

AN INVESTIGATION INTO THE POTENTIAL IMPACT OF
CARVE-OUTS FOR RANCHING AND FARMING PROTECTIONS
THROUGH STATE CONSTITUTIONAL AMENDMENTS

*Michele H. Inman**

I. INTRODUCTION

In recent years, a number of states have sought to amend their constitutions to provide special protections against legislative enactments which may impinge on “farming and ranching” activities.¹ In fact, North Dakota and Missouri have already amended their state constitutions to guarantee the rights of ranchers and farmers to engage in their current practices as well as in unforeseeable technically enhanced practices with unknown ramifications.² In Indiana, the Senate considered amending its state constitution to protect the right to farm and ranch in 2015, but declined to do so.³ More recently in 2016, Oklahoma State Senator Scott Biggs used similar language that provided special protections for these carved-out activities in a proposed constitutional amendment that was placed on the November ballot.⁴ The voters defeated the proposal.⁵ Nebraska was expected to introduce a similar measure in 2017 after Senator John Kuehn, the measure’s sponsor,

* J.D. 2018, Oklahoma City University School of Law.

¹ See Brooke Jarvis, *A Constitutional Right to Industrial Farming?*, BLOOMBERG (Jan. 9, 2014), <http://www.bloomberg.com/news/articles/2014-01-09/industrial-farming-state-constitutional-amendments-may-give-legal-shield>.

² See Logan Layden, *Uncertainty Surrounds Right-to-Farm Even in States that Adopted It Years Ago*, STATEIMPACT (Oct. 13, 2016), <https://stateimpact.npr.org/oklahoma/2016/10/13/uncertainty-surrounds-right-to-farm-even-in-states-that-adopted-it-years-ago/>.

³ See Associated Press, *Senate Defeats Proposed Farming Constitutional Amendment*, DAILY HERALD, (Feb. 24, 2015), <http://www.dailyherald.com/article/20150224/news/302249875/> (stating that the Indiana Senate voted against the measure 28-22).

⁴ See Cody Carlson, *Farmed Animals Swept the Polls This Election Day!*, MERCY FOR ANIMALS (Nov. 8, 2016), <http://www.mercyforanimals.org/farmed-animals-swept-the-polls-this-election-4/>; Laura Eastes, *Law Language of State Question 777 Is Major Issue for Opponents as Supporters Preach Its Protections*, OKLA. GAZETTE (Nov. 2, 2016), <https://www.okgazette.com/oklahoma/law-language-of-state-question-777-is-major-issue-for-opponents-as-supporters-preach-its-protections/Content?oid=2981576>. State question No. 777 was voted down by popular vote in Oklahoma with 60% of voters voting against the measure. Carlson, *supra*.

⁵ Carlson, *supra* note 4.

moved to delay the measure during the final weeks of the 2016 legislative session because some legislators, including one who removed her name as co-sponsor before the debate began, felt that there was too little information about how these constitutional amendments work and whether they are needed in the first place.⁶

Nonetheless, there's no reason to think that other states, particularly states like North Carolina, which harbors the largest hog slaughtering plant in the world,⁷ will not soon be seeking to adopt these same types of amendments to their state constitutions.

Several questions come to mind when scrutinizing these proposed constitutional amendments. Who qualifies as a "rancher" or "farmer"? Why grant special status to ranching and farming as opposed to any other business or industry? How are these proposed constitutional amendments different from the Right to Farm statutes that all fifty states have on the books that protect farmers and ranchers from nuisance lawsuits?⁸ What probable effects will propositions like these have on the interests of parties other than those of ranchers and farmers? What are the vices and virtues of the potential impacts of "Right to Farm" amendments upon anticipated regulatory issues that may arise in the areas of animal cruelty; environmental damage; human nutrition and food safety; and business interests?⁹

This note investigates the following question: Is it reasonable to create additional rights for ranchers and farmers through state constitutional amendments? This note concludes that the ranchers and farmers benefited by these propositions are not individual, family, or organic farmers, but animal agricultural giants who operate intensive industrial factory farms and slaughterhouses. State laws already provide many agribusiness protections, and agribusiness activities have significant and detrimental effects on

⁶ See Kate Sullivan, *'Right to Farm' Amendment Put on Hold*, GRAND ISLAND INDEP. (Mar. 26, 2016), http://www.theindependent.com/opinion/another_opinion/rifht-to-farm-amendment-put-on-hold/article_ef567c9c-f2da-11e5-8b90-1b5edf8c0963.html ("We simply don't know enough about how the constitutional amendments in these states will work or are working. Nebraska shouldn't leap into this issue without additional study, an understanding of the potential effects of the amendment on the ability of future Nebraska Legislatures to respond to the needs of its citizens, and whether the protections are truly needed in our state.").

⁷ STEVEN M. WISE, *AN AMERICAN TRILOGY: DEATH, SLAVERY, AND DOMINION ON THE BANKS OF THE CAPE FEAR RIVER* 103 (2009).

⁸ See Kyle Weldon & Elizabeth Rumley, *States' Right-to-Farm Statutes*, NAT'L AGRIC. L. CTR., <http://nationalaglawcenter.org/state-compilations/right-to-farm/> (last visited Apr. 22, 2018). The laws "protect qualifying farmers and ranchers from nuisance lawsuits filed by individuals who move into a rural area where normal farming operations exist." *Id.*

⁹ See *Industrial Livestock Production*, GRACE COMM. FOUND., <http://www.sustainabletable.org/859/industrial-livestock-production> (last visited Apr. 22, 2018).

animal treatment;¹⁰ the planet's health;¹¹ human nutrition and food safety;¹² and alternative food production and associated businesses.¹³

II. BACKGROUND

A. Purpose and History of State Constitutional Amendment Propositions

States generally differ on the methods used to amend their constitutions in two ways: through the state legislature or by popular initiative.¹⁴ All states, except for Delaware, allow propositions by the legislature though some states require a supermajority in the legislature, while others permit referendums, which are direct votes by the people, or a combination of both or other special procedures.¹⁵ Indiana sought to add its “[R]ight to [F]arm” proposition to its constitution through its legislature.¹⁶ Others may use a referendum that is not through the legislature, but triggered by popular initiative.¹⁷ This process is widely considered to be impracticable

¹⁰ See Jarvis, *supra* note 1; *Animal Welfare*, GRACE COMM. FOUND., <http://www.sustainabletable.org/274/animal-welfare> (last visited Apr. 22, 2018).

¹¹ WISE, *supra* note 7, at 222–23; *Environment*, GRACE COMM. FOUND., <http://www.sustainabletable.org/265/environment> (last visited Mar. 9, 2018).

¹² See Aviva Shen, *How Factory Farms Quietly Defeated Food Safety in North Dakota*, THINKPROGRESS (Nov. 13, 2012), <https://thinkprogress.org/how-factory-farms-quietly-defeated-food-safety-in-north-dakota-c20524d8ec02/>; *Food Safety*, GRACE COMM. FOUND., <https://www.sustainabletable.org/501food-safety> (last visited on Apr. 22, 2018).

¹³ See *Food Economics*, GRACE COMM. FOUND., <http://www.sustainabletable.org/491/food-economics> (last visited Apr. 22, 2018); *Tyson Foods Sales Plummet; Stock Crashes; CEO Fired*, KIRSCHNER'S KORNER (Nov. 21, 2016), <https://kirschnerskorner.com/2016/11/21/tyson-foods-stock-crash/> [hereinafter *Tyson Foods Sales Plummet*].

¹⁴ See WILLIAM N. ESKRIDGE JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 367 (5th ed. 2014); *State-by-State List of Initiative and Referendum Provisions*, INITIATIVE & REFERENDUM INST. AT USC, http://web.archive.org/web/20160211180917/http://www.iandrinstitute.org/statewide_i&r.htm (last visited Apr. 22, 2018) (indicating differences in each state's initiative or referendum process). One of the instruments of direct democracy is the initiative with “more than 70% of Americans liv[ing] in a state, locality, or both that provide access to the initiative . . . [which] allows a certain percentage of the electorate to petition to have a proposed statute or amendment to the state constitution put on the ballot for a vote of the electorate.” ESKRIDGE ET AL., *supra* note 14, at 367. Under the direct initiative, “the issue goes on the ballot automatically after the requisite signatures of voters are collected, [while under the less common] indirect initiative, after the collection of the requisite signatures, the proposed statute is submitted to the legislature” before it is placed on the ballot in its original or amended form. *Id.* at 367–68.

¹⁵ See *State-by-State List of Initiative and Referendum Provisions*, *supra* note 14 (“Every state has some form of the legislative process which allows the government to place issues on the ballot.”).

¹⁶ See Associated Press, *supra* note 3.

¹⁷ See ESKRIDGE ET AL., *supra* note 14, at 368.

because the ballot qualification standards require a minimum number of signatures that are generally exceedingly high;¹⁸ yet the Right to Farm proposition had been successfully placed on the ballot in North Dakota,¹⁹ reflecting the money and power of agribusiness special interests to meet the qualification standard. And, while Missouri and Oklahoma both allow the initiative process, the Right to Farm measures in both states were referred by the state legislatures.²⁰

Initiative petitions have arisen historically as a way for individuals to bypass the federal and state legislative process because “voters may write statutes . . . which will go to the ballot if sufficient valid petition signatures are gathered” to protect their rights and interests.²¹ This legal shortcut has been adopted by states to allow their citizens who felt they were unrepresented by their representatives and under-represented in the Congress to more directly have their voices heard.²² Thus, state constitutions can provide rights not provided elsewhere.²³

Not all states recognize constitutional amendments by initiatives, though virtually all allow them by legislative referral.²⁴ In fact, just eighteen states recognize initiatives²⁵ and they require a requisite

¹⁸ See e.g., Jim Nintzel, *Extra-Special Interests: A Look at Who's Really Paying for This Year's Crop of Props*, TUCSON WEEKLY (Oct. 16, 2008), <https://www.tucsonweekly.com/tucson/extra-special-interests/Content?oid=1092953> (“[I]nitiatives have moved away from empowering the average citizen and toward becoming a plaything for well-heeled special interests to experiment in democracy.”).

¹⁹ See *Initiated Constitutional Measure 3 (2012)*, ANIMAL LEGAL & HIST. CTR., <https://www.animallaw.info/statute/nd-initiatives-initiated-constitutional-measure-3-right-farm> (last visited Apr. 22, 2018); *North Dakota Farming and Ranching Amendment, Measure 3 (2012)*, BALLOTPEDIA, [https://ballotpedia.org/North_Dakota_Farming_and_Ranching_Amendment,_Measure_3_\(2012\)](https://ballotpedia.org/North_Dakota_Farming_and_Ranching_Amendment,_Measure_3_(2012)) (last visited Apr. 22, 2018) (stating that the campaign was led by N.D. Feeding Families Committee and that supporters submitted a minimum of 26,904 valid signatures for the ballot qualification).

²⁰ See MO. CONST., art. I, § 35; *Missouri Right-To-Farm, Amendment 1 (August 2014)*, BALLOTPEDIA, [https://ballotpedia.org/Missouri_Right-to-Farm,_Amendment_1_\(August_2014\)](https://ballotpedia.org/Missouri_Right-to-Farm,_Amendment_1_(August_2014)) (last visited Apr. 22, 2018); *Oklahoma Right to Farm Amendment, State Question 777 (2016)*, BALLOTPEDIA, [https://ballotpedia.org/Oklahoma_Right_to_Farm_Amendment,_State_Question_777_\(2016\)](https://ballotpedia.org/Oklahoma_Right_to_Farm_Amendment,_State_Question_777_(2016)) (last visited Apr. 22, 2018).

²¹ See David B. Magleby, *Let the Voters Decide? - An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 13 (1995); Dennis W. Arrow, *Representative Government and Popular Distrust: The Obstruction/Facilitation Conundrum Regarding State Constitutional Amendment by Initiative Petition*, 17 OKLA. CITY U.L. REV. 3, 7–8, 8 n.17, n.18 (1992).

²² See Arrow, *supra* note 21, at 7.

²³ See *id.* at 8, 9–11.

²⁴ See *State-by-State List of Initiative and Referendum Provisions*, *supra* note 14.

²⁵ *Id.* (showing that the following states allow initiated, or direct, state constitutional amendments: Arizona, Arkansas, California, Colorado, Florida, Illinois, Michigan, Missouri,

number of signatures on a petition (between three and fifteen percent of typically the last gubernatorial election total, a generally high standard) in order to appear on the ballot.²⁶

State constitutional amendments are generally welcomed by state supreme courts since they seek “to insulate their decisions [that are above the federal constitutional floor] from Supreme Court review.”²⁷ The standard for avoiding Supreme Court review of a state law judicial decision is an explicit “plain statement” by the state that its holding is based on an “adequate and independent state ground[]” (i.e., a state constitutional amendment) as outlined in *Michigan v. Long*.²⁸

Some people vaunt the constitutional initiative, legislative proposition, and the referendum as an opportunity to educate the public at large on important issues that impact its well-being and interests.²⁹ However, others lament that special interests are typically necessary to propose the initiative and referendum, write the language of the proposition, campaign for and solicit signatures for the ballot, and then advertise their arguably one-sided message to persuade voters.³⁰ Some argue that the constitutional proposition process provides for citizen participation and issue debate, which increases voter turnout and the number of informed voters,³¹ while representational government results in “[l]egislators consistently vot[ing] on legislation without understanding what is in it [since] reading the bill usually is not part of the procedure, and listening to

Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota); *see also* ESKRIDGE ET AL., *supra* note 14 at 368, 370, 371 (“[Twenty-seven] states provide for initiative, popular referendum or both. Eighteen of those states have a constitutional initiative process, through which the people can directly initiate a constitutional change; 21 have a statutory initiative process. . . . A popular vote is required in every state except Delaware for adoption of constitutional amendments. . . . [O]ver 60% of all initiative activity has taken place in just six states—Arizona, California, Colorado, North Dakota, Oregon and Washington.’ . . . [Hybrid democracy] tend[s] to weaken representative institutions and undermine the ability of lawmakers to govern . . . reduc[ing] the discretion of elected officials. . . . Madison and the Founders favored representative democracy and rejected direct democracy at the national level . . . because of . . . impassioned majorities threaten[ing] the rights of minorities.”).

²⁶ Arrow, *supra* note 21, at 8 n.17.

²⁷ Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 171–72 (1983).

²⁸ *See* *Michigan v. Long*, 463 U.S. 1032, 1041–42 (1983) (citing *Herb v. Pitcairn*, 324 U.S. 117, 125, 126 (1945); then citing *Able State Bank v. Bryan*, 282 U.S. 765, 773 (1931)).

²⁹ Matt Childers & Mike Binder, *Law & Politics in the Age of Direct Democracy: The Differential Effects of Initiatives and Referenda on Voter Turnout in the United States, 1890–2008*, 19 CHAP. L. REV. 35, 35–36 (2016).

³⁰ *See id.*; John Diaz, *A Long Way from the Grassroots*, SFGATE, (Oct. 12, 2008), <https://www.sfgate.com/opinion/article/A-long-way-from-the-grassroots-3190565.php>.

³¹ *See, e.g.*, Childers & Binder, *supra* note 29 at 35–36.

debate on the bill's merits certainly is not either."³² Furthermore, the legislative process allows for "logrolling," which essentially means that several issues, none of which have a majority backing, are passed together in one legislative bill so that minority factions win in the end.³³

Finally, in a representational government, politicians are elected to act in the public interest, yet oftentimes we experience the "[p]rincipal-agent problem," where agents ignore the public interest if it is not in their own self-interest.³⁴ Similarly, "public choice" theorists argue that voters "vote in their best economic interest, period," affecting not only public voting, but also resulting in a concentration of lobbying effort and political desire of legislators to remain incumbent to fulfill voters' self-interests, which impact the outcomes of not only representational government but state

³² Arrow, *supra* note 21, at 52.

³³ *See id.* at 22–23. The name logrolling comes from the idea that "minority interests work together to enact a bill, providing goodies to the organized constituents of a majority of lawmakers." ESKRIDGE ET AL., *supra* note 14, at 44. Public choice theorists suggest that with logrolling, minority groups "can express the intensity of their preferences by their willingness to trade votes for their favored proposals, in return for supporting proposals they would otherwise oppose." *Id.* at 313. "The modern concern is that the initiative process is merely another avenue for the wealthy to influence public policy unduly." *Id.* at 371. "One substantial expense for initiative proponents is money spent to qualify a question for the ballot. It often requires hundreds of thousands of signatures to trigger a vote on a direct initiative or popular referendum. Well-funded interests have a great advantage at this stage because states may not prohibit them from paying petition circulators." *Id.* at 372. "In short, money is a sufficient condition for ballot access [so that] . . . groups with funds will determine which issues are placed before the people." *Id.* Ballot measures often boost voter turnout while stimulating new laws by the legislature from initiative proponent pressure so that "direct democracy favors the majority, rather than special interests." *Id.* at 384, 385. Finally, there is the implementation problem where "initiatives must be implemented by elected and appointed officials—people who often resisted the policy in the first place." *Id.* at 386. "Of course, some initiatives are struck down by courts holding that they are unconstitutional or legally flawed in some way. Here the people cannot get what they want because their preferences conflict with larger principles and values, such as the protection of individual rights guaranteed in the Constitution." *Id.*

³⁴ *See* Thayer Watkins, *Public Choice Theory*, SAN JOSE STATE UNIV. ECON. DEP'T, <https://sjsu.edu/faculty/watkins/publicchoice.htm> (last visited Apr. 23, 2018); *Food Policy & Regulation*, GRACE COMM. FOUND., <https://www.sustainabletable.org/497/food-policy-regulation> (last visited Apr. 23, 2018) ("[A]gribusiness uses its enormous wealth to influence government decisions. . . . [A]lso [it] lobbies hard on the state level. In 2009, agribusiness went on the attack in Ohio, creating a state ballot measure that proposed shifting oversight of factory farms from the Ohio State Department of Agriculture to a governor-appointed board, packed with members friendly to corporations. The proponent group generated an incredible \$5.4 million in a matter of a few weeks from corporate players like Monsanto and Cargill, using the money to inundate voters with an aggressive media campaign. The ballot measure succeeded, enacting a radical policy shift in Ohio toward non-democratic oversight of food production, and demonstrating how far corporate agribusiness will go to make sure policies and regulations are favorable to its bottom line.").

constitutional propositions as well.³⁵ For example, with regard to the vast interests in agribusiness to maintain the status quo, “we find a large number of groups whose views might be discounted” for goods like meat, clothing, luxury items, including “[b]utchers, furriers, hunters, cattlemen, chicken farmers, scientific experimenters . . . [who] cannot . . . be expected to see the moral issue [of animal cruelty, environmental protection and wildlife habitat destruction, for example] without the distortion of special interest.”³⁶

Regardless of whether the benefits of constitutional propositions outweigh the drawbacks to representational government, for the states which adopted the constitutional initiatives, this debate is moot. With North Dakota and Missouri already having adopted a constitutional amendment for the protection of farmers and ranchers,³⁷ and Oklahoma voters and the Indiana Senate more recently defeating such measures,³⁸ while the Nebraska Legislature debated whether to place such a proposal on the ballot in 2016,³⁹ we can expect to see more of these proposals be presented to state legislators and voters in the future.

