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## HOG FARMS: HOW FAR CAN THE LEGISLATURE GO IN REDUCING NUISANCE ACTIONS?

JOHN D. RUNKLE<sup>1</sup>  
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### INTRODUCTION

Since 1979, the North Carolina General Assembly has promulgated a series of laws to protect concentrated animal feeding operations (CAFOs) from nuisance actions. Beginning with the Right-to-Farm Act, the North Carolina General Assembly has substantially limited the ability of adjacent landowners to bring nuisance claims for the noxious odors and other negative effects of the operations, and at the same time has limited their ability to claim punitive damages. In response to a recent series of lawsuits, and resulting multi-million dollar jury verdicts, the pair of laws promulgated in 2017 and 2018 arguably far exceed any rational state policy for protecting “agricultural” operations. Rather than control the adverse impacts on neighboring landowners and their families, the North Carolina General Assembly has taken the basic property right of the “use and enjoyment” of land from North Carolina residents and given it to owners of CAFOs. The authors argue that this legislative action violates both Constitutional guarantees against takings without just compensation and North Carolina provisions against the granting of private emoluments.

This Article will proceed in four main parts. Part I will briefly address the evolution of common law nuisance actions. Part II will provide a concise overview of current litigation against one of the nation’s largest agribusinesses and how the courts have interpreted statutory amendments to North Carolina’s Right-to-Farm Act. Part III will examine the passage of 2017 and 2018 statutory amendments to North Carolina’s Right-to-Farm Act and their effects on North Carolina landowners. Part IV argues the unconstitutionality of the North Carolina General Assembly’s actions.

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## I. COMMON LAW ORIGINS OF NUISANCE

The intersection of environmental law, property law, and tort law is complex and, in recent years, has become a popular topic of discussion, particularly as it relates to CAFOs; despite its popularity in recent years, the overlap between these areas of law are not attributable to modern societal concerns. For centuries, “the [American] legal system relied principally on tort law remedies . . . to rectify environmental harms” suffered by individual landowners.<sup>3</sup> Furthermore, even after the development of legally enforceable environmental protections, tort law continues to remain one of the main paths landowners travel to protect their individual property rights.<sup>4</sup>

These individual property rights are like a bundle of sticks. A cursory glance at this bundle would make one assume the sticks were quite uniform and homogenous, but closer inspection would reveal the distinct characteristics of each individual stick. As it follows, property rights can be evaluated individually, but they can also be grouped together in a bundle of privileges commonly cited and practiced by landowners. A crucial stick in the bundle is the right to the use and enjoyment of one’s land. That is, a landowner has the freedom to use and enjoy his land without interference by his neighbors. If, however, a neighboring landowner’s actions deprive another landowner from using or enjoying his land as he sees fit, a nuisance action can likely remedy the situation. While a nuisance lawsuit is a traditional remedy to tortious interference with a landowner’s property rights, North Carolina landowners living near CAFOs “no longer enjoy the same protections under common law nuisance,” according to author Cordon M. Smart, who aptly characterizes this deprivation of rights as the “right to commit nuisance.”<sup>5</sup>

*A. Nuisance Claims at Common Law*

Beginning as early as the twelfth century, an outside interference with the use and enjoyment of a landowner’s free hold estate led to royal interventions.<sup>6</sup> These royal interventions were, less the free hold estate limitation, equivalent to modern day nuisance actions. During this time, in order for a nuisance action to be sustainable, the defendant had to cause both a legal

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3. Cordon M. Smart, *The “Right to Commit Nuisance” in North Carolina: A Historical Analysis of the Right-to-Farm Act*, 94 N.C. L. Rev. 2097, 2098 (2016). The authors of the present paper initially set out to present the history of nuisance and the impacts of the Right-to-Farm Act and the subsequent laws, but encountered Mr. Smart’s commendable and well-written article on the topic. As such, we will add our thoughts and provide a description of the recent legislation and the series of jury trials.

