Private Governance and Animal Welfare

Sarah J. Morath

As public support for farmed animal welfare standards has grown, private entities have responded in a number of ways. Recently, Walmart announced it would adopt the globally recognized “Five Freedoms” of animal welfare. In spring 2016, Tyson Foods, the largest meatpacker in the United States, announced that it would eliminate the use of antibiotics in its poultry production by September 2017. A few months later, following on the heels of General Mills and Walmart, McDonald’s, the biggest purchaser of eggs in the United States, announced plans to go “cage free” over the next ten years. This activity in the business world points to a “tipping point” in the animal welfare movement.

The food industry’s changing attitude toward farmed animal welfare is a result of dedicated lobbying by the Humane Society of the United States and other nonprofits, as well as growing consumer and investor interest in food safety, ethical food production, and food ingredients. Several surveys have shown that animal welfare is a priority for consumers and that consumers are willing to pay more for humanely raised products. For example, a 2014 survey by the American Humane Association, the organization that administers the third-party American Humane Certified labeling program, reported that the “humanely raised” label was the most important label to consumers, followed by the “antibiotic free” label. Additionally, 75% of respondents were “very willing” to pay more for humanely raised products. In addition, the number of global investors interested in animal welfare standards is growing.

Currently, there are no federal animal welfare standards for agricultural animals. While several states have recently enacted standards for agricultural animals, these efforts have been viewed as merely codifying industry practice. This regulatory void has allowed private entities from the food industry (particularly, retailers and restaurants) to freely adopt voluntary standards, perform audits, and add labels. Retailer campaigns are viewed as a favorable way to address animal welfare standards because they can create a “race to the top” environment in the marketplace, where costs are shared.

10. Id. at 7.
11. See infra Part III(C).
16. See id.
Drawing from the scholarly work on private environmental governance, this Article explores the various types of private animal welfare governance that has emerged in response to both a regulatory void and a growing demand for the humane treatment of agricultural animals. Michael Vandenbergh describes private environmental governance as “the development and enforcement by private parties of requirements designed to achieve traditionally governmental ends”—such as reducing externalities or managing a public good or commonly pooled resource. The negative externality in the context of animal welfare is both moral (animal suffering) and technical or physical (consumer safety and environmental pollution).

Private environmental governance has emerged as an “important and growing component of modern environmental governance.” Action by a private entity can include “standard-setting, implementation, monitoring, enforcement, and adjudication functions of governments.” In private governance arrangements, governmental bodies “do not participate in or control the outcome of these private requirements” to a noticeable degree. Instead, private environmental governance arises through private-private interactions distinct from typical market behavior “in the extent to which the standards of conduct are institutionalized or formalized and the extent to which the activity influences the behavior of large, geographically distant groups.”

Part I of this Article provides a brief overview of farmed animal welfare concerns. Part II introduces private environmental governance and describes three types of instruments used by private firms to address farmed animal welfare: performance standards, information, and procurement or supply-chain contracting. Part III explores different motivations for the changes being made by private entities including: consumer preference, state requirements, and investor concerns. The Article concludes by identifying potential barriers to the private governance of animal welfare.

I. Farmed Animal Welfare

The agricultural industry has long benefited from “agricultural exceptionalism,” or the use of legal exceptions to protect industry.” The term agricultural exceptionalism is often associated with labor laws, which exempt farm workers from many of the laws intended to protect laborers, like the Fair Labor Standards Act. Farm businesses are also exempt from involuntary bankruptcy laws, environmental laws, antitrust restrictions, and animal welfare standards.

The environmental harm from industrialized farming operations is extensive. Modern farms exacerbate problems like habitat loss and degradation, soil erosion, water resources depletion, soil salinization, chemical releases, animal waste disposal, water pollution, and air pollution. More recently, farms have been identified as “significant contributors to climate change.” Industrial agricultural operations are not only fossil fuel-intensive, but livestock production is responsible for 50% of total anthropogenic methane emissions. Globally, the agricultural sector is the world’s second largest emitter of greenhouse gases, emitting six billion tons or 13% of total global greenhouse emissions in 2011. In the United States, the agricultural industry was responsible for 9% of the total greenhouse gas emissions in 2015.

But not all farming operations have the same environmental impact. The farming operations responsible for the most significant environmental harms are called concentrated animal feeding operations (“CAFOs”). Unlike small-scale farms, CAFOs aim to increase yields through operations that maximize livestock density. While these operations have significant environmental impacts (such as degrading our soil, water, and air), concentrated farming operations also pose animal welfare concerns because of the number of animals housed in a single confined space. Some scholars argue that animals raised on small farms suffer less than those raised in CAFOs.

