

LAND USE AND AGRICULTURAL EXCEPTIONALISM

I. INTRODUCTION

In *Johnson v. M'Intosh*, a seminal case¹ establishing some of the bases for the American law of real property,² Chief Justice John Marshall noted in passing that there might be “abstract principles” whereby some types of land use confer upon their practitioners a greater right to the land than those who make different use of it.³ *Johnson* arose from one of the greatest problems of land use in our national history—the conflict between the North American natives and the expanding European population.⁴ The European conquest of the continent involved converting “wilderness,” which was previously used for hunting and gathering, into agricultural fields.⁵ New European arrivals in North America believed that agriculture, not hunting and gathering, was the method by which humans possessed land.⁶ Thus, in the earliest moments of European presence in North America, there arose the problem of divergent and competing land uses at the root of a cultural conflict.⁷

Today we face another problem of divergent and competing land uses that may involve those “abstract principles” to which Justice Marshall

¹ *Johnson v. M'Intosh*, 21 U.S. 543 (1823).

² JESSE DUKEMINIER, ET AL., PROPERTY 10-17 (6th ed. 2006) (arguing that most land-owners in the United States can trace title back to European discovery as upheld in *Johnson*, that title in the United States is based on the doctrine of first in time as applied by *Johnson*, and that the native peoples of North America did satisfy the doctrine of first in time because their occupancy did not include the type of labor such as would perfect a property interest in the soil).

³ *Johnson*, 21 U.S. at 588 (“We will not enter into the controversy, whether agriculturists, merchants, and manufacturers, have a right, on abstract principles, to expel [Native American] hunters from the territory they possess, or to contract their limits”).

⁴ *United States v. Sioux Nation of Indians*, 448 U.S. 371, 437 (1980) (Rehnquist, J., dissenting) (“That there was tragedy, deception, barbarity, and virtually every other vice known to man in the 300-year history of the expansion of the original 13 Colonies into a Nation which now embraces more than three million square miles and 50 States cannot be denied”).

⁵ ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 12 (George Lawrence, trans., Encyclopaedia Britannica, Inc., 6th prtg. 1996) (1835).

⁶ *Id.*

⁷ *Id.*

alluded nearly two centuries ago. Population growth and the movement of our national economy away from agriculture have induced strife between agricultural and urban land users.⁸ It may be unfortunate, but many urban land users see agricultural land users as competitors.⁹ Conversely, many agricultural land users believe that their method of using the land confers upon them greater rights than those who practice other means.¹⁰

The conflict between urban and agricultural land users is particularly acute at the fringes of urban areas, where agricultural landowners often find themselves new neighbors of commercial and residential developments whose inhabitants are unaccustomed to agricultural operations and their effects.¹¹ This conflict might be confined to a simple category of legal issues: Where neighboring landowners desire to use their lands in ways that interfere with each other, there must be a way to determine their rights regarding those mutually interfering uses of land.¹² The problem of determining the relative rights of neighboring owners often includes the law of nuisance.¹³ The problem of determining the rights of individual landowners relative to the community includes issues raised by community use of government power to limit the use of property by individual landowners, including the power of eminent domain.¹⁴

⁸ STEVEN C. BLANK, THE END OF AGRICULTURE IN THE AMERICAN PORTFOLIO 159 (1998) ("The number of rural-urban battlefields seems to be increasing each year. Why is it that rural and urban dwellers seem to be clashing more often? It's because they are coming into contact with one another more often. It is as simple as that. Does close proximity breed contempt? Apparently so in this case.").

⁹ *Id.* at 155.

¹⁰ *Id.* at 154. See also 3 AM. JUR. 2D *Agriculture* § 5 (2006) ("The use by a landowner of land for agricultural purposes has been called a "natural right."").

¹¹ Matthew Wacker, et al., *County Right-to-Farm Ordinances in California: An Assessment of Impact and Effectiveness* 15 U. OF CAL. AGRIC. ISSUES CTR. BRIEFS 1 (May 2001).

¹² RICHARD R. POWELL, *POWELL ON REAL PROPERTY* §§ 55.02, 69.01 (Michael Allen Wolf ed., Matthew Bender 2005) (distinguishing between issues arising from relationships between parties with interests in the same or separate parcels of land and issues arising from relationships between the owner of an interest in land and the community); see also Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 NEB. L. REV. 210, 221 ("Restrictions on the use of farm property represent [an] area of tension between the agricultural community and societal concerns.").

¹³ Powell, *supra* note 12, at § 55.02.

¹⁴ Hamilton, *supra* note 12, at 221.

II. AGRICULTURAL EXCEPTIONALISM

A. Defining Exceptionalism

Historically, individual landowners under the Anglo-American law of real property were afforded a strong right to do as they wished with their own property.¹⁵ The law has since developed to recognize an increasing social interest in how land is used.¹⁶ Modern law takes notice of which uses of land are more acceptable to the whole community and that requires decisions about the interests of the affected community, or perhaps of the whole society.¹⁷

In the conflict between agricultural and urban uses of land, one of the most important questions in the process of determining the interests of society may be whether practitioners of agriculture should be afforded special protections to carry on their activities, even if those activities have adverse social consequences.¹⁸ One scholar suggests that the passage of laws to protect agriculturalists from lawsuits for nuisance and for water pollution indicates that our society has answered that question in the affirmative.¹⁹ However, the negative response to such laws by both citizens²⁰ and courts²¹ may indicate the opposite conclusion.

Some states have also used lower property taxes for farmland to abate the apparently rapid rate at which farmland has been converted to non-agricultural uses, such as residential neighborhoods.²² Many people who

¹⁵ Powell, *supra* note 12, at § 69.02.

