

May 2020

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Recommended Citation

Pollard, Ashley (2020) "This Little Piggy Caused a Nuisance: Analyzing North Carolina's 2018 Amendment to Its Right-to-Farm Act," *Liberty University Law Review*: Vol. 14 : Iss. 3 , Article 5.
Available at: https://digitalcommons.liberty.edu/lu_law_review/vol14/iss3/5

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NOTE

THIS LITTLE PIGGY CAUSED A NUISANCE: ANALYZING NORTH CAROLINA'S 2018 AMENDMENT TO ITS RIGHT-TO-FARM ACT

Ashley Pollard[†]

“Also if a person keeps his hogs, or other noisome animals, so near the house of another that the stench of them incommodes him and makes the air unwholesome, this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house.”¹

ABSTRACT

Hogs stink. It's as simple as that. Because of this fact, North Carolina, along with many other states, adopted a “right-to-farm” statute in the late 1970s. These statutes were designed to protect farmers from being held liable for the nuisances that their farms created. The need for the statutes was felt deeply in the late 1970s and early 1980s as the suburbs began a hostile takeover of former agricultural lands. The purpose of the laws was to prevent the farmers' new neighbors from suing them for the stench, or other nuisances, caused by their farms.

In the summer of 2018, the North Carolina General Assembly passed an amendment to the North Carolina Right-to-farm Statute. This amendment substantially limited the circumstances under which a neighbor to a farm could bring a nuisance action against a farming operation. This amendment came during a summer of nuisance victories for hog farm neighbors. The legislature considered these actions “frivolous” and began its work to amend the statute to prevent similar actions from succeeding.²

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1. 3 WILLIAM BLACKSTONE, COMMENTARIES *217.
2. S.B. 711, N.C. Gen. Assemb., Reg. Sess. (N.C. 2018).

While the legislature had the best of intentions in attempting to further shield farmers from nuisance liability, it missed the point being made in the actions: factory-sized farms are damaging to property rights and human health. It is this reasoning that the neighbors adopted in their arguments, and it is this reasoning that has now won over several juries.

Because of the negative impact on both property rights and human health, North Carolina lawmakers should revise the current statute to accommodate the industry's shift to factory-sized farming operations. Additionally, the North Carolina courts should implement the use of pretrial hearings to determine whether the statute is unconstitutional as applied to certain plaintiffs.

I. INTRODUCTION

Shortly after Tom Butler began raising pigs at his Lillington, North Carolina, farm, he received an upsetting call from his neighbor down the road.³ This call brought the news that Butler's neighbor, who lived two miles from his farm, could smell his hogs in her home.⁴ This revelation greatly troubled Butler and created a desire within him to change.⁵ "We don't have the right to make anyone suffer while we profit," said Butler; "[i]f we can do something to lessen the impact on our neighbors, then we should be doing something."⁶ And something is exactly what he did.

Since receiving this phone call, Butler has taken great steps in reducing the impact, i.e., the smell, of his farm on his surrounding community.⁷ In furtherance of this goal, Butler installed green tarps, made of a high-density plastic, over his waste lagoons.⁸ These tarps began working immediately to decrease the smell, but they also kept out rainwater to prevent spillage and trapped the methane gas which emits from the waste as it decays.⁹ Through the use of technology, which he has spent the past eight years researching and developing, Butler is able to recycle the methane gas from his hogs' waste to provide energy for his farm and "up to 150 homes in Harnett County."¹⁰

3. Billy Liggett, *Power of Rural*, CAMPBELL MAG., June 12, 2018, at 25.

4. *Id.*

5. *Id.*

6. *Id.* at 26.

7. *Id.*

8. *Id.*

9. Liggett, *supra* note 3, at 26.

10. *Id.* at 26–27.

However, not all hog farmers adhere to Butler's philosophy of lessening the impact of his farm on his neighbors. These farmers adopt a farming method by which they prevent the overflow of their waste lagoons by spraying the waste as fertilizer on nearby fields.¹¹ While this technique is common, it has acute ramifications on public health.¹² A 2016 report from Duke University Medical Center found that "living near concentrated animal feeding operations causes upper-respiratory problems, high blood pressure, fatigue, depression and exposure to a number of carcinogens."¹³ Despite the negative impact that industrialized hog farms have on the community, lawmakers continue to shield them from nuisance liability through right-to-farm acts. These statutes have not only failed to change with the increase of factory-style farming operations but have also narrowed the circumstances in which neighbors may hold farmers accountable for the nuisances that they create.¹⁴

Allowing the right-to-farm to extend to concentrated animal feeding operations will pose issues involving the property rights and the health of farm neighbors. For these reasons, courts should institute a balancing test through which they balance the interests of the property owners against the legislative purpose of applying statutory immunity to farmers. Through this balancing test, courts could achieve justice by finding the statute unconstitutional as applied to certain plaintiffs.

II. BACKGROUND

Home to nearly 9 million hogs, the Tar Heel State is hog heaven, or perhaps hog hell.¹⁵ North Carolina is the nation's second largest hog-producer, trailing behind Iowa's 22.6 million pigs.¹⁶ However, with many hogs come many problems. Other than angry phone calls from neighbors, the main issue that hog growers face is their potential nuisance liability.

11. *Hog Farms & Hurricanes: A Primer on Lagoons and Flooding*, N.C. PORK COUNCIL (Sept. 11, 2018), <http://www.ncpork.org/primer/>.

12. See *infra* note 34.

13. Liggett, *supra* note 3, at 28.

14. Cordon M. Smart, *The "Right to Commit Nuisance" in North Carolina: A Historical Analysis of the Right-to-Farm Act*, 94 N.C. L. REV. 2097, 2116 (2016).

15. Liggett, *supra* note 3, at 30.

16. *Id.*

A. *What Is a Nuisance?*

Before one can understand the “right-to-farm,” it is important to note what that “right” protects farmers from, namely, private nuisance liability.¹⁷ Generally, a nuisance is the unreasonable interference with another’s use and enjoyment of her land.¹⁸ Nuisance law is a court-developed doctrine that is imbedded in the principle “*sic utere tuo ut alienum non laedas*,” which means “one must so use her property as not to injure that of another.”¹⁹ Essentially, “[t]he law of nuisance provides that although each landowner has the general right to make use of her land as she wishes, no landowner has the right to use her land in a way that unreasonably interferes with her neighbors’ enjoyment of their possessory rights in their land.”²⁰

B. *Hog Farming in North Carolina: From Small Farms to CAFOs*

In the dawn of the twentieth century, the agricultural industry employed nearly half of the United States’ population.²¹ In addition to its employment of a high percentage of the American workforce, the agricultural industry supplied Americans with food. These two aspects of the industry proved extremely important to America as a whole, and with the rise of suburban America on the horizon, lawmakers saw fit to protect America’s farmers from potential nuisance liability resulting from the encroaching urbanization.²² This protection came in the form of statutes known as “right-to-farm acts.”

Right-to-farm acts offer statutory immunity to farms from civil liability arising from nuisance lawsuits. In the 1970s, former agricultural lands became fraught with an influx of citizens, giving farmers neighbors that they did not once have.²³ The influx of people brought an influx of complaints about the smells and noises coming from neighboring farms. These complaints took the form of nuisance lawsuits, and farmers became liable for the disturbance their operations caused their new neighbors. In the interest of justice, our nation’s lawmakers took to drafting legislation to protect

17. See N.C. GEN. STAT. § 106-701 (2020).

18. R. WILSON FREYERMUTH, ET AL., *Governmental Land Use Controls: Judicial Doctrines and Legislative Regulation*, in PROPERTY AND LAWYERING 822–24 (3d. ed. 2011).

19. *Id.* at 823.

20. *Id.*

21. DIMITRI ET AL., ECON. RES. SERV., U.S. DEPT. OF AGRIC., ECON. INFO. BULL. NO. 3, THE 20TH CENTURY TRANSFORMATION OF U.S. AGRICULTURE AND FARM POLICY, 2 (June 2005).

22. See Smart, *supra* note 14, at 2116.

23. *Id.*

farmers from the increased urbanization which threatened to run them out of business. As a result, the right-to-farm was born.

Since the 1970s, every state has enacted a right-to-farm act, each with varying degrees of protection.²⁴ The typical right-to-farm offers nuisance immunity to farms that comply with state regulations. In recognition of the right-to-farm's history, the majority of states have limited nuisance immunity to only allow immunity against neighbors that "came to the nuisance."²⁵ This "coming to the nuisance" defense allows farmers the ability to protect themselves from neighbors who moved into the agricultural lands after the farm had occupied the land for a specified period of time.²⁶

In recent years, America's agricultural industry has experienced a shift from traditional, small family farms to large-scale farms with corporate contracts.²⁷ North Carolina has not been exempted from this trend. In the past few decades, North Carolina's farm industry has seen a massive shift toward large-scale farming and a decrease in the traditional family farm.²⁸ Change in the industry, however, has not spurred change in policy. With the decreasing number of family farms and the increasing number of "factory farms," states continue to protect farms from nuisance liability through right-to-farm acts, and industrial-sized farms, known popularly as CAFOs, hide behind such protection.

