
2021

Sanctioning Nuisance: How the Modern Right to Farm Impermissibly Burdens Neighbors

Ginger Pinkerton

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>

 Part of the [Law Commons](#)

Recommended Citation

Ginger Pinkerton, *Sanctioning Nuisance: How the Modern Right to Farm Impermissibly Burdens Neighbors*, 72 Case W. Rsrv. L. Rev. 141 (2021)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol72/iss1/7>

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

— Note —

SANCTIONING NUISANCE: HOW THE
 MODERN RIGHT TO FARM
 IMPERMISSIBLY BURDENS NEIGHBORS

CONTENTS

INTRODUCTION 141

I. THE RISE OF CONCENTRATED ANIMAL FEEDING OPERATIONS AND
 THEIR IMPACT ON NEIGHBORS 144

II. THE RIGHT TO FARM AND CREATE NUISANCE IN THE PROCESS 149

 A. *Nuisance and its Underlying Property Interest* 150

 B. *Immunization of Agricultural Operations from Nuisance Actions* 151

III. INDIANA’S RIGHT TO FARM ACT 153

IV. CONSTITUTIONAL CONCERNS 156

 A. *Fundamentality of the Affected Property Interests* 159

 B. *Affected Liberty Interests* 162

 C. *Distinctions in Rational Basis* 167

CONCLUSION 172

INTRODUCTION

Richard and Janet Himsel found that living on their property—land Richard’s family had owned since 1940—had become utterly unbearable.¹ The stench and side effects of the emissions from the hog-raising facilities that had been erected less than a half-mile away had forced Janet to cease living in their home on advice of her doctor,² and kept the Himsels’ children and grandchildren from visiting.³ The emissions from the facilities stung their eyes and throats, and made it difficult to eat and sleep.⁴ The facilities were so close to the Himsels’

1. Emily Hopkins, *Hendricks County Homeowners Wanted Relief from the Smell of 8,000 Neighboring Hogs; Indiana Court Weighs In*, INDYSTAR (Apr. 26, 2019, 6:00 AM), <https://www.indystar.com/story/news/environment/2019/04/26/right-farm-indiana-court-rejects-nuisance-case-hendricks-county/3573056002/> [https://perma.cc/YB6T-BRGY] (“[S]taying in the house is at times unbearable, Himsel said.”).

2. See Petition for Writ of Certiorari at 11–12, *Himsel v. Himsel*, 122 N.E.3d 935 (Ind. Ct. App. 2019) (No. 18A-PL-645) [hereinafter *Himsel Petition*].

3. See Hopkins, *supra* note 1.

4. See *id.*; Samantha Horton, *After Supreme Court Rejects Hearing Right to Farm Case, Both Sides Look to Policy Changes*, WFYI

residence that the hog-raising buildings could be seen from the second floor of the Himsels' home, just beyond the corn field that buffered the neighboring property.⁵

Richard considered the prospect of selling the property—including the house he was born in over 70 years prior and had occupied with his wife since 1994—but knew that no buyer would be motivated to purchase a property directly adjacent to an industrialized hog facility.⁶ Even just considering selling the property was painful—Richard and Janet had created their life together there, and they had planned to spend their retirement there.⁷ Moreover, the property was now worth less than half what it was prior to construction of the Concentrated Animal Feeding Operation (CAFO).⁸ Richard and Janet had themselves farmed on their land up until 2000,⁹ but their own history of farming did not deter them from bringing a nuisance suit in 2015 against their neighbors—neighbors who happened to be Richard's cousin and nephews.¹⁰

The Himsel defendants had, for nearly twenty years, used their property primarily for crop agriculture.¹¹ In 2013, they successfully petitioned for a rezoning of their land from agricultural residential (AGR) to agricultural intense (AGI).¹² This enabled them to switch from crop agriculture to the operation of concentrated hog raising facilities—an operation that the previous zoning restrictions would not have permitted.¹³ Richard Himsel, and other community members,

INDIANAPOLIS (Oct. 12, 2020), <https://www.wfyi.org/news/articles/after-supreme-court-rejects-hearing-right-to-farm-case-both-sides-look-to-policy-changes> [https://perma.cc/9D56-BE75].

5. See Hopkins, *supra* note 1.
6. *Id.*; Himsel v. Himsel, 122 N.E.3d 935, 941 (Ind. Ct. App. 2019).
7. See Cailen LaBarge, *Bringing Big Ag's Right to Harm to the U.S. Supreme Court*, SENTIENT MEDIA (Oct. 1, 2020), <https://sentientmedia.org/bringing-big-ag-s-right-to-harm-to-the-u-s-supreme-court/> [https://perma.cc/82SU-X3QR].
8. Himsel Petition, *supra* note 2, at 14 (acknowledging a 60% devaluation in the Himsels' property value).
9. *Himsel*, 122 N.E.3d at 940.
10. Hopkins, *supra* note 1.
11. *Himsel*, 122 N.E.3d at 939 (“Between at least 1994 and 2013, the Farm had been used consistently for crops.”). *But see* LaBarge, *supra* note 7 (describing the Himsel defendants' property as having been used for crop agriculture for “the past century”).
12. *Himsel*, 122 N.E.3d at 939.
13. *Id.*

vocally opposed the rezoning to no avail.¹⁴ The Himsel defendants proceeded with construction and operation of “two 4,000-hog production buildings,” wherein a new batch of hogs would come in roughly every six months to replace the grown hogs that were shipped out.¹⁵ Within seven months of the rezoning, Richard and Janet found themselves living within a half-mile of 8,000 hogs and the accompanying pits of those hogs’ excrement¹⁶—pits collecting nearly four million gallons of waste annually.¹⁷ This became the reality of the Himsels’ lives—a reality which Indiana courts upheld under Indiana’s Right to Farm Act.¹⁸

This Note discusses the general origins and evolution of the right to farm as it has been memorialized in the legislation of each of the fifty states,¹⁹ with a particular focus on Indiana’s Right to Farm Act, as applied in *Himsel* to immunize a concentrated hog feeding operation from a nuisance claim brought by rural neighbors.²⁰ Such concentrated, industrial, agricultural operations, compared to traditional, smaller-scale agricultural operations, impose unique and wide-ranging effects on those living around them. A full discussion of those effects follows in Part I.

Significant policy concerns arise from the immunization of these agricultural operations from nuisance liability, particularly when immunization is applied outside of the context of urban encroachment and where the neighbor did not “come to the nuisance.”²¹ This immunization challenges the resolution of the individual property

-
14. LaBarge, *supra* note 7 (“[H]undreds of residents attended zoning hearings to oppose the farm’s change in designation from ‘Agriculture Residential’ to ‘Agriculture Intense.’”); *Himsel*, 122 N.E.3d at 939 (“Following a public hearing on March 12, 2013, at which Richard Himsel spoke in opposition to the rezoning, the Plan Commission unanimously recommended approval of the requested rezoning.”).
 15. *Himsel*, 122 N.E.3d at 940.
 16. *Id.* (noting that rezoning was approved March 26, 2013, and the CAFOs were filled with hogs on October 2, 2013); Himsel Petition, *supra* note 2, at 6.
 17. Himsel Petition, *supra* note 2, at 11.
 18. *Himsel*, 122 N.E.3d at 945 (holding that the Himsels’ nuisance claim was barred by Indiana’s Right to Farm Act), *transfer denied sub nom.* Himsel v. 4/9 Livestock, LLC, 143 N.E.3d 950 (Ind. 2020).
 19. *See infra* notes 87–101 and accompanying text.
 20. *See infra* notes 102–13 and accompanying text.
 21. *See infra* notes 90–92 and accompanying text; *see also* Buchanan v. Simplot Feeders, Ltd. P’ship, 952 P.2d 610, 615–16 (Wash. 1998) (“[Washington’s right to farm law] should not be read to insulate agricultural enterprises from nuisance actions brought by an agricultural or other rural plaintiff, especially if the plaintiff occupied the land before the nuisance activity was established.”).

interest—the interest on which the action of nuisance has been founded for centuries.²²

This Note subsequently analyzes the right to farm—specifically, broad formulations of the right to farm such as that of Indiana—under a due process framework.²³ At least as applied to the Himsels, the right to farm has impermissibly and inappropriately burdened property and liberty interests. Ultimately, it asserts that the right to farm as it exists now in many states, including Indiana, has failed to accomplish an appropriate balancing between the interests of agricultural operations and those of neighboring property owners. This has led to absurd and unjust outcomes for property owners such as the Himsels.

In addition to placing heavy burdens on recognized due-process interests of neighbors, the vast and substantiated negative impacts of CAFOs on neighbors create serious policy concerns.²⁴ Right-to-farm legislation often leaves little-to-no realistic opportunity for neighbors to vindicate their property and liberty interests, protect their health, and preserve the meaningful bonds and associations they have created within their communities.

I therefore advocate that the right to farm be narrowed back to its original form—limited in application to circumstances in which the neighbor “came to the nuisance.”²⁵ Doing so would establish a more appropriate balance between the interests of agricultural operations and their neighbors and would alleviate the due process and policy concerns that exist now.

I. THE RISE OF CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON NEIGHBORS

Agriculture has long been an important American industry—so much so that some states have enshrined farming as a right protected by their state constitutions.²⁶ But the agricultural setting that exists in America today is dramatically different than that which existed mere decades ago.²⁷ The traditional family farm has been, and is being,

22. See *infra* notes 150–69 (discussing the historical importance of this property interest and its fundamentality).

23. See *infra* Part IV.

24. See *infra* Part I.

25. See *infra* notes 89–94 and accompanying text.

26. Joseph Malanson, Note, *Returning Right-to-Farm Laws to Their Roots*, 97 WASH. U. L. REV. 1577, 1578, 1581 (2020). Indiana’s Senate considered, but ultimately did not approve, a proposed amendment to enshrine the right to farm in Indiana’s constitution. Ryan Sabalow, *Indiana Senate Kills ‘Right to Farm’ Amendment*, INDYSTAR (Feb. 24, 2015, 2:02 PM), <https://www.indystar.com/story/news/2015/02/24/indiana-senate-kills-right-farm-amendment/23944627/> [<https://perma.cc/V5V3-82AN>].

