

# Taking (Live) Stock of Animal Welfare in Agriculture: Comparing Two Ballot Initiatives

Neil Thapar\*

## I. PROP 2 AND ISSUE 2: WHAT DID THEY DO?

On November 4, 2008, California voters passed Proposition 2 with 63.5% of the vote. Proposition 2 (Prop 2), a historic ballot initiative, prescribed for the first time in state history, statewide standards of care for livestock.<sup>1</sup> Within a year, on November 3, 2009, Ohio voters passed Issue 2, another historic ballot initiative. Issue 2 amended the Ohio state constitution and delegated the task of creating substantive standards of care for the state's livestock to a Livestock Care Standards Board. Although both initiatives relate to the welfare of animals in agriculture, and both passed by an overwhelming majority, the similarities end there. While other states have addressed animal welfare issues in agriculture, California and Ohio are far more significant producers of animals for food than any of those states, signaling the bona fide entrance of animal welfare into the mainstream of American agricultural politics.<sup>2</sup>

California's Prop 2 amended the California Health and Safety Code to prohibit confining any "covered animal"<sup>3</sup> "for all or the majority of any day," in a manner that prevents it from lying down, standing up, fully

---

\* Notes Editor, *Hastings Women's Law Journal*, 2010–11; J.D. Candidate, 2011, University of California, Hastings College of the Law; B.A., 2007, University of California, Los Angeles. The author would like to thank the *Hastings Women's Law Journal* for its commitment to publishing this Note. He offers his gratitude to David Nims, Katy Edwards, Leeja Patel, Aishlin Hicks, Erin Emmer, and Caitlin Tallon for their dedication and continued effort during the editing process.

1. November 4, 2008 General Election Supplement to the Statement of Vote – Statewide Summary by County for State Ballot Measures, CAL. SEC'Y ST., [http://www.sos.ca.gov/elections/sov/2008\\_general/](http://www.sos.ca.gov/elections/sov/2008_general/) (follow "Statewide Summary Propositions" hyperlink under "Statewide Measures" heading) (last visited Mar. 8, 2011).

2. California is the largest dairy producer, seventh-largest beef cattle producer, and seventh-largest poultry and eggs producer in the United States. See USDA, NASS, 2007 Census of Agriculture State Profile, available at [http://www.nass.usda.gov/Statistics\\_by\\_State/Ag\\_Overview/AgOverview\\_CA.pdf](http://www.nass.usda.gov/Statistics_by_State/Ag_Overview/AgOverview_CA.pdf); Ohio is the second-largest egg producer, ninth-largest pork producer by weight, and eleventh-largest milk producer in the United States, see USDA, NASS, Ohio Agriculture: A Profile, available at [http://www.nass.usda.gov/Statistics\\_by\\_State/Ohio/Publications/PRO07.pdf](http://www.nass.usda.gov/Statistics_by_State/Ohio/Publications/PRO07.pdf).

3. A "covered animal" is any "pig during pregnancy, calf raised for veal, or egg-laying hen who is kept on a farm." CAL. HEALTH & SAFETY CODE § 25991(b) (West 2006).

extending its limbs, and turning around freely.<sup>4</sup> Effective January 2015, the standards Prop 2 creates may also result in criminal punishment for noncompliance.<sup>5</sup> The law provides exceptions for scientific and agricultural research, veterinary testing, transportation, certain public exhibitions, and slaughter.

By contrast, Ohio's Issue 2 (Issue 2) amends the Ohio state Constitution instead of a state statute. Rather than prescribing standards of care outright, it creates a thirteen-member Livestock Care Standards Board charged with the exclusive authority to issue "standards governing the care and well-being of livestock<sup>6</sup> and poultry"<sup>7</sup> enforced by the state's Department of Agriculture.<sup>8</sup> Since Issue 2 is a constitutional amendment, it became effective thirty days after election day.<sup>9</sup>

Prop 2 and Issue 2 represent two very different forms of agricultural animal welfare regulation. As a preliminary matter, the two bills establish different types of laws. California's Prop 2 creates substantive standards for livestock care through legislation, codified in California's Health and Safety Code. Ohio's Issue 2, on the other hand, does not prescribe any substantive standards for the welfare of livestock. Instead, it imbues an administrative body created by the state constitution with authority to prescribe such standards subject to a few guiding principles.<sup>10</sup> Additionally, although proponents of both bills marketed each initiative as advancing animal welfare, the language of the bills stated significantly different purposes. Prop 2 explicitly endeavored to "prohibit the cruel confinement of farm animals,"<sup>11</sup> while Issue 2 sought to "establish standards governing the care and well-being of livestock and poultry."<sup>12</sup> The criminal penalties for violating Prop 2 suggest that the primary purpose of that law is to deter cruel conduct.<sup>13</sup> There is no such provision in Issue 2, nor does Issue 2 expressly authorize criminal penalties for violations of the rules promulgated by the Board.<sup>14</sup> Lastly, while Prop 2 is just one piece

---

4. CAL. HEALTH & SAFETY CODE § 25990 (West 2006).

5. *Id.* Violation of the code is a misdemeanor subject to a fine up to \$1,000, jail time up to 180 days, or both. *Id.*

6. The enacting legislation introduced in the Ohio House of Representatives defines "livestock" to include equine animals regardless of the purpose for which they are raised and porcine, bovine, caprine, and ovine animals, poultry, alpacas, and llamas raised for food. OHIO REV. CODE § 904.1 (2011).

7. OHIO CONST. art. XIV § 1(A) and OHIO REV. CODE § 904.

8. OHIO REV. CODE § 904.04.

9. OHIO CONST. art. II § 1b.

10. The text of Issue 2 provides that in establishing standards, "the Board shall consider factors that include, but are not limited to, agricultural best management practices for such care and well-being, biosecurity, disease prevention, animal morbidity and mortality data, food safety practices, and the protection of local, affordable food supplies for consumers."

11. CAL. HEALTH & SAFETY CODE § 25990.

12. OHIO CONST. art. XIV § 1(A) and OHIO REV. CODE § 904.

13. CAL. HEALTH & SAFETY CODE § 25990.

14. *Id.*

of a growing body of law aimed at regulating animal welfare and preventing cruelty, Issue 2 sets forth an entire regulatory structure for livestock care throughout the state of Ohio.

This Note compares each ballot initiative's means of regulating livestock welfare, describes their benefits and drawbacks, and concludes that legislative ballot initiatives like Prop 2 do a better job of promoting livestock welfare than constitutional amendments by ballot initiative. In Part II, this Note provides a brief overview of the changes in the agricultural industry that led to the ballot initiatives. Because politics supporting both initiatives provide valuable context for the subsequent comparison and analysis, this Note recounts the events leading up to the passage of both initiatives, along with an explanation of the scope and probable effect each law will have. Following this contextual background, in Part III this Note briefly summarizes the ballot initiative as a legislative tool and its use related to animal welfare. This Note does not address the controversial role of the ballot initiative in our democracy—rather this Note merely recognizes its existence as a political tool. Part IV analyzes direct legislation by ballot initiative—the method of regulation instituted by Prop 2—in the context of animal welfare, and evaluates the benefits and disadvantages of ballot initiatives for promoting the welfare of animals in agriculture. Part V addresses administrative regulation—the result of Issue 2—and the potential risks of the arbitrariness and outside influence present in the administrative state. Finally, Part VI analyzes which method is likely to advance the welfare of animals in agriculture through the law, and concludes in Part VII that direct legislation, via ballot initiative or otherwise, is the more appropriate method for addressing animal welfare in agriculture.