These amendments limit state legislation of agribusiness to one degree or another, which affect states’ police power to safeguard the health, safety and welfare of their citizens.⁴⁰ Given that state constitutional amendments are specifically worded so that they “provide less justification for flexible interpretation,”⁴¹ the texts of

³⁵ Steve Mariotti, *What Every Voter Should Know About Public Choice Theory*, HUFFPOST (Dec. 6, 2017), https://huffingtonpost.com/steve-mariotti/what-every-voter-should-know-about-public-choice-theory_b_8217650.html; see Tom Ginsburg, *Public Choice and Constitutional Design*, 13–14 (John M. Olin Program in Law and Econ., Working Paper No. 451, 2009).

³⁶ Annette C. Baier, *Knowing Our Place in the Animal World*, in *ETHICS AND ANIMALS* 61, 64 (Harlan B. Miller & William H. Williams eds., 1983).

³⁷ MO. CONST. art. I, § 35; N.D. CONST. art. XI, § 29.

³⁸ Associated Press, *supra* note 3; *Oklahoma Right to Farm Amendment, State Question 777 (2016)*, *supra* note 20.

³⁹ Grant Schulte, *Nebraska ‘Right to Farm’ Proposal Stalls in Committee*, WASH. TIMES (Mar. 1, 2016), <https://www.washingtontimes.com/news/2016/mar/1/nebraska-right-to-farm-proposal-stalls-in-committee/> (noting the proposal was ultimately not placed on the ballot).

⁴⁰ See DAVID CRUMP ET AL., *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 253 (6th ed. 2014) (“[T]he power to provide for the local health welfare, and morals [is an] essential province of the states.”); see also *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 216 (1983) (holding that an economic purpose is a legitimate state interest); *W. Coast Hotel Co. v. Parris*, 300 U.S. 379, 386, 398–99 (1936) (upholding a minimum wage for women); *Nebbia v. New York*, 291 U.S. 502, 515, 538 (1934) (upholding New York’s Agriculture and Markets Law to regulate minimum prices of milk). Both the *Nebbia* and *W. Coast Hotel Co.* cases reflect the concept that the state is free to adopt whatever economic policy it reasonably deems to promote the public welfare. See *W. Coast Hotel Co.*, 300 U.S. at 398–99; *Nebbia*, 291 U.S. at 538.

⁴¹ Williams, *supra* note 27, at 198–99; see also ESKRIDGE ET AL., *supra* note 14, at 389 (“[Because] direct democracy is in tension with the federal constitutional principle of republican

the amendments become crucial in discerning just how much state power is curbed and how citizens' interests might be affected; hence, the need to examine the texts of the constitutional initiatives for the carve-outs of ranching and farming protections.

B. Purpose and History of "Right to Farm" Constitutional Amendments

In 2016, Oklahoma was the most recent state to consider amending its constitution with a proposition that would ensure rights "to engage in farming and ranching practices."⁴² Its voters, however, soundly defeated the proposition, with sixty percent of the voters voting no.⁴³ Indiana preceded Oklahoma in 2015 by defeating a similar proposition with a legislative vote.⁴⁴ However, two states have added Right to Farm protections to their constitutions: North Dakota in 2012 and Missouri in 2014.⁴⁵

The first step is to examine the language of these propositions in analyzing what these constitutional proposals really mean—what their purpose and goals are and what effects they may have on the functions of the government in relation to public interests against farming and ranching interests.

At first glance, especially to the general public, the Right to Farm seems innocuous, even desirable.⁴⁶ Proponents understood that many people would wonder why we would not want to ensure the

government. . . . [B]allot measures should be interpreted consistent with the plain meaning of their text and the obvious understandings of the voters concerning the core purposes of the measure. As to ambiguities, however, such measures should be interpreted narrowly, to limit their effects in displacing prior law enacted in republican fashion (i.e., by the legislature).").

⁴² See *Oklahoma Right to Farm Amendment, State Question 777 (2016)*, *supra* note 20.

⁴³ *Id.*

⁴⁴ See Associated Press, *supra* note 3; *Indiana Right to Hunt and Fish Public Question 1*, BALLOTPEdia, [https://ballotpedia.org/Indiana_Right_to_Hunt_and_Fish_Public_Question_1_\(2016\)](https://ballotpedia.org/Indiana_Right_to_Hunt_and_Fish_Public_Question_1_(2016)) (last visited Apr. 23, 2018). Indiana passed in 2016 the "Indiana Right to Hunt and Fish Amendment," a legislatively referred constitutional amendment permitting the "right to hunt, fish, and trap to be subjected to regulations promoting wildlife conservation and management and preserving the future of hunting and fishing. Furthermore, the amendment designated public hunting and fishing as the preferred method of wildlife management." *Id.*; *Indiana: Support the Right to Hunt and Fish Amendment!*, NAT'L RIFLE ASS'N-INST. LEGISLATIVE ACTION, (Nov. 7, 2016), <https://www.nraila.org/articles/20161107/indiana-support-the-right-to-hunt-and-fish-amendment-on-the-november-ballot>. In 2016, Kansas also adopted a similar amendment. See *Kansas Right to Hunt and Fish, Constitutional Amendment 1 (2016)*, BALLOTPEdia, [https://ballotpedia.org/Kansas_Right_to_Hunt_and_Fish_Constitutional_Amendment_1_\(2016\)](https://ballotpedia.org/Kansas_Right_to_Hunt_and_Fish_Constitutional_Amendment_1_(2016)) (last visited Apr. 23, 2018).

⁴⁵ MO. CONST. art. I, § 35; N.D. CONST. art. XI, § 29.

⁴⁶ See Logan Layden, *Oklahoma Right -to-Farm Legislation About More than Agricultural Practices*, STATEIMPACT (Feb. 26, 2015), <https://stateimpact.npr.org/oklahoma/2015/02/26/oklahoma-right-to-farm-push-about-more-than-agricultural-practices/>.

rights of family farmers and others to farm and ranch since these vocations have been practiced in the United States since its inception, as well as portrayed as a way of life in the mass media through western movies and television shows.⁴⁷ Still, there were skeptics. When the Indiana state legislature introduced the Right to Farm bill in 2011, many people did not take the bill seriously and “regarded it as a joke.”⁴⁸ A senator mocked the bill by claiming it was trying to “tack on a constitutional right to garden,” and a political columnist characterized the amendment as a “circus-like sideshow.”⁴⁹ The bill’s sponsors, Indiana Republicans, defended their efforts and explained that “it was a way to keep non-farmers, including national animal rights groups, from meddling in the state’s rural interests.”⁵⁰

Similarly in Oklahoma, the resolution supporters, backed by the Farm Bureau (which claims to be “the voice of Oklahoma agriculture for almost 75 years”⁵¹ and was represented at the time by rancher-farmer President Tom Buchanan)⁵² stated that the amendment for ranching and farming rights needs to protect:

[1] Against] outside interests to come into Oklahoma in an attempt to dictate agricultural production practices. This is not an issue of water use and regulation, as certain urban and municipal interests claim[;]

[2] O]ur farming and ranching heritage, where agriculture ranks No. 2 as an economic engine for Oklahoma. This is no small thing in a state where we have produced food and fiber for more than 100 years[;]

[3] C]onsumers as they stand the most to gain from a safe, secure and affordable food supply[;]

[4] Against confusion] by the professional, Washington, D.C.-based anti-agriculture extremists and their anti-agriculture

⁴⁷ See Anna Thompson Hajdik, *Agricultural Romance: Constructing and Consuming Rural Life in Modern America* 295–96 (May 2011) (unpublished Ph.D. dissertation, University of Texas at Austin) (on file at <https://repositories.lib.utexas.edu/handle/2152/11633>).

⁴⁸ Jarvis, *supra* note 1.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Tom Buchanan, *Right to Farm Bill: Legislation Protects Oklahoma’s Farming, Ranching Heritage*, OKLAHOMAN (Apr. 8, 2015), <http://newsok.com/right-to-farm-bill-legislation-protects-oklahomas-farming-ranching-heritage/article/5408124>; Randy Krehbiel, *Right to Farm’ State Question Highlights ‘Disconnect’ Between Rural and Urban Oklahoma, Proponent Says*, TULSA WORLD (Oct. 21, 2016), http://www.tulsaworld.com/news/elections/right-to-farm-state-question-highlights-disconnect-between-rural-and/article_e1b65eb8-e208-5931-8692-9bffb5b7f97b.html.

⁵² See Press Release, Okla. Farm Bureau, Buchanan Named New Oklahoma Farm Bureau President (Nov. 28, 2013) (on file at <http://www.okfarmbureau.org/index.php?action=news.newsdetail&rowid=414>).

message.⁵³

Oklahoma is hardly a “farm heavy” state since only two percent of its population is considered to be agricultural.⁵⁴ The primary premise behind this official statement is protection against pressures from animal rights and environmental groups as summed up by Republican State Senator Scott Biggs from Chickasaw, who introduced the proposal.⁵⁵ The opponents, led by Oklahoma Stewardship Council chairman and former Oklahoma Attorney General, Drew Edmondson,⁵⁶ were primarily concerned about the bill’s language that required a “compelling state interest” in order for the state to regulate any type of farming or ranching activity, including livestock production: “I’m telling you . . . I believe . . . [any] new legislation[], [any] new ordinances, [any] new rules will not survive that kind of scrutiny. . . . [a]nd certainly, it will be at great expense to the taxpayers to try to defend them (in court),” said Edmondson.⁵⁷

Biggs argued that “[c]ompelling state interest has time and time again been defined as anything that is necessary for the health, safety and welfare of the public.”⁵⁸ He added that water issues would always meet that scrutiny and that environmental concerns would not be affected by this amendment.⁵⁹

Yet Edmondson’s concerns were not with just water use, but chemicals, growth hormones and antibiotics that are a part of animal agriculture, which have been shown to not only have ill effects now but also to have future effects that are not completely understood.⁶⁰

These issues give rise to a broader question of why any state legislature would be willing to tie its hands and disable its power to

⁵³ Buchanan, *supra* note 51.

⁵⁴ *Id.* (“The latest agricultural census indicated only [two] percent of Oklahoma’s population is directly involved in production agriculture.”).

⁵⁵ See Daniel C. Houston, *Critics of ‘Right to Farm’ Proposal Make Public Case*, ASSOCIATED PRESS (June 17, 2016), <https://www.apnews.com/59443263b32b4612a6ec13c963c8f672>.

⁵⁶ *Oklahoma Right to Farm Amendment, State Question 777 (2016)*, *supra* note 20.

⁵⁷ Houston, *supra* note 55; Sonci Kingery, *The Agricultural Iron Curtain: Ag Gag Legislation and the Threat to Free Speech, Food Safety, and Animal Welfare*, 17 DRAKE J. AGRIC. L. 645, 670–71 (2013) (“If the Court finds that a ban is content-based, strict scrutiny is applied. Under strict scrutiny analysis, a government regulation must be narrowly tailored to further a compelling government interest [utilizing [a] slightly different standard of ‘least restrictive means.’”).

⁵⁸ Houston, *supra* note 55.

⁵⁹ *See id.*

⁶⁰ *See id.* (“We don’t know what chemicals are going to be added to the feed, seed or fertilizer in 2017, 2018 or down the road. . . . We don’t know what kind of growth hormones, antibiotics or other chemicals are going to be added to our poultry or our pork after (State Question 777) becomes the law.”); Matthew Hoffman, *Safer Food for a Healthier You*, WEBMD, <https://www.webmd.com/diet/features/safer-food-healthier-you#1> (last visited Apr. 24, 2018).

enact legislation it deems necessary to ensure the state's police powers are respected. Edmondson wondered whether

[t]his measure would not only take away the power of the legislature and municipal governments to regulate agricultural practices, it effectively takes away the power of the people to vote on such changes. The world of industrial agriculture is changing with chemical additives to feed, growth hormones and genetic modifications. I can understand why they want to be free from scrutiny and regulation, but I cannot understand why we should let them.⁶¹

Perhaps the answer to that question lies in part with discovering the interests behind the Right to Farm proposals.⁶² By examining the text of the propositions in the states that introduced Right to Farm bills, we can detect commonalities pointing to the same authorship, that of the American Legislative Exchange Council ("ALEC"), a powerful right-wing group that provides model bills for states to consider for possible propositions.⁶³ Specifically, the group works with large corporations and state legislators to "write pro-business bills" that work, for example, as "model legislation . . . to grant wide-ranging legal rights to farms of all sizes . . . void[ing] local farm ordinances and [making] it harder to lodge complaints about animal mistreatment, pollution, and noise."⁶⁴

The term "Right to Farm" might lead the public to think these bills are all about keeping the family farms protected, especially perhaps in Oklahoma where the proposition's language refers to the ranching and farming rights of "citizens and lawful residents," but, in actuality, Edmondson argued that the referendum is the result of lobbying by big business factory farms and their interest groups.⁶⁵ Big agricultural corporations are responsible for the push behind these bills, like Cargill, one of the largest producers of beef, pork, and turkey, and Monsanto, which produces fertilizers, chemicals, and seeds that are often mandated by law for farmers to use exclusively.⁶⁶

⁶¹ *Oklahoma Right to Farm Amendment, State Question 777 (2016)*, *supra* note 20.

⁶² *See id.*

⁶³ *See* Mary Turck, *New Right-to-Farm Laws Protect Big Ag, Not Small Farmers*, AL JAZEERA AM. (Oct. 9, 2014), <http://america.aljazeera.com/opinions/2014/10/right-to-farm-lawscommercialagricultureenvironmentanimalrights.html>.

⁶⁴ Jarvis, *supra* note 1.

⁶⁵ *See* Barry Friendman, *Selling the Farm*, TULSA VOICE (July 2016), <http://www.thetulsavoice.com/July-A-2016/Selling-the-farm/> (describing Edmondson's view that it is actually agriculture business interest groups that pushed for this referendum); *Oklahoma Right to Farm Amendment, State Question 777 (2016)*, *supra* note 20.

⁶⁶ Jarvis, *supra* note 1; Chris Parker, *How Monsanto is Terrifying the Farming World*, MIAMI NEW TIMES (July 25, 2013), <http://www.miaminewtimes.com/restaurants/how-monsanto-is->

Animal activists, such as those in some Indiana counties, who want to ban concentrated animal feeding operations (“CAFOs”) that crowd animals into unnatural conditions⁶⁷ create huge concern for agribusinesses.⁶⁸ Peverill Squire, a political scientist, explained: “[g]oing after puppy mills ‘may be one thing, but when people start talking about cattle and the treatment of pigs, that gives them greater worry. . . . They [agribusinesses] want to strike first, in essence, and prevent any of that concern from taking root.’”⁶⁹

Furthermore, it is likely that these propositions, if passed, would “shield large industrial dairies, feedlots, and slaughterhouses from environmental and food safety regulations—and curb lawsuits from people who get sick from the rivers of noxious animal waste they produce.”⁷⁰ Attorney Kim Ferraro stated, “[a]ll the safeguards that we already have would be subject to constitutional challenge. . . . You can’t limit an activity if it’s a fundamental right.”⁷¹

The following are the texts of the “Right to Farm” bills in North Dakota, Missouri, Indiana and Oklahoma:

North Dakota: “The 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.”⁷²

Missouri: “That agriculture which provides food, energy, health benefits, and security is the foundation and stabilizing force of Missouri’s economy. To protect this vital sector of Missouri’s economy, the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state, subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri.”⁷³

Indiana: “(a) The people of Indiana desire to: (1) protect the rights of ownership of property and the adequate production of food, fuel, fiber, and shelter, while maintaining the common

terrifying-the-farming-world-6392824.

⁶⁷ Jarvis, *supra* note 1. CAFOs are defined by the U.S. Environmental Protection Agency (“EPA”) as “businesses that ‘congregate animals, feed, manure and urine, dead animals, and production operations on a small land area.’” *Id.*

⁶⁸ *See id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² N.D. CONST. art. XI, § 29.

