

Extending Protections for CAFOs Is the Wrong Move for Iowa Courts and the Legislature to Make

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ABSTRACT: On June 30, 2022, the Iowa Supreme Court, in a 4–3 decision, overruled 18-year-old precedent to find that Iowa’s right-to-farm statute, Iowa Code section 657.11, does not violate the Inalienable Rights Clause of the Iowa Constitution, overruling the test set out in Gacke v. Pork Xtra, L.L.C. This decision will have a large impact on Iowa’s right-to-farm laws and could potentially lead to the overturning of other right-to-farm cases, specifically Bormann v. Board of Supervisors. This Note examines the history and impacts of CAFOs in Iowa, as well as examining Iowa case law and the constitutional provisions utilized in those cases. It also examines the future of Bormann under the Garrison decision and the Iowa Supreme Court’s ideology that precedent does not always matter. This Note proposes that the Iowa Supreme Court should adhere to stare decisis principles. This Note also proposes legislation that the Iowa Legislature should adopt now that Garrison has been decided and CAFOs seem to have free rein. The Iowa Legislature must put policy in place to protect Iowans and their communities.

INTRODUCTION	2268
I. THE RISE AND LEGAL PROTECTION OF CAFOS	2270
A. LEGISLATIVE IMPORTANCE AND HISTORY OF CAFOS IN IOWA	2271
B. IOWA COURTS’ HISTORY WITH CAFO ISSUES	2272
1. Property Doctrines and CAFOs.....	2273
2. <i>Bormann v. Board of Supervisors</i>	2274
3. <i>Gacke v. Pork Xtra, L.L.C.</i>	2276
4. <i>Honomichl v. Valley View Swine, LLC</i>	2278
C. THE IOWA SUPREME COURT’S RECENT DEPARTURE FROM PRECEDENT.....	2278

* J.D. Candidate, The University of Iowa College of Law, 2024; B.S., Truman State University, 2021. I would like to thank my family and friends for their constant support and encouragement. I would also like to thank my colleagues on the *Iowa Law Review* for their feedback and guidance, especially Quinton McNitt, J. Steele Kowalczyk, and Audrey Felderman. Without these people, this publication would not have been possible.

1. Facts of the Case	2279
2. Majority Holding	2279
3. Concurring Opinion	2280
4. Dissenting Opinions.....	2281
D. <i>ECONOMIC AND SOCIAL IMPORTANCE OF CAFOS IN IOWA</i>	2282
II. THE IMPACTS AND ISSUES OF THE <i>GARRISON</i> DECISION	2285
A. <i>IS BORMANN UNDER ATTACK?</i>	2286
B. <i>THE DIFFERENCES AND SIMILARITIES BETWEEN THE TAKINGS CLAUSE AND THE INALIENABLE RIGHTS CLAUSE</i>	2287
C. <i>THE IOWA SUPREME COURT'S RECENT DISREGARD FOR PRECEDENT</i>	2288
III. MOVING FORWARD TO PROTECT IOWANS AGAINST CAFOS	2288
A. <i>CAFOS SHOULD NOT BE ERADICATED COMPLETELY</i>	2289
B. <i>THE IOWA SUPREME COURT'S ROLE IN CURBING CAFOS</i>	2290
C. <i>THE IOWA LEGISLATURE'S AND EXECUTIVE BRANCH'S ROLE IN REGULATING CAFOS</i>	2290
CONCLUSION	2292

INTRODUCTION

What's in Iowa, you ask? Apart from fields of corn and the Hawkeyes, there are also the distinctive smells and sights of animal confinements.¹ These animal confinements that house large quantities of animals, known as “concentrated animal feeding operations” (“CAFOs”), are plaguing the environment and the small farm operations that formerly thrived in the state of Iowa.² In addition to the economic and environmental harms, these animal confinements give rise to legal issues that have appeared on the Iowa Supreme Court's docket for decades.³

1. There are, of course, many more things in the state of Iowa. These are just some of the highlights.

2. CARRIE HRIBAR, NAT'L ASS'N OF LOC. BDS. OF HEALTH, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON COMMUNITIES III, at 16 (Mark Schultz ed., 2010), https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf [<https://perma.cc/XQ3T-U LSS>].

3. See generally *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309 (Iowa 1998) (holding that Iowa Code section 3542.11(1)(a) was an unconstitutional taking); *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168 (Iowa 2004) (holding that Iowa Code section 657.11 created an easement and was unconstitutional), *overruled in part* by *Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67 (Iowa 2022); *Honomichl v. Valley View Swine, LLC*, 914 N.W.2d 223 (Iowa 2018) (overviewing cases that this Note focuses on and that have had the biggest impact on right-to-farm laws), *overruled in part* by *Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67 (Iowa 2022).

CAFOs have environmental, social, and legal impacts on the entire state of Iowa.⁴ There is no denying that these confinements have had a negative impact on Iowa's environment and local, family-owned farms.⁵ The Iowa Supreme Court has protected these areas in the past⁶ by concluding that right-to-farm laws, which "provide[d] statutory immunity to animal agriculture producers against nuisance suits,"⁷ were unconstitutional under two different constitutional provisions: the Takings Clause and the Inalienable Rights Clause.⁸

In its 2021–2022 term, the Iowa Supreme Court decided *Garrison v. New Fashion Pork LLP*, which was a large departure from Iowa Supreme Court precedent. Notably, the *Garrison* decision could have a negative impact on the persuasive power as precedent of past animal confinement cases. *Garrison* extended immense protections to animal feeding operations from nuisance suits and made them essentially immune from any actions brought against them under a nuisance suit.⁹ The Iowa Supreme Court adopted a new test to look at right-to-farm laws' constitutionality under the Inalienable Rights clause.¹⁰

This Note argues that the Iowa Supreme Court should continue to follow the precedent it set out in *Bormann v. Board of Supervisors*¹¹ and should not follow the trend of the recent Iowa Supreme Court decision in *Garrison v. New Fashion Pork LLP*.¹² In order to achieve these goals, the Iowa Legislature should enact a temporary moratorium on CAFOs and the Iowa Executive Branch should ensure that CAFOs are following current regulations. This Note will proceed in three parts. First, Part I will examine the rise of CAFOs and the protection that they are afforded. This will be done by looking at their legislative history, the history of Iowa's case law surrounding CAFOs/nuisance issues, the Iowa Supreme Court's recent decision in *Garrison*, and the economic and social importance of these operations. Next, Part II

4. See JAMES MERCHANT & DAVID OSTERBERG, IOWA POL'Y PROJECT, THE EXPLOSION OF CAFOS IN IOWA AND ITS IMPACT ON WATER QUALITY AND PUBLIC HEALTH ii, 10 (2018), <https://roactivist.org/wp-content/uploads/2018/01/Explosion-of-CAFOs-in-Iowa-and-Its-Impact-on-Water-Quality-and-Public-Health.pdf> [<https://perma.cc/XF63-CZRJ>].

5. *Id.*

6. See generally *Bormann*, 584 N.W.2d 309 (holding that Iowa Code section 3542.11(1)(a) was an unconstitutional taking); *Gacke*, 684 N.W.2d 168 (holding that Iowa Code section 657.11 created an easement and was unconstitutional); *Honomichl*, 914 N.W.2d 223 (making clear that lower courts must follow the *Gacke* reasoning when ruling on nuisance suits). These are arguably the most important decisions when it comes to CAFOs and how they are regulated and protected in the State of Iowa.

7. Gary Taylor, *Iowa Supreme Court Backtracks on Constitutionality of Right-to-Farm Law*, IOWA STATE UNIV.: EXTENSION & OUTREACH (Aug. 24, 2022), <https://blogs.extension.iastate.edu/planningBLUZ/2022/08/24/iowa-supreme-court-backtracks-on-constitutionality-of-right-to-farm-law> [<https://perma.cc/X3D4-3X9V>].

8. See IOWA CONST. art. I, §§ 1, 18.

9. See *Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67, 86 (Iowa 2022).

10. See generally *id.* (overturning the *Gacke* test to adopt a rational basis test that is now to be applied when examining right-to-farm laws under the Inalienable Rights Clause).

11. See generally *Bormann*, 584 N.W.2d 309 (holding that Iowa Code section 352.11 was unconstitutional according to the state's Takings Clause).

12. See generally *Garrison*, 977 N.W.2d 67 (holding that the *Gacke* test was not applicable anymore and a rational basis test is what should be used for nuisance suits).

analyzes the impacts and issues that the *Garrison* decision created. Specifically, Part II will analyze *Garrison's* impact on the *Bormann* precedent, the implications for Iowa's Takings Clause and Inalienable Rights Clause jurisprudence, and how the Iowa Supreme Court in the 2021–2022 term failed to adhere to principles of stare decisis. Finally, Part III will analyze how to move forward to strike a balance between the rights of affected landowners and the economic benefits to the state that CAFOs provide, including the Iowa Supreme Court's role and the Iowa Legislature's role.

