

2-1-2016

Extraordinary Protections for the Industry that Feeds Us: Examining a Potential Constitutional Right to Farm and Ranch in Montana

Ariel Overstreet-Adkins

Follow this and additional works at: <http://scholarship.law.umt.edu/mlr>

Recommended Citation

Ariel Overstreet-Adkins, *Extraordinary Protections for the Industry that Feeds Us: Examining a Potential Constitutional Right to Farm and Ranch in Montana*, 77 Mont. L. Rev. 85 (2016).

Available at: <http://scholarship.law.umt.edu/mlr/vol77/iss1/5>

This Essay is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized administrator of The Scholarly Forum @ Montana Law.

ESSAYS

EXTRAORDINARY PROTECTIONS FOR THE INDUSTRY THAT FEEDS US: EXAMINING A POTENTIAL CONSTITUTIONAL RIGHT TO FARM AND RANCH IN MONTANA

Ariel Overstreet-Adkins*

I. INTRODUCTION

“[O]nce in your life you need a doctor, a lawyer, a policeman and a preacher but every day, three times a day, you need a farmer.”

*Brenda Schoepp*¹

During the 2013 Montana Legislative Session, Senator Eric Moore introduced Senate Bill 300, a constitutional referendum to create a right to farm and ranch.² The bill attempted to replicate a successful constitutional amendment in North Dakota in 2012,³ but it was never heard at Moore’s

* The author is a third-year student at the Alexander Blewett III School of Law at the University of Montana. Prior to attending law school, the author served as communications director and lobbyist for the Montana Stockgrowers Association. She was present for many of the discussions about a possible constitutional amendment for a right to farm and ranch in Montana during the 2013 Legislative Session. The author would like to thank Professor Anthony Johnstone for his guidance during the Spring 2015 Montana Constitutional Law class, and the staff and editors of the Montana Law Review, especially Lars Phillips, Mike Wilson, and Lucas Hamilton for their advice, support, and careful editing of this article.

1. Brenda Schoepp, [brendashoepp.com](http://perma.cc/B874-KUDQ), <http://perma.cc/B874-KUDQ> (last visited Oct. 3, 2015) (Brenda Schoepp is a farmer, author, and inspirational speaker from Alberta, Canada.)

2. S. 300, 63d Leg., Reg. Sess. (Mont. 2013), *available at* <http://perma.cc/9C3V-PN4W> (last visited Sept. 29, 2015).

3. N.D. CONST. art. XI, § 29.

request and died in committee.⁴ Missouri passed its own right to farm amendment in 2014.⁵ In 2015, a similar effort to amend Indiana's Constitution failed,⁶ while an amendment to Oklahoma's Constitution passed the Legislature and will be presented to voters in 2016.⁷

State constitutional amendments for the right to farm and ranch are the newest trend in an evolution of laws aimed at protecting farming and ranching across the United States, largely in response to unprecedented efforts across the country to restrict and regulate agriculture.

Agriculture is worthy of extraordinary legal protections. Behind oxygen and water, nothing is more vital to human life and existence than food.⁸ We need a legal climate that protects the investments made in agriculture to ensure a continued abundant, safe, and inexpensive food supply in this country. However, the industry should not have absolute immunity from regulation. Essential environmental, animal welfare, and food safety regulations must continue.

Although Montana's Constitution and laws already provide strong protections for agriculture, a carefully drafted constitutional amendment conferring the right of individuals in Montana to engage in farming and ranching would provide further legal protections for agriculture, while allowing vital regulatory efforts to continue. Part II of this article explores the evolutionary path of agricultural protections, from early statutory exemptions from nuisance claims and zoning regulations to the so-called "ag-gag" bills in response to undercover investigations by animal rights activists. Part III reviews the modern "right to farm" constitutional amendments. Part IV examines the legal landscape for a potential right to farm and ranch amendment in Montana. Part V proposes specific text for a right to farm and ranch amendment located in Article IX of the Montana Constitution, expressly creating a right while clearly signaling Montana courts to apply a balancing test of middle-tier scrutiny. This will protect agriculture from unnecessary regulation, but allow the state to regulate when the need to do so clearly outweighs the constitutionally protected right.

4. DETAILED BILL INFO. S. 300, 63d Leg., Reg. Sess. (Mont. 2013), available at <http://perma.cc/8ZKU-33AC> (last visited Sept. 29, 2015).

5. Mo. CONST. art. 1, § 35.

6. S. Res. 12, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015), available at <https://iga.in.gov/legislative/2015/resolutions/senate/joint/12#> (last visited Sept. 29, 2015).

7. H.R.J. Res. 1012, 55th Leg., 1st Reg. Sess. (Okla. 2015), available at <http://perma.cc/KZR8-Y74A> (last visited Sept. 29, 2015); *Oklahoma Right to Farm, State Question 777 (2016)*, BALLOTEDIA: THE ENCYCLOPEDIA OF AM. POLITICS, <http://perma.cc/Z7DS-VE98> (last visited Oct. 31, 2015).

8. As posited by Abraham Maslow in his "hierarchy of needs" theory. See A.H. Maslow, *A Theory of Human Motivation*, PSYCHOL. REV. 50, 370-396 (1943).

2016 *CONSTITUTIONAL RIGHT TO FARM & RANCH IN MONTANA* 87

II. THE EVOLUTION OF AGRICULTURAL PROTECTIONS FROM COMMON LAW TO A CONSTITUTIONAL RIGHT TO FARM

Protection of agricultural endeavors in Montana and nationwide has evolved from right to farm statutes to right to farm constitutional amendments. This section examines Montana's 1972 Constitutional directive to the legislature to "protect, enhance and develop all agriculture,"⁹ statutory exemptions for agriculture in response to nuisance and zoning laws, and ag-gag laws in response to undercover animal rights activist investigations. This background sets the stage for a discussion about right to farm amendments arising now, the suitability of state constitutions as a forum for protecting the right to farm, and the potential form of a right to farm and ranch constitutional amendment in Montana.

A. *1972 Montana Constitution Directs Legislature to Protect Agriculture*

Forty years prior to North Dakota's passage of the first right to farm constitutional amendment, delegates of the 1972 Montana Constitutional Convention discussed the need to ensure protections for agriculture in the state's new Constitution.

One scholar described the 1972 Montana Constitution as marking a profound shift in Montana politics and society, calling it "a monument to a new, urban Montana" and "a city triumph over an older, rural Montana."¹⁰ By the 1960 census, more Montanans lived in cities and towns than the country.¹¹ Following reapportionment, the 1967 legislature had a "markedly diminished" proportion of farmers and ranchers.¹² That year, the Legislature established a subcommittee to review the 1889 Constitution.¹³ The 1969 Legislature asked the voters whether a Constitutional Convention should be called, and the voters answered in the affirmative with a 65% majority.¹⁴

Despite the new demographics favoring urban over rural living, the 1972 Montana Constitutional Convention delegates made a strong statement about agriculture's continued, prominent role in the state. The Natural Resources and Agricultural Committee revised the existing provision for a Department of Agriculture from the 1889 Montana Constitution and added

9. MONT. CONST. art. XII, § 1.

10. Harry W. Fritz, *The 1972 Montana Constitution in a Contemporary Context*, 51 MONT. L. REV. 270, 270-271 (1990).

11. *Id.* at 271.

12. *Id.*

13. *Id.* at 272.

14. *Id.*

new language to their proposed Article XII, Section 1 directing: “The legislature must . . . enact laws and provide appropriations to protect, enhance, and develop all agriculture.”¹⁵

The Natural Resources and Agricultural Committee described Article XII, Section 1 as “necessary to recognize the largest and most important industry in the state . . . and to provide appropriations and authorities to adequately protect, enhance and develop the agricultural industry of the state.”¹⁶ This provision responded directly to the declining influence of agriculture in state legislative processes and the need to take affirmative steps to protect the industry. Delegate Louise Cross, Chairman of the Natural Resources and Agriculture Committee, presented the proposed article to the Committee of the Whole on March 1, 1972.¹⁷ She stated: “Agriculture is in a tenuous position because it is rapidly losing its voice and its representation in legislative halls.”¹⁸

The 1972 Constitutional Convention’s Revenue and Finance Committee separately addressed the issue of agricultural levies, which would be codified in Article XII, Section 1(2). According to the Committee Majority Report, “the importance of agriculture to the Montana economy should not be underestimated—in fact, it should be emphasized.”¹⁹

The delegates adopted the final draft of Article XII, Section 1 on March 22, 1972, on a 90–5 vote.²⁰ The 1972 Montana Constitution was narrowly ratified by voters on June 6, 1972, by a vote of 116,415–113,883.²¹

The main case to interpret the actual weight of Article XII, Section 1 was *Montana Stockgrowers Association v. State Department of Revenue*.²² The case involved an equal protection challenge of the classification of livestock for property tax assessment. The Court held Article XII, Section 1 of the Montana Constitution does not “impart[] to stock growers a constitutionally significant interest in tax classification.”²³ The Court stated further, “The language provides a broad directive whose specifics are implemented

15. 2 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 560 (1979) [hereinafter CONSTITUTIONAL CONVENTION TRANSCRIPT II]; see also *XII.1 Agriculture*, MONTANA CONSTITUTION WIKI, <http://perma.cc/5U5Z-GQPD> (last modified May 4, 2015).

16. CONSTITUTIONAL CONVENTION TRANSCRIPT II, *supra* note 15, at 560.

17. 4 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 1198–1199 (1981).

18. *Id.* It is interesting to note that the committee introduced this new article in the same proposal that would eventually create the clean and healthful environment protections in Article IX.

19. CONSTITUTIONAL CONVENTION TRANSCRIPT II, *supra* note 15, at 597–599.

20. 7 MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 2942–2943 (1981); MONT. CONST. art. XII, § 1.

21. LARRY M. ELISON & FRITZ SNYDER, *THE MONTANA STATE CONSTITUTION: A REFERENCE GUIDE* 15 (G. Alan Tarr, ed., Ref. Guides to the State Constitutions of the U.S., 2001).

