

NOTES

ANIMAL WELFARE, WHO CARES? WHY THE UNITED NATIONS NEEDS TO TACKLE HORSE-SORING

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INTRODUCTION

Imagine having your feet and legs painted with the chemicals: mustard oil, kerosene, and diesel. Then, your feet and legs are wrapped with plastic, causing your skin to cook and fester. Once your legs are coated with chemical burns, chains are affixed over the sores to force you to pick up your feet higher in response to the pain. Afterward, when the pain becomes so great that you can no longer bring yourself to stand, you are whipped until the lashes are more unbearable than the pain endured while standing.¹ This is the reality for many Tennessee Walking Horses, especially those that compete in performance competitions, or what is more commonly referred to as padded competitions, which draw trainers, contestants, and breeders to the United States from across the globe.²

The Tennessee Walking Horse is a gaited horse that is a source of national pride and tradition born in the State of Tennessee. The breed began with the birth of the “little black colt with the white blaze,” Black Allan or Allan F-1, fusing seven horse breeds into one animal.³ The Tennessee Walking Horse has the global reputation of being the “world’s greatest pleasure, trail, and show horse.”⁴ It is famed for the natural beauty of its “running walk,” which replaces a horse’s traditional two-beat trot with a four-beat gait marked by an overstride and nodding head unique to the breed.⁵ Despite the running walk’s fame, beauty, and uniqueness, “as a society, we want bigger; we want more.”⁶ Thus, during the mid-twentieth century, trainers began to contemplate, “If [walking horses] can do it that high in their natural gait, why not get them to do more?”⁷ As a result, the

1. See Mary Ann Jolly, *The Untold Cruelty of Tennessee Walking Horses*, Documentary (SBS Dateline Austl. Public Broadcast Apr. 29, 2014), https://www.youtube.com/watch?v=1HPwX_L211w (featuring an undercover video, shot by the Humane Society of the United States, of Jackie McConnell, a famous horse trainer who was serving a five-year suspension from competing and selling horses in the Tennessee Walking Horse (TWH) industry). See also BRUCE A. WAGMAN ET AL., *ANIMAL LAW* 192 (6th Ed. 2019).

2. The Tennessee Walking Horse industry is international; however, the shows in which horse-soring is utilized as a training method are concentrated in the Southeastern United States but composed of both U.S. and international participants. See *International Board of Directors*, TENN. WALKING HORSE BREEDERS’ & EXHIBITORS’ ASS’N, <https://www.twhbea.com/board-of-directors/> [<https://perma.cc/Z3DT-S3UJ>].

3. Those seven breeds are the Narragansett Pacer, Canadian Pacer, Tennessee Pacer, Thoroughbred, Standardbred, Morgan, and the American Saddlebred. *The Breed*, TENN. WALKING HORSE ASS’N OF W. CAN., <http://www.twhawc.com/the-breed.html> [<https://perma.cc/3M5E-LF8Y>]; *History of the Tennessee Walking Horse*, TENN. WALKING HORSE BREEDERS’ & EXHIBITORS’ ASS’N, <https://www.twhbea.com/breed-general-info/> [<https://perma.cc/3S2W-3Q93>].

4. *The Breed*, *supra* note 3.

5. Pricilla Presley in Jolly, *supra* note 1.

6. *Id.*

7. *Id.*

Big Lick emerged with the success of a horse named “Merry Go Boy” that had a “high-prancing gait that captivated the judges.”⁸ This impressive gait earned Merry Go Boy back-to-back world championships in 1947 and 1948.⁹

Most horses walk by placing 65 percent of their weight on the front legs and rest on the rear legs. Merry Go Boy’s trainer reversed the proportions by teaching the horse to lift his knees to the height of a man’s chest and then to reach out with his hooves. To support the gait, Merry Go Boy gathered his hind legs beneath his belly, almost as though he was sitting like a dog.¹⁰

Merry Go Boy was magnificent, and his high-prancing gait was traditionally strived after through “selective breeding and training.”¹¹

Nevertheless, it did not take long for horses to be limping their way to the show ring, as “trainers discovered they could produce the same championship gait in far less time by soring the front ankles and hooves of their horses with mustard oil, kerosene, acid, chains, nails and spiked objects,” as narrated at the beginning of this Note.¹² This process is called “chemical soring.”¹³ From this, the training methods evolved into “mechanical soring, known as pressure shoeing,” which entails “cutting the horse’s hoof down to the sensitive laminae, or adding a welded bead of metal to the horse’s shoe, creating intense pain whenever the horse put its foot down.”¹⁴ From these efforts, the Big Lick has become an artificial, “pain-based gait” that cannot be taught without inflicting abuse.¹⁵

Today, horses are legally trained to perform the Big Lick through a combination of chemical and mechanical horse-soring tactics except for painting the horse’s legs in caustic chemicals.¹⁶ Hence, despite the Horse Protection Act

8. Keith Schneider, *Tennessee Walking Horse Drawing New Cheers and Charges of Cruelty*, N.Y. TIMES (Aug. 27, 1986), <https://www.nytimes.com/1986/08/27/us/tennessee-walking-horse-drawing-new-cheers-and-charges-of-cruelty.html> [<https://perma.cc/7YFU-DM9M>].

9. *Id.*

10. *Id.*

11. Lewis Bollard, *The Legal Tipping Point on Horse Soring, Racing, and Slaughter*, 7 KY. J. EQUINE AGRIC. & NAT. RESOURCES L. 423, 426 (2014).

12. *Id.*

13. Keith Dane, Senior Adviser for Equine Protection for the Humane Society of the United States, *Institutionalized Horse Abuse: The Soring of Tennessee Walking Horses*, 3 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 201, 202-03 (2011).

14. Bollard, *supra* note 11, at 427. *See also*, Dane, *supra* note 11, at 204 (citation omitted).

15. Marty Irby in Jolly, *supra* note 1. Note, Marty Irby is an eight-time world champion in the Tennessee Walking Horse industry and former president of the Tennessee Walking Horse Breeders’ and Exhibitors’ Association (TWHBEA). *Id.* *See also* Doug Corey et al., *Putting the Horse First: Veterinary Recommendations for Ending the Soring of Tennessee Walking Horses*, AM. ASS’N OF EQUINE PRACTITIONERS at 1, 2-3, 7 (2008), <http://www.aaep.org/custdocs/AAEPWhitePaperonTWHSoring.pdf> [<https://perma.cc/6S68-JWPS>].

16. Winky Grover in Jolly, *supra* note 1. Winky Groover is a professional Tennessee Walking Horse trainer who owns and operates Groover Stables at Saddlecrest Farms in Shelbyville,

of 1970 that made horse-soring illegal, the equine industry has not shifted its priorities to “valu[ing] the innate grace and beauty” of the Tennessee Walking Horses’ natural gaits, nor stopped “rewarding the currently manufactured extravagant and exaggerated” Big Lick by promoting padded competitions.¹⁷ United States domestic authorities have provided meager incentives for the equine industry to make real change, effectively ratifying the practice by implementing ineffective legislation and enforcement measures to enable the continuation of the practice of horse-soring. Meanwhile, in the event the United States manages to end horse-soring within its borders, other domestic State governments are positioning themselves to welcome relocated padded competitions by protecting horse-soring through exclusions in their animal welfare legislation.

This Note will demonstrate that horse-soring is not solely a domestic issue in the United States. Yet thus far, the international community has failed to step up even though the United States domestic authorities have not taken effective action to eliminate horse-soring. Instead, domestic governments worldwide have taken measures to ensure the protection of the future of horse-soring. For these reasons, this Note explains why the international community, specifically the United Nations, needs to take lead and end horse-soring. An international solution to eliminate horse-soring not only better the quality of life for horses, but horse-soring is also a prime example of how the international community can and should use underrepresented and uncontroversial issues to build positive working relationships among nations. Positive working relationships among nations are vital because they produce more successful and productive future negotiations, regarding more controversial issues.¹⁸

This Note will take a six-step approach to demonstrate why the United Nations needs to pursue an end to horse-soring. First, the Note defines horse-soring and provides a background on the Tennessee Walking Horse industry and competitions, and it explains how the data for the Note was compiled and computed. Second, the Note provides an overview of the current and proposed U.S. legislation and regulations regarding horse-soring and their degree of success. Third, the Note illustrates how horse-soring is an international issue rather than a U.S. domestic issue, briefly defining international law and touching on the international community’s current approach to animal welfare. Fourth, the Note explains the significance of dispute resolution of uncontroversial and underrepresented issues for relations among States, and it explores additional

Tennessee, has numerous world championship titles, and is a former president of the Walking Horse Training Association. *Local Tennessee Walking Horse Trainer Holds Free Demonstration For Local Boys and Girls Club*, THE WALKING HORSE REP. (Aug. 27, 2012), <https://www.walkinghorsereport.com/news/local-tennessee-walking-horse-trainer-holds-free-7148> [<https://perma.cc/6C8V-V3KP>].

17. Corey, *supra* note 15, at 7.

18. See Monica Hakimi, *Constructing an International Community*, 111 AM. J. INT’L L. 317, 328 (2017) (explaining “International law . . . establishes mechanisms through which they can [effectively] communicate their discontent and demand change”).

incentives and deterrents in a nation's decision to consent to be bound to a treaty. Last, the Note outlines the different avenues available for the international community to end horse-soring.

METHOD

This Note combines the data available from the American Veterinarian Medicine Association (AVMA) 2015 Soring Booklet for show seasons 2007 through 2014 with the show and annual reports published on APHIS's website for show seasons 2017 through 2020.¹⁹

The AVMA compiled a chart for the show seasons 2007 through 2014 that contained (1) the total number of inspections performed each year, (2) the total violations issued for HPA non-compliances each year, (3) total violation rate (i.e. § 2 / § 1), (4) the number of inspections with the USDA in attendance, (5) violations issued with the USDA in attendance, (6) violation rate when the USDA is in attendance (i.e. § 5 / § 4), and (7) percent of total violations issued when the USDA is in attendance.

For show seasons 2017 through 2020, a similar chart to the AVMA's was compiled. The only difference between these data sets is that for 2017 through 2020 there is additional data on (1) the total number of shows per season, (2) the number of shows that the USDA was not in attendance, and (3) the percentage of shows that the USDA did not attend per season.

HORSE-SORING AND U.S. LEGISLATION

I. HORSE PROTECTION ACT

Today, horse-soring is illegal; nevertheless, it is still widely employed throughout the United States by citizens and foreign nationals alike.²⁰ In 1970, the 91st Congress passed the Horse Protection Act, which "sought to end" horse-soring because Congress found that horse-soring is "cruel and inhumane" and gives competitors an "unfair" advantage in competition.²¹ The HPA makes it illegal to show, exhibit, sell, auction, offer to sell, or transfer a sore horse.²²

19. See *infra* Section 3, Part II.

20. WAGMAN ET AL., *supra* note 1. See generally Horse Protection Act of 1970, 15 U.S.C.A. §§ 1821-1831 (amend 1976) [hereinafter HPA].

21. HPA, 15 U.S.C.A. §§ 1821-1822; American Horse Protection Ass'n, Inc. v. Lyng, 812 F.2d 1, 2, 6 (D.C. Cir. 1987); Kjirsten Sneed, Article, *When Cheaters Prosper: A Look at Abusive Horse Industry Practices on the Horse Show Circuit*, 6 KY. J. EQUINE AGRIC. & NAT. RESOURCES L. 253, 258 (2014); OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF AGRIC., AUDIT REP. 33601-2-KC, ANIMAL AND PLANT HEALTH INSPECTION SERVICE ADMINISTRATION OF THE HORSE PROTECTION PROGRAM AND THE SLAUGHTER HORSE TRANSPORT PROGRAM, 1, 17 (Sept. 2010).

22. HPA, § 1824(2). See *McCloy v. U.S. Dep't of Agric.*, 351 F.3d 447, 451-52 (10th Cir. 2003) (holding that an owner is liable under the HPA "regardless of the knowledge or fault for a sore horse" entered into a show, exhibit, etc. because of the Act's key language, "respecting a horse which is sore." The court reasons that this language does not require any knowledge or intent).

Congress defines that the term “sore” means

- (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse;
- (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse;
- (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse; or
- (D) any other substance or device has been used by a person on any limb of a horse.²³

Unfortunately, it almost immediately became clear to Congress that the HPA was not much more effective than the state laws that preceded it. Therefore, Congress amended the HPA in 1976 “to stop an inhumane and harmful practice that the Congress thought” the original HPA would end.²⁴ These 1976 amendments sought “[t]o facilitate greater enforcement . . . expand[ing] its inspection program by directing the U.S. Secretary of Agriculture to establish a regulatory regime appointing qualified individuals to conduct inspections enforcing the HPA,”²⁵ and, today, the U.S. Secretary of Agriculture administers the HPA through its Animal and Plant Health Inspection Service (APHIS)

An HPA violation implicated capped “criminal and civil penalties assessed against both the horse’s trainer and owner.” Sneed, *supra* note 21, at 263. Civil liability is capped at \$2,000 per violation. HPA, § 1825(b)(1). Criminal liability begins with a maximum of \$3,000 and/or one year imprisoned. *Id.* § 1825(a)(1). This increases to \$5,000 and 2 years if the person knowingly violated the HPA and has at least one prior conviction.” *Id.* § 1825(a)(2)(A). Persons who are convicted may also be disqualified from exhibiting, selling, and auctioning horses and managing horse shows by an order by the USDA Secretary for a violation “not less than one year for the first violation and not less than five years after for any subsequent violation.” Additionally, anyone who disobeys said order shall be subjected to a \$3,000 maximum civil penalty. *Id.* § 1825(c).

However, this is not a true representation of the Act in practice, as criminal cases are not pursued. See Dane, *supra* note 13; Esther L. Roberts, *Trademarking Animal Abuse: Should the Tennessee Walking Horse Breeders' And Exhibitors' Association (“TWHBEA”) Lose The TWHBEA Trademark Portfolio Under The Lanham Act For Failure To Comply With The Horse Protection Act?*, 9 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 65, 73 (2016). These penalties are limited and inconsistently employed; for example, there has only been “one known criminal case . . . initiated under the Act.” Dane, *supra* note 13, at 209. See also APHIS, U.S. DEP’T OF AGRIC., USDA HORSE PROTECTION ACT DISQUALIFICATION AND CIVIL PENALTY LIST (Nov. 12, 2019), <https://www.aphis.usda.gov/ies/downloads/disqualification-list.pdf> [<https://perma.cc/PF8Z-M3KK>].

23. HPA, § 1821.

24. *Lyng*, 812 F.2d at 7 (citation omitted).

25. Sneed, *supra* note 21, at 259. See also HPA, § 1823(c) (“The Secretary shall prescribe by regulation requirements for the appointment by the management of any horse show, horse exhibition, or horse sale or auction of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcing this Act.”).

division.²⁶ Notwithstanding, these amendments did not expand the funds allocated to the enforcement and administration of the HPA, depriving the USDA of adequate funding necessary to effectively end horse-soring.²⁷

As a result of the underfunding, the USDA created “a system of . . . industry self-regulation”—known as the Designated Qualified Persons (DQPs) Program.²⁸ Through this program, the USDA certifies horse industry organizations (HIOs) to provide formal training for DQPs, as licensed inspectors.²⁹ These HIO-licensed inspectors are hired by the management of horse shows “to detect violations of the HPA on behalf of the USDA,” diminishing the USDA’s hands-on role in HPA enforcement.³⁰ DQP inspectors’ mandate is to “determine whether the horse

26. APHIS, U.S. DEP’T OF AGRIC., HORSE PROTECTION ACT AND ITS ADMINISTRATION (Aug. 9, 2016) [hereinafter HORSE PROTECTION ACT AND ITS ADMINISTRATION], https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/hpa/ct_hpa_history_and_administration [<https://perma.cc/6EGK-9DLA>]; Roberts, *supra* note 22, at 78.

27. “The USDA’s Horse Protection Program also suffered from underfunding and understaffing. For four decades, the Program had a stagnant annual budget of no more than \$500,000 to enforce the Act.” Bollard, *supra* note 11, at 428.

28. Dane, *supra* note 13, at 207; HORSE PROTECTION ACT AND ITS ADMINISTRATION, *supra* note 26; WAGMAN ET. AL, *supra* note 1.

Even though the DQP was developed out of necessity, the Fifth Circuit has deemed that 9 C.F.R. § 11.25 exceeds the scope of the USDA’s authority under §1828 of the HPA, holding that the HPA only gave the USDA the authority to establish a private inspection system; it did not give the USDA the authority to establish a private enforcement system. *See* Contender Farms, L.L.P. v. U.S. Dep’t of Agric., 779 F.3d 258, 273-74 (5th Cir. 2015). 9 C.F.R. § 11.4(a) (1991) requires

For the purpose of effective enforcement of the Act: . . . Each horse owner, exhibitor, trainer, or other person having custody of, or responsibility for, any horse at any horse show, horse exhibition, or horse sale or auction, shall allow any APHIS representative to reasonably inspect such horse at all reasonable times and places the APHIS representative may designate.

At the conclusion of the 2019 show season, there were thirteen certified HIOs, and sixty-six licensed DQPs. Certified-HIOs: California Fox Trotter Association (CFTA), Racking Horse Breeders Association of America (RHBA), and Spotted Saddle Horse Breeders & Exhibitors Association (SSHBEA) do not have any licensed DQPs. *See* APHIS, U.S. DEP’T OF AGRIC., LIST OF CERTIFIED DESIGNATED QUALIFIED PERSON PROGRAMS (Oct. 9, 2019), https://www.aphis.usda.gov/animal_welfare/hp/downloads/hio/LIST-OF-CERTIFIED-DESIGNATED-QUALIFIED-PERSON-PROGRAMS.pdf [<https://perma.cc/7TFW-BWCV>]; APHIS, U.S. DEP’T OF AGRIC., DESIGNATED QUALIFIED PERSON (DQP) LIST (Oct. 9, 2019), https://www.aphis.usda.gov/animal_welfare/hp/downloads/hio/HIO_DQP_LIST.pdf [<https://perma.cc/3WVU-FS7K>].

29. 9 C.F.R. § 11.7 (2012). To pursue more consistent enforcement, the USDA regulated that “the HIO that licensed the DQP shall assess and enforce penalties for violations in accordance with § 11.25 and shall report all violations in accordance with § 11.20(b)(3).” 9 C.F.R. § 11.21(d). *See also*, 9 C.F.R. § 11.25.

30. Dane, *supra* note 13, at 207; HORSE PROTECTION ACT AND ITS ADMINISTRATION, *supra* note 26. However, the hiring of DQPs is optional, show management may elect not to hire DQPs and take the responsibility for “identifying all horses that are sore or otherwise in violation of the

moves in a free and easy manner and is free of any signs of soreness . . . no more than three classes ahead of the time the inspected horses are to be shown” by examining the horse for “any visible signs of soring, palpating the animal’s limbs for any response that appears to be pain-induced, and observing the animal walk to check for soring.”³¹ In addition, the DQP is to ensure that the action devices used comply with 9 C.F.R. § 11.2.³² After the completion of such an inspection, horses must remain within the designated area until showing.³³

In the early days of horse-soring, the practice “left grossly deforming, telltale signs . . . [such as h]uge ‘cauliflower’ callouses encircling the horses’ pasterns and bleeding, open lesions . . . In response to these very visible and publicly abhorrent scars, the USDA implemented the Scar Rule.”³⁴ Under the Scar Rule, horses born on or after Oct. 1, 1975,³⁵ would be considered sore, if,

(a) The anterior and anterior-lateral surfaces of the fore pasterns (extensor surface) must be free of bilateral granulomas, other bilateral pathological evidence of inflammation, and, other bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair.

(b) The posterior surfaces of the pasterns (flexor surface), including the sulcus or “pocket” may show bilateral areas of uniformly thickened epithelial tissue if such areas are free of proliferating granuloma tissue, irritation, moisture, edema, or other evidence of inflammation.³⁶

Act or regulations, and shall disqualify or disallow any horses which are sore or otherwise in violation of the Act or regulations from participating or competing.” 9 C.F.R. § 11.20 (1992).

31. 9 C.F.R. § 11.21 (2013); Roberts, *supra* note 22, at 79.

32. 9 C.F.R. § 11.21 (2013). There are general, specific, and substance prohibitions expressed.