¹⁶ *Id. But see* JOHN F. HART, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (April, 1996) (contesting the modern assumption about that historical private landowners had relative freedom to use their land as they saw fit by presenting evidence that colonial governments commonly restricted private land use).

¹⁷ *Id.*

¹⁸ Hamilton, *supra* note 12, at 220.

¹⁹ *Id.*

²⁰ Douglas T. Kendall, Op-Ed., "Taking" the Right to Farm, LAS VEGAS REVIEW-JOURNAL, December 3, 1998, available at <http://www.communityrights.org/Newsroom/OpEdsLetters/lvReviewJournal/12-3-98.asp>; see also Samuel Krasnow, *Farm Wars: Can 'Right to Farm' Laws Resolve Growing Land Use Conflicts?*, THE URBAN/RURAL EDGE, April 2005, available at http://www.americancity.org/article.php?id_article=124 and JARED DIAMOND, COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED 72 (2005) (quoting Montana dairy farmer Tim Huls: "In a society that espouses tolerance, it's amazing how intolerant some folks are to animal agriculture and what comes with producing food").

²¹ Neil D. Hamilton, *Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective*, 3 DRAKE J. AGRIC. L. 103, 107 (Spring, 1998).

²² NICHOLAS A. ROBINSON, ENVIRONMENTAL REGULATION OF REAL PROPERTY §15.01.

live in regions with a high rate of urban development, such as California, worry that expanding cities and shrinking farmland will lead to in a complete “paving over” of the countryside, a net loss to the economy, and an inability of the society to feed itself.²³ In response, Californians passed the California Land Conservation Act of 1965, commonly known as the Williamson Act, which was specially designed to help farmers defend their agricultural use of land against the pressures of urban development.²⁴

The term “agricultural exceptionalism” is typically applied to the practice of treating agriculture differently than other industries.²⁵ However, affording special treatment to a particular class of economic behavior, like offering agricultural activities some level of immunity from nuisance lawsuits, puts lawmakers in a dangerous position.²⁶ Where the right to relief is limited without compensation, there will be natural opposition to the limiting law.²⁷ While protection for a particular kind of economic activity may be justified in some cases, the question of whether to offer protection turns on the characteristics of the activity and whether it is so important that society is willing to absorb some of its costs.²⁸

For agriculture in particular, society is increasingly aware of its costs, especially as people encounter health problems, demand higher standards for comfortable use and enjoyment of their property, and feel a greater sense of empowerment against these factors via the legal system.²⁹ While urban Americans may have once romanticized and ennobled the practice of agriculture, they are now more attuned to its social and environmental impacts.³⁰ However, as food producers, agriculturalists have traditionally

²³ See generally Nicolai V. Kuminoff et al., *Farmland Conversion: Perceptions and Realities* 16 U. OF CAL. AGRIC. ISSUES CTR. BRIEFS (May 2001) (discussing the differences between Californians’ perceptions and the statistical and economical realities of farmland conversion).

²⁴ Kathleen A. McGurty, Comment, *The State of Agricultural Land Preservation in California in 1997: Will the Agricultural Land Stewardship Program Solve the Problems Inherent in the Williamson Act?*, 7 S. J. AGRI. L. REV. 135, 135-136 (1997).

²⁵ Randy Green, Part II: Review of Key Substantive Agreements: Panel II C: Agreement on Agriculture: The Uruguay Round Agreement on Agriculture, 31 LAW & POL’Y INT’L BUS. 819, 820 (2000); see also Gerald Torres, Symposium: Changing Structures and Expectations in Agriculture: Luncheon Address, 14 N. ILL. U. L. REV. 799, 805 (Summer, 1994).

²⁶ Hamilton, *supra* note 21, at 105.

²⁷ *Id.* at 106.

²⁸ Torres, *supra* note 25, at 805.

²⁹ See Terence J. Centner, *Governments and Unconstitutional Takings: When Do Right-to-Farm Laws Go Too Far?*, 33 B.C. ENVTL. AFF. L. REV. 87, 91-92, 93 (2006).

³⁰ Blank, *supra* note 8, at 155.

believed they were special³¹ and legislatures have manifested their agreement by providing special legal privileges to agriculture.³²

B. Defining Agriculture

Before a practice can be afforded legal status as agriculture, exceptional or otherwise, that practice must be within the definition of agriculture.³³ Generally, agriculture is defined as the practice of growing plants and raising animals for human use or consumption.³⁴ However, where statutes have targeted agricultural activities, lawyers, judges, and legislators have tinkered with that definition to move some operations into or out of the statute.³⁵ The following examples are offered as evidence of this definitional flexibility.

The Michigan Court of Appeals determined that a public corn maze and a recreational horse rental facility were “farm products” under state statutory definitions and therefore the land upon which they were located was exempt from local zoning regulations.³⁶

The Supreme Court of North Dakota held that a grain elevator owned by a limited liability company was an “agricultural operation” because the relevant statute included such organizations so long as they were involved in the preparation of plant or animal products for human use.³⁷ Thus, the company was allowed to cut down trees that helped keep dust, noise, and exhaust fumes from spilling onto neighboring property and the neighbors were barred from bringing a cause of action for private nuisance.³⁸

The Washington Court of Appeals found that an indoor facility producing compost for the growing of mushrooms met the statutory defini-

³¹ *Id.* at 154.

³² Hamilton, *supra* note 12, at 219.

³³ See, e.g., 97 Ky. Op. Att'y Gen. 31 (August 21, 1997) (defining “agricultural operations” as “the production of crops or livestock by any generally accepted, reasonable, and prudent method that is performed in a reasonable and prudent manner customary among farm operators” before determining that an “industrial-scale hog operation” is neither reasonable nor prudent and therefore not an agricultural operation for the purpose of a right-to-farm statute).

