

THE COW SAYS MOO, THE DUCK SAYS QUACK, AND THE DOG SAYS VOTE!

THE USE OF THE INITIATIVE TO PROMOTE ANIMAL PROTECTION

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INTRODUCTION

At the dawn of the twentieth century, progressive policy-makers across the country, but primarily in the West, developed a new legislative tool designed to empower the politically discouraged and disheartened—direct democracy. This is the umbrella term for two legislative tools: the initiative and the referendum. Put simply, the initiative gives a group of citizens the ability to propose legislation and have that legislation voted on directly by the people. It thus gives individuals and groups the ability to circumvent seemingly unsympathetic legislators by allowing the citizenry to take their issue(s) directly to the people for approval.¹ Similarly, the referendum allows the citizenry to have the final word on whether a bill passed by the legislature becomes (or remains) law by requiring popular approval before the measure is given legal effect.² In both instances, the process is “direct” because a simple majority of those voting determine whether a measure passes or fails.³

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1. More detail is provided on the initiative process *infra* text and notes 21–43.

2. Likewise, the referendum is discussed in greater detail *infra* notes 44–51.

3. For an outline of how the system works, see generally WILLIAM N. ESKRIDGE, JR., ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 499–505 (3d ed. 2001); see also *infra* text and notes 32–40.

Using the initiative, voters have enacted eight-hour workday limits,⁴ given women the right to vote,⁵ limited the number of terms elected representatives may serve,⁶ frozen property tax rates,⁷ precluded future local anti-discrimination legislation,⁸ and restricted the availability of abortions.⁹ This process has also been used to propose making newspapers a public utility,¹⁰ prohibit land ownership by aliens,¹¹ and even regulate the future of nuclear development.¹² As these examples show, throughout its relatively short history, direct democracy (and specifically the initiative) has focused on humans and human interests. In recent elections, however, a new "interest group"—the animal protection movement—has discovered the power of direct democracy. As a result, issues concerning both wild and domestic animals are increasingly finding their way onto the ballot.

The use of ballot initiatives by animal advocates presents two issues. First, one must evaluate the true nature of these proposals to uncover their actual aims. Second, one must ask how effective direct democracy can be in advancing the cause of animals. As an illustration of the former issue, while animal proponents portray their measures as simple attempts to protect animals, opponents decry the initiatives as attempts by radical animal rights advocates to hijack the American system and bestow rights on animals at the expense of people.¹³ Yet in many cases, neither characterization is accurate. Certainly

4. Daniel A. Smith & Joseph Lubinski, *Direct Democracy During the Progressive Era: A Crack in the Populist Veneer?*, 14 J. POL'Y HIST. 349, 364-67 (2002).

5. Caroline J. Tolbert, *Public Policy and Direct Democracy in the Twentieth Century: The More Things Change, the More They Stay the Same*, in THE BATTLE OVER CITIZEN LAWMAKING 35, 45 (M. Dane Waters ed., 2001).

6. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

7. Notably, California's Proposition 13 was enacted in 1978. For a discussion of Proposition 13 and its implications, see Jack Citrin & Frank Levy, *From 13 to 4 and Beyond: The Political Meaning of the Ongoing Tax Revolt in California*, in THE PROPERTY TAX REVOLT: THE CASE OF PROPOSITION 13, 13 (George G. Kaufman & Kenneth T. Rosen eds., 1981); PROPOSITION 13: A TEN YEAR RETROSPECTIVE (Frederick D. Stocker ed., 1991).

8. See *infra*, text and note 238.

9. See Rebecca L. Andrews, Note, *The Unconstitutionality of State Legislation Banning "Partial-Birth" Abortion*, 8 B.U. PUB. INT. L.J. 521 (1999).

10. Smith & Lubinski, *supra* note 4, at 361 n.48.

11. *The Four Amendments*, ROCKY MTN. NEWS, Oct. 31, 1944, at 14.

12. DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 6 (1984).

13. See *infra*, text and notes 161, 208, 227.

most such proposals implicate more than just animal interests because their passage would further regulate and restrict human activity. However, in most cases these measures are completely unrelated to advancing positive notions of *rights* for animals at all. Instead, they are protectionist measures designed to enhance the *welfare* of nonhumans. The distinction is not one of semantics; it is important both because of the popular perception of the measures and also because of the reaction these proposals have evoked from animal rights opponents.

At the outset, it is worth noting that concern for the well being of animals is not a new phenomenon. Rather, it dates back hundreds of years and has only increased over time.¹⁴ And yet, animal protectionism¹⁵ has reached a crossroads. While many medical schools across the country are discontinuing the use of animal labs to instruct students,¹⁶ researchers are altering the genetic structure of pigs to make inter-species organ transplants a viable reality.¹⁷ While vegetarianism increases in popularity,¹⁸ so too does wearing leather and fur.¹⁹ Moreover, divisions within the animal protection movement, described below, further complicate the

14. See *infra*, text and notes 53–68.

15. Throughout this article, I use the term “animal protection” as an umbrella term to describe activists who seek to advance the interests of animals generally. As the following discussion illustrates, not all animal advocates share the same goals or view animals in the same way. Nonetheless, they all share at least some common purposes that fit within the bounds of this term—improved treatment for animals.

16. For a list of medical schools that have discontinued the use of vivisection, see Doctors Against Dog Labs, *Medical School Curricula with No Live Animal Laboratories*, at <http://www.doctorsagainstdoglabs.com/Schools.htm> (last visited Dec. 21, 2002).

17. See CNN.com, *Research Progress: Pig Cloning for Organs*, at <http://www.cnn.com/2002/HEALTH/01/03/pig.cloning/> (last visited Dec. 21, 2002); see also Teresa R. Strecker, *Mammalian Cloning: An Exciting Technical Advance with Practical and Ethical Considerations*, 1997 UCLA J.L. & TECH. 6 (1997), at <http://www.lawtechjournal.com/archives/blt/i3-trs.html>.

18. See Steven J. Haverkamp, Note, *Are Moderate Animal Welfare Laws and a Sustainable Agricultural Economy Mutually Exclusive? Laws, Moral Implications, and Recommendations*, 46 DRAKE L. REV. 645, 649 n.15 (1998).

19. See Shelley Emling, *Fur is Back*, ATLANTA J. CONST., Feb. 6, 2003, at 1C (“Fur sales totaled \$1.53 billion in 2001, and the figures for 2002 are expected to be up by 8 percent to 10 percent, according to the [Fur Information Council], which represents manufacturers and retailers nationwide. The year 2000 was particularly strong, boasting sales of \$1.69 billion, a sharp climb from \$1 billion in 1991.”).

situation.²⁰ In somewhat naïve fashion, some animal advocates seem to believe the initiative may be the cure to both the movement's current dilemmas and society's contradictory behavior towards animals.

As mentioned above, the measures proposed to date have not sought recognition of "animal rights" at all. They do not attempt to bestow any sort of positive legal rights or liberties upon other members of the animal kingdom. Instead, the initiatives aim only to minimize the suffering humans inflict upon other creatures. More important to the animal rights community, however, is the evidence that the initiative and referendum can be powerful tools in their cause for inter-species equality. Despite the system's limitations, if used properly, direct democracy could significantly change the status of animals in many states.

This Comment, then, proceeds in four parts. In Parts I and II, I introduce the basic tenets of direct democracy and animal protection theory, respectively. With this foundation in place, I examine in Part III several recent ballot contests in order to demonstrate how animal advocates and opponents have used the system to date. Finally, I discuss the potential for future use of the system by animal advocates in Part IV.

I. THE MECHANICS OF THE BALLOT INITIATIVE AND REFERENDUM

The initiative and referendum give voting citizens a direct role in the legislative process. The roots and origins of direct democracy are considered in Subpart A. Having given a historical context, in Subpart B I provide an overview of how the initiative process actually works. In Subpart C, finally, I provide a short introduction to the referendum.

A. *The History of the Initiative and Referendum*

The initiative owes its American existence to Reverend Robert Haire, a South Dakota Catholic priest who introduced the initiative process to that state and the country in 1898.²¹ Over the next twenty years, eighteen other states enacted

20. See *infra*, text and notes 53–124.

21. DANIEL A. SMITH, TAX CRUSADERS AND THE POLITICS OF DIRECT DEMOCRACY 4 (1998).

similar laws to give their citizens direct lawmaking authority.²² Progressives believed the initiative could fix a political system that they perceived to be broken by special-interest domination at the statehouse.²³ Indeed, the enactment of direct democracy was the key to many of the Progressives' larger reform proposals, all of which sought to return power to the average citizen.²⁴ With the initiative, activists no longer needed to curry favor with legislators to have their issues considered. Rather, direct democracy allowed "citizens to set the political agenda by placing statutes and constitutional amendments on the ballot."²⁵ Similarly, the referendum allowed the citizenry directly to check the actions of the state legislature, thus providing oversight of their representatives.

In the early years of direct democracy, state ballots were packed with initiated and referred measures. Coloradans, for instance, passed judgment on thirty-two measures in 1912, the year of the state's first foray into the world of direct democracy.²⁶ The system's popularity persisted through the first decades of the twentieth century, until, in the 1950s and 1960s, direct democracy virtually disappeared from the American political landscape.²⁷ Despite this momentary gap in the system's popularity, the process reemerged as a favored tool of reformers during the 1970s and remains a powerful weapon today.²⁸

22. *Id.* Today, twenty-four states have some form of initiative and/or statutory referendum system. See Initiative & Referendum Institute, *Statewide I&R*, at http://www.iandrinstitute.org/statewide_i&r.htm (last visited Mar. 28, 2003).

23. *Id.* For an introduction to the Progressives and the Progressive movement, see RICHARD HOFSTADTER, *THE PROGRESSIVE MOVEMENT: 1900-1915* (1963).

24. See generally Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in American West*, 2 MICH. L. & POL'Y REV. 11, 24-32 (1997).

25. David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 13 (1995).

26. Smith & Lubinski, *supra* note 4, at 355. Coloradans passed on several important issues that year, including eight-hour workday legislation, public utility regulation, and public financing of the James Peak Tunnel. *Id.* at 355-56. In that election, voters passed into law the recall device and an early welfare law. *Id.*

27. MAGLEBY, *supra* note 12, at 3-5.

28. *Id.* at 26-31. Magleby argues that the use of the initiative varies with the level of trust people feel towards their elected officials. *Id.* at 14-15 ("Direct legislation is seen by some as a cure for the low level of confidence in government.").

Perhaps surprisingly, the resurrection of direct democracy was not the product of liberals and progressives—its original supporters—but of conservative activists. As Thomas Cronin notes, “[c]onservatives, together with the established political parties and business groups, have learned to use [initiatives] for their own issues and have almost always been able to defeat opponents’ proposals.”²⁹ Indeed, the conservative use of initiatives can be directly tied to the process’s rediscovery in California in the form of Proposition 13, which froze property tax levels in the state.³⁰ Today, state ballots in every election are filled with initiative contests dealing with issues such as abortion, taxes, term limits, campaign finance reform, and even school class size.³¹

B. *Making the Initiative Work*

Initiatives reach the voting public only after their sponsors jump through a number of procedural hoops. The process is perhaps easiest to understand by focusing on the particularities of a specific state.³² Colorado, for example, requires that initiative proponents take the following steps.³³ First, the proponent must submit to the state, in this case the Legislative Council Staff (LCS), the typed text of the proposed

29. THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 186 (1989).

30. See generally Daniel A. Smith, *Howard Jarvis, Populist Entrepreneur: Reevaluating the Causes of Proposition 13*, 23 SOC. SCI. HIST. 173, 173–210 (1999).

31. Tolbert, *supra* note 5, at 45–47.

32. Throughout this article, Colorado is often used for illustration. I choose to use Colorado not only for my own convenience as an author, but also because that state’s initiative requirements are substantially the same as other states’ procedures. See e.g., Oregon Secretary of State, *2002 State Initiative and Referendum Manual* (2002) (on file with author); Washington Secretary of State, *Procedures for Filing Initiatives and Referendums in Washington State* (2002) (on file with author); Montana Secretary of State, *Ballot Issues*, at http://www.sos.state.mt.us/css/ELB/Ballot_Issues.asp (last visited Jan. 20, 2003). Moreover, the state has passed judgment on several animal protection measures. The introduction that follows is based on the direct initiative, as opposed to the indirect system used in a minority of states. For more on the indirect system, see *infra*, note 151.