1. What Is a CAFO?

Concentrated Animal Feeding Operations ("CAFOs"), popularly known as "factory farms," are particular types of Animal Feeding Operations ("AFOs") which meet certain regulatory criteria.²⁹ To be considered a CAFO, a farm must first be defined as an AFO.³⁰ An AFO, as defined within the Clean Water Act, is an agricultural operation which keeps and raises animals

24. CARRIE HRIBAR, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON COMMUNITIES 11, (Nat'l Ass'n of Loc. Boards of Health, 2010).

25. Terence J. Centner, *Governments and Unconstitutional Takings: When Do Right-To-Farm Laws Go Too Far?*, 33 B.C. ENVTL. L. REV. 87, 88 (2006).

26. See Smart, *supra* note 14, at 2117.

27. See ECON. RES. SERV., *supra* note 21 (charting the declining percentage of the labor force employed in agriculture).

28. See Smart, *supra* note 14, at 2104.

29. See Hribar, *supra* note 24, at 1.

30. *Id.*

in a confined situation.³¹ An AFO is a lot or facility where animals are stabled or confined for forty-five days or more in a twelve-month period.³² A CAFO is an “AFO with more than 1000 animal units . . . confined on site for more than 45 days during the year.”³³

CAFOs have economic benefits such as providing low cost meat and promoting the local economy.³⁴ However, these benefits come with costs: the impact on public health through contamination of the air and water, horrible odors, creation of insect vectors, exposure to pathogens, and the lowering of property values in the surrounding area.³⁵

2. The Health Issues Arising from Current CAFO Farming Methods

One of the major concerns about CAFOs is their impact on public health. Farms and other agricultural operations are heavily regulated to mitigate the damage to their surrounding environments. The Clean Water Act, for example, places limits on a farm’s operations to ensure that it does not badly pollute the groundwater and surrounding waterways.³⁶ Pollution is especially vexing in areas where most residents obtain their drinking water from private wells, which can be contaminated and cause its drinkers to experience diarrhea, vomiting, and nausea.³⁷ The concern over water pollution is magnified in eastern North Carolina, the home of many hog farms. The magnification of pollution concerns is attributable to a method of waste management adopted by hog farmers, the anaerobic lagoon system.

31. *Id.*

32. *Animal Feeding Operations (AFOs)*, U.S. ENVTL. PROTECTION AGENCY, <https://www.epa.gov/npdes/animal-feeding-operations-afos> (last visited Nov. 10, 2018).

33. *Animal Feeding Operations (AFOs)*, U.S. DEP’T OF AGRIC., <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/plantsanimals/livestock/afos/> (last visited Nov. 10, 2018).

34. See Hribar, *supra* note 24, at 2.

35. *Id.* at 2–11.

36. See generally 33 U.S.C.A. § 1329 (2020).

37. Wynne Davis, *Overflowing Hog Lagoons Raise Environmental Concerns in North Carolina*, NAT’L PUB. RADIO (Sept. 22, 2018), <https://www.npr.org/2018/09/22/650698240/hurricane-s-aftermath-floods-hog-lagoons-in-north-carolina>.

Anaerobic lagoons are deep, man-made ponds which store excrement.³⁸ These lagoons are often not lined, but rather are open-air, earthen basins.³⁹ The typical depth of an anaerobic lagoon is eight feet or greater.⁴⁰ The waste enters through the bottom of the lagoon and mixes with the “sludge” layer.⁴¹ The lagoons are often a pink, Pepto-Bismol tint resulting from the bacteria in the mixture.⁴² After a specified period of time, which varies from lagoon to lagoon, the now-liquid waste is applied as a fertilizer on nearby fields through the use of sprayers.⁴³

While the obvious issue these lagoons raise would be the potential for water pollution, the Act has graciously provided that it shall not affect or defeat the right of potential plaintiffs to recover for injuries or damages resulting from water pollution.⁴⁴ This provision, however, does not preserve claims for injuries or damages resulting from air pollution or illness caused by airborne bacteria emanating from the lagoons. As noted in the previous section, researchers have attributed a variety of illnesses and even higher mortality rates to living in close proximity to hog farm operations.⁴⁵

While these health issues could be resolved through enacting more restrictive regulations on the farms, an alternative to enacting further legislation would be to permit nuisance lawsuits under certain circumstances. This alternative is useful because statutory enforcement actions are often

38. U.S. ENVTL. PROTECTION AGENCY, WASTEWATER TECHNOLOGY FACT SHEET: ANAEROBIC LAGOONS (Sept. 2002).

39. *Id.*; see Emily Moon, *North Carolina's Hog Waste Problem Has A Long History. Why Wasn't It Solved In Time For Hurricane Florence?*, PACIFIC STANDARD (Sept. 14, 2018) <https://psmag.com/environment/why-wasnt-north-carolinas-hog-waste-problem-solved-before-hurricane-florence>) (explaining some newer pits are now lined with clay).

40. U.S. ENVTL. PROTECTION AGENCY, WASTEWATER TECHNOLOGY FACT SHEET: ANAEROBIC LAGOONS (Sept. 2002).

41. *Id.*

42. Wynne Davis, *Overflowing Hog Lagoons Raise Environmental Concerns in North Carolina*, NAT'L PUB. RADIO (Sept. 22, 2018, 07:54 p.m.), <https://www.npr.org/2018/09/22/650698240/hurricane-s-aftermath-floods-hog-lagoons-in-north-carolina>.

43. *Hog Farms & Hurricanes: A Primer on Lagoons and Flooding*, N.C. PORK COUNCIL (Sept. 11, 2018), <http://www.ncpork.org/primer/>.

44. N.C. GEN. STAT. § 106-701(c) (2020).

45. Julia Kravchenko et. al., *Mortality and Health Outcomes in North Carolina Communities Located in Close Proximity to Hog Concentrated Animal Feeding Operations*, 79 N.C. MED. J., NO. 5, 278 (2018).

difficult and expensive.⁴⁶ Additionally, successful enforcement actions will not provide plaintiffs with the proper remedies and compensation for their injuries and damages.⁴⁷

C. *The Cases Against Murphy-Brown, LLC*

In 2013, 479 plaintiffs filed twenty-five cases in the Superior Court of Wake County, North Carolina against Smithfield Foods, Inc., Murphy-Brown, LLC, and several individual growers in eastern North Carolina.⁴⁸ These suits alleged nuisance and negligence claims against approximately ninety hog farms.⁴⁹ In August 2014, 515 plaintiffs filed approximately twenty-five cases in the United States District Court for the Eastern District of North Carolina; these claims were filed exclusively against Murphy-Brown.⁵⁰

The plaintiffs in the first decided case, *McKiver v. Murphy Brown, LLC*, consisted of ten neighbors who lived near a hog farm that housed nearly 15,000 hogs.⁵¹ In their complaint, the plaintiffs alleged several injuries to the use and enjoyment of their property, such as the heavy stench that was impossible to remove from their clothing, the swarms of flies that terrorized their yards, and the increased noise from the farm's trucks.⁵² During trial, the plaintiffs focused on the anaerobic lagoons⁵³ used by the farms to store hog waste until the waste could be liquefied and sprayed onto nearby fields.⁵⁴

46. Andrew C. Hanson, *Concentrated Animal Feeding Operations and the Common Law: Fixing Wrongs Committed Under the Right-to-farm*, in CREATIVE COMMON LAW STRATEGIES FOR PROTECTING THE ENVIRONMENT 287 (Clifford Rechtschaffen & Denise Antolini eds., 2007).

47. *Id.*

48. Memorandum in Support of Motion to Dismiss, *McKiver v. Murphy-Brown, LLC*, 2014 WL 12837397 (E.D.N.C. 2014) (No. 7:14-cv-00180-BR).

49. *Id.*

50. *Id.*

51. Anne Blythe, *Jury Awards Hog Farm Neighbors \$50 Million*, NEWS & OBSERVER (Apr. 26, 2018, 07:25 PM), <https://www.newsobserver.com/news/business/article209927914.html>; see also Ned Barnett, *Opinion, N.C. Hog Industry Gets a Whiff of Odor's Cost – \$50 million. Will It Clean Up Now?*, NEWS & OBSERVER (May 1, 2018, 03:57 PM), <https://www.newsobserver.com/opinion/article210207404.html>.

52. Anne Blythe, *Jury Awards Hog Farm Neighbors \$50 Million*, NEWS & OBSERVER (Apr. 26, 2018, 07:25 PM), <https://www.newsobserver.com/news/business/article209927914.html>.