³⁴ <http://www.google.com/search?q=define:agriculture> (collection of definitions for agriculture from multiple internet sources).

³⁵ Hamilton, *supra* note 21, at 113. But see 3 AM. JUR. 2D *Agriculture* § 1 (defining agriculture as “the science or art of cultivating soil, harvesting crops, and raising livestock” and distinguishing “agriculture” from “farming”).

³⁶ *Village of Rothbury v. Double JJ Resort Ranch, Inc.*, 2004 WL 1837835 (2004) (unpublished).

³⁷ *Tibert v. Slominski*, 692 N.W.2d 133, 137 (2005).

³⁸ *Id.* at 135.

tion of a “farm,”³⁹ which included land and buildings “used in the commercial production of farm products.”⁴⁰ Thus, the operator of the facility was protected from a nuisance lawsuit that was brought on the grounds that the facility emitted unacceptable odors into a residential neighborhood.⁴¹ The court rejected the argument that the indoor manufacture of compost was an industrial process rather than an agricultural one on the grounds that the compost could not be separated from the commercial production of mushrooms, which fell under the definition of “farm products.”⁴²

Running counter to these examples, the Attorney General of Kentucky declared in 1997 that an “industrial-scale hog operation” was not an “agricultural operation” on the grounds that operations of such scale, which release large amounts of animal waste into waterways, are neither reasonable nor prudent means of producing livestock.⁴³ He also declared “farms” to be synonymous with “small farms” and called them “ancient heirlooms” which “deserve protection from the forces tending to break that which is irreplaceable.”⁴⁴ The apex of his romanticism came with a nod to poet Thomas Gray⁴⁵: “If a farm was begun far from the madding crowd, its inhabitants should be allowed to keep the noiseless tenor of their way though a city spring up around them.”⁴⁶ Under his scheme, one must wonder whether small farms would be protected because they are economically advantageous for society, or because they are museum pieces and therefore to be preserved as such at any cost, though cities spring up around them. Meanwhile, large operations of the type that provide far more food to society are disregarded as unworthy of protection. But not all authorities agree with the Attorney General of Kentucky; in the examples above, courts in both North Dakota and Washington afforded agricultural protections to activities the Attorney General surely would have found outside of his “heirloom” definition for farms.⁴⁷

³⁹ *Vicwood Meridian Partnership v. Skagit Sand and Gravel*, 123 Wn.App. 877 (2004).

⁴⁰ WASH. REV. CODE § 7.48.310(2) (2006).

⁴¹ *Vicwood Meridian Partnership*, 123 Wn.App. at 880.

⁴² *Vicwood Meridian Partnership*, 123 Wn.App. at 884-886.

⁴³ 97 Ky. Op. Att'y Gen. 31, 3-5 (August 21, 1997).

⁴⁴ *Id.* at 3.

⁴⁵ In Gray’s poem “Elegy Written in a Country Churchyard” (1768), lines 73-76 read: “Far from the madding crowd’s ignoble strife, / Their sober wishes never learned to stray; / Along the cool sequestered vale of life / They kept the noiseless tenor of their way.”

⁴⁶ *Id.*

⁴⁷ See also *Premium Standard Farms, Inc. v. Lincoln Township of Putnam County*, 946 S.W.2d 234, 239-240 (Mo. Sup. Ct. 1997) (holding that livestock sewage lagoons and livestock finishing buildings were “farm structures” and therefore exempt from zoning regulations) and *Barerra v. Hondo Creek Cattle Co.*, 132 S.W.3d 544, 547 (Tex. App. Ct.

These cases illustrate both the extent to which courts and lawyers are willing to provide protection to activities that may be brought under the rubric of agriculture and the extent to which they are unwilling to recognize an increased blurring of the boundary between agricultural and industrial activities, despite the continuing industrialization of agriculture.⁴⁸ If the future of agriculture lies with industrialization, and it almost certainly does,⁴⁹ then it makes little sense to give special protections to some businesses merely because they meet a definition of agriculture,⁵⁰ where their activities would otherwise face the same balancing of harm versus utility that is applied to other uses of land.⁵¹

III. THE LAW OF NUISANCE

Actions for private nuisance may be classified as a problem of determining the relative rights of neighboring landowners.⁵² Between neighboring landowners, a private nuisance occurs where one landowner, within the boundaries of his or her own property, by conduct that is either negligent or intentional and unreasonable, engages in an activity or creates a condition that substantially and unreasonably interferes with a neighbor's use and enjoyment of his or her own property.⁵³ Unreasonableness arises twice in that definition; one landowner must create the nuisance by unreasonable conduct and a second landowner must then suffer unreasonable interference with his or her use and enjoyment of the land. Thus, where a particular type of land use is singled out to receive special treatment under the law of nuisance, it is tantamount to a legal conclusion that either the type of conduct or its effects are unreasonable.

In all but one of the examples above,⁵⁴ plaintiff landowners claimed that defendant neighbors who cultivated plants or raised livestock had

2004) (relying on trial court finding that cattle feedlot was an agricultural operation in affirming trial court decision to bar a claim for nuisance).

⁴⁸ Mark Drabenstott & Alan Barkema, *A New Vision for Agricultural Policy*, ECON. REV. FED. RES. BANK KAN. CITY 63, 70-71 (3rd Qtr., 1995); see also Hamilton, *supra* note 12, at 212 (discussing the recent, increased industrialization of American agriculture).

⁴⁹ Hamilton, *supra* note 48, at 212.

⁵⁰ Drabenstott, *supra* note 48, at 67-68.

