, including: (1) to increase the cost of animal products, leading consumers to change consumption patterns and producers to decrease production levels, (2) to improve the lives of farmed animals, and (3) to help small farmers and hurt big factory farms.


Part V, supra, will analyze whether these goals of mainstream animal protection groups are achieved by supporting increased environmental regulation of factory farms. See generally, Gene Baur, FARM SANCTUARY CHANGING HEARTS AND MINDS ABOUT ANIMALS AND FOOD (Touchstone 2008); Kreuziger, supra note 28; Jim Mason & Peter Singer, ANIMAL FACTORIES: WHAT AGROBUSINESS IS DOING TO THE FAMILY FARM, THE ENVIRONMENT AND YOUR HEALTH (Harmony Bks. 1990); Bernard E. Rollin et al, THE WELL-BEING OF FARM ANIMALS CHALLENGES AND SOLUTIONS (G. John Benson & Bernard E. Rollin, eds., Blackwell Publ’g Ltd. 2004); Wolfson & Sullivan, supra note 28.

Wayne Pacelle has often written in support of changing consumer behaviors towards a plant-based diet. See e.g., Carla Hall, Career Ark of an Animal Defender, LA TIMES, July 19, 2008, http://articles.latimes.com/2008/jul/19/local/me-pacelle19/3 (“It’s really about human behavior and less about the animals. Animals for the most part just need to be left alone”). He has stated: “The science is clear that a diet that is primarily plant-based is better for our personal health, and it’s obviously better for animals and the environment. . . . If we are going to succeed in reducing the consumption of animal products, we have to have alternatives that excite the palate and tempt the skeptical.” Wayne Pacelle, Hitting the Spot with Healthy and Humane Foods (2009), http://Humane Society.typepad.com/wayne/2009/10/tal-ronnen.html. A key part of this strategy is to make factory farms pay the “hidden costs” (or externalities) of their operations including environmental harms. See e.g., Humane Society Report, Impact, supra note 67; Humane Society Fact Sheet, Climate Change, supra note 67; Cassuto, Brazilian Odyssey, supra note 67. The goal of decreasing meat consumption is well documented. See e.g., Elizabeth Bennett, Powerful Final Day at the Second World Conference on Bioethics and Animal Rights, (2010), http://animalblawg.wordpress.com/2010/08/30/powerful-final-day-at-the-second-world-conference-on-bioethics-and-animal-rights/ (“David Favre followed by speaking about the practical political hurdles associated with decreasing meat consumption, citing the uproar in response to the suggestion of meatless days, but pointing out that a meat tax may work.”).

See e.g., Farm Animal Protection, http://www.humanesociety.org/issues/campaigns/factory_farming/ (Aug. 15, 2011) (describing the Humane Society’s mission as “[w]orking to reduce the suffering of animals raised for meat, eggs and milk.”); Kim W. Stallwood et al., SPEAKING OUT FOR ANIMALS: TRUE STORIES ABOUT REAL PEOPLE WHO RESCUE ANIMALS 78 (Kim W. Stallwood, ed., Lantern Books 2001) (quoting Pacelle, who described the mission of Humane Society as follows: “We want to create a humane
First, mainstream animal protection supporters seek to increase the cost of animal products as a means of spurring a chain of events leading to a net decrease in the production of meat for consumption—that is, fewer animals raised and slaughtered for food. They argue that the true cost of meat is much higher than the prices consumers pay at the grocery store; myriad government policies serve to subsidize the farmed animal industry either directly, in the form of subsidies, or indirectly, through a lax regulatory environment that permits factory farms to avoid paying for the negative externalities generated by the production process—for example, the environmental harms generated from CAFOs. A better approach, they argue, would be to force producers and consumers to internalize the hidden costs associated with the farmed animal industry, not least being the suffering and slaughter of billions of farmed animals.

The narrow goal of raising prices of animal products is thought to promote the larger goal of decreasing the overall production of meat. The idea is that increased costs of production will be passed down to the consumer. Faced with higher meat prices, consumers will tend to shift their consumption patterns away from meat. This decrease in consumer demand will lead producers to decrease production.

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81 See e.g., Hall, supra note 78; Pacelle, supra note 78; Bennett, supra note 78; Humane Society Report, Impact, supra note 67; Humane Society Fact Sheet, Climate Change, supra note 67; Cassuto, Brazilian Odyssey, supra note 67.


83 See Copeland, supra note 46.

84 See e.g., Stathopoulos, supra note 13, at 412.
Second, mainstream animal protection groups seek to nudge the farmed animal industry towards more humane farming methods. For example, the Humane Society maintains that it does not seek to end animal agriculture entirely, but merely to end the most cruel practices. Third, animal protection groups seek to support humane family farms and small producers, while only opposing the big factory farms, which engage in inhumane farming practices. They argue that industrial farming has harmed rural communities and diminished their quality of life.