22. 777 P.2d 285 (Mont. 1989).

23. *Id.* at 288.

2016 *CONSTITUTIONAL RIGHT TO FARM & RANCH IN MONTANA* 89

through legislative decision, not by constitutional mandate. Thus, it is in no sense a self-executing provision which can be enforced by this Court.”²⁴ The Court held rational basis, not middle-tier scrutiny, was the proper test for the classification at issue in the case.²⁵

Montana Stockgrowers Association demonstrates that while Article XII, Section 1 provides a strong foundation for laws beneficial to agriculture, it does not confer a “constitutionally significant interest.”²⁶ A right to farm and ranch constitutional amendment is necessary to provide such an interest.

B. *Right to Farm Statutes: Protecting Agriculture’s Use of Land*

As in Montana, the rest of the United States has transformed from a rural society and economy to a society centered around the urban and suburban.²⁷ This has resulted in increased conflicts between expanding development and existing agriculture under the common law nuisance doctrine.²⁸ As two commentators have noted: “Since the end of World War II, the increasingly rapid conversion of land from agricultural to nonagricultural uses has enticed many urban dwellers into rural areas, where these new neighbors may be surprised and offended by some common elements of farm life: odors from farm animals and fertilizers, dust, flies, noise from animals and machinery, pesticide and herbicide spraying, and slow-moving vehicles.”²⁹

Today, every state has enacted “right to farm” laws in response to these conflicts.³⁰ Most of the statutory responses to increasing nuisance conflicts across the country occurred in the late 1970s and early 1980s.³¹ Although the states employ similar statutory schemes, each state has approached the issue in their own way.³²

1. *Nuisance Exemptions for Agriculture*

Traditionally, common law dealt with issues such as noise, odors, dust and other happenings offensive to the senses through public and private

24. *Id.*

25. *Id.*

26. *Id.*

27. Ross H. Pifer, *Right to Farm Statutes and the Changing State of Modern Agriculture*, 46 CREIGHTON L. REV. 707, 707 (2013) (internal citations omitted).

28. *Id.*; Margaret R. Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 97 (1983).

29. Grossman & Fischer, *supra* note 28.

30. Elizabeth R. Rumly, *State’s Right-To-Farm Statutes*, NAT’L AGRIC. L. CENTER, <http://perma.cc/Z2BQ-6MRQ> (last visited Sept. 29, 2015).

31. Pifer, *supra* note 27, at 708.

32. Rumly, *supra* note 30.

nuisance claims.³³ The Restatement (Second) of Torts defines a public nuisance as “an unreasonable interference with a right common to the general public.”³⁴ A private nuisance is “a nontrespassory invasion of another’s interest in the private use and enjoyment of land.”³⁵

In examining a private nuisance claim, a court usually balances the gravity of the harm with the utility of the conduct.³⁶ To determine the gravity of the harm, a court considers the following factors:

- (a) The extent of the harm involved;
- (b) the character of the harm involved;
- (c) the social value that the law attaches to the type of use or enjoyment invaded;
- (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
- (e) the burden on the person harmed of avoiding the harm.³⁷

To determine the utility of the conduct, a court considers the following factors:

- (a) the social value that the law attaches to the primary purpose of the conduct;
- (b) the suitability of the conduct to the character of the locality; and
- (c) the impracticability of preventing or avoiding the invasion.³⁸

An oft-used defense to common law nuisance claims is the coming to the nuisance doctrine, which requires the person defending against a nuisance claim to show that she “engaged in the offending activity with similar results before the plaintiff moved to the neighborhood.”³⁹ One of the most frequently cited cases applying the coming to the nuisance doctrine is *Spur Industries v. Del E. Webb Development Company*.⁴⁰ There, the court ordered a permanent injunction against a cattle feedlot in Maricopa County, Arizona, after finding flies and odors to be a nuisance to residents of a nearby retirement community.⁴¹ However, because the developer had “brought people to the nuisance,” he was required to indemnify the cattle feeder for the reasonable cost of moving or shutting down.⁴²

33. Pifer, *supra* note 27, at 707–708.

34. RESTATEMENT (SECOND) OF TORTS § 821B(1) (1979).

35. *Id.* § 821D.

36. *Id.* §§ 827–828.

37. *Id.* § 827.

38. *Id.* § 828.

39. *Real Estate and Property Law: Nuisance*, JUSTIA, <https://perma.cc/3EHN-V4QA> (last visited Sept. 29, 2015); see also 4 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 33:5 (5th ed. 2015).

40. 494 P.2d 700 (Ariz. 1972); see also SALKIN, *supra* note 39, at § 33:5.

41. *Spur Indus. Inc.*, 494 P.2d at 708.

42. *Id.*

R

R

2016 *CONSTITUTIONAL RIGHT TO FARM & RANCH IN MONTANA* 91

Spur is required to move not because of any wrongdoing on the part of Spur, but because of a proper and legitimate regard of the courts for the rights and interests of the public.⁴³

. . . It does not seem harsh to require a developer, who has taken advantage of the lesser land values in a rural area as well as the availability of large tracts of land on which to build and develop a new town or city in the area, to indemnify those who are forced to leave as a result.⁴⁴

Because the coming to the nuisance doctrine is not a complete defense to nuisance liability, many states enacted right to farm statutes to protect agricultural operations from “encroaching development.”⁴⁵ In 1981, the Montana Legislature added sections exempting normally operating, established agricultural or farming operations from the definitions of both public and private nuisance.⁴⁶ There are no cases in Montana prior to 1981 that suggest that the Legislature was responding directly to previous nuisance litigation in crafting this exemption.

2. *Shielding Agriculture from Zoning Laws*

In addition to nuisance, zoning laws restrict the use of land. In 1995, the Montana Legislature sought to protect agriculture from zoning laws and ordinances.⁴⁷ Senator Ken Mesaros sponsored Senate Bill 207 and explained to the Senate Committee on Agriculture, Livestock and Irrigation that the purpose of the bill was to address “an escalating problem” arising around some cities in Montana.⁴⁸ “Because of the economic growth affecting Montana there exists certain problems that may jeopardize Montana farms and ranches. . . [O]rdinary activities associated with farming and ranching, noise, dust, movement of livestock, or anything else” might lead to “political pressures” resulting in “zoning ordinances that would preclude agricultural activities.”⁴⁹ The bill resulted in §§ 76–2–901 to 903, Montana Code Annotated.

Under § 76–2–901, the legislature codified Montana’s “right to farm”:

(1) The legislature finds that agricultural lands and the ability and right of farmers and ranchers to produce a safe, abundant, and secure food and fiber supply have been the basis of economic growth and development of all sectors of Montana’s economy. In order to sustain Montana’s valuable farm

43. *Id.*

44. *Id.*

45. SALKIN, *supra* note 39, at § 33:5 (internal citations omitted).

46. MONT. CODE ANN. § 27–30–101(3) (2013); *see also* MONT. CODE ANN. § 45–8–111(4) (2013).

47. *Hearing on S. 207 Before the S. Agriculture, Livestock & Irrigation Comm.*, 54th Leg., Reg. Sess. 2 (Mont. 1995) [hereinafter *Hearing on S. 207*].

48. *Id.* at 1–2.

49. *Id.*

economy and land bases associated with it, farmers and ranchers must be encouraged and have the right to stay in farming.

(2) It is therefore the intent of the legislature to protect agricultural activities from governmental zoning and nuisance ordinances.⁵⁰

Section 76–2–903, regarding local ordinances, states that no political subdivision of the state may adopt “an ordinance or resolution that prohibits any existing agricultural activities or forces the termination of any existing agricultural activities outside the boundaries of an incorporated city or town.”⁵¹ Furthermore, agricultural activities that were established outside the city limits and later annexed into the limits cannot be prohibited by zoning and nuisance ordinances.⁵²

In addition to protecting agriculture from zoning, Montana’s Growth Policy Act allows local governments to identify how projected development will “adversely impact . . . agricultural lands and agricultural production” and describes “measures, including land use management techniques and incentives, that will be adopted to avoid, significantly reduce, or mitigate [impacts to agricultural lands and agricultural production.]”⁵³ The Montana Subdivision and Platting Act requires that local governments review and mitigate a subdivision’s “impacts on agriculture”⁵⁴ and that subdivision regulations must be made in accordance with the growth policy.⁵⁵

While Montana law provides strong protections for agriculture against land use restrictions, other challenges to agriculture have nothing to do with the use of land.

C. *Ag-Gag Laws: Protecting Agriculture from Undercover Animal Rights Activists*

Another national trend in statutory protection of agriculture, and the clearest forerunner to the constitutional right to farm amendments, are the “ag-gag” laws.⁵⁶ Ag-gag laws are anti-whistleblower laws that criminalize “acts related to investigating the day-to-day activities of industrial farms,

50. MONT. CODE ANN. § 76–2–901 (2013).

51. *Id.* § 76–2–903.

52. *Id.*

53. *Id.* § 76–1–601(4)(c)(viii)–(ix); *see also* LAND USE & NATURAL RES. CLINIC: UNIV. OF MONT. SCH. OF LAW, AGRICULTURAL PROTECTION IN MONTANA: LOCAL PLANNING, REGULATION AND INCENTIVES (Spring 2012), *available at* <http://perma.cc/N6J9-LB3S>.

54. MONT. CODE ANN. § 76–3–608(3).

55. *Id.* § 76–1–606.

56. The term “ag-gag” was coined by Mark Bittman in a column he published in the *New York Times*. Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES (Apr. 27, 2011), *available at* <http://perma.cc/JUP5-JBWA>.

