

**RITUAL SLAUGHTER IN THE “RITUAL BUBBLE”:
RESTORING THE WALL OF SEPARATION BETWEEN
CHURCH AND STATE**

*By Bruce Friedrich**

Introduction.....	223
I. Ritual Slaughter in the United States: Factual & Legal Background ...	224
A. The Statutory, Regulatory, and Policy Status of Ritual Slaughter...	224
B. The Science of Ritual Slaughter.....	229
C. Case Study: Agriprocessors	232
II. Revisiting <i>Jones v. Butz</i> and a Religion Clauses Challenge to FSIS Regulations.....	234
A. The Ritual Slaughter Exemption Violates the Establishment Clause	234
1. The Ritual Slaughter Exemption Probably has a Secular Purpose	235
2. The Ritual Slaughter Exemption Advances Two Religions and Inhibits Others.....	237
3. The Ritual Slaughter Exemption Excessively Entangles Government with Religion.....	240
4. The <i>Lemon</i> Test is Applicable to Ritual Slaughter Analysis. .	243
5. The Kosher Labeling Cases	244
B. <i>Jones v. Butz</i>	247
III. Solution: A Petition for Rulemaking	249
A. The Problem of Severability	249
B. The Need for Ritual Oversight: A Petition for Rulemaking	250
Conclusion	253

“I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between Church & State.”

Thomas Jefferson¹

“Notwithstanding any other provision of this chapter, in order to protect freedom of religion, ritual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this chapter.”

The Humane Slaughter Act²

INTRODUCTION

Somewhere in America, there is an observant Jew or Muslim—we’ll call her Lisa—who is purchasing kosher or halal meat. She takes great pride in her faith’s long tradition of compassion for animals, and in the reverential requirements of ritual slaughter. If she is a Muslim, she has heard her imam speak of the compassion of Muhammad and eternal salvation for animals; she knows that the Qur’an declares that “[a]ll the beasts that roam the earth and all the birds that wing their flight are communities like your own They shall all be gathered before their lord.”³ If she is Jewish, she has heard her Rabbi speak of how kosher slaughter is much more compassionate than conventional slaughter, and she knows about tza’ar ba’ale chayyim, the Jewish prohibition against causing unnecessary pain to one of God’s creatures.⁴ Jewish or Muslim, she has been told since she was very young that the meat she is purchasing is more humane than meat from conventional slaughterhouses. She would be surprised to learn that animals who are killed for kosher or halal meat—and only kosher or halal meat—have significantly less protection from abuse than animals who are killed conventionally.

The Humane Slaughter Act of 1958 (“HMSA”) requires that animals slaughtered in the United States be rendered insensible to pain before their throats are slit. But it includes an exemption for ritual slaughter, which is defined by the Act as “a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument.”⁵ In their execution of the law, the United States Department of Agriculture (“USDA”) has created a “ritual bubble,” during which it says that its own

* I would like to offer my thanks to Dena Jones from the Animal Welfare Institute for her groundbreaking work on the topics of humane and ritual slaughter, without which this article would not have been possible, and to Prof. Lisa Heinzerling for your excellent comments and suggestions, which made this a much better article.

1. Letter from Thomas Jefferson to the Danbury Baptists (Jan. 1, 1802), <http://perma.cc/Q6S3-HH5P>.

2. Humane Methods of Slaughter Act (HMSA) § 6, 7 U.S.C. § 1906 (2012).

3. *Cattle* 6:38 (The Qur’an)

4. AARON S. GROSS, *THE QUESTION OF THE ANIMAL AND RELIGION: THEORETICAL STAKES, PRACTICAL IMPLICATIONS* 153 (2014).

5. 7 U.S.C § 1902.

inspectors have no authority at all to ensure that animals are humanely treated. USDA's refusal to regulate ritual slaughter in that bubble cannot be reconciled with the humane intention of the federal slaughter law, and it also cannot be reconciled with the Establishment Clause of the United States Constitution.

In part one of this paper, I explain the statutory and regulatory scheme that applies to ritual slaughter, examine the science behind the ritual exemption to the humane slaughter requirement, and consider a real-life controversy over a specific kosher slaughterhouse that was the subject of an undercover investigation. In part two, I argue that the ritual slaughter exemption as interpreted by USDA violates the Establishment Clause of the United States Constitution. In part three, I suggest that the best way forward on ritual slaughter is for USDA to promulgate regulations to require that it is conducted as humanely as possible. This solution would preserve the ritual slaughter exemption, thus not inhibiting religious freedom, while removing most of the Establishment Clause problems that are presented by USDA's current interpretation of the law.

I. RITUAL SLAUGHTER IN THE UNITED STATES: FACTUAL & LEGAL BACKGROUND

In this part, I review the legal framework that finds USDA refusing to ensure that ritually slaughtered animals are killed in as humane a manner as possible, the science of ritual slaughter, and a particularly disturbing undercover investigation, which puts into stark relief the problem of the ritual slaughter exemption.

A. *The Statutory, Regulatory, and Policy Status of Ritual Slaughter*

In 1958, Congress passed the HMSA, which declares "the policy of the United States [is] that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods."⁶ The law explains what Congress found to constitute humane slaughter:

No method of slaughtering or handling in connection with slaughtering shall be deemed to comply with the public policy of the United States unless it is humane. Either of the following two methods of slaughtering and handling are hereby found to be humane: (a) in the case of cattle, calves, horses, mules, sheep, swine,

6. *Id.* § 1901.

and other livestock, all animals are rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut; or (b) by slaughtering in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument and handling in connection with such slaughtering.⁷

With regard to religious slaughter, the law concludes in its final section:

Notwithstanding any other provision of this chapter, in order to protect freedom of religion, ritual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this chapter. For the purposes of this section the term “ritual slaughter” means slaughter in accordance with section 1902(b).⁸

The 1958 law did not include a provision for USDA inspection of slaughterhouses or any enforcement mechanism, and the only sanction against a slaughterhouse that violated humane slaughter requirements was a procurement ban (i.e., the federal government would not purchase meat from noncompliant slaughterhouses).⁹ Thus, USDA’s original HMSA regulations included exclusively information about acceptable methods of slaughter and nothing related to enforcement.¹⁰

Twenty years later, Congress passed The Humane Slaughter Act of 1978, which for the first time provided administrative and criminal sanctions for inhumane slaughter of mammals,¹¹ though it exempts poultry.¹² Congress directed USDA to promulgate regulations to ensure that Congress’ humane

7. *Id.* § 1902.

8. *Id.* § 1906.

9. Humane Methods of Slaughter Act of 1958, Pub. L. No. 85-765, § 3, 62 Stat. 698, 862–63 (1958) (*repealed by* Humane Slaughter Act of 1978, Pub. L. No. 95-445, § 5(b), 92 Stat. 1069, 1069 (1978) (codified as 7 U.S.C. § 1904)).

10. Humane Slaughter of Livestock; Designation of Methods, 24 Fed. Reg. 1549, 1549–53 (Mar. 3, 1959).

11. 7 U.S.C. § 1906.

12. Ritual slaughter of poultry is entirely unregulated with regard to cruelty, because USDA has thus far refused to promulgate any regulations (ritual or not) to ensure that poultry are humanely treated. For an extended treatment of this issue, including an argument that USDA should cover poultry under the HMSA. Bruce Friedrich, *Still in the Jungle: Poultry Slaughter and the USDA*, 23 N.Y.U. ENVTL. L.J. 245 (2015).

slaughter intention became reality, and also empowered the agency to hand down both administrative and criminal sanctions against slaughterhouses where animals “have been slaughtered or handled in connection with slaughter . . . by any method not in accordance with the Act.”¹³

In response to this new humane slaughter mandate, USDA promulgated the first regulations aimed at enforcing the HMSA.¹⁴ However, those regulations did not include anything related to ritual slaughter. This was because, according to the agency, HMSA “exempted from its provisions, the slaughtering and handling or preparation of livestock for slaughter in connection with a religious ritual.”¹⁵ In response to comments about ritual slaughter, USDA explained again that HMSA “specifically exempts certain ritual slaughter and the handling or other preparation of livestock for such ritual slaughter from its requirements. The regulations are therefore similarly inapplicable to such ritual slaughter and handling.”¹⁶ Thus, the Code of Federal Regulations does not discuss ritual slaughter at all.¹⁷

The Food Safety Inspection Service (“FSIS”), which is the branch of USDA that oversees humane slaughter enforcement, very briefly interpreted its mandate to encompass ritual slaughter oversight. The original version of FSIS’s “Humane Slaughter of Livestock” directive, issued in October 2003, stated:

Inspection program personnel may act under section 1902(b) of the HMSA if, after the animal’s throat is cut, it struggles or bellows for an extended period of time or otherwise exhibits consciousness, or if the act of slaughter includes throat sawing, hacking, or multiple slicing of the neck with a sharp instrument. Such incidents are examples of noncompliance because either the cut of the carotid arteries is not instantaneous and simultaneous, or the animals do not lose consciousness by anemia of the brain.¹⁸

This is the most reasonable interpretation of section 1902(b), which defines ritual slaughter as “a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and

13. 21 U.S.C. §§ 603, 610, 676 (1996).

14. Food Safety and Quality Service Humane Slaughter Regulations, 44 Fed. Reg. 68,809, 68,809 (Nov. 30, 1979).

15. *Id.* at 68,809–10.

16. *Id.* at 68,812.

17. 9 C.F.R. § 313.