27. See Malanson, *supra* note 26, at 1579.

gradually replaced by industrial agricultural operations.²⁸ Large-scale, corporate agriculture has surged over the last several decades, while the prevalence of smaller-scale, independent farming has dropped.²⁹

Among these industrial operations are CAFOs.³⁰ CAFOs are high-density facilities that contain non-aquatic animals for at least forty-five days per year and which do not sustain “crops, vegetation, or forage growth . . . over a normal growing period.”³¹ These facilities are classified as either Large, Medium, or Small CAFOs, depending on various factors, including the number of animals they contain and the means by which the facility discharges waste into the water supply.³² Large CAFOs commonly house tens of thousands of animals within the same building.³³ A Large CAFO dedicated to swine, for example, houses at least 2,500 swine weighing over 55 pounds each, or at least 10,000 swine weighing under 55 pounds each.³⁴ Such facilities are designed to optimize large-scale production, with speed and cost efficiency as predominant concerns, containing animals in a “factory-like setting

-
28. *E.g.*, Jonathan Morris, Comment, “*One Ought Not Have So Delicate a Nose*”: CAFOs, Agricultural Nuisance, and the Rise of the Right to Farm, 47 ENV’T L. 261, 272 (2017).
29. *See, e.g.*, NAT’L AGRIC. STAT. SERV., U.S. DEP’T OF AGRIC., 2017 CENSUS OF AGRICULTURE: UNITED STATES SUMMARY AND STATE DATA 2 (2019), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/usv1.pdf [<https://perma.cc/Y9TM-PWYE>] (showing, in Figure 1, approximately 9% increase from 2012 in legal identification of U.S. farms as “Corporation” and approximately 4% decrease from 2012 in legal identification as “Family or individual”); Chris McGreal, *How America’s Food Giants Swallowed the Family Farms*, GUARDIAN (Mar. 9, 2019), <https://www.theguardian.com/environment/2019/mar/09/american-food-giants-swallow-the-family-farms-iowa> [<https://perma.cc/AEL5-FEW7>] (discussing the decline of independent pig and cattle farms since 1985); Madeleine Skaller, Comment, *Protecting the Right to Harm: Why State Right to Farm Laws Should Not Shield Factory Farms From Nuisance Liability*, 27 SAN JOAQUIN AGRIC. L. REV. 209, 210 (2017).
30. CARRIE HRIBAR, NAT’L ASS’N OF LOC. BDS. OF HEALTH, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON COMMUNITIES 1 (Mark Schultz ed., 2010), https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf [<https://perma.cc/CHZ7-BVKB>].
31. *Id.*; Morris, *supra* note 28, at 272–73.
32. ENV’T PROT. AGENCY, REGULATORY DEFINITIONS OF LARGE CAFOs, MEDIUM CAFO, AND SMALL CAFOs, https://www3.epa.gov/npdes/pubs/sector_table.pdf [<https://perma.cc/7RQM-FX3T>]; 40 C.F.R. § 122.23 (2012).
33. *See* ENV’T PROT. AGENCY, *supra* note 32 (showing that a turkey CAFO is designated as “Large” if it houses at least 55,000 turkeys and a sheep or lamb CAFO is designated as “Large” if it houses at least 10,000 sheep or lambs).
34. *Id.*

where the animals are . . . densely packed in pens or crates.”³⁵ The animals’ waste is typically collected in outdoor lagoons—“open-air storage ponds”³⁶—or in pits underneath the animal confinement buildings.³⁷ The amount of waste accumulated through these facilities is far from insubstantial. Hogs, for example, produce up to eight times as much waste as humans,³⁸ with a single hog producing an average of 11 pounds of waste per day.³⁹ And unlike for humans, there exist no sewage-treatment facilities to deal with this waste safely.⁴⁰

The intensive production and dense animal confinement inherent in the operation of CAFOs are associated with more significant impacts on the surrounding environment and on neighbors.⁴¹ Documented issues include degradation of surrounding water and air quality, health implications from aerial emissions,⁴² increased prevalence of odors, insects, and noise,⁴³ and reduction in surrounding property values.⁴⁴

CAFOs produce greater levels of aerial emissions due to their size and concentration, and areas surrounding CAFOs experience reduced

-
35. See Himsel Petition, *supra* note 2, at 9 (citing HRIBAR, *supra* note 30, at 1).
36. Cordon M. Smart, Comment, *The “Right to Commit Nuisance” in North Carolina: A Historical Analysis of the Right-to-Farm Act*, 94 N.C. L. REV. 2097, 2106 (2016).
37. Himsel Petition, *supra* note 2, at 9.
38. Smart, *supra* note 36, at 2106; cf. ROBBIN MARKS, NAT’L RES. DEF. COUNCIL & THE CLEAN WATER NETWORK, CESSPOOLS OF SHAME: HOW FACTORY FARM LAGOONS AND SPRAYFIELDS THREATEN ENVIRONMENTAL AND PUBLIC HEALTH 3 (2001), <https://www.nrdc.org/sites/default/files/cesspools.pdf> [<https://perma.cc/5BQR-X9FN>] (“A single hog produces two to four times the amount of waste as a human produces . . .”).
39. Talia Buford, *A Hog Waste Agreement Lacked Teeth, and Some North Carolinians Say They’re Left to Suffer*, PROPUBLICA (Nov. 23, 2018, 5:00 AM), <https://www.propublica.org/article/a-hog-waste-agreement-lacked-teeth-and-some-north-carolinians-say-left-to-suffer> [<https://perma.cc/S86R-3NBK>].
40. HRIBAR, *supra* note 30, at 2.
41. See, e.g., C.M. Williams, *CAFOs: Issues and Development of New Waste Treatment Technology*, 10 PENN STATE ENV’T L. REV. 217, 218 (2002) (acknowledging the health and environmental impacts attributable to concentrated animal feeding operations); Smart, *supra* note 36, at 2104 (describing CAFOs as “posing serious environmental and public health threats to not only neighboring landowners but also [to] surrounding communit[ies]”); Skaller, *supra* note 29, at 217 (“CAFOs present uniquely dangerous hazards to human and environmental health by creating large amounts of waste and emitting harmful pollutants in greater quantities than smaller farms.”).
42. Williams, *supra* note 41, at 218.
43. HRIBAR, *supra* note 30, at 3.
44. Smart, *supra* note 36, at 2107.

air quality as a result.⁴⁵ These emissions include gaseous emissions—such as ammonia, hydrogen sulfide, and methane—which are primarily caused by the decomposition of manure.⁴⁶ A testing of the ammonia levels on the Himsels’ property, for example, discovered levels “far exceeding ordinary levels” of similarly rural properties not located near a CAFO.⁴⁷ Also contributing to reduced air quality is the emission of particulate matter—mostly dust from animal feed and dried excrement—which is spread by the animals’ movement.⁴⁸

This reduced air quality can harm the health of neighboring communities.⁴⁹ This is particularly true for children, for whom closer proximity to a CAFO correlates with a greater risk of experiencing asthma symptoms.⁵⁰ Ammonia and hydrogen sulfide emissions can cause irritation to and inflammation of the skin, eyes, and respiratory tract,⁵¹ and exposure to these gases at high concentrations can be fatal.⁵² Exposure to particulate matter increases the risk of chronic bronchitis and chronic respiratory symptoms, as well as a decline in lung function.⁵³ Studies have shown that individuals living within two miles of swine operations report higher frequencies of nausea, respiratory problems, headaches, sore throat, and burning eyes, among other symptoms, compared to a control population residing outside of that two-mile radius.⁵⁴ Indeed, the Himsels experienced several of these symptoms.⁵⁵

In addition to these health implications, the intensified production of CAFOs creates odors that reduce the quality of life of those living on neighboring properties.⁵⁶ Depending on weather conditions and specific farming practices, odors from CAFOs are commonly smelled

45. HRIBAR, *supra* note 30, at 5.

46. *Id.*

47. Himsel Petition, *supra* note 2, at 12.

48. HRIBAR, *supra* note 30, at 5; Williams, *supra* note 41, at 228.

49. *See* HRIBAR, *supra* note 30, at 5–7.

50. *Id.* at 5–6.

51. *Id.* at 6.

52. MARKS, *supra* note 38, at 26–27 (“At high concentrations, [hydrogen sulfide] can result in unconsciousness, respiratory failure, and death within minutes . . . [Ammonia] . . . in high concentrations, can be fatal.”).

53. HRIBAR, *supra* note 30, at 6.

54. Morris, *supra* note 28, at 275.

55. Himsel Petition, *supra* note 2, at 12 (“Although invisible to the naked eye, these emissions are chemical compounds that burn the Himsel’s [sic] . . . noses, throats and eyes.”).

56. *See* Williams, *supra* note 41, at 230–31.

three miles away and can be smelled up to six miles away.⁵⁷ In the Himsels' case, the CAFO is much closer. From less than half a mile away, the smells of the CAFO permeate the inside of the Himsels' home.⁵⁸

Odors from CAFOs are generally more significant and far-reaching than those associated with smaller farms.⁵⁹ This can be attributed, at least in part, to the higher levels of excrement and manure created by CAFOs.⁶⁰ These odors often force neighboring property owners to adjust their use of their property—restricting their ability to enjoy time outdoors or forcing them to keep windows closed year-round.⁶¹

Contamination of groundwater and surface water is another serious issue associated with CAFOs.⁶² This is significant because “[g]roundwater is a major source of drinking water in the United States.”⁶³ This is particularly true in rural areas, where agricultural operations are more prevalent and where their impacts are thus experienced more closely.⁶⁴ Animal excrement and urine may leach into the groundwater through the lagoons where the waste is stored.⁶⁵ The same result can occur when manure is overapplied (whether by too frequent application or application in too large a quantity) to fields.⁶⁶ Massive spills—sometimes of millions of gallons of livestock waste—are not uncommon.⁶⁷ After Hurricane Florence in 2018, nearly fifty lagoons in North Carolina overflowed, spilling waste onto surrounding properties and into bodies of water.⁶⁸ Such spills and seepage can ultimately

57. HRIBAR, *supra* note 30, at 7.

58. Himsel Petition, *supra* note 2, at 11–12.

59. *See id.*

60. *See id.* at 11.

61. *See id.* at 12–13.

62. *See, e.g.*, Williams, *supra* note 41, at 218–19.

63. HRIBAR, *supra* note 30, at 3.

64. *Id.*

65. *See* Williams, *supra* note 41, at 219.

66. HRIBAR, *supra* note 30, at 3.

67. *See, e.g.*, Buford, *supra* note 39 (recounting a 25-million-gallon hog waste spill in 1995 and dozens of spills from Hurricanes Floyd and Florence); MARKS, *supra* note 38, at 1.

