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From Farm to Table: How This Little Piggy Was Dragged Through the Market

by

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Comments

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By JUSTINE HINDERLITER*

ON DECEMBER 9, 2003, a Holstein cow raised in Alberta, Canada arrived at Vern's Moses Lake Meats ("Vern's") in Washington for slaughter.[1] Unbeknownst to the slaughtering plant employees, and the rest of America, the cow was infected with Bovine Spongiform Encephalopathy ("BSE"), more commonly known as "Mad Cow Disease."[2] Even more troubling is how Vern's discovered the infected animal. According to Dave Louthan, Vern's then-slaughterer, the cow was not caught by routine inspection, "but by 'a fluke.'"[3] Louthan asserts that the cow he killed was not a "downer" cow,[4] although the

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1. Jason R. Odeshoo, *No Brainer? The USDA's Regulatory Response to the Discovery of "Mad Cow" Disease in the United States*, 16 STAN. L. & POL'Y REV. 277, 297 (2005); *see also* Donald G. McNeil, Jr., *Official Tells of Investigation into Mad Cow Discrepancies*, N.Y. TIMES, Mar. 4, 2004, at A16 [hereinafter *Official Tells*]; Donald G. McNeil, Jr., *Feed in Mad Cow Investigation Is Traced to 2 Mills in Canada*, N.Y. TIMES (AP), Mar. 20, 2004, at A1 [hereinafter *Feed in Mad Cow*]. The cow had been fed contaminated feed containing meat and bone meal of infected animals. *See* McNeil, *Feed in Mad Cow*, *supra*, at A1. In 1997, the Food and Drug Administration imposed a "ban on feeding rendered cattle meat or beef byproducts to cattle." Eric Schlosser, *The Cow Jumped over the U.S.D.A.*, N.Y. TIMES, Jan. 2, 2004, at A17.

2. *See* Sandra Blakeslee, *Plan for Sharp Rise in Mad Cow Testing Gets Mixed Reaction*, N.Y. TIMES, Mar. 17, 2004, at A19 [hereinafter Blakeslee, *Plan*].

3. Donald G. McNeil, Jr., *Man Who Killed the Mad Cow Has Questions of His Own*, N.Y. TIMES, Feb. 3, 2004, at F2 [hereinafter *Man Who Killed*].

4. A downer cow is one that is either too sick or injured to walk. *See Official Tells*, *supra* note 1, at A16. The USDA uses the term "non-ambulatory" to designate cows that are unable to walk. *See* Press Release, U.S. Dep't of Agric., USDA Announces BSE Test Results and New BSE Confirmatory Testing Protocol, Release No. 0232.05 (June 24, 2005), *available at* http://www.usda.gov/wps/portal/!ut/p/_s.7_0_A/7_0_1OB?contentidonly=True&contentid=2005/06/0232.xml [hereinafter June 24 Press Release]; *see also* U.S. DEP'T OF

United States Department of Agriculture ("USDA" or "Agency") reported otherwise.[5] After the animal was killed, it was subjected to visual post-mortem inspection[6] and a sample of its brain tissue was sent to a laboratory for further testing.[7] In the meantime, the cow went to slaughter—its carcass amounted to 600 pounds of infected meat, and was mixed with untainted meat from nineteen other cows, totaling five tons[8] of tainted meat.[9] It was not until December 23, 2003, when the brain sample tested positive for BSE,[10] that the USDA implemented a "voluntary recall of meat that might have been tainted."[11] The USDA targeted 38,000 pounds of tainted meat, but only recovered 21,000 pounds.[12] By the time the USDA initiated the voluntary

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AGRIC., FOOD SAFETY & INSPECTION SERV., FSIS NOTICE 5-04, INTERIM GUIDANCE FOR NON-AMBULATORY DISABLED CATTLE AND AGE DETERMINATION (2004), *available at* http://www.fsis.usda.gov/OPPDE/rdad/FSISNotices/5-04.pdf. In fact, Mr. Louthan and two other witnesses attest that the cow was walking when it was killed. *See Official Tells*, *supra* note 1, at A16.

5. *Man Who Killed*, *supra* note 3, at F2. "The official records of the veterinarian at the slaughterhouse . . . said the animal was . . . down on its sternum, or chest, before it was killed." *Official Tells*, *supra* note 1. The distinction between downer and walking cows is significant because, shortly after the infected cow was discovered, the USDA announced a plan to increase testing for Mad Cow Disease. *See* Marc Kaufman, *USDA Accused of Misleading Public on Mad Cow*, WASH. POST, Feb. 18, 2004, at A1, A6. The plan, critics argue, falsely focused on testing downer cows because the Agency claimed that downer cows are more likely to have BSE. *See* News Release, U.S. Dep't of Agric., Release No. 0105.04, Veneman Announces Expanded BSE Surveillance Program (Mar. 15, 2004). The Agency hailed the increased testing on downer cows as the most effective strategy because downer cows are "at higher risk of having mad cow disease." *See* Blakesee, *supra* note 2, at 19. Although the USDA claimed the plan should "reassure consumers, trading partners and the industry that cows were being properly tested," the Agency also ignored the fact that the infected cow was not a downer cow. *Id.* In fact, the USDA Inspector General said the "testing program was poorly designed, falsely assumed only high-risk animals could be infected, and inappropriately relied on voluntary submissions for testing." Carey Gillam, *Furor Grows over Lax US Mad Cow Testing*, RENSE.COM, Aug. 2, 2004, http://www.rense.com/general56/loo.htm.

6. *See Man Who Killed*, *supra* note 3, at F2 (describing Mr. Louthan's ante-mortem observations of the infected cow); Odeshoo, *supra* note 1, at 297.

7. *See* Odeshoo, *supra* note 1, at 297.

8. One ton is approximately 2000 pounds.

9. *See* Jon Ortiz, *State Wants to Revisit Beef-Recall Secrecy Pact*, SACRAMENTO BEE, Feb. 18, 2004, at A1, A10 [hereinafter Ortiz, *Beef-Recall Secrecy Pact*]. More troubling still is the fact that the cow had arrived in the United States in a herd. It is likely that these other cows, over 255, ate the same infected feed. The USDA began a "traceback investigation," and on February 9, 2004, it concluded the investigation having found only twenty-eight cows. *See* Odeshoo, *supra* note 1, at 298–99.

10. *See* Ortiz, *Beef-Recall Secrecy Pact*, *supra* note 9, at A10.

11. *See id.*

12. *See* Press Release, U.S. Dep't of Agric., Food Safety & Inspection Serv., FSIS Update of Recall Activities (Feb. 9, 2004), http://www.fsis.usda.gov/oa/recalls/prelease/update067-2003.htm (last visited Feb. 5, 2006).

recall, the tainted meat had already been shipped to over forty businesses in eight states and Guam.[13] The USDA's slow response left many—politicians and citizens alike—wondering how safe the American meat supply is and what the USDA could do to improve its regulation.[14]

This Comment argues that although the USDA is mandated to protect the United States' meat supply,[15] its complex and ineffective regulations compromise meat safety instead of ensuring it, especially in the face of the BSE threat. Further, the USDA and its antiquated laws and overreaching protocols prevent the market from correcting many of the current problems in the meat industry. As opposed to guiding and supporting the meat market, the USDA's protocols render it inefficient. As a result, retailers cannot mitigate against the BSE threat, producers are required to produce under the USDA's poor quality standards, and consumers are forced to make uninformed purchasing decisions.

Although a complete overhaul of USDA authority and protocols would ideally restore faith and safety to the meat industry, large-scale reorganization is unlikely to happen. Therefore, this Comment proposes that in order for the USDA to ensure a safe meat supply, it must incorporate containment mechanisms in addition to its preventative mechanisms into its regulatory scheme. Specifically, this Comment asserts that the USDA must have mandatory recall authority to effectively contain potential outbreaks within the United States. Part I of this Comment outlines the two main meat regulation statutes and current inspection practices in the United States. Part II discusses how the USDA is ill-equipped to protect against Mad Cow Disease. Part III describes how the USDA's protocols create market inefficiencies that harm producers, retailers, and consumers. Part IV explains how the

13. Odeshoo, *supra* note 1, at 298. States that were affected by the recall: "Washington, Oregon, California, Nevada, Idaho, and Montana." U.S. GEN. ACCOUNTING OFFICE, FOOD SAFETY, USDA AND FDA NEED TO BETTER ENSURE PROMPT AND COMPLETE RECALLS OF POTENTIALLY UNSAFE FOOD 41 (2004) [hereinafter GAO REPORT].

14. *See* Jon Ortiz, *State Hit a Wall on Beef Recall: Incomplete—or No—Responses from the USDA Put Officials in a Bind*, SACRAMENTO BEE, May 10, 2004, at D1, D3 [hereinafter *State Hit a Wall*].

15. *See* Blake B. Johnson, *The Supreme Beef Case: An Opportunity to Rethink Federal Food Safety Regulation*, 16 LOY. CONSUMER L. REV. 159, 161 (2003). In 1862, the USDA was established to promote American agriculture, and the charter did not include any provisions regarding food safety. *Id.* It was not until the 1890s, after European countries opposed America's lack of food safety standards that Congress gave the USDA power to inspect meat. *See* Hana Simon, *Food Safety Enforcement Enhancement Act of 1997: Putting Public Health Before the Meat Industry's Bottom Line*, 50 ADMIN. L. REV. 679, 683 (1998) [hereinafter *Food Safety*].