(a) General prohibitions. Notwithstanding the provisions of paragraph (b) of this section, no chain, boot, roller, collar, action device, nor any other device, method, practice, or substance shall be used with respect to any horse at any horse show, horse exhibition, or horse sale or auction if such use causes or can reasonably be expected to cause such horse to be sore. [(b) Specific prohibitions include nineteen specifically expressed action devices.] (c) Substances. All substances are prohibited on the extremities above the hoof of any Tennessee Walking Horse or racking horse while being shown, exhibited, or offered for sale at any horse show, horse exhibition, or horse sale or auction, except lubricants such as glycerine, petrolatum, and mineral oil, or mixtures thereof.

9 C.F.R. § 11.2 (1989). The consequence of this regulation is that there is an abundance of action devices that cause horses agony that are still legal. See Jolly, *supra* note 1.

33. 9 C.F.R. § 11.21(b) (2013).

34. Dane, *supra* note 13, at 203. See 9 C.F.R., § 11.3 (1989).

35. By including “Oct. 1, 1975,” the regulation was prevented from applying to horses that could have been legally sored before implementation of the HPA as amended in 1976. Dane, *supra* note 13, at 203.

36. 9 CFR § 11.3 (1989).

Unfortunately, the rule did not obtain its desired deterrent effect. Instead, “unscrupulous trainers worked diligently to find ways to reduce or remove the scars caused by soring.”³⁷ As a consequence, modern horse-soring is masked by any combination of methods, including: (i) chemically sloughing off the scarred skin; (ii) applying a numbing agent to the “horses’ legs prior to inspection” to prevent the horse from reacting to the inspectors’ touch;³⁸ (iii) conducting repeat “mock inspections” while beating the horse if it reacts to the pain during the physical examination so that the fear of the beating overwhelms the pain felt during inspections;³⁹ and (iv) “attach[ing] alligator clips . . . to sensitive parts of the horse prior to inspection, causing him to focus on the new source of pain rather than his legs and feet.”⁴⁰

In addition to these masking techniques, many forms of mechanical horse-soring remain legal due to USDA alterations to the intent of the HPA.⁴¹ Trainers attach “action devices” not expressly specified in 9 C.F.R. § 11.2(b) to the bottom of horses’ front hooves. From there, a footpad attached to a package made of plastic is nailed in the horses’ hooves, which is “kept in place by a metal ban over the hoof” across the pastern. Then, trainers add “weights to the horse’s front legs [through] either chains around the ankles or a plate of lead in the footpads.” These weights force horses to “lift their legs higher.” As a result of these loopholes, the law does not protect horses as the U.S. Congress intended when it made the practice of horse-soring illegal through the HPA.⁴²

II. RECENT HPA NON-COMPLIANCE

The HPA was intended to eradicate the use of “all soring devices;”⁴³ however, this intention has not been respected with the U.S. executive branch’s enforcement and the U.S. judicial branch’s interpretation of the HPA. The USDA recently passed regulations that “only prohibited devices shown by themselves to have caused soreness or that can ‘reasonably be expected to cause’ soreness.”⁴⁴ Before this new regulation could be formally added to the Federal Registrar, the

37. Dane, *supra* note 13, at 203.

38. To chemically remove a horse’s skin “salicylic acid and alcohol are mixed into a paste and applied to closely-shaved scarred areas of the pastern, which are then covered in plastic wrap. Left on for days, the paste hardens, and erodes the damaged skin until it sloughs off. The caustic effect is excruciating to the animal, and the pain is so severe that it is said to cause unconsciousness and even death in some cases.” *Id.* at 202, 204.

39. Ann Fugate, Review, *2018 Federal Legislative Review*, 25 ANIMAL L. 465, 473 (2019).

40. Dane, *supra* note 13, at 206.

41. See Bollard, *supra* note 11, at 427.

42. Groover in Jolly, *supra* note 1.

43. See HPA, 15 U.S.C.A. §§ 1821-1822; see also *American Horse Protection Ass’n, Inc. v. Lyng*, 812 F.2d 1, 6 (D.C. Cir. 1987) (finding that the HPA “was clearly designed to end soring”).

44. Bollard, *supra* note 11, at 427; *Humane Soc’y of the U.S. v. U.S. Dep’t of Agric.*, 2020 WL 4286826 (D.D.C. July 27, 2020). See 9 C.F.R. § 11.2(a) (1989); see also *infra* Section II.c.

Fifth Circuit Court held that

The HPA authorizes the USDA to develop a private inspection system carried out by DQPs who are certified by HIOs, *but it does not imply that the USDA may then establish a mandatory private enforcement system administered by those HIOs . . .* reject[ing] the USDA's argument that it can maintain this scheme merely because Congress did not expressly disallow such regulation . . . This statutory regime does not support the USDA's position that Congress authorized it to promulgate the Regulation, which requires private parties to impose government-mandated suspensions as an arm of HPA enforcement.⁴⁵

Simply put, the Fifth Circuit held that the HPA does not allow for the administrating department of the executive branch to enforce the HPA. Instead, the HPA only allows for the executive branch to create an industry self-regulation system to enforce the law despite that no language in the HPA limits the executive branch in this way. This limitation limits the USDA to the enforcement approach that the USDA utilized when it was directed to create an inspection regime without being allocated any additional resources to perform the additional investigations themselves.⁴⁶ As a consequence, horses continue to endure the agony of horse-soring today. The data from inspections over the past fifteen years supports the assertion that the HPA has not been executed and interpreted in good faith; furthermore, the data suggests that there continues to be an effort to find a "compromise" between the horse industry and those that find horse-soring to be "barbaric."⁴⁷

The data demonstrates that HPA enforcement is connected to public awareness of horse-soring through three key events. First, the September 2010 USDA audit where the inspector general, after intense oversight of HPA enforcement during the 2009 show season, found that "the DQP-inspection process is not serving APHIS' intended purpose" and recommended that "APHIS abolish the DQP program, and instead provide independent, accredited veterinarians to perform inspections at sanctioned shows."⁴⁸ Second, the 2012

45. *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 273-74 (5th Cir. 2015) (emphasis added).

46. *See* HPA, § 1823(c).

47. *Lyng*, 812 F.2d at 6-7 (the enforcement of the HPA demonstrates a belief by the executive branch that the HPA intended to be a "compromise between industry proponents of soring and persons who regarded the practice as barbarous." However, this belief is false. "The Act was clearly designed to end soring . . . there is no indication of the Act or the legislative history that Congress was only concerned with the ability of horses to 'retain the desired gait.'" The HPA was not intended to only do away "with the unnecessary cruelty of soring," rather all aspects of horse-soring, which the court found was evident in the HPA's aim to also eliminate "unfair competition.").

48. OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF AGRIC., AUDIT REP. 33601-2-KC, ANIMAL AND PLANT HEALTH INSPECTION SERVICE ADMINISTRATION OF THE HORSE PROTECTION PROGRAM AND THE SLAUGHTER HORSE TRANSPORT PROGRAM, 1, 3 (Sept. 2010). *See infra* Section 3, Part

release of the undercover film, featuring Jackie McConnell soring the horses at the McConnell training facility, as depicted in the introduction of this Note, exposing the gruesome nature of horse-soring to the public.⁴⁹ Third, the USDA Blackout that started on February 9, 2017, and ended on February 18, 2020, that limited transparency and, thus, the need for HPA enforcement, skewing the results to only what APHIS wanted the public to believe.⁵⁰

A. September 2010 USDA Inspector General Audit

The September 2010 USDA Audit placed the enforcement of the HPA under the microscope during the 2009 Show Season, bringing the issue of horse-soring to the outskirts of public awareness by demonstrating to the U.S. executive branch that the current self-policing mechanism for enforcing the HPA was failing to eliminate horse-soring.⁵¹ Additionally, the DQPs freely admitted that they gave freebies when the APHIS inspectors were not present, issuing 49% fewer violations from 2005 to 2008 in APHIS's absence.⁵² As a result of the Inspector General's engagement during the 2009 show season, there was substantially higher reporting than the previous or following years.⁵³

Prior to the commencement of the audit, the violation rate reported was less than one percent. In the 2007 show season, there was a violation rate of a mere 0.58%. This rate increased to 4.45% for the inspections APHIS was present for, as 56.44% of the total non-compliances were found in APHIS's presence. Similarly, the violation rate during the 2008 show season was 0.57%. 58.44% of these non-compliances reported were from the inspections performed while APHIS was present. Hence, the 2008 violation rate for when APHIS was present was 5.12%—slightly better than the 4.45% in 2007, but substantially lower than the violation rate of 2009.⁵⁴

II.A.

49. See Jolly *supra* note 1; see also *infra* Section 3, Part II.B.

50. See *infra* Section 3, Part II.C.

51. The Inspector General's report found that there was an "inherent conflict of interest" with the self-regulating system in place because (a) the inspectors were hired by the show industry, making issuing violations "inconveniences [to] their employers;" (b) DQPs are often a part of the industry "while they are acting as a DQP at one show, they may be an exhibitor at another show, and the exhibitor of the horse they are examining might later act as the DQP." The Inspector General deemed that because of these conflicts, the self-regulating system APHIS has put in place was ineffective, causing it not to sufficiently enforce the HPA, allowing "the practice of abusing show horses to continue." The Inspector General recommended, "that APHIS abolish the DQP system and institute a system based on inspections by veterinarians independent of the horse industry." OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF AGRIC., *supra* note 48, at 2-3, 10, 17.

52. *Id.* at 2.

53. 2015 *Soring Booklet*, AM. VETERINARIAN MED. ASS'N, https://www.avma.org/sites/default/files/resources/2015-Soring-Booklet-Final_Logo.pdf at 1, 24 [<https://perma.cc/ZVU5-7P9Y>].

54. *Id.*

During the 2009 show season, the violation rate among the APHIS inspections skyrockets despite the reported violation rate rising less than one percent. There were 70,122 inspections performed with 889 total non-compliances reported, reporting a 1.27% violation rate. However, 87.85% of the non-compliances issued were from the 5,798 inspections that the APHIS was present for, increasing the violation rate to 13.47%.⁵⁵ This data suggests that the DQPs were not holding the same enforcement standards in APHIS's absence. Nevertheless, this dramatic increase between the general violation rate and the violation rate when APHIS was present was not the start of a new trend of discrepancies.

As we moved away from the 2010 USDA Audit of the HPA, there is a gradual decline in the enforcement of the HPA, as the USDA's attention to the enforcement of the HPA by DQPs lessened. With this decreased attention, the non-compliances dramatically cut in half. In the 2010 show season, there was an increased number of inspections and non-compliances reported, but the reported violation rate only rose to 1.8%. The violation rate for the inspections performed with APHIS presence fell harshly from 2009's 13.47% to 8.75%. In addition to this dramatic decline, for the first time in the available data, the percent of non-compliances found when the APHIS was present was less than the majority at 45.17%. In the 2011 show season, the reported violation rate declined to 1.32%. This time APHIS was present for 52.84% of the non-compliances, but their presence only increased the violation rate to 6.06%.⁵⁶

On the one hand, the dramatic decrease between the 2009 show season and the 2011 show season could reflect a true dramatic reduction of horse-soring in response to the Inspector General's 2010 Audit. On the other hand, the data for the years after the USDA audit mirror the data for the years preceding the USDA audit. And to interpret a rapid, dramatic decrease from the data presumes that the HPA is being enforced in good faith. However, a violation rate of less than one and a half percent is not consistent with the testimony of members of the Tennessee Walking Horse industry who have told the public that horse-soring is widespread and necessary for success.⁵⁷ Moreover, a low violation rate does not explain why U.S. Senators continue to battle over amendments to the HPA.⁵⁸

B. Release of the 2012 Undercover Footage of Jackie McConnell

In 2012, the United States Humane Society captured an undercover video of Jackie McConnell, exposing the abuse inflicted on the horses at Jackie McConnell's facility, but the results of this footage did not peak until the 2014

55. *Id.*

56. *Id.*

57. *See* Groover and Irby in Jolly, *supra* note 1. Here, this 1.5% is referring to the total violation record not the violation record for APHIS inspections alone, which is much higher but not necessarily high enough to indicate horse-soring is widespread.

58. *See infra* Section 4.

show season.⁵⁹ This film depicted McConnell and his staff painting horses' feet and legs with chemicals and wrapping the chemically soaked limbs in plastic, causing the skin to cook and fester.⁶⁰ Once the horse legs are covered with chemical burns, chains were affixed over the sores to force the horses to lift their feet higher in response to the pain, and the horses were whipped into a standing position to force them to endure the pain.⁶¹ Despite the delayed peak in results, the public was outraged upon viewing the footage, and the equine industry was at the forefront of public attention.⁶²

As a result, APHIS took a substantially more active role in inspections during the 2012 show season and were present for 78.33% of the non-compliances. The reported violation rate, for the 2012 show season, was 1.04%, but this rose to 5.84% in APHIS's presence. Likewise, during the 2013 show season, APHIS was present for 85.25 of the non-compliances issued, and the reported violation rate of 0.8% rose to 4.17%. Then, the peak occurred during the 2014 show season when APHIS was present for 83.17% of the non-compliances, and the reported violation rate of 1.34% rose to 7.79% respectively.⁶³

At first glance, the data following the September 2010 Audit and the release of the footage of Jackie McConnell appears to convey that the DQPs are still the ones giving freebies and APHIS is doing its job. However, a closer examination of the data depicts a different picture. Although APHIS was still present for most of the non-compliances, the increased violation rate steadily fell until the 2014 show season. In the 2013 show season, there was a low in both the total number of inspections and the increased violation rate.⁶⁴ Furthermore, a consistent total reported violation rate of around one percent is inconsistent with this testimony from members of the Tennessee Walking Horse industry.⁶⁵ According to these individuals, horse-soring was very much alive and practiced during the 2010-2014 show seasons.⁶⁶ For example, Marty Irby, the eight-time national champion and former president of the Tennessee Walking Horse Breeders' and Exhibitors' Association (TWHBEA), told interviewers that "the claim that [horse-soring] isn't widespread is simply not true . . . if you don't cheat you can't compete."⁶⁷ Irby elaborated that most horses who compete in the padded competitions have been "sored at one time to learn that gait or are currently being sored."⁶⁸ A member of the industry like Irby would not have categorized horse-soring as widespread if it was happening to less than two percent of the horses, especially

59. Jolly, *supra* note 1. *See also* WAGMAN ET AL., *supra* note 1, at 191-92.

60. *Id.*

61. Jolly, *supra* note 1.

62. *See id.*; BRUCE A. WAGMAN ET AL., *supra* note 1, at 192.

63. *2015 Soring Booklet*, *supra* note 53, at 24.

64. *Id.*

65. Jolly, *supra* note 1.

66. *Id.*

67. *Id.*

68. *Id.* *See also* Dane, *supra* note 13, at 205 (estimating "up to 20,000 Tennessee Walking Horses are subjected to horse-soring and soring related cruelty every year").

since Irby specifically expressed that it was happening or had happened to most of the horses competing in the padded competition. It would be irrational for anyone as invested in the industry as Irby to condemn the industry so vehemently if he was not speaking the truth.

This look at the data does not inspire confidence that APHIS is continuing to vigorously enforce the HPA even when the equine industry fails to enforce the HPA in the industry's self-regulation. Instead, the data illustrates that when the security and funding did not change for APHIS after the September 2010 Audit that APHIS began to take it upon themselves to create a feasible solution to find a compromise between the equine industry and APHIS's need to convey to the public that the government is taking action against horse-soring. The fallacy of this data is that there is a spike in HPA enforcement by APHIS in 2014. This suggests that it is possible there was a short time period following the conviction and lifetime disqualification of Jackie McConnell, there was a spike in enforcement. Unfortunately, there is no data readily available for the 2015 to 2016 show seasons to confirm nor deny this.⁶⁹ For all we know, the 2014 show season was an outlier because the data from the 2017 show season to present emphasizes the compromise that we see from the legislatures with the proposed 2019 Amendments and the APHIS declining enforcement in every show season following 2009 other than 2014.

C. 2017 USDA Blackout

The 2017 show season coincided with the "USDA Blackout." The USDA Blackout refers to February 9, 2017, when all inspection records for the Animal Welfare Act, including the HPA, that had always been made public were removed from the USDA website.⁷⁰ This required "official requests made under the Freedom of Information Act (FOIA)" for access to those records.⁷¹ The records

69. The data from the 2015 show seasons and 2016 show seasons are not publicly available, and APHIS was only willing to release that information through a Freedom of Information Act (FOIA) request. Email from Melissa K. Radel, Horse Protection Compliance Specialist, APHIS (Mar. 19, 2020, 12:42 PM EDT). FOIA requests are costly and take an extraordinary amount of time to determine (1) whether the individual's request meets the requirement for the release, and (2) whether the information requested exists. See U.S. Dep't of Just., *How to Make a FOIA Request?*, FREEDOM OF INFORMATION ACT, <https://www.foia.gov/how-to.html> [<https://perma.cc/S8AX-ATVQ>].

70. Emily Malhiot, Comment, *Finding Transparency in a "Blackout": The USDA's Removal of Animal Welfare Records from Its Public Database*, 50 U. PAC. L. REV. 104, 105 (2018).

71. *Id.* (citing Natasha Daly, *U.S. Animal Abuse Records Deleted—What We Stand to Lose*, NAT'L GEOGRAPHIC (Feb. 13, 2017), <https://www.nationalgeographic.com/news/2017/02/wildlife-watch-usda-animal-welfare-trump-records.html> [<https://perma.cc/K7QU-Y3KF>]). This is more of a problem than an inconvenience. Still, the cost of the inconvenience is in itself problematic because it will discourage the public from pursuing the information. Moreover, FOIA requests are costly and take an extraordinary amount of time to determine (1) whether the individual's request meets the requirement for the release, and (2) whether the information requested exists. See U.S.

include “inspection records and annual reports for every commercial animal facility in the United States—including zoos, breeders, factory farms, and laboratories.”⁷² The public database of USDA reports had allowed animal welfare groups and professionals “to keep tabs on the practices” of the different facilities, but this monitoring became “nearly impossible” with the Blackout.⁷³

Before the Blackout, APHIS was attempting to amend 9 C.F.R. § 11.25 to tighten down on HPA enforcement in response to the USDA audit.⁷⁴ Unamended § 11.25 required HIOs to impose “penalties for soring violations and provided procedures for appealing those penalties. [However,] HIOs were free to vary their penalties and appeals procedures, and competitors had a choice to select events, which could be based in part on a particular HIO's penalties and procedures.”⁷⁵ Whereas, under the proposed regulation, there was a “mandatory minimum penalties for a number of soring violations” that HIOS has to adopt “as a condition of certification for participation in the DQP program,” and the USDA had to approve the HIOs appeals process.⁷⁶ However, the case that coincided with the USDA Blackout, *Contender Farms, L.L.P. v. U.S. Dep’t of Agriculture*, quickly worked to squash the USDA’s efforts to better enforce the HPA. Contender Farms determined that the proposed amendment to § 11.25 exceeded the scope of USDA’s authority under the HPA.⁷⁷

The data illustrates that the results of the USDA Blackout on horse-soring was that APHIS increasingly stopped attending shows among the 2017, 2018, and 2019 show seasons even though participation in these breed shows had fallen drastically, allowing APHIS to have the resources necessary to have a vigorous presence. APHIS attendance is marked through observation shows. Observation shows are competitions in which there are no USDA inspectors officially present. It is expected that DQPs will still be diligently inspecting horses, but the DQPs’ non-compliance data from those shows are not included in USDA reports. Additionally, from the 2017 show season forward APHIS suddenly no longer had a higher violation rate in its inspections than the overall violation rate reported or the DQPs’ separate violation rate.

In the 2017 show season, 27% of the season was observation shows; still, APHIS was present for 83.17% of the non-compliances for the season. Despite this participation, the violation rate for when APHIS was present only rose from 1.78% to 2.42%. This is less than half the increased violation rate of the 2014

Dep’t of Just., *supra* note 69.

72. Natasha Daly, *supra* note 71.

73. Dan Ashe from the Association of Zoos and Aquarium explained that “If these records aren’t made readily available, ‘you can only really reach one conclusion, and that is that the public’s ability to hold these institutions accountable will be diminished’.” *Id.*

74. *See, e.g.,* Bollard, *supra* note 11, at 427; Humane Soc’y of the U.S. v. U.S. Dep’t of Agric., 2020 WL 4286826 (D.D.C. July 27, 2020); C.F.R. § 11.2(a) (1989).

75. *Contender Farms, L.L.P. v. U.S. Dep’t of Agriculture*, 779 F.3d 258, 263 (5th Cir. 2015).