## II. THE TRANSFORMATION FROM HUSBANDRY TO INDUSTRY: A CLOSER LOOK AT TWO STATES

### A. THE STORY BEHIND CALIFORNIA'S PROP 2

Prop 2 is one of the most important animal welfare reform laws in history. It cannot be fully understood without also understanding the context within which it was conceived, drafted, and finally passed.<sup>15</sup> The most galvanizing event for the supporters of Prop 2 was an animal abuse scandal at a meatpacking plant in Southern California. However, the roots of the movement grow from the deeper changes taking place in livestock production throughout California and the United States.

The use of animals in agriculture has gone through a dramatic transformation in the United States over the past century and a half. Pasture-based systems of rearing livestock, commonplace even seventy-

---

15. Jonathan R. Lovvorn & Nancy V. Perry, *California Proposition 2: A Watershed Moment for Animal Law*, 15 *ANIMAL L.* 149, 150–51 (2009).

five years ago, have rapidly been replaced with intensive feedlot-based systems that have a capacity for housing more animals and a faster production cycle for raising animals to slaughter weight.<sup>16</sup> Greater economies of scale have led to more production and lower prices, as well as a corresponding increase in demand for animal-based products.<sup>17</sup> The transformation from husbandry to industry has been facilitated through consolidation, aimed at maximizing the quantity of meat, poultry, eggs, and other animal products produced from given quanta of land and other resources.<sup>18</sup> This consolidation, along with increases in meat and dairy production over the past twenty years, are staggering. In 1992, there were 191,347 hog farms in the United States.<sup>19</sup> By 2007, there were only 75,442 hog farms nationwide, but the total number of farmed hogs increased by more than ten million.<sup>20</sup> Likewise, there was an 88% reduction in the number of dairy operations between 1970 and 2006, while dairy production itself increased by nearly 65%.<sup>21</sup> In the case of broiler chickens, production of the largest farms has jumped from 47.6% to 67% of the total market, while the production of the smallest farms have remained at just 0.01% of the total market during the same time period.<sup>22</sup>

As a consequence of the increased demand for cheaper animal-based products, this consolidation has prioritized increased efficiencies and economies of scale over the welfare of animals. The industrialization of the livestock sector has encouraged proliferation of large-scale production facilities commonly referred to as "concentrated/confined animal feeding operations" (CAFOs) or "factory farms." These recent innovations have

---

16. Charles W. Abdalla, *The Industrialization of Agriculture: Implications for Public Concern and Environmental Consequences of Intensive Livestock Operations*, 10 PENN ST. ENVTL. L. REV. 175, 177-81 (2002).

17. *Id.*

18. For a comprehensive overview of the consolidation of the meat industry, see James M. MacDonald, et. al., Economic Research Service, USDA, Econ. Research Rep. No. 785, *Consolidation in U.S. Meatpacking* (Feb. 2000), available at <http://meatami.com/ht/a/GetDocumentAction/i/2436>.

19. USDA, NASS, *2007 Census of Agriculture—Table 1: Historical Highlights: 2007 and Earlier Census Years*, available at [http://www.agcensus.usda.gov/Publications/2007/Full\\_Report/Volume\\_1\\_Chapter\\_1\\_US/st99\\_1\\_001\\_001.pdf](http://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1_Chapter_1_US/st99_1_001_001.pdf).

20. *Id.*

21. James M. MacDonald, et al., Economic Research Service, USDA, Econ. Research Rep. No. 47, *Profits, Costs, and the Changing Structure of Dairy Farming*, 2 (Sep. 2007), available at <http://www.ers.usda.gov/publications/err47/err47.pdf>.

22. In 1992, the smallest farms (1,999 animals or less) constituted 20.6% of the total number of broiler operations, while the largest farms (500,000 animals or more) constituted 15.5%. In 2007, the smallest farms accounted for 35% while the largest grew to 24%. Even with a 15% increase in the number of small operations, their share of the production stayed at .01%, while a 9% increase in the number of large farms led to a 20% increase in the share of production. See USDA, NASS, *1997 Census of Agriculture – United States Data, Table 20*, available at [http://www.agcensus.usda.gov/Publications/1997/Vol\\_1\\_Chapter\\_1\\_U.S.\\_National\\_Level\\_Data/us-51/us1\\_19.pdf](http://www.agcensus.usda.gov/Publications/1997/Vol_1_Chapter_1_U.S._National_Level_Data/us-51/us1_19.pdf); and USDA, NASS, *2007 Census of Agriculture – United States Data, Table 27*, available at [http://www.agcensus.usda.gov/Publications/2007/Full\\_Report/Volume\\_1\\_Chapter\\_1\\_US/st99\\_1\\_027\\_028.pdf](http://www.agcensus.usda.gov/Publications/2007/Full_Report/Volume_1_Chapter_1_US/st99_1_027_028.pdf).

emerged as a result of the mechanization of raising animals in agriculture, transforming the art of animal husbandry into a science. Three “innovations of efficiency” created by this industrialized process are battery cages,<sup>23</sup> veal crates,<sup>24</sup> and gestation crates.<sup>25</sup> These now-standard industry practices are the primary bases for the fight over animal welfare in agriculture. All three cause great concern to animal rights advocates because such restrictive housing has been shown to impair mental, physical, and emotional characteristics otherwise present in nonintensively confined populations.<sup>26</sup>

Additionally, consumer awareness over food safety issues has increased in the United States following highly publicized *E. coli* outbreaks in beef and spinach, and more recently, *Salmonella* in peanuts.<sup>27</sup> The event that catalyzed the Prop 2 campaign was an animal abuse scandal at Hallmark Meat Packing Company (Hallmark) in Chino, California.<sup>28</sup> In 2007, the Humane Society of the United States (HSUS) investigated the Hallmark premises and uncovered cruelty to “downer”<sup>29</sup> cows, in violation of sections 597(a) and 599a of the California Penal Code.<sup>30</sup> Hallmark

---

23. Battery cages are holding pens for egg-laying hens, usually made of wire and stacked several tiers high, where the birds spend nearly their entire existence. See Lovvorn & Perry, *supra* note 15, at 152.

24. Veal crates are holding pens for calves where the animals are generally tethered in a space about sixty-six inches long and twenty-five inches wide. See Lowell L. Wilson, Carolyn L. Stull, & Tammy L. Terosky, Scientific Advancements And Legislation Addressing Veal Calves in North America, Proceedings of the International Symposium in Le Mans, France, September 12–13.

25. Gestation crates are holding devices for impregnated sows where they are kept throughout the three- to four-month gestation period, before being moved to a farrowing crate, then back to the gestation crate for re-impregnating. See *The Truth Behind Gestation Crates: The Life of the Sow*, FARM SANCTUARY, <http://www.farmsanctuary.org/issues/factoryfarming/pork/gestationcrates.html> (last visited Mar. 8, 2011).