⁷³ MO. CONST. art. I, § 35.

law; and (2) promote agriculture as a central activity to be conducted in Indiana, and to maintain agriculture as a vital economic activity serving as a foundation and stabilizing force of Indiana's economy. (b) The right of the people of Indiana to engage in diverse farming and ranching practices is guaranteed by this Constitution. (c) The General Assembly may not pass a law that unreasonably abridges the right of farmers and ranchers to employ or refuse to employ effective agricultural technology and livestock production and ranching practices.”⁷⁴

Oklahoma: “To protect agriculture as a vital sector of Oklahoma's economy, which provides food, energy, health benefits, and security and is the foundation and stabilizing force of Oklahoma's economy, the rights so citizens and lawful residents of Oklahoma to engage in farming and ranching practices shall be forever guaranteed in this state. The Legislature shall pass no law which abridges the right of citizens and lawful residents of Oklahoma to employ agricultural technology and livestock production and ranching practices without a compelling state interest.”⁷⁵

It does not take a discerning reader to detect the similarity of the language, particularly when all of the bills use the word “guarantee” while three of them “forever guarantee” rights as reflected in Oklahoma's phrase, “the right . . . to engage in farming and ranching practices shall be forever guaranteed in this state.”⁷⁶ While it is implicit in Missouri's language, the other three explicitly state that no law which “abridges the right . . . to employ agricultural technology, and livestock production and ranching practices” shall be

⁷⁴ S.J. Res. 12, 119th Gen. Assemb. 2d Reg. Sess. (Ind. 2015). Indiana Senate Joint Resolution 12 also included the following language: “This section does not modify any: (1) provision of the common law; (2) statute relating to trespass or eminent domain; or (3) other property right, existing or previously enacted statute, or existing or previously adopted administrative rule.” *Id.*

⁷⁵ S.J. Res. 1012 55th Gen. Assemb. 1st Reg. Sess. (Okla. 2015). Proposed Section 38 to Article II of the Oklahoma Constitution also included the following language:

Nothing in this section shall be construed to modify any provision of common law or statutes relating to trespass, eminent domain, dominance of mineral interests, easements, rights of way or any other property rights. Nothing in this section shall be construed to modify or affect any statute or ordinance enacted by the Legislature or any political subdivision prior to December 31, 2014.

Id.

⁷⁶ See MO. CONST. art. I, § 35; N.D. CONST. art. XI, § 29; Ind. S.J. Res. 12; Okla. S.J. Res. 1012. The words “forever guaranteed” appear in the first clause of Oklahoma's proposition. See Okla. S.J. Res. 1012.

passed or enacted.⁷⁷

Besides the “Right to Farm” bills, ALEC has underwritten other model bills and policy commitments such as the State Pesticide Preemption Act, the Preemption of Local Agriculture Laws Act, the Resolution on Animal Antibiotic Use, and the Natural Hair Braiding Protection Act.⁷⁸ The group is based on the idea of federalism, which posits that “[r]eal solutions to America’s challenges can be found in the states—America’s fifty laboratories of democracy—not in one-size-fits all federal government policies that disregard regional differences and local community needs.”⁷⁹

Since ALEC has done much of the work in modeling Right to Farm bills, and agribusinesses continue to exact pressure on state legislatures for ever more protections against animal rights and environmental groups,⁸⁰ more states will likely seek to introduce these measures in the coming years. Hence, we need to examine the possible effects of these constitutional amendments on: states and communities, businesses, animals, and the public at large.

III. ANALYSIS

A. *Possible Effects on Animal Welfare*

Farms are not what they used to be. In fact, the *farms* that produce most of our animal and plant food supply can hardly be categorized as “40 acres of pastures, red barns, and rows of mixed vegetable crops that most Americans imagine.”⁸¹ Instead, they are characterized as industrial farms, or factory farms, which are owned by fewer and fewer corporations so that food production is highly concentrated and intensive.⁸² In particular, most animals destined to be food are no longer considered farm-raised, but instead are residents of Animal Feeding Operations (“AFOs”), which are described by the EPA as “agricultural operations where animals are kept and raised in confined situations.”⁸³ Live animals share the “small land area” with

⁷⁷ See MO. CONST. art. I, § 35; N.D. CONST. art. XI, § 29; Ind. S.J. Res. 12; Okla. S.J. Res. 1012.

⁷⁸ See Jeff Pierce, Legislative Counsel, Animal Legal Def. Fund, Presentation at Oklahoma City University School of Law Animal Law Group and The Humane Society of the United States SQ 777 Debate and Conference: SQ 777 at 30,000 Feet (Sept. 17, 2016).

⁷⁹ *Federalism*, AM. LEGIS. EXCH. COUNCIL, <https://www.alec.org/issue/federalism/> (last visited Apr. 24, 2018).

⁸⁰ See Turck, *supra* note 63.

⁸¹ *Industrial Livestock Production*, *supra* note 9.

⁸² See *id.*

⁸³ *Id.*

“feed, manure, dead animals, and production operations.”⁸⁴ The animals must be “stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period” to be considered an AFO.⁸⁵ The more familiar term, CAFO, is distinguished by how large the operation is based on the number of animals it holds; for example, a large CAFO (factory farm) holds at least 1,000 cattle and 2,500 hogs with 125,000 non-laying chickens and 82,000 laying hens if the site does not use a liquid manure system (urine and feces mixed with water and held either under the facility or outside in open lagoons), or 30,000 non-laying chickens and 30,000 laying hens if it does use a liquid manure system.⁸⁶ The characteristics of these operations are summarized as follows:

[A]n unnaturally large number of animals are confined closely together. Cattle feedlots generally contain thousands of animals in one place, while many egg-laying businesses house one million or more chickens. The main animals for such operations are cows, pigs, chickens and turkeys, but this practice is also applied to sheep, goats, rabbits, and various types of poultry.⁸⁷

These factory farms by their very nature reflect a disregard for animal welfare, along with adverse effects on soil and water quality; reliance on chemicals, medicine and hormones; mismanagement of the agricultural system; and agribusiness economics that result in “[i]rresponsible corporate ownership.”⁸⁸

The plight of farm animals in today’s world has become an issue that some consider “one of the most pressing ethical issues of our time.”⁸⁹

The industrialization—and brutalization—of animals in America is a relatively new, evitable, and local phenomenon: No other country raises and slaughters its food animals quite as intensively or as brutally as we do. No other people in history has lived at quite so great a remove from the animals they eat. Were the walls of our meat industry to become

⁸⁴ *See id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Yuval Noah Harari, *Industrial Farming is One of the Worst Crimes in History*, GUARDIAN (Sept. 25, 2015) <https://www.theguardian.com/books/2015/sep/25/industrial-farming-one-worst-crimes-history-ethical-question>.

transparent, literally or even figuratively, we would not long continue to raise, kill, and eat animals the way we do. Tail docking and sow crates and beak clipping would disappear overnight, and the days of slaughtering four hundred head of cattle an hour would promptly come to an end—for who could stand the sight? Yes, meat would get more expensive. We’d probably eat a lot less of it, too, but maybe when we did eat animals we’d eat them with the consciousness, ceremony and respect they deserve.⁹⁰

Yet many others wonder why domesticated animals have it so bad: Wild buffaloes spend their days searching for food, water and shelter, and are constantly threatened by lions, parasites, floods and droughts. Domesticated cattle by contrast, enjoy care and protection from humans, . . . [they are] provide[d] . . . with food, water and shelter . . . and [people] protect them from predators and natural disasters. True, . . . cows and calves sooner or later find themselves in the slaughterhouse. Yet does that make their fate any worse than that of wild buffaloes? Is it better to be devoured by a lion than slaughtered by a man? Are crocodile teeth kinder than steel blades?⁹¹

That answer would be a resounding no; at least, according to such groups as the Nevada Farm Bureau which calls itself “the Voice of Nevada’s agriculture”⁹² and United Egg Producers, which “is a cooperative whose independent members sell about 97% of all the eggs produced in the United States.”⁹³

Both of these organizations, and other state, federal and private agricultural groups tout that they “produce an abundance of affordable, safe food,” and are seeking to protect themselves from “[a]nimal [a]ctivists [who] [m]ay [l]imit [o]ur [a]bility [t]o [f]eed [o]ur [n]ation [a]nd [w]orld.”⁹⁴ But is it their ability to feed the world they are most concerned about, or is it growth and profits? Certainly their profits have recently been impacted by groups like Mercy for Animals

⁹⁰ MICHAEL POLLAN, *THE OMNIVORE’S DILEMMA: A NATURAL HISTORY OF FOUR MEALS* 333 (2006).

⁹¹ Harari, *supra* note 89.

⁹² NEV. FARM BUREAU, *POLICIES FOR 2015*, at 1 (2015), <http://nvfb.org/wp-content/uploads/2014/08/2015-Nevada-Farm-Bureau-Policy-FINAL.pdf>.

⁹³ See AMERICAN EGG FARMING: HOW WE PRODUCE AN ABUNDANCE OF AFFORDABLE, SAFE FOOD, UNITED EGG PRODUCERS 5, 13, https://mafiadoc.com/queue/american-egg-farming-how-we-produce-an-abundance_5a29752b1723ddce0d2c749c.html.

⁹⁴ See *id.*; *POLICIES FOR 2015*, *supra* note 92 at 1, 4–5.

and the Humane Society of the United States.⁹⁵ For example, these groups successfully fought for improved animal welfare conditions in: 1) California, where Ballot Proposition 2 was passed in 2008 “requir[ing] that veal calves, egg-laying hens and pregnant pigs be confined ‘only in ways that allow these animals to lie down, stand up, fully extend their limbs and turn around freely,’”⁹⁶ and 2) Massachusetts, where the Question 3 ballot measure was passed with 78 percent of the vote to “outlaw the most extreme forms of animal confinement . . . beginning in 2022.”⁹⁷

Most people want to believe that the slaughtering process is humane. Two-thirds of Americans polled by the American Press agreed that “[a]n animal’s right to live free of suffering should be just as important as a person’s right to live free of suffering.”⁹⁸ Yet most people eat their fast food hamburgers and hot dogs without a second thought as to who the animals are and how they arrived on their plates. Is it hypocritical that people value animals such as wildlife and pets, and even farm animals (as reflected in the popularity of petting zoos and animal sanctuaries) so that “many of us seem eager to extend the circle of our moral consideration to other species, [yet] in our factory farms we’re inflicting more suffering on more animals than at any time in [our] history?”⁹⁹ Some say this behavior is moral and legal schizophrenia where “sentiment and brutality exist side by side. Half the dogs in America will receive Christmas presents this year, yet few of us ever pause to consider the life of the pig—an animal easily as intelligent as a dog—that becomes the Christmas ham.”¹⁰⁰ On the American factory farm, “few things are regarded so cheaply as an animal’s life and . . . the great suffering [they] endure in the name of human interests.”¹⁰¹ This schizophrenia or cognitive dissonance can exist because agribusiness successfully keeps its business practices virtually secret from the public while “[a]nimals

⁹⁵ See, e.g., Carlson, *supra* note 4; Ariel Overstreet-Adkins, *Extraordinary Protections for the Industry that Feeds Us: Examining a Potential Constitutional Right to Farm and Ranch in Montana*, 77 MONT. L. REV. 85, 97 (2016).

⁹⁶ See Overstreet-Adkins, *supra* note 95, at 97.

⁹⁷ Carlson, *supra* note 4. (“Massachusetts is now the fifth state to outlaw or phase out battery cages, the ninth state to outlaw veal crates, and the tenth state to outlaw gestation crates. It is now also the second state, after California, to ban not just the production but also the sale of products made using these cruel confinement systems.”).

⁹⁸ GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG? XIX (2000).

⁹⁹ POLLAN, *supra* note 90, at 306.

¹⁰⁰ *Id.*

¹⁰¹ Tom Regan, *Animal Rights Human Wrongs*, in ETHICS AND ANIMALS, *supra* note 36, at 19, 23–24.

are treated as machines—'production units'—incapable of feeling pain. Since no thinking person can possibly believe this anymore, industrial animal agriculture depends on a suspension of disbelief on the part of the people who operate it and a willingness to avert one's eyes on the part of everyone else."¹⁰²

Humaneness must be questioned when thousands of animals are slaughtered each day in a large slaughterhouse.¹⁰³ According to the Humane Society of the United States, in 2015, and again in 2016, 9.2 billion animals in the United States were slaughtered for food, comprising cattle, chickens, ducks, hogs, sheep, lambs, and turkeys.¹⁰⁴ The number of animals per year slaughtered in the United States dwarfs the entire human population of the world.

In fact, the numbers of domesticated farm animals in the world that live on industrial farms are equally staggering: one billion pigs, 1.5 billion cows, and 20 billion chickens compared to seven billion people, 40,000 lions, 500,000 elephants and 50 million penguins.¹⁰⁵ That's why "the fate of farm animals is not an ethical side issue. It concerns . . . tens of billions of sentient beings, each with a complex world of sensations and emotions, but which live and die on an industrial production line."¹⁰⁶

The federal government, through the USDA, has not ignored the plight of animals in the U.S. slaughterhouses. The Humane Slaughter Act ("HAS") and the Humane Methods of Livestock Slaughter Act ("HMLSA") are "designed to protect food animals just prior to and during their moment of slaughter," excluding poultry, other birds, and fish.¹⁰⁷ However, this protection is questionable when slaughtering tools that are deemed legal are inherently problematic, including:

"Stunning knives, [which] are . . . used to stun animals;
Electric bath[s], [which are] tub[s] of water with an electric

¹⁰² POLLAN, *supra* note 90, at 317.

¹⁰³ See *Animal Welfare*, *supra* note 10. ("In some slaughterhouses up to 2000 cattle are slaughtered each day.")

¹⁰⁴ *Farm Animal Statistics: Slaughter Totals*, HUMANE SOC'Y OF THE U.S., http://www.humanesociety.org/news/resources/research/stats_slaughter_totals.html (last visited Apr. 24, 2018). Projections for 2016 as of June 2015: 28 million cattle, 8.8 billion chickens, 27 million ducks, 115 million hogs, 2 million sheep and lambs, and 232 million turkeys. *Id.*

¹⁰⁵ Harari, *supra* note 89.

¹⁰⁶ *Id.*

¹⁰⁷ *Government Regulation of Factory Farms*, HUMANE EDU. SOC'Y, <https://nhes.org/3372-2> (last visited Apr. 24, 2018); see also Deborah G. Mayo, *Against a Scientific Justification of Animal Experiments*, in *ETHICS AND ANIMALS*, *supra* note 36, at 339 (stating that the only other federal law governing humane treatment of animals is the Animal Welfare Act of 1966, which governs the treatment of laboratory animals).

current . . . designed to stun poultry prior to slaughter. The birds are [hung] upside down and placed in the electric bath . . . [yet,] the bath system is not foolproof; and many birds are fully conscious throughout the remainder of the slaughter process.

Killing stick[s], [which are used] . . . to cut the carotid arteries and jugular veins . . . [after stunning].

Captive bolt gun[s], [which are] used to render large farmed animals, such as cattle and pigs, unconscious by shooting a metal bolt or rod [in] the animal's head and into the brain. Unfortunately, the accuracy . . . is not 100 percent."¹⁰⁸

In addition, the level of inspection and standards is not well known, only that "slaughterhouses are required to meet USDA standards for cleanliness and humane treatment during slaughter."¹⁰⁹ Prior to 2009, the USDA considered humane treatment of animals to include "downer-cattle [that] could be slaughtered for food if they passed the pre-slaughter . . . inspection [yet] were unable to walk [so] they were routinely pushed, prodded and shoved into the slaughterhouse by any means possible, causing much pain to the already suffering animals."¹¹⁰

Humane treatment takes a backseat when slaughterhouses are "in the business of killing animals . . . the faster the slaughter and butchering . . . the more meat produced and the more money made."¹¹¹ This leads to mistakes that not only fail to meet USDA standards, but result in cruelty because the speed of the assembly line makes it "nearly impossible to guarantee each is slaughtered within the regulations."¹¹² This results in animals routinely being conscious when they are hung and bled due to the failure of the stunning process.¹¹³ Journalist and author, Michael Pollan, described the slaughter process second-handedly, as he "could only wonder what was going on just then . . . on the kill floor of the National Beef Plant, where steer number 534 had his date with the stunner."

I could only wonder because the company had refused to let me see. When I'd visited the plant earlier that spring, I was shown everything but the kill floor. I watched steers being

¹⁰⁸ *Government Regulation of Factory Farms*, *supra* note 107.

¹⁰⁹ *Animal Welfare*, *supra* note 10.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

unloaded from trailers into corrals and then led up a ramp and through a blue door. What happened on the other side of the blue door I had to reconstruct from the accounts of others who had been allowed to go there. I was fortunate to have the account of Temple Grandin, the animal-handling expert, who had designed the ramp and killing machinery at the National Beef Plant, and who audits the slaughter there for McDonald's. Stories about cattle 'waking up' after stunning only to be skinned alive—stories documented by animal rights groups—had prompted the company to hire Grandin to audit its suppliers. . . . Here's how Grandin described what steer 534 experienced after passing through the blue door:

'The animal goes into the chute single file. The sides are high enough so all he sees is the butt of the animal in front of him. As he walks through the chute, he passes over a metal bar, with his feet on either side. While he's straddling the bar, the ramp begins to decline at a twenty-degree angle, and before he knows it, his feet are off the ground, and he's being carried along on a conveyor belt. We put in a false floor so he can't look down and see he's off the ground. That would panic him. . . . [T]he conveyor [moves] along at roughly the speed of a moving sidewalk. On a catwalk above stands the stunner. The stunner has a pneumatic-powered 'gun' that fires a steel bolt about seven inches long and the diameter of a fat pencil. He leans over and puts it smack in the middle of the forehead. When it's done correctly it will kill the animal on the first shot. After the animal is shot while he's riding along a worker wraps one of his feet and hooks it up to an overhead trolley. Hanging upside down by one leg, he's carried by the trolley into the bleeding area, where the bleeder cuts his throat. Animal rights people say they're cutting live animals, but that's because there's a lot of reflex kicking. What I look for is, is the head dead? It should be flopping like a rag, with the tongue hanging out. He'd better not be trying to hold it up—then you've got a live one on the rail. Just in case, they have another stunner in the bleed area. . . . Mistakes are inevitable on an assembly line that is slaughtering four hundred head of cattle every hour. (McDonald's tolerates a 5 percent 'error rate.').¹¹⁴

The slaughtering process for poultry is arguably worse since

¹¹⁴ POLLAN, *supra* note 90, at 329–30.

poultry are completely left out of any regulatory scheme of the USDA.¹¹⁵ A participant at the American Meat Institute Stunning Conference 2002 succinctly described the “meat-type” bird that is slaughtered: “A broiler is essentially an overgrown baby bird, easily hurt, sometimes treated like bowling balls.”¹¹⁶ Each day, thousands of birds are crated inside trucks for up to nine hours waiting to be killed, many dying of heat suffocation or freezing to death before the forklifts pick up the pallets of crates to begin the slaughter process.¹¹⁷ They are painfully hung upside down in assembly line fashion by their feet in metal shackles before being dipped in an electrical bath to be stunned, which often leaves them still conscious so they feel pain and stress¹¹⁸ as their throats are slit by thin blades and then their bodies dipped in scalding water to remove feathers.¹¹⁹ A more humane controlled atmosphere slaughter process using a gas—argon—is being considered by some slaughterhouses, but has not been widely adopted as yet.¹²⁰

Correspondingly, within the U.S. egg industry, which consists of consolidated farms which typically harbor 75,000 birds for a total of 302 million hens producing over 80 billion eggs annually,¹²¹ male chicks are expendable because they do not lay eggs nor are they the type raised for meat;¹²² therefore, they are culled by grinding them up alive when they are one day old.¹²³ But recently, due to “mounting pressure from animal rights groups” and unexplained advances in technology, United Egg Producers announced that this practice will cease by 2020,¹²⁴ though there is no word as to how male chicks will be handled thereafter. But the story of the fate of the animals in an egg operation does not stop there. The American laying hen has arguably the worst living conditions, as described by Pollan, though it’s difficult to know for sure since “journalists are unwelcome [in

¹¹⁵ See *Government Regulation of Factory Farms*, *supra* note 107.