2016 *CONSTITUTIONAL RIGHT TO FARM & RANCH IN MONTANA* 93

including the recording, possession or distribution of photos, video and/or audio [taken] at a farm.”⁵⁷

The first set of ag-gag laws (before that term had even been coined) were adopted in Kansas, Montana, and North Dakota in 1990–1991.⁵⁸ None of these laws were challenged in court. More recently, Iowa, Missouri and Utah passed ag-gag laws in 2012,⁵⁹ and Wyoming in 2015.⁶⁰ A bill passed this year in North Carolina will go into effect on January 1, 2016.⁶¹

A federal district court declared Idaho’s ag-gag law unconstitutional in 2014 on First Amendment and equal protection grounds.⁶² The court held:

Although the State may not agree with the message certain groups seek to convey about Idaho’s agricultural production facilities, such as releasing secretly-recorded videos of animal abuse to the Internet and calling for boycotts, it cannot deny such groups equal protection of the laws in their exercise of their right to free speech. Far from being tailored to a substantial governmental interest, § 18–7042 classifies activities protected by the First Amendment based on content. Therefore, under the Equal Protection Clause, it cannot stand.⁶³

A similar challenge is currently in front of a U.S. District Court in Utah.⁶⁴ After the ruling in Idaho, it is reasonable to expect that other laws will be challenged.

57. Larissa Wilson, *Ag-Gag Laws: A Shift in the Wrong Direction for Animal Welfare on Farms*, 44 *GOLDEN GATE U. L. REV.* 311, 311–312 (2014); see generally Am. Soc’y for the Prevention of Cruelty to Animals, *Ag-Gag Legislation by State*, [aspc.org, perma.cc/AR76-ZHT8](http://aspc.org/perma.cc/AR76-ZHT8) (last visited Dec. 8, 2015).

58. *KAN. STAT. ANN.* §§ 47–1825 to 47–1828 (2015) (criminalizes “enter(ing) an animal facility to take pictures by photograph, video camera or by any other means”); *MONT. CODE ANN.* §§ 81–30–101 to 81–30–105 (2013) (discussed in detail in following paragraphs); *N.D. CENT. CODE* §§ 12.1–21.1–01 to 12.1–21.1–05 (2013) (criminalizes entering “an animal facility and using or attempting to use a camera, video recorder, or any other video or audio recording equipment.”).

59. *IOWA CODE* §§ 717a.1 to 717a.4 (2015) (criminalizes providing false information on an employment application with the intent to record images); *MO. REV. STAT.* § 578.013 (2015) (requires that evidence of animal abuse must be turned over to law enforcement within 24 hours); *UTAH CODE* § 76–6–112 (2015) (criminalizes providing false information on an employment application with the intent to record images).

60. *WYO. STAT. ANN.* § 6–3–414 (2015) (criminalizes collection of photographs, video and other “resource data” on private land, and prohibits such collected data from being used as evidence in criminal trials).

61. H.R. 405, Gen. Assemb. of 2015–2016, Sess. (N.C. 2015) (enacted), available at <http://perma.cc/P7R8-C7DS> (last visited Sept. 30, 2015) (creates a civil cause of action prohibiting employees from accessing the non-public area of their employer’s property for the purpose of making secret recordings or removing data or other material).

62. *IDAHO CODE ANN.* § 18–7042 (2015) (criminalizes production of audio or video recordings of the conduct of an agricultural production facility’s operations), held unconstitutional by *Animal Legal Def. Fund v. Otter*, No. 1:14-CV-00104-BLW, ___ F. Supp. 3d ___, 2015 WL 4623943 (D. Idaho Aug. 3, 2015), appeal filed *sub nom.* *Animal Legal Def. Fund v. Wasden*, No. 15-35960 (9th Cir. Dec. 14, 2015).

63. *Animal Legal Def. Fund*, 2015 WL 4623943 at *14.

64. *Civil Rights Complaint, Animal Legal Def. Fund v. Herbert*, No. 2:13-cv-00679-RJS (D. Utah July 22, 2013), available at <https://perma.cc/N3U8-UC8R>; see also *Taking Ag Gag to Court*, *ANIMAL LEGAL DEFENSE FUND*, <http://perma.cc/M6PC-8CDQ> (last visited Sept. 29, 2015).

Montana's ag-gag law, passed in 1991, is known as Montana's Farm Animal and Research Facilities Protection Act.⁶⁵ The Act makes it illegal to enter an animal facility to take photographs or video with intent to commit criminal defamation, or to damage or destroy an animal facility. The Act allows for treble damages, court costs, and attorney fees.⁶⁶

In the debate over House Bill 120 during the 1991 Montana Legislature, proponents of the Act cited a number of "ecoterrorism" or "animal rights terrorism" incidents that had occurred out of state. The sponsor of the bill, Representative Hayne, told the Senate Agriculture, Livestock and Irrigation Committee:

There are certain groups of individuals in our society that do participate in criminal acts that include vandalism against livestock operators. Because they are concerned about the cruelty they believe is involved in raising animals in confinement. We all agree that animals should not be mistreated but we cannot elevate animals to the same level as human beings.⁶⁷

Other testimony to the committee included descriptions of printed materials circulated by "various organizations" about how to kill livestock grazing on public land and a training manual about how to conduct surveillance and bomb a research lab.⁶⁸ Other examples were the defacing of the California Cattlemen's Association office, the burning of a livestock auction market in California, and a special bulletin from the Coconino County (Arizona) Sheriff's Department warning cattlemen of Earth First's recommendation to start hunting cattle and sheep to eliminate livestock from public lands.⁶⁹ The Montana Farm Bureau Federation lobbyist, Lorna Frank, said the bill was necessary to "better cover rodeos, horse shows, 4-H fairs, and other agriculture related activities."⁷⁰ Frank stated that the provision about taking pictures with a camera or video camera was necessary because "pictures can be altered and changed to depict whatever someone wants you to believe."⁷¹ She said the Farm Bureau felt "that by passing HB 120 the state of Montana will be sending a message to animal terrorist groups that they are not welcome in the state, and if they are caught breaking the laws, they will be prosecuted."⁷²

65. MONT. CODE ANN. §§ 81-30-101 to 81-30-105.

66. *Id.* § 81-30-104; see also Mich. State Univ. Coll. of Law, *Farm Animal and Research Facilities Protection Act: Summary*, ANIMAL LEGAL & HISTORICAL CENTER, <https://perma.cc/T4WG-8KD5> (last visited Sept. 29, 2015).

67. *Hearing on H. 120 Before the S. Agriculture, Livestock & Irrigation Comm.*, 52d Leg., Reg. Sess. 2 (Mont. 1991) [hereinafter *Hearing on H. 120*].

68. *Id.* at 3 (testimony of Les Graham, Montana Department of Livestock). The minutes reflect that he showed a video highlighting the activities of the Animal Liberation Front.

69. *Id.* at Ex. 3 (testimony of Keith Bales of the Montana Stockgrowers Association, Montana Wool Growers Association and Montana Association of State Grazing Districts).

70. *Id.* at 3 (testimony of Lorna Frank).

71. *Id.* (testimony of Lorna Frank).

72. *Id.* at 4.

2016 *CONSTITUTIONAL RIGHT TO FARM & RANCH IN MONTANA* 95

Opponents included local humane societies who feared the bill would prevent them from conducting investigations into animal cruelty. Tim Sweeney, an attorney and President of the Lewis & Clark Humane Society, said in written testimony:

Under House Bill 120, persons who commit such acts in support of animal rights are to be accorded harsher penalties than those who commit such acts in furtherance of other causes, for example, in support of the right-to-life movement or in opposition to the war. This bill represents special-interest legislation and is more a political statement than it is an attempt to improve Montana's criminal code.⁷³

Constance Carson, director of the Missoula Humane Society said in written testimony:

The Missoula Humane Society does not condone or engage in illegal activities. We acknowledge the right of individuals, businesses and government agencies to be protected against illegal trespass, harassment, theft, and damage to property. Since state law already prohibits, and provides substantial penalties for these offenses, HB 120 serves only to target and intimidate law abiding individuals who wish to help correct animal abuse. . . . This bill would not only impede legitimate organizations from investigating and documenting animal abuse and neglect complaints, it would potentially make it a criminal offense to do so! . . . It would protect from public scrutiny potentially illegal activities and enterprises, and it would impede the legitimate investigation and documentation of cruelty complaints undertaken by community animal welfare organizations.⁷⁴

The more recent ag-gag bills are directed at undercover investigations by animal rights groups like the Humane Society of the United States (HSUS), People for the Ethical Treatment of Animals (PETA), and the American Society for Prevention of Animal Cruelty (ASPCA).

During the 2015 Montana Legislature, the Senate Agriculture Committee considered and tabled a second ag-gag bill. SB 285 proposed that a person who knowingly failed to report evidence of cruelty to animals at an animal facility within 24 hours could be found guilty of cruelty to animals himself.⁷⁵ The bill was sponsored by Senator Eric Moore, who sponsored the right to farm amendment in 2013. This bill was very similar to the bill passed in Missouri in 2012.

During executive session on March 26, Senator Jill Cohenour commented that the issues the bill was trying to address weren't happening in Montana.⁷⁶ Moore explained why he thought the bill was necessary, shed-

73. *Hearing on H. 120, supra* note 67, at Ex. 8 (testimony of Tim Sweeney).

74. *Id.* at Ex. 11 (testimony of Constance Carson).