33. Colorado General Assembly, *Steps for Placing an Initiated Proposal on the Statewide Ballot*, at http://www.state.co.us/gov_dir/leg_dir/initiative.htm (last visited Jan. 20, 2003); see also Colorado General Assembly, *Rules for Staff of Legislative Council and Office of Legislative Legal Services: Review and Comment Filings*, at http://www.state.co.us/gov_dir/leg_dir/initrules.htm (last visited Jan. 20, 2003).

measure.³⁴ Once the ballot language is set, proponents file the measure with the Secretary of State for title setting.³⁵ Based on the action of the title board, the proposal may require revisions and a rehearing. In the alternative, the proponents can appeal the title set by the title board to the state supreme court.³⁶ Once the text and title of the provision are set, the proponents must begin collecting signatures equal to some percentage of the votes cast for the Secretary of State in the previous election.³⁷ This requisite number can range anywhere between three and fifteen percent.³⁸ This minimum number of signatures must be collected before the measure can appear on the ballot.³⁹ Moreover, proponents only have six months from the date the title is set to submit these signatures to the Secretary of State.⁴⁰

The Secretary of State's office will then begin verifying the signatures to ensure that they are genuine and from eligible signers.⁴¹ Finally, once the text has been approved, the title set, and the requisite number of signatures collected, the proposal will be put on the ballot for the next regular election.

34. Colorado General Assembly, *Steps for Placing an Initiated Proposal on the Statewide Ballot*, *supra* note 33. The measure must be written in plain and straightforward language and contain the names and contact information for at least two of the sponsors. From there, LCS schedules a "review and comment meeting" at which the wording of the measure is reviewed. In essence, at this meeting LCS provides proponents with suggestions on the constitutionality of the proposal and the best way to phrase the measure in order to effectuate their intent. The proponents are not, however, required to incorporate any of these suggestions. At this point, proponents may redraft their measure and resubmit it, after which another comment hearing may be held, or proponents may simply proceed to the next step. *Id.*

35. *Id.* The title is set by the "title board" and "must be brief, unambiguous, and in the form of a question that is answered 'yes' to vote in favor of the proposed change and 'no' to vote against the proposed change. Further, a ballot title for a proposal cannot conflict with any other title set for the same election." *Id.*

36. *Id.*

37. *Id.* In Colorado, the magic number is five percent, which equated to 80,571 signatures in Colorado for the 2002 ballot. Colorado General Assembly, *Steps for Placing an Initiated Proposal on the Statewide Ballot*, *supra* note 33.

38. Todd Donovan & Shaun Bowler, *An Overview of Direct Democracy in the American States*, in *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES* 8 (Shaun Bowler et al. eds., 1998).

39. Colorado General Assembly, *Steps for Placing an Initiated Proposal on the Statewide Ballot*, *supra* note 33.

40. *Id.*

41. *Id.* Ineligible signatures are thrown out and do not count toward the five percent requirement. If enough signatures are thrown out to disqualify the measure for the ballot, proponents have fifteen days to gather more signatures and/or thirty days to challenge the Secretary of State's determinations in court. *Id.*

Of course, getting a measure onto the ballot is only the beginning. In the weeks and months leading up to the election, proponents and opponents alike will spend thousands, if not millions, of dollars attempting to sway voters.⁴²

Despite the procedural obstacles that must be overcome and the financial burdens of the campaign that follows,⁴³ ballot initiatives remain popular among activists for a variety of reasons. Of significance to this discussion, direct democracy gives activists access to the system when they lack the political credibility or credentials of the ruling elite.

C. *Understanding the Referendum*

Some people use the term "referendum" to explain the larger system of direct democracy itself. One author, for instance, states that "[t]he referendum can be defined as a vote by the people in which every voter has the right to vote on a given issue."⁴⁴ Such nebulous definitions can blur the distinction between referenda and initiatives. In practice, the referendum gives voters the final word on issues before the legislature.⁴⁵ Referenda find their way to the voters in a slightly different fashion than initiatives. Referred measures actually pass through the state legislature before being put on the ballot. Then, before becoming law, voters must approve the measures at the next election.⁴⁶

This can happen in one of two ways.⁴⁷ First, if legislators recognize the importance of an issue but are uncomfortable passing final judgment on a statutory solution,⁴⁸ both chambers may pass what amounts to a resolution that requires approval by the voters. This scheme is mandatory when legislators seek

42. See *infra*, text and notes 168–69. For a general discussion of money in the initiative process, see DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* (2000).

43. See, e.g., Elizabeth Garrett & Elisabeth R. Gerber, *Money in the Initiative and Referendum Process: Evidence of Its Effects and Prospects for Reform*, in *THE BATTLE OVER CITIZEN LAWMAKING*, *supra* note 5, at 73–95.

44. MARKKU SUKSI, *BRINGING IN THE PEOPLE: A COMPARISON OF CONSTITUTIONAL FORMS AND PRACTICES OF THE REFERENDUM* 5 (1993).

45. *Id.* at 6.

46. *Id.*

47. *Id.* at 7.

48. Often this occurs when the issue is highly divisive. *Id.* (calling such a referendum a "vote of confidence").

to amend the state constitution.⁴⁹ Legislators may also be forced to refer bills. Under this process, known as the “popular referendum,” citizens concerned about a bill passed by the legislature can petition to have the measure reviewed by the voters before it can take effect.⁵⁰ In practice, however, the popular referendum is rarely used.⁵¹

The referendum is important to animal protection because of its use by established interests to try and limit animal advances. As will be discussed in detail, the referendum has proven to be a powerful weapon for those concerned that animal initiatives have gone too far.⁵²

II. ANIMAL RIGHTS VERSUS ANIMAL WELFARE⁵³

Appreciating the effect of the initiative and referendum on animal protection requires an understanding that animal protection can mean any of several different things. Indeed, once the ballot is set and the campaigning begins, there is often much public wrangling about the nature of the measure being proposed and questions about the type of animal protection being promoted. However, to recognize the true nature of the measure on any given ballot first requires an overview of the various strains of animal protection thought. Rather than existing as a single, cohesive group with the same conception of and goals for animals, the animal protectionist community includes members of three schools of thought: animal welfarism, animal rights, and new welfarism.

49. Lynn A. Baker, *Constitutional Change and Direct Democracy*, 66 U. COLO. L. REV. 143, 143 (1995).

50. CRONIN, *supra* note 29, at 2. For a general discussion of the popular referendum, see Chip Lowe, *Public Safety Legislation and the Referendum Power: A Reexamination*, 37 HASTINGS L.J. 591 (1986).

51. This is due, in large part, to the advent of the so-called safety clause legislators attach to the end of legislation. Such clauses cause the law to take immediate effect upon passage and exempt the measure from popular review. See Lowe, *supra* note 50, at 595–97.

52. See *infra*, notes 220–28.

53. For a larger overview of animal rights and animal welfare, as well as the issues attendant to each, see generally Joseph Lubinski, *Introduction to Animal Rights*, Animal Legal & Historical Center, at <http://www.animallaw.info/articles/ddusjlubinski2002.htm> (last visited Dec. 20, 2002). The following material is drawn in substantial part from that article.

A. *Animal Welfare Theory*

Animal welfarism is the oldest form of animal protection thought. Welfarists accept that animals will be, and perhaps to some extent should be, used as resources for humanity. Most importantly, however, welfarists believe animals should not be made to suffer unnecessarily.⁵⁴ Thus, the function of welfare advocacy is to minimize unnecessary pain, suffering, and death through anti-cruelty laws and the work of charitable organizations.⁵⁵

Interest in animal welfare dates back hundreds of years. In fact, the first animal protection law in North America predated the American Revolution—an animal cruelty law passed by the Massachusetts Bay Colony in 1641.⁵⁶ Two hundred years later, activists in New York formed the American Society for the Prevention of Cruelty to Animals (ASPCA),⁵⁷ an organization that is modeled after the Royal Society for the Prevention of Cruelty to Animals.⁵⁸ The ASPCA now has over 400,000 members.⁵⁹

Concern for animals was not new even in the Seventeenth Century. In fact, read in a certain light, one can see the first animal protectionist writings in the opening chapter of the Bible. For example, animals are a key component of the Book of Genesis's description of Creation.⁶⁰ Moreover, the Bible

54. GARY L. FRANCIONE, *ANIMALS, PROPERTY AND THE LAW* 18 (1995).

55. *Id.*

56. Beth Ann Madeline, *Cruelty to Animals: Recognizing Violence Against Nonhuman Victims*, 23 U. HAW. L. REV. 307, 309 (2000).

57. CLIFFORD J. SHERRY, *ANIMAL RIGHTS* 86 (1994).

58. See PETER SINGER, *ANIMAL LIBERATION* 205 (2d ed. 1990).

59. SHERRY, *supra* note 57, at 86.

60.

And God said, Let the waters bring forth abundantly the moving creature that hath life, and fowl that may fly above the earth in the open firmament of heaven. And God created great whales, and every living creature that moveth, which the waters brought forth abundantly, after their kind, and every winged fowl after his kind: and God saw that it was good. And God blessed them, saying, Be fruitful, and multiply, and fill the waters in the seas, and let fowl multiply in the earth. And the evening and the morning were the fifth day. And God said, Let the earth bring forth the living creature after his kind, cattle, and creeping thing, and beast of the earth after his kind: and it was so. And God made the beast of the earth after his kind, and cattle after their kind, and every thing that creepeth upon the earth after his kind: and God saw that it was good.

Genesis 1:20–25 (King James) (paragraphs omitted).

grants humanity *dominion* over all animals, a term that implies not only power and control but also responsibility.⁶¹ As a final example, God commanded Noah to not only save himself and his family, but also

every living thing of all flesh, two of every sort shalt thou bring into the ark, to keep them alive with thee; they shall be male and female. Of fowls after their kind, and of cattle after their kind, of every creeping thing of the earth after his kind, two of every sort shall come unto thee, to keep them alive.⁶²

Furthermore, religious recognition of animals is not limited to the Bible. For example, Saint Francis of Assisi is legendary for his treatment of the animal world.⁶³

Philosophers, too, have long debated animal welfare. While John Locke⁶⁴ and Rene Descartes⁶⁵ are among such thinkers, the work of Jeremy Bentham perhaps contributed the most to animal welfare thought. Bentham is famous for his claim that the existence of rights should turn on an entity's ability to suffer.⁶⁶ Put simply, if suffering is possible, rights to protect against such suffering are warranted. While the

61. *Id.* at 1:28. The Oxford English Dictionary defines dominion as "[t]he power or right of governing and controlling; sovereign authority; lordship, sovereignty; rule, sway; control, influence." 4 THE OXFORD ENGLISH DICTIONARY 949 (2d ed. 1989). In each of these descriptions there is more than the mere power over, but also an implicit responsibility to those dominated. *But see* Steven J. Bartlett, *Roots of Human Resistance to Animal Rights: Psychological and Conceptual Blocks*, 8 ANIMAL L. 143, 149 (2002) (arguing that the same Biblical passage reinforces the homocentrism that inhibits the development of true animal rights).

62. *Genesis* 6:19–20 (King James).

63. For a thorough account of Saint Francis's life and work in this regard, see ROGER D. SORRELL, *ST. FRANCIS OF ASSISI AND NATURE: TRADITION AND INNOVATION IN WESTERN CHRISTIAN ATTITUDES TOWARD THE ENVIRONMENT* (1988).

64. Gary L. Francione, *Animals, Property and Legal Welfarism: "Unnecessary" Suffering and the "Humane" Treatment of Animals*, 46 RUTGERS L. REV. 721, 733 (1994). As Francione points out, Locke was troubled by the place of animals in a human society. In short, because he viewed animals as a common resource the notion of animal ownership bothered him. *Id.* at 733–36. Locke also vocally condemned animal cruelty, but because he thought violence towards animals tended to lead to violence against people. *Id.*

65. Descartes denied any notion of animal rights. Indeed, he denied animals were capable of conscious thought at all. SINGER, *supra* note 58, at 200. *See also* TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* 3–6 (1983) (questioning the extent to which Descartes really held this extreme view).