USDA prevents the meat market from correcting its inefficiencies. Finally, Part V maintains that the USDA must have mandatory recall authority, which it currently lacks, to ensure a safe American meat supply.

I. The Current USDA Regulation Protocols Do Not Effectively Regulate Meat and Cannot Ensure a Safe American Meat Supply

Several federal agencies, including the USDA, share responsibility for food quality and health standards.[16] Each agency operates independently and has numerous enforcement departments, giving the impression that the American meat supply is one of the safest in the world. This notion, however, is far from the truth. On the contrary, this multi-jurisdictional approach often complicates and hinders effective regulation.[17] To wit, the Food Safety Office of the Centers for Disease Control and Prevention estimates that "76 million people get sick, more than 300,000 are hospitalized, and 5000 Americans die each year from food-borne illness."[18] The most common causes of food-borne infections are bacterial pathogens, which are most frequently found in meat and poultry.[19] Not only does this fragmented structure jeopardize a safe meat supply, but the USDA, as the primary agency that regulates the meat industry,[20] also operates under century-old laws—the Federal Meat Inspection Act (1906)[21] and the Virus Serum Toxin Act (1913)[22]—a fact which in and of itself lends to the USDA's inability to keep up with the changing times. As such, the

16. Other agencies include: the Federal Drug Administration, the Environmental Protection Agency, the Department of Treasury's Customs Service, the Cooperative State Research, Education, and Extension Service, the Agricultural Marketing Service, the Economic Research Service, the Grain Inspection, Packers, and Stockyard Administration, the United States Codex Office, the Department of Commerce's National Marine Fisheries Service, as well as independent state agencies. *See* Lisa Lovett, *Food for Thought: Consistent Protocol Could Strengthen Food Supply Security Measures*, 10 TEX. WESLEYAN L. REV. 465, 468–69 (2004).

17. *See* Michael R. Taylor, *Preparing America's Food Safety System for the Twenty-First Century—Who Is Responsible for What When It Comes to Meeting the Food Safety Challenges of the Consumer-Driven Global Economy?*, 52 FOOD & DRUG L.J. 13, 18 (1997).

18. Ctrs. for Disease Control & Prevention, Food Safety Office, http://www.cdc.gov/foodsafety (last visited Feb. 1, 2006).

19. Ctrs. for Disease Control & Prevention, Division of Bacterial & Mycotic Diseases, Food-borne Illness, General Information, http://www.cdc.gov/ncidod/dbmd/diseaseinfo/food-borneinfections_g.htm#mostcommon (last visited Feb. 1, 2006).

20. *See infra* Part I.A.

21. 21 U.S.C. §§ 601–695 (2000).

22. 21 U.S.C. §§ 151–159.

USDA and its antiquated and inadequate regulations actually prevent the market from operating efficiently.

A. The History of the Federal Meat Inspection Act and the Creation of the USDA

In the 1890s Congress delegated to the USDA the responsibility of ante and post-mortem inspection of all livestock slaughtered for United States distribution and consumption.[23] It was not until 1906, and after intense public pressure,[24] that Congress passed the first legislation focused on meat inspection.[25] The Federal Meat Inspection Act[26] ("Federal Meat Act") established sanitary standards for cattle carcasses and gave the USDA the authority to inspect as it saw fit.[27] In the same year, Congress also passed the Pure Food and Drugs Act[28] ("PFDA"), which made it a crime to introduce adulterated[29] food into the stream of commerce.[30]

Although Congress has amended the Federal Meat Act several times to increase USDA responsibilities,[31] Congress has never indicated how the USDA is to enforce meat inspection and safety. Instead of explicit instructions, Congress relies on the USDA to create inspection protocol.[32] As such, the USDA has two units[33] primarily responsi-

23. *See* Johnson, *supra* note 15, at 161.

24. Upton Sinclair's THE JUNGLE, which exposed the horrific and unsanitary conditions in the Chicago meat-packing industry, sparked public outcry. For background on THE JUNGLE and its social and political implications, see generally JAMES HARVEY YOUNG, *PURE FOOD: SECURING THE FEDERAL FOOD AND DRUGS ACT OF 1906* (1989).

25. *See* Dion Casey, *Agency Capture: The USDA's Struggle to Pass Food Safety Regulations*, 7 KAN. J.L. & PUB. POL'Y 142, 143 (1998).

26. 21 U.S.C. §§ 601–695.

27. 21 U.S.C. § 603(a). For an example of the USDA exercising its vast power, see Pathogen Reduction; Hazard Analysis and Critical Control Points (HACCP) Systems, 60 Fed. Reg. 6774, 6777 (Feb. 3, 1995) (codified at 9 C.F.R. 308, 310, 318, 320, 325–27, 381). [hereinafter Pathogen Reduction].

28. Pub. L. No. 59-384, 34 Stat. 768 (1906) (repealed by Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. 392(a))).

29. Any meat product that does not meet USDA approval during inspection is considered adulterated. *See* Pathogen Reduction, *supra* note 27, at 6780.

30. 21 U.S.C. § 392(a).

31. For example, in 1967, Congress passed the Wholesome Meat Act, which amended the Federal Meat Act to give USDA control over more aspects of the meat industry. Pub. L. No. 90-201, 81 Stat. 585 (1967) (current version at 21 U.S.C. §§ 71–91).

32. 21 U.S.C. § 603(a).

33. The USDA has over half a dozen different USDA branches involved in food safety. *See* U.S. Dep't of Agric., Agencies and Offices, http://www.usda.gov/ (follow "Agencies & Offices" hyperlink). Arguably, the Grain Inspection, Packers, and Stockyards Administration ("GIPSA") plays a role in ensuring safe meat as well. GIPSA is responsible for inspect-

ble for ensuring a safe American meat supply: the Food Safety Inspection Service[34] and the Animal and Plant Health Inspection Service.[35] As discussed in the following sections, both of these branches are separated by statutory boundaries within overlapping areas of responsibility. Consequently, the USDA's bureaucratic landscape further complicates the USDA's ineffective protocols.[36]

1. Food Safety Inspection Service

The Food Safety Inspection Service ("Food Inspection Service") is the enforcement branch of the USDA responsible for meat inspection.[37] "Federal law requires the Food Inspection Service to physically inspect each animal slaughtered in a meat packing plant."[38] As such, the Food Inspection Service is in charge of continual inspection of each and every plant in the United States that processes meat or food containing meat products.[39]

Considering the number of processing plants, consumer demand, the competitive environment surrounding the meat industry, and the risk to public health involved, the USDA inspection mandate puts a hefty burden on the Food Inspection Service. Yet, changes and innovation in meat inspection are rare. Tests established in 1906 were mainly organoleptic (sight, smell, touch) tests,[40] which are ineffective in detecting food-borne pathogens, such as E. coli[41] and BSE. However, the "poke and sniff method"[42] remained virtually unchanged until the mid-1990s after a severe outbreak of E. coli in 1993, where over seven hundred people got sick after eating undercooked hamburgers

ing grains for safety and quality. *See* 7 C.F.R. 2.81 (2004). Because BSE became an epidemic when infected cattle remains were used as feed for other cattle, it is clear that what cows eat directly affects their health and impacts the quality of the meat that humans consume. *See infra* Part II.

34. 7 C.F.R. 2.53.

35. 7 C.F.R. 2.80.

36. *See infra* Parts I.A.1, I.B.

37. 7 C.F.R. § 2.53.

38. *See* Johnson, *supra* note 15, at 162–63.

39. 21 U.S.C. § 604 (2000); 7 C.F.R. § 2.53 (describing various Food Inspection Service responsibilities).

40. *See* Press Release, Pub. Citizen, New Federal Meat Inspection System Fails to Earn Inspectors' Seal of Approval (Sept. 5, 2000), *available at* http://www.citizen.org/pressroom/release.cfm?ID=768 (last visited Nov. 18, 2005).

41. *See* Casey, *supra* note 25, at 148.

42. *See* Kerri E. Machado, *"Unfit for Human Consumption": Why American Beef Is Making Us Sick*, 13 ALB. L.J. SCI. & TECH. 801, 816 (2003). There was a reported sixty-five outbreaks of E. coli from 1980–1990, an astronomical and unacceptable amount for American consumers. *See* GAIL A. EISNITZ, SLAUGHTERHOUSE: THE SHOCKING STORY OF GREED, NEGLECT, AND INHUMANE TREATMENT INSIDE THE U.S. MEAT INDUSTRY 158 (1997).

from a fast food restaurant.[43] As a result, the Food Inspection Service initiated an inspection program to alleviate inspection stresses. From 1998 to 2000, the Food Inspection Service phased in the Hazard Analysis and Critical Control Point ("HACCP") system, which is the meat industry's current and directed inspection program.[44] Although the HACCP system appeared to be a step in the right direction,[45] it fails when faced with the BSE threat.