I. THE RISE AND LEGAL PROTECTION OF CAFOs

Livestock farming and production widely evolved between the early 2000s and 2020s, shifting from an industry dominated by family-run farms to one primarily composed of large corporate operations.¹³ These large corporate farms are called CAFOs.¹⁴ A CAFO is defined as, “a specific type of large-scale industrial agricultural facility that raises animals, usually at high-density, for the consumption of meat, eggs, or milk.”¹⁵ A CAFO is first “categorized as an animal feeding operation” (“AFO”), which is defined as, “a lot or facility where animals are kept confined and fed or maintained for [forty-five] or more days per year, and crops, vegetation, or forage growth are not sustained over a normal growing period.”¹⁶ AFOs that fall within the regulatory definition of a CAFO are subject to regulation under the National Pollutant Discharge Elimination System (“NPDES”) permitting program.¹⁷ The regulatory definition of a large, medium, or small CAFO is mainly dependent on how many animals it holds.¹⁸ From 2000 to 2020, the number of CAFOs in Iowa increased nearly five times.¹⁹ This large increase makes CAFOs and their impact on Iowa's environment and economy one of great importance to the state.

This Part will explain the history of CAFOs in Iowa and will proceed in four Sections. First, this Part will discuss the legislative importance and history of CAFOs in the state of Iowa. Second, this Part will analyze the history of CAFO issues before the Iowa Supreme Court, including *Bormann v. Board of Supervisors*, *Gacke v. Pork Xtra, L.L.C.*, and *Honomichl v. Valley View Swine, LLC*. Third, this Part will analyze the recent Iowa Supreme Court's departure from precedent in *Garrison v. New Fashion Pork LLP*. Finally, this Part will analyze the economic and social impacts of CAFOs in the state of Iowa.

13. See HRIBAR, *supra* note 2, at 1.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Animal Feeding Operations (AFOs)*, U.S. ENV'T PROT. AGENCY (Jan. 24, 2024), <https://www.epa.gov/npdes/animal-feeding-operations-afos> [<https://perma.cc/N2FB-W8YY>]; U.S. DEP'T OF AGRIC. & U.S. ENV'T PROT. AGENCY, UNIFIED NATIONAL AFO STRATEGY EXECUTIVE SUMMARY *4, <https://www.epa.gov/sites/default/files/2015-10/documents/exexsum.pdf> [<https://perma.cc/4AMJ-G2Q4>].

18. See U.S. DEP'T OF AGRIC. & U.S. ENV'T PROT. AGENCY, *supra* note 17, at *1–2.

19. Jamie Konopacky & Soren Rundquist, *EWG Study and Mapping Show Large CAFOs in Iowa Up Fivefold Since 1990*, ENV'T WORKING GRP. (Jan. 21, 2020), <https://www.ewg.org/interactive-maps/2020-iowa-cafos> [<https://perma.cc/Z6VD-T9GT>].

A. LEGISLATIVE IMPORTANCE AND HISTORY OF CAFOS IN IOWA

The issue of CAFOs has been pertinent in Iowa's history and legislation over the past five decades. In the 1970s, the introduction and subsequent boom of CAFOs led many states to enact statutes relating to these operations, specifically, statutes dealing with nuisance actions.²⁰ A nuisance is "actions by someone or something within their control that interfere with rights of either the public or private citizens outside of their property."²¹ There are two types of nuisances: a public nuisance and a private nuisance. "A public nuisance is when a person unreasonably interferes with a right that the general public shares in common."²² Iowa's longstanding nuisance liability statute, Iowa Code section 657, defines a nuisance as,

Whatever is injurious to health, indecent, or unreasonably offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere unreasonably with the comfortable enjoyment of life or property . . . and a civil action by ordinary proceedings may be brought to enjoin and abate the nuisance and to recover damages sustained on account of the nuisance.²³

Iowa is known "for having . . . weak state laws and regulations governing the approval, siting, operation, and monitoring of CAFOs."²⁴ To ensure protection for CAFOs, the Iowa Legislature decided to enact two separate and distinct types of legislation dealing with the right-to-farm laws.²⁵ The first, Iowa Code section 352.11, was enacted in 1982.²⁶ This statute was created to protect "normal farm activities from" lawsuits being brought under a nuisance violation.²⁷ "A private nuisance is [defined as] when the plaintiff's use and enjoyment of her land is interfered with substantially and unreasonably through the actions of another."²⁸ While the statute was enacted to protect these "normal farm activities," it did not shield these activities if the harm was brought on by negligence or there had been "a violation of public law."²⁹ In 1998, this statute was ultimately declared unconstitutional under the Iowa State Constitution in the decision of *Bormann v. Board of Supervisors*.³⁰

20. See N. Williams Hines, *CAFOs and U.S. Law*, 107 IOWA L. REV. ONLINE 19, 38 (2022) (discussing how CAFOs started to come into existence and how legislatures "began enacting specific legislation and promulgating administrative regulations governing the siting and operation of CAFOs, including requiring detailed manure management plans").

21. *Nuisance*, CORNELL L. SCH., LEGAL INFO. INST. (Aug. 2023), <https://www.law.cornell.edu/u/wex/nuisance> [<https://perma.cc/98Z5-XKNB>].

22. *Id.*

23. IOWA CODE § 657.1(1) (2024).

24. Hines, *supra* note 20, at 39.

25. *Id.* at 53.

26. *Id.*

27. *Id.*

28. *Nuisance*, *supra* note 21.

29. Hines, *supra* note 20, at 53.

30. *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 321 (Iowa 1998).

In 1995, the second law enacted by the Iowa Legislature relating to CAFOs was an amendment to Iowa Code chapter 657, Iowa's longstanding nuisance statute, and "was enacted . . . for the express purpose of immunizing CAFOs from nuisance liability to their neighbors."³¹ Iowa Code chapter 657 was amended to include section 657.11,³² which stated that CAFOs are subject "to nuisance liability only if the pollution complained about resulted because the CAFO did not comply with applicable federal and state regulations or 'failed to use existing prudent generally accepted management practices reasonable for the operation.'"³³ Essentially, section 657.11 "limited CAFOs liability for private nuisance actions."³⁴ This law was struck down in *Gacke v. Pork Xtra, L.L.C.*³⁵ In 2017, the Iowa Legislature enacted an amendment to section 657.11, which is labeled as 657.11A.³⁶ This law limits money damages that a plaintiff can collect from a CAFO in a nuisance suit.³⁷ The law has not come before the Iowa Supreme Court yet, but the statutory language could be interpreted to "severely restrict neighbors' rights in nuisance suits against CAFOs," including an "interpretation [that] would not only bar plaintiffs from fully recovering compensatory damages but also prevent them from being granted injunctive relief and to being awarded punitive damages."³⁸ This change goes to show how the Iowa Legislature has tended to take pro-CAFO legislative action.

B. IOWA COURTS' HISTORY WITH CAFO ISSUES

Between the enactment of section 657.11 in 1995 until the summer of 2022, the Iowa Supreme Court had declared Iowa's right-to-farm laws—which protected CAFOs—unconstitutional.³⁹ This Section will discuss the impact of the judiciary's interpretation of the Iowa Constitution and the CAFO legislation by discussing three cases. First, this Section will discuss property doctrines and how they apply to CAFOs. Second, this Section will discuss the Iowa Supreme Court's decision in *Bormann v. Board of Supervisors*, which struck down Iowa Code section 352.11 as unconstitutional under the state of Iowa's Takings

31. Hines, *supra* note 20, at 53.

32. IOWA CODE ANN. § 657.11 (West 2014).

33. Hines, *supra* note 20, at 54 (quoting *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 173 (Iowa 2004), *overruled in part* by *Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67 (Iowa 2022)).

34. N. Williams Hines, *Farm Animal Production and the Law*, in FARM ANIMAL PRODUCTION, THE ENVIRONMENT AND PUBLIC HEALTH (Johns Hopkins Press 2024) (forthcoming Aug. 2024) (manuscript at 23) (on file with the *Iowa Law Review*).

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

36. IOWA CODE ANN. § 657.11 (West 2014); IOWA CODE § 657.11A (2024).

37. IOWA CODE § 657.11A; *see also* Hines, *supra* note 20, at 53–54 (discussing the outcomes of *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309 (Iowa 1998), and *Gacke*, 684 N.W.2d 168, at the Iowa Supreme Court).

38. Hines, *supra* note 20, at 54.

39. *See generally Gacke*, 684 N.W.2d 168 (declaring section 657 unconstitutional under the Inalienable Rights Clause); *Honomichl v. Valley View Swine, LLC*, 914 N.W.2d 223 (Iowa 2018) (making clear that lower courts must follow the *Gacke* reasoning when ruling on nuisance suits), *overruled in part* by *Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67 (Iowa 2022).