⁵¹ HERBERT HOVENKAMP & SHELDON F. KURTZ, PRINCIPLES OF PROPERTY LAW 424 (6th ed. 2005).

⁵² See *supra* note 13 and text accompanying.

⁵³ HERBERT HOVENKAMP & SHELDON F. KURTZ, PRINCIPLES OF PROPERTY LAW 421 (6th ed. 2005); see also Powell, *supra* note 12, at § 64.02.

⁵⁴ See *supra* text accompanying note 35. The issue in *Village of Rothbury* arose from zoning laws, not nuisance claims. But see Dukeminier, *supra* note 2, at 821-822 (noting

unreasonably engaged in activities or created conditions that substantially and unreasonably interfered with the use and enjoyment of their own property; that is, they were private nuisance claims.

A. Right-to-Farm Laws

In the last few decades, all fifty states have passed right-to-farm statutes that prevent new residents in rural or agricultural areas from bringing nuisance lawsuits against established farming operations.⁵⁵

Citizens on the other side of right-to-farm laws have not always responded favorably. In 1998, the Iowa Supreme Court held that a right-to-farm law in that state amounted to a regulatory taking of the neighbors' property. By requiring compensation for such a taking, this holding made it more expensive for the state of Iowa to protect its farms from nuisance lawsuits. In *The Las Vegas Review-Journal*, one writer opposite the editorials asked, "Why should farmers have the right to foul their neighbors [sic] property, even if they have been doing it for a long time?"⁵⁶ In other words, there is no reason why agriculture, despite being a traditional use of land, should confer upon its practitioners a greater right to interfere with the property interests of their neighbors.

Recently, after the Vermont Supreme Court held that an expanded orchard near an existing home was not protected by that state's 1981 right-to-farm law, the problem of nuisance-causing agricultural land uses came to the fore.⁵⁷ A representative of the Vermont Farm Bureau claimed in testimony to the Vermont House Agriculture Committee that farms must be granted the absolute right to adopt different methods and hours and to diversify their operations without fear of a lawsuit.⁵⁸ Small dairy farmer Fran Bessette responded with a plea for greater legal equality for different uses of land: "I don't think farmers or non-farmers have the right to impose a nuisance on anyone. I don't care who it is; they should not be able to cause that much harm to someone else."⁵⁹

the relationship between the law of nuisance and the law of zoning, that the latter developed, in part, as a result of inadequacies in the former).

⁵⁵ Hamilton, *supra* note 21, at 104-105.

⁵⁶ Kendall, *supra* note 20.

⁵⁷ Trickett v. Ochs, 176 Vt. 89 (Vt. Sup. Ct. 2003).

⁵⁸ Samuel Krasnow, "Farm Wars: Can 'Right to Farm' Laws Resolve Growing Land Use Conflicts?," *The Urban/Rural Edge*, April 2005, available at http://www.americancity.org/article.php?id_article=124.

⁵⁹ *Id.*

B. Nuisance vs. Remedy

If a landowner is allowed to engage in conduct or create a condition that constitutes a nuisance, then, in the absence of a remedy, that landowner has effectively condemned all the adjacent land to a servitude and subtracted from its value without compensation.⁶⁰ However, if those neighboring landowners may be awarded damages or injunctive relief against the party causing the nuisance, then their ability to bring that action effectively subtracts from the potential value of the defendant's land.⁶¹ Thus, in determining which landowner should prevail in a private nuisance lawsuit, a court must decide which use of land affords a greater right to its practitioner; or, in established terms, a court must weigh the relative social values of the activities against the relative harms to their neighbors.⁶²

The pertinent question is not whether agriculture is an unreasonable interference per se, but whether agricultural practices are entitled to a defense against nuisance lawsuits on the grounds that they are agricultural, rather than on other grounds that are equally applicable to any use of the land, including that by other industries. If agriculture intrinsically merits such a defense, then owners of neighboring non-agricultural lands may be deprived of a remedy and their lands condemned to a servitude merely because they are adjacent to agricultural land. Absent such exceptionalist treatment, the right to inflict a nuisance on a neighbor or to restrict the nuisance-creating conduct of another would fall to the party who values it more.⁶³

C. Comparison to Other Industries

In *Bormann v. Kossuth County Board of Supervisors*, a local board of supervisors classified certain land as an "agricultural area."⁶⁴ A group of

⁶⁰ RESTATEMENT (SECOND) OF TORTS § 840D cmt. b.

⁶¹ See Lawrence Berger, *An Analysis of the Doctrine that "First in Time is First in Right,"* 64 NEB. L. REV. 349, 379.

⁶² RESTATEMENT (SECOND) OF TORTS § 826.

⁶³ RONALD H. COASE, THE FIRM, THE MARKET, AND THE LAW 157-158 (1988). Elsewhere Coase writes: "Whether a newly discovered cave belongs to the man who discovered it, the man on whose land the entrance to the cave is located, or the man who owns the surface water under which the cave is situated is no doubt dependent on the law of property. But the law merely determines the person with whom it is necessary to make a contract to obtain the use of a cave. Whether the cave is used for storing bank records, as a natural gas reservoir, or for growing mushrooms depends, not on the law of property, but on whether the bank, the natural gas corporation, or the mushroom concern will pay the most in order to be able to use the cave." *Id.* at 157.