¹¹⁶ Karen Davis, *The Need for Legislation and Elimination of Electrical Immobilization*, UNITED POULTRY CONCERNS, <https://www.upc-online.org/slaughter/report.html> (last visited Apr. 24, 2018).

¹¹⁷ *Id.*

¹¹⁸ See *Animal Welfare*, *supra* note 10.

¹¹⁹ Davis, *supra* note 116.

¹²⁰ See *id.*

¹²¹ See *Industrial Livestock Production*, *supra* note 9; *US Egg Producers to Eliminate Routine Killing of Male Chicks by 2020*, FOX NEWS (June 13, 2016), <http://www.foxnews.com/food-drink/2016/06/13/us-egg-producers-to-eliminate-routine-killing-male-chicks-by-2020.html>.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

these places.]”¹²⁵

[T]he American laying hen . . . spends her brief span of days piled together with a half-dozen other hens in a wire cage the floor of which four pages of this book could carpet wall to wall. Every natural instinct of this hen is thwarted, leading to a range of behavioral “vices” that can include cannibalizing her cage mates and rubbing her breast against the wire mesh until it is completely bald and bleeding. (This is the chief reason broilers get a pass on [a] caged life; to scar so much high-value breast meat would be bad business.) Pain? Suffering? Madness? The operative suspension of disbelief depends on the acceptance of more neutral descriptors, such as “vices” and “stereotypes” and “stress.” But whatever you want to call what goes on in those cages, the 10 percent or so of hens that can’t endure it and simply die is built into the cost of production. And when the output of the survivors begins to ebb, the hens will be “force-molted”—starved of food and water and light for several days in order to stimulate a final bout of egg laying before their life’s work is done. . . . [W]hat you see when you look is the cruelty—and the blindness to cruelty—required to produce eggs that can be sold for seventy-nine cents a dozen.¹²⁶

As for pigs, the slaughter experience is equally, if not more, sobering. The process at the largest slaughterhouse in the world in North Carolina involves electrically stunning the animals to cause an “epileptic seizure[, and then] their bodies are placed on a conveyor belt with their back legs shackled about chest high, and they are hoisted upside down. A worker sticks them in the upper torso with a knife to sever the jugular vein [which all] must be accomplished within forty seconds of stunning or the pig may regain consciousness.”¹²⁷ Animal husbandry experts, such as scholar John Webster, claims that “it is impossible to guarantee that a pig will be shackled, stuck, and bled out, all within forty seconds of stunning.”¹²⁸

The pigs, in fact, are routinely not sufficiently stunned, as a former Tar Heel pig sticker described:

[I]f you’re killing 16,000 hogs a shift, those guys aren’t going to stun all them hogs all the time. Some hogs come out kicking

¹²⁵ POLLAN, *supra* note 90, at 317.

¹²⁶ *Id.* at 317–18.

¹²⁷ WISE, *supra* note 7, at 116.

¹²⁸ *Id.*

and raising hell . . . Most of the time those stunners are not getting the right charge to connect to the hog. Then, if a person can knock that hog down without stunning it and put a shackle around it, they're going to hang that hog up. If a hog ain't stunned correctly, then the shackler's supposed to let it hit the floor and somebody else is supposed to restun that hog and hang him up. . . . But the supervisors don't want the shacklers to do that. They want the shacklers to try to shackle the hog, hang it up, and keep on going. But, if the shackler drops too many hogs, they write that shackler up. A shackler out there don't have no choice but to hang hogs alive in order to keep his job.¹²⁹

While the humaneness of the slaughtering processes is questionable, so too is the entire life of the factory farmed animal.¹³⁰

The root of the problem is that domesticated animals have inherited from their wild ancestors many physical, emotional and social needs that are redundant in farms. Farmers routinely ignore these needs without paying any economic price. They lock animals in tiny cages, mutilate their horns and tails, separate [their] mothers from offspring, and selectively breed monstrosities. The animals suffer greatly, yet they live on and multiply.¹³¹

Currently, commonly accepted practices and procedures that are deemed legally justifiable include: 1) confining animals indoors their entire lives in unnatural conditions with little or no sunlight or fresh air;¹³² 2) mutilating animals to enable them to live in these unnatural, crowded conditions, such as cutting off chicks' beaks to avoid damaging each other by pecking, amputating tails, pulling teeth of pigs, and castrating pigs—all without anesthesia;¹³³ and 3) restricting natural behavior and movement of the animals by confining calves in veal crates and sows in gestation crates that do not allow for them to even turn around.¹³⁴ A pork industry pundit acknowledged little sympathy for the animals by stating, “[s]o our animals can't turn around for the [two-and-a-half] years that they are in the stalls. . . . I don't know who asked the sow if she wanted to turn

¹²⁹ *Id.* at 117.

¹³⁰ See Harari, *supra* note 89.

¹³¹ *Id.*

¹³² See *Animal Welfare*, *supra* note 10.

¹³³ *Id.*

¹³⁴ *Id.*

around.”¹³⁵ In some states, however, such as Arizona, California, Colorado, and Oregon confinement like this for pigs is or will be a crime.¹³⁶

It is not clear how the USDA determines when abuse against the USDA standards occurs due to “ag gag’ or ‘whistleblower suppression’ bills” that were proposed and enacted in several states “to criminalize undercover investigations and prevent the public from learning the hidden truth.”¹³⁷ Many of these proposed bills have been defeated by animal protection, environmental and workers’ rights groups primarily through asserting first amendment rights against the state, including in Arizona, Florida, Minnesota, Iowa and New York.¹³⁸ In Idaho, a bill was passed but was declared unconstitutional after being challenged by such groups as the Animal Legal Defense Fund (“ALDF”) and Farm Sanctuary.¹³⁹

Statutes and state constitutional amendments are not the only ways the meat industry exerts its influence on the legislature and the people; it also lobbies federal agencies like the USDA and EPA. For example, it pressured the USDA to “apologiz[e]” for an internal Meatless Monday initiative sponsored by two Iowa Republican Senators by claiming that the “optional vegetarian day was a full-scale attack on agriculture[,]” and the EPA by its “recent abandonment of a farm waste reporting rule that simply required CAFO owners to disclose basic operations.”¹⁴⁰

¹³⁵ Paul Shapiro, *Factory Farming Affects Public as Well as Animals*, COURIER-J. (June 13, 2014), <http://www.courier-journal.com/story/opinion/contributors/2014/06/12/factory-farming-affects-public-animals/10364155/>; see also *Federal Legislation and Regulation*, FARM SANCTUARY, <https://farmsanctuary.org/get-involved/federal-legislation/#> (last visited Apr. 25, 2018) (“Undercover investigations show pigs and other farm animals, who are sick or disabled by the cruelty of factory farming, being beaten, dragged by their ears or tails, pushed with forklifts, and shocked with electric prods to get them onto the kill floor so they can be slaughtered for profit. President Obama . . . announced a rule banning the slaughter of adult cattle who are too sick or injured to walk. But . . . other farm animals [are] unprotected. Farm Sanctuary responded with a regulatory petition to the USDA to extend the rule to all livestock, including pigs . . . [which was] temporarily rejected. But [Farm Sanctuary is] not giving up th[e] fight.”); Kingery, *supra* note 57, at 677, 680. (“[A]nimals often suffer on their way to slaughter [and] actors in the industry invest their time and energy in hiding their production process from consumers.”).

¹³⁶ See ARIZ. REV. STAT. ANN. § 13-2910.07 (2018) (“Cruel and inhumane confinement of a pig during pregnancy or of a calf raised for veal.”); CAL. HEALTH & SAFETY CODE § 25990 (West 2018); COLO. REV. STAT. § 18-9-202 (2018) (“Cruelty to animals—aggravated cruelty to animals—service animals.”); OR. REV. STAT. § 600.150 (2018) (“Prohibition against restrictive confinement.”); WISE, *supra* note 7, at 139.

¹³⁷ *State Legislation*, FARM SANCTUARY, <https://www.farmsanctuary.org/get-involved/federal-legislation/state-legislation/> (last visited Apr. 25, 2018).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Shen, *supra* note 12.

Yet even though the USDA does not clearly define to what extent or level abuses must occur before it takes action, the USDA does perform oversight of the meat industry. For example, it has shut down operations of slaughterhouses in violations of its codes; to wit the USDA temporarily shut down an Oregon slaughterhouse in October 2016 because cattle were not properly stunned but instead were being shot with a second blow when the first shot failed to result in unconsciousness.¹⁴¹

Still, concerned individuals argue that legal protection for farm animals against cruelty is lacking.¹⁴² The oversight of the USDA to ensure humaneness at slaughter continues to be hit-and-miss given that standard business practices include high error rates simply due to the automation and high speed of the slaughter process.¹⁴³ And, while all states have criminal anti-cruelty statutes on the books, they have not been used against agribusinesses and farming operations.¹⁴⁴

First, they vary according to which animals are covered—some do not apply to livestock or fish, but only to animals considered as pets or wildlife.¹⁴⁵ Second, even when they encompass farm animals, such as in Oklahoma, where it is a felony to be cruel to or withhold food and water from any animal,¹⁴⁶ they have not been used against farming operations.¹⁴⁷ They offer little hope for business-owned animals destined to be food due to the implicit balancing of justifiable

¹⁴¹ See Associated Press, *USDA Suspends Rural Oregon Slaughterhouse*, STATESMAN J. (Nov. 4, 2016), <https://www.statesmanjournal.com/story/money/business/2016/11/04/usda-suspends-rural-oregon-slaughterhouse/93292536/>.

¹⁴² See Kingery, *supra* note 57, at 680; Nancy Perry & Peter Brandt, *A Case Study on Cruelty to Farm Animals: Lessons Learned from the Hallmark Meat Packing Case*, 106 MICH. L. REV. FIRST IMPRESSIONS 117, 118 (2008).

¹⁴³ See *Food Processing and Slaughterhouses*, GRACE COMM. FOUND., <https://www.sustain.abletable.org/279/food-processing-slaughterhouses> (last visited Mar. 6, 2018).

¹⁴⁴ See Darian M. Ibrahim, *The Anticruelty Statute: A Study in Animal Welfare*, 175 WM. & MARY J. ANIMAL L. & ETHICS 175, 179–80 (2006); *Cruelty Laws*, STRAY PET ADVOCACY, http://www.straypetadvocacy.org/cruelty_laws.html (last visited Apr. 25, 2018).

¹⁴⁵ See *Cruelty Laws*, *supra* note 144.

¹⁴⁶ See OKLA. STAT. tit. 21 § 1685 (2018) (“Any person who shall willfully or maliciously torture, destroy or kill, or cruelly beat or injure, maim or mutilate any animal in subjugation or captivity, whether wild or tame, and whether belonging to the person or to another, or deprive any such animal of necessary food, drink, shelter, or veterinary care to prevent suffering; or who shall cause, procure or permit any such animal to be so tortured, destroyed or killed, or cruelly beaten or injured, maimed or mutilated, or deprived of necessary food, drink, shelter . . . or who shall willfully set on foot, instigate, engage in, or in any way further any act of cruelty to any animal, or any act tending to produce such cruelty, shall be guilty of a felony and shall be punished by imprisonment in the State Penitentiary not exceeding five (5) years, or by imprisonment in the county jail not exceeding one (1) year, or by a fine not exceeding Five Thousand Dollars (\$5,000.00). Any animal so maltreated or abused shall be considered an abused or neglected animal.”).

¹⁴⁷ See *id.* §§ 1680.1(2), 1685.

business interests outweighing animal welfare concerns.¹⁴⁸

Other statutes may include protection for fish, but only if it is a pet—a “domesticated animal [entitled to] be cared for and maintained by human beings in or near a human household.”¹⁴⁹ This was explained in a 2004 New York “aggravated cruelty to animals” case where stomping on a pet goldfish in front of the child owner was not a “justified purpose” for killing it, but eating fish is.¹⁵⁰ Still other statutes include pets in the definition of “any animal,” where again in New York in 2008, the abuse of a feline was charged under the Agriculture and Markets Law which states in part that a person is guilty of a Class A misdemeanor if he “unjustifiably injured, maimed, mutilated or killed . . . any animal.”¹⁵¹ Despite these varied descriptions of the animals covered in state felony cruelty statutes, “[t]he [h]umane [t]reatment [p]rinciple: [a] [p]rohibition against ‘[u]nnecessary’ [a]nimal [s]uffering,” as deemed by attorney and author Gary L. Francione, has not been used to protect farm animals owned by agribusinesses under these statutes.¹⁵²

Finally, there is just one federal law that protects animal welfare—the Animal Welfare Act of 1966—but it protects laboratory animals, not farm animals, in the form of mostly licensing and inspections.¹⁵³ However, a new Congressional bill called the “Aware Act,” seeks to extend the Animal Welfare Act to include farm animals used for research to modify them biologically so they are more profitable.¹⁵⁴ Nonetheless, its current oversight is questionable when it allows repetitive experiments that have doubtful relevance, such as “sewing up the ends of the intestines of dogs rendering them unable to defecate. Death has been observed to follow in some cases between 5 and 11 days, in other cases between 8 and 34 days,” which leads one to ask, “[t]o what use is such information to be put?”¹⁵⁵

In order to address the legal justification of abuses of farm animals by agricultural companies who claim that these practices are necessary for business reasons,¹⁵⁶ some animal rights lawyers seek to

¹⁴⁸ See WISE, *supra* note 7, at 139.

¹⁴⁹ See N.Y. AGRIC. & MKTS. LAW § 350(5) (McKinney 2018); *People v. Garcia*, 777 N.Y.S.2d 846, 847, 851 (N.Y. Sup. Ct. 2004).

¹⁵⁰ *Garcia*, 777 N.Y.S.2d at 847, 851, 852.

¹⁵¹ *People v. Walsh*, 859 N.Y.S.2d 906, 906 (N.Y. Crim. Ct. 2008).

¹⁵² FRANCIONE, *supra* note 98, at xxiii, xxiv.

¹⁵³ See Mayo, *supra* note 107, at 354.

¹⁵⁴ See Michael Moss, *Lawmakers Aim to Protect Farm Animals in US Research*, N.Y. TIMES (Feb. 5, 2015), <https://nyti.ms/1zcNURX>.

¹⁵⁵ Mayo, *supra* note 107, at 343.

¹⁵⁶ See, e.g., *Beak Trimming*, POULTRY HUB, <http://www.poultryhub.org/health/health-management/beak-trimming/> (last visited Apr. 25, 2018).

redefine an animal from a “thing” or “property”¹⁵⁷ in the eyes of the law.¹⁵⁸ They argue that courts should grant personhood to animals so that animals’ interests in autonomy and liberty are legally recognized.¹⁵⁹

There is no one legal right to personhood, but a bundle of rights that are distinct and discrete, such as 1) liberty; 2) a claim to a right that another must respect, 3) power to affect another’s rights, and 4) immunity which protects one’s body from interference.¹⁶⁰ A claim to liberty that all U.S. citizens enjoy is not what nonhuman animals are necessarily entitled to, explained Steven Wise, an animal rights attorney.¹⁶¹ “[This is] not the same as saying they are human,” he clarified.¹⁶² Instead, he seeks to establish that nonhuman animals should be granted immunities so that freedom from torture is a basic legal right.¹⁶³ He rests his argument on the idea of “practical autonomy” with an implicit consciousness, which most judges think is sufficient for basic liberty rights, defined as: 1) the ability to desire; 2) an intentional attempt to fulfill desires; and 3) a sense of self-sufficiency and self-awareness.¹⁶⁴ While philosophers such as Jeremy Bentham and Peter Singer assert that an animal’s ability to feel pain, not its intelligence, should be enough to extend legal personhood, Wise does not necessarily disagree, but he believes that argument is insufficient to be legally persuasive.¹⁶⁵ Law professor Cass Sunstein asked in a 2000 *New York Times* book review, “[w]hy isn’t the capacity to suffer a sufficient ground for legal rights of some kind—for dogs, cats, horses, chimpanzees, bonobos, or for that matter

¹⁵⁷ See Gavan Daws, “*Animal Liberation*” as Crime, in ETHICS AND ANIMALS, *supra* note 36, at 361–365, 367, 368 (referencing a felony theft case in Hawaii in 1977 against two individuals who released two captive dolphins for experimental purposes back into the wild, in which the judge defined dolphins as property and not as persons as a matter of law, resulting in felony conviction despite the argument that the defendant did not intend to benefit from the situation); see also Mayo, *supra* note 107, at 355 (showing that animals are routinely referred to as things in advertisements and industry reports; for example, an ad in February 1977 in *Laboratory Animal Science* magazine for beagles enlisted buyers to buy dogs by their model size, tailor-made to the owner and easy to use).

¹⁵⁸ See Chris Berdik, *Should Chimpanzees Have Legal Rights?*, BOS. GLOBE (July 14, 2013), <https://www.bostonglobe.com/ideas/2013/07/13/should-chimpanzees-have-legal-rights/Mv8iDDGYUFGNmWNLOWPRFM/story.html>.