Finally, a few words must be said about distinguishing overarching goals from narrower goals, and means from ends. To be sure, at the highest level of abstraction, these three goals merely serve larger ones; increasing the cost of meat is not an end in itself, but rather is a means to achieve the larger goal of reducing the number of animals that are slaughtered for food. However, these three primary goals of animal protection groups are conceptually distinct because they often work at cross-purposes. For example, increasing the cost of meat itself may hurt small farmers insofar as they are less able to absorb the increased cost of production than larger factory farms (unless, of course, small farmers receive regulatory relief from such burdens). Likewise, eliminating some abusive practices—for example, close confinement crates—may harm small farmers to the extent that they cannot afford the substantial investment

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87 See Humane Society Press Release, Air Violations at Egg Farm, supra note 2.
in new equipment to comply with the new regulations. Also, small farms as well as big factory farms engage in abusive practices. 89

B. Why Do Animal Protection Groups Say That Increasing Environmental Regulation Serves These Goals?

Over the last several years, mainstream animal protection groups have supported increased environmental regulation of industrial agriculture, cheered Jackson’s bold activism, and partnered with environmentalists to ramp up the environmental regulation of factory farms. 90 When animal protection groups give reasons for applying this strategy, they rarely assert that these actions will directly result in better treatment for animals on factory farms. 91 But rather, these groups seem to support expanding the environmental regulations of factory farms on the theory that farmed animals will benefit indirectly, or that, such a strategy generally advances the cause of animal welfare by hurting their tormentors—the farmed animal industry.

In a recent example, the Humane Society of the United States (Humane Society) united with several prominent environmental groups—such as the Sierra Club, Waterkeeper Alliance, and Northwest Environmental Defense Center—to petition the EPA to start regulating ammonia emissions from CAFOs. 92 Ammonia emissions can endanger human health and welfare by

89 There is a vigorous debate about the extent to which factory farms are worse for animals than small farmers. See e.g., Helena Bottemiller, Q&A with Temple Grandin, FOOD SAFETY NEWS, June 22, 2010, http://www.foodsafetynews.com/2010/06/qa-with-temple-grandin/ (interviewing Temple Grandin, an animal welfare expert). According to Temple Grandin, the worst atrocities are unlikely to occur in “most of the big plants that are audited by McDonald's and places like that.” Id. To the contrary, “the little local places that are not being audited” concern her the most. Id. This Article makes no attempt to advance this debate. Suffice to say, mainstream animal protection groups strongly believe that small farmers are better for animals, and this Article explores whether their goals are achieved by certain tactics—namely, forming alliances with environmental groups.

90 See notes 11-13, and accompanying text.


92 Id. The coalition of twenty national, state, and local organizations consisted of a diverse set of environmental protection, public health, and rural economies and communities. Id. Notably, the Humane
causing respiratory health problems. In addition to these adverse health effects, the petition asserted that ammonia from factory farms diminishes the people’s quality of life and pollutes the waterways. The goals of the environmental groups petitioning the EPA were clear and direct: the environment cannot afford exempting factory farms from the Clean Air Act standards that govern other major polluters. But why did animal protection groups join the petition? What do ammonia regulations have to do with the animal-welfare-centered mission of the Humane Society?

Jonathan Lovvorn, Chief Counsel for the Humane Society, attempted to link these direct environmental benefits with the indirect outcome of advancing animal welfare on factory farms, stating that “[c]onfining hundreds of thousands of animals in tiny cages at a single location is not only unconscionably cruel to farmed animals, but also destroys local communities, harms wildlife, and pollutes the natural environment.”

However, it strongly appears that the link between federal ammonia regulations and improving animal welfare is quite attenuated. To be sure, the connection comes into focus when one considers the argument that ammonia pollution from factory farms is exacerbated by the common industry practice of confining hundreds of thousands of animals in small cages at a few

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93 See Humane Society Press Release, Ammonia, supra note 2 (pointing out that the EPA itself has documented the adverse health effects of ammonia pollution, and stating that citizens living close to CAFOs have suffered from this type of pollution).
94 Id. (quoting Environmental Integrity Project Attorney Tarah Heinzen). Although factory farms are the largest source of ammonia emissions, for decades the EPA has declined to regulate the air emissions from CAFOs. Humane Society Press Release, Ammonia, supra note 2.
95 Id.
96 See About Us by the Humane Society, available at http://www.humanesociety.org/about/ (last visited Aug. 15, 2011) (stating its mission is “to celebrate animals and to confront cruelty”).
large facilities. This practice concentrates the pollution from factory farms animals, a problem that is presumably diminished on small farms because animals are permitted to roam over larger distances fewer animals are raised for food. In other words, it is possible that potential ammonia regulations might compel factory farms to limit the concentration of animals at a given facility—for example, leading to a “free range” industry norm. At best, however, this is a tenuous connection and it is not at all clear that potential EPA ammonia regulations would take the form of forcing factory farms to scale back their operations, as opposed to implementing new technology, for example.

Defenders of the farmed animal industry warned that this “dangerous petition . . . should be taken seriously” because it poses “mortal threat” to CAFO operators. Thus, another tactical benefit of this strategy becomes apparent: these regulations terrify the farmed animal industry. Since factory farms are the sworn enemy of animal protection groups, it would make sense to try to hurt them. But does hurting the farmed animal industry necessarily improve the welfare of farmed animals?

V. Increased Environmental Regulation of Industrial Agriculture May Hurt Animal Welfare

It appears that animal protection groups desire to punish factory farms, and believe that no harm will come to the farmed animals in the process. This assumption may be wrong, and to the contrary, there is good reason to believe that this strategy of supporting increased environmental regulation may hurt, more than help, animal welfare on factory farms. If so, the partnership between the animal protection movement and the environmental movement is

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98 See About Factory Farms, supra note 92 (describing the petition).
misguided and should be abandoned. This Part will examine these arguments in relation to the three defined goals of mainstream animal protection groups.