⁶⁴ *Bormann v. Kossuth County Board of Supervisors*, 584 N.W.2d 309, 312 (1998).

neighbors then sued to enjoin the act on the grounds that the grant of nuisance immunity that came with the agricultural classification of the land “deprived them of property without due process or just compensation.”⁶⁵ The neighbors argued that the deprivation came from giving agricultural landowners the right to create “noise, odor, dust, or fumes” without any right of recovery for those upon whom these byproducts of agricultural operation were inflicted.⁶⁶ That right, argued the neighbors, amounted to an easement against their property.⁶⁷

The court in *Bormann*⁶⁸ compared the case before it with the facts of *Richards v. Washington Terminal Co.*,⁶⁹ wherein a court found that smoke, dust, cinders, vibrations, and gases “partially destroyed the plaintiff’s interest in the enjoyment of his property.”⁷⁰ However, those factors that were “the kind of harm normally incident to railroading operations” could not lead to recovery, while those that caused “special and peculiar damage” could lead to recovery.⁷¹

The comparison between a railroad’s smoke, dust, cinders, vibrations, and gases with an agricultural area’s noise, odor, dust, or fumes is telling, for two reasons. First, it puts the environmental side effects of farming on par with the environmental side effects of non-agricultural industries. Second, the comparison entrenches the idea that the residential property right to be free of those factors outweighs the freedom of industries, including agriculture, to produce them.

The court may have analogized agricultural activities to industrial ones only because there were no similar reported cases dealing with agriculture. However, that the court was able to analogize agriculture to other polluting industries was highlights of the similarity between the two and points toward the propriety of treating them the same way under the law.

However, some industries may be so necessary that they should be afforded the upper hand in the law, even if they cause inconvenience or discomfort to their neighbors, so long as the conduct of those industries remains reasonable.⁷²

⁶⁵ *Id.* at 312.

⁶⁶ *Id.* at 321.

⁶⁷ *Id.* at 313.

⁶⁸ *Id.* at 319.

⁶⁹ *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914).

⁷⁰ *Bormann*, 584 N.W.2d at 319.

⁷¹ *Id.*

⁷² Coase, *supra* note 63, at 120, quoting William L. Prosser, *Handbook of the Law of Torts*, 2d ed., 398-99, 412. Prosser would define reasonable conduct “in light of its utility and the harm that results.”

Agriculture may be one of these industries. On the other hand, we may consider the rationale of an English court in the case of *Sturges v. Bridgeman*,⁷³ one of the earliest leading cases to consider the effects of industrialization on property rights.⁷⁴ After a doctor added a new examination room to his building next to a confectioner, the doctor discovered that the noise and vibration from the confectioner made it impossible to use the room in the quiet, contemplative manner he had planned. The court held that the doctor was entitled to an injunction, despite the confectioner's machinery having been in operation for over twenty years prior to the doctor's erection of the new examination room. An interesting dictum follows:

Individual cases of hardship may occur in the strict carrying out of the principle upon which we found our judgment, but the negation of the principle would lead even more to individual hardship, and would at the same time produce a prejudicial effect upon the development of land for residential purposes.⁷⁵

The problem broached by the court in that instance 125 years ago is not much different from the one raised today in the conflict between urban and agricultural land uses. In *Sturges*, the court analogized to a blacksmith putting his forge in the midst of a barren moor, where no one will be disturbed by the byproducts of his industry. But as time passes and a neighboring town grows into the surrounding land, the forge will no doubt disturb its new neighbors. It would be both unjust and inexpedient, the court opined, if the activity of the forge on the blacksmith's land could restrict and diminish the use and value of the neighboring land for all time; for the neighbors, who were barred by the law of trespass to enter the forge and stop the blacksmith, a cause of action in nuisance must lie.⁷⁶

A comparison between *Sturges* and the modern problem of agricultural nuisances is difficult to avoid. The expansion of urban and suburban development into lands once rural and agricultural brings new neighbors with new sensitivities, not unlike the doctor who needed a calm and quiet environment in which to perform his work, or neighbors who may not tolerate a blacksmith and his forge near their homes. Thus, the same question of justice and expedience arises: whether agricultural operations

⁷³ *Sturges v. Bridgeman*, 11 Ch. D. 852 (1879).

⁷⁴ Amanda J. Owens & Charles K. Rowley eds., COKE'S INSTITUTES OF THE LAW, No. 1, THE CLASSICAL LAW OF TORT available at <http://www.thelockeinstitute.org/journals/tortlaw4.html>.

⁷⁵ *Sturges*, 11 Ch. D. 852.

⁷⁶ *Id.*

should be allowed to restrict and diminish the uses of neighboring lands and prejudice development near agricultural lands.

D. Right-to-Farm as Regulation

In 1980, the United States Court of Appeals for the Tenth Circuit decided *Haas v. Lavin*, an agricultural nuisance dispute that it called “somewhat unusual in that it is concerned with a controversy between farmers.”⁷⁷ In that case, two farmers worked adjacent land. According to testimony from a third local farmer, the defendant had made excessive use of an offset disc with the effect that the soil was pulverized after the weeds had drained its moisture.⁷⁸ This made the soil especially susceptible to blowing away in the wind, which it did so substantially that the dust destroyed most of the plaintiff’s wheat crop and caused severe damage to his mechanical equipment.⁷⁹ The defendant contended that the dispute was “a mere disagreement as to the proper way to farm” and such a use of land was not unreasonable.⁸⁰

However, some right-to-farm laws do require farmers to use generally accepted agricultural management practices.⁸¹ In some jurisdictions, the state department of agriculture defines these practices, but in many jurisdictions the laws are silent on who defines them.⁸² For jurisdictions in the latter group, the courts may choose to rely on expert testimony, as the court in *Haas* apparently did when it analyzed the conduct of the defendant under the rubric of common law negligence.⁸³ If the conduct of farmers regarding their agricultural practices may be subject to standards of reasonableness or regulation based on the foreseeable effects of their conduct, regardless of the stated objective of their activity, such as the production of food, then our laws are able and our society is willing to separate the effects of agriculture from its products.