¹⁵⁹ *Id.*

¹⁶⁰ See STEVEN M. WISE, *DRAWING THE LINE: SCIENCE AND THE CASE FOR ANIMAL RIGHTS* 25, 26 (2002).

¹⁶¹ *Id.* at 26; Berdik, *supra* note 158.

¹⁶² Berdik, *supra* note 158.

¹⁶³ See *id.*; Steven M. Wise, *Rattling the Cage Defended*, 43 B.C.L. REV. 623, 638–39 (2002).

¹⁶⁴ Wise, *supra* note 163, at 655; Berdik, *supra* note 158.

¹⁶⁵ See Berdik, *supra* note 158; *Animal Rights Philosophy*, SPEAKING OF RES. (last visited Apr. 25, 2018) <https://speakingofresearch.com/extremism-undone/ar-beliefs/>.

cognitively impaired human beings?”¹⁶⁶ Wise responded that it is the realistic way to argue for animal interests because judges decide legal rights, not moral rights which are the province of philosophers.¹⁶⁷

Francione asserted that “[t]he status of animals as property . . . precludes any meaningful recognition of their interests.”¹⁶⁸ The balancing of human interests against those of animals that current laws uphold establishes that it is “morally acceptable to use animals for food, hunting, entertainment, clothing, experiments, product testing, and so forth” so that the balancing is not whether the animal use is necessary, but whether the practices of the animal industries are necessary.¹⁶⁹ He continued, “[w]e question not whether it is necessary to eat animals, but whether the dehorning or branding or castrating of cattle is a necessary component of the process of bringing animals to our table—and we look to the commonly accepted practices of the food industry to answer the question.”¹⁷⁰

Common law rights of personhood for nonhuman animals so that they are inherently immune from torture may take some time to develop. Traditionally, the law does not view animals as constitutional persons, especially given that founding father James Madison described even human animals (slaves) as property, not persons.¹⁷¹ Yet it is possible to “extend” such rights to animals since those rights have been granted to women, African-Americans, children, naturalized citizens and even things like corporations¹⁷² and ships.¹⁷³ And while animal rights groups have trouble establishing standing,¹⁷⁴ entities like states have standing and can

¹⁶⁶ Cass R. Sunstein, *The Chimps' Day in Court, A Lawyer Argues that Animals Should Have Legal Rights*, N.Y. TIMES (Feb. 20, 2000), <http://www.nytimes.com/books/00/02/20/reviews/000220.20sunstet.html>.

¹⁶⁷ See Berdik, *supra* note 158.

¹⁶⁸ FRANCIONE, *supra* note 98, at 54.

¹⁶⁹ *Id.* at 55.

¹⁷⁰ *Id.*

¹⁷¹ See James Madison, *Animals are Not Constitutional Persons*, in ANIMAL RIGHTS: A HISTORICAL ANTHOLOGY 127, 128 (Andrew Linzey & Paul Barry Clarke eds., 1990); see also ARTHUR BEST, EVIDENCE EXAMPLES AND EXPLANATIONS 82 (9th ed. 2015) (stating that a dog is not considered a person under the Federal Rules of Evidence, such that a handler's testimony of a dog's statement made out of court would not be considered hearsay and reliability of the animal observation is supported by evidence of the animal training.).

¹⁷² Bernard E. Rollin, *The Legal and Moral Bases of Animal Rights*, in ETHICS AND ANIMALS, *supra* note 36, at 103, 115.

¹⁷³ Berdik, *supra* note 158.

¹⁷⁴ See WILLIAM F. FUNK & RICHARD H. SEAMON, ADMINISTRATIVE LAW: EXAMPLES & EXPLANATIONS 213 (2016) (explaining that standing requires injury, causation, and redressability, for which an animal rights group in *Lujan v. Defenders of Wildlife* failed to show primarily due to the individual harm-in-fact requirement.); but see *id.* at 217 (explaining that, in a rare case, *Animal Legal Defense Fund v. Glickman*, an animal rights group did establish

function as persons to bring claims against agencies like the EPA.¹⁷⁵ Finally, the idea is not new since Supreme Court Justice William O. Douglas proposed that “animals, plants, and natural objects should have legal rights just as humans do.”¹⁷⁶

Meanwhile, this note suggests that lawyers and legislators seek to use our current laws to better balance animal welfare interests based on husbandry guidelines for minimal environmental requirements against business interests in profits and the need to “feed[] a hungry world.”¹⁷⁷ These guidelines include:

- Freedom to perform natural physical movement
- Association with other animals, where appropriate of their own kind
- Facilities for comfort-activities, e.g., rest, sleep and body care
- Provision of food and water to maintain full health
- Ability to perform daily routines of natural activities
- Opportunity for the activities of exploration and play, especially for young animals
- Satisfaction of minimal spatial and territorial requirements including a visual field and “personal” space.¹⁷⁸

In sum, “Right to Farm” constitutional amendments are unnecessary. First, animals are legally considered “things,”¹⁷⁹ so they have no legal rights as sentient beings; instead, they are considered business-owned “units of production.”¹⁸⁰ Second, farmers and ranchers already benefit from federal regulations that encompass standard practices in slaughter that endorse high-speed kill rates;¹⁸¹ state felony anti-cruelty statutes that are inapplicable to

standing when it challenged primate zoo conditions with the court having found recreational standing in that a person is harmed when confronted by allegedly inhumane conditions).

¹⁷⁵ See *id.* at 227 (“[I]t is of considerable relevance that the party seeking review here is a sovereign state and not . . . a private individual. . . . [The state] is entitled to special solicitude in our standing analysis.”).

¹⁷⁶ See THE FALSE CRISES OF RACHEL CARSON, SILENT SPRING AT 50, at 32–33 (Roger Meiners et al. eds., 2012) [hereinafter SILENT SPRING].

¹⁷⁷ AMERICAN EGG FARMING, *supra* note 93, at 6, 7.

¹⁷⁸ MICHAEL W. FOX, INHUMANE SOCIETY: THE AMERICAN WAY OF EXPLOITING ANIMALS 39–40 (1990).

¹⁷⁹ Katie Sykes, *Human Drama, Animal Trials: What the Medieval Animal Trials Can Teach Us About Justice for Animals*, 17 ANIMAL L. 273, 274 (2011).

¹⁸⁰ Francesca Ortiz, *Ethical Implications of the Commercial Use of Animals*, 54 S. TEX. L. REV. 451, 457 (2013).

¹⁸¹ See *Stop the Dangerous, High-Speed Slaughtering of Animals*, CREDO ACTION, https://act.credoaction.com/sign/high_speed_slaughter (last visited Mar. 19, 2018).

agribusinesses;¹⁸² and state “Right to Farm” statutes that protect farmers from nuisance suits.¹⁸³ Third, they should be frowned upon for unduly adding provisions to already extremely lengthy constitutions.¹⁸⁴

An ever-growing human population and the increasingly heavy consolidation of agribusinesses should sound an alarm bell that constitutional rights for ranching and farming are antithetical to the best interests of the public. Instead of additional rights, agribusinesses should carry the burden of proving that alternative practices which provide animals’ sensory, emotional and behavioral needs result in greater harm to human beings, rather than to profits.¹⁸⁵

B. Possible Effects on Environmental Issues

Today, even without protection of “Free to Farm” constitutional amendments, industrial farming has been subject to few regulatory laws and legal claims against its impact on the environment.¹⁸⁶ For

¹⁸² See, e.g., William A. Reppy, Jr., *Broad Exemptions in Animal Cruelty Statutes Unconstitutionally Deny Equal Protection of the Law*, 70 L. & CONTEMP. PROBS. 255, 255–56 (2007).

¹⁸³ See Weldon & Rumley, *supra* note 8.

¹⁸⁴ See Audrey Wall, *Book of the States 2016: Chapter 1: State Constitutions*, COUNCIL OF STATE GOV'T (June 6, 2016), <http://knowledgecenter.csg.org/kc/content/book-states-2016-chapter-1-state-constitutions-0>. The Oklahoma constitution is the second longest in the country. *Id.*

¹⁸⁵ See, e.g., *Oklahoma Right to Farm Amendment, State Question 777 (2016)*, *supra* note 20 (exploring the Oklahoma Right to Farm Amendment containing a balancing test of compelling state interest against the right to employ agricultural, livestock production, and ranching practices technology). This analysis requires a balancing of interests similar to what Drew Edmondson, prior Oklahoma Attorney General, referenced in his example of state environmental interest versus factory farm interest. See *id.* State interests (prohibiting cruelty, for example) should be balanced against agribusiness interests (profits) by borrowing the “least restrictive alternative” concept from the Pike balancing test so that agribusiness must show that an alternative, more humane or environmental-friendly procedure (than the current standard procedure) would cause greater harm to humans, not profits, under a state felony cruelty statute or EPA regulation. See CRUMP ET AL., *supra* note 40, at 275. State interests of anti-cruelty and economics prevailed under the same New York statute (Agriculture and Markets Law) in a case of feline cruelty in 2008, and milk price regulation in 1934. *Nebbia v. New York*, 291 U.S. 502, 515, 539 (1934); *People v. Walsh*, No. 2007NY022001, 2008 WL 724724, at *1 (N.Y. Crim. Ct. Jan. 3, 2008). Therefore, this note asks: why not use this statute against a New York agribusiness which uses a practice deemed inhumane if done to a pet or “any animal”?

¹⁸⁶ See *Food Policy & Regulation*, *supra* note 34 (“[F]actory farms produce as much waste as mid-sized cities, [yet] they have very little capacity and no requirement to treat it. . . . [t]he EPA does almost nothing to reduce the release of . . . ammonia and hydrogen sulfide . . . [and instead] offers factory farms a ‘free pass’ for air-quality violations as long as they participate in and pay for part of an emissions monitoring study.”). Finally, there is no federal regulation regarding “odor, nuisance, and health code violations;” those are left up to state and local

example, in 2002, the Neuse River Foundation lacked standing against Smithfield Foods when North Carolina river associations sought pollution claims against a large industrial hog farm for “improperly handled hog waste.”¹⁸⁷ However, in 2003, using the EPA’s Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”), popularly known as Superfund, the Tulsa Metropolitan Authority in Oklahoma had standing against Tyson Foods in Arkansas to assert cleanup cost contribution claims for contaminated lakes by phosphates in poultry litter that was considered a “hazardous substance.”¹⁸⁸ And more recently, cases against industrial dairy farms have been successful in granting relief for local communities¹⁸⁹ under the EPA’s Clean Water Act (“CWA”), Safe Drinking Water Act (“SDWA”), and the Resource Conservation & Recovery Act (“RCRA”) so that the “industry [is] forced to bear the costs of [its] practices.”¹⁹⁰ The EPA, founded by President Richard Nixon in 1970 as an executive agency,¹⁹¹ is the regulation authority by which industry must adhere under these Acts, along with varied programs issuing compliance requirements, environmental impact assessments (“EIAs”), as well as permits and bio solids discharge reporting.¹⁹² In 2016, for example, under the National Environmental Policy Act (“NEPA”), the agency is assessing the environmental impact of 1,000 new broiler chicken houses in Northeast Arkansas.¹⁹³

If more states adopt “Free to Farm” constitutional amendments, will they impinge on or override regulations like the CWA? At the very least, these amendments would seem to make it harder to prove the source of water runoff or chemicals in the water, for example,

governments. *Id.*

¹⁸⁷ Neuse River Found. v. Smithfield Foods, 574 S.E.2d 48, 50, 55 (N.C. Ct. App. 2002).

¹⁸⁸ City of Tulsa v. Tyson Foods, 258 F. Supp. 2d 1263, 1270, 1271, 1276 (N.D. Okla. 2003), *vacated pursuant to settlement*, No. 01 CV 0900EA(C), 2003 U.S. Dist. LEXIS 23416, at *7–8 (N.D. Okla. July 16, 2003).

¹⁸⁹ See Cmty. Ass’n for Restoration of the Env’t v. Cow Palace, 80 F. Supp. 3d 1180, 1187, 1230 (E.D. Wash. 2015); *Blackwood v. N&M Dairy*, PUB. JUST., https://www.publicjustice.net/case_brief/animal-legal-defense-fund-et-al-v-gary-r-herbert/ (last visited Apr. 26, 2018).

¹⁹⁰ JESSICA CULPEPPER & ELI HOLMES, ANIMAL LEGAL DEF. FUND, CURRENT LITIGATION APPROACHES TO FACTORY FARMING, <http://aldf.org/wp-content/uploads/ALC/2016/Culpepper%20&%20Holmes%20PPT%20-%20ALC%202016.pdf> (last visited Mar. 19, 2018).

¹⁹¹ Phil Wisman, *EPA History (1970-1985)*, ENVTL. PROTECTION AGENCY (Nov. 1985), <https://archive.epa.gov/epa/aboutepa/epa-history-1970-1985.html>.

¹⁹² See *Agriculture: Laws and Regulations that Apply to Your Agricultural Operation by Farm Activity*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/agriculture/agriculture-laws-and-regulations-apply-your-agricultural-operation-farm-activity> (last visited Apr. 28, 2017).

¹⁹³ CULPEPPER & HOLMES, *supra* note 190.

because the injured party would carry the burden of proof under strict scrutiny while the factory farm is under no obligation to provide proof that its practices are safe.¹⁹⁴

Industrial farming in the U.S. is not what environmentalists would consider a “healthy farm system, [where] agriculture works in harmony with the natural environment.”¹⁹⁵ The foundation of all food production is “healthy soil that stores water and nutrients and. . . support[s] plant roots,” which is balanced by food systems that are sustainable, utilizing crop rotation methods, livestock grazing and waste management for proper soil fertilization.¹⁹⁶

Instead industrial farms are not in balance with the environment because land is never “rested” and monocrops are continuously grown instead of rotating crops to re-nourish the soil.¹⁹⁷ Furthermore manure becomes a major problem instead of a tool for replenishment.¹⁹⁸ Hundreds of millions of pounds of waste are generated in a year in just one factory farm housing 35,000 pigs.¹⁹⁹ This massive amount of manure carries with it antibiotics and hormones, along with chemical fertilizers and pesticides, that run off into waterways killing fish and their habitats and even affecting a community’s drinking water.²⁰⁰

Likewise, as stated in *CARE v Cow Palace*²⁰¹ in 2015, dairy farmers term the manure from their 7,000 plus cows as a “valuable product,”²⁰² or better known as “liquid gold;”²⁰³ yet, much of that manure is either in “lagoons” or over-applied along with chemical fertilizers to the fields, or “gifted” away, or sold as compost . . . which places its value in question when it is free, over-applied and seeps out of the lagoons.²⁰⁴ Over-application of manure which contains zinc, copper, chromium, arsenic, cadmium and lead from animal feed, builds up and affects fertility of the soil.²⁰⁵ Excessive salt from dairy

¹⁹⁴ See Lindsey Temple, *Concerns Raised over State Question 777*, RED DIRT REP. (Nov. 18, 2015), <http://www.reddirtreport.com/red-dirt-news/concerns-raised-over-state-question-777>; *Oklahoma Right to Farm Amendment, State Question 777 (2016)*, *supra* note 20.

¹⁹⁵ *Environment*, *supra* note 11.

¹⁹⁶ *Id.*

¹⁹⁷ *See id.*

¹⁹⁸ *See id.*; see also POLLAN *supra* note 90, at 79 (“CAFOs . . . transform what at the proper scale would be a precious source of fertility—cow manure—into toxic waste.”).

¹⁹⁹ *See Environment*, *supra* note 11.

²⁰⁰ *See id.*

²⁰¹ *Cnty. Ass’n for Restoration of the Env’t v. Cow Palace, LLC*, 80 F. Supp. 3d 1180 (E.D. Wash. 2015).

²⁰² *Id.* at 1187–88, 1203.

²⁰³ CULPEPPER & HOLMES, *supra* note 190.

²⁰⁴ *See Environment*, *supra* note 11.

²⁰⁵ *See id.*

farm manure also is a contributor to erosion.²⁰⁶ Furthermore, poultry manure is a problem because poultry litter (consisting of wood shavings or rice hulls as bedding with excrement) contains phosphorus and nitrogen which is commonly spread on the ground, sold or provided to neighbors for free as fertilizer, presenting risks that the poultry industry has been aware of since the late 1980's due to "nutrient loading resulting from surface water runoff on pastures and fields."²⁰⁷

Additionally, massive quantities of feed crops are grown that are inedible for humans in order to feed thirty million beef cows a year, each eating thirty pounds of food a day,²⁰⁸ which burdens the land to yield ever-increasing crop harvests causing about seven tons of erosion per acre per year which affects loss of nutrients, fertility and water in the soil.²⁰⁹

Traditionally, animal agriculture has "controlled the narrative"²¹⁰ so that consumer interest in good living conditions for the animals raised for food and environmental impact are supplanted by more concentrated and intensive practices to provide an "abundance" of food more efficiently and profitably than ever.²¹¹ "Concentration is the problem,"²¹² and with vertically integrated conglomerates owning the animals, the slaughterhouses, the railway cars, the warehouses, the rendering plants, and more,²¹³ they are a powerful economic force that legislators cannot ignore. For example, Tyson operates a "vertically integrated poultry operation . . . to control the genetics and the breeding stock that goes into the chickens that are processed; to have consistency in the final product; and to produce the highest

²⁰⁶ *See id.*

²⁰⁷ *City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263, 1273 (N.D. Okla. 2003), *vacated pursuant to settlement*, No. 01 CV 0900EA(C), 2003 U.S. Dist. LEXIS 23416, at *7–8 (N.D. Okla. July 16, 2003).

²⁰⁸ *See Environment*, *supra* note 11.

²⁰⁹ *See id.*; *see also*, POLLAN, *supra* note 90, at 34 ("[A farmer's] crops are basically inedible—they're commodities that must be processed or fed to livestock before they can feed people."). [S]ynthetic fertilizers open the way to monoculture[.] . . . Fixing nitrogen allowed the food chain to turn from the logic of biology and embrace the logic of industry. Instead of existing exclusively from the sun, humanity now began to sip petroleum [because] . . . [g]rowing corn . . . became a process of converting fossil fuels into food . . . [rather than] captur[ing] a whole year's worth of sunlight[.] . . . [E]very bushel of industrial corn requires the equivalent of between a quarter and a third of a gallon of oil to grow it, [taking] more than a calorie of fossil fuel energy to produce a calorie of food.").