2. The Current Food Inspection Service Meat Inspection Methods

The HACCP system is an inspection system that meat processing plants incorporate in their production lines.[46] It focuses on preventing outbreaks by testing for microbial pathogens at the processing level.[47] Established in 1996,[48] the HACCP system shifted inspection duties to industry producers, while Food Inspection Service inspectors became the overseers.[49] It also instituted the first set of regulations incorporating science into meat inspection[50]—a bonafide step away from the 1906 inspection methods.

> The HACCP plan identifies the potential hazards in the process . . . and specifies process controls . . . that have been validated as effective in preventing or minimizing the hazards. The HACCP plan also establishes recordkeeping and monitoring procedures that enable the operator to verify on a continuing basis that the controls are working and to detect and promptly correct processing errors.[51]

Essentially, plant employees "identify the major points of potential contamination in their production process as a means of preventing contamination."[52] The plant then tests products at these identified points to determine if meat is within the contamination regulations.[53]

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43. *See* Casey, *supra* note 25, at 148; *see also* EISNITZ *supra* note 42, at 159. In this E. coli outbreak, three children died, and others affected by the infected meat were "sick enough to need medical help," including hospitalization. *Id.*

44. *See* Johnson, *supra* note 15, at 160.

45. The HACCP instituted the first set of regulations incorporating science into meat inspection. *See* Machado, *supra* note 42, at 820.

46. *See* Pathogen Reduction, Hazard Analysis and Critical Control Point (HACCP) Systems, 61 Fed. Reg. 38,806–38,989 (July 25, 1996).

47. *See id.*

48. *See id.*

49. *See* Taylor, *supra* note 17, at 21.

50. *See* Machado, *supra* note 42, at 820.

51. Taylor, *supra* note 17, at 20.

52. *See* Machado, *supra* note 42, at 820.

53. *See* EISNITZ, *supra* note 42, at 284–85. To be sure, the HACCP system does not identify contamination problems and then eliminate them. Rather, it merely determines if the product meets USDA standards. *See id.*

Although the HACCP was hailed as the first regulatory effort to include microbial testing in the meat inspection process, and, as a result, a vast improvement from the poke and sniff method, the USDA mistakenly relies on the system to catch all potential problems. The HACCP has quality controls for some food-borne pathogens, such as salmonella and E. coli,[54] but the system does not detect BSE.[55] In addition, under current regulations, plants are not required to obtain USDA approval for their processes, equipment, or facilities, nor are USDA inspectors required to perform pre-slaughter sanitation checks.[56] Instead, Food Inspection Service inspectors simply verify that the producer-designed program meets meat safety standards.[57] In effect, Food Inspection Service inspectors no longer perform the actual inspections, but rather "check plant documentation."[58] Rather than double checking the products, Food Inspection Service inspectors merely rely on the plant's production records to determine whether the plant's sanitation methods meet USDA standards.[59] Given that the HACCP does not detect BSE and the Food Inspection Service inspectors do not double check products meant for human consumption, the USDA's reliance on the HACCP system is a gross mistake that endangers American consumers.

3. Additional Food Inspection Service Responsibility: Labeling

In addition to setting regulation standards for meat inspection, the Federal Meat Act also governs meat and meat product labeling. The USDA regulates branding and labeling of meat and meat products "to avoid inconsistency in . . . standards."[60] The Food Inspection Service is solely responsible for pre-market approval of the formulas and labeling of most meat products.[61] While the Federal Meat Act established sanitary standards and mandated meat inspection of all carcasses, it also required the Food Inspection Service to approve product labels to ensure that labels reflect the USDA quality stan-

54. *See* Jerry Adler, *Mad Cow: What's Safe Now?*, NEWSWEEK, Jan. 12, 2004, at 43, 45.

55. *See infra* Part III.A.

56. *See* Machado, *supra* note 42, at 822.

57. Taylor, *supra* note 17, at 21.

58. *See* Machado, *supra* note 42, at 822.

59. Casey, *supra* note 25, at 142.

60. 21 U.S.C. § 607(c) (2000).

61. *See* Richard A. Merrill & Jeffrey K. Francer, *Organizing Federal Food Safety Regulation*, 31 SETON HALL L. REV. 61, 101 (2000). However, the Food and Drug Administration regulates game species meat. *See* 21 U.S.C. §§ 453(e), 601(j); 9 C.F.R. §§ 301.2(qq), (rr), 381.1(b)(40) (1996).

dards.[62] "[O]ne purpose of the [Federal Meat Act is] to empower the [USDA] to adopt definitions and standards of identity or composition so that the 'integrity' of meat food products could be 'effectively maintained.'"[63] Essentially, the Federal Meat Act sets quality standards and requires that labels state only those standards. For example, after meat is shipped to a store, the store cannot add or subtract any information supplied to them by the USDA. This mandatory information typically includes USDA cut and grade, weight, and expiration date. A store is prohibited from indicating where the meat came from or which slaughtering plant processed the meat. Labels cannot indicate any divergence from the USDA standards—regardless of whether the product falls short of USDA quality standards or exceeds them.[64] The danger with this kind of regulation is that since the current USDA inspection protocols do not test for BSE, no information regarding BSE contamination is included in the USDA mandatory product information. As discussed further in Part IV, this regulation effectively prevents market players, such as producers and retailers, from passing on vital information to consumers.

B. The Virus Serum Toxin Act of 1913[65] and the Animal and Plant Health Inspection Service

The Animal and Plant Health Inspection Service ("APHIS") is another branch of the USDA and is responsible for keeping animals and plants healthy.[66] Generally, APHIS protects against plant and animal pests and diseases.[67] The Virus-Serum-Toxin Act of 1913[68] ("Virus Act") delegates to APHIS sweeping powers—including sole review and approval authority of diagnostic testing and the techniques used to

62. 21 U.S.C. § 607.

63. Armour Co. v. Ball, 468 F.2d 76, 81 (6th Cir. 1972).

64. 21 U.S.C. § 678 (stating that marking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this Act may not be imposed); *see also* United States v. Jorgensen, 144 F.3d 550 (8th Cir. 1998).

65. 21 U.S.C. §§ 151–159. Another example of government reacting to market conditions is the recent enactment of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, 116 Stat. 594 (codified at 42 U.S.C. § 201). This recent legislation was passed in response to the events of 9/11. Title III specifically targets the food supply and aims to protect the "safety and security of the food and drug supply." *Id.* §§ 301–336. Although on its face this legislation appears to tackle many concerns Americans had of further—primarily biological—attacks, it has been argued that it is merely another empty law aimed to appease the public as opposed to protect it. *See* Lovett, *supra* note 16, at 476–87.

66. *See* Adler, *supra* note 54, at 48.

67. Lovett, *supra* note 16, at 468.

68. 21 U.S.C. §§ 151–159 (delegating powers to APHIS).

treat animal diseases.[69] The importance of the Virus Act in terms of Mad Cow Disease is that it prohibits the production, marketing, and use of diagnostic tests "use[d] in the treatment of domestic animals, unless and until the said [diagnostic test] shall have been prepared, under and in compliance with regulations prescribed by the Secretary of Agriculture."[70] Essentially, no diagnostic test may be used without a license from APHIS and failure to obtain a license would violate the Virus Act.[71] Unfortunately, APHIS has only licensed the BSE test kits to itself.[72] As such, only USDA scientists may lawfully test cows to determine if they have BSE.[73]

Considering the shift of the Food Inspection Service inspection duties to plant employees, the reason for prohibiting plants from using additional testing methods to ensure that its product is BSE-free seems at odds with Congress's general deference to USDA-developed regulations. Instead of permitting the meat industry to determine appropriate and effective quality control mechanisms, as it does under the Federal Meat Act, the Virus Act sanctions anyone—even states[74] and private plants—who administer tests without a federal license.[75] Therefore, as discussed further in Part IV, although slaughtering plants must create their own quality control processes, they are prohibited from developing a system that will detect BSE within their products.

69. *Id.*

70. 21 U.S.C. § 151.

71. *See* 21 U.S.C. § 159.

72. *See* Stephanie Simon, *U.S., Some Ranchers Clash over Mad Cow Tests: The USDA Rejects the Need to Certify All Cattle, a Policy that Blocks Some Beef Exports*, L.A. TIMES, May 24, 2004, at A1 [hereinafter *Some Ranchers Clash*].

73. Eric Schlosser, *Order the Fish*, VANITY FAIR, Nov. 2004, at 240, 245 [hereinafter Schlosser, *Fish*]; *see also Some Ranchers Clash, supra* note 72, at A1, A11.

74. Initially, the 1913 Act was interpreted to apply only to "interstate" commerce. *See* Grand Labs., Inc. v. Harris, 644 F.2d 729 (8th Cir. 1981); Animal Health Inst. v. United States Dep't of Agric., 487 F. Supp. 376 (D. Colo. 1980). Under these rulings, the 1913 Act did not apply to licensing solely within an individual state. In response, Congress amended it in 1985 to place regulation and licensing of all products and activities both interstate and intrastate within the domain of federal law. *See* Food Securities Act of 1985, Pub. L. No. 99-198, 99 Stat. 1657, tit. XVII, § 1768(e) (codifed at 7 U.S.C. § 136(y)).

