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### When Fox and Hound Legislate the Hen House: A Nixon-in-China Moment for National Egg-Laying Standards?

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# WHEN FOX AND HOUND LEGISLATE THE HEN HOUSE: A NIXON-IN-CHINA MOMENT FOR NATIONAL EGG-LAYING STANDARDS?

*Lucinda Valero and Will Rhee*

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## WHEN FOX AND HOUND LEGISLATE THE HEN HOUSE: A NIXON-IN-CHINA MOMENT FOR NATIONAL EGG-LAYING STANDARDS?

Lucinda Valero\* & Will Rhee\*\*

### INTRODUCTION

It is no secret that the vast majority of Americans eat animals and animal products.<sup>1</sup> Because of the popularity of animals and animal products as food, “foxes”—agricultural producers—have long struggled against “hounds”—animal welfare advocacy groups—to influence the popular American appetite. This essay focuses upon one such fox, the United Egg Producers (UEP), the nation’s largest egg farmer organization,<sup>2</sup> and one such hound, the Humane Society of the United States (HSUS), the nation’s largest animal advocacy organization.<sup>3</sup> HSUS had already outmaneuvered UEP by successfully swaying popular opinion in California, Michigan, Ohio, Oregon, and Washington to pass state law referenda or legislation<sup>4</sup> outlawing the sale of battery-cage eggs, eggs laid by chickens confined within cages of a certain size.<sup>5</sup> Then the unthinkable happened.

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1. In 2010, one study estimated that only 7.3 million Americans, or 3.2% of the adult population, were vegetarian and only one million Americans, or 0.5% of the adult population, were vegan. Megan A. Senatori & Pamela D. Frasch, *The Future of Animal Law: Moving Beyond Preaching to the Choir*, 60 J. LEGAL EDUC. 209, 217 (2010) (citing *Vegetarianism in America*, VEGETARIAN TIMES, <http://www.vegetariantimes.com/article/vegetarianism-in-america> (last visited Jan. 28, 2013)).

2. See *About Us*, UNITED EGG PRODUCERS (UEP), <http://www.unitedegg.org> (last visited Feb. 3, 2013).

3. See *About Us: Overview*, HUMANE SOC’Y U.S. (Sept. 19, 2011), <http://www.humanesociety.org/about/overview>.

4. See *infra* Part II.

5. A battery cage typically is

a 12-inch by 18-inch wire cage that may hold up to six [chickens]. In a six-bird cage, each bird would have approximately 36 in<sup>2</sup> of room. The cages are stacked on top of each other in a layer house that may hold over 80,000 birds. . . . The crowded conditions mean that the hens cannot engage in most of their normal behaviors. They cannot walk, fly, perch, preen, nest, peck, dust-bathe, or scratch for food. Hens may not even be able to stand up and their feet may actually grow into the wire floor of their cages.

Veronica Hirsch, *Biological Facts on the Domestic Chicken*, in ANIMAL LAW: WELFARE, INTERESTS, AND RIGHTS 278, 279 (David S. Favre ed., 2d ed. 2011). Battery cages were created in the 1950s because they reduced disease and provided cleaner eggs. JOEL L. GREENE & TADLOCK COWAN, CONG. RESEARCH SERV., R42534, TABLE EGG PRODUCTION AND HEN WELFARE: THE UEP-HSUS AGREEMENT AND H.R. 3798 (2012), at 3, <http://www.fas.org/sgp/crs/misc/R42534.pdf> (citing Joy A.

In July 2011, UEP and HSUS began working together.<sup>6</sup> The fox and the hound decided to legislate the hen house. This essay seeks to favor neither fox nor hound but rather to explore the impetus and possible ramifications of their unexpected collaboration. On July 7, 2011, they signed a formal agreement seeking passage by June 30, 2012,<sup>7</sup> of the Egg Products Inspection Act (EPIA) Amendments of 2012 (“2012 EPIA Amendments”), a federal bill introduced in both the Senate<sup>8</sup> and the House.<sup>9</sup> As one of the sponsors of the bill, Senator Dianne Feinstein (D-Calif.), recognized, the “compromise represents something unique in animal agriculture[,] . . . an animal welfare group and industry working to forge an agreement that is practical and contains reasonable time frames.”<sup>10</sup> According to UEP and HSUS, “[t]he welfare of egg-laying hens has been among the most contentious issues that the agriculture industry and animal advocates have clashed over for the past several decades.”<sup>11</sup> Both UEP and HSUS “have spent millions of dollars on state legislation and ballot measure campaigns, litigation, research and investigations and more.”<sup>12</sup>

Because UEP and HSUS have been working together for less than two years, any definitive conclusions about their collaboration would be premature. Their détente, however, provides a unique case study to discern how different audiences might react to such compromise. Four of those audiences are: (1) UEP and HSUS’s former allies; (2) UEP and HSUS’s former adversaries; (3) lawmakers; and, most importantly, (4) the general consumer public. At present, many former allies and adversaries remain undecided.<sup>13</sup> The ultimate judgment of lawmakers and the public remains uncertain.<sup>14</sup>

Although UEP and HSUS have experienced a Nixon-in-China moment,<sup>15</sup> where bitter adversaries bury the hatchet, only time will tell if that moment catalyzes a corresponding Nixon-in-China effect,<sup>16</sup> where other foxes and other hounds, following UEP and HSUS’s example, decide to collaborate on other

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Mench, Daniel A. Sumner & J. Thomas Rosen-Molina, *Sustainability of Egg Production in the United States—The Policy and Market Context*, 90 *POULTRY SCI.* 229, 230 (2011)). An estimated 95% of all eggs produced in the U.S. are produced in battery cages. *Id.*

6. *See infra* Part III.

7. Greene & Cowan, *supra* note 5, at 1.

8. S. 3239, 112th Cong. (2012).

9. H.R. 3798, 112th Cong. (2012).

10. *Egg Products Inspection Act Amendments of 2012: Hearing on S. 3239 Before the S. Comm. on Agric., Nutrition, & Forestry*, 112th Cong. 3 (2012) (statement of Sen. Dianne Feinstein).

11. Wayne Pacelle & Gene Gregory, *Humane Society, Egg Group Agree on Reform*, *TULSA WORLD*, Aug. 9, 2012, [http://www.tulsaworld.com/news/article.aspx?articleid=20120809\\_222\\_A15\\_CUTLIN449259](http://www.tulsaworld.com/news/article.aspx?articleid=20120809_222_A15_CUTLIN449259). Pacelle is the President and CEO of HSUS and Gregory is the President and CEO of UEP. *Id.*

12. *Id.*

13. *See infra* Part IV.

14. *See infra* Part IV.

15. *See* Forrest Briscoe & Sean Safford, *The Nixon-in-China Effect: Activism, Imitation, and the Institutionalization of Contentious Practices*, 53 *ADMIN. SCI. Q.* 460, 464 (2008); *see also* Alex Cukierman & Mariano Tommasi, *When Does It Take a Nixon to Go to China?*, 88 *AM. ECON. REV.* 180, 180, 193 (1998); Mike Dorf, *How Big is the Nixon-to-China Effect?*, *DORF ON LAW* (Oct. 9, 2012), <http://www.dorfonlaw.org/2012/10/how-big-is-nixon-to-china-phenomenon.html>.

16. *See* Briscoe & Safford, *supra* note 15, at 464.

agricultural animal welfare issues. Shocked observers can find an idiosyncratic Nixon-in-China moment initially difficult to evaluate. At such a moment, it is impossible to ascertain whether the partisans-turned-peacemakers are motivated by sincerity or subterfuge.

Such an ambiguous armistice thus is appropriately named after the ruthless, resourceful, and enigmatic U.S. President Richard Nixon,<sup>17</sup> with the nefarious nickname “Tricky Dicky.”<sup>18</sup> As Professor James MacGregor Burns observed, “[h]ow can one evaluate such an idiosyncratic president, so brilliant and so morally lacking?”<sup>19</sup> Nixon was the only U.S. President to resign from office to avoid certain impeachment and likely criminal prosecution. An established anti-communist, he ignored a long-standing Western practice against direct interaction with communist governments, traveled to China, and re-established diplomatic relations in 1972.<sup>20</sup> This shocking U.S. change-of-course led to many other Western leaders following suit and also establishing diplomatic relations with China.<sup>21</sup> The fact that Nixon until then had been such a steadfast Cold Warrior made the change more credible than if Nixon had already been known as amenable to negotiating with communists.<sup>22</sup>

Because of two curious contradictions, UEP and HSUS’s Nixon-in-China moment at present serves as a self-fulfilling Rorschach test in which any audience can see whatever it wants to see.<sup>23</sup> In this way, the moment tells us more about the observers than the observed. Wary or suspicious observers recognize that UEP and HSUS’s publicly-stated reasons for cooperating might not match UEP and HSUS’s private rationales. On the other hand, UEP and HSUS may actually mean what they publicly say. Bystanders thus can simultaneously see two former adversaries courageously compromising for the common good, two self-interested parties cynically making an unprincipled yet mutually beneficial deal, or some hybrid of both extremes.

The first contradiction is that UEP and HSUS have agreed to limit national agricultural standards solely to the egg industry.<sup>24</sup> Instead of seeking uniform national standards for all agriculture, they reject national standards for any area

17. See MAX J. SKIDMORE, *PRESIDENTIAL PERFORMANCE: A COMPREHENSIVE REVIEW* 286-298 (2004).

18. See, e.g., Dan Glaister, *Tricky Dicky: Nixon Recordings Confirm Popular View*, THE GUARDIAN, Dec. 3, 2008, <http://www.guardian.co.uk/world/2008/dec/04/richard-nixon-recordings>.

19. Quoted in Arthur M. Schlesinger, Jr., *Rating the Presidents: Washington to Clinton*, 112 POL. SCI. Q. 179, 183 (1997).

20. *Id.*

21. *Id.*

22. See *id.*

23. See, e.g., James M. Wood, *The Comprehensive System for the Rorschach: A Critical Examination*, PSYCHOL. SCI., Jan. 1996, at 3-10.

24. See Letter from Wayne Pacelle, President & CEO, HSUS, to Gene Gregory, President & CEO, UEP (Apr. 30, 2012), <http://www.humanewatch.org/images/uploads/UEPLetter30APR12.pdf> [hereinafter *Letter from Pacelle to Gregory*] (“It is regrettable that the cattle and pork industries are trying to subvert an accord that has no bearing on their industries, but I am confident we’ll be able to overcome their obstructionist efforts.”). See also Greene & Cowan, *supra* note 5, at 12-13; UEP, *Frequently Asked Questions*, SUPPORT THE EGG BILL, <http://www.eggbill.com/faqs.html> (last visited Jan. 21, 2013).

except egg production.<sup>25</sup> If national standards are the best solution for the egg industry, why stop there? The same logic justifying national egg-laying standards can justify national standards in other agricultural industries.

The second contradiction is that UEP and HSUS have deliberately reversed their respective prior policy positions. In the early 2000s, when the Illinois Humane Political Action Committee supported Illinois state legislation phasing-out battery cages, UEP President and CEO Gene Gregory allegedly “adopted the poultry industry’s [then] longstanding, informal SOP [(standard operating procedure)] to refuse to dialog with animal welfare advocates”<sup>26</sup> as UEP killed the bill. Similarly, UEP “once said you cannot talk with HSUS because it is their way or no way and they want to put you out of business.”<sup>27</sup>

UEP’s SOP has clearly changed. Last year, Gregory and HSUS CEO and President Wayne Pacelle gave joint media interviews and lobbied members of Congress together.<sup>28</sup> Gregory’s son and successor, Chad,<sup>29</sup> and Pacelle have even recorded videos together.<sup>30</sup> As the son of the sponsor of the failed Illinois legislation observed, this newfound cooperation is “a fundamental change in the landscape of US animal protection.”<sup>31</sup>

UEP also disregarded its longstanding commitment to consumer choice in the way eggs are commercially produced—battery-cage, cage-free, organic, or through other methods—by adopting a specific preference for enriched egg cages.<sup>32</sup> In contrast to its previous policy initiatives, UEP’s preference for enriched cages

25. See *infra* Part III; see also *supra* note 24 and accompanying text.

26. Aaron Gross, *Historic Welfare Legislation?*, FARMING FORWARD, <http://www.farmforward.com/features/letter> (July 2011) (last visited Jan. 28, 2013) (quoting Steve Gross) (internal quotation marks omitted).

27. Gene Gregory, *UEP and HSUS Seeking Federal Legislation for Hen Housing Standards: 2012 NAIA Annual Conference*, NAT’L INST. ANIMAL AGRIC. 4 (Mar. 28, 2012), <http://www.animalagriculture.org/Solutions/Proceedings/Annual%20Conference/2012/Emerging%20Diseases/Gregory,%20Gene.pdf> [hereinafter *UEP 2012 NAIA Presentation*].

28. See Dan Charles, *How Two Bitter Adversaries Hatched a Plan to Change the Egg Business*, NAT’L PUB. RADIO (Feb. 10, 2012 12:01 AM), <http://www.npr.org/blogs/thesalt/2012/02/10/146635596/how-two-bitter-adversaries-hatched-a-plan-to-change-the-egg-business>.