18. U.S. DEP’T OF AGRIC., FOOD SAFETY & INSPECTION SERV., FSIS DIRECTIVE 6900.2, HUMANE HANDLING AND SLAUGHTER OF LIVESTOCK 7 (2003), <http://perma.cc/633K-7W6B> [hereinafter FSIS DIRECTIVE 6900.2]

instantaneous severance of the carotid arteries with a sharp instrument and handling in connection with such slaughtering.”¹⁹ This definition leaves room for regulatory oversight to ensure the use of a sharp knife, a swift loss of consciousness, and so on. And the only exempted handling, according to the plain text of the Act, is handling that is specifically related to this definition of ritual slaughter; handling outside this mandate can and should be regulated to ensure humane treatment in accordance with federal policy.

Unfortunately, FSIS changed its mind less than six weeks later, when Directive 6900.2 was reissued to clarify the instructions in Part V by creating a ritual bubble in which anything goes.²⁰ Specifically, the Directive’s section on ritual slaughter has removed the just-quoted section and instead requires:

- A) Inspectors “to request the establishment manager to inform them about what type of ritual slaughter (e.g., Kosher, Halal) will be performed, when it will be performed, and who will perform the ritual slaughter”;
- B) Inspectors to ensure that pre-slaughter regulatory requirements are adhered to (e.g., water availability, condition of pens and ramps, use of electric prods);
- C) Inspectors “not to interfere in any manner with the preparation of the animal for ritual slaughter, including the positioning of the animal, or the ritual slaughter cut and any additional cuts by or under the supervision of the religious authority to facilitate bleeding”;
- D) Inspectors “to verify that after the ritual slaughter cut and any additional cut to facilitate bleeding, no dressing procedure (e.g., head skinning, leg removal, ear removal, horn removal, opening hide patterns) is performed until the animal is insensible”;
- E) “If [inspectors] have concerns, [that] they are to contact the District Office (DO) through supervisory channels.”²¹

Although the law says with regard to ritual slaughter that each animal slaughtered should “suffer[] loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument,”²² USDA declines to ensure use of sharp instruments, instant severance of arteries, or anything else that would ensure compliance with this very clear statutory obligation. Now, even if animals

19. HMSA § 2, 7 U.S.C. § 1902 (2012).

20. U.S. DEP’T OF AGRIC. FOOD AND SAFETY INSPECTION SERV., FSIS DIRECTIVE 6900.2, REV. 1, HUMANE HANDLING AND SLAUGHTER OF LIVESTOCK 1 (2003), perma.cc/68A8-EHNR.

21. FSIS DIRECTIVE 6900.2, *supra* note 18, at 7–8.

22. 7 U.S.C. § 1902.

are bellowing, struggling, and fully conscious as the ritual slaughterer hacks and saws away at animals' throats, USDA does not consider there to be a violation of the HMSA.

At another point in the Directive, immediately after stating that “[l]ivestock are to be rendered insensible to pain (unconscious) by a single blow or gun shot or an electrical, chemical, or other means that is rapid and effective” and also stating that “[t]he stunning area is to be designed and constructed to limit the free movements of the animals and to allow the stunning blow to have a high degree of accuracy,” USDA clarifies: “NOTE: For those animals that are ritually slaughtered, stunning effectiveness will not be evaluated, unless stunning methods (9 CFR 313) are an accepted part of that religious slaughter protocol and are inhumanely applied before or after the ritual slaughter cut.”²³ In other words, religious authorities dictate whether they will be subject to oversight or not; as noted below, a fair number of Halal slaughter facilities allow for stunning. Where that is true, FSIS will oversee the process.²⁴

Similarly, non-ritual slaughter requires that inspectors “verify the establishment’s procedures to appropriately and effectively administer stunning methods that are rapid and effective and that produce unconsciousness in the animals before the animal is shackled, hoisted, thrown, cast, or stuck.”²⁵ Inspectors during ritual slaughter “are not to interfere in any manner with the preparation of the animal for ritual slaughter, including the positioning of the animal, or the ritual slaughter cut and any additional cuts”²⁶ Thus, it remains legal in ritual slaughter to hoist animals into the air by one leg before their throats are slit—which, in addition to being cruel, makes an accurate slice across the neck exceedingly difficult.²⁷

An FSIS training module released in May 2014 explains that

The ritual slaughter cut and the handling and restraint that immediately precedes that cut is often called the “ritual bubble.” The activities that occur within that “ritual bubble” fall under Section 1906 of the HMSA, and are protected as part of the Constitutional

23. FSIS DIRECTIVE 6900.2, *supra* note 18, at 16.

24. Clearly, this provides a perverse disincentive to religious authorities; if they refuse to allow stunning, there is no regulation. If they allow it, they open themselves up for citations.

25. U.S. DEP’T OF AGRIC., FOOD SAFETY & INSPECTION SERV., FSIS DIRECTIVE 6900.2, HUMANE HANDLING & SLAUGHTER OF LIVESTOCK 15 (Rev. 2 2011).

26. *Id.* at 7.

27. See FSIS TRAINING MODULE, HUMANE HANDLING OF LIVESTOCK AND GOOD COMMERCIAL PRACTICES IN POULTRY 4 (May 8, 2014), <http://perma.cc/8Y3R-ARC9> [hereinafter TRAINING MODULE] (explaining acceptable slaughter methods).

right of religious freedom. . . . Agency personnel don’t enforce humane handling regulations within that “ritual bubble.”²⁸

On the next page, USDA reiterates the point:

When you perform your [inspection] verification activities, you will observe all [inspection] categories except stunning effectiveness. An exception to this is when stunning methods are an accepted part of that religious slaughter protocol. So, if stunning methods are an accepted part of that establishment’s religious slaughter protocol, you will verify that the stunning method is effectively applied.²⁹

That said, there appears to be at least some purported recourse for an inspector who witnesses hideous cruelty during the “ritual bubble.” The training manual explains that “if you see something during the ‘ritual bubble’ that concerns you, contact your immediate supervisor and the District Veterinary Medical Specialist (DVMS) for guidance on what action can be initiated.”³⁰

What the DVMS is supposed to do with the information, i.e., “what action can be initiated,” is unclear. The final key FSIS document related to ritual slaughter is the DVMS Work Methods Directive, which reiterates that “[t]he requirement that animals be rendered unconscious before being shackled or cut does not apply to those animals slaughtered according to religious ritual requirements”³¹ The only authority a DVMS has vis-à-vis ritual slaughter is to ensure that plants are not violating their own self-imposed requirements (e.g., a Halal slaughter plant might allow stunning, in which case stunning oversight would be allowed): “If the establishment conducts ritual slaughter, the DVMS is to assess the establishment procedures to determine whether they are in conformance with the appropriate dietary laws and the Humane Methods of Slaughter Act.”³² Again, this means that ritual slaughter facilities determine whether they are subject to HMSA obligations within the “ritual bubble.”

B. The Science of Ritual Slaughter

28. *Id.*

29. *Id.* at 5.

30. *Id.* at 4.

31. U.S. DEP’T OF AGRIC., FOOD SAFETY & INSPECTION SERV., FSIS DIRECTIVE 6910.1 REVISION 1, DISTRICT VETERINARY MEDICAL SPECIALIST–WORK METHODS 8 (REV. 1 2009), [hereinafter FSIS DIRECTIVE 6910.1], <http://perma.cc/WJP2-DRWG>.

32. *Id.*

According to the HMSA, “Ritual Slaughter” is “a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument.”³³ USDA explains that

[a]n example would be kosher slaughter. In common practice, each animal is shackled by a hind leg and hoisted into the air or the animal is cut while restrained in a special pen prior to hoisting. The animal is fully conscious when the stick or cut takes place. The cut is done by a Shochet (slaughterer) chosen from the community, trained in the laws of the orthodox religion, and supervised by a rabbi in his area. The cut is made with a razor sharp knife called a Chalef that is honed after each cut.³⁴

Of course, this is what kosher slaughter is supposed to be; but, as noted, USDA does not ensure training for the Shochet, a sharp knife, or anything else.

The only other ritual slaughter process currently overseen by USDA is Halal slaughter, in which “a person of the Islamic faith or a designee performs the ritual cut. A prayer to Allah is recited during the procedure. You may see a lot of variation in how Halal slaughter is done. Many religious authorities will accept stunning either before or after the ritual slaughter cut.”³⁵

It is impossible that ritual slaughter, even if done perfectly, could be as humane as well-conducted conventional slaughter, which requires that “all animals are rendered insensible to pain by a single blow . . . that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut.”³⁶ Most critically, no matter how quickly an animal bleeds out, pain will be absent when an animal is instantly rendered insensible from a stunning device.³⁷

According to the U.K. government’s Farm Animal Welfare Council, animals who are slaughtered without stunning will feel “very significant pain and distress” from the moment their throats are slit, until they lose consciousness.³⁸ Where conventional slaughter requires that animals be

33. 7 U.S.C. § 1902.

34. TRAINING MODULE, *supra* note 27, at 4.

35. *Id.*

36. 7 U.S.C. § 1602(a).

37. Professor the Lord Trees & Hannah Jordan, *Animal Welfare and Non-Stun Slaughter: Key Facts*, VETERINARY POL’Y RES. FOUND. 11–12 (July 22, 2014), <https://perma.cc/G38J-3RW7> [hereinafter VPRF] (follow VPRF Animal Welfare and Non Stun Slaughter Factfile hyperlink).

