"YES, IN YOUR BACKYARD!"

MODEL LEGISLATIVE EFFORTS TO PREVENT COMMUNITIES FROM EXCLUDING CAFOS

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I. INTRODUCTION

> "Like ancient heirlooms our farms deserve protection from the forces tending to break that which is irreplaceable. 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."[1]

From the air, a typical large-scale hog farm looks entirely unlike agriculture as most laypeople would imagine it.[2] Brown ponds

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1. Whether KRS 413.072 Prohibits Cntys. from Regulating Indus.-Scale Hog Operations, 97-31 Ky. Op. Att'y Gen. 5 (1997), *available at* http://ag.ky.gov/civil/opinions/Pages/1997.aspx. [hereinafter Ky. Op. Att'y Gen.].

2. *See, e.g.*, Steve Wing, *Social Responsibility and Research Ethics in Community-Driven Studies of Industrialized Hog Production*, 110 ENVTL. HEALTH PERSP. 437, 438 (2002); Meggan Anderson, *Aerial Views of Eastern North Carolina Pig Farms*, YOUTUBE (Nov. 29, 2010), www.youtube.com/watch?v=PKjjj-bjgAo. In 2014, North Carolina legislators introduced legislation that would exempt aerial views of agricultural operations from public records disclosure obligations, in response to North Carolina Farm Bureau concerns that environmental NGOs were better able to bring complaints and suits because of increased access to aerial technology. Farm GPS Coordinates/Photos/Public Records, S.B. 762, 2013 Gen. Assemb., Reg. Sess. (N.C. 2014). This is unfortunately not surprising in an era when agricultural law increasingly shields farmers and industrial agriculture from investigation and criticism, rather than working to ensure transparency and safety. *Cf.* Cody Carlson, *The Ag Gag Laws: Hiding Factory Farm Abuses from Public Scrutiny*, ATLANTIC ONLINE (Mar. 20, 2012, 9:06 AM), http://www.theatlantic.com/health/archive/2012/03/the-ag-gag-laws-hiding-factory-farm-abuses-from-public-scrutiny/2546

separated by strips of grassless dirt abut a series of long corrugated metal buildings clumped together. Beyond the buildings, cropless dirt fields extend into the distance. There is not an animal to be seen, and no rows of vegetable or grain crops. The ponds, dubiously named "lagoons," are pits of hog waste that are the inevitable byproduct of large scale hog farming. The fields are not for animals to graze on, but rather are spray fields, receptacles for liquid manure.[3] The buildings house the hogs, which live exclusively indoors, pressed shoulder to shoulder in their pens, eating feed calculated to cause rapid growth and thus maximize profits by minimizing life spans.[4] Not unique to hogs, this industrialized farming model of Animal Feeding Operations ("AFOs") also dominates the poultry industry and increasingly characterizes dairy and beef cattle production as well.[5]

The Environmental Protection Agency ("EPA") defines AFOs as "agricultural enterprises where animals are kept and raised in confined situations" and which "congregate animals, feed, manure and urine, dead animals, and production operations on a small land area."[6] For regulatory purposes, the EPA divides AFOs by size, designating medium and large AFOs as Concentrated Animal Feeding Operations ("CAFOs").[7] To give a sense of how large these operations must be to qualify as a CAFO, medium CAFOs can house, for example, anywhere from 300 to 9,999 hogs weighing under fifty-five pounds.[8] A CAFO with 10,000

74 (discussing Iowa legislation criminalizing undercover investigation of factory farm abuses).

3. The absence of land available for grazing or silage is a defining characteristic of an Animal Feeding Operation according to EPA regulations which, in part, identify AFOs as operations where "[c]rops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility." 40 C.F.R. § 122.23(b)(1)(ii) (2012).

4. Robyn Mallon, *The Deplorable Standard of Living Faced by Farmed Animals in America's Meat Industry and How to Improve Conditions by Eliminating the Corporate Farm*, 9 MED. & L. 389, 405 (2005); *see also Management Practices That Maximize Feed Efficiency*, PIG SITE (Nov. 8, 2013), http://www.thepigsite.com/articles/4514/management-practices-that-maximize-feed-efficiency.

5. *Id.* at 403–04.

6. *Animal Feeding Operations FAQs*, EPA, http://water.epa.gov/polwaste/npdes/afo/AFO-FAQs.cfm (last updated July 3, 2014).

7. 40 C.F.R. § 122.23(b)(2) (2012).

8. Compiled CAFO Final Rule, 40 C.F.R. § 122.23(b)(6)(i)(E). Additionally, a medium CAFO may house, for example, "200 to 699 mature dairy cows" § 122.23(b)(6)(i)(A); "300 to 999 cattle other than mature dairy cows or veal calves"

immature hogs or more would be classified as large; the EPA has not set upper limits for the allowable number of hogs or any other animal raised in a feeding operation.[9]

AFOs as an approach to animal agriculture are a relatively recent development, beginning with the industrialization of poultry farming in the 1960s and surging as a strategy for hog and cattle farming in the 1980s and 1990s.[10] Once new economies of scale developed, with a concomitant vertical integration of animal housing and animal slaughter, smaller farms were rendered less profitable and merged horizontally. Thus, AFOs became the primary form of animal agriculture in the United States.[11] The animals raised in CAFOs are not generally owned by the farmers tending to them each day, but by agricultural corporations.[12] The corporate owner of the animals contracts with these farmers, known as "integrators," giving them specifications: for example, how and what to feed the animals, whether to give them subtherapeutic antibiotics, or when animals should be deemed unfit and be culled.[13] This consolidation of animal agriculture also concentrates lobbying power in a small number of massive agribusinesses who can influence federal and state legislatures and regulatory agencies to make policies promoting CAFOs and limiting restrictions on CAFO practices.[14]

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§ 122.23(b)(6)(i)(C); "750 to 2,499 swine each weighing 55 pounds or more" § 122.23(b)(6)(i)(D); "9,000 to 29,999 laying hens or broilers, if the AFO uses a liquid manure handling system" § 122.23(b)(6)(i)(I); or "25,000 to 81,999 laying hens, if the AFO uses other than a liquid manure handling system" § 122.23(b)(6)(i)(J).

9. 40 C.F.R. § 122.23(b)(4).

10. PEW COMM'N ON INDUS. FARM ANIMAL PROD., PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA 5–6, *available at* http://www.ncifap.org/_images/PCIFAPFin.pdf.

11. JAMES M. MACDONALD & WILLIAM D. MCBRIDE, THE TRANSFORMATION OF U.S. LIVESTOCK AGRICULTURE (2009), *available at* http://www.ers.usda.gov/media/265070/eib43fm_1_.pdf.

12. Karl S. Coplan, *Integrator Liability for CAFO Clean Water Act Violations*, GREENLAW (July 23, 2010), https://greenlaw.blogs.law.pace.edu/2010/07/23/integrator-liability-for-cafo-clean-water-act-violations.

13. *See generally* CARRIE HRIBAR, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON COMMUNITIES (2010), *available at* http://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf.

14. *Myth: CAFOs Are Farms, Not Factories*, CAFOTHEBOOK.ORG, http://www.cafothebook.org/thebook_myths_4.htm (last visited Jan. 23, 2015).

This is not agriculture as envisioned by most consumers of animal products (or of the romanticized ideal of America's agrarian roots). It is a mass production of living commodities that Kentucky's Attorney General lamented "hardly deserves to be called a farm at all. An industrial-scale hog operation is less a farm than a manufacturing facility."[15] It is certainly not the agriculture that most Americans view favorably as they support right-to-farm acts, or press for origin labeling to help them feel that they are supporting local or, at least, domestic agriculture.[16] Therefore, society needs to evaluate how current laws and policies deliberately or inadvertently advance this shift in agricultural practice. If a course correction is needed, communities must have the legal means to realign their agricultural reality with their ideal community standards for their local food systems.

Part II of this Article will give an overview of the nexus between CAFOs and public health, discussing the effects of CAFO operations on water and air quality, the wellbeing of surrounding communities, and the healthfulness of the food supply. Part III will then describe the current federal regulatory regime, or lack thereof, addressing the public health risks CAFOs pose. Next, Part IV will look at state-level statutory efforts to restrict legal challenges to agriculture generally, and CAFOs specifically, via Right-to-Farm laws and restrictions on local zoning power. Lastly, Part V will discuss two pieces of model legislation proposed by the American Legislative Exchange Council ("ALEC") that, taken together, would nearly eliminate the last remaining tools of communities wanting to restrict, regulate, or enjoin CAFOs: tort litigation and municipal land use laws.

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15. Ky. Op. Att'y Gen., *supra* note 1, at 7. When asked to render an opinion about whether CAFOs were protected under Kentucky's Right to Farm Act, Attorney General went on in the opinion letter to wax poetic:

> Gone is the bucolic image of the lowing herd winding slowly o'er the lea. Gone is the symbiosis between farmer and land. For the most part, condition of the land is immaterial on an industrial-scale hog operation; the operation could be carried out effectively on a shingle of solid rock.

Id.

16. *See generally id.* at 5 ("Throughout the recorded history of Kentucky, and indeed even before that, the word 'farm' has been synonymous with 'small farm' or 'family farm.'").

II. THE EFFECTS OF CAFOS ON PUBLIC HEALTH

The primary recurring environmental and public health challenge created by CAFO practices is waste management. Animal agriculture produces nearly 150 million tons of waste in the United States annually, thirteen times more than that produced by the human population.[17] A 10,000 head hog farm creates the same amount of waste as a town of 40,000 people, but lacks the infrastructure and wastewater treatment facilities to process it.[18] The chemicals, pathogens, pharmaceutical residue and bacteria in the resulting quantity of waste cause water, air, and odor pollution that affect not only nearby properties, but also communities miles downstream or upwind.[19] Environmental pollution from CAFOs causes or correlates with an extensive assortment of physical and mental health problems in residents of surrounding communities, imposing collateral consequences of environmental injustice and reduction in property values.[20] Closer to the source, the polluting practices of CAFOs also diminish the

17. JoAnn Burkholder et al., *Impacts of Waste from Concentrated Animal Feeding Operations on Water Quality*, 115 ENVTL. HEALTH PERSP. 308, 308 (2007).

18. James C. Barker, *Frequently Asked Environmental Questions About Livestock Production*, DEP'T BIOLOGICAL & AGRIC. ENG'G, http://www.bae.ncsu.edu/topic/animal-waste-mgmt/program/land-ap/barker/questions/q_doc.html (last visited Jan. 23, 2015).