76. *Id.*

77. *Id.* at 273-74.

show season.⁷⁸

In the 2018 show season, 40.63% of the season was observation shows, and APHIS was only present for 23.31% of the non-compliances. APHIS's lack of

78. See APHIS, U.S. DEP'T OF AGRIC., FY2017 USDA HORSE PROGRAM ACTIVITY REPORT (Sept. 30, 2017), https://www.aphis.usda.gov/animal_welfare/downloads/hp/FY2017-Horse-Program-Activity-Report.pdf [<https://perma.cc/S7VL-62WJ>]; SHOW, Laurel Charity Walking Horse Show, Mar. 4, 2017, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2017/20170304-Laurel-Charity-Walking-Horse-Show-HP-Activity-Report.pdf [<https://perma.cc/7GFY-R4A4>]; WHOA, WHOA Academy/Schooling Horse Show, Mar. 18, 2017, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2017/20170318-WHOA-Academy-Schooling-Horse-Show-HP-Activity-Report.pdf [<https://perma.cc/XFU2-GXTJ>]; KY-HIO, 27th Annual Spring 2017 S.C. Walking Horse Ladies Auxiliary Cancer Benefit Horse Show, Apr. 7-8, 2017, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2017/20170407-08-27th-Annual-Spring-2017-SC-Walking-Horse-Ladies-Auxiliary-Cancer-Benefit-VMO-Nightly-Report.pdf [<https://perma.cc/26H5-XWX4>]; WHOA, Smokey Mountain Classic, Apr. 22, 2017, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2017/20170422-Smokey-Mountain-Classic-HP-Activity-Report.pdf [<https://perma.cc/53JZ-SMES>]; SHOW, 59th Manchester Lion's Club Horse Show, May 6, 2017, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2017/20170506-59th-Manchester-Lions-Club-HP-Activity-Report.pdf [<https://perma.cc/AUQ5-UH7M>]; NWA, Michigan Little Celebration, June 17, 2017, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2017/20170617-Michigan-Little-Celebration-HP-Activity-Report.pdf [<https://perma.cc/2B4G-LKJT>]; WHOA, SSHBEA Ladies Auxiliary Horse Show, June 24, 2017, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2017/20170624-SSHBEA-Ladies-Auxiliary-Horse-Show-HP-Activity-Report.pdf [<https://perma.cc/L2RR-2LKN>]; KY-HIO, Southern West Virginia Horseman's Association 2017 West Virginia State Walking and Racking Horse Championship Show, July 7-8, 2017, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2017/20170707-08-West-Virginia-State-Walking-and-Racking-Horse-Championship-Show-HP-Activity-Report.pdf [<https://perma.cc/A6DV-RR8R>]; RHBAA, Union Parish Tennessee Walking Horse Show, July 15, 2017, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2017/20170715-Union-Parish-Tennessee-Walking-Horse-Show-HP-Activity-Report.pdf [<https://perma.cc/9JJ4-XU87>]; RHBAA, 5th Annual Roger Latham Memorial Horse Show, July 29, 2017, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2017/20170729-Roger-Latham-Memorial-Horse-Show-HP-Activity-Report.pdf [<https://perma.cc/L6D3-98UK>]; IWA, Bluegrass and WHA Horse Show, Aug. 12, 2017, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2017/20170812-Blue-Grass-Pleasure-and-WHA-HP-Activity-Report.pdf [<https://perma.cc/7UZK-PNFS>]; DQP Services, Texas Jackpot Horse Show, Aug. 12, 2017, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2017/20170812-Trainers-Jackpot-Show-HP-Activity-Report.pdf [<https://perma.cc/3M93-WU5J>]; KY-HIO, Tollesboro Lion's Club Horse Show, Sept. 9, 2017, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2017/20170909-Tollesboro-Lion-Club-Fall-Horse-Show-VMO-Nightly-Report.pdf [<https://perma.cc/23HJ-T5E3>]; AHS, 2017 Southern Championship Charity Horse Show, Sept. 29-30, 2017, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2017/20170929-30-2017-Southern-Championship-Charity-Horse-Show.pdf [<https://perma.cc/FS9G-Q7DV>].

participation in the 2018 show season caused a reversal in the roles of APHIS and the DQPs. Overall, there was a 1.19% violation rate, but this fell to 0.43% when APHIS was present even though participation in the shows rose 26.66% from the 2017 show season.⁷⁹ Thus, even though more horses were involved in the shows

79. Note, one show was canceled upon APHIS's arrival. APHIS, U.S. DEP'T OF AGRIC., FY2018 USDA HORSE PROGRAM ACTIVITY REPORT (Sept. 30, 2018), https://www.aphis.usda.gov/animal_welfare/downloads/hp/FY2018-Horse-Program-Activity-Report.pdf [https://perma.cc/J7VR-KKW4]; RHBAA, 2017 Fall Fling Walking Horse Show Report, Oct. 6, 2017, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20171006-Fall-Fling-Horse-Show-HP-Activity-Report.pdf [https://perma.cc/B37Z-BYXB]; AHS, Northwest Georgia Fall Horse Show, Oct. 14, 2017, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20171014-GWHEA-Northwest-Georgia-Fall-Horse-Show-HP-Activity-Report.pdf [https://perma.cc/U7QC-GG4N]; WHOA, Four Beats Veteran's Day Gala, Nov. 11, 2017, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20171111-Pine-Rock-Farm-3-and-Four-Beats-Veterans-Day-Gala-HP-Activity-Report.pdf [https://perma.cc/N87L-MAWG]; WHOA, WHOA Academy/Schooling Show, Mar. 17, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20180317_WHOA_Academy_Schooling_Show_HPA_Activity_Report.pdf [https://perma.cc/WLB4-BNEL]; KY-HIO, Spring SC Walking Horse Ladies Auxiliary Show, Mar. 13-14, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20180413_14_28th_Annual_Spring_SC_%20Ladies_Aux_Cancer_Benefit_HP_Activity_Report.pdf [https://perma.cc/J6Z5-UL3D]; KY-HIO, URHOEA 20th Annual Spring Show, Mar. 13-14, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20180413_14_URHOEA_20th_Annual_Spring_Show_HP_Activity_Report.pdf [https://perma.cc/3X9A-9C9Z]; WHOA, Walking for the Future, Mar. 14, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20180414_Walking_for_the_Future_Horse_Show_HP_Activity_Report.pdf [https://perma.cc/ZRB4-5G6B]; HAWHA, MWHTA Colt Preview, Mar. 14, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20180414_MWHTA_Colt_Preview_HP_Activity_Report.pdf [https://perma.cc/M489-XK9F]; RHBAA, Texas Jackpot, Mar. 21, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20180421_CFTA_April_Horse_Show_HPA_Activity_Report.pdf [https://perma.cc/M489-XK9F]; CFTA, California Foxtrotters Association April Horse Show, Mar. 21, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20180421_CFTA_April_Horse_Show_HPA_Activity_Report.pdf [https://perma.cc/FP9T-WBXB]; HAWHA, Assoc. of Northwest Arkansas Riding Club Show, Apr. 28, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20180428_ANWARC_HPA_Activity_Report.pdf [https://perma.cc/A2K8-ECH5]; KY-HIO, 7th Annual Strides Against Cancer Horse Show, Apr. 28, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20180428_7th_Annual_Stides_Against_Cancer_HPA_Activity_Report.pdf [https://perma.cc/W3SD-A2VS]; KY-HIO, 7th Annual Strides Against Cancer Horse Show, Apr. 28, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20180428_7th_Annual_Stides_Against_Cancer_HPA_Activity_Report.pdf [https://perma.cc/J2PZ-TEU3]; RHBAA, Texas Spring Classic 2018, May 11-12, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20180511_12_Texas_Spring_Classic_HPA_Activity_Report.pdf [https://perma.cc/AJ89-MGX6]; SHOW, Upper Cumberland Walking Horse High Point Show, May

the USDA reported an inaccurate and low violation rate of 0.32% because the USDA skewed the data to look better by increasing the number of observation shows and decreasing APHIS's separate violation rate. Hence, the fear of diminishing accountability with the lack of transparency is exactly what came to light with APHIS's enforcement of the HPA as early as the first full show season encompassed within the USDA Blackout.

The data from the 2019 show season further demonstrates the diminishing

12, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20180512_45th_Annual_Upper_Cumberland_Walking_Horse_Show_HPA_Activity_Report.pdf [<https://perma.cc/6CFU-5ZFK>]; KY-HIO, KWHA Juvenile Auxiliary Horse Show, May 19, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20180519_KWHA_Juvenile_Auxiliary_HPA_Activity_Report.pdf [<https://perma.cc/YY2Q-82H6>]; WIWHA, 2018 NWWHIA All Breed Extravaganza, May 26-27, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20180526_27_2018_NWWHIA_All_Breed_Extravaganza_HPA_Activity_Report.pdf [<https://perma.cc/AV7U-YP2X>]; MFTBHA, 39th Annual 3 Year Old Futurity Spring Show and Youth Seminar, June 8-9, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20180608-09_39th_Annual_3_Year_Old_Futurity_Spring_Show_HPA_Activity_Report.pdf [<https://perma.cc/R9DH-DJCL>]; KY-HIO, 49th Annual East Tennessee Classic Horse Show, June 16, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20180616-49th-Annual-East-Tennessee-Classic-Horse-Show-HP-Activity-Report.pdf [<https://perma.cc/58DW-PXKP>]; KY-HIO, 43rd Annual Chestnut Hill Charity Horse Show, June 29-30, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20180628-29-43rd%20Annual%20Chestnut%20Hill%20Charity%20Horse%20Show-HP%20Activity%20Report.pdf [<https://perma.cc/9Q7J-2AQQ>]; SHOW, 35th Annual Money Tree Classic, July 6, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20180706-35th-Annual-Money-Tree-Classic-HP-Activity-Report.pdf [<https://perma.cc/X5DK-SX87>]; NWAHA, Illinois Walking Horse Association Lincolnland Show, June 30, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20180630-Illinois%20Walking%20Horse%20Association%20Lincolnland%20Show%20HP%20Activity%20Report.pdf [<https://perma.cc/A9RR-5RTC>]; KY-HIO, Come-Unity Cooperative Memorial Horse Show, July 21, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/0721_2018_ComeUnity_Cooperative_Tim_Philpot_Memorial_Horse_Show_HP_Activity_Report.pdf [<https://perma.cc/S7B2-2HLV>]; KY-HIO, KWHA Ladies Auxiliary Jubilee Horse Show, Aug. 11, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20180811_KWHA_Ladies_Auxiliary_Jubilee_Horse_Show_HP_Activity_Report.pdf [<https://perma.cc/MW4Q-2ZVA>]; DQP Services, Sale-A-Bration Super Sale, Aug. 25, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20180825_Sale_A_Bration_Super_Sale_HP_Activity_Report.pdf [<https://perma.cc/BVQ9-4AAG>]; AHS, 2018 Alabama Open Horseman Association State Show, Sept. 01, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20180901_Alabama_Open_Horseman_Association_State_Show_HP_Activity_Report.pdf [<https://perma.cc/8D6T-U2EF>]; MFTHBA, World Show and Celebration, Sept. 7-8, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2018/20180907_08_World_Show_and_Celebration_HP_Activity_Report.pdf [<https://perma.cc/F5SL-H4Z7>].

accountability and reversal of roles between the DQPs and APHIS. During the 2019 show season, 67.39% of the season were observation shows. In total, there were 251 non-compliances found, but only *five* of those non-compliances (less than two percent of the total) were found when APHIS was present. The overall violation rate of 3.05% dropped to 0.14% for events where APHIS was present, creating a substantially low reported violation rate of 0.07%.⁸⁰

80. APHIS, U.S. DEP'T OF AGRIC., FY2019 USDA HORSE PROGRAM ACTIVITY REPORT (Sept. 30, 2019), https://www.aphis.usda.gov/animal_welfare/downloads/hp/FY2019-Horse-Program-Activity-Report.pdf [<https://perma.cc/7RJE-SBSB>]; RHBAA, Baileyton Fall Classic, Oct. 13, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/20181013_Baileyton_Fall_Classic_HP_Activity_Report.pdf [<https://perma.cc/5W4S-BLCB>]; HAWHA, HAWHA Fall Classic, Oct. 19-20, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/20181019_1020_HAWHA_Fall_Classic_HP_Activity_Report.pdf [<https://perma.cc/4DJB-9U7X>]; AHS, NCWHA TIP Show, Nov. 03, 2018, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/20181103_NCWHA_TIP_Show_HP_Activity_Report.pdf [<https://perma.cc/6K26-V7TU>]; AHS, NCWHA Sneak Preview, Mar. 09, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/20190309-NCWHA-Sneak-Preview-HP-Activity-Report.pdf [<https://perma.cc/HTK4-U8TL>]; WHOA, Four Beats for Pleasure Eastern N. Carolina Jubilee, Mar. 23, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/20190323-Four-Beats-for-Pleasure-Eastern-NC-Jubilee-2019-HP-Activity-Report.pdf [<https://perma.cc/WP25-GEJK>]; KY-HIO, URHOEA 21st Annual Spring Show, Mar. 12-13, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/20190412-13-URHOEA-21st-Annual-Spring-Show-HP-Activity-Report.pdf [<https://perma.cc/3JQH-E4K8>]; HAWHA, ANWARC Gaited Show, Apr. 13, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/20190413-ANWARC-Gaited-Show-HP-Activity-Report.pdf [<https://perma.cc/434B-SJTT>]; AHS, Southeastern NC Walking & Raking Horse Show, Apr. 20, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/20190420-Southeastern-NC-Walking-and-Racking-Horse-Show-HP-Activity-Report.pdf [<https://perma.cc/Y3PN-FDQN>]; HAWHA, Spring Kickoff, Apr. 20, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/20190420-HAWHA-Spring-Kickoff-HP-Activity-Report.pdf [<https://perma.cc/Y7YP-HHFA>]; KY-HIO, KWRHT Derby Classic, May 04, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/20190504-KWRHT-Derby-Classic-HP-Activity-Report.pdf [<https://perma.cc/C9RH-86F7>]; KY-HIO, WHAO Spring Fling, May 10, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/20190510-WHAO-Spring-Fling-HP-Activity-Report.pdf [<https://perma.cc/ML86-RGYR>]; AHS, NCWHA Spring Show, May 10, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/20190510-NCWHA-Spring-Show-HP-Activity-Report.pdf [<https://perma.cc/85PA-G2N9>]; KY-HIO, Ohio Valley Walking Horse Association 52nd Annual Show, May 11, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/20190511-Ohio-Valley-Walking-Horse-Association-Horse-Show-HP-Activity-Report.pdf [<https://perma.cc/PG25-GLR4>]; KY-HIO, 46th Annual Mississippi State Racking Horse Championship Show, May 25, 2020, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/20190525-Mississippi-State-Racking-Horse-Championship-Show-HP-Activity-Report.pdf [<https://perma.cc/A5J3-YD7X>]; KY-HIO, Virginia Walking and Racking Horse Owners Association Show, May 25, 2019,

Unfortunately, the accountability held by APHIS has only grown worse

https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/20190525-Virginia-Walking-and-Racking-Horse-Owners-Association-Show-HP-Activity-Report.pdf [https://perma.cc/99W4-L9RL]; KY-HIO EKWRHA 30th Annual Celebration, May 25, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/20190525-EKWRHA-30th-Annual-Celebration-Horse-Show-HP-Activity-Report.pdf [https://perma.cc/J7Z4-X9R7]; KY-HIO, East Tennessee Classic Horse Show, June 01, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/20190601-East-TN-Walking-Horse-Association-Trainers-Show-HP-Activity-Report.pdf [https://perma.cc/9QL2-XT73]; HAWHA, Midwest Walking Horse Trainers Association Show, June 15, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/20190615-Midwest-Walking-Horse-Trainers-Association-Show-HP-Activity-Report.pdf [https://perma.cc/7W97-VBNJ]; SHOW, 48th Annual Northside Lions Club Horse Show, June 29, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/20190629-48th-Annual-Northside-Lions-Club-Horse-Show-HP-Activity-Report.pdf [perma.cc/TKT3-53CX]; KY-HIO, Owingsville Lions Club Horse Show, July 5-6, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/20190705-06-Owingsville-Lions-Club-Horse-Show-HP-Activity-Report.pdf [perma.cc/3DYV-A8P6]; KY-HIO, Southern WV Horseman's Association 2019 State Walking and Racking Horse Competition Show, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/20190712-13-SWVHA-State-Walking-And-Racking-Championship-HP-Activity-Report.pdf [perma.cc/9RPS-BN45]; KY-HIO, Putnam Co. Fair Horse Show, July 13, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/20190713-Putnam-County-Fair-Horse-Show-HP-Activity-Report.pdf [perma.cc/A6M3-MCQH]; KY-HIO, Tennessee Valley Classic Horse Show, July 26-27, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/20190726-27-TN-Valley-Classic-HP-Activity-Report.pdf [perma.cc/FL43-VDWM]; KY-HIO, Ohio-Kentucky Walking & Racking Horse Association Horse Show, July 27, 2020, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/20190727-OH-KY-Walking-Racking-Horse-Association-Show-HP-Activity-Report.pdf [perma.cc/F3GG-E57F]; KY-HIO, 95th Annual State Fair of West Virginia Horse Show, Aug. 16-17, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/state-fair-west-virginia-horse-show.pdf [perma.cc/9DXR-AW7L]; KY-HIO, 2019 Bland Co. Fair Horse Show, Sept. 6-7, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/Bland-Co-Fair-Report.pdf [perma.cc/GA3S-46DK]; HAWHA, ANWARC Gaited Horse Show, Sept. 7, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/ANWARC-Gaited-Show-Report.pdf [perma.cc/HLD6-JKZK]; KY-HIO, Warren Co. Agric. & Livestock Fair Walking Horse Show, Sept. 14, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/Warren-Co-AG-Livestock-Fair-HP-Activity-Report.pdf [perma.cc/8RV5-324Q]; SHOW, 48th Annual World Celebration, Sept. 20-21, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/48th-Annual-World-Celebration-Activity-Report.pdf [perma.cc/PM2W-UU34]; KY-HIO, Brown Co. Fair Horse Show, Sept. 27, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/Brown-County-Fair-HP-Activity-Report.pdf [perma.cc/M9SQ-6NBK]; KY-HIO, WHAO Buckeye Fall Classic, Sept. 28, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2019/WHAO-Buckeye-Fall-Classic-HP-Activity-Report.pdf [perma.cc/4VRG-LCH8].

through the 2020 show season despite that it coincided with the end of the USDA Blackout. 37.5% of the 2020 show season was observation shows. Although this attendance record was better than the 2019 show season, only 1.28% of the non-compliances of the 2020 show season were found when APHIS was present. The total violation rate was 7.11%, yet events, where APHIS was present, had a 0.2% violation rate, and the reported violation rate was only 0.09%. This skewing of HPA enforcement in the 2020 show season was worse before the USDA Blackout ended on February 18, 2020. All of the 2020 observation shows occurred before February 18, 2020, taking full advantage of the limited transparency that the USDA Blackout provided.⁸¹

*D. Data Analysis*⁸²

The HPA may appear to provide comprehensive protection for horses, but the application of the HPA has provided meager protection, eroding with each show season. The current legislation and administration of the HPA do not protect the welfare of horses as the 91st and 94th U.S. Congress intended because there is an increasing lack of accountability arising from underfunding, conflicts of interests, techniques to prevent detection, and a lack of transparency.

81. APHIS, U.S. DEP'T OF AGRIC., FY2020 USDA HORSE PROGRAM ACTIVITY REPORT (SEPT. 30, 2020), https://www.aphis.usda.gov/animal_welfare/downloads/hp/FY2020-Horse-Program-Activity-Report.pdf [<https://perma.cc/VH24-NJQ9>]; HAWHA, 2nd Annual Jerry Manes Memorial Show, Oct. 05, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2020/Jerry-Manes-Memorial-Show-HP-Activity-Report.pdf [<https://perma.cc/XC74-DPG3>]; AHS, Baileyton Fall Classic Horse Show, Oct. 12, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2020/Baileyton-Fall-Classic-Horse-Show-Activity-Report.pdf [<https://perma.cc/EF24-UKF6>]; KY-HIO, The Appalachian Championships, Oct. 12, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2020/The-Appalachian-Championships-HP-Activity-Report.pdf [<https://perma.cc/EN7B-J265>]; SHOW, ETWHA Fall Classic Horse Show, Oct. 19, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2020/ETWHA-Fall-Classic-Horse-Show-HP-Activity-Report.pdf [<https://perma.cc/7WL6-9F5S>]; HAWHA, HAWHA Fall Classic, Oct. 19, 2019, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2020/HAWHA-Fall-Classic-Activity-Report.pdf [<https://perma.cc/RZ9G-6LQB>]; Gulf Central Association, Gulf Central Association Mobile Horse Show, Mar. 07, 2020, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2020/gca-mobile-horse-show-activity-report.pdf [<https://perma.cc/GTU8-RC57>]; AHS, Owingsville Lions Club Horse Show, July 04, 2020, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2020/owingsville-lions-club-horse-show-hp-activity-report.pdf [<https://perma.cc/8Q6P-5KZ5>]; SHOW, 82nd Annual TWH National Celebration, Sept. 05, 2020, https://www.aphis.usda.gov/animal_welfare/downloads/hp/show_reports/2020/82nd-annual-twh-national-celebration-hp-activity-report.pdf [<https://perma.cc/S6BY-9Y9N>].