53. *Id.*

54. *Id.*

In reinforcing their nuisance argument, the plaintiffs acquired several experts to establish the farms' interference with their quality of life. These experts specialized in research on CAFOs and their impact on public health.⁵⁵

In addition to providing testimony from public health professionals, plaintiffs from each lawsuit underwent testing of their homes for a bacterium called Pig2Bac, a microbe native to swine that is excreted with hog feces.⁵⁶ The testing and report was done by Dr. Shane Rogers, a professor at Clarkston University who previously worked alongside the Environmental Protection Agency.⁵⁷ Of the seventeen homes tested, fourteen tested positive for the bacterium.⁵⁸ In his report on this study, Dr. Rogers stated that “[i]t is far more likely than not that hog feces also gets inside the clients['] homes where they live and where they eat.”⁵⁹

In April 2018, the first verdict in this series of lawsuits was rendered.⁶⁰ The jury awarded the plaintiffs \$50 million, a mixture of both compensatory and punitive damages.⁶¹ However, in order to comply with the damage caps that the North Carolina General Assembly has imposed on farm nuisance suits,⁶²

55. See Declaration of Shane Rogers, *McKiver v. Murphy-Brown, LLC*, 2017 WL 9910608 (E.D.N.C. 2017), (No. 714CV00180); see also Deposition of Dr. Viney P. Aneja, Ph.D., *McKiver v. Murphy-Brown, LLC*, 2017 WL 9887574 (E.D.N.C. 2017), (No. 714CV00180); Expert Report of Dr. Kendall Thu, *McKiver v. Murphy-Brown, LLC*, 2017 WL 9910603 (E.D.N.C. 2017) (No. 714CV00180); Before Trial Video Deposition of Steve Wing, Ph.D., *McKiver v. Murphy-Brown, LLC*, 2016 WL 11418466 (E.D.N.C. 2016) (Nos. 5:15-CV-000013-BR, 7:14-cv-00183-BR, 7:14-cv-0023-BR, 7:14-cv-00185-BR, 7:14-cv-00182-BR, 7:14-cv-00180-BR).

56. Catherine Clabby, *The Science of Hog Farm Odors*, N.C. HEALTH NEWS (June 25, 2018), <https://www.northcarolinahealthnews.org/2018/06/25/the-science-of-hog-farm-odors/>.

57. *Id.*

58. Alex Formuzis, *Ignoring Findings, State Lawmakers Look to Shield Big Pork From Liability*, ENVTL. WORKING GROUP (May 11, 2017), <https://www.ewg.org/release/study-fecal-bacteria-nc-hog-farms-infests-nearby-homes#.WyzeAS-ZOjQ>.

59. *Id.*

60. Homeowners Receive \$50M for Hog Farm Nuisance, *McKiver v. Murphy-Brown, LLC*, No. 7:14CV00180 (E.D.N.C. 2018), 2018 WL 4582665.

61. *Id.*

62. See N.C. GEN. STAT. § 106-702(a) (2018) (capping compensatory damages for a permanent nuisance at the fair market value of the property and capping compensatory damages for a temporary nuisance at the diminution in the fair rental value of the property); see also N.C. GEN. STAT. § 106-702(a1) (2018) (removing the ability to recover punitive damages where the “nuisance emanated from an agricultural or forestry operation that has not been subject to a criminal conviction or a civil enforcement action taken by a State or federal environmental regulatory agency”).

the judge reduced the \$50 million to \$3.25 million.⁶³ In June 2018, the second verdict in this series of lawsuits was rendered.⁶⁴ The jury awarded the plaintiffs more than \$25 million in damages.⁶⁵ In August 2018, the third verdict in this series of lawsuits was rendered, and the jury awarded the plaintiffs \$473.5 million in damages.⁶⁶ Each plaintiff received between \$3 million and \$5 million in compensatory damages, and the jury awarded \$75 million in punitive damages to each plaintiff.⁶⁷ The verdict was capped and remitted to \$94 million.⁶⁸ The fourth verdict in this series came in December 2018.⁶⁹ This verdict carried no punitive damages, and the jury awarded each of the neighbors between \$100 and \$75,000.⁷⁰

D. *Big Pork's Marketing: Community Response to Nuisance Lawsuits Against Farmers*

The summer of 2018 aimed the spotlight on North Carolina agriculture. During the course of a few months, several verdicts against Murphy-Brown, Inc., a subsidiary of Smithfield Foods, were handed down, and North Carolina lawmakers responded with an amendment to the North Carolina Right-to-farm Act.⁷¹ The response of lawmakers was spurred not only by their own disagreement with the court decisions but by the strong reaction of their constituents.⁷² Following the decisions, North Carolinians began to

63. Anne Blythe, *Jury Awards Hog Farm Neighbors \$50 Million. A Judge Reduced the Award Dramatically.*, NEWS & OBSERVER (May 9, 2018), <https://www.newsobserver.com/news/business/article210747979.html>.

64. Homeowners Received \$12.1M for Hog Farm Nuisance, *McGowen v. Murphy-Brown, LLC*, No. 7:14CV00182 (E.D.N.C. 2018), 2018 WL 4859109.

65. *Id.*

66. Travis Fain, *Jury Awards \$473.5 Million to Neighbors Who Sued Smithfield Over Hog Waste*, WRAL (Aug. 3, 2018), <https://www.wral.com/third-hog-trial-to-jury-plaintiffs-ask-for-millions/17743873/>.

67. *Id.*

68. *Id.*

69. Andrew M. Ballardin & Steven M. Sellers, *No Punitive Damages in Latest Hog Farm Odor Lawsuit (1)*, BLOOMBERG L. (Dec. 13, 2018, 9:59 AM), https://www.bloomberglaw.com/document/X5MJH87G000000?bna_news_filter=true&jcsearch=BNA%252000000167a7b9d7d0a5fff7bf93400000#jcite.

70. *Id.*

71. See discussion *infra* Part II.E.

72. Cole Villena, *Big Pork Rallies as the General Assembly Protects Chinese-Owned Smithfield Foods From Nuisance Lawsuits*, INDYWEEK (June 27, 2018, 10:28 AM),

show their support for the farmers through rallies and demonstrations, as well as by posting signs on their lawns.⁷³ This reaction may be attributed to the pork industry's portrayal of these lawsuits to the public.⁷⁴ The rallies, some of which took place at a hog farm and some of which took place in the state capital, framed the issue as an attack on family farms.⁷⁵ The signs in local yards read, "Stand Up for NC Farm Families" and "Stop Complaining or Put Down the Bacon."⁷⁶ The content of the rallies and the signs, however, misinterpreted the situation. These lawsuits targeted Murphy-Brown, not the local farmers. Additionally, politicians continually referred to the hog neighbor's attorneys as "out-of-state lawyers" in an attempt to garner sympathy for the local farmers.⁷⁷ It is this public relations strategy which helped spawn the 2018 amendment to North Carolina's Right-to-farm Act.

E. *The Legislative Action in the Wake of the Murphy-Brown Litigation*

In 1979, the North Carolina legislature adopted its first right-to-farm act.⁷⁸ The stated purpose at that time was to "reduce the loss to the State of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance."⁷⁹ This limitation was said to be imposed in order to "conserve and protect and encourage the development and improvement of its agriculture land for the production of food and other agricultural products."⁸⁰ The current version of this stated purpose has only slightly changed in that it now explicitly includes forestry operations; however, the same general intent remains: limit the circumstances in which

<https://indyweek.com/news/archives/big-pork-rallies-general-assembly-protects-chinese-owned-smithfield-foods-nuisance-lawsuits/>.

73. *Id.*

74. See, e.g., *The Hog Nuisance Trials: A Summary*, N.C. FARM FAM. (Aug. 29, 2018), <https://www.ncfarmfamilies.com/farmkeepersblog/2018/08/29/the-hog-nuisance-trials-a-summary>.

75. Charlotte Harris, 'Traffic Jam' at Duplin County Hog Farm as Rally Pushes Back on Neighbors' Lawsuits, NEWS & OBSERVER (July 10, 2018, 10:12 PM), <https://www.newsobserver.com/news/politics-government/article214649640.html>; Villena, *supra* note 72.

76. Villena, *supra* note 72.

77. *Id.*

78. See Smart, *supra* note 14, at 2099.

79. Act of Mar. 26, 1979, ch. 202, 1979 N.C. Sess. Laws 140, 140-41 (codified as amended at N.C. GEN. STAT. § 106-700 (2020)).