4. *See id.*

5. Smart, *supra* note 3, at 2097.

6. *See* Janet Loengard, *The Assize of Nuisance: Origins of an Action at Common Law*, 37 Cambridge L.J. 144, 144-47 (1978).

injury and a material damage to the plaintiff landowner.<sup>7</sup> However, by the 1400s, nuisance actions incorporated natural rights of *seisin*, which offered a general protection of both the landowner's residential and economic uses of land from interference by neighbors.<sup>8</sup> During this era, interference was broadly interpreted, allowing almost any interference with a landowner's residential use and enjoyment of his land to constitute a cognizable injury.<sup>9</sup> In addition, a legally recognizable material damage could simply be the deprivation of the landowner's enjoyment in his land.<sup>10</sup> Thus, a nuisance action could be upheld if the plaintiff's injury resulted from excessive noise emanating from a neighbor's home, leaving the landowner unable to use and enjoy his land the way he normally would.<sup>11</sup>

In the 1500s, the right to bring a nuisance action was extended beyond possessors of free hold estates to other individuals, such as "lessees for years and tenants in common."<sup>12</sup> This led to the development of two groundbreaking common law principles in the 1600s. The first principle recognized that "an injury to a plaintiff's enjoyment of his land was actionable so long as the injury pertained to a matter of necessity, such as wholesome air or light."<sup>13</sup> The second principle pertained to the advancement of negative easements. More specifically, a landowner was required to use his "own property as not to injure [his] neighbors."<sup>14</sup>

### *B. Modern Developments in Nuisance Claims*

The Restatement (Second) of Torts breaks nuisance into two general categories: private nuisance and public nuisance. Similar to common law nuisance, the Restatement defines a private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land."<sup>15</sup> The Restatement further provides that a person is subject to liability for private nuisance if, in addition to his conduct being the "legal cause of an invasion of another's private use and enjoyment of land," the invasion is either "(a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for

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7. Daniel R. Coquillette, *Mosses from an Old Manse: Another Look at Some Historic Property Cases About the Environment*, 64 CORNELL L. REV. 761, 769 (1979).

8. *See id.* at 770.

9. *See id.* at 770-71.

10. *See id.*

11. *See id.*

12. *Id.* at 773-74.

13. *Id.* at 775.

14. *Id.* at 776.

15. RESTATEMENT (SECOND) OF TORTS § 821D (AM. LAW INST.1979).

abnormally dangerous conditions or activities.”<sup>16</sup> Moreover, the Restatement defines a public nuisance as “an unreasonable interference with a right common to the general public.”<sup>17</sup> In a similar fashion, the North Carolina General Assembly defines a nuisance under its Right-to-Farm Act as “an action that is injurious to health, indecent, offensive to the senses, or an obstruction to the free use of property.”<sup>18</sup> The North Carolina General Statutes further provide that remedies for nuisance actions “may be judgment for damages . . . removal of the nuisance, or both.”<sup>19</sup> However, beginning as early as 1979, the North Carolina General Assembly has sided with agricultural and forestry operations, thereby placing an abundance of limitations on nuisance claims filed by aggrieved landowners against large agribusinesses, particularly those that utilize CAFOs.<sup>20</sup>

## II. CURRENT STATE OF NORTH CAROLINA PRIVATE NUISANCE ACTIONS AGAINST AGRICULTURAL AND FORESTRY OPERATIONS

Known for its rich soil and wide-open spaces, it comes as no surprise that North Carolina’s economy was initially built on agriculture. In fact, according to a recent study conducted by the Environment North Carolina Research and Policy Center, five North Carolina based industrial farming corporations produce 44 percent of the nation’s pork, chicken, and beef.<sup>21</sup> One of these five corporations, Murphy-Brown, LLC, a division of Smithfield Foods, Inc., which is now owned by the Chinese-based WH Group, has recently found itself as the defendant in more than twenty-five nuisance lawsuits.<sup>22</sup> Claiming that Murphy-Brown’s CAFOs employ waste disposal procedures that are detrimental to their health and well-being, neighbors to the large hog farm conglomerate voiced their grievances and exposed the injurious impact the hog farm industry has, and will continue to have, on North Carolina communities

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16. RESTATEMENT (SECOND) OF TORTS § 822 (AM. LAW INST. 1979).

17. RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST. 1979).

18. N.C. GEN. STAT. § 7A-38.3(a) (2018).

19. N.C. GEN. STAT. § 1-539 (2018).

20. See generally Smart, *supra* note 3, at 2099.

21. JOHN RUMPLER, ENCRP, CORPORATE AGRIBUSINESS AND THE FOULING OF AMERICA’S WATERWAYS: THE ROLE OF LARGE AGRIBUSINESS COMPANIES IN POLLUTING OUR RIVERS, LAKES AND COASTAL WATERS 14 (2016), <https://environmentnorthcarolina.org/sites/environment/files/reports/NCE%20Farms%20Report%20Jun16.pdf>.

22. Erica Hellerstein, *Will a Raleigh Jury’s \$50 Million Verdict Against Murphy-Brown LL Force Big Pork to Clean Up Its Act?*, INDY WEEK (May 2, 2018), <https://www.indyweek.com/indyweek/will-a-raleigh-jury-50-million-verdict-against-murphy-brown-llc-force-big-pork-to-clean-up-its-act/Content?oid=13864489>. See also *Who’s Behind the Chinese Takeover of World’s Biggest Pork Producer?* PBS NEWS HOUR (Sep. 12, 2014), [www.pbs.org/newshour/show/whos-behind-chinese-takeover-worlds-biggest-pork-producer](http://www.pbs.org/newshour/show/whos-behind-chinese-takeover-worlds-biggest-pork-producer) (explaining at the time of the buyout, the WH Group was then known as the Shuanghui Group).

through filing nuisance lawsuits in the United States District Court for the Eastern District of North Carolina.

*A. The Impact of Corporate Agribusinesses on Rural North Carolina Communities*

Murphy-Brown, among other large agricultural companies, maintains anaerobic lagoons for storing animal waste.<sup>23</sup> Anaerobic lagoons are “deep impoundment[s], essentially free of dissolved oxygen, that promote . . . anaerobic conditions.”<sup>24</sup> Anaerobic lagoons are principally used as pretreatment systems for industrial or municipal wastewaters and have proven to be especially effective in “rural communities that have a significant organic load from industrial sources.”<sup>25</sup> This pretreatment stage is typically followed by another stage that requires the use of aerobic or facultative lagoons in order to finalize the purification process.<sup>26</sup> Liquids from those lagoons are then sprayed on nearby fields.

Some of the known advantages of anaerobic lagoons and spray fields include: (1) cost effectiveness; (2) lack of need for additional energy usage; and (3) sustainable energy, as they produce methane.<sup>27</sup> However, some of the known disadvantages are that the lagoons: (1) require large areas of land; (2) produce undesirable odors; (3) permit wastewater seepage into the groundwater; and (4) are sensitive to fluctuations in environmental conditions.<sup>28</sup> The North Carolina Environmental Justice Network, an advocacy group with many members living near CAFOS, proclaims that the negative impacts of CAFOs include, but are not limited to, noxious odors, contamination of drinking water, mental health problems caused by stress, and the unjust distribution of CAFOs in communities of color.<sup>29</sup>

Kinlaw Farm, one of Murphy-Brown’s large-scale industrial hog farms, is a 15,000-hog farm located in Eastern North Carolina that has operated and maintained anaerobic lagoons for decades.<sup>30</sup> Moreover, instead of using the lagoons as a pretreatment method of water purification, as they are intended, Murphy-Brown routinely liquefies and sprays the hog waste from the

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23. Anne Blythe, *Jury Awards More Than \$25 Million to Duplin County Couple in Hog-Farm Case*, NEWS & OBSERVER (June 29, 2018), <https://www.newsobserver.com/news/local/article214096384.html>.

24. U.S. ENVTL. PROT. AGENCY, WASTEWATER TECHNOLOGY FACTSHEET: ANAEROBIC LAGOONS (Sept. 2002), <https://www3.epa.gov/npdes/pubs/alagoons.pdf>.

25. *Id.*

26. *See id.*

27. *See id.*

28. *See id.*

29. *See* NORTH CAROLINA ENVIRONMENTAL JUSTICE NETWORK, <https://ncejn.org/cafos/> (last visited Jan. 23, 2019).