This Part argues that each of the three major goals of the animal protection movement in the realm of industrial agriculture—namely, (1) to increase the cost of animal products, leading consumers to change consumption patterns and producers to decrease production levels, (2) to improve the lives of farmed animals, and (3) to help small farmers and hurt big factory farms—may be undermined by increased environmental regulation. To the contrary, the EPA’s activism could result in a lack of change in consumption patterns, the reduction of animal welfare, and the empowerment of big factory farms. This Part contends that the animal protection movement’s support for the EPA’s incoming regulatory assault on the farmed animal industry, promising to increase regulatory costs for factory farms, and its alliance with the environmental movement are misguided policies because the costs of increased environmental regulations may translate to worse treatment of animals.

To begin, there is no proof that these legislative strategies benefit animals.100 Supporters of this strategy largely rely on the fact that the farmed animal industry is a common enemy to both animal welfare and the environment.101 True, but is the enemy of my enemy necessarily my friend? To be sure, the ecosystem and the environment stand to benefit when animal protection groups sue to enforce environmental laws, but how do the animals benefit? So far, animal protection groups have not made a strong case that farmed animals stand to benefit from this strategy, instead they have made only vague claims that farmed animals indirectly benefit.102 To the contrary, my thesis is that expanded environmental regulation of the farmed animal industry

100 See Hill, supra note 2 (expressing some skepticism that suing under environmental laws is effective in promoting animal welfare).
101 See e.g., Humane Society Fact Sheet, Climate Change, supra note 67; Landis-Marinello, supra note 59; Humane Society Report, Impact, supra note 59.
may actually undermine the welfare of farmed animals. In fact, animal protection groups could be totally wrong and unwittingly undermining their own movement by contributing to the suffering of farmed animals.

On the other hand, it is clear that this strategy generates a number of secondary benefits. First, suing under environmental laws may permit animal protection litigators to overcome the daunting obstacle that is the Court’s standing jurisprudence, and also to expand available causes of action.\textsuperscript{103} Second, once animal protection litigators get entry into the courthouse, discovery requests can be a useful source of information that otherwise would not be available. Third, a high-profile lawsuit can capture the public’s attention and gain sympathy for the plight of animals, which advances the cause. To be sure, this seems to cut against my arguments that animal protection groups are making a mistake by suing under environmental laws, because even if increased regulatory costs leads to diminished treatment of animals on factory farms, these secondary benefits still accrue to the animal protection movement.\textsuperscript{104} However, if this potential harm to farmed animals gives one pause, it seems unlikely that the entire strategy can be justified solely by secondary benefits. Notably, a leading animal rights advocate, Mariann Sullivan,

\textsuperscript{103} See e.g., Delcianna J. Winders, Confronting Barriers to the Courtroom for Animal Advocates, 13 ANIMAL L. 1, 6 (2006) (tracing the numerous obstacles that the standing doctrine presents to animal protection groups and proposing ways that these hurdles may be overcome); Cussuto et al., Legal Standing, supra note 57, at 69-71 (informational-injury claims); Sunstein, Standing, supra note 57, at 1366 (proposing to create a private right of action under the AWA).

\textsuperscript{104} At this point, it would be a matter of conducting a cost/benefit analysis of whether the harm to farmed animals is outweighed by the benefits involved with punishing the factory farms. Finally, even if the benefits of this strategy are great and the costs are relatively small—by assuming for the sake of argument that factory farms are highly unlikely to shortchange animal welfare in response to higher regulatory costs—it would be prudent for animal protection groups to at least acknowledge the risk they are taking. And if there is a reasonable probability that this strategy could contribute to even more suffering of farmed animals, should not the burden of proof that this strategy actually benefits animals rest on those advocating it?
conceded that if the thesis of this Article were proven on a large scale, she would be forced to reconsider her strategy of suing factory farms under environmental laws.105

A. Failure of Increased Prices To Change Consumer Behavior

The first goal of mainstream animal protection groups is to increase the cost of animal products, leading consumers to change consumption patterns and producers to decrease production levels.106 The problem with achieving this goal through expanded environmental regulation is that it relies on a long causal chain, of at least four steps. First, increased environmental regulation must increase the cost of production for animal products. Second, these increased costs must be passed on to consumers. Third, the increase in the market price of animal products must be significant enough to force consumers to change consumption habits away from meat towards green foods. Fourth, the decrease in consumer demand for animal products must lead producers to decrease production. The problem here is that if any one particular step proves shaky and flawed, the whole foundation must collapse like a house of cards.