24. Id. at 935–36.
25. Id. at 936. The term “animal” under the Animal Welfare Act, 7 U.S.C. § 2131 et seq. (2012), “excludes” “horses . . . and [other] farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber.” Id. at § 2132(g).
29. The energy sector, which includes emissions from power generation and transportation, is the first. See Stephen Russell, Everything You Need to Know About Agricultural Emissions, WRI RESEARCH INST.: BLOG (May 29, 2014), http://www.wri.org/blog/2014/05/everything-you-need-know-about-agricultural-emissions [https://perma.cc/38HT-J7KA].
32. See Matheny & Leahy, supra note 15, at 325–26 (“Although factory farms may be economically efficient in producing meat, eggs, and milk at low cost, they significantly impair animal welfare.”).
CAFOs because they are not subject to “intense confinement practices” found on industrial farms.\(^{35}\) CAFOs dominate industrial agriculture with ninety-nine percent of farm animals in the United States raised on factory farms in concentrated feedlots.\(^{34}\) In 2011, factory farms raised 99.9% of chickens for meat, 97% of laying hens, 99% of turkeys, 95% of pigs, and 78% of cattle currently sold in the United States.\(^ {35}\) The routine practice of caging hens and crating pregnant sows\(^ {36}\) prevents these animals from spending time outdoors or engaging in natural behaviors like foraging, nesting, or turning around.\(^ {37}\)

Animal confinement is just one farmed animal welfare issue. Other concerns include physical alterations like tail-docking and beak trimming, access to natural light, breeding for high production yields, misuse or overdose of antibiotics, and abuse or neglect by farm workers.\(^ {38}\) Farmed animal welfare considers the overall “quality of life experienced by farm animals.”\(^ {39}\) Concern about farmed animal welfare also extends to how farmed animals are transported to slaughter and the ways in which they are slaughtered.\(^ {40}\)

Numerous surveys suggest that public concern about the treatment of farmed animal welfare has increased over the years.\(^ {41}\) For example, a 2016 survey found that 77% of consumers are “concerned about the welfare of animals that are raised for human food.”\(^ {42}\) A Consumer Reports Survey found that “86[%] of consumers who buy organic food said they strongly cared that the animal farms their food was raised on were held to high standards.”\(^ {43}\) In that same Consumer Reports Survey, 74% of consumers reported “paying more attention to the labels that pertain to how an animal was raised than they were five years ago.”\(^ {44}\) Consumers are also willing to pay more for humanely raised animal products.\(^ {45}\)

Sixty-seven percent of consumers reported a willingness to purchase welfare certified products even if it means a modest increase in price.\(^ {46}\) Even though there is growing public interest in animal welfare—unlike European countries, which have had highly developed animal protection laws for some time—United States federal law offers little protection for factory farmed animals. For example, The Animal Welfare Act only covers the treatment of animals used in research, retail, and exhibition, and expressly excludes farmed animals.\(^ {47}\) Federal regulation of farmed animal treatment is limited to the transport and slaughtering of animals through the Humane Methods of Slaughter Act (“HMSA”), enacted in 1958,\(^ {48}\) and the Twenty-Eight Hour Law, enacted in 1877.\(^ {49}\) Despite these laws, many farmed animals die during transport or are still conscious when slaughtered.\(^ {50}\) Furthermore, these laws are not strictly enforced and offer exemptions for poultry,\(^ {51}\) which accounts for approximately 95% of the animals slaughtered in the United States.\(^ {52}\)

The closest the U.S. federal government has come to setting farmed animal welfare standards is through the Organic Food Production Act.\(^ {53}\) On January 17, 2017, the U.S. Department of Agriculture (“USDA”) published a rule (as part of the Organic Food Protection Act) requiring farms engaging in organic livestock and organic poultry operations to adhere to specified animal welfare standards.\(^ {54}\) The Organic Livestock and Poultry Practices (“OLPP”) rule enumerates minimum indoor and outdoor space requirements and requires enrichment (such as dust bathing materials), for poultry.\(^ {55}\) The rule also restricts physical alterations, like tail-docking in pigs and de-beaking of chickens and turkeys.\(^ {56}\) While these changes have been called a “victory,” the rule applies only to certified organic livestock and poultry, which
II. Private Governance

Recently, scholars have offered private governance as an "alternative or complement" to public regulation or governance by the administrative state. More and more private entities are "developing and implementing rules that serve the traditional social goals of public regulation, particularly health, safety, and environmental protection." As the name suggests, private governance is governance by nongovernmental means. Private governance arrangements can be created by private firms and business groups or nongovernmental organizations (NGOs) and civic participants or community actors. Hybrid arrangements between business, nongovernmental, or civic participants also exist. Private governance occurs when these groups perform the functions traditionally performed by public entities such as "standard-setting, implementation, monitoring, enforcement, and adjudication." For example, without government intervention, industry groups often set specific standards for member companies. Private firms can also receive specific certification or labels from NGOs for voluntarily adhering to established standards.

