Where Does Iowa Nuisance Law Stand After *Garrison v. New Fashion Pork LLP*?: The Continuing Saga of Constitutional Challenges to Legislative Efforts to Immunize Iowa CAFOs from Neighbors' Nuisance Suits

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ABSTRACT: This Essay examines almost forty years of interaction between the Iowa General Assembly and the Iowa Supreme Court regarding the constitutional application of Iowa's Freedom to Farm laws to large-scale agricultural activities conducted by concentrated animal feeding operations ("CAFOs") sued for causing nuisance harms to their neighbors. Prior to Iowa's enactment of its so-called "Freedom to Farm" laws, aggrieved neighbors of these CAFOs successfully sued them as private nuisances for failing to properly dispose of animal wastes produced by hogs or poultry raised in tightly confined indoor facilities. The neighbors prevailed in these nuisance suits because Iowa courts regularly found that the offensive odors and other unwanted annoyances escaping from the CAFOs unreasonably interfered with the neighbors' comfortable use and enjoyment of their lives and property.

This Essay examines three versions of Iowa's Freedom to Farm laws adopted between 1979 and 2017, along with five key cases in which these laws were challenged as unconstitutional before the Iowa Supreme Court. The claims of unconstitutionality were based on both the Takings Clause in section 18 of the Iowa Constitution's Bill of Rights and the explicit special protection afforded property rights by the Inalienable Rights Clause in section 1 of the Iowa Bill of Rights.

This Essay gives primary attention to Garrison v. New Fashion Pork LLP, *a 4-3 decision in 2022 that controversially overruled a key 2004 farm nuisance case,* Gacke v. Pork Xtra, L.L.C. *The* Gacke *case unanimously held unconstitutional Iowa Code section 657.11(2), a 1995 amendment to Iowa's statutory nuisance law that granted immunity from nuisance liability*

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to agricultural operations producing farm animals or animal products for market. The Gacke *decision ruled this statute's grant of nuisance immunity to CAFO operators was unconstitutional as both an uncompensated taking and as a violation of Iowa's Inalienable Rights Clause. After* Gacke*, Iowa courts appeared to convert the complicated "unduly oppressive" review applied in that case to a simple three-part factual test. Overturned specifically in the* Garrison *case was the* Gacke *holding that courts considering constitutional challenges to state actions based on section 1 of the Iowa Bill of Rights should apply a higher standard of judicial review than a highly deferential rational basis review. The court also overturned the ruling in* Gacke *that the Iowa Freedom to Farm law severely limiting an Iowa landowner's right to sue an offending CAFO for nuisance damages was unconstitutional under the Inalienable Rights Clause of the Iowa Bill of Rights. The majority in* Garrison *refused to accord the* Gacke *decision* stare decisis*, on the grounds that it applied an incorrect judicial review standard and was wrongly decided on the merits because the result was contrary to Iowa precedents and inconsistent with other state courts' treatment of their Freedom to Farm laws.*

After short descriptions of the three Iowa Freedom to Farm statutes and the five cases in which they were challenged before the Iowa Supreme Court, this Essay focuses on three main legal issues raised by this series of farm nuisance cases: (1) The scope of the Iowa Constitution's Takings Clause—Is it restricted to protecting only against losses in land value?; (2) The constitutional force of the "property rights" language in the Iowa Constitution's Inalienable Rights Clause—Is judicial enforcement ever available?; and (3) Why wasn't Iowa Code section 657.11A(3), on the books since 2017, invoked by Iowa courts as authorization to award winning plaintiffs all the conventional compensatory damages justified by the facts of a nuisance verdict against an Iowa CAFO?