26. For the effects on chickens, see *The Welfare of Hens in Battery Cages: A Summary of the Scientific Evidence*, FARM SANCTUARY, [http://www.farmsanctuary.org/issues/factoryfarming/eggs/bc\\_evidence.html](http://www.farmsanctuary.org/issues/factoryfarming/eggs/bc_evidence.html) (last visited Mar. 8, 2011); for the effect on pigs, see *The Truth Behind Gestation Crates*, *supra* note 25; for the effects on dairy cows, see *The Welfare of Cattle in Dairy Production*, FARM SANCTUARY, [http://www.farmsanctuary.org/mediacenter/assets/reports/dairy\\_report.pdf](http://www.farmsanctuary.org/mediacenter/assets/reports/dairy_report.pdf) (last visited Mar. 8, 2011).

27. See *California Firm Recalls Beef Products Due to Possible E. coli O157:H7 Contamination*, USDA, FSIS, (Jan. 18, 2010), [http://www.fsis.usda.gov/News\\_Events/Recall\\_004\\_2010\\_Release/index.asp](http://www.fsis.usda.gov/News_Events/Recall_004_2010_Release/index.asp); *FDA Statement on Foodborne E. coli O157:H7 Outbreak in Spinach*, FDA, (Sep. 23, 2006), available at <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2006/ucm109579.htm>; *FDA Warns Against Consuming Peanuts and Peanut Products Sold by Westco Fruit and Nuts Inc.*, FDA, (Mar. 23, 2009), available at <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2009/ucm149549.htm>.

28. Lovvorn & Perry, *supra* note 15, at 156.

29. “Downer cow” is the common term for a cow that is so injured or diseased that it cannot stand or walk. The legal definition is an animal that “cannot rise from a recumbent position or that cannot walk, including but not limited to, those with broken appendages, severed tendons or ligaments, nerve paralysis, fractured vertebral column, or metabolic conditions.” 9 C.F.R. § 309.2 (2009).

30. CAL. PEN. CODE § 597 (West 2011); CAL. PEN. CODE § 599a (West 2011).

happened to be the second-largest supplier of beef to the National School Lunch Program at the time, so the scandal drew national attention from the media and consumers. Surveillance data shows that downer cows have a higher incidence of Bovine Spongiform Encephalopathy (BSE), commonly known as Mad-Cow Disease.<sup>31</sup> Due to the “practice of occasionally slaughtering cattle that, despite passing ante-mortem inspection, became non-ambulatory prior to entering the slaughter operation,”<sup>32</sup> the USDA announced a voluntary recall of the meat distributed by Hallmark—the largest recall in U.S. history to date.<sup>33</sup> While the Hallmark scandal directly prompted stricter consumer scrutiny over food safety, it also opened the eyes of the nation, and Californians in particular, to the treatment of animals in agriculture. Images of forklifts driven into the side of a cow, electric prods and high-pressure hoses used to get the animal to stand up for inspection, and workers jabbing animals in the eyes alerted consumers to the cruel treatment of animals that became our food. As a result, the Hallmark scandal fueled the Prop 2 campaign, which mobilized thousands of Californians to register voters and collect signatures for the November 2008 election.<sup>34</sup> The final proposal offered as an initiative a modest, yet effective initiative to prevent the mistreatment of certain livestock on California farms.

#### B. THE STORY BEHIND OHIO'S ISSUE 2

Following on the heels of Prop 2, several states adopted legislation restricting certain livestock confinement practices. For example, Maine passed legislation in 2009 similar to Prop 2, prohibiting the use of veal and gestation crates.<sup>35</sup> Soon after, the Michigan legislature followed suit by banning veal crates by 2013, and gestation crates and battery cages by 2020.<sup>36</sup> Much of this legislative progress was due to the growing campaigns for the humane treatment of animals in agriculture by animal advocacy organizations. Led by HSUS, these campaigns were beginning to flourish in several states across the country. There are now seven states

---

31. See USDA, FSIS, *Current Thinking on Measures That Could Be Implemented To Minimize Human Exposure to Materials That Could Potentially Contain the Bovine Spongiform Encephalopathy Agent*, (Jan. 15, 2010), available at [http://www.fsis.usda.gov/oa/topics/bse\\_thinking.htm](http://www.fsis.usda.gov/oa/topics/bse_thinking.htm).

32. *Questions and Answers Hallmark/Westland Meatpacking Co.—Recall Information*, USDA, (March 6, 2008), [http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=Recall\\_Information.xml](http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=Recall_Information.xml).

33. Andrew Martin, *Largest Recall of Ground Beef Is Ordered*, N.Y. TIMES, Feb. 18, 2008, available at <http://www.nytimes.com/2008/02/18/business/18recall.html>; USDA, FSIS, *Recall Release: California Firm Recalls Beef Products Derived from Non-Ambulatory Cattle Without the Benefit of Proper Inspection*, (Feb. 17, 2008), available at [http://www.fsis.usda.gov/PDF/Recall\\_005-2008\\_Release.pdf](http://www.fsis.usda.gov/PDF/Recall_005-2008_Release.pdf).

34. Lovvorn & Perry, *supra*, note 15 at 160.

35. 7 M.R.S. § 4020 (West 2010); 17 M.R.S. § 1039 (West 2010).

36. M.C.L. §287.746 (West 2010).

that have banned gestation crates,<sup>37</sup> five that have banned veal crates,<sup>38</sup> and two that have banned battery cages.<sup>39</sup>

After these successes in other states, HSUS-led animal activists took their concerns to the state of Ohio. Aware of HSUS' growing success, and knowing that Ohio would soon make a decision on the future of livestock welfare in the state, several groups led by the Ohio Farm Bureau Federation drafted the ballot initiative that became Issue 2. Proponents claimed that drafting a constitutional amendment to establish a regulatory board, as opposed to amending an existing statute, would protect Ohio's local food supply from out-of-state interests seeking to regulate Ohio's family farm industry.<sup>40</sup> Proponents also argued that a constitutional amendment was necessary to prevent those same out-of-state interests from regulating livestock care through a constitutional amendment of their own.<sup>41</sup>

Issue 2's Livestock Care Standards Board has near-exclusive authority over livestock welfare in the state of Ohio. Proponents of the legislatively referred ballot initiative intended this as a defensive mechanism to protect local farmers from out-of-state special interests.<sup>42</sup> They claimed that as a result of Prop 2, California farmers would be rushing to leave the state because of the increased operating costs imposed by the new standards, and that Ohio could not afford for that to happen.<sup>43</sup> As such, Issue 2 was advertised as something that would keep livestock production in-state, provide locally grown food, and set a uniform livestock care policy throughout the state using the knowledge of local experts.<sup>44</sup>

Opponents of Issue 2 argued that by creating a Board that would probably be staffed by twelve industry-backed members, the ballot initiative effectively precluded those interested in promoting animal

---

37. Florida, Oregon, Maine, Colorado, Arizona, and Michigan are the other six states that have banned gestation crates. FLA. CONST. art. X, § 21; ARIZ. REV. STAT. ANN. § 13-2910.07 (2011); COLO. REV. STAT. § 35-50.5-102 (2010); ME. REV. STAT. tit. 7, § 4020 (2011); MICH. COMP. LAWS SERV. § 287.746 (LexisNexis 2011); S.B. 694, 74th Leg. Assemb., Reg. Sess. (OR. 2007).

38. Arizona, Colorado, Maine, and Michigan are the other four states that have banned veal crates. ARIZ. REV. STAT. ANN. § 13-2910.07 (2011); COLO. REV. STAT. § 35-50.5-102 (2010); ME. REV. STAT. tit. 7, § 4020 (2011); MICH. COMP. LAWS SERV. § 287.746 (LexisNexis 2011).