30. *See* Anne Blythe, *Jury Awards Hog Farm Neighbors \$50 Million*, NEWS & OBSERVER (Apr. 27, 2018), <https://www.newsobserver.com/news/business/article209927914.html>.

anaerobic lagoons onto nearby fields.<sup>31</sup> Surprisingly, this practice of waste disposal has remained unchanged for years, despite calls for reformation; Kinlaw Farm is not the only Murphy-Brown affiliated hog farm that engages in these waste disposal practices.<sup>32</sup>

The method corporate agribusinesses, like Murphy-Brown, use to dispose of hog waste is particularly injurious to the environment. In most instances, neighbors to hog farms across the state of North Carolina will essentially quarantine themselves inside their homes because the noxious odors that leach from the nearby lagoons are so nauseating, they prevent the neighbors from using and enjoying their own land.<sup>33</sup> In addition, the neighbors to these large-scale hog farms assert that, as a result of Murphy-Brown's operations, they have been exposed to "swarms of flies and other insects, dead swine," and large trucks transporting hogs near their homes, on a recurring basis.<sup>34</sup>

#### *B. Crafting the Legal Argument: McKiver v. Murphy-Brown, LLC*

On April 26, 2018, *McKiver v. Murphy-Brown LLC*, one of twenty-six nuisance lawsuits filed against Murphy-Brown in recent years, was decided in favor of the plaintiffs.<sup>35</sup> In *McKiver*, ten neighbors of Murphy-Brown's Kinlaw Farm were each awarded "\$75,000 in compensatory damages and \$5,000,000 in punitive damages"<sup>36</sup> However, on post-trial motions, the court reduced the ten plaintiffs' punitive damages awards to \$250,000 each, pursuant to North Carolina's statutory cap on punitive damages.<sup>37</sup> Section 1D-25(b) of the North Carolina General Statutes states in relevant part that "[p]unitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars (\$250,000), whichever is greater."<sup>38</sup> On August 31, 2018, the court directed entry of final judgment of the modified April 26, 2018 jury verdict, pursuant to the defendant's motion.<sup>39</sup> In response, the plaintiffs filed a timely motion to alter or amend the judgment on the ground that the North Carolina punitive

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31. *See id.*

32. *See generally* Blythe, *supra* note 23; *see also* Blythe, *supra* note 30.

33. *See* Hellerstein, *supra* note 22.

34. *McKiver v. Murphy-Brown LLC* (In re NC Swine Farm Nuisance Litig.), No. 5:15-CV-00013-BR, 2017 U.S. Dist. LEXIS 80597, at \*15 (E.D.N.C. May 25, 2017).

35. *See* Blythe, *supra* note 30.

36. *McKiver v. Murphy-Brown LLC*, No. 7:14-CV-180-BR, 2018 U.S. Dist. LEXIS 76286, at \*2 (E.D.N.C. May 7, 2018).

37. *See* *McKiver v. Murphy-Brown LLC*, No. 7:14-CV-180-BR, 2018 U.S. Dist. LEXIS 148965, at \*2 (E.D.N.C. Aug. 31, 2018).

38. N.C. GEN. STAT. § 1D-25(b) (2018).

39. *See* *McKiver*, 2018 U.S. Dist. LEXIS 148965, at \*3.

damages cap was unconstitutional as applied in their case.<sup>40</sup> Nonetheless, the court denied the plaintiffs' motion on December 17, 2018.<sup>41</sup>

The defendants filed their own motions, including a motion to vacate the judgment within twenty-eight days after the judgment's entry.<sup>42</sup> In the motion, the defendant claimed that "post-trial amendments to North Carolina's Right-to-Farm Act . . . bar[red] plaintiffs' claims or, alternatively, prohibit[ed] plaintiffs' recovery of punitive damages."<sup>43</sup> The defendant specifically argued that the amendments to the Right-to-Farm Act clarified existing law, permitting application to pending cases.<sup>44</sup> The plaintiffs countered that the "amendments work a change in law, applying only prospectively," and the court agreed.<sup>45</sup> On December 17, 2018, the court denied the defendant's motion to vacate the judgment.<sup>46</sup>

