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Proposition Animal Welfare: Enabling an Irrational Public or Empowering Consumers to Align Advertising Depictions with Reality?

Whitney R. Morgan

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**PROPOSITION ANIMAL WELFARE: ENABLING AN
IRRATIONAL PUBLIC OR EMPOWERING CONSUMERS TO
ALIGN ADVERTISING DEPICTIONS WITH REALITY?**

*Whitney R. Morgan**

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INTRODUCTION

Industrial farming has increasingly come under scrutiny by the public.¹ On the one hand, it allows for much higher levels of meat, dairy, and egg production through standardized and mechanized processes, ultimately providing more and cheaper food.² Yet, the processes in industrial farming, unlike many other industrialized realms, involve the lives of animals. For this reason, industrial farming's focus on efficiency and productivity has been questioned because it often wholly excludes meaningful consideration for the quality of life of animals that are very much alive and quite capable of suffering.³

1. *See infra* Part II.

2. Farmers are after more for less, and to some extent the public is too. However, we do not let factories exploit workers with excessively long hours and low wages in the name of profit. Similarly, we should not let farmers exploit livestock, especially if the public is on board. MARIAN STAMP DAWKINS & ROLAND BONNEY, *THE FUTURE OF FARMING: RENEWING THE ANCIENT CONTRACT* (2008) (refer to the section on The Economic Model).

3. *An HSUS Report: The Welfare of Intensively Confined Animals in Battery Cages, Gestation Crates, and Veal Crates*, HUMANESOC'Y OF THE UNITED STATES 1 (July 2012), <http://www.humanesociety.org/assets/pdfs/farm/hsus-the-welfare-of-intensively-confined-anima>

Several industrial farming practices have been the focus of public scrutiny: confinement of pregnant sows, laying hens, and veal calves; tail docking of dairy cows and pigs; de-beaking of chickens; and castration of bulls and piglets without anesthetization.⁴ All of these practices serve practical ends in industrialized farming. For instance, tail docking pigs, some would argue, discourages a pig from allowing other pigs to nurse on its tail because the docking increases sensitivity, which in turn reduces the number of tail infections experienced by confined pigs.⁵ Tail nursing, however, is a by-product of the exceptionally unnatural living environment experienced by animals in industrial farming.⁶

Many members of the public have identified some farming practices as intolerable and have voted on state initiatives to ban them.⁷ At least ten states have adopted measures to reduce or ban the use of gestation crates for pregnant sows, veal crates, or battery cages for chickens.⁸ State animal welfare organizations and the Humane Society of the United States have in some instances instituted petitions to place such initiatives on state ballots.⁹ Even though the organizations that have started petitions are often viewed as “special interest” groups advocating unrealistic change, initiatives have been passed with around two-thirds support from voters from the general public.¹⁰

Noting this success, some states that authorize ballot initiatives have taken away that authority from their citizens for the subject matter of animal treatment. They have accomplished this removal either by direct legislation against the subject matter, by increasing the constitutional protection of farming, or by forming state boards that are exclusively authorized to make farm animal welfare laws.¹¹ In support of such removal, states and another group of special interests, namely factory farmers and grocers, have argued that the public is incapable of reasonably considering and passing laws on the subject of farm animal welfare because the public has a tendency to become irrational about animal treatment.¹² In addition, supporters on this side of the debate contend that the public is not knowledgeable enough about the utility, or

ls.pdf [hereinafter *Welfare of Intensely Confined Animals*].

4. See *infra* Part II.

5. Nicolette Hahn Niman, *The Unkindest Cut*, N.Y. TIMES (Mar. 7, 2005), <http://www.nytimes.com/2005/03/07/opinion/the-unkindest-cut.html> (Ms. Niman is a lawyer and a rancher).

6. *Id.*

7. See *infra* Part II.A.

8. See *infra* Part II.A (Florida, California, Arizona, Oregon, Ohio, Rhode Island, Maine, Michigan, and Colorado).

9. See, e.g., *infra* Part II.A.

10. See *infra* Part II.A.2–3 (California and Arizona).

11. See *infra* Part IV.B–D.

12. See *infra* Part IV.A.

in some cases the necessity, of certain farming practices.¹³

This Article argues, however, that the public is quite capable of assessing the value of some farming practices against the cost of prohibiting them. In particular, this Article asserts that animal living conditions and non-medical practices resulting from such living conditions are within the realm of appropriate public consideration because expertise is not required. Instead, the bulk of the assessment to be made with these types of farming practices is an economic one. The question is whether the cost to improve living conditions, which will inevitably be transferred to consumers, is worth it. Moreover, because the public *is* the consumer base, one that is fed idyllic depictions of farm life in order to encourage consumption of animal products, it would be exceptionally problematic not to allow the public to make law that enables that duping to become more of a reality.

This Article first, in Part I, elaborates on the living conditions at issue, focusing on the welfare cost to livestock animals. Part II provides background on state ballot initiatives that have been utilized to effect change as well as other successes. Part III then explores the general role of state ballot initiatives and how states have traditionally limited their usage. An explanation of efforts to undermine livestock welfare improvements is provided in Part IV. Moving to Part V, this Article argues that industry exploits consumer notions of idyllic farm life and, in Part VI, that laws regarding livestock living conditions and the non-medical practices that result from them may appropriately be the subject of state ballot initiatives because expertise is not required, because this realm is analogous to others that are permitted to be the subject of state ballot initiatives, and because doing so would not unduly impact interstate commerce. It then argues, more specifically in Part VII that state animal welfare boards are a particularly inadequate alternative to state ballot initiatives because they will inevitably over-represent the agricultural industry and the physical health of animals while disregarding their mental health and well-being. The Article concludes by briefly placing the issue of farm animal welfare in the context of the growing ethical food movement.

In sum, this Article argues that the public can and should be able to make laws improving farm animal welfare and that state ballot initiatives are an essential mechanism for doing so because the public is the consumer base ingesting products from living animals, is perfectly capable of weighing what are primarily economic considerations at issue in making living condition improvements, and is otherwise deceived by the farming industry through product advertising that often misleadingly depicts idyllic farm life.

13. See *infra* Part IV.A.

I. PROBLEMATIC LIVING CONDITIONS

While all fifty states have some form of animal cruelty laws, thirty states exempt “common,” “normal,” or “customary” farm animal husbandry practices from such laws.¹⁴ However, far from the traditional notions of normal and customary farming practices performed through most of farming’s history, animals today are reared and housed in massive factory farms. Approximately 60% of hogs are part of a farm containing 50,000 or more animals, and over 75% are part of one containing 10,000 or more.¹⁵ The vast majority of hogs live on farms with over 1,000.¹⁶ Of the roughly 355,000,000 egg-laying hens, around 97% live on farms with over 10,000 hens.¹⁷ The sheer size of these operations often encourages questionable confined housing, which is explained in Part I.A. As explained in Part I.B through Part I.D, large operations also encourage a number of related practices such as de-beaking chickens, tail docking cows and pigs, and castrating cows and pigs without anesthesia.¹⁸

A. Problematic Confinement

On high population factory farms, egg-laying hens, pregnant sows, and veal calves are often raised in battery cages, gestation crates, and veal crates, respectively. Extensive scientific research shows that these fairly standard farming practices lead to frustration, stress, and suffering for the animals.¹⁹ While the farming industry generally insists on viewing the animals as commodities in a production scheme, the public is increasingly alarmed with practices such as confinement that have become more prominent as farming becomes grander in scale and more standardized and mechanized.²⁰

One problem is that too often industry equates—not simply prioritizes but equates—productivity with welfare.²¹ While a herd of confined sows

14. David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 205, 212–16 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

15. *Nat’l Agric. Statistics Serv., 2007 Census*, <http://151.121.3.59/results/D0C45A7E-B5D4-3FFC-BEB3-8122B5232465> (last visited Nov. 8, 2014) (as of 2012).

16. *Id.*

17. *Id.* (as of 2009).

18. Although, castration is performed for preferred meat characteristics as well. See *Literature Review on the Welfare Implications of Swine Castration*, J. AM. VETERINARY MED. ASS’N 1 (May 29, 2013), available at https://www.avma.org/KB/Resources/LiteratureReviews/Documents/swine_castration_bgnd.pdf [hereinafter *Literature Review*].

19. See *Welfare of Intensely Confined Animals*, *supra* note 3, at 1.

20. *Id.*

21. *Id.*

might be more productive—meaning more sows are alive and the herd as a whole produces more meat—than a non-confined herd, such a herd assessment ignores the well-being of individual animals.²² On the one hand, it is not all that unreasonable for producers to equate productivity with welfare. If more meat can be obtained from a confined herd, the herd is arguably healthier, at least in some sense, because either more animals survive or the animals are larger.²³ However, this assessment of health only considers physical health and focuses on animal mass. Larger animals or more surviving animals in a herd do not necessarily mean that fewer animals have lesions, broken bones, or any number of physical ailments. Further, larger animals or more surviving animals are not necessarily indicators of whether animals are experiencing mental stress or suffering. Instead, the well-being of animals is largely tied to their ability to express natural tendencies (*e.g.*, a migratory bird’s ability to migrate).²⁴

Not surprisingly, confinement affects hens, sows, and veal calves in detrimental ways: caged birds cannot spread their wings in restrictive cages, most pregnant sows are regularly penned in an area just two feet wide and cannot turn around, and most veal cows are tied to the front of a narrow individual stall and are prohibited from assuming a natural sleeping position.²⁵

More specifically, battery cages have about the floor space of a single sheet of paper, which prevents chickens from engaging in a number of their natural tendencies such as “nesting, perching, dust-bathing, scratching, foraging, exploring their environment, running, jumping, flying, stretching, wing-flapping, and even freely walking.”²⁶ Similarly, sows are placed in a pen just larger than their bodies. They are prevented from grazing, rooting, turning around, and exercising, and often live in or right above their own feces.²⁷ Veal calves are tethered with a short rope to the front of an individual stall that is two to two and half feet wide,²⁸ preventing them from assuming their preferred sleeping posture, grooming themselves, playing, galloping, bucking, kicking, and

22. *Id.* (“[I]n industrial agriculture, this link between productivity and well-being is severed. When productivity as an economic metric is applied to the whole operation, the welfare of the individual animal is ignored.” Bernard Rollin, University Distinguished Professor of Philosophy, Physiology, and Animal Sciences at Colorado State University; Cambridge University Professor of Animal Welfare Donald Broom asserts, “[E]fforts to achieve earlier and faster growth, greater production per individual, efficient feed conversion and partitioning, and increased prolificacy are the causes of some of the worst animal welfare problems.”).

23. *See id.*

24. *Id.* at 2.

25. *Id.*

26. *Id.*

27. *Id.* at 55.

28. *Id.* at 77.

socializing.²⁹

In all three instances, animals suffer psychological and physiological consequences from confinement and the inability to express natural behaviors. Battery hens often suffer from osteoporosis as a result of the lack of access to physical exercise.³⁰ Also from lack of exercise, they can suffer from fatty liver hemorrhagic syndrome and “cage layer fatigue,” a condition that involves a compromised skeletal system and can lead to fractures, paralysis, and even death.³¹ Meanwhile, crated veal cows have increased levels of stress hormones and rates of disease.³² Sows often suffer from urinary tract infections and bone loss from lack of exercise, which is only exacerbated by repeat pregnancies.³³ They are also particularly susceptible to mental stress since they are naturally intelligent and curious animals. The sows express this mental frustration as stereotypies, which are “movements or behaviors that are abnormal, repetitive, and seemingly have no function or goal.”³⁴ These behaviors are widely regarded as evidence of suffering.³⁵ Renowned animal welfare scientist Dr. Temple Grandin says, “[w]e’ve got to treat animals right, and gestation stalls have got to go.”³⁶ She continues, “[c]onfining an animal in a box in which [it] is not able to turn around does not provide a decent life.”³⁷

While such confinement has been banned in some states, a handful of painful practices that are closely related to confinement or living conditions in industrial-scale farming have not yet been addressed anywhere in the United States, although attention abroad might indicate that the American public will soon show an interest. While many of these practices aim to protect or improve the output of animals reared in abnormally crowded living conditions, they also implicate animal welfare concerns—particularly relevant are those performed with a substantial medical purpose.

29. *Id.* at 8 (calves have demonstrated that they are willing to work in order to gain access to full socialization).

30. *Id.* at 44.

31. *Id.*

32. *Id.* at 8–9.

33. *Id.* at 5.

34. *Id.* at 6 (e.g., “bar-biting, head-weaving, pressing their drinkers without drinking, and making chewing motions with an empty mouth (sham or vacuum chewing)”).

35. *Id.*

36. *Crammed into Gestation Crates*, HUMANE SOC’Y OF THE UNITED STATES, http://www.humanesociety.org/issues/confinement_farm/facts/gestation_crates.html (last visited Nov. 12, 2014).

37. *Id.*

B. *De-Beaking or Beak Trimming Chickens*

De-beaking or beak trimming is a common practice performed on egg-laying hens.³⁸ In excessively crowded living conditions, hens have a tendency to feather-peck each other compulsively.³⁹ Therefore, at just a few days old, chicks have a portion of their beak trimmed to lessen the damage caused by the nervous tendency.⁴⁰ The process of de-beaking involves removing one to two-thirds of the beak with a hot blade without anesthesia.⁴¹ Although some farmers strangely compare beak-trimming to trimming a fingernail, the beak is a highly sensitive portion of the chicken because it is “loaded with blood vessels, pain receptors, and sensory nerves that facilitate food detection in the wild.”⁴² The tip is the most sensitive portion of the beak as it contains a high number of nerve endings.⁴³ In the most extreme of instances, “debeaking is so painful for chickens that some die of shock on the spot; others die of starvation or dehydration because using their beaks is so excruciating, or their mutilations are so disfiguring that they cannot properly grasp and swallow food.”⁴⁴ Over 95% of chickens are raised in battery cages that are about the size of a filing cabinet and contain anywhere from five to eleven other chickens, which necessitates de-beaking.⁴⁵ However, even “cage-free” and “free range” chickens often undergo the process of de-beaking because living conditions are still very crowded.⁴⁶

Unfortunately, the following supposedly “humane” labels allow de-beaking: Certified Organic; Certified Humane; American Humane Certified; Process Verified; Free-Roaming; Food Alliance Certified; and United Egg Producers Certified.⁴⁷ In other words, consumers have very little way in terms of options and labeling, at present, to avoid consuming chickens or eggs that result from the practice of de-beaking.