82. Unless otherwise indicated, this section draws heavily from data sources found at *supra* notes 53, 78-81. A comprehensive collection of the data used was compiled by the author. This data compilation is on file with the author and was provided to the U.S. Humane Society.

Before the USDA Blackout, the strongest concern was for the inherent conflict of interest of the self-regulating system and the freebies the DQPs were giving out when APHIS was not present. Hence, prior to the Blackout, the proper course of

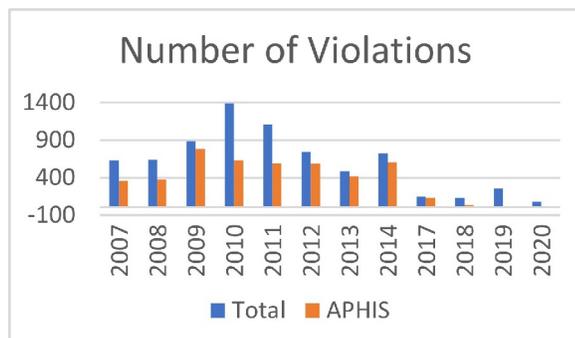


Figure 1 Compares the total number of HPA violations found each season to those found specifically when APHIS was present from the 2007 to 2020 show seasons.

presence and its selective attendance that created the absurdly low violation rates reported since 2017.

In the earlier years of the data, it seemed that the DQPs' inspection results were

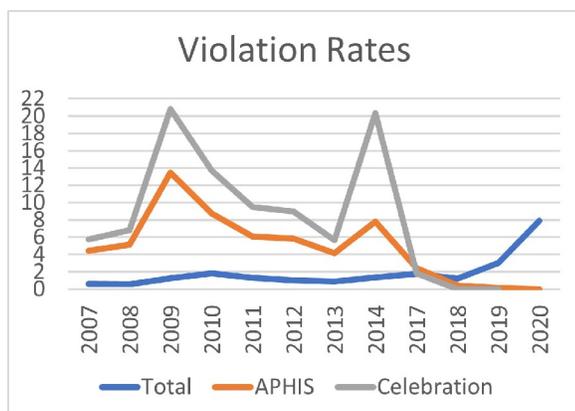


Figure 2 Compares the violation rates reported by APHIS, the total violation rate when the data includes the violations reported by DQPs from observation shows, and the violation rate of the Tennessee Walking Horse Championship Show—the Celebration, from the 2007 to 2020 show seasons.

those same years is 0.56%. Second, there has been a rapid decline in APHIS attendance from 73% of shows in 2017, 59.37% of shows in 2018, 32.61% of shows in 2019, and 37.5% of the shows in 2020.

With the number of participants in the past four years being only a fraction of the participation from earlier years of the twenty-first century, APHIS's excuse for not attending all shows due to lack of funding is null and void. The high of participation throughout the data was in 2008 where 111,932 inspections were

action seemed to be a strengthening of the HPA and an increase in the budget for HPA administration and enforcement. Nonetheless, the U.S. Congress was never able to come to a consensus, and the courts shot down APHIS's regulations. For these reasons, the data after the USDA Blackout demonstrates that no piece of domestic legislation will be sufficient to put an end to horse-soring. It is APHIS's

annual report because they were not reliable. Today, the reverse appears to be the case. The data demonstrates how the integrity of the DQP inspections versus the APHIS inspections has reversed roles. Chiefly, a new trend has emerged where substantially fewer non-compliances have been issued when the APHIS was officially present than observation shows. The total violation rates for the past four years produce an average violation rate of 2.3%; yet the average violation rate reported by the USDA over

recorded. From 2007 to 2014, the number of inspections was cut in half; today, there is less than ten percent of that amount. Recently, the total number of inspections has only exceeded 10,000 once. Based upon these numbers, APHIS should have the resources to perform almost every inspection since APHIS's average number of inspections performed from the years 2007 to 2014 was 8,186. There is no reasonable rationale for APHIS not to be administering the inspections at the present-day shows where consistently high rates of non-compliance are found each year by the DQPs.

APHIS is selecting its attendance to manipulate the results conveyed to the public. This is best illustrated by comparing the data for the 2017, 2018, and 2019 show seasons.⁸³ The 2017 show season's data fairly represents most of the season's data. With the only exception being that although KY-HIO hosted the second most events and had the most non-compliances found that season, yet

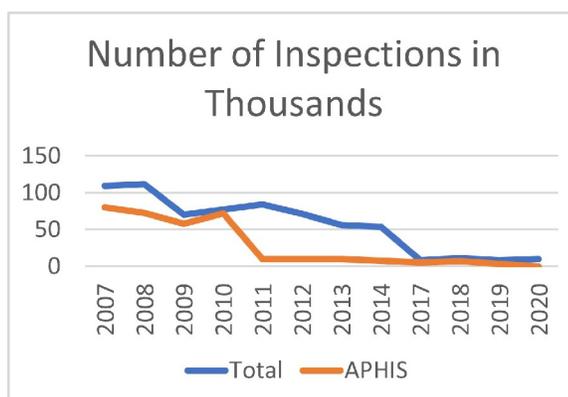


Figure 3 Compares the total number of inspections performed to the total number of inspections performed while APHIS was present from the 2007 to 2020 show seasons.

APHIS was only present for 66.67% of the non-compliances. In contrast, for the 2018 show season, the USDA only reasonably represented one HIO's non-compliances, one other was semi-reasonably represented, and five HIOs' data was misconstrued to misrepresent 84.2% of the season's reported non-compliances with the HPA. For the 2019 show season, APHIS only reasonably represented an unaffiliated show that amounted to 0.04% of the

seasons non-compliances, leaving only 2.67% of the other 99.96% of the non-compliances recorded in the 2019 annual report.

This intentional skewing of data is an enormous issue because the data that the USDA is displaying to the public is substantially misrepresenting the prominence of horse-soring and the success of the USDA in diminishing it through APHIS.⁸⁴ Moreover, the consequence of this ingenuity is that tens of

83. For this paper, reasonable representation refers to APHIS's presence for a minimum of seventy percent of the HIO's violations. Representation of about sixty percent is considered semi-reasonably representative of the HIO's violations. Anything below sixty percent is considered to misrepresent the HIO's violations.

Additionally, the 2020 show season is not included in this comparison because as a result of the 2019 pandemic, there is not enough data to clearly illustrate whether a permeant change has been made in APHIS's attendance now that there is transparency again.

84. There are also indirect misrepresentations, the USDA's reports for individual shows that APHIS was present at are not consistent with the data on the annual reports. Then, when asked

thousands of gaited horses are left to continue to endure the agony of horse-soring each year, especially since horse-soring is not a one-time affair in a gaited horse's life.⁸⁵ Rather, "horses endure this abuse from the time they enter training at an age as early as 18 months," then is "continue[d] to be sored throughout [horses'] show ring careers."⁸⁶ This can amount to decades of agony for each horse because the average lifespan of a horse is 25-33 years.⁸⁷

This fraudulent veil is not what the 91st and 94th Congresses intended the HPA to create. The 91st and 94th Congresses created the HPA to put a stop to horse-soring.⁸⁸ Yet, it is a half of a century later, and horse-soring prominently continues because the U.S. executive and judicial branches have eroded the HPA into a meaningless formality, and present-day Congress has refused to check these abuses of power and uphold the integrity of the HPA. Instead, each U.S. branch of government spends its attention on the HPA propelling its obliteration to please the industry in trade for financial support.⁸⁹

III: PROPOSED BILLS TO AMEND THE HPA

To create an effective HPA, two bills were introduced to the United States Senate in 2019; one of which passed in the House of Representatives. The first of the two bills would (1) "replace the self-policing system with third-party, independent inspectors who are trained, licensed and assigned by the USDA;" (2) "ban the [action] devices integral to soring;" and (3) "strengthen penalties."⁹⁰ The second bill, alternatively, "allows the industry to continue policing itself with no accountability."⁹¹ In light of the trends in the enforcement of the HPA throughout

which data set APHIS considered correct, it was unable to provide an answer. This inconsistency emphasizes the lack of integrity in the USDA's administration and enforcement of the HPA. Email from Melissa K. Radel, Horse Protection Compliance Specialist, APHIS (Mar. 20, 2020, 11:40 AM EDT).

85. See Irby in Jolly, *supra* note 1.

86. Dane, *supra* note 13, at 205. Because the HPA has been in effect since 1970, no scarring, calluses or other skin conditions indicative of treatments directed at increasing sensitivity should be present in horses currently in competition and none should be tolerated. Corey, *supra* note 15, at 3.

87. See Katherine Blocksdorf & Anna O'Brien, DVM, *Horse Ownership Basics: How Long Do Horses Live?*, THE SPRUCE PETS (Aug. 15, 2019), <https://www.thesprucepets.com/how-long-do-horses-live-1887384> [<https://perma.cc/M39H-WQ8P>].

88. See HPA, 15 U.S.C.A. §§ 1821-1822; see also American Horse Protection Ass'n, Inc. v. Lyng, 812 F.2d 1, 6 (D.C. Cir. 1987).

89. See *infra* Section III.

90. Kitty Block & Sara Amundson, *Louisville, KY, Urges Sens. Mitch McConnell and Rand Paul to Stop Blocking Efforts to End Horse Soring, Pass PAST Act*, THE HUMANE SOCIETY OF THE UNITED STATES: A HUMANE WORLD (Nov. 8, 2019), <https://blog.humanesociety.org/2019/11/louisville-ky-urges-sens-mitch-mcconnell-and-rand-paul-to-stop-blocking-efforts-to-end-horse-soring-pass-past-act.html> [<https://perma.cc/NY2Y-QS6D>].

91. *Id.*

the 21st century thus far, it is improbable that either bill would bring an end to horse-soring.

The first bill is the Prevent All Soring Tactics Act (PAST Act), which was first proposed to Congress in 2013.⁹² The PAST Act would amend the HPA to “designate additional unlawful acts . . . , strengthen penalties for violations . . . , [and] improve Department of Agriculture enforcement.”⁹³ First, the additional unlawful acts would include all types of “action device[s]” that are meant to strike or cause friction to the lower leg of the horse, excluding “soft rubber or soft leather bell boots or quarter boots that are used as protective devices,” making illegal all action devices as the HPA intended rather than only the devices expressed in 9 C.F.R. § 11.2(b).⁹⁴

Second, the penalties would be strengthened. The PAST Act would expand to include both direct action of soring a horse and indirect action by “directing another” to sore a horse.⁹⁵ And the term “participate” would be extended to include “(i) transporting or arranging for the transportation of a horse . . . ; (ii) personally giving instructions to an exhibitor; or (iii) being knowingly present in a warm-up area, inspection area, or another area at a horse show, horse exhibition, or horse sale or auction that spectators are not permitted to enter,” while explicitly excluding “spectating” from the definition.⁹⁶ Also, maximum fines would be raised; and the USDA would be required to disqualify horses for a minimum of 180 days the first time, one year for the second time, then three years the third time the horse is determined sore.⁹⁷

Third, the PAST Act would improve USDA enforcement by (a) eliminating the industry self-regulation by requiring that the USDA train, license, and appoint DQPs; (b) requiring that all DQPs are “free from conflicts of interest,” which is left to be defined by the USDA; (c) mandating that any event that needs a DQP notify the USDA a minimum of 30 days before the event to provide ample time for the USDA to appoint a DQP;⁹⁸ and (d) off-setting the conflict that the event’s management is still paying the DQP by implementing a fine of up to \$4,000 if the management refuses to pay.⁹⁹

In comparison, the second bill, the Horse Protection Amendments of 2019

92. Prevent All Soring Tactics Act of 2013, H.R. 1518, 113th Cong. (2013); S. 1406, 113th Cong. (2013). The PAST Act was first introduced as a result of the new public attention to horse-soring brought by the video of Jackie McConnell in 2012. See Jolly, *supra* note 1; WAGMAN ET AL., *supra* note 1, at 192.

93. PAST Act preamble.

94. PAST Act § 2(a)(2). See also *Lyng*, 812 F.2d at 6 (finding that the USDA Secretary had been blind to its “delegated power . . . when she appeared to resist the proposition that the Act was intended to prohibit devices reasonably likely to cause soreness . . . [there is] nothing ambiguous in the Act’s treatment of soring methods. The Act was clearly designed to end soring”).

95. PAST Act § 2(d)(1)(B).

96. *Id.* § 2(a)(3).

97. *Id.* §§ 2(c)(1)(B), (e).

98. *Id.* §§ 2(c)(3), (d)(2)-(5).

99. *Id.* § 2(e)(1)(C).

(2019 Amendments), sponsored by Republican Senator Lamar Alexander, was introduced to the Senate on May 14, 2019.¹⁰⁰ This proposed bill similarly received no further action after being referred to the Committee on Commerce, Science, and Transportation.¹⁰¹ The 2019 Amendments would codify the USDA's current industry self-regulated system and the Contender Farms holding, preventing the USDA from ever taking charge of the inspection process, training, licensing, or disqualifications.¹⁰²

These two proposed amendments to the HPA are opposite to each other. The PAST Act would charge the USDA with the inspection process, training, licensing, etc.¹⁰³ Whereas the 2019 Amendments would ratify the ineffective, self-regulating system that the USDA currently has in place.¹⁰⁴ Still, it is not clear that the PAST Act would fare better than more of the same because, as the data illustrated, there is presently a trend of APHIS poorly enforcing the HPA and the judicial branch ruling against strong enforcement of the HPA when balanced against individuals' liberties.¹⁰⁵ Additionally, even if APHIS ensures that the inspectors do not have conflicts of interest from the start of their employment, there is no preventing competitors, trainers, or owners from using their resources and wealth to create conflicts of interest after the fact.¹⁰⁶ Therefore, there is no guarantee that the PAST Act would protect the welfare of horses.

On the other hand, the 2019 Amendments would not best protect the welfare of horses. It would enhance the already existing conflict of interest between those who sore horses and the U.S. Government. The 2019 Amendments bill is co-sponsored by four Republican senators from Tennessee, Kentucky, and

100. 2019 Amendments, S. 1455, 116th Cong. (2019). Like the PAST Act, the 2019 Amendments was not Sen. Lamar's first amendment proposed. In 2015, S. 1161 was proposed to the Senate supported again by Sen. McConnell and Sen. Rand Paul (KY). In 2013, S. 2193 was proposed to the Senate co-signed by Sen. McConnell, Sen. Paul, Sen. Johnny Isakson (GA), and Sen. Orrin Hatch. Note, Sen. McConnell has supported Sen. Lamar's efforts to prevent the PAST Act from the start. CRS, *S.1161: Co-Sponsors*, CONGRESS (Apr. 30, 2015), [https://www.congress.gov/bill/114th-congress/senate-bill/1161/cosponsors?q={%22search%22:\[%22horse+%22soring%22\]}=undefined&r=2&s=10&searchResultViewType=expanded&KWICView=false](https://www.congress.gov/bill/114th-congress/senate-bill/1161/cosponsors?q={%22search%22:[%22horse+%22soring%22]}=undefined&r=2&s=10&searchResultViewType=expanded&KWICView=false) [<https://perma.cc/5JTK-895A>]; CRS, S. 2193: *Co-Sponsors*, CONGRESS (May 07, 2014), [https://www.congress.gov/bill/113th-congress/senate-bill/2193/cosponsors?q={%22search%22:\[%22horse+%22soring%22\]}&r=3&s=10&searchResultViewType=expanded](https://www.congress.gov/bill/113th-congress/senate-bill/2193/cosponsors?q={%22search%22:[%22horse+%22soring%22]}&r=3&s=10&searchResultViewType=expanded) [<https://perma.cc/R3RC-JVEE>].

101. CRS, *S. 1455: Co-Sponsors*, CONGRESS (Sept. 19, 2019), [https://www.congress.gov/bill/116th-congress/senate-bill/1455/cosponsors?q={%22search%22:\[%22soring+%22horse%22\]}&r=3&s=2&searchResultViewType=expanded](https://www.congress.gov/bill/116th-congress/senate-bill/1455/cosponsors?q={%22search%22:[%22soring+%22horse%22]}&r=3&s=2&searchResultViewType=expanded) [<https://perma.cc/8FNW-L6SJ>].

102. 2019 Amendments, S. 1455, § 4(a)(1) "(c)(2)," *Contender Farms, L.L.P. v. U.S. Dep't of Agriculture*, 779 F.3d 258, 263 (5th Cir. 2015).

103. PAST Act.

104. 2019 Amendments § 4.

105. *See supra* Section 3, Part II.

106. Roberts, *supra* note 22, at 86.

Mississippi¹⁰⁷—all states in which violations have been repeatedly found and that continue to regularly host a majority of performance competitions.¹⁰⁸ Among these co-sponsors is the Republican Senate Majority Leader, Mitch McConnell, who is not only the most powerful Senator of the 116th Congress¹⁰⁹ but has a history of supporting the equine industry when it conflicts with animal welfare.¹¹⁰ Moreover, Steve Smith, a known HPA violator, served simultaneously as the President of the TWHBEA's International Board of Directors and Senator Alexander's 2014-election-finance chair.¹¹¹ These entanglements with these four

107. MS Senator Cindy Hyde-Smith is the only co-sponsor of the 2019 Amendments who was not an original co-signer. Sen. Hyde-Smith became a co-signer on Sept. 19, 2019. *S. 1455: Co-Sponsors*, *supra* note 101.

108. APHIS, U.S. DEP'T OF AGRIC., FY2017 USDA HORSE PROGRAM ACTIVITY REP. (Sept. 30, 2017), https://www.aphis.usda.gov/animal_welfare/downloads/hp/FY2017-Horse-Program-Activity-Report.pdf [<https://perma.cc/S7VL-62WJ>]; APHIS, U.S. DEP'T OF AGRIC., FY2018 USDA HORSE PROGRAM ACTIVITY REP. (Sept. 30, 2018), https://www.aphis.usda.gov/animal_welfare/downloads/hp/FY2018-Horse-Program-Activity-Report.pdf [<https://perma.cc/J7VR-KKW4>]; APHIS, U.S. DEP'T OF AGRIC., FY2019 USDA HORSE PROGRAM ACTIVITY REP. (Sept. 30, 2019), https://www.aphis.usda.gov/animal_welfare/downloads/hp/FY2019-Horse-Program-Activity-Report.pdf [<https://perma.cc/7RJE-SBSB>]; APHIS, U.S. DEP'T OF AGRIC., FY2020 USDA HORSE PROGRAM ACTIVITY REP. (Sept. 30, 2020), https://www.aphis.usda.gov/animal_welfare/downloads/hp/FY2020-Horse-Program-Activity-Report.pdf [<https://perma.cc/VH24-NJQ9>].

109. *S. 1455: Co-Sponsors*, *supra* note 101.

110. For example, Sen. Mitch McConnell is the “single biggest hurdle” in anti-horse slaughter legislation; this is because the racing industry prefers to send retired horses to slaughter if they do not have significant value on the breeding market, and they currently have to send the horses out of the country to do so. Ben Schreckinger, *The Strange Tale of Biden's Bid to Ban Horse Meat*, POLITICO (Nov. 06, 2019, 05:04 AM), <https://www.politico.com/news/2019/11/06/joe-biden-frank-biden-horse-meat-ban-066394> [<https://perma.cc/7MSH-CU7G>]. In addition, Sen. Mitch McConnell introduced the Equine Equity Act of 2007 to “promote investment in the horse industry” through tax provisions, which encourages owners to start their racehorses off at one-year-old, allowing for higher capital gains even though it shorts the physical health and thus the duration of the horse's race career. *Equine Equity Act Introduced by McConnell*, THE HORSE: YOUR GUIDE TO EQUINE HEALTH CARE (May 1, 2007), <https://thehorse.com/128077/equine-equity-act-introduced-by-mcconnell/> [<https://perma.cc/XG9F-LVEC>]. Plus, after the house passed the bi-partisan Horseracing Integrity Act introduced in part by Republican Kentucky U.S. House of Representative, Andy Barr, creating an anti-doping regime for race-day to “bring back equine safety and integrity back into the sport.” Tim Sullivan, *Horse Racing Anti-Doping Bill Attains Majority Support in U.S. House Of Representatives*, LOUISVILLE COURIER J. (Dec. 18, 2015, 10:15 PM), <https://www.courier-journal.com/story/sports/horses/horse-racing/2019/12/18/u-s-house-gives-support-horse-racing-anti-doping-bill/2692781001/> [<https://perma.cc/7W4S-DLKD>]. The house's biggest concern was that Sen. Mitch McConnell would block the bill in the Senate at the request of Churchill Downs Racetrack. *Id.* This fear has come to fruition, as the bill was introduced to the Senate on June 12, 2019; then, like the PAST Act, it was sent off to the Committee of Commerce, Science, and Transportation to never be acted upon again. S. 1820, 116th Cong. (2019).