75. 21 U.S.C. § 152. Violators could face a $1000 fine, up to a year in jail, or both per incident. *Id.* § 158.

II. The USDA's Inertia Makes It Ill-Equipped to Protect Against the Unique and Contemporary Threat of Mad Cow Disease

The first case of Mad Cow Disease was diagnosed in the United Kingdom in 1986.[76] "BSE is part of a closely related family of brain wasting diseases called Transmissible Spongiform Encephalopathies ("TSEs")),"[77] which affect a number of species. TSEs create holes in the brain where brain cells have died and are slow, degenerative, and one hundred percent fatal diseases.[78]

In 1982, Nobel Prize winning scientist Dr. Stanley Prusiner[79] developed the "prion theory," which explains that TSEs "[consist] only of a protein which [he] termed the prion."[80] The difference between normal proteins and prions is the shape of the molecules.[81] Prions are folded, which makes them resistant to heat, digestion, radiation, and chemicals,[82] and, more importantly, prions "force normal protein molecules to conform to [their] shape . . . . [It is] the accumulation of prions [that] destroys the brain."[83]

The sudden European outbreak of BSE in the 1980s and 1990s resulted from slight changes to the "rendering process,"[84] which ena-

76. *See* Australian Acad. of Sci., Mad Cow Disease—A Human Problem?, www.science.org.au/nova/003/003key.htm (last visited Feb. 1, 2006).

77. Susanne Aberbach-Marolda, *The Law and Transmissible Spongiform Encephalopathies: The Case for Precautionary Measures*, 15 PACE INT'L L. REV. 1, 4 (2003). A common form of TSE, a disease called Scrapie, is found in sheep and has been prevalent for over 100 years. *Id.* at 5–6; *see also* World Health Org., Bovine Spongiform Encephalopathy, http://www.who.int/zoonoses/diseases/bse/en/.

78. *See* Australian Acad. of Sci., *supra* note 76. As a result, the animal loses control over movement and suffers from behavior changes, rendering it "mad." The clinical name reflects the topography of the brain once the disease takes over—essentially, the brain looks like a sponge. *See id.*

79. Stanley B. Prusiner, *Detecting Mad Cow Disease*, SCI. AM., July 2004, at 86, 91 ("Stanley B. Prusiner is professor of neurology and biochemistry at the University of California San Francisco School of Medicine. . . . In 1997 he won the Nobel Prize in Physiology or Medicine for his discovery and research into prions.").

80. *Id.* at 86.

81. *Id.*

82. *See id.*

83. *See* Nat'l Consumers League, *Mad Cow Disease Basics*, NCL BULL., Jan./Feb. 2004, at 11 [hereinafter NCL BULLETIN].

84. *See* Aberbach-Marolda, *supra* note 77, at 7–8. The rendering process is a process during which protein matter from carcasses of slaughtered animals is isolated. *Id.* During the rendering process carcasses are thrown into boiling water after all consumable parts are removed. While boiling, the fat rises to the top, and all that is left is protein. The changes in the rendering process included using less harsh chemical solvents and adding the use of steam heat. *Id.*

bled the disease agents in the animal protein to survive throughout processing.[85] The disease soon became an epidemic since leftover protein from slaughtered animals was used as animal feed.[86] The Mad Cow Disease epidemic in England began when infected feed was fed to cows, and it intensified as infected cattle were slaughtered and became feed for other cattle.[87] Despite the severe public health risk, the British government did not institute strict cannibalistic feed bans until 1996,[88] allowing the problem to cross borders via international cattle markets.

Like cows, humans are susceptible to the brain wasting disease simply by eating infected material.[89] Considering that one hamburger may contain meat from hundreds of cows, the risk of infection is quite high—even if only one cow in an entire herd or batch has BSE.[90] The human strain of TSE is a new form of Creutzfeldt-Jakob disease ("CJD"), which traditionally affected only older people. The new form, known as variant CJD, has a characteristic clinical and pathological phenotype which differs from other routinely diagnosed cases of CJD.[91] The first cases of this human brain-wasting disease were discovered in England in 1996.[92] The variant CJD incubates "before erupt-

85. *See* Australian Acad. of Sci., *supra* note 76.

86. *See* Aberbach-Marolda, *supra* note 77, at 7. The animal feed was sold to farmers, laboratories, and zoos. *See id.*

87. *See* Prusiner, *supra* note 79, at 88.

88. *See id.*

89. *See* NCL BULLETIN, *supra* note 83, at 11.

90. Pub. Broad. Sys., Frontline, Modern Meat: Interview of Dr. Robert Tauxe, Ctrs. for Disease Control & Prevention, Chief, Food-Borne & Diarrheal Diseases Branch, http://www.pbs.org/wgbh/pages/frontline/shows/meat/interviews/tauxe.html (last visited Feb. 5, 2006) [hereinafter Tauxe Interview] ("I suspect there are hundreds or even thousands of animals that have contributed to a single hamburger."). *See also* Ctrs. for Disease Control & Prevention, Div. of Bacterial Mycotic Diseases, Food-borne Illnesses General Information Frequently Asked Questions, http://www.cdc.gov/ncidod/dbmd/diseaseinfo/food-borne infections_g.htm#riskiestfoods (last visited Feb. 5, 2006).

91. Dept. of Health & Human Servs., Ctrs. for Disease Control & Prevention, variant CJD, http://www.cdc.gov/ncidod/dvrd/vcjd/ (last visited Feb. 5, 2006). The differences between CJD and variant CJD are "characterized by a younger age at onset of symptoms . . . behavioral change symptoms, longer duration of illness, a non-diagnostic or normal EEG tracing, and . . . different lesions in brain tissues." U.S. Army Ctr. for Health Promotion & Preventive Med., Questions and Answers for Medical Care Providers About Variant Creutzfeldt-Jakob Disease, http://chppm-www.apgea.army.mil/madcowdisease/ProviderQA.doc. (last visited Feb. 5, 2006).

92. *See* Merritt McKinney, *Mad Cow Proteins Form in Muscle as Well as Brain*, RENSE.COM, Mar. 19, 2002; Prusiner, *supra* note 79, at 88. As of March 2006, there has been one documented American case of variant CDJ. *See* Marc Santora, *Crop of Deaths from Fare Brain Disease Has Upstate Residents Asking, 'Why Us?,'* N.Y. TIMES, Oct. 25, 2004, at B1, B4. However, doctors claimed that the young victim contracted the disease in the United Kingdom, where she lived until she was thirteen years old. *See Family of Only U.S. Mad Cow Case Blames*

ing into dementia, paralysis and death."[93] Given that prions, and thus, BSE, are undetectable to the naked eye, and the fatal nature of variant CJD, the USDA's current protocols are unprepared to deal with this contemporary threat.

The American BSE aftermath left many consumer groups and meat industry critics wondering just how concerned the USDA is with protecting the American meat supply.[94] For example, many critics wondered how the suspected Holstein was allowed into the food supply in the first place.[95] Unfortunately, the multi-jurisdictional regulation system prevented one enforcement branch from detaining the cow while another awaited test results.[96] "[T]esting for mad-cow disease falls under the USDA's . . . [APHIS], not . . . [Food Inspection Service]—and APHIS's job is to keep *animals* healthy,"[97]—not humans. APHIS's "authority does not cross into the arena of food safety."[98] The USDA's response to the 2003 BSE case highlights the problems with its bureaucratic landscape.

The easiest way to ensure the meat supply is safe is through extensive testing.[99] The USDA, however, continues to use "immunohistochemistry" testing[100] ("IHC"), which, according to Dr. Prusiner, is

U.K., CNN.COM, Oct. 25, 2002, http://edition.cnn.com/2002/HEALTH/conditions/10/17/madcow.us/. The twenty-three year-old woman suffered "uncontrollable biting and hitting episodes" and later could "no longer speak or control her functions." *Id.*

93. Adler, *supra* note 54, at 45–46.

94. Prior to the 2003 case of Mad Cow Disease in the United States, the USDA initiated measures to prevent Mad Cow Disease from entering and spreading in America. Memorandum from Cal. Cattlemen's Assoc., to Senator Jackie Speier, Cal. State Senator 1 (Mar. 8, 2004) (on file with U.S.F. Law Review). For example, in 1989, the United States "banned the importation of ruminant animals and at-risk ruminant products from countries with confirmed cases of BSE." *Id.* On December 30, 2003, the agency announced new protocol to protect against Mad Cow Disease "including the elimination of 'downer cattle' (cows that cannot walk [due to sickness or injury]) from the food chain, the removal of high-risk material like spinal cords from meat processing." Schlosser, *supra* note 1, at A17. Ruminant animals are animals that have been fed the parts of other animals, typically blood, bone, and neurological matter. In 1997, the FDA banned the use of ruminant meat and bone meal in cattle feed in the United States. *See* Prusiner, *supra* note 79.

95. *See* Adler, *supra* note 54, at 43, 48; *see also* Schlosser, *Fish*, *supra* note 73, at 253.

96. Adler, *supra* note 54, at 43, 48.

97. *Id.*

98. *Id.*

99. *See* Prusiner, *supra* note 79, at 89.