### *C. Crafting the Legal Argument: McGowan v. Murphy Brown, LLC*

On June 29, 2018, a "jury awarded plaintiffs Elvis Williams and Vonnie Williams each \$65,000 in compensatory damages and \$12.5 million in punitive damages."<sup>47</sup> Mr. and Mrs. Williams are neighbors to a 4,700-hog farm that, while owned by a North Carolina farmer, is also affiliated with Murphy-Brown.<sup>48</sup> In response to the damages awarded by the jury, the defendant filed a motion to impose the statutory punitive damages cap on July 11, 2018.<sup>49</sup> The defendant specifically requested, "in accordance with the court's decision in the related case of *McKiver v. Murphy-Brown, LLC*, No. 7:14-CV-190-BR, . . . that the court reduce the punitive damages award to \$250,000 per each of these plaintiffs," pursuant to the requirements set out in N.C. Gen. Stat. § 1D-25(b).<sup>50</sup> The court, as it did in *McKiver*, rejected the plaintiffs' arguments that § 1D-25(b) violates their right to a jury trial and violates the United States and North Carolina Constitutions.<sup>51</sup> Consequently, the court

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40. See *McKiver v. Murphy-Brown LLC*, No. 7:14-CV-180-BR, 2018 U.S. Dist. LEXIS 211807, at \*11 (E.D.N.C. Dec. 17, 2018).

41. See *id.*

42. *Id.* at \*2.

43. *Id.*

44. See *id.*

45. *Id.*

46. See *id.* at \*13.

47. *McGowan v. Murphy-Brown, LLC*, No. 7:14-CV-00182-BR, 2018 U.S. Dist. LEXIS 157902, at \*2 (E.D.N.C. Sep. 17, 2018).

48. See Blythe, *supra* note 23.

49. *McGowan*, 2018 U.S. Dist. LEXIS 157902, at \*2.

50. *Id.*

51. *Id.* at \*3-4.

granted the defendant's motion to reduce the punitive damages awarded by the jury.<sup>52</sup>

*D. Crafting the Legal Argument: Gillis v. Murphy Brown, LLC*

In the most recent trial, the court did not allow the plaintiffs' recovery of punitive damages, stating they had not sufficiently shown that the operations of Sholar Farm, another Murphy-Brown affiliated farm, met the standard for punitive damages in § 1D-15, i.e., fraud, malice, willful or wanton conduct, by clear and convincing evidence.<sup>53</sup> Despite the plaintiffs' arguments that their right to use and enjoy their land was substantially and unreasonably interfered with by the defendant's conduct, the court sided with the defendant who, at trial, "outlined improvements the company had made over the years, and [stated] punitive damages were reserved for the worst offenders, not for the hog producers."<sup>54</sup>

### III. LEGISLATION LIMITING THE ABILITY TO RECOVER FOR NUISANCES

In addition to the legislative restrictions on punitive damages described above, the 1979 Right-to-Farm Act and its progeny were designed to protect "agricultural operations" from nuisance liability.<sup>55</sup> NC Session Law 1979-202 restricted claims for nuisances for all agricultural operations, primarily because of encroaching development on traditionally rural areas. For example, the Act's policy statement reads in relevant part, "[w]hen nonagricultural land use extend into agricultural areas, agricultural operations often become the subject of nuisance suits," and may be forced to cease operations.<sup>56</sup> The Act, limiting a nuisance action to the first year of operation, retained the concept that a change in conditions may cause an operation to become a nuisance. As an important caveat, a nuisance action could be raised "whenever a nuisance results from . . . negligent or improper operation."<sup>57</sup> The Right-to-Farm Act also did not apply to other causes of actions, most noticeably trespass actions.

In 1991, the North Carolina General Assembly added "forestry" to the Right-to-Farm Act and its protections against nuisance actions.<sup>58</sup> Moreover,

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52. *Id.* at \*4.

53. See generally Craig Jarvis, *Hog Farm's Neighbors Not Entitled to Punitive Damages*, *Judge Rules*, NEWS & OBSERVER (Dec. 13, 2018), <https://www.newsobserver.com/news/politics-government/state-politics/article223044710.html>.