80. *Id.*

nuisance suits may be brought in order to protect agricultural operations.⁸¹ This overarching purpose is generally shared among many states.⁸²

The typical right-to-farm statute contains some provision for the “coming to the nuisance” defense.⁸³ This defense provides that farms cannot be subject to liability for “becom[ing] a nuisance” because of a change in the surrounding locality.⁸⁴ Providing this defense for farmers was the primary reason many states enacted right-to-farm statutes during the 1970s and 1980s.⁸⁵ During this period, lands which were formerly agricultural rural areas began experiencing increased urbanization with the rise of suburban homes.⁸⁶ In an effort to protect farmers from potential nuisance liability, many states began enacting “right-to-farm” laws with provisions stating that farm operations shall not “be or become a nuisance . . . by any changed conditions in or about the locality outside of the operation.”⁸⁷ In fact, prior to the 2018 amendment, North Carolina’s right-to-farm act mirrored that language.⁸⁸ The 2013 version of North Carolina’s right-to-farm statute read:

No agricultural or forestry operation or any of its appurtenances shall be or become a nuisance, private or public, by any changed conditions in or about the locality outside of the operation after the operation has been in operation for more than one year, when such operation was not a nuisance at the time the operation began.⁸⁹

This language reflected the main purpose for which the legislature adopted the right-to-farm: protecting farmers from nuisance liability as a result of changes in their locality.⁹⁰ In fact, the 1979 North Carolina Right-to-farm Act

81. N.C. GEN. STAT. § 106-701 (2020).

82. See Smart, *supra* note 14, at 2099.

83. *Id.* at 2100.

84. Act of Mar. 26, 1979, ch. 202, 1979 N.C. Sess. Laws 140, 140-41 (codified as amended at N.C. GEN. STAT. § 106-700 (2020)).

85. See Smart, *supra* note 14, at 2099.

86. *Id.* at 2116.

87. Act of July 18, 2013, ch. 314, sec. 1, § 106-701, 2013 N.C. Sess. Laws 858, 858-59 (codified as amended at N.C. GEN. STAT. § 106-701 (2020)).

88. N.C. GEN. STAT. § 106-701 (2018).

89. *Id.*

90. Act of July 18, 2013, ch. 314, sec. 1, 2013 N.C. Sess. Laws 858, 858-59 (codified as amended at N.C. GEN. STAT. § 106-701 (2013)).

noted this as one of its purposes by observing in its declaration of policy that “[w]hen nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits.”⁹¹

The provision for the “coming to the nuisance” defense through the “changed conditions” language did more than protect farmers from nuisance liability; it preserved a method of recourse for plaintiffs when a nuisance came to them. For example, in *McKiver*, the plaintiffs had lived on the properties for decades prior to the establishment of the farm. That fact provided their cases the ability to avoid being precluded by statute.⁹²

However, in 2018, the North Carolina General Assembly directly responded to the multitude of lawsuits filed against Murphy-Brown, LLC and amended the North Carolina Right-to-farm Act to remove any language regarding “changed conditions in the locality.”⁹³ Senate Bill 711 cited the reason for the Bill, stating that “frivolous nuisance lawsuits” were forcing the State to “make plain [the legislature’s] intent that existing farms . . . in North Carolina that are operating in good faith be shielded from nuisance lawsuits filed long after the operations [were] established.”⁹⁴ The General Assembly also specifically cited the recent suits against Murphy-Brown, LLC, stating that “recently a federal trial court incorrectly and narrowly interpreted the North Carolina Right-to-farm Act in a way that contradicts the intent of the General Assembly.”⁹⁵ This statement suggests that it is the General Assembly’s intent that this Act be interpreted broadly to offer farms maximum protection from nuisance liability. Following the 2018 amendment, North Carolina’s Right-to-farm Act now reads:

No nuisance action may be filed against an agricultural or forestry operation unless all of the following apply:

(1) The plaintiff is a legal possessor of the real property affected by the conditions alleged to be a nuisance.

91. Act of Mar. 26, 1979, ch. 202, 1979 N.C. Sess. Laws 140, 140-41 (codified as amended at N.C. GEN. STAT. §§ 106-700 (2020)).

92. Third Amended Complaint at 80, *McKiver v. Murphy-Brown, LLC*, No. 7:14-cv-00180-BR (E.D.N.C. 2018), 2018 WL 4189408.

93. Compare N.C. GEN. STAT. § 106-701 (2020), with Act of July 18, 2013, ch. 314, sec. 1, § 106-701, 2013 N.C. Sess. Laws 858, 858-59 (codified as amended at N.C. GEN. STAT. § 106-701 (2013)).

94. S. 711, 2018 Gen. Assemb., Reg. Sess. (N.C. 2018).

95. *Id.*

(2) The real property affected by the conditions alleged to be a nuisance is located within one half-mile of the source of the activity or structure alleged to be a nuisance.

(3) The action is filed within one year of the establishment of the agricultural or forestry operation or within one year of the operation undergoing a fundamental change.⁹⁶

This revised language only permits plaintiffs who have had a nuisance come to them a mere year to file a lawsuit, or otherwise lose the opportunity.

F. *The Governor Veto and Its Override*

On June 15, 2018, the North Carolina General Assembly presented the right-to-farm amendment to Governor Roy Cooper.⁹⁷ On June 25, 2018, Governor Cooper returned his veto of the bill.⁹⁸ In his veto message, Governor Cooper stated that the laws of North Carolina “must balance the needs of businesses versus property rights. Giving one industry special treatment at the expense of its neighbors is unfair.”⁹⁹ The Governor also referenced the infamous Tennessee Valley Authority (TVA) case in which he, as Attorney General of North Carolina, represented the state in a nuisance claim against TVA based on the air pollution that the company was pumping into the North Carolina mountains.¹⁰⁰

On June 26, 2018, the North Carolina State Senate met to discuss the Governor’s veto and the possibility of overriding his veto.¹⁰¹ In a 37–9 vote, the Senate voted to override Governor Cooper’s veto of the 2018 Farm Bill.¹⁰² The bill then made its way to the House of Representatives.

On June 27, 2018, the North Carolina House of Representatives met to discuss overriding Governor Cooper’s veto of the 2018 Farm Bill.¹⁰³ In a 74–45 vote, the House of Representatives joined the Senate in voting to override

96. N.C. GEN. STAT. § 106-701 (2020).

97. S. 711, 2018 Gen. Assemb., Reg. Sess. (N.C. 2018).

98. ROY COOPER, GOVERNOR ROY COOPER OBJECTIONS AND VETO MESSAGE, (June 25, 2018).

99. *Id.*

100. *Id.*

101. *Senate Bill 711*, N.C. GEN. ASSEMBLY, <https://www.ncleg.gov/BillLookup/2017/s711> (last visited Mar. 5, 2020).

102. *Id.*

103. *Id.*

the Governor's veto.¹⁰⁴ Following the override, the 2018 Farm Bill was ratified, thus amending the North Carolina Right-to-farm Act.¹⁰⁵

G. *Problems with the Current Language of the Statute*

As mentioned above, the current language of the statute states that a person may bring an action in nuisance if they fit the specified criteria. One of the three listed criteria is that the plaintiff must file the action "within one year of the establishment of the agricultural or forestry operation or within one year of the operation undergoing a fundamental change."¹⁰⁶ The General Assembly then defined "fundamental change" in the negative, saying that it is not "[a] change in ownership or size," "[a]n interruption of farming for a period of no more than three years," "[p]articipation in a government-sponsored agricultural program," "[e]mployment of new technology," or a "[c]hange in type of agricultural or forestry product produced."¹⁰⁷ This definition in the negative poses a few issues for those interpreting and applying the statute.

The statute states that a fundamental change is not a "change in type of agricultural or forestry product produced."¹⁰⁸ Read plainly, this provision means that a farm may change from producing crops to producing hogs without having to worry about its neighbors holding it liable for its newly generated nuisance. This provision seems to overrule the Court of Appeals of North Carolina's decision in *Durham v. Britt*.¹⁰⁹ In *Britt*, the plaintiff and his wife built a home and later purchased the property across the road.¹¹⁰ At the time that the plaintiff purchased that property, the defendant operated three turkey houses on the eastern border of the property.¹¹¹ The defendant had been operating his farm for over twenty years when the plaintiff purchased the adjoining property.¹¹² A couple of years after the plaintiff had purchased the property, the defendant wrote the plaintiff a letter telling of his intent to construct and operate a hog farm on his own land and requesting access to

104. *Id.*

105. S. 711, 2018 Gen. Assemb., Reg. Sess. (N.C. 2018).

106. N.C. GEN. STAT. § 106-701(a)(3) (2020).

107. *Id.* at (a1).

108. *Id.* at (a1)(5).

109. *Durham v. Britt*, 451 S.E.2d 1, 4 (N.C. Ct. App. 1994).

110. *Id.* at 1.