100. *See* U.S. Dep't of Agric., Animal & Plant Health Inspection Servs., APHIS Hot Issues, Bovine Spongiform Encephalopathy (BSE) Q & A's for Rapid BSE Test, http://www.aphis.usda.gov/lpa/issues/bse/bse_rapidtest_faq.html; *see also* Donald G. McNeil, Jr., *Research in Italy Turns Up a New Form of Mad Cow Disease*, N.Y. TIMES, Feb. 17, 2004, at A9 [hereinafter *Research in Italy*]. Although considered the "gold standard" of BSE tests, IHC is a time-consuming process. *See* Prusiner, *supra* note 79, at 90. "[Technicians must examine each slide [of sample brain tissue so] the process . . . often [takes] as many as seven days

"an old technique that is cumbersome and extremely time-consuming . . . and so is impractical for universal application."[101] In the mid-1980s, Dr. Prusiner and his colleagues developed a new method of testing for low levels of prions called "conformation-dependent immunoassay" ("CDI"), which is fast and easy to apply universally.[102] In 2003, CDI gained approval for use in Europe and Japan.[103]

The choice of test to be used is significant because of the time sensitivity surrounding the detection of BSE. For example, one plausible reason why it took so long for the USDA to respond to the 2003 American BSE case is that the USDA uses a test that takes "as many as seven days [to complete]."[104] Further, since only the USDA may conduct the testing, samples must be sent to one of the seven USDA laboratories[105] before results are conclusive. Although the IHC test cannot be blamed for all of the USDA's shortcomings, had the USDA used the CDI test, things may have been different. In contrast to the IHC test, the CDI test produces results in about five hours, which permits the tests to be administered at the time of slaughter.[106]

Shortly after the discovery of the first American BSE case, Consumers Union, along with other food safety and consumer groups, met with then-Secretary of Agriculture Ann Veneman to discuss additional protocols to ensure the safety of the American meat supply.[107] Among the coalition's recommendations were an extensive testing program and cattle identification system.[108] As a result, the USDA announced that it would increase testing "for a one-and-a-half year pe-

[to complete], and is not useful for mass screenings." *Id.* For a more detailed description of the IHC test, see generally U.S. Dep't of Agric., Animal & Plant Health Inspection Servs., APHIS Factsheet, The IHC Test Variables, http://www.aphis.usda.gov/lpa/issues/bse/bse.html.

101. Prusiner, *supra* note 79, at 89.

102. *Id.* at 89–90; *see also Research in Italy*, *supra* note 100.

103. Prusiner, *supra* note 79, at 92; *see also Research in Italy*, *supra* note 100, at A9; Sandra Blakeslee, *One Producer of U.S. Beef Wants to Test All Its Cattle*, N.Y. TIMES, Feb. 27, 2004, at A18.

104. Prusiner, *supra* note 79, at 90.

105. *See Some Ranchers Clash*, *supra* note 72, at A1, A11.

106. *See* Prusiner, *supra* note 79, at 90; Robert Lull & Steve Heilig, *Remedy for an Insane Policy—Test All Beef for Mad Cow*, S.F. CHRON., May 14, 2004, at B11. Other differences include the levels of prions necessary for detection. The CDI tests can detect the *presence* of BSE prions whereas the IHC test detects "full-blown neurological disease." *Id.*; *see also* Prusiner, *supra* note 79, at 89.

107. *See* Press Release, Consumers Union, Consumer Food Safety Groups Meet with USDA Secretary to Outline Requests on Mad Cow Disease (Jan. 15, 2003).

108. *See id.*

riod,"[109] but would continue to use its testing method, rather than the faster CDI test. The strategy behind the increased testing was not to promote meat safety assurances, but rather to assess the risk of BSE in America. By increasing testing for one and a half years, the USDA hoped to glean a "snapshot" of the state of the American BSE threat.[110] The USDA plan included increased testing—from 40,000 animals to between 201,000 and 268,000 animals.[111] Nevertheless, this plan still left America testing less than one percent of the thirty-five million cattle slaughtered in America each year.[112] Further, in light of its limited testing and the recent discovery of another American BSE case in June 2005,[113] the "snapshot" program did not adequately portray the BSE threat in America.

Compared to many other countries, not only is America's testing method far behind the norm, but with a testing goal of only one percent, it targets the least amount of animals of the countries that perform testing.[114] For example, "many European Union countries test seventy-five percent of the cows old enough to be at-risk, and Japan tests *all* slaughtered cows regardless of age."[115] Indeed, an international panel consulting the USDA during the BSE aftermath suggested more pervasive testing.[116]

III. USDA Protocols Create Market Inefficiencies

The USDA has vast authority, but it refuses to initiate protocols sufficient to detect BSE, leaving the meat market paralyzed and inefficient. This leaves retailers unable to mitigate against BSE by using bet-

109. *See* Press Release, Consumers Union, USDA Announcement of More Mad Cow Testing Still Inadequate to Protect Public Health (Mar. 16, 2004) [hereinafter Mar. 16 Press Release].

110. *See* June 24 Press Release, *supra* note 4; U.S. Dep't of Agric., Animal & Plant Health Inspection Servs., USDA's BSE Testing Program, http://www.aphis.usda.gov/lpa/issues/bse_testing/plan.html (last visited Feb. 6, 2006) [hereinafter USDA Announces BSE Test Results].

111. *See* USDA Announces BSE Test Results, *supra* note 110. Traditionally, the USDA only tested 20,000 cattle per year for BSE. *See* Blakeslee, *Plan*, *supra* note 2, at A19. However, after the 2003 American BSE case was discovered, the USDA increased its testing to 40,000 per year. *Id.*

112. *See* Mar. 16 Press Release, *supra* note 109; *see also Official Tells*, *supra* note 1, at F2.

113. *See* June 24 Press Release, *supra* note 4.

114. *See* Mar. 16 Press Release, *supra* note 109.

115. NCL BULLETIN, *supra* note 83, at 11.

116. The panel was instituted to make recommendations for gauging and containing the mad cow disease problem within the United States. *See* Donald G. McNeil, Jr. & Denise Grady, *Ban Urged on All Animal Protein for Cattle*, N.Y. TIMES, Feb. 5, 2004, at A20; Alicia Ault, *Federal Panel Recommends More Testing for Mad Cow*, N.Y. TIMES, Feb. 14, 2004, at A12.

ter consumer indicators on product labels, producers are required to produce under low USDA quality standards without implementing known and widely used BSE detection processes, and consumers are left to make uninformed purchasing decisions because they lack the necessary information about meat and meat products. This market is inefficient because, absent the USDA obstacles, producers would be willing to incur costs to produce a higher quality, BSE-free product[117] and consumers would be willing to pay more for a safer, BSE-free product.[118]

A. The USDA Prevents Retailers from Determining Which Suppliers Produce the Best Quality Meat and Informing Customers of Improved Quality Standards

The meat industry has many different layers of specialization,[119] and the pervasive anonymity within the system prevents retailers from determining which producers produce the safest meat. Although this organization may be logistically efficient, it also creates a complicated system in terms of accountability and traceability. Producers have different processing plants and once at the slaughterhouse, plants use mass production lines to produce meat, which results in meat from many different sources being mixed. "[W]hen [cows] are transported to slaughter, animals from many different farms may go in the same truck or the same transport freight to the slaughterhouse."[120] After it is processed, distributors purchase beef to sell to retailers. Distributors generally "purchase beef from multiple sources, [and] mix it in their inventory, and lose track of the source of the beef they send to the stores that they supply."[121] This problem of anonymity as to source is exacerbated by the fact that there is no cattle-tracking system in the United States. During its investigation of the December 2003 case, the USDA was unable to locate two-thirds of the eighty-cattle herd that entered the United States along with the infected Holstein.[122] The only reason that the USDA was able to trace the infected Holstein, is

117. *See infra* Part IV.A.

118. *See infra* Part IV.B.

119. *See* Pub. Broad. Sys., Frontline, Modern Meat: Interview of Bill Haw, CEO, Kan. Nat'l Farms, http://www.pbs.org/wgbh/pages/frontline/shows/meat/interviews/haw.html (last visited Mar. 15, 2006). Bill Haw discusses the "life of an average cow," which describes the various participants in meat production and demonstrates the specialized nature of the meat industry.

120. Tauxe Interview, *supra* note 90.

121. GAO REPORT, *supra* note 13, at 41.

122. Shakar Vedantam, *U.S. Ends Investigation of Mad Cow Case; Officials Fail to Find Two-Thirds of Animals at Risk of Infection*, WASH. POST, Feb. 10, 2004, at A1.

because it came from a ranch in Canada, which does have a national tracking system.[123] Given the nature of cattle raising—many cows are bred on a single ranch, raised for a period of time on that same farm, fed the same feed, and then sold to various buyers[124]—it is unlikely that only one infected Holstein came to the United States for slaughter. This anonymity within the system often prevents retailers from withdrawing their business from low-quality producers because they cannot always identify which of their many suppliers are supplying poor meat.[125]

In order for retailers to determine if the meat they are getting is safe, they would need to audit each supplier's plants to determine the quality of the beef that each is producing, and then limit their purchases to only the safe plants.[126] Although the larger retailers should, and often do, perform these audits, unfortunately, audits are not an option for smaller retailers.[127] Audits are expensive, time consuming, and require that the retailer have a certain relationship with the supplier in order to gain access to their plants. For example, Jack in the Box has the status to guarantee the quality of their product and they "work as total partners" with their suppliers.[128]

> Collectively, [Jack in the Box] go[es] back to people that supply meat . . . with the people that do the processing, back to the slaughter plants . . . [to] make sure those plants are OK. Then [they] audit those plants together. Then [they] have agreements about how the testing will be done and what happens in the[ ] plants.[129]

Not every retailer benefits from such a close relationship with its suppliers. Smaller chains, mom-and-pop groceries, school districts, and local restaurants are left with no way of assuring quality to their customers. They lack the personnel, status, and negotiating power to encourage suppliers and plants to work with them in audits.