38. Robert Uhlig, *Ban Urged on Kosher and Halal Butchery*, TELEGRAPH, (June 11, 2003, 12:01 AM), <http://perma.cc/Q55V-HXQL>; *see also* VPRF, *supra* note 37, at 13 (citing other

rendered instantly insensible through stunning, ritual slaughter causes significant suffering for however long is required for animals to lose consciousness. According to recent studies, time to insensibility will average between eight to twenty seconds, but will often last for a minute or even longer.³⁹

The consensus that non-stun slaughter is cruel is strong enough that despite the religious issues at stake, at least eight European states—including Switzerland, Denmark, and Sweden—do not allow slaughter without stunning because they hold it to be cruel.⁴⁰ Five more states—including Luxembourg and Germany—have not practiced it in years.⁴¹ While the U.K. allows non-stun slaughter, it prohibits live shackling, requires that animals be upright and restrained in a specific manner that ensures a maximum likelihood of a clear and effective cut, requires inspection of knives and oversight to ensure “uninterrupted severance of both carotid arteries and jugular veins,”⁴² and demands that animals be “protect[ed] from any avoidable pain, suffering, agitation, injuries or contusions”⁴³

Even with these regulatory requirements, there is a spirited debate in the U.K. about whether non-stun slaughter should be banned altogether. All of the mainstream animal groups support a ban, including charities that support eating meat, like the Royal Society for the Prevention of Cruelty to Animals and Compassion in World Farming.⁴⁴ The British Veterinary Association also supports a ban on humane grounds,⁴⁵ as do the Federation of Veterinarians in Europe and the Humane Slaughter Association.⁴⁶

Of course, these groups want to ban non-stun slaughter even with robust oversight that ensures a proper cut, bans shackle-and-hoist, and minimizes undue suffering.⁴⁷ Obviously, shackling and hoisting a 1,350 pound cow is

sources that have found non-stunned animals feel pain after the throat is cut).

39. CB Johnson et al., *A Scientific Comment on the Welfare of Domesticated Ruminants Slaughtered Without Stunning*, 63 N.Z. VETERINARY J. 58–65 (2015); see also VPRF, *supra* note 37, at 12 (finding that time to unconsciousness for 174 cattle averaged twenty seconds but took as long as four and a half minutes).

40. VPRF, *supra* note 37, at 3.

41. *Id.*

42. *Id.*

43. *Id.* at 3.

44. Caroline Wyatt, *Should Ritual Slaughter Be Banned in the UK?*, BBC NEWS (Feb. 15, 2015), <http://perma.cc/V33M-TW7V>.

45. *Id.*

46. VPRF, *supra* note 37, at 15–16 (“The BVA view is that all animals should be stunned before slaughter FVE is of the opinion that the practice of slaughtering animals without prior stunning is unacceptable under any circumstances and that animals should be effectively stunned before slaughter. . . . [T]he HSA’s position on the pre-slaughter stunning of animals has always been unequivocal, all animals should be effectively stunned prior to being bled”); *If This is Kosher*. . . , YOUTUBE (Nov. 12, 2010), <https://perma.cc/4ZSZ-SK3R>.

47. VPRF, *supra* note 37, at 15–16.

going to cause her to suffer tremendous pain, and a thrashing animal is going to be hard to stick properly so that both arteries are cut and she bleeds out. These two realities are why the U.K. bans shackle and hoist and requires proper positioning for the cut.⁴⁸

But USDA applies a “ritual bubble” to the entire process, so that shackle-and-hoist is legal, despite there being no accommodation for it in the law. Additionally, there is no oversight at all to determine that arteries are simultaneously and instantaneously severed, that animals are suffering swift loss of consciousness, that knives are sharp, or anything else. USDA has an “anything goes” policy in the ritual bubble, despite the fact that, by its own admission, the only ritually required aspect of the process is that the animal have her throat slit before she is stunned.

C. Case Study: AgriProcessors

In late 2004, the New York Times broke the story of an undercover investigation by People for the Ethical Treatment of Animals (“PETA”) into the largest kosher slaughterhouse in the United States. The plant, called AgriProcessors, produced an estimated sixty percent of the kosher beef and forty percent of the kosher poultry in the United States.⁴⁹

Earlier that day, an “animal-rights group released grisly undercover videotapes . . . showing cows in a major kosher slaughterhouse in Iowa staggering and bellowing in seeming agony long after their throats were cut.”⁵⁰ The story continues,

Immediately after the shochet, or ritual slaughterer, has slit the throat, another worker tears open each steer’s neck with a hook and pulls out the trachea and esophagus. The drum rotates, and the steer is dumped on the floor. One after another, animals with dangling windpipes stand up or try to; in one case, death takes three minutes.⁵¹

University of San Diego Religious Studies Professor Aaron Gross notes that of 230 visible slaughters, at least twenty percent of the animals were still conscious “after having their tracheas and esophagi removed and then being released from the rotating pen in which they were held during slaughter.”⁵²

48. Johnson, *supra* note 39.

49. GROSS, *supra* note 4, at 26–27.

50. Donald G. McNeil, Jr., *Videos Cited in Calling Kosher Slaughterhouse Humane*, N.Y. TIMES (Dec. 13, 2004), <http://perma.cc/AGU5-EJSZ>.

51. *Id.*

52. GROSS, *supra* note 4, at 32.

Based on eyewitness accounts from 1996 and 1998, it seems that these same abuses had been meted out to animals for a minimum of eight years.⁵³

The Times story noted that no one at the facility or its kosher certifier found that the horrible abuse at the plant was a violation of kosher requirements.⁵⁴ Specifically, “the plant’s supervising rabbi said the tapes were ‘testimony that this is being done right.’ And representatives of the Orthodox Union, the leading organization that certifies kosher products, said that while the pictures were not pretty, they did not make the case that the slaughterhouse is violating kosher law.”⁵⁵

AgriProcessors’ stance—that what was depicted on the video was perfect kosher slaughter—never changed, and neither did the Orthodox Union’s stance that nothing on the tape violated kosher requirements.⁵⁶ And while the wider Jewish community was outraged, with key leaders of the largest Jewish denominations supporting PETA and condemning AgriProcessors, kosher certifiers lined up to support the plant. As Dr. Gross explains, “the leadership of all of America’s halakhic forms of Judaism—modern Orthodoxy, Haredi Orthodoxy, and the Conservative movement—have, since the AgriProcessors event, emphasized publically that any degree of cruelty, no matter how egregious, has no impact on the kosher status of the meat.”⁵⁷

Notably, there were ten USDA inspectors in the plant at all times,⁵⁸ and for years, they had not cited the plant for inhumane treatment, since they were under the correct impression that there was nothing they could do. A twelve-page Office of Inspector General review documented laziness (e.g., video-game playing on the job) and bribery (in the form of meat) of inspectors and found that the abuse had been going on “for some time,” but stopped short of indicating that anything documented by PETA was illegal, other than unspecified post-cut dressing procedures.⁵⁹

In fact, PETA documented multiple cuts on conscious animals, hacking away at the throats of conscious animals, and animals dumped from restraints and stumbling around with their tracheas hanging out (“the pulling of the

53. *Id.* at 33.

54. McNeil, *supra* note 50.

55. *Id.*

56. GROSS, *supra* note 4, at 32.

57. See GROSS *supra* note 4, at 34, 42 (“After carefully studying the video . . . [OU experts concluded] that these procedures meet all OU standards to the highest degree, and that the shochtim (rabbinic slaughterers) are all highly proficient, skilled and knowledgeable. Nevertheless . . . the trachea will no longer be removed following shechita, and . . . any animals that appear to have survived the procedure will be promptly stunned or shot.”).

58. Memorandum from Dallas L. Hayden, Special Agent-in-Charge, USDA, to Assistant Deputy Admin., Office of Field Operations, Food Safety Inspection Serv. 2 (Apr. 25, 2005) (on file with the author).

59. *Id.* at 9.

trachea was an approved practice”).⁶⁰ All of this happened in the “ritual bubble,” and so based on the regulations as they stand today, it appears that AgriProcessors did not violate the HMSA, as enforced by USDA. Not unsurprisingly, then, the Assistant United States Attorney for the Northern District of Iowa declined to prosecute the plant.⁶¹

II. REVISITING *JONES V. BUTZ* AND A RELIGION CLAUSES CHALLENGE TO FSIS REGULATIONS

The First Amendment to the United States Constitution declares that “Congress shall make no law respecting an establishment of religion”⁶² According to Establishment Clause jurisprudence, this means that the government cannot pass laws that are designed to support religious practice generally, cannot support specific faiths, and cannot excessively entangle itself in religion. As we will see in this part, USDA’s application of the ritual slaughter exemption violates two of these three principles, and there is no salvation for USDA in the Free Exercise clause.

A. *The Ritual Slaughter Exemption Violates the Establishment Clause.*

It is actually not a close question: the way FSIS enforces ritual slaughter violates the Establishment Clause of the United States Constitution. There are a variety of tests against which courts measure Establishment Clause challenges,⁶³ but by far the most common is the “*Lemon Test*,” which was codified by the Supreme Court in *Lemon v. Kurtzman*.⁶⁴ The test was based on a consideration of all previous case law, and states that: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”⁶⁵ The principle exception to the *Lemon* factors comes when the questioned practice dates back to our Nation’s founding, but for all other circumstances, *Lemon* provides the framework for analysis. Ritual slaughter as administered in the United States fails two of the three *Lemon* prongs and is not constitutionally sound under any existing Supreme Court jurisprudence.