111. Roberts, *supra* note 22, at 86.

senators and the equine industry tell us that regardless of the effectiveness prospects of the HPA, the 2019 Amendments bill seeks to ratify the present status quo, allowing soring to remain rampant while the public believes the U.S. government is taking action.

RESPONSIBILITY EXTENDS OUTSIDE OF U.S. BORDERS

Those before me have stressed the importance of new U.S. legislation; however, at this point, domestic legislation alone is insufficient to eliminate horse-soring. We cannot trust the welfare of horses in the backers of the 2019 Amendments bill, nor can we trust APHIS to end their current understanding with the equine industry and effectively enforce the HPA if we place enforcement wholly in APHIS's hands. Furthermore, neither amendment could abolish horse-soring because competitors have invented ways to circumvent discovery.¹¹² Therefore, amending the HPA will not sufficiently put an end to horse-soring unless the U.S. Government is willing to pay for veterinarians to attend every event with infrared testing equipment. This may be ideal hypothetically, but it is improbable, as the U.S. Government is already providing insufficient funds for the USDA to provide proper, basic inspections without the costs of specialists and special equipment.¹¹³ For these reasons, domestic legislation is just one step of several the world must take to ensure the HPA's intended effect comes to fruition and allow Tennessee Walking Horses to be safe from the agony inflicted through horse-soring. For horse-soring to be eliminated, change must occur within the equine industry, society, the U.S. Government, and the international community. Without all these groups working together, horse-soring will prevail.

Domestic legislation is generally the ideal step that is strived for to achieve change. Nonetheless, domestic legislation is not always the most effective and efficient medium to achieve change. Domestic legislation is also only as good as it is administered, enforced, and effectively interpreted; plus, domestic legislation is confined to the enacting country's jurisdiction. This is the fallacy of relying solely on the passage of the PAST Act to eliminate horse-soring. There is no guarantee that the PAST Act would be administered, enforced, nor interpreted any differently than the present HPA because the intent of the HPA has been to eliminate horse-soring since 1970, and the PAST Act would not be the first legislative effort to emphasize the HPA's intent. Moreover, the PAST Act will do nothing to stop padded competitions from relocating elsewhere to countries where those countries' domestic authorities have made the practice of horse-soring an exception to their animal welfare protections. Consequently, horse-soring cannot cease to exist without action from the international community.

I. BOTH U.S. CITIZENS AND FOREIGN NATIONALS SORE HORSES

Although the practice of horse-soring is most prevalent in the Southeastern

112. See Dane, *supra* note 13, at 202-09.

113. See Corey, *supra* note 15, at 2 (contending that even a non-corrupt self-regulating process with proper funding would be sufficient to end soring).

United States, horse-soring's reach is global.¹¹⁴ Tennessee Walking Horse performance competitors and trainers travel to the United States to train and compete from all over the globe. Every continent except for South America and Antarctica are represented on the TWHBEA's board of directors.¹¹⁵ Additionally, there are Tennessee Walking Horse Associations in Switzerland, Israel, the Netherlands, and Western Canada that advertise their associations on the TWHBEA's website.¹¹⁶ Further, TWHBEA's members are offered discounts for not only U.S. companies, but also New Holland Agriculture and Construction, which is headquartered in Turin, Italy,¹¹⁷ and TWHBEA has partnerships with Bader Tennessee Walking Horses in Germany and North America Trail Riding Conference.¹¹⁸

Despite that horse-soring is most rampant in the United States for both U.S. Citizens and foreign nationals, it is the only country where horse-soring is illegal.¹¹⁹ And the TWHAWC inadvertently ratifies the training practice of horse-soring by expressly informing its members, who likely compete and train in the United States, that it refuses to condone horse-soring.¹²⁰ This paradox begs the question, why travel to the United States? The answer is twofold. One, it is not a competition unless there is competition. Equine competitions are like any athletic sport's playoffs. There is a hierarchy of competitions that eventually

114. Fugate, *supra* note 39, at 474.

115. Specifically, Region 1 of the TWHBEA includes Austria, Australia, Belgium, France, Germany, Israel, Italy, the Netherlands, New Zealand, Norway, Poland, Sweden, Thailand, and the United Kingdom. And these 14 countries are represented on the 2019 Board of Directors by Gerrit Band. Canada is in Region 9 with the States Hawaii and Alaska, which is represented by Kendel Sigurdson with independent representation for Canada as William (Bill) Adams. *International Board of Directors*, *supra* note 2.

116. *State/Regional/International Associations*, TWHBEA, <https://www.twhbea.com/state-regionalinternational-associations/> [https://perma.cc/C9DG-GRGN].

117. *Partnered Discounts*, TWHBEA, <https://www.twhbea.com/member-partners-discounts/> [https://perma.cc/25YA-F594]; *About Us*, NEW HOLLAND, <https://agriculture.newholland.com/nar/en-us/about-us/new-holland/nh-in-the-world/europe> [https://perma.cc/TWJ6-5E3W].

118. The North America Trail Riding Conference is an international riding conference with different regions throughout Canada, the United States, and Mexico. *Partnerships*, TWHBEA, <https://www.twhbea.com/partnerships/> [https://perma.cc/MRD7-Q284].

119. For instance, the European Union expressly allows unnecessary infliction of pain, suffering, and injury to competition animals, excluding them from its typical high standard of animal welfare. Council Directive 98/58/C of July 20, 1998, Concerning the protection of animals kept for farming purposes, art. 1, 1998 O.J. (L221/23), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31998L0058&qid=1573865730082&from=EN> [https://perma.cc/4JYH-G5VD].

120. The Tennessee Walking Horse Association of Western Canada (TWHAWC) announces directly on the website that although the TWHAWC does not host the padded performance competitions (where the Big Lick and soring are most rampant), the TWHAWC “does not endorse or condone the abuse of soring.” *Who We Are*, TENN. WALKING HORSE ASSOCIATION OF W. CAN., www.twhawc.com/ [https://perma.cc/T7HR-NRPR].

results in the best-of-the-best competing against each other. For this reason, competitors are drawn from all over the world to the Southeastern United States because it is the hub of the Tennessee Walking Horse industry, and it would be impossible to recreate a competition hierarchy comparable to its scale in another country without U.S. competitors. Two, there is not much, if any, horse-soring occurring outside of the United States because there is a difference in culture. In Canada and Europe, society holds its Tennessee Walking Horse owners accountable—horse-soring is taboo; society simply does not stand for it.¹²¹ In contrast, the United States has an “out of sight; out of mind” philosophy.¹²²

At present, international competitors, trainers, and owners can avoid their own societies’ outrage by traveling to the hub of Tennessee Walking Horse competitions in the Southeastern United States because they know that the HPA is poorly enforced, but this does not mean that the circuit cannot relocate. It is impossible to know why the European Union and Canada with their generally high animal welfare standards, decided to keep horse-soring legal in their countries. However, the result is that there are many options available for performance competitors to relocate and continue to compete if the United States successfully inspects and enforces a future-amended HPA. Accordingly, any domestic legislation in the United States alone is insufficient to eliminate horse-soring because it cannot provide the necessary protection to Tennessee Walking Horses relocated to other countries.

II. DEFINING INTERNATIONAL LAW

Before divulging further into what type of international action would be appropriate to end horse-soring, let us first step back and define international law more generally. Today, it is incorrect to assert that there is no such thing as “law” at an international level. International law exists, but its authority, creation, and enforcement are different than domestic law. The term “law” is no different than any other legal term—its definition depends on and changes with context.

121. See Council Directive 98/58/C, *supra* note 119; Treaty on the Functioning of the European Union, art. 13, 2012 O.J. (C 326/47), <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:EN:PDF> [<https://perma.cc/BD6Q-2RZ6>]; *Animal welfare protection in the EU*, LIBR. EURO. PARL., at 1, 1 (Feb. 28, 2013), [https://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130438/LDM_BRI\(2013\)130438_REV1_EN.pdf](https://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130438/LDM_BRI(2013)130438_REV1_EN.pdf) [<https://perma.cc/KM97-RCXG>]; Katherine Schlemmer, *Walking Tall*, HEARTLAND 7.12 (Stephen Reynolds director, Dynamo Films and SEVEN24, Jan. 26, 2014); *U.S. Passes Prevent All Soring Tactics (PAST) Act*, HORSE CAN. (July 26, 2019), <https://horse-canada.com/horse-news/u-s-passes-prevent-all-soring-tactics-past-act/> [<https://perma.cc/S7ZU-Y3LQ>].

122. See Arianna Schiano Lomoriello et al., *Out of Sight Out of Mind: Perceived Physical Distance Between the Observer and Someone in Pain Shapes Observer’s Neural Empathic Reactions*, FRONTIER PSYCHOL. (Oct. 11, 2018), <https://doi.org/10.3389/fpsyg.2018.01824>; Ana Singh, *Out of Sight, Out of Mind: How the United States Discards E-Waste*, BERKLEY POL. REV. (Dec. 5, 2019), <https://bpr.berkeley.edu/2019/12/05/out-of-sight-out-of-mind-how-the-united-states-discards-e-waste/> [<https://perma.cc/9KL4-EXL6>].

Whereas domestic law is created by legislatures and courts, international law refers to “a system of [predetermined] precepts governing relations between a defined group of persons or entities” where compliance or non-compliance with those precepts result in certain consequences, privileges, or rewards that are “independent from the actor.”¹²³ The actor remains sovereign in that it may choose whether to comply, but it does so with “the knowledge and possibility that the appropriate” predetermined result will follow regardless of the actor’s will.¹²⁴ Therefore, the main difference between international and domestic law is that in international law there is not an overarching legislative body; rather it is dependent on agreement and custom.¹²⁵

International law comes in many different mediums, i.e., treaties, Memorandums of Understandings (MOUs), International Court of Justice (ICJ)’s orders, contracts of international organizations, and customary law.¹²⁶ For this Note’s purposes, the principal mediums to address are treaties versus MOUs. The United Nations defines a treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”¹²⁷ This definition does not clearly illustrate the distinction between a treaty and other informal international agreements, i.e., a MOU. This is because when the Vienna Convention on the Law of Treaties was adopted, it was not yet clear whether less formal international agreements could be considered treaties.¹²⁸ Today, treaties are differentiated from other less formal international agreements by two conditions: (1) intent to create “international legal rights and obligations,” and (2) in a written instrument.¹²⁹ Conversely, a MOU is an international agreement where “the participants record their mutual understandings to how they will conduct themselves.”¹³⁰ In short, treaties and MOUs differ because (a) a treaty must be written whereas a MOU only needs to

123. HUGH THIRLWAY, *THE SOURCES OF INTERNATIONAL LAW* 1-2 (2014).

124. *Id.* at 2.

125. *Id.* at 1-2.

At the national level, such conflicts between individual and collective rationality can be resolved by the intervention of the government. At the international scale, however, there is no supranational authority that could coerce states into adopting efficient policies if they run counter to national interests. Filling the void are international agreements.

Ulrich J. Wagner, *Estimating Strategic Models of International Treaty Formation*, 83 *REV. ECON. STUD.* 1741, 1741-42 (Feb. 20, 2016), doi:10.1093/restud/rdv054 (citation omitted).

126. Statute of the International Court of Justice art. 38; Vienna Convention on the Law of Treaties art. 34-38, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; THIRLWAY, *supra* note 123, at 5-8; ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 15, 18 (3d ed. 2013).

127. Vienna Convention, *supra* note 126, art. 2 § 1(a).

128. AUST, *supra* note 126, at 15.

129. *Id.* at 18, 228.

130. *Id.* at 18.

be recorded, and (b) treaties require that a country parts with some degree of its sovereignty so that the treaty's member States can hold each other accountable through the agreed-upon consequences. Hence, a MOU does not qualify as a treaty because the participants have no legal obligations.¹³¹

There are also different types of treaties. The fundamental types of treaties are bilateral and multilateral treaties. A bilateral treaty is between two States and a multilateral treaty is between three or more States.¹³² There are also "plurilateral" treaties that are made with a limited number of States, with a particular interest in the subject matter. Then, "constituent" treaties, establish international organizations to create an efficient mechanism for countries to communicate and make MOUs and treaties, i.e., the United Nations.¹³³ With each type of treaty, the number of parties involved grows, causing an increase of authority as a result of the greater pressure, incentives, and sacrificed sovereignty.¹³⁴

Next, the ICJ's jurisdiction and authority are not analogous to a domestic court's jurisdiction and authority. In domestic law, courts make "common law," or "a body of law establish over the years by the decisions of the court" of that jurisdiction, meaning the courts' holdings are the rule of law until they have been replaced by a subsequent statute or court holding within that jurisdiction. In contrast, the jurisdiction of the ICJ is "voluntary even for [U.N.] Member States" because States have to agree to have dispute resolution before the ICJ; thus, unlike domestic courts, the ICJ cannot compel a State's presence or submission to its jurisdiction.¹³⁵ The ICJ decision does not become common law, as it is only binding to the parties of that particular case that have consented to be bound to the Court's decision.¹³⁶ Hence, ICJ decisions like the research and theories of scholars, are merely persuasive sources for future issues.¹³⁷ On the other hand, similar to domestic courts, the State party must abide by the ICJ's decision after it consents for the ICJ to hear the case.¹³⁸ Failure to abide by the ICJ decision allows the opposing party to have recourse through the Security Council.¹³⁹

Third, international organizations play a significant role in shaping international law through their contracts with countries, their organizational

131. *Id.* at 15.

132. *Id.* at 9.

133. *Id.* at 15.

134. Emily O'Brien & Richard Gowan, *What Makes International Agreements Work: Defining Factors for Success*, *CTR. ON INT'L COOPERATION* at 1, 7, 31 (Sept. 2012), https://cic.nyu.edu/sites/default/files/gowan_obrien_factors_success.pdf [<https://perma.cc/3APS-U4EQ>].

135. THIRLWAY, *supra* note 123, at 2-3.

136. Statute of the International Court of Justice art. 59.

137. *Id.* art. 38; THIRLWAY, *supra* note 123, at 7-8, 29 (comparing Latin principles *pacta sunt servanda*, meaning what has been agreed to is to be respected, and *lex ferenda*, or law that ought to exist).

138. U.N. Charter art. 94.

139. *Id.*

policies, and their activism.¹⁴⁰ For example, it was the Humane Society of the United States that took the undercover video at Jackie McConnell that brought horse-soring to the attention of the media outlets and public.¹⁴¹ However, some battles are too great for even the most influential international organizations, and horse-soring is one of these battles.¹⁴² If the battle was feasible for international organizations alone, the Humane Society would have reached out and partnered up with another international organization like the World Trade Organization (WTO), and compelled U.S. Congress to act expediently.

Finally, customary law, like treaties, is a main source of international law and is recognized formally as a leading authority in international law.¹⁴³ The United Nations defines customary law as “evidence of a general practice accepted as law.”¹⁴⁴ This includes generally accepted, widespread practices that were originally “set forth in a treaty.”¹⁴⁵ Note, “general practice” does “not necessarily [mean] unanimous among those concerned;” rather it requires that the practice is “widespread.”¹⁴⁶ And a practice is only binding customary law if it is both widespread *and* generally accepted as the proper way “to deal with . . . [the] problem.”¹⁴⁷

III. EXISTING TREATMENT OF ANIMALS INTERNATIONALLY

The legal and political international community at large has failed to address the protection of animal welfare. The international protections for animals currently in existence extend exclusively to endangered species and placing limitations on commercial trade practices. The only exception to this general rule is the European Union.

The European Union protects animal welfare for farm animals, animals used for research, and companion animals, but it does not protect competition animals, i.e., show horses.¹⁴⁸ The European Union recognizes that animals are “sentient beings” who are to be respected and protected, making animal welfare a high priority consideration to be balanced against government interests, “religious

140. THIRLWAY, *supra* note 123, at 29; Lewis Bollard, *Global Approaches to Regulating Farm Animal Welfare*, in INTERNATIONAL FARM ANIMAL, WILDLIFE AND FOOD SAFETY LAW 83, 96-104 (Gabriela Steier & Kiran K. Patel eds., 2017), DOI 10.1007/978-3-319-18002-1_3; Andrew Lurie & Maria Kalinina, *Protecting Animals in International Trade: A Study of the Recent Successes at the WTO and in Free Trade Agreements*, 30 AM. U. INT’L L. REV. 431, 449-51 (2015).

141. Jolly, *supra* note 1.

142. See Lurie & Kalinina, *supra* note 140, at 462.

143. Statute of the International Court of Justice art. 38; AUST, *supra* note 126, at 9.

144. Statute of the International Court of Justice art. 38.

145. Vienna Convention, *supra* note 126, art 38.

146. THIRLWAY, *supra* note 123, at 7; AUST, *supra* note 126, at 9.

147. Note, it is not enough that a practice is widespread and is recognized as *a proper way* to deal with a problem; it must be *the proper way*. THIRLWAY, *supra* note 123, at 7.

148. Council Directive 98/58/C, *supra* note 119, art.1; Treaty on the Functioning of the European Union, *supra* note 121, art. 13.

rites, cultural traditions and regional heritage.”¹⁴⁹ The term “welfare” is not expressly defined in any European Union treaty. Instead, the definition is demonstrated in the Council Directive 98/58/C,¹⁵⁰ requiring as a minimum, that every Member State “take all reasonable steps to ensure the welfare of animals under their care and to ensure that those animals are not caused any unnecessary pain, suffering or injury.”¹⁵¹ Note, the European Union extends animal welfare beyond providing for animals’ basic needs; this extension includes protection from pain and that the animals be kept in conditions that are species-appropriate with the animal’s physical, psychological, and ethological needs.¹⁵² Additionally, European Union Member States are permitted to restrict trade among each other to “protect the health and life of . . . animals.”¹⁵³

This definition put forth by the European Union is a good one. It successfully addresses that animals are sentient beings that suffer similarly to humans, recognizing how animals’ pain and suffering should not be ignored without good reason. Plus, the European Union does not demand perfect treatment for all animals. It establishes a good faith standard to take all “reasonable steps” possible when weighed against other important interests and the capacity to protect beyond the animal’s basic needs in the circumstances.¹⁵⁴ As a result, this is a workable standard that could be employed in all States.

On the other hand, the European Union’s standard is not perfect. Its flexibility makes it easy to abuse; still, this problem should not end the discussion because it would be a victory in itself for individuals, organizations, and

149. Treaty of Amsterdam, Protocol on protection and welfare of animals at 1, 110, Oct. 2, 1997, https://europa.eu/european-union/sites/europa.eu/files/docs/body/treaty_of_amsterdam_en.pdf [<https://perma.cc/5YPR-AR83>].

150. The directive requires that animals are “kept in conditions that are appropriate for their species and ‘degree of development, adaptation and domestication,’ and [provide for] their physiological and ethological needs in accordance with established experience and scientific knowledge. Council Directive 98/58/C, *supra* note 119, art. 4. The annex further elaborates that animals should be “protect[ed] from adverse weather, predators and risks of their health;” and animals should be provided a “wholesome diet, [water, and medication that] is appropriate to their age and species and which is fed to them in sufficient quantity to maintain them in good health and satisfy their nutritional needs.” *Id.* at Annex §§ 12-18.

For further reading, see generally Citizens’ Rights and Constitutional Affairs, *Animal Welfare in the European Union*, EURO. PARL., [https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583114/IPOL_STU\(2017\)583114_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2017/583114/IPOL_STU(2017)583114_EN.pdf) [<https://perma.cc/QZ4J-DBZM>]; Kea Ovie, *Harmonized Approach in Intensive Livestock Production Systems in Europe*, in INTERNATIONAL, FARM ANIMAL, WILDLIFE AND FOOD SAFETY LAW, 269, 285 (Gabriela Steier & Kiran K. Patel eds., 2017).