123. *See* Odeshoo, *supra* note 1, at 298–99.

124. *See supra* note 119 and accompanying text.

125. *See* Micheal Ollinger & Nicole Ballenger, *Amber Waves: The Economics of Food, Farming, Natural Resources and Rural America: Weighing Incentives for Food Safety in Meat and Poultry*, AMBER WAVES, Apr. 2003, at 34, 36, *available at* http://www.ers.usda.gov/AmberWaves/April03/Features/WeighingIncentives.htm.

126. Pub. Broad. Sys., Frontline, Modern Meat: Interview of David Theno, Vice President, Technical Servs., Jack in the Box, http://www.pbs.org/wgbh/pages/frontline/shows/meat/interviews/theno.html (last visited Feb. 6, 2006) [hereinafter Theno Interview].

127. *Id.*

128. "While we do not own those plants, we have a very good relationship, and it is like we are partners in that plant and that production." *Id.*

129. *Id.*

Furthermore, under the current testing protocol, audits are useless in the face of BSE. Currently there are no USDA standards in place to universally detect BSE on a continual basis, and private farmers, ranchers, and plants do not have the authority or capabilities to test for the disease on their own.[130] As such, retailers have no way of discovering which suppliers provide the safest meat. However, even if a retailer could find a supplier that would provide only BSE-free meat[131]—the retailer would have no way of passing on the information to its customers. Unless the suppliers want to create a brand name to market their meat, the labels on meat only identify the store in which it is sold.[132] However, suppliers are less likely to brand their lower cost meats because the investment necessary to create a brand would not be worth it for such products.[133] Therefore, retailers are prevented under the Federal Meat Act meat labeling restrictions and would violate the Federal Meat Act if they were to include any identifiers of quality standards "in addition to, or different than" the USDA-mandated quality standards.[134] As a result, retailers cannot mitigate against the effects of Mad Cow Disease using their traditional auditing methods.

B. Producers Are Forced to Produce at the Low Quality Standards Set by the USDA

The USDA's antiquated statutory regulations prevent any improvement at the state and local levels or within the private sector, unless specifically authorized by the agency. As discussed in Part I.B, APHIS has sole authority to grant licenses to use diagnostic tests on animals via the Virus Act.[135] Therefore, if states, meat producers, or ranchers wanted to increase the testing of their own products and herds, they are prevented from doing so unless they receive a federal license.[136] When "Congress passed the [Virus Act] back in

130. *See infra* Part IV.A.

131. Hypothetically, if a supplier could purchase cows from American ranchers who have never fed their herds infected animal parts, and could verify their practices to their buyers through documentation and recordkeeping, then the suppliers would be able to assure that the meat they were selling was BSE-free.

132. *See* Ollinger & Ballenger, *supra* note 125, at 36. Not all companies want to bear the extra costs and risks associated with creating a brand name. Although consumers "will pay premiums for branded products because they are perceived to be of better quality," the suppliers must invest much more in producing the brand product. *Id.*

133. *Id.* at 37.

134. 21 U.S.C. § 678 (2000).

135. *See infra* Part I.B.

136. *See infra* Part I.B.

1913 . . . [it] not only gave the USDA the power to . . . [specify] what safety tests [ranchers and meat packers] had to perform; it also gave the USDA the ability to prevent testing."[137] Congress amended the Virus Act in 1985 and effectively prevented individual states from enacting legislation for license-granting authority as well. Congress explained that due to drastic changes in animal agriculture since 1913, an "intrastate/interstate" distinction no longer exists for animal products.[138] Congress also claimed that a uniform regulatory standard would be better for the "truly national market."[139] Although several courts addressing APHIS's regulatory preemption of state law have found that the Virus Act does preempt state law,[140] regardless of whether preemption is indeed the case in all states, the mere threat of preemption prevents individual states from successfully passing legislation to require testing of all cattle for BSE.[141]

C. Consumers Cannot Make Informed Purchasing Decisions

The government has assumed responsibility for meat inspection and "[w]e take as given that government has many important roles to play, that federal authorities are important actors in fulfilling those roles, and that significant federal resources will, and should continue to be devoted to these activities."[142] Although there have been significant technological changes within the meat industry, changes in meat regulation and inspection are rare.

> There have been a number of important changes in the meat industry over the last 50 years. . . . As the line speeds and the general efficiency of the slaughter plants increase, there may also be a greater opportunity for contamination to spread from one carcass to another. . . . [T]he industrialization of our meat supply opened up a conduit for . . . infections to pass through to the consumer.[143]

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137. *See* Jon Ortiz, *USDA Goes Mad: Meat Plant Told It Can't Test Every Cow*, SACRAMENTO BEE, Apr. 14, 2004, at B6.

138. *See* S. REP. NO. 99-145, at 338–39 (1985).

139. *See id.*

140. *See, e.g.*, Lynnbrook Farms v. Smithkline Beecham Corp., 887 F. Supp. 1100 (C.D. Ill. 1995); Murphy v. Smithkline Beecham Animal Health Group, 898 F. Supp. 811 (D. Kan. 1995); Grand Labs., Inc. v. United States Dep't of Agric., 10 F.3d 584 (8th Cir. 1993).

141. *See* Will Shuck, *Bill to Test Every Cow Is Dropped: Critics Assailed Costs of Proposal*, RECORD, Apr. 29, 2004. California State Sentator "Michael Machado . . . dropped his plans to require mad cow disease tests on every head of cattle slaughtered in California. . . . Currently, the federal government prohibits such testing, and it remained unclear whether California would be able to enact a contradictory law." *Id.*

142. Richard A. Merrill & Jeffrey K. Francer, *Organizing Federal Food Safety Regulation*, 31 SETON HALL L. REV. 61, 65 (2000).

143. Tauxe Interview, *supra* note 90.

Unfortunately, because insufficient product information is supplied, the majority of consumers have no idea that the government does not adequately protect the meat supply. Unless the supplier produces a brand name, marketing strategies do not have a consumer focus, and consumers have much less access to information about the meat products they buy than do those who produce them.[144] Currently, meat that consumers purchase at the supermarket does not indicate anything beyond the basics: weight, date, cooking instructions, and the store name. Absent from the label information are specifics such as who the meat producer is, which plant processed it, where its farm or ranch of origin is located, what kinds of tests were conducted, and for which health and safety risks were the tests conducted. To find out any of this information while at the store, a consumer could ask the butcher, but butchers are not likely to know the answers either.[145] The butcher may be able to give the consumer a phone number to call, but instead of specifics, the consumer is likely to hear only the following information: "[L]ook at the freshness of the product. Look at the shelf life."[146] Not only does imperfect information affect purchasing power, but it also affects the legal liability of meat producers.

D. The Legal Liability of Meat Producers Provides Little Incentive for Change

The idea that civil lawsuits will not only redress consumer harm but will also force defendants within the meat industry to change their "bad" behavior is not a reality in the meat industry.[147] In theory, civil lawsuits seem simple: If meat producer X produces and distributes adulterated meat, it violates the Federal Meat Act and PFDA.[148] Various consumers purchase and consume the tainted meat and as a result experience illness or even die. The victims or victims' families bring a lawsuit and seek monetary damages from meat producer X. Any damages awarded are transaction costs in connection with the sale of contaminated meat, and, in theory, meat producer X would then be compelled to minimize the incidence of adulterated products in its plants. Unfortunately, there are many problems with this theory under current meat production practices.

144. *See* Theno Interview, *supra* note 126.
145. *Id.*
146. *Id.*
147. *See* Ollinger & Ballenger, *supra* note 125, at 37.
148. *See supra* Part I.A.1.

First, causation is an issue. "[P]laintiffs are unlikely to receive awards in food-borne illness trials, even in the case of a major illness, because rarely can the plaintiff make a certain link between a particular food and the sickness."[149] Many food-borne pathogens have an incubation period, making it difficult to prove causation by a sufficient legal standard. Second, even if a plaintiff could prove all the elements under the Federal Meat Act and PFDA, monetary damages vary greatly and are often too small to prompt any sort of change in the meat industry.[150] Third, because producers want to avoid the threat of public trials as much as possible, lawsuits are more likely to settle than go to trial. Without a highly publicized trial and exposure to market reaction, producers are unlikely to change their meat safety practices.[151] Therefore, even if consumers could overcome these hurdles by tracking a tainted hamburger back to the plant, the feedlot, and the ranch to pinpoint exactly how the infected cow contracted BSE, they are left with little remedy other than a one-time monetary compensation that will not affect meat safety.