Private governance does have its limits—the most notable being that participation is voluntary. When private entities no longer want to comply with a specific standard, they can choose not to with few ramifications. Furthermore, the negative externalities are never fully internalized. Other noted disadvantages include "conflicts of interest, inadequate enforcement and accountability, and insufficient monitoring of compliance." Despite these concerns, scholars have argued that private governance is a necessary component of addressing global environmental concerns, including climate change. As the next section explains, private environmental governance has emerged as an "important and growing component of modern environmental governance."

A. Private Environmental Governance

"Private environmental governance" is a type of private governance that "addresses environmental quality and other public goods ... but [] does not use the coercive power of the state or draw on democratic institutions for its legitimacy." Private environmental governance arises when private organizations perform traditionally governmental functions, including reducing negative externalities and managing public goods or common pool resources. Private entities have tackled concerns about deforestation, climate change, and...
fishery management using governance instruments or tools such as voluntary standards, certifications, and labeling standards. The Marine Stewardship Council ("MSC") system for labeling sustainably harvested fish, the Forest Stewardship Council ("FSC") system for labeling sustainably harvested forest products, and the U.S. Green Building Council’s ("USGBC") Leadership in Energy and Environmental Design ("LEED") standards for certifying environmentally sustainable buildings are all examples of private environmental governance through labeling and certification.

The standardization of food date labels provides a good example of governance through an industry standard as opposed to government regulation. In February 2017, in an effort to reduce food waste, the Food Marketing Institute ("FMI") and the Grocery Manufacturers Association ("GMA")—two major trade associations for retailers and consumer products manufacturing—recommended simplifying the phrases on food date labels from ten to four or two words: “best if used by” and “use by.” Retailers and manufacturers have been encouraged to immediately use these two phrases, thereby clarifying and simplifying date labels. While this industrywide initiative is voluntary, advocates have applauded this as a "critical step" in the food waste fight.

Other private governance tools include supply-chain contracting where contract terms require suppliers to maintain certain environmental standards. Walmart, for example, requires that its suppliers use less energy; similarly, Hewlett-Packard requires its suppliers to reduce their use of toxic substances. As the next section explains, private businesses, nonprofits, and partnerships between business and nonprofits are using similar private governance tools to address the farmed animal welfare concerns of consumers and investors.

B. Private Animal Welfare Governance

In 2015, McDonald’s announced it was transitioning to "cage-free eggs," so that by 2025, all eggs sold in its restaurants in the United States and Canada would be sourced from hens raised in "aviary systems": hen houses where birds can move around on ramps and platforms. The move quickly prompted other food businesses to respond and, by the end of 2016, more than 200 large companies, including Starbucks, PepsiCo, and Walmart, publicly announced their decisions to go “cage-free.” According to Paul Shapiro, Vice President of Policy for the Humane Society of the United States ("Humane Society"), the move by McDonald’s essentially “ends any debate that there may have been over whether cages have a future in the industry.” Earlier in 2015, McDonald’s also declared that it would stop using chickens which have been exposed to antibiotics that are used to treat humans.

McDonald’s commitment to source cage-free and antibiotic-free chickens is just one example of the food industry addressing farmed animal welfare concerns. In 2007, Smithfield Farms, the world’s largest pork and hog buyer, began asking independent farmers to convert from housing sows in gestation crates to group housing by 2022. At that time, 40% of Smithfield sows were raised on independent farms, while 60% were raised on company-owned farms, which Smithfield was already in the process of converting to group housing. By the end of 2015, 81.8% of Smithfield’s company-owned farms had been converted to group housing. As with McDonald’s decision to go cage-free, the Humane Society deemed Smithfield’s announcement “certain death for the gestation crate in pork production.”

In yet another example, in 2015, Walmart—the nation’s largest grocery retailer—announced its “support” for the “Five Freedoms” of animal welfare and made a public commitment to work with its meat, seafood, poultry, deli, and egg suppliers to implement practices consistent with the Five Freedoms.

B. Private Animal Welfare Governance

In 2015, McDonald’s announced it was transitioning to “cage-free eggs,” so that by 2025, all eggs sold in its restaurants in the United States and Canada would be sourced from hens raised in “aviary systems”: hen houses where birds can move around on ramps and platforms. The move quickly prompted other food businesses to respond and, by the end of 2016, more than 200 large companies, including Starbucks, PepsiCo, and Walmart, publicly announced their decisions to go “cage-free.” According to Paul Shapiro, Vice President of Policy for the Humane Society of the United States (“Humane Society”), the move by McDonald’s essentially “ends any debate that there may have been over whether cages have a future in the industry.” Earlier in 2015, McDonald’s also declared that it would stop using chickens which have been exposed to antibiotics that are used to treat humans.