66. *See* SINGER, *supra* note 58, at 7.

purpose of Bentham's writing—expression of his opposition to Britain's continued racial oppression—must be remembered, his theory is nonetheless applicable to the treatment of animals.⁶⁷ Thus, to Bentham, the question of whether an entity, be that entity man or beast, deserves protection depends on the entity's capacity to suffer pain.⁶⁸

Today, much of the world's concern for animals is predicated on this welfarist theory. Indeed, the most recognizable animal protection organizations in the United States subscribe to a welfarist notion of protection.⁶⁹ Similarly, state governments across the country protect animals through anti-cruelty laws aimed at protecting animals from inhumane treatment.⁷⁰ Federal law also contributes to a welfarist view of animal protection. The Federal Humane Methods of Livestock Slaughter Act, for instance, regulates how animals raised for their meat can be killed.⁷¹ The Animal Welfare Act regulates the use of animals in research, seeking to prevent laboratory animals from needless suffering.⁷²

It is important to note, however, that in none of these laws is animal exploitation prohibited; rather it is merely regulated.⁷³ Indeed, these statutes reflect the general view

67. Perhaps more precisely, this single proposition has proven important to the animal protection community. *E.g.* Katharine M. Swanson, Note, *Carte Blanche for Cruelty: The Non-Enforcement of the Animal Welfare Act*, 35 U. MICH. J.L. 937, 938–39 (2002) (quoting Bentham); *see also* Ruth Payne, *Animal Welfare, Animal Rights, and the Path to Social Reform: One Movement's Struggle for Coherency in the Quest for Change*, 9 VA. J. SOC. POL'Y & L. 587, 593 (2002) ("Many writers believe that the true founder of the animal welfare movement was the renowned utilitarian Jeremy Bentham. As a utilitarian, Bentham believed that the correct moral action is discovered by noting which action produces the most social benefit, even if that benefit comes at a significant cost to a few.").

68. *Id.*

69. Examples include the Humane Society of the United States and the innumerable local animal organizations spread across the United States. *See, e.g.*, Humane Society of the United States, *Home Page*, at <http://www.hsus.org> (last visited Mar. 26, 2003). Take, for example, the Denver Dumb Friends League. Founded in 1910, it states as its mission: "The Dumb Friends League is committed to the welfare of animals. We shall provide shelter and care for animals. We shall provide programs and services that enhance the bond between animals and people. We shall be advocates for animals . . . speaking for those who cannot speak for themselves." Dumb Friends League, *Who We Are*, at <http://www.ddfl.org/whoweare.htm> (last visited Nov. 4, 2001).

70. Madeline, *supra* note 56, at 309–10.

71. 7 U.S.C. §§ 1901–1906 (2000).

72. 7 U.S.C. §§ 2131–47, 2148–49, 2153–56.

73. Gary L. Francione, *Animal Rights and Animal Welfare*, 48 RUTGERS L. REV. 397 (1996) [hereinafter Francione, *Animal Rights*].

that, under the law, animals are treated as tangible goods to be bought and sold, acquired and maintained. This property status of animals is introduced in many first year law school curricula with the famous cases of *Pierson v. Post*⁷⁴ and *Keeble v. Hickeringill*.⁷⁵

Welfare theory, then, accepts the legal status of animals as property and simply seeks to ensure that animals do not suffer too much; however, it does so without defining the threshold at which pain and suffering become unnecessary or unjustified.⁷⁶ Despite this imprecise formulation, for much of the twentieth century animal protection meant animal welfare. Indeed, until the 1970s, this is what animal activists lobbied for,⁷⁷ and, perhaps more importantly, this is what society probably understood animal advocates to be seeking.

B. Animal Rights

The traditional view of animal protection changed markedly in 1975 with the publication of Peter Singer's now famous, and still controversial, *Animal Liberation*.⁷⁸ Although commonly considered the innovator of animal rights theory, Singer does not actually advocate a rights position.⁷⁹ A utilitarian at heart, he instead advocates better treatment for animals by balancing their interests against those of humanity.⁸⁰ Nonetheless, the book helped to shift the way that

74. 3 Cai. R. 175 (N.Y. Sup. Ct. 1805) (holding that during a fox hunt, ownership of the prey attached upon capture, not merely pursuit).

75. 103 Eng. Rep. 1127 (Q.B. 1707) (addressing the extent to which one can interfere with another's duck pond).

76. Laura G. Kniaz, *Animal Liberation and the Law: Animals Board the Underground Railroad*, 43 BUFF. L. REV. 765, 793 (1995).

77. The foundations for the animal rights movement were beginning to be laid, however, by the 1960s. See, e.g., RUTH HARRISON, *ANIMAL MACHINES* (1964). "Among animal activists, [Harrison's] influence in stimulating concerns and public actions about how humans treat animals has been compared to Rachael Carson who stimulated interest and public policies in the US environmental movement." HAROLD GUITHER, *ANIMAL RIGHTS: HISTORY AND SCOPE OF A RADICAL SOCIAL MOVEMENT 2* (1998).

78. See generally SINGER, *supra* note 58.

79. Gary L. Francione, *Animal Rights Theory and Utilitarianism: Relative Normative Guidance*, 3 ANIMAL L. 75, 79 (1997).

80. *Id.*

society perceived animal advocates—now as radical extremists bent on equating humankind with the animal kingdom.⁸¹

Probably not coincidentally, around the same time Singer's book altered society's view of the animal protectionist movement, an increasing number of animal advocates began to reevaluate the effectiveness of welfarism. This shift resulted in a growing number of activists who lobbied for something called animal rights.⁸² The basic difference between this new camp and traditional welfarists lies in how each saw animals fitting into a human-dominated world.

To a rights advocate, animals, like people, enjoy certain inalienable rights that must always be respected. Animal rights advocates do not necessarily seek recognition of rights equal to those of humans, but rather simple acknowledgement that some rights do exist.⁸³ In doing so, animal rights advocates attempt to shift animals' conceptual classification from thing to person⁸⁴ and question whether there is a significant distinction that makes animals qualitatively different from humans.⁸⁵

Understanding animal rights, then, first requires an appreciation of the term "rights" more generally. Because the term has, heretofore, meant human rights, it is in this context that we must begin. Bernard Rollin defines natural rights as "the idea that human beings have *by nature* . . . certain rights that governments cannot legitimately violate, and that political law must respect."⁸⁶ To the philosopher Thomas Hobbs, a right is "the freedom to act without moral constraint."⁸⁷ Wesley

81. Francione, *Animal Rights*, *supra* note 73, at 403 ("Animal rights, on the other hand, reflects a view that is 'radical,' 'militant,' 'terrorist,' and opposed to human well-being.") (quoting AMERICAN MEDICAL ASSOCIATION, *USE OF ANIMALS IN BIOMEDICAL RESEARCH: THE CHALLENGE AND THE RESPONSE* (1989)).

82. *Id.* at 397–98.

83. *Id.* at 398.

84. See, e.g., Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 532–33 (1998) ("[I]t is an appropriate time for the judiciary to take an evolutionary step in the development of the common law and remove animals from their status as mere property.").

85. *Id.* at 533.

86. BERNARD E. ROLLIN, *ANIMAL RIGHTS AND HUMAN MORALITY* 110–11 (rev. ed. 1992). According to Rollin, a right might also be conceived of as a moral foundation, something that "serves a major political, legal, and social function" of protecting individuals from the rest of the world, *id.* at 117, or even "protective fences" that shield the individual from the needs and wants of the rest of society. *Id.* at 116.

87. JORDAN CURNUTT, *ANIMALS AND THE LAW: A SOURCEBOOK* 20 (2001).

Hohfield tried to pin down the definition more concretely. In some circumstances, a right is something that creates a duty in others "not to interfere with the rightsholder doing or having something."⁸⁸ In other circumstances, rights mean that others have no legal recourse to prevent the right-holder from acting.⁸⁹ Additionally, some rights give the individual "the authority to alter his or her own legal status."⁹⁰ Finally, some rights protect the right-holder from the control of others.⁹¹

These differing conceptions of human rights have important consequences to the definition of animal rights.⁹² Most importantly, this discussion illustrates that a simple definition of animal rights may not be possible. Regardless, under any of these definitions, animals do not currently enjoy even the most basic rights. To illustrate this point, consider the example given by Jordon Curnutt:

[E]very state in the United States requires dog owners to vaccinate their animals for rabies. Rabies is fatal for any dog unlucky enough to contract it, so the law indisputably protects canines. Does this mean that it gives them the legal right to a vaccination? Probably not. The legislative goals of the immunization requirement are to promote public safety . . . and paternalistically compel dog owners to take care of their property⁹³

Curnutt's point is that even though people may owe legal obligations to pets, those pets have no legal right to enforce such obligations—no court will entertain a suit by the family dog against his owner. An unenforceable obligation is not a right. Moreover, laws that seem to benefit animals may have purposes other than promoting the rights of animals at their core.⁹⁴

That animals do not have "rights" in any recognizable sense is generally uncontested. What "animal rights" does

88. *Id.*

89. *Id.*

90. *Id.* at 21.

91. *Id.*

92. Though it may be that the distinctions are only visible to those within the animal rights movement. Francione, *Animal Rights*, *supra* note 73, at 405.

93. CURNUTT, *supra* note 87, at 26 (citation omitted).

94. One such purpose may be the prevention of future harm to people. *See infra*, note 211 and accompanying text; *see also* Madeline, *supra* note 56, at 325–28.

mean is quite a bit more complex, especially within the animal protectionist community. Not everyone agrees about what rights advocates should be seeking on behalf of animals. To illustrate, consider the lifestyles of rights advocates. Some are vegetarians, believing at the very least that animals have the right not to be eaten.⁹⁵ Others, however, believe the baseline for rights must be higher and include protecting animals from any direct exploitation for food production. These people become vegans, refusing to eat any food made with animal products—such as milk, cheese, pasta, or anything gelatin.⁹⁶ Still others contend that even the vegetarian and vegan are violating the rights of animals when they sit down to the dinner table if the vegetables they eat were sprayed with pesticides.⁹⁷

Pets provide another problem for animal rights advocates. To some, animal ownership is itself an abomination on par with slavery. To these people, while pet ownership might currently be a necessary evil given the domestication of several species, the ultimate goal of the movement should be to stop making things “pets.”⁹⁸ This belief contrasts starkly with those of other animal advocates who view pet “ownership” as something more akin to a parent’s guardianship over a child.⁹⁹ These advocates believe pet ownership violates no rights, and the last thing such advocates would want is a world where homes are devoid of cats and dogs.

Given the distinctions and qualifications that advocates can give to the term “rights,” some have contended that “[m]any of the leaders of the animal rights movement are at best abolitionists but in several cases anarchists when it comes to human use of animals.”¹⁰⁰ Between abolitionist and anarchist lie many more subtle classifications. Perhaps rights

95. See EXPLORING ANIMAL RIGHTS AND ANIMAL WELFARE: USING ANIMALS FOR FOOD 111 (Vol. 1 2002).

96. *Id.* at 101. See generally ERIK MARCUS, VEGAN: THE NEW ETHICS OF EATING (2001).

97. TOM REGAN, DEFENDING ANIMAL RIGHTS 11 (2001).

98. *Id.*

99. The National Animal Interest Alliance (“NAIA”), a self-proclaimed animal welfare organization, dedicates an entire page on their website to show the radical anti-pet agenda of the animal rights agenda. NAIA Trust, *Animal Rights Quotes About Pets*, at <http://naiaonline.org/body/articles/archives/Animalrightsquote.htm> (last visited Feb. 24, 2003).

100. LORENZ OTTO LUTHENER & MARGARET SHEFFIELD SIMON, TARGETED: THE ANATOMY OF AN ANIMAL RIGHTS ATTACK 11 (1992).

ideology is best defined when set against rights opponents' ideology. Most animal rights activists contend that no single defining characteristic clearly puts humans in a superior position to animals.¹⁰¹ Opponents, on the other hand, argue that it is the compilation of distinctions between man and beast (such as rationality, the ability to speak, the existence of a soul, the biblical grant of dominion, and the capacity for moral action) that set humans apart as a species.¹⁰² Opponents further contend that animal rights theory is based on a mistaken presumption—that rights are simply freedoms from suffering or distress.¹⁰³ Thus, Schmahmann and Polacheck, responding to Bentham's work, argue that the simple ability to suffer does not justify extending actual rights.¹⁰⁴ Furthermore, attempts by animal rights advocates to equate degrees of human suffering to that of animals are often met with stern reproach.¹⁰⁵

Unfortunately, I cannot conclude this section with a succinct definition of animal "rights." The distinction between rights and welfare is clear, however, at least at the level of theory. A contemporary example illustrates the differences. Each year, laboratories take billions of animals and subject them to tests for education, consumer protection, and medical research.¹⁰⁶ Animal welfarists seek to regulate such testing through laws such as the Animal Welfare Act.¹⁰⁷ They identify tests that are especially cruel and unnecessary and lobby for alternatives.¹⁰⁸ They accept, however, the notion and propriety

101. Kniaz, *supra* note 76, at 770–71 ("Despite the opposition's efforts, there is an increasing body of literature blurring the distinctions between humans and other animals, whether one looks to genetic differences, language capabilities, morality, intelligence, the ability to make and use tools, or possession of a soul. Thus, numerous studies persuasively demonstrate that at least some animals possess each of these allegedly unique human qualities.").