Clause.⁴⁰ Third, this Section will discuss the decision in *Gacke v. Pork Extra, L.L.C.*, which held Iowa Code section 657.11 “was unconstitutional under the [T]akings [C]ause and the [I]nalienable [R]ights [C]ause.”⁴¹ Finally, this Section will discuss *Honomichl v. Valley View Swine, LLC*, which reaffirmed the decision in *Gacke*.⁴²

1. Property Doctrines and CAFOs

The two main clauses that are used in cases where CAFOs are at issue are the Takings Clause and the Inalienable Rights Clause.⁴³ There are similarities in these two clauses that can be seen in the texts of the clauses themselves. The Iowa Constitution gives the Inalienable Rights Clause in Article I, Section 1.⁴⁴ It states, “All men and women are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.”⁴⁵ While the term “inalienable rights” is not explicitly mentioned in the U.S. Constitution, it is associated with the Declaration of Independence which states, “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”⁴⁶ The U.S. Constitution also contains provisions that protect individual rights and liberties, such as the Bill of Rights.⁴⁷ “Inalienable rights are rights that we are unable to give up, even if we want to.”⁴⁸

The Takings Clause is found in Article I, Section 18 of the Iowa Constitution.⁴⁹ The language there is,

Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken.⁵⁰

The U.S. Constitution has a similar provision in the Fifth Amendment, which states, “nor shall private property be taken for public use, without just

40. *Bormann*, 584 N.W.2d at 321.

41. *Gacke*, 684 N.W.2d at 171–72; *Honomichl*, 914 N.W.2d at 234 (discussing *Gacke*, 684 N.W.2d at 171–72, 178).

42. *Honomichl*, 914 N.W.2d at 237 (discussing *Gacke*, 684 N.W.2d at 171–79).

43. IOWA CONST. art. I, §§ 1, 18; U.S. CONST. amend. V.

44. IOWA CONST. art. I, § 1.

45. *Id.*

46. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

47. U.S. CONST. amends. I–X.

48. *Terms to Know: From the Declaration of Independence*, CTR. FOR CIVIC EDUC., <https://www.civiced.org/9-11-and-the-constitution-terms-to-know> [<https://perma.cc/B7MU-4V32>].

49. IOWA CONST. art. I, § 18.

50. *Id.*

compensation.”⁵¹ It is important to note the U.S. constitutional provisions, but the focus of CAFO regulation is essentially on the state’s constitutional provisions because property rights are primarily defined by state law.⁵²

American property law has long held the principle that one’s use of property should not cause injury to someone else’s property.⁵³ This principle gives the basis for the “private property right to be free from unreasonable harm inflicted by a neighbors’ [sic] intrusive use of [one’s] property.”⁵⁴ Every state enforces some sort of nuisance law, but they differ on how they define a nuisance and what remedies are allowed.⁵⁵ These nuisance laws have been countered by right-to-farm laws that allow “farmers engaging in normal farming activities” to perform “conventional farming practices without fearing” a nuisance suit from their neighbors.⁵⁶ The ideas of the Takings Clause and having inalienable rights in one’s property all must balance with these bedrock principles of property law. These constitutional provisions have played out in Iowa court cases over the years.

2. *Bormann v. Board of Supervisors*

In 1998, the Iowa Supreme Court unanimously held that Iowa Code section 352.11 was unconstitutional under the State’s Takings Clause.⁵⁷ The “Girres[es] applied to the Kossuth County Board of Supervisors for establishment of an ‘agricultural area’ that would include land . . . owned” by the Girreses as well as other property owners.⁵⁸ The Board denied the application, holding that it was inconsistent with Iowa Code chapter 352.⁵⁹ The Girreses filed an application again, and this time they were approved.⁶⁰ This time, the Board found that the application followed section 352.6 of the Iowa Code and that its adoption was warranted under chapter 352.⁶¹ It appears that the approval this time was luck, with the deciding vote from the three to two majority being “based on the ‘flip [of] a nickel.’”⁶² With the Board’s approval, the owners of the agricultural area were granted statutory immunity from nuisance suits because of section 352.11(1)(a)’s blanket protection, which

51. U.S. CONST. amend. V.

52. Hines, *supra* note 34 (manuscript at 25).

53. *See id.* (manuscript at 26) (“The legal maxim ‘[u]se your property so as not to injure the property of another’ has been an important principle in Anglo-American property law for nearly a millennium.” (footnote omitted)).

54. *Id.* (manuscript at 26).

55. *Id.* (manuscript at 26–27) (discussing “that typically the legislation codifying [the nuisance principle] is interpreted by courts to leave ample room for the common law of nuisance to continue to evolve organically”).

56. *Id.* (manuscript at 31).

57. *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 321–22 (Iowa 1998).

58. *Id.* at 311.

59. *Id.*

60. *Id.* at 311–12.

61. *Id.* at 311–12 (discussing IOWA CODE § 352.6 (1993)).

62. *Id.* (alteration in original).

states, “[A] farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operations.”⁶³ After the Girreses application was approved, “neighbors of the . . . agricultural area filed a writ of certiorari” in court seeking a declaratory judgment against the Board.⁶⁴ The plaintiffs argued that the Board had “violated their constitutionally inalienable right to protect property under the Iowa Constitution.”⁶⁵ The plaintiffs further argued that this “deprived them of property without due process or just compensation under both the federal and Iowa Constitutions, denied them due process under the federal and Iowa Constitutions, ran afoul of res judicata principles, and was ‘arbitrary and capricious.’”⁶⁶ The district court rejected all of the plaintiffs’ arguments except that the Board had acted arbitrarily and capriciously.⁶⁷ The case was then appealed to the Iowa Supreme Court.⁶⁸

The Iowa Supreme Court found that the provisions of section 352.11 created an easement over the neighboring landowners’ properties by granting the agricultural area immunity from any nuisance suit.⁶⁹ The court held that “[t]his is because the immunity allows the applicants to do acts on their own land which, were it not for the easement, would constitute a nuisance.”⁷⁰ The court also held that the state must provide just compensation to those injured by a nuisance because it “cannot . . . insulate . . . users from potential private nuisance claims.”⁷¹ Therefore, the court found that there was an unconstitutional taking.⁷² The court struck down Iowa Code section 352.11(1)(a), declaring it unconstitutional under “the Fifth Amendment [of] the Federal Constitution and [A]rticle I, [S]ection 18 of the Iowa Constitution.”⁷³ The court stated, “while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a

63. Beau R. Morgan, Note, *Iowa and Right to Farm: An Analysis of the Constitutionality of Right to Farm Statutes Across the United States*, 53 CREIGHTON L. REV. 623, 637 n.151 (2020) (citing and discussing IOWA CODE § 352.11 (2020)); see also IOWA CODE § 352.11(1)(a) (2024); *Bormann*, 584 N.W.2d at 312–13 (discussing how a nuisance is declared in the eyes of the court and how in this case there was a nuisance).

64. *Bormann*, 584 N.W.2d at 312.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 315–16; Morgan, *supra* note 63, at 627–28.

70. *Bormann*, 584 N.W.2d at 316; Morgan, *supra* note 63, at 628.

71. *Bormann*, 584 N.W.2d at 319–20; Morgan, *supra* note 63, at 628.

72. *Bormann*, 584 N.W.2d at 322.

73. *Id.* at 321–22.

character as to amount in effect to a taking.”⁷⁴ The Iowa Legislature had gone beyond their authority, according to the court.⁷⁵

3. *Gacke v. Pork Xtra, L.L.C.*

In 2004, the Iowa Supreme Court unanimously held that the nuisance damage limitations within Iowa Code section 657.11 were unconstitutional under the Takings Clause and the Inalienable Rights Clause.⁷⁶ In *Gacke v. Pork Xtra, L.L.C.*, the Gackes, owners of agricultural land adjacent to a CAFO, sued Pork Xtra, L.L.C., the CAFO’s owner, claiming that the CAFO constituted a private nuisance.⁷⁷ The Gackes alleged that the hog confinements had caused them emotional distress and decreased their property value.⁷⁸ The Gackes sought an injunction, but Pork Xtra asserted a claim of immunity under section 657.11(2).⁷⁹ The district court ruled against Pork Xtra, finding that the hog confinement was deemed a nuisance based on “the frequent and significant noxious odors that emanated from the operation.”⁸⁰ Pork Xtra then appealed to the Iowa Supreme Court.⁸¹

The Iowa Supreme Court found, as it had in *Bormann*, that section 657.11 “created an easement, and the easement created a taking of a property right.”⁸² “[T]he court upheld *Bormann*, reaffirming that nuisance immunity from an agricultural operation was unconstitutional so long as it violated the Takings Clause.”⁸³ The court interpreted the *Bormann* precedent, though, as only to protect a plaintiff’s right to remedies for economic damages.⁸⁴ The court moved on to ask whether the legislature’s intent can be effectuated by limiting damages to only economic harms.⁸⁵ The court then utilized the

74. *Id.* at 320 (quoting *Richards v. Wash. Terminal Co.*, 233 U.S. 546, 552–53 (1914)); Adam Van Buskirk, *Right-to-Farm Laws as “Takings” in Light of Bormann v. Board of Supervisors and Moon v. North Idaho Farmers Association*, 11 ALB. L. ENV’T OUTLOOK J. 169, 179 (2006).

75. *Bormann*, 584 N.W.2d at 321.

76. *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 179 (Iowa 2004), *overruled in part* by *Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67 (Iowa 2022).

77. *Id.* at 170–71.

78. *Id.* at 171.