29. See *United Egg Producers President Announces Retirement: Chad Gregory, President’s Son, Will Take Over*, WATTAGNET.COM (Jan. 24, 2012), [http://www.wattagnet.com/United\\_Egg\\_Producers\\_president\\_announces\\_retirement.html](http://www.wattagnet.com/United_Egg_Producers_president_announces_retirement.html).

30. See *United Egg Producers, Videos, Chad Gregory and Wayne Pacelle Discuss Strong Support for the Egg Bill*, SUPPORT THE EGG BILL, <http://www.eggbill.com/videos.html> (last visited Jan. 30, 2013).

31. Aaron Gross, *supra* note 26.

32. Cf. UEP, *About Us*, UNITED EGG PRODUCERS, <http://www.unitedegg.org> (last visited Jan. 30, 2013) (stating UEP’s commitment to consumer choice). Enriched egg cages

were developed as an attempt to improve conventional cages by providing outlets for known strong behavioral priorities and are in use in several European countries . . . though not commonly in the United States. [They] are similar to battery cages except they typically include a nest box, perch, litter area for dustbathing, and greater height.

HSUS, *An HSUS Report: Welfare Issues with Furnished Cages for Egg-Laying Hens*, HUMANE SOC’Y U.S. 2 (Feb. 2010),

[http://www.humanesociety.org/assets/pdfs/farm/welfare\\_issues\\_furnished\\_cages.pdf](http://www.humanesociety.org/assets/pdfs/farm/welfare_issues_furnished_cages.pdf). Enriched cages were first developed in Europe in the 1980s in response to criticism over battery cages. See Greene & Cowan, *supra* note 5, at 4.

appears motivated by neither scientific evidence nor market competition but rather by popular politics.<sup>33</sup> UEP has publicly explained that its inability to convince voters largely ignorant of agricultural science in state referenda battles with HSUS rendered this compromise economically necessary.<sup>34</sup>

Likewise, HSUS's newfound preference for enriched cages appears to be motivated more by politics and less by improving animal welfare.<sup>35</sup> In 2010, a mere two years before the Nixon-in-China moment, HSUS had publicly rejected enriched egg cages as "inadequate" with "inherent welfare problems."<sup>36</sup> Before 2012, HSUS's goal seemed to be to limit all U.S. agricultural egg production to cage-free eggs.<sup>37</sup> In exchange for UEP's cooperation, HSUS halted or reversed promising state law initiatives<sup>38</sup> for a federal standard that protects chickens less than the state laws it would preempt.<sup>39</sup> While HSUS has advocated for a clucking form of utilitarianism publicly, arguing that a uniform national standard can benefit the greatest number of chickens,<sup>40</sup> HSUS may be elevating quantity over quality. HSUS's hound critics correctly comment that adopting such national standards would legally concede that putting chickens in cages is humane.<sup>41</sup>

Whether UEP or HSUS's public explanations are sincere is not only unknowable but also largely irrelevant. Regardless of fairness or accuracy, all that really matters are the reactions of four audiences—former allies, former adversaries, lawmakers, and the public—to the UEP-HSUS compromise. Do they believe UEP and HSUS? Do they even care? Or is their response already predetermined by their own self-interest?

To explore their possible reactions, this essay selects four relevant theoretical tools: (1) overlapping consensus, the Rawlsian concept where divided parties can agree on publicly shared reasons while maintaining their private disagreement;<sup>42</sup> (2) incompletely theorized agreement, a practical and morally shallow agreement made in mutual self-interest that deliberately avoids considering deep theory;<sup>43</sup> (3) the interest-convergence thesis,<sup>44</sup> which applied to animals suggests that humans only protect animal welfare when human economic interests and animal welfare

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33. See *infra* Part III.

34. For further discussion, see *infra* note 136 and accompanying text.

35. See *infra* Part III.

36. HSUS, *supra* note 32, at 2, 9.

37. See WAMU 88.5 FM American University Radio NPR, Transcript, *Strange Bed Fellows: The Humane Society & So-Called Factory Farmers*, THE KOJO NNAMDI SHOW (Feb. 15, 2012), <http://thekojonnamdishow.org/shows/2012-02-15/strange-bedfellows-humane-society-so-called-factory-farmers/transcript>. See also *UEP 2012 NAIA Presentation*, *supra* note 27, at 4.

38. See *infra* Part III.

39. See *infra* Part III.

40. See James F. Childress, *Methods in Bioethics*, in THE OXFORD HANDBOOK OF BIOETHICS 15, 19-20 (Bonnie Steinbock ed., 2007). For further discussion, see *infra* notes 141-144 and accompanying text.

41. See *infra* note 225 and accompanying text.

42. See JOHN RAWLS, *POLITICAL LIBERALISM* 133-134, 144-50 (1993).

43. Cass R. Sunstein, *Commentary, Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735-36 & n.8 (1994).

44. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

converge;<sup>45</sup> and (4) the clucking theorem, “which states that human nature unnecessarily inflates the costs of processes related to proposed legal changes.”<sup>46</sup>

The essay proceeds in five parts. Part I examines why the Nixon-in-China effect may occur and some of the present collaboration’s unique characteristics. Part II summarizes UEP and HSUS’s past bitter legal battles over battery-cage eggs. Part III recounts the events that led to UEP and HSUS advocating national agriculture standards for hen houses. Part IV surveys the still developing reaction of UEP and HSUS’s respective friends and foes. Finally, Part V employs the four theoretical tools to explore some possible explanations for the collaboration.

#### I. DINING ROOM DÉTENTE: WHAT TO THINK WHEN A FRIEND BEFRIENDS THE ENEMY

Although UEP and HSUS have both already “gone to China” by agreeing to a cease-fire and by jointly lobbying for federal egg-laying standards,<sup>47</sup> it is still too early to determine if there will be any significant Nixon-in-China effect among their respective peer organizations. Nonetheless, social movement research suggests that peer organizations may exhibit the Nixon-in-China effect for at least three reasons.

First, peer organizations experience cognitive dissonance<sup>48</sup> between their prior expectations of the adversarial-turned-collaborating organizations and the new agreement. Such dissonance causes these peer organizations—in this case, peer foxes and peer hounds—to reflect about the core issue—in this case, national agricultural standards—more seriously and openly.<sup>49</sup>

Second, such reflection might allow peer organizations to recognize multiple pragmatic reasons for collaboration.<sup>50</sup> Although in the past these peer organizations might have rejected collaboration outright without much thought, the fact that the new collaborators had previously demonstrated staunch opposition to such compromise bestows newfound credibility upon collaboration.<sup>51</sup> Other foxes or hounds might wonder, if HSUS and UEP can cease fighting and work together for national agricultural standards, then maybe such standards make economic or strategic sense.

Finally, the counterintuitive collaboration of former enemies suggests to their peers that perhaps collaboration is not as politically or popularly risky as previously

45. See, e.g., Ani B. Satz, *Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property*, 16 *ANIMAL L.* 65, 68-70 (2009); see also Joseph Lubinski, Note, *Screw the Whales, Save Me!: The Endangered Species Act, Animal Protection, and Civil Rights*, 4 *J. L. SOC’Y* 377, 411-12 (2003).

46. Barak Y. Orbach & Frances R. Sjoberg, *Excessive Speech, Civility Norms, and the Clucking Theorem*, 44 *CONN. L. REV.* 1, 9 (2011).

47. See *infra* Part III.

48. See Michael P. Vandenbergh, Amanda R. Carrico & Lisa Schultz Bressman, *Regulation in the Behavioral Era*, 95 *MINN. L. REV.* 715, 759 (2011) (citing LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* 2-3 (1957)). “Cognitive dissonance” is “the psychological discomfort that is felt when a person holds two contradictory ideas or cognitions” or when a person’s actions contradict one of her key attitudes or beliefs. *Id.*

49. Briscoe & Safford, *supra* note 15, at 464-65 (collecting authorities).

50. *Id.*

51. *Id.* at 465.



thought.<sup>52</sup> Thus, the shock of the unexpected deal causes peers to give collaboration another serious look. If HSUS and UEP have managed to convince senators and congressmen to sponsor federal legislation<sup>53</sup> and are trumpeting their collaboration throughout the national media,<sup>54</sup> then their peers might wonder if the winds of political and popular opinion are changing.

But what distinguishes this Nixon-in-China moment from any other? While this particular policy debate over national egg-laying standards is indeed a social movement for legal change, perhaps what is different here is the unique role of popular opinion and the directly impacted group's corresponding silence. Unlike marginalized human groups, chickens—and other animals—obviously are unable to shape public opinion on their own. They can't write blogs or books, give television interviews, vote, or lobby legislatures.

Consequently, humans have no alternative but to substitute their own subjective views of what may or may not be in animals' best interests. Without the check of the affected population's voices, there is particular temptation to act in one's self-interest. In particular, the 2012 EPIA Amendments repeatedly rely upon the "best available science."<sup>55</sup> These ambiguous words would allow for a battle of expert opinion where animal and industry advocates can shop for expert witnesses who will say what they want to hear.<sup>56</sup>

Although all social movements in a democracy must shape public opinion,<sup>57</sup> the role of consumer preferences in a market food economy cannot be overemphasized. Given our American free market capitalist system, the food industry ultimately is a popularity contest.<sup>58</sup> The food choices with the greatest consumer demand generate the most profit.<sup>59</sup> Profit maximization generally outweighs all other ideological or normative considerations.

While profit maximization may avoid intractable ideological battles, it also means that the pocketbook may trump even the most persuasive moral or scientific arguments. For example, there are HSUS members who don't see any hypocrisy in advocating for increased pet welfare protections while continuing to purchase and to consume cheaper factory-farmed meat and dairy.<sup>60</sup> We can love our pets and

52. *Id.*

53. See *infra* Part III.B.

54. See *infra* Part III.

55. H.R. 3798, 112th Cong. (2012).

56. For further discussion, see *infra* text accompanying note 185.

57. See, e.g., Edwin Amenta, Neal Caren, Elizabeth Chiarello & Yang Su, *The Political Consequences of Social Movements*, 36 ANN. REV. SOC. 287, 288 (2010).

58. See, e.g., F. BAILEY NORWOOD & JAYSON L. LUSK, COMPASSION, BY THE POUND: THE ECONOMICS OF FARM ANIMAL WELFARE 38-39 (2011). See generally *Food Surveys Research Group: Home*, USDA: AGRICULTURAL RESEARCH SERVICE, [http://www.ars.usda.gov/Main/site\\_main.htm?modecode=12-35-50-00](http://www.ars.usda.gov/Main/site_main.htm?modecode=12-35-50-00) (last visited Jan. 30, 2013) (gathering consumer food surveys).

59. See, e.g., NORWOOD & LUSK, *supra* note 58, at 38-41. See also U.S. Farmers & Ranchers Alliance, *Town Hall Highlights*, FOOD DIALOGUES, <http://www.fooddialogues.com/gather/live-event> (last visited Jan. 30, 2013) (featuring town hall debates over consumer food questions).

60. As former HSUS CEO John Hoyt observed, "We are not a vegetarian organization, and as a matter of policy do not consider the utilization of animals for food to be either immoral or inappropriate—a position that, as you might expect, earns us a great deal of criticism from various

love our cheap chicken nuggets at the same time.

Similarly, independent scientific experts might agree with UEP that a diversified approach including battery-cage eggs is the best approach.<sup>61</sup> Such expert consensus, however, is unhelpful when it is ignored by voters who decide to ban battery cages anyway and thereby drive up egg producers' operating costs.<sup>62</sup> UEP recognized that "factors beyond science are at play such as economics" and a "holistic approach to" egg producers' own "sustainability."<sup>63</sup>

Increasing animal welfare and improving consumer health is expensive.<sup>64</sup> With agricultural products like eggs, there is an unavoidable tradeoff between animal welfare and consumer health on the one hand and price and quantity on the other.<sup>65</sup> As profit-maximizing businessmen, egg farmers, like all farmers, want to make the most money possible by meeting consumer demand. If increasing animal welfare guaranteed greater profits, all agricultural firms most probably would support increased animal welfare.<sup>66</sup>

Moreover, hounds like HSUS recognize that American consumers are unlikely to stop eating all meat or animal products like eggs.<sup>67</sup> While such hounds may be animal food abolitionists at heart, they must accept the reality that the best they can achieve at present is incremental change.<sup>68</sup>

## II. HOUNDED AND OUTFOXED: PAST HEN HOUSE HOSTILITIES

Perhaps the hound that nationally has most embraced the need for gradual, pragmatic change is HSUS. After all, HSUS was the animal welfare organization that Michael Vick, hated celebrity, convicted felon, and former dogfighter, approached about collaboration.<sup>69</sup> After first refusing to collaborate with Vick, HSUS agreed to work with him.<sup>70</sup>

HSUS claims to be "the nation's animal protection organization, rated most effective by its peers."<sup>71</sup> Billing itself as "America's mainstream force against cruelty, exploitation and neglect, as well as the most trusted voice extolling the human-animal bond," HSUS emphasizes that the "humane and sustainable world

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animal rights organizations." HAROLD D. GUITHER, *ANIMAL RIGHTS: HISTORY AND SCOPE OF A RADICAL SOCIAL MOVEMENT* 116 (1998).