Nevertheless, instead of subjecting agricultural practices to standards of reasonableness, many right-to-farm laws essentially lock protected farms into their current practices; if the farming operation changes in size or methods, the protections of those laws will fall away.⁸⁴ This does not protect farms from development, or even from lawsuits initiated over a

⁷⁷ *Haas v. Lavin*, 625 F.2d 1384, 1385 (1980).

⁷⁸ *Id.* at 1388.

⁷⁹ *Id.* at 1389-1390.

⁸⁰ *Id.* at 1389. “Needless to say, this is not a defense to a nuisance claim.”

⁸¹ Janie Hipp, Balancing the Right-to-Farm with the Rights of Others, available at <http://www.farmfoundation.org/pubs/increas/98/hipp.pdf>.

⁸² *Id.*

⁸³ *Hass*, 625 F.2d at 1386-1389.

⁸⁴ Hipp, *supra* note 81.

particular agricultural practice.⁸⁵ To provide absolute nuisance immunity would likely require that compensation be paid to neighbors whose properties are affected by the nuisance, thus making such immunity likely too expensive for local governments and communities.⁸⁶

Conversely, while it may not be equitable to enjoin nuisance-creating farm operations, justice may require that relief in the form of permanent damages be granted in order to lay the risk of harm on the operators as an incentive to finding cleaner, less interfering processes. While that may put some operators out of business, the countervailing social interest lies in preserving only the most competitive and economical enterprises.⁸⁷

E. Right-to-Farm as Regulatory Taking

The United States Supreme Court has defined property as “the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it.”⁸⁸ Property so defined is “taken” where government action, even that short of assuming title or occupancy, deprives the owner of all or most of those rights without payment of just compensation.⁸⁹ In *Bormann*, the government action was a right-to-farm statute. The issue before the court was whether the plaintiff landowners were substantially deprived of the use and enjoyment of their property by their inability to seek a legal remedy for an agricultural nuisance, because of the right-to-farm statute in Iowa.⁹⁰

The right-to-farm statute in Iowa went so far as to provide complete immunity from nuisance actions, even for newly established farms or farm operations.⁹¹ Thus, all claims for nuisance would be barred, neighbors would have no remedies, agricultural operations were effectively allowed to carry out whatever activities they desired, and those

⁸⁵ Wacker, *supra* note 11, at 3.

⁸⁶ See *Bormann*, 584 N.W.2d at 322 (recognizing that absolute nuisance immunity “amounts to a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of a few”).

⁸⁷ See *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 226-227 (1970). *But see* dissent, at 230: “It is the same as saying..., you may continue to do harm to your neighbors so long as you pay a fee for it.... This kind of inverse condemnation may not be invoked by a private person or corporation for private gain or advantage. Inverse condemnation should only be permitted when the public is primarily served in the taking or impairment of property” (citation omitted).

⁸⁸ *United States v. General Motors Corp.*, 323 U.S. 373, 377-378 (1945).

⁸⁹ *Id.* at 378.

⁹⁰ *Bormann*, 584 N.W.2d at 321.

⁹¹ IOWA CODE § 352.11(1)(a) (2005): “A farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation.”

activities would never be found unreasonable by virtue of the fact that they were agricultural. The Iowa Supreme Court ultimately ruled that the law amounted to a taking because the prohibition against neighbors of farmers filing nuisance actions is equivalent to an easement that substantially reduces the value of those neighbors' property without compensation.⁹² *Bormann* is an extreme case, because most right-to-farm laws do not provide such complete immunity to nuisance lawsuits, but its extreme nature expands and illuminates the defect at the core of this notion that agricultural operations ought to be privileged. If a strong privilege will not pass constitutional muster, then a weak privilege provided under the same rationale may only avoid unconstitutionality because the harm created in any given case is not valuable enough to support appellate litigation. The aggregate effect, however, may be detrimental not just to neighbors of agricultural operations, but also to the public image of agriculture.

IV. TAKINGS

Separate but not unrelated to the issue of agricultural nuisances is the issue of eminent domain as a land use tool of local government. In the wake of *Kelo v. City of New London*,⁹³ proponents of agriculture articulated their fear of future takings of farmland under the "economic development" rationale propounded by the Court.⁹⁴ While Justice John Paul Stevens, writing for the majority, said the Constitution does not bar this use of eminent domain, he also stressed that "nothing in our opinion precludes any state from placing further restrictions on its exercise of the takings power."⁹⁵ As a result, laws to strengthen statutory protection of

⁹² *Bormann*, 584 N.W.2d at 321. But see *Moon v. North Idaho Farmers Association*, 140 Idaho 536 (2004), in which Idaho's Right-to-Farm law was not considered an easement. A facial challenge to the statute was rejected because plaintiffs failed to show "no conceivable constitutional application for this legislation." *Id.* at 545. The court found a public welfare interest in burning fields to be a conceivable constitutional application. *Id.* at 545. As well, the court deferred to the legislature, stating that it can "abolish[] nuisance or trespass causes of action that have not yet accrued" (i.e., it can create immunity to common law causes of action). *Id.* at 544. Also, citing *Osmunson v. State*, 135 Idaho 292, 295 (2000), the Moon court reiterated that "no one has a vested right to a particular common law...cause of action." *Id.* at 545.

⁹³ *Kelo v. New London*, 545 U.S. 469, 125 S.Ct. 2655 (2005) (United States Reports pagination unavailable).

⁹⁴ William Yardley, *Anger Drives Property Rights Measures*, N.Y. TIMES, Oct. 8, 2006 available at <http://travel2.nytimes.com/2006/10/08/us/08domain.html>.