68. Wynne Davis, *Overflowing Hog Lagoons Raise Environmental Concerns in North Carolina*, NPR (Sept. 22, 2018, 7:54 AM), <https://www.npr.org/2018/09/22/650698240/hurricane-s-aftermath-floods-hog-lagoons-in-north-carolina> [<https://perma.cc/CYP6-LWAE>]; *cf.* Buford, *supra* note 39 (asserting that thirty-three lagoons overflowed as a result of Hurricane Florence).

contaminate the drinking water of surrounding communities,⁶⁹ and can cause or contribute to gastroenteritis (stomach flu), fever, kidney failure, and nitrate poisoning.⁷⁰

Dense confinement in facilities where animals share troughs and inevitably have increased contact with each other also creates a greater incidence of the spread of pathogens (microorganisms which can be a source of infection) between animals.⁷¹ Increased amounts of feed piles, trough water, animal waste, and manure-treatment lagoons in these facilities also attract pests and insects, which further this spread of pathogens.⁷² Such exposures risk health implications for “animal care workers, their families and pets, and casual farm visitors, and [can] potentially spread into nearby communities.”⁷³ Regardless of whether they ultimately contribute to the spread of disease, the flies, mosquitos, and other insects associated with CAFOs can be extremely bothersome for neighbors, who experience higher levels of flies compared to more distant residences as a result of their proximity to a CAFO.⁷⁴

II. THE RIGHT TO FARM AND CREATE NUISANCE IN THE PROCESS

As shown in Part I, CAFOs can harm neighboring properties and the quality of life that neighbors enjoy. Many such harms would ordinarily constitute private nuisances: “nontrespasory invasion[s] of another’s interest in the private use and enjoyment of land.”⁷⁵ But right-to-farm laws immunize agricultural operations from private nuisance actions, thereby depriving neighbors of those actions’ protective effects.

69. See HRIBAR, *supra* note 30, at 4 (“When groundwater is contaminated by pathogenic organisms, a serious threat to drinking water can occur. . . . [And] community members should be concerned about nitrates and nitrate poisoning.”).

70. MARKS, *supra* note 38, at 1, 23; *Stomach Flu (Gastroenteritis)*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/diseases/12418-gastroenteritis> [<https://perma.cc/337P-YANY>] (last visited Dec. 27, 2020) (describing gastroenteritis by its common name, the stomach flu).

71. SHANE ROGERS & JOHN HAINES, ENV’T PROT. AGENCY, DETECTING AND MITIGATING THE ENVIRONMENTAL IMPACT OF FECAL PATHOGENS ORIGINATING FROM CONFINED ANIMAL FEEDING OPERATIONS: REVIEW 27 (2005); MARKS, *supra* note 38, at 21.

72. ROGERS, *supra* note 71, at 29.

73. *Id.* at 30–31.

74. See HRIBAR, *supra* note 30, at 8.

75. RESTATEMENT (SECOND) OF TORTS § 821D (AM. L. INST. 1979).

A. *Nuisance and its Underlying Property Interest*

The action for private nuisance serves to protect the interests of property owners and possessors,⁷⁶ and the *Restatement (Second) of Torts* defines this interest broadly: comfort, enjoyment that one normally derives from one's land, and freedom from annoyance.⁷⁷ The concept is grounded in the principle that "one must so use her property as not to injure that of another."⁷⁸ That principle, and its application in private nuisance, are not absolute, however. A defendant need not abstain from any and all interference with her neighbor's enjoyment of his property—intentional interferences must be *unreasonable* to be actionable.⁷⁹ The analysis turns on the specific circumstances to determine whether such an interference is unreasonable.⁸⁰ An unreasonable interference with a neighbor's enjoyment of her property may constitute nuisance even if the conduct causing the nuisance is itself reasonable.⁸¹

Historically, the interference with this interest must also cause significant harm in order for liability to attach.⁸² Still, successful private nuisance suits commonly involve issues similar to those discussed above,

76. *Id.* cmt. a.

77. *Id.* cmt. b. Retention of market value is also included in the use and enjoyment of one's land. Thus, an act which negatively affects a property's market value is considered an interference with the property owner's interest in the use and enjoyment of his land and, therefore, constitutes nuisance. Louis W. Hensler II, *What's Sic Utere for the Goose: The Public Nature of the Right to Use and Enjoy Property Suggests a Utilitarian Approach to Nuisance Cases*, 37 N. KY. L. REV. 31, 32 (2010).

78. Ashley Pollard, Note, *This Little Piggy Caused a Nuisance: Analyzing North Carolina's 2018 Amendment to its Right-to-Farm Act*, 14 LIBERTY U. L. REV. 569, 572 (2020) (quoting R. WILSON FREYERMUTH, JEROME M. ORGAN & ALICE M. NOBLE-ALLGIRE, PROPERTY AND LAWYERING 822–24 (3d ed. 2011)).

79. RESTATEMENT (SECOND) OF TORTS § 821D cmt. d (AM. L. INST. 1979).

80. Beth Bates Holliday, *Cause of Action for Private Nuisance Caused by Noise, Light, or Odors Emanating from Neighboring Property*, in 26 CAUSES OF ACTION (SECOND) §§ 5–6 (2004).

81. *Id.* § 6 (citing *Mayes v. Tabor*, 334 S.E.2d 489, 490 (N.C. Ct. App. 1985)).

82. RESTATEMENT (SECOND) OF TORTS § 821D cmt. d (AM. LAW. INST. 1979). (“[F]or a private nuisance, there is no liability without significant harm.”); accord Holliday, *supra* note 80, § 5 (“The determination also turns on whether there is an appreciable, substantial, tangible injury resulting in actual, material, and physical discomfort to the plaintiff.”).

including those relating to odors,⁸³ pests,⁸⁴ dust,⁸⁵ and interference with health.⁸⁶

B. Immunization of Agricultural Operations from Nuisance Actions

Right-to-farm laws exist in some form in all fifty states.⁸⁷ These laws vary widely in precise content, but they all serve to protect agricultural interests by limiting the conditions under which a neighbor can succeed in a nuisance action against an agricultural operation.⁸⁸

A primary and original purpose of right-to-farm laws was to protect agricultural operations from encroachment by residential developments into traditionally agricultural land.⁸⁹ This purpose is reflected in the policy statements of some states' right-to-farm laws—evidencing the governments' interest in preserving and protecting existing farmland from encroachment by other land uses and thereby reducing the loss of agricultural resources.⁹⁰

This is essentially a codification of the property law doctrine of coming to the nuisance⁹¹—the theory being that established agricultural operations should not face nuisance liability when a new resident encroaches upon that existing, nuisance-causing operation and subsequently sues over the “unavoidable and sometimes unsavory

-
83. *See, e.g.*, *Baptiste v. Bethlehem Landfill Co.*, 965 F.3d 214, 218, 222–23 (3d Cir. 2020) (finding private nuisance where noxious odors from landfill within 2.5-mile radius of neighbors impeded plaintiff property owners from enjoying their property).
84. *See, e.g.*, *Bowlin v. George*, 123 S.E.2d 528, 529–30 (S.C. 1962) (finding private nuisance where defendant's automobile wrecking yard created “a breeding place for mosquitos”).
85. *See, e.g.*, *Norton Shores v. Carr*, 265 N.W.2d 802, 805–06 (Mich. Ct. App. 1978) (finding that emission of black dirt dust from defendant's property onto plaintiff's was private nuisance).
86. *See, e.g.*, *Sullivan v. Am. Mfg. Co. of Mass.*, 33 F.2d 690, 691–92 (4th Cir. 1929) (finding nuisance where plaintiff's health was affected by the dust and fumes emitted by defendant's property onto plaintiff's).
87. *E.g.*, *Morris*, *supra* note 28, at 266–67; *see also* Terence J. Centner, *Governments and Unconstitutional Takings: When Do Right-to-Farm Laws Go Too Far?*, 33 B.C. ENV'T AFFS. L. REV. 87, 147–48 (2006).
88. *See, e.g.*, Beau R. Morgan, Note, *Iowa and the Right to Farm: An Analysis of the Constitutionality of Right to Farm Statutes Across the United States*, 53 CREIGHTON L. REV. 623, 623 (2020).
89. *E.g.*, *Smart*, *supra* note 36, at 2099–100; Harrison M. Pittman, Annotation, *Validity, Construction, and Application of Right-to-Farm Acts*, 8 A.L.R.6th 465 (2005).
90. N.C. GEN. STAT. § 106-700 (2019) (declaring the policy of the State as that of conserving development of agricultural land, specifically from extension of “nonagricultural land uses” into agricultural areas); IND. CODE § 32-30-6-9 (2019); *see also infra* note 105 and accompanying text.
91. *Morris*, *supra* note 28, at 277.

conditions” that operation entails.⁹² This doctrine, and its codification through right-to-farm laws, represents a reasonable balancing of the interests between individual property owners as neighbors and pre-existing agricultural operations, and rightfully acknowledges that the nature of an established property interest, as distinguished from a new property interest, has “legitimate expectations of permanence” and thus deserves particular recognition.⁹³ This concept has been acknowledged for centuries. Blackstone wrote that “if I am entitled to hold a fair or market, and another person sets up a fair or market so near mine that he does me a prejudice, it is a nuisance [sic] But in order to make this out to be a nuisance, [sic] it is necessary . . . [t]hat my market or fair be the elder, otherwise the nuisance [sic] lies at my own door.”⁹⁴

Generally, that a neighbor came to the nuisance is not an absolute bar to recovery and is merely a factor to be considered.⁹⁵ Nonetheless, courts applying the concept to right-to-farm cases have occasionally treated this factor as conclusive in declining to find nuisance liability.⁹⁶

As American agriculture has evolved and become more industrialized, however, the agricultural industry has had tremendous success in lobbying for more comprehensive right-to-farm laws.⁹⁷ As a result, some of these laws have been enacted and applied to provide broader immunity against nuisance suits, even in instances where the residential neighbor did not encroach on the agricultural operation—i.e., outside of the traditional coming-to-the-nuisance context.⁹⁸ In a significant

92. See Pittman, *supra* note 89, § 2.

93. Malanson, *supra* note 26, at 1591–93 (reproaching right-to-farm laws that have been expanded beyond their originally intended application in the coming-to-the-nuisance context as improper and advocating for a return to the more limited application of these laws within the context of that doctrine); see also Pollard, *supra* note 78, at 586 (describing implementation of the coming-to-the-nuisance doctrine in right-to-farm laws as “fair and equitable” and resulting from a “balancing of interests”).