61. See *infra* notes 83-85 and accompanying text.

62. See *infra* notes 123-126 and accompanying text.

63. UEP 2012 NAIA Presentation, *supra* note 27, at 19.

64. See generally Norwood & Lusk, *supra* note 58.

65. See, e.g., *id.* at 46-48.

66. See *id.* at 94-103.

67. For example, HSUS's campaign to reduce American meat and dairy consumption asserts the principle that farm animals "are individuals with personalities, needs, and preferences—and, most importantly, the capacity to suffer," yet concedes that changing consumer eating habits "need not be an all-or-nothing endeavor." Paul Shapiro, *Standing Up for Animals, One Bite at a Time: A Letter from Paul Shapiro*, Article in HSUS, *Guide to Meat-Free Meals* (Apr. 19, 2012), [http://www.humanesociety.org/issues/eating/meatfree-guide-2011/standing\\_up\\_for\\_animals\\_one.html](http://www.humanesociety.org/issues/eating/meatfree-guide-2011/standing_up_for_animals_one.html).

68. HSUS has been accused of harboring the ultimate goal of destroying animal agriculture in favor of a long game of forced veganism. See *infra* Part V.B-C.

69. HSUS, *Michael Vick and The HSUS's work to end dogfighting* (Mar. 30, 2012), [http://www.humanesociety.org/issues/dogfighting/qa/vick\\_fa.html](http://www.humanesociety.org/issues/dogfighting/qa/vick_fa.html).

70. *Id.*

71. See HSUS, *About Us*, *supra* note 3.

for all animals” it seeks “will also benefit people.”<sup>72</sup> In its mission statement, HSUS proudly states that it has successfully cooperated with corporations and government.<sup>73</sup>

With regard to its agricultural strategy, HSUS, not surprisingly, has adopted an incremental approach for “conscientious eating” called the “Three Rs—reducing the consumption of animal products; refining the diet by avoiding foods created in the worst production systems (for example, switching to cage-free eggs); and replacing animal products with plant-based foods.”<sup>74</sup>

Accordingly, HSUS pragmatically encourages meat-and-dairy loving Americans who wish they could eat less meat and eggs to “[g]o at your own pace. A lifetime of ingrained eating habits can be difficult to break, so you should praise yourself for every step of progress you make.”<sup>75</sup> Recognizing that not every American is willing to go “cold turkey” on meat and eggs and become a vegetarian, HSUS encourages Americans to become “flexitarians,” people “who take a part-time approach to avoiding meat.”<sup>76</sup> HSUS’s campaign against battery-cage eggs thus embraces an incremental approach where, instead of trying unrealistically to ban the consumption of all animals or animal products, HSUS seeks to refine the American diet to avoid animal food created in the most cruel ways.

HSUS’s “No Battery Eggs” campaign began in January 2005.<sup>77</sup> As a Capper-Volstead cooperative<sup>78</sup> of “egg farmers from all across the United States and representing the ownership of approximately 95% of all the nation’s egg-laying hens,”<sup>79</sup> UEP battled fiercely and publicly with HSUS for six years. UEP members believe “in consumer choice and therefore produce eggs in modern cage, cage-free and organic production.”<sup>80</sup>

Perhaps not surprisingly, UEP’s initial response to HSUS’s campaign to ban battery cages was to argue that doing so would result in negative economic and environmental consequences that outweighed any purported animal welfare benefits. UEP argued that banning battery-cage eggs would

require massive investment in new production facilities and conversion of old ones; . . . drive some egg production to countries like Mexico without such a ban, and result in imports of eggs produced under different food safety, welfare and environmental standards; . . . raise production costs and consumer prices; . . .

72. *Id.*

73. *Id.* (stating how HSUS has “join[ed] with corporations on behalf of animal-friendly policies” and that HSUS’s “track record of effectiveness has led to meaningful victories for animals in Congress, state legislatures, courtrooms and corporate boardrooms”).

74. HSUS, *Flex Appeal: Eating Humanely Doesn't Have to Be All-or-Nothing*, in *Guide to Meat-Free Meals* (May 31, 2011), [http://www.humanesociety.org/issues/eating/meatfree-guide-2011/flex\\_appeal\\_.html](http://www.humanesociety.org/issues/eating/meatfree-guide-2011/flex_appeal_.html) (emphasis added).

75. HSUS, *Standing Up for Animals, One Bite at a Time*, *supra* note 67.

76. HSUS, *Flex Appeal*, *supra* note 74.

77. HSUS, *Progress for Egg-Laying Hens* (Oct. 15, 2012), [http://www.humanesociety.org/issues/confinement\\_farm/timelines/eggs\\_timeline.html](http://www.humanesociety.org/issues/confinement_farm/timelines/eggs_timeline.html).

78. The Capper-Volstead Act, formally known as the Co-operative Marketing Associations Act, exempts UEP as an agricultural association from certain antitrust laws. *See* 7 U.S.C. §§ 291, 292 (2006).

79. UEP, *About Us*, *supra* note 2.

80. *Id.*

increase federal expenditures on food assistance programs like WIC [(the Women, Infants, and Children program)] and school lunch and breakfast, and likely reduce egg consumption under some of these programs; . . . require additional land to be planted in corn and soybeans to meet the higher feed demand in cage-free systems; and . . . have an adverse impact on the environment and the industry's carbon footprint.<sup>81</sup>

UEP also sensibly admitted that “[t]here are pros and cons to all [egg] production systems”<sup>82</sup>—which there are.

Recognizing that popular consumer and lawmaker opinion of egg-laying practices was often woefully ignorant of industry realities, UEP, in 2002, sought a counterreformation through its own UEP Certified egg program.<sup>83</sup> The UEP Certified egg program claimed to employ: “(1) [a] scientific approach to animal welfare guidelines; (2) guidelines that are driven by the industry rather than government mandates or legislation; [and] (3) guidelines that created a level playing field for both egg farmers and our customers.”<sup>84</sup> UEP’s Certified guidelines were formed by an Independent Scientific Advisory Committee for Animal Welfare that continues to meet regularly and advise UEP on welfare issues.<sup>85</sup> Both the Food Marketing Institute, a retail grocer trade association, and the National Council of Chain Restaurants, a fast food chain restaurant trade association, have approved the UEP Certified egg program guidelines.<sup>86</sup>

HSUS opposed the UEP Certified guidelines as misleading and inhumane because they permitted battery cages.<sup>87</sup> HSUS initially took a moral position, concluding that “[b]attery cage eggs are simply too inhumane for any socially-responsible company or person to support.”<sup>88</sup> Even though HSUS subsequently took another moral position against enriched egg cages,<sup>89</sup> HSUS abandoned such moralizing with its current agreement.

Although enriched egg cages are larger and better furnished than battery cages, they are still cages. Hounds like the Humane Farming Association oppose the 2012 EPIA Amendments on moral grounds, arguing that the law “would keep hens in cages forever”<sup>90</sup> and “simply trade one cruel metal cage for another.”<sup>91</sup>

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81. PROMAR INT’L, IMPACTS OF BANNING CAGE EGG PRODUCTION IN THE UNITED STATES: A REPORT PREPARED FOR UNITED EGG PRODUCERS 1 (Aug. 2009), [http://www.unitedegg.org/information/pdf/Promar\\_Study.pdf](http://www.unitedegg.org/information/pdf/Promar_Study.pdf).

82. *Id.* at 2.

83. UEP, *Animal Welfare*, <http://www.unitedegg.org/AnimalWelfare/default.cfm> (last visited Jan. 31, 2013).

84. *Id.*

85. Greene & Cowan, *supra* note 5, at 4 & n.7.

86. For a brief list of what the guidelines cover, see *id.*

87. HSUS, Press Release, What Does The “UEP Certified” Logo Mean? (Nov. 2, 2009), [http://www.humanesociety.org/issues/confinement\\_farm/facts/uep\\_certified\\_logo.html](http://www.humanesociety.org/issues/confinement_farm/facts/uep_certified_logo.html). For a definition of battery cages, see *supra* note 5.

88. *Id.*

89. See HSUS, *Welfare Issues with Furnished Cages*, *supra* note 32. For a definition of enriched cages, see *supra* note 32.

90. *Stop the Rotten Egg Bill*, HUMANE FARMING ASS’N (Apr. 16, 2012), <http://hfa.org/blog/stop-the-rotten-egg-bill/>.

In spite of the Food Marketing Institute and the National Council of Chain Restaurants' approval of UEP Certified guidelines which allowed for so-called battery cages, from 2005 to 2007, HSUS managed to convince Whole Foods, Ben & Jerry's, and Burger King to transition to using only cage-free eggs.<sup>92</sup> But the watershed moment in HSUS's campaign against battery-cage eggs came in California, which would have had the eighth largest economy in the world in 2009 if it were an independent nation.<sup>93</sup>

#### A. California Bans Battery-Cage Eggs

Perhaps HSUS's greatest victory in its "No Battery Eggs" campaign was the passage of California Proposition 2 ("Prop 2"), the Prevention of Farm Animal Cruelty Act,<sup>94</sup> in November 2008. Prop 2 banned not only battery cages but also veal crates used for veal production and sow gestation crates used for pork production.<sup>95</sup> Under this new law, California required all food sellers doing business in the state to house veal calves, laying hens, and pregnant pigs in ways that allow them to lie down, stand up, and fully extend their limbs.<sup>96</sup> These requirements effectively banned battery cages.<sup>97</sup>

Prop 2 was passed by 63% of California voters.<sup>98</sup> HSUS's marketing blitz, which stressed consumer health as much as animal welfare, appeared to be successful. UEP later admitted that there was "[n]o question about it: Proposition 2 was a major wake-up call to the entire U.S. egg industry."<sup>99</sup> Echoing its prior economic and environmental concerns, UEP responded that HSUS "misle[d]" California voters into passing a law they did not understand.<sup>100</sup> Furthermore, HSUS did not endear itself to UEP when, in April 2010, HSUS asked the U.S. Department of Justice to investigate UEP for an alleged criminal egg price-fixing scheme.<sup>101</sup>

In July 2010, follow-up legislation passed, banning even the sale of battery-cage eggs within the state. This law appears to require out-of-state egg sellers to

91. Bradley Miller, *Miller: A Cage Is a Cage—Stop the Rotten Egg Bill*, ROLL CALL (Aug. 2, 2012), <http://www.rollcall.com/news/Miller-A-Cage-Is-a-Cage-Stop-the-Rotten-Egg-Bill-216695-1.html> (article written by Humane Farming Association National Director Bradley Miller opposing the bill).

92. See HSUS, *Progress for Egg-Laying Hens*, *supra* note 77.

93. See *California Economy Ranking in the World*, ECONPOST (Feb. 3, 2011), <http://econpost.com/californiaeconomy/california-economy-ranking-among-world-economies>.

94. See CAL. HEALTH & SAFETY CODE § 25990 (West 2012).

95. See *id.*

96. See *id.*

97. See Greene & Cowan, *supra* note 5, at 18.

98. Debra Bowen, *Statement of the Vote: November 4, 2008, General Election*, CALIFORNIA SECRETARY OF STATE 6-7 (2008), [www.sos.ca.gov/elections/sov/2008-general/sov\\_complete.pdf](http://www.sos.ca.gov/elections/sov/2008-general/sov_complete.pdf).

99. Stuart Pfeifer, *California's Egg-Farm Law Prompts a Push for National Standards*, L.A. TIMES, May 27, 2012, <http://articles.latimes.com/2012/may/27/business/la-fi-egg-farms-20120527>.

100. *American Egg Farming: How We Produce an Abundance of Affordable, Safe Food and How Animal Activists May Limit Our Ability to Feed Our Nation and World*, UNITED EGG PRODUCERS 4, [http://www.unitedegg.org/information/pdf/American\\_Egg\\_Farming.pdf](http://www.unitedegg.org/information/pdf/American_Egg_Farming.pdf) (last visited Feb. 1, 2013).

101. See HSUS, Press Release, *The HSUS Asks Attorney General to Open Criminal Investigation of Egg Industry Price-Fixing Scheme* (Apr. 12, 2010), [http://www.humanesociety.org/news/press\\_releases/2010/04/UEP\\_price\\_fixing\\_041210.html](http://www.humanesociety.org/news/press_releases/2010/04/UEP_price_fixing_041210.html).

comply with Prop 2 if they want to sell eggs in California.<sup>102</sup> Both Prop 2 and this follow-up law go into effect on January 1, 2015.<sup>103</sup> By supporting a bill that reaches well beyond California's borders,<sup>104</sup> however, HSUS may have overreached.<sup>105</sup> As UEP observed, the economic battle over egg standards "is not so much about where eggs are produced—but more so about where eggs can be marketed. A patchwork of 24 state laws restricting the free flow of eggs would be a nightmare for egg farmers and retailers."<sup>106</sup>

California's restriction on out-of-state battery-cage eggs thus could have very serious economic consequences for egg-producing states. While pro-agriculture popular opinion might keep those states safe from HSUS's referenda, their eggs, nevertheless, have to be sold somewhere. For example, Iowa produces nearly twice as many table eggs as any other state.<sup>107</sup> UEP recognized that ballot initiatives like Prop 2 could still cripple Iowa's agricultural economy:

Take Iowa for example: 55 million hens and 3 million people. Iowa is not a ballot initiative state *but where are they going to sell their eggs[?]* Nearly every state to their west[,] one state to their east[,] and two states to their south are ballot initiative states [that could ban battery-cage eggs].<sup>108</sup>

Concerned about his constituents' economic interests, Iowa Congressman Steve King (R-Ia.) consequently proposed an amendment to the 2012 Farm Bill, the Protect Interstate Commerce Act, prohibiting states like California from restricting the in-state marketing of out-of-state battery-cage eggs.<sup>109</sup> King explained that his amendment "prohibits states from enacting laws that place onerous conditions on the means of production for agricultural goods that are sold within its own borders but are produced in other states."<sup>110</sup> In other words, if the King Amendment

102. See CAL. HEALTH & SAFETY CODE § 25996 (West 2012).

103. See Greene & Cowan, *supra* note 5, at 18.

104. See HSUS, Press Release, Governor Schwarzenegger Signs Landmark Egg Bill into Law 1 (July 6, 2010), [http://www.humanesociety.org/news/press\\_releases/2010/07/ab1437\\_passage\\_070610.html](http://www.humanesociety.org/news/press_releases/2010/07/ab1437_passage_070610.html).