151. Council Directive 98/58/C, *supra* note 119, art. 3. Any definition of animal welfare “needs to include [these] three elements: [1] the emotional state of the animal, [2] its biological functioning, and [3] its ability to show normal patterns of behav[ior].” Treaty on the Functioning of the European Union, *supra* note 121, at 2.

152. Council Directive 98/58/C, *supra* note 119, art. 3, 4.

153. Treaty on the Functioning of the European Union, *supra* note 121, art. 13, 36.

154. Council Directive 98/58/C, *supra* note 119, art. 3.

governments around the world would have a universal standard to reference.¹⁵⁵ However, more fatally, the European Union's standard does not protect competition animals.¹⁵⁶ This is unacceptable—competition animals should be entitled to the same considerations and protections as other animals. An individual's ability to win a blue ribbon should not be a higher priority than scientific research; yet, right now, animals involved with scientific research are fully protected in the European Union when animals who merely are being used for entertainment value receive nothing. If agriculture animals and research animals deserve respect and dignity, then competition animals do too.

Outside of the European Union, the existing multilateral treaties protect only endangered species and limit commercial animal trade practices.¹⁵⁷ Most prominently, there is the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), which aims to ensure that the “international trade . . . of wild animals and plants does not threaten their survival,”¹⁵⁸ and to “prevent exploitative wildlife harvesting activities from exacerbating . . . the pre-existing threats . . . [of] the habitat loss, wildlife loss, and agricultural activities.”¹⁵⁹ Similarly, the Convention on the Conservation of Migratory Species of Wild Animals (CMS) “seeks to provide a global platform for conserving and sustainably utilizing migratory animals and their habitats [by] instruct[ing] States falling within an animal's migratory range to coordinate [their] conservation measures.”¹⁶⁰ CMS uses additional international agreements to “strive towards strictly protecting these animals, conserving or restoring the places where they live, mitigating obstacles to migration[,] and controlling other factors that might endanger them.”¹⁶¹

Nonetheless, an international agreement that extends beyond endangered

155. See David Favre, *An International Treaty for Animal Welfare*, 18 ANIMAL L. 237, 239 (2012).

156. Council Directive 98/58/C *supra* note 119, art.1; Treaty on the Functioning of the European Union, *supra* note 121, art. 13.

157. Note, Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) “regulates wildlife trade explicitly for conservation purposes.” Leslie Couvillion, *Habitat Loss, Agrobiodiversity, and Incidental Wildlife Loss*, INTERNATIONAL FARM ANIMAL, WILDLIFE AND FOOD SAFETY LAW 755, 764 (Gabriela Steier & Kiran K. Patel eds., 2017), DOI 10.1007/978-3-319-18002-1_24.

158. CITES, 27 U.S.T. 37, 1037 (1972); *What is CITES?*, CITES, <https://www.cites.org/eng/disc/what.php> [<https://perma.cc/8Y92-3FD4>].

159. CITES protects endangered species from harmful international trade practices by requiring all import, export, and re-export of covered species to be authorized through a licensing and permit system. “Under this system, trade in Appendix I species is allowed only in exceptional circumstances, while trade in Appendix II and III species is generally permitted subject to controls ‘to avoid utilization incompatible with [species’] survival.’” Couvillion, *supra* note 157, at 764-65 (quoting CITES, *supra* note 158, § 2015a).

160. CMS, 1134 U.N.T.S. 97 (1979); Couvillion, *supra* note 157, at 765.

161. CMS Secretariat, *Introduction*, CMS, <https://www.cms.int/en/legalinstrument/cms> [<https://perma.cc/TXQ8-KKQR>].

species and commercial animal trade practices, focusing on animal welfare has been encouraged by scholars, U.S. Congressmen, and Non-Governmental Organizations (NGOs) of which the World Organization for Animal Health (OIE) has led the way, promoting animal welfare worldwide by creating the “first internationally applicable farm animal welfare standards.”¹⁶² Unfortunately, five out of six of the OIE’s mission statements target the spreading of disease throughout the international trade rather than animal welfare.¹⁶³ The “OIE standards are [also] minimal, largely enshrining current industry practices.”¹⁶⁴ Still, despite these weaknesses, the OIE has “developed a global animal welfare infrastructure” beyond the reach of any other organization due to its workshops, animal welfare strategic plans for implementing the OIE standards throughout different regions, and the OIE has appointed liaisons for all 180 of its Member States.¹⁶⁵

The OIE’s efforts have led to the World Trade Organization (WTO) and the Food and Agriculture Organization of the United Nations (FAO) promoting animal welfare as well.

WTO case law involving animal welfare reveals that “the WTO appreciates the growing worldwide awareness that animal welfare is an ethical concern [that] should trump free trade in certain circumstances.”¹⁶⁶ For example, in *U.S.—Tuna*, the WTO found that the U.S. Dolphin-Safe Labeling Standards’ “goal to protect dolphins was legitimate and could justify restricting trade.”¹⁶⁷ Moreover, in *EC—Seal Products*, the WTO Appellate Body found that the European Union’s regulation prohibiting the placing of any seal

products from any countries (including the E.U.) on the market . . . fell within the ambit of public morals under Article XX(a) of GATT and that the protection of public morals related to seal hunting is a legitimate objective pursuant to the TBT Agreement . . . [explicitly] acknowledg[ing] that ‘animal welfare is an issue of ethical or moral nature . . . [, which is a] matter of ethical responsibility for human beings in general.’¹⁶⁸

162. Bollard, *supra* note 140, at 96.

163. *See About Us*, OIE, <https://www.oie.int/about-us/> [<https://perma.cc/MD7T-D5FX>].

164. Bollard, *supra* note 140, at 96.

165. *Id.* at 97.

166. Lurie & Kalinina, *supra* note 140, at 433-34, fn.8. *See generally* Appellate Body Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, 303-06 (May 16, 2012) [hereinafter *US—Tuna*]; *see also* Appellate Body Reports, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R, 2.196, 5.138 (May 22, 2014) [hereinafter *EC—Seal Products*].

167. *See* Regulations Governing the Taking and Importing of Marine Animals, 50 C.F.R. §§ 216.91(1)(i) - (ii) (2013). Lurie & Kalinina, *supra* note 140, at 443.

168. “The explicit recognition of the importance of animal welfare by the WTO was unprecedented.” *Id.* at 446, 449.

Before *EC—Seal*, the WTO did not recognize the protection of animal welfare on its own as a legitimate objective; there had to be a direct harm to an animal's life or health, the survival of the species, or the environment.¹⁶⁹ It was through these two watershed cases that the WTO recognized that the “OIE standards are a presumptively valid basis for regulating trade” despite the WTO's historical hostility to animal welfare regulations.¹⁷⁰

Akin to the WTO, the FAO mostly ignored animal welfare until recently.¹⁷¹ The transition began in 2008 with a vague report encouraging States to “search for [animal welfare] improvements that are practical under the particular circumstances.”¹⁷² Now, although animal welfare is not a primary issue for the FAO, it continues to promote animal welfare through “an online ‘Gateway to Farm Animal Welfare,’ which publishes news, resources, and events.”¹⁷³ In addition, the FAO helps States draft animal welfare legislation and “build their capacities to monitor farm animal welfare.”¹⁷⁴

Like the above international organizations, U.S. House Representative of Oregon's Third District, Earl Blumenauer, stresses the need for international law to properly further animal welfare. Rep. Blumenauer finds that animal welfare is a “long-term challenge” for which the United States needs to “build on [its] foundation . . . and the vision and network of consumers, governments, and industries investing in humane practices in the United States and around the

169. *Id.* at 450.

170. Bollard, *supra* note 140, at 97, 100 (citing SPS Agreement, Preamble, art. 3, Annex A, ¶ 3(b)); *About Us*, *supra* note 163. See also KathrynAnn H Fields et al., *International Beef Trade: A Value Proposition*, 8 ANIMAL FRONTIERS, June 29, 2018, at 16-22, <https://doi.org/10.1093/af/vfy013> [<https://perma.cc/FHE8-H292>] (explaining that recognition of the OIE standards is a significant victory for animal welfare because about nine percent of the world's meat was traded internationally in 2007, and that number has continued to grow - particularly in regard to U.S. pork exports). For further insight into the WTO's historical hostility against animal welfare, see generally General Agreement on Tariffs and Trade, 1867 U.N.T.S. 187 (1994) [hereinafter GATT]; Agreement on Technical Barriers to Trade, 1868 U.N.T.S. 120 (1994) [hereinafter TBT Agreement]; Bollard, *supra* note 140, at 100.

171. Bollard, *supra* note 140, at 98.

172. D. Fraser, R.M Kharb et al., *Capacity Building to Implement Good Animal Welfare Practices*, FAO (Oct. 3, 2008), <http://www.fao.org/3/i0483e/i0483e00.pdf> [<https://perma.cc/DT8K-VYLA>]. But see Leslie Couvillion, *Marine and (Over-) Fishing*, in INTERNATIONAL FARM ANIMAL, WILDLIFE AND FOOD SAFETY LAW 815, 860 (Gabriela Steier & Kiran K. Patel eds., 2017), DOI 10.1007/978-3-319-18002-1_25 (explaining that the FOA had included subtle promotions of animal welfare in its agreements before their recent shift, i.e., the Code of Conduct for Responsible Fisheries of 1995 (FOA Fisheries Code) “sets out voluntary, non-binding principles and standards for responsible fisheries practices”).

173. Bollard, *supra* note 140, at 98; *Themes*, FAO, <http://www.fao.org/themes/en/> [<https://perma.cc/3PKW-K58L>].

174. Bollard, *supra* note 140, at 98.

world.”¹⁷⁵ Rep. Blumenauer deems Congress’s recent action on animal welfare bills, like the HPA, “lip service” that allows individuals to “maintain their cruel practices, [while] misleading the public and continuing to profit.”¹⁷⁶ Furthermore, Rep. Blumenauer argues that “harnessing the forces of international treaties, global market behavior, and increasing public awareness” is the best solution for bettering animal welfare.¹⁷⁷

David Favre, an Animal Law professor at Michigan State University College of Law, strongly advocates for an international animal welfare treaty as well, finding that the wellbeing of animals would be best protected through a “universal view.”¹⁷⁸ Professor Favre explains how the lack of a treaty specifically regarding animal welfare is a hindrance because it means that “every battle has to be fought over and over again in each country,” since there is no universal animal welfare standard to reference.¹⁷⁹ This is unacceptable, he explains, because a “horse is a horse regardless of what country it lives in, and it is not appropriate that it can receive high care in some places and no concern in others.”¹⁸⁰

Notwithstanding the calls of action by the OIE, WTO, FAO, Rep. Blumenauer, and Professor Favre, no animal welfare treaty exists today. Lewis Bollard proposes that

In the meantime, . . . the international community could achieve a lot of incremental progress on farm animal welfare through the existing institutions and rules . . . [by] (1) push[ing] for a more liberal interpretation of the GATT’s Article XX and SPS agreement; (2) develop[ing] stronger voluntary best practices at the OIE and FAO; (3) implementing binding standards through free trade agreements.¹⁸¹

These are all steps the international community could and should take, but these steps alone are insufficient to protect and promote animal welfare.¹⁸² Ultimately, animal welfare will never be protected by a high-standard worldwide unless the international community comes together to make a treaty. But not all of the

175. Congressman Earl Blumenauer, *Changing Humanity: Fifteen Years of Progress in Animal Welfare and Protection*, 22 ANIMAL L. 203, 220 (2016).

176. *Id.*

177. *Id.* at 222.

178. Favre, *supra* note 155, at 244.

179. *Id.* at 239.

180. *Id.* at 244.

181. Bollard, *supra* note 140, at 103-04. Dena Jones & Michelle Pawlinger, *Voluntary Standards and Their Impact on National Laws and International Incentives*, INTERNATIONAL FARM ANIMAL, WILDLIFE AND FOOD SAFETY LAW 111, 117 (Gabriela Steier & Kiran K. Patel eds., 2017), DOI 10.1007/978-3-319-18002-1_4 (citation omitted) (“While countless corporations have established environmental policies [protecting animal welfare], it is important to remember that there is a difference between creating policies and implementing them.”).

182. Lurie & Kalinina, *supra* note 140, at 462-63 (citation omitted) (“[I]t may be impractical and unrealistic for individual and non-governmental entities with limited resources to seek redress through private remedies for a transnational problem of great scope and complexity.”).

international community is prepared and/or willing to dive in headfirst to the promotion of animal welfare and sacrifice their economies and citizens' livelihoods in doing so.¹⁸³ All the same, a broad treaty is not necessary for the international community to promote and protect animal welfare. Animal welfare can be protected and promoted incrementally through issues-specific multilateral and plurilateral treaties, allowing countries' economies to slowly adjust and acquire the new technologies necessary to remain competitive in the global marketplace, i.e., a treaty specifically targeting the elimination of horse-soring.

HORSE-SORING AND INTERNATIONAL LAW

I. UTILIZING UNCONTROVERSIAL AND UNDERREPRESENTED ISSUES

Animal welfare treaties concern more than improving the lives of animals worldwide. The topic of animal welfare provides a platform for which States can utilize uncontroversial and underrepresented issues to build positive working relationships. Methods for bringing about successful negotiations are discussed often by both legal and business professionals, yet the importance of positive relationships between the parties is often overlooked and underappreciated in international politics. There is a tendency for international politicians and lawyers to focus too heavily on their end goals rather than the larger picture. This shortsighted approach to negotiations overlooks how the international community could benefit from addressing the issue of animal welfare in increments of issue-specific multilateral or plurilateral treaties. This approach to animal welfare strengthens the working relationships among States, leading to more successful negotiations in the future.¹⁸⁴

A. Trust Crafts Successful Negotiations

All communication comes down to three fundamental elements: *pathos*, *ethos*, and *logos* (or emotions, credibility, and logic respectively). These fundamental elements do not change regardless of how educated or what title the communicator has; hence, these three elements are just as important when States sit down at a negotiation table as to when those same diplomats learned to write

183. Professor Favre acknowledges that a broad animal welfare treaty is too daunting of a task for the international community because what is best for animals and what is best for countries' economies do not align. Favre, *supra* note 155, at 248-49. For example, the high animal welfare standards in Britain are undermined by the reality that "high-welfare British producers [are] at a comparative disadvantage" because high-welfare producers are replaced in the market with imported lower-welfare standards and lower-cost meats from outside of the European Union's jurisdiction. BOLLARD, *supra* note 140, at 99 (citation omitted).

184. *Building Trust in your Business Negotiation Relationships*, NEGOT. EXPERTS (Aug. 30, 2017), <https://www.negotiations.com/articles/negotiation-relationship/> [<https://perma.cc/JB55-9BMK>] (citing HARVARD BUSINESS ESSENTIALS 'NEGOTIATION' (2003) ("If we concentrate too heavily on the amount of value we can get today, we may lose opportunities from transactions of greater value, later on down the road.")).

their first persuasive essay. Despite this, articles and practitioner guides do not stress the significance of relationships—an aspect of *pathos* in negotiations. For this reason, readers, I urge you to think back to grade school before critical thinking and athletic skills developed. Who did we pick to be on our teams in gym class or at recess? Our friends—the people we trusted; the people with whom we shared our lunch boxes.

This allure to those with whom we have the strongest bond does not cease to exist once we have grown, developed, and received an education. It remains subconsciously embedded in us because humans are social beings.¹⁸⁵ For this reason, the international legal community needs to recognize that *pathos* includes more than careful word choice just as *logos* and *ethos* do. For *logos*, it is not only what you say, but the organization in which you say it. For *ethos*, it is word choice, types of sources, and personal qualifications. Likewise, for *pathos*, one's ability to connect with his/her audience is just as important as choosing words that tug on readers' heartstrings, and the relationship built between speaker and audience naturally affects this connection.

As a result, to produce the most persuasive negotiations or arguments possible, an individual must capitalize on all the facets of *pathos*, *ethos*, and *logos*, extending beyond word choice.¹⁸⁶ Harvard University emphasizes that “[p]ositive negotiation relationships are important not because they engender warm, fuzzy feelings, but because they engender trust.”¹⁸⁷ Trust is a necessary component for a successful negotiation because the more trust that exists the fewer risks parties feel they are assuming.¹⁸⁸ Trust, consequently, decreases the implementation costs because there is less “need to spend resources on time and money in perpetually monitoring” the other parties.¹⁸⁹ This element of trust is why Harvard University found that “[b]usinesses’ long term success can be judged by the extent to which they build and nurture their relationships.”¹⁹⁰

Similar to businesses, these same principles apply to negotiations throughout the international community. Thus, for trust to exist between States, the relationship cannot be forged through social gatherings on the golf course.¹⁹¹ The

185. Hakimi, *supra* note 18, at 327 (“International communities are constituted through social interactions.”).

186. For further explanation of *pathos*, *ethos*, and *logos*, see *Ethos, Logos and Pathos: The Structure of a Great Speech*, FARNAM STREET, <https://fs.blog/2016/11/ethos-logos-pathos/> [<https://perma.cc/RZ7G-TLFQ>].

187. Jeswald Salacuse, *The Importance of a Relationship in Negotiation*, PROGRAM ON NEGOT. HARVARD L. SCH. (June 18, 2019), <https://www.pon.harvard.edu/daily/negotiation-training-daily/negotiate-relationships/> [<https://perma.cc/JT22-FHKU>].

188. *Id.*

189. *Building Trust in your Business Negotiation Relationships*, *supra* note 184.

190. *Id.*

191. Under the rational choice approach of international relations, dispute resolution is what creates the international community. Therefore, global actors are bound together by “mutual objectives” and “solv[ing] common problems. Likewise, through Ian Johnstone’s “interpretive communities” approach, communities are made when there is “share a perspective and way of

parties need to know that they are not being schmoozed; they need to know that the partnership is valued. This knowledge comes from working together because negotiators approach issues differently depending on the value attached to the ongoing relationship between the States.¹⁹² Value changes a negotiators approach because

the negotiator who does not place any emphasis on a relationship, will be negotiating from a distributive perspective . . . They will try to gain as much as possible from the distribution of available resources. [Whereas, t]he negotiator who desires to form a long-term relationship, will be seeking to add value that is beneficial to both sides.¹⁹³

Although any dispute resolution will contribute to building a relationship, the best way for States to forge these strong and positive relationships is by addressing issues that are uncontroversial and underrepresented between them.¹⁹⁴ If States only work together when there is a conflict or a crisis, it is more difficult to prioritize the long-term relationship and find a mutually valuable solution.¹⁹⁵ This is because, in the heat of the moment, emotions and stakes are high. Therefore, neither State will compromise or assume the risk by bargaining with a State that they have no reason to trust.¹⁹⁶ On the other hand, if the parties collaborate on an issue that they both concede needs solutions and the risks are low, then the parties are presented with an opportunity to learn: (1) how to work

understanding the world acquired through their immersion in the law and interaction with one another.” Hakimi, *supra* note 18, at 323-24.

192. *Building Trust in your Business Negotiation Relationships*, *supra* note 184.

193.

When two parties approach the negotiations from the perspective of forming relationships, they do so by building the level of trust through an open line of communication. Generally, the agreement reached will likely offer both parties a partnership that presents more possibilities, in creating mutual value that enhances the partnership agreement.

Id.

194. “People coalesce into a community not necessarily by overcoming their differences but by engaging together in what Aristotle called a practice of justice—a practice of trying to establish and hold one another accountable to standards that are generalizable for the group.” Hakimi, *supra* note 18, at 325. “The best way to avoid such destructive conflicts . . . The trick, then, is to foster the “right” kinds of conflict.” *Id.* at 327.

195.

Conflict is an integral—often critical—part of these arrangements. So, we should assess and treat it as such. Rather than persistently try to cabin, curtail, or defuse it, we should at times preserve or even cultivate it. And we should study how best to structure it so that it further enhances both specific regulatory arrangements and the global order more generally.

Id. at 356.

196. See David Felicissimo, *M&A Advice from Outside the Courtroom*, ACC DOCKET, Mar. 2019, at 1, 38.

with each other, (2) what each other's main goals are, (3) where each is willing to compromise, (4) what makes the other tick, and (5) what are the social norms that are going to convey respect or disrespect. This opportunity to learn how to build a positive relationship is important because it is a strong relationship and mutual understanding that will open the door for future cooperation.¹⁹⁷ Hence, the issue of horse-soring is a prime opportunity for the international community to devise how the United Nations and other States can continue to work positively with the United States.