39. Michigan is the only other state to ban battery cages. MICH. COMP. LAWS SERV. § 287.746 (LexisNexis 2011).

40. See Jack Palmer, *Issue 2 Touted as a High Stakes, Pre-emptive Strike*, THE CRESCENT-NEWS, Oct. 18, 2009, available at <http://www.crescent-news.com/news/article/4691391>.

41. *Id.*

42. See *Issue 2 Proponents Speak Out on Town Hall Ohio, News and Events*, OHIO FARM BUREAU (Oct. 30, 2009), <http://ofbf.org/news-and-events/news/491/> (last visited Mar. 31, 2011).

43. *Id.*

44. Palmer, *supra* note 40.

welfare from being able to do so.<sup>45</sup> By taking control of livestock care through regulation rather than legislation, Issue 2 put the future of farm animal welfare in jeopardy.<sup>46</sup> Opponents further argued that, in essence, Issue 2 was a power grab by big agribusiness and not in the best interests of local farmers or animals.<sup>47</sup> Notwithstanding this opposition, on November 3, 2009, the voters of Ohio approved Issue 2 by an overwhelming majority, almost by the exact margin that Prop 2 passed in California.<sup>48</sup>

The thrust of Issue 2 was that creating a Board made up of farmers, veterinarians, and trade representatives placed authority over livestock welfare with those who purportedly would best know how to manage it, taking into account technical, health, medical, and economic considerations.<sup>49</sup> The Board consists of thirteen members: ten appointed by the governor, one family farmer appointed by the Speaker of the House of Representatives, one family farmer appointed by the President of the Senate, and the Director of the Ohio Department of Agriculture, who is chairperson of the Board.<sup>50</sup> The ten gubernatorial appointees are appointed as follows:

- One member representing family farms,
- One member who is knowledgeable about food safety issues,
- Two members representing statewide organizations that represent farmers,
- One state-licensed veterinarian,
- The state veterinarian in the department that regulates agriculture,
- The dean of the agriculture department of a college or university located in Ohio,
- Two members of the public representing Ohio consumers, and
- One member representing a county humane society that is organized under state law.<sup>51</sup>

---

45. See *What Opponents of Issue 2 Are Saying*, TIMES REPORTER (Sept. 28, 2009), available at [http://www.timesreporter.com/local\\_news/x576525980/What-opponents-of-Issue-2-are-saying](http://www.timesreporter.com/local_news/x576525980/What-opponents-of-Issue-2-are-saying).

46. *Id.*

47. *Id.*

48. According to the Ohio Secretary of State, Issue 2 passed with 63.76% in favor and 36.24% opposed to the ballot initiative. For more information, see *State Issue 2: November 3, 2009 Official Results*, OHIO SEC'Y ST., <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2009ElectionResults/20091103issue2.aspx> (last visited Mar. 4, 2010).

49. OHIO CONST. art. XIV § 1.

50. *Id.*

51. *Id.*



While the fight over the Board's existence ended with the passage of Issue 2, animal advocates continued to fight in the legislature to circumscribe the Board's broad anticipated powers by introducing strict enacting legislation. There were two competing pieces of enacting legislation in the House of Representatives.<sup>52</sup> H.R.B. 414 enacted the Livestock Care Standards Board using the same language as the initiative.<sup>53</sup> The other bill, H.R.B. 341, enacted the Board in substantially the same manner but included a short list of definitions<sup>54</sup> and a provision requiring that the Board prohibit certain confinement practices by 2015.<sup>55</sup> H.R.B. 341 was rejected and the law eventually passed was a hybrid between the House and Senate bills parroting the language of Issue 2.<sup>56</sup>

Still one more option remained for the opponents of the Board. Before it even officially formed, animal welfare advocates quickly made a move to limit the Board's discretion, since they couldn't defeat the broad delegation of authority feared from the start. On January 27, 2010, citizens of Ohio submitted a ballot initiative for certification by the Attorney General to further amend the Ohio Constitution provision, added just two months prior creating the Board, by setting minimum standards of care that the Livestock Care Standards Board must adopt by 2016.<sup>57</sup> The standards prescribed in the proposed ballot initiative reflected similar standards to those established by Prop 2, namely requiring adequate space for livestock to move around freely, requiring humane slaughter,<sup>58</sup> and prohibiting commercial slaughter of downer cows.<sup>59</sup> On February 5, 2010, the Ohio State Attorney General certified the ballot initiative to the state Ballot Board.<sup>60</sup> The stage was set for the second battle at the ballot box between Issue 2 supporters and their opposition over control of livestock care in the state.

Instead of the anticipated skirmish, the initiative's proponents removed the proposed ballot initiative as a result of negotiations between the Governor of Ohio, the Ohio Farm Bureau Federation, and the Humane

---

52. H.R.B. 341, 128th Gen. Assemb., Reg. Sess. (Ohio. 2010); H.R.B. 414, 128th Gen. Assemb., Reg. Sess. (Ohio 2010).

53. H.R.B. 414. The Ohio Senate proposed the companion bill, S.B. 233, at the same time.

54. H.R.B. 341 § 901.80(E).

55. H.R.B. 341 § 901.80(C). The confinement practices prohibited by this bill would have been the use of battery cages, gestation crates, and veal crates.

56. H.R.B. 414.

57. *Initiative Petition, Amendment to the Constitution Proposed by Initiative Petition*, OHIO ATT'Y GEN., available for download at <http://www.ohioattorneygeneral.gov/getattachment/63be15ee-4321-4b4f-8f81-6ec071f93c3d/Livestock-Board-Amendment.aspx>.

58. Humane slaughter is already mandated by federal law, under the Humane Methods of Slaughter Act, codified as 7 U.S.C. §§ 1901 *et seq.*

59. *Initiative Petition*, *supra* note 57.

60. See Letter from Richard Cordray, Ohio Attorney General, to Jennifer Brunner, chair of the Ohio Ballot Board, (Feb. 5, 2010), available at <http://www.sos.state.oh.us/sos/upload/ballotboard/2010/2010-02-16petition.pdf>.

Society of the United States.<sup>61</sup> Removal of the ballot initiative was part of a legally impotent “gentleman’s agreement” struck between the parties in June 2010.<sup>62</sup> According to the “Ohio Compromise,” former Ohio Governor Ted Strickland promised to transition away from veal crates by 2017, phase out gestation crates by 2025, and deny permits to new egg-laying hen facilities.<sup>63</sup> HSUS, on the other hand, promised to fund research into the best practices for animal welfare and not to initiate litigation or use the ballot initiative, including the removal of the 2010 initiative already certified by the Attorney General.<sup>64</sup>

### III. USING THE BALLOT TO INSTITUTE SOCIAL POLICY

The ballot initiative is as foundational and controversial a feature of American politics as is the administrative state. Therefore, a brief summary of the use and limits of ballot initiatives is appropriate here.