105. See *infra* Part III.B.

106. UEP 2012 NAIA Presentation, *supra* note 27, at 8.

107. Greene & Cowan, *supra* note 5, at 2.

108. UEP 2012 NAIA Presentation, *supra* note 27, at 8 (emphasis added).

109. See Federal Agriculture Reform and Risk Management Act of 2012, H.R. 6083, 112th Cong., § 12308 (as reported by H. Comm. on Agric., Sept. 13, 2012). During the 112th Congress, the bill was calendared but not voted on. See Library of Cong., *Bill Summary & Status, 112th Congress (2011-2012)*, H.R. 6083, THOMAS, <http://thomas.loc.gov/home/LegislativeData.php> (follow "112" hyperlink; enter "Federal Agriculture Reform and Risk Management Act" in "Word/Phrase" field; follow "All Congressional Actions" hyperlink) (last visited Feb. 2, 2013). HSUS reportedly targeted King in the last election, spending more than \$750,000 in a losing effort to undermine his reelection. *HSUS Crushed on Election Day*, HUMANEWATCH (Nov. 7, 2012), [http://humanewatch.org/index.php/site/post/hsus\\_crushed\\_on\\_election\\_day/](http://humanewatch.org/index.php/site/post/hsus_crushed_on_election_day/).

110. Congressman Steve King, Press Release, Two King Amendments Included in Farm Bill, [http://steveking.house.gov/index.php?option=com\\_content&view=article&id=4440:two-king-amendments-included-in-farm-bill&catid=71:press-releases&Itemid=300164](http://steveking.house.gov/index.php?option=com_content&view=article&id=4440:two-king-amendments-included-in-farm-bill&catid=71:press-releases&Itemid=300164) (last visited Feb. 2, 2013). King explained this so-called "King Amendment:"

I am pleased that the Committee passed my amendment, the Protect Interstate Commerce Act (PICA)[,] because states are entering into trade protectionism by requiring cost prohibitive production methods in other states . . . PICA blocks states from requiring "free range" eggs or "free range" pork . . . By 2014 California will require only "free

passes, then in-state California egg sellers would be forced to comply with Prop 2 but out-of-state California egg sellers would not. Because battery-cage eggs are cheaper to produce,<sup>111</sup> such a regulatory framework might drive in-state egg producers out of California.<sup>112</sup>

### B. Related Bans

With the momentum from Prop 2, HSUS attempted to encourage more states to ban battery-cage eggs. In February 2009, the Illinois legislature introduced a bill modeled after Prop 2 that failed to pass.<sup>113</sup> Likewise, in May 2009, the New York legislature introduced a similar bill that died in committee.<sup>114</sup>

After those two failures, HSUS experienced a string of victories. In October 2009, the Michigan legislature passed a state law banning battery cages by 2019.<sup>115</sup> In January 2010, Walmart agreed to render its own line of eggs cage-free.<sup>116</sup> Five months later, in June 2010, the Ohio Farm Bureau and other Ohio agricultural regulators agreed to a moratorium on new battery cage construction.<sup>117</sup> HSUS even purchased stock in ConAgra Foods to gain access to ConAgra executives and shareholders at its annual shareholder meeting.<sup>118</sup> A little under a year later, ConAgra agreed to “incorporate one million cage-free eggs in its supply chain” in July 2011.<sup>119</sup>

Most recently, three more states have banned or prohibited battery cages. In September 2011, Ohio made its moratorium permanent with new administrative regulations prohibiting any new battery cages.<sup>120</sup> Oregon passed a law phasing out battery cages for enriched cages.<sup>121</sup> Finally, the state of Washington followed

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range” eggs be sold and the impact of their large market would compel producers in every other state to invest billions to meet the California standard of “means of production.” PICA will ensure that radical organizations like the Humane Society of the United States (HSUS) and PETA are prohibited from establishing a patchwork of restrictive state laws aimed at slowly suffocating production agriculture out of existence.

*Id.*

111. See, e.g., UEP, Press Release, Egg Farmers Warn That Egg Prices Could Double Without Congressional Legislation; 45,000 Jobs in 24 States at Risk, 1 (July 26, 2012), <http://www.eggbill.com/images/pdf/Senate%20Hearing%20News%20Release%20Egg%20Bill%20HR%203798.pdf>.

112. See Daniel A. Sumner, Williams A. Matthews, Joy A. Mench & J. Thomas Rosen-Molina, *The Economics of Regulations on Hen Housing in California*, 42 J. AGRIC. & APPLIED ECON. 429, 436-37 (2010).

113. See S.B. 1337, 96th Gen. Assem. (Ill. 2009).

114. See A.B. 8163, 2009-2010 Reg. Sess. (N.Y. 2009).

115. See MICH. COMP. LAWS § 287.746 (2012).

116. HSUS, *Progress for Egg-Laying Hens*, *supra* note 77.

117. *Id.*

118. HSUS, Press Release, The Humane Society of the United States to Address ConAgra Executives About Animal Cruelty at Company’s Shareholder Meeting (Sept. 23, 2010), [http://www.humanesociety.org/news/press\\_releases/2010/09/ConAgra092310-1.html](http://www.humanesociety.org/news/press_releases/2010/09/ConAgra092310-1.html).

119. *Growing for Good: 2011 Corporate Responsibility Report*, CONAGRA FOODS 51, [http://company.conagrafoods.com/phoenix.zhtml?c=202310&p=corp\\_resp](http://company.conagrafoods.com/phoenix.zhtml?c=202310&p=corp_resp) (last visited Feb. 2, 2013).

120. OHIO ADMIN. CODE 901:12-9-03 (2012).

121. OR. REV. STAT. § 632.840 (2012). For further discussion of enriched cages, see *infra* note 32 and accompanying text.

Oregon's lead with a similar law in August 2012.<sup>122</sup>

UEP had little to show for the millions of dollars it spent in opposition to these measures. UEP failed to defeat most of these anti-battery-cage bills and consumer campaigns.<sup>123</sup> Recognizing that it was losing a nationwide war of attrition to HSUS one state at a time and weary of the cost of battle, UEP was ready to try a new strategy. Furthermore, UEP's "UEP Certified" standards appeared less promising because UEP had been sued for allegedly using the "UEP Certified" standards as a means to violate antitrust laws.<sup>124</sup> As an agricultural journalist observed, "UEP had little choice but to adhere to the maxim, 'If you can't beat 'em, join 'em.'"<sup>125</sup> An animal activist concurred, "[i]t was just plain common sense for . . . UEP to negotiate."<sup>126</sup>

### III. HEN HOUSE HARMONY: NATIONAL EGG-LAYING STANDARDS

UEP President Gene Gregory first reached out to HSUS President Wayne Pacelle in March 2011.<sup>127</sup> Using a trusted intermediary, his son and successor Chad, Gregory contacted Pacelle to ask if they could talk.<sup>128</sup> Their armistice talks occurred over four months, from April through early July of 2011.<sup>129</sup>

Nearing retirement in 2012,<sup>130</sup> Gregory, like many other "wartime" leaders near the end of their career, may have wanted a different legacy.<sup>131</sup> Although Gregory initially expected HSUS to insist upon either "their way or no way," Gregory later wrote that Pacelle was surprisingly "receptive to and willing to discuss a transition to enriched colony cages as an option to ending the conflict."<sup>132</sup>

Pacelle later said that he then recognized an opportunity. Unlike Gregory, who under UEP's organizational structure was less independent,<sup>133</sup> Pacelle is responsible only to the HSUS's Board of Directors.<sup>134</sup> Accordingly, Pacelle had more room to think outside the box. As he explained, HSUS "could fight [UEP] for another 10 or 15 years and spend millions and millions of dollars on both sides.

122. WASH. REV. CODE § 69.25.065 (2012).

123. See Gene Gregory, Op-Ed, *UEP Justifies Deal with HSUS*, FEEDSTUFFS, Jan. 23, 2012, at 8, [http://fdsmagissues.feedstuffs.com/fds/PastIssues/FDS8404/fds08\\_8404.pdf](http://fdsmagissues.feedstuffs.com/fds/PastIssues/FDS8404/fds08_8404.pdf) [hereinafter *Feedstuffs Article*].

124. See Greene & Cowan, *supra* note 5, at 12.

125. Andy Vance, *Time Will Tell If UEP Gambit Pays Off*, FEEDSTUFFS, Jan. 23, 2012, at 8, [http://fdsmagissues.feedstuffs.com/fds/PastIssues/FDS8404/fds08\\_8404.pdf](http://fdsmagissues.feedstuffs.com/fds/PastIssues/FDS8404/fds08_8404.pdf).

126. Gross, *supra* note 26.

127. *Feedstuffs Article*, *supra* note 123, at 8.

128. Charles, *supra* note 28.

129. *UEP 2012 NAIA Presentation*, *supra* note 27, at 10.

130. See *United Egg Producers President Announces Retirement*, *supra* note 29.

131. See *infra* note 271 (collecting examples).

132. *Feedstuffs Article*, *supra* note 123, at 8.

133. UEP's executive committee voted several times to make the deal with HSUS. The board members who voted for the agreement reportedly represented 45% of the egg industry. See Greene & Cowan, *supra* note 5, at 6. UEP is an agricultural cooperative. See 7 U.S.C. § 291 (2006) ("[S]uch associations are operated for the mutual benefit of the members thereof[.] . . . [N]o member . . . is allowed more than one vote."); see also generally Christine A. Varney, *The Capper-Volstead Act, Agricultural Cooperatives, and Antitrust Immunity*, ANTITRUST SOURCE, Dec. 2010.

134. See HSUS, *HSUS Bylaws*, HUMANEWATCH 12, [http://humanewatch.org/images/uploads/HSUS\\_bylaws\\_2004.pdf](http://humanewatch.org/images/uploads/HSUS_bylaws_2004.pdf) (last updated Nov. 17, 2010).



But the other option is we could sit down together and figure out a pathway that's good for the industry and better for the animals."<sup>135</sup>

UEP justified its *realpolitik* move as necessary for its members' economic survival:

Egg farmers believe that a single national standard is the only way to shape their own future as sustainable, family-owned businesses. It is the only way to have some control over their own destiny and avoid a bleak future of overlapping, inconsistent, unworkable, state-based animal welfare standards that will result from ballot initiatives our industry cannot win even if we raise millions of dollars to try to educate the public, as we did in California in 2008.<sup>136</sup>

In return for UEP's cooperation, HSUS agreed to: suspend all of its pending egg-laying state legislation and ballot initiatives; clarify the egg-laying standards in California, Michigan, Ohio, Oregon, and Washington, the states where HSUS had already banned battery-cage eggs; recognize enriched cages as humane for chickens; stop all pending egg-laying lawsuits and undercover farm videos; allow "eggs to continue flowing across state lines"; and allow egg farmers a grace period to continue to use battery cages.<sup>137</sup> UEP claims that the 2012 EPIA Amendments' phase-in period was planned carefully to "ensure [there is always] a sufficient supply of eggs at a fair price."<sup>138</sup>

UEP has also made it clear that there should be no Nixon-in-China effect because these national standards should be limited to the egg industry and not apply to any other industry. UEP asserts that this

proposal deals only with egg-laying hens, and has no impact on others in animal agriculture. . . . This is a matter of self-determination for the egg industry. If this legislation is blocked by other livestock organizations unfamiliar with the science or economics of egg production, egg farmers face the very real prospect of going out of business. For egg producers, the stakes couldn't be higher.<sup>139</sup>

When reassuring other agricultural industries such as veal and pork producers, UEP stresses that federal animal welfare legislation would be impossible without the egg industry's support. Relax, says UEP to other agricultural industries, Congress will adopt national animal welfare standards over your industry only if you—like us—tell Congress that you want them. As UEP Board Chairman David Lathem explained, "[i]t is inconceivable that Congress would pass any laws regarding livestock animal husbandry requirements that are not supported by those who would be affected."<sup>140</sup>

In its public statements, HSUS appears to believe that notwithstanding that the proposed federal legislation offers qualitatively less protection for hens than would-

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135. Charles, *supra* note 28.

136. Vance, *supra* note 125, at 8.

137. UEP 2012 NAIA Presentation, *supra* note 27, at 18. See also Dan Wheat, *Egg Bill Union Silent*, CAPITAL PRESS (Dec. 27, 2012), <http://www.capitalpress.com/print/djw-eggbills-112712>; Charles, *supra* note 28.