POLLAN, *supra* note 90, at 45–46.

²¹⁰ CULPEPPER & HOLMES, *supra* note 190.

²¹¹ *See AMERICAN EGG FARMING*, *supra* note 93, at 1, 6.

²¹² CULPEPPER & HOLMES, *supra* note 190.

²¹³ *Id.*

quality finished product possible.”²¹⁴ What is more, agribusinesses enjoy a strong and embedded economic infrastructure, supported by governmental councils (such as pork, beef and dairy) funded by taxpayers to advertise and promote animal consumption,²¹⁵ as well as governmental subsidies and grazing rights,²¹⁶ that result in a massive job market encompassing everything from fast food outlets, furniture, sports equipment, clothing, cars, and more.²¹⁷

Yet for diligent lawyers who seek to place public and individual interests for a healthy and safe environment above standard agribusiness practices that may have adverse effects on communities, the EPA and its Acts can be powerful tools. To wit, in 2015 under the RCRA, Jessica Culpepper, attorney for Public Justice, a Washington D.C. non-profit corporation, among other non-profit plaintiffs, was granted summary judgment against Cow Palace, a commercial dairy operation with 7,000 cows in Washington State for groundwater contamination from manure runoff containing nitrates, which affected the community’s drinking water.²¹⁸ Even more recently, an order was issued in California denying defendant N&M Dairy’s motion to dismiss a claim under the RCRA and Safe Drinking Water Act for improper storage and disposal of solid waste and manure with seepage of pollutants into groundwater,²¹⁹ and was settled in 2017, according to Culpepper.²²⁰

The environmental issues of factory farming are not just a concern for U.S. policy, but a worldwide one recognized by the United Nations, which concluded in 2006 that “raising food animals ‘emerges as one of the top two or three most significant contributions to the [world’s] most serious environmental problems . . . [t]he livestock sector is ‘responsible for 18 percent of greenhouse gas emissions measured in CO₂ equivalent,’” contributing more than that of transportation.²²¹ What’s more, “a reduction in . . . the livestock

²¹⁴ *City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263, 1273 (N.D. Okla. 2003).

²¹⁵ Robert Holly, *Agribusiness Companies Capitalize on Tax Breaks, Grants, Subsidies and Loans*, INVESTIGATE MIDWEST (May 12, 2015), <http://investigatemidwest.org/author/robertholly/page/10/>.

²¹⁶ *See id.*; *Livestock Grazing on Public Lands*, BUREAU OF LAND MANAGEMENT (last visited April 2, 2018), <https://www.blm.gov/programs/natural-resources/rangelands-and-grazing/livestock-grazing>.

²¹⁷ *See* Jeff Daniels, *Agriculture: Job growth to boom over next five years*, CNBC (May 20, 2015), <https://www.cnbc.com/2015/05/20/agriculture-fertile-ground-for-job-seekers.html>.

²¹⁸ *See* Cmty. Ass’n for Restoration of the Env’t v. Cow Palace, LLC, 80 F. Supp. 3d 1180, 1186, 1210 (E.D. Wash. 2015).

²¹⁹ *Blackwood v. N&M Dairy*, No. 5:14-cv-00395-JGB-SP (C.D. Cal. Aug. 28, 2014).

²²⁰ *Blackwood v. N&M Dairy*, *supra* note 191.

²²¹ WISE, *supra* note 7, at 222–23.

industry through reduced consumption is the most effective way of cutting [greenhouse gases] from animal production,” according to a 2008 statement presented by the “chair of the Nobel-winning Intergovernmental Panel on Climate Change.”²²²

Besides being directly environmentally unsound, industrial farming also raises questions about sustainability due to its massive natural resources consumption to turn animals into meat and dairy products.²²³ Cattle rarely get the chance to graze, but even if they do, the vast majority end up in feedlots prior to slaughter and eat soybeans and corn supplemented with “chicken manure, plate waste from restaurants, and animal blood” to improve protein content of the feed for a cheap and fast way to fatten them to market weight.²²⁴ Even though this diet often sickens them and even causes death because a ruminant needs grass to neutralize acids,²²⁵ the feedlot method is standard practice.²²⁶ Yet, this process is inefficient for producing food because converting grain into meat means that eight pounds of grain needs to be consumed for every one pound of meat.²²⁷

Furthermore, animal agriculture is extremely thirsty requiring water for growing the crops animals eat, supplying water for animals to drink and using water for cleaning and processing.²²⁸ “Pound for pound, [meat] has a much high water footprint than vegetables, grains or beans . . . [requiring] on average, 1,800 gallons of water” for one pound of beef while one pound of corn takes about 147 gallons of water.²²⁹

Environmental skeptics disagree and decry Jeremy Rifkin’s warning in his 1992 book *Beyond Beef* that “cattle production and

²²² *Id.* at 222.

²²³ See Mark Bittman, *Rethinking the Meat-Guzzler*, N.Y. TIMES (Jan. 27, 2008), <http://www.nytimes.com/2008/01/27/weekinreview/27bittman.html>.

²²⁴ *Sustainable Livestock Husbandry*, GRACE COMM. FOUND., <https://www.sustainabletable.org/248/sustainable-livestock-husbandry> (last visited Apr. 28, 2018); see also POLLAN, *supra* note 90, at 76–78 (“[T]he rules still permit feedlots to feed nonruminant animal protein to ruminants. Feather meal and chicken litter (that is, bedding, feces, and discarded bits of feed) are accepted cattle feeds, as are chicken, fish, and pig meal. . . . [A] great many feedlot cattle . . . are simply sick . . . [with] bloat . . . [and] acidosis [while] [c]attle rarely live on feedlot diets for more than 150 days, which might be about as much as their systems can tolerate . . . [and] [w]hat keeps a feedlot animal healthy—or healthy enough—are antibiotics.”).

²²⁵ *Sustainable Livestock Husbandry*, *supra* note 224 (“It is estimated that 12 to 32% of all feedlot cattle develop liver abscesses as a result of the high-grain diet.”).

²²⁶ See Barry Estabrook, *Feedlots vs. Pastures: Two Very Different Ways to Fatten Beef Cattle*, ATLANTIC (Dec. 28, 2011), <https://www.theatlantic.com/health/archive/2011/12/feedlots-vs-pastures-two-very-different-ways-to-fatten-beef-cattle/250543/>.

²²⁷ See *Sustainable Livestock Husbandry*, *supra* note 224.

²²⁸ See *The Water Footprint of Food*, GRACE COMM. FOUND., <https://www.gracelinks.org/1361/the-water-imprint-of-food> (last visited Apr. 28, 2018).

²²⁹ *Id.*

beef consumption now rank[] among the gravest threats to the future well-being of the earth and its human population.”²³⁰ While conceding that Rifkin “is absolutely right to condemn the centur[ies]-old subsidized grazing privileges that ranchers have enjoyed on public lands in the American West,” one critic claimed that cattle are actually very efficient since they take “an average of four-and-a-half pounds of grain to produce a pound of beef, retail weight.”²³¹ The four-and-a-half pounds of grain statistic is derived from the Cattleman’s Association in 1992,²³² which is substantially different from the eight pounds of grain statistic derived from a source in 2000 touting the benefits of grass-fed beef.²³³ Either way, whether it’s four pounds or eight pounds of grain, the result is still only one pound of meat, which leaves one wondering how anyone could consider that to be efficient.

Furthermore, while Rifkin claims that “one-third of the world’s grain is fed to livestock,” causing starvation in third world countries, critics counter that “more than 90 percent of the U.S. land used for grazing is unsuitable for cultivated crops” and that “cattle consume just 11 percent of U.S.-produced grain,” while each year “we have an enormous grain surplus.”²³⁴ The blame, then, for third world food problems are not cows but ill-conceived policies of international development agencies.²³⁵

As for the usage of water for cattle, Rifkin critics argue to end the federally subsidized irrigation in the west which props up ranchers while costing taxpayers a few billion dollars, rather than demand people avoid beef-eating.²³⁶

Finally, others lament that the Clean Water Act’s “zero-risk paradigm” based on Rachel Carson’s seminal 1962 environmental treatise *Silent Spring*, which calls for “zero discharge of pollutants” is unrealistic and “an embarrassing legacy of an outdated mindset” given that this goal has never been met decades later, much less by the 1985 deadline that was initially mandated.²³⁷ Yet, this Act is the primary means by which the public may hold industrial farming accountable given its vast usage of water as well as its vast waste

²³⁰ JAMES T. BENNETT & THOMAS J. DiLORENZO, *THE FOOD & DRINK POLICE* 119 (1999).

²³¹ *Id.* at 121, 123.

²³² *Id.* at 155.

²³³ See *Sustainable Livestock Husbandry*, *supra* note 224.

²³⁴ BENNETT & DiLORENZO, *supra* note 230, at 124.

²³⁵ See *id.*

²³⁶ See *id.* at 125.

²³⁷ SILENT SPRING, *supra* note 176, at 284–285.

production.²³⁸ And while the U.S. has yet to follow the E.U.'s "precautionary principle" which holds that "any discharge should, broadly speaking . . . thus be avoided,"²³⁹ reducing risk, rather than eliminating risk, by considering trade-offs of risks to benefits is a more rational goal.²⁴⁰

From a moral standpoint, though, should not *zero-risk* be the goal regardless of whether it is ever obtainable? Philosophers and ethicists ask not whether we have a duty to protect the environment, but whether we have a duty to do no harm to the environment—the former resting on the positive duty to bring aid (traditionally not imposed in U.S. tort law), and the latter being a negative duty to not act in a destructive manner.²⁴¹ Our natural preference is for "ecosystems over static lifelessness" and "good ecosystems over poorer ones" so that morality guides us to do no harm not necessarily for the interest of humans or animals, but for the intrinsic worth of the ecosystems themselves.²⁴²

Although the industry is primarily self-regulated, the EPA, various state laws, and the judicial system impose some accountability on businesses by requiring affirmative duties for disaster clean-ups, such as the Exxon Valdez oil spill in 1989 that provided the impetus for the Oil Pollution Act in 1990.²⁴³ Yet, surprisingly, there has been little record of litigation against factory farms under these regulations in the past decades.²⁴⁴ When infractions occur in the agribusiness industry and manure-laden lagoons leach into waterways affecting community drinking water, will successes against dairy farms that we've seen recently in California and Washington State for groundwater contamination²⁴⁵ be less likely in the future?

It is too early to tell since only two "Right to Farm" state constitutional amendments have passed;²⁴⁶ however, by their very

²³⁸ See *id.*; see also Editorial Board, *The E.P.A. Backs Off on Factory Farms*, N.Y. TIMES (June 14, 2008), <https://www.nytimes.com/2013/06/15/opinion/the-epa-backs-off-on-factory-farms.html?mtrref=www.google.com&assetType=opinion>.

²³⁹ SILENT SPRING, *supra* note 176, at 286, 287.

²⁴⁰ See *id.* at 288.

²⁴¹ See Peter S. Wenz, *Ecology, Morality and Hunting*, in ETHICS AND ANIMALS, *supra* note 36, at 187.

²⁴² See *id.* at 191.

²⁴³ See Megan Gannon, *Exxon Valdez 25th Anniversary: 5 Facts About the Historic Spill*, LIVE SCI. (Mar. 24, 2014), <http://www.livescience.com/44314-exxon-valdez-spill-anniversary-facts.html>.

²⁴⁴ See Steven M. Sellers, *As Factory Farms Spread So Do Toxic Tort Cases*, BLOOMBERG L. (May 5, 2017), <https://www.bna.com/factory-farms-spread-n73014450563/>.

²⁴⁵ See *id.*

²⁴⁶ See Chuck Abbot, *Three States in a Row for Right to Farm?*, AGRICULTURE.COM (July 26,

nature they set high burdens of strict scrutiny in measuring an environmental interest against the interest of the ranchers and farmers.²⁴⁷

C. Possible Effects on Food Safety and Human Nutrition

Many people may be surprised that food safety is not heavily regulated by the federal government. Instead, the responsibility for food safety is borne by the industry, which relies on voluntary product recalls when food safety is risked, rather than preventative measures.²⁴⁸ This is alarming since each year “50 million Americans get sick from eating unsafe food, resulting in more than 100,000 hospitalizations, 3,000 deaths” and an untold loss of productivity.²⁴⁹ With little federal regulation, any grievances against the food industry for sicknesses must be sought through state laws.

“Right to Farm” amendments protect not ranchers and farmers, who are “essentially forced to buy and sell at whatever prices . . . agribusiness giants offer,” but the self-regulated giant corporations which get food on Americans’ tables in a consolidated, concentrated fashion, namely “the four largest companies in each industry [which] slaughter nearly all the beef, process two-thirds of the pork, sell half the groceries[,] and manufacture about half the milk in the United States.”²⁵⁰ Just four companies—Tyson, JBS, Cargill and Smithfield—“control almost all the meat you eat,” by producing eighty-five percent of all U.S. beef.²⁵¹ In North Dakota, CAFOs now

2016), <https://www.agriculture.com/news/business/three-states-in-a-row-for-right-to-farm>; Kristofor Husted, *Missouri Constitutional Amendment Pits Farmer Against Farmer*, NPR (Aug 6, 2014), <https://www.npr.org/sections/thesalt/2014/08/06/338127707/missouri-s-right-to-farm-amendment-pits-farmer-against-farmer>.

²⁴⁷ See *Hill v. Mo. Dep’t of Conservation*, No. ED105042, 2017 Mo. App. LEXIS 1011, at *22 (Mo. Ct. App. Oct. 10, 2017).

²⁴⁸ See *Food Safety*, *supra* note 12; see also ERIC SCHLOSSER, *FAST FOOD NATION: THE DARK SIDE OF THE ALL-AMERICAN MEAL* 9 (2001) (“Meat industry practices . . . have facilitated the introduction of deadly pathogens, such as *E. coli* O157:H7, into America’s hamburger meat, a food aggressively marketed to children. Again and again, efforts to prevent the sale of tainted ground beef have been thwarted by meat industry lobbyists and their allies in Congress. The federal government has the legal authority to recall a defective toaster oven or stuffed animal—but still lacks the power to recall tons of contaminated, potentially lethal meat.”).

²⁴⁹ *Food Safety*, *supra* note 12.

²⁵⁰ *Taking on Corporate Power in the Food Supply Fact Sheet*, FOOD & WATER WATCH 1 (Mar. 2011); see Weldon & Rumley, *supra* note 8; *Right to Farm, Amendment 1 . . . Pro and Con*, RICHMOND NEWS, <https://www.richmond-dailynews.com/2014/07/right-to-farm-amendment-1-pro-and-con/> (last visited Apr. 29, 2018).

²⁵¹ Bernice Napach, *How 4 Companies Control Almost All of the Meat You Eat*, DAILY TICKER (Feb. 19, 2014), <http://finance.yahoo.com/blogs/daily-ticker/how-four-companies-control-the-supply-and-price-of-beef-pork-and-chicken-in-the-u-s-eat-prices-224406080.html#>. See *Food Policy & Regulation*, *supra* note 34 (“Extreme concentration in agricultural markets—where

have “blanket protection” against possible food safety infractions even though “[t]hese facilities have been exposed time and again for abusing livestock, passing off sick cattle as healthy, and, most seriously, polluting water and air quality with massive amounts of animal manure.”²⁵²

With this kind of power and concentration, and with the high risk of food safety and the importance of human nutrition, increased protection for agribusinesses under “Right to Farm” propositions is the opposite direction for state laws to follow. Instead, when challenged, the industry should be asked to carry the burden of proof under a strict scrutiny standard of review by defending their standard industry practices against alternative practices that have lower incidences of contamination.²⁵³

Food contamination in the form of bacteria, viruses and parasites like *Salmonella*, and *E. coli* headline the current food safety issues, followed closely by pesticides, antibiotics and hormone use, as well as Bovine Spongiform Encephalopathy (“BSE”) or mad cow disease.²⁵⁴

These food contamination issues, though heavily dependent on industry self-regulation, are subject to government oversight by three federal agencies, and state and local governments, as follows: 1) the USDA, which oversees all meat, poultry and egg processed foods, and seeks voluntary recalls for “adulterated” products;²⁵⁵ 2) the Food and Drug Administration (“FDA”), which inspects mostly non-meat production and reviews new products and may order unsafe food recalls;²⁵⁶ 3) the Center for Disease Control and Prevention (“CDC”), which works with the states to track outbreaks;²⁵⁷ and 4) state and local governments, which enforce standards for foods produced within a state, as well as inspect retail outlets, dairy farms, and

four or five firms control many aspects of the food chain—has resulted in enormous profits and power.”).

²⁵² Shen, *supra* note 12.

²⁵³ *Oklahoma Right to Farm Amendment, State Question 777 (2016)*, *supra* note 20. This analysis requires balancing of interests similar to what Drew Edmondson, prior Oklahoma Attorney General, referenced in his example of state environmental interest versus factory farm interest. *Id.*; see CRUMP ET AL., *supra* note 40, at 275 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). State interests should be balanced against agribusiness interests by borrowing the “least restrictive alternative” concept from the Pike balancing test so that agribusiness must show that an alternative, more environmental-friendly procedure would cause greater harm to humans not profits in justifying its standard practices. See *Food Safety*, *supra* note 12 (suggesting methods for containment of contamination other than post-facto remedies and recalls).

²⁵⁴ *Food Safety*, *supra* note 12.

²⁵⁵ See *id.*

²⁵⁶ See *id.*

²⁵⁷ See *id.*

manufacturing and processing plants.²⁵⁸ The effectiveness of this split in responsibility as well as the heavy reliance on industry self-regulation requires an examination of the vulnerability to risk the public is exposed to every day.