19. *See* Burkholder et al., *supra* note 17 (impact of CAFOs on water and air quality); *see also* Ky. Op, Att'y Gen., *supra* note 1, at 7–8 (providing specific examples of hog waste lagoon ruptures and leaks that polluted water and air quality); Ryan Teel, Note, *Not in My Neighborhood: The Fight Against Large-Scale Animal Feeding Operations in Rural Iowa, Preemptive Tactics, and the Doctrine of Anticipatory Nuisance*, 55 DRAKE L. REV. 497, 502 (2007) (explaining that odor emissions from decomposition of manure are produced by a mixture of "gases, vapors, dust, and volatile compounds," and can travel long distances).

20. *See* Wendee Nicole, *CAFOs and Environmental Justice: The Case of North Carolina*, 121 ENVTL. HEALTH PERSP. A182, A183–85 (2013) (discussing environmental justice); R. Jason Richards & Erica L. Richards, *Cheap Meat: How Factory Farming Is Harming Our Health, the Environment, and the Economy*, 4 KY. J. EQUINE AGRIC. & NAT. RES. L. 31, 38–39 (2011-2012) (discussing reduction of property values near hog CAFOs); Sigurdar T. Sigurdarson & Joel N. Kline, *School Proximity to Concentrated Animal Feeding Operations and Prevalence of Asthma in Students*, 129 CHEST 1486, 1489–90 (2006) (reporting an increase of asthma in children attending school within one mile of a CAFO); Steve Wing et. al., *Air Pollution from Industrial Swine Operations and Blood Pressure of Neighboring Residents*, 121 ENVTL. HEALTH PERSP. 92, 94–96 (2013) (showing increased blood pressure in nearby residents due to transient odor plumes from CAFO hog emissions); Wing, *supra* note 2, at 440 (showing nearby residents, in response to symptoms questionnaires, reporting physical problems such as headaches, runny noses, sore throats, excessive coughing, diarrhea, and burning eyes).

healthfulness of the confined animals and, ultimately, of the food supply.[21]

A. CAFOs and Environmental Health

Storage and discharge of agricultural wastewater and land application of untreated animal waste pollutes rivers and streams as well as groundwater. In instances when CAFOs intentionally discharge polluted water or waste slurry directly into rivers, the pollutant effect is obvious. Even when waste is not directly discharged, waste and wastewater held in lagoons "can enter water bodies from spills or breaks of waste storage structures (due to accidents or excessive rain)."[22] Lagoons can leach and rupture, and maintaining an in-use lagoon to prevent spillage poses logistical challenges. Even a well-maintained lagoon can spill over during heavy rainfall, especially in low lying areas.[23] Land application, which involves spraying liquid waste onto fields, often surpasses the nutrient needs of the fields and oversaturates them, and the excess enters the water system as runoff.[24] Phosphorous contamination from animal manure along with runoff of organics and solid waste spurs development of algal blooms in water; the resultant anoxic conditions coupled with high concentrations of ammonia cause fish kills in rivers and streams.[25] Additionally, when waste is managed through land application, and not previously treated, pathogens in the liquid waste can survive and

21. *See* Cynthia A. Daley et al., *A Review of Fatty Acid Profiles and Antioxidant Content in Grass-fed and Grain-fed Beef*, 9 NUTRITION J. 10 (2010) (reporting that grain-fed beef has smaller amounts of compounds proven to reduce the risk of depression, Alzheimers, vision loss, bone degeneration, cancer, artherosclerosis, diabetes, and cell degeneration than grass-fed beef); P.J. Huffstutter, *Insight: Pork Industry Hunts for Deadly Pig Virus*, REUTERS (May 28, 2013, 3:11 PM), http://www.reuters.com/article/2013/05/28/us-swine-virus-insight-idUSBRE94R0VD20130528 (explaining that the spread of a viral outbreak is amplified when hogs are infected by ingesting contaminated feces in close quarters).

22. *Animal Feeding Operations Overview*, EPA, http://water.epa.gov/polwaste/npdes/afo (last updated Sept. 9, 2014).

23. This is a particular problem for the ninety-five percent of North Carolina hog CAFOs located in the lowland eastern counties of the state near the coast. *See* Nicole, *supra* note 20 at A186 (discussing the problems of lagoon overflow specific to North Carolina).

24. Scott Jerger, *EPA's New CAFO Land Application Requirements: An Exercise in Unsupervised Self-Monitoring*, 23 STAN. ENVTL. J. 91, 95 (2004).

25. Burkholder et al., *supra* note 17, at 309.

remain in the soil of spray fields, contaminating the soil, groundwater, and nearby water sources.[26]

CAFOs also impact air quality in communities where they operate. Though the day-to-day effects of CAFO pollution on ambient air quality are highly variable, and the extent of the pollution depends in part on the waste management infrastructure used by any given operation, all CAFOs emit pollutants as a result of high concentrations of waste.[27] Open-air manure pits, for example, release chemical byproducts of decomposition that include volatile organic compounds, methane, ammonia, and hydrogen sulfide.[28] Land application of waste releases the same harmful chemical compounds into the air, along with substantial amounts of particulate matter.[29] Poultry CAFOs that maintain solid waste management systems store chicken waste in massive litter piles, which can result in windborne feathers and other offal, as well as waste particulates and ammonia.[30] Most noticeably to nearby residents, the varied airborne emissions from CAFOs combine to form windborne "odor plumes" that reek of rotten eggs due to hydrogen sulfide, and of animal waste due to, not surprisingly, animal waste particulate matter.[31]

Although the fact that CAFOs emit pollutants into the air and water is undisputed,[32] quantifying the extent of that pollution is difficult. One hurdle in assessing the pollution levels associated with CAFOs is that "[t]here are relatively few monitoring

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26. Charles P. Gerba & James E. Smith, *Sources of Pathogenic Microorganisms and Their Fate During Land Application of Wastes*, 34 J. ENVTL. QUALITY 42, 42 (2005).

27. Sarah C. Wilson, Comment, *Hogwash! Why Industrial Animal Agriculture Is Not Beyond the Scope of Clean Air Act Regulation*, 24 PACE ENVTL. L. REV. 439, 444–45 (2007).

28. *Id.* at 441.

29. Tarah Heinzen, Comment, *Stopping the Campaign to Deregulate Factory Farm Air Pollution*, 17 N.Y.U. ENVTL. L.J. 1482, 1493–94 (2009).

30. *See, e.g.*, Kenneth D. Casey et al., *Air Quality and Emissions from Livestock and Poultry Production/Waste Management Systems*, ANIMAL AGRICULTURE AND THE ENVIRONMENT: NATIONAL CENTER FOR MANURE AND ANIMAL WASTE MANAGEMENT WHITE PAPERS 1, 3 (J.M. Rice et al. eds., 2006), http://lib.dr.iastate.edu/cgi/viewcontent.cgi?article=1624&context=abe_eng_pubs (giving the general makeup of emissions from poultry CAFOs).

31. Nicole, *supra* note 20, at A183; *see also* Teel, *supra* note 19, at 502 (noting that the odors caused by a CAFO were also described as "like an open septic tank" and "like a battery overcharged") (citing Weinhold v. Wolff, 555 N.W.2d 454, 460 (Iowa 1996)).

32. IOWA STATE & THE UNIV. OF IOWA STUDY GRP., IOWA CONCENTRATED ANIMAL FEEDING OPERATIONS AIR QUALITY STUDY 42 (2002).

programs for large-scale livestock production compared to other industries that are regulated."[33] Another is the many overlapping contact points with toxins for people living near CAFOs, who experience:

> exposures through air, water, and soil . . . inhalation, ingestion, and dermal exposures. People have been exposed to multiple chemicals: hydrogen sulfide, particulate matter, endotoxins, nitrogenous compounds. Then you have a plume that moves; what gets into the air gets into the water. You have runoff from spray fields. These are complex exposure profiles.[34]

B. CAFOs, Public Health, and Community Well-Being

The detrimental effects of CAFO emissions on environmental health concurrently harm human health, as nearby residents drink polluted water, breathe polluted air, and lose enjoyment of their homes and communities because of noxious odor. Drinking water contaminated with bacteria and nitrates from animal waste can have devastating health effects, especially for infants and the immunocompromised.[35] Generally, in rural areas where CAFOs operate, there is limited access to public water or sewers and, therefore, many residential households depend on well water that has not been processed by a water treatment facility.[36] Thus, when land applications of manure and other

33. *Id.* at 35.

34. Nicole, *supra* note 20, at A186 (quoting Sacoby Wilson, environmental health professor at the University of Maryland).

35. EPA, DRINKING WATER FROM HOUSEHOLD WELLS 5 (2002). Exposure to high levels of nitrates during a concentrated period of time—such as the infancy of a formula-fed baby—can cause serious illness; in very young children it can lead to "blue baby" syndrome, a constriction of oxygen flow in the bloodstream. *Id.* Bacteria from animal waste can cause a variety of illnesses. *Id.*

36. Approximately ninety-six percent of rural residents in the United States depend on groundwater for their drinking supply. Kevin McCray, Editorial, *Ground Water: Out of Sight, But Not Out of Mind*, http://www.ngwa.org/Events-Education/awareness/Pages/Editorial.aspx (last updated Apr. 8, 2014). Overall, fifteen percent of U.S. households rely on private wells for their water. CENTERS FOR DISEASE CONTROL AND PREVENTION, PRIVATE GROUND WATER WELLS (2011), *available at* http://www.cdc.gov/healthywater/drinking/private/wells.

wastewater discharges pollute groundwater, they also pollute residents' drinking supply; in particular, neighbors of CAFOs have elevated concentrations of nitrates in their water.[37] Private wells are unregulated, and the burden of obtaining and paying for private well water quality testing is on homeowners rather than environmental protection agencies.[38] Compounding the problem, nitrates are only detectable through testing, not by sight or taste, so unless residents proactively and regularly test their water, rural residents with unhealthy levels of nitrates in their well water likely drink the contaminated water, unaware.[39]

Communities surrounding CAFOs consistently report higher incidents of a variety of physical and psychological morbidities linked to airborne emissions. One study, based on symptom questionnaires filled out by rural residents, found that households near a hog CAFO reported "increased numbers of headaches, runny noses, sore throats, excessive coughing, diarrhea, and burning eyes" compared to households near an industrial dairy operation and to a control sample in an area with no agricultural presence.[40] Those symptoms likely resulted from exposure to airborne particulate matter, ammonia, and hydrogen sulfides.[41] In another study, exposure to transient odor plumes of hog CAFO emissions correlated with increased blood pressure in nearby residents, likely as a combined result of stress from the unpleasant conditions and the respiratory effects of particulate pollutants and ammonia.[42] A comparison of children attending school within a mile of a CAFO to children with no nearby exposure showed a significant increase in the number of children diagnosed with asthma, even after controlling for the possible increased exposure of the children in rural areas to agricultural emissions while at home.[43]

37. U.S.G.S. Interview: Contaminants in 20% of U.S. Private Wells (Mar. 26, 2009), *available at* http://gallery.usgs.gov/audios/251#.VDVrJ6HD-M9.