138. *Id.*

139. UEP, *Frequently Asked Questions*, *supra* note 24.

140. UEP, Press Release, United Egg Producers' Chairman Sets the Record Straight (May 10, 2012), <http://www.eggbill.com/images/Press-Release-Setting-the-Record-Straight.pdf>.

be preempted state laws like Prop 2, a uniform national animal welfare standard would quantitatively help more hens than piecemeal state legal action.<sup>141</sup> In particular, a national standard would help the hens in staunchly pro-agriculture states otherwise unlikely to regulate egg production voluntarily.<sup>142</sup> For example, five of the ten largest egg producing states, Indiana, Iowa, Minnesota, Pennsylvania, and Texas, lack any state ballot initiative process.<sup>143</sup>

The problem with HSUS's position, however, is that by agreeing at least in the near term to limit national agricultural standards only to egg laying,<sup>144</sup> HSUS is contradicting itself.<sup>145</sup> Other than the obvious—to make a deal—why limit the benefits of national standards only to egg-laying hens? Surely the welfare of other agricultural animals could equally benefit from national standards.

Perhaps the answer is because such cooperation appears consistent with HSUS's mission to be a *moderate* animal protection organization that cooperates with industry. "It is always our greatest hope to find common ground and to forge solutions, even with traditional adversaries," said Pacelle.<sup>146</sup> He concluded, "[t]he federal legislation provides a pathway to give the birds a much better life. It's not perfect, but it is a dramatic improvement."<sup>147</sup>

Once the deal was struck, Gregory and Pacelle—by both accounts formerly "bitter adversaries"—became the "odd couple of American agriculture," lobbying members of Congress together in DC.<sup>148</sup> Having worked together over many months in support of the bill, Gregory and Pacelle claim to have newfound respect for each other and their respective positions. Gregory stated that Pacelle has been a man of his word, not close-minded, and not out to eliminate the animal agriculture business. Pacelle, said Gregory, "just wants to see improvements made."<sup>149</sup> In turn, Pacelle stated that Gregory helped Pacelle "understand the pressures involved in trying to make a living producing food."<sup>150</sup>

The federal legislation for which both Gregory and Pacelle are lobbying amends a well-established federal law, the Egg Products Inspection Act.

#### A. *The Egg Products Inspection Act*

Congress passed the Egg Products Inspection Act (EPIA) in December 1970.<sup>151</sup> The EPIA's purpose is to insure the food safety of eggs and egg products sold for human consumption.<sup>152</sup> The EPIA covers matters such as pasteurization,<sup>153</sup>

141. HSUS, Press Release, *HSUS, Egg Industry Agree to Promote Federal Standards for Hens* (July 7, 2011) [hereinafter *Egg Industry Agree*],

[http://www.humanesociety.org/news/press\\_releases/2011/07/egg\\_agreement.html](http://www.humanesociety.org/news/press_releases/2011/07/egg_agreement.html).

142. Charles, *supra* note 28.

143. Greene & Cowan, *supra* note 5, at 3 tbl.1, 5 n.12.

144. For further discussion, see *supra* text accompanying notes 38-40.

145. See *infra* notes 35-41 and accompanying text.

146. *Egg Industry Agree*, *supra* note 141.

147. Pfeifer, *supra* note 99.

148. Charles, *supra* note 28.

149. *Id.*

150. *Id.*

151. 21 U.S.C. §§ 1031-1056 (2006).

152. See *id.* § 1032.

153. See *id.* § 1036(a).

storage,<sup>154</sup> transportation,<sup>155</sup> facilities maintenance,<sup>156</sup> and reporting.<sup>157</sup> What the EPIA doesn't cover at all, however, is animal welfare. There is no mention in the EPIA of housing or treatment standards for laying hens. In fact, hens are not mentioned at all in the EPIA.

### B. *The EPIA Amendments of 2012*

If adopted, the 2012 EPIA Amendments would appear to be “the first federal law addressing the treatment of animals on farms.”<sup>158</sup> Traditionally, both state and federal governments have excluded agricultural animals from regulation.<sup>159</sup> As the Congressional Research Service noted, 2012 EPIA Amendments opponents “are concerned that [the Amendments] federally legislate[] management practices for farm animals, something that has not been done in the past.”<sup>160</sup>

For example, the Animal Welfare Act of 2006 defines “animal” under the Act as excluding

other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber.<sup>161</sup>

Similarly, the Humane Methods of Slaughter Act not only limits coverage to the ways animals may be slaughtered—and is silent about how they should be housed—but also excludes poultry.<sup>162</sup> The U.S. Department of Agriculture (USDA) confirmed this paucity of federal agricultural animal welfare law by observing, in a notice of regulatory action, that “there is no specific federal humane handling and slaughter statute for poultry.”<sup>163</sup>

Representative Kurt Schrader (D-Or.) introduced the 2012 EPIA Amendments on January 23, 2012.<sup>164</sup> In May 2012, the bill was referred to the House Subcommittee on Livestock, Dairy, and Poultry and went no further.<sup>165</sup> Senator Feinstein, however, introduced a companion bill in the Senate on May 24, 2012. Although Feinstein hoped to have the bill added to the 2012 Farm Bill, the Senate

154. *See id.* § 1034(e).

155. *See id.* § 1037.

156. *See id.* § 1035(b).

157. *See id.* § 1040.

158. *Egg Industry Agree*, *supra* note 141.

159. Greene & Cowan, *supra* note 5, at 17-18.

160. *Id.* summary.

161. 7 U.S.C. § 2132(g) (2006).

162. *See* 7 U.S.C. §§ 1901-1907 (2006).

163. Treatment of Live Poultry Before Slaughter, 70 Fed. Reg. 56624 (Sept. 28, 2005).

164. *Congressman Schrader Introduces Bill to Improve Housing for Egg-Laying Hens and Provide Stable Future for Egg Famers*, CONGRESSMAN KURT SCHRADER (Jan. 23, 2012), <http://schrader.house.gov/index.cfm?sectionid=24&itemid=498>.

165. *S. 3239: Egg Products Inspection Act Amendments of 2012*, GOVTRACK.US, <http://web.archive.org/web/20120705230739/http://www.govtrack.us/congress/bills/112/s3239> (last visited Feb. 14, 2013) [hereinafter *3798 Bill Summary*] (archived version of the bill summary as of July 5, 2012).

rejected her proposal.<sup>166</sup> In late July, the Senate bill was referred to the Committee on Agriculture, Nutrition, and Forestry. Although the Committee held hearings about the 2012 EPIA Amendments on July 26, 2012, as of this article's final submission date, the bill has not progressed any further in either the House or the Senate.<sup>167</sup>

At time of writing, the House and Senate versions of the 2012 EPIA Amendments were identical. The bill's purpose is "[t]o provide for a uniform national standard for the housing and treatment of egg-laying hens."<sup>168</sup> The bill uniformly requires all egg producers within two years of enactment to: (1) provide their laying hens with "acceptable air quality, which does not exceed more than 25 parts per million of ammonia during normal operations;"<sup>169</sup> (2) forbid "forced molting," including "feed-withdrawal or water-withdrawal molting;"<sup>170</sup> and (3) provide humane euthanasia only when "necessary," using "a method deemed 'Acceptable' by the American Veterinary Medical Association."<sup>171</sup> The bill also requires special labels on commercially-sold eggs to reflect how they were produced and the egg producer's molting, air quality, and euthanasia standards.<sup>172</sup>

The bill provides brown-egg laying hens with more space than white-egg laying hens. After enactment, egg producers must implement the bill's requirements in three phases: (1) no later than six years after enactment, commercial egg producers must have at least 25% of their hens either in new caging devices or existing caging devices that meet the 4-16 year requirements explained below;<sup>173</sup> (2) no later than 12 years after enactment, commercial egg producers must have at least 55% of their hens either in new caging devices or existing caging devices that provide a minimum of 130 square inches of floor space per brown-egg laying hen and 113 square inches per white-egg laying hen;<sup>174</sup> and (3) as of December 31, 2029 (17 years after 2012), all egg-laying hens must meet the bill's final requirements.<sup>175</sup>

The proposed statute applies its housing, treatment, and labeling requirements to three separate categories: (1) "existing caging devices," which refers to "any caging device that was [already] continuously in use for the production of eggs in commerce" at the time of the statute's enactment;<sup>176</sup> (2) "new caging devices," which refers to caging devices that were not existing caging devices at the time of

166. Statement on Farm Bill Passage, DIANNE FEINSTEIN: US SENATOR CA. (JUNE 21, 2012), <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=7861789d-d938-4be0-89b1-e10724ddd4cf>.

167. *3798 Bill Summary*, *supra* note 165.

168. H.R. 3798, 112th Cong. (2012), <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3798ih/pdf/BILLS-112hr3798ih.pdf>.

169. *Id.* at 9 ll. 24-25, 10 ll. 1-4.

170. *Id.* at 10 ll. 5-9. Feed-withdrawal molting prevents hens from eating to induce molting. *Id.* at 5 ll. 8-10. Water-withdrawal molting prevents hens from drinking water to induce molting. *Id.* at 6 ll. 1-3.

171. *Id.* at 10 ll. 10-16.

172. *Id.* at 2 ll. 24-25, 3 ll. 1-3.

173. *Id.* at 12 ll. 4-12.

174. *Id.* at 12 ll. 13-21.

175. *Id.* at 12 ll. 22-25, 13 ll. 1-2.

176. *Id.* at 5 ll. 1-4, 6 ll. 12-16.

enactment,<sup>177</sup> and (3) “caging devices in California,” which refers to all California caging devices.<sup>178</sup> Eggs produced in these three categories of cages (or without cages) must be marked with “adequate housing-related labeling,” which is “a conspicuous, legible marking on the front or top of a package of eggs accurately indicating the type of housing that the egg-laying hens were provided during egg production.”<sup>179</sup>

### 1. Existing Caging Devices

The bill’s requirements do not apply to “recently-installed existing caging devices,”<sup>180</sup> “hens already in production,”<sup>181</sup> and “small producers.”<sup>182</sup> Other than those three exemptions, egg producers have fifteen years after enactment to implement, in existing caging devices, all of the bill’s required “adequate environmental enrichments,”<sup>183</sup> which are “adequate perch space, dust bathing or scratching areas, and nest space, as defined by the Secretary of Agriculture, based on the best available science, including the most recent studies available at the time that the Secretary defines the term.”<sup>184</sup>

As previously discussed, although the desire to keep the law up-to-date with the latest scientific research is commendable, such language also provides the USDA with considerable discretion over its implementing regulations. In particular, “best available science” might become a moving target open to interpretation by cherry-picked expert opinion.<sup>185</sup> Nevertheless, the American Veterinary Medical Association, the non-profit veterinary professional organization, supports the bill.<sup>186</sup> Eggs obtained from existing caging devices that do not yet contain the required “adequate environmental enrichments” must be labeled as “eggs from caged hens.”<sup>187</sup>

Minimum space requirements for each hen shall also be implemented in existing caging devices over time. From 4-15 years after enactment, each brown-egg laying hen must have a minimum of 76 square inches of individual floor space and each white-egg laying hen must have a minimum of 67 square inches of

177. *Id.* at 5 ll. 20-22, 6 ll. 17-21.

178. *Id.* at 4 ll. 14-18, 6 ll. 22-25.

179. *Id.* at 2 ll. 24-25, 3 ll. 1-3. Two labels pertain to eggs produced by chickens not housed in cages: “[e]ggs from cage-free hens,” *id.* at 3 ll. 9-12, and “[e]ggs from free-range hens” that were also “provided with outdoor access.” *Id.*

180. Existing caging devices “first placed into operation between January 1, 2008, and December 31, 2011,” are grandfathered exemptions by the law for eighteen years after enactment. *Id.* at 11 ll. 4-13.

181. Farmers don’t have to worry about applying any of the bill’s requirements to hens that were “already in egg production” on the date of enactment. *See id.* at 11 ll. 14-21.

182. A farmer “who buys, sells, handles, or processes eggs or egg products solely from one flock of not more than 3,000 egg-laying hens” is exempt from the law. *Id.* at 11 ll. 22-24, 12 ll. 1-2.

183. *Id.* at 6 ll. 12-16.

184. *Id.* at 2 ll. 15-23.

185. *See supra* text accompanying note 56.

186. *See* Am. Veterinary Med. Ass’n, *Animal Welfare and Human Bond Issues*, AVMA.ORG, <https://www.avma.org/Advocacy/National/Congress/Pages/AnimalWelfare-HumanAnimalBondIssues.aspx> (last visited Feb. 6, 2013); *see also* Greene & Cowan, *supra* note 5, at 10.