The first link in the causal chain is that increased environmental regulation must increase the cost of production for animal products. Among the various links, this one is the least problematic. Increasing the costs of animal products is an express goal of animal protection groups.107 Moreover, judging from their public statements, the agri-business industry clearly believes that the EPA’s regulatory agenda will dramatically increase their cost of production.108

107 See e.g., Hall, supra note 78; Pacelle, supra note 78; Bennett, supra note 78; Humane Society Report, Impact, supra note 67; Humane Society Fact Sheet, Climate Change, supra note 67; Cassuto, Brazilian Odyssey, supra note 67.
Undoubtedly, this alarmist rhetoric exaggerates the potential costs at stake, but if there is even a kernel of truth behind them, the EPA’s regulatory agenda promises to significantly raise costs.\textsuperscript{109}

The second link in the causal chain is that increased regulatory compliance costs must be passed on to consumers. Should producers fail to pass on such increased costs to consumers, then consumers will not have a greater incentive to shift their consumption habits towards green alternatives.\textsuperscript{110} Leaders of the farmed animal industry claim that they cannot pass on higher costs of production to consumers.\textsuperscript{111} Don Shawcroft, the Colorado Farm Bureau President, testified before Congress that farmers and ranchers “cannot simply pass higher expenses along to their customers” in the context of high fuel prices.\textsuperscript{112}

Taking this statement well salted, in what general circumstances are costs passed on to consumers, and in what circumstances are they not passed on, but borne by the firm, either through reduced profits or by cutting costs in other areas? In other words, how are market shocks transmitted through the various stages of the supply chain?

Generally speaking, whether firms are able to pass on increased costs “depends both on competitive conditions and the sensitivity of consumer demand to prices.”\textsuperscript{113} In particular, there tends to be imperfect price transmission in agriculture markets, such that “a price reduction at the

\textsuperscript{109} Obtaining hard data on the costs of potential EPA regulations of factory farms is elusive because many of these regulations are not yet enacted, but rather are still working their way through the administrative process.

\textsuperscript{110} On the other hand, if increased costs are not passed on to consumers, then in all likelihood the firms are absorbing more expenses, and their profits should decline. Insofar as one views hurting the profits of the farmed animal industry as an end in itself, independent of whether the welfare of farmed animals is improved in the process, this may be a good thing.


\textsuperscript{112} Id.

farm level is only slowly, and possibly not fully, transmitted through the supply chain.”114 In contrast, “price increases at the farm level are thought to be passed more quickly on to the final consumer.”115 This imperfect price transmission is widely believed to be the product of market power and oligopolistic behavior.116

Based on the available economic data, can we predict whether the cost of expanded environmental regulations of factory farms would be passed on to the consumer? The literature on the subject of price transmission in agriculture offers inconclusive results.117 One reason why there are few hard answers in this field of research is that it is difficult to understand “the increasingly complicated relationships among prices along the supply chain and the underlying behavior of agents.”118 Thus, this Article makes no attempt to offer a definitive conclusion on whether expanded environmental compliance costs would likely be passed on to the consumer. For present purposes, it is enough to identify the difficult economic puzzles that need to be solved in order for animal protection groups to justify their strategy of supporting increased environmental regulation of the farmed animal industry.

Third, the resulting increase in the market price of animal products must be significant enough to force consumers to change their consumption patterns away from meat and towards green foods. In other words, even if the costs of complying with new environmental regulations

115 Id.
116 Id.
117 For example, one study undertook an exhaustive review of the literature of competition in the meatpacking industry. After 179 pages of analysis, this study concluded that the literature failed to demonstrate that the meatpacking industry is not competitive. The study then noted that “It is equally important to emphasize that failure to show conclusively that the industry is not competitive is not, by any means, evidence that it is competitive in the sense of price-taking behavior.” See Dale G. Anderson & Azzeddine M. Azzam, Assessing Competition In Meatpacking: Economic History, Theory, and Evidence, USDA GIPSA-RR 96-6 (1996), http://archive.gipsa.usda.gov/pubs/packers/rr96-6.pdf.
118 See Vavra, supra note 114.
are passed on to the consumer, is that really going to make a dent in consumer demand? The basic law of demand holds that there is an inverse relation between the price charged and quantity demanded.\textsuperscript{119} To make green foods competitive with animal products, how much would the cost of the latter need to rise in order to compel consumers to substitute away from these products?\textsuperscript{120}

The answer would generally depend on the elasticity of demand for various farm animal products. To take one example, it seems that egg consumption in the United States tends to be relatively unresponsive to price changes, meaning that the elasticity of demand is high.\textsuperscript{121} According to one study, a price increase of 40% of the cost of eggs in California would likely reduce egg consumption by less than 10%.\textsuperscript{122} As a result, even a considerable increase in the costs of eggs would only marginally reduce egg consumption.\textsuperscript{123} Therefore, for animal protection groups to make a significant impact in consumer demand for eggs in California, the price of eggs must be raised two or even threefold.

The conventional wisdom among animal protection groups seems to be that increased costs will lead to a decline in consumer demand. However, it is not clear whether this conventional wisdom would prove true in practice. It is also at least plausible that some factory farm managers will respond to increased regulatory costs by cutting corners on animal treatment.