38. *Id.*

39. *Id.*

40. Wing, *supra* note 2, at 440.

41. *See id.* at 438.

42. Wing et al., *supra* note 20, at 94–96.

43. Sigurdarson & Kline, *supra* note 20, at 1489 (noting that the rate of asthma among children attending school near a CAFO was "approaching the prevalence of asthma reported among inner-city socioeconomically disadvantaged children").

These ill-effects disproportionately affect impoverished communities and communities of color. CAFOs are overwhelmingly located in counties with low average income and, particularly in North Carolina, in counties that have higher non-white populations.[44] One analysis of North Carolina CAFO sitings determined that a county where twelve percent or more of residents were impoverished and ten percent or more were nonwhite was nine times more likely to have a CAFO sited in the community.[45] The disparity is even greater for integrator operations than for independently owned farms: a census tract in the lowest quintile of wealth was twenty times more likely to have an integrator-run CAFO than was a tract in the uppermost quintile.[46] This reflects a strategic relocation on the part of integrators who bought out smaller farms and moved operations to economically depressed areas. Prior to takeover by integrators, hog farms were dispersed more evenly around the state, with all but one county having one in 1982; within fifteen years of the advent of vertical integration, ninety-five percent of North Carolina's hog farms were located in largely minority eastern counties.[47] Now, throughout the eastern coastal counties, all the impacts of living near a CAFO are magnified, as the region is saturated with hog farms.

Obviously, the negative externalities of the CAFO model of animal agriculture are disproportionately borne by the regions where CAFOs locate. The current pattern of CAFO siting places the burden of those externalities on communities of color and low income communities. Forcing these communities to bear more than their share of the externalized costs of CAFOs creates racially disparate health and economic effects by "expos[ing] communities that lack political power to environmental malodors while benefiting consumers and producers in nonimpacted areas."[48]

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44. *See* Nicole, *supra* note 20, at A183.

45. Steve Wing et al., *Environmental Injustice in North Carolina's Hog Industry*, 108 ENVTL. HEALTH PERSP. 225, 229 (2000).

46. *Id.*; *see also* Nicole, *supra* note 20, at A184–A185 (exploring studies that reported greater numbers of CAFOs in high poverty areas).

47. Nicole, *supra* note 20, at A185–86.

48. Wing et al., *supra* note 20, at 96.

Compounding the problem for all communities where CAFOs locate, but particularly low income communities, siting of CAFOs drastically affects already depressed rural property values. One study of Iowa property values calculated a decline in home values of forty percent for properties within a half mile of a CAFO; the effects decreased inversely with distance from the CAFO but still resulted in a ten percent decrease at a distance of two miles.[49] When CAFOs locate where land values are already low, and then drive down value further, they externalize their costs in very real and tangible ways by drying up much of the equity that nearby residents might have in their homes. The poverty that makes these communities attractive for siting of locally undesirable land uses also prevents many residents from being able to relocate to avoid CAFOs, as many lack the financial means to move even before the CAFOs arrive and are less able to do so once their resale values are decimated.

C. CAFOs and Healthy Food

Beyond the harmful impact of CAFO operations on neighboring communities, CAFOs also negatively affect the healthfulness of the food supply generally. CAFO-raised animals are fed a diet primarily consisting of high-energy grains, calculated to increase the rate at which the animals mature to slaughter weight.[50] Elimination of pasture forage in animal diets reduces the nutritive value of their meat, eggs, or milk.[51] Grass-fed beef, for example, has been shown to have higher concentrations of omega-3 fatty acids, beta-carotene (a precursor to vitamin A), conjugated linoleic acid, and tocopherols (vitamin E) than those found in grain-fed beef.[52] These compounds in the human diet reduce the risk, respectively, of depression and Alzheimer's; vision loss and bone degeneration; cancer, atherosclerosis, and diabetes; and cell degeneration from free radicals.[53] Similar differences in heart-

49. Richards & Richards, *supra* note 20, at 38–39.
50. HRIBAR, *supra* note 13, at 1.
51. *See* Daley et al., *supra* note 21.
52. *Id.* at 4–8.
53. *Id.*

healthy fatty acids have been identified in free-range pigs.[54] On the other hand, a recent study suggests that free-range poultry produce eggs that are no more nutritious than those produced by hens housed in conventional battery cages in CAFOs,[55] though they may be less prone to carry foodborne pathogens such as salmonella.[56]

The prolific use of antibiotics in CAFO-raised animals also affects the health of consumers, who are exposed to trace amounts of antibiotics when eating most conventionally produced animal products.[57] The nature of CAFO farming begets the equally troubling necessity of subtherapeutic antibiotic use in animals. Rather than treat animals who exhibit symptoms of illness, a more efficient practice is to add antibiotics to the feed in hopes of preventing illness from starting or spreading.[58] While this practice proactively streamlines animal care, it is also a practice responsive to the realities of CAFO farming: if you breed animals for qualities not related to longevity or fitness, remove them from a natural environment, and cram them into close quarters indoors where they experience social stress along with the respiratory effects of breathing the waste of a thousand other animals, illness will become the rule rather than the exception.[59] Environmental

54. *See* Milagro Reig et al., *Variability in the Contents of Pork Meat Nutrients and How It May Affect Food Composition Databases*, 140 FOOD CHEM. 478, 479 (2013).

55. *See* K.E. Anderson, *Comparison of Fatty Acid, Cholesterol, and Vitamin A and E Composition in Eggs from Hens Housed in Conventional Cage and Range Production Facilities*, 90 POULTRY SCI. 1600, 1600 (2011).

56. *See* L.C. Snow et al., *Investigation of Risk Factors for Salmonella on Commercial Egg-Laying Farms in Great Britain, 2004–2005*, 166 VETERINARY REC. 579, 581 (2010).

57. HRIBAR, *supra* note 13, at 10. Even people who do not consume meat can be exposed to excess antibiotics from CAFOs, as airborne particulate matter from CAFOs can contain traces of antibiotics as well as bacteria carrying antibiotic resistance genes. Andrew D. McEachran, et al., *Antibiotics, Bacteria, and Antibiotic Resistance Genes: Aerial Transport from Cattle Feed Yards via Particulate Matter*, ENVTL. HEALTH PERSP. Advance Publication DOI:10.1289, *available at* http://dx.doi.org/10.1289/ehp.1408555 (Jan. 22, 2015).

58. *Id.*

59. Additionally, the concentration of animals in close quarters amplifies the effect of outbreaks, such as the porcine epidemic diarrhea virus, which to date has killed over eight million hogs in 2014. *See, e.g.*, Megan Durisin, *Virus Killing 8 Million Pigs Means Expensive Barbecues*, BLOOMBERG (June 6, 2014), http://www.bloomberg.com/news/print/2014-06-05/virus-killing-8-million-pigs-means-expensive-barbecues.html. That virus, which first appeared in the United States just last year, is a strain of coronavirus that causes severe dehydration and has a nearly 100% mortality rate in piglets. *Id.* It is transmitted through contact with the saliva or feces of an infected hog. P.J. Huffstutter,

overexposure to antibiotics may be a significant contributing factor in the emergence of antibiotic-resistant bacteria that pose a risk to the public health, and individual overexposure to trace antibiotics in the food supply can affect an individual's subsequent responsiveness to antibiotics necessary to treat illness.[60] In this area, some signs of improvement are on the horizon, even in the CAFO context, as several industrial poultry producers have announced voluntary phase-outs of subtherapeutic antibiotics.[61] Perhaps they have seen the writing on the wall in light of increasing public outcry and a recent Executive Order mandating that the FDA and USDA take steps to "eliminate the use of medically important classes of antibiotics for growth promotion purposes in food-producing animals."[62]

D. Protecting Public Health, Restricting CAFOs

In light of the myriad environmental and public health concerns posed by CAFOs, the lack of longitudinal studies on the pollution emitted by CAFOs, and the need for broader review of studies based on anecdotal reporting, some watchdog groups, including the American Public Health Association, have urged a moratorium on new CAFO permitting while the long term effect on public health can be studied.[63] Some states have already done

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Insight: Pork Industry Hunts for Deadly Pig Virus, REUTERS (May 28, 2013, 3:11 PM), http://www.reuters.com/article/2013/05/28/us-swine-virus-insight-idUSBRE94R0VD20130528. Not surprisingly, the rate of transmission is much higher when animals are confined indoors in close quarters in constant contact with their waste.

60. *See, e.g.*, Sudeshna Ghosh & Timothy M. LaPara, *The Effects of Subtherapeutic Antibiotic Use in Farm Animals on the Proliferation and Persistence of Antibiotic Resistance Among Soil Bacteria*, 1 ISME J. 191, 191 (May 24, 2007) http://www.nature.com/ismej/journal/v1/n3/pdf/ismej200731a.pdf (discussing the increase in antibiotic resistance); Antibiotic Resistance and the Threat to Public Health: Hearing Before the Subcomm. on Health of the H. Comm. on Energy and Commerce, 111th Cong. (Apr. 28, 2010) (statement of Thomas Frieden, Director, Ctr. for Disease Control and Prevention), *available at* http://www.cdc.gov/washington/testimony/2010/t20100428.htm (discussing health concerns caused by antibiotic resistance).

61. Lydia Zuraw, *Will FDA's Voluntary Plan Actually Reduce Antibiotics in Animal Feed?*, FOOD SAFETY NEWS (Dec. 12, 2013), www.foodsafetynews.com/2013/12/fda-finalizes-guidance-for-phasing-out-antibiotics-in-food-animals.

62. Exec. Order No. 13,676, 76 Fed. Reg. 56,931, 56,933 (2014).

63. Am. Pub. Health Ass'n, Policy Statement No. 20037, PRECAUTIONARY MORATORIUM ON NEW CONCENTRATED ANIMAL FEED OPERATIONS (Nov. 18, 2003), *available at* http://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/24/11/17/precautionary-moratorium-on-new-concentrated-anim

so. For example, in 1997 North Carolina passed a temporary moratorium on construction of new hog CAFOs and expansion of existing CAFOs, citing concerns about pollution and odor,[64] and in 2007 made the moratorium permanent with the passage of the Swine Farm Environmental Performance Act.[65] However, provisions of the act intended to encourage implementation of best practices were voluntary, and few existing hog CAFOs have availed themselves of cost-sharing programs that would assist them in upgrading their waste management systems.[66] Additionally, as the moratorium is specific to hog farms, one significant unintended result within the state has been an explosion of new poultry CAFOs, substituting one source of harm for another.[67] Subsequently, South Carolina and Georgia have relaxed or considered relaxing their states' hog farm regulations to attract hog producers that are no longer able to readily expand in North Carolina.[68] This is one weakness of relying on states to craft policies that balance corporate interests and public health—they may be influenced by a particular animal industry and end up with the same problem in a different flavor, or they may be encouraged to engage in a race to the bottom to attract new businesses to the state if surrounding states manage to kick CAFOs out. The mixed results experienced by states suggest that comprehensive federal legislation to regulate existing CAFOs, and possibly restrict future CAFOs, coupled with zoning and land use discretion at the local level would be a better solution.