94. 3 WILLIAM BLACKSTONE, COMMENTARIES *218.

95. RESTATEMENT (SECOND) OF TORTS § 840D cmts. b, c (AM. L. INST. 1977).

96. Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 108 (1983).

97. See HRIBAR, *supra* note 30, at 11 (“[T]he agribusiness industry lobbied for and achieved the passage of stricter laws in the 1990s . . .”).

98. See *Himsel v. Himsel*, 122 N.E.3d 935, 943 (Ind. Ct. App. 2019) (determining that the defendants were entitled to protection against nuisance actions even though it was “not a case where the Plaintiffs moved to the nuisance as that expression is typically understood”). *But see* *Buchanan v. Simplot Feeders, Ltd. P’ship*, 952 P.2d 610, 615–16 (Wash. 1998) (“[Washington’s Right-to-Farm Act] should not be read to insulate agricultural enterprises from nuisance actions brought by an

departure from their original intent,⁹⁹ these laws have strayed from a reasonable balancing of the relevant interests to a dramatically imbalanced system in which agricultural interests trump individual property interests to an inappropriate degree.¹⁰⁰ Further, because courts in right-to-farm cases have limited discretion in balancing the factors involved, there is little or no opportunity to judicially correct this imbalance.¹⁰¹

III. INDIANA'S RIGHT TO FARM ACT

Indiana's Right to Farm Act, as amended in 2005, provides extensive immunity to agricultural operations and significantly restricts the circumstances in which a neighbor can succeed in a nuisance action against such an operation.¹⁰² As a result of the amendment, the Indiana law is no longer limited in application to the traditional coming-to-the-nuisance context (immunizing agricultural operations from nuisance liability only where the plaintiff "moved to the nuisance").¹⁰³ Instead,

agricultural or other rural plaintiff, especially if the plaintiff occupied the land before the nuisance activity was established.”).

99. Malanson, *supra* note 26, at 1587 (“[S]ome [right-to-farm] laws have departed from the foundation on which they were built.”); *see also* Smart, *supra* note 36, at 2100 (“While the original justification for [right-to-farm] laws may have seemed reasonable at the outset, some states have extended these statutory protections well beyond their originally intended purpose.”); LaBarge, *supra* note 7 (“[B]roadly drafted statutes like Indiana’s have fundamentally altered the balance of power in favor of Big Ag.”).
100. The Court of Appeals of Indiana did not deny that its state’s Right to Farm Act subordinated neighbors’ property interests to those of agricultural operations. To the contrary, the court expressly acknowledged that “the RTFA affords preferential treatment to farmers . . . by conferring immunity from nuisance suits that are not based on operational negligence.” *Himsel*, 122 N.E.3d at 948.
101. *See* Grossman & Fischer, *supra* note 96, at 117 (“The legislatures in right to farm states have limited the courts’ discretion to balance the various factors involved in the nuisance action. Once the requirements of the statute are met, the court cannot weigh the policy of protecting the agricultural operation against other concerns . . .”). In response to this concern, some have argued that courts should be afforded more opportunity to balance the interests in right-to-farm cases. Pollard, *supra* note 78, at 571 (“[C]ourts 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.”).
102. *See* Himsel Petition, *supra* note 2, at 4–6 (outlining the effect of Indiana’s Right to Farm Act on the Himsels).
103. *Id.* at 4–5 (comparing IND. CODE § 32-30-6-9 (2005) with IND. CODE § 34-1-52-4(f) (1981)); *see Himsel*, 122 N.E.3d at 934–44 (noting that Indiana’s Right to Farm Act, as amended in 2005, “now encompasses coming to the potential future nuisance”).

the law now protects agricultural operations from nuisance liability even in cases where the plaintiff's property use preceded the existence of the nuisance-causing operation.¹⁰⁴ Such a scenario is contrary to the law's explicitly stated policy—preventing nonagricultural land uses from extending into agricultural areas.¹⁰⁵ Where the agricultural operation comes later, it is arguably *that* land use which is extending into nonagricultural land uses.

All that is required to receive the law's protection is that the agricultural operation has been in operation "continuously on the locality for more than one (1) year," that "[t]he operation would not have been a nuisance at the time the agricultural . . . operation began on that locality," that the nuisance not result from negligent operation, and that there has been no "significant change in the type of operation."¹⁰⁶ "[S]ignificant change" is defined narrowly under the 2005 amendment. Under the statute, "significant change" does *not* include: switching from one type of agriculture to another (such as from crop agriculture to livestock), adopting new technology, or changing an agricultural operation's size.¹⁰⁷ Therefore, regardless of how significantly such changes affect surrounding properties, those enumerated circumstances are not enough to defeat agricultural operations' immunity from nuisance actions.¹⁰⁸

It was based on this law that the Indiana Court of Appeals affirmed the trial court's grant of summary judgment to the *Himsel* defendants on all of the *Himsel* plaintiffs' claims, asserting that the "RTFA's 2005 amendment bars *all* of the Himsel's [sic] . . . tort claims because Respondents' switch from crops to a CAFO no longer constitutes a 'significant change . . . in the type of agricultural operation . . . as *strictly defined* under subsection (d)(1) of the RTFA."¹⁰⁹ The *Himsel* defendants' switch from a decades-long practice of crop agriculture to

104. Himsel Petition, *supra* note 2, at 5–6; see *Himsel*, 122 N.E.3d at 934–44.

105. IND. CODE § 32-30-6-9(b) (2021) ("[I]t is the policy of the state to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products. The general assembly finds that *when nonagricultural land uses extend into agricultural areas*, agricultural operations often become the subject of nuisance suits It is the purpose of this section 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.") (emphasis added).

106. *Id.* § 32-30-6-9(d)(1).

107. *Id.*; Himsel Petition, *supra* note 2, at 5.

108. Himsel Petition, *supra* note 2, at 5–6 ("In other words, no matter how large, damaging, or odious the transformed operation may be, injured landowners who were there first no longer have any nuisance remedy." (discussing the impact of IND. CODE § 32-30-6-9(b))).

109. Himsel Petition, *supra* note 2, at 15 (quoting *Himsel*, 122 N.E.3d at 943).

intensive, industrialized hog farming was protected by law, despite its creating millions more gallons of noxious waste than the previous practice, harming neighbors' health (in Janet Himsel's case, to the extent that she could no longer reside in her home), and devaluing neighboring properties by up to 60%.¹¹⁰

To have drawn such a line is to practically have drawn no line at all. Even the Indiana Court of Appeals seemed to acknowledge the astonishing breadth of this provision, writing that, under the 2005 amendment, "it is difficult to imagine what *would* constitute a significant change in the type of [agricultural] operation."¹¹¹

In other words, Indiana's Right to Farm Act deprives neighbors like the Himsels of any legal recourse to vindicate their property rights against neighboring agricultural operations committing what would otherwise be actionable nuisance.¹¹² The right to farm thus essentially constitutes a right to commit government-sanctioned agricultural nuisance.¹¹³

Indiana is not alone in immunizing—and thereby encouraging—agricultural nuisance through its law. Utah,¹¹⁴ Nebraska,¹¹⁵ North Carolina,¹¹⁶ Michigan,¹¹⁷ and Oklahoma,¹¹⁸ for example, have enacted right-to-farm laws granting immunity from nuisance liability in similar circumstances as those described above.¹¹⁹ Some states have gone even

110. *See supra* notes 2–17 and accompanying text.

111. *Himsel*, 122 N.E.3d at 943 n.5 (emphasis added); *see also* LaBarge, *supra* note 7 ("It's difficult to imagine a more significant transformation than converting cropland to an 8,000-pig factory farm, and it's unclear what type or degree of change, if any, the state envisioned as actually meeting this standard.").

112. *Himsel* Petition, *supra* note 2, at 6, 37 ("Were it not for the 2005 amendment to the RTFA, that gross interference with the Himsels' . . . lives and property would be an actionable nuisance for which state law would provide a remedy."); *cf.* Grossman & Fischer, *supra* note 96, at 134 ("By making an historically important remedy unavailable in some situations, right to farm statutes deprive landowners of one form of protection against serious interferences with the use and enjoyment of their property.").

113. Smart, *supra* note 36, at 2100 ("[M]any of these amended RTF statutes have effectively created a 'right to commit nuisance' as opposed to a 'right to farm.'").

114. UTAH CODE ANN. §§ 17-41-402 to 17-41-406 (LexisNexis Supp. 2021).

115. NEB. REV. STAT. §§ 2-4401 to 2-4404 (2020).

116. N.C. GEN. STAT. § 106-701 (2019).

117. MICH. COMP. LAWS §§ 286.471–286.474 (2018).

118. OKLA. STAT. ANN. tit. 50, § 1.1 (West 2021).

119. *Himsel* Petition, *supra* note 2, at 38; Malanson, *supra* note 26, at 1596–97 ("[T]he Michigan RTF law specifically provides that an operation

further—Mississippi’s right-to-farm law, for example, serves as an “absolute defense” against nuisance actions for agricultural operations that have existed for at least one year.¹²⁰ In these states, agricultural interests are prioritized over the property interests of neighbors—sometimes even if the neighbor was there before any nuisance-causing activity came to exist—in a skewed balancing of interests. These laws disregard fundamental and basic rights of neighbors to reasonably enjoy their property¹²¹ and simultaneously discourage agricultural operations from adjusting their practices to reduce their effects on neighbors.¹²²

IV. CONSTITUTIONAL CONCERNS

Right-to-farm laws are most commonly challenged under the Fifth Amendment as a regulatory taking and as a violation of the Due Process Clause.¹²³ Much commentary exists on the application of the Takings Clause to right-to-farm laws.¹²⁴ Analysis of the right to farm as a deprivation of property interests under the Due Process Clause is less prevalent.¹²⁵ This is perhaps in part because the takings challenge is generally considered more likely to succeed in right-to-farm cases than

conforming with GAAMPs cannot become a nuisance even if it changes in size, adopts new technology, or changes the type of farm product being produced.”); Smart, *supra* note 36, at 2101 (“Under [North Carolina’s] amended RTF law, an agricultural operation may raise an affirmative defense to liability in a nuisance action regardless of whether it had undergone a change in ownership, size, or type of product produced.”).