38. Ashley Capps, *Debeaking Video Shows Standard Practice on Free Range Egg Farms*, FREE FROM HARM (June 11, 2013), <http://freefromharm.org/animal-cruelty-investigation/debeaking-video-shows-standard-practice-on-free-range-egg-farms/#st.hash.DRitlpoH.dpuf>; see Michael J. Gentle & John Breward, *The Bill Tip Organ of the Chicken*, 145 J. ANAT. 79–85 (1986).

39. Capps, *supra* note 38.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

C. Tail Docking Pigs and Dairy Cows

Tail docking is another fairly standard practice performed on dairy cows and swine.⁴⁸ Cutting the tails of dairy cows is common, mostly because it makes the cows easier to milk.⁴⁹ Beyond convenience, however, the *Journal of Dairy Science* at the University of Wisconsin found that “no positive benefits to the cow have been identified.”⁵⁰ There is little proof that tail docking reduces disease.⁵¹ Tail docking does, however, result in pain and suffering to dairy cows as they are removed without anesthesia or analgesia.⁵² Ordinarily a cow uses its tail to deflect flies and other pesky insects, which have always been the bane of its existence.⁵³ In crowded living conditions, the flies are even worse than they would be in a more natural setting.⁵⁴

Similarly, swine have their tails removed because stressed pigs have a tendency to nurse or bite on each other’s tails. Often tails are clipped with wire cutters and without anesthesia or analgesia.⁵⁵ In addition to insect deflection, swine use their tails for communication of emotion much like a dog. “[P]igs wag their tails when they are happy, twitch them when they are nervous, let them drop straight down when they are sick. They may stick them straight out behind them when they are frightened or alarmed.”⁵⁶ Pigs’ tendency to bite and nurse is a direct result of confinement that typically provides little stimulation for what is normally a very active and inquisitive animal.⁵⁷ Whether tail docking actually decreases tail-biting is questionable according to at least one British study that instead showed a three-fold increase in the problem for docked pigs.⁵⁸

D. Castration Without Anesthesia in Pigs

Castration without anesthesia is a common practice in the United States.⁵⁹ Castration of male pigs is performed for at least two reasons: (1) to reduce aggression among a herd and (2) to avoid boar taint.⁶⁰ Boar taint

48. See Niman, *supra* note 5.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. See *Literature Review*, *supra* note 18, at 1.

60. *Id.*

is an off-putting taste that results from male pig hormones skatole and androstenone.⁶¹ Two forms of castration, surgical and immunocastration, are currently available.⁶² Surgical castration is the most common form of castration performed in the United States.⁶³ It is typically performed within the first three days of life, well before weaning. The surgical process proceeds as follows:

Piglets may be restrained for castration in a variety of ways including suspension by the hind legs using a castration stand or another stockperson, placement in a V-trough, or being held with a hand or between an individual's legs. After the piglet is secure, either two vertical cuts or one horizontal cut is made to the skin of the scrotum, and the testes are removed by cutting the spermatic cord with a scalpel or pulling until the cord tears.⁶⁴

Immunocastration, on the other hand, approved in over sixty countries, requires an injection eight to eleven weeks before slaughter and another four weeks prior to slaughter to reduce the boar taint hormones.⁶⁵ In addition to being a cost-effective alternative,⁶⁶ immunocastrated pigs are more productive livestock in terms of having a higher growth rate, lower feed conversion rates, and less dead and non-ambulatory pigs.⁶⁷

The painfulness of the procedure is evidenced by a number of piglet behaviors post-unaesthetized castration.⁶⁸ The piglets display "elevated blood cortisol concentrations, high pitched squealing, and pain indicative behaviors, such as trembling and lying alone. Some behavioral indicators of pain may persist for up to five days."⁶⁹

Farmers suspect that if consumers knew of the practice there would be low consumer acceptance of surgical castration without anesthesia.⁷⁰ However, at present, consumers are generally not aware that male pigs are castrated or why this practice occurs.⁷¹ When consumers are informed, the practice is widely regarded as a "serious animal welfare

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. See H.B. Oonk et al., *New GnRH-like Peptide Construct to Optimize Efficient Immunocastration of Male Pigs by Immunoneutralization of GnRH*, 16 VACCINE 1074, 1080 (1998).

67. See *Literature Review*, *supra* note 18, at 2.

68. *Id.*

69. *Id.* (citations omitted).

70. *Id.*

71. *Id.*

concern,”⁷² and reasonably so.

E. *Castration without Anesthesia in Cattle*

Castrating male cattle is a common practice worldwide, and it is performed in a variety of ways.⁷³ Much like with pigs, male cattle are castrated in order to reduce aggressiveness and achieve desirable meat characteristics.⁷⁴ For purposes of this Article, the methods of castration implicating animal welfare are primarily the physical forms, although chemical and hormonal methods are also available.⁷⁵ Physical castration is by far the most common form, and only one in five veterinarians report using any form of anesthesia or analgesia in this procedure.⁷⁶

Several methods of physical castration are used: surgical removal, placing a rubber ring at the base of the scrotum, and application of an external clamping device commonly referred to as a Burdizzo clamp.⁷⁷ The rubber ring method cuts off the blood supply to the testicles until the tissue dies.⁷⁸ Similarly, a Burdizzo clamp places such pressure on the blood vessels leading to the testicles that they break.⁷⁹ Once blood supply to the testicles is lost, the tissue dies and typically detaches.⁸⁰

All of these methods of physical castration without anesthesia result in acute or chronic pain.⁸¹ Evidence of pain manifests in behavior such as “struggling, kicking the hind legs, tail swishing, foot stamping, head turning, restlessness, stilted gait, reduced activity, increased recumbency, abnormal standing posture, reduced interest in dams and each other and reduced grazing and feed intake.”⁸² Acute pain from surgical castration or castration via a Burdizzo clamp can last up to four hours unabated,⁸³ but comparatively, these two methods produce less chronic pain than the use of elastic bands.⁸⁴ While the original placement of elastic bands may cause less initial acute pain, loss of blood flow, called ischemia, is known to cause acute pain.⁸⁵ In addition to this acute pain, chronic pain may

72. *Id.*

73. *See id.* *See Literature Review on the Welfare Implications of Castration of Cattle*, J. AM. VETERINARY MED. ASS'N 1 (July 15, 2014), <https://www.avma.org/KB/Resources/LiteratureReviews/Documents/castration-cattle-bgnd.pdf>.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *See id.*

79. *See id.*

80. *See id.*

81. *Id.* at 2.

82. *Id.*

83. *Id.*

84. *Id.* at 3.

85. *Id.* at 2.

result for several weeks.⁸⁶ After the attachment of an elastic band, calves develop purulent inflammation as well as swelling and hardening of the tissues, until finally the scrotum detaches at a mean of 47 days.⁸⁷

Castration causes a tremendous amount of stress to livestock. This has been measured in the onset, magnitude, and duration of cortisol increase as an indicator of physiologic stress.⁸⁸ Although it is viewed as a necessary aspect of rearing livestock, there is certainly potential to reduce the pain and stress associated with it through anesthesia and analgesia.⁸⁹ Naturally, animal welfare concerns warrant efforts to minimize pain in this way.⁹⁰

It is not unlikely that many of the aforementioned practices would pull at the heartstrings of many, if not most, city-living Americans.⁹¹ Although most Americans are removed from farm life, they can comprehend the distinction between the traditional farming that they imagine is involved in producing their food and reinforced through industry advertising and the factory farming that actually produces most food. Moreover, in addition to deceptive food advertising as an indicator that the industry acknowledges the public's concern with farm animal welfare, the industry has pushed for laws that prohibit filming or taking photos of farm animal treatment, especially on factory farms.⁹²

Thus, it is also not all that unlikely that given the opportunity to effect a change, even penny-pinching, meat-eating Americans would be willing to seriously consider paying more for humanely produced food.⁹³ In one market research study, where one of the top considerations of "ethical food" was humane treatment, 57% of people indicated that they were willing to pay 1% to 10% more for ethical food, and another 12% were willing to pay more than 10% more for ethical food.⁹⁴ The rising generations showed even greater willingness to pay more for ethical

86. *Id.* at 3.

87. *Id.* Purulent inflammation contains pus.

88. *Id.* at 4.

89. *Id.* at 7.

90. *Id.*

91. Eighty-nine percent of Americans live in urban settings. *Population Division-Country Profiles*, U.N. DEP'T OF ECON. & SOC. AFF., <http://esa.un.org/unpd/wup/Country-Profiles/Default.aspx> (select "United States of America.").

92. Karen E. Lange, *Public Gag Order With "Ag Gag" Bills, Big Ag Seeks to Stifle Reform*, HUMANE SOC'Y OF THE UNITED STATES, http://www.humanesociety.org/issues/campaigns/factory_farming/fact-sheets/ag_gag.html#id=album-185&num=content-3312 (last visited Jan. 2, 2015).

93. See *Ethical Food: A Research Report on the Ethical Claims that Matter Most to Food Shoppers and How Ethical Concerns Influence Food Purchases*, CONTEXT MARKETING 3, 6 (Mar. 2010), http://www.contextmarketing.com/sources/feb28-2010/ethical_foodreport.pdf [hereinafter *Ethical Food*].

94. *Id.* at 6.

food.⁹⁵ Recent legislation in several states, addressed in Part II, indicates that this research is founded.

II. SUCCESSFUL IMPROVEMENTS TO LIVESTOCK LIVING CONDITIONS

At least ten states have enacted laws that improve one or more of the confined living conditions discussed thus far. Three have created these laws through state ballot initiatives, which are taken up in Part II.A, while seven have created laws through traditional legislation discussed in Part II.B. All of these improvements focus on each individual state's permitted farming practices and, therefore, do not directly affect farmers out of state, with one exception. California, not only prohibits the practice of using battery cages to produce eggs, but also prohibits the sale of any battery cage eggs within the state.⁹⁶ Lastly, although not yet addressed in the United States, the problematic practices that result from confinement have been outlawed in some or all of the European Union, some of which is detailed in Part II.C.

A. State Ballot Initiatives

State ballot initiatives began the movement toward improving livestock living conditions. Florida led the way, passing an initiative in 2002. Arizona and California followed suit with state ballot initiatives. Shortly afterward, Colorado, Maine, Michigan, Ohio, Oregon, Rhode Island, and Washington passed similar laws through traditional legislation.

1. Florida

Floridians voted on November 5, 2002, on state ballot initiative Amendment 10, for a proposed amendment to the state constitution, to ban the use of gestation crates for pregnant sows.⁹⁷ Prior to the initiative, the proposed amendment did not pass the Florida Legislature.⁹⁸ As a result, former Florida Supreme Court Justice Stephen Grimes, leader of the initiative, supported the use of such ballot measures, such as this one because after legislation fails, it is the only avenue left to effect change

95. *See id.* at 8.

96. *See Judge Dismisses Challenge to California Egg Law*, FOOD SAFETY NEWS (Oct. 3, 2014), <http://www.foodsafetynews.com/2014/10/court-dismisses-challenge-against-california-egg-law/#.Vg77URNVikp>.

97. *See* FLA. CONST. art. X, § 21 (2014).

98. Diana Lynne, *Pregnant Pigs on Florida Ballot*, WORLD NET DAILY (Oct. 16, 2002), <http://www.wnd.com/2002/10/15554/> (last visited Jan. 2, 2015).

that the public wants.⁹⁹ Justice Grimes stated, “[t]his is a perfect example of why we have a constitutional initiative.”¹⁰⁰

Floridians for Humane Farms sponsored the initiative.¹⁰¹ The original petition required 488,722 signatures, and 506,779 valid signatures were obtained to place it on the Florida ballot.¹⁰² Once on the ballot, 54.75% of voters voted in favor of the initiative, while 42.25% opposed it.¹⁰³ The final version of the constitutional amendment states that it is “unlawful for any person to confine a pig during pregnancy in an enclosure, or to tether a pig during pregnancy, on a farm in such a way that she is prevented from turning around freely.”¹⁰⁴ In order to turn around freely, the sow must be able to do so without touching the sides of her crate.¹⁰⁵ The only exceptions to this rule is that the pig may be restrained during “an examination, test, treatment or operation carried out for veterinary purposes” or during the “prebirthing period” seven days just prior to birth.¹⁰⁶

2. Arizona

On November 7, 2006, Arizona voters voted in favor of Proposition 204, the Humane Treatment of Farm Animals Act.¹⁰⁷ The legislation was aimed at eliminating the inhumane confinement of sows and veal calves.¹⁰⁸ It prohibits confinement that prevents either animal from turning around freely or lying down and fully extending limbs for the majority of the day.¹⁰⁹ Proposition 204 amends Arizona’s criminal code to make such violations a class one misdemeanor.¹¹⁰

99. *Id.*

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

101. *Animal Cruelty Amendment: Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy*, FLA. DEP’T OF STATE, <http://dos.elections.myflorida.com/initiatives/initdetail.asp?account=34174&seqnum=1>.

102. *Id.*

103. *Id.*

104. FLA. CONST. art. X, § 21(a) (2014).

105. FLA. CONST. art. X, § 21(c)(5) (2014).

106. FLA. CONST. art. X, § 21(b)(1), (c)(6) (2014).

107. *Humane Treatment of Farm Animals Act, 2006 General Election*, ARIZ. SEC’Y OF STATE, <http://apps.azsos.gov/election/2006/General/Canvass2006GE.pdf>.

108. *2006 Ballot Proposition Guide*, ARIZ. SEC’Y OF STATE, <http://apps.azsos.gov/election/2006/Info/PubPamphlet/english/Prop204.htm> (last visited Jan. 2, 2015) [hereinafter *2006 Ballot Proposition Guide*].

109. ARIZ. REV. STAT. ANN. § 13-2910.07(A)(1)–(2) (2014). There are exceptions for sows or calves that are involved in a rodeo, fair, or scientific experiments or that are being killed, under veterinary treatment, or are within seven days of their expected due date. ARIZ. REV. STAT. ANN. § 13-2910.07(B) (2014).