Several reasons are advanced to question whether in Garrison *the Iowa Supreme Court departed from its customary mode of constitutional analysis in dealing with the legislature's repeated attempts to create special protections for Iowa CAFOs to avoid responsibility for lawsuits by their neighbors claiming nuisance injuries. With regard to the force of the Iowa Inalienable Rights Clause, this Essay questions the reasons for the court's refusal in the recent* Garrison *case to apply* stare decisis *to* Gacke *and two other cases judicially entertaining rights based on this section of the Iowa Bill of Rights. Also questioned is the court's unwillingness to even consider the possible relevance of a recent Iowa statute regulating awards of economic and non-economic damages to plaintiffs suing Iowa CAFOs for nuisances.*

This Essay concludes by offering a brief analysis of how the recent Garrison *decision altered Iowa constitutional law and nuisance law as they pertain to Iowa CAFOs and how the decision may possibly lead to additional changes in Iowa property law. In making this final assessment, the Essay addresses*

three simple questions: (1) What did Garrison *decide?; (2) What did* Garrison *not decide?; and (3) What does the* Garrison *decision portend for the impact of Iowa Freedom to Farm laws on neighbor's future nuisance actions against CAFOs claimed to be unreasonably interfering with the comfortable use and enjoyment of their lives and property?*

INTRODUCTION

> *Can the government, consistent with article 1, section 1 of the Iowa Constitution, enact a statute that authorizes a landowner to appropriate or take for the landowner's benefit the property interest of a neighboring landowner, without any compensation or benefit to the other owner? . . . Or, more particularly, can the legislature give a ticket to a large business to come to a rural neighborhood, build a huge animal confinement facility that creates a common law nuisance through fetid odor, without risk of being sued for damages by long -time residential property owners whose right to enjoyment of their property has been impaired or destroyed?*[1]

The quotation above is from Justice Appel's dissent in the *Garrison* case. In these rhetorical questions, Justice Appel was attempting to frame what he saw as the central constitutional issue raised by the case. Justice Appel's dissent made clear that his response to these questions, and to one other version he proposed,[2] was a resounding NO.[3]

The type of confined hog-feeding business operated by the defendant, New Fashion Pork, in the *Garrison* nuisance case, and to which Justice Appel's question was addressed, is known among farm nuisance lawyers as a "CAFO."[4] The term is an acronym based on the federal regulatory phase, "concentrated animal feeding operations."[5]

Private legal remedies for nuisance harms created when domestic animals are concentrated in too close proximity to places of human habitation can be traced all the way back to a two-thousand-year-old Roman law maxim: "Sic utere tuo ut alienum non laedas."[6] Translated this Latin phrase required landowners: "to use your property as not to injure others." For over four hundred years in Anglo/American jurisprudence, prevailing nuisance law has

1. Garrison v. New Fashion Pork LLP, 977 N.W.2d 67, 98 (Iowa 2022) (Appel, J., dissenting).

2. *See id.* at 96–102 ("Or, put more simply, can a statute permit a private entity to take property from other people without any benefit to the property owner?").

3. *Id.*

4. *See* N. William Hines, *CAFOs and U.S. Law*, 107 IOWA L. REV. ONLINE 19, 20 (2022).

5. The term "concentrated animal feeding operations" was first used in the Clean Water Act of 1972 ("CWA"). *See* 33 U.S.C. §§ 1251–1387 (2018). The CWA was a federal statute based on public nuisance law principles. It expressly forbids CAFOs from discharging animal wastes directly into US waterways. *Id.* The CWA also mandated states to prevent the indirect discharge of such potential pollutants into surface waters or underground waters by controlling the siting and operations of CAFOs. *Id.*

6. This is the Latin maxim commonly used by courts to state the nuisance principle.

provided civil accountability for one landowner's unreasonable interference with other owners' comfortable use and enjoyment of their land.[7]

Land use conflicts in modern farm nuisance cases typically occur when intensive animal agricultural production on one parcel of land regularly creates offensive odors, airborne particulates, pathogens, noise, and other annoying externalities that escape the CAFO site and unreasonably interfere with the use being made of a neighboring parcel.[8] Judging from the litigated cases,[9] by far the most common complaint against hog CAFOs in Iowa is highly offensive odor. With the way hog CAFOs operate, bad odors can emanate from three places: (1) smelly air forced out of the confinement facility by large fans, (2) putrid odors naturally escaping from the storage lagoon where animal wastes are slowly decomposing, and (3) noxious odors caused by the application of animal wastes to nearby farm fields as fertilizer. Since before statehood, Iowa's courts and legislatures have routinely recognized traditional nuisance law and applied it aggressively to rural nuisances.[10] Early nuisance cases involved livery stables and the disposal of waste products from such rural businesses as cheese manufacturing plants.[11] Later cases involved slaughterhouses and asphalt production sites.[12] More recent cases have mostly involved hog and poultry CAFOs as they have proliferated around the state.[13] Since 1851, civil actions to abate or recover damages for such nuisances as "noxious exhalations," "unreasonably offensive smells," and "other annoyances" have been expressly authorized by Iowa Code sections 657.1 and 657.2.[14]