\textsuperscript{120} One could expect such a change in consumer demand to decrease the amount of animals slaughtered on factory farms. By way of analogy, governments often attempt to levy so-called “sin” taxes, such as the very heavy tax in most countries on cigarettes. See Posner, supra note 120, at 5. These taxes have substantially increased the price of these goods have and reduced their consumption. Id. Noted economist Gary Becker cited studies estimating that for every 10% increase in the retail price of cigarettes from higher taxes cuts, smoking levels dropped by about 4% after the first year, and up to 7% in following years. Id.
\textsuperscript{122} Id.
\textsuperscript{123} Id.
B. In This Largely Unregulated Industry, There Is Too Great a Risk That Crushing Environmental Regulation Will Lead to Diminished Treatment of Farmed Animals on Factory Farms

The second goal of animal protection groups regarding factory farms is to improve the welfare of farmed animals by eliminating the most abusive industry practices. However, the absence of meaningful legal constraints in this largely unregulated industry means that there are no/few legal barriers to cutting corners on animal welfare in response to increased regulatory costs. In other words, the feeble patchwork of regulations governing the welfare of farmed animals is not sufficient to constrain firm behavior and ensure that expanding environmental compliance costs will not result in reduced animal welfare. It is at least plausible that firms will respond in this manner, especially considering that it is a legal course of action, it is technically possible to reduce animal welfare even further, and neither social nor market pressures are likely to constrain firm behavior.

1. Legal Constraints: the Animal Agricultural Industry Is Largely Unregulated

Since the farmed animal industry is largely unregulated, there are few legal barriers to reducing animal welfare in response to higher regulatory costs. If the thesis of this Article is true, that expanded environmental regulation harms animal welfare on factory farms—then the strategy of animal protection groups—namely, to expand the regulatory burdens on the farmed animal industry—may in fact lead to more suffering. These groups should at least acknowledge that such a risk exists, if not decide to change course.

While there are some trends towards greater regulation of farmed animal welfare on the state level, such regulation exists in only a handful of states. In contrast, the voluntary regimes in

place in most states leave a lot of discretion in the hands of firm managers in how to treat their animals. Not surprisingly, this voluntary approach does not appear to reliably constrain firm behavior, nor result in a uniformity of treatment. Some facilities treat their animals “atrociously bad,” while others do not.\textsuperscript{125}

Given that the EPA’s pending environmental regulations would surely apply to all states, whether they have animal welfare regulations or not, one could posit that increased regulatory costs are more likely to be borne by animals in states with regulations on farmed animal welfare than in states without such protections. In the absence of a minimum legal standard of treatment for farmed animals, the only remaining constraints on firm behavior are those of a non-legal variety, such as technical barriers, social/moral influences, and market-based pressures. To make matters worse, many of the states with the greatest meat production have the most lax state animal welfare laws.\textsuperscript{126}

Applying conventional economic theory, how can we expect a typical factory farm operator to react to increased regulatory costs? According to conventional economic theory, “man is a rational utility maximizer” in his economic affairs as well as all areas of life.\textsuperscript{127} Moreover, people respond to incentives and will alter their behavior to maximize utility in response to changing conditions.\textsuperscript{128} Thus, if a factory farm operator’s costs of doing business significantly increase due to higher environmental regulation, it is reasonable to expect him to react by cutting costs to stay in business or maintain profit levels. For example, if a manager’s choice is between squeezing more profit out of the chickens he owns, which after all are his own

\textsuperscript{125} See Bottemiller, supra note 41 (interviewing Temple Grandin).
\textsuperscript{126} See PEW COMMISSION ON INDUSTRIAL FARM ANIMAL PRODUCTION, FINAL REPORT: PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA (2009), http://www.ncifap.org/bin/ej/PCIFAPFin.pdf.
\textsuperscript{127} See Posner, supra note 119.
\textsuperscript{128} Id.
property, or going out of business, which option is this manager more likely to choose? Clearly, he will tend to choose to reduce animal welfare since this option is not proscribed, unless there are technical barriers to doing so, or his moral sentiments outweigh the quest for profits, or market forces are a sufficient constraint.

Conversely, insofar as state-level animal welfare regulations are currently in place, increased environmental compliance costs are more likely to be passed on to consumers than borne by animals because state law has prescribed minimum standards of treatment for farmed animals. Having such regulations in place removes the legal option of cutting corners on animal welfare as a firm responds to increasing costs. True, having such regulations in place will not guarantee that firms will comply with them, especially if these standards are not enforced. However, one could expect that such standards would at least reduce the incentive for firms to cut corners on animal welfare.

In conclusion, animal protection groups cannot depend on legal constraints—that is, the fear of criminal punishment or civil penalties—to motivate the behavior of factory farm operators in most states without animal welfare protections, and therefore there is a risk that their strategy may have the unintended consequence of reducing animal welfare.

2. Technical Barriers

Is it feasible for factory farm managers to diminish the treatment of animals any more than they do now? Generally speaking, in response to economic pressure—whether it be from regulatory burdens, competition, or a slumping economy—firms often react by cutting costs, taking shortcuts, and otherwise trying to stay afloat within the applicable legal constraints. For

129 Interestingly, there is a trend towards increasing regulation on the state level, as animal protection groups have won victories through ballot initiatives in several states that have garnered popular support. This is the better approach because without a floor level of treatment, these unintended consequences are in play.
example, in the context of labor-management relations, in good times unions may negotiate for generous benefits, but in bad times management often seeks to slash the wages, hours, and benefits of its employees. Compensation of workers becomes an attractive means of cutting costs, partly because alternative means of cutting costs involving diminishing the health and/or safety of workers are proscribed. Likewise, in response to economic pressures, one can expect the farmed animal industry to react by trying to cut costs. The key difference, however, is that reducing the welfare of animals is a legal option in this largely unregulated industry.

The conventional wisdom among animal protection groups is that the animals are treated so terribly now that they cannot be treated any worse. They assert that the production process in factory farms has evolved in such a way that the farmed animal industry has already maximized the efficiency out of these animals.