CAFOs pose a well-documented threat to the environment, public health, animal welfare and nutritional yield, private property valuation, and the well-being of communities, especially predominately low income and minority communities.

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al-feed-operations.

64. Act of Aug. 26, 1997, ch. 458, sec. 1.1, 1997 N.C. Sess. Laws 1938.

65. Nicole, *supra* note 20, at A188.

66. *Id.*

67. *Id.*

68. S.C. CODE ANN. § 47-20-165 (2012) (repealing what had previously been stringent state regulations of swine operations); Proposed Amendments to the Rules of the Department of Natural Resources Environmental Protection Division Relating to Water Quality Control, Chapter 391-3-6 (Sept. 25, 2013), *available at* http://environet.dnr.state.ga.us/6/20130923_ProposedAmendments_CAFORule2013.pdf (substantially increasing the size of hog farms not subject to state Environmental Protection Division permitting requirements).

Communities with legitimate concerns for the health, safety, and welfare of their citizens should be able to determine how to mitigate those risks, but a dearth of federal regulation, coupled with increasingly permissive state laws and efforts to preempt local zoning and regulatory authority, has left individuals and communities limited recourse against the destructive effects of industrial agriculture.

III. FEDERAL REGULATION OF CAFOS

Despite the impact of CAFOs on the environment, and consequently on the health of surrounding communities, animal agriculture remains the "final frontier of the environmental movement."[69] Congressional efforts to pass CAFO-specific legislation have failed to find traction, leaving federal agencies the task of regulating CAFOs under the auspices of existing statutory schemes, which they have largely been unable or unwilling to do.[70] The U.S. Department of Agriculture ("USDA") and the EPA each enforce statutes that could be used to reach CAFOs, but choose to exempt them instead. USDA oversight of CAFOs consists only of voluntary programs to help animal agricultural operations improve their management practices through the development of Comprehensive Nutrient Management Plans.[71] Perhaps the voluntary programs would more effectively create change if the perceived benefits were greater; the programs have not attracted large numbers of farmers seeking to change their practices. Other statutes the USDA enforces, such as the Animal Welfare Act, could theoretically reach CAFOs, but instead that statute expressly exempts livestock from its scope.[72]

EPA efforts to regulate CAFOs under federal environmental statutes have been minimally successful, narrowly applicable, and heavily influenced by industry pressure. Under the Clean Water Act ("CWA"), the EPA has the authority to regulate

69. Warren A. Braunig, Note, *Reflexive Law Solutions for Factory Farm Pollution*, 80 N.Y.U. L. REV. 1505, 1505 (2005).

70. *Id.* at 1513–15 (citation omitted).

71. *Animal Feeding Operations (AFO) and Concentrated Animal Feeding Operations (CAFO)*, USDA, http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/plantsanimals/livestock/afo (last visited Jan. 23, 2015).

72. 9 C.F.R § 1.1 (2014).

sources of pollution affecting the "waters of the United States,"[73] but ultimately it oversees very little of the polluting practices of CAFOs. The 1972 CWA identified CAFOs, among other industries, as a "point source" for potential discharges of pollutants.[74] As potential point sources, medium and large CAFOs must request a National Pollution Discharge Elimination System ("NPDES") permit prior to discharging manure, litter, or wastewater into certain water sources.[75] This mechanism achieves only limited oversight of agricultural pollution, as it only applies to medium and large CAFOs, and only when they intend to pollute waters over which the EPA has regulatory authority.[76] For many years, agencies and courts interpreted "waters of the United States" broadly,[77] but a series of Supreme Court decisions over the past fifteen years limited the reach of EPA regulations under the CWA to pollution sources affecting "relatively permanent, standing or continuously flowing bodies of water . . . described in ordinary parlance as 'streams, oceans, rivers, and lakes,'" or having a "significant nexus" to traditional navigable waters.[78] Although the EPA can still regulate CAFOs as a point source under the CWA, that authority is constrained by jurisprudence that has not yet recognized the inseparability of components of the water system and placed all water sources within the ambit of federal oversight.[79]

In recent years, the EPA has initiated some rulemaking proceedings in an attempt to improve oversight of CAFO water pollution, but the end results have been unsatisfying. In response to several high profile pollution discharges resulting in massive

73. Clean Water Act, 33 U.S.C. § 1342 (2012).

74. *Id.* at § 1362.

75. *Id.* at § 1342.

76. *Id.*

77. *See, e.g.*, Navigation and Navigable Waters, 33 C.F.R. § 328.3(a)(3) (2007) (where the Army Corps of Engineers defines "waters of the United States" sweepingly, to include "waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds"). Pollution discharges into many of these enumerated water sources are no longer subject to NPDES permitting restrictions because of their lack of "navigability" or "contiguousness."

78. Rapanos v. United States, 547 U.S. 715, 739 (2006); Solid Waste Agency v. Army Corps of Eng'rs, 531 U.S. 159, 167 (2001).

79. *Rapanos*, 547 U.S. at 776–77, 782–83.

fish kills,[80] the EPA issued a rule in 2003 that subjected all CAFOs to NPDES permitting requirements, whether or not they actually discharged wastewater.[81] Industry representatives sued, and the Fifth Circuit vacated the portion of the rule that would require NPDES permits for those CAFOs that "propose to discharge" but have not actually discharged pollutants.[82] In 2011, the EPA began the process of promulgating a more modest rule that would have required CAFOs to provide the EPA basic operational information, such as the owner's name and contact information, the geographical locational coordinates of the farm, the maximum number of animals housed, and the acreage available as spray fields.[83] Then, in 2012, it withdrew the rule, stating that instead of attempting to collect data centrally, it would rely on existing data-collection mechanisms at the state level and through other agencies.[84] A coalition of nonprofit groups has sued the EPA, claiming that it failed to properly justify its withdrawal of the rule and pointing out the inadequacy of current data.[85] The current system is inadequate, depending mainly on state permitting authorities to report information about CAFOs, despite the wide variance in state guidelines for reporting and the permitting of animal agricultural operations.[86] Without centralized data about CAFOs, enforcement of what federal regulations there are to prevent CAFO water pollution will be primarily reactive, responding to complaints, rather than proactive as part of a coordinated inspection schedule.[87]

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80. CLAUDIA COPELAND, ANIMAL WASTE AND WATER QUALITY: EPA REGULATION OF CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFOS) (2006), http://www.ncifap.org/_images/CRS_Animal_Waste_and_Water_Quality_EPA_CAFOs_Sept_2006.pdf (describing recent animal waste dumps and the response of the federal government).

81. *Id.*

82. Nat'l Pork Producers Council v. EPA, 635 F.3d 738, 756 (5th Cir. 2011); NPDES Permit Regulation for CAFOs: Removal of Vacated Elements in Response to 2011 Court Decision, 77 Fed. Reg. 44,429, 44,494 (July 30, 2012) (to be codified at 40 C.F.R. pt. 122).

83. NPDES CAFO Reporting Rule, 76 Fed. Reg. 65,431, 65,235 (Oct. 21, 2011) (to be codified at 40 C.F.R. pts. 9, 122).

84. FOOD & WATER WATCH, THE EPA'S FAILURE TO TRACK FACTORY FARMS 1 (2013), *available at* http://documents.foodandwaterwatch.org/doc/EPA_Factory_Farms.pdf.

85. *Id.*

86. *See id.* at 5 (noting that thirty-two states make some CAFO data publicly available, though not in a central database, but that the data is inherently incomplete as it only includes permitted CAFOs).

87. *Id.* at 2.

The EPA has given CAFOs even more latitude to pollute the air than the water. Some of the blame for exempting CAFOs from Clean Air Act ("CAA") provisions falls on the EPA, and some on the states, due to the cooperative federalism model that characterizes implementation and enforcement of CAA provisions. For example, the EPA is required to set National Ambient Air Quality Standards ("NAAQSs"),[88] or target pollution levels, but states create State Implementation Plans ("SIPs") that determine which industries have to be accountable for their pollution levels as the state tries to achieve its targets.[89] Although CAFOs emit some of the "criteria" pollutants for which the EPA has set NAAQs, most states categorically exempt agriculture from their SIPs. Additionally, Congress wrote possible exemptions for agriculture into the CAA, at the discretion of the EPA administrator. For instance, when setting hazard levels for chemicals believed to cause serious harm to the environment or human health, the administrator may choose to change the threshold level deemed hazardous for, "or to exempt entirely, any substance that is a nutrient used in agriculture when held by a farmer."[90] Along with expressly exempting agriculture from some CAA requirements, the EPA has also let CAFOs go underregulated by omitting them from existing pollution oversight mechanisms. A facility emitting over 100 tons a year of any pollutant is considered a "major stationary source of air pollution," and under the CAA must obtain annual permits;[91] even though CAFOs can emit well

88. Specifically, they emit fine and coarse particulate matter and ozone in quantities high enough to substantially affect air quality.

89. Citizen groups have filed petitions for rulemaking to label hydrogen sulfide and ammonia, two common pollutants released by CAFOs, as criteria pollutants for which NAAQS must be set. *See, e.g.*, Humane Society et al., Petition to List Concentrated Animal Feeding Operations Under Clean Air Act Section 111(B)(1)(A) of the Clean Air Act, and to Promulgate Standards of Performance Under Clean Air Act Sections 111(B)(1)(B) and 111(D), *available at* www.foe.org/sites/.../files/HSUS_et_al_v_EPA_CAFO_CAA_Petitio n.pdf. (2009); Envtl. Integrity Project et al., Petition for the Regulation of Ammonia as a Criteria Pollutant Under Clean Air Act Sections 108 and 109 43, 49 (2011), *available at* http://www.environmentalintegrity.org/documents/PetitiontoListAmmoniaasaCleanAirA ctCriteriaPollutant.pdf. As CAFOs are a dominant emitter of ammonia, if the EPA agrees to set NAAQS, states are almost certain to have to include CAFOs in their SIPs to meet targets, which would subject CAFOs to EPA regulation and enforcement. This is unlikely to proceed, at least not in a timely manner.

90. 42 U.S.C. § 7412(r)(3) (2012).