McDonald’s commitment to source cage-free and antibiotic-free chickens is just one example of the food industry addressing farmed animal welfare concerns. In 2007, Smithfield Farms, the world’s largest pork and hog buyer, began asking independent farmers to convert from housing sows in gestation crates to group housing by 2022. At that time, 40% of Smithfield sows were raised on independent farms, while 60% were raised on company-owned farms, which Smithfield was already in the process of converting to group housing. By the end of 2015, 81.8% of Smithfield’s company-owned farms had been converted to group housing. As with McDonald’s decision to go cage-free, the Humane Society deemed Smithfield’s announcement “certain death for the gestation crate in pork production.”

In yet another example, in 2015, Walmart—the nation’s largest grocery retailer—announced its “support” for the “Five Freedoms” of animal welfare and made a public commitment to work with its meat, seafood, poultry, deli, and egg suppliers to implement practices consistent with the Five Freedoms.

---


89. See Beth Koskitt, Inside McDonald’s Bold Move to Go Cage Free, FORTUNE (Aug. 18, 2016), http://fortune.com/mcdonalds-cage-free/.

90. See Strom, supra note 6.


93. See id.


95. Eliza Barclay, supra note 92.

Third-party NGOs can also set and monitor performance standards. A performance standard might require or prohibit certain conduct, like requiring the use of a certain technology to reduce greenhouse gas emissions or prohibiting the use of toxic chemicals. Performance standards also include goal setting or targets, like reducing energy and water use by a certain amount. In the context of farmed animal welfare, firms, industry groups, and third-parties have been active in setting performance standards.

1. Single-Firm

Private entities can “self-regulate” by setting their own internal policies without input from other parties, such as the government or industry. For example, Brunty Farms, in Ohio, declared through its website that its animals are “pasture raised.” Similarly, Dole & Bailey, a processor, butcher, and distributor of meat in the Northeast and the nation’s first green processor, is using Animal Welfare Approved (“AWA”) meats. No entity is requiring Brunty Farms or Dole & Bailey to sell pasture-raised or AWA certified products. Rather, both the farmer and the distributor in these examples are acting to achieve a performance standard individually set and self-imposed, as opposed to a standard set by a governmental agency or an industry group.

2. Industry Groups

Industry groups, however, can and often do set performance standards. In the context of farmed animal welfare, several industry standards have been set at the production level. In 2005, the National Chicken Council, a national, nonprofit trade association for the U.S. broiler chicken industry, developed Animal Welfare Guidelines and an Audit Checklist to assist the people and companies that produce and process chickens for food. While 95% of chickens are raised by producers who adhere to these guidelines, the guidelines have been called “woefully inadequate” by the Animal Welfare Institute, requiring only the “absolute minimum” to address concerns such as stocking density, artificial lighting, and air quality. Other examples of performance standards

---


99. Strom, supra note 2.


103. As Sarah E. Light and Eric W. Orts explain, these instruments parallel the instruments seen in public environmental law. See Light & Orts, supra note 78, at 23 (describing the primary categories of public environmental law as prescription ("command-and-control"), property, market leveraging, tradable permit regimes, information, procurement, and insurance). Not all instruments are being used in the animal welfare context. This Article looks at prescription, or standard setting, information, and procurement.

104. See id. at 26–27.

105. See id. at 25–26.

106. See id. at 26–29.

107. See id.

108. This is sometimes called corporate social responsibility, or “CSR.” See Roberts, supra note 66, at 87.


set by industry groups include The American Veal Association’s decision to encourage all veal producers to go crate-free by 2017, and the National Milk Producers Federation’s recommendation that tail-docking of dairy cattle be phased out by 2022. While industry performance standards are better than no performance standards, they often impose only minimal requirements, and, like single-firm standards, are voluntary.

iii. Third-Party

A final way to set performance standards without a government mandate or regulation is through third-party certification programs. Third-party certification often involves the use of labels to demonstrate that the producer has complied with certain standards. In the context of farmed animal welfare standards, three labels indicate the highest animal welfare standards: AWA; Certified Humane (“CH”); and Global Animal Partnership (“GAP”).

AWA is a program of A Greener World (“AGW”), a 501(c)(3) nonprofit organization whose goal is to improve farmed animal welfare by certifying family farmers who adhere to what AWA describes as “the highest animal welfare and environmental standards.” Unlike the other two certifications, AWA is the only animal welfare certification accredited as meeting the requirements of the International Organization for Standardization’s ISO/IEC 17065.

The CH certification program is an international program of Humane Farm Animal Care (“HFAC”), a 501(c)(3) nonprofit organization dedicated to “improving the lives of farm animals in food production from birth through slaughter” by “driving consumer demand for kinder and more responsible farm animal practices.” Since 2003, HFAC has certified over 144 companies and over 5,000 farms for compliance with HFAC standards. As compared to AWA and GAP, CH Raised and Handled products are sold by the widest variety of distributors, retailers, and restaurants. The label can be found in the United States, Brazil, Canada, and Peru.