187. H.R. 3798 at 3 ll. 23-24, 4 ll. 1-4.

individual floor space.<sup>188</sup> After the statute has been in effect for over 15 years, each brown-egg laying hen must have a minimum of 144 square inches of individual floor space and each white-egg laying hen must have a minimum of 124 square inches of individual floor space.<sup>189</sup>

## 2. *New Caging Devices*

Egg producers have nine years after enactment to implement each of the bill's required "adequate environmental enrichments" in new caging devices.<sup>190</sup> After enactment, any new cages must provide a minimum of 76 square inches of floor space per brown-egg laying hen and 67 square inches of floor space per white-egg laying hen.<sup>191</sup> In addition, any new cages must be "capable of being adapted to accommodate adequate environmental enrichments."<sup>192</sup>

Eggs obtained from new enriched caging devices that contain "adequate environmental enrichments" and a minimum of 116 square inches of floor space for each brown-egg laying hen and a minimum of 101 square inches of floor space for each white-egg laying hen are labeled "[e]ggs from enriched cages."<sup>193</sup> If the eggs from new enriched cages either do not contain all of the "adequate environmental conditions" or do not provide at least 116 square inches per brown-egg laying hen and at least 101 square inches for each white-egg laying hen, then they must be labeled "[e]ggs from caged hens."<sup>194</sup>

Minimum space requirements for each hen shall also be implemented in new caging devices over time. From 3-6 years after enactment, each brown-egg laying hen must have a minimum of 90 square inches of individual floor space and each white-egg laying hen must have a minimum of 78 square inches of individual floor space.<sup>195</sup> From 6-9 years, the minimum space increases 12 square inches per brown-egg laying hen (to 102) and 12 square inches per white-egg laying hen (to 90).<sup>196</sup> From 9-12 years, the minimum space increases 14 square inches per brown-egg laying hen (to 116) and 11 square inches per white-egg laying hen (to 101).<sup>197</sup> From 6-9 years, the minimum space increases 14 square inches per brown-egg laying hen (to 130) and 12 square inches per white-egg laying hen (to 113).<sup>198</sup> Finally, after 15 years, the minimum space increases 14 square inches per brown-egg laying hen (to 144) and 11 square inches per white-egg laying hen (to 124).<sup>199</sup>

## 3. *Caging Devices in California*

California egg producers have approximately six years (until December 31,

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188. *Id.* at 4 ll. 12-13, 6 ll. 4-5, 7 ll. 5-12.

189. *Id.* at 4 ll. 12-13, 6 ll. 4-5, 7 ll. 13-18.

190. *Id.* at 6 ll. 17-21.

191. *Id.* at 10 ll. 17-24.

192. *Id.* at 11 ll. 1-2.

193. *Id.* at 3 ll. 13-22.

194. *Id.* at 3 ll. 23-24, 4 ll. 1-8.

195. *Id.* at 7 ll. 22-25, 8 ll. 1-5.

196. *Id.* at 8 ll. 6-13.

197. *Id.* at 8 ll. 14-21.

198. *Id.* at 8 ll. 22-25, 9 ll. 1-4.

199. *Id.* at 9 ll. 6-11.

2018, in the bill) to implement all of the bill's required "adequate environmental enrichments."<sup>200</sup> Minimum space requirements for each hen shall also be implemented in California caging devices over time. From 3-8 years after enactment, each brown-egg laying hen must have a minimum of 134 square inches of individual floor space and each white-egg laying hen must have a minimum of 116 square inches of individual floor space.<sup>201</sup> After nine years, the minimum space increases 14 square inches per brown-egg laying hen (to 144) and 11 square inches per white-egg laying hen (to 124).<sup>202</sup>

Given that neither the UEP-HSUS bill that would establish national egg-laying standards nor the King Amendment that would eviscerate Prop 2 passed during the last Congress,<sup>203</sup> it will be critical to see how both pending pieces of legislation are treated in the next Congress. As far as the UEP-HSUS cease-fire, which expired on December 31, 2012,<sup>204</sup> at time of submission, HSUS has yet to announce officially whether it plans to extend the cease-fire.<sup>205</sup> According to unofficial news reports, HSUS shall try again.<sup>206</sup>

UEP spokesman Mitch Head has been quoted as saying that UEP and HSUS have committed to extending the cease-fire until the bill passes.<sup>207</sup> One of the most outspoken hound opponents of the bill, Humane Farming Association National Director, Bradley Miller, concluded that HSUS now has no "face-saving option" other than continuing its alliance with UEP. "Wayne Pacelle can't very well revive the aborted [state] ballot measures," commented Miller. "He killed those in exchange for nothing but air. Nor can he initiate a new campaign to outlaw egg factory cages because he's now on record as endorsing them."<sup>208</sup>

Miller may be right that HSUS has no choice but to re-introduce the bill. Pacelle wrote to UEP in April 2012:

We've worked very hard on the HSUS-UEP agreement in Congress, and we are putting the full weight of our organization behind the agreement. . . . Passing the federal legislation and codifying the UEP-HSUS agreement is our top priority, and we look forward to working with you and the country's egg producers to get this bill over the finish line.<sup>209</sup>

At present, the 2012 EPIA Amendments appear to have little chance of passing. During the last Congress, a congressional monitoring service at one time calculated the bill as having a 10% chance of passage based upon the following factors:

A cosponsor is the chairman of a committee to which the bill has been referred . . . .  
The sponsor is in the majority party and at least one third of the bill's cosponsors

200. *Id.* at 6 ll. 22-25.

201. *Id.* at 9 ll. 12-19. The time period is listed in the 2012 bill as "beginning January 1, 2015, and through December 31, 2020." *Id.*

202. *Id.* at 9 ll. 20-23.

203. See 3798 *Bill Summary*, *supra* note 165.

204. See *Wheat*, *supra* note 137.

205. See *id.*; see also *infra* note 217.

206. See *infra* notes 217-219 and accompanying text.

207. See *Wheat*, *supra* note 137.

208. *Id.* (internal quotation marks omitted).

209. *Letter from Pacelle to Gregory*, *supra* note 24, at 2.

are from the minority party. . . . Companion bill H.R. 3798: There is at least one cosponsor from the majority party and one cosponsor outside of the majority party . . . . Companion bill H.R. 3798: A cosponsor in the minority party has a high leadership score . . . . Companion bill H.R. 3798: 6+ cosponsors serve on a committee to which the bill has been referred . . . .<sup>210</sup>

One of the bill's fiercest fox opponents, Vice President of Government Affairs of the National Cattlemen's Beef Association, Colin Woodall, predicted the likelihood of the bill's passage as remote.<sup>211</sup> While Woodall conceded that the bill had some bipartisan support, he asserted that most Republicans are against it and that the November 2012, election has not changed Congress's political dynamics. Because the bill did not pass this past congressional session, it will have to be reintroduced during the next session. Woodall believes it might be harder for the bill to build momentum for a second attempt because congressmen tend to think twice about sponsoring the same bill again.<sup>212</sup> The American Farm Bureau Federation added that they "worked with most animal agricultural organizations to defeat the egg legislation during the previous [legislative] session. Since our policy hasn't changed, we would have the same position if similar legislation were introduced in the [next] Congress."<sup>213</sup>

Paul Shapiro, the Senior Director of the HSUS's Factory Farming Campaign, conceded that the fox opposition from the American Farm Bureau Federation, the National Cattlemen's Beef Association, the National Pork Producers Council, and other big meat and dairy trade groups has been "extremely influential."<sup>214</sup> Pacelle promised them payback, writing that HSUS has "concentrated [its] more adversarial efforts on the pork industry, both because of its inhumane production practices and its attempts to subvert the HSUS-UEP agreement."<sup>215</sup> Likewise, UEP admitted that their "ability to pass this legislation may be limited based upon the strong opposition from others in agriculture that seem to feel it is their right to determine the future of egg farmers."<sup>216</sup>

According to a recent industry news report, Schrader and Feinstein are going to reintroduce their bills in the 113th Congress.<sup>217</sup> The new bills apparently shall have added language making explicit that the national standard is only for hen housing and inapplicable to other agricultural industries such as beef, pork, or other poultry producers.<sup>218</sup> UEP recognized the need to amend the bills "to make it clear

210. See *3798 Bill Summary*, *supra* note 165.

211. See *Wheat*, *supra* note 137.

212. See *id.*

213. E-mail from Kelli Ludlum of the Am. Farm Bureau Fed'n to Lucinda Valero re [no subject] (Jan. 18, 2013) (on file with the authors).

214. *Id.*

215. *Letter from Pacelle to Gregory*, *supra* note 24, at 2.

216. *UEP 2012 NAIA Presentation*, *supra* note 27, at 27.

217. Rod Smith, *HSUS-UEP Housing Pact Heading into New Congress*, FEEDSTUFFS (Jan. 29, 2013), <http://www.feedstuffs.com/ME2/dirmod.asp?sid=F4D1A9DFCD974EAD8CD5205E15C1CB42&nm=Breaking+News&type=news&mod=News&mid=A3D60400B4204079A76C4B1B129CB433&tier=3&nid=AA223F2608234C5EA39C9C2BD03AF0DC> (on file with the authors).

218. *Id.*



this is only an egg bill [without] an impact upon other farm animals.”<sup>219</sup>

Even National Public Radio commented in July 2012, that “[s]o far, the red-meat lobby is winning.”<sup>220</sup> In addition, NPR observed that hound opposition to the bill was not “getting much air time on Capitol Hill.”<sup>221</sup> So how have the rest of the foxes and hounds reacted?

#### IV. DOG EAT DOG?: THE PACK AND THE SKULK REACT

The authors’ own rather informal survey of peer foxes and hounds reveals initial reactions across the board.<sup>222</sup> It is premature to attempt to discern any pattern or trend. While some foxes and hounds have publicly supported the compromise, other foxes and hounds have publicly criticized it.

Perhaps not surprisingly the most supportive foxes are egg producers and the most supportive hounds are HSUS’ allies.<sup>223</sup> They arguably have the most to gain from the federal legislation.

Critical foxes and hounds generally have mentioned three reasons. First, they fear that—notwithstanding UEP and HSUS’s promises of limited scope—if the 2012 EPIA Amendments become federal law, the Amendments might set a precedent for further federal regulation of agricultural animal welfare. Foxes in other livestock and cattle industries with animal practices similar to battery cages fear further federal meddling.<sup>224</sup> On the other hand, hounds fear that the federal

219. *UEP 2012 NAIA Presentation*, *supra* note 27, at 11.

220. Dan Charles, *U.S. Pig and Cattle Producers Trying to Crush Egg Bill*, NAT’L PUB. RADIO (July 11, 2012), <http://www.npr.org/blogs/thesalt/2012/07/10/156551903/pig-and-cattle-producers-trying-to-crush-egg-bill>.

221. *Id.*

222. The following results are based upon the authors’ e-mail correspondence and telephone calls with the surveyed organizations’ public relations officers. These records are on file with the *Maine Law Review*. Copies are available upon request.

223. Supportive foxes and hounds (some of the organizations evade easy categorization) include: UEP, HSUS, American Veterinary Medical Association, Association of Avian Veterinarians, American Association of Avian Pathologists, Humane Society Veterinary Medical Association, American Society for the Prevention of Cruelty to Animals, National Federation of Humane Societies, Consumer Federation of America, National Consumers League, Compassion in World Farming, World Society for the Protection of Animals, Humane League, Compassion Over Killing, Mercy for Animals, Farm Sanctuary, In Defense of Animals, Animal Legal Defense Fund, Center for Food Safety, Center for Science in the Public Interest, Humane Society Legislative Fund, State & Regional Egg Farmer & Agricultural Groups, Arkansas Egg Council, Association of California Egg Farmers, Colorado Egg Producers Association, Florida Poultry Federation, Georgia Egg Association, Michigan Allied Poultry Industries, Michigan Agri-Business Association, New England Brown Egg Council, North Carolina Egg Association, Ohio Egg Processors Association, Rocky Mountain Farmers Union, State & Local Humane Societies, Animal Welfare Society (Maine), Oregon Humane Society, Animal Humane Society (Minnesota), Humane Society of Charlotte (North Carolina), Humane Society of Berks County (Pennsylvania), SPCA Cincinnati (Ohio), Richmond SPCA (Virginia), SPCA for Monterey County (California), SPCA of Texas, Sacramento SPCA (California), Washington Humane Society, and Dr. Jeffrey Armstrong, President, California Polytechnic State University. *See UEP 2012 NAIA Presentation*, *supra* note 27, at 24-25; List of EPIA Endorsements, HUMANE SOC’Y U.S., <http://www.humanesociety.org/assets/pdfs/farm/egg-products-inspection-act-endorse.pdf> (last visited Mar. 17, 2013).

224. Livestock associations opposing federal legislation include National Cattlemen’s Beef Association, National Pork Producers Council, American Farm Bureau Federation, American Sheep

law will essentially cement the belief that caging chickens is humane and therefore paralyze the thus-far successful nationwide campaign for cage-free eggs.<sup>225</sup> Second, they argue that these federal standards are not based upon the best science and do not allow for future innovations driven by better scientific research.<sup>226</sup> What if future scientific research demonstrates convincingly that some of the law's requirements are either not necessary for, or insufficient to, laying hen welfare? Third, they argue that the cage conversion cost is so high that the federal standards might either force out the small family farmer or increase factory farming.<sup>227</sup>

Finally, a smaller group of foxes and hounds have remained silent or refused to respond to our inquiries.<sup>228</sup> They are still watching from the sidelines. Of this smaller group, perhaps the most notable is the infamous People for the Ethical Treatment of Animals (PETA). PETA claims to be "the largest animal rights organization in the world, with more than 3 million members and supporters."<sup>229</sup> PETA did not respond to any of the authors' inquiries about the UEP-HSUS collaboration and does not appear to mention the pending legislation on their website.<sup>230</sup>

#### V. UNNATURAL RELATIONS: WHY ARE NATURAL ENEMIES ACTING LIKE BEST FRIENDS?

When faced with a Nixon-in-China moment like the UEP-HSUS agreement, the subsequent reactions of surprised friends, enemies, lawmakers, and the public are dictated not by unknowable actual intentions but rather by their own beliefs—whether accurate or not—of UEP and HSUS's intentions. Here, perception *is* reality. In other words, whether their initial shock over the Nixon-in-China moment will turn into a Nixon-in-China effect depends upon their own subjective explanations of the collaboration. If friends, enemies, lawmakers, and the public believe that the Nixon-in-China moment was motivated by positive intentions favorable to their interests, then they are more likely to attempt or encourage similar collaboration. If, however, they believe that the Nixon-in-China moment was motivated by negative intentions adverse to their interests, then they are unlikely to attempt or encourage similar collaboration.