In the absence of special legislation protecting animal agricultural operations from nuisance liability, when neighbors sued the offending farm business for its nuisance, complaining that odor from the CAFO unreasonably interfered with the comfortable use and enjoyment of their property, the

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7. *See* William Aldred's Case (1610) 77 Eng. Rep. 816 [MJ].

8. *See* Hines, *supra* note 4, at 21 (explaining that "[b]y far the biggest problem faced by" CAFO operators is how to effectively dispose of the huge amounts of animal waste their facilities produce).

9. All the farm nuisance cases challenging Iowa's Freedom to Farm laws have involved hog CAFOs.

10. *See* IOWA CODE §§ 657.1, 657.2 (2025).

11. *See generally* Shiras v. Olinger, 50 Iowa 571 (Iowa 1879) (assessing a nuisance claim in relation to a livery stables); Bowman v. Humphrey, 109 N.W. 714 (Iowa 1906) (assessing a nuisance claim in relation to a cheese plant).

12. *See generally* Higgins v. Decorah Produce Co., 242 N.W. 109 (Iowa 1932) (assessing a nuisance claim in relation to a poultry production plant); Andrews v. Western Asphalt Paving Corp., 188 N.W. 900 (Iowa 1922) (assessing a nuisance claim in relation to an asphalt plant).

13. *See generally* Patz v. Farmegg Prods. Inc., 196 N.W.2d 557 (Iowa 1972); Weinhold v. Wolff, 555 N.W.2d 454 (Iowa 1996).

14. Iowa Supreme Court decisions have made clear that the codification of nuisance law did not curtail the organic evolution of common law nuisance principles in Iowa law. *Weinhold*, 555 N.W.2d at 459.

neighbors usually prevailed and were awarded a variety of remedies.[15] One point Iowa courts have long made clear is that a business or activity operated in an otherwise legal manner could nevertheless be held responsible for unreasonable nuisance harms it inflicted on its neighbors.[16] This understanding that an otherwise perfectly legal business or permissible use of private land may nevertheless be conducted in a manner that will create a legal nuisance has routinely been recognized in Iowa cases involving CAFOs.[17]

Theoretically, a winning nuisance plaintiff against an Iowa CAFO can be granted the remedy of abatement—an injunction prohibiting continuation of the offending activity. Iowa Code section 657.1 expressly provides for this remedy.[18] Such direct equitable relief is not common, however, in today's Iowa nuisance litigation. Under Iowa law, abatement necessitates a court of equity engaging in a "relative hardship" balancing test that can be stacked against a winning nuisance plaintiff.[19] This balancing process tends to favor the defendant owing to the economic importance of the CAFO to the local community and the fact that the CAFO typically does not have affordable access to an alternative waste disposal option that would be more effective in preventing the nuisance harm at issue.[20]

A winning nuisance plaintiff in Iowa is much more likely to recover compensatory money damages. These damages include recovery for the loss in value suffered by the plaintiff's land, and for provable, direct and indirect personal economic losses attributable to the nuisance, such as medical bills, loss wages, lodging away from home, transportation costs, etc.[21] Noneconomic damages such as "personal inconvenience, annoyance and discomfort" are also recoverable in Iowa nuisance cases.[22] Punitive damages are routinely sought but are very rarely awarded in farm nuisance cases.[23]

I. HISTORICAL ANALYSIS: IOWA'S FREEDOM TO FARM LAWS AND THEIR CONSTITUTIONAL CHALLENGES

A. IOWA'S FIRST FREEDOM TO FARM LAW

The long-running story about legislative efforts to stop or limit nuisance actions against Iowa CAFOs that this Essay will recount began in 1979. That

15. *See* Bates v. Quality Ready-Mix, 154 N.W.2d 852, 858 (Iowa 1967).