120. MISS. CODE ANN. § 95-3-29 (1972).
121. See Smart, *supra* note 36, at 2098 (acknowledging nuisance law as a tool for aggrieved landowners to protect their rights in enjoyment of their property).
122. See Malanson, *supra* note 26, at 1584 (“[W]ith RTF laws removing the threat of litigation—and thus damages—the farmer has less incentive to rein in his activities and instead may continue to foist costs onto neighbors.”); Skaller, *supra* note 29, at 223 (“[I]f CAFO operators are cognizant of the threat of a nuisance lawsuit and the associated costs, CAFOs may conform their management practices to be less offensive to neighbors.”).
123. Pittman, *supra* note 89, § 2; see Grossman & Fischer, *supra* note 96, at 135 n.174 (focusing on the constitutional challenge of taking without just compensation while acknowledging a due process argument only in footnote).
124. See, e.g., Grossman & Fischer, *supra* note 96, at 135–38 (focusing on takings as the relevant constitutional challenge); Morris, *supra* note 28, at 280–81 (focusing on the unconstitutional takings analysis).
125. See Morris, *supra* note 28, at 280–81 (discussing cases in which right-to-farm laws were challenged as unconstitutional takings, but not discussing due process challenges to right-to-farm laws); see also Centner, *supra* note 87, at 87 (discussing the right to farm in relation to regulatory takings, but not discussing the right to farm under due process analysis).

due-process challenges.¹²⁶ Still, there are compelling arguments that some right-to-farm laws that operate beyond the traditional coming-to-the-nuisance context implicate various due process rights of neighbors. This Note will refrain from delving into the already common discussion of the right to farm under a takings analysis and will instead focus on the due process analysis.

The Due Process Clauses¹²⁷ entail both procedural and substantive protections.¹²⁸ Together, the Due Process Clauses dictate that government entities, whether state or federal, shall not “deprive any person of life, liberty, or property, without due process of law.”¹²⁹

Due process prohibits government from depriving one of one’s protected interests “in a manner that shocks the conscience, regardless of the procedure used to cause the deprivation.”¹³⁰ It is a recognition that, regardless of the nature and extent of the processes in place to effect the deprivation, such deprivation cannot stand.¹³¹

As a threshold matter, the person asserting a deprivation of an interest in violation of due process must establish that that interest is protected.¹³² Since some right-to-farm laws deprive neighbors of the ability to bring nuisance actions for what would otherwise be actionable instances of nuisance, it can be said that one property interest of which the neighbor is deprived by the right-to-farm law is the nuisance cause of action itself.¹³³ Such an interest in a cause of action is considered a

126. See Grossman & Fischer, *supra* note 96, at 135 n.174 (“Although the substantive and procedural due process challenges are unlikely to succeed, the taking issue may be more significant.”).

127. The Due Process Clause of the Fourteenth Amendment applies against the states, while the Due Process Clause of the Fifth Amendment applies against the federal government. *Nebbia v. New York*, 291 U.S. 502, 525 (1934) (“The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action”); Lawrence Alexander, *The Relationship Between Procedural Due Process and Substantive Constitutional Rights*, 39 U. FLA. L. REV. 323, 323 (1987).

128. Alexander, *supra* note 127, at 324 (acknowledging that the Due Process Clauses govern both procedures “by which rules and policies are applied” as well as some “substantive content of rules and policies”).

129. U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. V; Alexander, *supra* note 127, at 323.

130. David Hughes, *Looking Behind the Due Process Label on Land Use Decisions*, 32 COLO. LAW. 59, 59 (2003).

131. See *id.* at 60 (“Procedural protections are irrelevant to a substantive due process analysis.”).

132. *Id.*

133. Grossman & Fischer, *supra* note 96, at 138 (“Right to farm statutes usually deprive landowners of the right to file nuisance actions against neighboring agricultural operations. A cause of action has long been recognized as a species of property protected by the United States

property interest protected for purposes of due process.¹³⁴ The other clear property interest infringed by right-to-farm legislation is the right of the neighbor to fully use and enjoy their property.¹³⁵

In the context of purely social or economic legislation, plaintiffs face more difficult odds in succeeding on substantive due-process challenges.¹³⁶ This is because legislation in such an area need only be supported by a rational basis.¹³⁷ This is so unless the legislation implicates a fundamental right, in which case a higher standard of review is necessary.¹³⁸ Among those rights that have been recognized by courts as being constitutionally fundamental include that of privacy in the home,¹³⁹ intimate association through marriage,¹⁴⁰ suffrage,¹⁴¹ the

Constitution. Moreover, a state tort claim is probably a property right for purposes of constitutional protection.” (footnotes omitted)). Indeed, in *Himsel*, the plaintiffs alleged that Indiana’s Right-to-Farm Act had “been unconstitutionally applied to deny their access to the courts to enforce [their right to use and enjoy their property].” *Himsel v. Himsel*, 122 N.E.3d 935, 946 (Ind. Ct. App. 2019).

134. See Grossman & Fischer, *supra* note 96, at 138, 141 (“[A] situation may arise in which a right to farm law deprives the plaintiff of a property interest—that is, the nuisance cause of action necessary to prevent serious harm to property or person.”).
135. Pollard, *supra* note 78, at 598.
136. See *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (“We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.”); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).
137. Grossman & Fischer, *supra* note 96, at 136 n.174; Pollard, *supra* note 78, at 597.
138. Grossman & Fischer, *supra* note 96, at 136 n.174; Pollard, *supra* note 78, at 597 (“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.’”).
139. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (identifying the right to engage in private, consensual sexual conduct as fundamental).
140. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival To deny this fundamental freedom on so unsupportable a basis . . . is surely to deprive all the State’s citizens of liberty without due process of law.”); *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015) (“[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”).
141. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (acknowledging the “political franchise of voting” as a fundamental political right). This

right to keep and bear arms,¹⁴² the right to refuse medical treatment,¹⁴³ and the right to freedom of association.¹⁴⁴ Where a government entity infringes on a fundamental right, due-process review requires that the government demonstrate a “compelling state interest” for the legislative infringement.¹⁴⁵ Further, the means implemented in furtherance of that compelling state interest must be narrowly tailored.¹⁴⁶

The Supreme Court has implemented various tests for determining the fundamentality of a given right.¹⁴⁷ Among those tests are whether the right falls within “immutable principles of justice” or “the very essence of a scheme of ordered liberty,” whether the right is “so rooted in the traditions and conscience of our people,”¹⁴⁸ and whether the right is “explicitly or implicitly guaranteed by the Constitution.”¹⁴⁹

A. Fundamentality of the Affected Property Interests

Protection of private property rights is vital to economic well-being, as well as to maintenance of individual liberty and autonomy.¹⁵⁰ As affirmed by President John Adams: “Property must be secured, or liberty cannot exist.”¹⁵¹ The right to use and enjoy one’s property has thus been recognized for centuries and is inherent in the concept of the property interest as a collection of a bundle of rights, rather than mere

is so because the right to vote is considered to be “preservative of all rights.” *Id.*

142. *See* McDonald v. City of Chicago, 561 U.S. 742, 778 (2010) (“[I]t is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”).

143. *Substantive Due Process—Fundamental Rights*, LAWSHELF, <https://lawshelf.com/coursewarecontentview/substantive-due-process-fundamental-rights/> [https://perma.cc/J425-JQQZ] (last visited Mar. 26, 2021).

144. *Id.*

145. *E.g.*, Pollard, *supra* note 78, at 597.

146. *City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 200 (2003) (Scalia, J., concurring) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

147. *See infra* note 148 and accompanying text.

148. *McDonald v. City of Chicago*, 561 U.S. 742, 760 (2010) (compiling and quoting various Supreme Court cases).

149. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33–38 (1973) (acknowledging the societal significance of education but refraining from holding education to be a fundamental right).

150. Steven J. Eagle, *A Prospective Look at Property Rights and Environmental Regulation*, 20 GEO. MASON L. REV. 725, 746 (2013).

151. *Id.* (quoting John Adams, *Discourses on Davila*, in 6 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 223, 280 (Charles Francis Adams ed., 1851)).

possession of land.¹⁵² It is for these reasons that the action of nuisance exists—it recognizes that even absent a physical trespass, interference with the enjoyment derived from one’s land should be actionable.¹⁵³

Despite its acknowledged vitality, a neighbor’s interests in enjoying her property and in her ability to bring a nuisance action have not been definitively recognized by courts as constitutionally fundamental.¹⁵⁴ The fundamentality argument can certainly be made, however, by applying the previously mentioned tests.¹⁵⁵

That a property owner’s interest in use and enjoyment of his property is within “the very essence of a scheme of ordered liberty”¹⁵⁶ is supported by the fact that that interest is widely considered “one of the important ‘sticks’ in the bundle of property interests held by the real property owner.”¹⁵⁷

The long-standing existence of the private nuisance cause of action evidences the fundamental nature of the right to enjoy one’s property.¹⁵⁸ That the right is so “rooted in the traditions and conscience of our people”¹⁵⁹ is evidenced by the frequent inclusion of private nuisance in literature spanning centuries.¹⁶⁰ Blackstone wrote of nuisance that “if a person keeps his hogs, or other noisome animals, so near the house of

152. Pollard, *supra* note 78, at 586–87.

153. Eagle, *supra* note 150, at 749.

154. Courts disagree on the fundamentality of these rights. *Compare* Coal. for Equal Rights, Inc. v. Owens, 458 F. Supp. 2d 1251, 1263 (D. Colo. 2006) (“[T]he *general* right to enjoy one’s property is not *per se* a fundamental right . . .”), *aff’d sub nom.* Coal. for Equal Rights, Inc. v. Ritter, 517 F.3d 1195 (10th Cir. 2008), *with* Lovett v. Cole, 584 S.W.3d 840, 863 (Tenn. App. 2019) (“[A] ‘property owner’s right to own, use, and enjoy private property is a fundamental right . . .’”) (citing *Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 474 (Tenn. 2012)), *appeal denied* (Sept. 18, 2019). In *Murr v. Wisconsin*, the Supreme Court, during a takings analysis, described property rights as “necessary to preserve freedom” but did not explicitly label the rights as constitutionally fundamental. 137 S. Ct. 1933, 1943 (2017).

155. *See* Pollard, *supra* note 78, at 598. Pollard argues that 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” and that strict scrutiny is therefore the appropriate test. *Id.*

156. *McDonald v. City of Chicago*, 561 U.S. 742, 760 (2010).