The final third-party certification program is GAP, a 501(c)(3) nonprofit organization based in Austin, Texas, dedicated to “working collaboratively to facilitate and encourage continuous improvement and higher welfare in animal agriculture.” GAP certification is multi-tiered, in which operations with higher animal welfare standards receive higher “Step Ratings” (step levels range from one through five). GAP is an outgrowth of work done by Whole Foods Market (“WFM”) in 2005. In 2011, WFM established a procurement policy of buying only GAP-certified fresh meats. As a result, according to GAP, the vast majority of today’s GAP-certified farms and ranches maintain their GAP certification in order to sell (or continue to sell) fresh meats into the WFM supply-chain.

All three certification labels have standards for farmed animals, such as: bison; pigs; beef and dairy cows, meat and dairy sheep, broiler chickens, turkeys, laying hens, and meat and dairy goats. Standards cover things like outdoor access, use of feedlots, weaning, physical alterations, air quality, natural light, and antibiotic use. For example, AWA requires turkey growers to provide continuous pasture access, while such access is optional under the CH certification. Similarly, to be certified as “GAP Step 3” or above, turkey growers must provide pasture access. Standards for weaning dairy cattle also vary, with AWA recommending the weaning of dairy cattle after twelve weeks (but not before six weeks), CH prohibiting weaning before five weeks, and GAP having no standard for the weaning of calves.

All three certifications require auditing of the facilities, the animals, and records. Both AWA and CH perform audits of farms, while GAP accredits independent certification companies to conduct audits and award GAP certifications on its behalf. AWA and CH consider conditions from birth through slaughter, while GAP covers birth through life on-farm. There is no application or certification fee for AWA, and farms that pass an AWA audit can apply to CH for equivalency certification without paying CH audit or certification fees. CH has an application fee of $75 and inspection fees of $700 to $800. There is no GAP application fee, but inspection fees run from $1,000 to $1,750. In addition to completing the audit process, a farmer or processor who plans to market welfare-certified animal products and wishes to use the certification program label on its products must first apply to the USDA’s Food Safety and Inspection Service (“FSIS”) for approval to do so.

117. See id. at 14. AGW took over responsibility for the AWA program in 2014 from the Animal Welfare Institute and also manages the Certified Grass-fed and Certified Non-GMO certification. See id.
118. Id.
119. See id.
120. Id. at 24.
121. ASPCA, supra note 116, at 24.
122. Id. at 25.
123. See id.
124. Id. at 35.
125. See id. at 36.
126. See ASPCA, supra note 116, at 35.
127. See id.
128. See id.
129. See id. at 6.
130. See id. at 8–13 (comparing programs to highlight what the standards cover).
131. See ASPCA, supra note 116, at 13.
132. See id.
133. Id. at 10.
134. Id. at 7.
135. See id.
136. See ASPCA, supra note 116.
137. See id.
138. See id.
139. See id.
2. Information

Information is another instrument entities along the food supply-chain can use to proclaim adherence to animal welfare standards. Information can be conveyed to the public in a variety of ways, including disclosures and reports, ranking and awards, and labels. In 2012, the Business Benchmark of Farm Animal Welfare ("BBFAW") became the first global measure of corporate farmed animal welfare.141 Its stated goals are to (1) provide investors with the information they need to understand the business implications of farmed animal welfare for the companies in which they are invested; (2) provide investors, governments, academics, NGOs, consumers and other stakeholders with an independent, impartial, and reliable assessment of individual company efforts to adopt higher farmed animal welfare standards and practices; and (3) provide guidance to companies interested in improving their management of and reporting on farmed animal welfare issues.142 In total, ninety-nine companies were included in the 2016 Benchmark, twenty-eight of which were incorporated in the United States.143 Companies are broadly spread across the three food industry subsectors: food retailers and wholesalers, restaurants and bars, and food producers.144

Companies are assessed on a number of criteria, including (1) whether the company publishes animal welfare standards; (2) assigns management responsibility for farmed animal welfare to an individual or specified committee; (3) sets objectives and targets for the management of farmed animal welfare; (4) describes how it implements its farmed animal welfare policy (or equivalent) through its supply-chain; (5) promotes higher farmed animal welfare to consumers through education; and (6) awareness-raising activities.145

Information can also be provided through rankings and awards. The ranking system administered by the BBFAW is a tiered system with "Tier 1" representing the best performances and "Tier 6" representing the worst.146 Businesses like Nestle and Unilever were assessed in 2016, with Unilever achieving Tier 2 (the "[Animal Welfare] Integral to Business Strategy" tier), and Nestle achieving Tier 3 (the "[Animal Welfare] Established but Work to be done" tier).147 Kraft Heinz landed in Tier 6, with "no evidence" of animal welfare being important to the business’ performance.148