111. *Id.*

112. *Id.*

the road adjoining their properties.¹¹³ The plaintiff never responded to this letter.¹¹⁴ The plaintiff brought a nuisance action against the defendant, and the trial court granted a motion for summary judgment in favor of the defendant based upon the right-to-farm act.¹¹⁵ On appeal, the plaintiff argued that the Act did not apply to his case because “no nuisance existed until defendant Britt fundamentally changed the nature of the agricultural activity occurring on his property by constructing a high-volume commercial swine facility.”¹¹⁶ Based upon this argument, the Court of Appeals reversed the trial court’s grant of summary judgment, finding that the statutory immunity provided by the right-to-farm act did not apply in this instance.¹¹⁷

While the holding in *Britt* makes logical sense, the language of the statute demonstrates that the legislature would have agreed with the trial court’s grant of summary judgment. While the statute uses the same language, “fundamental change,” that was used in *Britt*, its use runs counter to the statutory reference to the case by including a provision that contradicts the case’s outcome. The court in *Britt* found that, “[c]ertainly, in the instant case, a fundamental change has occurred where defendant, who previously operated turkey houses, has decided to change his farming operation to that of a hog production facility.”¹¹⁸ Now, the statute allows for such a fundamental change and expressly states that a fundamental change is not “a change in the type of agricultural or forestry product produced.”¹¹⁹ Thus, under the current statute, a court would have to affirm the trial court’s grant of summary judgment, unless that court narrowly construed the term “product.”

Second, the statute states that a fundamental change is not “[a]n interruption of farming for a period of no more than three years.”¹²⁰ This provision carries a new weight when considered in conjunction with the removal of the Act’s “changed conditions in the locality” provision. The changed conditions in the locality provision was a remnant of the coming to the nuisance defense. It provided that no agricultural or forestry operation

113. *Id.* at 1–2.

114. *Id.* at 2.

115. *Durham*, 451 S.E.2d at 2.

116. *Id.* at 3.

117. *Id.* at 4.

118. *Id.*

119. N.C. GEN. STAT. § 106-701(a1) (2020).

120. *Id.*

“shall be or become a nuisance . . . by any changed conditions in or about the locality outside of the operation after the operation has been in operation for more than one year, when the operation was not a nuisance at the time the operation began.”¹²¹ This provision was removed from the latest version of the Act. This suggests that someone who has moved next door to the farm following the farm’s establishment would be able to bring a nuisance suit if the operation were to undergo a fundamental change.¹²² However, with the removal of one barrier to justice, another is built. With the operations being permitted to have an interruption of farming, meaning no farming is conducted, for a period of up to three years, a party may take possession of the land during that interruption and have no redress when the farm reboots operation two years later.

The third major issue with the negative definition of “fundamental change” is that a “fundamental change” does not include a change in size.¹²³ This is especially troubling in the era of CAFOs. Under the current language of the statute, a smaller farm with 200 hogs could contract with Murphy-Brown, LLC, and begin housing 1,000 hogs without constituting a fundamental change. Thus, if such an occurrence were to happen, the neighbors of the farm would be burdened with the increased smell and swarms of flies without having an outlet of redress for their injuries.

III. THE PROBLEM WITH RESTRICTIVE RIGHT-TO-FARM ACTS

The right-to-farm has arisen out of a justified need to protect America’s farmers from economic destruction at the hands of their neighbors. The societal need for the agricultural industry further supports the implementation of the right-to-farm. However, implementing a right-to-farm magnifies the need to ensure the protection of property rights for farm neighbors. The primary purpose of nuisance law is to protect the right to use and enjoy one’s property. In adopting and ratifying the right-to-farm, most states implemented the typical “coming to the nuisance” defense that revokes

121. Act of July 18, 2013, ch. 314, sec. 1, § 106-701, 2013 N.C. Sess. Laws 858, 858-59 (codified as amended at N.C. GEN. STAT. § 106-701 (2020)).

122. This is because the only three requirements for standing are that the plaintiff? is the “legal possessor of the real property affected by the conditions alleged to be a nuisance,” that the affected property be “located within one half-mile of the source of the activity or structure alleged to be a nuisance,” and that the “action be filed within one year of the establishment of the . . . operation or within one year of the operation undergoing a fundamental change.” See N.C. GEN. STAT. § 106-701 (2020).

123. N.C. GEN. STAT. § 106-701 (2020).

a property owner's nuisance claim where the owner moved next door to the purported nuisance (i.e., the farm). This decision resulted from a balancing of interests. In the eyes of the lawmakers, it seemed just to protect farmers from potential litigation where a neighbor "came to the nuisance." Similarly, it seemed fair and equitable to disallow a nuisance claim where the party bringing the action is responsible for the complained injury. For these reasons, the "coming to the nuisance" defense has persisted and should persist within right-to-farm acts.

With the birth of the right-to-farm, lobbyists began pushing the General Assembly for further protections from nuisance litigation. These additional protections came in the form of additional criteria that plaintiffs must satisfy for their action to survive a motion to dismiss. In North Carolina, these criteria include provisions requiring the action to be filed within one year of a new operation's establishment or within one year of a fundamental change to an existing operation.¹²⁴ Though the act does not define a fundamental change, it explains that a fundamental change is not a change in size or product type.¹²⁵ While these provisions further the state's interest in shielding agricultural operations from nuisance liability, the strictness of the criteria and the narrow definition, or definition by broad exclusion, of what constitutes a fundamental change functions contrary to the interest of preserving property rights. With the rise of CAFOs, strict restrictions upon nuisance claims create problems for property owners. These problems include the infringement upon property rights guaranteed by both the state and federal Constitutions, the health issues arising from current farming methods, and the disincentive to solve these issues.

A. *Infringement upon Property Rights: Revoking the Right to Use and Enjoy Property*

The right to use and enjoy one's property has been recognized since the days of Blackstone. Indeed, Sir William Blackstone acknowledged this right in the chapter "Of Nuisance" within his *Commentaries on the Laws of England*. In that chapter, Blackstone states, "if a person keeps his hogs . . . so near the house of another that the stench of them incommodes him and makes the air unwholesome, this is an injurious nuisance, as it tends to

124. *Id.*

125. *Id.*

deprive him of the use and benefit of his house.”¹²⁶ This right to use and enjoy one’s property has long been considered one of the sticks in the bundle of property rights.¹²⁷ This bundle of rights creates the legal understanding of property as a collection of rights rather than merely possession of land. Thus, because property is observed by the law as a collection of rights, infringement upon any of those rights creates an infringement upon one’s property. Additionally, the North Carolina Supreme Court has adopted this view by recognizing that “[p]roperty” . . . includes ‘not only the thing possessed but . . . the right of the owner to the land; the right to possess, use, enjoy and dispose of it, and the corresponding right to exclude others from its use.’”¹²⁸

1. The Example of Iowa: From *Gacke* to *Honomichl*

In 2004, the Supreme Court of Iowa held that the state’s statutory grant of nuisance immunity to animal feeding operations violated the Iowa Constitution to the extent that it deprived the plaintiffs of “a remedy for the taking of their property resulting from a nuisance created by an animal feeding operation.”¹²⁹ Though this decision is not binding on North Carolina courts, it is highly persuasive considering the level of prominence that farming has in the Iowa economy compared to that of the North Carolina economy.¹³⁰ As stated above, Iowa is the only state in the nation that produces more hogs than North Carolina.¹³¹

The Gackes lived across the road from two hog buildings, both owned and operated by the defendant, Pork Xtra, L.L.C. The operation was established in 1996 and the Gackes had lived at that location since 1974.¹³² The Gackes filed an action claiming that the operation was a nuisance, citing their injuries of emotional distress and the decrease in the value of their property.¹³³ The farm attempted to claim immunity under Iowa’s right-to-farm statute, but

126. 3 WILLIAM BLACKSTONE, COMMENTARIES *217.

127. Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV. 247, 252–53 (2007).

128. *Kirby v. N.C. Dep’t of Transp.*, 786 S.E.2d 919, 924 (N.C. 2016) (quoting *Hildebrand v. So. Bell Tel. & Tel. Co.*, 14 S.E.2d 252, 256 (1941)).

129. *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 171 (Iowa 2004).

130. *Liggett*, *supra* note 3, at 28.

131. *See* discussion *supra* Part II; *see also* *Liggett*, *supra* note 3, at 28.

132. *Gacke*, 684 N.W.2d at 171.

133. *Id.*

the court denied its claim because it viewed the immunity as an unconstitutional taking.¹³⁴

In support of its holding, the court cited one of its previous decisions, *Bormann v. Board of Supervisors in and for Kossuth County*. In *Bormann*, the Kossuth County Board of Supervisors had approved the application of landowners to declare an agricultural area within the county.¹³⁵ Their approval gave the applicants statutory nuisance immunity.¹³⁶ The neighbors of the applicants challenged this declaration, and the Supreme Court of Iowa held that the statute's grant of nuisance immunity created "an easement in the property affected by the nuisance . . . in favor of the applicants' land . . . because the immunity allows the applicants to do acts on their own land which, were it not for the easement, would constitute a nuisance."¹³⁷ In *Bormann*, the court concluded that "such '[e]asements are property interests subject to the just compensation requirements of the Fifth Amendment . . . and [the Iowa] Constitution."¹³⁸ The *Gacke* court found *Bormann* controlling and affirmed the lower court's application of *Bormann* in holding Iowa's right-to-farm statute created an unconstitutional taking.¹³⁹

The defendant in *Gacke* argued that the court should overrule *Bormann* because it applied a per se takings analysis rather than the *Penn Central* balancing test¹⁴⁰ for regulatory takings. The *Gacke* court, however, declined to retreat from its holding in *Bormann*, stating that the "ultimate conclusion was simply that the immunity statute created an easement and the appropriation of this property right was a taking."¹⁴¹ The court was not interested in parsing words to determine whether the taking was regulatory or per se; it simply found that a taking had occurred because an easement was created.¹⁴²

134. *Id.* at 172–73.