110. *Arizona: An Initiative Measure Proposing Amendment to Title 13, Chapter 29, Arizona Revised Statutes by Adding Section 13-2910.07; Relating to Cruel and Inhumane Confinement of Animals (2006)*, ANIMAL LEGAL & HISTORICAL CTR., at 4, <https://www.animallaw.info/statute/az->

At least ninety-five veterinarians¹¹¹ and eleven medical professionals¹¹² supported the initiative. In addition, numerous animal advocacy groups supported the proposition, including the Sierra Club, the Arizona Humane Society, and the Jane Goodall Institute.¹¹³

Supporters of the Arizona ballot initiative, some admitted meat-eaters,¹¹⁴ raised numerous animal welfare concerns. They argued that sows “suffer from muscle atrophy, pressure sores, joint maladies, and immense frustration.”¹¹⁵ The large operations that utilize confinement practices undermine family farms and contribute significant amounts of detrimental waste to the environment.¹¹⁶ One veterinarian, in addition to making the aforementioned arguments, referenced the unwillingness of large agribusinesses to allow reporters within their operations in order to show the public how “benign” they purport their practices to be.¹¹⁷ Numerous veterinarians described affording animals the simple ability to turn around and extend their limbs while lying down as a “*minimum* standard of care.”¹¹⁸ The practice of factory farming is described by supporters as one that solely focuses on efficiency at the expense of decency.¹¹⁹

Ultimately, 926,913 Arizonans, 62% of voters, supported Proposition 204, while only 569,190, or 38% of voters, voted against it.¹²⁰ Criminal liability for confinement became effective in January 2013.¹²¹

3. California

Proposition 2, known as the Standards for Confining Farm Animals,

initiatives-proposition-204-inhumane-confinement (last visited Nov. 8, 2014) [hereinafter *Arizona: An Initiative Measure*].

111. 2006 Ballot Proposition Guide, *supra* note 108.

112. *Id.*

113. *Id.*

114. *Id.* (Joseph M. Arpaio, Sheriff, Maricopa County Sheriff’s Office, Phoenix). Some supporters were much less reasonable. *Id.* For example, Jackie Winsor of Phoenix is apparently the epitome of who initiative opposition thinks would support the bill. *Id.* She basically advocates for everyone to stop eating meat and hunting. *Id.* Written in all caps, her position is extreme and is not representative of the initiative supporters as a whole. *Id.*

115. *Id.* (quoting Cheryl Naumann, Chairwoman, Arizonans for Humane Farms, Phoenix).

116. *Id.*

117. *Id.* (Janet M. Forrer, DVM, Tucson).

118. *Id.* (emphasis added).

119. *Id.* (Statement of Gene Bauston, President, Watkins Glen, who has a PhD from Cornell in agricultural economics: “They treat the animal like a machine. But it’s not a machine. It’s an animal, and it needs care.”).

120. 2006 General Election, – November 7, 2006, STATE OF ARIZ. OFFICIAL CANVASS (Dec. 4, 2006, 1:16 PM), <http://apps.azsos.gov/election/2006/General/Canvass2006GE.pdf>.

121. *Arizona Humane Farms, Proposition 204, (2006)*, BALLOTEDIA, [http://ballotpedia.org/Arizona_Humane_Farms,_Proposition_204_\(2006\)](http://ballotpedia.org/Arizona_Humane_Farms,_Proposition_204_(2006)) (last visited Jan. 2, 2015).

was a California state initiative passed by 63.5% of voters, that prohibits the confinement of farm animals such that they are prevented from turning around freely, extending their limbs, lying down, and standing up.¹²² Animals covered by the initiative include pregnant sows, veal calves, and a new addition, egg-laying hens.¹²³

Supporters of the initiative, in addition to harping on the inhumane treatment of the animals, advocated that the ballot initiative would improve health and safety, support family farmers, and better protect the air and water quality in the environment generally.¹²⁴ On this last point, supporters pointed out that factory farms leach an inordinate amount of waste into the environment, so much so that the American Public Health Association has called for a moratorium on factory farms.¹²⁵ Many other organizations supported the initiative: Consumer Federation of America, Humane Society of the United States, Union of Concerned Scientists, Pew Commission on Industrial Farm Animal Production, Sierra Club California, and California Clean Water Action.¹²⁶ In order to combat the increased food cost scare tactics, supporters pointed to the egg industry's own economists who indicated that stopping current caging practices would result in a one penny increase in cost per egg.¹²⁷

In addition to California's successful state ballot initiative, the state also passed a bill, AB 1437, through traditional legislation that requires all eggs sold within the state to be from chickens that can "stand up, fully extend their limbs, lie down and spread their wings without touching each other or the sides of their enclosure."¹²⁸ Alabama, Iowa, Kentucky, Missouri, Nebraska, and Oklahoma recently challenged the constitutionality of California's law, arguing that it violates the Commerce and Supremacy Clauses.¹²⁹ However, the claims were dismissed by a federal judge for lack of standing because the states did not bring the action on behalf of their residents, but on behalf of a discrete group of farmers; the states had no quasi-sovereign interest in the matter; and any harm was speculative.¹³⁰

122. CAL. HEALTH & SAFETY CODE § 25990 (West 2015).

123. CAL. HEALTH & SAFETY CODE § 25991 (West 2015).

124. *Prop 2, Standards for Confining Farm Animals. Initiative Statute*, CALIFORNIA GENERAL ELECTION (Nov. 4, 2008), <http://www.voterguide.sos.ca.gov/past/2008/general/argu-rebut/argu-rebutt2.htm> [hereinafter *Prop 2, California Voter Guide*].

125. *Id.*

126. *Id.*

127. *Id.*

128. *Governor Schwarzenegger Signs Landmark Egg Bill into Law*, HUMANE SOC'Y OF THE U.S. (July 10, 2010), http://www.humanesociety.org/news/press_releases/2010/07/ab1437_passage_070610.html.

129. *Missouri v. Harris*, 58 F. Supp. 3d 1059, 1063 (E.D. Cal. 2014); see *Judge Dismisses Challenge to California Egg Law*, *supra* note 96.

130. *Missouri*, 58 F. Supp. 3d at 1059, 1079.

B. State Legislation

An Oregon statute passed in 2007 makes the confinement of gestation sows for more than twelve hours of any 24-hour period a violation of the law, effective January 1, 2008.¹³¹ Sows must be allowed to lie down and fully extend their limbs or be able to turn around freely without touching any side of their enclosure.¹³²

Maine passed a similar statute in 2009 to protect sows and veal calves. However, the Maine statute requires that the animals be able to both extend their limbs and turn around freely without touching any side of their enclosure.¹³³ The statute took effect January 1, 2011, and provides for both criminal and civil liability.¹³⁴ In addition, it explicitly states that “compliance with best management practices for animal husbandry” is not an affirmative defense.¹³⁵ Colorado’s statute very similarly addresses sows and veal calves.¹³⁶ It was passed in 2008 and became effective for calves January 1, 2012, and will become effective for sows January 1, 2018. The Colorado statute imposes criminal liability.¹³⁷

Michigan’s confinement legislation was passed in 2009 and addresses calves and sows as well as egg-laying hens.¹³⁸ It too requires that all three animals be able to both extend their limbs and turn around freely without touching any side of their enclosure.¹³⁹ The statute only imposes civil liability and became effective October 1, 2012, for calves and will become effective October 12, 2019, for hens and sows.¹⁴⁰

Ohio, as part of an agreement to drop a state ballot initiative, created regulations that eliminate the regular use of gestation crates past December 31, 2025, and prohibit any new construction of gestation crates as of September 29, 2011.¹⁴¹ On the same day, Ohio banned the construction of new battery cages on new farms.¹⁴² On pre-existing farms, new hen housing must afford each layer sixty-seven square inches of space, and all old housing must be modified to provide the same space by September 29, 2016.¹⁴³ Ohio also passed regulations that eliminate the

131. OR. REV. STAT. § 600.150 (2014).

132. *Id.*

133. ME. REV. STAT. ANN. tit. 7, § 4020 (2014); ME. REV. STAT. ANN. tit. 17, § 1039 (2014).

134. ME. REV. STAT. ANN. tit. 7, § 4020.

135. *Id.*

136. COLO. REV. STAT. ANN. § 35-50.5-102 (West 2014).

137. *Id.*

138. MICH. COMP. LAWS ANN. § 287.746 (West 2014).

139. *Id.*

140. *Id.*

141. OHIO ADMIN. CODE 901:12-8-02 (2014).

142. OHIO ADMIN. CODE 901:12-9-03 (2014).

143. *Id.*

regular use of veal crates by December 31, 2017.¹⁴⁴

In 2013, Rhode Island passed a law requiring that veal calves and sows be afforded the ability to turn around freely, lie down, stand up, and fully extend their limbs.¹⁴⁵ The statute explicitly states that keeping an animal in accordance with customary animal husbandry or farming practices is not a defense, and it imposes civil liability and a \$50-150 fine.¹⁴⁶

Typical exceptions to these statutes include confinement for scientific or agricultural research; examination, testing, or veterinary treatment; transportation, subject to some limitations; rodeos, 4-H programs, and similar exhibitions; slaughter; and, in the case of sows, a limited time just before birth, ranging from around 1-2 weeks.¹⁴⁷ Lastly, Washington passed legislation to move its egg producers toward “enriched colony housing” and bring it in line with “the European Union standard for egg production, which is considered the benchmark for animal welfare innovation.”¹⁴⁸

C. European Union

The European Union has been largely ahead of the game in terms of banning confinement practices. It passed laws requiring that the use of veal crates cease by 2007, the use of gestation crates cease by 2013, and the use of batter cages cease by 2012.

Beak-trimming was banned in the Netherlands effective 2018.¹⁴⁹ As a result of studies conducted on the utility and harm associated with tail docking, Britain, Norway, the Netherlands, Sweden, and Switzerland all prohibit tail docking dairy cows; the European Union adopted a directive in 1991 barring routine docking of pigs’ tails.¹⁵⁰ Further, in recognition of obvious animal welfare concerns and accompanying research, Norway, Switzerland, and the Netherlands require local or general anesthesia in castrating pigs, while other countries such as the United Kingdom, Ireland, New Zealand, and Australia simply leave nearly all male pigs intact.¹⁵¹

144. OHIO ADMIN. CODE 901:12-5-03 (2014).

145. R.I. GEN. LAWS ANN. § 4-1.1-3 (West 2014).

146. *Id.*

147. COLO. REV. STAT. ANN. §§ 35-50.5-10103 (2014); ME. REV. STAT. ANN. tit. 7, § 4020; (2014); ME. REV. STAT. ANN. tit. 17, § 1039; (2014); OR. REV. STAT. ANN. § 600.150. (2014).

148. REV. CODE WASH. § 69.25.065 (2015); Nietol, *Better Conditions for Washington Hens Signed into Law*, HOUSE DEMOCRATS: ONE WASHINGTON, OPPORTUNITIES FOR ALL (May 11, 2011), <http://housedemocrats.wa.gov/brian-blake/better-conditions-for-washington-hens-signed-into-law/> (statement made by Representative Brian Blake).

149. *Netherlands Betters Britain on Welfare*, COMPASSION IN WORLD FARMING, <http://www.philiplymbery.com/tag/debeaking/>.

150. *Id.*

151. *Id.* at 2–3.

III. STATE BALLOT INITIATIVES GENERALLY

Twenty-four state constitutions, in addition to creating a representative legislature, also vest lawmaking power in the general public through state ballot initiatives.¹⁵² There are roughly two forms of initiatives: those that may be directly voted on by the people, known as direct initiatives, and those that may be proposed by the people but must be voted on by the legislature, indirect initiatives.¹⁵³ Fourteen states permit direct initiatives¹⁵⁴ and ten permit indirect initiatives¹⁵⁵ in order to pass statutory law. Meanwhile fifteen states¹⁵⁶ allow constitutional amendments via direct initiatives and two through indirect initiatives.¹⁵⁷ Nineteen allow at least one form of direct initiatives.¹⁵⁸

In order to create law through direct initiatives, citizens place a proposed law on their state ballot and then vote on it directly while bypassing the state legislature.¹⁵⁹ Although the state ballot initiative process varies state to state, the process typically includes the following steps:

- (1) preliminary filing of a proposed petition with a designated state official;

152. John Gildersleeve, *Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment?*, 107 COLUM. L. REV. 1437, 1437–38 (2007); see, e.g., ARIZ. CONST. art. IV, pt. 1, § 1.(1) (“The legislative authority of the State shall be vested in the legislature . . . but the people reserve the power to propose laws and amendments to the Constitution and to enact or reject such laws and amendments at the polls, independently of the Legislature. . . .”); CAL. CONST. art. IV, § 1 (“The legislative power of this State is vested in the California Legislature . . . but the people reserve to themselves the powers of initiative and referendum.”); MASS. CONST. amend. art. XLVIII, pt. I, § 150 (“Legislative power shall continue to be vested in the general court; but the people reserve to themselves the popular initiative. . . .”); see also DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* 298–311 (1989); M. DANE WATERS, *INITIATIVE AND REFERENDUM ALMANAC* 32–33 tbl.1 (2003). For a list of initiative states, see Nat’l Conference of State Legislatures, *Initiative and Referendum in the 21st Century* 63 (2002), available at http://www.ncsl.org/programs/legismgt/irtaskfc/landR_report.pdf [hereinafter NCSL, Initiative and Referendum].

153. *Id.*

154. Arizona, Arkansas, California, Colorado, Idaho, Missouri, Montana, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Utah, and Washington. *Initiative and Referendum States*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/chart-of-the-initiative-states.aspx> (last visited Jan. 2, 2015) [hereinafter *NCSL, Initiative and Referendum States*].