Compassion in World Farming, which helps administer the BBFAW rankings, also distributes the Good Farm Animal Welfare Awards to food companies for policies or commitments that result in positive impacts to farmed animal welfare across supply chains.149 The 2016 winners included both large and small businesses, such as ALDI, Pret A Manger, and The Happy Egg Co.150 In 2015, Aramark received the Henry Spira Humane Corporate Progress Award, given by the Humane Society.151

3. Procurement or Supply-Chain Contracting

The final instrument private entities are using to achieve animal welfare goals is procurement or supply-chain contracting.152 With this instrument, a business entity can impose animal welfare standards on its suppliers or vendors and either refuse to purchase from the supplier or terminate an existing contract for failing to comply with enumerated standards. The firms engaging in this practice are both large and small.153 For example, Perdue, the fourth-largest poultry producer (with more than 2,100 farm contracts), will no longer compensate suppliers solely for efficiency; rather, Perdue will reward them for ensuring better welfare for the birds they tend.154 A smaller scale example is Kitchfix, a meal delivery service in Chicago, Illinois, which purchases from farms that have AWA certification.155

As with other private governance tools, private entities voluntarily engage in supply-chain contracting to achieve animal welfare requirements. Some companies “favor” certain performance while others may “require” the same conduct. Furthermore, some contracting goals do not have effective dates, and the effectiveness of this approach depends on the company monitoring its suppliers. For example, General Mills has said it will “favor”—but not require—pork suppliers to provide “administrative plans by 2017 to create traceability and end their use of gestation crates within the U.S. pork supply chain.”156 Similarly, Aramark will “[c]e

---

152. See Roberts, supra note 65, at 87 (describing supply-chain contracting as a “source of environmental and social regulation”).
153. Id. at 87-88.
ngage its employees and suppliers to understand animal welfare issues; [i]ncorporate our principles and policy into all contracts. RFIs, RFPs, etc.; [r]equire 3rd party [sic] documentation demonstrating that suppliers meet or exceed our expectations; [r]equire annual supplier data progress reports; [and] [e]xpect swift and decisive action in unforeseen cases of animal abuse or cruelty.157 Likewise, Walmart will require its pork supplies to “have on-farm video monitoring for sow farms” and will perform “unannounced animal welfare video audits by an accredited and independent third-party.”158 Episodes like Chipotle’s decision to refrain from selling carnitas when its pork provider was in violation of Chipotle’s welfare standards and the restaurant chain was unable to find a replacement shows how important animal welfare considerations are to some supply-chain contracts.159

III. Motivations for Change

There are three main reasons for private entities’ growing interest in animal welfare: consumer preferences, state actions, and investor and shareholder concerns.160

A. Consumer Preferences

Animal welfare is no longer deemed “a niche issue.”161 Whether in response to advocacy campaigns by People for the Ethical Treatment of Animals (“PETA”), Mercy for Animals, or a desire for healthier food,162 consumers are more aware of animal conditions than just a few years ago.163 Several surveys reveal that consumers are interested in animal welfare concerns, pay attention to food labels addressing animal welfare, and are willing to pay more for food that is more humanely produced. For example, the 2015 Consumer Reports Survey found that 84% of consumers view “better living conditions for farm animals” as “very important” or “important.”164 The 2016 Lake Research Partners Survey found that 74% of consumers say they are paying more attention than they were five years ago to labels reflecting how animals are raised.165 In the same survey, 67% of consumers stated they would purchase welfare-certified products even if it means a modest rise in price.166 Through boycotts and petitions, consumers are demanding action from businesses regarding animal welfare, and companies like Walmart are not shy about making clear that they are responding to their consumers.167

B. State Requirements

While all fifty states have laws prohibiting animal cruelty, all either expressly or implicitly exempt farm animals from these protections.168 Reflecting consumer interest and preference, citizens have engaged in ballot initiatives in Florida, Arizona, California, and Massachusetts169 to improve animal welfare standards.170 These initiatives, which have been led by the Humane Society of the United States, have passed fairly easily. For example, the 2008 California ballot initiative banning veal crates, sow gestation crates, and battery cages for hens passed 63% to 37%.171 The 2016 Massachusetts initiative banning gestation crates, veal crates, hen confinement, and forbidding the sale of veal, pork, or eggs from confinement passed by an even larger margin—78% to 22%.172

The cage-free egg movement is particularly illuminating. In 2008, United Egg Producers, the main industry group for egg producers, raised $10 million to defeat California’s cage-free ballot initiative and gained the backing of at least twenty-eight state newspaper editorial boards.173 But in the end, 64% of California voters supported the measure.174 United Egg Producers decided not to fight Massachusetts’s ballot initiative, instead focusing on “educat[ing] the law-