54. *Id.*

55. See N.C. GEN. STAT. § 1D-1; see also N.C. GEN. STAT. § 1D-25(b).

56. See 1979 N.C. Sess. Laws 202 § 1 (codified as N.C. Gen. Stat. § 106-700).

57. See *Id.* (codified as N.C. Gen. Stat. § 106-701).

58. See 1991 N.C. Sess. Laws 892.

in 1995, the General Assembly created another procedural hurdle for plaintiffs by requiring pre-litigation mediation of farm nuisance disputes.<sup>59</sup> Furthermore, in 2013, after a few legal actions were filed against CAFOs but with the apparent threat of widespread litigation, the North Carolina General Assembly limited the ability to bring nuisance claims even further by redefining the provisions, recognizing “any changed conditions” to exclude from “a fundamental change” all changes in ownership or size, or change in the type of product produced.<sup>60</sup> As a result, if an agricultural or forestry operation was not a nuisance, it could expand at will and still not become a nuisance. For example, a farmer with one hog could then increase his operation to 10,000 hogs and this would still not be considered a fundamental change. Similarly, a small Christmas tree farm could convert to a 10,000-hog CAFO, and if the tree farm was not a nuisance, the new operation would, likewise, not be considered a nuisance. Thus, as the law now stands, once an operation is established, there is little control over its future operations, regardless of whether there is clearly a fundamental change in its operation. It should be noted that the 2013 amendments retained the provision that the restrictions on making a nuisance claim did not apply “whenever a nuisance results from the negligent or improper operation.”<sup>61</sup> In addition, in the same session law, the North Carolina General Assembly also allowed either of the parties to apply for “reasonable attorneys’ fees” for frivolous or malicious claims or affirmative defenses for nuisance actions.<sup>62</sup>

In 2017, the General Assembly put a cap on the compensatory damages awarded in private nuisance actions to the reduction of the fair market value of the property, “but not to exceed the fair market value of the property.”<sup>63</sup> Furthermore, after the series of jury awards, with the limited punitive damage awards referenced above, the North Carolina General Assembly injected itself in the litigation and the public criticism of the outcome of the actions, which were led by the North Carolina Pork Council and others. In the introduction, i.e., “whereas clauses,” to Session Law 2018-113 (Senate Bill 711), the North Carolina General Assembly declared the nuisance lawsuits “frivolous,” and complained that a federal court had “incorrectly and narrowly interpreted the North Carolina Right-to-Farm Act.”<sup>64</sup>

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59. See 1995 N.C. Sess. Laws 500 (codified as amended at N.C. Gen. Stat. § 7A-38.3 (1995)). For program rules, see *Pre-litigation Farm Nuisance Program*, NORTH CAROLINA JUDICIAL BRANCH, <https://www.nccourts.gov/programs/pre-litigation-farm-nuisance-program>.

60. See 2013 N.C. Sess. Laws 314.

61. *Id.*

62. *Id.*

63. 2017 N.C. Sess. Laws 11 (codified as amended at § 106-702(a)).

64. 2018 N.C. Sess. Laws 113 § 10(a).

The 2018 amendments to the Right-to-Farm Act went further in substantially limiting nuisance operations at CAFOs and other agricultural and forestry operations.<sup>65</sup> Under these amendments, once the operation is established for one year, a nuisance action cannot be brought against it at any time unless there is a fundamental change.<sup>66</sup> However, as noted above, the earlier legislation in 2013 no longer classified any change of size or change in the type of product produced as a fundamental change.<sup>67</sup> The amendments continue to overreach and eliminate instances where “a nuisance results from the negligent or improper operation.”<sup>68</sup> The 2018 amendments further eliminate the recovery of punitive damages in private nuisance actions brought against agricultural and forestry operations to only those operations where the alleged nuisance has been the subject of a criminal conviction or civil enforcement action.<sup>69</sup>

In passing the amendments to the Right-to-Farm Act, the North Carolina General Assembly directly interjected itself into litigation on behalf of the CAFO industry and against neighboring property owners. In an opinion piece on this topic, Professor Ryke Longest at Duke University School of Law concluded, “our General Assembly should let our justice system do its job and stop defending the indefensible.”<sup>70</sup>