155. Alaska, Maine, Massachusetts, Michigan, Nevada, Ohio, Utah, Washington, Wyoming, and Virgin Islands. *Id.*

156. Arizona, Arkansas, California, Colorado, Florida, Illinois, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, and South Dakota. *Id.*

157. Massachusetts and Virgin Islands. *Id.*

158. *Id.*

159. See Gildersleeve, *supra* note 152, at 1438.

- (2) review of the petition for conformance with statutory requirements and, in several states, a review of the language of the proposal;
- (3) preparation of a ballot title and summary;
- (4) circulation of the petition to obtain the required number of signatures of registered voters, usually a percentage of the votes cast for a statewide office in the preceding general election; and
- (5) submission of the petitions to the state elections official, who must verify the number of signatures.¹⁶⁰

Once enough valid signatures are obtained, the proposed law is placed on the ballot (or sent to the legislature for indirect initiatives).¹⁶¹ Generally, a majority vote is required for passage.¹⁶²

The use of initiatives has increased in recent years both in support of and to combat special interests.¹⁶³ Initiatives are distinct from public referenda where state legislatures, as opposed to the people, draft and propose a law and then place the measure on a ballot for public vote.¹⁶⁴ Historically, ballot initiatives and referenda originated as early as the 17th century and gained some force in the late 19th and early 20th century when people became disgruntled by an “out of touch government or [a

160. *Initiative, Referendum, and Recall*, NAT'L CONFERENCE ON STATE LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx> (last visited Dec. 15, 2014) [hereinafter *Initiative, Referendum, and Recall*].

161. *Id.*

162. *Id.*

Exceptions include Nebraska, Massachusetts and Mississippi. Those states require a majority, provided the votes cast on the initiative equal a percentage of the total votes cast in the election: 35 percent in Nebraska, 30 percent in Massachusetts and 40 percent in Mississippi. In Wyoming, an initiative must receive a majority of the total votes cast in a general election. For example, in Wyoming's 1996 general election the votes cast totaled 215,844, so an initiative would have had to receive at least 107,923 votes to be passed. In Nevada, initiatives amending the constitution must receive a majority vote in two consecutive general elections.

Id.

163. See RICHARD J. ELLIS, *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA 35–38* (2002) [hereinafter ELLIS, *DELUSIONS*] (discussing “modern initiative revolution”); INITIATIVE & REFERENDUM INST., *INITIATIVE USE 1* (2006), available at [http://www.iandrinstitute.org/IRI%20Initiative%CC20Use%20\(2006-11\).pdf](http://www.iandrinstitute.org/IRI%20Initiative%CC20Use%20(2006-11).pdf) (noting that between 1990 and November 2006, 680 initiatives appeared on state ballots). In November 2006, seventy-six initiatives appeared on ballots nationwide, the third highest number in the last hundred years. *Ballot Measure Results: A Bad Night for Many, a Great Night for a Few*, NAT'L CONFERENCE OF STATE LEGISLATURES (Nov. 8, 2006), <http://www.ncsl.org/statevote/06ballotmeasures.htm>.

164. *Initiative, Referendum, and Recall*, *supra* note 160.

government [marked] by inaction.”¹⁶⁵ Over the years, many important statewide reforms have resulted from ballot initiatives:

[W]omen gained the right to vote, movie theatres and other stores were allowed to be open on Sunday, poll taxes were abolished, states were barred from funding abortions, the eight-hour workday was created, medical marijuana was legalized, physician-assisted suicide was legalized, campaign finance reform was passed, prohibition was adopted and then repealed, and the death penalty was adopted and abolished.¹⁶⁶

Opposition to state ballot initiatives goes as far back as the initiatives themselves. One fear was that the initiative process would be used to improve the status of African-Americans, Irish-Catholics, and immigrants, essentially to “enact reforms that were not consistent with the beliefs of the ruling class.”¹⁶⁷ Much like the resistance to farm animal welfare reform, historical opposition to initiatives was often rooted in a desire to maintain the status quo.¹⁶⁸

Nationwide, subject matter restrictions on initiatives are few. Twelve states limit initiatives to addressing single subjects in order to avoid earmarking.¹⁶⁹ Another handful of states do not allow an initiative to reappear on a ballot for a specified period of time.¹⁷⁰ Otherwise, eight states have no subject-matter limitations.¹⁷¹ Eleven states only prohibit revenue, appropriations, judiciary, local or special legislation measures, or limit initiatives to the same subject matter appropriate for the legislature.¹⁷² Otherwise, only five states, Illinois, Massachusetts, Mississippi, Ohio, and Utah provide more specific subject matter

165. *A Brief: The History of the Initiative and Referendum Process in the United States*, INITIATIVE AND REFERENDUM INST., <http://www.iandrinstituteiandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Quick%20Facts/History%20of%20I&R.pdf> [hereinafter *History*].

166. Nicholas R. Theodore, *We the People: A Needed Reform of State Initiative and Referendum Procedures*, 78 MO. L. REV. 1401, 1405 (2013) (citing *History*, *supra* note 165, at 6–7).

167. *History*, *supra* note 165, at 3.

168. *See id.*

169. NCSL, Initiative and Referendum, *supra* note 152, at 15–19 (2002). Alaska, Arizona, California, Colorado, Florida, Missouri, Montana, Nebraska, Oklahoma, Oregon, Washington, and Wyoming.

170. *Id.* at 16–17 (Massachusetts, Mississippi, Nebraska, Oklahoma, and Wyoming and ranging two to six years).

171. *Id.* (Arizona, Arkansas, California, Colorado, Idaho, Oklahoma, Oregon, Utah, and Washington).

172. *Id.* at 20 (Alaska, Florida, Maine, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, South Dakota, and Wyoming).

limitations.¹⁷³ Illinois limits the use of initiatives for the purpose of affecting Article IV of the state constitution relating to structural and procedural aspects of the legislature.¹⁷⁴ Massachusetts, in addition to some of the previously mentioned subjects, does not allow initiatives concerning religion and the eighteenth amendment to its Constitution, which relates to service members' right to vote even if unable to pay a poll tax.¹⁷⁵ Mississippi prohibits initiatives affecting the right to work, the initiative process, the Bill of Rights, and the public employee's retirement system.¹⁷⁶ Ohio does not allow some initiatives that affect the classification of property for tax purposes.¹⁷⁷ Lastly, Utah, although it permits ballot initiatives related to hunting, requires that those initiatives pass by a super majority with two-thirds support.¹⁷⁸

Some have argued, and at least one circuit¹⁷⁹ has agreed, that limitations on ballot initiative subject matter burden First Amendment speech.¹⁸⁰ Furthermore, the Supreme Court has held that regulation of initiative campaigns implicates First Amendment speech.¹⁸¹ The level of scrutiny applied, if any, to subject matter limitations is unresolved and beyond the scope of this article. Nevertheless, there is a strong argument that states may not freely limit the subject matter of initiatives.¹⁸² Free speech violations aside, the only subject matter limitation currently in effect that is comparable to the direct or indirect limitations regarding farm animal welfare is the Utah requirement that hunting laws passed through the initiative process obtain a super majority.¹⁸³ Otherwise, limiting farm animal welfare initiatives is quite distinct from the putative measure of protecting, for example, the judiciary or tax system from direct democracy.¹⁸⁴

173. *Id.*

174. *Id.* at 18.

175. *Id.*

176. *Id.*

177. *Id.* at 19.

178. UTAH CONST. art. VI, § 1, subsec. 2(A)(ii) ("Notwithstanding [the majority of votes otherwise required], legislation initiated to allow, limit, or prohibit the taking of wildlife or the season for or method of taking wildlife shall be adopted upon approval of two-thirds of those voting.").

179. *Wirzburger v. Galvin*, 412 F.3d 271, 279 (1st Cir. 2005).

180. *Gildersleeve*, *supra* note 152, at 1438.

181. *Meyer v. Grant*, 486 U.S. 414, 414 (1988) (overturning state's prohibition on using paid petition circulators); *see also* *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299 (1981) (invalidating an ordinance limiting contributions to initiative campaign committees and holding that "there is no significant state or public interest in curtailing debate and discussion of a ballot measure").

182. *See* *Gildersleeve*, *supra* note 152.

183. UTAH CONST. art. VI, § 1, subsec. 2(A)(ii).

184. *See* *Gildersleeve*, *supra* note 152, at 1439.

IV. EFFORTS TO COMBAT IMPROVEMENTS TO LIVESTOCK LIVING CONDITIONS

In addition to campaigns against improvement to livestock living conditions via ballot initiatives as discussed in Part IV.A, three other mechanisms battle the use of ballot initiatives in the first place: Part IV.B explains the creation of various state boards as the sole entity authorized to govern livestock welfare. Then, Parts IV.C and IV.D briefly delve into state constitutional changes that create a right to farm and state laws that prohibit the creation of local laws on the subject of livestock welfare.

A. Campaigns Against Improvement

The opposition to state ballot initiatives that improve living conditions is surprisingly wide-ranging. In Arizona, opposition involved citizens concerned about animal rights getting out of control to the point where the world is forced to become vegetarian.¹⁸⁵ It also included agri-business lobbyists, self-purported small farmers, the state farm bureau, eleven veterinarians (some of which were also members of state lobby groups such as the Arizona Pork Council), the state cattle growers association, the state cattle feeders association, representatives from the state chamber of commerce and industry, and a campaign for state farmers and ranchers.¹⁸⁶ These groups were concerned about outside interests influencing the state, anti-meat agendas, and infringing on pork producers' independence as farmers.¹⁸⁷

Similarly, in California, opposition to the confinement standards set forth in the state's Proposition 2 state ballot initiative made false claims about the cost of eggs skyrocketing and appealed to the fear that avian flu would spread more quickly because chickens would be exposed to the outdoors more.¹⁸⁸ However, the initiative says nothing about whether chickens must be housed outdoors. Otherwise, the opposition made blanket statements about the quality of care provided to battery cage chickens, arguing that they are humane and modern; strangely, they noted a distinction between "humane treatment" and "housing methods."¹⁸⁹ The opposition also multiple times referred to the concern that eggs would have to be imported from elsewhere. Of particular concern were eggs imported from Mexico.¹⁹⁰ Veterinarians and various professors backed

185. *Arizona: An Initiative Measure*, *supra* note 110, at 26.

186. *Id.* at 27.

187. *Id.* at 33, 41.

188. *Prop 2, California Voter Guide*, *supra* note 124.

189. *Id.*

190. *Id.*

these arguments.¹⁹¹

To a certain extent, it is true that confinement practices often serve practical goals: they typically allow for easier oversight of the animals' well-being and attempt to minimize the adverse effects of such dense populations. For example, as late as 2012, 90% of the six million sows on American farms were housed in gestation crates.¹⁹² Gestation crates are labor-efficient in that they require a less qualified worker to run them.¹⁹³ Sows are physically restrained from doing what they otherwise tend to do: fight with each other.¹⁹⁴ They also save barn space.¹⁹⁵

The reasons for utilizing confinement and the concerns over altering the system are largely economic. One estimate puts the cost of converting from gestation crates to group housing at \$1.87 billion to \$3.24 billion.¹⁹⁶ Even at this expense, many large pork companies are voluntarily ceasing gestation crates due to consumer demand, in particular, consumer demand being voiced through even larger food corporations such as McDonald's, Burger King, Wendy's, Subway, Oscar Mayer, Kroger, Safeway, Costco, Denny's, Jack in the Box, Carl's Jr., Hardee's, Sodexo, Sysco, Aramark, Compass Group, Heinz, Campbell Soup, Baja Fresh, Wienerschnitzel, and Harris Teeter.¹⁹⁷ All of these corporations have voiced intention to eliminate gestation sows from their supply chains.¹⁹⁸ Because so many companies are willing to insist on this change, it is hard to imagine that the change is prohibitively costly.¹⁹⁹

Regarding the increased cost to produce eggs as a result of switching from battery cages, one source indicates only a one-cent increase per egg.²⁰⁰ Along the same lines, a European Commission socioeconomic report indicates that "one free-range egg costs 2.6 Eurocents more to produce than a battery egg, and a barn egg costs 1.3 Eurocents more to produce than a battery egg."²⁰¹ The increase from battery to free range amounts to 3 cents per egg, and the increase from battery to barn eggs

191. *Id.*

192. Tim Carman, *Pork Industry Gives Sows Room to Move*, WASH. POST (May 29, 2012), http://www.washingtonpost.com/lifestyle/food/pork-industry-gives-sows-room-to-move/2012/05/25/gJQAISlxyU_story.html.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Crammed into Gestation Crates*, *supra* note 36.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Alternatives to the Barren Batter Cage for the Housing of Laying Hens in the European Union*, COMPASSION IN WORLD FARMING 27 (Jan. 1, 2007), <http://www.ciwf.org.uk/media/3818829/alternatives-to-the-barren-battery-cage-in-the-eu.pdf>.

amounts to 2 cents per egg.²⁰² The cost to consumers is estimated to be somewhere between 7-18 cents per week, arguably something that the public would be willing to fork up in exchange for humanely produced eggs.²⁰³

Although farmers argue that their independence to manage their factory farms is undermined by farm animal welfare standards, it is important to note that at present, farmers are typically required, at most, to adhere to the generally accepted agricultural and management practices of their peers.²⁰⁴ This standard operates much as it sounds: if a practice is generally accepted by farmers, then the practice is sound.²⁰⁵ Unfortunately, this standard only perpetuates farmers' natural and reasonable tendency to do what makes them profitable. As mentioned earlier, even the "well-being" of animals under this mindset is gauged by herd health insofar as it is reflected in product yield. The standard has no reason to contemplate true animal welfare.

B. *The Creation of Livestock Care Standards Boards*

Livestock care standards boards have sprung up in several states around the country, ostensibly to address growing concerns about many of the industrial agriculture practices at issue in this Article.²⁰⁶ However, these boards may actually serve to maintain the status quo, rather than effect change, on account of the political climate of the states enacting them.²⁰⁷ Below, all of the boards that have been formed to date are examined: Ohio, West Virginia, Rhode Island, Utah, Indiana, Illinois, Louisiana, and Vermont.

The first state to create a livestock care standards board was Ohio, which appropriately called it the Ohio Livestock Care Standards Board (OLCSB), and it did so by amending its Constitution.²⁰⁸ Although one stated purpose of the OLCSB was to evaluate and set the living standards for agricultural animals, another was to prevent average citizens from

202. *Id.* at 28.

203. *Id.*; see *Ethical Food*, *supra* note 93, at 6.