157. Hensler II, *supra* note 77, at 31.

158. Pollard, *supra* note 78, at 598.

159. *McDonald*, 561 U.S. at 760.

160. *See, e.g.*, 3 BLACKSTONE, *supra* note 94, at *5 (“If a house or wall is erected so near to mine that it stops my [ancient] lights, which is a *private* nuisance, I may enter my neighbour’s land and peaceably pull it down.”); *see also* 1 H.G. WOOD, A PRACTICAL TREATISE ON THE LAW OF NUISANCE IN THEIR VARIOUS FORMS 126 (3d ed. 1893) (committing a chapter to private nuisances).

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.”¹⁶¹ Indeed, Blackstone enumerated “[c]orrupting the air with noisome smells” as a discrete category of nuisance affecting one’s dwelling place.¹⁶² This type of nuisance was specifically enumerated as its own category because “light and air are two *indispensable* requisites to every dwelling.”¹⁶³

One 19th-century treatise described the right of a possessor of land to exercise full dominion over his land as being “among the earliest rights recognized by the courts.”¹⁶⁴ Such right was subject only to the qualification that exercise of that right not prohibit neighboring possessors of land from exercising the same.¹⁶⁵ He further emphasized the right of a possessor of land to have the air over his land be free from foreign gases and substances that interfere with the land possessor’s comfort.¹⁶⁶

Contemporary commentary has asserted that in assessing the state of the common law, subsequent statutory enactments, and their application to American nuisance cases, it would be difficult to find “significant departures from the nuisance doctrine of 17th century English common law.”¹⁶⁷ This evidences a steadfast and consistent commitment to traditional nuisance law and its protection of property owners’ right to use and enjoy their properties.

Thus, it has been consistently acknowledged for hundreds of years that enjoyment of one’s property—free from injurious smells and other nuisances—is not only an interest of sufficient importance to warrant a remedy, but also to be considered indispensable.¹⁶⁸ If this does not evidence the interest’s being “rooted in the traditions and conscience of our people,”¹⁶⁹ then what does?

161. 3 BLACKSTONE, *supra* note 94, at *217 (footnote omitted).

162. *Id.*

163. *Id.* (emphasis added). Blackstone further wrote that “it follows, that if one does any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another’s property, it is a nuisance: for it is incumbent on him to find some other place to do that act, where it will be less offensive.” *Id.* at *217–18.

164. 1 WOOD, *supra* note 160, § 94, at 127.

165. *Id.*

166. 1 WOOD, *supra* note 160, § 95, at 127–28.

167. Morris, *supra* note 28, at 286.

168. See *supra* notes 160–63 and accompanying text.

169. McDonald v. City of Chicago, 561 U.S. 742, 760 (2010). In *Washington v. Glucksberg*, the Court asserted that the right to commit suicide was not rooted in American tradition and thus was not fundamental because that interest had been “long rejected” by “centuries of legal doctrine and

B. Affected Liberty Interests

To limit the identification of affected interests in *Himsel* as only falling within the “property” category of the Due Process Clause¹⁷⁰ is to mischaracterize *Himsel* and to trivialize the situation that the Himsels endured and continue to endure. It was not simply a matter of an objective devaluation of the Himsels’ home.¹⁷¹ Nor was it merely a deprivation of that stick in the bundle of property rights that ensures a property owner the ability to enjoy the use of her property.¹⁷² Of course, those were serious burdens the Himsels were forced to shoulder.¹⁷³ But what of the other respects in which the Himsels’ lives have been burdened and altered, and will be further altered if the Himsels are constructively forced to leave their home?

The word “liberty” as it is used in a due-process analysis is not constrained by a definitive list of discrete rights.¹⁷⁴ It refers instead to a spectrum of interests—a continuum of freedom.¹⁷⁵ In *Himsel*, the operation of the CAFO—and specifically, the courts’ sanctioning of that operation through right-to-farm legislation—implicated other due-process interests in the sense that the Himsels suffered harms to their health as a result of both their proximity to the CAFO’s toxic pollutants and their inability to enjoin what would otherwise be actionable nuisance.¹⁷⁶ Cases have recognized this and similar interests (namely, the right to bodily integrity) in due process cases where government action harms the health of residents—whether directly, or, as here, by sanctioning third-party behavior.¹⁷⁷

practice.” 521 U.S. 702, 723 (1997). In contrast, protection of a property owner’s right to use and enjoy his property has long been provided through the action of nuisance. *See supra* notes 158–68 and accompanying text.

170. *See* U.S. CONST. amend. XIV, § 1.

171. *See* Himsel Petition, *supra* note 2, at 13–14 (alleging a 60% devaluation in the Himsels’ property value).

172. *See supra* notes 152, 157 and accompanying text.

173. *See supra* notes 1–8 and accompanying text.

174. RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.5, at 846 (5th ed. 2012).

175. *Id.* at 848 (“[A]ll human activity may constitute liberty.”).

176. *See supra* notes 2, 4, 112 and accompanying text.

177. *Cf.* Guertin v. Michigan, 912 F.3d 907, 915 (6th Cir. 2020) (holding that plaintiffs pled a plausible due process violation of their bodily integrity rights against various city officials where the City of Flint, with approval from the State of Michigan, dispensed unsafe drinking water to residents, causing E. coli transmission, hair loss, rashes, dangerous blood-lead levels, and even fatalities among Flint residents). It was there argued, essentially, that the dispensing of unsafe water by the city to residents constituted a

While the right to bodily integrity usually presents itself in the context of government-imposed punishment or physical restraint, bodily-integrity jurisprudence as a whole has made clear that its scope is not so limited.¹⁷⁸ The key in such cases is the involuntary nature of the intrusion—and there is essentially no limit on the cognizable manner of intrusion.¹⁷⁹

Ultimately, “a government actor violates individuals’ right to bodily integrity by knowingly and intentionally introducing life-threatening substances into individuals without their consent.”¹⁸⁰ The State of Indiana, through its Right to Farm Act, has allowed concentrated animal feeding operations to emit harmful and toxic substances into the surrounding air and water, causing substantiated, serious side effects for nearby residents.¹⁸¹ The literature detailing these effects spans decades and is visible to anyone who cares to look.¹⁸² Indeed, these effects are not merely general or hypothetical—Janet Himsel was advised to no longer reside on her property due to the effect the nearby CAFOs had on her health.¹⁸³ It cannot possibly be said that the state, in enacting its Right to Farm Act, was unaware or without basis for knowing of the thoroughly documented adverse health effects posed by CAFOs. This is significant because cases alleging bodily integrity violations are considered all the more viable where they involve such “deliberate indifference” by government.¹⁸⁴

Further, the Himsels certainly did not consent to ingesting such toxic substances on a daily basis—the CAFOs were constructed over the Himsels’ and other nearby residents’ objections.¹⁸⁵ And at the time the Himsels purchased their property, operation of such intensive animal-raising facilities was not even allowed under the zoning code.¹⁸⁶ The Himsels’ “choice” of whether to continue to endure such effects is

compelled intrusion into the bodies of nonconsenting individuals in violation of their right of bodily integrity. *Id.* at 920–21.

178. *Id.* at 919.

179. *Id.* (“[T]he central tenet of the Supreme Court’s vast bodily integrity jurisprudence is balancing an individual’s common law right to informed consent with tenable state interests, *regardless of the manner in which the government intrudes upon an individual’s body.*” (emphasis added)).

180. *Id.* at 921.

181. *See supra* notes 41–54 and accompanying text.

182. *See id.*

183. *See supra* note 2 and accompanying text.

184. *Cf. Guertin*, 912 F.3d at 924 (“It is in these kinds of situations where we would expect plaintiffs asserting substantive due process claims based on deliberate indifference to be most successful.”).

185. *See supra* note 14 and accompanying text.

186. *See supra* note 13 and accompanying text.

not much of a choice at all. Even if they were to make the painful decision to uproot themselves, they would not financially be able to do so without finding a buyer for their now unlivable and devalued property.¹⁸⁷

The Himsels also experienced restrictions on their ability to associate and gather with loved ones and relatives in their home, potentially implicating their freedom of association and similar interests.¹⁸⁸ Richard and Janet are unable to continue living together in the home they have shared for decades and in which they planned to spend their retirement.¹⁸⁹ Their grandchildren can no longer safely visit them in the home that has been in the family since 1926.¹⁹⁰

They were ultimately forced to decide between remaining on the property they had shared together since 1994¹⁹¹ and continuing to suffer from the effects of state-sanctioned activities, or uprooting their family and losing the life, memories, bonds, and associations with rural Indiana that they had created over the course of multiple generations.¹⁹² The essence of the Himsels' lives—consisting of much that cannot properly be quantified, but the significance of which cannot be denied—was infringed upon, and that infringement was sanctioned by Indiana courts.¹⁹³

The mere prospect of being forced to relocate from one's home, let alone actually having to rip out one's roots and attempt to transfer them elsewhere, can be a traumatic experience “[g]iven the extraordinary importance of place, of attachments to the most minute details of a community's environment.”¹⁹⁴ There is much literature dedicated to detailing the psychological effects that forced relocation can have on

187. See *supra* notes 6–8 and accompanying text.

188. See *supra* note 2 and accompanying text.

189. See *supra* notes 2, 7 and accompanying text.

190. Himsel Petition, *supra* note 2, at 7, 12, 13.

191. Himsel v. Himsel, 122 N.E.3d 935, 940 (Ind. Ct. App. 2019).

192. See LaBarge, *supra* note 7 (describing the longstanding connections the Himsels have to the property).

193. See *supra* notes 16–18.

194. See Byron J. Good, *Mental Health Consequences of Displacement and Resettlement*, 31 ECON. & POL. WKLY. 1504, 1506 (1996). Indeed, in a study of middle-class working families who were forced to relocate out of the West End of Boston, one woman analogized the experience of moving to that of a plant being torn up by its roots. Marc Fried, *Grieving for a Lost Home: Psychological Costs of Relocation*, in THE URBAN CONDITION (Leonard J. Duhl ed., 1963), reprinted in URBAN RENEWAL: THE RECORD AND THE CONTROVERSY 359, 374 (James Q. Wilson ed., 1966).

a person.¹⁹⁵ Dislocation disrupts the lives of a place's inhabitants in profound and lasting ways. The experience can be intensely stressful, can plant seeds of bitterness and resentment, and triggers grief not unlike that of mourning a lost loved one.¹⁹⁶

In his work on the psychological effects of forced relocation on working-class families from the West End of Boston, Marc Fried described feelings of post-relocation longing, social distress, and a sense of helplessness experienced by many of those dislocated.¹⁹⁷ An individual attested to feeling as though her “heart [had been] taken out of [her],” and others described feeling that some part of them had been severed and remained in the West End.¹⁹⁸ The study recorded startling rates of post-relocation depression, especially among those who had felt particularly attached to the West End prior to the relocation.¹⁹⁹ The experience intensely altered former residents' sense of belonging—an admittedly amorphous, but indisputably important, concept.²⁰⁰ Fried also emphasized the importance of one's sense of spatial identity (one's feeling of being at home as tied to a specific place) as being *fundamental* to human functioning.²⁰¹

In a more extended and far-reaching sense, dislocation touches a person's relationships with neighbors and community members and may contribute to the breakdown of the family unit.²⁰² One's community and residential area is the space within which “a vast and interlocking set of social networks is localized” and is essentially “an extension of the home.”²⁰³ Following forced relocation, individuals described a feeling of isolation—of having lost their sense of familiarity

195. *See generally* Good, *supra* note 194 at 1504–06; Fried, *supra* note 194 (describing the general emotional reactions of those forcibly relocated from the West End of Boston).