The 2017 and 2018 amendments were not passed in a political vacuum. In response to the nuisance actions and the jury awards in those cases, the North Carolina Pork Council, the trade group for the hog industry, which is supported by individual legislators, led a campaign to discredit the nuisance suits. The North Carolina Pork Council labeled the recent nuisance suits as frivolous actions brought by “predatory attorneys,” the jury awards as excessive, and the presiding federal judge as biased.<sup>71</sup> While the criticism came

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65. Id. (codified as § 106-701 (2018)).

66. Id. (codified as § 106-701(a)).

67. See 2013 N.C. Sess. Laws 314.

68. 2018 N.C. Sess. Laws 113, sec. 10(a), eliminating § 106-701(a2), “The provisions of subsection (a) of this section shall not apply whenever a nuisance results from the negligent or improper operation of any agricultural or forestry operation of its appurtenances.”

69. 2018 N.C. Sess. Laws 113, sec. 10(b), codified as § 106-702(a1) (2018).

70. Ryke Longest, *NC Lawmakers On Wrong Side of Hog Farm Nuisance Lawsuits*, DURHAM HERALD SUN, (June 28, 2018), <https://www.heraldsun.com/opinion/article213992774.html>.

71. See for example, [www.ncpork.org/news/](http://www.ncpork.org/news/); Erica Hellerstein, *Despite Governor Cooper's Veto, HB 467—the Hog-Farm-Protection-Bill—Is Now Law*, INDY WEEK (May 17, 2017), <https://indyweek.com/news/despite-governor-cooper-s-veto-hb-467-the-hog-farm-protection-bill-is-now-law/>; Catherine Clabby, *Legislators Move to Protect Hog Farms, Again*, NORTH CAROLINA HEALTH NEWS (June 7, 2018), [www.northcarolinahealthnews.org/2018/06/07/nuisance-lawsuits/](http://www.northcarolinahealthnews.org/2018/06/07/nuisance-lawsuits/).

from the highly influential hog industry, support for the results of the legal actions came from communal, environmental, and social justice groups.<sup>72</sup>

#### IV. CONSTITUTIONAL GROUNDS FOR CHALLENGING THE AMENDMENTS TO THE RIGHT-TO-FARM ACT

The authors herein suggest there may be constitutional grounds under both the United States and North Carolina Constitutions for challenging the North Carolina Right-to-Farm Act as it currently stands. As discussed below, both constitutions prohibit the taking of private property by the government without just compensation. The North Carolina Constitution further prohibits the granting of private emoluments.<sup>73</sup>

The Fifth Amendment of the United States Constitution includes a provision known as the Takings Clause, which states that “private property [shall not] be taken for public use, without just compensation.”<sup>74</sup> Much has been written about what constitutes a taking and what constitutes public use.<sup>75</sup> The issue raised in this article is whether the effective elimination of the ability to raise a nuisance action against CAFOs is the taking of a property right by governmental action without compensation. A secondary issue is whether the North Carolina General Assembly’s action in doing so was for a public use.

Similar to the United States Constitution, the North Carolina Constitution has a prohibition against takings without just compensation, couched in the terms of deprivation of property, “but by the law of the land.”<sup>76</sup> Section Nineteen of the North Carolina Constitution states in relevant part,

No person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.<sup>77</sup>

By statute, North Carolina law recognizes “inverse condemnation” by which the owner of the property can initiate an action to seek compensation for governmental taking when no declaration of taking is filed.<sup>78</sup> Similar to the proposed issues under the Fifth Amendment, another issue raised in this article

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72. See for example, Bill Walker & Soren Rundquist, *N.C. Bill to Shield CAFOS’ Liability Would Curb Legal Rights for Hundreds of Thousands*, EWG (Apr. 17, 2017), [www.ewg.org/research/north-carolina-bill-shield-cafos-liability-would-curb-residents-legal-rights](http://www.ewg.org/research/north-carolina-bill-shield-cafos-liability-would-curb-residents-legal-rights).