By their very nature, Nixon-in-China moments often concern legal change in

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Industry Association, National Farmers Union, National Turkey Federation, and National Milk Producers Federation. See *UEP 2012 NALA Presentation*, *supra* note 27, at 23.

225. See Humane Farming Association (HFA), STOP THE ROTTEN EGG BILL, <http://stoptherotteneggbill.org> (last visited Mar 17, 2013).

226. See *id.*

227. See *supra* note 224.

228. People for the Ethical Treatment of Animals (PETA), Animal People, Compassionate Action for Animals, American Agricultural Law Association, National Federation of Humane Societies, Poultry Science Association, and Humane Farm Animal Care.

229. *About PETA: Our Mission Statement*, PETA, <http://www.peta.org/about/default.aspx> (last visited Feb. 15, 2013).

230. Aware of its inflammatory reputation, PETA might avoid public positions on animal welfare issues so as not to distract the public from the issues. For arguments that PETA is an extremist organization, see, for example, *A PETA Army of Child Activists?*, CENTER CONSUMER FREEDOM (Apr. 17, 2012), <http://www.consumerfreedom.com/2012/04/a-peta-army-of-child-activists/>.

highly divisive areas of law.<sup>231</sup> Therefore, legal theories that attempt to explain how and why legal change occurs in highly divisive areas of law might shed light on bystanders' reactions to such a Nixon-in-China moment. Specifically, four legal theories appear particularly relevant: (1) overlapping consensus; (2) incompletely theorized agreement; (3) the interest-convergence thesis; and (4) the clucking theorem.

#### A. *Overlapping Consensus*

First, overlapping consensus provides the most positive, idealistic interpretation of the UEP-HSUS collaboration. An overlapping consensus is

John Rawls's answer to the critical question of how to accommodate "a diversity of conflicting and irreconcilable—and what's more, reasonable—comprehensive doctrines." . . . By definition, an overlapping consensus must be "a freestanding view starting from the fundamental ideas of a democratic society and presupposing no particular wider doctrine." . . . An overlapping consensus somehow must transcend the reasonable yet irreconcilable ideological disagreement among conflicting policies such that both sides will buy into its framework in spite of their severe division. Ideally, it would be "possible for all to accept" the overlapping consensus "as true or reasonable from the standpoint of their own comprehensive view, whatever it may be."<sup>232</sup>

If the UEP-HSUS collaboration is indeed an overlapping consensus, then UEP and HSUS truly understand that compromise ultimately best furthers the public good. Although sacrificing some of their own respective goals—for UEP, consumer choice in egg production,<sup>233</sup> and for HSUS, heightened protections for fewer hens,<sup>234</sup> they both benefit from the money and resources saved by no longer fighting.

In short, UEP and HSUS would recognize the benefits of getting along. If their agreement is an overlapping consensus, then third parties could accept at face value the soaring rhetoric about the deal. As Pacelle explained, "[t]his legislation is a compromise between HSUS and UEP, with both organizations stretching themselves in order to find a solution that's good for animal welfare, for the industry, and for the nation as a whole."<sup>235</sup> He later elaborated, "I think we are changing the debate about animal agriculture in our country, and showing that we can forge mutually acceptable solutions that will both provide security to producers and better treatment for animals."<sup>236</sup> Pacelle and Gene Gregory both wrote about their deal as if it was an overlapping consensus:

231. See Briscoe & Safford, *supra* note 15, at 463.

232. Will Rhee, *Entitled to Be Heard: Improving Evidence-Based Policy Making Through Audience and Public Reason*, 85 IND. L.J. 1315, 1318 n.20 (2010) (quoting Rawls, *supra* note 42, at 36, 40, 150).

233. For further discussion, see *supra* notes 83-86 and accompanying text.

234. For further discussion, see *supra* notes 141-144 and accompanying text.

235. UEP & HSUS, Press Release, Senate Bill Introduced to Improve Housing for Egg-Laying Hens and Provide Stable Future for Egg Farmers, May 24, 2012, at 2, [http://www.humanesociety.org/news/press\\_releases/2012/05/hen\\_bill\\_052412.html](http://www.humanesociety.org/news/press_releases/2012/05/hen_bill_052412.html).

236. *Letter from Pacelle to Gregory*, *supra* note 24, at 1.

It's not often in Washington that two political adversaries come together and find a solution that is good for everyone involved and good for the nation . . . This is the sort of problem-solving the country needs. Congress should enthusiastically approve this legislation for the good of farmers, consumers, and hundreds of millions of birds.<sup>237</sup>

Any observer who believes that this Nixon-in-China moment reflects an overlapping consensus would be most likely to encourage or attempt similar collaborations. Belief in an overlapping consensus, therefore, would most likely contribute to the Nixon-in-China effect.

### *B. Incompletely Theorized Agreement*

Second, if an overlapping consensus provides the most positive, idealistic interpretation, then an incompletely theorized agreement is the opposite. In contrast, an incompletely theorized agreement provides a more cynical, realistic interpretation of the UEP-HSUS collaboration. An incompletely theorized agreement avoids discussing deep principles and instead focuses upon shallow self-interest.<sup>238</sup>

For example, in an incompletely theorized agreement, UEP and HSUS would intentionally avoid discussing deep questions, such as, if eating animals or animal products is justified or if egg farming is a noble profession. Instead, they would focus on you-scratch-my-back-I'll-scratch-yours mutual self-interest. Conjecture over UEP and HSUS's possible mutual self-interest could range from the considerable time, money, and resources saved by no longer fighting state-to-state, to creating positive public relations and corporate and political contacts, to making UEP more powerful than other foxes and HSUS more powerful than other hounds.

Both agricultural and animal welfare organizations that subscribe to the belief that “the friend of my enemy is my enemy,” appear to view the deal as an incompletely theorized agreement. The National Cattlemen's Beef Association considers UEP's agreement with HSUS to be “a deal with the Devil.”<sup>239</sup> The National Pork Producers Council and other frightened foxes fear a “slippery slope” where passage of the 2012 EPIA Amendments, which they call the “Federal Farm Takeover Bill,” could set a precedent for federal animal welfare regulation over all American agriculture.<sup>240</sup> They believe that UEP has sold its friends down the river to save its own hide.

In a similar manner, hostile hounds, like the Humane Farming Association, believe that HSUS has sold its friends and—more importantly—defenseless chickens down the river for its own selfish populist and political gains. Humane Farming Association Director, Bradley Miller, declared that HSUS “is now trying to undo Proposition 2. They've switched sides. They've sold out. They're betraying not only California voters but millions of hens that are locked in horrific

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237. Pacelle & Gregory, *supra* note 11.

238. See Sunstein, *supra* note 43, at 1735-36.

239. Dan Charles, *U.S. Pig And Cattle Producers Trying To Crush Egg Bill*, NAT'L PUB. RADIO (July 11, 2012), <http://www.npr.org/blogs/thesalt/2012/07/10/156551903/pig-and-cattle-producers-trying-to-crush-egg-bill>.

240. *Id.*

conditions.”<sup>241</sup>

For both passage of the federal bill and promoting the Nixon-in-China effect, UEP and HSUS don’t want their friends, enemies, lawmakers, and the public to believe that their Nixon-in-China moment was merely an incompletely theorized agreement motivated solely by selfish expediency. Lawmakers and the public are less likely to support what appears to be naked self-interest than the noble self-sacrifice of an overlapping consensus.<sup>242</sup> Furthermore, peer organizations are unlikely to follow UEP and HSUS’s lead with further compromises if they believe such compromises were motivated primarily by narrow self-interest.<sup>243</sup>

### C. *The Interest-Convergence Thesis*

Third, the scope of the interest-convergence thesis is much broader than both overlapping consensus and incompletely theorized agreement. Instead of focusing upon the immediate agreement before the parties, the interest-convergence thesis provides axiomatic commentary on all of American society. Paralleling the conviction of some black Americans that the United States must rely upon permanent racism to function as a society,<sup>244</sup> the animal version of this thesis cynically posits that American law will protect animal welfare only when it furthers US economic self-interest.<sup>245</sup>

The interest-convergence thesis is oversimplified and problematic. It is called a thesis because it is inherently unprovable.<sup>246</sup> It also excessively aggregates human and animal interests into oversimplified monoliths.<sup>247</sup> Furthermore, it ignores all past legal progress.<sup>248</sup> Finally, the thesis discounts the agency of individuals, organizations, lawmakers, and the public.<sup>249</sup>

Much like the permanence of racism, you either believe that a majority of Americans will never selflessly change the law to help animals or you don’t. The interest-convergence thesis helps explain why some foxes harbor conspiracy theories about HSUS’s true motivation for its Nixon-in-China moment. If HSUS truly believed in the interest-convergence thesis, then HSUS would understand that the only way to improve animal welfare legally in the United States is through incremental change that appears to further economic self-interest and through deception over HSUS’s endgame. If a majority of Americans will only support animal welfare reforms when the new law appears to promote their own self-interest, then HSUS cannot candidly admit that its ultimate goal is the elimination of all animal agriculture and forcing all Americans to become vegan.

Although many foxes might harbor these conspiratorial beliefs, two outspoken voices are Nebraska Governor Dave Heineman and the Center for Consumer

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241. Pfeifer, *supra* note 99.

242. See Sunstein, *supra* note 43, at 1736.

243. *Id.* at 1761-64.

244. See Bell, *supra* note 44.

245. See Satz, *supra* note 45, at 65.

246. See Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 149 (2011).

247. See *id.* at 164-65.

248. See *id.* at 165.

249. See *id.*

Freedom. Both appear to suspect HSUS of subscribing to some form of the interest-convergence thesis.

Governor Heineman didn't hide his views of HSUS as a wolf in sheep's clothing: "This is about our American way of life and the HSUS wants to destroy the dream for farmers and ranchers in this country."<sup>250</sup> Referring to HSUS, Heineman boasted, "[w]e will kick their butt out of Nebraska. We don't want them in Nebraska. They don't represent our values."<sup>251</sup>

Despite HSUS's agreement with UEP to limit the federal legislation to egg farmers, Heineman and the Nebraska cattle industry believe that HSUS is playing a deceptive long game with a vegan end goal. In a joint public appearance with the Governor, the Nebraska Cattlemen's Executive Vice-President said, "[i]f they come after pork and poultry, it won't be long before they come after us. And they are."<sup>252</sup> We Support Agriculture Executive Director, Michele Ehresman, who also appeared with the Governor, accused HSUS of having a vegan agenda.<sup>253</sup> The American Farm Bureau Federation claimed that the federal legislation was being driven "largely on the political goals of an animal rights group that seeks eventually to shut down animal agriculture by government mandate."<sup>254</sup>

Perhaps HSUS's most vocal critic is the Center for Consumer Freedom, the creator of a website called "HumaneWatch.org."<sup>255</sup> The Center for Consumer Freedom is a nonprofit organization funded by the restaurant and farming industries.<sup>256</sup> The Center for Consumer Freedom's motto is "promoting personal responsibility and protecting consumer choices."<sup>257</sup> HumaneWatch.org's banner displays the subtitle: "Keeping a watchful eye on the Humane Society of the United States."<sup>258</sup>

The Center for Consumer Freedom claims that HSUS has "a stealth vegan agenda to get rid of eggs, cheese, milk, and meat."<sup>259</sup> "Even if you bought every farm chicken in America a treadmill, a chaise lounge, and an iPad mini," the Center speculates, "HSUS still wouldn't like the fact that [the hens] were being raised in captivity to feed humans."<sup>260</sup> The Center characterized UEP as suffering from

250. Andrew Bottrell, *Heineman: People don't want HSUS in Nebraska*, NORTH PLATTE TELEGRAPH (Sept. 26, 2012), [http://www.nptelegraph.com/news/heineman-people-don-t-want-hsus-in-nebraska/article\\_db9c36ed-958b-59c1-8adb-40a70112016a.html](http://www.nptelegraph.com/news/heineman-people-don-t-want-hsus-in-nebraska/article_db9c36ed-958b-59c1-8adb-40a70112016a.html).

251. *Id.*

252. *Id.*

253. Kris Allen, *Heineman Warns: Don't Be Fooled HSUS is Anti-Agriculture*, N. PLATTE POST (Sept. 26, 2012), <http://www.northplattepost.com/2012/09/26/heineman-warns-dont-be-fooled-hsus-is-anti-agriculture/>.

254. American Farm Bureau Federation, Press Release, *Egg Legislation Replaces Science with Politics* (Jan. 24, 2012), <http://www.fb.org/index.php?action=newsroom.news&year=2012&file=nr0124.html>.

255. *Why HumaneWatch?*, HUMANEWATCH, <http://humanewatch.org/index.php/why/>.

256. *About Us*, CENTER FOR CONSUMER FREEDOM, <http://www.consumerfreedom.com/about/>.