196. Good, *supra* note 194, at 1506; Fried, *supra* note 194, at 359, 369 (“[I]t is the tenaciousness of the imagery and affect [sic] of grief . . . which is so strikingly similar to mourning for a lost person.”).

197. Fried, *supra* note 194, at 359.

198. *Id.* at 360.

199. *Id.* at 360, 364 (“[T]he pre-relocation view of the West End as ‘home’ shows an even stronger relationship to the depth of post-relocation grief.”).

200. *See id.* at 362–63. Fried described “belonging” as the sense of being in a place which is “quite familiar and . . . in which one feels ‘at home.’” *Id.* at 363.

201. *Id.* at 365–66. According to Fried, this is particularly true for the working class—of which the Himsels, as retired farmers, are likely a part.

202. Good, *supra* note 194, at 1506.

203. Fried, *supra* note 194, at 362. The loss and disruption of these affiliations and social connections within one's community is “intense and frequently irrevocable.” *Id.* at 366.

with those around them.²⁰⁴ These impacts may not be limited to those actually physically dislocated; the consequences can linger for generations.²⁰⁵

The due-process right of association has not been limited to that of political association—it may encompass the social benefit of association.²⁰⁶ Although the Supreme Court has not recognized a “generalized right of ‘social association,’”²⁰⁷ the constitutional importance of one’s ability to gather, to maintain relationships and companionship, and to associate with one’s community and family has been acknowledged in various contexts.²⁰⁸ Because of the clear significance of such interests, “state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”²⁰⁹

Although these liberty interests may seem more amorphous than the previously discussed property interests, this should be no reason to disregard them. They may be more difficult to fit into discretely labeled categories, but they are no less significant; and the identification of which interests are definitively fundamental for purposes of due process “has not been reduced to any formula.”²¹⁰ The significance of a person’s relationships and ties to a community—and the psychological effects experienced following a severing of those ties—is clear.²¹¹ Where

204. *Id.* at 371.

205. Good, *supra* note 194, at 1505. Refugees and immigrants, for example, can suffer from a sort of “cultural bereavement”—a grieving for the home and culture one is forced to leave behind. *Id.* at 1506. Good acknowledges that the dislocation of a person from their home country is, of course, different from forced domestic resettlement to a nearby community, but he believes the findings on mental health outcomes for refugees and immigrants can be illustrative in a domestic context as well. *Id.*

206. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (“[W]e have protected forms of ‘association’ that are not political in the customary sense but pertain to the *social*, legal, and economic benefit of the members.” (emphasis added)); *IDK, Inc. v. Clark Cnty.*, 836 F.2d 1185, 1199 (9th Cir. 1988) (Reinhardt, J., dissenting) (“The protection of the Constitution extends to association for social as well as political ends.”).

207. *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989).

208. *See, e.g., Russ v. Watts*, 190 F. Supp. 2d 1094, 1096 (N.D. Ill. 2002) (recognizing a due-process right of association with one’s dependent child, “including the loss of society and companionship as secured by the . . . Fourteenth Amendment[]”).

209. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 399, 460–61 (1958).

210. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

211. *See supra* notes 194–205 and accompanying text.

reasoned judgment recognizes the fundamentality of such interests, “the State must accord them its respect.”²¹²

C. Distinctions in Rational Basis

Right-to-farm laws, then, necessarily implicate several property interests: enjoying the use of one’s property; existing on one’s own property without experiencing damaging side effects to one’s health as a result of state-sanctioned neighboring activities; being able to sustain a nuisance cause of action in court; and being able to retain the associations and bonds created with one’s community. If these various implicated interests are not considered fundamental, then the due-process analysis requires only that the governmental interference be supported by a rational basis.²¹³

To survive rational-basis review, there must first exist a legitimate government interest to support the challenged legislation.²¹⁴ Through its police powers, the government has considerable latitude in protecting public health, safety, and general public welfare.²¹⁵ An interest falling within that sphere of protection is considered a legitimate government interest.²¹⁶

Legislation falling within the scope of the government’s police powers is presumed constitutional.²¹⁷ In that context, surviving rational-basis review is generally not a difficult hurdle,²¹⁸ as a “law need not be

212. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015). In *Obergefell*, the Court recognized that the drafters of the Constitution did not presume that the interests enumerated explicitly therein represented the full extent and limit of the Constitution’s protection—they anticipated “the right of all persons to enjoy liberty as we learn its meaning.” *Id.*

213. See *supra* notes 136–38 and accompanying text.

214. Pollard, *supra* note 78, at 597 (“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.’” (quoting *Tripp v. City of Winston-Salem*, 655 S.E.2d 890, 893 (N.C. Ct. App. 2008))).

215. Grossman & Fischer, *supra* note 96, at 141.

216. See *id.* at 141–42 (“The state can regulate an owner’s use of his or her own property when that regulation is necessary to promote the public interest.”).

217. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397 (1937) (citing *O’Gorman & Young v. Hartford Fire Ins. Co.*, 282 U.S. 251, 256–57 (1931)); see also *Nebbia v. New York*, 291 U.S. 502, 537–38 (1934) (“[E]very possible presumption is in favor of its validity . . .”).

218. See *Nebbia*, 291 U.S. at 537–38 (“[The law] may not be annulled unless palpably in excess of legislative power.”).

in every respect logically consistent with its aims” in order to survive rational-basis review.²¹⁹

How do we characterize the government’s interest in promulgating right-to-farm laws and thereby disturbing traditional nuisance law by depriving neighbors of the ability to vindicate their property rights?²²⁰ Identifying the purposes and goals of right-to-farm legislation, in its various forms, provides insight.

Some assert that right-to-farm laws promote the public welfare by preserving agricultural lands.²²¹ The specific concern of protecting agricultural land from infringement by urban sprawl is a common theme underlying right-to-farm legislation.²²² The policy statements of some right-to-farm laws explicitly address an interest in keeping non-agricultural land uses from extending into agricultural land uses.²²³ One explicitly stated goal of Indiana’s Right to Farm Act is “to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products.”²²⁴ These do constitute legitimate government interests, as

219. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955). In *Lee Optical*, the Court said it was sufficient that the legislature thought the means implemented were a rational way to correct the “evil at hand.” *Id.* at 488.

220. *See Morris*, *supra* note 28, at 276 (characterizing promulgation of right-to-farm laws as “abrogat[ing] significant portions of the common law of nuisance”).

221. *Grossman & Fischer*, *supra* note 96, at 143; *see also Morris*, *supra* note 28, at 277 (“These laws are generally enacted to further the protection of agricultural investments and the preservation of land being used for agricultural operations.”).

222. *Grossman & Fischer*, *supra* note 96, at 97–100 (identifying urban growth as a threat to the maintenance of agricultural lands); *Buchanan v. Simplot Feeders, Ltd. P’ship*, 952 P.2d 610, 612 (Wash. 1998) (“As more urban dwellers moved into agricultural areas, nuisance lawsuits by those urbanites threatened the existence of many farms.”). In *Buchanan*, the Supreme Court of Washington declined to interpret the state’s right-to-farm law as protecting agricultural operations from nuisance claims brought by “an agricultural or other rural plaintiff.” *Id.* at 615–16. The court there determined that the law should be interpreted and applied narrowly so as to only afford protection to agricultural operations in the context of urban encroachment. *Id.* at 614. Similarly, in *Trickett v. Ochs*, the Supreme Court of Vermont noted that “the present case . . . arises from unique circumstances that have little to do with the problem of urbanization.” 838 A.2d 66, 73 (Vt. 2003). The court thus declined to allow the state’s right-to-farm law to immunize the agricultural operation from the nuisance action brought by a rural neighbor, stating that “it is apparent that the [statute’s] stated purpose of protecting agricultural land from the encroachment of nonagricultural activities has no application here.” *Id.* at 75–76 (alteration in original).

223. *See supra* note 105 and accompanying text.

224. IND. CODE § 32-30-6-9(b) (2021).

they aim generally at promoting agricultural production, which can be said to promote public welfare.²²⁵

However, a further distinction in rational-basis review is relevant here. Even within the standard of rational basis itself, there are differing degrees of scrutiny.²²⁶ In *Williamson v. Lee Optical of Oklahoma, Inc.*,²²⁷ the Supreme Court applied what is considered the “traditional and most minimal version of the rational-basis test.”²²⁸ There, the Court rejected a due process challenge to an Oklahoma law that mandated that only licensed optometrists or ophthalmologists, but not opticians, could perform certain eye care procedures.²²⁹ The Court stated that “it is for the legislature, not the courts, to balance the advantages and disadvantages of the [law].”²³⁰ The Court essentially accepted that, as long as “[t]he legislature *might have concluded*” that the legislation was related to the government’s legitimate interest, that was enough to survive rational-basis review.²³¹ Under that standard, the Court does not make an evaluation of the means implemented to determine whether they are particularly effective in addressing the asserted

225. See Grossman & Fischer, *supra* note 96, at 141 (“The state has considerable regulatory authority to protect the public health, safety, and general welfare. Right to farm statutes are aimed for the most part at the public welfare: over the long term, they are designed to ensure continued agricultural production and a strong state economy.”); see also Pollard, *supra* note 78, at 585 (“The societal need for the agricultural industry . . . supports the implementation of the right-to-farm.”).