135. *Id.* at 172.

136. *Id.*

137. *Id.* (quoting *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 316 (Iowa 1998)) (omissions in original).

138. *Gacke*, 684 N.W.2d at 172 (quoting *Bormann*, 584 N.W.2d at 316) (alterations and omissions in original).

139. *Id.* at 173, 185.

140. See generally BRIAN W. BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE DISCRETION § 1:21 (database updated Aug. 2019).

141. *Gacke*, 684 N.W.2d at 173.

142. *Id.* at 173–74.

After finding that a taking had occurred, the Iowa court turned to the issue of whether the taking was a valid exercise of the state's police power; it held that it was not. The court found that the statutory nuisance immunity constituted an "oppressive exercise of the state's police power."¹⁴³ The court noted that it is "important in substantive due process analysis to consider whether the effect of a statute is 'to give an injured person, in essence, no right of recovery.'"¹⁴⁴ The court noted that the Gackes bore the burden of the statute's "undesirable impact" without a "corresponding benefit" and the statute deprived them of any remedy for their injury.¹⁴⁵ The court summarized the situation by stating that "one property owner—the producer—is given the right to use his property *without* due regard for the personal and property rights of his neighbor."¹⁴⁶ The court held that such a situation resulted in an unduly oppressive exercise of the state's police power.¹⁴⁷

In 2018, the Supreme Court of Iowa discussed the application of the *Gacke* factors.¹⁴⁸ In this decision, the court identified the procedural options available to Iowa courts as they balance the *Gacke* factors with the legislative purpose of the right-to-farm.¹⁴⁹ This procedure would unfold as follows: the CAFOs would be allowed to plead the right-to-farm as an affirmative defense, then the plaintiffs would be required to show that the statute is unconstitutional as applied to them through proving the *Gacke* factors.¹⁵⁰

In *Honomichl*, the defendants were Valley View Swine, LLC, and JBS Live Pork, LLC.¹⁵¹ The defendants partnered together to establish CAFOs at two locations in Wapello County, Iowa.¹⁵² The plaintiffs were owners of real estate located near the defendants' CAFOs and alleged that the CAFOs constituted a nuisance because of "the odors, pathogens, and flies" that emanated from

143. *Id.* at 185.

144. *Id.* at 179 (quoting *Shearer v. Perry Cmty. Sch. Dist.*, 236 N.W.2d 688, 692 (Iowa 1975)).

145. *Id.*

146. *Id.*

147. *Gacke*, 684 N.W.2d at 179.

148. *Honomichl v. Valley View Swine, LLC*, 914 N.W.2d 223 (Iowa 2018).

149. *Id.* at 238.

150. *Id.*

151. *Id.* at 227.

152. *Id.*

the farms.¹⁵³ The district court then split the case into three divisions based upon the allegations against the different defendants.¹⁵⁴ The Division A plaintiffs filed an amended petition claiming “temporary nuisance, permanent nuisance, and negligence.”¹⁵⁵ The defendants answered the complaint alleging Iowa’s right-to-farm statute as an affirmative defense.¹⁵⁶ Following the initial pleadings, the court allowed the plaintiffs and defendants to choose two plaintiff households for separate bellwether trials to occur in the different divisions.¹⁵⁷

In all the divisions, the defendants filed motions for summary judgment alleging that the right-to-farm provided them with statutory immunity to the plaintiffs’ claims.¹⁵⁸ On the same day that the defendants filed their motions for summary judgment, the plaintiffs filed a motion for partial summary judgment, requesting that the court declare the statutory immunity defense unconstitutional as applied to their case.¹⁵⁹ The district court granted the defendants’ motion for summary judgment on all permanent nuisance claims but granted the plaintiffs’ motion for partial summary judgment in Division A.¹⁶⁰ Thus, the court declared that the statute was unconstitutional as applied to the Division A plaintiffs.¹⁶¹ The defendants appealed, arguing that the district court erred in granting the plaintiffs’ motion and finding that the statute was unconstitutional as applied to the Division A plaintiffs.¹⁶² Specifically, the defendants alleged that the district court improperly applied the *Gacke* holding without making specific factual findings.¹⁶³ The Supreme Court of Iowa agreed with the defendants, and reversed and remanded the case for further proceedings.¹⁶⁴ The court concluded that “[w]ithout this fact-based analysis, we are unable to resolve this issue on this record.”¹⁶⁵

153. *Id.* at 226.

154. *Honomichl*, 914 N.W.2d at 228.

155. *Id.*

156. *Id.* at 228–29.

157. *Id.* at 229.

158. *Id.*

159. *Id.*

160. *Honomichl*, 914 N.W.2d at 229.

161. *Id.*

162. *Id.* at 230.

163. *Id.*

164. *Id.* at 238.

165. *Id.* at 227.

The Supreme Court of Iowa began its analysis of the situation by distinguishing between facial and as-applied constitutional challenges.¹⁶⁶ It noted that facial challenges are those in which “no application of the statute could be constitutional under any set of facts.”¹⁶⁷ However, “an as-applied challenge alleges the statute is unconstitutional as applied to a particular set of facts.”¹⁶⁸ In *Gacke*, the court found Iowa’s Right-to-farm statute unconstitutional as applied.¹⁶⁹ After noting the distinction between facial and as-applied constitutional challenges, the court reviewed its analysis in *Gacke*.¹⁷⁰

The court began its review of *Gacke* by discussing Iowa’s inalienable rights clause, stating, “This provision protects ‘pre-existing common law’ property rights from ‘arbitrary restrictions.’”¹⁷¹ This protection is subject to “reasonable regulation by the state in the exercise of its police power.”¹⁷² The court’s analysis then began to mirror the North Carolina takings analysis presented below. The court’s analytical framework, like the North Carolina takings analysis, is split into two steps.¹⁷³ First, it must appear that the public interest requires state interference with the individual’s right.¹⁷⁴ Second, the means of accomplishing the purpose must be “reasonably necessary” and not “unduly oppressive upon individuals.”¹⁷⁵ The similarities between North Carolina’s takings analysis and Iowa’s inalienable rights clause framework end in applying this second step of analysis.¹⁷⁶ That is because in applying the second step of the analysis, Iowa courts must apply *Gacke*’s three-prong test.¹⁷⁷ This test states:

166. *Honomichl*, 914 N.W.2d at 231.

167. *Id.*

168. *Id.*

169. *Id.* at 234.

170. *Id.* at 235–37.

171. *Id.* at 235 (citing *May’s Drug Stores v. State Tax Comm’n*, 45 N.W.2d 245, 250 (Iowa 1950)).

172. *Honomichl*, 914 N.W.2d at 235 (quoting *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 176 (Iowa 2004)).

173. *Id.* (citing *Lawton v. Steele*, 152 U.S. 133, 136–37 (1984)).

174. *Id.* (citing *Lawton*, 152 U.S. at 136–37).

175. *Id.* (quoting *Lawton*, 152 U.S. at 136–37).

176. *Id.*

177. *Id.*

[P]laintiffs must show they (1) receive[d] no particular benefit from the nuisance immunity granted to their neighbors other than that inuring to the public in general[,] (2) sustain[ed] significant hardship[,] and (3) resided on their property long before any animal operation was commenced on neighboring land and had spent considerable sums of money in improvements to their property prior to construction of the defendant's facilities.¹⁷⁸

The court in *Honomichl* noted that in *Gacke*, it found the statute unconstitutional as applied to the plaintiffs because of the way their specific circumstances affected the application of this test.¹⁷⁹

After reviewing its decision in *Gacke*, the court considered the changes that the industry had undergone and the significant regulatory schemes that had been enacted since *Gacke* was decided.¹⁸⁰ Despite these changes, the court reaffirmed the *Gacke* test as the standard for analyzing as-applied constitutional challenges to the Iowa Right-to-farm Act.¹⁸¹

The court in *Honomichl* explained that the *Gacke* factors could not be decided at the summary judgment stage because each of the factors is “dependent upon the genuine issues of material fact of each case.”¹⁸² It stressed this finding by referring to the *Gacke* test as the “fact-specific enterprise of balancing of interests.”¹⁸³ Although it would not permit the as-applied constitutional challenge to be resolved at the summary judgment stage, the court specifically noted that the challenge could be resolved in pretrial litigation.¹⁸⁴ However, the proper application of the test is to:

[A]llow the CAFOs to plead [the right-to-farm] as an affirmative defense to the claims, if applicable. Correspondingly, the plaintiffs claiming [the right-to-farm] is unconstitutional as applied to them must prove the factors

178. *Honomichl*, 914 N.W.2d at 235 (internal quotation marks omitted) (quoting *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 178 (Iowa 2004)) (alterations in original).