16. *See Patz*, 196 N.W.2d at 560–61.

17. *See* Valasek v. Baer, 401 N.W.2d 33, 35 (Iowa 1987).

18. "[C]ivil action by ordinary proceedings may be brought to enjoin and abate the [same] nuisance and to recover damages sustained on account of the nuisance." IOWA CODE § 657.1(1) (2025).

19. *See* Riter v. Keokuk Electro-Metals Co., 82 N.W.2d 151, 151 (Iowa 1957).

20. *See* N. William Hines, *Here We Go Again: A Third Legislative Attempt to Protect Polluting Iowa CAFOs from Neighbors' Nuisance Actions*, 103 IOWA L. REV ONLINE 41, 44 (2018).

21. *See* Hines, supra note 4, at 51.

22. *Id.*

23. *Id.*

was the year when the Iowa General Assembly joined all the other fifty states in adopting new legislation generally referred to as "Freedom to Farm" laws.[24] These statutes were designed to insulate farmers engaged in various types of modern industrialized farming from being sued for possible nuisance harms sustained by their neighbors.[25] Iowa Code chapter 352 was Iowa's original Freedom to Farm statute.[26] It granted county Boards of Supervisors the power to designate "Agricultural Areas."[27] Under section 352.11(1)(a) of this statute, owners conducting farm businesses located within a properly designated Agricultural Area could not be found liable for nuisance harms inflicted on their neighboring landowners.[28] Under the law, however, four exceptions were recognized: The nuisance immunity did not apply (1) if the agricultural operation was violating a federal statute or regulation or state statute or rule, (2) if the nuisance was caused by "negligent operation" of the farm business, (3) if there was the discharge of a pollutant to a waterway, or (4) if the nuisance damage occurred prior to the time the Agricultural Area designation was received.[29]

B. THE WEINHOLD *CASE*

The enforceability of this law first came before the Iowa Supreme Court in *Weinhold v. Wolff*,[30] a 1996 CAFO case. In *Weinhold,* Justice Lavorato, writing a unanimous decision for the court, found the Freedom to Farm law did not apply because the defendant's hog CAFO had been operating for over a year before the defendant received the Agricultural Area designation for his land.[31] As noted above, Iowa Code section 352.11(1)(b) expressly provided its immunity protection did not apply to any nuisance harms created prior to the approval of the Agricultural Area. It is interesting to note that the district judge in the case refused to apply section 352.11 because he held it was an unconstitutional taking of an easement to pollute without just compensation.[32]

In *Weinhold*, the Iowa Supreme Court upheld the nuisance damages the district court awarded the plaintiff for a permanent loss in land value, for medical and other personal injuries, and for special indirect harms. Justice Lavorato affirmed these compensatory damages awards along with approving the lower court's application of the Iowa three-factor nuisance test that

24. *See id.* at 38.
25. *Id.*
26. *See* IOWA CODE §§ 352.1–352.13 (2025).
27. *See id.* § 352.6.
28. *See id.* § 352.11(1)(a).
29. *See id.* § 352.11(1)(b).
30. *See generally* Weinhold v. Wolff, 555 N.W.2d 454 (Iowa 1996).
31. *Id.* at 457.
32. *Id.* at 454.

plaintiffs must meet for a court to find a private nuisance.[33] Since the 1960s, under this test, Iowa courts considered the following factors: (1) the plaintiff's priority in time in initiation of the land use harmed, (2) the character of the neighborhood in which the conflict in land uses occurred, and (3) the degree of the defendant's unreasonable interference with the plaintiff's comfortable use and enjoyment of their land.[34] The *Weinhold* court also reaffirmed the Iowa commitment to a "normal person" standard in judging the seriousness of various harms claimed to constitute nuisances.[35] Relying on earlier Iowa decisions, the court upheld the district court's refusal to issue an injunction as requested by the plaintiff.[36]

Since the Freedom to Farm nuisance immunity did not apply, the *Weinhold* case provided an excellent example of an Iowa court applying Iowa's traditional three-part nuisance test, and it identified and awarded the full range of possible compensatory damages available to Iowa plaintiffs who prove successfully that the operator of a CAFO committed a private nuisance against them.[37]