⁹⁵ *Kelo*, 125 S.Ct. at 2668 (United States Reports pagination unavailable). See also *Author of Kelo Says He Would "Oppose" Eminent Domain Abuse as a Legislator*, Institute for Justice Web Release available at http://www.ij.org/private_

farmland have been proposed in many states.⁹⁶ But much of that legislation has stalled.⁹⁷

The American Farm Bureau Federation has launched a campaign called "Stop Taking Our Property"⁹⁸ and polls have consistently shown that between eighty and ninety percent of Americans "favor curtailing eminent domain powers."⁹⁹ In particular, the percentage of people who believe farmland should be off-limits to eminent domain is comparable to the percentage of people who believe church, schools, hospitals, and historical monuments should receive special treatment regarding their use of land.¹⁰⁰

While there is little evidence that local governments have used eminent domain to take farmland with enough regularity to constitute the crisis that agriculture proponents fear, as urban growth continues and the pressure on land increases, the likelihood that eminent domain will be used to take farmland for economic development may increase.¹⁰¹ Further complicating the matter, the Public Policy Institute of California found in a 1998 study that where local governments have sponsored redevelopment, they have brought no more economic benefits to their communities than where other governments have not.¹⁰²

Members of the agricultural sector worry that their land is not safe from local governments executing economic development plans. But the fears of the agricultural community, while perhaps misplaced, implicate an issue arising under the Takings Clause: where agricultural and urban land uses are pitted against one another, it is possible that the "public benefit" will not favor agriculture.

property/connecticut/8_25_05pr.html (in which Justice Stevens commented that using the economic development rationale for eminent domain is bad policy: "I would have opposed it if I were a legislator...My own view is that the free play of market forces is more likely to produce acceptable results in the long run than the best-intentioned plans of public officials").

⁹⁶ Eminent Domain 2006 State Legislation, American Planning Association (Aug. 14, 2006), <http://www.planning.org/legislation/eminentdomain/edlegislation.htm>.

⁹⁷ Steven Malanga, *Can California Curb Land Grabs?*, LOS ANGELES TIMES, Jan. 24, 2006 available at <http://www.latimes.com/news/opinion/commentary/la-oe-malanga24jan24,0,2982834.story?coll=la-news-comment-opinions>.

⁹⁸ Kate Campbell, *Eminent Domain Controversy Triggers Action*, California Farm Bureau Federation (Nov. 16, 2005), <http://www.cfbf.com/agalert/AgAlertStory.cfm?ID=478&ck=CFEE398643CBC3DC5EEFC89334CACDC1>.

⁹⁹ Malanga, *supra* note 97.

¹⁰⁰ Survey: Americans say they oppose eminent domain, http://www.vafb.com/news/2006/jan/011906_1.htm.

¹⁰¹ Yardley, *supra* note 89.

¹⁰² Malanga, *supra* note 97; see also Stevens, *supra* note 95.

A. Eminent Domain

The question of whether private property should ever be taken for economic development has spawned the latest uproar over eminent domain.¹⁰³ However, the problem of whether eminent domain is ever a viable means for promoting economic development is best left to other discussions. The only question here is whether farmland should be protected from eminent domain, exercised for whatever reason, any more than other land is protected.

B. Heritage Value

In July of 2006, the Governor of Missouri signed House Bill 1944, which restricted the use of eminent domain in that state.¹⁰⁴ Among the provisions of the new Missouri law was an increase to the amount paid when some properties are taken. Specifically, the law prescribes compensation of one hundred twenty-five percent of fair market value for the taking of a homestead¹⁰⁵ and compensation of fair market value plus "heritage value" where property is taken that is "owned by a business enterprise with fewer than one hundred employees, that has been owned within the same family for fifty or more years."¹⁰⁶

Despite the broad language of the statute, which addresses family-owned "business enterprises" with fewer than one hundred employees rather than naming "small family farms" as its subject, the public reception of the law indicates that its hurdles to the operation of eminent domain are intended to benefit small farmers. When the Missouri House of Representatives approved the bill, president of the Missouri Farm Bureau Charlie Kruse lamented that the legislators had "bowed to the pressures of developers, utility companies and other special interests in tentatively approving a watered-down version of eminent domain reform legislation."¹⁰⁷ That is, despite the increased protections for farms, the Farm Bureau felt that urban interests had won. Commenting on the "heritage

¹⁰³ Campbell, *supra* note 98.

¹⁰⁴ Press Release, Missouri Governor Matt Blunt, *Blunt Signs Bill to Protect Missouri Farm Families; Property Owners* (July 13, 2006) available at <http://www.gov.mo.gov/press/HB1944071306.htm>.

¹⁰⁵ H.B. 1944, 93d Gen. Assemb., (Mo. 2006) § 523.001(3) (defining "homestead" as "a dwelling owned by the property owner and functioning as the owner's primary place of residence" including "property within three hundred feet of the owner's primary place of residence").

¹⁰⁶ *Id.* at § 523.001(2).

¹⁰⁷ Josh Flory, *House Passes Eminent Domain Restrictions*, COLUMBIA TRIBUNE, April 13, 2006 available at <http://www.columbiatribune.com/2006/Apr/20060413News003.asp>.

value” provision of the new law, one citizen remarked, “For a lot of people, land is part of their family. It’s a way of life. It’s a way to raise your children.”¹⁰⁸ That points to the quintessential agrarian view that the business of farming is also a lifestyle.¹⁰⁹

However, where we as a society are economically reluctant to protect business, we are favorable to the protection of lifestyle.¹¹⁰ It cuts to the core of the American ideal of freedom. What happens, then, when business and lifestyle are conflated for some, but remain conflicted under broader policy considerations?