79. *Id.*

80. *Id.*

81. *Id.*

82. Morgan, *supra* note 63, at 628–29; *see also Gacke*, 684 N.W.2d at 174 (“[T]he taking that occurs by operation of the statutory immunity is the granting of an easement in the property burdened by the animal feeding operation.”).

83. Emily A. Kolbe, Note, “*Won’t You Be My Neighbor?*” *Living with Concentrated Animal Feeding Operations*, 99 IOWA L. REV. 415, 437 (2013).

84. *Gacke*, 684 N.W.2d at 175 (“In conclusion, we hold that *Bormann* and state takings jurisprudence requires us to invalidate the statutory immunity only insofar as it prevents property owners subjected to a nuisance from recovering damages for the diminution in value of their property.”).

85. *Id.* at 174–75.

Inalienable Rights Clause to hold that one has a right to more than mere economic damages in nuisance cases, at least in this case.⁸⁶

The court created a two-part test in order “to determine whether [a] statute violate[s] the Inalienable Rights Clause” of the Iowa Constitution.⁸⁷ The first step is to inquire whether there had been “a reasonable exercise of the state’s police power” in creating the right-to-farm statute.⁸⁸ The second step is “a three-pronged [factor] analysis to determine whether the Iowa right to farm statute . . . as applied to the plaintiffs” is unconstitutional.⁸⁹ The first factor is whether the plaintiff can show that they “receive[d] no particular benefit from the nuisance immunity granted to their neighbors other than that [affecting] the public in general.”⁹⁰ The next factor is whether the plaintiff can show that “they sustain[ed] significant hardship.”⁹¹ The final factor is whether the plaintiff “resided on their property long before any animal operation was commenced [on neighboring land] and had spent considerable sums of money in improvements to their property prior to construction of the defendant’s facilities.”⁹² In this inquiry, the following facts were relevant to the court:

Property owners like the Gackes bear the brunt of the undesirable impact of this statute without any corresponding benefit. Moreover, their right to use and enjoy their property is significantly impaired by a business operated as a nuisance, yet they have no remedy. Unlike a property owner who comes to a nuisance, these landowners lived on and invested in their property long before Pork Xtra constructed its confinement facilities. Under these circumstances, the police power is not used for its traditional purpose of insuring [sic] that individual citizens use their property “with due regard to the personal and property rights and privileges of others.”⁹³

The court held that the ends aimed at by the legislature through section 657.11(2) were within the state police power, however the means used to accomplish those ends were “unduly oppressive.”⁹⁴ The court held that “[u]nder these circumstances, the police power is not used for its traditional purpose of insuring that individual citizens use their property ‘with due regard

86. *Id.* at 175–79; see Hines, *supra* note 20, at 54–55.

87. Morgan, *supra* note 63, at 629 (discussing *Gacke*, 684 N.W.2d at 178–79).

88. *Id.* (discussing *Gacke*, 684 N.W.2d at 176–78).

89. *Id.* (discussing *Gacke*, 684 N.W.2d at 178).

90. *Gacke*, 684 N.W.2d at 178.

91. *Id.*

92. *Id.*

93. *Id.* at 179 (quoting *May’s Drug Stores, Inc. v. State Tax Comm’n*, 45 N.W.2d 245, 250–51 (Iowa 1950)).

94. *Id.* at 178 (quoting *Gravert v. Nebergall*, 539 N.W.2d 184, 186 (Iowa 1995)) (internal quotation marks omitted).

to the personal and property rights and privileges of others.”⁹⁵ Therefore “the statutory immunity violate[d] [A]rticle I, [S]ection 1 of the Iowa Constitution.”⁹⁶

4. *Honomichl v. Valley View Swine, LLC*

In 2018, the Iowa Supreme Court reaffirmed its decision in *Gacke* in the case of *Honomichl v. Valley View Swine, LLC*.⁹⁷ In *Honomichl*, the plaintiffs owned land located near CAFOs operated by Valley View Swine.⁹⁸ The plaintiffs brought suit claiming that Valley View Swine negligently operated their CAFOs and that “the CAFOs [were] a nuisance that entitle[d] [them] to damages”⁹⁹ Valley View Swine sought immunity under Iowa Code section 657.11.¹⁰⁰ The district court ruled for the plaintiffs, finding that section 657.11 was unconstitutional under the Iowa Constitution.¹⁰¹ The defendants appealed.¹⁰²

The Iowa Supreme Court reversed the district court, not because it had come to the wrong decision, but rather “because the district court did not make any specific finding of fact.”¹⁰³ The district court failed to apply the test that was crafted in *Gacke*, so the Iowa Supreme Court could not deem the statute unconstitutional without first reviewing the relevant facts under that test.¹⁰⁴ In the *Honomichl* decision, the Iowa Supreme Court made it clear that district courts must follow the *Gacke* reasoning when making decisions on nuisance suits.¹⁰⁵

C. THE IOWA SUPREME COURT’S RECENT DEPARTURE FROM PRECEDENT

During the 2021–2022 term, the Iowa Supreme Court ruled in multiple cases to do away with long-standing precedents dealing with a variety of issues. One of these cases was *Garrison v. New Fashion Pork LLP*, which overturned the court’s decision in *Gacke*.¹⁰⁶ Notably, Justice Waterman, who wrote a concurrence in *Honomichl* alluding to his inclination to overturn the *Gacke* decision, wrote the opinion for the majority of the court.¹⁰⁷ The *Garrison* decision has the effect of making it harder, if not impossible, for plaintiffs to recover non-economic damages.¹⁰⁸

95. *Id.* at 179 (quoting *May’s Drug Stores*, 45 N.W.2d at 250–51).

96. *Id.*

97. *Honomichl v. Valley View Swine, LLC*, 914 N.W.2d 223, 237–38 (Iowa 2018), *overruled in part* by *Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67 (Iowa 2022).

98. *Id.* at 226.

99. *Id.*

100. *Id.*

101. *Id.* at 226–27.

102. *Id.* at 227.

103. Morgan, *supra* note 63, at 630.

104. *Id.* at 630–31.

105. *Id.* at 631.

106. *Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67, 72, 85 (Iowa 2022).

107. *Honomichl*, 914 N.W.2d at 239 (Waterman, J., concurring).

108. See *Garrison*, 977 N.W.2d at 113 (“Do the men and women of this state have the constitutional right to protect their property? The text of the constitution, precedent, and history say yes. The majority says no.”) (McDonald, J., dissenting).

This Section will first give the important facts of the *Garrison* case. Next, this Section will give the majority's holding and reasoning for their decision to affirm the lower courts and overrule *Gacke*. Third, this Section will discuss the concurring opinion's significance. Finally, this Section will discuss the two dissenting opinions that were given in this case.

1. Facts of the Case

Garrison lived on land in Emmet County and owned other land in Kossuth and Wright Counties.¹⁰⁹ In 2015, New Fashion Pork began operating a CAFO approximately half of a mile from Garrison's property line, both of which are situated on uphill, adjacent parcels.¹¹⁰ Garrison complained about numerous issues that he experienced due to the newly established CAFO. First, he said that there was "more drainage flowing to his property" due to the pattern tiling the defendants had done.¹¹¹ Next, he claimed that New Fashion Pork improperly applied manure to the field "and the manure discharged [on] to [his] property."¹¹² Finally, Garrison noted on multiple occasions that he was repulsed by an overpowering stench that blanketed his property, depriving him of all enjoyment of his home, including the ability to sleep.¹¹³

Garrison sued New Fashion Pork for damages in Iowa district court asserting three causes of action: "common law nuisance, trespass, and drainage law violations."¹¹⁴ New Fashion Pork moved for summary judgment, arguing that they had immunity under Iowa Code section 657.11.¹¹⁵ The district court ruled for New Fashion Pork and held that Garrison had failed to satisfy the *Gacke* test.¹¹⁶ On appeal, the Iowa Supreme Court affirmed.¹¹⁷

2. Majority Holding

The Iowa Supreme Court took this opportunity to do away with the *Gacke* test and said the correct test when deciding these cases is a rational basis test.¹¹⁸ The court started by discussing the history of the *Gacke* and *Honomichl* decisions.¹¹⁹ The majority found that *Gacke* and *Honomichl* did not cite or note "any authority for adopting the three-part [factor] test."¹²⁰ The majority stated:

109. *Id.* at 72–73 (majority opinion).

110. *Id.* at 73.

111. *Id.*

112. *Id.* (second alteration in original).

113. *Id.*

114. *Id.* at 72.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 76.

119. See generally *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168 (Iowa 2004), *overruled in part by Garrison*, 977 N.W.2d 67; *Honomichl v. Valley View Swine, LLC*, 914 N.W.2d 223 (Iowa 2018), *overruled in part by Garrison*, 977 N.W.2d 67.

120. *Garrison*, 977 N.W.2d at 78.