75. S. 285, 64th Leg., Reg. Sess. (Mont. 2015), available at <http://perma.cc/YA98-QBW6> (last visited Sept. 29, 2015).

76. *Executive Action on S. 285 Before the S. Agriculture, Livestock, & Irrigation Comm.*, 64th Leg., Reg. Sess. 7:40 (March 26, 2015), available at http://montanalegislature.granicus.com/MediaPlayer.php?view_id=&clip_id=16842&meta_id=115411 [hereinafter *Executive Action on S. 285*].

ding more light on why he had introduced SB 300 for a constitutional right to farm amendment in 2013:

Those of us actually in the livestock industry both within the state and across the nation . . . realize that there is a very large, very powerful, very well-funded, multi-state, international groups, two of them to be specific, which I won't mention in the name of decorum. Two of them which are multi-million dollar international companies and who are dedicated, and it says so right in their bylaws, to the elimination of all animal agriculture. It is a very serious threat to our number one industry in Montana. We are fortunate that they have not put most of their efforts in this state, yet. Although they did hire a lobbyist in this legislative session for the first time ever, so they are starting to eye Montana. And if you talk to livestock producers in Colorado, Arizona, Iowa, Missouri, that is number one on their list of concerns. You go to cattlemen's meetings that are nation-wide in origin and you talk to producers from these states, we want to talk about wolves and bison and fences and they talk about the encroachments of animal rights groups. I think this is good legislation that's fair, it's specific . . . to my laymen's eyes I'm satisfied it is targeting the exact behavior we want to prohibit in the state.⁷⁷

After the original hearing, Senator David Howard raised concerns that, without a law requiring a bystander to report a murder in Montana, this bill would raise the bar for reporting animal cruelty beyond what exists for all other crimes.⁷⁸ The bill died in committee, and no similar bills were introduced during the 2015 Montana Legislative session.⁷⁹

Senator Moore's comments on SB 285 help explain the fears and concerns that propel both the plethora of ag-gag bill proposals across the country and the emergence of constitutional amendments for the right to farm. The constitutional challenges to ag-gag statutes are well founded, as demonstrated in *Animal Legal Defense Fund v. Otter*.⁸⁰ In addition to potentially violating First Amendment rights, these statutes do nothing to bridge the gaps between the urban and rural or consumers and producers. Rather than closing doors to keep farm activities hidden from consumers' view, the agricultural community must do a better job of demonstrating and explaining production practices to consumers. The right to farm and ranch amendments offer a better opportunity to engage with those not involved in agriculture.

III. CONSTITUTIONAL AMENDMENTS FOR THE RIGHT TO FARM

The new trend of constitutional amendments concerning the right to farm “represents the granting to farms of protection that is of a different

77. *Id.* at 8:26.

78. *Id.* at 10:58.

79. DETAILED BILL INFO. S. 285, 64th Leg., Reg. Sess. (Mont. 2015), available at <http://perma.cc/SM3U-KR7K> (last visited Sept. 29, 2015).

80. *Animal Legal Def. Fund*, 2015 WL 4623943.

2016 *CONSTITUTIONAL RIGHT TO FARM & RANCH IN MONTANA* 97

type than that granted through traditional Right to Farm Statutes.”⁸¹ One commentator noted that while traditional right to farm statutes were spurred by existing conflicts, the potential for future conflict between farms and their neighbors, and the conversion of farmland, the new constitutional amendments seem to be more about protecting in-state interests from out-of-state interests.⁸² This battle of interests has played out in the media in the debates surrounding the new amendments. However, the growing urban–rural divide and disconnect between those who produce food and those who consume it contributes to the tenor of the conversation as well.

A. *California Prevention of Farm Animal Cruelty Act*

In 2008, the Humane Society of the United States (HSUS) drew the attention of agricultural entities across the United States.⁸³ The organization spearheaded an effort to pass Proposition 2, a ballot proposition in the California’s general election.⁸⁴ Known as the “Prevention of Farm Animal Cruelty Act,”⁸⁵ the proposition required that veal calves, egg-laying hens and pregnant pigs be confined “only in ways that allow these animals to lie down, stand up, fully extend their limbs and turn around freely.”⁸⁶

As a proposition, the proposed law bypassed the legislative process and went to the electorate for a direct vote.⁸⁷ The measure passed with 63.5% of the vote.⁸⁸ According to the National Institute on Money in State Politics, supporters raised nearly \$9 million while opponents raised over \$7 million.⁸⁹ HSUS itself contributed over \$2.6 million to the campaign to pass Proposition 2.⁹⁰ The law went into effect January 1, 2015.⁹¹

The Ninth Circuit Court of Appeals upheld the constitutionality of Proposition 2 in *Cramer v. Harris*.⁹² William Cramer challenged the constitutionality of Proposition 2, claiming that because Proposition 2 does not

81. Pifer, *supra* note 27, at 715–719.

82. *Id.*

83. *California Proposition 2, Standards for Confining Farm Animals (2008)*, BALLOTPEDIA: THE ENCYCLOPEDIA OF AM. POLITICS, <http://perma.cc/6D29-VZQ2> (last visited September 22, 2015) [hereinafter *California Proposition 2*].

84. *Id.*

85. *Cramer v. Harris*, 591 Fed. Appx. 634 (9th Cir. 2015).

86. Attorney Gen., *2008 Official Voter Info. Guide Prop. 2*, CAL. SEC’Y OF STATE, <http://perma.cc/ME6Z-TLC6> (last visited Sept. 22, 2015).

87. *Initiated state statute*, BALLOTPEDIA: THE ENCYCLOPEDIA OF AM. POLITICS, <http://perma.cc/73XA-K2FV> (last visited Sept. 30, 2015).

88. *California Proposition 2*, *supra* note 83.

89. *Proposition 002*, NATIONAL INSTITUTE ON MONEY IN STATE POLITICS, <http://perma.cc/AE62-ZRRC> (last visited on May 21, 2015); *see also California Proposition 2*, *supra* note 83.

90. *California Proposition 2*, *supra* note 84.

91. *Cramer*, 591 Fed. Appx. at 634–635.

92. *Id.*

R

R

specify minimum cage sizes for egg-laying hens, it should be void for vagueness. The Ninth Circuit disagreed, stating:

All Proposition 2 requires is that each chicken be able to extend its limbs fully and turn around freely. This can be readily discerned using objective criteria. Because hens have a wing span and a turning radius that can be observed and measured, a person of reasonable intelligence can determine the dimensions of an appropriate confinement that will comply with Proposition 2. While it may have been preferable for Proposition 2 to state that an enclosure for egg-laying hens must provide a specified minimum amount of space per bird, the Due Process Clause does not demand “perfect clarity” or “precise guidance.”⁹³

California was not the first state to pass a measure like Proposition 2. Arizona,⁹⁴ Colorado,⁹⁵ and Oregon,⁹⁶ passed similar measures prior to California’s Proposition 2. Florida even amended its state Constitution in 2002 to limit “cruel and inhumane confinement of pigs during pregnancy.”⁹⁷ However, the high profile battle surrounding Proposition 2 got the attention of agricultural entities across the country as they began to perceive HSUS as a real threat.⁹⁸

B. North Dakota Passes Nation’s First Constitutional Amendment for the Right to Farm

In 2011, the North Dakota Farm Bureau began collecting signatures to place a first-of-its-kind, right to farm amendment to the North Dakota Constitution on the ballot.⁹⁹ The initiative proposed a new section in the Article XI “General Provisions”¹⁰⁰ of the North Dakota Constitution:

The right of farmers and ranchers to engage in modern farming and ranching practices shall be forever guaranteed in this state. No law shall be enacted which abridges the right of farmers and ranchers to employ agricultural technology, modern livestock production, and ranching practices.¹⁰¹

93. *Id.* at 635.

94. ARIZ. REV. STAT. ANN. § 13–2910.07 (2015); *see also Arizona Humane Farms, Proposition 204 (2006)*, BALLOTPEdia: THE ENCYCLOPEDIA OF AM. POLITICS, <http://perma.cc/E2UZ-YG62> (last visited Oct. 1, 2015).

95. COLO. REV. STAT. §§ 35–50.5–101 to 35–50.5–103 (2015).

96. OR. REV. STAT. § 600.150 (2015).

97. FLA. CONST. art. 10, § 21; *see also Florida Animal Cruelty, Amendment 10 (2002)*, BALLOTPEdia: THE ENCYCLOPEDIA OF AM. POLITICS, <http://perma.cc/PG9K-8U6L> (last visited Oct. 1, 2015).

98. HSUS claims that of the 44 statewide ballot measure campaigns it was involved in between 1990–2010, it won 30, a 69% success rate. *See Ballot Measures*, HUMANE SOC’Y LEGISLATIVE FUND, <http://perma.cc/8YU8-ZVLU> (last visited Oct. 1, 2015).

99. Dale Wetzel, *ND Official OKs Measure to Ban Limits on Farming*, THE JAMESTOWN SUN (Aug. 16, 2011), <https://perma.cc/6KV7-XE24>.

100. North Dakota’s “Declaration of Rights” is located in Article I. *North Dakota Farming and Ranching Amendment, Measure 3 (2012)*, BALLOTPEdia: THE ENCYCLOPEDIA OF AM. POLITICS, <http://perma.cc/8LJW-3FZM> (last visited May 22, 2015) [hereinafter *Measure 3*].

101. *Id.*

2016 *CONSTITUTIONAL RIGHT TO FARM & RANCH IN MONTANA* 99

The Farm Bureau stated that it was responding to efforts by HSUS both in the state and in other states pushing regulatory measures that would harm agriculture.¹⁰² Opponents warned the amendment was overly broad and would lead to increased animal abuse, water pollution, and environmental concerns.¹⁰³

The measure received enough signatures to be placed on the November 2012 ballot. The amendment passed with 66.89% of the vote.¹⁰⁴ The Farm Bureau spent only \$150,000 to promote the amendment, which received scant attention from outside the state.¹⁰⁵

Doyle Johannes, president of the North Dakota Farm Bureau told the Minneapolis based *Star Tribune*:

It's going to give us a big leg up on special interest groups that come in from outside and want to tell us what to do and what not to do. They're not going to stop. That was the big thing, to beat these people back. We don't need outsiders coming here and telling us how to do things.¹⁰⁶

It is unclear what this right really means in North Dakota today. No cases have cited the amendment as of December 2015.