226. See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18–20 (1972); Jarrett Dieterle, *Differing Levels of Scrutiny for Economic Regulations: “Anything Goes” Rational Basis v. Rational Basis “With Bite”*, THE FEDERALIST SOCIETY (Apr. 26, 2017), <https://fedsoc.org/commentary/fedsoc-blog/differing-levels-of-scrutiny-for-economic-regulations-anything-goes-rational-basis-v-rational-basis-with-bite> [<https://perma.cc/3KRD-S4V5>]. “The switch from scrutinizing economic regulations to ensure they were not ‘arbitrary, unreasonable, or discriminatory,’ to rubber-stamping such infringements for ‘any hypothetical reason’ occurred during the U.S. Supreme Court’s New Deal era.” *Id.*

227. 348 U.S. 483 (1955).

228. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 458 (Marshall, J., concurring in part) (discussing *Lee Optical*, 348 U.S. at 489).

229. *Lee Optical*, 348 U.S. at 486–87.

230. *Id.* at 487.

231. *Id.* at 487–88 (emphasis added). This standard has been referred to as “‘anything goes’ rational basis scrutiny.” Dieterle, *supra* note 226 (quoting Randy Barnett, *Strict Scrutiny for Every Law? Remembering the Real Carolene Products*, THE VOLOKH CONSPIRACY (Apr. 20, 2012, 10:34 AM), <https://volokh.com/2012/04/20/remembering-the-real-carolene-products/> [<https://perma.cc/ELE4-L7VW>]). That standard is satisfied “so long as a judge can imagine any possible rational basis for a statute.” Dieterle, *supra* note 226 (quoting Barnett, *supra*).

interests—“[i]t is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”²³² In other words, it is an extremely deferential standard of review.

In contrast, in *City of Cleburne v. Cleburne Living Center*,²³³ the Supreme Court applied a sort of heightened rational-basis review and, under that review, held the city’s ordinance invalid as applied.²³⁴ The standard enunciated by the Court was that, in order to withstand constitutional review, the legislation “must be rationally related to a legitimate governmental purpose.”²³⁵ The Court acknowledged that rational basis afforded government the “latitude necessary” to pursue effective policies, but nonetheless determined that, through the ordinance, the City of Cleburne had exceeded that latitude.²³⁶ This was because, in the Court’s view of the record, there was no rational basis for applying the ordinance to a group home but not to other property uses that were excluded.²³⁷ In other words, the Court rejected the asserted interests proposed by the government as applied to the group home at issue and did not merely accede to the City’s claims underlying the ordinance and its application to the group home.²³⁸ The ordinance was thus held unconstitutional as applied to the group home.²³⁹

232. *Lee Optical*, 348 U.S. at 487–88.

233. 473 U.S. 432.

234. *Id.* at 435.

235. *Id.* at 446.

236. *Id.* at 435, 446.

237. *Id.* at 448 (“[T]his difference is largely irrelevant unless the Featherston home and those who would occupy it would threaten legitimate interests of the city in a way that other permitted uses such as boarding houses and hospitals would not [I]n our view the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city’s legitimate interests”).

238. *Id.* at 448–50. For example, the Court rejected the City Council’s asserted interest in applying the ordinance to the group home as a means of “avoiding concentration of population and [of] . . . lessening congestion of the streets” because there was no rational reason for that concern not extending to other property uses. *Id.* at 450. The Court also rejected the City’s claim that, through the ordinance, the City was addressing the “negative attitude of the majority of property owners” as an impermissible basis on which to legislate. *Id.* at 448.

239. *Id.* at 450. Justice Marshall questioned whether the standard applied by the Court truly constituted rational basis, asserting that the ordinance would have been upheld under the “traditional rational-basis test applicable to economic and commercial regulation.” *Id.* at 456 (Marshall, J., concurring in part). He proposed that “perhaps the method employed must hereafter be called ‘second order’ rational-basis review rather than ‘heightened scrutiny.’ But however labeled, the rational basis test invoked

That more modern, heightened application of rational-basis review seems to accord with the Court's enunciation in *Meyer v. Nebraska*²⁴⁰: one's protected property interests "may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect."²⁴¹

Right-to-farm laws, such as that of Indiana, that so drastically depart from traditional nuisance law and significantly curtail longstanding individual property rights²⁴² may not clear the relatively low bar of rational-basis review by as wide a margin as proponents of these laws might expect.²⁴³ Under a standard as lenient and deferential as rational-basis review, the odds are definitively in favor of right-to-farm laws being sustained as constitutional. But there is some evidence to suggest that the broader versions of these laws (such as that of Indiana) do not bear a particularly close relation to the asserted end.²⁴⁴

At the very least, especially when considered in light of the extensive, above-discussed policy concerns underlying CAFOs' proximity to neighbors,²⁴⁵ this gives one pause.

Under the extremely deferential standard of review of *Lee Optical*,²⁴⁶ it is perhaps quite likely that Indiana's Right to Farm Act—and frankly, nearly any legislation relating in some respect to the state's police powers—would survive a due-process challenge.²⁴⁷ Under the heightened form of rational-basis review applied in *Cleburne*,²⁴⁸

today is most assuredly not the rational-basis test of *Williamson v. Lee Optical of Oklahoma*" *Id.* at 458 (Marshall, J., concurring in part). This standard of review applied by the Court is sometimes referred to as rational basis with bite, entailing an analysis of actual rationality and scrutinizing the law's actual basis. See Gunther, *supra* note 226; Dieterle, *supra* note 226.

240. 262 U.S. 390 (1923).

241. *Id.* at 399–400.

242. See *supra* notes 99–105 and accompanying text.

243. *But see* Himsel v. Himsel, 122 N.E.3d 935, 946–49 (Ind. Ct. App. 2019) (declining to find Indiana's Right-to-Farm Act unconstitutional). The Court of Appeals of Indiana, in upholding Indiana's Right to Farm Act and barring the Himsels' nuisance action, concluded that "[t]he RTFA is rational and falls comfortably within the legislature's legitimate constitutional authority." *Id.*

244. See *infra* notes 248–49.

245. See *supra* Part I.

246. See *supra* notes 227–32.

247. *Himsel*, 122 N.E.3d at 949 (Ind. Ct. App. 2019). The Indiana Court of Appeals did not analyze the legislation under a due-process framework, as the plaintiffs did not challenge it on that basis and instead made a takings argument. *Id.* at 945.

248. See *supra* notes 233–41.

however, the interests underlying broad formulations of the right to farm may not be sufficiently related to at least some of the underlying asserted interests, such as that of preventing nonagricultural land uses such as urban sprawl from extending into agricultural lands. But commentators believe that “the laws will have little effect on the . . . factors [apart from the threat of potential nuisance actions] that encourage conversion of agricultural land to nonagricultural uses. The laws cannot truly determine the direction of the local farm economy”²⁴⁹ Certainly, as applied to the Himsels, Indiana’s Right to Farm Act did not further the interest in preventing encroachment of nonagricultural land uses onto agricultural lands because the Himsels’ land use *preceded* the subsequently protected agricultural operation.²⁵⁰

These laws significantly burden an array of recognized due-process interests while simultaneously failing to achieve a more than tenuous relationship to some of the purported state interests. This should at minimum prompt state legislators to reconsider how the competing interests involved are being balanced—or rather, how they have become unbalanced.

CONCLUSION

The right to farm as it existed at its inception represented a reasonable balancing of the interests between agricultural operations and their residential neighbors.²⁵¹ It achieved this by providing agricultural operations immunity from nuisance actions in situations where the complaining residential neighbor came to the nuisance, while reserving the nuisance cause of action for those whose residence preceded the existence of the nuisance-causing activity.

With the passage of time and the influence of intense agricultural lobbying, however, that right expanded in many states to almost completely consume the agricultural nuisance cause of action and to leave neighbors with little to no legal recourse to protect their

249. Grossman & Fischer, *supra* note 96, at 161. Grossman & Fischer later state, however, that they believe that “[d]espite their limitations, right to farm laws can play a significant role in a state’s program to preserve farmland.” *Id.* Ultimately, Grossman and Fischer concluded that: “In terms of policy considerations, farms should not be privileged industries protected from nuisance liability, in the absence of strong countervailing considerations such as the preservation of farmland. When that goal is irrelevant, right to farm statutes should not alter traditional nuisance law.” *Id.* at 125.

250. *See supra* notes 104–05 and accompanying text. *See also* Himsel Petition, *supra* note 2, at 5–6 (“As a result of the amendment, . . . injured landowners who were there first no longer have any nuisance remedy Such is the situation here”).

251. *See supra* notes 91–93 and accompanying text.

interests.²⁵² The scales have become skewed to the point that in many instances, unwitting neighbors of CAFOs who did not come to the nuisance in any sense of the phrase, such as the Himsels, have been forced to shoulder impermissibly heavy burdens on their liberty and property interests. Meanwhile, CAFOs may continue to commit what would otherwise be actionable nuisance with impunity.²⁵³

The broad formulations of these laws raise legitimate due-process concerns—implicating obvious and objective property interests but also other recognized liberty interests. Those concerns, in conjunction with the numerous policy interests compelling against such broad right-to-farm protection,²⁵⁴ evidence that right-to-farm laws should be narrowed back to the traditional coming-to-the-nuisance context. Doing so would restore balance between the competing interests of agricultural operations and neighbors and would alleviate the constitutional concerns that accompany today’s broad formulations of the right to farm. Furthermore, it would reduce the instances of inappropriate application of these laws to neighbors such as the Himsels—neighbors whose residence preceded the nuisance-causing activity and who thus do not deserve to shoulder the heavy burdens that CAFOs have placed on them.

Ginger Pinkerton[†]

252. See *supra* notes 97–98 and accompanying text.

253. See *supra* note 112 and accompanying text.

254. See *supra* Part II(A); see also Skaller, *supra* note 29, at 210 (“[I]t is dangerous and contrary to public policy to allow CAFOs to access state right to farm laws.”).

[†] Case Western Reserve University School of Law, J.D. expected 2022; University of Wisconsin-River Falls, B.S. 2019. For my grandmother, Kathleen Ann Johnson, who raised my mother on a small Wisconsin dairy farm and was herself a writer and poet, and to whom I in good part owe my affinity for writing. This Note is the winner of Case Western Reserve University School of Law’s Sindell Torts Prize for best essay in the field of torts.