60. *Id.* at 4.

61. *Id.* at 12.

62. U.S. CONST. amend. I.

63. See generally Steven G. Gey, *Reconciling the Supreme Court’s Four Establishment Clauses*, 8 PA. J. CONST. L. 725 (2006).

64. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

65. *Id.* at 612–13 (internal citations omitted).

1. The Ritual Slaughter Exemption Probably has a Secular Purpose.

The ritual slaughter exemption to humane slaughter requirements appears to protect religious freedom, which is different—of course—from actively promoting religion *per se*. While it might sound slightly confusing to say that protecting religious freedom constitutes a legitimate secular purpose, courts have been clear that a statute or regulation will be invalidated based on the purpose prong of *Lemon* only where a government actor was “motivated wholly by religious considerations.”⁶⁶

The most recent Supreme Court case to focus on legislative purpose was *McCreary County v. ACLU*, in which the Court ruled that posting the Ten Commandments in county courthouses violated the Establishment Clause.⁶⁷ In that case, the Court reprised previous case law in which religious purpose was found to disqualify state action, noting that “[i]n each case, the government’s action was held unconstitutional only because openly available data supported a commonsense conclusion that a religious objective permeated the government’s action.”⁶⁸ In response to the county’s attempt to claim a secular purpose to posting the Ten Commandments, the Court noted that “after a host of cases it is fair to add that although a legislature’s stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective.”⁶⁹

Similarly, in *Wallace v. Jaffree*, Alabama amended a statute that allowed for schools to begin each day with a minute of silence for meditation, to include the possibility of voluntary prayer.⁷⁰ The Court could find no reason to add the possibility of prayer other than the promotion of religion.⁷¹ And in *Stone v. Graham*, the Court used only the first prong of *Lemon* to strike down a Kentucky law that required posting of the Ten Commandments in school classrooms, despite the legislature’s claim of secular purpose, and a disclaimer at the bottom of every posted copy.⁷²

66. *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984).

67. *McCreary Cty. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 854, 881 (2005).

68. *Id.* at 862–63.

69. *Id.* at 864 (internal citation omitted); *see also* *Edwards v. Aguillard*, 482 U.S. 578, 586–87 (1987) (“While the Court is normally deferential to a State’s articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham.”).

70. *Wallace v. Jaffree*, 472 U.S. 38, 40 (1985).

71. *Id.* at 56 (“It is the first of these three criteria that is most plainly implicated by this case. As the District Court correctly recognized, no consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose. For even though a statute that is motivated in part by a religious purpose may satisfy the first criterion, the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion”) (internal citation omitted).

72. *Stone v. Graham*, 449 U.S. 39, 40–41 (1980) (“The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments

Of course, in all of these cases, the Court struck down laws that actively promoted religion, rather than laws that simply accommodated religious practice.⁷³ The religious slaughter exemption tracks almost perfectly to the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”)⁷⁴ and the Religious Freedom Restoration Act of 1993 (“RFRA”).⁷⁵ RLUIPA declares that:

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person -- (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.⁷⁶

RFRA dictates more broadly that the federal government cannot substantially burden religious exercise, without applying the same two-part test (compelling interest and least restrictive means).⁷⁷

An Establishment Clause challenge to the RLUIPA reached the Supreme Court, which upheld religious accommodation in institutions by a vote of 9-0⁷⁸ because the law served to lessen a burden that the state had created by putting the individuals into the institution.⁷⁹ The Supreme Court has not considered an Establishment Clause challenge to RFRA, but the law has been upheld by all of the circuit courts that have considered Establishment Clause challenges. For example, the Fifth Circuit held that “[f]or a law to have forbidden ‘effects’ under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence.”⁸⁰ Other

are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact.”)

73. 7 U.S.C. § 1906 (“[I]n order to protect freedom of religion, ritual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this Act.”).

74. Religious Land Use and Institutionalized Persons Act of 2000 § 5, 42 U.S.C. § 2000cc-3 (2000).

75. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993).

76. 42 U.S.C. § 2000cc-1.

77. *Id.* at § 2000bb-1.

78. *Cutter v. Wilkinson*, 544 U.S. 709, 711-12 (2005).

79. *Id.* at 720-21 (“Foremost, we find RLUIPA’s institutionalized-persons provision compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise. . . . RLUIPA protects institutionalized persons who are unable to attend to their religious needs.”).

80. *Flores v. City of Boerne*, 73 F.3d 1352, 1364 (1996) (internal citation and quotation omitted).

circuits have explicitly deferred to this analysis,⁸¹ and the same analysis would likely find in favor of the ritual slaughter exemption vis-à-vis the first prong of *Lemon*.

2. The Ritual Slaughter Exemption Advances Two Religions and Inhibits Others.

However, unlike the RLUIPA and RFRA, which are focused on religion broadly, the ritual slaughter exemption to humane slaughter advances two specific religions in violation of the second prong of the *Lemon* Test. It is rare that government action that explicitly prefers specific religions, as is the case here—and no such government action has ever been upheld by the Supreme Court. The Court will sometimes uphold state support for religious institutions where the support is predicated on something other than religion, e.g., tax exemption for good works, regardless of their religious nature,⁸² Title I services to all (including religious) schools provided by outside teachers,⁸³ or buses to religious schools where buses were provided to all schools.⁸⁴ But it has never upheld a regulation that so explicitly prefers specific faiths, as the HMSA ritual slaughter exemption does.

In fact, as an indication of how rare a regulatory scheme like this one is, the sole Supreme Court case that is on point is *Board of Education of Kiryas Joel Village School District v. Grumet*, in which the Court considered a New York State statute that created a special school district for the Satmar Hasidim, an ultra-orthodox Jewish sect.⁸⁵ All of the Satmar Hasidim’s abled students attended a private religious school, but the sect’s disabled students attended public school, and they were having significant difficulties.⁸⁶ Thus, New York State created a school district for the Satmar Hasidim so that they could create a public school just for the sect’s disabled students. Although the Court was sympathetic with the goals of the legislature, it held that a government could not create a school district for one religion without

81. See, e.g., *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996), *vacated*, 521 U.S. 1114 (1997) (“We defer to the Fifth Circuit’s analysis of why the Act also does not violate the separation of powers or the establishment clause of the First Amendment.” (citing *Flores*, 73 F.3d at 1361–64); *Equal Emp’t Opportunity Comm’n. v. Catholic Univ. of Am.*, 83 F.3d 455, 470 (D.C. Cir. 1996) (“We agree with the Fifth Circuit that RFRA represents nothing more sinister than a ‘legislatively mandated accommodation of the exercise of religion.’” (citing *Flores*, 73 F.3d at 1364).

82. *Walz v. Tax Comm’n of New York City*, 397 U.S. 664 (1970).

83. *Agostini v. Felton*, 521 U.S. 203, 234–35 (1997).

84. *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 17–18 (1947); *but see Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 11 (1989) (finding a Texas sales tax exemption for religious publications violates the Establishment Clause).

85. *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687 (1994); *Texas Monthly*, 489 U.S. at 11.

86. *Id.* at 691–92.

violating the second prong of *Lemon*.⁸⁷ Of utmost concern to the Court was the preference of one specific religion. The Court explained: “[W]hatever the limits of permissible legislative accommodations may be . . . it is clear that neutrality as among religions must be honored.”⁸⁸ Additionally, the Court noted that “a State may not delegate its civic authority to a group chosen according to a religious criterion.”⁸⁹

Sectarian neutrality is a common principle in the Court’s Establishment Clause jurisprudence. For example, in *Estate of Thornton v. Caldor, Inc.*, the Court considered a Connecticut law that required employers to give people of faith their chosen Sabbath day, without any possibility of exception.⁹⁰ The Court felt that such a law obviously promoted religion:

This unyielding weighting in favor of Sabbath observers over all other interests contravenes a fundamental principle of the Religion Clauses, so well articulated by Judge Learned Hand: “The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities.”⁹¹

And in *Texas Monthly, Inc. v. Bullock*, the Court struck down an exemption to state sales taxes for religious books and periodicals, declaring that:

When government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, as Texas has done . . . it “provide[s] unjustifiable awards of assistance to religious organizations” and cannot but “conve[y] a message of endorsement” . . .⁹²

In *Texas Monthly*, the Court nodded to the idea that such an exemption might be permissible if it were necessary as a concession to Free Exercise. In *Corporation of Presiding Bishop v. Amos*, the Court found such a need, and

87. *Id.* at 706–07 (“The anomalously case-specific nature of the legislature’s exercise of state authority in creating this district for a religious community leaves the Court without any direct way to review such state action for the purpose of safeguarding a principle at the heart of the Establishment Clause, that government should not prefer one religion to another, or religion to irreligion.”).

88. *Id.*

89. *Id.* at 698.

90. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 706 (1985).

91. *Id.* at 710.

92. *Texas Monthly*, 489 U.S. at 15.

upheld a blanket religious exemption for nonprofit religious employers from the mandates of Title VII’s prohibition on religious discrimination.⁹³ The Court noted that because the nonprofit organizations that were granted the exception were engaged in promoting religion, this was simply an accommodation of Free Exercise and would be perceived as such.⁹⁴

So we ask ourselves, does the exception to the second prong of *Lemon* laid out in *Amos* apply? I don’t think so. First, *Amos* dealt with an exception for all religions, rather than just a few. There was none of the taking sides that the ritual slaughter exemption entails. Second, the exemption in *Amos* simply tracked common sense: a nonprofit that promotes religion would be significantly burdened in its right to Free Exercise if it were required to hire people of other faiths to carry out its religious purposes.