91. *Id.* at § 7661(2)(B).

over the limits to be a major stationary source, they have not been subjected to permitting by the EPA.[92]

The EPA has also not prioritized penalizing CAFOs that violate those provisions of federal law that do apply to them. Briefly, in the early 2000s, the EPA pursued enforcement actions against CAFOs for violations of federal environmental statutes.[93] However, in response to industry pressure, the EPA entered an unusual voluntary consent agreement with the entire animal agriculture industry in which the EPA agreed not to take enforcement action against the industry while they studied the pollutant effects of CAFOs.[94] The study dragged on and initial raw data were released in 2011,[95] but the study was poorly designed, data was incomplete, the final study is still a work in progress, and nothing more has been done to resume enforcement against CAFOs under the CAA. Therefore, following a burst of enforcement in the early 2000s, CAFOs have been free from EPA enforcement of air quality standards for nearly ten years.[96]

IV. STATE-LEVEL REGULATION: NUISANCE SUITS, ZONING, RIGHT TO FARM ACTS, AND CAFOS

In the absence of robust federal oversight of CAFOs, states and local governments must grapple with how to regulate CAFOs and how to resolve disputes over CAFO siting and practices. The dilemma of how to balance the side effects of agriculture with the interests of adjacent landowners is not new, and indeed the importance of agriculture in the American self-image has helped shape many principles of land use laws in the United States.[97] In an agrarian society, the use of land for agricultural purposes was

92. *See* FOOD & WATER WATCH, *supra* note 84.

93. Teresa B. Clemmer, *Agriculture and the Clean Air Act*, *in* FOOD, AGRICULTURE, & ENVIRONMENTAL LAW 163, 171 (2013).

94. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 4959 (Jan. 31, 2005).

95. U.S. Envtl. Prot. Agency, *Monitored AFOs*, http://www.epa.gov/airquality/agmonitoring/data.html; *see also* J. Nicholas Hoover, *Can't You Smell That Smell? Clean Air Act Fixes for Factory Farm Air Pollution*, 6 STAN. J. ANIMAL L. & POL'Y 1, 15 (2013).

96. Clemmer, *supra* note 93, at 171.

97. *See generally* Peter J. Wall, *Land Use and Agricultural Exceptionalism*, 16 SAN JOAQUIN AGRIC. L. REV. 219 (2007) (describing how agriculture has influenced land use laws throughout United States history).

understood to be the highest and best use of most lands, and residents expected to coexist with the smells, sounds, and sights of agriculture.[98] However, particularly during the wave of suburbanization that followed World War II, new residents and businesses encroached on previously far-flung areas, and courts were forced to decide whether agricultural operations remained the highest and best use of the land or if they so offended their new neighbors as to be deemed nuisances.[99]

Under common law, disputes over appropriate use of one's land were left between individual landowners, to be settled in private lawsuits sounding in nuisance. English common law exalted the rights of property owners to exercise "sole and despotic dominion"[100] over their land, but tempered that right somewhat with the doctrine of nuisance. The private nuisance doctrine attempts to balance "the right of one individual to put his land to productive use and the right of nearby property owners to be free from physical invasions that substantially interfere with the use and enjoyment of their property."[101] The public nuisance doctrine prevents land use that would impair a right generally held by the public.[102] In evaluating nuisance complaints against farms, courts balance the harm of the offensive use or practice to the affected party against the harm to the farmer if the practice were enjoined, while also considering the societal value and reasonableness of the agricultural use.[103] One fundamental principle in balancing the equities is the common law "coming to the nuisance" doctrine, which rejects as unfair the possibility of a

98. *Id.* at 219.

99. *Id.* at 220.

100. John R. Nolon, *Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control*, 23 PACE ENVTL. L. REV. 821, 823 (2006) (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1782)).

101. Aaron M. McKown, *Hog Farms and Nuisance Law in* Parker v. Barefoot*: Has North Carolina Become a Hog Heaven and Waste Lagoon?*, 77 N.C. L. REV. 2355, 2361–62 (1999).

102. To determine what rights might give rise to a cognizable claim, one must look to state constitutions. In states with broad public trust doctrines, impairment of air and water quality, quiet, or even recreation might be deemed a public nuisance. *Compare* ILL. CONST. art. XI, § 2 (stating generally the right to a "healthful environment"), *and* MONT. CONST. art. II, § 3 (stating generally the right to a "clean and healthful environment"), *with* PA. CONST. art. I, § 27 (stating specifically the right to "clean air, pure water").

103. *See, e.g.*, Mayes v. Tabor, 334 S.E.2d 489, 490-91 (N.C. Ct. App. 1985) (citing Pendergrast v. Aiken, 236 S.E.2d 787, 797 (N.C. 1977)).

newcomer purchasing land next to a farm (or other potentially offensive enterprise) and then attempting to enjoin the farm from conducting business as usual.[104]

As comprehensive planning schemes supplanted individual litigation as the prevailing approach to land use disputes in the United States,[105] all states codified some form of the "coming to the nuisance" doctrine, to protect agricultural lands from encroachment by urban and suburban growth and from subsequent lawsuits alleging that the agricultural use was a nuisance, incompatible with the changing surroundings.[106] These statutes, commonly referred to as "right to farm" acts, grant some measure of immunity from nuisance suits to preexisting agricultural operations, and often incorporate other provisions to protect and preserve agricultural land from development or overly restrictive zoning.[107] In theory, right to farm acts protect traditional agriculture from suburbanization and the threat of costly litigation, but in reality many modern amendments to right to farm acts threaten to abrogate community standards and excessively favor industrial agribusiness.

Right to farm acts vary in their breadth, but include substantially similar categories of provisions. Generally, the statutes may include a policy statement; definitions of "agriculture" and "agricultural activities" or "agricultural operations;" statutes of limitation or repose for bringing nuisance suits against existing operations; and categorical exceptions to nuisance immunity for types of operations or changes in operations.[108] Additionally, right to farm acts can restrict not only private causes of action but also local land use planning, by limiting municipal use of zoning authority that would impact

104. Jeffry R. Gittins, Comment, *Bormann Revisited: Using the Penn Central Test to Determine the Constitutionality of Right-To-Farm Statutes*, 2006 BYU L. REV. 1381, 1387–88 (2006).

105. *See* Rusty Rumley, *A Comparison of the General Provisions Found in Right to Farm Statutes*, 12 VT. J. ENVTL. L. 327, 328 (2011).

106. Gittins, *supra* note 104, at 1385–1387.

107. Rumley, *supra* note 105, at 328.

108. *See id.* at 329 (presenting a comprehensive overview of statutory language adopted nationally).

agricultural lands or, alternately, encouraging or mandating municipal creation of agricultural protection districts.[109]

How well a right to farm act achieves a fair balance between the rights of farms and their neighbors depends on who is protected from suit and how much flexibility courts have to reevaluate whether farm activities have become offensive. Some statutory definitions of "agricultural operations" include only privately owned "family" farms, exempting agribusinesses from their scope and retaining the availability of nuisance actions against industrial agriculture; others define "agricultural operations" more broadly to include industrial agriculture as well.[110] While states vary in the length of time a farm must have operated to be considered established, the prevailing approach is to impose a "one-year" rule, granting protection from nuisance liability only to farms that existed for at least a year prior to changes in the surrounding area and that were not a nuisance when established.[111] Most also enumerate the types of changes to an operation that will allow neighbors to relitigate, such as a change in size or in the type of agricultural product being produced. Some statutes, however, allow farm operations to expand or change ownership without restarting the clock on nuisance suits.[112]

Although most right to farm acts envision an individualized approach that calls for an evaluation of whether the farm was a nuisance when it was established, some states, most notably Iowa, have attempted to condition immunity from nuisance not on the existence of an established agricultural operation, but categorically, by extending immunity to operations in areas zoned for agricultural use so long as they abide by Generally Accepted Agricultural Management Practices ("GAAMPs").[113] This approach has met mixed results upon judicial review, as such a broad grant negatively affects preexisting property interests of all

109. *See also id.* at 341.

110. *Id.* at 331–32.

111. *Id.* at 338.

112. *Compare* Fla. Stat. § 823.14(5) (specifying that expansions of farm operations can trigger a reevaluation of the farm's nuisance status if the farm is adjacent to a homestead) *with* N.C. Gen. Stat. § 106-701 (including no exceptions to the one year statute of limitations other than negligence on the part of the agricultural operation).

113. Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 314 (Iowa 1998).

non-agricultural landowners with property in an agricultural zone. In the landmark case of *Bormann v. Board of Supervisors*, the Iowa Supreme Court struck down the Iowa Right to Farm Act, which had given agricultural operations immunity from nuisance suits if they were in a designated agricultural district and following GAAMPs—even if the surrounding nonagricultural uses predated the creation of an agricultural district.[114] The court found that the Iowa Right to Farm Act effected an unconstitutional taking, reasoning that: [T]he nuisance immunity provision . . . creates an easement in the property affected by the nuisance . . . in favor of the applicants' land . . . because the immunity allows the applicants to do acts on their own land which, were it not for the easement, would constitute a nuisance.[115] The United States Supreme Court declined to grant certiorari, allowing the lower court's ruling to stand.[116]

Bormann illustrates the moderating influence courts can have when right to farm act provisions go too far. In drafting right to farm acts, most state legislatures attempted, at least in the earliest iterations of their statutes, to codify the coming to the nuisance doctrine in a manner that would result in similar outcomes to those that would have been achieved under common law schemes. Though there is variation in the statutes, there is also state-by-state variation in community standards of reasonableness, in the protections offered by environmental regulations, and in the extent of discretion given to local governments to "zone out" offensive uses.[117] Where other avenues exist to prevent unreasonable agricultural practices,[118] the statutes tend to correspondingly protect farms.[119] Where such avenues are lacking, the statutes are generally narrower in scope and provide more opportunities to revisit farms' nuisance status as their operations

114. *Id.*

115. *Id.* at 316. Iowa's statutory grant of immunity from private nuisance suits to CAFOs was subsequently also struck down, despite its exemptions for CAFOs whose practices constituted an unreasonable use or which failed to maintain GAAMPs. Gacke v. Pork Xtra, LLC, 684 N.W.2d 168 (Iowa 2004).

116. Girres v. Bormann, 525 U.S. 1172 (1999).

117. *See* Alexander A. Reinert, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694, 1712–14 (1998).

118. *See id.*

119. *See id.*

evolve. And when statutory language would seem to overly preference farms—for example, by allowing changes in size or use without restarting the established use time clock—in the absence of other regulatory regimes to prevent abuses, many courts have interpreted the statutes to give neighbors a renewed opportunity to be heard.[120] In this way, when the right to farm acts fail to do so, courts have arrived at an approach and outcome that closely resembles the balancing of equities under the common law.