Taken a step further, one could argue that it is reasonable to assume that factory farmers are currently maximizing their economic interest as rational actors; conversely, they are not currently acting economically irrationally--for example, by spending more money on treating animals than they need to. For example, a trade group, the Animal Agriculture Alliance, has pointed out that the broiler chicken industry has an economic motive to care about the physical well-being of animals because only healthy animals can be utilized for human food. Therefore, it would not make economic sense for the broiler industry to cut corners by starving their chickens because that would reduce their market value.

130 See Cassuto, note 26, at 70 (“The common denominator [for all factory farm operations] is an almost single-minded focus on economic yield.”).
131 Id.
To be sure, the farmed animal industry is geared towards maximizing the efficiency of their "inputs" in the production process.133 However, this conclusion cannot be generalized to say that it would always be economically irrational for factory farms to further diminish the treatment of animals. For example, noted animal welfare expert Temple Grandin has emphasized that the degree of animal welfare on factory farms depends a great deal on “the attitude of the manager.”134 Specifically, Grandin has found in her experience working with the meat industry that the fate of animal welfare often comes down to the attitude of top management.135 Managers who do not care about animal welfare tend to “cut[] corners on methods, cut[] corners on materials, and the way they treat animals [is] atrociously bad.”136 Conversely, managers who do care about animal welfare tend to treat their animals better.137 Therefore, it is wrong to argue that factory farm managers cannot treat farmed animals any worse; experience shows that they can and frequently do treat animals “atrociously bad,” depending on the whims of top management.

In what particular ways can one expect factory farms to reduce animal welfare? In the spectrum of industry practices thought of as abusive, certain practices could be altered resulting in worse animal treatment, more so than others. One category of abusive practices is inherently connected with the type of equipment used. Another category, however, involves more managerial discretion.

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133 See Cassuto, note 26, at 70.
134 See Bottemiller, supra not 41 (“The thing I have found about little plants, they're either really good or really bad. There's like no middle road. It's so dependent on the attitude of the manager. . . . It gets down to the top person caring. It's the attitude. It's gotta start with top management.”).
135 Id.
136 Id. (emphasis added).
137 Id.
As to the former, certain abusive practices are related to the type of equipment used on a given farm. The purchase of equipment on a large scale requires a substantial investment, and likewise purchasing new equipment is expensive. Since the purchase of new equipment may be prohibitively expensive in the short term, one could expect that abuses related to the type of equipment used is not likely to change in response to incremental shifts in a firm's regulatory burden. For example, assuming that some farms provide more cage space for hens than economic efficiency dictates, one could expect firms to keep the current system in place in the face of expanded environmental compliance costs because purchasing new cages with less space is expensive. Thus, it is not likely that much diminishment of animal welfare would spring from these investment intensive sources.

As to the latter—that is, those industry practices involving more managerial discretion, it is more likely that factory farm managers could cut corners on animal treatment. Bill Weida, an Agricultural Economist, has stated emphatically that the farmed animal industry can make life even more hellish for farmed animals.

To the extent that factory farms have taken voluntary measures to improve animal welfare in response to public pressure in states where the agriculture industry is unregulated, these advances for animal welfare can be reversed. For example, according to the voluntary industry standards of the United Egg Producers, the practice of forced molting is being phased out. Likewise, one of the country’s largest pork producers, Smithfield Foods, has instituted a

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138 See Stathopoulos, supra note 13, at 412 (“Three common industry practices that present the most extreme cases of confinement are the gestation crate, the veal crate, and battery cages. Gestation crates are metal stalls with concrete floors that are used to confine pregnant pigs. . . . Veal crates are small wooden crates used to confine young calves and similarly restrict their ability to move. Battery cages are wire cages used to confine egg-laying hens that are stacked on top of one another.”).
140 Forced molting refers to the practice of restricting the feed of laying hens at regular intervals for the purpose of encouraging egg laying. See Frequently Asked Questions about the Pew Commission on
gestation crate phase out.\textsuperscript{141} Both of these voluntary measures appear to have sacrificed some efficiency in the production process, and the companies complying with such voluntary measures may decide to change course in response to expanded environmental compliance costs. In conclusion, it is likely that many factory farms have the technical capacity to decrease animal welfare in response to higher regulatory costs.

3. Social Constraints

Neither should animal protection groups rely on social norms to prevent factory farm managers from cutting corners on animal welfare in response to increased regulatory costs. According to renowned economist Richard Posner, people are not motivated by ethical beliefs unless the right thing is aligned with their self-interest.\textsuperscript{142} With respect to the farmed animal industry, the profit motive is king; the entire animal-production process “results from a legal and regulatory environment designed to facilitate animal-based wealth acquisition.”\textsuperscript{143}

The animals-as-property framework has dominated popular culture for many years, and certainly is true within the farmed animal industry. Under this framework, animals are viewed as mere commodities, and social norms cannot be relied on to constrain firm behavior. Professor David Cassuto has put it nicely, stating:

[t]he animal-production process results from a legal and regulatory environment designed to facilitate animal-based wealth acquisition. . . . Factory-farm conditions vary depending on the species and the desired product. The common denominator, however, is an almost single-minded focus on economic yield. Chickens, for example, might be “broilers” or