The Ritual Slaughter exception to the HMSA suffers from precisely the fatal flaws the Court found in *Grumet* and *Caldor*: first, we have a clear violation of the neutrality requirement of the Establishment Clause. While it is true that section 1902(b) exempts

slaughtering in accordance with the ritual requirements of . . . any . . . religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument,”⁹⁵

the only two applicable religions are Judaism and Islam.⁹⁶ Clearly, this law prefers Judaism and Islam, just as Christianity would be preferred by a law that granted a religious exemption to “any religion that, like Christianity, worships Jesus Christ as their personal lord and savior.”

Second, as in *Caldor*, by allowing religious authorities to dictate what is and is not a violation of the law—the law is regulated according to whatever religious authorities say—the government has delegated impermissible authority to religion in a way that cannot be reconciled with adherence to the Establishment Clause; it is clearly promoting religion.

There is one more problem with the ritual slaughter exemption: it puts everyone who eats meat in a position of participation in ritual slaughter,

93. Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 339 (1987).

94. *Id.* at 349 (O’Connor, J., concurring) (“Because there is a probability that a nonprofit activity of a religious organization will itself be involved in the organization’s religious mission, . . . the objective observer should perceive the Government action as an accommodation of the exercise of religion rather than as a Government endorsement of religion.”).

95. 7 U.S.C. § 1902(b).

96. *Supra* Part I.A.

because most of the meat that is slaughtered in a ritual fashion is sold conventionally. The New York Times story about AgriProcessors noted that:

Meat from the AgriProcessors plant can end up in any market or restaurant. Because Jewish law requires that the sciatic nerves and certain fats be cut out, which tears up the meat until it can only be sold as hamburger, the hindquarters of virtually all kosher-killed steers are sold as conventional meat.⁹⁷

Many readers have probably heard that kosher meat comes exclusively from the front half of the cow,⁹⁸ but in fact, more than two-thirds of every cow slaughtered for kosher comes from a part of the animal that cannot be marketed as kosher, and so is marketed conventionally.⁹⁹

As the Court recently explained in *Town of Greece*, “[i]t is an elemental First Amendment principle that government may not coerce its citizens ‘to support or participate in any religion or its exercise.’”¹⁰⁰ But because most of the meat that is slaughtered in kosher and halal slaughterhouses winds up sold conventionally, everyone who eats meat is supporting and participating in, involuntarily and largely unknowingly, ritual slaughter. Of course, meat-eaters could go out of their way to avoid ritually slaughtered meat by, for example, looking for “Certified Humane” or “Animal Welfare Approved” products. However, forcing them to do that clearly entails both: 1) preferring religious practice over a desire to avoid that practice; and 2) preferring certain religions over other religions (or no religion). Even if there is not coercion, there is certainly promotion of religion.

3. The Ritual Slaughter Exemption Excessively Entangles Government with Religion.

Finally, the ritual slaughter exemption to humane slaughter requirements entangles USDA with religion by handing religious authorities the power to determine what does and does not constitute humane slaughter within the ritual bubble, in clear violation of *Lemon*’s third prong. The entanglement prong of *Lemon* requires that a court review all aspects of the government

97. McNeil, *supra* note 50.

98. Rabbi Dr. Ari Z. Zivotofsky, *What’s the Truth about Nikkur Achoraim?*, KASHRUT.COM (2007), <http://perma.cc/ELR8-W6LP>.

99. Abul Taher & Amanda Perthen, *Meat from Cattle Slaughtered in “Cruel” Kosher Method is in Your High Street Burger*, DAILYMAIL.COM (May 8, 2014), <http://perma.cc/5CPC-UBRA>.

100. *Town of Greece v. Galloway*, 134 S.Ct. 1811, 1825 (2014).

action at issue and the degree to which either the state or religion intrudes “into the precincts of the other.”¹⁰¹

Entanglement was the *Lemon* Test prong that proved fatal to the Rhode Island and Pennsylvania statutes in *Lemon* itself, where the Court voided state laws that provided funding to religious schools and teachers in religious schools even though that funding was for secular purposes.¹⁰² The Rhode Island statute provided funds to teachers of secular subjects in religious schools, with the goal of ensuring that students received adequate instruction in those subjects.¹⁰³ Recipients of aid were required to teach exclusively secular courses and use exclusively secular materials; both the funded courses and the funded books also had to be used in the public schools.¹⁰⁴ Nevertheless, the Court found against the statute because of the religious nature of the schools.¹⁰⁵ The Court noted that the buildings contained religious symbols, many of the teachers were people of faith, and the school atmosphere was religious. “In short, parochial schools involve substantial religious activity and purpose. . . . Religious authority necessarily pervades the school system.”¹⁰⁶ Second, the Court worried about the “continuing state surveillance [that] will inevitably be required to ensure that these restrictions are obeyed”¹⁰⁷ The Court voiced similar concerns with the Pennsylvania statute, noting both the religious nature of the schools and “intimate and continuing relationship between church and state” that would be required to ensure that money was going exclusively for secular instruction.¹⁰⁸ In both cases, the Court found the laws to be unconstitutional because “the cumulative impact of the entire relationship arising under the statutes in each State involve[d] excessive entanglement between government and religion.”¹⁰⁹

Similarly, in *Larkin v. Grendel’s Den, Inc.*, the Court invalidated a Massachusetts statute that allowed churches to prevent liquor stores from opening within 500 feet of them.¹¹⁰ The issue for the Court was not the prohibition of liquor stores near churches, but rather was the ability of Churches to make the decision about liquor stores, which placed churches in a regulatory role that should be, the Court held, the exclusive province of the

101. *Lemon*, 403 U.S. at 614.

102. *Id.* at 602.

103. *Id.* at 607.

104. *Id.* at 608.

105. *Id.* at 614.

106. *Id.* at 616–17.

107. *Id.* at 619.

108. *Id.* at 622.

109. *Id.* at 614.

110. *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 117, 127 (1982).

state.¹¹¹ The Court wrote: “This statute enmeshes churches in the exercise of substantial governmental powers contrary to our consistent interpretation of the Establishment Clause” where “the core rationale underlying the Establishment Clause is preventing ‘a fusion of governmental and religious functions.’”¹¹²

Cases where the Court has not found excessive entanglement include: *Walz v. Tax Commission of City of New York*, where the Court allowed for property tax exemptions for houses of worship because the exemption applied not only to religious institutions but to all similar nonprofit organizations.¹¹³ *Tilton v. Richardson*, where the Court allowed grants to religious colleges because the grants would not require follow-up and the colleges were only incidentally religious;¹¹⁴ and *Bowen v. Kendrick*, in which the Court upheld counseling grants to religious organizations because the grants were going for nonreligious activities to organizations that were, as in *Tilton*, not necessarily sectarian.¹¹⁵

With regard to the ritual slaughter exemption from HMSA, we do not have an exemption that applies to both religious and nonreligious institutions or a program that aids in secular functions only, as in *Walz*, *Tilton*, and *Bowen*. Instead, we have both of the flaws of the programs in *Lemon* and the violation of core principles found in *Larkin*. First, the ritual slaughter process is at least as pervasively religious as the religious instruction and atmosphere discussed regarding the schools at issue in *Lemon*. In kosher slaughterhouses, rabbis oversee the process in cooperation with USDA inspectors and specially trained religious slaughterers kill the animals. In halal slaughterhouses, prayers are said over the animals. In both cases, the entire process is deeply religious. Second, the oversight is even more “intimate and continuing” than that found to be fatal to the statutes in *Lemon*—both USDA and religious authorities are on site at all times. Finally and most crucially, we have the precise problem that the Court flagged in *Larkin*: By granting religious authorities the power to prescribe what is and is not legal, and then requiring inspectors to enforce what the religious authorities prescribe, this total entanglement violates the “core rationale underlying the Establishment

111. *Id.* at 126.

112. *Id.*

113. *Walz*, 397 U.S. at 698.

114. *Tilton v. Richardson*, 403 U.S. 672, 688 (1971) (“There are no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution’s expenditures on secular as distinguished from religious activities.”).

115. *Bowen v. Kendrick*, 487 U.S. 589, 616, 622 (1988) (“[T]here is no reason to assume that the religious organizations which may receive grants are ‘pervasively sectarian’ in the same sense as the Court has held parochial schools to be. There is accordingly no reason to fear that the less intensive monitoring involved here will cause the Government to intrude unduly in the day-to-day operation of the religiously affiliated AFLA grantees.”).