IV. USDA Protocols Force the Market to Remain Inefficient

In general, an inefficient market is one where the given commodity's price does not reflect its fair market value. Here, an inefficient meat market indicates that producers would be willing to invest more money to implement better safety control mechanisms on their lines, and thus, produce a higher quality product if they had the legal means to do so. On the consumer side, it suggests that consumers would be willing to pay more for a higher quality product if they were informed of which products were safe through proper labeling and product differentiation.

A. Producers Would Be Willing to Incur Costs to Produce Safer Products

Following the 2003 BSE case, Creekstone Farms Premium Beef LLC ("Creekstone"), a ranch in Arkansas City, Kansas, wanted to test

149. *See* Ollinger & Ballenger, *supra* note 125, at 37.

150. Sharlene W. Lassiter, *From Hoof to Hamburger: The Fiction of a Safe Meat Supply*, 33 WILLAMETTE L. REV. 411, 419–44 (1997) (discussing how the civil action through consumer lawsuits seeking monetary damages have failed to shift the cost-benefit analysis for the meat producer enough to alter the status quo).

151. *See* Ollinger & Ballenger, *supra* note 125, at 37.

its meat for BSE.[152] The ranch proposed to use the CDI rapid test developed by Dr. Prusiner.[153] Creekstone's main buyers were Japanese companies,[154] but the Japanese government closed its doors to meat exports from the United States after the USDA refused to initiate testing for BSE.[155] The USDA denied Creekstone's request because it had "qualms about delegating authority to test for mad cow [disease]."[156] The USDA also claimed that the use of the test "as proposed by Creekstone would have implied a consumer safety aspect that is not scientifically warranted."[157]

Given the changes in meat inspection in the 1990s, the USDA response is unjustified. The worries regarding "delegating authority" certainly do not exist for other types of inspection within the meat industry. As discussed in Part I.A, HACCP shifted almost all inspection duties—including tests for food-borne pathogens like E. coli and salmonella—to plant employees.[158] The Food Inspection Service no longer controls meat inspection as it did when the Federal Meat Act was first enacted in 1906, and APHIS, likewise, should not control testing the way it has been since the Virus Act was enacted in 1913.

Further, the USDA's claim that testing all its cows is "not scientifically warranted" with the rapid CDI test is unsupported. The European Union and Japan approved the CDI test in 2003. Moreover, many countries within the European Union test over seventy-five percent of the animals they slaughter, and Japan tests all of its cows sent to slaughter with the rapid CDI test.[159] In fact, shortly after denying Creekstone use of the rapid CDI test, the USDA approved CDI for use in its main laboratories during its increased testing period.[160] In addition, Dr. Prusiner also believes that "[g]iven that seemingly healthy

152. *See* Jon Ortiz, *State Looks to Test Beef: Lawmakers Hope to Soften Foreign Ban*, SACRAMENTO BEE, Mar. 12, 2004, at D1, D2 [hereinafter Ortiz, *Soften Foreign Ban*].

153. *See supra* Part II.

154. Japan alone accounts for roughly ten percent of United States foreign beef sales. *See* Ortiz, *Soften Foreign Ban*, *supra* note 152, at D1.

155. Since December 23, 2003, more than fifty countries accounting for roughly $3.86 billion in export sales have closed its doors to United States beef. *See id.*

156. *See id.* at D1, D2; *see also* Press Release, Bill Hawks, U.S. Dep't of Agric., Undersec'y for Mktg. & Regulatory Programs, Statement Regarding a Request by Creekstone Farms for Private BSE Testing (Apr. 9, 2004).

157. Press Release, Bill Hawks, *supra* note 156.

158. *See supra* Part I.A.2.

159. *See supra* note 115 and accompanying text.

160. *See* Ira Dreyfuss, *U.S. Reportedly Approves Mad Cow Test*, ASSOCIATED PRESS, Mar. 18, 2004; *see also* John S. Carroll (ed.), *Let Beef Consumers Decide*, L.A. TIMES, May, 5, 2004, at B12.

animals can potentially carry pathogenic prions, . . . testing all slaughtered animals is the only rational policy."[161]

B. Consumers Are Willing to Pay More for BSE-Free Meat

Currently, meat in the United States is one of the most inexpensive food products available. In fact, beef now costs roughly half of what it did in 1970.[162] The price of beef, however, does not reflect what consumers would be willing to pay for a higher quality product. Consumer Reports conducted a national survey in January 2004—weeks after the discovery of the first case of Mad Cow Disease in the United States. Respondents were first screened for awareness of the discovery of Mad Cow Disease in the United States and beef consumption.[163] The survey indicated that 71% of adults who eat beef would be willing to pay more to support testing of cattle to ensure that they are free of BSE.[164] Of these, 95% would be willing to pay ten cents more per pound of beef, the upper limit of the estimated cost of testing.[165] Additionally, if certified and non-certified varieties were available at the store, 77% of those who eat beef would pay more for beef certified as testing negative for BSE.[166] This survey indicates that consumers want the chance to make informed decisions. Nevertheless, since the industry is unable to test for BSE themselves and is forced by the USDA to label their meat with minimal information, consumers cannot differentiate products based on quality standards, and as a result, they are not given the opportunity to demonstrate their preferences.

V. Solution: Mandatory Recall Authority Is Necessary for Consumer Safety

Given that BSE is difficult to detect and the high consumer health risks it poses, the meat industry and the agencies that regulate it do not adequately provide consumers assurance that the products they buy are safe. To properly protect American consumers, the USDA, its regulations, and the laws under which it operates should be

161. Prusiner, *supra* note 79, at 86, 92.

162. Pub. Broad. Sys., Frontline, Modern Meat: Industrial Meat: Interview of Patrick Boyle, CEO, Am. Meat Inst., http://www.pbs.org/wgbh/pages/frontline/shows/meat/industrial/consolidation.html (last visited Feb. 6, 2006).

163. CONSUMER REPORTS: MAD COW DISEASE SURVEY 1, 2 (2004) (prepared by Consumer Reports Market Research).

164. *Id.* at 3.

165. *Id.*

166. *Id.*

completely overhauled and should incorporate a more comprehensive prevention system.[167] However, such a long term solution is highly unlikely to be implemented anytime soon. Further, the lengthy legislative process that would ensue would offer no protection to Americans during the interim.[168]

Considering that the USDA fails to have adequate preventative mechanisms to detect BSE and that it prevents the market from ensuring that only safe products enter the stream of commerce, the meat regulatory system also needs authoritative containment mechanisms, in the likely event that there are future cases of BSE in America.[169] Therefore, the next best solution is to delegate mandatory recall authority to the USDA, so that, in the case of a BSE outbreak, the USDA is better equipped to correct the situation and alert consumers of the potential danger.

A. Current USDA Recall Authority Lacks a Safety Net

Between 1995 and 2000, the USDA initiated 275 recalls for meat products, for a total of more than 140 million pounds of meat.[170] Of all the recalls completed, less than thirty percent of the contaminated meat was recovered.[171]

The reason meat is rarely recovered is that the current USDA recall process is extremely lengthy, and, given the perishable nature of meat, it fails to recognize that time is of the essence when issuing a recall of tainted product. The voluntary and secret nature of USDA recall authority prolongs and complicates recall completion.

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167. For example, the USDA should increase testing for BSE and test all cows meant for human consumption. The Agency should also initiate a cattle identification and tracking system in order to reduce the amount of time it takes to trace back infected cows to their herd of origin. Additionally, centralizing meat regulation into one agency and demarking specific roles within its branches would alleviate overlapping jurisdictional problems.

168. The problems confronting an overhaul of meat industry regulation is beyond the scope of this Comment. For a more detailed discussion regarding such obstacles, see Casey, *supra* note 25, at 147.

169. In fact, the most recent case of American BSE was discovered in March 2006. *See* Miranda Hitti, *Alabama Cow Has Mad Cow Disease: Cow Never Entered the Animal or Human Food Chains, U.S. Official Says*, WEBMD.COM, Mar. 13, 2006, http://www.webmd.com/content/article/119/113557.htm (last visited Mar. 15, 2006).

170. Pub. Broad. Sys., Frontline, Meat Recalls, http://www.pbs.org/wgbh/pages/frontline/shows/meat/safe/recalls.html (last visited Feb. 6, 2006.

171. *Id.*

First, unlike the toy and car tire industries where issued recalls are mandatory,[172] establishments distributing meat notify the public on a *voluntary basis.* A recall, as Food Inspection Service defines it, is a "firm's *voluntary* removal of products from trade or consumer channels . . . to protect the public from consuming adulterated or misbranded products."[173] Under such a voluntary system, the USDA does not have the authority to "require a company to follow certain recall procedures."[174] Without a strict procedure, firms then have the ability to negotiate the scope of the recall, and "while they're negotiating how much meat should be recalled, people are eating the meat."[175]

Additionally, once a voluntary recall is initiated, the USDA has a very limited role. Using press releases and web postings, the USDA alerts consumers to the recall.[176] Many critics think such passive notification is ineffective[177] and the USDA should participate more. However, once it has issued the alerts, the Agency merely monitors the recall progress and has little more responsibility.[178] Thus, the USDA has no real knowledge of whether companies promptly and properly complete the recalls.