204. See, e.g., *Generally Accepted Agricultural and Management Practices for the Care of Farm Animals*, MICH. DEP'T OF AGRIC. & RURAL DEV. 1, at http://www.michigan.gov/documents/mdard/2014_CARE_OF_FARM_ANIMALS_GAAMPs_452762_7.pdf.

205. See *id.*

206. OHIO CONST. art. XIV, § 1; 20 ILL. COMP. STAT. ANN. 5/5-525 (West 2014); IND. CODE ANN. § 15-17-3-23 (West 2014); KY. REV. STAT. ANN. § 257.192 (West 2014); LA. REV. STAT. ANN. § 3:2093 (2014); UTAH CODE ANN. § 4-2-7 (West 2014); VT. STAT. ANN. tit. 6, § 792 (West 2014); W. VA. CODE ANN. § 19-1C-3 (West 2014).

207. Lindsay Vick, *Confined to A Process: The Preemptive Strike of Livestock Care Standards Boards in Farm Animal Welfare Regulation*, 18 ANIMAL L. 151, 152 (2011).

208. OHIO CONST. art. XIV, § 1.

encroaching on decisions that arguably should be left to farmers.²⁰⁹ This board was established in the wake of the Humane Society of the United States' (HSUS) success in other states with state ballot initiatives.²¹⁰

The OLCSB is made up of thirteen members, only seven of which may be from the same party.²¹¹ The director of the state department that regulates agriculture is set as the chairperson of the board.²¹² The board also consists of ten members appointed by the governor with the advice and consent of the senate.²¹³ These ten members include the following:

- (a) One member representing family farms;
- (b) One member who is knowledgeable about food safety in this state;
- (c) Two members representing statewide organizations that represent farmers;
- (d) One member who is a veterinarian who is licensed in this state;
- (e) The State Veterinarian in the state department that regulates agriculture;
- (f) The dean of the agriculture department of a college or university located in this state;
- (g) Two members of the public representing Ohio consumers;
- (h) One member representing a county humane society that is organized under state law.²¹⁴

In addition, two family farmers are appointed to the board, one by the Speaker of House of Representatives and one by the Senate.²¹⁵ The board's thirteen members are charged with "establish[ing] standards governing the care and well-being of livestock and poultry."²¹⁶ In doing so, it must take into consideration a number of factors: "agricultural best

209. Vick, *supra* note 207, at 154; see Peggy Kirk Hall & Leah F. Finney, *Ohio Voters Approve Livestock Care Standards Board: Now What?*, 26 AGRIC. L. UPDATE 5 (Oct. 2009), available at <http://nationalaglawcenter.org/wp-content/uploads/assets/aala/10-09.pdf>.

The measure [creating the OLCSB] is a direct attempt to preempt efforts by . . . [HSUS], which met with Ohio farm leaders last spring to discuss its intent to propose laws that would prohibit certain livestock management practices in Ohio. Rather than negotiating with HSUS, Ohio's agricultural interests worked through the Ohio legislature to create an alternative approach to livestock care.

Id.

210. See *supra* Part II.A.2.

211. OHIO CONST. art. XIV, § 1(A)(1), (4).

212. OHIO CONST. art. XIV, § 1(A)(1).

213. OHIO CONST. art. XIV, § 1(A)(2).

214. OHIO CONST. art. XIV, § 1(A)(2)(a)–(h).

215. OHIO CONST. art. XIV, § 1(A)(3), (4).

216. OHIO CONST. art. XIV, § 1(B).

management practices for such care and well-being, biosecurity, disease prevention, animal morbidity and mortality data, food safety practices, and the protection of local, affordable food supplies for consumers.”²¹⁷

Before OLCSB made its first set of standards, HSUS entered a compromise that involved the board looking into standards on several of its most pressing issues: “downer cattle and humane euthanasia issues; elimination of veal crates by 2017; prohibition on the issuance of permits for new pork operations using gestation crates; and prohibition on new operations that use battery cage systems for egg-laying hens.”²¹⁸ Moving forward, however, the board is comprised of at least seven members, or over half of the total members, that will, in all reasonable likelihood, represent agriculture’s interest in not changing—three farmers, two representatives of agricultural organizations, the dean of a university agricultural department, and a veterinarian that regulates agriculture.²¹⁹

West Virginia adopted a very similar board. The Governor appoints eleven members:

- (1) One member who is a veterinarian licensed in this state engaging in large animal practice, for a term of two years;
- (2) The dean of the agriculture department of a college or university located in this state, for a term of three years;
- (3) One member representing a county humane society that is organized under state law, for a term of four years;
- (4) One member who is knowledgeable about food safety in this state, for a term of five years;
- (5) Two members of the public representing West Virginia consumers, one for a term of two years and one for a term of four years;
- (6) Two members representing state agricultural organizations that represent farmers, one of whom must be a member of the largest organization in the state representing farmers for a term of three years, and the other must be a member of a statewide livestock organization, for a term of five years; and
- (7) Three members representing family farms engaged in animal

217. *Id.* (Although, the board is not limited to those considerations.).

218. Vick, *supra* note 207, at 156–57; *State Agreement with HSUS Calls for these Recommendations*, FARM & DAIRY (July 1, 2010), <http://www.farmanddairy.com/news/state-agreement-with-hsus-calls-for-these-recommendations/15273.html> (noting that the parties also agreed to recommend to the legislature that it consider stronger puppy mill regulations, stronger cockfighting legislation, and stronger regulation against the breeding and possession of exotic wildlife).

219. The dean is included because in all likelihood the agricultural department receives substantial funding from agricultural organization with a strong interest in opposing any improvement to livestock living conditions. The veterinarian that regulates agriculture was likely appointed by the same special interests.

production, at least two of whom are family farmers, for the following terms: one for three years, one for four years and one for five years.²²⁰

The two members representing agricultural organizations, the three members representing family farms, as well as the dean of the agricultural department form a majority of the eleven members and arguably will adamantly represent farming interests.²²¹ Only the one member representing a county humane society is assuredly going to support improvements, while the other four members—a veterinarian, two consumers, and a food safety representative—could swing either way.

The Rhode Island board is made up of the following:

(a) There is established a livestock care standards advisory council consisting of the state veterinarian, or his or her designee, who shall serve as the chairperson and six (6) public members appointed by the director as follows:

- (1) A representative from the Rhode Island farm bureau, or his or her designee, who shall serve as secretary;
- (2) A representative from the Rhode Island society for the prevention of cruelty to animals, or his or her designee;
- (3) A Rhode island based livestock farmer, or his or her designee;
- (4) A representative from the University of Rhode Island department of environment and life sciences, or his or her designee;
- (5) A representative from a Rhode Island nonprofit animal welfare entity, or his or her designee; and
- (6) A representative from a national nonprofit animal welfare entity.²²²

Rhode Island's board is significantly less lopsided than Ohio's and West Virginia's boards. At least half of its members would likely have a willingness to take a hard look at standard farming practices, rather than simply maintaining the status quo.²²³ Indeed, aside from the few Ohio laws resulting from a compromise with HSUS to drop a state ballot initiative, Rhode Island's board is the only one to pass laws improving farm animal welfare.²²⁴

220. W. VA. CODE §§ 19-1C-3 (2014).

221. The dean is included because in all likelihood the agricultural department receives substantial funding from agricultural organization with a strong interest in opposing any improvement to livestock living conditions.

222. R.I. GEN. LAWS § 4-26-14 (West 2014).

223. *See id.*

224. R.I. GEN. LAWS ANN. § 4-1-32 (West 2014).

Utah's board is one of the more egregiously farm-favoring boards. It is structured as follows:

- (1) There is created the Agricultural Advisory Board composed of 16 members, with each member representing one of the following:
 - (a) Utah Farm Bureau Federation;
 - (b) Utah Farmers Union;
 - (c) Utah Cattlemen's Association;
 - (d) Utah Wool Growers' Association;
 - (e) Utah Dairymen's Association;
 - (f) Utah Pork Producer's Association;
 - (g) egg and poultry producers;
 - (h) Utah Veterinary Medical Association;
 - (i) Livestock Auction Marketing Association;
 - (j) Utah Association of Conservation Districts;
 - (k) the Utah horse industry;
 - (l) the food processing industry;
 - (m) the fruit and vegetable industry;
 - (n) the turkey industry;
 - (o) manufacturers of food supplements; and
 - (p) a consumer affairs group.²²⁵

Only one member of the Utah board might represent animal welfare, the consumer affairs representative, but it is just as likely that a consumer who cares more about meat and egg prices, whether or not that concern is founded, would be appointed.²²⁶ Otherwise, nine or more of the members clearly represent industry.²²⁷ Worse, however, is the Indiana board, which essentially prohibits any consideration of livestock welfare outside of the traditional notion of generally accepted management practices as they are set by the farming industry itself:

The board may adopt rules to establish standards governing the care of livestock and poultry. The board shall consider the following when adopting the standards:

- (1) The health and husbandry of the livestock and poultry.
- (2) Generally accepted farm management practices.
- (3) Generally accepted veterinary standards and practices.
- (4) The economic impact the standards may have on:
 - (A) livestock and poultry farmers;
 - (B) the affected livestock and poultry sector; and

225. UTAH CODE ANN. § 4-2-7 (West 2014).

226. *See id.*

227. *See id.*

(C) consumers.²²⁸

The primary focus of the board's assessment with regard to determining "rules to establish standards governing the care of livestock and poultry" is generally accepted management practices.²²⁹ Moreover, "health" is broadly stated and does not necessarily include "welfare."²³⁰ Lastly, economic impact gets a good deal of emphasis. The likelihood that generally accepted farming practices would be reassessed under this board is slim.²³¹

Illinois' board, named an "Advisory Board of Livestock Commissioners," far more than "advisory," must approve "[r]ules and regulations of the Department of Agriculture pertaining to the well-being of domestic animals and poultry."²³² The board consist of the following:

[Twenty-five] persons, consist[ing] of the administrator of animal disease programs, the Dean of the College of Agricultural, Consumer, and Environmental Sciences of the University of Illinois, the Dean of the College of Veterinary Medicine of the University of Illinois, and commencing on January 1, 1990, the Deans or Chairmen of the Colleges or Department of Agriculture of Illinois State University, Southern Illinois University, and Western Illinois University . . . the Director of Public Health, the Director of Natural Resources, the Chairperson of the Agriculture and Conservation Committee of the Senate and the Chairperson of the Agriculture & Conservation Committee of the Senate, and the Chairperson of the Agriculture & Conservation Committee of the House of Representatives . . . and 17 additional persons . . . [of which] one shall be a representative of breeders of beef cattle, one shall be a representative of breeders of dairy cattle, one shall be a representative of breeders of dual purpose cattle, one shall be a representative of breeders of swine, one shall be a representative of poultry breeders, one shall be a presentative of sheep breeders, one shall be a veterinarian licensed in this state, one shall be a representative of general or diversified farming, one shall be a representative of deer or elk breeders, one shall be a representative of livestock auction markets, one shall be a representative of cattle feeders, one shall be a representative of pork producers, one shall be a representative of the State licensed meat packers, one shall be a representative of canine breeders, one shall be a presentative of

228. IND. CODE § 15-17-3-23 (2014).

229. *See id.*

230. *See id.*

231. *See id.*

232. 20 ILCS 5/5-525(b) (2015).

equine breeders, one shall be a representative of the Illinois licensed renderers, and one shall be a representative of livestock dealers.²³³

None of the required 25 board members have apparent interests in improvements to livestock well-being, while most board members likely have interest in maintaining the status quo.²³⁴

Kentucky's Livestock Care Standards Commission" is similarly made up almost entirely of individuals with interests that more than likely would avoid change:

- (1) The state veterinarian, who shall be a nonvoting member;
- (2) The co-chairs of the Interim Joint Committee on Agriculture . . . ; and
- (3) Thirteen (13) voting members as follows:
 - (a) The Commissioner or the Commissioner's designee, who shall serve as chair;
 - (b) The dean of the University of Kentucky, College of Agriculture or the dean's designee;
 - (c) The chair of the Animal Control Advisory Board or the chair's designee;
 - (d) The director of the University of Kentucky Livestock Disease Diagnostic Center or the director of the Murray State University Breathitt Veterinary Center. Each director shall serve one (1) year terms on a rotating basis;
 - (e) Four (4) members appointed by the Governor as follows:
 1. One (1) person selected from a list of three (3) submitted by the Kentucky Farm Bureau;
 2. One (1) person selected from a list of three (3) submitted by the Kentucky County Judge/Executive Association;
 3. One (1) veterinarian selected from a list of three (3) submitted by the Kentucky Veterinary Medical Association. The veterinarian's practice shall include working on one (1) or more of the species named in paragraph (f) of this subsection; and
 4. One (1) citizen at large with an interest in food safety; and
 - (f) Five (5) members actively engaged in farming and appointed by the Governor with assistance by the department. The department shall contact commodity organizations named in this paragraph, collect a list of potential representatives from the organizations, and deliver the list to the Governor. The Governor

233. *Id.*

234. *See id.*; PUBLIC RESEARCH, PRIVATE GAIN: CORPORATE INFLUENCE OVER UNIVERSITY AGRICULTURAL RESEARCH, FOOD & WATER WATCH (2012), available at <http://documents.foodandwaterwatch.org/doc/PublicResearchprivateGain.pdf>.

shall appoint:

1. One (1) active producer from the list submitted by Kentucky commodity organizations representing bovine species;
2. One (1) active producer from the list submitted by Kentucky commodity organization representing ovine and caprine species;
3. One (1) active producer from the list submitted by Kentucky commodity organizations representing porcine species;
4. One (1) active producer from the list submitted by Kentucky commodity organizations representing equine species; and
5. One (1) active producer from the list submitted by Kentucky commodity organizations representing poultry species.²³⁵

Louisiana's board is comparable, consisting of "eighteen members appointed by the commissioner of agriculture and forestry": one member each from lists provided by the Louisiana Livestock Marketing Association, Louisiana Farm Bureau Federation, Louisiana Veterinary Medical Association, Louisiana Thoroughbred Breeders' Association, Louisiana Pork Producers' Association, Louisiana Sheep Producers' Association, Louisiana Poultry Federation, the commissioner of agriculture, Independent Meat Packers Association, and Louisiana Meat Goat Association; one breeder each nominated by the Louisiana Cattlemen's Association; a dairy farmer; a livestock dealer; an exotic animal farmer; two members appointed by the commissioner . . . [from lists] submitted by the chairman of the Senate Committee on Agriculture, Forestry, Aquaculture, and Rural Development and the House Committee on Agriculture, Forestry, Aquaculture, and Rural Development.²³⁶

Vermont's board looks a bit different:

- (1) The secretary of agriculture, food and markets, who shall serve as the chair of the council.
- (2) The state veterinarian.
- (3) The following six members appointed by the governor:
 - (A) A person with knowledge of food safety and food safety regulation in the state.
 - (B) A person from a statewide organization that represents the beef industry.
 - (C) A Vermont licensed livestock or poultry veterinarian.
 - (D) A representative of an agricultural department of a Vermont college or university.
 - (E) A representative of the Vermont slaughter industry.
 - (F) A representative of the Vermont livestock dealer, hauler, or

235. K.R.S. § 257.192 (2015).

236. LA. R.S. § 3:2091 (2015).

auction industry.