Clause,” which is “preventing a fusion of governmental and religious functions.”¹¹⁶

4. The *Lemon* Test is Applicable to Ritual Slaughter Analysis.

The way USDA oversees ritual slaughter in the United States fails two of *Lemon*’s third prong, but the Supreme Court does sometimes look beyond the *Lemon* Test when considering Establishment Clause challenges to statutes and regulations.¹¹⁷ On the same day that the *McCreary* Court explicitly applied *Lemon*, the *McCreary* dissenters won Justice Breyer’s support for their decision to ignore (but not overrule) *Lemon* in favor of a different analysis.¹¹⁸ In *Van Orden v. Perry*, the Court considered the constitutionality of a Ten Commandments display near the Texas state capital.¹¹⁹ The Court ruled that the display did not violate the Establishment Clause because of “both . . . the nature of the monument and . . . our Nation’s history.”¹²⁰ Specifically, the Court found it significant that “the Decalogue” has played a unique and critical role in the United States since our founding, and also that they “have an undeniable historical meaning” that transcends their religious meaning.¹²¹ The Court also found it significant that the display was part of a monument on the capitol grounds, and thus was—to the degree that it promoted religion at all—entirely passive.¹²²

A divided majority of the Court applied similar analysis in *Town of Greece*.¹²³ The Court held that Greece’s ritual of opening its monthly board meetings with a prayer did not violate the Establishment Clause.¹²⁴ The Court felt that two things protected Greece’s prayers. First, the Court cited the history of opening legislative sessions with prayer: “The First Congress made it an early item of business to appoint and pay official chaplains, and both

116. *Grendel’s Den, Inc.*, 459 U.S. at 126.

117. Circuit courts also continue to use *Lemon*. *Am. Atheists, Inc. v. Port Auth. of N.Y. & N.J.*, 760 F.3d 227, 238 (2d Cir. 2014); *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 849 (7th Cir. 2012); *Barnes-Wallace v. City of San Diego*, 704 F.3d 1067, 1083 (9th Cir. 2012).

118. *McCreary Cty.*, 545 U.S. at 844; *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring).

119. *Perry*, 545 U.S. at 677.

120. *Id.* at 686–87.

121. *Id.* at 689–90.

122. *Id.* at 678 (“Texas’ placement of the Commandments monument on its capitol grounds is a far more passive use of those texts than was the case in *Stone*, where the text confronted elementary school students every day. Indeed, petitioner here apparently walked by the monument for years before bringing this suit.”). See also Justice Breyer’s concurrence, in which he makes clear that he voted with the majority because in his view, “the Commandments’ text on this monument conveys a predominantly secular message” *Id.* at 702 (Breyer, J., concurring).

123. *Town of Greece*, 134 S. Ct. 1811.

124. *Id.* at 1827–28.

the House and Senate have maintained the office virtually uninterrupted since that time.”¹²⁵ Second, the Court noted that the prayers were in no way coercive: “In the town of Greece, the prayer is delivered during the ceremonial portion of the town’s meeting. Board members are not engaged in policymaking at this time, but in more general functions.”¹²⁶ The Court focused on the fact that the prayer opening the session was “benign” because it neither favored nor excluded any particular faith and focused on lending gravity to the situation.¹²⁷ Summing up, the Court held that “[t]he town of Greece does not violate the First Amendment by opening its meetings with prayer that comports with our tradition and does not coerce participation by nonadherents.”¹²⁸ Reflecting on Establishment Clause tests generally, the Court noted that “[a]ny test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.”¹²⁹

The message of both *Van Orden* and *Town of Greece* is that a majority of the Court is willing to carve out historical exceptions to the *Lemon* factors with certain additional caveats. In the case of the Ten Commandments, the Court also required passivity and a strong argument that the display in question was not primarily serving religious ends.¹³⁰ In *Town of Greece*, the Court required—in addition to historical justification—proof that there was a strong normative value to the religious practice and that the practice did not prefer any particular religion or religions.¹³¹ While one could argue—correctly—that ritual slaughter requirements date back to well before the founding of America, one cannot argue that they are enshrined in our founding in the same way as the Ten Commandments and a prayer to open a legislative session. Additionally, there is nothing passive or even arguably non-religious about ritual slaughter, as with the Ten Commandments in *Van Orden*. And a ritual slaughter exemption is neither ecumenical (it prefers just two religions) nor normatively valuable, since it allows egregious cruelty to go unregulated, distinguishing it from the prayer in *Town of Greece*. Finally, ritual slaughter involves the coercion that has never been allowed by the Court, as discussed in prong two, above.

5. The Kosher Labeling Cases

125. *Id.* at 1818.

126. *Id.* at 1827.

127. *Id.* at 1823.

128. *Id.* at 1828.

129. *Id.* at 1819.

130. *Perry*, 545 U.S. at 678.

131. *Town of Greece*, 134 S. Ct. at 1823.

My Establishment Clause analysis is supported by holdings related to kosher labeling laws from the New Jersey Supreme Court¹³² and the Second and Fourth Circuit Courts of Appeals.¹³³ Many states have laws requiring honesty in labeling of kosher products, but courts have vacated laws and regulations where, as with the “ritual bubble” created by USDA, they relied on Orthodox authorities to determine what the laws in question required. These courts agreed that there was enough secular purpose to the kosher labeling laws in question—elimination of consumer fraud—to clear the very low Establishment Clause bar set by the first prong of the *Lemon* Test, but held that the portions of the laws or regulations in question that involved religious authorities setting the standard of what was kosher violated the second and third prongs of *Lemon*.¹³⁴

First, in *Ran-Dav’s County Kosher, Inc. v. State*, the New Jersey Supreme Court considered whether the state’s kosher labeling and oversight regulations violated both state and federal constitutions.¹³⁵ Because the regulations at issue went beyond a simple labeling regime and “incorporate[d] a complex body of religious doctrine and contemplate[d] the assistance by clergy or religious experts in the interpretation and enforcement of that doctrine,”¹³⁶ the Court held that they violated both the second and third prongs of the *Lemon* Test.¹³⁷ With regard to the second prong, the Court held that regulations when the government “adopts religious law as its own” will foster that religion—both in perception and in reality.¹³⁸ With regard to the third prong, the Court held that “the State’s adoption and enforcement of the substantive standards of the laws of kashrut is precisely what makes the regulations religious, and is fatal to its scheme.”¹³⁹ The Court concluded, “The entanglement test under the Establishment Clauses of our [state and

132. *Ran-Dav’s Cnty. Kosher, Inc. v. State*, 608 A.2d 1353, 1355 (N.J. 1992).

133. *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337 (4th Cir. 1995); *Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 418 (2d Cir. 2002).

134. *Commack Self-Serv.*, 294 F.3d 415; *Barghout*, 66 F.3d 1337; *Ran-Dav’s Cnty.*, 608 A.2d 1353.

135. *Ran-Dav’s Cty. Kosher*, 608 A.2d 1353.

136. *Id.*

137. *Id.* at 1366.

138. *Id.* at 1364–65 (“In *Larkin v. Grendel’s Den*, *supra*, the Supreme Court observed that ‘the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred.’ The Court concluded that state action promoting such an image violates the Establishment Clause, for it has ‘a ‘primary’ and ‘principal’ effect of advancing religion.’ Here, the symbolism is especially graphic and the benefit to religion more than symbolic: the State is calling on religious personnel to enforce and certify religious compliance.”).

139. *Id.* at 1360.

federal] constitutions forbids government adoption and enforcement of religious law.”¹⁴⁰

Second, in *Barghout v. Bureau of Kosher Meat & Food Control*, the Fourth Circuit invalidated a Baltimore ordinance that prohibited the fraudulent sale of kosher food and defined kosher as adhering to orthodox requirements.¹⁴¹ Once again, because the ordinance required civil authorities to apply religious law, the Court found violation of both the second and third prongs of *Lemon*. On the second prong, the court noted that the joint exercise of authority created, at the very least, the symbolic union of church and state decried in *Larkin*.¹⁴² But as with *Ran-Dav’s County*, the Court was even more concerned with the entanglement prong, which created a reliance on religious authorities for what qualified as legal in clear violation of the third prong of *Lemon*: “[T]he Establishment Clause does not permit legislative bodies to expressly delegate discretionary governmental functions to religious organizations or their members.”¹⁴³

Finally, in *Commack Self-Serv. Kosher Meats, Inc. v. Weiss*, the Second Circuit considered New York’s kosher labeling laws, which prohibited fraud in kosher labeling and “defin[ed] ‘kosher’ to mean food that is ‘prepared in accordance with the orthodox Hebrew religious requirements.’”¹⁴⁴ Following *Ran-Dav’s* reasoning, the Court found violation of the second and third prong of *Lemon*. With regard to the second prong, the Court found promotion of religion through the “joint exercise of religious and civic authority” entailed by the kosher laws.¹⁴⁵ With regard to entanglement, the Court found that the laws violated the “core rationale” of the Establishment Clause, “preventing ‘a fusion of governmental and religious functions’”¹⁴⁶ by allowing religious authorities to dictate qualified as kosher.¹⁴⁷

Of course, ritual slaughter as enforced by the USDA gives total authority to interpret what is exempt from the law to religious leaders, which the New

140. *Id.* at 1362.

141. *Barghout*, 66 F.3d at 1338–39, 1344.

142. *Id.* at 1345.

143. *Id.* at 1342.

144. *Commack*, 294 F.3d at 418.

145. *Id.* at 430–31 (“The Supreme Court has held that even the mere appearance of such joint exercise ‘can be seen as having a ‘primary’ and ‘principle’ effect of advancing religion.’ Here, the challenged laws, as described earlier, produce an actual joint exercise of governmental and religious authority. United exercises of authority of this kind are prohibited by the Establishment Clause” (internal citation omitted)).

146. *Id.* at 428 (internal citations omitted).

147. Ten years later, the same plaintiff sued to overturn laws that were exclusively related to kosher labeling, but which did not require any state action with regard to what qualified as kosher and did not involve the state in any sort of kosher oversight. The Court applied the *Lemon* Test and upheld the challenged laws. *See Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 207 (2d Cir. 2012).