102. David R. Schmahmann & Lori J. Polacheck, *The Case Against Rights for Animals*, 22 B.C. ENVTL. AFF. L. REV. 747, 752 (1995).

103. *Id.* at 750.

104. *Id.*

105. *Id.* at 753. In the example cited, Ingrid Newkirk, founder of People for the Ethical Treatment of Animals, had compared the number of Jews killed in concentration camps during World War II to the number of chickens slaughtered each year for human consumption.

106. 2 EXPLORING ANIMAL RIGHTS AND ANIMAL WELFARE: USING ANIMALS FOR RESEARCH 29 (2002).

107. 7 U.S.C. §§ 2131–47, 2148–49, 2153–56 (2000).

108. GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG? 32–33 (2000).

of animal testing in the abstract because of the benefits conferred on humans.¹⁰⁹ Rights advocates, on the other hand, see animal testing as violative of a fundamental right,¹¹⁰ especially when the testing involves animals with human characteristics.¹¹¹

Understanding the distinction between rights and welfare is of critical importance to this discussion for two reasons. First, opponents often depict the pro-animal issues presented to the voters as radical rights measures,¹¹² when they often have little or nothing to do with animal rights at all. Second, many of these measures present examples of an emerging "theory" in animal protectionism, a sort of "new welfarism."¹¹³

C. *The Revival of Welfarism by Animal Advocates?*

At its most fundamental level, new welfarism represents a compromise between rights and welfare. In principle, the new welfarist seeks animal rights as his or her ultimate goal but is willing to sacrifice and make only incremental strides towards that end.¹¹⁴ In other words, new welfarists are willing to accept something less than true animal rights in the present if such concessions likely will lead to real animal rights in the future.

According to Professor Francione, there are five essential characteristics of new welfarism.¹¹⁵ Like animal rights advocates, new welfarists reject the idea that animals serve as mere tools for humanity to use and advocate something more than humane treatment and the avoidance of unnecessary suffering.¹¹⁶ They also reject the traditional animal rights framework, however, as too radical to make any substantial

109. *Id.*

110. GARY L. FRANCIONE, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT 11 (2000) [hereinafter FRANCIONE, RAIN WITHOUT THUNDER].

111. See generally Coalition to End Primate Experimentation, *Non Human Primates Should Not be Used in Experiments*, ANIMAL EXPERIMENTATION: OPPOSING VIEWPOINTS 115–20 (Helen Cothran ed., 2002). Of course, some dispute whether a single experiment subject could ever save a life.

112. See, e.g., Tomoko Hosaka, *Animal Rights, Hunting Laws Hit State Ballots*, OREGONIAN, Oct. 27, 2000, at A-16; Ed Owens, *Should Animal Traps be Banned?*, SEATTLE TIMES, Oct. 10, 2000, at B-7; Jack Sullivan, *Choices 2000: Answers to the Questions*, BOSTON HERALD, Nov. 5, 2000, at E-7.

113. Francione, *Animal Rights*, *supra* note 73, at 397–99.

114. *Id.*

115. FRANCIONE, RAIN WITHOUT THUNDER, *supra* note 110, at 36–37.

116. *Id.* at 36.

headway with society and thus unlikely to further the interests of animals.¹¹⁷ Thus, the strategies they instead employ tend to mimic those of traditional welfare-based groups.¹¹⁸ By adopting the traditional welfarist strategies, these activists' efforts actually work to substantially reinforce the notion of human superiority over the animals that they claim to reject.¹¹⁹ Finally, in so doing, they perceive no "moral or logical inconsistency in promoting measures that explicitly endorse or reinforce [a] . . . view of animals [as instrumentalities of humanity] and at the same time articulating a long-term philosophy of animal rights."¹²⁰

Accepting Francione's definition of new welfarism,¹²¹ the first three characteristics of the theory make it seem a viable action plan for change. If the last two characteristics are true as well, however, new welfarists may actually harm the animal protectionist movement. This point can best be illustrated by an analogy to other reformist movements. Consider, for example, the work of scholars who have evaluated the effects of "incremental change" in race relations. As Professor Richard Delgado and others have noted, a majority group will often allow token advancement to a vocal minority in the hopes that this will quiet it down.¹²² The intent is to give that group something small that will temporarily placate its most vocal members and hopefully help bleed off some of the group's membership—those simply looking for a cause who, sensing a victory, will move on to a new injustice that must be righted.¹²³ The effect is to silence the group, cutting its legs out from under it before any real momentum can be gained or sustained.

In the case of animals, then, by accepting less than actual animal rights, new welfarists might unwittingly be participating in such token advancement. Assuming animal advocates represent a minority of the population, the majority could enact laws that advance animal protection only

117. *Id.*

118. *Id.*

119. *Id.* at 37.

120. *Id.*

121. Such acceptance makes sense, given that Francione coined the term.

See *id.* at 36.

122. Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992).

123. *Id.*

slightly.¹²⁴ And if the majority of the population is attuned to the idea of appeasement, animal advocates may find that instead of making slow but steady progress, they are actually standing still, if not moving backwards.

There are, then, at least three different ways to view animal protection legislation. Each comes with its own benefits and costs. A welfarist proposal is more likely to win popular support because it is less radical, but is also the least likely to substantially improve the well being of animals. Animal rights proposals advance the cause of animals the farthest, yet are unlikely to gain widespread support. Finally, while a new welfarist approach might seem a happy compromise, it may do little more than a welfarist approach and additionally threaten the future vitality of animal protection. These realities become clearer in the specific context of direct democracy.

III. ANIMAL ISSUES ON THE BALLOT

As already introduced, animal-related initiatives are appearing on statewide ballots with increasing frequency. Indeed, the measures have begun to catch the eye of some political commentators. A recent piece by Wayne Pacelle, the Vice President of the Humane Society of the United States, discusses the increasing use of the initiative by the animal protectionist movement.¹²⁵ As Pacelle notes, use of the initiative by animal advocates has a long history.

Massachusetts was the first state to place an animal protection measure on the ballot, with citizens voting overwhelmingly in favor of banning certain animal trapping devices in 1930.¹²⁶ Despite this positive start, forty-two years passed before another animal measure went to the people on a

124. For example, many cities have recently amended their municipal ordinances to change animal "owners" to animal "guardians." While such a change might at first seem a fundamental change in animal ownership, in reality such laws are nothing more than semantic modifications to describe the same relationship that existed before. See Rebecca J. Huss, *Separation, Custody, and Estate Planning Issues Relating to Companion Animals*, 74 U. COLO. L. REV. 181, 195-97 (2003).

125. Wayne Pacelle, *The Animal Protection Movement: A Modern-Day Model Use of the Initiative Process*, THE BATTLE OVER CITIZEN LAWMAKING 109-19 (M. Dane Waters ed., 2001).

126. *Id.* at 118.

statewide ballot.¹²⁷ Further, between 1972 and 1992, only five more measures appeared for voters to consider.¹²⁸ Then, in the 1990s, animal measures exploded onto the ballot: two in 1992, two in 1994, eight in 1996, ten in 1998, and nine in 2000.¹²⁹ In 2002, voters considered another four measures.¹³⁰ For purposes of this discussion, I take a sampling of recent measures from 2000 and 2002 to illustrate the variety of animal issues touched by direct democracy. I first discuss measures that address animals used in entertainment, as Oklahoma sought to ban cockfighting and Massachusetts to end dog racing. I then discuss proposals that sought to regulate hunting and increase the penalties for animal cruelty before concluding with the responses of anti-animal protection forces.

A. *The Long Fight to Ban Cockfighting in Oklahoma*

Perhaps the most compelling animal initiative story comes from Oklahoma, where animal protectionists have long sought

127. In 1972, South Dakota banned the hunting of mourning doves. *Id.* at 118.

128. *Id.*

129. *Id.* at 112, 118–19 (1992: Colorado banned hunting bears in the spring and “baiting and hounding” bears; 1994: Arizona banned body-gripping traps on some land; 1996: California and Oregon voters rejected attempts to repeal recently enacted animal protectionist legislation, Colorado and Massachusetts approved trapping restrictions, Washington banned “baiting and hounding” of bears, cougars, and bobcats, and Alaska banned airborne hunting of wolves and wolverines, Idaho and Michigan rejected proposals to restrict bear hunting; 1998: Arizona and Missouri banned cockfighting, California banned some trapping of wildlife and banned slaughter of horses and sale of horsemeat, Ohio rejected a ban on dove hunting, Alaska rejected a proposal to ban some wolf snarings, Colorado considered competing proposals to regulate livestock, Minnesota approved a measure recognizing hunting’s importance to the state’s heritage, and Utah approved a measure requiring a two-thirds majority to enact animal protection legislation via the initiative; 2000: Alaska rejected a proposal to ban any future animal protection initiatives and rejected a ban on airborne wolf hunting, Arizona rejected a proposal to require a super-majority to pass animal protection initiatives, Massachusetts rejected a ban on greyhound racing, Montana banned “canned hunts,” North Dakota and Virginia passed constitutional protections for the right to hunt, Oregon rejected a ban on leghold traps, and Washington passed a similar proposal).

130. Humane Society of the United States, *The Nov. 5 Ballot Initiatives: Cast a Vote for Animals*, at <http://www.hsus.org/ace/14852> (last visited Feb. 24, 2003) (Florida approved a ban on small gestation crates for pigs; Oklahoma rejected a proposal to make it harder to put animal measures on the ballot and also enacted a ban on cockfighting; Georgia approved special pet license plates; Arizona rejected a proposal to expand greyhound racing within the state; and Arkansas declined to make animal cruelty a felony).

to ban cockfighting.¹³¹ The saga began in 1963, when an appellate court judge ruled that a state statute outlawing animal fighting did not apply to cockfighting because chickens were not animals.¹³² Although animal protectionists sought help from the legislature for years, they were continually rebuffed in their attempts to protect chickens because of rural legislators' sympathy for cockfighters.¹³³ Finally, in 1999, protectionists turned to the initiative. After gathering the requisite number of signatures, the sponsors were faced with multiple lawsuits intended "to drain the time, money, and enthusiasm of petition organizers."¹³⁴ At the same time, opponents placed advertisements in local newspapers, arguing that the initiative was an attempt by animal rights activists to open the door to banning other activities, such as hunting and rodeos.¹³⁵ Three years later, both sides were still fighting over whether the measure qualified for the ballot. It was not until early in 2002 that the Oklahoma Supreme Court ruled the supporters had complied with all relevant laws¹³⁶ and the governor signed an executive order putting the measure on the ballot.¹³⁷

Many viewed the measure as a direct threat to their livelihoods. According to an Oklahoma newspaper, over fifty thousand people were involved in "breeding, growing, selling and transporting fighting chickens within and outside the state."¹³⁸ Once the campaign began, cockfighting supporters again claimed the measure was the work of animal rights extremists and its success would only encourage them to attack

131. Indeed, Pacelle begins his article by discussing the movement to ban cockfighting in Oklahoma. Pacelle, *supra* note 125, at 109–10. Cockfights are probably familiar to most readers. For those unfamiliar, and without the gory details, trainers teach their birds to fight with dangerous weapons strapped to their bodies and then enter them in competitions. Spectators, as well as the trainers, wager money on the outcomes. For more information on cockfighting and its history, see CURNUTT, *supra* note 87, at 276–83.

132. Pacelle, *supra* note 125, at 109.

133. *Id.*

134. *Id.* at 110.

135. *Id.*

136. Humane Society of the United States, *Oklahoma: S.Q. 687 Cockfighting Initiative*, at <http://www.hsus.org/ace/14670> (last visited Jan. 20, 2003).