C. 2013 Proposed Montana Constitutional Amendment

In 2013, Senator Eric Moore,¹⁰⁷ inspired by the North Dakota amendment, proposed Senate Bill 300 to add a new section to the Montana Constitution's "Bill of Rights" in Article II.¹⁰⁸ His proposed language was nearly identical to North Dakota's: "The right of farmers and ranchers to engage in modern farming and ranching practices is guaranteed. No law may be enacted that abridges the right of farmers and ranchers to employ agricultural technology or modern livestock production and ranching practices."¹⁰⁹

The bill was introduced and referred to the Senate Agriculture, Livestock, and Irrigation Committee on Feb. 13, 2013.¹¹⁰ However, the bill was never heard at the sponsor's request and died in committee.¹¹¹ The bill required a simple majority to pass out of committee but, as a proposal to amend the constitution, it needed at least 100 votes between the House and

102. Blake Nicholson, *Voters Make North Dakota First State in Nation to Protect Right to Farm in Constitution*, STAR TRIBUNE, (Nov. 8, 2012), <http://perma.cc/H4PZ-XFJM>.

103. *Right to Farm, Amendment 1 . . . Pro and Con*, RICHMOND DAILY NEWS (July 2014), <http://perma.cc/55XV-763W>.

104. *Measure 3*, *supra* note 100.

105. Nicholson, *supra* note 102.

106. *Id.*

107. Moore and his family operate a cattle feedlot and ranch. *About Eric*, SenatorEricMoore.com, <http://perma.cc/QE6S-6WUW> (last visited Oct. 31, 2015).

108. S. 300, *supra* note 2.

109. *Id.*

110. DETAILED BILL INFO. S. 300, *supra* note 4.

111. *Id.*

the Senate to reach the ballot.¹¹² Had it passed, the act would have appeared on ballot for the next general election in 2014.¹¹³

Because the bill was never heard, the purpose of the proposed amendment was never stated on the record. It was, however, discussed privately by Senator Moore and other legislators with a number of membership-based agricultural groups who had lobbyists at the Legislature.¹¹⁴ Moore advocated pursuing an amendment in Montana to preempt challenges to animal agriculture in Montana from groups like the Humane Society of the United States (HSUS).¹¹⁵ Moore and the lobbyists discussed the increasing scrutiny of technologies such as genetically modified organisms (GMOs), hormones, and antibiotics.¹¹⁶ Further, Moore and the lobbyists expressed concerns about the low number of people directly involved in production agriculture both in Montana and nationwide, and the lack of understanding by consumers about where their food comes from or how it is produced.¹¹⁷

The agriculture groups decided not to pursue the amendment at that time because they felt unprepared for the long and costly effort of promoting and passing the amendment. There were major concerns about costs and fundraising needs, especially if the amendment drew the ire of HSUS. Perhaps most of all, the groups did not understand what a constitutional amendment would mean for the agriculture industry in the state and what, if any, additional protections it would offer.

D. Missouri Passes Constitutional Right to Farm

In 2014, Missouri became the second state to pass a constitutional provision guaranteeing the right to farm. The Missouri amendment, located in the Missouri Constitution's Article I "Bill of Rights," states:

That agriculture which provides food, energy, health benefits, and security is the foundation and stabilizing force of Missouri's economy. To protect this vital sector of Missouri's economy, the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state, subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri.¹¹⁸

Proponents argued that the changing demographics in Missouri with fewer people "directly connected to farms and ranches by occupation or

112. MONT. CONST. art. XIV, § 8.

113. S. 300, *supra* note 2.

114. Discussion of the proposed amendment between Senator Moore, other legislators, and agricultural groups (summaries of meetings on file with author).

115. *Id.*

116. *Id.*

117. *Id.*

118. MO. CONST. art. I, § 35. Article VI contains all of the Local Government provisions of Missouri's Constitution.

2016 *CONSTITUTIONAL RIGHT TO FARM & RANCH IN MONTANA*101

through family” has made agriculture “vulnerable to attacks from well funded outside groups that push misinformation on the public to pass burdensome and expensive regulations.”¹¹⁹ Proponents argued that too many regulations “make farming and ranching less profitable, make our food supply less safe and less secure, and cause increased food prices.”¹²⁰

Opponents argued that the language of the amendment was too vague and that it would favor large corporate agribusinesses over small, family-owned farms and ranches.¹²¹ Other concerns were raised about the amendment potentially being used to “prevent the labeling of genetically modified organisms (GMOs) and to regulate pollution caused by agribusinesses, including concentrated animal feeding operations (CAFOs).”¹²²

The Missouri amendment appeared on the August 5, 2014, primary election ballot in Missouri as a legislatively referred constitutional amendment.¹²³ It passed narrowly, by just 2,375 votes after a recount, with 50.12% of the vote.¹²⁴ Over \$1.1 million was spent by proponents of the measure and nearly \$500,000 was spent in opposition.¹²⁵

Following the election, Wes Shoemyer, an outspoken opponent of the amendment, and two other plaintiffs filed suit in the Supreme Court of Missouri challenging the fairness and sufficiency of the summary statement in the amendment’s ballot title.¹²⁶ The Missouri Supreme Court upheld the election results.¹²⁷

E. Right to Farm Constitutional Amendment Fails in Indiana

In 2015, an effort to amend the Indiana Constitution to include a right to farm failed. On Feb. 24, 2015, the Indiana Senate voted down Senate Joint Resolution 12 by a vote of 22–28.¹²⁸ The resolution would have added a new section to the Indiana Constitution’s Bill of Rights, stating:

- (a) The people of Indiana desire to: (1) protect the rights of ownership of property and the adequate production of food, fuel, fiber, and shelter, while maintaining the common law; and (2) promote agriculture as a central activity

119. BRENT HAYDEN, KEEP MISSOURI FARMING: SUPPORT AMENDMENT #1 (2014), available at <https://perma.cc/3R3D-2RSU?type=source>.

120. *Id.*

121. *Missouri Right-to-Farm, Amendment 1 (August 2014)*, BALLOTPEDIA: THE ENCYCLOPEDIA OF AM. POLITICS, <https://perma.cc/NXL3-334E?type=source> (last visited Oct.5, 2015).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Shoemyer v. Mo. Sec’y of State*, 464 S.W.3d 171 (Mo. 2015).

127. *Id.*

128. S.J. Res. 12, 119th Gen. Assemb. 1st Reg. Sess. (Ind. 2015), available at <https://iga.in.gov/documents/2d6f63ac>. (click “Resolution Actions”).

to be conducted in Indiana, and to maintain agriculture as a vital economic activity serving as a foundation and stabilizing force of Indiana's economy.

(b) The right of the people of Indiana to engage in diverse farming and ranching practices is guaranteed by this Constitution.

(c) The General Assembly may not pass a law that unreasonably abridges the right of farmers and ranchers to employ or refuse to employ effective agricultural technology and livestock production and ranching practices.

(d) This section does not modify any: (1) provision of the common law; (2) statute relating to trespass or eminent domain; or (3) other property right, existing or previously enacted statute, or existing or previously adopted administrative rule.¹²⁹

According to the *Indy Star*, the bill's sponsor "touted the amendment as a way to protect family farmers from the attacks of zealot animal-rights and environmental groups opposed to modern farming and livestock-rearing practices." Critics of the bill said, "it would prevent regulators from passing rules governing mega-farms to ensure humane animal husbandry practices and prevent manure and pesticides from polluting the environment."¹³⁰

Interestingly, although the Indiana Senate voted against a right to farm amendment, it overwhelmingly passed another constitutional amendment for the right to hunt and fish 42–7.¹³¹ The Indiana House also passed the resolution 81–12.¹³² This measure will be on the November 8, 2016 ballot in Indiana.¹³³

F. Oklahoma Voters to Decide on Right to Farm Amendment

In 2015, a resolution to place a right to farm constitutional amendment on the ballot in Oklahoma sailed through the legislature with little opposition.¹³⁴ The measure will go to the voters on the 2016 ballot.¹³⁵ The amendment would add the following language to the Oklahoma Constitution's Bill of Rights:

To protect agriculture as a vital sector of Oklahoma's economy, which provides food, energy, health benefits, and security and is the foundation and stabilizing force of Oklahoma's economy, the rights of citizens and lawful

129. *Id.*

130. Ryan Sabalow, *Indiana Senate Kills 'Right to Farm' Amendment*, *INDY STAR* (Feb. 24, 2015), <http://perma.cc/6D8G-LFLU>.

131. S.J. Res. 2, 119th Gen. Assemb. 1st Reg. Sess. (Ind. 2015), available at <https://iga.in.gov/legislative/2015/resolutions/senate/joint/2> (click "Resolution Actions").

132. *Id.*

133. *Indiana Right to Hunt and Fish Amendment (2016)*, *BALLOTPEdia: THE ENCYCLOPEDIA OF AM. POLITICS*, <http://perma.cc/R7QW-BE6A> (last visited May 22, 2015).

134. *BILL INFO.*, H.R.J. Res. 1012, 55th Leg., 1st Reg. Sess. (Okla. 2015), available at <http://perma.cc/DU6D-UL8L>.

135. *Oklahoma Right to Farm, State Question 777*, *BALLOTPEdia: THE ENCYCLOPEDIA OF AM. POLITICS*, <http://perma.cc/Z7DS-VE98> (last visited Oct. 31, 2015).

2016 *CONSTITUTIONAL RIGHT TO FARM & RANCH IN MONTANA*103

residents of Oklahoma to engage in farming and ranching practices shall be forever guaranteed in this state. The Legislature shall pass no law which abridges the right of citizens and lawful residents of Oklahoma to employ agricultural technology and livestock production and ranching practices without a compelling state interest.