\textsuperscript{141} Lawsuit Against California Pig Farm Dropped as Company Announces End to Abusive Breeding Practices (2008), http://www.aldf.org/article.php?id=506.
\textsuperscript{143} See Cassuto, Bred Meat, supra note 26, at 70.
egg producers. The nature of their confinement and length of their life depends on their designated function.\textsuperscript{144}

Therefore, it is reasonable to expect that the profit motive would outweigh any social norm to treat animals well on factory farms.\textsuperscript{145} In contrast, there is a general sense that small farmers tend to care more about the welfare of the animals in their care.\textsuperscript{146}

4. Market Forces

Having established that reducing animal welfare in response to expanded environmental compliance costs is a legal option, technically possible, and unlikely to be constrained by moral pressure, the only constraint remaining relates to market pressure. Chief among market forces that may influence agri-business managers is consumer demand.\textsuperscript{147}

The farmed animal industry is highly responsive to consumer demand, which is illustrated by the decision of McDonald’s to purchase cage-free eggs in Europe, but not in the United States. In April of 2010 the board of directors of McDonalds issued a recommendation to its shareholders to oppose voting for a proposal to require that five percent of the company’s egg purchases in the United States be from cage-free sources.\textsuperscript{148} What is interesting about this story is that a big disparity exists between McDonald’s policies in in Europe and in the United States; in Europe, McDonald’s had committed itself to purchasing one hundred percent cage-free eggs by 2010 for all of its European restaurants.\textsuperscript{149} A McDonald’s spokesperson attributed this

\textsuperscript{144} See David N. Cassuto, Bred Meat, \textit{supra} note 26, at 70.
\textsuperscript{145} One might ask: if social norms play no role in the decisions of factory farmers, why have they taken voluntary steps in some cases to improve animal welfare in response to public pressure? The motivations of the industry are based on a variety of factors. Importantly, however, many of the voluntary industry actions of late appear to have been motivated by a fear of ballot initiatives promoted by the Humane Society.
\textsuperscript{146} See Bottemiller, \textit{supra} not 41
\textsuperscript{147} See Posner, note 119, at 4.
\textsuperscript{149} Id.
disparity to the presence of high consumer demand for cage-free eggs in Europe, but not in the United States.\textsuperscript{150}

True, to some extent the farmed animal industry is influenced by a fear of bad publicity. However, this influence is clearly limited on a macro-scale, since the shocking abuses on factory farms have been well-documented and publicized, yet many such practices remain in place.\textsuperscript{151} There is some evidence that consumer preferences have changed after heightened media attention.\textsuperscript{152} However, only limited research has been conducted to date.\textsuperscript{153}

Furthermore, so far as these companies are motivated by a fear of negative publicity, such fears are diminished by the general lack of transparency in the farmed animal industry.\textsuperscript{154} Thus, there is a smaller likelihood in the farmed animal industry than in other industries that firms can conduct their operations in secret without fear of public scrutiny.

In summary, animal protection groups tend to assume that increased costs of complying with environmental regulations will be passed on to consumers without any harm accruing to the farmed animals. However, this may not be the case for four reasons: the treatment of animals on factory farms is largely unregulated, it is technically possible for to further reduce animal welfare, and neither social nor market constraints appear likely to foreclose this legal option to

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\textsuperscript{150} Id.
\textsuperscript{151} Numerous exposés have raised public awareness of the welfare of farmed animals. However, one could argue that the failure to take animal interests into account represents a market failure insofar as it represents information asymmetries, but more likely the consumer is willfully ignorant of the suffering of animals in the production of food.
\textsuperscript{152} See Glynn Tonsor, Connecting Livestock Producers With Economic Research, Jan. 2011 (“The authors found increased media attention to have significant direct impacts in reducing pork and poultry demand.”).
\textsuperscript{153} See id. (noting that only 6 of the 24 relevant studies on what production practices the public desires involved U.S. residents. Tonsor concludes by stating that “without additional insights regarding consumer preferences . . . the industry is forced to make critical decisions such as what production practices to support or discourage without sufficient information.” Id.
\textsuperscript{154} See e.g., Sanders, supra note 42 (discussing state bill to criminalized farm photography).
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firm managers as a means of cutting costs in response to expanded environmental compliance burdens.

C. EPA Regulations May Empower Big Factory Farms and Hurt Small Farmers

The third goal of the animal protection movement is to fight factory farms while promoting small farmers.155 Animal protection groups tend to assume that big factory farms are worse for animal welfare.156 To the extent small farmers are not exempt from EPA environmental regulations, they would also be subject to increased environmental compliance costs.157 However, small farmers are less able than factory farms to absorb increased regulatory costs.158 As a result, many small farmers may be driven out of business, leading to greater market share for factory farms, and greater consolidation of the animal agriculture industry, an outcome that would be contrary to the stated goals of animal protection groups. In contrast, direct regulation of animal welfare on the state level arguably helps family farmers by leveling the

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156 For some commentary on the debate on whether small farmers are better for animal welfare, see note 89.