(4) The following three members appointed by the committee on committees:

(A) A producer of species other than bovidae.

(B) An operator of a medium farm or large farm permitted by the agency.

(C) A professional in the care and management of equines and equine facilities.

(5) The following three members appointed by the speaker of the house:

(A) An operator of a small Vermont dairy farm.

(B) A representative of a local humane society or organization from Vermont registered with the agency and organized under state law.

(C) A person with experience investigating charges of animal cruelty involving livestock, provided that no such person who has received or is receiving compensation from a national humane society or organization may be appointed under his subdivision.²³⁷

The last three members, though hardly balancing the other 11 industry-supporting members, would likely advocate practices that improve livestock well-being. Unsurprisingly, this little influence has not been enough to bring about change benefiting livestock welfare.²³⁸

C. State Constitutional Changes

Another, but less obvious, method by which states might undermine future state ballot initiatives in support of farm animal welfare is by passing a constitutional amendment that guarantees the “right to farm.”²³⁹ One such example is Missouri. Incidentally, Missouri’s Constitutional amendment was a ballot initiative itself, but it only passed by a slim margin.²⁴⁰ The margin was so small in fact that a recount occurred:²⁴¹ 50.18% of voters supported the proposition and 49.88% opposed it.²⁴² In

237. 6 V.S.A. § 792 (2015).

238. See, e.g., SWINE GESTATION CRATE STATEMENT, VERMONT AGENCY OF AGRICULTURE, FOOD, & MARKETS (2013), available at http://agriculture.vermont.gov/sites/ag/files/pdf/animal_heath/LCSAC%20swine%20gestation%20crate%20position%20statment%20January%202013.pdf.

239. *Missouri Right-to-Farm, Amendment 1 (August 2014)*, BALLOTPEdia at 1, http://ballotpedia.org/Missouri_Right-to-Farm,_Amendment_1_%28August_2014%29 (last visited Dec. 16, 2014).

240. *Id.*

241. *Id.*

242. *Id.* at 2.

the future, what the “right to farm” means in Missouri will likely be the subject of judicial interpretation for some time.²⁴³ It might mean something along the lines of a comparable constitutional amendment passed in North Dakota that states that “[t]he right of farmers and ranchers to engage in modern farming and ranching practices shall be forever guaranteed in this state. No law shall be enacted which abridges the right of farmers and ranchers to employ agricultural technology, modern livestock production, and ranching practices.”²⁴⁴ Constitutional amendments such as these that solidify farmer autonomy, whether passed through state ballot initiatives or other means, can undermine the public’s ability to use state ballot initiatives in order to improve livestock animal welfare. While this issue is worth noting, it is beyond the scope of this Article.

D. Preventing Local Farm Animal Welfare Laws

One last method by which states are undermining ballot initiative is by passing state laws that prohibit their use at any government level lower than the state for the subject of farm animal welfare.²⁴⁵ Often, various levels of local government permit ballot initiatives as a way to create city ordinances, for instance.²⁴⁶ However, Oklahoma, South Carolina, and Georgia, insofar as local initiatives are available, have passed state laws prohibiting any form of local law that sets standards for farm animal welfare.²⁴⁷ For example, the Georgia statute states: “No county, municipality, consolidated government, or other political subdivision of this state shall adopt or enforce any ordinance, rule, regulation, or resolution regulating crop management or animal husbandry practices involved in the production of agricultural or farm products on any private property.”²⁴⁸ South Carolina’s statute is quite similar.²⁴⁹ Oklahoma’s goes further: “Oklahoma Department of Agriculture, Food, and Forestry shall be the state entity empowered to implement the policy of the state regarding the care and handling of livestock in this state.”²⁵⁰ This method of removing power from the public makes it quite difficult for people to pass laws to improve livestock living conditions.²⁵¹ In Oklahoma, citizens

243. *Id.* at 4.

244. N.D. CONST. art. XI, § 29.

245. GA. CODE ANN. § 2-1-6 (2014); OKLA. ST. ANN. tit. 2, § 2-4c (2014); S.C. CODE ANN. § 47-4-160 (2014).

246. *See generally History, supra* note 165.

247. GA. CODE ANN. § 2-1-6 (2014); OKLA. ST. ANN. tit. 2, § 2-4c (2014); S.C. CODE ANN. § 47-4-160 (2014).

248. GA. CODE ANN. § 2-1-6 (2014).

249. S.C. CODE ANN. § 47-4-160 (2014).

250. OKLA. ST. ANN. tit. 2, § 2-4c (2014).

251. *See id.*

are vested with the power to use state ballot initiatives to directly change both statutory law and their state constitutional law.²⁵² Arguably, Oklahoma's statute has removed that right from its citizens.²⁵³ Neither South Carolina nor Georgia grant their citizens the opportunity to use state ballot initiatives,²⁵⁴ but local initiatives might have otherwise been available.

Removing that power from the public disables a crucial ability to overcome flaws in the democratic process, namely that money and special interest, as opposed to popular opinion, influence law as much as they do. These measures were originally put in place to combat ineffective government, a problem widely considered an issue still today.²⁵⁵ Removing that power from the public disables people's ability to overcome flaws in the democratic process, especially now since money and special interest rather than interests popular opinion influence law as much as they do.²⁵⁶ For purposes of this Article, not only do people suffer a loss of influence and power in democracy, but many millions of animals suffer too.

V. INDUSTRY EXPLOITS CONSUMER NOTIONS OF IDYLIC FARM LIFE

Consumers are quite capable of understanding the suffering endured by farm animals in confinement and subject to certain related practices as well as the trade-off of paying more for food in exchange for the alteration or elimination of confinement and certain farming practices.²⁵⁷ However, one of the agricultural industry's principle claims against state ballot initiatives and in favor of care standards boards, constitutional protection of the right to farm, and prohibiting local animal welfare laws is that the public is too emotional about animals and too susceptible to becoming irrational about farm animal welfare; therefore, it should not be able to make law directly on the subject matter.²⁵⁸ Meanwhile, the very same agricultural industry profits greatly from displays of idyllic farm life in animal product advertising.²⁵⁹ One need only stroll around the grocery store and peruse the images of chickens in open fields, clean pigs in

252. *NCSL, Initiative and Referendum States*, *supra* note 154.

253. *See* OKLA. ST. ANN. tit. 2, § 2-4c (2014).

254. *NCSL, Initiative and Referendum States*, *supra* note 154.

255. *See History*, *supra* note 165, at 2.

256. *See Gildersleeve*, *supra* note 152, at 381-439.

257. *See supra* Part VI.A.

258. *What is Food Sovereignty?*, U.S. FOOD SOVEREIGNTY ALLIANCE, <http://usfoodsovereigntyalliance.org/what-is-food-sovereignty/> (last visited Dec. 18, 2014).

259. Stephen Wells, *Legally Brief: Truth in Advertising*, ANIMAL LEGAL DEFENSE FUND (Sept. 19, 2013), <http://aldf.org/blog/legally-brief-truth-in-advertising/>.

sunshine, and cows (with tails) out to pasture.²⁶⁰ Clearly these depictions are marketing lies in many, if not most, cases.²⁶¹ Beyond advertising, labeling can be equally misleading. For example, labeling terms such as “Certified Humane,” “American Humane Certified,” and “free-roaming” all permit the process of de-beaking, which is common in exceedingly crowded living conditions.²⁶² Thus, if consumers wanted to avoid some practices, and market research indicates that many would,²⁶³ they would have difficulty; meanwhile, the ambiguity of such labels certainly benefits factory farmers.

The cognitive dissonance between the agricultural industry’s willingness to exploit a consumer understanding and simultaneously deny consumer understanding the moment it becomes inconvenient is problematic, to say the least. Put simply, the argument that state boards are an effort to prevent the public from passing laws on something it does not understand makes little sense in light of industry’s acknowledgment through advertising that the public clearly understands the value of farm animal treatment. The result, boards appear in a much more truthful light to be an effort by industry to simply avoid change and protect their bottom line.

In its further recognition of the public’s ability to comprehend farm animal suffering, the agricultural industry has pressed for laws that prohibit the public from seeing what really happens inside factory farms through “ag-gag” laws.²⁶⁴ These laws prevent individuals from recording and reporting practices that occur on factory farms.²⁶⁵ While the industry insists that the public simply cannot handle factory farm realities, it seems odd to remove this sort of decision from the public. In what other realm has an industry been able to set its own standards behind entirely closed

260. *Id.*

False advertising—that deceptively claims a company treats animals humanely while doing anything but—is not only illegal but jeopardizes the progress of truly humane companies.

Consumers are increasingly committed to more compassionate purchases, buying products that are not tested on animals or free-range eggs. When companies take advantage of lax or nonexistent labeling laws and make deceptive animal welfare claims, compassionate consumers lose and so do animals.

Id.

261. *Id.*

262. See Capps, *supra* note 38, at 3.

263. See *Ethical Food*, *supra* note 93, at 2.

264. Lange, *supra* note 92; see *2006 Ballot Proposition Guide*, *supra* note 108 (Forrer’s comment regarding agribusiness’s unwillingness to allow reporters within their operations in order to show the public how “benign” they purport their practices to be).

265. *Id.*

doors? Especially considering that animals cannot speak for themselves, requiring human representatives to advocate for their interests, the public has a pressing interest in transparency. Thus, consumers should be allowed to know what actually happens to animals on factory farms and to lessen the gap between advertising and reality, particularly through state ballot initiatives.

VI. CURRENT FEDERAL AND STATE FARM ANIMAL WELFARE LAWS

Most farm animal welfare laws at the state level rely heavily on generally accepted practices, which is a standard largely set by industry.²⁶⁶ For the most part, the only protections beyond the generally accepted practices standard are those discussed in this paper.²⁶⁷ Occasionally, a state's laws preventing deliberate cruelty to animals also applies to farm animals.²⁶⁸

Federal farm animal welfare law rests primarily in the Humane Slaughter Act (HSA)²⁶⁹ because the broader Animal Welfare Act, which governs the minimum standard of care for warm-blooded animals in commerce, exempts farm animals.²⁷⁰ The HSA mandates that livestock be slaughtered in a humane manner.²⁷¹ It applies to "cattle, calves, horses, mules, sheep, swine, and other livestock," not including poultry and fowl, and requires that the animals be rendered insensible to pain through any of a number of rapid measures, including severance of the carotid arteries for religious slaughter.²⁷² However, in 2008, significant failures in enforcement came to light when the largest meat recall in history and insider filming revealed the regular slaughtering of downer, or non-ambulatory, cattle, which is expressly prohibited by the HSA.²⁷³ Since that time, increased funding and reporting have aimed to improve enforcement.²⁷⁴

Members of the House and Senate Committees on Agriculture, however, have generally taken the stance that humane care should be

266. See, e.g., *Generally Accepted Agricultural and Management Practices for the Care of Farm Animals*, *supra* note 204, at iii.

267. See *supra* Part II; see also Tadlock Cowan, *Humane Treatment of Farm Animals: Overview of Issues*, CONG. RES. SERV. 1 (May 9, 2011), <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RS21978.pdf>.

268. See Cowan, *supra* note 267, at 1.

269. 7 U.S.C. §§ 1901–07 (2014).

270. See Cowan, *supra* note 267, at 1.

271. 7 U.S.C. § 1901 (2014).

272. 7 U.S.C. § 1902 (2014).

273. 7 U.S.C. § 1907 (2014); see Cowan, *supra* note 267, at 4.

274. See Cowan, *supra* note 267, at 4.

voluntary rather than regulatory.²⁷⁵ The 110th Congress was not able to pass a law that merely required “[w]hoever, without justification, kills, mutilates, disfigures, tortures, or intentionally causes an animal held for commercial use pain or suffering” be subject to up to one year in jail or up to a \$100,000 fine.²⁷⁶ The 110th²⁷⁷ and 111th²⁷⁸ Congresses failed to pass bills that would have essentially addressed confinement practices in a manner similar to the state ballot initiatives.

Thus, legislation at the federal level and even traditional legislation at the state level fall short because as democratic as a representative democracy attempts to be, it will never be as democratic as direct democratic measures such as state ballot initiatives.²⁷⁹ State ballot initiatives were created specifically to overcome the shortcomings of representative democracy, especially one unfairly influenced by industry resources unavailable to the average citizen. In the instant case, if the state ballot measures approved in Florida, Arizona, and California are at all representative of the general public’s position on sow, calf, and hen confinement, the federal confinement bills should have passed.²⁸⁰ In Florida, in particular, state legislation failed as well.²⁸¹ It was not until Floridians took lawmaking into their own hands, at least lessening the intense influence of industry, that they were able to make law reflect popular demand.²⁸² The shortcomings of current state and federal law are yet another reason why state ballot initiatives are an essential lawmaking mechanism for the improvement of farm animal welfare.

VII. LAWS REGARDING LIVING CONDITIONS CAN APPROPRIATELY BE SET THROUGH STATE BALLOT INITIATIVES

This Article argues that state ballot initiatives are an appropriate means by which the public may establish laws regarding livestock living conditions for three primary reasons. First, as addressed in Part VII.A, the knowledge required is predominantly a consumer-oriented cost-benefit analysis. Second, discussed in Part VII.B, there are many

275. *Id.* at 12.