Nothing in this section shall be construed to modify any provision of common law or statutes relating to trespass, eminent domain, dominance of mineral interests, easements, rights of way or any other property rights. Nothing in this section shall be construed to modify or affect any statute or ordinance enacted by the Legislature or any political subdivision prior to December 31, 2014.¹³⁶

The language proposed in Oklahoma shows striking similarities to Missouri's language, but differs in important ways. For example, Oklahoma refers to "citizens and lawful residents"¹³⁷ rather than "farmers and ranchers."¹³⁸ The right "to engage in farming and ranching practices" is broad and vague and does not clearly define the scope of the right.¹³⁹ However, the next sentence specifically highlights "agricultural technology" and "livestock production and ranching practices."¹⁴⁰

Introducing his bill to the Rules Committee, Representative Biggs stated: "This is a bill to protect agriculture here in Oklahoma. Unfortunately, we have an out of state interest group who has seen fit to kind of attack agriculture here in Oklahoma and go as far as to sue the Attorney General who is looking to protect us."¹⁴¹ On the House Floor, Biggs described the bill as a "preemptive strike" against HSUS and referenced the group's effort to ban farrowing crates for hog farming in Oklahoma.¹⁴²

Senate Floor Leader Mike Schulz was quoted by the *Tulsa World* as saying:

This is not a solution looking for a problem. Agriculture in this country is under attack not from people who care about the welfare of animals, but by people who want to make a political statement, who do not like farmers and ranchers profiting in their businesses, profiting off animals."¹⁴³

136. H.R.J. Res. 1012, 55th Leg., 1st Reg. Sess. (Okla. 2015), available at <http://perma.cc/VC33-ML85>.

137. *Id.*

138. MO. CONST. art. I, § 35.

139. Okla. H.R.J. Res. 1012, *supra* note 136.

140. *Id.*

141. *Rules Comm. Meeting: Hearing on H.J.R. Res. 1012*, 55th Leg., 1st Reg. Sess. (Okla. 2015) available at http://okhouse.granicus.com/MediaPlayer.php?view_id=&clip_id=1533&meta_id=442116 [hereinafter *Rules Comm. Meeting*].

142. *H. Floor Session: Hearing on H.J.R. Res. 1012*, 55th Leg., 1st Reg. Sess. (Okla. 2015), available at http://okhouse.granicus.com/MediaPlayer.php?view_id=&clip_id=1674&meta_id=710852.

143. Barbara Hoberock, *Oklahoma Senate Passes 'Right to Farm' Bill*, *TULSA WORLD* (Apr. 22, 2015), <https://perma.cc/77AB-X69Q?type=source>.

The Amendment is opposed by HSUS, which has reframed the issue as a “Right to Harm.” A 30-second video advertisement released by the HSUS says:

The Oklahoma Constitution, it’s always protected our liberty and way of life. But now, corporate lobbyists are trying to rewrite it to add a “Right to Farm” when it’s really their corporate “Right to Harm.” Giving out of state corporations free reign to pollute our land and drinking water, abuse our animals, and destroy traditional family farmers’ way of life. Oklahomans already have the right to farm, so tell your legislators: No corporate takeover of our land and our constitution. No Right to Harm.¹⁴⁴

In a press release accompanying the ad, the HSUS stated that if it passed, “the amendment would solidify the bad practices of industrial agriculture that harm family farmers, animal welfare, food safety and the environment.”¹⁴⁵

Wayne Pacelle, President and CEO of the HSUS, wrote about the passage of the Amendment on his blog “A Humane Nation.”

If any of these folks think they are silencing The HSUS, they’re wrong. We’ll be doubling down in Oklahoma and we’ll be announcing future plans in the state soon. And we’ll be continuing the fight to drive animal welfare reforms for farm animals, elephants, greyhounds, and other animals every day of the year in every state.¹⁴⁶

The debate in Oklahoma is representative of debates occurring in other states, though perhaps demonstrating an increase in intensity. The conversation in Oklahoma should prove instructive if Montana considers a similar amendment.

G. State Constitutions as Forums for Deliberating about Rights

A large number of rights-related amendments to state constitutions have been enacted since 2000, and many of them, like the right to farm, create rights not guaranteed in the United States Constitution.¹⁴⁷ Such rights expand beyond the anti-discrimination and privacy rights that were the focus of earlier periods of our nation’s history.¹⁴⁸

Some commentators have questioned the need for these new amendments. Professor Stacey Gordon at the University of Montana School of Law, in an article criticizing the “right to hunt” amendment passed in Mon-

144. The Humane Soc’y of the U.S., *Stop the destructive “Right to Harm” bill in Oklahoma*, YOUTUBE, <https://youtu.be/p44r3WacCRU> (last visited May 22, 2015).

145. *New TV Ad: Corporate “Right to Harm” Bill Bad for Animals and State’s Traditional Family Farm Economy*, THE HUMANE SOC’Y OF THE U.S. (March 30, 2015), <http://perma.cc/AGW7-38AR>.

146. Wayne Pacelle, *Right to Farm, Right to Poach, and Other Shenanigans in the States*, A HUMANE NATION: WAYNE PACELLE’S BLOG (April 29, 2015), <http://perma.cc/S4B6-HZXP>.

147. John Dinan, *State Constitutional Amendments and Individual Rights in the Twenty-First Century*, 76 ALB. L. REV. 2105, 2106–2108 (2013).

148. *Id.* at 2107–2112.

2016 *CONSTITUTIONAL RIGHT TO FARM & RANCH IN MONTANA*105

tana and similar amendments in other states, comments that “state constitutional amendments often reflect partisan politics and concerns instead of the broader, weightier issues important to the whole of the state populations.”¹⁴⁹ She argued that right to hunt amendments turn traditional constitutional logic on its head because rather than “amending the constitution because it no longer reflects the values of the citizens of the state” the amendments seek to protect a value based on fear that “citizens of the state would no longer value it.”¹⁵⁰

Other commentators see state constitutions as a “source of rights independent of the Federal Constitution” that can “grant more protection for individual rights.”¹⁵¹ One commentator, John Dinan, writes that state constitutions, relatively easy to amend compared to the U.S. Constitution, serve as “forums for deliberating about rights.”¹⁵²

Constitutions represent the fundamental values of the people of a state and how they wish to govern themselves.¹⁵³ The continued protection of agriculture across the nation is undeniably a weighty issue that concerns everyone, even those who are not directly involved in production agriculture. While just 1.5% of U.S. workers were employed in agriculture as of 2012, every single person in this country consumes agricultural products on a daily basis.¹⁵⁴

In Montana, where agriculture is the state’s top earning industry and economic foundation, the people should have an opportunity to discuss what they collectively value. The constitutional amendment process is an excellent “forum,” to borrow from Dinan, for engaging in such a debate about those things that are most important. Legislative and ballot processes provide ample opportunities for Montanans to debate whether we want to have a constitutionally guaranteed individual right to farm and ranch or whether those protections are best left to statutes.

IV. EXAMINING A POTENTIAL RIGHT TO FARM AND RANCH IN MONTANA

Examining Montana’s current constitutional provision in Article XII, Section 1, as well as a number of other laws that exempt agriculture from

149. Stacey Gordon, *A Solution in Search of a Problem: The Difficulty with State Constitutional “Right to Hunt” Amendments*, 35 PUB. LAND & RESOURCES L. REV. 3, 4, 11 (2014).

150. *Id.* at 11–12.

151. E. Norman Veasy, *Forward*, in RANDY J. HOLLAND ET AL., *STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE* iii (2010).

152. Dinan, *supra* note 147, at 2106.

153. Gordon, *supra* note 149, at 10.

154. U.S. Dept. of Labor Bureau of Labor Statistics, *Employment by Major Industry Sector, EMPLOYMENT PROJECTIONS* (Dec. 19, 2013), <http://perma.cc/3US4-NV2J>.

nuisance and zoning, might lead one to believe that agriculture in Montana is well protected, if not revered. However, as noted in *Montana Stockgrowers Association*, Article XII is not self-executing and does not confer a constitutionally significant interest.¹⁵⁵ Further, laws are relatively easy to change. Based on the Montana Supreme Court's scrutiny of laws under equal protection claims, a right to farm and ranch constitutional amendment will do important work. There are also vital lessons to be drawn from the right to a clean and healthful environment and the right to hunt and fish in Montana's Constitution.

A. *Montana Supreme Court's Approach to Constitutionally Designated Rights*

The concerns raised by Senator Moore and others about the future of agriculture are not farfetched. Based on the way the Montana Supreme Court treats constitutional rights implicated in equal protection challenges, a right to farm and ranch would do important work in protecting agriculture from challenges.

The Montana Supreme Court typically applies three levels of scrutiny to equal protection challenges when it comes to individual rights that might be infringed by statutes, regulations, or government actions: rational basis scrutiny, middle-tier scrutiny, and strict scrutiny.¹⁵⁶ Rational basis scrutiny applies to "rights" that are not addressed by the text of the Montana Constitution. Middle-tier scrutiny applies to rights that are explicitly addressed in the Constitution, but outside of Article II.¹⁵⁷ Strict scrutiny applies to fundamental rights listed under Article II.¹⁵⁸

Rational basis scrutiny determines whether the law or classification is rationally related to legitimate government interests.¹⁵⁹ Middle-tier scrutiny requires the state to demonstrate that: (1) its classification is reasonable; and (2) its interest in classifying is more important than the people's interest in obtaining constitutionally significant benefits.¹⁶⁰ The Court, based on the facts and circumstances of the case, balances governmental interests with individual rights.¹⁶¹ Strict scrutiny, the highest level of scrutiny, requires that a state action be narrowly tailored to a compelling state interest.¹⁶² As

155. *Mont. Stockgrowers Ass'n*, 777 P.2d at 288.

156. *Snetsinger v. Mont. Univ. System*, 104 P.3d 445, 449–450 (Mont. 2004).

157. *Id.*

158. *Id.*

159. *Id.* at 450.

160. *Mont. Env'tl. Info. Ctr. v. Dept. of Env'tl. Quality*, 988 P.2d 1236, 1245 (Mont. 1999) (citing *Butte Community Union v. Lewis*, 712 P.2d 1309, 1314 (Mont. 1986)).

161. *Id.*

162. *Snetsinger*, 104 P.3d at 450.

2016 *CONSTITUTIONAL RIGHT TO FARM & RANCH IN MONTANA*107

U.S. Supreme Court Justice Souter has noted, “strict scrutiny leaves few survivors.”¹⁶³

Adding a constitutional right to farm and ranch in Montana would mean that, rather than being subject to the relatively low bar of rational basis scrutiny, any law that might abridge Montana’s right to farm and ranch would face either a middle-tier or strict scrutiny review, depending on where the right was located in the Montana Constitution.