However, the increasing prevalence of industrial agriculture, and particularly animal agriculture, calls for a reevaluation of whether existing right to farm acts and nuisance jurisprudence adequately address potential conflicts between communities and CAFOs. Some states have undertaken such a reevaluation, and amended their right to farm acts to expressly exclude CAFOs from the agricultural activities protected by the statute in keeping with the original purpose of preventing the destruction of rural agrarian ways of life.[121] Private and public nuisance suits against CAFOs have continued to succeed in many states, as those states' courts have interpreted their right to farm acts as implicitly distinguishing between traditional agriculture and CAFOs.[122] Other states, however, have chosen to embrace industrial agriculture and have passed sweeping legislation to benefit CAFOs and shield them from litigation or even basic obligations to the communities in which they locate.[123]

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120. *See, e.g.*, Durham v. Britt, 451 S.E.2d 1, 3 (N.C. Ct. App. 1994) (holding that conversion of a turkey farm to a hog farm fundamentally changed the use in a manner that the North Carolina Right to Farm Act had not contemplated, and therefore was not protected from suit).

121. *See, e.g.*, MINN. STAT. ANN. § 561.19(2)(c)(4).

122. For a compilation of data and details of nuisance suits brought against CAFOs, see S. Mark White, *Regulation of Concentrated Animal Feeding Operations: The Legal Context*, LAND USE L. & ZONING DIG., Feb. 2000, at 3, 7.

123. Some states are taking their protection of industrial agriculture to the next level, enshrining the right to farm in the state constitutions. North Dakota has already amended its state constitution to include the right to "employ agricultural technology, modern livestock production and ranching practices." N.D. Const. art. IX, § 29 (amended 2012). A similar, hotly contested amendment passed in Missouri in August of 2014, and Indiana legislators have attempted to put a similar amendment before voters. Brooke Jarvis, *A Constitutional Right to Industrial Farming?*, BLOOMBERG BUSINESSWEEK (Jan. 9, 2014), http://www.businessweek.com/articles/2014-01-09/industrial-farming-state-constitutional-amendments-may-give-legal-shield.

The intended goal of the constitutional amendments would be to make use of industrial agricultural practices, a constitutional right that could not be infringed upon by

Right to farm acts can be a helpful tool for protecting our agricultural lands, and for helping rural communities preserve an agrarian way of life. However, in the hands of special interest groups and lobbyists for industrial agriculture intent on stripping local governments of control and clearing the way for industrial agriculture to set up shop, they can become a vehicle by which to hand over local land use decisions to corporate agribusiness.

V. ALEC MODEL LEGISLATION

One particularly sweeping version of a right to farm act is a model bill drafted by the American Legislative Exchange Council, a highly influential nonpartisan conservative think tank.[124] Understanding the importance of the expansive reach of the model Right to Farm Act requires a brief overview of ALEC's philosophy, goals, and extraordinary impact on state legislatures. Established in 1973 as an organization of state lawmakers, ALEC has grown in membership over the last forty years to include hundreds of private sector members and state and federal representatives and senators.[125] ALEC's priority is to draft and advocate for the passage of model legislation that advances federalist principles, deregulation and free markets, and limited government.[126] They are quite successful at it. According to ALEC, "each year, close to 1,000 bills, based at least in part on ALEC

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state and local legislation and regulation. Proponents perpetuate the perception that legislation requiring humane treatment of animals or environmental best management practices are pushed by "special interest groups that come in from outside and want to tell us what to do and what not to do," as the president of the North Dakota Farm Bureau said. Blake Nicholson, *ND Voters Add Farmer Protection to Constitution*, AP (Nov. 8, 2012, 1:51 PM), http://bigstory.ap.org/article/nd-voters-add-farmer-protection-constitution. He continued, "[t]hey're not going to stop. That was the big thing, to beat these people back. We don't need outsiders coming here and telling us how to do things." *Id.*

Ironically enough, thirty-two state representatives and state senators from North Dakota currently have ties to ALEC, several of whom sit on the Energy, Environment, and Agriculture Task Force. *North Dakota ALEC Politicians*, SOURCEWATCH, http://www.sourcewatch.org/index.php/North_Dakota_ALEC_Politicians (last modified Oct. 1, 2014).

124. *See Right to Farm Act*, ALEC, http://www.alec.org/model-legislation/right-to-farm-act (last visited Jan. 23, 2015) [hereinafter ALEC Right to Farm Act]; *History*, ALEC, http://www.alec.org/about-alec/history (last visited Jan. 23, 2015).

125. *See Frequently Asked Questions*, ALEC, http://www.alec.org/about-alec/frequently-asked-questions (last visited Jan. 23, 2015); *History*, *supra* note 124.

126. *See Frequently Asked Questions*, *supra* note 125.

Model Legislation, are introduced in the states. Of these, an average of 20 percent become law."[127]

One of the overarching principles behind much of ALEC's legislation is that neither the federal government nor municipalities ought to regulate private enterprise or the environment. Much of their legislation is aimed at relocating regulatory authority in the states.[128] ALEC abhors most federal legislation regulating environmental health, energy exploration, or free markets. On the opposite end of the spectrum, when those closest to the concerns of the citizenry, counties and municipalities, attempt to exercise their traditional powers of zoning to solve environmental or land use challenges, ALEC sees excessive variation and, therefore, market uncertainty, as well as the possibility of municipalities excluding uses that the rest of the state permits.[129]

To be fair (and perhaps avoid overstating ALEC's relevance), watchdog groups scanning proposed state legislation for signs of ALEC involvement are perhaps too quick to assign ghost authorship to the group each time they see a bill preempting local action.[130] Preemption of municipal authority is a

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127. *History*, *supra* note 124.

128. *See generally History*, *supra* note 124 (stating that ALEC policy ideas are aimed at protecting and expanding free society by enacting legislation that expand free markets, federalism, individual liberty, and limited government).

129. It is worth noting that in 1998, after the Clinton administration issued an Executive Order on Environmental Justice, in response to concerns about environmental racism, ALEC drafted a model resolution opposing Interim Guidance regulation for the EPA. *Resolution on Environmental Justice*, ALEC EXPOSED, http://bdgrdemocracy.files.wordpress.com/2011/12/3f4-resolution_on_environmental_justice_exposed.pdf (last visited Jan. 23, 2015). In it, they justified their opposition in part because the "Interim Guidance Document would conflict with state and local land use policies" and stated that "environmental, land use and development permits are the proper domain of state and local government." *Id.* The Executive Order was issued in response to concerns about discriminatory siting of locally undesirable land uses such as landfills, power plants, and industrial sites, see *supra* Part II.B, but also would apply to the disproportionate siting of CAFOs in predominantly minority communities. Environmental justice advocates fighting to keep municipal control for those living near CAFOs, despite being staunch advocates of retaining the "domain of local government," might find themselves philosophically at odds with ALEC's current position on the "proper" role of counties and municipalities.

130. For example, one bill identified by a watchdog group for its similarity to ALEC model legislation overlooked the more obvious comparison between the bill's language and the language the Supreme Court previously stated would unambiguously express an intent to preempt municipal regulation and successfully "occupy the field" being regulated. Steve Horn, *Exposed: Pennsylvania Act 13 Overturned by Commonwealth Court,*

priority for many conservative lawmakers acting independently of ALEC. However, even where bills preempting local land planning or limiting local recourse against siting of undesirable land uses cannot be attributed directly to ALEC, the overarching sentiment stressed by ALEC, that conservative causes will be best (and most swiftly) served by eliminating local control, has permeated the last two years of legislative sessions in many of the states in which the legislature switched party control in 2012.[131]

A. The ALEC Right to Farm Act

The ALEC Right to Farm Act embodies ALEC's pro-business principles, clearing the way for CAFOs to freely locate in agricultural areas, buy out existing family farms, and expand operations indefinitely, without being accountable to their neighbors. This model legislation would define both "farm" and "farm operation" expansively, protecting far more aspects of agricultural conduct from nuisance suits than did typical earlier state iterations of right to farm acts.[132] Like most such acts, it covers typical components such as generation of dust and odors, operation of farm equipment, application of fertilizer, feeding and sheltering of animals, and management of waste.[133] Unlike many earlier statutes, however, it also includes in its definition the "use, handling, *and care* of farm animals"; "conversion from a farm operation activity to other farm operation activities"; and the "employment and use of labor."[134]

By extending the definition of a farm operation to include aspects of farm business that usually are litigated under other doctrines, such as animal welfare, construction, employment, and housing law, this bill could immunize farms from a whole host of

Originally an ALEC Model Bill, DESMOGBLOG.COM (July 27, 2012, 3:30 AM), http://www.desmogblog.com/exposed-pennsylvania-act-13-overturned-commonwealth-court-originally-alec-model-bill.

131. Brendan Fischer, *ALEC Stands Its Ground, but Stumbles*, PR WATCH (Dec. 6, 2013), http://www.prwatch.org/news/2013/12/12335/alec-supports-local-control.

132. Brooke Jarvis, *A Constitutional Right to Industrial Farming?*, BLOOMBERG BUSINESSWEEK (Jan. 9, 2014), http://www.businessweek.com/articles/2014-01-09/industrial-farming-state-constitutional-amendments-may-give-legal-shield#p2; ALEC Right to Farm Act, *supra* note 124.

133. ALEC Right to Farm Act, *supra* note 124.

134. *Id.* (emphasis added).

civil actions. Given that right to farm acts express an overall public policy goal of protecting farms from having to litigate over their operations, courts could be willing to extend nuisance immunity to other types of claims by analogy. Some earlier courts, when plaintiffs attempted to circumvent right to farm acts and sue in trespass or tortious interference, have presumed that the legislature intended to protect farms from not only nuisance suits but also other civil suits predicated on substantially similar facts that could have been brought in nuisance.[135] If a court interpreted this model bill similarly, it could prevent individuals and local governments from taking legal action against a CAFO or its owner under a different doctrine; the reach of immunity would depend on how far a court would stretch in determining what cases were in fact nuisance claims in disguise.

Another departure from the norms of state right to farm acts is the deference given to state agency standards for GAAMPs. In typical right to farm acts, adherence to GAAMPs factors into the analysis in one of two ways. First, when courts decide whether a farm was a nuisance at the beginning of the established interest period (typically the one-year rule), right to farm acts might direct them to find that the farm was not a nuisance if it was following GAAMPs, the use was appropriate and reasonable, and the surrounding area had not yet changed.[136] Second, some statutes make following GAAMPs either a prerequisite for a farm to avail itself of nuisance immunity, or make GAAMP compliance a

135. *See, e.g.*, John Larkin, Inc. v. Marceau, 959 A.2d 551, 555(Vt. 2008) (finding that there was no action in trespass because the plaintiff failed to demonstrate that the defendant's pesticides impacted his property); Ehler v. LVDVD, L.C., 319 S.W.3d 817, 824 (Tex. Ct. App. 2010) (finding that an action for trespass was incorporated in a nuisance action, and allowing the plaintiffs to bring a trespass action rather than a nuisance action would defeat the purpose of the right to farm act); Ranchero Viejo, LLC v. Tres Amigos Viejos, LLC, 123 Cal. Rptr. 2d 479 (Cal. Ct. App. 2002) (rejecting the idea that the legislature intended for the right to farm act to only protect farmers when a nuisance claim was brought, and finding that the plaintiff could not avoid the immunity by recharacterizing the claim as a trespass claim).