“No other court in any jurisdiction has adopted or used the test.”¹²¹ They also noted that Iowa was the only state that declared it unconstitutional for right-to-farm laws to give statutory immunity to CAFO operators.¹²²

Notably, the court also acknowledged “that Garrison failed to preserve his takings claim” on appeal, and therefore, the court was precluded from ruling on it.¹²³ The court went on to overrule the *Gacke* three-factor test.¹²⁴ The court reasoned that *Gacke* was an outlier that led to adverse consequences, created unnecessary litigation, and was practically difficult to administer.¹²⁵ The court articulated that the correct test, based on prior and subsequent decisions, is a “highly deferential rational basis test.”¹²⁶ *Gacke* failed in the court’s eyes by not inquiring “whether *the law* furthers a reasonable legislative objective” but instead “it asked whether its *application to the plaintiffs* in that particular case did—effectively the opposite of a rational basis test.”¹²⁷ The court stated, “CAFOs are controversial, but it is not our role to second-guess the legislature’s policy choices.”¹²⁸

The court went on to apply the rational basis test to the statute to see whether “there [was] a reasonable fit between the means used to advance the government interest and the interest itself.”¹²⁹ Applying rational basis, a statute will be deemed constitutional unless it “clearly, palpably, and without doubt infringe[s]’ a constitutional right.”¹³⁰ The court found that the state had a legitimate interest in protecting and encouraging production of livestock and that it used a proper means in “granting partial immunity from nuisance suits.”¹³¹ The court ultimately held that Iowa Code section 657.11 passed the rational basis test and that New Fashion Pork qualified for the statutory immunity.¹³² Because the court could not rule on the Takings Clause analysis, the scope of the court’s holding is limited only to allow statutory immunity from non-economic damages.

3. Concurring Opinion

Justice Mansfield concurred with the court’s decision and wrote separately solely to respond to the opinions of the dissenting justices.¹³³ Justice Mansfield began by emphasizing that the court’s decision did not deal with the *Bormann*

121. *Id.*

122. *Id.*

123. *Id.* at 79–81.

124. *Id.* at 81.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 85.

129. *Id.* at 86.

130. *Id.* (alteration in original) (quoting Residential & Agric. Advisory Comm., LLC v. Dyersville City Council, 888 N.W.2d 24, 50 (Iowa 2016)).

131. *Id.*

132. *Id.* at 81, 88.

133. *Id.* at 91 (Mansfield, J., concurring).

case or the Takings Clause because Garrison argued entirely under *Gache* and the Inalienable Rights Clause.¹³⁴ Justice Mansfield discussed the difference “between property and common law rules,” which he claimed were somewhat meshed together by the *Gache* decision.¹³⁵ He pointed out that the common law is not “froze[n]” by the Iowa Constitution and that the legislature is designed and empowered to create laws that modify and “change the common law.”¹³⁶ Finally, Justice Mansfield said that the test from *Gache* “came out of nowhere and ha[d] no limiting principle” and the court was correct to do away with it.¹³⁷

4. Dissenting Opinions

There were two dissenting opinions in the case. Justice Appel wrote the first dissenting opinion.¹³⁸ He began by reviewing the Iowa Bill of Rights and stated that the Bill of Rights is consistent with the Inalienable Rights Clause in that “[n]othing in [S]ection 2 the Iowa Bill of Rights undercuts the rights established in the [I]nalienable [R]ights [C]ause.”¹³⁹ Justice Appel found text of Article I, Section 1 of the Iowa Constitution important, stating clearly that this section “is a legal prescription conferring powers upon the courts.”¹⁴⁰ *Gache* reflected this legal prescription in Justice Appel’s eyes as he stated that the *Gache* test was a test for judicial review of issues arising out of property rights.¹⁴¹ Justice Appel said that just because the majority did not like the three-factor test it does not mean they were permitted to get rid of it.¹⁴² According to Justice Appel, *Gache* “was not an outlier” and to overturn it would be to abandon the principle of stare decisis.¹⁴³

Justice McDonald set forth a second dissenting opinion, in which he was joined by Justice Oxley.¹⁴⁴ Justice McDonald first claimed that the majority’s holding did “not faithfully apply” the court’s law when it came to rational basis review.¹⁴⁵ Expanding on his dissent, Justice McDonald asserted that the majority had focused solely on the ends of the legislation, but neglected to look at the means.¹⁴⁶ On the other hand, *Gache* applied the law and examined “both the end[s] and the means of [the] statute,” as one is supposed to.¹⁴⁷ Referencing the U.S. Supreme Court case, Justice McDonald discussed *Richards v. Washington*

134. *Id.* at 91–92.

135. *Id.* at 91.

136. *Id.*

137. *Id.* at 94.

138. *Id.* at 96–97 (Appel, J., dissenting).

139. *Id.* at 97.

140. *Id.* at 99 (emphasis omitted).

141. *Id.* at 100.

142. *Id.* at 100–02.

143. *Id.* at 100–02.

144. *Id.* at 103, 113 (McDonald, J., dissenting).

145. *Id.* at 103.

146. *Id.*

147. *Id.*

Terminal Co., which *Bormann* had followed.¹⁴⁸ *Richards* held “that while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance.”¹⁴⁹ *Gacke* followed both *Richards* and *Bormann*.¹⁵⁰ Justice McDonald stated that he was not persuaded by the majority’s reasoning that Iowa is an outlier when it comes to their reasoning in *Gacke*.¹⁵¹ “[g]iven the unique nature of our property and nuisance law, it should be no surprise that constitutional protections for property rights apply differently in Iowa.”¹⁵² Justice McDonald further contended that Iowa is unique from any other state based on the level of immunity it awards parties in nuisance suits.¹⁵³ Reflecting on the Garrisons’ experience, Justice McDonald noted that their experience is not uncommon for ones living in areas with these hog confinements.¹⁵⁴ Justice McDonald’s strong support of the *Gacke* test is summarized well by his statement that “when the legislature exercises its police powers to allow one person to profit by damaging, degrading, and destroying the property and property rights of another, the legislature has exceeded its constitutional authority”¹⁵⁵

D. ECONOMIC AND SOCIAL IMPORTANCE OF CAFOs IN IOWA

“Hogs . . . are one of the main sources of meat in the United States.”¹⁵⁶ In 2017, Iowa “housed more than 22.7 million hogs,”¹⁵⁷ and in 2023, that number rose to about 23.5 million hogs.¹⁵⁸ No other state comes even close to producing as much pork as Iowa does. Minnesota, the second largest producer of pork, only produces around nine million hogs.¹⁵⁹ The fact “that Iowa [is] the top hog-producing state” signifies the economic and social significance of CAFOs in the region.¹⁶⁰ In 2019, there were 3,963 large CAFOs in Iowa, each of them housing over one thousand animals.¹⁶¹

148. *Id.* at 104–05 (discussing *Richards v. Wash. Terminal Co.*, 233 U.S. 546 (1914); *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309 (Iowa 1998)).

149. *See id.* at 104 (quoting *Richards*, 233 U.S. at 553).

150. *Id.* at 104–05.

151. *Id.* at 106.

152. *Id.*

153. *Id.* (discussing IOWA CODE § 657.11(2) (2020)).

154. *Id.* at 111–12.

155. *Id.* at 112.

156. M. Shahbandeh, *Top 10 U.S. States by Inventory of Hogs and Pigs as of March 2023 (in 1,000s)*, STATISTA (Sept. 13, 2023), <https://www.statista.com/statistics/194371/top-10-us-states-by-number-of-hogs-and-pigs> [<https://perma.cc/8LV6-6HSW>].

157. Konopacky & Rundquist, *supra* note 19.

158. Shahbandeh, *supra* note 156.

159. *Id.*

160. *See* Konopacky & Rundquist, *supra* note 19 (providing statistics to show how much of an impact the pork industry has on the State of Iowa).

161. *Id.*

Eighty-nine of Iowa's ninety-nine counties have adopted a Master Matrix system.¹⁶² This is a system used by the Department of Natural Resources ("DNR") to help decide whether to approve or deny the building of a CAFO.¹⁶³ This system applies in two situations: "(1) confinement feeding operations using unformed manure storage, and (2) confinement feeding operations of [one thousand] animals or more using a formed manure storage."¹⁶⁴ Producers will apply for the DNR to come assess their facilities and see if they are suitable to become a CAFO.¹⁶⁵ The Master Matrix system has forty-four "questions whereby points can be earned" to reach a satisfactory score and hence be approved to construct a CAFO.¹⁶⁶ The issue with Iowa's Master Matrix system is that it approves almost all applicants. In fact, "[ninety-seven] percent of requested permits are approved," according to the Des Moines Register.¹⁶⁷ Significantly, these approvals have been met with objection and protests from community members and citizens of Iowa.¹⁶⁸ Approving more CAFOs than disapproving poses a problem due to the DNR's limited resources, which are not equipped to handle the large number of CAFOs being built.

Looking at economic impact, CAFOs have had a negative impact on employment in the state.¹⁶⁹ Contrary to popular belief, corporate or factory farms employ fewer people than the family farms they are replacing.¹⁷⁰ This is partially because CAFOs can produce a large number of animals with fewer employees.¹⁷¹ A study conducted by Food and Water Watch, a national environmental advocacy group, found that "Iowa counties with the most hog [CAFO] development" had significant declines in population, median household income, and total job opportunities.¹⁷² Additionally, CAFO overproduction lessens the price of livestock.¹⁷³ According to Food and Water Watch, "[a]djusting for inflation, today's farmers earn [two dollars] less per pound of

162. Ryan Buren, Note, *It's Time to Take a Second Look at Iowa's Master Matrix*, 23 DRAKE J. AGRIC. L. 469, 471 (2018).

163. *Id.* at 470.