The use of the ballot initiative is limited to the states.<sup>65</sup> Laws created through the ballot process are still subject to the Supremacy Clause of the United States Constitution, and can be invalidated for conflicting with federal law.<sup>66</sup> In general, ballot initiatives are only proper if they seek to enact legislative rules.<sup>67</sup> Permitting authority, licensing authority, and other administrative functions are not proper for ballot initiatives.<sup>68</sup> Thus, the power of the people in passing ballot initiatives is limited to prescribing broad policies and prohibited from making judgments on individual cases.<sup>69</sup> Ballot initiatives to enact legislation are currently allowed in twenty-four states in the Union.<sup>70</sup> Of these twenty-four states, eighteen have provisions for ballot initiatives proposing a constitutional amendment.<sup>71</sup>

---

61. *Landmark Ohio Animal Welfare Agreement Reached Among HSUS, Ohioans for Humane Farms, Gov. Strickland, and Leading Livestock Organizations*, HUMANE SOC’Y U. S. (Jun. 30, 2010), [http://www.humanesociety.org/news/press\\_releases/2010/06/landmark\\_ohio\\_agreement\\_063010.html](http://www.humanesociety.org/news/press_releases/2010/06/landmark_ohio_agreement_063010.html).

62. *Agreement Validates Ohio Livestock Care Standards Board*, OHIO FARM BUREAU FEDERATION (Jun. 30, 2010), <http://ofbf.org/news-and-events/news/799/>.

63. *Id.*

64. On March 2, 2011, the Board released, for public comment, a proposed standard for veal allowing the use of veal crates past 2017, in direct opposition to the terms and spirit of the compromise agreed to by the former governor and HSUS. See *Draft of Ohio Livestock Legislation 901:12-5 Bovine-Veal*, available at [http://ohiolivestockcarestandardsboard.gov/public\\_docs/proposedrules/901\\$12-5%20Bovine-Veal.pdf](http://ohiolivestockcarestandardsboard.gov/public_docs/proposedrules/901$12-5%20Bovine-Veal.pdf).

65. K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Question: A Medical Marijuana Case Study*, 40 WAKE FOREST L. REV. 221, 222 (2005).

66. *Id.* at 223.

67. *State Comp. Ins. Fund v. State Bd. of Equalization*, 176 Cal. App. 4th 357, 367 (2009).

68. *Id.*

69. *Id.*

70. *Interactive Map and State-by-State List of Initiative and Referendum Provisions*, INITIATIVE & REFERENDUM INST. UNIV. OF S. CAL., [http://www.iandrinstitute.org/statewide\\_i%26r.htm](http://www.iandrinstitute.org/statewide_i%26r.htm) (last visited Mar. 4, 2010).

71. *Id.*

In Ohio, there are two methods for amending the state constitution by ballot initiative.<sup>72</sup> The traditional method is a two-step process beginning with a legislatively proposed constitutional amendment by joint resolution of both houses of the State Legislature, passed by a three-fifths majority.<sup>73</sup> During the next general election, the legislature places the amendment on the ballot for approval by the voters by simple majority.<sup>74</sup> This is the way that Ohio's Issue 2 was placed on the ballot.<sup>75</sup> The second method is the initiated constitutional amendment.<sup>76</sup> This method originates from the citizenry, allowing any group of citizens formally organized into a committee to file a constitutional amendment with the Attorney General and Secretary of State.<sup>77</sup> If approved by these two offices, the committee must gather enough signatures for certification before it is allowed to place the amendment on the ballot during the next election for voter approval by simple majority.<sup>78</sup>

The use of ballot initiatives has been criticized with more frequency of late. Critics argue that the original intent of the ballot initiative—to involve the people of the state in an informed resolution of a public problem of social policy—has been reduced to a mere venue for well-organized special interests to defy democratic and representative values.<sup>79</sup> Defenders of ballot initiatives counter that, in a state like California where agricultural issues are highly politicized, legislators hesitate to adopt new policies that will upset the status quo.<sup>80</sup> They argue that legislative bodies are notoriously susceptible to industry lobbying and as a result, tend to move very slowly on controversial political issues.<sup>81</sup> This is why proponents say ballot initiatives are useful. The initiative power vests the people with legislative, and in some states constitutional, authority in the absence of action by the state legislature. The controversy surrounding the wisdom, use, and failures of the ballot initiative is not addressed in this Note. Wise or not, the legislative ballot initiative is an integral part of the legislative

---

72. *Procedures for Statewide Ballot Issues*, OHIO SEC'Y OF STATE, <http://www.sos.state.oh.us/SOS/elections/issues.aspx> (last visited Mar. 4, 2010).

73. *Id.*

74. *Id.*

75. See Arthur A. Schwartz & Jennifer Brunner, Legislative Reference Bureau, *Amendment and Legislation: Proposed Constitutional Amendments, Initiated Legislation, and Laws Challenged by Referendum, Submitted to the Electors*, 28 (Aug. 8, 2010), available at <http://www.sos.state.oh.us/sos/upload/elections/historical/issuehist.pdf>.

76. *Procedures for Statewide Ballot Issues*, *supra* note 72.

77. *Id.*

78. *Id.*

79. Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 SANTA CLARA L. REV. 1037, 1051–54 (2001).

80. Karl Manheim & Edward P. Howard, *A Structural Theory of the Initiative Power in California*, 31 LOY. L. A. L. REV. 1165, 1170–71 (1998).

81. DuVivier, *supra* note 65 at 238–39.

process in nearly half the states in the country.<sup>82</sup> Indeed, amending a state constitution through simple majority vote is an example of how powerful a ballot initiative can be.

For animal advocates, the ballot box has been a very successful tool. While Prop 2 is perhaps the shining example in this field, the use of ballot initiatives as a tool for animal advocacy did not begin with Prop 2. The first ballot measure to affect the welfare of farm animals was passed in Florida in 2002, amending the Florida Constitution to ban the confinement of pregnant pigs in gestation crates.<sup>83</sup> A similar initiative passed in Arizona in 2006, amending the state criminal code to ban veal crates in addition to gestation crates.<sup>84</sup> In fact, the ballot initiative has been used forty-four times since 1990 on issues affecting animals, many times led by animal protection organizations such as HSUS.<sup>85</sup> The precedent established in Florida and Arizona set the stage for the campaigning and eventual landslide<sup>86</sup> passage of Prop 2, which added to the prohibition of the use of veal crates, gestation crates, as well as the use of battery cages for egg-laying hens.

#### IV. USING BALLOT INITIATIVES TO ADVANCE ANIMAL WELFARE

Statutes, whether passed by ballot initiative or legislative vote, provide the fairest and most transparent way to regulate animal welfare in agriculture for two reasons. First, cruelty to animals in the form of inhumane treatment of livestock should be considered within the scope of a state's police power, and as such the legislature should be free to legislate to advance such a compelling state interest. Second, in the absence of legislative action, the ballot initiative process allows citizens to participate in shaping public policy in a way that adequately reflects societal and cultural norms.

##### A. BACKGROUND: FEDERAL REGULATION OF ANIMALS IN AGRICULTURE

Traditionally, there has been little-to-no federal regulation of livestock care. The preeminent federal statute governing the treatment of animals, the Animal Welfare Act, explicitly exempts from its definition of animal,

---

82. The constitutionality of initiatives and referendums was implicitly decided by the Supreme Court in 1912. *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (dismissing a constitutional challenge against Oregon's initiative provision as a political question outside the scope of the jurisdiction of the Court).

83. FLA. CONST. art. X § 21 (West 1999).

84. A.R.S. § 13-2910.07 (West 1999).

85. See *Initiative and Referendum History—Animal Protection Issues*, HUMANE SOC'Y U.S., [http://www.humanesociety.org/assets/pdfs/legislation/ballot\\_initiatives\\_chart.pdf](http://www.humanesociety.org/assets/pdfs/legislation/ballot_initiatives_chart.pdf) (last visited Mar. 4, 2010).