In response to the new Missouri law, the President of the Missouri Farm Bureau remarked that ownership of private property is “as sacred an issue as anything” for Americans and praised the “higher hurdle” placed before the taking of that property.¹¹¹ This attitude of obfuscation to protect the private property rights of citizens is contrary to the legal traditions that developed in the earliest moments of our national history.¹¹² Although many citizens oppose modern takings and land use regulation on the grounds that government action in these areas was historically minimal, colonial governments did not shy from regulation to promote a broad conception of public welfare objectives, including aesthetics.¹¹³

C. The Questionable Necessity of Farmland Protection

Wherever cities are expanding into surrounding farmland, people are concerned about the rate that at which land is converted from agricultural to nonagricultural use.¹¹⁴ In California, about 49,700 acres of farmland

¹⁰⁸ Andy Ostmeyer, *Eminent domain: ‘It’s David against Goliath,’* THE JOPLIN GLOBE, July 14, 2006, available at http://www.normantranscript.com/commerce/cnbinbusiness_story_195144612.html.

¹⁰⁹ Blank, *supra* note 8, at 27-28 (describing a 20-square-mile dairy surrounded by Los Angeles development, then remarking, “Why do the dairies not sell out? Some of them have, of course, but many of the people who sold used their financial gains to buy bigger dairies for themselves and/or their children in northern California or some other state. They obviously like the lifestyle. To some people this is land speculation; to many other people this is evidence of insanity”).

¹¹⁰ Patricia E. Norris, et al., *Are Public Funds Being Spent to Preserve the Farmland that the Public Wants to Preserve?* in COMPENSATING LANDOWNERS FOR CONSERVING AGRICULTURAL LAND 49, 50 (Nora De Cuir, Alvin D. Sokolow, and Jeff Woled eds., 2003) available at <http://aic.ucdavis.edu/research1/Conserv.ag.pdf>.

¹¹¹ *New Law Limits Eminent Domain,* *supra* note 108.

¹¹² See generally Hart, *supra* note 16.

¹¹³ *Id.*

¹¹⁴ Kuminoff, *supra* note 23, at 1.

were urbanized every year for the period between 1988 and 1998.¹¹⁵ Because that number sounds so high, people often think that “[u]rban growth is paving over California farmland.”¹¹⁶ However, closer examination reveals that the dire conclusion is more a result of context and personal values than objective fact.¹¹⁷ All of the land converted during the decade from 1988 to 1998—a total of about 497,000 acres—amounted to less than two percent of California’s privately owned farmland as of 1997.¹¹⁸ At that rate, it would take over 540 years to deplete all of California’s farmland.¹¹⁹ However, few would suggest that California could continue to grow at its present rate for nearly six centuries. The problem is that public concern about farmland conversion is not stimulated by knowledge of statistics, but by the direct perception of local farmland being converted to new residential and commercial developments.¹²⁰

Loss of food production capacity is another concern that affects public perceptions and sentiments regarding farmland conversion.¹²¹ However, almost all researchers believe that food production worldwide can be increased to meet the demands of our growing population.¹²² The confidence of these researchers is grounded in facts while the concerns of “doomsayers” have no basis but “short-sighted fears.”¹²³ Instead of food production, the real problem is food distribution.¹²⁴

V. CONCLUSION

There is no “right to farm” any more than there is a right to build cars or a right to pump oil from the ground. Nor does “heritage value” do anything but promote the old ideal of the landed aristocracy being more valuable—keep land in your family, rather than competing to use it in the best way and you can command a higher price. These special protections are fundamentally inimical to the American tradition of meritocracy. Legislators may believe they are serving the public good by enacting

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 2.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Twenty-seven million acres of privately owned farmland, divided by 49,700 acres converted each year, equals approximately 543 years until there is no more privately owned farmland in California, assuming a constant rate of conversion.

¹²⁰ Kuminoff, *supra* note 114, at 3.

¹²¹ *Id.* at 5-6. *See also* Blank, *supra* note 8, at 137.

¹²² Blank, *supra* note 8, at 160.

¹²³ *Id.* at 161.

¹²⁴ *Id.*

protections for farmers and heritage-landowners, but the sentiments of judges and the public are headed elsewhere.

The solution is to re-conceive agriculture and its legal status in the same terms applied to other industries: First, farming is not a “lifestyle” but an industry. Second, nuisance-causing byproducts are not allowable from farming or any other industry. Third, food is like any other technology or product, not an end so privileged that it justifies any means to produce it. Finally, farming is only one among many ways to use land and not to be privileged for any reason intrinsic to farming, but for its integration with neighboring uses, its economic viability, and its relation to the local community.

The ultimate goal should be to bring farmers and agricultural producers back into a stable union with urban interests by obliterating the barrier between them—the romanticization of agrarianism and the exceptional treatment of agriculture.

In 1823, Justice Marshall declined to address “whether agriculturalists, merchants, and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits.”¹²⁵ After almost two hundred years of legal struggle over land use and with our economy moving farther and farther away from agriculture with each passing year, it may be time to address that issue with the simple answer that no interest, be it agricultural, mercantile, industrial, residential, or recreational, has any right to special protections for land use simply by virtue of the sentimental value attached to that activity.

No interest should afford the right, on principles abstract or otherwise, to “expel” others from land or contract the limits of their activities based simply on the nature of its conduct. That is, public policy considerations regarding an industry or mode of land use cannot look at the nature of that industry or land use, declare it intrinsically superior, and then act to protect it without considering countervailing needs. Such a perspective, however, appears not to have infiltrated the thinking of the agriculture proponents who shape our laws.

Land uses need to be considered in the totality of their circumstances, with greater weight given to what is most economical, most functional, and most aesthetically pleasing to the local community. If agriculture loses, we should be willing to allow it.

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¹²⁵ *Johnson*, 21 U.S. 543 at 588.