164. *Id.*

165. *See id.* at 469, 471.

166. *Id.* at 471.

167. James Merchant & David Osterberg, *Impacts of the CAFO Explosion on Water Quality and Public Health*, DES MOINES REG. (Jan. 24, 2018, 11:28 AM), <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2018/01/24/impacts-cafo-explosion-water-quality-and-public-health/1059051001> [<https://perma.cc/5NX8-99ZS>].

168. *See id.* (stating that approval of permits by the Master Matrix system have happened "over objections of county supervisors in now [twenty] counties, and despite the protests of neighbors and citizen groups").

169. *See Economic Impacts on Rural Economies*, IOWA ALL. FOR RESPONSIBLE AGRIC., <https://iowa-responsibleagriculture.org/learn-about-the-problem/economic-impact-of-cafos-on-rural-communities> [<https://perma.cc/KXY5-YH97>].

170. *Id.*

171. *See id.*

172. Seth Gladstone, *New Report Outlines Deepening Crisis in Iowa Hog Industry*, FOOD & WATER WATCH (May 5, 2022), <https://www.foodandwaterwatch.org/2022/05/05/new-report-outlines-deepening-crisis-in-iowa-hog-industry> [<https://perma.cc/GV7G-57GW>].

173. *Id.*

pork produced compared to 1982, while the retail price fell only [one dollar]; slaughterhouses, processors and retailers capture the other [one dollar].”¹⁷⁴

Economic impacts are not the only negative consequence brought to bear by the proliferation of CAFOs in Iowa—there are numerous social costs as well. Of primary concern is the impact on water systems and water quality in Iowa.¹⁷⁵ Manure leaks and spills are common among CAFOs and they often go unregulated.¹⁷⁶ The Environmental Protection Agency (“EPA”) found in their 2000 National Water Quality Inventory that twenty-nine states attributed impairment in water quality to AFOs and CAFOs.¹⁷⁷ Additionally, CAFOs and their gaseous air emissions have had an impact on the health of neighbors of these confinements.¹⁷⁸ There have been large “increases in childhood asthma, adult asthma, airway obstruction, and irritant-linked eye and upper airway symptoms.”¹⁷⁹ Children are particularly susceptible to health problems caused by the environment that they are in.¹⁸⁰ The Keokuk County Rural Health Study found that 42.9% of children that lived near CAFOs or on farms raising swine have asthma.¹⁸¹ The Iowa Policy Project cited a study that found that at “CAFO-proximate” schools, the likelihood that children would have asthma was 19.7%, while at non-CAFO-proximate schools it was 7.3%.¹⁸² Studies show that adults similarly suffer from airway diseases, including “upper airway irritation and asthma.”¹⁸³

There are also psychosocial impacts, as people have said that their quality of life has gone down due to the growing number of CAFOs in their community.¹⁸⁴ The main impact on individuals’ quality of life is the odor of these confinements.¹⁸⁵ CAFO growth also has a potential impact on “rural tourism, recreation, and destination retirement development.”¹⁸⁶ One final social impact is a decline in property value when the property is located near these operations.¹⁸⁷ An article by John A. Kilpatrick found that diminution

174. *Id.* (emphasis omitted).

175. *See Impact of CAFOs on Water Quality*, IOWA ALL. FOR RESPONSIBLE AGRIC., <https://iowaresponsibleagriculture.org/learn-about-the-problem/water-quality> [<https://perma.cc/3SJJ-BYVB>].

176. *See id.*

177. HRIBAR, *supra* note 2, at 3.

178. *Id.* at 5–7.

179. Merchant & Osterberg, *supra* note 167.

180. *See* MERCHANT & OSTERBERG, *supra* note 4, at 3–4.

181. *Id.* at 4.

182. *Id.*

183. *Id.* at 5–6.

184. *See* Merchant & Osterberg, *supra* note 167.

185. *See* Hines, *supra* note 34 (manuscript at 3).

186. *See* JAN L. FLORA, QIAOLI (LILY) CHEN, STACY BASTIAN & RICK HARTMANN, HOG CAFOs AND SUSTAINABILITY: THE IMPACT ON LOCAL DEVELOPMENT AND WATER QUALITY IN IOWA 21 (2007), https://www.academia.edu/26522666/Hog_CAFOs_and_Sustainability_The_Impact_on_Local_Development_and_Water_Quality_in_Iowa (on file with the *Iowa Law Review*).

187. *See* Merchant & Osterberg, *supra* note 167.

in property value is confirmed by county tax assessors' actions.¹⁸⁸ Across farm states, Iowa included, “[r]eductions of the assessed value [of property] range from [twenty] to [forty] percent.”¹⁸⁹ A study cited by Kilpatrick stated “that only landfills have a worse effect of adjacent property values.”¹⁹⁰

These concerns continue to play a large role in legislative decisions regarding the regulation of CAFOs in Iowa. There have been many discussions surrounding how to best regulate CAFOs, with the most extreme position belonging to Iowa Democratic legislators who have proposed a moratorium on new CAFO construction for four years in a row.¹⁹¹

II. THE IMPACTS AND ISSUES OF THE *GARRISON* DECISION

The implications of the *Garrison* decision can negatively impact the holdings of other court cases, primarily the *Bormann* decision. One of the big takeaways from the *Garrison* decision is that it essentially gives statutory immunity to CAFOs from nuisance lawsuits.¹⁹² These CAFO cases are linked together in a chain. Now that one link has been “broken” it is not unimaginable that the others could be done away with as well. Protecting CAFOs comes at the expense of protecting small farmers, neighboring landowners, and the environment.¹⁹³ Two key points need to be emphasized in this context. First, Iowa should not overrule precedent unless there is a compelling reason to do so.¹⁹⁴ Second, there is a social cost to protecting CAFOs.¹⁹⁵

This Part will start by analyzing whether the *Bormann* decision will be overturned in a future Iowa Supreme Court term if the justices are given the opportunity. Next, this Part will discuss the differences and similarities between the Takings Clause and the Inalienable Rights Clause. Finally, this Part will analyze the Iowa Supreme Court’s recent disregard for precedent and the effects that it could have on CAFO regulations in the future.

188. John A. Kilpatrick, *Animal Operations and Residential Property Values*, 83 APPRAISAL J. 41, 46 (2015); MERCHANT & OSTERBERG, *supra* note 4, at 12.

189. MERCHANT & OSTERBERG, *supra* note 4, at 12–13.

190. Kilpatrick, *supra* note 188, at 46 (citing Richard C. Ready & Charles W. Abdalla, *The Amenity and Disamenity Impacts of Agriculture: Estimates from a Hedonic Pricing Model*, 87 AM. J. AGRIC. ECON. 314 (2005)) (internal quotation marks omitted).

191. See Donnelle Eller, *Group Takes Aim at Large Livestock Operations it Says Pollutes Iowa’s Water*, DES MOINES REG. (Feb. 9, 2021, 4:53 PM), <https://www.desmoinesregister.com/story/money/agriculture/2021/02/09/iowa-lawmakers-join-environmentalists-calling-halt-large-livestock-operations/4436620001> [<https://perma.cc/Q9MT-DDR7>] (discussing the proposal of “Rep[resentative] Art Staed of Cedar Rapids and Sen[ator] Pam Jochum of Dubuque”).

192. See *Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67, 86–88 (Iowa 2022) (indicating that rational basis is a very low standard that is almost impossible not to meet).

193. See MERCHANT & OSTERBERG, *supra* note 4, at 2–3.

194. See generally Michael Kimberly, *Symposium: The Importance of Respecting Precedent*, SCOTUSBLOG (Dec. 20, 2017, 2:57 PM), <https://www.scotusblog.com/2017/12/symposium-importance-respecting-precedent> [<https://perma.cc/9M8B-K54Y>] (discussing the importance of the doctrine of stare decisis and how it “establishes a strong presumption favoring adherence to precedent in order to maintain respect for the rule of law and cabin judicial discretion”).

195. See MERCHANT & OSTERBERG, *supra* note 4, at ii, 2–12.

A. IS BORMANN UNDER ATTACK?

Gacke was based on principles from *Bormann*, as “the Iowa Supreme Court adopted the same taking-of-an-easement reasoning propounded in *Bormann*” to make their decision in *Gacke*.¹⁹⁶ Based on this, it does not take a far stretch of the imagination to see how the court could say that since *Gacke* was overturned, it is only right to now do away with *Bormann*. If the opportunity presents itself to the court, *Bormann* could be overturned.