158 See ROBERT A. HOPPE & DAVID E. BANKER, UNITED STATES DEPARTMENT OF AGRICULTURE, STRUCTURE AND FINANCES OF U.S. FARMS: FAMILY FARM REPORT, 2010 EDITION (2010), http://www.ers.usda.gov/publications/eib66/ (“Most U.S. farms—98 percent in 2007—are family operations, and even the largest farms are predominantly family run. Large-scale family farms and nonfamily farms account for 12 percent of U.S farms but 84 percent of the value of production. In contrast, small family farms make up most of the U.S. farm count but produce a modest share of farm output. Small farms are less profitable than large-scale farms, on average, and their operator households tend to rely on off-farm income for their livelihood. Generally speaking, farm operator households cannot be characterized as low-income when both farm and off-farm income are considered.”).
playing field.\textsuperscript{159} Such regulations serve to neutralize some of the efficiency advantages of larger factory farms by making them adopt less efficient (but more humane) practices.

In summary, factory farms exist in a cut-throat, profit-driven industry, which generates enormous pressure to compete. In the farmed animal industry, where animal welfare is largely unregulated, we cannot be confident that such increased environmental compliance costs will necessarily be passed on to consumers. Instead, it is plausible that such costs will be partly borne by the animals. Since the strategy of animal protection groups to expand the environmental regulation of factory farms may lead to these dire unintended consequences, should the animal protection movement err on the side of caution, and abandon its alliance with the environmental movement?

VI. Better Approach: Stick With Promoting Ballot Initiatives

This Article argues that the strategy of animal protection groups to seek expanded environmental regulation of factory farms is misguided because it fails to recognize the risk that the costs of compliance may partly be borne by the farmed animals. The missing link in this strategy is the absence of state laws establishing a minimum floor of treatment for farmed animals. Until such standards are established in the states where most of the country's farmed animals are produced, it may be unwise for animal protection groups to seek to increase the regulatory burdens on factory farms.

Instead, a better approach would involve the animal protection movement focusing its fire on state-level laws and/or ballot initiatives that directly enhance animal welfare. Over the

\textsuperscript{159} See Gail Shepherd, Two Florida Farmers Opt Out of Animal Rights Battles, \textit{Broward Palm Beach New Times}, Apr. 13 2010, http://blogs.browardpalmbeach.com/juice/2010/04/two_florida_farmers_opt_out_of.php (“The Humane Society's Paul Shapiro contends that the Florida amendment may have ‘helped provide an environment in which family farms can flourish.’”).
past decade, the animal protection movement has won a series of victories such ballot initiatives. This approach has proven to be the only successful way that animal protection groups have managed to strengthen animal welfare regulations at the state level, and only in states where ballot initiatives are available.

In such states, animal protection groups have supported ballot initiatives to restrict some of the worst abuses of factory farms. This approach has enabled animal protection groups to sidestep state legislatures, which are often subject to the influence of the agri-business industry, and make their appeal directly to the people, who often voice support for animal welfare reforms in public opinion polls.

VII. Conclusion

The animal protection movement has adopted a strategy of allying itself with the environmental movement to increase the environmental regulation of factory farms. However,

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161 See e.g., A Landmark Day for Animals from Coast to Coast!, (2008) http://www.peta.org/b/thepetafiles/archive/2008/11/05/a-landmark-day-for-animals-from-coast-to-coast.aspx (marking the passage of Proposition 2 in California by a large margin that “will ban some of the worst cruelty to animals who are raised for food in that state: keeping egg-laying chickens in battery cages so small that they can’t spread their wings, keeping veal calves in crates for their entire miserable short lives, and keeping pregnant pigs in crates that are so small that they can’t take a step forward or backward or turn around”); Hinman, supra note 17 (tracing the Humane Society’s “state-by-state offensive” to convince voters to change the industry practices of factory farms, as opposed to going through the legislative process, and noting how this was successful in Florida to ban gestation crates for pigs). Part VI, infra, will argue that these campaigns are more beneficial to animal welfare than suing under environmental laws.
162 See Lovvorn, supra note 17, at 144-47 (discussing recent efforts for federal and state animal welfare legislation, as well as efforts in the courts).
163 See Kreuziger, supra note 28, at 363.
this approach carries potentially devastating unintended consequences—namely, it risks generating even more suffering of animals on factory farms.

Animal protection groups should not seek to expand the environmental regulations of animal agriculture in the absence of laws that establish minimum standards of treatment because there is too great a risk that factory farm managers may shortchange the welfare of animals as agri-businesses cope with higher regulatory costs. Instead, a better approach would involve animal protection groups focusing their fire on state-level ballot initiatives to directly enhance animal welfare on factory farms, an approach that has demonstrated some promise.

It is incumbent on the leaders of the animal protection movement to consider whether farmed animals stand to benefit from their general strategy of forming alliances with environmental groups, and their particular strategy of supporting the EPA’s regulatory assault on the agri-business industry and pursuing a litigation strategy of suing factory farms under environmental laws.

As for the former, animal rights leaders must consider whether the two movements have irreconcilably divergent interests, such that an immediate change of course is required for the sake of minimizing risks to farmed animals. As for the latter, this approach has not been demonstrated to advance animal welfare, and actually the opposite outcome is more likely to occur. Since many of the highly burdensome regulations on the EPA’s agenda are not finalized, but rather are still working their way through the administrative process, there may still be time to change course and try to influence the outcome of the EPA’s review process in the other direction, so as to minimize the serious risk that many factory farm managers will decide to shortchange animal welfare in response to crushing regulatory costs. It is not too late.