Jersey Supreme Court rightly called a violation of both *Lemon* prong two and three. In violation of the Establishment Clause principles articulated by the Fourth Circuit in *Barghout* and the Second Circuit in *Commack*, the kosher exemption to humane slaughter requirements: 1) creates a joint exercise of legal authority in violation of *Lemon* prong two;¹⁴⁸ and 2) fuses the governmental and religious functions, in violation of *Lemon* prong three.¹⁴⁹

B. Jones v. Butz

The above analysis must be reconciled with an Establishment Clause challenge to the ritual slaughter exception to the HMSA from more than forty years ago. In 1974, a three-judge panel of the District Court in New York ruled that the government’s approval of shackling and hoisting animals for ritual slaughter did not represent a violation of the Establishment Clause.¹⁵⁰ In *Butz*, the plaintiffs did not contest the basic exemption from the stunning requirement and did not contest Congress’ finding that ritual slaughter is humane.¹⁵¹ Instead, the plaintiffs argued that allowing animals to be shackled and hoisted while still conscious was “offensive to and inconsistent with the humane purposes of the Act,” and thus was “a special religious purpose in contravention of the First Amendment.”¹⁵²

The court held that Congress had fully considered “abundant evidence” that kosher slaughter and handling are humane, and so there it found no religious preference at all—this was simply another humane killing method.¹⁵³ Thus, the Court found that it was mere “coincidence” that ritual slaughter happened to satisfy the humane requirements of the Act.¹⁵⁴ Even if the Court’s ruling could withstand scrutiny in 1974, USDA’s interpretation of the law, wherein there is no oversight at all in the ritual bubble, cannot. It is impossible to reconcile the humane intent of the law with the allowance of any practice, no matter how cruel, as long as it is approved by religious authorities.

The Court further held that even if the Ritual Slaughter exemption were a religious accommodation, it would still be acceptable.¹⁵⁵ The Court based this view on the Sunday Closing and Conscientious Objector cases, which,

148. *Weiss*, 294 F.3d at 430–31; *Barghout*, 66 F.3d at 1435.

149. *Weiss*, 294 F.3d at 428; *Barghout*, 66 F.3d at 1342.

150. *Jones v. Butz*, 374 F.Supp. 1284 (S.D.N.Y. 1974), *aff’d.*, 419 U.S. 806 (1974).

151. *Id.* at 1289.

152. *Id.* at 1289–90.

153. *Id.* at 1291.

154. *Id.* at 1292.

155. *Id.* at 1292–93.

according to the court, allowed for preferential treatment of religion.¹⁵⁶ In fact, this is a misanalysis of those cases, at least as they have been subsequently interpreted by the Supreme Court. The Court in *McCreary* explained that Sunday closing statutes were upheld “on practical, secular grounds after finding that the government had forsaken the religious purposes behind centuries-old predecessor laws.”¹⁵⁷ To add an exclamation point to the Court’s analysis, when religion was added to the concept of Sabbath observance in *Caldor*, the Court struck the law down.¹⁵⁸ The conscientious objector cases did not involve an Establishment Clause challenge at all, so the court in *Butz* was forced to quote from the dissent in support of its position.¹⁵⁹ In fact, the Court in *Welsh* found that principled belief constitutes religion so that it would not have to confront the Establishment Clause, which does not allow for preference in favor of religion.¹⁶⁰

Finally, the Court applied a perfunctory *Lemon* Test. On the first two *Lemon* factors, the court offers no discussion, simply asserting without analysis that the ritual slaughter provision “ha[s] a secular purpose [and that its] principal or primary effect is to provide for humane slaughter.”¹⁶¹ On the issue of entanglement, the court notes perfunctorily that “[t]he governmental functions involved have no connection with any religious practices. The only government expenditure attributable to allegations in the complaint is the sum of \$210.05 paid to Rabbi Joseph Soloveitchik for travel and subsistence expenses as a member of the advisory committee authorized under [the since repealed] section 5.”¹⁶²

The court’s analysis of prongs two and three may have been fair in 1974 (before the Humane Slaughter Act of 1979), but it is not defensible today. At that time, enforcement was nonexistent and so there was no religion preference resulting in entanglement of enforcement.¹⁶³ Ritual slaughter as

156. *Id.* (“[I]f Congress acted here out of deference to the religious tents of many orthodox Jews it did so constitutionally and in substantially the same ways as it accommodated the Sabbatarians and conscientious objectors by the exemptions in the applicable statutes.”).

157. *McCreary Cty.*, 545 U.S. at 861.

158. *Caldor*, 472 U.S. at 705.

159. *Butz*, 374 F. Supp. at 1292.

160. *Welsh v. United States*, 398 U.S. 333, 356 (1970) (Harlan, J., concurring) (“However, having chosen to exempt, it cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other. Any such distinctions are not, in my view, compatible with the Establishment Clause of the First Amendment.”); see also Bruce Friedrich, *The Church of Animal Liberation: Animal Rights as ‘Religion’ Under The Free Exercise Clause*, 21 ANIMAL L. 65, 81–82 (2014).

161. *Butz*, 374 F. Supp. at 1293.

162. *Id.*

163. See Jeff Welty, *Humane Slaughter Laws*, 70 LAW & CONTEMP. PROBS. 175, 187 (2007) (noting that federal meat inspection did not begin until 1978 and *Jones v. Butz* was decided in 1974).

administered by the USDA today violates the second and third *Lemon* prongs.

III. SOLUTION: A PETITION FOR RULEMAKING

I have focused my discussion on USDA’s administration of sections 2 and 6 of the HMSA, rather than on the sections themselves. Although the constitutional argument against the actual statute is strong, such a challenge might prove to be a quintessential case of “be careful what you wish for,” because vacating the ritual slaughter exemption might end in a striking down of the entire HMSA. Regardless, the bigger problem for animal welfare is not the ritual slaughter exemption as written, but USDA’s refusal to exert any oversight authority at all in the “ritual bubble.” A petition for rulemaking could request oversight of the ritual cut, which would alleviate the most egregious Establishment Clause issues discussed in part II.

A. *The Problem of Severability*

Anyone who challenges sections 2(b) and 6 of the HMSA on humane grounds will want to sever those two provisions and retain the rest of the law. However, a court will only sever an unconstitutional portion of a law if that aligns with the will of the Congress that passed the Act.¹⁶⁴ Absent a severability clause in the statute—and there is no severability clause in the HMSA—courts will ask whether, once the offending provisions are excised from the statute, it will then “function in a manner consistent with the intent of Congress.”¹⁶⁵ The legislative history of the HMSA and the inclusion of the ritual exemption have been well-covered elsewhere,¹⁶⁶ but it suffices to say that Congress only passed the law after agreeing to exempt ritual slaughter. Based on this history and the lack of a severability clause in the Act, it is quite possible that a court would void the entire statute.¹⁶⁷

164. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685–86 (1987).

165. *Id.* at 685; *see also Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006) (discussing the importance of “legislative intent” as “the touchstone for any decision about remedy”).

166. *Welty*, *supra* note 165, at 186 (“Two subsequent amendments, each intended to strengthen the protection for ritual slaughter, passed. Then the bill itself passed easily. It was sent back to the House, which agreed with the Senate’s amendments, and it was signed into law by President Eisenhower on August 27, 1958.”).

167. In *Pasado’s Safe Haven v. State*, 259 P.3d 280, 286 (2011), the Washington State Court of Appeals heard a challenge to the ritual slaughter exemption in that state’s version of the HMSA and refused to reach the Establishment Clause analysis because the relief requested involved severing the ritual exemption from the law, and the Court felt that the Washington State Congress would not have passed the law without the ritual exemption.

B. The Need for Ritual Oversight: A Petition for Rulemaking

While Congressional action could certainly require better regulatory oversight, Congressional action in the area of meat industry oversight seems highly unlikely, since there is overwhelming evidence of Congressional capture by the meat industry and no indication of Congressional interest in acting in the area of meat industry oversight.¹⁶⁸ A petition for rulemaking represents a more likely path to protection, and a petition is also much safer than an Establishment Clause challenge to the ritual exemption. Denial of such a request would be arbitrary and capricious as a matter of both policy¹⁶⁹ and substance.¹⁷⁰ Notably, if the Agency refused to promulgate ritual slaughter regulations, courts would not grant any deference to the agency's decision, because of the Establishment Clause concerns that would be at issue.¹⁷¹

As discussed in part I of this article, FSIS created a “ritual bubble,” during which it refuses to even consider what is happening to the animals whose slaughter it is supposed to be policing. Literally anything goes in this bubble, as we saw in PETA's investigation of AgriProcessor. If a rabbi or imam claimed that their ritual required lighting the animal on fire either just before or just after the ritual cut, the most an inspector could do under current FSIS policy is talk with the assigned DVM; what the DVM might do is unclear.

This interpretation of the law is a flagrant violation of the plain meaning of the statute, which defines ritual slaughter as “a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument.”¹⁷² Although section 6 of the HMSA exempts ritual slaughter from the rest of the HMSA, it explicitly states that “‘ritual slaughter’ means slaughter as defined in section 2(b).”¹⁷³ There is

168. Bruce Friedrich, *When the Regulators Refuse to Regulate: Pervasive USDA Underenforcement of the Humane Slaughter Act*, 104 GEO. L.J. 197, 215–16 (2015).

169. 5 U.S.C. § 706 (2)(A) (1966); *see also* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41 (1983) (holding that an “arbitrary and capricious standard” applied to occupant-protection standard modification by the U.S. Department of Transportation).

170. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–45 (1984) (discussing the deference given to an agency as long as an agency decision is “based on a permissible construction of the statute”).

171. *Clark v. Martinez*, 543 U.S. 371, 381 (2005); *see also* Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Engineers, 531 U.S. 159, 172–73 (2001) (“This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.”).

172. 7 U.S.C. § 1902.

173. *Id.* § 1906.

plenty of room to regulate to ensure that ritual slaughter takes place as per the proffered section 2 definition and that it is as humane as possible.

Thus, a petition could be filed with USDA that calls on the agency to ensure that animals lose consciousness through “instantaneous severance of the carotid arteries with a sharp instrument.”¹⁷⁴ Just as the agency attempts to ensure that conventional slaughter is humane, the agency should also ensure that ritual slaughter is as humane as possible. This interpretation would be more reasonable than the agency’s current “anything goes if the rabbi or imam says so” interpretation.

In addition to the regulatory requirements in the U.K., an additional request that would align closely with the humane intent of the law would be for a stunning requirement that takes effect a few seconds after the ritual cut, in order to ensure insensibility. Such a requirement would be perfectly in line with the law, which only allows an exception from the pre-cut stun, and it would be perfectly in line with kosher requirements, since after shechita, the animal is halachically dead and such a stun would be irrelevant. Jewish authorities could look at such a requirement as a clear protection of ritual slaughter, since it would remove the objections that appear to be universal in the humane and veterinary communities in Europe. These requirements could easily come to North America.

Such an interpretation would avoid many of the Establishment Clause problems identified in part II. A quick review of the *Lemon* factors demonstrates this point: On prong one, interpreted to focus only on the ritual cut, the Act now could be seen as simply laying out two ways that animals can be humanely slaughtered. In this way, the secular purpose would be humane slaughter.¹⁷⁵ On prong two, although there would still be problems, they would lessen because the total exception to the letter and spirit of the HMSA on behalf of just two religions would be ameliorated.¹⁷⁶ On the third prong, rabbis and imams would no longer dictate how the law was enforced, which would remove the collaborative enforcement effort that courts have always ruled to violate the Establishment Clause.¹⁷⁷ Such regulation would be similar to the statutes that passed Establishment Clause muster, because the regulatory focus would be devoid of religious oversight or elements.¹⁷⁸ That is, both ritual and conventional slaughter would be held to a firm

174. *Id.* § 1902.

175. Part II.A.1.

176. Part II.A.2.

177. Part II.A.3.

178. *Lemon*, 403 U.S. at 616–17 (“Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause. We note that the dissenters in *Allen* seemed chiefly concerned with the pragmatic difficulties involved in ensuring the truly secular content of the textbooks provided at state expense.”).

humane handling and slaughter standard, and that would remove many of the constitutional problems identified in part II.

Because such a petition would meet broad support in the Jewish community, I suggest that the Jewish leaders and groups file the petition. There is ample reason to believe that such an effort is possible. The Conservative Movement's Rabbinical Assembly, which is the second most popular Jewish denomination and represents approximately one-third of American Judaism, has repeatedly taken a stand on behalf of humane animal treatment at slaughter.¹⁷⁹ For example, three years before PETA investigated AgriProcessors, the Assembly unanimously declared both shackle and hoist slaughter and inversion at slaughter to be a violation of Jewish principles.¹⁸⁰ In response to PETA's investigation, the Assembly's President, Rabbi Perry Rank, declared that the video produced by PETA "should be regarded as a welcome, though unfortunate service to the Jewish community [because] [w]hen a company purporting to be kosher violates the prohibition against tza'ar ba'ale chayyim, causing pain to one of God's living creatures, that company must answer to the Jewish community, and ultimately, to God."¹⁸¹

Similarly, many prominent leaders in Reform Judaism, which is the most populous Jewish denomination, comprising approximately forty percent of American Judaism, also denounced AgriProcessors for cruelty.¹⁸² Although kosher certifiers, which are all ultra-orthodox, declared that there is no abuse so flagrant that it will violate kosher principles, multiple prominent orthodox rabbis begged to differ, condemning AgriProcessors for its flagrant abuse of animals.¹⁸³ To this day, the large kosher certifiers continue to claim—despite all stating that AgriProcessors was entirely kosher—that the kosher slaughter is compassionate.¹⁸⁴ To avoid the threat of a consumer fraud lawsuit, or a repeat of the horrendous public relations disaster that followed the AgriProcessors investigation, it is possible that they would support better civil regulation of the ritual slaughter process.¹⁸⁵

The goal of such a petition would be to convince USDA that its current interpretation is incorrect, of course, and my hope is that the above analysis

179. GROSS, *supra* note 4, at 32.

180. *Id.* at 50.

181. *Id.* at 50–51.

182. *Id.* at 52.

183. *Id.* at 47–48.

184. *Supra* §§ I.B, I.C.

185. *Setting the Record Straight on Kosher Slaughter*, ORTHODOX UNION KOSHER (Dec. 29, 2003), <https://perma.cc/J39G-VXZB> ("Torah law, however, is most insistent about not inflicting needless pain on animals and in emphasizing humane treatment of all living creatures."). This statement cannot be plausibly reconciled with the OU's endorsement of everything on the PETA video as kosher. Prof. Gross details the OU's duplicitous (at best) messaging that followed the AgriProcessors controversy in chapter 2 of his book. GROSS, *supra* note 4.

would prove convincing enough that the agency would promulgate proper regulations. If USDA were to continue to claim that it does not have oversight authority in the ritual bubble, courts would not extend *Chevron* deference to the Agency’s interpretation. Where there are two plausible constructions of a statute, but one raises constitutional questions and the other does not, courts will choose the one that does not and will not grant an agency *Chevron* deference.¹⁸⁶ In *Clark v. Martinez*, the Court explained that “[i]t is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.”¹⁸⁷ If the USDA refused to promulgate regulations by continuing to claim that it does not have the authority to do so, all of the Establishment Clause analysis above would point toward a court challenge being successful.¹⁸⁸

CONCLUSION

At the time the Hebrew Scriptures and Qur’an were written, ritual slaughter represented a significant improvement over common methods of animal slaughter. It was common to hack limbs off live animals and to pack them in salt in order to keep the meat fresh (keeping the animal alive and in excruciating pain).¹⁸⁹ The concept of stunning did not exist. One can see today what best-case slaughter probably looked like 2,000 years ago, in the abattoirs of China and India, where men hack away at the throats of fully conscious cattle, all of whom take minutes to die, in abject agony.¹⁹⁰

186. *Clark*, 543 U.S. at 381; *Solid Waste Agency of N. Cook Cnty.*, 531 U.S. at 173.

187. *Clark*, 543 U.S. at 381.

188. If the agency refuses to enforce based on its enforcement discretion, the situation would be more difficult. However, in *Heckler v. Chaney*, the Court specifically left open the possibility that it would force an agency to enforce a law where discretion had become effective repeal of the law. 470 U.S. 821, 833 n.4, 839 (1985) (“We do not have in this case a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction. Nor do we have a situation where it could justifiably be found that the agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”) (internal citation omitted); see also *Id.* at 839 (Justice Brennan, concurring) (“Thus the Court properly does not decide today that nonenforcement decisions are unreviewable in cases where (1) an agency flatly claims that it has no statutory jurisdiction to reach certain conduct; (2) an agency engages in a pattern of nonenforcement of clear statutory language; (3) an agency has refused to enforce a regulation lawfully promulgated and still in effect; or (4) a nonenforcement decision violates constitutional rights.”) (internal citations omitted). Here, we have arguments both that the Agency’s interpretation of the HMSA section 2(b) abdicates its responsibilities (it simply ignores its mandate) and that its abdication poses significant constitutional problems.

189. Temple Grandin & Joe M. Regenstein, *Religious Slaughter and Animal Welfare: A Discussion for Meat Scientists*, MEAT FOCUS INT’L 115–23 (1994), perma.cc/7ASD-RSTH.

190. See, e.g., People for the Ethical Treatment of Animals (PETA), *Stella McCartney Takes on the Leather Trade*, YOUTUBE (Jan. 31, 2012) <https://perma.cc/YVF9-M2TD>; *The Global Leather Trade*, PETA, <http://perma.cc/L6B2-9V5J> (last visited Nov. 12, 2015).

The advent of modern slaughter technology has turned what was once the kindest form of slaughter, leading to death within a minute or two at the most, into the opposite, where even in a best case ritual slaughter, the animal will suffer much more than necessary. Both science and experience show that the best case is not reality. Sadly, kosher authorities have declared that there is no requirement for kosher that even the worst imaginable cruelty be eliminated.

USDA is charged with enforcing the Humane Slaughter Act, and that includes the provision related to ritual slaughter. While the law provides an exception to the stunning requirement, there is no justification for USDA's current "ritual bubble" interpretation, which allows egregious and illegal abuse to go completely unregulated. USDA's "anything goes" interpretation is unfair to religious authorities, who believe and tell their congregations that ritual slaughter provides a more humane death for animals. It is unfair to consumers like Lisa, our hypothetical shopper from the introduction of this article, because they cannot be sure that animals slaughtered for kosher or halal meat had any protection from egregious cruelty.

USDA will soon be asked to promulgate humane ritual slaughter regulations. If the Agency clings to its current "cruelty is not cruelty in the ritual bubble" policy of non-enforcement, a court is likely to force it to promulgate the requested regulations, because its current policy cannot be reconciled with Congressional intent or with the Establishment Clause of the U.S. Constitution.