In *Bormann*, the court found that there was an unconstitutional taking.¹⁹⁷ The court struck down Iowa Code section 352.11(1)(a) under the Takings Clause of Iowa’s and the U.S.’s Constitution.¹⁹⁸ The court did not approve of the legislature going beyond their authority to immunize CAFOs from nuisance.¹⁹⁹ In *Gacke*, the court found that Iowa Code section 657.11 was unconstitutional under the Takings Clause and the Inalienable Rights Clause.²⁰⁰ Turning to *Garrison*, the court explicitly ruled only on the inalienable rights issue from *Gacke*.²⁰¹ They could not reach the “taking of an easement” theory propounded in *Bormann* because *Garrison* “failed to preserve error on his takings claim” and “failed to generate a question of fact precluding summary judgment on statutory nuisance immunity or causation for his trespass and drainage claims.”²⁰² The court did not decline to rule on the Takings Clause issue because they did not think it needed a second look; rather, they did not rule on it only because it was not preserved properly.²⁰³ Justice Waterman, in his majority opinion, made sure to note that Iowa is an outlier in how it interprets the constitutionality of statutory nuisance immunity for CAFOs and how “*Gacke* and *Bormann* stand alone” when looking at the fifty states’ interpretations of these issues.²⁰⁴ Justice Waterman also cited cases that rejected *Bormann*’s easement theory.²⁰⁵ If it would have been preserved, the court could have gone as far to overrule *Bormann*. The court, if the opportunity presents itself, might decide to overrule *Bormann* and say that a nuisance

196. Hines, *supra* note 34 (manuscript at 33) (discussing the similarities in *Bormann* and *Gacke* and going on to state that “[t]he court ruled that 352.11(1) and 657.11 were functionally so similar they must be considered under the same constitutional analysis”).

197. *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 321 (Iowa 1998).

198. *Id.*

199. *Id.*

200. *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 179 (Iowa 2004) *overruled in part* by *Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67, 72 (Iowa 2022) (overruling the test used for the inalienable rights analysis).

201. *Garrison*, 977 N.W.2d at 72.

202. *Id.*

203. *Id.*

204. *Id.* at 78.

205. *Id.* (citing *Moon v. N. Idaho Farmers Ass’n*, 96 P.3d 637, 644–45 (Idaho 2004); *Lindsey v. DeGroot*, 898 N.E.2d 1251, 1259 (Ind. Ct. App. 2009)).

immunity statute can no longer be considered under the “taking of an easement” theory.²⁰⁶

Another indicator that *Bormann* could be on the chopping block is that Justice McDonald’s dissent essentially predicts that the *Garrison* decision will impact other right-to-farm cases.²⁰⁷ Before the *Garrison* decision, the Iowa Supreme Court was the only court in the United States that “unequivocally struck down right-to-farm laws protecting CAFOs as unconstitutional.”²⁰⁸ At one time, it was very important in the court’s eyes to protect neighboring property owners from the nuisance created by CAFOs, but that now appears to be going by the wayside.

B. *THE DIFFERENCES AND SIMILARITIES BETWEEN THE TAKINGS CLAUSE AND THE INALIENABLE RIGHTS CLAUSE*

While the *Bormann* and *Gacke* decisions were decided under two different constitutional principles, the Iowa Supreme Court in both of these cases ruled that the laws were unconstitutional because the laws “allow[ed] the state to acquire a permanent easement against the neighbor’s property that allowed a CAFO to pollute the property without any liability for the harm caused”; therefore, it was “an unconstitutional taking of the neighbor’s property right because the state provided no payment of just compensation to the neighbor for loss of [the] valuable easement.”²⁰⁹ While Iowa case law on CAFOs has distinguished between the Takings Clause and the Inalienable Rights Clause, there is overlap in how the two clauses work, in that the Takings Clause is protecting one’s inalienable property rights. These two clauses are related in nature and related to how they were used to strike down nuisance immunity statutes in Iowa.

From the *Gacke* decision, the court found that *Bormann* only protected a property owner to the extent that they faced economic damages.²¹⁰ The court then used the Inalienable Rights Clause to come to the novel holding that one has inalienable rights in all of the damages available in a nuisance suit.²¹¹ This rendered unconstitutional the Iowa statute’s limitation on damage

206. See Paul Goeringer, *Supreme Court of Iowa Reverses Course on Right-to-Farm Rulings*, UNIV. MD., COLL. AGRIC. & NAT. RES. (Aug. 23, 2022), <https://www.agrisk.umd.edu/post/supreme-court-of-iowa-reverses-course-on-right-to-farm-rulings> [<https://perma.cc/CY7T-CPM6>] (discussing how the rational basis standard in the Inalienable Rights context is hard for plaintiffs to prove); see also Debra Cassens Weiss, *Overturing Precedent, Top Iowa Court Limits Nuisance Suits Against Hog Farms*, ABAJ. (July 5, 2022, 2:31 PM), <https://www.abajournal.com/news/article/overturing-precedent-top-iowa-court-limits-nuisance-suits-against-hog-farms> [<https://perma.cc/3Q8L-LWYG>] (discussing the role of nuisance immunity in right-to-farm litigation).

207. See *Garrison*, 977 N.W.2d at 106 (McDonald, J., dissenting) (indicating the justices on the Iowa Supreme Court may have discussed the future of right-to-farm laws in light of the *Garrison* decision).

208. Hines, *supra* note 34 (manuscript at 34).

209. *Id.*

210. See *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 172–74 (Iowa 2004), *overruled in part by Garrison*, 977 N.W.2d 67.

211. *Id.* at 179.

awards.²¹² There appears to be a double layer of protection with these two clauses, with the *Gache*/inalienable rights layer extending more protections than the first layer, *Bormann*/takings. The *Garrison* decision has stripped the protective nature of the inalienable rights protection under the Iowa Constitution and eroded this layer of protection that Iowa citizens once had. If the inalienable rights protection is essentially gone, statutory immunity could be back in business soon for CAFOs if *Bormann* is overturned.

C. THE IOWA SUPREME COURT'S RECENT DISREGARD FOR PRECEDENT

The Iowa Supreme Court has recently disregarded precedent.²¹³ In 2021–2022 term, the Iowa Supreme Court overruled some long-held precedents, including the contentious decision of *Planned Parenthood of the Heartland v. Reynolds*.²¹⁴ In *Planned Parenthood of the Heartland*, Justice Mansfield stated, “our court has been more willing to revisit constitutional precedents in recent years.”²¹⁵ Justice Mansfield noted that “[s]tare decisis has limited application in constitutional matters,” and “courts must be free to correct their own mistakes when no one else can.”²¹⁶ This lends to the prediction that if the court had the chance to overturn *Bormann*, they would not shy away from doing so, especially because a majority of the justices signed onto a majority opinion in *Garrison* criticizing the *Bormann* decision.²¹⁷ Even though the Iowa Supreme Court is considered a 7–0 conservative court, that does not mean they will always agree. In the 2021–2022 term, the justices unanimously decided fifty-six percent of their cases, which is a decline from unanimously deciding seventy percent of their cases in the 2020–2021 term.²¹⁸ Doug Keith, an attorney for the Brennan Center for Justice, stated that “the justices sometimes shift from defending the importance of precedent to attacking it, depending on whether they support the underlying ruling, rather than being committed to precedent for its own sake.”²¹⁹

III. MOVING FORWARD TO PROTECT IOWANS AGAINST CAFOS

There are two different avenues that would lead to a desirable outcome regarding CAFO regulations. Both paths provide an adequate means of protection for the State of Iowa and its citizens while also adhering to the

212. *Id.*

213. William Morris, *Iowa Supreme Court More Often Rejects Precedents Under Bigger Conservative Majority, Analysis Shows*, DES MOINES REG. (July 31, 2022, 7:00 PM), <https://www.desmoinesregister.com/story/news/crime-and-courts/2022/08/01/iowa-supreme-court-precedent-stare-decisi-s-abortion-conservative-majority> (on file with the *Iowa Law Review*).

214. *Id.*

215. *Planned Parenthood of the Heartland, Inc. v. Reynolds*, 975 N.W.2d 710, 733 (Iowa 2022).

216. *Id.* (first quoting *State v. Kilby*, 961 N.W.2d 374, 386 (Iowa 2021) (McDonald, J. concurring); then quoting J. Buller & Kelli A. Huser, *Stare Decisis in Iowa*, 67 DRAKE L. REV. 317, 322 (2019)).

217. *See Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67, 72, 90 (Iowa 2022).

218. Morris, *supra* note 213.

219. *Id.*; *see also* Kimberly, *supra* note 194 (discussing why stare decisis is important and what it is protecting the law from, which seem to be implicated in Iowa's recent disregard for stare decisis).

principles of the Iowa and U.S. Constitutions. Each option has its shortcomings, but they are better than living in a world where CAFOs are protected from essentially any nuisance suit that could be brought against them.²²⁰

This Part will first argue that CAFOs cannot and should not be eradicated completely from the state of Iowa. Second, this Part will propose that the Iowa Supreme Court should adhere to the established precedent and not overrule the *Bormann* decision in a future case. Finally, this Part will argue that the Iowa Legislature should enact legislation that creates a temporary moratorium on CAFOs so that the benefits of these operations can be felt more heavily throughout the state.