C. *THE* BORMANN *CASE: STATUTORY NUISANCE IMMUNITY PROTECTING FARM ACTIVITIES FROM NUISANCE SUITS RULED UNCONSTITUTIONAL*

Only two years later, the constitutionality of Iowa Code section 352.11 was before the Iowa Supreme Court in another CAFO case, *Bormann v. Kossuth County Board of Supervisors*,[38] with Justice Lavorato again writing the opinion for a unanimous court. *Bormann* reversed a lower court decision upholding the constitutionality of the nuisance immunity granted certain farm operations under the law.[39] Justice Lavorato's analysis looked at the case from a property rights perspective and ruled that section 352.11(1) effectively granted farmers doing business in a designated Agricultural Area an easement to impose nuisance harms on neighboring landowners' property, without paying the neighbors just compensation for that easement.[40] Justice Lavorato examined the exceptions provided in sections 352.11(1)(a) and (b), but he did not rule on whether any of them were sufficient to sustain the constitutionality of the challenged statute.[41] Presumably this was because under Iowa law, businesses otherwise operating legally can still cause actionable nuisances, and nuisance law is not based on negligence principles,

33. *Id.* at 457.

34. *See* Bates v. Quality Ready-Mix Co., 154 N.W.2d 852, 857 (Iowa 1967).

35. *Weinhold*, 555 N.W.2d at 458.

36. *Id.* at 459. The court cited specifically *Helmkamp v. Clark Ready Mix Co.*, 214 N.W.2d 126, 130 (Iowa 1974).

37. *Weinhold*, 555 N.W.2d at 460.

38. *See generally* Bormann v. Kossuth Cnty. Bd. of Supervisors, 584 N.W.2d 309 (Iowa 1998).

39. *Id.* at 321.

40. *Id.* at 322.

41. *See id.* at 312–14.

it is an intentional wrong. The *Bormann* court therefore ruled that nuisance immunity granted to farmers in a designated Agricultural Area by section 352.11 violated both the Federal Takings Clause set forth in the Fifth Amendment to the U.S. Constitution and the Iowa Takings Clause, found in section 18 of the Iowa Bill of Rights.[42]

In support of his "easement analysis" applied in the case, Justice Lavorato relied on a rather obscure nineteenth-century U.S. Supreme Court case, *Richards v. Washington Terminal Co.*[43] This decision recognized the taking of an easement by a railroad company when excessive smoke was forced out of a railway tunnel by strong fans and the smoke corrupted the air of an adjacent private landowner. Because the railroad operated as a common carrier under an authorization by federal law, this was deemed a taking by the U.S. government.[44]

Justice Lavorato reasoned that it should make no legal difference whether the extreme noise, odor, dust, or fumes experienced by neighbors were regarded as physically invading their land or merely causing unreasonable interference with their comfortable use and enjoyment of their land. Either way the Iowa statute that barred them from suing the source of the nuisance harm took an easement from them and gave the benefit of the easement to the farm operator.[45]

Justice Lavorato concluded his *Bormann* opinion by acknowledging the broad scope of the legislature's police power but noted that it is subject to constitutional limits the court was bound to enforce.[46] He observed in describing the statute at issue: "When all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of a few. In short, it appropriates valuable private property interests and awards them to strangers."[47] Justice Lavorato concluded his opinion by asserting that the court's responsibility to strike down the statute was "clear because the challenged scheme is plainly—we think flagrantly—unconstitutional."[48]

D. A SECOND FREEDOM TO FARM LAW ADOPTED

In 1995, while litigation in the *Bormann* case was just starting in the district court in Kossuth County, the Iowa General Assembly amended Iowa's statutory nuisance law to add a second Freedom to Farm law.[49] In section

42. *Id.* at 321.
43. Richards v. Washington Terminal Co., 233 U.S. 546, 548 (1914).
44. *Id.* at 556–58.
45. *Bormann*, 584 N.W.2d at 319.
46. *Id.* at 322.
47. *Id.*
48. *Id.*
49. *See* IOWA CODE § 657.11 (2025).