257. *Id.*

258. HUMANEWATCH, <http://humanewatch.org> (last visited Feb. 7, 2013).

259. *The Great American Egg Drama, Continued*, HUMANEWATCH (June 19, 2011), [http://www.humanewatch.org/index.php/site/comments/the\\_great\\_american\\_egg\\_drama\\_continued/](http://www.humanewatch.org/index.php/site/comments/the_great_american_egg_drama_continued/).

260. *HSUS Hurts Family Farmers*, HUMANEWATCH (Dec. 7, 2012), [http://humanewatch.org/index.php/site/post/hsus\\_hurts\\_family\\_farmers/](http://humanewatch.org/index.php/site/post/hsus_hurts_family_farmers/).

Stockholm Syndrome<sup>261</sup> when UEP decided to collaborate with HSUS because “Pacelle and HSUS are not honest partners for farmers in any industry.”<sup>262</sup> Admittedly, the Center has managed to uncover anecdotal evidence that HSUS might possess a long-term vegan agenda.<sup>263</sup> Regarding eggs, however, Pacelle has admitted that HSUS has “always favored cage-free as a production strategy. . . .”<sup>264</sup>

Like Governor Heineman, the Nebraska cattle industry, and the Center for Consumer Freedom, foxes, who are convinced that HSUS hides the ulterior aspiration of vegan national domination, are unlikely to contribute to a Nixon-in-China effect.

#### D. *The Clucking Theorem*

When a Nixon-in-China moment happens, it is impossible to know with certainty why any party—be it a warrior-turned-peacemaker or a bystander—is behaving the way it is. Organizations may have multiple, even conflicting, reasons to act. Moreover, one cannot read the minds of the key decision-makers. After a Nixon-in-China moment, the only evidence any party possesses with which to assess the other parties’ possible motives is its own perceptions or preconceptions, past experience with the other parties, and, perhaps most influentially, what they say—their own proffered explanation of why they made the deal or why they support or oppose the deal.

Talk, however, is cheap. As Saint Thomas Aquinas observed, what parties do is more important than what they say.<sup>265</sup> As overlapping consensus, incompletely-theorized agreement, and the interest-convergence thesis demonstrate, a party might explain its actions publicly one way but hide an entirely different justification. Such misleading or even deceitful speech, then, might be considered

261. *The Egg Industry’s Stockhold Syndrome*, HUMANEWATCH (Sept. 10, 2012), [http://humanewatch.org/index.php/site/post/the\\_egg\\_industrys\\_stockholm\\_syndrome/](http://humanewatch.org/index.php/site/post/the_egg_industrys_stockholm_syndrome/). Stockholm syndrome is “a paradoxical psychological phenomenon wherein a positive bond between hostage and captor occurs that appears irrational in light of the frightening ordeal endured by the victims. In essence, eventually, the hostage views the perpetrator as giving life by simply not taking it.” Additionally, the hostage identifies with the captor and may comply with the captor’s demands. See *Understanding Stockholm Syndrome*, FBI LAW ENFORCEMENT BULL. 11-12 (Jul. 2007), [http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2007-pdfs/july071eb.pdf/at\\_download/file](http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2007-pdfs/july071eb.pdf/at_download/file).

262. *Id.*

263. HumaneWatch has assembled quotes from HSUS executives made at various hound conferences that HumaneWatch claims demonstrates HSUS’s secret motives. For example, HumaneWatch quotes HSUS Vice-President Miyun Park as saying:

We don’t want any of these animals to be raised and killed [for food] . . . unfortunately we don’t have the luxury of waiting until we have the opportunity to get rid of the entire industry. And so because of that, a number of organizations including the Humane Society of the United States . . . work on promoting veganism . . . Are we saying that cage-free eggs are the way to go? No, that’s not what we’re saying. But we’re saying it’s a step in the right direction.

*The Visual HSUS, Part 6*, HUMANEWATCH (July 26, 2011), [http://www.humanewatch.org/index.php/site/post/the\\_visual\\_hsus\\_part\\_6/](http://www.humanewatch.org/index.php/site/post/the_visual_hsus_part_6/).

264. WAMU 88.5 FM American University Radio NPR, *supra* note 37.

265. See SAINT THOMAS AQUINAS, *SUMMA THEOLOGICA*, Questions 110-13 (1987), <http://www.basilica.org/pages/ebooks/St.%20Thomas%20Aquinas-Summa%20Theologica.pdf>.

undesirable speech because other parties cannot take it at face value.

The conventional response is that the cure for undesirable speech is more speech.<sup>266</sup> But particularly with legal change, parties might have an incentive to “cluck,” to obfuscate and to confuse the discussion over the legal change “to promote and preserve some perceived interest, triggering other parties to counter-cluck or to decline to cluck altogether.”<sup>267</sup> The clucking theorem—developed through a qualitative analysis of the public discourse over changing U.S. backyard chicken laws from 2007-2010—“states that certain aspects of debates and controversies constitute costly externalities. The cost of these externalities could be lowered by procedural rules and social norms.”<sup>268</sup>

With regard to the third-party evaluation of the Nixon-in-China moment here, the clucking theorem further complicates a bystander’s evaluation of the unlikely collaboration. Are UEP and HSUS clucking? Are some of their former friends? Former enemies? Undecided peers, lawmakers, and the general public must decide whether to believe UEP and HSUS’s laudatory public explanations of their Nixon-in-China moment or to discount them as clucking.

Cluck you? To cluck or not to cluck, that then becomes the question. Regardless of whether or not undecided peers, lawmakers, and the general public believe UEP and HSUS are clucking, those bystanders must decide whether to express publicly the true reasons behind their support (*i.e.*, not to counter-cluck) or to disdain the Nixon-in-China effect (*i.e.*, to counter-cluck).

The multi-layered complexity of the various discourses between UEP and HSUS; between UEP and other foxes; between HSUS and other hounds; and between collaborating fox and hound, lawmakers, and the public is evident when considering the nine hundred pound rooster in the room—the unhealthy genetics of factory-farmed chickens. Farm Forward’s Founder and CEO, Aaron Gross, explained:

[T]he joint HSUS-UEP proposal has not opened a dialog—not yet—about the unhealthy genetics of the birds themselves, which I and many welfare experts . . . would argue is the biggest welfare problem in the poultry industry. It is in fact largely because of changes in the genetics of laying hens introduced by the intensive breeding techniques of the modern industry that these birds have ended up in cages in the first place. When these intensive breeding techniques managed to double the numbers of eggs hens laid each year, they also compromised the immune systems of the birds. One way the industry chose to deal with these genetically-induced immune problems was by isolating birds in cages so that they would be less likely to transmit disease. Cages, enriched or not, are an attempt to mitigate welfare problems introduced by the Frankenstein genetics of today’s laying hens . . . . Both industry and animal advocates know this but few are talking about it because we have been, not without reason, focused on issues of

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266. Orbach & Sjoberg, *supra* note 46, at 4 (collecting authorities).

267. *Id.* at 7.

268. *Id.* at 10. An “externality” is an economic term for the uncompensated “impact of one person’s actions on the well-being of a bystander.” N. GREGORY MANKIW, *PRINCIPLES OF MICROECONOMICS* 200 (1998).



how these birds are raised.<sup>269</sup>

All four aforementioned theories can provide different possible explanations for UEP and HSUS's joint silence over this question of laying hen genetics. If we believe their agreement is an overlapping consensus, we might encourage patience. Don't snuff out the flickering flame of cooperation prematurely. Let's pass the federal law, develop more fox and hound cooperation, then address this important issue.

In contrast, if we see the collaboration as an incompletely theorized agreement, we might suspect that both UEP and HSUS might have agreed to wash their hands of this issue in exchange for a selfish sellout. Hound adherents of the interest-convergence thesis might seize upon this issue, concluding we need to focus more on human selfishness via consumer safety, and less on fickle human altruism for animals they are going to eat anyway. Finally, maybe the UEP-HSUS agreement is actually a form of clucking to avoid this real issue. Or maybe hounds who believe they are winning the war are counter-clucking by bringing up this obvious deal-breaker. Perhaps they still believe unconditional victory remains within their grasp, so they don't want to compromise and thus are trying to sabotage the peace process with what foxes might consider unreasonable demands.

Who is right? At the end of the day, the only opinion that matters is that of the general public and their democratically-accountable lawmakers. Only time will tell which discourse ultimately wins the battle of popular opinion.

#### CONCLUSION

First impressions can be lasting. While the initial reactions of peers, lawmakers, and the public to UEP and HSUS's collaboration can set the tone for the future, only more data and, most importantly, more time will tell if the 2012 EPIA Amendments result in any lasting legal change. In future research, we also hope to identify for comparison similar Nixon-in-China moments where former adversaries decided to collaborate to change the law. In addition, we intend to review the interdisciplinary conflict studies literature<sup>270</sup> and specific historical

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269. Gross, *supra* note 26 (citations omitted). See also *What is Hybrid Poultry?*, FARM FORWARD <http://www.farmforward.com/features/hybrid>. Table egg productivity has improved over the last ten years without much of an increase in the laying flock. Greene & Cowan, *supra* note 5, at 2. Compare Janet E. Fulton, *USDA Animal Genomics Program: The View from the Chicken Coop*, 10 BMC GENOMICS, Supp. 2, 2009 at S1 ("The last few years have been exciting times in the chicken genetics community. . . . These tools, resources and philosophies have all opened many more avenues for poultry research than were available just 10 years ago.") with TEMPLE GRANDIN & CATHERINE JOHNSON, ANIMALS MAKE US HUMAN: CREATING THE BEST LIFE FOR ANIMALS 207-34 (2009). Grandin and Johnson write,

Chickens have several serious welfare problems that come from bad genetics and can be fixed only with good genetics. The biggest problem in many intensively raised animals is pushing the animal's biology for more and more production. Breeders choose the most productive animals—the fastest growing, the heaviest, the best egg layers, and so on—and selectively breed just those animals. Bad things always happen when an animal is overselected for any single trait. Nature will give you a nasty surprise.

*Id.* at 217.

270. See, e.g., DONALD BLACK, MORAL TIME (2011); DONALD BLACK, THE BEHAVIOR OF LAW (1976).

examples of leaders who went from warrior to peacemaker with the same foe-turned-friend.<sup>271</sup>

Many Americans believe that our democracy is more politically polarized than ever.<sup>272</sup> Whether or not such perception reflects reality, a growing number of Americans pine for greater political consensus. In his farewell address after losing re-election, Senator Richard Lugar (R-Ind.), then the most senior Republican and the third most senior Senator, concluded that the current political dialogue was “one of the least constructive I have ever witnessed.”<sup>273</sup> Lugar added that “[g]overnance requires adaptation to shifting circumstances. It often requires finding common ground with Americans who have a different vision than your own. It requires leaders who believe . . . that their first responsibility to their constituents is to apply their best judgment.”<sup>274</sup>

In particular, Americans may pine for more Nixon-in-China moments where former bitter adversaries decide to collaborate for the common good. This simple example of UEP and HSUS’s cooperation, however, demonstrates that even for apparent Nixon-in-China moments, the discourse between multiple concerned parties is more complicated than simply saying, can’t we all just get along?

Two years after UEP and HSUS decided to work together for national egg-laying standards, it is premature to conclude whether there shall be any actual Nixon-in-China effect among their fellow foxes and hounds that might catalyze additional cooperation. In fact, as overlapping consensus, incompletely theorized agreement, the interest-convergence thesis, and the clucking theorem demonstrate, the early stages of a potential Nixon-in-China moment act as a self-fulfilling Rorschach test where the public, lawmakers, friends, and adversaries can see whatever they want to see in the initial collaboration. Only further research can identify if this self-fulfilling prophecy will ever shift to widespread constructive compromise.

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271. History is filled with examples of leaders who began as warriors but later in life made peace with the very enemies they had previously fought. See, e.g., HUGH A. DEMPSEY, *MASKEPETOON: LEADER, WARRIOR, PEACEMAKER* (2011) (Canadian native American tribal chief); Andrew Hunt, *Sharon’s change from warrior to peacemaker remarkable*, KITCHENER-WATERLOO REC., Jan. 14, 2006, at A19 (2006 WLNR 777142) (Israeli Prime Minister Ariel Sharon); Sharon Shaw, *Gen. Colin Powell: Complex warrior turned peacemaker*, CHI. DEFENDER, Jun. 24, 2000, at 19 (2000 WLNR 7432375) (US Chairman of the Joint Chiefs of Staff and Secretary of State Colin Powell); *Begin: Warrior and Peacemaker*, SOUTH FLA. SUN-SENTINEL, Mar. 10, 1992, at 12A (1992 WLNR 4212270) (Israeli Prime Minister Menachem Begin).

272. See, e.g., *Partisan Polarization Surges in Bush, Obama Years, Trends in American Values: 1987-2012*, PEW RES. CENTER PEOPLE & PRESS (June 4, 2012), <http://www.people-press.org/2012/06/04/section-1-understanding-the-partisan-divide-over-american-values/> (suggesting that Americans surveyed are more divided on partisan lines now than ever before over the past 25 years).

273. Maureen Groppe, *Richard Lugar’s parting words: lawmakers should work together to govern, not just focus on re-election*, INDY STAR (Dec. 12, 2012), <http://www.indystar.com/article/20121212/NEWS05/121212030/Richard-Lugar-s-parting-words-lawmakers-should-work-together-govern-not-just-focus-re-election>.

274. *Id.*