136. *See, e.g.*, Twp. of Shelby v. Papesh, 704 N.W.2d 92 (Mich. Ct. App. 2005) (reversing and remanding the lower court's decision because further proceedings were needed to determine whether the defendants' farm was protected by the right to farm act for being commercial in nature and being in compliance with the applicable GAAMPs); Steffens v. Keeler, 503 N.W.2d 675, 677 (Mich. Ct. App. 1993) (finding that defendants had complied with generally accepted and recommended livestock waste management practices and thus were not subject to nuisance litigation).

rebuttable presumption against being found a nuisance.[137] The model bill takes neither of these approaches, instead using GAAMP adherence as standalone proof that a farm is not a nuisance (or is, at least, not subject to suit for being one).[138]

The Model Right to Farm Act would extend immunity from nuisance suits even when a farm or farm operation undergoes a "change in ownership or size," "[a]doption of new technology," or a "change in the type of farm product being produced."[139] Unlike many right to farm acts, this would allow corporate purchase of land without resetting the clock on the statute of repose, and would allow unfettered expansion to occur without triggering a reevaluation of the compatibility of the agricultural operation with the surrounding land uses. Additionally, it would treat all farm products equally, despite the reality that the impact of, say, a soybean farm on nearby quality of life is vastly different from that of a hog or poultry operation. Essentially, under the ALEC bill, if a small farmer who owned his land and grew alfalfa on it sold to the operator of a CAFO, the land could be cleared and stocked with two thousand beef cattle and adjacent landowners would have no redress, as that would not be considered a change in use.

And lastly, if an agribusiness or CAFO won a nuisance suit, the model act would let them recover costs and attorneys' fees from the litigant who had been foolish enough to try to sue.[140] Given how aggressively this bill would already stack the deck

137. *See, e.g.*, MICH. COMP. LAWS ANN. § 286.473 (West 2010) ("A farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation alleged to be a nuisance conforms to generally accepted agricultural and management practices."); N.J. STAT. ANN. § 4:1C-10 (1998) ("[T]here shall exist an irrebuttable presumption that no commercial agricultural operation, activity or structure which conforms to agricultural management practices . . . shall constitute a public or private nuisance."); ALA. CODE § 2-6B-1 (LexisNexis 1999) ("[L]awfully conducted farms and farm operations will not be considered to be public or private nuisances when and so long as they are operated in conformance with generally accepted agricultural and farm management practices.").

138. ALEC Right to Farm Act, *supra* note 124. For an overview of American Legislative Exchange Council's agricultural policies and model legislation, *see* ALEC, THE NATURAL RESOURCE RESERVE: A GUIDE TO ENERGY, ENVIRONMENT, AND AGRICULTURE MODEL POLICIES OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL (2014), *available at* http://www.alec.org/wp-content/uploads/Natural-Resource-Reserve.pdf [hereinafter ALEC, 2014 Guide].

139. ALEC Right to Farm Act, *supra* note 124.

140. *Id.*

against plaintiffs attempting to sue in nuisance, it seems to be unwise overkill to dissuade landowners from litigating close questions, as those would likely be the cases in which the contours of the courts' approach to this somewhat new (or at least revamped) doctrine would be clarified. Obviously, CAFOs would like the certainty of knowing how the courts will apply the new statute, but would like even more to not be taken to court, and this provision will tilt the scales even further in agribusiness's favor, as prospective plaintiffs would reasonably fear the additional cost of litigating and losing.

Perhaps, one could hope, this clause would actually help the pendulum swing back to the middle faster. Ultimately, the cases that will be close will be winnowed out, as potential plaintiffs with weaker cases decline to risk the additional costs of losing, leaving the ones plaintiffs believe they can win. The cases that go before the court would also likely be the ones in which the plaintiff may have believed an injunction—and precedential opinion from a court—would be preferable to a monetary pretrial settlement. Faced with only the most egregious and sympathetic cases, courts may take a more favorable view of the righteousness of remaining landowner-plaintiffs' claims and begin correcting from the bench for the overreach in the statute. As communities wait for jurisprudence to mitigate the one-sidedness of this act, however, CAFOs will be able to inflict environmental and economic harm on neighboring residents with relative impunity.

B. Rural Decentralization of Land Use Planning

Ordinarily, when statutes provide farms with robust protection against nuisance suits and thus limit the ability of individuals to litigate their grievances, municipal zoning and land use regulation attempts to balance landowners' rights and preserve residents' quality of life. But now, a far lesser-known piece of model legislation by ALEC is slowly influencing state legislatures: a model bill drily and innocuously titled "An Act Granting the Authority to Rural Counties to Transition to Decentralized Land Use Regulation."[141] The Act, drafted by the

141. An Act Granting the Authority of Rural Counties to Transition to Decentralized Land Use Regulation (2010), *available at* http:// www.ncel.net/articles/DecentralizedLan

Goldwater Institute and proposed by ALEC's Energy, Environment, and Agriculture Task Force, would allow rural counties to abandon their zoning and planning authority and revert to an approach based on restrictive covenants and private nuisance law.[142] If adopted by a rural county, the Act would:

> [R]equire the county to repeal or modify any land use restriction stemming from the county's exercise of its planning or zoning authority, which prohibits or conditionally restricts the peaceful or highest and best uses of private property, or which would cause a diminishment in the value of the affected private property if the land use restriction were converted to a restrictive covenant, to allow the otherwise restricted uses. . . .[143]

Like the ALEC model Right to Farm Act, this model legislation is one piece in a larger agenda aimed at stripping local governments of their authority, in keeping with ALEC's philosophy that "the federal government should avoid intruding on state sovereignty over intrastate agriculture matters and the proliferation of local agriculture regulations should be discouraged."[144] While at first glance the voluntariness of the Act would seem to allow for local control, letting communities exercise home rule by conducting their own cost-benefit analyses of permitting CAFOs (or other nonagricultural uses), later language in the bill demonstrates the true intent of removing home rule power from municipalities. Buried in the final clause of the bill, "Effects of Exercise," is a provision stating that the effect of such a decision by the county would bar "the exercise of planning and zoning powers by any state agency, political

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dUseRegs.pdf [hereinafter Rural Decentralization Act]. This model legislation was first introduced at ALEC's 2010 Annual Meeting and remains part of ALEC's platform. *See* Memorandum from Clint Woods, ALEC Task Force Director, to Energy, Environment and Agriculture Task Force Members 42–45 (July 1, 2010), *available at* http:// www.commoncause.org/issues/more-democracy-reforms/alec/whistleblower-complaint/original-complaint/National_ALEC_Exhibit_4_EEA_2010_Annual_Meeting.pdf.

142. Rural Decentralization Act, *supra* note 141, at § 1(A).

143. *Id.* at § 1(B)(2)(a).

144. ALEC, 2014 Guide, *supra* note 138, at 42.

subdivision of the state, special district or other local government within the designated decentralized land use regulation area."[145]

Because the grant of authority to decentralize is only available to counties, and not to municipalities, by choosing this approach counties would be able to preempt zoning or planning by municipalities located within the counties. Generally, in states where both cities and counties have land use planning authority, neither local government is subservient to the other.[146] If there is a demographic and ideological distinction between the city council and the county commission, either they compromise on a unified approach, or differing approaches and rules result in one set of zoning laws inside city limits and another set in unincorporated areas. Under this model bill, counties would be able to neuter the (often more progressive) voices of municipal residents and city councils. And to further encourage counties to avail themselves of this opportunity to consolidate their authority, states could quite easily tie county adoption of decentralization to other incentives, such as block grant monies, and thus ensure broad adoption of this approach. By convincing counties to cede their land planning authority and divest municipalities of theirs, states adopting this combination of legislation would leave citizens opposing CAFOs without a local government that could represent their interests in setting community standards according to community desires.

If a county authorized decentralization pursuant to this statute, existing land use restrictions based on zoning and land use planning regulations would go through a sunset review period and then, after an opportunity for landowners to be heard, would be converted into restrictive covenants running with the land, enforceable against landowners by adjacent landowners.[147] In other words, every property would have its own unique set of

145. Rural Decentralization Act, *supra* note 141, at § 1(B)(3).

146. *See, e.g.*, *A Citizen's Guide to Planning*, GOVERNOR'S OFF. PLAN. & RES. (Jan. 2001), http://ceres.ca.gov/planning/planning_guide/plan_index.html; STATE OF COLO. DEP'T OF LOCAL AFF., LOCAL GOVERNMENT LAND USE AUTHORITY IN COLORADO, *available at* http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheadername1=Content-Disposition&blobheadername2=Content-Type&blobheadervalue1=inline%3B+filename%3D%22Land+Use+Planning+in+Colorado.pdf%22&blobheadervalue2=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251883675536&ssbinary=true (last visited Oct. 23, 2014).

147. Rural Decentralization Act, *supra* note 141, at § 1(A).

permitted and prohibited uses, and if a property owner violated the covenant, neighbors could sue to force them to abide by the restrictions. Restrictive covenants are most commonly used to achieve aesthetic consistency in planned communities or neighborhoods with homeowners associations, not to make significant public policy equivalent to zoning.[148] In those circumstances, similar restrictive covenants typically run with every parcel of property in the development, creating a highly localized community standard. Importantly, they also ordinarily supplement, rather than supplant, broader categorical use zoning plans.

Read alone, this bill would alter the mechanism by which neighbors and communities arrive at generally acceptable community standards, but would not leave communities and affected individuals entirely without recourse. Indeed, in the position paper the Goldwater Institute submitted along with the model bill, the Institute urged "litigation between private parties" as the more efficient and effective alternative to zoning.[149] The central premise of this approach is that, because of recorded restrictions on land use, communities would still have many of the certainty benefits of a zoning approach.[150] Theoretically, individuals could rely on the restrictions running with their neighbor's land to prevent changes in use that would substantially alter their quality of life or property value. In addition to suing to enforce the terms of a restrictive covenant, they would also retain the ability to sue under traditional nuisance law. However, shifting the burden of land use determinations to private litigation imposes significant burdens on the individual property owners on either side of the litigation: upfront filing costs, the expense of retaining and paying an attorney in what may be a long and complex process, the potential cost of independent experts, time and trouble, and even the possibility of paying a winning

148. *See* J. David Breemer, Note, Hiner v. Hoffman*: Strict Construction of a Common Restrictive Covenant*, 22 U. HAW. L. REV. 621, 623–24 (2000).

149. NICK DRANIAS, GOLDWATER INSTITUTE, A NEW CHARTER FOR AMERICAN CITIES: TEN RIGHTS TO RESTRAIN GOVERNMENT AND PROTECT FREEDOM, 31 (2009), http://goldwaterinstitute.org/sites/default/files/A%20New%20Charter%20for%20American%20Cities.pdf (stating that litigation between private parties is a better alternative to litigation with local governments).