The extent and cost of foodborne illnesses are a foremost concern in the U.S. with 1.4 million cases and 400 deaths reported annually in the past few years,²⁵⁹ perhaps because the two primary causes—*Salmonella* and *E. coli*—are found in products like bologna, hazelnuts (for *Salmonella*), beef, and even fruit and vegetables due to contact with manure (for *E. coli*).²⁶⁰ The level of beef contamination is so high that it is now deemed “commonplace” with 200,000 pounds recalled in just one month in 2011.²⁶¹

The problem is complex because the processing of foods, such as adding flavorings, involves many different parties in the global supply food chain.²⁶² In fact, alarmingly, the CDC has not been able to determine the agents of most of the foodborne illnesses in the U.S.²⁶³ Today’s globalization with limited historical natural barriers such as oceans combined with unsanitary, crowded, . . . factory farms results in outbreaks that [are] difficult to trace or monitor.²⁶⁴ Even ConAgra, a giant food manufacturer, could not identify the source of the ingredients in its “highly processed product”²⁶⁵ to determine where salmonella originated in their pot pies in the 2007 class action, *True v. ConAgra*,²⁶⁶ resulting in recalls of their well-known Banquet® brands, among others.²⁶⁷ ConAgra “initially blamed consumers for undercooking,” and tried to push the burden of food safety onto the consumer by including instructions to wash and cook food (a standard practice); yet “cooking directions. . . failed to keep nearly 15,000

²⁵⁸ *See id.*

²⁵⁹ *See id.*

²⁶⁰ *See id.*

²⁶¹ *See id.* (noting July 2011 beef recall for *E. coli*).

²⁶² *See id.*

²⁶³ *See id.*

²⁶⁴ CARRIE HRIBAR, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON COMMUNITIES 3 (2010); WATERBORNE AND FOODBORNE DISEASE OUTBREAKS, CTR. FOR DISEASE CONTROL 5 (2013); Monica Nickelsburg, *5 Modern Diseases Grown by Factory Farming*, WEEK (Nov. 7, 2013), <http://theweek.com/articles/457135/5-modern-diseases-grown-by-factory-farming>.

²⁶⁵ *Food Safety*, *supra* note 12.

²⁶⁶ *True v. Conagra Foods, Inc.*, No. 07-00770-cv-w-dw, 2011 U.S. Dist. LEXIS 6770 (W.D. Mo. Jan. 4, 2011).

²⁶⁷ *See* Complaint at 8, *True*, 2011 U.S. Dist. LEXIS 6770; *Against Conagra on Behalf of Consumers Who Purchased or Ingested Salmonella Contaminated Pot Pies*, POGUST BRASLOW & MILLROOD (Oct. 12, 2017), <https://pbmattorneys.com/first-nationwide-class-action-filed-conagra-behalf-consumers-purchased-ingested-salmonella-contaminated-pot-pies/>.

consumers safe” from contamination.²⁶⁸

Adding another layer to the food safety issue is the “post-harvest food safety interventions” of “injecting meat with ammonia or irradiating it with spent nuclear fuel,” which has not met with much consumer approval despite government regulators’ enthusiastic responses²⁶⁹ and scientists’ attempts to assure the public of the safety of these methods.²⁷⁰ While these methods focus on after-the-fact contamination remedies that are unsavory, regulators should instead focus on simpler and currently available methods of addressing contamination by requiring “slower line speeds in slaughter plants, stronger government inspection authority[,] and more careful work to ensure that feces and other contamination does not come in contact with products in the first place, rather than simply focusing on disinfecting or rinsing contaminants off.”²⁷¹

The extensive use of pesticides, which are widely used in growing the crops and grains that the factory farmed animals consume,²⁷² are used to improve crop yield with minimal consideration regarding human health as a result of exposure and ingestion, such as cancer, nerve damage, and development issues in children.²⁷³ These high-yield crops are also bred for their low “vulnerability to weeds and insects”²⁷⁴ and are genetically modified to be used for specific purposes, other than feeding humans; in fact, “[a]ll the corn in the cornfields you see out in the Midwest is being used to feed cars and animals . . . and to make high fructose corn syrup.”²⁷⁵

As local governments look to establish restrictions on the use of pesticides and genetically modified organisms (“GMO”), “commercial agricultural entities” are fighting back, as demonstrated by the 2016

²⁶⁸ *Food Safety*, *supra* note 12.

²⁶⁹ *Id.*; see also POLLAN, *supra* note 90, at 82 (“[T]his process of acidification can be reversed, and that doing so can greatly diminish the threat from *E. coli* . . . by switching a cow’s diet from corn to grass or hay for a few days prior to slaughter. . . . But such a solution (*Grass?*!) is considered widely impractical by the cattle industry and (therefore) by the USDA. Their preferred solution for dealing with bacterial contamination is irradiation—essentially, to try to sterilize the manure getting into the meat.”).

²⁷⁰ F. Breidt, Jr., et al., *Independent Effects of Acetic Acid and PH on Survival of Escherichia Coli in Simulated Acidified Pickle Products*, 67 J. FOOD PROTECTION 1, 12 (2003).

²⁷¹ *Food Safety*, *supra* note 12.

²⁷² See *Food and Personal Health*, GRACE COMM. FOUND., <https://www.sustainabletable.org/271/food-personal-health> (last visited Apr. 30, 2018); *Pesticides*, GRACE COMM. FOUND., <http://www.sustainabletable.org/263/pesticides> (last visited Apr. 30, 2018).

²⁷³ See *Food and Personal Health*, *supra* note 272; *Pesticides*, *supra* note 272.

²⁷⁴ *Food and Personal Health*, *supra* note 272.

²⁷⁵ Keiren, *Dent Corn Puts a Dent in Our Health*, INSTEADING (June 23, 2016), <https://instead.com/blog/dent-corn-and-sweet-corn/>.

case in Hawaii, *Syngenta Seeds v. County of Kauai*,²⁷⁶ where the seed company seeks to invalidate three provisions of the County ordinance that requires: 1) mandatory disclosures, 2) buffer zones between treated crops and adjacent properties, and 3) an impact study completed by the County to address environmental and public health questions.²⁷⁷

While local governments are enacting legislation to improve food safety and oversight, the federal government remains reliant on voluntary industry guidelines that are proving to be less than effective.²⁷⁸ Recently, the FDA chose to address the decades-long practice of the use of antibiotics on factory farms to prevent infections and stimulate growth of the animals by issuing voluntary guidelines for drug companies to discontinue drug sales solely for that purpose.²⁷⁹ This action proved to be grossly inadequate—the same drugs used for growth were also approved for therapeutic use and farms simply used “disease-prevention” as their reason for obtaining the drugs, resulting in the availability of “97% of all medically important drugs [being] available in 2014 without a prescription or a veterinary feed directive.”²⁸⁰ Because agribusiness can obtain antibiotics over the counter, “we’re walking swiftly down the path towards a post-antibiotic era, in which our life-saving medicines no longer work.”²⁸¹

The World Health Organization (“WHO”) warns that antibiotics may not control new and changing forms of diseases such as the antibiotic resistant CRE bacteria, also known as “the phantom menace,” and the MSRA “superbug” due to overuse in the food supply chain.²⁸² As a result, some popular food businesses, are taking their own actions: McDonald’s and Subway alerted their suppliers that

²⁷⁶ *Syngenta Seeds, Inc., et al., v. County of Kauai*, No. 14-00014BMK, 2014 WL 1631830 (D. Haw. Apr. 23, 2014).

²⁷⁷ *See id.* at *1 (granting the motion to intervene by Food Safety Center, Pesticide Action Network and Surfrider Foundation).

²⁷⁸ *See* COMM. ON THE REVIEW OF THE FOOD AND DRUG ADMIN. ROLE IN ENSURING SAFE FOOD, ENHANCING FOOD SAFETY: THE ROLE OF THE FOOD AND DRUG ADMINISTRATION 205 (Robert B. Wallace & Maria Oria eds., 2010); Bill Wenzel, *Predictable Problems in the FDA Annual Report*, U.S. PIRG BLOG (Dec. 15, 2015), <https://uspirg.org/blogs/blog/usp/predictable-problems-fda-annual-report>.

²⁷⁹ *See* Wenzel, *supra* note 278.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*; *see also* *Carbapenem-resistant Enterobacteriaceae in Healthcare Settings*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/HAI/organisms/CRE/index.html> (last updated Feb. 23, 2018); *Methicillin-resistant Staphylococcus aureus (MRSA)*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/MRSA> (last updated May 16, 2016).

they will no longer buy “meat raised on antibiotics.”²⁸³ Still, reliance on industry self-regulation falls short of halting the routine use of antibiotics on farms; therefore, the FDA should resist the lobbying efforts of agribusiness and institute a ban so that “our life-saving medicines can remain effective for generations to come.”²⁸⁴

What factory farms feed the animals also is a human health hazard given that the feedlot is an unnatural way for grazing animals to eat, resulting in diseases such as BSE or mad cow disease that occurs when cattle ingest nervous system material from other cattle that had the disease.²⁸⁵ Though not nearly as prevalent in the U.S. as in Great Britain where it was first detected in 1986,²⁸⁶ 200,000 cattle have been affected—a fact concerning human health, since ingestion of BSE cattle has been linked to an incurable disease which takes up to thirty years to manifest.²⁸⁷ Furthermore, animal feed contains a number of questionable substances, such as metal compounds, pathogens, carcinogens, plastics, “rendered” animal products, animal waste (containing antibiotics and hormones), and even arsenic compounds, which are approved for chickens to “enhance growth and to control parasites.”²⁸⁸

Human health and nutrition is not only affected by food safety risks, but by the intrinsic value and quality of food. The government has imposed on itself the duty to impart nutritional information to the American public in the way of USDA-recommended guidelines while not being held accountable for the information it disseminates;²⁸⁹ yet, at the same time creating “normalization” so that “people follow that standard because they do not want to deviate from that norm.”²⁹⁰

Not surprisingly, the recommendations for a healthy diet have

²⁸³ Wenzel, *supra* note 278.

²⁸⁴ *Id.*

²⁸⁵ *See Food Safety, supra* note 12.

²⁸⁶ *See id.*

²⁸⁷ *See id.*; *see also* SCHLOSSER, *supra* note 248, at 284–85 (“As of this writing, about a hundred people have died from vCJD, the human form of mad cow disease. . . . At the moment there is no cure for vCJD, and it is impossible to predict how many people will get the disease by eating tainted meat. . . . If it takes about ten years for most infected people to develop the disease, than we are now in the middle of the epidemic, and perhaps a thousand or so will die. If the average incubation period is twenty, thirty, or forty years—as the latest science suggests—then the epidemic is just beginning, and hundreds of thousands may die.”).

²⁸⁸ *Food and Personal Health, supra* note 272.

²⁸⁹ ESKRIDGE ET AL., *supra* note 14, at 68.

²⁹⁰ *Id.* at 68–69 (“Congress often assigns agencies particular informational tasks, and agencies have broad discretion to gather and promulgate information they consider useful to the public. . . [agencies can contribute powerfully to social normalization.]”).

changed over the decades since the first USDA food guide in 1917,²⁹¹ which was contrary to its own agricultural chemist researcher, who proffered that fat and sugar should be limited while “proteins, beans, and vegetables” should be emphasized.²⁹² Instead, milk, milk products and meat headlined the top food categories for the next 60 years.²⁹³

In 1977, however, the Select Committee on Nutrition and Human Needs, which was established in 1968 to address hunger and malnutrition, recommended “all Americans reduce their fat, saturated fat and cholesterol consumption, and increase their carbohydrate consumption to 55-60% of daily calories,” which was met with vitriol from the cattle, egg and dairy industry pundits, who went “ballistic [over] Congress. . .telling people that animal products were bad for health!”²⁹⁴ As a result, the report was revised, but the “damage had been done,” and, in the 1980s, what eventually became known as the USDA Food Pyramid was issued, along with various other reports from the Surgeon General and the National Research Council, both touting low fat diets.²⁹⁵ The 1992 food pyramid, while showing milk and meat products below bread, cereals, vegetables and fruits, was still not reflective of the low-fat whole foods emphasis that scientific research reported.²⁹⁶ In 2010, the experts continued to advise the USDA on a low-fat, high-carbohydrate diet, but the food pyramid continued to “recommend the products that benefit agricultural and food processing interests.”²⁹⁷

More recently, the food pyramid was redesigned and called “My Plate,” but it still offered “bad dietary advice.”²⁹⁸ Research points to eating minimally processed foods, such as whole grains, legumes and fresh fruits and vegetables,²⁹⁹ which My Plate does not sufficiently

²⁹¹ *USDA Food Pyramid History*, KETOGENIC DIET RESOURCE, <http://www.healthy-eating-politics.com/usda-food-pyramid.html> (last visited Apr. 29, 2018).

²⁹² *See id.*; *see also* ESKRIDGE ET AL., *supra* note 14, at 68. (“The famous ‘food pyramid’ suggest[s] a healthful balance of food groups for a day’s meal, [which] has shaped the thinking of two generations of Americans. [However] [t]he federal government has recently abandoned the pyramid and has changed its mind about the most healthful balance of foods, as it turns out.”).

²⁹³ *See USDA Food Pyramid History*, *supra* note 291.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.*; *see also* Richard David Feinman et al., *In the Face of Contradictory Evidence: Report of the Dietary Guidelines for Americans Committee*, 26 *NUTRITION* 915, 916 (2010) (discussing the denial of the facts of a lower carb and reduced grain consumption diet in a separate paper).

²⁹⁹ *See Additives*, GRACE COMM. FOUND., <http://www.sustainabletable.org/385/additives> (last visited Apr. 29, 2018); *The Nutrition Source, Whole Grains*, HARV. T.H. CHAN SCH. OF PUB.

emphasize. My Plate, nonetheless, made strides toward healthier, more wholesome dietary advice by including “calcium-fortified soymilk” as an alternative to dairy and giving “protein” less than a quarter of the plate,³⁰⁰ defining it as “beans . . . eggs, nuts,” along with “meat, poultry or fish,” highlighting specifically vegetarian protein choices.³⁰¹ In 2015, My Plate was replaced by a lengthy USDA Dietary Guide that is in effect until 2020.³⁰² The beef industry’s immediate reaction is described as “[h]aving a [c]ow over the [p]otential USDA [r]ecommendations.”³⁰³ Its position was strong enough to exert influence so that “[m]eat producers showed dominance over scientists . . . preventing discussion of sustainability” at the Congressional hearing on 2015 dietary recommendations.³⁰⁴

Unfortunately, it seems not much attention has been paid to these updated recommendations by the general public, as the U.S. continues to have an alarming obesity epidemic: Thirty-five percent of adults in 2009-2010 were classified as obese and a whopping sixty percent were considered overweight, with both conditions linked to chronic diseases such as Type II diabetes, heart disease and stroke.³⁰⁵

While the U.S. public continues to ignore warnings about the intrinsic unhealthfulness of meat, WHO has published warnings that “[p]rocessed [m]eat [c]auses [c]ancer.”³⁰⁶ Processing refers to ways to preserve or flavor meat, which include salting, curing, fermenting, and smoking that are done to meats such as “hot dogs, ham, bacon, sausage, some deli meats, . . . beef, pork, lamb, and goat.”³⁰⁷ The conclusions were based on:

HEALTH, <https://www.hsph.harvard.edu/nutritionsource/what-should-you-eat/whole-grains/> (last visited Apr. 29, 2018).

³⁰⁰ *2010 Dietary Guidelines: All About the Dairy Group*, USDA, <https://www.choosemyplate.gov/dairy> (last visited Apr. 30, 2018); *2010 Dietary Guidelines: All About the Protein Foods Group*, USDA, <https://www.choosemyplate.gov/protein-foods> (last visited Apr. 30, 2018) [hereinafter *Protein*].

³⁰¹ *Protein*, *supra* note 300.

³⁰² See U.S. DEPT OF HEALTH & HUMAN SERV. & U.S. DEPT OF AGRIC., 2015-2020 DIETARY GUIDELINES FOR AMERICANS xi (2015), https://health.gov/dietaryguidelines/2015/resources/2015-2020_Dietary_Guidelines.pdf.

³⁰³ Leon Kaye, *Beef Industry Having a Cow over Potential USDA Recommendations*, TRIPLE PUNDIT (Jan. 9, 2015), <https://www.triplepundit.com/2015/01/beef-industry-cow-potential-usda-recommendations/>.

³⁰⁴ James Hamblin, *How Agriculture Controls Nutrition Guidelines*, ATLANTIC (Oct. 8, 2015), <http://www.theatlantic.com/health/archive/2015/10/ag-v-nutrition/409390/>.

³⁰⁵ *Food and Personal Health*, *supra* note 272.

³⁰⁶ Stacy Simon, *World Health Organization Says Processed Meat Causes Cancer*, AM. CANCER SOC’Y (Oct. 26, 2015), <http://www.cancer.org/cancer/news/news/world-health-organization-says-processed-meat-causes-cancer>.

³⁰⁷ *Id.*

Twenty-two experts from 10 countries reviewed more than 800 studies . . . [and] found that eating 50 grams of processed meat every day increased the risk of colorectal cancer by 18%. That's the equivalent of about 4 strips of bacon or 1 hot dog. For red meat, there was evidence of increased risk of colorectal, pancreatic, and prostate cancer. . . . [Furthermore], [t]he American Cancer Society has long recommended a diet that limits processed meat, and red meat, and that is high in vegetables, fruits, and whole grains.³⁰⁸

The food safety issue becomes even greater due to the mounting pressure of providing animal food products faster and more efficiently. Nutrition advice that de-emphasizes animal products is being ignored by the public. Animal agriculture continues to exert strong lobbying and special interest power.³⁰⁹ Therefore, agribusiness standard practices should be legally questioned, rather than further protected under "Right to Farm" amendments. When industry practices are challenged, the interests of agribusiness against state interests should be balanced using a test that places the burden of proof on agribusiness to justify its practices under a strict scrutiny standard of review, rather than requiring the public to show that agribusiness practices are unjustifiable.³¹⁰

D. Possible Effects on Business Interests

Ranching and farming activities that "Right to Farm" amendments seek to protect are hardly recognizable these days. Industrial farming now dominates our entire food system.³¹¹ The visions of cowboys riding horses and driving cattle, and early morning risers on the farm waking to the sound of roosters' cock-a-doodle-dos are now the stuff of folklore. Ranching and farming are no longer largely practiced by millions of farmers but by intensive, concentrated

³⁰⁸ *Id.* ("Overall, the lifetime risk of someone developing colon cancer is 5%. To put the numbers into perspective, the increased risk from eating the amount of processed meat in the study would raise average lifetime risk to almost 6%.").