276. Farm Animals Anti-Cruelty Act, H.R. 6202, 110th Cong. § 3(a) (2008).

277. Farm Animal Stewardship Purchasing Act, H.R. 1726, 110th Cong. (2008).

278. Prevention of Farm Animal Cruelty Act, H.R. 4733, 111th Cong. (2010).

279. *See Making Ballot Initiatives Work: Some Assembly Required*, 123 HARV. L. REV. 959, 959 (2010) (“With initiatives, each person can cast his or her own vote instead of relying on a perhaps-unaccountable representative; thus, all eligible voters can participate in decisionmaking instead of only a select few. Furthermore, broader participation serves as a potential check on tyranny.”).

280. *See supra* Part II.A.

281. *See supra* Part II.A.1.

282. *Supra* Part II.A.1.

analogous arenas where state ballot initiatives have been successfully and appropriately used to create laws that reflect popular opinion; many of these areas pose similar concerns as those expressed by opposition to livestock living condition initiatives. Lastly, Part VII.C argues that state ballot initiatives on the subject of animal welfare do not unduly affect interstate commerce.

A. Knowledge Required: An Understanding of Suffering, Not Expertise

A person of ordinary intelligence can understand the suffering experienced by livestock as a result of the problematic living conditions discussed in this Article. The average person can understand that the indefinite confinement of a sow to a space that only affords it the ability to stand straight up or lay straight down is truly suffering.²⁸³ He can compare his notion of a chicken in a red barn from childhood to one in a cage the size of a file cabinet with eleven other chickens.²⁸⁴ He can imagine the suffering experienced by a calf having his neck tied to a short tether in a stall that never affords him the ability to turn around or walk, ever.²⁸⁵ He can identify with the idea of having his fingertip cut off as a comparable experience to the pain a chicken endures in having the tip of its beak cut off.²⁸⁶ Lastly, especially with the number of pet dogs and cats in the United States, the average person can imagine removing the tail of an animal or the testes of an animal without anesthesia and the intense pain and suffering involved.²⁸⁷ One only need accidentally step on a pet dog or cat's tail, or worse, accidentally close it in a door, to realize that removing the tail, much less its testes, with no pain-mitigating measures would be excruciating. In sum, the average person can understand the difference between considering an animal to be merely another unit in a production scheme as compared to the living creature that it truly is, capable of both physical and mental suffering.²⁸⁸

Unfortunately, however, the public is not allowed to use these basic understandings of pain and suffering to influence farm animal welfare law. Even when it is fed lies about farm animal treatment in product advertising, the public is prevented from seeing these realities by ag-gag and similar laws, and it is prevented from creating law through state ballot initiatives when traditional legislation at the state or federal level fails.²⁸⁹

283. See *supra* Part I.A.

284. See *id.*

285. See *id.*

286. See *infra* Part I.B.

287. See *infra* Part I.C-E.

288. See *Welfare of Intensely Confined Animals*, *supra* note 3, at 1–2, 9.

289. See, e.g., Lynne, *supra* note 98; see *infra* Part VI; see Capps, *supra* note 38 (explaining that even when consumers would like to avoid foods that are derived from animals subject to de-beaking, labeling is unhelpful).

A number of indicators show that consumers are increasingly concerned about farm animal welfare and would like to be able to use that understanding in changing factory farming and in purchasing food: the very existence of humane labels, market research indicating a willingness to pay more for ethically produced food, two-thirds majority success in states as populated as California in passing initiative reform, and support from ten states that have at least begun to address farm animal welfare.

Moreover, a person of average intelligence can contemplate the tradeoff cost of paying more for food in exchange for peace of mind in knowing that food was humanely produced. Humane is defined by what appears to be popular opinion²⁹⁰ not the strange “definition” resulting from the notion of generally accepted practices.²⁹¹ Some generally accepted living conditions practices are functional or purposeful. For example, confining sows leads to a higher level of overall physical herd health, and de-beaking chickens lessens their ability to harm one another.²⁹² However, the balance between stopping the practice of confinement and moving to group housing in exchange for paying a bit more for pork or eggs is something virtually anyone can understand. Not only can the public understand suffering, but it also can understand the economic implications of changing how a farming operation functions. More space for animals means a higher cost for their products, but it also means less guilt in consuming them. Research indicates that this is something for which consumers are willing to pay: one study showed 57% of people are willing to pay one to 10% more, and 12% of people are willing to pay more than 10% more for ethical food. At least for truly free-range eggs, the additional cost would be 7–18 cents, which is just south of 10% more than the average cost of one dozen eggs in the United States.²⁹³

Although at present, the consumer base is one that more frequently chooses cheap food over humane food, that consumer base is also one that is generally not fully aware of factory farm animal treatment.²⁹⁴

290. See Capps, *supra* note 38; *Ethical Food*, *supra* note 93, at 2; see, e.g., *infra* Part II.A.

291. See, e.g., *Generally Accepted Agricultural and Management Practices for the Care of Farm Animals*, *supra* note 204, at 1, 4–7; ME. REV. STAT. ANN. tit. 7, § 4020 (2014); ME. REV. STAT. ANN. tit. 17, § 1039 (2014) (no exception for generally accepted practices); R.I. GEN. LAWS ANN. § 4-1.1-3 (West 2014) (no exception for generally accepted practices).

292. See *infra* Part I.A–B.

293. *Average Retail Food and Energy Prices, U.S. and Midwest Region*, BUREAU OF LABOR & STATISTICS, http://www.bls.gov/regions/mid-atlantic/data/AverageRetailFoodAndEnergyPrices_USandMidwest_Table.htm (updated as of October 2014 and showing an average price of eggs at \$2.03 nationwide); *Ethical Food*, *supra* note 93, at 2–7.

294. See, e.g., Rick McCarty, *Consumers Aware of Factory Farming, Term Creates Negative Impression*, NAT’L CATTLEMEN’S BEEF ASS’N, <http://www.beefusa.org/uDocs/factoryfarming.pdf> (only about 57% of consumers have even heard the term factory farming, and those that have generally associate it with negative picture of agriculture).

While the agricultural industry perpetuates this ignorance through advertising and ag-gag laws, state ballot initiatives pose an opportunity for the public to become educated and to decide for itself.²⁹⁵ Notably, the Florida state ballot initiative kick-started nationwide attention to farm animal welfare, and both the Arizona and California initiatives regarding farm animal welfare were passed with two-thirds majority.²⁹⁶ In fact, increased attention to humanely produced food is a fast-growing trend.²⁹⁷ Not only are the majority of people presently willing to pay more for ethically produced food, at least according to one market study, but the rising generation is even more amenable to greater food cost in exchange for peace of mind.²⁹⁸

Lastly, and most importantly, expertise in such matters as tax and the judicial system, which are common limits to state ballot initiatives, is not required.²⁹⁹ Specifically, veterinary expertise or similar competency is not necessary to understand the suffering experienced by animals in confinement or by animals that are de-beaked, tail docked, or castrated without anesthesia. Humans, as fellow animals, are fully capable of comprehending this suffering and contemplating the value of stopping it. If anything, humans divorced from financial and business incentive, and even farming, are in a better position to value animal suffering because their judgment is not clouded by a desire for profit or by desensitization to the suffering. Ultimately, the question is quite simple: are we willing to pay for animal-derived food in order for animals to be treated more humanely?

B. Analogous Use of State Ballot Initiatives

There are numerous examples of the use of state ballot initiatives that suggest that their use for livestock living conditions is appropriate. Examples include some that significantly affect industry autonomy or increase the cost of food or that involve contemplation of animal suffering.

1. State Ballot Initiatives that Significantly Affect Industry Autonomy or Increase the Cost of Food

In November 2014, four states proposed state ballot initiatives to

295. See *History*, *supra* note 165, at 6–7.

296. See *supra* Part II.A.

297. See *Ethical Food*, *supra* note 93, at 2; Michael Pollan, *The Food Movement Rising*, N.Y. REV. BOOKS (May 10, 2010), <http://michaelpollan.com/articles-archive/the-food-movement-rising/>.

298. See *Ethical Food*, *supra* note 93, at 8.

299. See *supra* Part III.

increase the minimum wage.³⁰⁰ Naturally, an increase in minimum wage has a substantial impact on businesses and communities.³⁰¹ It involves consideration of the impact on the number of jobs available, the prevalence of entrepreneurship, and the price of goods and services.³⁰² Much like the living condition adjustments required by livestock welfare initiatives, minimum wage initiatives typically involve a delayed effective date in order to allow the industry to make necessary accommodations.³⁰³ Most of the public is likely aware that increasing the cost of labor requires businesses to make modifications, much like a farmer might have to make housing accommodations for her animals. Even so, the public is generally viewed as capable of considering these costs for the benefit of an increased minimum wage.³⁰⁴

Another analogous initiative example is one that proposes labeling genetically modified organisms (GMOs) in genetically engineered food, a particularly common topic among state ballot initiatives. Among the thirty or so states that have contemplated or passed GMO legislation, several have done so through state ballot initiatives.³⁰⁵ California Proposition 37 was one of the first, and it sparked interest in the issue of labeling GMOs nationwide.³⁰⁶ In the most recent state elections, Colorado and Oregon had GMO initiatives on the ballot.³⁰⁷ The primary arguments against labeling GMOs are that (1) labeling will cause unfounded concern over their presence in food items and (2) labeling will drive up the cost of food.³⁰⁸ Similarly, farmers make arguments that the public's concern over the livestock living conditions and practices discussed in this Article are unfounded because they are generally

300. Niraj Chokshi, *Everything You Need to Know about Tuesday's 146 State Ballot Measures*, WASH. POST (Nov. 3, 2014), available at <http://www.washingtonpost.com/blogs/govbeat/wp/2014/11/03/everything-you-need-to-know-about-the-146-state-ballot-measures-voters-will-consider-tuesday/>.

301. Jeffrey Dorfman, *People Support Raising the Minimum Wage Until Told the Costs*, FORBES (May 22, 2014, 9:05 AM), <http://www.forbes.com/sites/jeffreydorfman/2014/05/22/people-support-raising-the-minimum-wage-until-told-the-costs/>.

302. *Id.*

303. See Chokshi, *supra* note 300.

304. See Dorfman, *supra* note 301.

305. *Map*, RIGHT TO KNOW GMO, <http://www.righttoknow-gmo.org/states> (last visited Jan. 3, 2015).

306. See *California*, RIGHT TO KNOW GMO, <http://www.righttoknow-gmo.org/states/california> (last visited Dec. 16, 2014).

307. *Proposition 105*, RIGHT TO KNOW COLORADO, <http://www.righttoknowcolorado.org/> (last visited Jan. 3, 2015); *Proposition 105*, YES ON 92, <http://oregonrighttoknow.org/challenge-ballots/> (last visited Jan. 3, 2015).

308. See, e.g., *Vote "no" on Proposition 105, GMO Labeling Measure*, DENVER POST (Oct. 1, 2015, 5:17 PM), http://www.denverpost.com/editorials/ci_26697300/vote-no-proposition-105-gmo-labeling-measure.

accepted practices in the farming industry.³⁰⁹ This is not unlike the sort of blanket acceptance afforded by the Food and Drug Administration (FDA) to GMOs when the FDA deemed GMOs not substantially different from their natural counterparts based solely on what has been widely criticized as inadequate testing performed solely by industry.³¹⁰ Further, because GMOs were classified as such, more testing was not required.³¹¹ In both instances, the public has deemed industry claims as questionable.³¹² In addition, both labeling GMOs and improving livestock living conditions might require an increase in the cost of food.³¹³ Yet, in the context of GMO legislation, it seems to be generally accepted that the public can comprehend this consequence to change.³¹⁴

2. State Ballot Initiatives that Involve Contemplation of Animal Suffering in Other Realms

Numerous state ballot initiatives have been proposed in order to change or create laws affecting animal welfare. For example, Maine recently proposed a law to make bear hunting more fair by ending “the inhumane and unsporting practices of bear hounding, baiting and trapping.”³¹⁵ The Maine Fair Bear Hunting Act would prohibit anything but traditional, fair-chase bear hunting in order to align its state with most others.³¹⁶ Arizona passed Proposition 201 to make cockfighting a crime.³¹⁷ California’s Proposition 6 was passed in order to prohibit the slaughter of horses for human consumption, the sale of horsemeat for human consumption, and the transport of horses out of state in order to be slaughtered for human consumption.³¹⁸ Florida approved Amendment

309. See, e.g., IND. CODE § 15-17-3-23 (2014).

310. *Statement of Policy—Foods Derived from New Plant Varieties*, FDA, available at <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Biototechnology/ucm096095.htm> (last visited Jan. 3, 2015).

311. *Id.*

312. See *Map*, *supra* note 305.

313. See, e.g., William Lesser, *Cost Consumers Union Critique of “Costs of Labeling Genetically Modified Food Products in N.Y. State,”* at 2–3, 5, available at <http://dyson.cornell.edu/people/profiles/docs/LabelingNY.pdf>; *supra* Part IV.A.

314. See, e.g., *GMO Labeling Will Cost Consumers Less than a Penny a Day*, *New Report Says*, CONSUMERS UNION, POLICY & ACTION FROM CONSUMER REPORTS (Oct. 1, 2014), <https://consumersunion.org/news/gmo-labeling-will-cost-consumers-less-than-a-penny-a-day-new-report-says/>.

315. *Ballot Measures*, HUMANE SOCIETY LEGISLATIVE FUND, <http://www.hslf.org/our-work/learn-more-about-ballot.html> (last visited Dec. 16, 2014).

316. *Id.*

317. *Arizona Cockfighting as a Crime, Proposition 201 (1998)*, BALLOTPEDIA, http://ballotpedia.org/Arizona_Cockfighting_as_a_Crime,_Proposition_201_%281998%29 (last visited Dec. 16, 2014) [hereinafter *Arizona Proposition 201*].