86. Prop 2 passed with 63.5% of the vote. *Votes for and Against 4, 2008 State Ballot Measures*, CAL. SEC'Y ST., [http://www.sos.ca.gov/elections/sov/2008\\_general/7\\_votes\\_for\\_a\\_gainst.pdf](http://www.sos.ca.gov/elections/sov/2008_general/7_votes_for_a_gainst.pdf) (last visited Apr. 6, 2011).

“farm animals, such as, but not limited to, livestock or poultry used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber.”<sup>87</sup> All the protections against cruelty to animals listed in the Act are thus inapplicable to the more than ten billion animals raised for food each year.

With the exception of the Humane Methods of Slaughter Act (HMSA),<sup>88</sup> any requirements for the treatment of animals in agriculture have been left to the states. The HMSA provides that federal inspectors are to oversee the humane slaughter of livestock at all federally licensed slaughter plants.<sup>89</sup> Notably, the statute does not have jurisdiction over the slaughter of poultry, which accounts for ninety percent of all livestock (equating to nine billion animals), thereby exempting the vast majority of animals slaughtered for food from its provisions.<sup>90</sup> In addition to the HMSA, the Twenty-Eight-Hour Rule regulates the transportation of animals, but only when moved in interstate commerce.<sup>91</sup> It places a limit of twenty-eight hours on the confinement of animals in transport without unloading, and also requires that the animals be provided with adequate food, water, and rest.<sup>92</sup> The statute requires proof of a knowing and willful violation before a person can be prosecuted.<sup>93</sup> Additionally, anyone can apply for an extension of the time period.<sup>94</sup> Given the inapplicability of the Animal Welfare Act to animals raised for food, the limited applicability of the Twenty-Eight-Hour Rule, and the lackluster enforcement of the HMSA, there remains almost no protection for farm animals at the federal level.

#### B. STATES AS LABORATORIES FOR ANIMAL WELFARE REGULATION

The federal government has no inherent police power to rely on to enforce statutes.<sup>95</sup> As a result, there is little to no federal protection of farm animals. There are several reasons for this. First, the federal government treats animals as articles of commerce.<sup>96</sup> This conception of animals, as nothing more than widgets with economic value, is reflected in the language of federal laws on animal welfare, which is targeted to protecting the value of the animal in commerce and not to prevent cruelty. Second, the groups involved in lobbying Congress to maintain this status are much larger and more powerful at the federal level than groups seeking to

---

87. 7 U.S.C. §§ 2131–2159 (2009).

88. 7 U.S.C. §§ 1901–1906 (2009).

89. *Id.*

90. *Id.*

91. 49 U.S.C. § 80502 (2009).

92. *See id.* at § 80502(a)(1).

93. *See id.* at § 80502(d).

94. *See id.* at § 80502(a)(2)(B).

95. Colin Kreuziger, *Dismembering the Meat Industry Piece by Piece: The Value of Federalism to Farm Animals*, 23 LAW & INEQ. J. 363, 387 (2005).

96. *Id.* at 370.

advance federal animal welfare legislation.<sup>97</sup> Lobbying for federal legislation is often expensive,<sup>98</sup> and given the disparity in resources between the agricultural industry and animal advocates, it is not a feasible option for the latter group. Third, since the federal government lacks explicit authority to regulate under any police power, any federal criminal statute may not have a constitutional basis and might therefore be vulnerable to a court challenge.<sup>99</sup>

By contrast, individual states are traditionally the site of criminal law enforcement.<sup>100</sup> Thus, a state could rely on its police power to enforce criminal penalties for abuse of animals in agriculture or, like Prop 2, set standards for livestock care that employ criminal penalties. Additionally, twenty-four states also allow the public to circumvent the legislature to enact such laws through the ballot box.<sup>101</sup> In one way, the ballot initiative levels the playing field for smaller interest groups by allowing them to participate directly in the lawmaking process by submitting a vote to the people. Even for national organizations such as HSUS, engaging in direct democratic campaigns at the state level provides momentum that can potentially translate into leverage at the federal level in the future.

Because there is little to no federal statutory law on the treatment of animals in agriculture, the states are left to regulate it as they see fit.<sup>102</sup> In most states the state department of agriculture has jurisdiction over the treatment of livestock, though a few state departments of agriculture promulgate rules directly related to animal welfare. Most laws prohibiting cruelty to animals are in state penal codes and many contain one or more exemptions for practices including veterinary procedures, research, hunting, pest control, entertainment, and agriculture.<sup>103</sup> In fact, thirty states explicitly exempt livestock from their anti-cruelty laws.<sup>104</sup> The lack of regulation of the treatment of animals in agriculture at the state level, like at the federal level, is largely due to the lobbying power of the agricultural sector, which in California and Ohio is especially potent.<sup>105</sup> Given the power of the agricultural lobby in both states, it is as much an impressive accomplishment that Prop 2 passed in California as it is a reminder of the power of agribusiness in the passage of Issue 2 in Ohio.

---

97. Kreuziger, *supra* note 95, at 385.

98. *Id.* at 386.

99. *Id.* at 387. See also *United States v. Stevens*, 130 S.Ct. 1577 (2010).

100. Kreuziger, *supra* note 95, at 387.

101. *Interactive Map and State-by-State List of Initiative and Referendum Provisions*, *supra* note 70.

102. See *infra* Part IV(A).

103. Pamela D. Frasch, Stephan K. Otto, Kristen M. Olsen & Paul A. Ernest, *State Animal Anti-Cruelty Statutes: An Overview*, 5 ANIMAL L. 69, 75-79 (1999).

104. *Id.* at 77.

105. *Id.* at 75-76.

### C. STATE BALLOT INITIATIVES FILL GAPS LEFT BY RELUCTANT REPRESENTATIVES

With regard to animal welfare issues the problem of the “recalcitrant legislature” is one that often presents itself.<sup>106</sup> Even when the mores of society may strongly favor laws against the intensive confinement of livestock, politics often cause the passage of these laws to lag behind. The ballot initiative presents a unique solution to fill that gap by allowing the people to force the legislature to recognize their will. Ballot initiatives apprise the government of shifts in public perception on certain issues, serving as a guiding light for future debates and legislation. Further, the ballot initiative acts like a stethoscope in checking the cultural pulse of the state on new and experimental issues in a way that our representative system simply cannot.<sup>107</sup> Prop 2, in effect, passed by simple majority of the voters of California what the state’s legislature could have done by simple majority themselves. In this sense, Prop 2 is an example of the traditional exercise of direct democracy by state citizens. On an issue without enough political importance for the legislature to take serious action, the California, Ohio and several other state Constitutions provide the people with a way to act.

Notwithstanding these useful attributes of the ballot initiative, critics cite the lack of accountability and compromise in the ballot process as evidence of its anti-democratic nature.<sup>108</sup> It is true that at the beginning of the process, proponents of a ballot initiative have total control over drafting the proposed statute or constitutional amendment, and the measures once written and certified are fixed.<sup>109</sup> This means that, once certified, even an error in the language or successful compromise on an issue forecloses any amendment of the initiative.<sup>110</sup> From a policy perspective this is an inefficient form of governance. Poorly drafted initiatives often end up in the hands of an already overburdened court to decide their legality and applicability. The ability to amend a bill before it becomes law is a hallmark of the legislative process and proof of democracy in action. Nevertheless, the potential for careless drafting is an insufficient reason to deny the public an opportunity to present legislation directly to voters on issues that the legislature cannot or will not address. Additionally, the ballot initiative is not a substitute for governance by the legislature; it is merely an available alternative when the people, in whom ultimate power in a democracy rests, desire to take action on issues that paralyze the political process.