137. Chuck Ervin, *Cockfighting Ban on Nov. 5 Ballot*, TULSA WORLD, Aug. 21, 2002, at A-1.

138. Chuck Ervin, *Cockfighting: Judge Moves to Halt New State Law*, TULSA WORLD, Nov. 9, 2002, at A1.

other traditions such as fishing and rodeos.¹³⁹ Perhaps surprisingly, the issue garnered more attention and debate than any other measure on that year's ballot in Oklahoma.¹⁴⁰ Indeed, voters were blitzed with campaign materials in the days leading up to the election.¹⁴¹ After the ban passed, some pundits claimed that former United States Representative Steve Largent lost his race for governor because of his opposition to the measure,¹⁴² and GOP leaders blamed the initiative for the party's loss in several congressional races.¹⁴³

Thus, it seemed, Oklahoma had become the forty-eighth state in the Union to ban cockfighting.¹⁴⁴ The debate would not be settled so quickly, however. Though the cockfighting ban passed by a one-hundred-thousand-vote margin statewide, fifty-seven of the state's seventy-seven counties rejected the measure.¹⁴⁵ Multiple lawsuits challenging the new law were filed across the state shortly after the election,¹⁴⁶ arguing that it was unconstitutional and that it presented an unreasonable financial burden on bird owners.¹⁴⁷ By December, a state trial judge had enjoined enforcement of the act in twenty counties.¹⁴⁸ Such action by the courts angered some voters, who felt that judicial intervention would only invalidate the will of the people.¹⁴⁹

139. Chuck Ervin, *Cockfighting Ban not First of Many Aims, Backers Say*, TULSA WORLD, Nov. 2, 2002, at A15.

140. Shaun Schafer, *Voters Back Ban on Cockfighting*, TULSA WORLD, Nov. 6, 2002, at A1.

141. Shaun Schafer, *Blood Sport's Fans, Foes Take Aim*, TULSA WORLD, Nov. 1, 2002, at A1.

142. Randy Krehbiel, *Campaign Connection*, TULSA WORLD, Nov. 12, 2002, at A4.

143. Paul English, *Largent's Effect on Races Eyed*, TULSA WORLD, Nov. 10, 2002, at A20.

144. Janet Pearson, *Cockfighting: Round Two*, TULSA WORLD, Dec. 1, 2002, at G1.

145. Rod Walton, *Cockfighting: Restraining Order Continued in Adair, Sequoyah Counties*, TULSA WORLD, Dec. 20, 2002, at A13.

146. Shaun Schafer, *Cockfighting: AG to Ask that Suits be Linked*, TULSA WORLD, Nov. 27, 2002, at A1.

147. Walton, *supra* note 145.

148. *Id.*

149. See, e.g., Call the Editor, *New Voter Asks: Why Bother?*, TULSA WORLD, Dec. 10, 2002, at A2 ("I'm an 18-year-old from Claremore. I voted for the first time in this last election. I voted against cockfighting. Now I wonder what was the point. They are going to overturn my vote anyway. I will never vote again."); Call the Editor, *Lawyer Jokes Finally Understood*, TULSA WORLD, Dec. 4, 2002, at A2; Call the Editor, *Why Bother Voting on Cockfighting?*, TULSA WORLD, Nov. 27, 2002, at A2.

Moreover, because the measure was statutory, rather than an amendment to the state constitution, the legislature is free to amend or even repeal the voter-approved law.¹⁵⁰ This led one legislator to propose making the law effective only in the twenty counties that approved the ban.¹⁵¹ As of this Comment, both the lawsuit and the proposed legislation are still pending. Compelling drama aside, the measure illustrates both the potential of the initiative to protect animals when the state legislature refuses to do so and also the mechanisms available to opponents to obstruct such measures.

B. Greyhound Racing

Animal advocates in Massachusetts placed an initiative to end dog racing in the state on the ballot in 2000.¹⁵² Opponents of dog racing did not use the initiative as their first line of attack against the industry, however. Prior to 2000, activists attempted to bring an end to racing in Massachusetts by lobbying state legislators to oppose extensions of racing simulcast and wagering laws.¹⁵³ When lobbying efforts failed, a group called Grey2K managed to put a measure on the ballot proposing to directly end dog racing in Massachusetts.¹⁵⁴

In the early fall of 2000, Grey2K sent out fund-raising letters charging that dog racing kills over twenty thousand greyhounds nationwide every year.¹⁵⁵ It also began airing video of the alleged abuse of racing greyhounds. Some of this footage was so graphic—such as dead greyhounds being piled into a

150. Chuck Ervin, *Cockfighting Ban to Face New Challenges*, TULSA WORLD, Dec. 6, 2002, at A1.

151. Chuck Ervin, *Cockfighting Fight Coming Up?*, TULSA WORLD, Dec. 8, 2002, A25.

152. Massachusetts uses the indirect initiative, which operates slightly differently than the process detailed above. Under this system, proponents first submit the proposed measure to the state legislature. The legislature can then either enact the measure itself or refer it to the people for a vote. See Laura J. Ireland, *Canning Canned Hunts: Using State and Federal Legislation to Eliminate the Unethical Practice of Canned "Hunting,"* 8 ANIMAL L. 223, 232 (2002); MASS. CONST. art. 48, pt. 4, § 2 (2002). For a detailed discussion of the greyhound racing industry, see CURNUTT, *supra* note 87, at 249–58.

153. Susannah Patton, *Dog Racing Bill Faces Threat*, BOSTON HERALD, Dec. 17, 1999, at 45.

154. J.M. Lawrence, *Dog Racing Foes Try to Get Ban on Ballot*, BOSTON HERALD, Nov. 18, 1999, at 5.

155. Scott van Voorhis, *Group Barks Back at Activists*, BOSTON HERALD, Sept. 30, 2000, at 17.

truck—that local television stations refused to air the footage, causing Grey2K to edit its campaign commercials to delete the scenes.¹⁵⁶ Editing problems would be the least of Grey2K's problems, however, once it was uncovered that the gruesome footage of animal mistreatment actually came from tracks in Arizona, not Massachusetts.¹⁵⁷ The implications from the Arizona video about Massachusetts owners and other claims by Grey2K led the track owners to file a lawsuit against Grey2K for libel.¹⁵⁸

Racing supporters asserted that more than animal welfare was at stake. The livelihoods of the many people employed by the tracks depended on the measure failing.¹⁵⁹ The message was clear: pass this measure and thousands of people will lose their jobs.¹⁶⁰ Opponents also directly attacked supporters, claiming the proponents of the measure were really radical animal rights activists.¹⁶¹

Several weeks before the election, one of Massachusetts's most famous politicians—Senator Ted Kennedy—publicly announced his support for the measure.¹⁶² But what should have been a time of renewed hope for proponents was quickly dashed when the esteemed Senator explained his support was based on his opposition to gambling.¹⁶³ Indeed, the senator's staff made sure to emphasize that his support stemmed from the gambling concerns, not a desire to foster animal rights or any concern for mistreatment of the dogs.¹⁶⁴ Things looked even grimmer after the *Boston Herald* recommended voting no on the measure.¹⁶⁵ Indeed, although the polls showed voters were evenly split the final week before the election, the measure was ultimately defeated.¹⁶⁶ On election day, the

156. Scott van Voorhis, *Grey2K's Ad Toned Down for Local TV*, BOSTON HERALD, Oct. 28, 2000, at 15.

157. *Id.*

158. Scott van Voorhis, *Greyhound Dogfight Bitter to End*, BOSTON HERALD, Nov. 7, 2000, at 10.

159. Sullivan, *supra* note 112.

160. *Id.*

161. *Id.*

162. Editorial, *Pols & Politics*, BOSTON HERALD, Oct. 22, 2000, at 25.

163. *Id.*

164. *Id.*

165. *Endorsement*, BOSTON HERALD, Nov. 7, 2000, at 28.

166. Scott Van Voorhis, *Dog Track Owners Defend Turf*, BOSTON HERALD, Oct. 24, 2000, at 40.

measure lost by only 51,666 votes, or just a little over one percent of the vote.¹⁶⁷

Money also played a large role in the outcome of the election. In the final two weeks alone, track owners spent over one million dollars on advertisements and campaigning.¹⁶⁸ All told, the owners spent several million dollars to defeat the measure.¹⁶⁹ In the wake of the close victory, track owners came to realize the danger their industry faced and immediately set about spending even more money to improve the image of the industry.¹⁷⁰ Despite the possibility of compelling a recount of the votes, an option given the closeness of the election, advocates instead chose to begin drafting a new initiative.¹⁷¹ The revised version cannot go before the voters, however, until 2006, the statutory minimum amount of time before failed initiatives may be resubmitted under Massachusetts's law.¹⁷² The Massachusetts experience demonstrates a major pitfall of direct democracy: by proposing such a radical measure—banning an entire industry—that had a questionable chance of success from the outset, proponents of the initiative are now prevented from another shot for many years. During that time, the greyhound industry will likely spend millions of dollars improving its public image so as to make it even more difficult to attack the tracks in the future.

C. *Regulating Hunting*

Voters often use the initiative as a means to regulate hunting. In 2000, voters in Oregon and Washington considered measures that would ban leghold traps. These traps, often made of heavy steel, clamp around an animal's leg, trapping it until it either bleeds to death, is taken by another predator, or

167. Massachusetts Secretary of the Commonwealth, *Untitled*, <http://www.state.ma.us/sec/ele/elebalm/balmpdf/balm2000.pdf> (last visited Apr. 11, 2003).

168. Van Voorhis, *Dog Track Owners Defend Turf*, *supra* note 166, at 40.

169. Scott van Voorhis, *Dog Track Owners Hoping the Race will go on*, BOSTON HERALD, Nov. 8, 2000, at 8.

170. Scott van Voorhis, *Close Win Alarms Tracks—Will Work to Sway Public Perception*, BOSTON HERALD, Nov. 9, 2000, at 35.

171. Steve Marantz, *Glavin Orders Recount of Hub Referendum Votes*, BOSTON HERALD, Nov. 11, 2001, at 11.

172. Scott Van Voorhis, *Race Foes Fight On*, BOSTON HERALD, Nov. 14, 2000, at 29.

is retrieved by the trapper.¹⁷³ Not surprisingly, animal protectionists despise this form of predator control.¹⁷⁴ Groups such as the National Trappers Association, however, claim that leghold traps are not cruel.¹⁷⁵

Colorado was the first state to question the propriety of leghold traps through an initiative in 1996.¹⁷⁶ Colorado voters passed the proposed ban, fifty-two percent to forty-eight percent.¹⁷⁷ The 2000 measures in the Northwest were substantially similar to the Colorado law. Yet while the measure in Washington passed comfortably with fifty-five percent of the vote, its counterpart in Oregon was soundly defeated, garnering only forty-one percent of the vote.¹⁷⁸ Opponents of the bans decried the measures, arguing that they were propaganda of the animal rights movement.¹⁷⁹ Once the ban was enacted in Washington, opponents tried, unsuccessfully, to get the measure stricken from the books.¹⁸⁰ The measure succeeded not only because its proponents convinced voters that such traps are cruel to animals, but also because proponents argued persuasively that innocent children, adults, and even pets might unwittingly step into such a trap and lose a limb, or worse.¹⁸¹ In so doing, proponents were able to combine animal interests with human interests.

173. CURNUTT, *supra* note 87, at 214; see also Wildlife Protection Network, *All About Leghold Traps*, at <http://www.wildlifeProtection.net/bobcat/animalslegholdtrap.html> (last visited Feb. 12, 2003).

174. See CURNUTT, *supra* note 87, at 216–17.

175. *Id.* at 214.

176. The history of this Colorado initiative is recounted in Pacelle, *supra* note 125, at 111–12.

177. Theo Stein, *Trappers Forging on with Appeals*, DENVER POST, Apr. 3, 2001, at B–4.

178. See Pacelle, *supra* note 125, at 119. For a discussion of why the measure succeeded in Washington but not Oregon, see Tomoko Hosaka, *Anti-Trapping Initiative Battle a Culture Clash*, OREGONIAN, Nov. 20, 2000, at C7.

179. *E.g.*, Ed Owens, *Should Animal Traps be Banned?*, SEATTLE TIMES, Oct. 10, 2000, at B7 (Beginning his article with: “WHY are six national animal-rights groups financing a boilerplate initiative in our state when they do not live or pay taxes here and cannot be held accountable after they leave for the legacy of their initiative? Initiative 713 is not about trapping. It’s about agendas that fail as legitimate legislation because they are so ill-conceived.”).

180. Paul Queary, *Trapping Ban Gets New Look by Lawmakers*, SEATTLE TIMES, Jan. 27, 2003, at B3.

181. *E.g.* Oregon Secretary of State, *Measure 97: Arguments in Favor*, at <http://www.sos.state.or.us/elections/nov72000/guide/mea/m97/97fa.htm> (last visited Feb. 10, 2003) (noting, from different respondents, the danger leghold traps pose to children and pets).

In addition to the trapping measures discussed above, initiatives have also targeted less traditional forms of hunting. In fact, while sportsmen often claim animal protectionists seek to ban all forms of hunting,¹⁸² animal advocates especially condemn one particular hunting practice. Canned hunts, or game farms as they are sometimes called, allow individuals, for a fee, to kill an animal raised within a confined area.¹⁸³ Hunters are guided to the animal of their choice, which may or may not be tied to a stake,¹⁸⁴ and allowed to kill the animal in a way that best preserves the trophy.¹⁸⁵ The animals that can be hunted in this way include not only traditional North American game such as elk, deer, bears, and the like, but also more exotic animals and even endangered species.¹⁸⁶ These animals are often obtained from zoos and circuses.¹⁸⁷

In 2000, a measure was put on the Montana ballot to gradually phase out such canned hunts by prohibiting the state from issuing new game farm licenses and preventing existing

182. JAMES B. WHISKER, *THE RIGHT TO HUNT* ix (2d ed. 1998); HERBERT M. LEVINE, *AMERICAN ISSUES DEBATED: ANIMAL RIGHTS* 60–74 (1998).