179. *Id.* at 235–36.

180. *Id.* at 236–37.

181. *Id.* at 237.

182. *Id.*

183. *Id.* at 238 (quoting *Dalarna Farms v. Access Energy Coop.*, 792 N.W.2d 656 (Iowa 2010)) (internal quotation marks omitted).

184. *Honomichl*, 914 N.W.2d at 238.

set forth in *Gacke*. After the parties have submitted their proof, the court can then determine the constitutionality of [the right-to-farm] as applied to particular plaintiffs.¹⁸⁵

The court could make this determination in a pretrial hearing which would allow the court to “properly balance the *Gacke* factors with the legislative purpose of the statute to protect and promote animal agriculture in the state.”¹⁸⁶ The court in *Honomichl* concluded that the district court erred by declaring the statute unconstitutional as applied to Division A plaintiffs “without the benefit of specific fact-finding.”¹⁸⁷

Gacke provides an example of how a court might resolve the injustice created by application of the right-to-farm’s statutory nuisance immunity; it provides excellent reasoning for finding that a right-to-farm statute can constitute a taking and that provisions for nuisance immunity tend to create easements.

2. The North Carolina Takings Clause Analysis

In North Carolina, the “fundamental right to property is as old as [the] state.”¹⁸⁸ Although the state constitution does not contain an express takings provision, “the fundamental right to just compensation [i]s so grounded in natural law and justice that it is considered an integral part of the law of the land within the meaning of Article I, Section 19 of our [North Carolina] Constitution.”¹⁸⁹ North Carolina, through its takings jurisprudence, has defined a taking as “the taking of something, whether it is the actual physical property or merely the right of ownership, use or enjoyment.”¹⁹⁰ Here, there is an obvious impact upon property rights. The use and enjoyment of property is an interest in property, the taking of which is compensable under

185. *Id.*

186. *Id.*

187. *Id.*

188. *Kirby v. N.C. Dep’t of Transp.*, 786 S.E.2d 919, 923 (N.C. 2016) (citing eighteenth century legal and political documents).

189. *Id.* at 924 (quoting *Long v. City of Charlotte*, 293 S.E.2d 101, 107–08 (N.C. 1982)) (alteration in original) (internal quotation marks omitted).

190. *Kirby v. N.C. Dep’t of Transp.*, 769 S.E.2d 218, 233 (N.C. Ct. App. 2015) (quoting *S. Bell Tel. & Tel. Co. v. Hous. Auth.*, 247 S.E.2d 663, 666 (N.C. Ct. App. 1978)).

the state takings doctrine.¹⁹¹ However, the takings inquiry does not end at determining impact upon property rights.

After determining an impact, if any, upon property rights, the court will then ask whether the state's act is an exercise of its police powers or of eminent domain.¹⁹² The government uses its police power to regulate property to "prevent injury to the public."¹⁹³ Such regulations "must be enacted in good faith, and ha[ve] appropriate and direct connection with that protection to life, health, and property which each State owes to her citizens."¹⁹⁴ In contrast, the government uses its power of eminent domain to take property "for public use because such action is advantageous or beneficial to the public."¹⁹⁵ A taking may last for a limited period or indefinitely. As such, a taking may take the form of "an easement, a mere limited use, . . . [or] an absolute, unqualified fee."¹⁹⁶ "The state must compensate for property rights taken by eminent domain; damages resulting from the exercise of the police power are noncompensable."¹⁹⁷ The North Carolina Court of Appeals has drawn the distinction between the exercise of police powers and eminent domain in relation to the use and enjoyment of property. In *Kirby*, the court stated that "[i]n the exercise of eminent domain[,] property or an easement therein is taken from the owner and applied to public use because the use or enjoyment of such property or easement therein is beneficial to the public."¹⁹⁸ In contrast, "[i]n the exercise

191. See *Long*, 293 S.E.2d at 109 (stating that for a taking to occur, "there need only be a substantial interference with elemental rights growing out of the ownership of the property"); see also *Ivester v. City of Winston-Salem*, 1 S.E.2d 88, 88, 90 (1939) (holding odors, smoke, ashes, rats, and mosquitoes and other insects from a sewage disposal plant to be a taking); *Gray v. City of High Point*, 166 S.E. 911, 913 (N.C. 1932) (holding odors from an adjacent sewage disposal plant to be a taking); *Hines v. City of Rocky Mount*, 78 S.E. 510, 511 (N.C. 1913) (holding odors from a nearby trash dump to be a taking).

192. *Kirby*, 786 S.E.2d at 924.

193. *Id.*

194. *Id.* (quoting *City of Durham v. Eno Cotton Mills*, 54 S.E. 453, 462 (N.C. 1906)) (internal quotation marks omitted).

195. *Id.*

196. *Id.* at 295 (quoting *Town of Morganton v. Hutton & Bourbonnais Co.*, 112 S.E.2d 111, 113 (N.C. 1960)) (alteration and omission in original) (internal quotation marks omitted).

197. *Barnes v. N.C. State Highway Comm'n*, 126 S.E.2d 732, 738 (N.C. 1962) (quoting *State v. Fox*, 332 P.2d 943, 946 (Wash. 1958)).

198. *Kirby v. N.C. Dep't of Transp.*, 769 S.E.2d 218, 230 (N.C. Ct. App. 2015) (quoting *Durham*, 54 S.E. at 462) (second alteration in original).

of the police power[,], the owner is denied the unrestricted use or enjoyment of his property, or his property is taken from him because his use or enjoyment of such property is injurious to the public welfare.”¹⁹⁹

The North Carolina Right-to-farm Act constitutes an unconstitutional taking without just compensation as applied to neighbors of CAFOs. First, there is an impact upon the neighbors’ property rights. As stated above, property rights include the right to use and enjoy one’s property. Such interest is taken from neighbors of CAFOs through the offensive odors and influx of flies. Some individuals have described the horrible smell that settles in their hair and clothes, following them all day.²⁰⁰ Others tell of how they cannot go outside because the odor induces nausea and makes them sick.²⁰¹ In addition to these reactions to the odor, a researcher at Duke University has found that people living near hog CAFOs “showed ‘more tension, depression, more anger, less vigor, more fatigue and more confusion’ than others.”²⁰² These testimonials indicate the negative impact that CAFOs have on their neighbors’ use and enjoyment of their property, and establishes a basis for damages.

The next step of the North Carolina takings analysis is to analyze whether the Right-to-farm Act is an exercise of the state’s police powers or of eminent domain. As stated above, an exercise of a police power must have an “appropriate and direct connection” to the protection of life, health, or property, which the state owes to its citizens. The right-to-farm is not such a protection. Viewing the act in the light most favorable to the government, the Right-to-farm Act protects the North Carolina economy. However, protection of the economy is not an enumerated interest and thus constitutes “[a]n exercise of police power outside of these bounds[, which] may result in a taking.”²⁰³

After determining that the right-to-farm does not constitute an exercise of the police power, the analysis then asks whether it is an exercise of eminent domain. Here, the right-to-farm is an exercise of eminent domain as applied to CAFO neighbors because the nuisance immunity provision is a governmental action which “takes property for public use because such

199. *Id.* (quoting *Durham*, 54 S.E. at 462) (second alteration in original).

200. DAVID KIRBY, ANIMAL FACTORY: THE LOOMING THREAT OF INDUSTRIAL PIG, DAIRY, AND POULTRY FARMS TO HUMANS AND THE ENVIRONMENT 89 (2010).

201. *Id.*

202. *Id.* at 90.

203. *Kirby v. N.C. Dep’t of Transp.*, 786 S.E.2d 919, 924 (N.C. 2016).

action is advantageous or beneficial to the public.”²⁰⁴ The analogy to *Gacke* applies here. Like the plaintiffs in *Gacke*, the neighbors of North Carolina CAFOs also have had an easement created on their land through the statutory immunity granted to CAFOs by the state. Like the statute in *Gacke*, the North Carolina statute creates an easement because “the immunity allows the [CAFOs] to do acts on their own land which, were it not for the easement, would constitute a nuisance.”²⁰⁵ Thus, relying on the reasoning in *Gacke*, the North Carolina Supreme Court should find that the North Carolina right-to-farm act constitutes an unconstitutional taking as applied to neighbors of CAFOs.