73. N.C. CONST. art. I, § 32.

74. U.S. CONST. amend. V.

75. U.S. CONST. amend. V. For discussion of case law, see for example, David W. Owens *Regulatory Takings*, UNC-CH SCHOOL OF GOVERNMENT (Jan., 2012), [www.sog.unc.edu/resources/legal-summaries/regulatory-takings](http://www.sog.unc.edu/resources/legal-summaries/regulatory-takings). See also Bill Funk, *CPR Perspective: The Takings Clause of the Fifth Amendment*, CENTER FOR PROGRESSIVE REFORM, [www.progressivereform.org/perspTakings.cfm](http://www.progressivereform.org/perspTakings.cfm).

76. N.C. CONST. art. I, § 19. See Owens, *supra* note 75.

77. N.C. CONST. art. I, § 19.

78. N.C. GEN. STAT. § 40A-51.

is whether the effective elimination of the ability to raise a nuisance action against CAFOs is the taking of a property right by governmental action without compensation. The secondary issue is whether there are limits of eminent domain under North Carolina law.

As an additional avenue for challenging the constitutionality of the recent amendments to North Carolina's Right-to-Farm Act, the Constitution of North Carolina prohibits the granting of "exclusive emoluments."<sup>79</sup> Section Thirty-Two of the North Carolina Constitution reads in full, "No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."<sup>80</sup> The question remains whether the virtual elimination of private nuisance suits, brought against CAFOs and other agricultural and forestry operations, grants those industries a right not conceded to any other person in North Carolina.

#### CONCLUSION

As it now stands, the current North Carolina Right-to-Farm Act essentially eliminates private nuisance claims against CAFOs and other agricultural and forestry operations.<sup>81</sup> The Act restricts nuisance claims to the first year of existence of an agricultural or forestry operation, which is a considerably narrow window to make a claim. The concepts of changing conditions, or fundamental changes in the scope of the operation, have been rendered meaningless by the comprehensive list of exceptions, including when the nuisance arises from negligent or improper operation of the facility. Punitive damages are limited to the value of the property involved but only if the alleged nuisance is the subject of a criminal or civil enforcement action. In the opinions of the authors herein, the potential for landowners to protect their property from nuisances has been virtually eliminated. In another law review article, this eradication of the nuisance action was appropriately characterized as providing CAFO owners the "right to commit nuisance."<sup>82</sup>

Returning to the analogy of the bundle of sticks of property rights, in regard to nuisance actions against CAFOs, the North Carolina General Assembly has systematically whittled down the stick for the use and enjoyment of one's property belonging to neighboring property owners and presented it, in

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79. N.C. CONST. art. I, § 32. For definitions and case law, see Jeanette K. Doran, *Exclusive Emoluments in North Carolina*, NORTH CAROLINA INSTITUTE FOR CONSTITUTIONAL LAW (Sep. 5, 2010), [www.ncicl.org/assets/uploads/article/exclusive%20emoluments%20whitepaper%20FINAL.pdf](http://www.ncicl.org/assets/uploads/article/exclusive%20emoluments%20whitepaper%20FINAL.pdf).

80. For summary of case law, see NORTH CAROLINA TREASURER, [www.nctreasurer.com/Retirement-and-Savings/For-Government-Employers/2017Lawbook/nccarti/nccarti-32.htm](http://www.nctreasurer.com/Retirement-and-Savings/For-Government-Employers/2017Lawbook/nccarti/nccarti-32.htm) (last visited Jan. 23, 2019).

81. N.C. Gen. Stat. § 106-701 *et seq.*

82. Smart, *supra* note 3, at 2097.

whole, to owners of CAFOs. There has been no compensation to neighboring property owners for the taking, and no discussion of the private emolument granted to the owners of CAFOs has occurred. More importantly, there has been no diminishment of the noxious stench, flies, and adverse health impacts from the hog farms, the lagoons, and the spray fields. Therefore, the authors of this article suggest future nuisance actions against CAFOs should challenge the constitutionality of the recent overreaching amendments to the North Carolina Right-to-Farm Act, and at the same time, bring claims against the State of North Carolina for unconstitutional taking without just compensation.