183. For a more in-depth discussion of canned hunts, see Ireland, *supra* note 152, at 223–24.

184. *Id.* at 225–26.

185. As one animal protection website describes the “hunt”:

The Corsican ram stopped cold in his tracks, raised his head to sniff the breeze, and tried to peer through the foliage. The hunter, covered head to toe in camouflage, slowly raised to shoulder level a modern technological marvel of levers, wheels, and pulleys and released his arrow. At the twang of the string, the ram jerked his head around—just as the razor-sharp broadhead sliced into his left flank. Letting out a bellow of pain and terror, he lunged forward into the wire fence that held him captive. The hunter, no more than twenty yards away, reloaded and shot. Another strike in the flank and another bellow as once again the ram hurled himself against the fence. A third arrow struck him in the side, a fourth high up on the back. The hunter was deliberately aiming away from the head and shoulders to avoid any risk of spoiling his trophy.

The Fund for Animals, *Canned Hunts: Unfair at any Price*, at <http://fund.org/library/documentViewer.asp?ID=338&table=documents#foot4> (last visited Jan. 22, 2003).

186. Ireland, *supra* note 152, at 225.

187. In the United States alone there are nineteen zoos that either sell directly to canned hunts or to dealers who sell to canned hunts, including Colorado’s Cheyenne Mountain Zoo. The San Antonio Zoo even has canned hunt operators on its board of directors in the form of Robert and Betty Kelso, who own the Auerhahn Ranch. *Canned Hunts: The Other Side of the Fence*, at <http://www.parkc.org/canned.htm> (last visited Apr. 11, 2002); see also, Diana Norris, *et al.*, *Canned Hunts: The Newest American “Sport”*, SATYA, at <http://www.satyamag.com/may01/norris.html> (last visited Apr. 10, 2002); Ireland, *supra* note 152, at 226.

operators from modifying or transferring their licenses.¹⁸⁸ The measure also specifically banned hunting captive trophy animals,¹⁸⁹ which meant that, over time, the number of canned hunt farms would have fallen from ninety-two to zero as existing owners retired or died.¹⁹⁰ Not surprisingly, stiff opposition quickly mounted by those who felt the measure sought “to hurt family farmers and ranchers by prohibiting them from diversifying their businesses, [attacking] private property rights and [damaging] the local economies.”¹⁹¹ Surprisingly, animal protectionists were not the sponsors of the measure, rather hunters who worried that these farms promoted disease that could decimate wild game populations put the initiative on the ballot.¹⁹² Following the narrow passage of the measure, several ranch owners filed suit in federal court seeking both injunctive relief from and damages for the “taking” of property the measure effected.¹⁹³

Beyond providing further support for the points discussed above, this measure illustrates how animal advocates may find allies in strange places. Though the two camps may not have agreed on *why* the measure was necessary, animal protectionists must take every advantage of instances where their short-term ends coincide with the goals of other interest groups. Such coalitions certainly are not new to social reform more generally,¹⁹⁴ but these possibilities have been understudied by the animal protectionist community to date.¹⁹⁵

188. Erin P. Billings, *Initiative to Ban Game Farm Industry Generates Controversy*, BILLINGS GAZETTE, Sept. 22, 2000, at B1.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.* (“Stan Frasier, secretary/treasurer of Sportsmen for I143, said sportsmen have long been worried about game farms, the threat of disease they pose and costs associated with a possible outbreak of disease.”).

193. Erin P. Billings, *Game Farmers Sue Over Initiative*, BILLINGS GAZETTE, Feb. 24, 2001, at B2. The plaintiffs sought \$50 to \$100 million in damages because the measure took property and prevented farmers “from passing on their operation to their children.” *Id.*

194. *E.g.*, Richard Delgado, *Derrick Bell’s Toolkit—Fit to Dismantle that Famous House?*, 75 N.Y.U. L. REV. 283, 303–06 (2000) (discussing coalition-building among racial minorities).

195. See Joseph Lubinski, *Screw the Whales, Save Me! The Endangered Species Act, Animal Protection, and Civil Rights*, __ J. L. IN SOC’Y __ (2003) (forthcoming) (article on file with author).

D. Anti-Cruelty

More traditional anti-cruelty proposals have also found their way onto state ballots. In 2002, Florida voters considered an initiative to mandate improved treatment of pregnant animals on hog farms.¹⁹⁶ Specifically, Amendment 10 banned containment of pregnant sows in gestation crates, which are ordinarily only two feet by seven feet in size.¹⁹⁷ Such small confines, argue animal protectionists, are unacceptably cruel to the animals.¹⁹⁸

Amendment 10 evoked a strong response from the community—much of it highly critical.¹⁹⁹ The *Tampa Tribune* went so far as to claim that no legitimate evidence existed that the hogs were being mistreated, and that the amendment was nothing more than a “proposal . . . designed to generate propaganda for animal rights activists.”²⁰⁰ A year before, however, the same editorial board claimed that “confining an animal to a small crate for life strikes us as cruel and inherently inhumane.”²⁰¹ Nevertheless, the board criticized the measure before it had even been approved for the ballot, arguing that legislating on behalf of confined pigs constituted an improper use of the initiative process.²⁰²

Another paper ran an editorial arguing that

amending the state Constitution to prohibit this very narrow practice certainly isn't the solution. It is an inappropriate use of the amendment process. Supporters say that they have tried, without success, to get the Legislature to address this issue. But the Legislature is still the appropriate place for it.²⁰³

196. The measure passed fifty-five percent to forty-five percent. Humane Society of the United States, *Voters Side with the Animals in Five Separate Ballot Measures*, at <http://www.hsus.org/ace/15690?pg=2> (last visited Jan. 16, 2003).

197. Humane Society of the United States, *Florida: Initiative to Ban Cruel Gestation Methods*, at <http://www.hsus.org/ace/11546> (last visited Jan. 14, 2003).

198. *Id.*

199. *See, e.g., Letters*, TAMPA TRIB., Oct. 20, 2002, at 3.

200. *Constitutional Amendments: The Good, Bad and Ridiculous*, TAMPA TRIB., Nov. 3, 2002, at 2.

201. *Immortalizing the Rights of Swine*, TAMPA TRIB., Nov. 10, 2001, at 16.

202. *Id.*

203. *The Herald Recommends: Vote No on Amendment 10*, MIAMI HERALD, Oct. 28, 2002.

Supporters of the measure countered not only with claims of animal abuse, but also with claims that the gestation crates were responsible for “putrefying the air, contaminating groundwater and threatening human health.”²⁰⁴ In the end, voters sided with the animals, or perhaps their concern for human health, and passed the measure comfortably on election day.²⁰⁵ This measure, once again, provides an example of animal protectionists persuasively arguing not only for animal interests but for human interests as well.

Of course not every anti-cruelty proposal will succeed. The lone animal defeat in 2002 occurred in Arkansas, where voters rejected an attempt to make animal cruelty a felony. This measure was part of a general trend across the country to increase penalties for animal cruelty.²⁰⁶ Arkansas’s proposed Animal Cruelty Act would not have automatically made animal cruelty a felony, but instead would have given prosecutors the discretion to charge a person either with the old misdemeanor or the new felony.²⁰⁷ Opponents of the measure, as in other elections, attempted to paint the initiative as just the first of many attempts by radical animal activists to limit human rights by creating rights for animals. For instance, one mailing claimed the measure was simply an attempt to proscribe the actions of hunters, farmers, and ranchers.²⁰⁸ The measure was opposed by the Arkansas Fish and Game Commission, Arkansas Farm Bureau, Ducks Unlimited, and the Arkansas Cattlemen’s Association.²⁰⁹ Even the University of Arkansas came forward to oppose the measure, afraid that it might cost the school research grant money.²¹⁰

204. Ban Cruel Farms.org, *The Florida Animal Cruelty Act*, at: <http://www.bancruelfarms.org> (last visited Dec. 22, 2002).

205. Humane Society of the United States, *Voters Side with the Animals in Five Separate Ballot Measures*, at <http://www.hsus.org/ace/15690?pg=2> (last visited Jan. 16, 2003) (stating that the measure passed fifty-five percent to forty-five percent).

206. See generally, Joseph G. Sauder, *Enacting and Enforcing Felony Animal Cruelty Laws to Prevent Violence Against Humans*, 6 ANIMAL L. 1 (2000).

207. Michael R. Wickline, *Proposal on Cruelty Exposes Deep Rift*, ARKANSAS DEMOCRAT-GAZETTE, Oct. 31, 2002, at 11.

208. Laura Kellams, *Cruelty Laws Foes Using Fear Tactics, Backers Say*, ARKANSAS DEMOCRAT-GAZETTE, Oct. 17, 2002, at 11.

209. Sheffield Nelson, *Guest Writer: A Pig in a Poke*, ARKANSAS DEMOCRAT-GAZETTE, Oct. 19, 2002, at 25.

210. Michael R. Wickline, *UAMS Researchers Throwing in with Foes of Animal Cruelty Act*, ARKANSAS DEMOCRAT-GAZETTE, Oct. 24, 2002, at 1.

Quite apart from any concern regarding cruelty to animals, supporters of stronger anti-cruelty laws pointed to studies that suggest animal abuse is often a prelude to violence against humans.²¹¹ Supporters further noted that thirty-seven other states already had felony animal cruelty statutes on the books.²¹² Proponents also tried to counter the claims that this was but a first step towards a larger goal of banning hunting altogether.²¹³ The *Arkansas Democrat-Gazette* endorsed the measure, writing that it

was put on the ballot [in 2002] to prevent knowing, malicious, deliberate, extreme acts of cruelty—like cock-fighting, dog-fighting, and torturing of animals. Farming is specifically exempt. Hunting is specifically exempt. Fishing is specifically exempt. Pest control is specifically exempt. Accidents don't count. Neither do innocent mistakes made while hunting/fishing (like, say, shooting a button buck before you realize it's a doe). Any activity already covered by "law or legal privilege" is exempt.²¹⁴

The paper also stressed the measure was not put on the ballot by some out-of-state animal rights organization, but instead reached the voters through the signatures of 87,000 Arkansans.²¹⁵ Voters weren't convinced, however, and defeated the measure handily: 462,549 to 281,334.²¹⁶

The margin of defeat, nearly two-to-one, if not the defeat itself, seemed surprising. After the election, there was speculation that opposition to the measure did not stem from a concern about the effects of the proposal itself, but was instead simply "a crude demonstration of raw political power" on the part of the measure's opponents.²¹⁷ The initiative, looked at through this lens, was not just a vote on animal cruelty—it was

211. *Id.* at 10–15.

212. See Humane Arkansas Online. org, *Other State Laws*, at <http://www.humanearkansas.org/statelaws.htm> (last visited Dec. 23, 2002).

213. Steven W. Kopp, *Guest Writer: Animal Cruelty Law Needed*, ARKANSAS DEMOCRAT-GAZETTE, Oct. 19, 2002, at 25.

214. Editorial, *Don't be Stampeded: Vote for Initiated Act 1*, ARKANSAS DEMOCRAT-GAZETTE, Nov. 1, 2002, at 22.

215. *Id.*; see also Wickline, *Proposal on Cruelty Exposes Deep Rift*, *supra* note 207.

216. *Official Results of Nov. 5 Election*, ARKANSAS DEMOCRAT-GAZETTE, Dec. 3, 2002, at 11.

217. Pat Lynch, *Election Recap: Good, Bad, Ugly*, ARKANSAS DEMOCRAT-GAZETTE, Nov. 14, 2002, at 17.

a message to animal protectionists to take their cause elsewhere. The measure's supporters, Citizens for a Humane Arkansas, spent \$294,775, while opponents, Arkansans for Responsible Animal Laws, spent an equivalent \$289,231.²¹⁸ Despite the relatively modest campaign spending, animosity between proponents and opponents nonetheless forced them to make the money (and its sources) an issue in the campaign.²¹⁹

Thus, even measures that might find popular support in some areas of the country must be carefully crafted in more conservative areas likely to resist animal protection reform. In such circumstances, careful management of the campaign is key.