³⁰⁹ See *Food Policy & Regulation*, *supra* note 34.

³¹⁰ See *Oklahoma Right to Farm Amendment, State Question 777 (2016)*, *supra* note 20. This note suggests balancing of interests similar to what Drew Edmondson, prior Oklahoma Attorney General, referenced in his example of state environmental interest versus factory farm interest. See *CRUMP ET AL.*, *supra* note 40, at 275, 276–77 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145–46 (1970)). This note suggests borrowing the "least restrictive alternative" concept from the Pike balancing test so that agribusiness must show that an alternative proactive containment procedure would cause greater harm to humans, not profits in justifying its current practices.

³¹¹ See *Food Economics*, *supra* note 13.

industrial “farms” within a vertically integrated system owned by “[a] handful of corporations [which include] producers of seeds, processors of meat and milk, and grocery retailers [that have] enormous power to control markets and pricing, and . . . influence food and agricultural regulations.”³¹²

Given the enormous size and power of agribusiness, why, then, does the industry feel the need to be further protected by state constitutions? While industry spokespeople cite the threats of animal welfare and environmental groups as justifications for these additional safeguards,³¹³ maybe other influences exert industry pressure. Expanded sources of plant-based protein and alternatives to dairy are becoming popular with consumers so that agribusiness marketing giants are taking notice. With the ever-increasing presence of these alternative foods in the marketplace and their growing popularity and acceptance, agribusinesses may well be concerned about protecting their competitive edge and profit margins rather than their ability to “feed the world.”³¹⁴

Today’s industrial farm complex produces efficiencies on a scale that were practically unheard of thirty years ago, plentifully supplying the U.S. and the world with “huge quantities of cheap food”³¹⁵ to an ever-growing human population. Yet, unlike other business models, this economic model has a unique and often neglected factor. It involves sentient creatures who factor into “hidden costs,” such that, per a Pew Commission report, “[the] increasing . . . speed of production [and] the intensive confinement” of animals contribute to “animal welfare problems . . . and significant shifts in the social structure and economy of many farming regions throughout the country,” along with numerous environmental issues.³¹⁶

Proponents of the industrial model often claim that smaller farms are unable to produce food efficiently.³¹⁷ Others dispute this notion. Not only do more traditional farms have enormous benefits to their

³¹² *Id.*

³¹³ See *Food Policy & Regulation*, *supra* note 34.

³¹⁴ Darrell Pursel, Statement at the Nevada Drought Forum Sector Meeting 3 (Aug. 19, 2015), <http://dcmr.nv.gov/uploads/documents/NevadaFarmBureauStatement.pdf>.

³¹⁵ *Food Economics*, *supra* note 13; see also POLLAN, *supra* note 90, at 32 (“[F]ewer than 2 million Americans still farm—[but] they grow enough to feed the rest of us. . . . [R]aising nothing but corn and soybeans on a fairly typical Iowa farm [with 470 acres] is so astonishingly productive that [the farmer] is, in effect, feeding some 129 Americans. Measured in terms of output per worker, American farmers . . . are the most productive humans who have ever lived.”).

³¹⁶ *Food Economics*, *supra* note 13.

³¹⁷ See *id.*

communities since they employ and do business locally, the “diversified sustainable farms produce more food per acre of land”³¹⁸ than industrial farming. This is achieved by employing more local workers, creating more jobs (instead of using machinery) and utilizing land holistically.³¹⁹

What we do see is local farmers contracting with conglomerates to raise animals for food.³²⁰ Many have complaints about the situation, such as the 2015 class action suit brought by poultry raisers in Western Kentucky against Tyson.³²¹ The suit claims that “Tyson acts as an ‘integrator,’ controlling all of the inputs used by the poultry growers—such as the birds, feed, and medical care—as well as the processing facilities and contracts for sale” so that the growers are “essentially . . . sharecroppers . . . unable to control their own destiny and being paid under an unfair system.”³²² In surviving the motion to dismiss, the growers asserted that Tyson “possess[es] anticompetitive power and has used that power to manipulate growers’ outputs and income.”³²³

The real conundrum of the “economic efficiency myth,” is this: “[I]ndustrial farming has not relieved famine or hunger throughout the world . . . [instead it] has fed a culture of over-consumption, particularly in the United States, where large quantities of food are tossed in the trash while . . . the population is in the throes of an obesity epidemic.”³²⁴

Nonetheless, the industrial farm complex model is thriving and enjoys an embedded economic infrastructure supported by the government in the form of farm subsidies, which “prop[] up a system designed to drive overproduction of commodity crops[,] . . . cheap corn and soy[,] . . . [for] factory farms and corporate profits.”³²⁵ Some

³¹⁸ *Id.*

³¹⁹ *See id.*

³²⁰ *Industrial Livestock Production*, GRACE COMM. FOUND., <http://www.sustainabletable.org/859/industrial-livestock-production> (last visited Apr. 30, 2018).

³²¹ *Morris v. Tyson*, No. 4:15-cv-00077-JHM, 2015 WL 7188479, at *1–2 (W.D. Ky. Nov. 13, 2015); *see Morris v. Tyson*, PUB. JUST., <https://www.publicjustice.net/casebrief/morris-v-tyson/> (last visited Apr. 30, 2018) [hereinafter PUB. JUST.].

³²² PUB. JUST., *supra* note 321.

³²³ *Id.*

³²⁴ *Food Economics*, *supra* note 13.

³²⁵ *Id.*; *see also* POLLAN, *supra* note 90, at 61. (“The Iowa Farmers Cooperative does not write the only check [an Iowa farmer] will receive for his corn crop. . . . He gets a second check from the . . . USDA—about twenty-eight cents a bushel no matter what the market price of corn is, and considerably more should the price of corn drop below a certain threshold. . . . Taken together these federal payments account for nearly half the income of the average Iowa corn farmer and represent roughly a quarter of the \$1.9 billion U.S. taxpayers spend each year on payments to farmers.”). “Very simply, we subsidize high-fructose corn syrup in this country,

ranchers and farmers also enjoy the benefits of “the national beef check-off program,” where money is collected and pooled from cattle sales to fund promotional and advertising campaigns for beef.³²⁶ Yet, recently, Montana ranchers decried the program because their contribution to the fund is being used by the Montana Beef Council, which is aligned with multinational, industrial cattle producers, to promote fast food chains like Wendy’s, while giving the impression that domestically and internationally raised beef is equal in quality to Montana beef.³²⁷

The success of the modern food system might have reached its peak success is measured by financial reports of two of the leaders in the industry. Smithfield’s 2016 annual report stated, “[w]e are the largest hog producer and pork processor in the world” yet net income of \$452.3 million in 2015 was down significantly from \$556.1 million in 2014, on sales of \$14 billion compared to \$15 billion dollars in the respective years.³²⁸ In addition, Smithfield acknowledged that Porcine Reproductive and Respiratory Syndrome Virus (“PRRSv”), “was more severe than observed in recent years . . . [and] [w]e are unable to predict the extent these diseases will impact our operations or market prices in the future.”³²⁹ On the other hand, it was noted that Congress repealed components of the Country of Origin Labeling regulation, which requires certain meat products to be labelled with where the animal was “born,” where it was “raised,” and where it was “slaughtered,” while “also prohibit[ing] combining or commingling of meats with different ‘Born, Raised, and Slaughtered’ combinations in the same package at retail;”³³⁰ thereby easing the burden of labeling requirements for the company.

but not carrots.” *Id.* at 108; *see also* SCHLOSSER, *supra* note 248, at 7–8 (“One historian has described the federal government’s 1950s highway-building binge as a case study in ‘interstate socialism.’ . . . The fast food industry took root alongside that interstate highway system, as a new form of restaurant sprang up beside the new off-ramps. . . . While publicly espousing support for the free market, the fast food chains have quietly pursued and greatly benefited from a wide variety of government subsidies. Far from being inevitable, America’s fast food industry in its present form is the logical outcome of certain political and economic choices.”). “But the value meals, two-for-one deals, and free refills of soda give a distorted sense of how much fast food actually costs. The real price never appears on the menu.” SCHLOSSER, *supra* note 248, at 9.

³²⁶ David Murray, *Where’s the Beef? R-CALF Sues to Amend Check-off Program*, GREAT FALLS TRIB. (Oct. 25, 2016), <https://www.greatfallstribune.com/story/news/local/2016/10/25/beef-calf-sues-amend-checkoff-program/92752558/>.

³²⁷ *See id.*

³²⁸ ANNUAL REPORT FORM 10-K, SMITHFIELD FOODS, INC. 29, 30, 121 (Mar. 29, 2016), <http://apps.shareholder.com/sec/viewerContent.aspx?companyId=SFD&docid=11284393>.

³²⁹ *Id.* at 31.

³³⁰ *Id.* at 31.

Tyson touted itself as “a recognized market leader in chicken, beef and pork as well as prepared foods,” reporting operating income increases of 31 percent in 2016 and 52 percent in 2015 on a sales increase of 10 percent for a record \$41.4 billion (but based on a 53-week year in 2015 versus a 52-week year in 2014 and 2013), crediting the growth to “accessibility of international markets . . . and operating efficiencies of . . . facilities.”³³¹ However, reports released in late 2016 revealed that CEO Donnie Smith is stepping down and that quarterly and annual earnings and sales were “missed,” causing Tyson’s stock price to fall.³³² In fact, for the fiscal year 2016, Tyson reported just \$36.8 billion in sales, down from the record \$41.4 billion in 2015.³³³ In addition, Tyson reported that it is “trying to turn around the flagging beef segment that turned in a 15% drop in both quarterly and annual sales.”³³⁴

Some people did not accept Tyson’s explanation of its sales misses by attributing the decline to “lower beef prices and higher costs,” but, instead believed that the “public has become increasingly fed up with their horrific abuse of animals, . . . mistreatment of employees, . . . lawsuits, . . . shareholder and consumer deception, . . . and felony pollution of air and water.”³³⁵

Other conglomerates either do not widely report their numbers or show declining numbers. For example, another one of the world’s largest beef and pork processing companies is a foreign-based corporation which does not publicly release its numbers. JBS USA is a subsidiary of the publicly-listed, Brazilian-based company, JBS SA., which is traded on the Sao Paulo Stock Exchange, and makes its numbers only available to “qualified institutional buyers.”³³⁶

Finally, widely considered to be one of the top four meat producing companies, Cargill, Inc. is an American global corporation based in Minnetonka, Minnesota, which is now the largest privately-held corporation in the United States in terms of revenue.³³⁷ If it were a

³³¹ See ANNUAL REPORT FORM 10-K, TYSON FOODS, INC. 23 (Nov. 23, 2015), http://s1.q4cdn.com/900108309/files/doc_financials/2015/annual/Q4-10K-2015.pdf; ANNUAL REPORT FORM 10-K, TYSON FOODS, INC. 23 (Nov. 21, 2016), http://s1.q4cdn.com/900108309/files/doc_financials/2016/Annual/TSN-FY16-Form-10-K.pdf [hereinafter Tyson 2016 Annual Report].

³³² See Paul Ausick, *Tyson Foods Pummeled on Sales, Earnings Misses*, 24/7 WALL ST. (Nov. 21, 2016), <http://247wallst.com/consumer-products/2016/11/21/tyson-foods-pummeled-on-sales-earnings-misses/>.

³³³ Tyson 2016 Annual Report, *supra* note 331.

³³⁴ Ausick, *supra* note 332.

³³⁵ See *Tyson Foods Sales Plummet*, *supra* note 13.

³³⁶ *Investors*, JBS USA, <https://www.JBSSA.com/investors> (last visited Apr. 20, 2018).

³³⁷ See *Financial Information*, CARGILL, <https://www.cargill.com/about/financial-inform>

public company, it would rank, as of 2015, number twelve on the Fortune 500, ahead of AT&T.³³⁸ Similar to Smithfield, Cargill reported a declining net income and sales in 2016 of \$1.6 billion on sales of \$107 billion, which is down from net income of \$1.9 billion on sales of \$120.4 billion in 2015.³³⁹

It is possible that the growing awareness of food animal cruelty practices, environmental damage, food safety and nutrition and business interests are increasingly resonating with consumers, causing the major players in the food system to pay attention. In 2016, Tyson invested millions of dollars, along with the Humane Society of the United States, in Beyond Meat, a plant-based meat substitute company which markets Beyond Burger, mimicking the taste and texture of meat.³⁴⁰ In addition, Hungry Man's frozen dinner parent, Pinnacle, purchased plant-based brand Gardein,³⁴¹ while Oscar Mayer's parent, Kraft, has been promoting the Boca plant-based burgers.³⁴² Furthermore, ConAgra Foods, "once [sic] of the country's largest meatpackers[] bought and built the LightLife brand of veggie meats."³⁴³ Similarly, Unilever, parent of Hellman's (or Best Foods in some areas of the country), the number one mayonnaise in the country, ironically is introducing "its own eggless spread" after it initiated a lawsuit in 2014 against Hampton Creek's Just Mayo spread.³⁴⁴ Unilever claimed that the Just Mayo product was misleading because it does not contain eggs and therefore did not

ation (last visited Apr. 30, 2018); *see also* POLLAN, *supra* note 90, at 63, 69 ("Cargill is the biggest privately held corporation in the world. . . . [A] mere four giant meatpacking companies (Tyson subsidiary IBP, Cargill subsidiary Excel, Swift & Company, and National) now slaughter and market four of every five beef cattle born in this country."); Kathy Bell, Opinion, *Beef Packing Industry*, DODGE CITY DAILY GLOBE, (June 14, 2016), <http://www.dodgeglobe.com/news/20160614/beef-packing-industry>; Nick Williams, *Cargill Makes Investment in Minneapolis Pea Protein Company Puris*, MINNEAPOLIS ST. PAUL BUS. J. (Jan. 17, 2018), <https://www.bizjournals.com/twincities/news/2018/01/17/cargill-makes-investment-in-minneapolis-pea.html>.

³³⁸ Bell, *supra* note 337.

³³⁹ *See Cargill Reports Fiscal 2016 Fourth-Quarter and Full Year Results*, CARGILL, <https://www.cargill.com/news/releases/2016/NA31964869.jsp> (last visited Apr. 30, 2018); *Cargill Reports Fiscal 2015 Fourth-Quarter and Full Year Results*, CARGILL, <https://www.cargill.com/news/releases/2015/NA31878663.jsp> (last accessed Apr. 30, 2018).

³⁴⁰ *See* Wayne Pacelle, *Beyond Amazing News About Beyond Meat*, HUMANE NATION (Oct. 11, 2016), <https://blog.humaneociety.org/2016/10/tyson-invests-beyond-meat.html>.

³⁴¹ *See id.*

³⁴² *See id.*

³⁴³ *Id.*

³⁴⁴ *See* Associated Press, *Hellmann's Gives Vegan a Go After Suing Eggless Spread Maker*, VOA NEWS (Feb. 3, 2016), <https://www.voanews.com/a/hellmanns-gives-vegan-a-go-after-suing-eggless-spread-maker/3174910.html>; Stephanie Strom, *After Suing over Eggless Spread, Hellmann's Introduces Its Own*, N.Y. TIMES (Feb 2, 2016), <https://www.nytimes.com/2016/02/03/business/after-suing-over-eggless-spread-hellmanns-introduces-its-own.html>.

meet “the federal standard of identity for mayonnaise.”³⁴⁵

With the business undergoing sales hits while the issues of industrial farming continue to make the news, it is no surprise that agribusiness may see the need for further governmental protection in the form of “Right to Farm” amendments. With the state’s interest in protecting the health, safety and welfare of its citizens, the state should be wary of acceding to the power of the agribusiness lobbyists in placing these types of amendments on the ballot. As demonstrated in Oklahoma and Indiana, where these bills failed most recently,³⁴⁶ states should recognize that the public is becoming more aware and concerned that, by granting additional protections to ranching and farming, we may be unable to quickly respond to unforeseen issues as a result of new agribusiness technology and practices.

IV. CONCLUSION

Food production will always be a key economic factor and a leader in the U.S. gross national product (“GNP”). Producing food is necessary to maintain human health and wellness, and our abundant country offers us an extensive variety of food substances. The importance of food production touches us all through daily, necessary interactions. Therefore, the impact of any legislation and state actions with respect to ranching and farming are deeply felt by everyone. By carving out protections for certain activities like ranching and farming that have a large effect on many aspects of our food supply, including animal welfare; environmental damage; food safety and nutrition; and business interests, we are weighing agribusiness interests above the general well-being of everyone else *not* defined as ranchers and farmers. Given the size and strength of the industry and its power over our entire food production system, instead of adding protections for these businesses, legislators and judges should be asking instead for “ranchers and farmers” to justify their current practices and procedures, as well as any future

³⁴⁵ Associated Press, *Mayonnaise Maker Hellman’s Gives Vegan a Go After Suing Eggless Spread Maker*, CHI. TRIB. (Feb 2, 2016), <http://www.chicagotribune.com/business/ct-hellmanns-vegan-mayonnaise-20160202-story.html> (detailing how Unilever dropped the suit after negative press and public outcry while also discovering that some of its own products were not qualified as mayonnaise under the federal standards either).

³⁴⁶ See Ryan Sabalow, *Indiana Senate Kills “Right to Farm” Amendment*, INDY STAR (FEB 24, 2015), <https://indystar.com/story/news/2015/02/24/indiana-senate-kills-right-farm-amendment/23944627/>; Joe Wertz & Logan Layden, *Oklahoma Divided: How Geography Influenced the Vote on “Right-to-Farm”*, NPR: ST. IMPACT (Nov. 10, 2016), <https://stateimpact.npr.org/oklahoma/2016/11/10/oklahoma-a-divided-how-geography-influenced-the-vote-on-right-to-farm/>.

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activities, so that alternative practices that do less damage and provide better animal care cause greater harm to profits, not to humans.