B. Horse-Soring is an Uncontroversial and Underrepresented Issue

It seems counterintuitive to categorize the training practice of horse-soring as an uncontroversial and underrepresented issue when it is a hot topic in the equine industry, opposing bills have been competing in the U.S. Congress for the past seven years, and this entire Note discusses horse-soring. However, most of the international legal community is not aware of this training technique nor the global engagement with the Tennessee Walking Horse industry. Furthermore, the controversy surrounding horse-soring within U.S. Congress and the equine industry has nothing to do with horse-soring itself, rather the opposition against definitively eliminating horse-soring is driven by personal conflicts of interest between individual U.S. politicians and the Tennessee Walking Horse industry. There is no one truly advocating for cooking a horse's flesh with chemicals; instead, U.S. Politicians are advocating for their financially supportive constituents and keeping the public in the dark. This contention is best shown by breaking down the definitions of "controversy" and "underrepresentation," then applying those definitions to the issue of horse-soring.

First, controversy is defined as a "disagreement [that is] prolonged, public, and heated."¹⁹⁸ There is no controversy on whether horse-soring should be legal—the HPA made it illegal half of a century ago. In addition, both the proposed PAST Act and 2019 Amendments concede that increased protections are necessary to protect horses and eliminate horse-soring for good.¹⁹⁹ Additionally, if Fox News asked on the evening news' audience tomorrow

197. Oona A. Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. CONFLICT RESOL. 588, 597 (Aug. 2007), <https://www.jstor.org/stable/27638567> ("Commitment to these shared norms and thereby smooth relations with other countries."). See also Hakimi, *supra* note 18, at 324-25 (finding that "the community is constituted through their interactions about the joint project. [And that] These interactions have the potential to construct and fortify the group").

198. Oxford, *Controversy*, LEXICO, <https://www.lexico.com/en/definition/controversy> [<https://perma.cc/TD4P-BNVJ>].

199. Compare PAST Act, S. 1007, 116th Cong., preamble (2019) ("To amend the Horse Protection Act to designate additional unlawful acts under the Act, strengthen penalties for violations of the Act, improve Department of Agriculture enforcement of the Act, and for other purposes."), with 2019 Amendments, S. 1455, 116th Cong., preamble (2019) ("To amend the Horse Protection Act to provide increased protection for horses participating in shows, exhibitions, sales, and auctions, and for other purposes.").

whether it was proper to subject a horse to illegally having mustard gas and kerosene painted and wrapped on its legs so that screws, resins, and chains can be attached to strike the cooked flesh to force the horse to raise its legs higher than is natural, the response from the public would not be a heated disagreement. Thus, it is not because there is a public, heated controversy among U.S. Citizens that prevents Congress from effectively amending the HPA.

Second, underrepresented is defined as inadequately given an impression on or protested.²⁰⁰ The impressions that are being most adamantly communicated to southern senators are from wealthy constituents who either support performance competitions, host them, or partake in horse-soring. There is virtually no general, public dialogue on horse-soring. How could there be? The administration of the HPA has been neglected and hidden from the public. Plus, there is no NGO that has the power and incentives available to turn the tides and ensure that the Tennessee Walking Horse industry is not able to continue to circumvent the administration of the HPA because the wealth and power are held by the Tennessee Walking Horse industry.²⁰¹ Therefore, this is ignorance, manipulation, lip service, and a conflict of interest between U.S. Congressmembers, their pocketbooks, and their duty to their constituents. This is not controversy; this is underrepresentation.

It has been almost a decade since the Humane Society of the United States videotaped Jackie McConnell and released the footage to the public.²⁰² Yet, four senators continue to prevent the passage of an amendment that has a chance of improving the administration of the HPA by eliminating the inherent conflicts of a self-regulated system. Instead,

their sham alternative bill would actually make the problem worse by further weakening the USDA's already limited authority and handing off more power to the perpetrators, while doing nothing to end the use of chains, heavy stacked shoes and other soring devices, or to establish meaningful penalties.²⁰³

The international community, unlike NGOs, does have the power and incentives to drive the U.S. Congress into action, and it should. There is no benefit to the common good when a State pawns its people off to another to commit horrendous acts. It is time that States take responsibility for their citizens' actions even when there is no risk of legal accountability. By doing nothing, States ratify their citizens' behavior, especially when said States allow the acts to

200. *Represented*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/represented> [<https://perma.cc/TD4P-BNVJ>] (last visited Jan. 14, 2020); *Underrepresented*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/underrepresented> [<https://perma.cc/SM8E-7N5R>].

201. It is "impractical and unrealistic for individuals and non-governmental entities with limited resources to seek redress through private remedies for a transnational problem of great scope and complexity." Lurie & Kalinina, *supra* note 140, at 462-63 (citation omitted).

202. See Jolly, *supra* note 1.

203. Block & Amundson, *supra* note 90.

remain legal within its borders. Consequently, the States ratifying horse-soring are equally as guilty of lip service as the U.S. Congress because Tennessee Walking Horses are legally less protected by those States' "high welfare standard" than the horses in the United States.

II. OVERCOMING THE VOLUNTARY ELEMENT OF INTERNATIONAL LAW

The most significant concern with using international law to end horse-soring is that treaties are voluntary.²⁰⁴ Nevertheless, the voluntary element of treaties is not an impermeable roadblock, it is merely an obstacle. There are many reasons why the United States may consent to be bound or may later find itself bound to a treaty eliminating horse-soring. Chiefly, there is a wide range of general incentives that can be offered or crafted. Secondly, there is a stronger incentive for the United States to consent to a treaty through the United Nations than a multilateral or plurilateral treaty with the States whose citizens are engaged in the Tennessee Walking Horse industry. Thirdly, the U.S. Government, as a whole, is not as hostile to animal welfare protections, as the inaction with horse-soring makes it first appear. Fourthly, the engagement of the international community automatically brings the issue to the attention of the executive branch rather than the legislative branch. Fifthly, third parties can later agree to or accept the obligations under a treaty. Lastly, what was once a treaty can evolve into customary law which is binding on all nations. For these reasons, U.S. Congress' failure to pass the PAST Act does not necessarily indicate that the United States would object to an issue-specific treaty promoting and protecting animal welfare by targeting the elimination of horse-soring.

A. General Treaty Incentives

Animal welfare treaties have comparable approaches to those of environmental and human rights treaties because for all these categories, "the presumed benefits won't be realized for some time . . . [yet] the costs must be paid" upfront.²⁰⁵ Therefore, unlike most other treaty areas, environmental, human rights, and animal welfare treaties do not create "incentives for reciprocal respect" through merely "mutual benefits of cooperation . . . States have relatively little to gain from [these types of] regulation and potentially much to lose from international interference in their own domestic practices."²⁰⁶ Consequently, countries are less inclined to consent to be bound to environmental, animal welfare, and human rights treaties without external incentives" and/or "tangible

204. This is true for even Member States of the United Nations. Vienna Convention, *supra* note 126, art. 34.

205. Lawrence Susskind, *Strengthening the Global Environmental Treaty System*, 25 ISSUES SCI. & TECH. (Fall 2018), <https://issues.org/susskind/> [<https://perma.cc/HD36-8LVR>].

206. Richard A. Nielsen & Beth A. Simmons, *Rewards for Ratification: Payoffs for Participating in the International Human Rights Regime*, 59 INT'L STUD. Q. 197, 197 (2015), https://scholar.harvard.edu/files/bsimmons/files/niensensimmons_rewards_isq_2015.pdf [<https://perma.cc/XZP5-JZC4>].

benefits.”²⁰⁷

First, an inherent incentive, “pressuring countries to live up to their obligations” is through shaming.²⁰⁸ Shaming is a natural and common consequence, encouraging compliance with international agreements because States want to avoid “bad publicity and reputational damage.”²⁰⁹ This is particularly relevant for the United States with animal welfare, as a refusal would illuminate to the world that the U.S. Government pushed for commercial restrictions on the trade of animals to benefit its economy at the expense of smaller, developing countries rather than for animal welfare. This is a problem for the United States because it is difficult to maintain one’s status as the world’s sole super-Power with an international community hostile to that country. Nonetheless, shaming is not a “fool-proof” method because this exposure would not be the first black mark against the United States’ reputation nor will it be the last; yet, the United States has remained a respected super-Power thus far.²¹⁰

Second, financial incentives and development assistance are exceptionally effective because “treaties are highly costly to negotiate and to enforce.”²¹¹ Thus, a treaty is made more attractive by linking “a variety of trade benefits and various forms of development assistance to membership in good standing in multilateral environmental treaty regimes.”²¹² For example, the World Bank . . . might offer favorable lending rates or even loan forgiveness to countries that sign, ratify, and implement key . . . treaties” in good faith.²¹³ Relatedly, the lower the implementation costs, the more attractive the treaty.²¹⁴ Here, implementation costs are an issue since horse-soring is already illegal in the United States, but the high cost of the HPA’s administration caused the creation of the ineffective self-regulatory system in place. As a result, there is no financial incentive for the United States to “reinforce behavior that . . . [it is] already active in.”²¹⁵ Correspondingly, there will be “domestic interest groups” like the TWHBEA pressuring the U.S. to violate the treaty or not to consent to it in the first place.²¹⁶

207. This is what is known as the “rewards theory.” Note, part of this is because “Politicians with limited electoral time frames;” therefore, their interests are tailored towards their own re-elections rather than what is most efficient and helpful in the long run. Susskind, *supra* note 205.

208. *Id.*

209. O’Brien & Gowan, *supra* note 134, at 5.

210. Susskind, *supra* note 205.

211. Thomas J. Miles & Eric A. Posner, *Which States Enter into Treaties, and Why? 1-5*, (John M. Olin Program in Law and Economics, Working Paper No. 420, 2008), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1622&context=law_and_economics [https://perma.cc/EX8M-BECJ].

212. Susskind, *supra* note 205.

213. *Id.*; Hathaway, *supra* note 197, at 596. *Pacta sunt servanda*: “every treaty in force is binding upon the parties to it and must be performed by them in good faith.” Vienna Convention, *supra* note 126, art. 26.

214. See O’Brien & Gowan, *supra* note 134, at 8.

215. *Id.* at 7.

216. *Id.* at 8.

Next, “technology-sharing” and information-sharing agreements are useful incentives.²¹⁷ International “agreements succeed when they make information more readily available: to States . . . , to domestic constituencies . . . , and to institutions engaged in monitoring compliance” because information-sharing agreements create “a common vocabulary and a “shared awareness” to build consensus around global goals . . . raising the stakes for compliance.”²¹⁸ Similarly, a fourth attractive incentive is to create “regional science advisory bodies” for animal welfare treaties “rather than organize separate committees for every treaty regime . . . [because] the fragmentation of scientific effort among separate treaty regimes is counterproductive.”²¹⁹ Accordingly, an overarching advisory body would ensure that the incremental steps to be taken to promote and protect animal welfare stay consistent with the end goal of the general promotion and protection of animal welfare.

Conversely, high negotiation and implementation costs discourage the most enthusiastic States. It is ineffective to threaten States with “financial penalties” because it emphasizes “sharing the pain rather than sharing the gain,” discouraging States from consenting.²²⁰ However, this concern must be balanced with the notion that “if there are no penalties, many countries might be more inclined to sign, but they certainly would have no incentive to comply.”²²¹ Tennessee Walking Horses will not be safe if the United States does not have to effectively uphold its treaty obligations because nothing would change, as, on paper, horse-soring is already illegal in the United States. Furthermore, an incentive-based treaty regime can create high implementation costs, which decreases its attractiveness.²²² Therefore, to decrease the cost, an incentive-based treaty regime can be limited by rewarding “special benefits” to only those countries whose implementation is “above-adequate.”²²³ Costs can also be minimized through an open multilateral treaty through the United Nations rather than bilateral or plurilateral treaties. Bilateral and plurilateral treaties have “high transaction costs because of their specificity.”²²⁴ Whereas open multilateral treaties generally have low costs for additional members because the goal was

217. Susskind, *supra* note 205.

218. O’Brien & Gowan, *supra* note 134, at 8.

219. Susskind, *supra* note 205.

220. *Id.*

221. *Id.*

222. O’Brien & Gowan, *supra* note 134, at 8. Implementation cost considerations include “how likely domestic institutions are to require the government to change state practices to conform to the treaty requirements.” Hathaway, *supra* note 197, at 594.

223. Joy Hyvarinen, *Countries Need an Incentive to Bid Ambitious Climate Plans*, CLIMATE HOME NEWS (Aug. 29, 2014, 09:17 AM), <https://www.climatechangenews.com/2014/08/29/countries-need-an-incentive-to-bid-ambitious-climate-plans/> [<https://perma.cc/3F5D-E3SY>].

224. Miles & Posner, *supra* note 211, at 6 (explaining that open multilateral treaties are treaties “deposited with the Secretary-General . . . sponsored by a United Nations organ such as the General Assembly” gaged towards a “general interest to the international community . . . [and] open to all”).

already “universal adoption;” hence, there is no need to tailor the specifics to new members.²²⁵

B. Strengthened Incentives through the United Nations

There is a reason why the United Nations has remained a respected international authority for seventy-five years—its recommendations are persuasive because the United Nations provides Member States with powers and resources the United Nations otherwise would not have.²²⁶ Accordingly, cost-savings is only one of many increased incentives available by creating a horse-soring-specific animal welfare treaty through the United Nations rather than as a bilateral or plurilateral treaty.

Primarily, States are not starting from scratch when they create multilateral treaties through the United Nations. For instance, there is already a budget system in place because the General Assembly considers and approves all “financial and budgetary arrangements.”²²⁷ Most significantly, since participation in U.N. Treaties is not correlated with size like bilateral and plurilateral treaties, creating the treaty through the United Nations allows States to work closely with smaller, developing States that more wealthy and large States do not generally have the opportunity to work with and thus build a working relationship with those countries.²²⁸

C. Incentives from the United States and the United Nations’ Relations

Even the United States is provided additional power and resources through its membership in the United Nations that the United States would not otherwise have.²²⁹ The first thing I can remember learning in my first International Relations class is BRIC—Brazil, Russia, India, China. The lesson discussed how the United States was the first sole super-Power. In the past, no one country has single-handedly held this much authority; and when the United States falls, the authority will not fall to only a single country’s hands. The professor explained that the world will fall to BRIC regardless of the globalization that technology has made available because even with advancing technology, the world remains too vast and diverse to be led by a single country independently.²³⁰ Nonetheless, this is not

225. *Id.* at 7.

226. This is what is called “soft power.” Soft power “works through attraction and co-option.” Whereas, “Hard power works through payments and coercion ([i.e.] carrots and sticks).” Joseph S. Nye, Jr., *The Soft Power of the United Nations*, PROJECT SYNDICATE (Nov. 12, 2007), <https://www.project-syndicate.org/commentary/the-soft-power-of-the-united-nations?barrier=accesspaylog> [<https://perma.cc/H6LK-MHDJ>].

227. U.N. Charter art. 17.

228. Miles and Posner, *supra* note 211, at 7, 18.

229. Secretary-General Kofi Annan's Heinz, Heinz Foundation Lecture at University of Pittsburg, SG/SM/8955/Rev.1 (Oct. 21, 2003), <https://www.un.org/press/en/2003/sgsm8955Rev1.doc.htm> [<https://perma.cc/W4WR-X3JP>].

230. *Id.*; International Relations, Adrian College (Fall 2014).

something Americans typically consider; the United States acts as if it is invincible.

This invincible mentality is conveyed throughout all aspects of U.S. culture. The world jokes that they can always distinguish an American tourist from any other because Americans are loud, confident, appalled at the lack of public trash cans, love ice in their drinks, and are awestruck by all their surroundings. But most of all, American tourists are oblivious and unreceptive to the variations of different cultures, i.e., Americans will wait to be seated at a restaurant even after watching others walk straight to open tables; Americans always ask where the “restroom” is instead of using the term “toilet;” and Americans persistently tip everyone even when it is considered an insult in that country.²³¹

These same distinctive traits are at play in how Americans view the U.S. Government’s role in the international community. For example, if you were to ask a citizen of Jordan, whether international law existed, the answer is likely to be yes because Jordanians see international law in action every day in their own lives, especially at their borders. In contrast, if you were to ask the same to an American, you are likely to receive a completely different answer. There is a culture in the United States that no one can impede its sovereignty without its permission, and even the U.S. Government has certain boundaries that it cannot cross on account of the rights of the American people. Plus, the United Nations does not continually interfere with the U.S. borders. For these reasons, for Americans, international law continues to be an abstract concept rather than a concrete reality.

However, the United Nations’ lack of interference should not be mistaken as an inability to interfere in the United States. While it is true that the United Nations does not have its own military, U.N. authority is backed by the resources and forces of Member States.²³² Often, the Member State providing the bulk of the resources and force is the United States. Because of this, Americans do not recognize the check the United Nations can enforce upon its Member States because it is something most Americans have never considered much less seen.²³³ Nonetheless, the United Nations exerts authority within its Member States daily, and there are several alternative avenues that the United Nations can obtain the resources and forces it needs from outside of the United States when necessary.

231. Talia Lakritz, *12 Mistakes Americans Make When Traveling Abroad That Out Them As Tourist*, INSIDER (Apr. 25, 2019, 04:28 PM), <https://www.insider.com/american-tourists-traveling-abroad-2019-4#they-take-off-their-shoes-at-the-airport-10> [<https://perma.cc/74AJ-UW2T>].

232. U.N. Charter art. 43 § 1 (“All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.”).

233. “You cannot see what I see because you see what you see. You cannot know what I know because you know what you know. What I see and what I know cannot be added to what you see and what you know because they are not of the same kind.” DOUGLAS ADAMS, *MOSTLY HARMLESS* 110 (1993).

Furthermore, at present, the United States cannot afford to oppose the United Nations for an issue that is uncontroversial to anyone who is not entangled in personal conflicts of interest with the Tennessee Walking Horse industry. The United States needs the United Nations because as the “sole-remaining super-Power,” the United States is “burdened” with great responsibilities that can only be undertaken “through diplomacy . . . rather than the exercise of unchallenged military power,” and no nation is “able to shoulder these burdens on its own.”²³⁴ Yet, recently, the United States has continuously opposed the United Nations and its values and principles,²³⁵ repeatedly disappointed the United Nations by the example the United States has set for the world.²³⁶

2019 was a year of unethical actions from the U.S. Government towards civilians. The High Commissioner for Human Rights, Michelle Bachelet, was appalled that in the U.S. Detention Centers “children [were being] forc[ed] to sleep on the floor in overcrowded facilities, without access to adequate healthcare or food, and with poor sanitation conditions.” The OHCHR chief explained, “immigration detention is never in the best interests of a child . . . because even

234. Secretary-General Kofi Annan's Heinz, *supra* note 229. “In collaboration where possible with the United States that is, . . . if success is to be found at all. It is to the remaining superpower that we must look, with trepidation and hope.” Trevor Findlay, *Why Treaties Work, Don't Work and What to do About It?*, 63 BEHIND THE HEADLINES, Jan. 25, 2006, at 14, <https://3mea0n49d5363860yn4ri4go-wpengine.netdna-ssl.com/wp-content/uploads/2017/08/BTH-63-1-2006.pdf> [<https://perma.cc/7W3L-4KTS>].

235. *US President Trump Rejects Globalism in Speech to UN General Assembly's Annual Debate*, UN NEWS (Sept. 25, 2018), <https://news.un.org/en/story/2018/09/1020472> [<https://perma.cc/Q7AE-MSJX>]; Josh Rogin, *Inside the Coming War between the United States and the United Nations*, WASH. POST (Dec. 28, 2016 7:01 AM), <https://www.washingtonpost.com/news/josh-rogin/wp/2016/12/28/inside-the-coming-war-between-the-united-states-and-the-united-nations/> [<https://perma.cc/KG7V-967T>]; *UN Rights Chief 'Appalled' by US Border Detention Conditions, says Holding Migrant Children may Violate International Law*, UN NEWS (July 8, 2019), <https://news.un.org/en/story/2019/07/1041991> [<https://perma.cc/LG8L-XKYG>]; *Afghanistan Probe: 'At Least 60 Civilians' Killed After US Military Airstrikes on Alleged Drug Labs*, UN NEWS (Oct. 9, 2019), <https://news.un.org/en/story/2019/10/1048851> [<https://perma.cc/DTL8-9RX7>]; Rahim Faiez & Kathy Gannon, *UN Says US Strikes Cause Civilian Casualties In Afghanistan*, ABC NEWS (Oct. 9, 2019), <https://abcnews.go.com/International/wireStory/us-strikes-civilian-casualties-afghanistan-66154008> [<https://perma.cc/PM45-FNRX>]; *Global Economy: 'We Must Do Everything Possible' to Avoid Global 'Fracture' Caused by US-China Tensions, Urges Guterres*, UN NEWS (Oct. 19, 2019), <https://news.un.org/en/story/2019/10/1049631> [<https://perma.cc/RED9-QP8R>]; Carol Morello, *Pompeo Presses U.N. Security Council to 'Pick a Side' in Venezuela's Crisis*, Washington Post (Jan. 26, 2019 01: 31PM), https://www.washingtonpost.com/world/national-security/security-council-meeting-on-venezuela-expected-to-highlight-tensions-between-us-and-russia/2019/01/25/10103b7e-20b6-11e9-8b59-0a28f2191131_story.html [<https://perma.cc/897Q-Z8DV>]; Agencies, *Security Council says Committed to International Law as U.S. and Iran Tensions Flare*, TIMES ISR. (Jan. 9, 2020 9:09 PM), <https://www.timesofisrael.com/security-council-says-committed-to-international-law-as-us-iran-tensions-flare/> [<https://perma.cc/3DPM-Q4XB>].