3. Due Process Jurisprudence

In addition to providing excellent reasoning for a takings analysis, *Gacke* also hints that narrow provisions within right-to-farm acts may violate due process rights. The Fourteenth Amendment to the United States Constitution (the Due Process Clause) provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.”²⁰⁶ The North Carolina constitution provides a parallel provision in Article I Section 19, which states that “[n]o person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land.”²⁰⁷ The North Carolina Supreme Court has held that “[t]he term ‘law of the land’ as used in Article I, Section 19, of the Constitution of North Carolina, is synonymous with ‘due process of law’ as used in the Fourteenth Amendment to the Federal Constitution.”²⁰⁸ Due Process jurisprudence divides due process into two categories: substantive due process and procedural due process.²⁰⁹ Substantive due process asks whether there is a sufficient justification or purpose for the government’s deprivation of a person’s life, liberty, or property.²¹⁰ Procedural due process

204. *Id.*

205. *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 172 (Iowa 2004).

206. U.S. CONST. amend. XIV.

207. N.C. CONST. art. I, § 19.

208. *State v. Williams*, 761 S.E.2d 662, 665 (N.C. Ct. App. 2014) (alteration in original).

209. *State v. Thompson*, 508 S.E.2d 277, 282 (N.C. 1998).

210. Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1501 (1999).

asks whether the government followed proper procedures when taking life, liberty, or property.²¹¹ Here, substantive due process applies.

“Substantive due process’ protection prevents the government from engaging in conduct that . . . interferes with rights ‘implicit in the concept of ordered liberty.’”²¹² It is a “guaranty against arbitrary legislation, demanding that the law shall not be unreasonable, arbitrary or capricious, and that the law be substantially related to the valid object sought to be obtained.”²¹³ Essentially, substantive due process “protects the public from government action that unreasonably deprives them of a liberty or property interest.”²¹⁴

The first step in analyzing a substantive due process claim is to determine the interest or right being invaded. The party seeking procedural protection bears the burden of establishing that a life, liberty, or property interest is at stake.²¹⁵ If the right infringed upon is fundamental, then the court will apply strict scrutiny, and the state must demonstrate “a compelling state interest for the law to survive a constitutional attack.”²¹⁶ If the interest is not fundamental, then the court will apply the rational basis test, and “the government action need only have a rational relation to a legitimate governmental objective to pass constitutional muster.”²¹⁷ To determine whether a right is fundamental, the court must assess “whether it is ‘objectively, deeply rooted in this Nation’s history and tradition or if it is implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed.’”²¹⁸ A violation of substantive due process may be claimed “any time the government takes away life, liberty or property.”²¹⁹ This is because “[a]ny time the government deprives a person of

211. *Id.*

212. *Thompson*, 508 S.E.2d at 282 (citations omitted).

213. *State v. Joyner*, 211 S.E.2d 320, 323 (N.C. 1975).

214. *Tripp v. City of Winston-Salem*, 655 S.E.2d 890, 893 (N.C. Ct. App. 2008) (quoting *Toomer v. Garrett*, 574 S.E.2d 76, 84 (N.C. Ct. App. 2002)).

215. *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).

216. *Clark v. Sanger Clinic*, 542 S.E.2d 668, 673 (N.C. Ct. App. 2001).

217. *Tripp*, 655 S.E.2d at 893 (quoting *Toomer v. Garrett*, 574 S.E.2d 76, 84 (N.C. Ct. App. 2002)).

218. *Standley v. Town of Woodfin*, 661 S.E.2d 728, 730 (N.C. 2008) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

219. *Chemerinsky*, *supra* note 210, at 1508.

life, liberty or property, the government must provide a sufficient justification.”²²⁰

A substantive due process issue arises in the context of the amended Act and its provision of nuisance immunity. The right or interest being invaded by the provision of statutory nuisance immunity for farmers is the right to use and enjoy one’s property. The right to use and enjoy one’s property is a fundamental property interest that is deeply rooted in the history and tradition of the United States. This property interest has existed since the time of Sir William Blackstone and is documented in his *Commentaries on the Laws of England*.²²¹ Additionally, the existence of nuisance as a cause of action, specifically designed to protect the use and enjoyment of one’s property, evidences the fundamental nature of the right in both the United States and the State of North Carolina. Indeed, as demonstrated above, the “fundamental right to property is as old as [the] state” and the term property in North Carolina includes the use and enjoyment thereof.²²²

Because the right to use and enjoy one’s property is a fundamental right, the court must apply strict scrutiny in determining whether the deprivation of it is adequately justified. Strict scrutiny requires the government to prove that the statute is narrowly tailored to achieve a compelling governmental interest.²²³ In this context, the interest that the state will likely claim will be the economic benefit of shielding farms from nuisance liability, as well as the purpose espoused in the Act. While this is a legitimate governmental interest, the statute is not narrowly tailored to achieve this end. As stated herein, there are several issues with the language of the statute that could work an injustice to the people of North Carolina.²²⁴ Because the statute is not narrowly tailored to achieve a compelling governmental interest, it will fail strict scrutiny.

It would be presumptuous to claim definitively how a court will decide this argument. However, based on the sea of cases flowing out of the eastern district of North Carolina, it is likely that the court will decide for the farm neighbors. Regardless, a substantive due process claim would be a viable alternative cause of action where a farm neighbor seeks to bring a nuisance

220. *Id.* at 1509.

221. 1 WILLIAM BLACKSTONE, COMMENTARIES *134 (“The third absolute right, inherent in every Englishman, is that of property; which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land.”).

222. Kirby v. N.C. Dep’t of Transp., 786 S.E.2d 919, 923 (N.C. 2016).

223. CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW 49 (5th ed. 2016).

224. See discussion *supra* Part II.F.

claim against a farm or agricultural producer because the statutory nuisance immunity creates an easement on the neighbor's property.

B. *Mitigating the Harm*

If the courts fail to find the Right-to-farm Act unconstitutional based upon the arguments herein, the North Carolina courts can still mitigate the damages that the newly amended right-to-farm act will pose to its citizenry by utilizing an undue burden standard for substantive due process and finding the statute unconstitutional as applied to certain plaintiffs. By following the example of Iowa, North Carolina courts can introduce pretrial hearings to determine whether the statute should be applied in specific situations. The purpose of these hearings will be to balance the interests of the parties. Ideally, this balancing will take a form like the *Gacke* model,²²⁵ or it could take the form of Restatement (2d) of Torts § 826.²²⁶ Either form would allow the CAFOs to plead the right-to-farm as an affirmative defense, then allow plaintiffs to counter that argument by showing that the application of the statutory immunity would be unconstitutional as applied to the plaintiff. The plaintiff can do this by showing the court the satisfaction of the *Gacke* factors. The *Gacke* factors would serve best to balance the plaintiff's property interests and the state's proposed interest in offering the statutory immunity. This test would ensure that the statute applies to accomplish the purpose of the General Assembly when the statutory immunity would not unreasonably interfere with the rights of the farm neighbors.

IV. CONCLUSION

The 2018 amendment to the North Carolina Right-to-farm Act drastically limits the ability to bring a nuisance action against a farm. Its harsh requirements make it nearly impossible to find a set of circumstances whereby a potential plaintiff would be able to satisfy all of the listed criteria and thus be able to bring a nuisance action.²²⁷ The espoused purpose for such stringency is the protection and preservation of North Carolina farmers and North Carolina's agricultural resources.²²⁸ What the Act fails to consider is that not all of North Carolina's farms are small, family-owned operations. An

225. See discussion *supra* Part III.A.1.

226. RESTATEMENT (SECOND) OF TORTS § 826 (AM. LAW INST. 1965) (weighing the gravity of the harm versus the utility of the conduct).

227. *Id.*

228. N.C. GEN. STAT. § 106-700 (2020).

increasing portion of the farms in North Carolina, and across the United States, are shifting to the CAFO model and those operations that were once family-owned now either have contracts with, or are owned by, large, international corporations.²²⁹ With such change in the industry, North Carolina lawmakers must adopt a change in policy; otherwise, farm neighbors will be left to suffer deprivations of their property rights and injuries to their health without compensation. Without reform, the cost of maintaining a nuisance will be placed upon the farm neighbor, rather than borne by the business itself or the consumer who “rightfully should pay for the *entire* cost of producing the product he desires to obtain.”²³⁰

For the above reasons, the courts should either hold the statute facially unconstitutional or unconstitutional as applied to certain plaintiffs. Additionally, the North Carolina General Assembly should further amend the statute to preclude CAFOs from receiving the benefits of nuisance immunity. Finally, plaintiffs must work with their attorneys to seek alternative sources of recovery for these injuries should the courts and the legislature deny them with recourse for their injuries.

229. See Smart, *supra* note 14, at 2116.

230. Carpenter v. Double R Cattle Co., 701 P.2d 222, 229 (Idaho 1985) (Bistline, J., dissenting).