150. *See id.* at 32 (describing the "best elements of zoning" that would be preserved).

opponent's attorney's fees. Prospective litigants may also be dissuaded because of the uncertain outcome, as there is little precedential certainty when courts adjudicate land use disputes on a case-by-case basis.

Another drawback of converting to restrictive covenants for property owners who believe CAFOs may be imminent is that to enforce the covenant against someone whose use is in violation, a plaintiff must show that she has an individual, private interest in property touched by the covenant.[151] In other words, concerned citizens cannot sue to enforce the covenant for the benefit of the community as a whole, as they could when suing in public nuisance. Anticipating the argument that individually litigating under a restrictive covenant regime would be cost prohibitive for individual private parties, the Goldwater Institute assured that "property owners would be free to band together, forming the equivalent of homeowners associations."[152] While this assertion, if codified in the model legislation, would alleviate concerns about the accessibility of such a system for individuals to an extent, it presupposes a level of legal sophistication and organization that may not be preexisting in rural or impoverished communities.[153]

Further restricting the usefulness of such suits for communities attempting to exclude CAFOs, the only landowners who are deemed to have a private interest under this model bill are those within "reasonable proximity" to the property whose use is in violation of the covenant.[154] The notion of reasonable proximity is intended to limit the burden of excessive litigation by potentially tangential parties on private landowners. However, by importing the Goldwater Institute's language, originally intended for urban environments, into the model bill, those parties to whom the benefit of the covenant would run due to their "reasonable proximity" to the offending use would only be parties

151. Rural Decentralization Act, *supra* note 141, at § 1(B).

152. DRANIAS, *supra* note 149, at 33.

153. This is not to say that poor and rural communities cannot effectively organize in the face of environmental injustice. *See* Wing, *supra* note 2. However, organizing after the threat has materialized, in communities with a dearth of legal aid, is unlikely to result in the strength of leverage that a homeowners association could wield in a wealthy suburb or upscale urban area.

154. Rural Decentralization Act, *supra* note 141, at § 1(B); DRANIAS, *supra* note 149, at 31 (stating that "reasonable proximity" should protect property interests under the 300-foot "zoning area").

with property interests within 300 feet of the offending property.[155] When the noxious emissions from a CAFO can cause malodors and reduced air quality a mile or more away, or discharge pollutants into a waterway that are detectable three miles downstream, a 300 foot proximity restriction is ludicrous. Additionally, in rural areas with low population density, few, if any, property owners would be situated closely enough to a CAFO to bring suit, much less to amass enough other plaintiffs with standing to feasibly share the costs of litigation. And finally, even in the event that a neighboring property owner brought suit, an industrial agribusiness with hundreds or thousands of acres could readily subdivide its property in order to create a 300 foot buffer and strip potential plaintiffs of their ability to sue to enforce the covenant.

Even if potential plaintiffs band together in an effort to prevent a CAFO from locating in their community, this proposal contemplates suing to enforce the provisions of restrictive covenants to be mainly a means to bring parties to a negotiation ending in a monetary settlement, rather than as a method to actually enjoin noxious activities.[156] The restrictive covenants are not intended to be static; instead when a landowner wishes to alter the allowed use of their land they are presumed to bargain with and compensate the few landowners within "reasonable proximity" for the value of the release from covenant provisions.[157] Such negotiations between an agribusiness hoping to site a CAFO and nearby residents are unlikely to be arm's length transactions between equally sophisticated constituents, particularly when a highly profitable corporation can buy out rural residents with a sum that is paltry to a company like Smithfield or Tyson but significant in a depressed economy in rural America.

Additionally, if this presumed bargaining and buyout does not occur, and a CAFO begins activities that violate the restrictive covenant, the only remaining recourse would be after-the-fact enforcement. Unless the nearby homeowners can obtain an injunction prior to the CAFO beginning operations, by the time

155. DRANIAS, *supra* note 149, at 31.

156. *See id.* at 32–33 (encouraging the use of litigation and settlement between private parties).

157. *See id.* at 31.

litigation, either to enforce the covenant or to have the CAFO declared a nuisance, wends its way through the courts an equitable resolution is likely to favor allowing the CAFO to continue operating while monetarily compensating victorious plaintiffs. Ultimately, this is not a solution that protects neighborhoods from encroachment, but one that relies on asymmetrical access to information, power, and the court system to preference industry.

The Rural Decentralization Act, if adopted, would magnify the already significant obstacles faced by individuals and communities attempting to keep CAFOs at a distance. However, even if the system of private litigation contemplated by the act—based on both restrictive covenants and nuisance principles—evolved in an unexpectedly even handed manner, it would be a bridge to nowhere in states that also adopted ALEC Right to Farm legislation. As the overarching goal of the ALEC Right to Farm Act is to grant all agricultural operations, including CAFOs, immunity from nuisance suits, that prong of the decentralization approach would be hopelessly defunct as a means to challenge CAFO siting. In the absence of categorical zoning specifying where agricultural operations may locate and how they may operate, or access to nuisance suits against individual agricultural operations that are out of character with their surrounding uses, the only protection for residents would be the particular terms of the restrictive covenant running with the land on which a CAFO would be sited.

Without either zoning ordinances or nuisance doctrine as a backdrop, restrictive covenants are entirely insufficient protection against encroachment by industrial agriculture. In a state that adopted both acts, it is uncertain how courts would treat efforts to sue to enforce restrictive covenants against CAFOs in light of the Right to Farm Act's clear intention to protect agricultural businesses from civil litigation relating to their operations, whether sounding in nuisance or framed within an alternative theory.[158] Even if a court allowed a suit against an agricultural operation to go forward based on the covenants, plaintiffs would find it difficult to prevail or gain meaningful redress if they did. Because they are a disfavored restriction on property rights, although ostensibly a restriction bargained for between parties at some point in time, restrictive covenants are construed against the

158. *See supra*, note 135 and accompanying text.

party seeking enforcement if the language of the covenant is ambiguous. Thus, courts' treatment of these claims would depend largely on the clarity with which each party expressed their expectations and understandings of the covenant, which in turn depends on the drafting expertise available to the parties and their ability to accurately predict future conflicts. Predicting all the adjacent land uses that, writ large and excessive, would be inconsistent with the character of the neighborhood would be impossible, so claims alleging noxious activities that fall outside the necessarily incomplete codification of the private covenant may not be cognizable in a suit to enforce a restrictive covenant.

Also, the prevailing approach for courts determining whether the language of a covenant is ambivalent or clearly expresses the intent of the parties is to look primarily to the language of the deed or recorded interest rather than to look at extrinsic evidence. The inquiry is whether the terms of a contract have been expressly breached, not the extent of the harm caused by the offending use, so witness testimony about reduced quality of life or scientific evidence of environmental contamination would only be relevant if it arguably helped clarify the terms of the covenant. Unlike suing in nuisance, where the court sitting in equity can use its discretion to look at extrinsic evidence, balance the harms, and craft a fair solution, the court hearing a suit to enforce a restrictive covenant puts the initial burden on the plaintiff, construes the covenant against the plaintiff, and determines whether or not to grant specific performance of the covenant. Thus, this is a narrower cause of action, determined on a narrower record, and limited to a narrower result even in the best-case scenario for the litigants.

While no state has yet adopted this legislation as drafted, ALEC-affiliated legislators have sponsored iterations of it as proposed legislation.[159] The states that have already adopted a variant of the decentralization legislation have done so not specifically to benefit CAFOs, but to streamline development of

159. *See, e.g.*, Ariz. S. 1022, 51st Leg., 2nd Sess. (Ariz. 2014); Ohio H.R. 29, 130th Gen. Assemb., Reg. Sess. (Ohio 2013-2014); *see also* Natural Res. Def. Council, *ALEC Affiliated Legislators Launch Premature Attacks on Carbon Pollution Limits*, ECO WATCH (Feb. 20, 2014, 4:45 PM), http://ecowatch.com/2014/02/20/alec-legislators-carbon-pollution-limits.

hydraulic fracturing, or fracking, for natural gas extraction.[160] Those states have clarified that their goal in repealing local zoning power is specifically preemption of municipal regulation of oil and gas exploration.[161] However, given that ALEC categorizes this bill not as one of their energy or natural resources proposals, but as an Agriculture and Land Use Model Policy,[162] concerned citizens should be watchful for this statute to emerge in the agricultural context in the near future.

VI. CONCLUSION

As communities, states, and the federal government decide how best to regulate CAFOs, weighing the needs of industry against the needs of neighborhoods, it is important to remain aware of the gains special interest groups with ties to the animal agriculture industry have sought to achieve with what looks like rather inoffensive, even dull legislation. Passage of the combination of the ALEC model Right to Farm Act and the Rural Decentralization Act in a jurisdiction would upend, at least in the short term, the equilibrium that courts, legislators, and constituents have arrived at in balancing preservation of farm practices with the rights of neighboring residents to enjoy their property. While it seems that stripping individuals and local governments of their recourse against CAFOs is the intended goal of this pro-business, anti-environment model legislation, it is doubtful communities or courts would abide that outcome for long. Regardless of the mechanism chosen by local or state legislators to preference one constituency over another, after a while and often with a nudge back toward the common law, courts tend to reassume some discretionary, equitable function when resolving these conflicts.

However, given the extent to which a CAFO siting can change the entire tenor of a community, rapidly and permanently altering residents' way of life, the knowledge that the law that allowed the CAFO will eventually return to a less extreme stasis is

160. ALEC, 2014 Guide, *supra* note 138, at 15–16. This still accomplishes a policy priority for ALEC, which has numerous model bills encouraging fracking.

161. *Id.* at 15.

162. *Id.* at 47.

cold comfort. With variations of these pro-CAFO bills proposed in statehouses across the country each year,[163] the best defense against CAFO intrusions is a good knowledgeable offense. Legislators must look at proposed legislation addressing land use and agriculture with an eye to the effect on CAFOs, asking whether the highest benefits accrue to family farms, communities, or CAFOs. Local governments should be attentive while the state legislature is in session, watching for right to farm expansion bills that would preempt them from wielding zoning authority and excise them from their own core function: regulating for the health, safety, and welfare of their community. The ramifications of CAFO sitings in communities are severe and localized, affecting public health, food safety, and the social, economic, and environmental welfare of local residents. As the costs of CAFOs are borne by local communities, local communities should retain the choice to keep CAFOs out while preserving traditional agriculture.

163. *See, e.g.*, MO. CONST. art I, § 35 (West, Westlaw through August 2014 amendments) (stating the rights of farmers to raise cattle, vales, and sheep); H.B. 150, 61st Leg., 1st Reg. Sess. (Idaho 2011) (defining CAFOs and introducing a CAFO suitability fee).