236. For further reading, see Rogin, *supra* note 235.

for short periods under good conditions [immigration detention] can have a serious impact on [a child's] health and development."²³⁷ Also, the United States performed a military airstrike in Afghanistan on alleged methamphetamine drug labs, resulting in more than 30 civilian casualties without "a sufficient nexus to the Taliban's war-fighting operations to warrant their classification as military objectives."²³⁸

2019 has also highlighted the insubordinate and lack of accountability that the United States has embraced since President Trump rejected globalism and began to decrease the United States' relationship with the United Nations.²³⁹ As a consequence, there is growing tension between the United States and the United Nations. For example, the U.N. Secretary-General, António Guterres, stressed the urgency to put a stop to the brewing trade war between China and the United States, calling it the "Great Fracture" where the two largest economic giants will "split [] the globe in two . . . [and] wipe out gains across the global economy."²⁴⁰ Relatedly, the United States insisted on a Security Council meeting to force the United Nations to pick a side in the Venezuela Crisis, intensifying the acrimonious relations between the United States, Russia, and China.²⁴¹ Then, the United States refused to respond to the United Nations' request to attend a Security Council meeting for the United States and Iran leadership to discuss their conflict diplomatically to attempt to stop the Middle East from falling into "open war."²⁴²

Through these actions, the United States has taken full advantage of its status as the sole super-Power of the world without any regard to how its position burdens it with too much responsibility for one State to bear alone. This confidence and disregard for any State's path but its own gives the United Nations the upper hand in their relationship. Because the United States' disregard

237. *UN Rights Chief 'Appalled' by US Border Detention Conditions, says Holding Migrant Children may Violate International Law*, *supra* note 235.

238. *Afghanistan Probe: 'At Least 60 Civilians' Killed After US Military Airstrikes on Alleged Drug Labs*, *supra* note 235; Faiez & Gannon, *supra* note 235.

239. U.S. President Donald Trump withdrew large parts of the United States' financial and resource support from the United Nations, declaring that United Nations needs to diversify its reliance throughout all of its Member States. He called the U.N. Human Rights Council a "grave embarrassment" for criticizing the United States "and its many friends." *US President Trump Rejects Globalism in Speech to UN General Assembly's Annual Debate*, *supra* note 235.

240. *Global Economy: 'We Must Do Everything Possible' to Avoid Global 'Fracture' Caused by US-China Tensions, Urges Guterres*, *supra* note 235.

241. Russia and China oppose the United States in the Venezuela Conflict and support President Nicolas Maduro. Furthermore, this is particularly destructive for the U.N. because the U.S., Russia, and China are all permanent members on the Security Council with a veto; therefore, the U.S. had to have known that it was an improbable mission, rather all the demand could accomplish is to stir up discontent among the U.N. Member States. Carol Morello, *supra* note 235.

242. Agencies, *supra* note 235 (explaining that The United Nations made this request after it was informed that the United States denied "Iran's Foreign Minister Javad Varif . . . a visa for his trip to U.N. Headquarters in New York").

for the consequences of its actions levels the playing field, making it less of a leader and more of an equal among the U.N. Member States. For these reasons, the United States cannot afford to oppose the United Nations on the issue of horse-soring—it cannot afford to lose more respect and authority from the United Nations for an issue that is generally uncontroversial because the United States’ working relationship with the United Nations is already fraught with discord.

III. COLLATERAL CONSEQUENCES

There are influences outside of the international legal community that may influence a State’s decision to consent and cooperate with a treaty.²⁴³ These non-legal incentives are called “collateral consequences,” referring to “when treaty commitment or compliance spurs [non-legal domestic or transnational] actors to act differently than they would in the absence of a treaty.”²⁴⁴ However, because collateral consequences

are not part of the formal structure of the treaty, these effects are often ignored. Yet they can prove to be just as important as, if not more important than, formal legal enforcement of the treaty requirements in influencing states’ behavior . . . [because] Together, these . . . collateral consequences can create powerful incentives for states to commit to treaties.²⁴⁵

In other words, “collateral consequences are incentives that can sometimes lead them [States] to act in ways that would otherwise be perplexing.”²⁴⁶ Here, the two main collateral consequences at play are the United States’ general support for animal welfare and its separate branches of government.

Contrary to what one might infer from the legislative history of the PAST Act, the United States typically promotes and protects animal welfare in international politics. However, as discussed earlier in this Note, its support is not regularly motivated to protect animals; instead, the laws are motivated by commercial incentives. But commercial incentives of the past do not necessarily mean animal welfare is not a priority to the U.S. Government. The United States is nowhere near as committed to animal welfare as the European Union, but most countries are not. Hence, it does not mean the United States is hostile to animal welfare. On the contrary, Rep. Blumenauer emphasized that “[c]ontinued progress in the United States is critical to the global solution” for animal welfare.²⁴⁷ Furthermore, “the United States was the first country to decisively act in 1972, banning the trade in all marine mammal products.”²⁴⁸ Plus, the PAST Act passed through the U.S. House of Representatives in 2019, and the Senate has the

243. Hathaway, *supra* note 197, at 595.

244. *Id.*

245. *Id.* at 595, 597.

246. *Id.*

247. Congressman Blumenauer, *supra* note 175, at 222.

248. Lurie & Kalinina, *supra* note 140, at 444-45.

votes needed for passage.²⁴⁹ Thus, the United Nations' involvement may be a strong enough incentive to overcome the personal conflicts of interests between some U.S. Congress Members and the Tennessee Walking Horse industry itself without any additional pressure or incentives employed.

Likewise, the executive branch, when separate from the legislative branch may investigate the training practices of horse-soring, the legislation and proposed bills, and whether the USDA's violation results truly reflect a dramatic decrease in the regularity of horse-soring in the Tennessee Walking Horse industry as of the USDA blackout and agree that the ineffective enforcement mechanisms are unacceptable.²⁵⁰ Particularly because it is possible that the Secretary of State and the Secretary's staff do not share the same personal conflicts of interest as Congress. Thus, the international community's investigation of horse-soring may be sufficient without any international legal action. As the HPA currently stands, the executive branch controls how violations are investigated—the current industry-regulated system is an executive branch creation. Therefore, the executive branch could change it, if the USDA is provided sufficient resources and incentives to do so. The executive branch does not have to wait for the legislature to take action. On the other hand, if the executive branch were to conclude that it cannot effectively end horse-soring on its own, separation of powers allows “treaties [to] offer executives in such states a tool to forward policy goals that may otherwise be more difficult for them to achieve.”²⁵¹

RECOMMENDATIONS

The United States outlawed the training practice of horse-soring half-of-a-century ago. Yet, owners, trainers, and riders come from across the globe to participate in Tennessee Walking Horse performance competitions in the Southeastern United States. This international participation demonstrates how the training methods of horse-soring is more than a U.S. domestic issue. Tennessee Walking Horses need the international community to take action. Horse-soring will not cease to exist if the international community does not intervene. First of all, there are U.S. Congress Members, including the current Senate majority leader who is personally invested in guaranteeing that horse-soring can continue to occur despite that it was made illegal in 1970. Second, the USDA blackout ensures that the public cannot hold the USDA accountable in administering the HPA diligently and effectively. Third, the PAST Act alone is insufficient to eliminate horse-soring.

For these reasons, Tennessee Walking Horses' only hope for protection against horse-soring is if the international community takes a stand. But a

249. The PAST Act has not passed through the Senate because it cannot move forward until “McConnell brings it to the Senate floor for a vote.” Block & Amundson, *supra* note 90.

250. “International agreements ‘change minds [and] move the undecided’.” O’Brien & Gowan, *supra* note 1134, at 31.

251. Hathaway, *supra* note 197, at 596.

plurilateral treaty among the countries involved in Tennessee Walking Horse competitions will not suffice. Individual countries alone do not have enough bargaining power to compel the United States to act. The United Nations is the international body of authority best equipped to develop an act of international law that will eradicate horse-soring because the United Nations provides more authority and more avenues that can be employed to eliminate the training practices of horse-soring.

The avenues available for creating international law through the United Nations are an amendment to the U.N. Charter, resolutions, and an open multilateral treaty. Of these avenues, an amendment to the U.N. Charter would be the most beneficial for protecting and promoting animal welfare as a whole, but it is the most difficult avenue. On the other side of the spectrum, a resolution is the least beneficial mechanism because resolutions do not carry the same binding authority as treaties—they are equivalent to MOUs.²⁵² In consequence, an open multilateral treaty is a median avenue that is the most likely to be successful because it is binding (or can become binding) on the United States, and it can be limited to specifically address horse-soring.

I. OPTION A: AMENDING THE U.N. CHARTER

An amendment to the U.N. Charter is binding on all Member States.²⁵³ Hence, an amendment to the U.N. Charter, following the European Union's lead,²⁵⁴ would be the most effective, long-run protection for animal welfare. Such as,

All Member States must “take all reasonable steps to ensure the welfare of animals under their care and to ensure that those animals are not caused any unnecessary pain, suffering or injury.” Welfare here is defined as extending beyond the animal's basic needs, including protection from pain and to be kept in conditions that are species-appropriate with the animal's physical, psychological, and ethological needs.²⁵⁵

252. Resolutions are analogous to MOU; therefore, it is not binding law. *See* ANTHONY AUST, *supra* note 126, at 15, 18.

253. U.N. Charter art. 108. “Membership in the United Nations is open to all peace-loving [S]tates which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.” *Id.* art. 4, § 1.

254.

In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

Treaty on the Functioning of the European Union, *supra* note 121, at 13, 36.

255. *See* Council Directive 98/58/C, *supra* note 119, art. 3-4.

Additionally, an amendment to the U.N. Charter would also provide for pre-established procedures for administration and remedies for violations,²⁵⁶ diminishing the amount of work necessary to draft the amendment in contrast to an open multilateral treaty.

First, there are already administrative mechanisms in place within the U.N. Charter. Art. 64 permits the Economic and Social Council (ESC) to obtain “regular reports from the specialized agencies,” including reports regarding “the steps taken [by Member States] to give effect to [the ESC’s and General Assembly’s] recommendations.” Art. 66 provides the ESC with the authority to “perform . . . functions . . . [to] carry out the recommendations of the General Assembly” and to provide services upon the requests of Member States and specialized agencies with the General Assembly’s approval. Thus, these administrative mechanisms reduce both negotiation and implementation costs.

Second, there are several avenues for direct remedies or resolution of violations within the U.N. Charter. For example, Art. 41 allows the Security Council to decide a “measure not involving the use of armed forces,” and it requires Member States “to apply such measures.” Relatedly, under Art. 5 if the Security Council has to take preventative or enforcement action against a Member State, the State may be suspended from the exercise of rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. Then, under Art. 94, Member States are required to comply with the decisions of the International Court of Justice (ICJ) when the Member State is a party to the decision, and a State’s failure to comply allows the other party to seek recourse through the Security Council. Lastly, Art. 6 provides that continuous violations of the U.N. Charter may result in a Member State’s expulsion from the United Nations.

Nevertheless, despite the strong protection for animal welfare that a U.N. Charter amendment would create, it is not the most realistic avenue to eliminate horse-soring. There are three steps necessary to amend the U.N. Charter. The proposed amendment must be (1) “adopted by a vote of two-thirds of the members of the General Assembly,” (2) “ratified [per] . . . their respective constitutional processes by two-thirds of the Members of the United Nations,” and (3) be adopted and ratified by all five of the permanent members of the Security Council: China, France, the Russian Federation, the United Kingdom, and the United States.²⁵⁷ This means that a U.N. Charter amendment requires the United States’ full cooperation. However, the United States may be more open to amending the U.N. Charter than it first appears because a U.N. Charter amendment is not the same question as balancing lip service with pleasing the horse industry. Therefore, Congress may be open to considering an animal welfare amendment to the U.N. Charter.

Still, even with the United States’ support, an amendment to the U.N. Charter

256. U.N. Charter art. 4-6, 17, 41, 64, 66, 94.

257. U.N. Charter art. 108; *Current Members*, U.N. SECURITY COUNCIL, <https://www.un.org/securitycouncil/content/current-members> [<https://perma.cc/5ZDM-7QKY>].

to protect and promote animal welfare is not guaranteed adoption. There is a concern among scholars and politicians that general animal welfare protection is not presently feasible because of the conflicts with animal welfare and States' economies. This is because not all Member States have the same capacity to protect and promote animal welfare, making them unable to compete in the global marketplace if there were strong animal welfare standards at play.²⁵⁸

Moreover, a substantive amendment adding additional obligations to the U.N. Charter is unprecedented. The U.N. Charter has been amended five times, but none of these amendments substantively added obligations to the U.N. Charter. Instead, four out of five amendments were procedural amendments to expand the number of seats on a council. Whereas the fifth amendment was substantive in that it altered Art. 109's requirements for a General Conference of Member States for reviewing the Charter in 1968.²⁵⁹ Accordingly, it is foreseeable that regardless of the topic matter, both the body of the General Assembly and the permanent members would be reluctant or even hostile to a substantive amendment that would *create additional obligations* to Member States because such an amendment would impede on State sovereignty.

Unlike a treaty where all Member States can agree to be bound, an amendment only requires a vote of two-thirds of the General Assembly. This leaves only the permanent members' sovereignty fully respected since one-third of the Member States could be bound unwillingly to additional obligations. On one hand, membership to the United Nations involves a State consenting to sacrifice some of its sovereignty for the benefits and privileges of membership. On the other hand, the sovereignty Member States have agreed to sacrifice is limited to that of the U.N. Charter. Coupled with the fact that there has never been a substantive amendment adding obligations, it suggests that the United Nations is unwilling to impede on the sovereignty of Member States through obligations that they have not previously consented to through membership or treaty. For these reasons, an amendment to the U.N. Charter following the European Union's lead in protecting and promoting animal welfare is not the most realistic avenue to eliminate horse-soring even though it would protect and promote animal welfare the most.

II. OPTION B: ISSUE-SPECIFIC MULTILATERAL TREATY

I am not the first to stress that a multi-national animal welfare treaty is dire.²⁶⁰ Yet, scholars have concluded that it is too daunting of a task because countries have a lot to lose. Specifically, their economies have a lot to lose if the

258. See, e.g., Favre, *supra* note 155, at 248-49.

259. Articles 23 and 27 were amended to enlarge the size and increase the required voting quota of the security council, accordingly, in 1965. And article 61 was amended twice in 1965 and then in 1973 to enlarge the size of the Economic and Social Council. Dag Hammarskjöld Library, *Can the UN Charter be amended, and how many times has this occurred?*, UNITED NATIONS, Aug. 15, 2019, <http://ask.un.org/faq/140440> [<https://perma.cc/H38G-DEDK>].

260. See Favre, *supra* note 155, at 264.

international community unites to protect sentient beings that cannot protect themselves. Hence, it is time to change tactics. Instead of an overarching animal welfare treaty, the international community should approach the promotion and protection of animal welfare in increments. Horse-soring is an excellent opportunity for the United Nations to do this because no country's economy or government other than the United States currently has anything to lose. Plus, even the United States would lose little because Tennessee Walking Horse pleasure competitions could continue. However, like with amending the U.N. Charter, the U.S. Senate's apparent refusal to act is an obstacle for eliminating horse-soring through an issue-specific multilateral treaty. Nonetheless, it does not make a treaty through the United Nations impossible. The United States is more likely to support a multilateral treaty than a U.N. Charter amendment because a treaty requires the voluntary consent of all parties; thus, a treaty best protects State sovereignty.

Moreover, a treaty can still be effective in eliminating horse-soring even if the United States is not originally a party to the treaty. If the United States was to sign the treaty but was unsuccessful in convincing Congress to ratify it, the United States would be required to "refrain from acts [that] defeat the purpose of a treaty" once it has signed or exchanged instruments subject to ratification, until it makes "its intentions clear not to become a party to the treaty."²⁶¹ For an issue-specific treaty, this should mean that the USDA could not continue with investigators that the USDA knows are allowing violators to pass inspection if they have inflicted additional pain on the horse to prevent discovery. This is because the HPA made horse-soring illegal in 1970; therefore, the United States' failure to take any effective action in light of their actual notice would defeat the purpose of the treaty, as the intentional inaction ratifies the acts of the inspectors. Furthermore, the 'until' language of the article would not relinquish the United States from its Article 18 obligations because it would be the Congress, not the executive branch, who prevented ratification; thus, the executive branch would still be able to represent to the United Nations that there is a possibility that the United States would ascend to or ratify the treaty in the future.²⁶² At a minimum, this solution could work at least for a long enough that horse-soring transitions into an international custom, since even in the United States a complete ban of horse-soring is the accepted solution on paper.

A third party may also become bound to a multilateral treaty that the state never signed through accession.²⁶³ Accession does not require that the U.S. Congress consents to effectively eliminate horse-soring. Instead, if the treaty is attached to an attractive bundle of rights, and if a State consents to the right in

261. Vienna Convention, *supra* note 126, art. 18.

262. Hathaway, *supra* note 197, at 595 (explaining that the executive branch "may be more likely to attempt to achieve some policy goals by committing to treaties because executives in such states frequently have more control over the process of making and committing to treaties than they do over the legislative process").

263. A state can express consent to be bound "by signature, exchange of instruments constituting a treaty, ratification, . . . or accession." Vienna Convention, *supra* note 126, art. 11.

writing and exercises one of those rights, the State is required to “comply with the conditions provided for in the treaty or established in conformity with the treaty.”²⁶⁴ Therefore, picking the correct incentives is critical, but it is a fine line because a treaty is not enforceable against a State if the consent to be bound was generated by coercion or fraud.²⁶⁵

For this reason, the United States must understand that through its consent, it is agreeing to the treaty against horse-soring and the repercussions established with the treaty. The key is to attach rights that are desirable and available to the United States that after being denied the rights that are directly in front of them, the United States is highly motivated to put aside the personal conflicts of interest and end horse-soring once and for all. Note, the rights included in the treaty to incentivize the United States do not need to be complex. The United Nations treaty body only needs to uncover what information the Congress Members with the conflicts of interest would find the most alluring and create a resource where that information can be combined and made available to all Member States who have consented to be bound to the treaty.²⁶⁶ This information does not necessarily even have to be informed that the United States does not already have access to, rather it only has to be information that is important to those Congress Members and requires extensive effort each time they have to collaborate it to one place. Thus, it is analogous to real estate; sometimes convenience has just as much value to an individual as quality.

CONCLUSIONS

Animal welfare needs to be addressed by international law. Animals are sentient beings that feel pain just like all of us, but they are not able to advocate for themselves. It is inhumane and ineffective to have a vast, arbitrary spectrum of standards for animal welfare. There needs to be one minimum, baseline, universal standard that extends beyond animals’ basic needs, including protection from pain, adverse weather, and predators and kept in conditions that are species-appropriate with the animal’s physical, psychological, and ethological needs. Alas, scholars and politicians have demonstrated that, at present, a general, multilateral animal welfare treaty is unattainable. However, a broad treaty is not necessary for the international community to promote and protect animal welfare. Rather than waiting for a world that is ready for an overarching animal welfare treaty, States can protect and promote animal welfare now through issue-specific policies allowing countries’ economies to adjust and acquire new technologies to remain competitive in the global marketplace.

Furthermore, issue-specific animal welfare treaties do more than promote and protect animal welfare. There is untapped potential awaiting the international community in these underrepresented and uncontroversial issues/areas of law. If the international community utilizes these issues, i.e., horse-soring, to strengthen

264. *Id.* art. 36.

265. *Id.* art. 49-52.

266. Susskind, *supra* note 205.

the relationships among nations, the relationships forged will allow States to achieve more successful outcomes in more critical, controversial negotiations in the future because parties are more willing to compromise when there is a strong foundation of trust, and trust comes from experience.