A. CAFOS SHOULD NOT BE ERADICATED COMPLETELY

CAFOs benefit Iowa's economy and should not be eradicated completely. When CAFOs are "properly managed, located, and monitored[,] they can be a great resource for the state they are in, and their social and environmental cost can be mitigated."²²¹ CAFOs are a source for low-cost animal products (meat, dairy, and eggs) due to the high-efficiency levels of these operations.²²² If these operations are run correctly according to regulations, they can increase employment rates in communities as well as strengthen the local economy.²²³ In 2012, the EPA issued a report on CAFOs in Iowa, in response to state environmental organizations pushing them to do so.²²⁴ The EPA found that "Iowa had . . . failed to issue required CAFO permits, conduct inspections and issue required penalties as required by federal law."²²⁵ These are all things that should, and need, to be done in order to reap the benefits CAFOs can offer to Iowa. The effects of CAFOs and "[t]he effects of using local materials, feed, and livestock" can be seen "throughout the economy, and increased tax expenditures will lead to increase[d] funds for schools and infrastructure."²²⁶ These are all reasons that CAFOs in Iowa should not be done away with completely. To stop building CAFOs in Iowa permanently would severely damage the livestock production industry in Iowa.²²⁷ Currently, the Iowa Legislature does not sufficiently regulate these operations so that their benefits are felt at the local level.²²⁸

220. It is important to note that one cannot be naïve to the benefits that CAFOs give us. The solutions proposed are, at best, trying to balance the interests of making sure CAFOs can continue to benefit the economy of Iowa while also protecting the social and environmental interests at stake.

221. HRIBAR, *supra* note 2, at 2.

222. *Id.*

223. *Id.*

224. Konopacky & Rundquist, *supra* note 19.

225. *Id.*

226. HRIBAR, *supra* note 2, at 2.

227. *Bills to Restrict New CAFOs in Iowa Likely Doomed This Session*, KIWA RADIO (Feb. 11, 2021), <https://kiwaradio.com/ag-news/bills-to-restrict-new-cafos-in-iowa-likely-doomed-this-session> [https://perma.cc/2F6A-EGW8].

228. See *supra* Section I.D (discussing the economic and social impacts that have occurred from the under regulation of CAFOs in the State of Iowa).

B. *THE IOWA SUPREME COURT'S ROLE IN CURBING CAFOS*

The first option is the court's to take. The Iowa Supreme Court should adhere to the principle of stare decisis and uphold *Bormann*.²²⁹ The court should continue to analyze per se Takings Clause claims under *Bormann* and should uphold the principle that nuisance immunity statutes can and should be considered under the "taking of an easement" theory.²³⁰ In future cases challenging the takings analysis under *Bormann*, the court should not stray from the test that was used in *Bormann* to ensure that the principle of the law is being reflected and not the justices' personal opinions on how Iowa should handle right-to-farm laws.²³¹ Iowa courts have held great importance in not immunizing CAFOs, even if they were the only ones to do so. Justice McDonald identifies the importance of the *Bormann* and *Gacke* decisions by saying:

The statutory immunity provided to certain animal feeding operations is not unconstitutional because it is bad policy; it is unconstitutional because immunizing private nuisancers from paying damages caused by their conduct is contrary to Iowa's legal history, Iowa's property law, Iowa's nuisance law, Iowa's precedents regarding the lawful exercise of the police power, and Iowa's interrelated constitutional provisions protecting private property.²³²

The court should continue to value Iowa's legal history, property law, nuisance law, precedents, and constitution, and it should not cave to the pressures of CAFOs.

C. *THE IOWA LEGISLATURE'S AND EXECUTIVE BRANCH'S ROLE IN REGULATING CAFOS*

If the Iowa Supreme Court fails to uphold its *Bormann* precedent, the Iowa Legislature and Executive Branch must put their foot down when it comes to CAFOs. The Iowa Legislature needs to stop protecting and shielding these large operations through regulation that gives statutory immunity from nuisance actions, and the Iowa Executive Branch needs to ensure that these CAFOs are following proper regulations.²³³ CAFOs should properly run their operations and follow regulations that are in place for them, such as the regulation requiring "all manure from an animal feeding operations [sic] must be land applied in a manner that will not cause surface or groundwater

229. See Kimberly, *supra* note 194.

230. See Weiss, *supra* note 206.

231. See Kimberly, *supra* note 194.

232. Garrison v. New Fashion Pork LLP, 977 N.W.2d 67, 112 (Iowa 2022) (McDonald, J., dissenting).

233. This has been demonstrated time and time again with legislation that has been approved to extend protections to CAFOs, with section 657.11 being a perfect example. IOWA CODE § 657.11 (2024).

pollution.”²³⁴ If CAFOs fail to follow regulations, they should be fined or have their permit revoked.

While following regulations would raise the cost of operations for CAFOs, which would raise the prices of their goods, it is an overall good for Iowa as it deals with the environmental issue. The way CAFOs are being run currently also costs Iowans. Alicia Vasto, the IEC Water Program Director stated:

Every Iowan is paying in some way for these operations — some more than others. Even if you don’t have a CAFO in your community, you’re probably paying higher water bills as utilities struggle to reduce nitrate in your drinking water. You’re paying health-care costs as well, whether it’s direct medical bills or increasing health-care premiums as Iowa’s cancer rate increases.²³⁵

In the end, it appears that the costs could even out by forcing CAFOs to follow regulations. The nuisance issue can be dealt with by the Iowa Legislature not creating more legislation like Iowa Code sections 352.11 and 657.11, and it should remove Iowa Code section 657.11(A), which limits the money damages a winning nuisance plaintiff could collect from CAFO defendants.²³⁶

There is proposed legislation that could and should be adopted to address this situation. On February 7, 2022, Representative Art Staed introduced “legislation to establish an immediate moratorium on the expansion of factory farming in the state.”²³⁷ The moratorium would expire on July 1, 2027.²³⁸ This “[b]ill includes provisions to expand the reach of the bill, expanding the Department of Natural Resources’ authority to regulate factory farm water pollution, while holding corporate integrators jointly responsible for this pollution.”²³⁹ This bill is intended to put a moratorium in place until current CAFO regulations are actually enforced. According to Johns Hopkins University, “[sixty-three percent] of Iowans” believe that it is “important for the [Iowa] Legislature to ban [the] construction of new and expanded CAFOs.”²⁴⁰ This is a bill that should be utilized to meet the needs of the Iowa pork industry while also protecting Iowans and their needs and wants.

234. *Separation Distances for Land Application of Manure*, IOWA DNR (Oct. 2008), https://www.iowadnr.gov/Portals/idnr/uploads/afo/fs_sepdstb4.pdf [<https://perma.cc/R8RQUGEA>] (noting Chapter 65 of the Iowa Administrative Code and the rules that govern CAFOS).

235. *New Report Reveals True Costs of CAFOS in Iowa*, IOWA ENV’T COUNCIL, RIVER CITIES’ READER (Nov. 15, 2023), <https://www.rcreader.com/news-releases/new-report-reveals-true-costs-cafos-iowa> [<https://perma.cc/MB5G-LQYC>].

236. IOWA CODE §§ 352.11, 657.11 (A); Kitt Tovar, *Update on Right-to-Farm Legislation, Cases, and Constitutional Amendments*, IOWA STATE UNIV., CTR. FOR AGRIC. L. & TAX’N (May 28, 2019), <https://www.calt.iastate.edu/article/update-right-farm-legislation-cases-and-constitutional-amendments> [<https://perma.cc/5HYX-J9RQ>].

237. Phoebe Galt, *Iowa Legislator Introduces Expanded Factory Farm Moratorium Legislation*, FOOD & WATER WATCH (Feb. 7, 2022), <https://www.foodandwaterwatch.org/2022/02/07/iowa-legislator-introduces-expanded-factory-farm-moratorium-legislation> [<https://perma.cc/G4MV-TGFM>].

238. H.F. 2305, 89th Gen. Assemb. (Iowa 2022).

239. Galt, *supra* note 237.

240. Eller, *supra* note 191.

It is important to note that this bill would not create a complete proliferation of CAFOs, as it has an “end date.” The Legislature cannot simply disregard the fact that the state of Iowa heavily benefits from the pork industry, and CAFOs should not just be tossed out the window as it would be detrimental to the Iowa economy.²⁴¹ CAFOs are a vital part of Iowa’s economy, and that must be balanced against the clear issues they present to citizens. With a temporary moratorium in place, this would also help the nuisance issue as more buildings would not be built for this period of time. Instead of creating statutes that immunize CAFOs, there should be a focus on halting CAFO production for the time being and ensuring that CAFOs follow the regulations that are in place.

CONCLUSION

The Iowa Supreme Court should not overrule the *Bormann* decision in future cases. The *Garrison* decision, deviating from precedent, marked a regression from Iowa’s longstanding direction of safeguarding communities from the hazards posed by CAFOs and allowing individuals to collect damages from these operations. The Iowa Legislature and Iowa courts need to ensure that they do not continue to erode nuisance law and the rights in the Iowa Constitution.

241. See *Bills to Restrict New CAFOs in Iowa Likely Doomed This Session*, *supra* note 227.