B. *Lessons from Other Montana Constitutional Rights*

Two existing Montana constitutional rights, the right to a clean and healthful environment¹⁶⁴ and the right to hunt and fish,¹⁶⁵ provide important context for a discussion about a proposed right to farm and ranch. Both rights were hotly debated before their inclusion in the Constitution, demonstrating Dinan’s “forum for deliberation about rights.”¹⁶⁶ Both rights deal with natural resource issues and seem to stem from an interest in protecting Montanans from perceived threats to our way of life from powerful influencers both inside and outside the state. These rights demonstrate the difference between an Article II, “fundamental right” (clean and healthful environment), subject to strict scrutiny, and a non-Article II right (hunt and fish), presumably subject to middle-tier scrutiny.

1. *Right to a Clean and Healthful Environment*

The right to a clean and healthful environment was added to the Montana Constitution during the 1972 Montana Constitutional Convention. The Preamble of the Montana Constitution, also added during the convention, sets the stage:

We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution.¹⁶⁷

The phrase “clean and healthful environment” is mentioned twice in the Montana Constitution. It first appears in the “Inalienable Rights” of in Article II, Section 3: “All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment . . .”¹⁶⁸ A

163. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 455 (2002) (Souter, J., dissenting).

164. MONT. CONST. art. II, § 3; MONT. CONST. art. IX, § 1.

165. MONT. CONST. art. IX, § 7.

166. Dinan, *supra* note 147, at 2112.

167. MONT. CONST. pmb. l.

168. *Id.* art. II, § 3.

clean and healthful environment is also the focus of Article IX, Section 1, Protection and Improvement:

- (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
- (2) The legislature shall provide for the administration and enforcement of this duty.
- (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.¹⁶⁹

The landmark case to examine Montana's constitutional right to a clean and healthful environment was *Montana Environmental Information Center v. Department of Environmental Quality (MEIC)*.¹⁷⁰ In *MEIC*, the Court noted it had not "had prior occasion to discuss the level of scrutiny which applies when the right to a clean and healthful environment . . . [is] implicated."¹⁷¹ The Court unanimously held that the right to a clean and healthful environment "is a fundamental right because it is guaranteed by the Declaration of Rights found at Article II, Section 3 of Montana's Constitution."¹⁷² Further, the Court held that both statutes and administrative rules implicating the fundamental right to a clean and healthful environment would be subject to strict scrutiny.¹⁷³ To survive strict scrutiny, the state would have to show first that the statute or rule serves a "compelling state interest," second, that "its action is closely tailored to effectuate that interest," and third, that it is "the least onerous path that can be taken to achieve the State's objectives."¹⁷⁴

In *Cape-France Enterprises v. Estate of Peed*¹⁷⁵ the Court held that the right to a clean and healthful environment is a fundamental right subject to strict scrutiny. The Court further extended the right to include private action, and thus private parties, as well as government action.¹⁷⁶

In *Northern Plains Resource Council v. Montana Board of Land Commissioners*,¹⁷⁷ the Court declined to apply strict scrutiny when an environmental organization challenged the Montana Land Board's decision to lease mineral interests to a coal company without the preparation of an environmental impact statement (EIS). The Court applied rational basis to the Montana Environmental Policy Act and determined that "even though the lease

169. *Id.* art. IX, § 1.

170. 988 P.2d 1236 (Mont. 1999).

171. *Id.* at 1244.

172. *Id.* at 1246.

173. *Id.*

174. *Id.* at 1240.

175. 29 P.3d 1011, 1016-1017 (Mont. 2001).

176. *Id.* at 1017.

177. 288 P.3d 169, 174 (Mont. 2012).

2016 *CONSTITUTIONAL RIGHT TO FARM & RANCH IN MONTANA*109

could ‘ultimately empower’ the lessee to conduct oil and gas activities that would have a significant impact on the environment, an EIS was not required at the point of issuing leases.”¹⁷⁸

John Echeverria, a professor at Vermont Law School, has argued that the recent losses in *Northern Plains Resource Council* and similar cases demonstrate an “unmistakable trend in the direction of the Court’s decision-making on environmental issues over the last 15 years.”¹⁷⁹ By Echeverria’s analysis, “even when the environmental side of the case has prevailed in recent years, such as in a controversial stream access case, the Court’s decision-making process appears to have become more conflicted than in years past.”¹⁸⁰ According to Echeverria, “[s]everal members of the current Court appear, based on their voting records, to be openly hostile to the goal of environmental protection.”¹⁸¹

One of the biggest lessons that can be drawn from the case law regarding the right to a clean and healthful environment is that there is tremendous risk of diluting or narrowing a right if the level of scrutiny is too high. Under this high bar, nearly every Montanan could be considered guilty of violating our own right to a clean and healthful environment simply by producing any molecule of pollution, perhaps simply by driving to work in the morning. Other than in *Peed*, the court has demonstrated a desire to avoid the clean and healthful environment question.

2. *Right to Hunt and Fish*

Montana’s right to hunt and fish¹⁸² provides an excellent comparison point for a potential right to farm and ranch because it arose in response to similar concerns and was placed outside of Article II in the Montana Constitution. The right was added to Article IX of the Montana Constitution in 2004 through the amendment process.¹⁸³ Article IX, Section 7, “Preservation of Harvest Heritage” states: “The opportunity to harvest wild fish and wild game animals is a heritage that shall forever be preserved to the indi-

178. *Id.* at 173–175.

179. John D. Echeverria, *State Judicial Elections and Environmental Law: Case Studies of Montana, North Carolina, Washington, and Wisconsin*, 16 *Vt. J. ENVTL. L.* 363, 378 (2015).

180. *Id.* at 377.

181. *Id.* at 378.

182. Professor Gordon argues that this is not a “right” in Montana at all, but rather “a value to preserve.” She does say that the House Fish, Wildlife, & Parks Committee “seemed to take for granted that the amendment would create a right, but a problematic one.” Gordon, *supra* note 149, at 13–14. This article treats this as a “right” for discussion purposes and because many people interpret it as a right, as evidenced by the language of the proponents’ arguments in the 2004 voter guide. BOB BROWN, 2004 VOTER INFO. PAMPHLET 15 (2004), available at <http://perma.cc/JXV4-Y9B2>.

183. MONT. CONST. art. IX, § 7. Professor Gordon notes that there were discussions about moving the amendment to Article II, Gordon, *supra* note 149, at 14.

vidual citizens of the state and does not create a right to trespass on private property or diminution of other private rights.”¹⁸⁴

The Preservation of Harvest Heritage Amendment was originally introduced in the 2001 legislative session as HB 264, but did not pass until introduced in the 2003 session as HB 306.¹⁸⁵ Representative Dave Lewis stated during the House Committee on Fish, Wildlife & Parks hearing on HB 264 that the purpose of the bill was “to avoid possible future animal rights issues.”¹⁸⁶

Professor Gordon concluded the purpose of Montana’s amendment and those of other states “is to ensure the American hunting tradition is protected from major threats against it, namely anti-hunting activity from animal rights advocates.”¹⁸⁷ The National Rifle Association, which has been heavily involved in the passage of right to hunt amendments nationwide, has specifically endeavored to “provide specific protections against the foreseeable attacks that will come from the Humane Society of the United States.”¹⁸⁸

House Bill 306 passed the House 81–17 and the Senate 49–1, far surpassing the 100 votes needed to place the proposed amendment on the ballot.¹⁸⁹ The amendment was presented to voters on the 2004 general election ballot where it passed overwhelmingly with 80.60% of the vote.¹⁹⁰

Montana is one of 18 states that currently have constitutional provisions protecting the right to hunt and fish.¹⁹¹ Vermont has had language pertaining to the right in its constitution since 1777.¹⁹² The others, Alabama, Arkansas, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Minnesota, Nebraska, North Dakota, Oklahoma, South Carolina, Tennessee, Virginia, Wisconsin and Wyoming, have all passed provisions since 1996.¹⁹³ The California and Rhode Island constitutions guarantee the right to fish but not to hunt.¹⁹⁴ Alaska’s constitutional language, “[w]herever occurring in

184. MONT. CONST. art. IX, § 7.

185. Gordon, *supra* note 149, at 4, 14.

186. *Id.* at 4 (citing *Mont. H. Fish, Wildlife & Parks Comm.: Hearing on H. 264*, 57th Legis., Reg. Sess. 15 (Jan. 16, 2001), available at <http://perma.cc/C7RX-BQN9>).

187. *Id.* at 6.

188. *Id.* at 18 (citing Daren LaSorte, *Right to Hunt: Oklahoma Sportsmen Have Opportunity to Establish National Model*, NRA-INST. FOR LEGISLATIVE POLICY, (Sept. 16, 2008), <https://perma.cc/DZ8D-A5S5>).

189. DETAILED BILL INFO. H. 306, 58th Leg., Reg. Sess. (Mont. 2003), available at <http://perma.cc/3XUT-ZCN6>.

190. *Montana Right to Wild Game Hunting and Fishing, C-41 (2004)*, BALLOTPEdia: : THE ENCYCLOPEDIA OF AM. POLITICS, <http://perma.cc/3SDC-A5JJ> (last visited May 22, 2015).

191. Douglas Shinkle, *State Constitutional Right to Hunt and Fish*, NAT’L CONFERENCE OF STATE LEGISLATURES, (March 26, 2015), <https://perma.cc/57R6-6N92?type=image>.

192. *Id.*

193. *Id.*

194. *Id.*

2016 *CONSTITUTIONAL RIGHT TO FARM & RANCH IN MONTANA*111

their natural state, fish, wildlife, and waters are reserved to the people for common use,” is considered to confer a right based on case law.¹⁹⁵ In 2015, ten states considered bills to add a constitutional right to hunt and fish: Indiana, Kansas, Maine, Michigan, Nevada, New Jersey, New York, Oregon, Texas and West Virginia.¹⁹⁶

According to Professor Gordon, the history of these hunting and fishing amendments “reflects a fear that an activity that was once ubiquitous is now under a significant enough threat to need constitutional protection.”¹⁹⁷ She argues, however, that all of the amendments “are a product of special interest fears, and, as often is the case when both special interests and fear control, most are problematic. All amend state constitutions unnecessarily.”¹⁹⁸ This line of argumentation is likely to be repeated in the context of a constitutional right to farm and ranch.