---

155.自然保护和动物福利的动机

有三个主要原因是私人实体对动物福利的日益增长的兴趣：消费者偏好、州行动，以及投资者和股东关注。160

A. 消费者偏好

动物福利不再被视为“一个细分领域”。161 无论是对人们为动物权益而战的“PETA”、Mercy for Animals的呼吁，还是出于对健康食品的追求，162 消费者对动物条件的认知在过去几年中变得更加敏锐。163 多个民意调查表明，消费者对动物福利问题感兴趣，会关注食品标签中关于动物福利的内容，并愿意为更加人道地生产的食品支付更多费用。例如，2015年《消费者报告》调查发现，84%的消费者认为“农场动物的更好生活条件”非常重要或重要。164 2016年Lake Research Partners调查发现，74%的消费者表示他们正在更关注动物标签，甚至愿意为此付出适度的代价。166 通过抵制和请愿，消费者正在要求企业就动物福利采取行动，而像Walmart这样的公司也不再回避表明他们正在响应消费者的诉求。167

B. 州要求

所有50个州都已经立法禁止动物虐待，但同时又都公开或隐含地为农场动物提供豁免。168 反映了消费者的兴趣和偏好，公民们已经在佛罗里达、亚利桑那、加利福尼亚和马萨诸塞州的公投中投票，以改善动物福利标准。169 这些公投活动，由美国 humane society of the united states领导，通过相对容易地通过了。例如，2008年加州的公投禁止了小牛笼、母猪妊娠笼和电池笼等设备，赢得了包括至少28家州报纸在内的编辑部的支持。173 但在最后，64%的加州选民支持了公投。174 United Egg Producers决定不为反对马萨诸塞州的公投而战，而是转而专注于“教育[选民]法律-
makers, voters and consumers” about the merits and cost-effectiveness of cage use. When asked about this move, A few years later, United Egg Producers’ President said “we don’t have any options... The activists are ripping apart conventional cages, and we have no middle ground to go to.”

Some farmed animal welfare regulations have also gone through the state legislative process. Colorado, Michigan, Ohio, Oregon, and Rhode Island all prohibit or put limits on the use of gestation crates for sows. California, New Jersey, Ohio, and Rhode Island restrict tail-docking for cattle. Michigan, Oregon, and Washington restrict the confinement of egg-laying hens. In order to comply with state regulations, private entities operating in these states will need to alter their animal welfare practices.

C. Investor and Shareholder Concerns

Investors and shareholders are also agents of change. Increasingly, investors evaluate ESG issues when making investment decisions. And “it has become increasingly important... to understand the ESG profile” of investment portfolios. As one asset management group explained, farmed animal welfare is part of “the next ESG frontier.”

The BBAFW supports the argument that “investors are key agents of change,” because they evaluate companies’ animal welfare practices. Companies with good animal welfare practices have a heightened awareness of the importance of reputational risk management, mitigation of impacts, and resilience alongside other sustainability challenges. The Global Investor Statement on Farm Animal Welfare is illustrative of growing investor interest in animal welfare. In May 2016, eighteen institutional investors signed the first global investor statement on farmed animal welfare. The signatories expect that the companies in which they have invested “have fully considered the risks and opportunities associated with farmed animal welfare, and have effective policies and processes for dealing with the challenges.” As of January 2017, twenty-three global investors have signed the animal welfare statement.

Both shareholders and investors are aware of the costs and risks associated with animal welfare. Unilever, for example, “reported its Hellmann’s brand grew by 7% in 2015, attributing the growth to its decision to source only cage-free eggs.” In contrast, in 2014, Smithfield Farms’ shares dropped 12.8%, Tyson Foods’ dropped 5.6%, and Hormel’s dropped by 3.1% during the swine influenza outbreak, a disease which spread rapidly as a result of the confined conditions of pigs. In addition to lost profits, when outbreaks like swine or avian influenza arise, companies risk harm to brand reputation, customer relations, and public perception.

Shareholders are also making their voices heard through shareholder proposals. In 2013, shareholders of Tyson Foods, together with the Humane Society, the United Methodist Church Benefits Board, and Green Century Capital Management, submitted a resolution asking that the meat giant disclose the financial and operational risks associated with its use of controversial gestation crates. The proposal explained that “Tyson’s failure to disclose the risks associated with the indefinite inclusion of gestation crates in its supply chain is of concern to shareholders.”