Further, under the voluntary system, companies are not required to notify the Agency when they identify a potentially unsafe product.[179] As such, there is no way of knowing if tainted meat has entered the stream of commerce until it is too late—and even then, tracing it back to the processing plant is not always certain. If, for some lucky reason, there is a "cluster of illnesses in one town, and epidemiologists [can] trace it back to meat at a restaurant [and] . . . there [i]s a sample of the meat left over in the restaurant, maybe they can find out what plant it came from, and that can precipitate a big recall."[180] Un-

172. *See* GAO REPORT, *supra* note 13, at 3. For example, the agencies responsible for the safety of products can order the recall of toys, heart pacemakers, and automobiles. *See id.*; Schlosser, *Fish*, *supra* note 73, at 245.

173. Press Release, U.S. Dep't of Agric., Food Safety & Inspection Serv., FSIS Update of Recall Activities (Feb. 9, 2004), *available at* http://www.fsis.usda.gov/oa/recalls/prelease/update067-2003.htm (last visited Feb. 5, 2006) (emphasis added).

174. GAO REPORT, *supra* note 13, at 54.

175. Pub. Broad. Sys., Frontline, Modern Meat: Interview of Eric Schlosser, Investigative Journalist, http://www.pbs.org/wgbh/pages/frontline/shows/meat/interviews/schlosser.html (last visited Mar. 15, 2006) [hereinafter Schlosser Interview].

176. *See* GAO REPORT, *supra* note 13, at 5.

177. *Id.*

178. *See id.* at 11 ("To carry out the[ ] verification checks, [the] USDA . . . contact[s] a percentage of the company's customers to determine whether the recall was carried out.").

179. *See* GAO REPORT, *supra* note 13, at 54.

180. Schlosser Interview, *supra* note 175.

fortunately, absent such luck, American consumers would have no idea if restaurants and supermarkets are selling tainted meat.

Second, once firms have agreed to conduct a voluntary recall, the USDA complicates the process by requiring state departments of agriculture to sign a Memorandum of Understanding ("MOU"), a contract binding the state health officials not to disclose where shipments of tainted meat have been shipped within its state, in exchange for finding out from the USDA where the meat was shipped.[181] Only if the MOUs are signed will the USDA disclose to state health officials where the tainted products were shipped.[182] The officials may then approach grocery stores, restaurants and businesses to ask if they will notify their customers.[183] If the businesses refuse, consumers may be left completely in the dark had they not thought to consult USDA web alerts on the off chance that a meat recall was issued in their area.[184] Even if the businesses do agree to post notices, the time state health officials waste trying to convince owners to notify their customers increases the likelihood that consumers eat the tainted meat. Not only is this contrary to public policy, but the process is very time consuming, as demonstrated in the Washington state BSE case. After the tests came back positive, it took an entire week to notify the affected states of the risk involved.[185]

The USDA claims the particulars about beef recalls, such as "distribution lists obtained from a firm recalling a meat . . . product are considered proprietary information protected from public disclosure."[186] As such, "the names and addresses of affected businesses, [are] proprietary and confidential information,"[187] and are generally exempt from the Freedom of Information Act.[188] Such a policy indi-

181. *See* Memorandum of Understanding Between FSIS and the Cal. Dep't of Health & Human Servs. (on file with U.S.F. Law Review) [hereinafter Memorandum of Understanding]; *see also Proposed Bill Bucks USDA Recall Policy Around the State*, CONTRA COSTA TIMES, Apr. 2, 2004, at F4 [hereinafter *Proposed Bill*].

182. *See* Memorandum of Understanding, *supra* note 181, at 2; *see also Proposed Bill*, *supra* note 181, at F4.

183. *See* Marjie Lundstrom, *State's Meat Recall Secrecy Pact Leaves Consumers in the Dark*, SACRAMENTO BEE, Jan. 22, 2004, at A3 [hereinafter *State's Meat Recall*].

184. *See id.*

185. *See State Hit a Wall*, *supra* note 14, at D1.

186. GAO REPORT, *supra* note, 13, at 25 n.23; *see* Memorandum of Understanding, *supra* note 181, at 2.

187. Jon Ortiz, *Mad Cow Secrecy May End: A Bill Requiring Better Public Notification Goes to Schwarzenegger's Desk*, SACRAMENTO BEE, Aug. 27, 2004, at D1. *See also State's Meat Recall*, *supra* note 183, at A3.

188. *See* Memorandum of Understanding, *supra* note 181, at 2; *see also* 5 U.S.C. § 552(b)(4) (2000).

cates that the USDA's primary objective is protecting the industry bottom line as opposed to consumer protection.[189]

B. Mad Cow Disease Is a Unique Threat and Mandatory Recall Authority Is Necessary to Protect American Consumers

The public health risks associated with BSE require containment measures that are swift and effective. Currently, under the voluntary recall process, timeframes of recovery exceed the actual shelf life of the product,[190] which renders the voluntary recall procedure almost useless. As such, concerns for public health and safety demand further regulation to give mandatory recall authority to the USDA. Although Food Inspection Service already has several methods for ensuring compliance,[191] the authority to mandate recalls is necessary given the swift nature of contemporary health threats and American commerce. Mandatory recall authority would include the power to "(1) require a company to notify the agency when it has distributed a potentially unsafe product, (2) order a recall, (3) establish recall requirements, and (4) impose monetary penalties if a company violates recall requirements."[192] As such, mandatory recall authority would reduce delays incident to the a company's ability to negotiate or respond to the recall as well as eliminate the so-called need for secret MOU agreements.

By allowing the USDA to order a recall the USDA would have more control over a potentially catastrophic situation. As it is now, the Agency is a mere by-stander. By requiring companies to notify the

189. California proposed a bill to address the recall problem, S.B. 1585, which was vetoed by Governor Arnold Schwarzenegger. The bill, if passed "would have ended a secrecy agreement between the U.S. Department of Agriculture (USDA) and California that prevents the state from disclosing the names and locations of stores that receive shipments of recalled meat." Press Release, Ctr. for Science in the Pub. Interest, Schwarzenegger Vetoes Meat Recall Disclosure Bill, *available at* http://www.cspinet.org/new/200410011.html.

190. *See* GAO REPORT, *supra* note 13, at 5.

191. One of Food Inspection Service's enforcement mechanisms is the removal of the quality control program and recapture of quality inspection. This sanction is considered a harsh punishment for those plants who continually fail quality standards because it may have the effect of putting a producer out of business. Quality control programs are required for production of certain products, including, but not limited to, child nutrition labeled products, nutrition labeled products, and products whose labels bear a fat or lean claim. In these cases, the establishments cannot produce the products under traditional inspection methods which can ultimately drive producers out of business. Although this procedure is seen as a punishment, it also has the effect of preventing producers from increasing and improving their safety programs on their own. *Food Safety*, *supra* note 15, at 692 n.87.

192. GAO REPORT, *supra* note 13, at 5.

USDA when it has distributed potentially tainted meat and establishing recall requirements, the USDA would be an active participant in recovering the adulterated meat. Further, the public would no longer be at the mercy of businesses to find out if they have purchased infected products since the USDA would have control over public notification. Accurate and early notification is the key to effective recalls, and delays, such as the one documented in December 2003 after the first case of American BSE was detected, are unacceptable given the severity of the BSE threat.[193] Americans who consume tainted products are at risk of infection—and the disease associated with the infection is always fatal.[194] "The more time that passes, the greater the likelihood that a large portion of the contaminated product will not be recovered, thereby exposing a larger number of people to serious health risks."[195]

Conclusion

The current USDA regulations do not protect American consumers from the threat of BSE contamination. In fact, its antiquated laws and overreaching protocols create market inefficiencies and prevent the market from self-correcting its many problems. Even though meat producers and consumers would be willing to incur costs to produce and purchase higher quality and BSE-free meat, the USDA inhibits the natural market. Given that the USDA has shifted inspection duties to the industry itself, its justifications for prohibiting higher quality production are inapposite. Although meat inspection authority should be completely overhauled, it is unlikely to happen. The next best solution is to mandate mandatory recall authority to the USDA in order to assure that the USDA has some containment mechanisms in place, if, and more precisely, when another BSE case is found in America. The nature of commerce and the BSE threat demand swift response mechanisms, and currently, voluntary recalls are not only ineffective but lengthy as well. Further, since the USDA has taken a "see no evil" approach[196] in terms of detecting Mad Cow Disease,

193. *See supra* Part II.

194. *See supra* Part II.

195. *Food Safety*, *supra* note 15, at 695; THE CTR. FOR PUB. INTEGRITY, SAFETY AT LAST: THE POLITICS OF E. COLI AND OTHER FOOD-BORNE KILLERS 91 (1998) (providing table of top meat recalls by weight, including total pounds recalled and total pounds actually recovered).

196. Other countries similarly denied "there was any risk of mad cow disease among their own cattle. [However, those] denials proved false, once widespread testing for the disease was introduced." Schlosser, *supra* note 1, at A17.

mandatory recall authority is necessary to enable the USDA to protect public health at the final stages of commerce.