---

106. Kreuziger, *supra* note 95, at 388.

107. DuVivier, *supra* note 65, at 240.

108. Miller, *supra* note 79.

109. *Id.*

110. *Id.* Of course, the proponents can withdraw the entire proposal, but they cannot make changes at this stage.

Historically, direct democracy has played a vital role in the growth of the United States. While it was generally rejected as a means of governance at the federal level, the people retained significant political power in several states.<sup>111</sup> In states where both constitutional amendments and legislation are available through the direct democratic process the stakes are raised even further. Additionally, as evidenced by Issue 2, the use of the ballot initiative as a means to a social or political end is available to both proponents of animal welfare and those who wish to maintain the status quo. Ultimately, the inability and disinterest of the federal and state governments to ensure livestock welfare promotion underscore the importance of initiated legislation by ballot.

## V. AGENCY REGULATION OF ANIMAL WELFARE IN AGRICULTURE

This section analyzes the legal innovation of Issue 2: A constitutionally mandated Livestock Care Standards Board with authority to regulate all livestock care standards across the state. Administrative regulation poses a unique solution to the myriad complications arising out of the legislative process. First, legislators are not always experts on the issues they debate. Second, legislation is a deliberate process, often slowed down further by politics. Lastly, the legislature is not insulated from the power of lobbyists. Expertise, efficiency, and independence are all, on the other hand, attributes of a properly functioning administrative state that ought to translate into swift, accurate rules and regulations. Nevertheless, for all its virtues, the administrative process is itself a complicated one that, in the case of the Ohio Livestock Care Standards Board, threatens progress in promoting animal welfare.

### A. OHIO'S INNOVATION: POSSIBLE BENEFITS OF THE LIVESTOCK BOARD

In the case of Issue 2, the voters of Ohio approved the creation of a state agency with regulatory oversight of all livestock care in the state.<sup>112</sup> The passage of Issue 2 in Ohio represented the first time a constitutional board was created by ballot initiative in the United States. There can be several advantages to vesting oversight authority in a single-purpose agency to regulate livestock care. First and foremost, the Board is specialized and will have expertise in the field it regulates.<sup>113</sup> Second, the Board is in a unique position to create broad-based solutions through diverse representation from the agricultural and animal welfare

---

111. DuVivier, *supra* note 65, at 230–32.

112. OHIO CONST. art. XIV, § 1(A) and OHIO REV. CODE, § 904 (2011).

113. See generally, Jeffrey Rudd, *The Evolution of the Legal Process School's "Institutional Competence" Theme: Unintended Consequences for Environmental Law*, 33 ECOLOGY L.Q. 1045 (2006).



communities. Third, the overall effect of the Board's regulations will be potentially much greater in scale than piecemeal legislation.

One of the hallmarks of the administrative state is the expertise and efficiency brought to bear on specific issues. At the federal level administrative regulation is an essential "fourth branch" of government, providing industries with guidelines and standards, protecting consumers by regulating quality, and shouldering much of the work that would otherwise have to be dealt with by an already overwhelmed Congress.<sup>114</sup> The story is the same at the state level. Administrative agencies provide invaluable support to the proper functioning of government today.

Accordingly, the Board's purpose will be to act as a support structure to the state, by drafting comprehensive regulations and standardized practices appropriate for raising animals for food. The board members, as listed above, purport to represent a diverse group of interests and skill sets that should be able to provide fair, sound, and efficient regulations for livestock care. Additionally, a well-functioning Board of thirteen people dedicated to a narrow set of issues would be better able to focus on the most pressing issues and produce accurate results that benefit animals and society. Another advantage to having the Board members represent varying interests is the theoretical comprehensiveness of the decisions made by the Board. Bringing all of these viewpoints to the table will potentially lead to the fairest outcomes, those that a broad spectrum of society ought to agree with. Furthermore, the appointment process is self-selecting. Allowing any citizen to apply for a position on the Board tends to draw those who have a vested interest in participating on the Board.<sup>115</sup> The benefit of a Board composed of volunteers representing various sectors of the economy and society is that compromise and broad-based solutions are possible.

If an administrative agency like the Livestock Care Standards Board promulgated regulations for livestock care, the quantitative effect on animals would be greater than piecemeal legislation crawling out of the Assembly. The quality of the effect, of course, would be judged differently depending on the lens through which it is assessed. Rules codifying standard industry practices, for example, would be supported by the industry but assailed by animal welfare groups as a rubber stamp on cruel confinement. Nonetheless, the impact that a regulatory agency has on animal welfare through Issue 2 is potentially greater than what is achievable through single-purpose legislation like Prop 2.

---

114. While technically a part of the executive branch, the administrative state holds a controversial place in American politics because executive agencies perform, to varying degrees, legislative and judicial functions as well. See Sidney A. Shapiro and Richard W. Murphy, *Eight Things Americans Can't Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 9 (2009).

115. There is no compensation for serving on the Board. See OHIO REV. CODE § 904.02 (West 2011).

## B. POSSIBLE CONSEQUENCES OF OHIO'S CURRENT BOARD STRUCTURE

There are counterarguments against administrative regulation by the Board on each of these points. First, efficiency, while a hallmark of the administrative state, cannot be allowed to trump equity. In Ohio, the power dynamic in politics favors large agricultural conglomerates, commonly referred to as "Big Ag."<sup>116</sup> As a major producer of agricultural products for the rest of the country, Ohio's Big Ag interests strongly influence decision-making.<sup>117</sup> These overarching politics put the legitimacy of the Board into question with respect to the varying interests that it is supposed to represent.

Second, delegating lawmaking authority to a thirteen-member Board, many of whom have a pecuniary interest in the laws they are authorized to make, is concerning for reasons of independence and fairness. There is nothing in Issue 2 that limits the discretion of the agency, and courts are likely to defer greatly to any decision that may be challenged in the future. Discretion is a valuable tool for the Board to exercise flexibility in setting accurate and feasible standards for livestock care. Without the ability to hold Board members accountable for their actions, however, this discretion may tempt narrow interests to influence the Board's decisions.

Lastly, the other hallmark of the administrative state, expertise, may in fact be diminished by the way the Board is populated. The Board creates a diverse panel of interested parties, but not necessarily the most knowledgeable parties.<sup>118</sup> This is particularly notable with the appointment of four family farmers.<sup>119</sup> Hypothetically, if all the farmers on the Board have either large or small operations, the expertise they bring to bear on animal welfare is narrow. It is important to mention that although certain board members must either be family farmers or represent family farmers, the enacting regulation fails to define "family farmer." Thus, while a farm may be called, for example, "Smith Family Farms," it may be run as a corporation, employing fifty to 100 employees and raising thousands of animals. Additionally, the only representative whose primary focus is animal welfare is the humane society representative.<sup>120</sup> Thus, the law directing the makeup of the Board does not emphasize expertise on animal welfare issues, it merely collects a group of parties with supposedly diverse interests. While trade representatives can provide anecdotal information on animal welfare, they speak on behalf of the interests of farmers, not animals.