657.11(2) of this addition to Iowa's nuisance law, the legislature sought to grant immunity from neighbors' nuisance actions to "an animal feeding operation, as defined in [Iowa Code] section 459.102."[50] To achieve this immunity, the statute provided that the activities of an animal feeding operation could not be found to constitute a legal nuisance, unless one of the two stated exceptions applied. Insulation from legal action was available only so long as the animal agricultural operation being sued (1) was not failing to comply with a federal statute or regulation or a state statute or rule[51] or (2) the CAFO "unreasonably and for [a] substantial[] period of time interferes with the person's comfortable use and enjoyment of the person's life or property" and "failed to use existing prudent generally accepted management practices reasonable for the operation."[52] In the world of hog CAFOs, this latter, lengthy phrase referred to the standard waste management practice of piping the manure slurry, made up of hog urine, manure, and wash water, from the CAFO building to a large outdoor storage basin (commonly called a "lagoon") where the decomposing hog wastes are contained until they can be removed to be sprayed on or incorporated into the soil of nearby farm fields as fertilizer.[53]

The first exception in section 657.11, concerning violating statutes or administrative rules, is nearly identical to the first exception in Iowa Code section 352.11(1)(b), Iowa's original Freedom to Farm law. The second exception, however, is not very close to the "negligent operation" exception to section 352.11(1)(b). Though the idea is somewhat the same, the second exception in section 657.11 is clearly different from the negligence exception in section 352.11(1)(b). Instead of referring to an irresponsible practice, it requires CAFO operators to employ the industry standard method for the disposal of animal wastes. The difference between the two exceptions is highlighted by the fact that most of the recent farm nuisance suits against CAFOs are caused not by negligence and also not by the failure to use the "prudent" waste management practices prescribed in section 657.11. In all the Iowa cases litigated so far, the prescribed "prudent" waste disposal method was used, but it was ineffective and did not prevent noxious odors and other annoyances from escaping the CAFO property and harming neighbors.

E. THE GACKE *CASE PART 1 AND PART 2: LIMITING* BORMANN *AND GIVING IT A NEW TWIST*

The constitutionality of section 657.11(2) was challenged in 2004 in *Gacke v. Pork Xtra, L.L.C.*, another hog CAFO nuisance case.[54] The decision in

50. *Id.* § 657.11(2).
51. *Id.* § 657.11(2)(a).
52. *Id.* § 657.11(2)(b).
53. *See* Hines, *supra* note 4, at 37–38.
54. Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168, 170 (Iowa 2004).

the *Gacke* case was really two distinct rulings. The first ruling was on the Takings Clause issue, and it applied the *Bormann* Takings Clause precedent but limited its scope to the recovery of damages for the loss in property value and did not apply it to the recovery of personal compensatory damages. The second ruling invoked the Inalienable Rights Clause in section 1 of the Iowa Bill of Rights to support the recovery of personal compensatory damages for economic losses and noneconomic harms. Although the official *Gacke* decision does not do so, in this Essay, I am going to identify these two quite different holdings within the *Gacke* decision as *Gacke* Part 1 and *Gacke* Part 2.

1. *Gacke* Part 1

Joseph and Linda Gacke were a married couple who had lived on their land in Sioux County since 1974. In 1996, Pork Xtra, L.L.C. built and began operating two medium-sized hog CAFOs just 1300 feet from the Gackes' home.[55] The Gackes experienced strong noxious odors emanating from the Pork Xtra CAFOs that they claimed frequently interfered with the comfortable use and enjoyment of their home, causing them a loss in the value of their property and various personal injuries, including emotional distress.[56] The Gackes sued Pork Xtra, claiming its two CAFOs were a legal nuisance and asked for the remedies of a permanent injunction, compensatory damages for their direct and indirect injuries, and punitive damages.[57]

Pork Xtra responded by pleading immunity from nuisance suits under Iowa Code section 657.11(2) as an affirmative defense.[58] Sioux County Judge Gaul struck the immunity defense, holding section 657.11(2) was an unconstitutional taking, citing *Bormann* as binding precedent.[59] The district court awarded the Gackes $50,000 for the loss in value of their property and $46,000 for direct and indirect personal economic damages resulting from the nuisance.[60] The court denied the Gackes' requests for an injunction and for punitive damages but ruled that if the defendants did not to pay the compensatory damages, the denial of injunctive relief would be revisited.[61]