E. Countermeasures

Opposition to animal initiatives can go beyond simply lobbying against pro-animal measures. If pushed far enough, opponents may offer counterproposals meant to limit the advances made by animal advocates. Virginia, North Dakota, and Arizona all considered such measures in 2000. In Arizona, animal rights opponents proposed a measure endorsed by the legislature that would have required future pro-animal initiatives to pass by a two-thirds majority before taking effect.²²⁰ Such a super-majority requirement would have ensured the state would never again enact pro-animal legislation through an initiative. Indeed, of the fifteen pro-animal measures passed since 1992, only two would have met this high standard—Colorado's 1992 bear hunting restriction²²¹

218. Michael R. Wickline, *Fight to Life Food, Medicine Tax Costly*, ARKANSAS DEMOCRAT-GAZETTE, Dec. 7, 2002, at 17. Among those contributing to the campaigns included the Arkansas Farm Bureau (\$191,750), Little Rock and Poultry Consultants, Inc. (\$46,500), the Humane Society of the United States (\$100,000), the Fund for Animals in New York City (\$90,000), and the American Society for the Prevention of Cruelty to Animals (\$40,000). *Id.*

219. Michael R. Wickline, *Anti-Cruelty Group Question Foes' Ties*, ARKANSAS DEMOCRAT-GAZETTE, Oct. 29, 2002, at 9.

220. Pacelle, *supra* note 125, at 116.

221. Even without a super-majority requirement, such a high level of support can be important. In 2000, the Colorado State Legislature considered two measures to start bear hunting in the state sooner each year. One bill, Senate Bill 44 was withdrawn by its sponsor, State Senator Lewis Entz, after he was unable to gather enough votes to get it out of the senate. Troy Seibert, *Sponsor Kills Bear Hunt Bill, Entz Now Backs House Version*, DENVER POST, Feb. 12, 2002, at A-10. A similar measure, House Bill 1221 passed out of committee, but at the meeting several legislators expressed concern at contravening the "will of

and Arizona's 1998 ban on cockfighting.²²² Arizona voters soundly rejected the super-majority proposal in 2000, with sixty-three percent of the electorate voting against the measure.²²³ Animal protectionists will not always be so lucky, however, as demonstrated by Utah's enactment of a similar measure in 1998.²²⁴

North Dakota and Virginia took the matter one step further, seeking to forever protect their "right" to hunt. In 2000, voters in each state chose to include hunting among the states' constitutionally protected activities by overwhelming margins.²²⁵ These measures came on the heels of similar laws enacted in Minnesota and Alabama.²²⁶ North Dakota hunters claimed the measure was needed because "the people of North Dakota should not have radical animal rights groups dictating whether they can hunt, fish or trap."²²⁷ Others, however, conceded that the proposal was little more than a "feel good" measure because hunting was never in any danger of being banned in the state.²²⁸ The essence of these measures is to draw a line. Animal activists can attempt to help animals by conferring upon them certain rights and protections, but they can only go so far. If they attempt to push past these limits and create absolute protections for animals, the state constitution stands squarely in the way.

The various measures discussed are just a sampling of the many different kinds of proposals found on state ballots in 2000 and 2002. In addition to those mentioned, voters in Georgia

the people." Under the Dome, *Bandits Outside Capitol Make off with Chlouber's Flaming Coach*, DENVER POST, Feb. 15, 2002, at A-14. For an argument that initiatives, whether they pass or fail, significantly shape the subsequent conduct of legislators, see Elisabeth R. Gerber, *Pressuring Legislatures through the Use of Initiatives: Two Forms of Indirect Influence*, in CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES 191 (Shaun Bowler, et al., eds. 1998). But see Daniel Smith & Joseph Lubinski, *Sponsoring "Counter-Majoritarian" Bills in Colorado* (1999), available at <http://www.ballot.org/resources/majoritarian.html> (last visited Feb. 15, 2002).

222. See Pacelle, *supra* note 125, at 119.

223. *Id.*

224. *Id.* at 116.

225. *Id.* at 119; see also Stephanie Simon, *Hunters Bag Constitutional Victory for State Pursuit*, BISMARCK TRIBUNE, Nov. 22, 2000, at 5C.

226. See Pacelle, *supra* note 125, at 119; see also Matgt Gouras, *Hunters Express Support for Adding Amendment*, BISMARCK TRIB. Oct. 1, 2000, at 10C.

227. Ron Wilson, *Measure Would Protect Hunting and Fishing*, BISMARCK TRIB., Oct. 22, 2000, at 1C.

228. Lloyd Omdahl, *Hunting Amendment Would Accomplish Nothing*, BISMARCK TRIB., Oct. 22, 2000, at 5C.

approved new license plates that promote spaying and neutering pets.²²⁹ In 2000, Alaskans considered two measures, one that would have banned airborne wolf hunting and another that would have prohibited any animal protection initiatives in future elections.²³⁰ Voters in Arizona rejected a proposal to expand greyhound racing in the state.²³¹ The measures discussed provide a broad overview of the kinds of issues raised by these ballot measures and the dynamics of their campaigns.

IV. UNTAPPED POTENTIAL

Undoubtedly, the initiative process can be a powerful tool for animal advocates.²³² Time and again, it has proven to be a valuable resource for animal protectionists when more traditional routes, such as lobbying at the state legislature, fail.²³³ Animal protectionists must understand, however, the bounds of that power and the limitations that prevent the initiative from becoming a panacea for animal mistreatment. This discussion is not meant to dissuade animal advocates from running such initiatives, but is rather intended as a reality check. As such, I proceed in this Part to identify the limits inherent in direct democracy generally and animal protection specifically. With these realities in place, I suggest how to deal with these constraints.

A. *Structural Limitations of Direct Democracy*

No power is unfettered. In the context of animal protection initiatives, two limits stand out—those applicable to direct democracy generally and those particular to advancing animal interests. Perhaps the greatest single limitation on animal initiatives is the inherent bounds of direct democracy itself. For one, its power cannot extend beyond the state and local level, leaving federal policy untouched. It is at the federal level

229. The Humane Society of the United States, *The Nov. 5 Ballot: Cast a Vote for Animals*, at <http://www.hsus.org/ace/14852?pg=3> (last visited Feb. 10, 2003).

230. Pacelle, *supra* note 125, at 119.

231. The Humane Society of the United States, *The Nov. 5 Ballot: Cast a Vote for Animals*, at <http://www.hsus.org/ace/14852?pg=3> (last visited Feb. 10, 2003).

232. Pacelle, *The Animal Protection Movement*, *supra* note 125, at 112.

233. See *supra* notes 133, 153 and accompanying text.

where many of the most important battles over animal issues are currently waged, such as the use of animals in laboratory experiments²³⁴ and the methods of their slaughter for human consumption.²³⁵ Without a national initiative,²³⁶ animal advocates have no way of bypassing an unresponsive Congress and directly amending federal law.

Further, statutory initiatives and referenda must comply with both state and federal constitutions, and any amendment to a state constitution must comport with the protections of the federal Constitution. In recent years, the courts have struck down initiated laws across the country for violating the United States Constitution, including an anti-immigrant measure in California²³⁷ and an anti-gay rights measure in Colorado.²³⁸ On what basis could animal protection or rights measures be struck down? One likely candidate is the Due Process Clause of the Fourteenth Amendment, which prohibits "any State [to] deprive any person of life, liberty, or *property* without due process of law."²³⁹ Protectionist opponents are already raising this argument, as evidenced by the lawsuits filed in Oklahoma after the passage of the ban on cockfighting.²⁴⁰ Without entering into a lengthy due process analysis, suffice it to say a takings challenge could prevail in these circumstances, particularly if the contested measure were to formally alter

234. Animal Welfare Act, *supra* note 72.

235. Humane Slaughter Methods Act, *supra* note 71.

236. It should be noted, however, that academics and commentators from time to time propose such a change to our federal system. Such a change would require a constitutional amendment, an amendment whose ratification seems dubious at best given that fewer than fifty percent of the states currently use the system themselves. For further discussion of a national referendum and initiative, see PHILIP L. DUBOIS & FLOYD FEENEY, *LAWMAKING BY INITIATIVE: ISSUES, OPTIONS, AND COMPARISONS* (1998).

237. Proposition 187. The substantive provisions of the law were scattered throughout the California code. CAL. PENAL CODE § 113 (2002); CAL. PENAL CODE § 114; CAL. PENAL CODE § 834B (2002); CAL. WELF. & INST. CODE § 10001.5 (2002); CAL. HEALTH & SAFETY CODE § 130 (2002); CAL. EDUC. CODE § 48215 (2002); CAL. EDUC. CODE § 66010.8 (2002); *see also* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 787 (C.D. Cal. 1995).

238. Voters knew the measure as Amendment 2. COLO. CONST. art. II, § 30b. *See* Evans v. Romer, 882 P.2d 1335 (1994); *aff'd on different grounds*, Romer v. Evans, 517 U.S. 620 (1996) (striking down Colorado's Amendment 2, which sought to prevent anti-discrimination legislation based on sexual orientation).

239. U.S. CONST. amend. XIV, § 1 (emphasis added).

240. *See supra* notes 146–49 and accompanying text.

animals' status as property.²⁴¹ The Supreme Court's past reluctance to recognize the interests of animals further complicates this analysis. The Court has protected the sacrifice of animals as a religious exercise²⁴² and has also denied animals legal standing to enforce federal animal protection laws.²⁴³

Another important consideration for animal advocates is the expense of getting a measure on to the ballot and passed. While early progressives championed direct democracy as a way to free the political system from vested, moneyed interests, contemporary analyses have shown the undeniable impact of money on elections.²⁴⁴ Part of this cost is inherent in the system. For instance, just qualifying a measure for the ballot—from drafting the legislation itself to getting the requisite number of signatures to qualify for the ballot—requires a significant amount of money and energy. More important, however, is the money required to support or oppose a measure once the campaign starts. Expensive television and print ads, sound bites, posters, and yard signs have all become staples of contemporary issue campaigns.²⁴⁵ Some attorneys, lobbyists, and campaign consultants have even made these issue campaigns a significant part of their business.²⁴⁶ Taken together, these limits and restraints on the system make it difficult for any interest group to effectively use the initiative.

241. See Steven M. Wise, *Hardly a Revolution—The Eligibility of Nonhuman Animals for Dignity-Rights in a Liberal Democracy*, 22 VT. L. REV. 793 (1998) (discussing the interplay between the Constitution, including the Due Process Clause, and recognizing animal rights).

242. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). It is interesting to note that in the case Justice Kennedy, writing for the majority, rejected the claim that such sacrifices could be banned based on the cruelty they inflicted on animals.

It prohibits the sacrifice of animals, but defines sacrifice as 'to unnecessarily kill . . . an animal in a public or private ritual or ceremony not for the primary purpose of food consumption. The definition excludes almost all killings of animals except for religious sacrifice, and the primary purpose requirement narrows the proscribed category even further, in particular by exempting kosher slaughter.

Id. at 535–36.

243. *Int'l Primate Prot. League v. Inst. for Behavioral Research, Inc.*, 799 F.2d 934, 938 (4th Cir. 1986).

244. See SMITH, *supra* note 21, at 11, 13.

245. FINANCING THE 2000 ELECTION (David B. Magleby, ed., 2002).

246. David B. Magleby & Kelly D. Patterson, *Consultants and Direct Democracy*, 31 POL. SCI. & POL. 160–69 (Jun. 1998).

B. Limits of Animal Protection

In addition to these structural limits, animal advocates must be aware of two limitations of the protectionist movement itself: first, the fact that the measures that are most likely to pass are welfarist rather than rights oriented, and second, that any gain in the animal protection movement is likely to be met by increased opposition by other groups. The first limitation relates back to the distinction between animal rights and animal welfare. The successful proposals to date have largely been welfarist in nature, despite the protests of opponents. For example, the restrictions on leghold traps do not advance animal rights, at least in any pure sense. These measures merely prohibit one method of taking wildlife; they do not extend any significant protections to the animals themselves. Put another way, the enactment of such measures would not prohibit killing the fox, it merely means a person could not kill him with a leghold trap. Other methods such as poisoning or shooting might very well be permissible.

Similarly, even the measure to ban game farms falls well short of advancing true animal rights. Hunting itself is not affected—wild animals will still meet their demise at the hands of hunters. The animals are not protected from death, only from being made tame and then being killed for money. The measure in Montana restricts business but does not affect animal rights.²⁴⁷ Moreover, as further evidenced by the measure in Montana, were such proposals aimed at true rights reform—banning hunting for instance—support would quickly erode. The hunter proponents of the Montana initiative were not concerned with the individual animals forced to live on the game farms in the state, but rather with the integrity and future of their sport.