318. *California Proposition 6, Prohibition on Slaughter of Horses for Human Consumption*

3 to its state constitution in order to “[l]imit[] the use of nets for catching saltwater finfish, shellfish, or other marine animals by prohibiting the use of gill and other entangling nets in all Florida waters, and prohibiting the use of other nets larger than 500 square feet in mesh area in nearshore and inshore Florida waters.”³¹⁹

The Maine and Arizona initiatives clearly result from public concern over the welfare of animals.³²⁰ The Maine initiative, in particular, aims to avoid unnecessary suffering on the part of bears in the process of being hunted.³²¹ Quite similarly, improvements to the problematic livestock living conditions at issue in this paper aim to do the same for farm animals in the process of rearing them for slaughter.³²² The Arizona cockfighting initiative acknowledges that animals do suffer and that that suffering is not necessarily worth human gain (*i.e.*, it deems chickens being shredded to death for the sake of entertainment inappropriate).³²³ Especially considering the surplus of food in this nation,³²⁴ it seems perfectly comparable for states to deem livestock suffering for the sake of more and cheaper meat and eggs inappropriate.

The California and Florida initiatives both clearly alter how an industry may conduct itself.³²⁵ Specifically, the California statute wholly eliminates an industry based largely, if not solely, on the moral determination that a certain animal should not be eaten. However, this is far beyond the hopes of the initiatives at issue in this Article, which only aims to treat animals humanely before inevitable slaughter.³²⁶ More analogous is the Florida initiative, eliminating fishermen freedom much like the farmer freedom emphasized by opposition to improvements in livestock living conditions.³²⁷ Net fishing assuredly has its benefits: much like confinement, de-beaking, tail docking, and castration, using nets allows fishermen to catch more fish with less effort, ultimately making

(1998), *BALLOTPEDIA*, http://ballotpedia.org/California_Proposition_6_Prohibition_on_Slaughter_of_Horses_for_Human_Consumption (1998) (last visited Sept. 21, 2015) [hereinafter *California Proposition 6*].

319. *Florida Marine Net Fishing, Amendment 3 (1994)*, *BALLOTPEDIA*, http://ballotpedia.org/Florida_Marine_Net_Fishing_Amendment_3_%281994%29 (last visited Dec. 16, 2014) [hereinafter *Florida Amendment 3*].

320. *Ballot Measures*, *supra* note 315.

321. *Id.*

322. *See supra* Part II.

323. *See Arizona Proposition 201*, *supra* note 317.

324. *See, e.g., U.S. Could Feed 800 Million People with Grain that Livestock Eat*, *Cornell Ecologist Advises Animal Scientists*, *CORNELL CHRON.* (Aug. 7, 1997), available at <http://www.news.cornell.edu/stories/1997/08/us-could-feed-800-million-people-grain-livestock-eat> (last visited Dec. 17, 2014); *see* SIMON FARLIE, *MEAT: A BENIGN EXTRAVAGANCE* (2011).

325. *California Proposition 6*, *supra* note 318; *Florida Amendment 3*, *supra* note 319.

326. *See generally Arguments in Favor of Proposition 6*, *CALIFORNIA VOTER GUIDE*, <http://www.voterguide.sos.ca.gov/past/2008/general/argu-rebut/argu-rebutt6.htm>.

327. *See Florida Amendment 3*, *supra* note 319.

the fish cheaper for consumers.³²⁸ However, the very same public (*i.e.*, the very same consumers) has voted that potentially cheaper fish is not worth the suffering that large nets cause animals.³²⁹

Thus, using state ballot initiatives for the purpose of improving the living conditions of livestock is not different from the use of initiatives in many other realms relying at least in part on animal welfare concerns. The public has historically been permitted to make laws via initiatives for the sake of animal welfare,³³⁰ and drawing a line at farm animals would be completely arbitrary.

C. State-Level Improvements to Animal Welfare Do Not Unduly Affect Interstate Commerce

While some might express concern that allowing state-level changes to farm animal welfare will affect out-of-state, national, or even international consumers because the food industry is predominantly comprised of national and international companies, the same can be said for virtually any industry.³³¹ Labeling GMOs in one state could raise the cost of certain food items nationally.³³² Limiting chemicals in products, something the highly populated state of California has progressively done, could raise the cost of particular goods across states and have widespread economic impact.³³³ However, above and beyond the average consumer product, the ability of consumers to influence food production, even at the state level, is particularly important because food consumption is a unique act of the consumer. It involves integrating a product with one's body in a way unmatched by most other consumer products.³³⁴ Not only is the "ripple effect" argument unreasonable in and of itself considering the breadth of our national economy and the world economy, but the argument is particularly unpersuasive for food because influence on food should receive more consideration than most consumer

328. *The Advantages of Net Fishing*, TRAILS.COM, https://www.trails.com/list_33251_advantages-net-fishing.html.

329. See *Florida Amendment 3*, *supra* note 319.

330. For a list of fifty state ballot measures dating as far back as 1912 on the subject of animal treatment, see *Treatment of Animals on the Ballot*, BALLOTPEDIA, http://ballotpedia.org/Treatment_of_animals_on_the_ballot.

331. See Kate Robertson, *America's Biggest Food Companies*, FORBES, (Nov. 2, 2010, 10:13 AM), <http://www.forbes.com/sites/investopedia/2010/11/02/americas-biggest-food-companies/>.

332. See *GMO Labeling Will Cost Consumers Less than a Penny a Day*, *supra* note 314.

333. See, e.g., *Green Chemistry*, CAL. DEP'T OF TOXIC SUBSTANCES CONTROL, <https://www.dtsc.ca.gov/PollutionPrevention/GreenChemistryInitiative/NewsArchive.cfm>; Jeffrey B. Margulies & William L. Troutman, *The Safer Consumer Product Regulation—California's Green Chemistry Initiative*, FULBRIGHT & JAWORSKI, L.L.P., available at http://www.nortonrosefulbright.com/files/us/e_templates/Data/!Tik/02212013EnvironmentalWP/WhitePaper2.pdf.

334. See *What is Food Sovereignty?*, *supra* note 258.

products.³³⁵ Furthermore, at least one effort to raise this argument in federal court was entirely unsuccessful.³³⁶

VIII. STATE BOARDS WILL INEVITABLY OVER-REPRESENT AGRICULTURAL INTERESTS

Not only are the fears surrounding improvements to livestock living conditions unfounded, livestock care standards boards are also a particularly inadequate solution to those fears. A closer look at the boards reveals not only bias but also that the purported fears are actually an effort for big industries to avoid change. In light of board bias and the cognitive dissonance between animal product advertising and the purpose of the boards, it becomes much more apparent that making improvements to livestock living conditions is yet one more consumer plight against a food industry that is increasing in size and influence.

Of the eight state livestock care standards boards, only one gives any substantial weight to considering or re-considering animal welfare.³³⁷ At least seven of the thirteen members of the Ohio board will assuredly represent agricultural interests.³³⁸ The same holds true for a majority of the members on the West Virginia board and the vast majority of the members on the Utah, Kentucky, and Illinois boards.³³⁹

In predominantly representing agricultural interests, these boards will focus on generally accepted practices as a measure of animal welfare,³⁴⁰ something the Indiana board explicitly states that it will do.³⁴¹ They will, in all likelihood, not re-evaluate the value of any practices; this notion is founded not only on the structure of the boards but also on the actions of the boards to date. Under all but the Rhode Island board, farm animal welfare likely will not change until the farmers themselves decide to change by creating new generally accepted practices. Animal welfare, in turn, will continue to be driven by profit and the herd health

335. See Whitney R. Morgan, *The Prohibition of MOOshine: A Consumer Protection Analysis of Raw Milk in Interstate Commerce*, 117 W. VA. L. REV. 385, 386–87 (2014).

336. Claims for violation of the Commerce and Supremacy Clause brought by six states against the state of California's law requiring all eggs sold within the state not be from battery hens were dismissed by a federal judge for lack of standing because states did not bring the action on behalf of their residents in general, but on behalf of a discrete group of farmers, the states had no quasi-sovereign interest in the matter, and any harm was speculative. *Missouri v. Harris*, 496147358 F. Supp. 3d 1059, 1060 (E.D. Cal. 2014); see *Judge Dismisses Challenge to California Egg Law*, *supra* note 96.

337. R.I. GEN. LAWS §§ 4-26-1–6 (2014).

338. OHIO CONST. art. XIV, § 1(A)–(B).

339. UTAH CODE ANN. § 4-2-7 (West 2014); W. VA. CODE §§ 19-1C-1–6 (2014).

340. See, e.g., *Generally Accepted Agricultural and Management Practices for the Care of Farm Animals*, *supra* note 204.

341. IND. CODE § 15-17-3-23. (2014).

assessment.³⁴² Again, the herd health assessment, as a measure of animal welfare, focuses on the physical health of animals in terms of productivity: how much healthy meat is coming out of a herd.³⁴³ This assessment pays little or no regard to the physical or mental health of individual animals,³⁴⁴ which is evidenced by the very existence of such practices as confinement, de-beaking, tail docking, and castration without anesthesia.³⁴⁵ Even the common name of these boards—livestock care standard boards—is indicative of what these boards will focus on. They are not farm animal welfare boards. They are care standard boards. It is no surprise that aside from Ohio and Rhode Island, not one of the states with a board has passed any laws improving farm animal welfare.³⁴⁶ In effect, most of these boards have accomplished what they set out to do: prevent farm animal welfare improvements, particularly through the initiative process.

Equally disconcerting, in over-representing agricultural interests, boards also undermine the experimentation function of federalism. Boards will perpetuate the status quo and prevent states from implementing more stringent animal welfare laws on a small scale in order to more quickly and easily assess their value in terms of food cost, general economic impact, and animal welfare improvement. In light of the increased interest in ethically produced food,³⁴⁷ this experimentation may very well be critical to adjusting a system that is demonstrably resistant to change.

CONCLUSION AND A WORD ON ETHICAL FOOD³⁴⁸

A general movement towards more autonomy in food choice and more access to alternative food choices is occurring.³⁴⁹ This has value and reflects the notion that food choice should be something at least analogous to a fundamental right because it has close ties to many Constitutional protections.³⁵⁰ At the very least, it is a movement to

342. See *Welfare of Intensely Confined Animals*, *supra* note 3, at 1.

343. *Id.* at 9.

344. *Id.* at 6.

345. See *supra* Part II.

346. Vick, *supra* note 207, at 156–57. Ohio’s board was formed as part of an agreement that an initiative against confinement would be withheld from the ballot in exchange for the board addressing certain animal welfare issues.

347. See *Ethical Food*, *supra* note 93, at 2.

348. This Article is part of what I hope will be a growing body of work adding to food sovereignty discourse. See Morgan, *supra* note 335.

349. See *What is Food Sovereignty?*, *supra* note 258.

350. See *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 279 (1990); *Roe v. Wade*, 410 U.S. 113, 153 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992);

democratize food and agricultural choices.³⁵¹ What people choose to put into their bodies sustains life, affecting both mental and physical health.³⁵² Food choice is a different decision than many other consumer decisions: “[i]t is connected to autonomy in health, religion, cultural beliefs, and other forms of expression.”³⁵³

The movement towards more humane treatment of farm animals is in line with the goals of food sovereignty insofar as that movement seeks to reflect what consumers want. Indeed, farmers have acknowledged that they would expect the public to be opposed to industrialized practices. At least one survey showed serious opposition to castration without anesthesia, for example.³⁵⁴ Further, state ballot initiatives on the subject matter of confinement have been passed such almost two-thirds majority.³⁵⁵ This level of support reaches well beyond the impassioned or irrational few and likely represents a much more balanced consideration of the animal welfare issues.

American farm life has been idealized throughout our lives. Many of us played with Fisher Price red barn and farm animal sets or similar toys, and we happily sang “Old McDonald.”³⁵⁶ Furthermore, many Americans have animals in their homes.³⁵⁷ We are well-connected both with the idea of traditional farm life and the well-being of animals. We are *not* well-versed in the notion of industrialized farm life and animals being treated almost exclusively as production units. If after becoming informed about the reality of “modern,” industrial farm life, the public is dissatisfied with its methods, it should be afforded the opportunity to use democratic processes to change it, especially through ballot initiatives when representative legislatures fail to reflect popular opinion.

The public can and should be able to make laws improving farm animal welfare, and state ballot initiatives are an essential mechanism for doing so because the public is the consumer base ingesting products from living animals. The public is perfectly capable of weighing what are primarily economic considerations at issue in making living condition improvements and is otherwise exploited by the farming industry through

Washington v. Harper, 494 U.S. 210, 221–22 (1990); see also Kammi Rencher, *Food Choice and Fundamental Rights: A Piece of Cake or Pie in the Sky?*, 12 NEV. L.J. 418, 427–31 (2012).

351. See *What is Food Sovereignty?*, *supra* note 258.

352. See *Cruzan*, 497 U.S. at 279; *Roe*, 410 U.S. at 153; *Casey*, 505 U.S. at 852 (1992); *Harper*, 494 U.S. at 221–22; see also Rencher, *supra* note 350, at 427–31.

353. Morgan, *supra* note 335, at 396.

354. See *Literature Review*, *supra* note 18, at 2.

355. See *2006 General Election*, *supra* note 120.

356. See Sarah Searle, *Stop Romanticizing Farms*, MODERN FARMER (July 30, 2014), <http://modernfarmer.com/2014/06/stop-romanticizing-farms/>.

357. U.S. Pet Ownership Statistics, AM. VETERINARY MED. ASS'N, <https://www.avma.org/KB/Resources/Statistics/Pages/Market-research-statistics-US-pet-ownership.aspx> (last visited Jan. 3, 2014).

product advertising that misleadingly depicts idyllic farm life. The public is quite capable of assessing the value of some farming practices against the cost of ceasing them.³⁵⁸ The establishment of state boards as an effort to avoid the irrational public is actually an effort to undermine consumer voice.³⁵⁹ There is little to no real fear that consumers will go too far. The majority of Americans are meat eaters and likely will continue to be.³⁶⁰ The only problem for farmers, if it is a problem at all, is that many Americans are also meat eaters with a conscience.³⁶¹

358. *See supra* Part VII.A.

359. *See supra* Part VIII.

360. Frank Newport, *In U.S., 5% Consider Themselves Vegetarians*, GALLUP, (July 26, 2012), <http://www.gallup.com/poll/156215/consider-themselves-vegetarians.aspx> (indicating approximately 95% of Americans are not vegetarians).

361. *See supra* Part II; *see also Ethical Food, supra* note 93, at 2.