---

116. *The Farm Bureau's Billions: The Voice of Farmers or Agribusiness?* FOOD & WATER WATCH (July 2010), available at <http://www.foodandwaterwatch.org/factsheet/farm-bureau/>.

117. *Id.*

118. OHIO CONST. art. XIV § 1(A); OHIO REV. CODE, § 904 (2011).

119. *Id.*

120. *Id.*

Administrative regulation presents a very attractive opportunity for regulation of livestock because of the expertise, efficiency, and compromise it has the potential to exercise, and the effect it can have on improving the livelihood of animals is vast. However, the opportunity for special interests to capture the agency cannot be ignored, and is magnified by the lack of electoral accountability that is available in the legislature. In reality, there are several hurdles that prevent an agency from exercising the expertise, efficiency, and compromise that makes it such a useful tool for governance.

#### VI. STATUTORY CONSISTENCY OUTWEIGHS ADMINISTRATIVE EFFICIENCY IN THE CONTEXT OF PROMOTING LIVESTOCK WELFARE

To meet the growing societal interest in protecting farm animals from cruelty, states must provide some systemic standards regarding how farm animals are raised and housed.<sup>121</sup> Currently, the system is broken and the need for governmental intervention is apparent.<sup>122</sup> The industrial confinement practices and mistreatment of animals in agriculture are, in addition to being morally repugnant, also producing hazardous human health risks. Careless and cruel livestock care needlessly leads to unsafe meat and dairy products, resulting in unintended consequences such as antibiotic resistance, E. Coli outbreaks, and other health risks.

Ballot initiatives proposing legislation aimed at curbing mistreatment of farm animals provide a promising avenue through which the citizens of at least twenty-four states can demand that their governments take action to address the treatment of animals in agriculture. There are several advantages to initiated legislation. First, direct legislation through the ballot provides a level playing field for smaller interest groups, like animal welfare advocates, against larger, more powerful industry groups, like the agricultural conglomerates, who have access to the legislature. Additionally, the legislative ballot initiative does not usurp any power from the legislature that it does not have itself. Prop 2 was an addition to the California Health and Safety Code, passed by simple majority of the voters; the same threshold it would need to meet if passed through the legislature.

Arguments criticizing ballot initiatives on animal welfare as representative of only special interests do not hold water. Prop 2 was passed by nearly two-thirds of California's voting population in 2008, giving it the largest margin of victory for any ballot initiative voted on that year.<sup>123</sup> While the interests that initiated the proposition may have been a

---

121. Geoffrey C. Evans, *Comment: To What Extent Does Wealth Maximization Benefit Farmed Animals? A Law and Economics Approach to a Ban on Gestation Crates in Pig Production*, 13 *ANIMAL L.* 167, 181 (2006).

122. *Id.*

123. *Supplement to the Statement of Vote*, *supra* note 1.

small group of animal welfare groups, the certification and signature-gathering processes helped ensure that the ballot was, at the least, of concern to a broad number of citizens from all parts of the state. All propositions are not created equal, however. It is possible that a focused, well-organized, and extremely wealthy interest group could amass the number of signatures needed as a result of paying an army of signature gatherers and launching a massive media campaign.<sup>124</sup> This criticism of the ballot initiative is not a sufficient basis for invalidating the entire process. The legislative initiative, at least in California, also provides for lasting results. By requiring that a voter-initiated piece of legislation be repealed only with the voters' consent, California has granted legislative initiatives more protection because of the broad support they require to pass. This makes repeal of a ballot initiative much more difficult than other legislation.

While administrative regulation of animal welfare may lead to quicker standard-setting and strict oversight over livestock care, the solution is inevitably short-term. The flaws in the administrative state, particularly the potential for agency capture, prevent administrative regulation of animal welfare from advancing the interests of animals. With an issue like promoting the welfare of livestock, which is still a small movement only recently visible on the public's political radar, direct legislation provides a much safer way of making modest, but lasting, progress. An agency similar to the Board in Ohio will likely have minimal representation, if any, from the animal welfare community. This will not only fail to promote the interests of animals; the fact that there will be some semblance of representation from the animal welfare community may undermine progress because all interests, including animal interests, are nominally, but not effectively, represented. Additionally, the will of a thirteen-member board can change much more drastically with a change in administration or membership than that of a state legislature.<sup>125</sup> Agency regulations are also easier to change than laws, and the lack of electoral accountability prevents citizens from demonstrating their satisfaction or disapproval in a meaningful way. Thus, the sacrifice of expertise and efficiency is outweighed by the certainty that is provided by legislative decisions arising out of a ballot initiative or the legislative process itself.

Prop 2, while perhaps a modest step in promoting animal welfare, is nevertheless a step forward.<sup>126</sup> The successful use of the ballot initiative as a tool for achieving legislated protection of livestock provides solid foundation for similar movements in other states.<sup>127</sup> Where the government

---

124. Miller, *supra* note 79, at 1052.

125. While this flexibility is also mentioned as an advantage of the administrative state, in this context, flexibility due to politics is asserted as a flaw in the system.

126. Lovvorn & Perry, *supra* note 15.

127. *Id.*

is either unable or unwilling to address an issue that is of concern to a sizeable group of citizens, the initiative process provides the people a tool to make their voices heard.<sup>128</sup>

## VII. CONCLUSION

Animals in agriculture are not just “articles of commerce.”<sup>129</sup> Unfortunately, the industrialized system of agriculture and the federal government treat them as such. With no federal protection available, it is up to the states to improve the treatment of animals in agriculture to adequately reflect the prevailing cultural mores of the general public, which rest on compassion for animals and contempt for their mistreatment evidenced in Prop 2 and its progeny in other states. The ballot initiative is one way for animal advocates to push states in the right direction, as seen with Prop 2, and it is also a tool for opponents of change to maintain the status quo, as evidenced by Issue 2.

Initiatives provide a public forum for disseminating information on an issue. During the several months leading up to election day, proponents and opponents of ballot initiatives aggressively campaign on television, radio, and the internet in order to drum up support for their position. This kind of airtime is extremely important for proponents to raise public awareness of politically marginalized issues like livestock welfare. Further, because animal cruelty and food safety are issues that provide disturbing and compelling imagery that easily stir public outcry, the advertising campaign for ballot initiatives is an important and effective tool for gathering support on these issues. With the ability to reach a wider audience with social media, more people will be informed during the ballot process than through the legislative process. As Jonathan Lovvorn and Nancy Perry point out, when state citizens are faced with a modest proposal to improve the welfare of farm animals, the majority will support the proposal, as evidenced by Prop 2.<sup>130</sup>

While Prop 2 was unquestionably a step forward in advancing animal welfare on farms because it established minimum standards for animal care, the passage of Issue 2 does not necessarily carry the same promise, because the self-regulating Board has discretion to bend to members’ and other interests. Even if Issue 2 furthers animal welfare, Prop 2’s approach, issuing directly enforceable standards, is still superior to amending the state constitution to create a state Board with regulatory authority over livestock care standards. Simple legislation reflects the true purpose of the ballot initiative, takes modest and sustainable steps, and is less susceptible to undue influence from opponents seeking to undermine the public will.

---

128. Lovvorn & Perry, *supra* note 15.

129. Kreuziger, *supra* note 95.

130. Lovvorn & Perry, *supra* note 15, at 155–56.

---

\*\*\*