This leads to the second concern mentioned above. As animal protection initiatives pass, opposition likely will only increase. Such opposition will likely take two forms. The first type of opposition is directly opposed to the measures proposed. As the examples given above demonstrate, opponents to these pro-animal measures tend to be well-funded and can characterize the initiatives as either attacks on civilization by radical animal rights supporters or threats to the livelihoods of

247. See *supra* text and notes 182–193.

state citizens. While these arguments have had varying degrees of success, it seems likely that the more radical the proposed measure, the more persuasive the rhetoric of opponents will be to voters. The second method for opposing animal initiatives is through lobbying at the state legislature. As Pacelle notes, anti-animal coalitions tend to have the ear of the legislature.²⁴⁸ This influence allows these coalitions to get referendums through the legislature and onto the ballot to try and curtail animal protection. And in some cases, depending on the state, they may also convince the legislature to repeal previously approved initiatives.²⁴⁹ Moreover, nothing prevents hunters, ranchers, and others from sponsoring their own initiatives.

Of course, this oppositional concern is not limited to animal initiatives. For instance, the U.S. Sportsmen Association recently publicly attacked an animal law website sponsored by Michigan State University-Detroit College of Law, demanding that the state-supported institution take down the site, which they characterized as authored by anti-hunting zealots.²⁵⁰ Members of the state legislature even entered the fray by threatening to take away the school's funding.²⁵¹ Several years earlier, the same coalition forced Rutgers University to shut down its animal law clinic.²⁵² Opponents of animal protection advancements, then, have considerable clout and resources to stymie animal progress.

In sum, animal advancements through the initiative process face substantial obstacles. Constraints on the system itself prevent fundamental changes to the animal-human legal relationship. Moreover, where a proposal has the potential to significantly impact human activities, such as by restraining a

248. Pacelle, *supra* note 125, at 113 ("In Oregon . . . after the passage of Measure 18 in 1994—banning bear baiting and the hound hunting of bears and cougars—legislators allied with hunting groups introduced fifteen bills to repeal, damage, or delay implementation of the initiative."); *id.* at 115 (noting legislator allegiance to hunters in Utah, Idaho, and Washington).

249. *E.g.*, Queary, *supra* note 180 (discussing four proposals before the Washington legislature to repeal, in whole or in part, the anti-trapping measure passed by state voters in 2000).

250. Dave Golowenski, *Web Site Drawing Fire*, COLUMBUS DISPATCH, Jan. 26, 2003, at 13E, *available at* 2003 WL 2839023.

251. Amy F. Bailey, *Lawmaker Fights Michigan State's Tie to Animal Rights Group*, ASSOCIATED PRESS NEWSWIRE, Jan. 21, 2003.

252. Golowenski, *supra* note 250.

sport or taking away jobs,²⁵³ victory becomes even more difficult. And even when measures succeed, advocates may face continued opposition through lawsuits and possibly even more legislation. It might seem direct democracy is not worth the trouble. But it is. History has shown that state legislatures are unsympathetic to activists who seek more than the most rudimentary protections for animals.²⁵⁴ As such, in some cases the initiative may be the only way to advance the animal agenda.

C. Using the Initiative to Promote Reformed Welfarism

These realities make it unlikely that the initiative can serve as a vehicle for real animal *rights* reform. But the process is capable of achieving more than traditional welfare reform. What remains, then, is something akin to Professor Francione's new welfarism—an approach I call “reformed” welfarism. The reformed welfarist, per Francione's formulation, rejects the unsatisfactory ideology of traditional welfarist theory and recognizes the implausibility of using the initiative for animal rights. Instead, he or she chooses an aggressive welfarist agenda that makes significant advancements for animals, rather than a strictly incremental approach that may do more harm than good to a true rights agenda. The initiatives put forward by the reformed welfarist therefore are carefully tailored to expand the bounds of animal welfare. This attention to detail and realization of the limits for reform ensure that the reformed welfarist does not fall into the same trap as the new welfarist.

For example, it is unlikely that an initiative seeking to prohibit the use of animals for all types of experimentation would be successful.²⁵⁵ But protectionists might target the state medical school that still uses animal labs to teach students.²⁵⁶ Similarly, protectionists would be hard pressed to

253. See *supra* notes 138, 159, 191 and accompanying text.

254. See Pacelle, *supra* note 125, at 109–13.

255. For a general discussion of animals used in research, see CURNUTT, *supra* note 87, at 516–18.

256. There is a growing trend among American medical schools to discontinue the use of animal labs as part of the curriculum. There are, however, several holdouts. For more information, see *Doctors Against Dog Labs*, at <http://www.doctorsagainstdoglabs.com> (last visited Jan. 20, 2003).

ban rodeos across the board in any state.²⁵⁷ But voters might be more sympathetic to a measure that sought only to regulate some of the more “objectionable” events, much like limits on canned hunts that had no effect on hunting more generally.²⁵⁸

Animal protectionists may also find fertile ground for reform through initiatives aimed at those animals closest to humans—family pets. Many dogs come from so-called “puppy mills,” which are “any place that breeds a lot of dogs receiving pedigree papers from the American Kennel Club (AKC).”²⁵⁹ The dogs are sold to pet stores and research facilities.²⁶⁰ Because of poor conditions at many puppy mills, dogs tend to be plagued by health problems.²⁶¹ Other authors have already suggested significant reforms to the puppy mill industry.²⁶² Protectionists might use the initiative to propose laws regulating “puppy mills,” either by requiring compensation for purchasers who buy a sick dog²⁶³ or by regulating the pet stores that buy from such mills.²⁶⁴

When putting these measures to a vote of the people, the reformed welfarist must be able to look beyond the interests of animals. First, the advocate must anticipate the opposition likely to mount against the particular initiative. In doing so, the advocate must not merely identify the arguments likely to be made, but also identify the groups and organizations likely to step forward. Knowing which groups may oppose the initiative will help supporters both define the terms on which

257. For a discussion of rodeos, see CURNUTT, *supra* note 87, at 264.

258. See *supra* notes 182–93 and accompanying text.

259. CURNUTT, *supra* note 87, at 117. Put more pejoratively, puppy mills are “breeding facilities that mass produce pure-bred puppies in poor to horrifically bad conditions of housing and care.” *Id.*

260. *Id.* at 118.

261. *Id.*

262. See Adam J. Fumarola, *With Best Friends Like Us Who Needs Enemies? The Phenomenon of the Puppy Mill, the Failure of Legal Regimes to Manage It, and the Positive Prospects of Animal Rights*, 6 BUFF. ENV'T'L. L.J. 253 (1999). As Fumarola puts it:

The interests of domestic animals, especially dogs, could be more effectively served by the assignment of rights. In such a situation the puppy miller, through his or her failure to provide adequate means for the carrying on of life, might be charged with some form of assault. In such circumstances the ability of the miller to escape punishment, due to limited staffing of enforcement authority or the enticing expectation of huge economic gain might be significantly limited.

Id. at 285.

263. *Id.* at 280.

264. CURNUTT, *supra* note 87, at 119.

the campaign will be fought and anticipate how much money and organization will be needed to win on election day.²⁶⁵ In addition, the proponents should look for allies in other groups, even if that group might be opposed to other forms of animal protection.²⁶⁶

In crafting his or her own campaign message, the reformed welfarist must be able to show how the proposed measure will benefit people, not just animals. For example, in advocating for stronger anti-cruelty proposals, advocates might remind voters that violence against animals is often a predictor of future violence against humans.²⁶⁷ In seeking increased protections for farm and ranch animals, protectionists should make voters aware that better living conditions for animals often result in cleaner air and water,²⁶⁸ as well as the prevention of disease.²⁶⁹ In the example of puppy mills discussed above,²⁷⁰ supporters of new regulations might suggest that, in addition to protecting "man's best friend," the consumer's often costly "investment" will be protected. Note, of course, these benefits to humans should be legitimate, not contrived. Real benefits to people will not only help sway voters, but might also counter claims that the measure is part of a larger animal rights agenda.²⁷¹ In pursuing these aims, I leave to the individual sponsors whether it would be wise for them to expressly disclaim any connection to animal rights.

Of course, following this strategy will not result in victory in every race. Even proposals considered mainstream in one state may prove too radical in another locality.²⁷² Moreover, even if successful at the polls, lawsuits²⁷³ and legislative responses²⁷⁴ are likely to follow. In fact, lawsuits have been

265. See *supra* notes 168–69 and accompanying text.; see also Pacelle, *supra* note 125, at 113–14.

266. See *supra* note 192–95.

267. Joseph G. Sauder, *Enacting and Enforcing Felony Animal Cruelty Laws to Prevent Violence Against Humans*, 6 ANIMAL L. 1, 1–2 (2000) ("Newspapers are full of stories about people whose abuse against animals escalated into violence toward humans. This progressive cycle of violence—from animals to humans—is not an aberration. Studies show that animal abusers often abuse their children, partners, and even strangers.").

268. See *supra* note 204 and accompanying text.

269. See *supra* note 192 and accompanying text.

270. See *supra* notes 259–64 and accompanying text.

271. See *supra* notes 144, 139, 161, 179, 200, 208 and accompanying text.

272. See *supra* notes 206–19 and accompanying text.

273. See *supra* notes 146–48 and accompanying text.

274. Queary, *supra* note 180.

filed in many states challenging the validity of successful measures while legislatures in several states have already reacted with referenda to curtail future animal initiatives²⁷⁵ and even repeal animal protections previously enacted through initiatives.²⁷⁶

Of course, animal advocates must directly confront and challenge these attempts.²⁷⁷ But the reformed welfarist approach itself may serve as a safeguard against such legislative intrusions. By pursuing an approach that proposes sensible and progressive gains for animal protection and thus confers tangible benefits on humanity, the animal protection community can gain popular credibility. Though there are certainly exceptions,²⁷⁸ legislatures are often reluctant to go against the “will of the people” and revisit decisions made by the electorate at the polls.²⁷⁹ Moreover, looking forward, such credibility might turn into political clout that will give the animal protectionist community access to the legislature and ultimately lead to pro-animal legislation being proposed and enacted through more traditional avenues.

CONCLUSION

Animal advocates increasingly are viewed as hostile, fringe, and radical. Popularly, and in some cases politically, they are considered too extreme to be taken seriously within the confines of the statehouse. Here, direct democracy becomes available to empower the powerless, to fortify their resolve and drive with a means to enact serious legislation. This system has given force to the animal movement in many states. Advocates must be aware of which measures likely will pass

275. See *supra* notes 220–28 and accompanying text.

276. Queary, *supra* note 180.

277. According to the U.S. Sportsmen's Alliance, a primary proponent of the attempts to overturn the anti-trapping measure in Washington, over 200 animal protectionists appeared at a legislative committee meeting to oppose changes to or repeal of the voter-enacted ban. U.S. Sportsmen's Alliance, *Washington Senate to Consider Repeal of Trapping Ban*, at <http://www.ussportsmen.org/interactive/features/Read.cfm?ID=989> (last visited Feb. 10, 2003).

278. See generally Daniel A. Smith, *Homeward Bound?: Micro-Level Legislative Responsiveness to Ballot Initiatives*, 1 STATE POL. & POL'Y Q. 50 (2001).

279. See *supra* note 221.

and which will draw the greatest amount of ire from the opposition.

Society most strongly supports welfare measures meant only to minimize the harm it inflicts upon its nonhuman companions. But, once proposals shift more toward an affirmative grant of rights and protections, public support wanes and serious debate begins. Further, as illustrated in recent elections, the mere perception of animal rights advances has led anti-animal rights activists on a crusade of their own. Now, in addition to the barriers of public opinion, animal activists in several states must also find a way to overcome the structural obstacles put in place by recent ballot measures—from super-majority requirements to flat out state constitutional rights to hunt.

There are several lessons to be learned. First, to make direct democracy work, animal advocates must recognize its limitations—both structurally and practically. Second, and perhaps more important, animal advocates must realize that the initiative acts as a double-edged sword. As the experience of several states shows, the system can be used to diminish animal rights as well. In the end, however, the ballot initiative remains a powerful tool if used carefully and properly.

Reformed welfarism is a pragmatic approach to animal protection that attempts to maximize the initiative's potential for animal protection reform. It first requires the animal protectionist to evaluate the likelihood of a measure's success at the polls and attempt to find a coalition of interest groups to support the proposal. In seeking potential allies, the protectionist must identify likely opponents as well. This approach would then only allow a measure to be put before the citizenry that makes a significant advancement for animals while also having a legitimate chance of enactment. Reformed welfarism, in other words, provides a workable framework for animal protectionists to use when evaluating whether to put an initiative before the people. With careful application, the initiative can then become an even more powerful tool for animal protectionism.