Within six months of the 2014 annual meeting, the Board of Directors provide a report to shareholders, prepared at reasonable cost and omitting proprietary information, detailing the possible risks and operational impacts associated with allowing the indefinite use of “gestation crates” in Tyson’s supply chain. The report should detail—using peer-reviewed data, when possible—all potential risks and impacts, includ-

175. Id.
176. Id.
188. In another example, the Avian influenza outbreak of 2015 is reported to have costs the wider economy over $3 billion. See Factory Farming, Assessing Investment Risk, FARM ANIMAL INVESTMENT RISK & RETURN, 14, 27, 30, 31 (2016), http://www.fair.org/wpcontent/uploads/FAIRR_Report_Factory_Farming_Assessing_Investment_Risks.pdf. “The large number of densely confined birds facilitates the mutation of viruses into harmful strains and international trade contributes to the global spread.” Id. at 27.
191. Id.
ing those regarding brand reputation, customer relations, public perception, and regulatory compliance.\textsuperscript{192}

While the institutional investors voted for this proposal, the board ultimately voted against it.\textsuperscript{193}

Despite increased shareholder interest in farmed animal welfare, shareholder proposals are still somewhat rare.\textsuperscript{194} In a 2013 Ernst & Young report, animal welfare or animal testing comprised 4% of shareholder proposals.\textsuperscript{195} And in 2014, only one out of four shareholder proposals on animal rights received majority shareholder support: a proposal calling on Kraft Foods to work toward higher animal-welfare standards.\textsuperscript{196} The proposal introduced by the Humane Society at Kraft Foods received the support of 76% of shareholders after the company’s board of directors endorsed the proposal.\textsuperscript{197}

IV. Implementation and Impact

A private firm’s desire to change is just the starting point for improving animal welfare. Regardless of whether a public or private approach is taken, the success of animal welfare regulation depends on completing five stages: “(1) agenda-setting, (2) negotiation of standards, (3) implementation, (4) monitoring, and (5) enforcement.”\textsuperscript{198} As described, private firms have set the agenda by agreeing to improve farmed animal welfare in a variety of ways, such as phasing out the use of crates and cages.\textsuperscript{199} They have also determined who will set these standards: the firm, industry, or a third-party.\textsuperscript{200} In addition to performance standards, firms are using information and supply-chain contracts to establish standards for animal welfare.\textsuperscript{201} These decisions comprise the negotiation-of-standards phase. What remains to be seen is whether these standards will be implemented, monitored, and enforced by private actors.

At this point, it can be predicted that cost will be an impediment to implementation. For example, if a farm with a stock of 10,000 hens is only permitted 6,200 hens on the property in the future, the producer could charge more per hen to make up the lost profit from the reduced number of hens, or it could acquire more space to maintain the 10,000-


\textsuperscript{193} See id. at 1.

\textsuperscript{194} One report found that shareholder proposals pertaining to animal welfare had decreased over 50% between 2010 and 2013. See Summer M. Hallaj, A Decent Proposal: How Animal Welfare Organizations Have Utilized Shareholder Proposals to Achieve Greater Protection for Animals, 47 J. MARSHALL L. REV. 795, 797 (2013).

\textsuperscript{195} The report is based on the EY Corporate Governance Center’s proprietary database and a review of more than 900 shareholder proposals submitted at Russell 3000 companies for annual meetings through 30 June 2013.” Ernst & Young, Taking Flight: Environmental Sustainability Proposals Gain More Attention 2–3 (2013), http://www.ey.com/Publication/vwLUAssets/Environmentsustainability_proposals_gain_more_attention/STFIE/EnvironmentalSustainabilityGainAttention.pdf.

\textsuperscript{196} James R. Copland & Margaret M. O’Keefe, A Report on Corporate Governance and Shareholder Activism 16, MANHATTAN INST. (2014).

\textsuperscript{197} Id.

\textsuperscript{198} Roberts, supra note 65, at 77 (describing the five states of regulatory activity).

\textsuperscript{199} See supra Part III.

\textsuperscript{200} See supra Part II.B.a-i.iii.

\textsuperscript{201} See supra Part II.B.


\textsuperscript{203} See Strom, supra note 154; see also Samuels, supra note 154.


\textsuperscript{205} Id.; see also The No Regulation Without Representation Act of 2016, H.R. 2887, 114th Congress (2017) (“This bill prohibits a state from taxing or regulating a person’s activity in interstate commerce unless the person is physically present in the state during the period in which the tax or regulation is imposed.”).


\textsuperscript{209} Fifefield, supra note 204.


\textsuperscript{211} The effectiveness of the private governance tool could also include consideration of accountability and transparency, legitimacy, potential for translation-
veracity of private animal welfare governance depends on a high degree of transparency, clarity, and trust. Disclosure and transparency require specific information and quantification about industry practices rather than broad unsubstantiated statements about being concerned with animal welfare and humane treatment. The risk of fraud or “greenwashing” is always a possibility. Industrial farming industry efforts to thwart transparency through legislation will only make completing the final stages of governance more difficult. The effectiveness of private animal welfare governance ultimately depends on implementing, monitoring, and enforcing animal welfare claims, and it appears that some members of the food industry are attempting to make these final stages of private governance more difficult.

213 Id.
214 Id. at 39–40 (discussing the abuse of labeling systems by companies that feel pressure to conform to consumer expectations but do not understand the potential legal liability).