Further, Professor Gordon argues that the preservation of Montana’s harvest heritage provision is weak, as evidenced by the lack of case law utilizing the amendment.¹⁹⁹ “In a state boasting a highly active hunting population, the Court has had no opportunity to apply the amendment in the decade since Montana voters approved it.”²⁰⁰ Parties in *Bitterroot River Protective Association v. Bitterroot Conservation District*,²⁰¹ mentioned the amendment, but it was not used by the Court in determining the outcome of the case.

Perhaps further demonstrating how problematic Montana’s right to hunt and fish has been, during the 2015 Montana legislative session, the Legislature attempted to clarify whether Article IX, Section 7 includes trapping. This effort raised many of the same issues that were discussed in 2003 and 2004 but in a new context. House Bill 212 states:

The legislature, mindful of its constitutional obligations under Article II, section 3, of the Montana constitution protecting the inalienable rights of a person to pursue life’s basic necessities, enjoy the person’s life and liberties, and pursue happiness in all lawful ways, and Article IX, section 7, of the Montana constitution protecting the opportunity for a person to harvest wild fish and wild game animals while not diminishing other private rights, has enacted the laws of this title pertaining to the lawful means of hunting, fishing, and trap-

195. *Id.*

196. *Id.*

197. Gordon, *supra* note 149, at 5.

198. *Id.*

199. *Id.* at 15–16.

200. *Id.*

201. 251 P.3d 131 (Mont. 2011).

ping, as defined in 87–2–101 and 87–6–101, as adequate remedies for the preservation of the harvest heritage of the individual citizens of this state.²⁰²

The bill passed the House 64–35 and the Senate 29–21.²⁰³ Governor Steve Bullock did not veto the bill but also did not sign it, allowing it to become law.²⁰⁴

There are many parallels to be drawn between Montana’s existing right to hunt and fish and a proposed right to farm and ranch. The impetus for the amendments—concerns about efforts by animal rights activists, specifically the HSUS, to limit Montanans’ ability to engage in certain traditional practices—is the same. The right to hunt and fish provides a valuable lesson for crafting a right to farm and ranch: if the right is placed outside Article II, the language should clearly convey a “right.” Also, the success of that amendment should give advocates of a right to farm amendment hope, although there is no guarantee that Montanans will react in a similar way to an agricultural amendment, especially if the wording is stronger. If this year’s experience in Indiana is any indication, this may be a false hope. As previously discussed, the Indiana Senate killed a proposed right to farm amendment but passed a right to hunt amendment.

V. PROPOSING A CONSTITUTIONAL RIGHT TO FARM AND RANCH IN MONTANA

A. Location: Article IX

While the aborted 2013 Montana amendment placed the right to farm and ranch in Article II, lessons from the Montana’s right to a clean and healthful environment recommend another approach. As discussed above, aside from the notable exceptions in *MEIC* and *Peed*, the Montana Supreme Court has thus far been loath to address the “fundamental right” to a clean

202. H. 212, 64th Leg., Reg. Sess. (Mont. 2015), available at <http://perma.cc/2VEV-DR4W>. The bill amends Montana Code Annotated §§ 87–2–101 and 87–6–101, adding the words “harvest” and “take” to the definitions of angling, fishing, hunting, and trapping.

203. DETAILED BILL INFO., H. 212, 64th Leg., Reg. Sess. (Mont. 2015) available at <http://perma.cc/E4GY-98GG>.

204. *Governor Bullock did not Sign HB212. However He Did Not Veto it Either and as of 3/24/15 It Became Law*, TRAP FREE MONTANA PUBLIC LANDS, <http://perma.cc/WT6G-79ZA> (last visited May 21, 2015). Governor Bullock sent a letter to the Secretary of State, Linda McCulloch, explaining why he allowed the bill to become law without his signature. *Id.* He stated: “There is continuing controversy over the scope of the term ‘harvest’ as used in Section 7. The legislature, through the enactment of HB 212 brings trapping into the term ‘harvest’ a constitutional term that remains subject to varying interpretations.” *Id.* He indicated that the issue of whether Section 7 includes trapping is best decided by the judiciary. *Id.* “HB 212 legislatively grafts onto Section 7 an after-the-fact intent to include trapping. I withhold my signature from this bill because I do not believe that this legislation resolves this controversy.” *Id.*

2016 *CONSTITUTIONAL RIGHT TO FARM & RANCH IN MONTANA*113

and healthful environment. The scope of the right seems to have been narrowed due to the impracticality of enforcing it under strict scrutiny.

A right to farm and ranch should not be placed in Article II. Like the right to a clean and healthful environment, this would create too high a bar to be workable. The courts would avoid it to the point that it becomes useless. Placing the right to farm and ranch in Article II could also set up an irreconcilable conflict should the right ever be at odds with the right to a clean and healthful environment or some other fundamental right.

Article XII, where the current directive to the legislature to “protect, enhance, and develop all agriculture” resides, is also an inappropriate location for a right to farm and ranch. Article XII specifically pertains to departments and institutions, but not individual rights.

A right to farm and ranch would best fit in Article IX, Environmental and Natural Resources, surrounded by other rights such as a right to a clean and healthful environment, water rights, and the right to hunt and fish. Also, farming and ranching are dependent on land and natural resources. The right should be added as a new Section 8, just after Section 7, Preservation of Harvest Heritage.

With the right to farm and ranch outside Article II, environmental protections will still prevail. Any other concerns such as animal welfare and food safety issues would not have to survive nearly impossible strict scrutiny, but would rather face a balancing test that weighs the State’s interest in classifying against the people’s interest in obtaining constitutionally significant benefits. However, there is still uncertainty about the court’s willingness to apply middle-tier scrutiny where it seems to prefer to use either strict scrutiny or rational basis. The right to hunt and fish provides no clarity on this issue so far.

B. Text: Assert Clear Right, Direct Courts to Use Middle-Tier Scrutiny

There are a number of good examples of model text for a Montana constitutional right to farm and ranch. There are the existing amendments in North Dakota and Missouri, the proposed language moving through the process in Oklahoma, the failed language in Indiana and the language drafted by Senator Moore in 2013. Montana Code Annotated § 76–2–901, discussed above, is instructive as well, as is Montana Constitution Article IX, Section 7, Preservation of Harvest Heritage. While it is tempting to copy language from another state, Montana needs its own, unique provision.

A potential draft of a constitutional right to farm and ranch in Montana, to be placed in Article IX, new Section 8, is as follows:

To protect agriculture and the ability of farmers and ranchers to produce a safe, abundant, and secure food and fiber supply as a vital part of Montana’s economy and culture, the right of the people to engage in farming and ranch-

ing practices shall be forever guaranteed in this state. The Legislature shall pass no law that abridges the right of Montanans to employ agricultural technology and modern livestock production and ranching practices without an important reason that clearly outweighs this right.

The specific language of the first sentence clearly states the policy and confers a right not only to farmers and ranchers, but all people. That avoids confusing distinctions between who exactly is a farmer or rancher and who is not. This is also in keeping with the language of Article XII which applies to “all agriculture.” The second sentence attempts to avoid the pitfalls that have faced Montana’s right to hunt and fish by clearly expressing a right and giving courts clear direction on how the right should be scrutinized, in keeping with middle-tier scrutiny as appropriate for rights outside of Article II. The courts, then, will be tasked with balancing the right to farm and ranch against the government’s interests in abridging that right. For example, this language would allow for vital regulation of agriculture regarding legitimate, science-based concerns about environmental protections, food safety, and animal welfare. At the same time, it will shield agriculture, especially animal agriculture, from frivolous, emotion-based attempts to curb or eliminate the industry altogether.

VI. CONCLUSION

While Montana already has many laws that benefit agriculture, a constitutional amendment for the right to farm and ranch would add another layer of protection for Montana’s farmers and ranchers. A right to farm and ranch constitutional amendment would make a strong statement that Montana cares deeply about its agricultural heritage and wants to see the economic and cultural tradition continue. By carefully wording the provision and placing it outside Article II, important and necessary regulations of the industry would remain possible.

The Montana Constitution is an apt forum for the state to deliberate rights and provides an important opportunity for Montana’s farmers and ranchers to tell their story to the people of Montana. Passing a right to farm and ranch amendment will not solve all of agriculture’s concerns. HSUS and other groups will likely continue their efforts to regulate agriculture. Consumers will still have questions and concerns about where their food comes from. Still, it is a good place to start.

The likelihood of success for a constitutional right to farm and ranch in Montana is unclear. Agriculture contributes greatly to the economy of Montana and has helped shape the culture and heritage of the state. Montana is a pro-agricultural state in many ways, but demographics continue to change. Fewer and fewer people are directly involved in agriculture today than in times past. More people live in urban areas than rural. A proposed amend-

*2016 CONSTITUTIONAL RIGHT TO FARM & RANCH IN MONTANA*115

ment would either have to make it through the legislature or earn enough signatures to get on the ballot through the initiative process, and then gain the approval of the electorate. The success of such an amendment would require a public relations campaign to emphasize the importance of agriculture in Montana. The campaign would have to show that the amendment would benefit all Montanans, not just those directly involved in agriculture. Throughout the process there will be political dynamics and campaign rhetoric. HSUS knows it is the target of these amendments and is demonstrating its willingness to fight back in Oklahoma. There will be many lessons to be learned from Oklahoma. It is up to the agricultural community to decide if they think the amendment's potential benefits outweigh the costs of running a campaign

Ultimately, Montana voters, either through an amendment process or otherwise, will decide whether or not agriculture will maintain its strong foothold in our economy and laws for the foreseeable future.