Justice Lavorato had retired by this time, and the unanimous *Gacke* decision was written by Justice Ternus.[62] In Part 1 of the *Gacke* decision, the Iowa Supreme Court agreed with the trial court that the Takings Clause issue was governed by the constitutional precedent established in the *Bormann* decision. Following the *Bormann* holding, the court ruled that Iowa Code

55. *Id.* at 171.
56. *Id.*
57. *Id.* at 170–71.
58. *Id.* at 171.
59. *Id.* at 170–71.
60. *Id.* at 171.
61. *Id.*
62. *Id.* at 170.

section 657.11(2) unconstitutionally imposed an easement on neighboring landowners without providing any just compensation for the property interest taken.[63]

Notwithstanding significant differences between section 352.11 and section 657.11, the *Gacke* court unanimously determined that the prudent management language in section 657.11(2) was "analogous to a negligence standard,"[64] and therefore, the operational effect of the most important exceptions in the two statutes was the same as a practical matter. Therefore, the immunity from nuisance suits granted by section 352.11 and the immunity granted by section 657.11(2) were sufficiently similar that the *Bormann* precedent applied to the *Gacke* facts. Following the *Bormann* easement analysis, section 657.11(2) was declared unconstitutional as a taking of an easement in the Gackes' property without just compensation.[65]

Then, the *Gacke* court decided to differentiate the *Gacke* case from *Bormann* in two important ways. First, in the *Gacke* opinion, the court held that its Takings Clause ruling would be confined to a violation of section 18 of the Iowa Bill of Rights.[66] The court said there was no reason for the *Gacke* decision also to rely on the Fifth Amendment to the U.S. Constitution, as the *Bormann* ruling did, because the Iowa Constitution was sufficient authority to decide the case.[67]

In my view, this was a most unfortunate narrowing of the judicial inquiry. The easement analysis Justice Lavorato introduced in the *Bormann* decision was based on a federal case under the Fifth Amendment to the U.S. Constitution.[68] Iowa takings law does not contain such a precedent. There is also no Iowa takings case equivalent to the U.S. Supreme Court decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, which held that a legislatively created easement does not need to lower the servient estate's land value to constitute a taking where the just compensation provided is not determined on a case-by-case basis.[69] Federal takings law limits the authority of state legislatures by its incorporation into the U.S. Constitution's Fourteenth Amendment,[70] and it was unfortunate that the *Gacke* court did not recognize the importance of federal takings law in extending the *Bormann* precedent to the *Gacke* facts.

Second, and much more importantly, after holding that Iowa Code section 657.11(2) was unconstitutional, the court then became intrigued by an argument made in the defendant's brief, based on Iowa Code section 4.12,

63. *Id.* at 173.
64. *Id.*
65. *Id.*
66. *See id.* at 174.
67. *Id.*
68. Bormann v. Kossuth Cnty. Bd. of Supervisors, 584 N.W.2d 309, 315–22 (Iowa 1998).
69. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426–35 (1982).
70. *See* Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 236–37 (1897).

regarding the severability of unconstitutional provisions. The defendant argued that, if section 657.11(2) was to be held unconstitutional under *Bormann*, it should be held only partially unconstitutional.[71] The court decided it was necessary to classify the damages the Gackes received in the district court between nuisance remedies protected by the Iowa Takings Clause and those not protected by it. The court ruled the Iowa Takings Clause applied only to the easement taken by the statute and therefore only to the recovery of damages for the loss in market value to the plaintiff's land caused by a nuisance.[72] The court explicitly stated that the recovery of compensatory personal economic damages and noneconomic damages caused by a farm nuisance was not protected by the Takings Clause and therefore, Iowa Code section 657.11(2) could constitutionally bar or limit their recovery, unless they were entitled to special protection under some other provision in the Iowa Constitution.[73] As explained later, I think the decision by the *Gacke* court to limit the scope of the violation of the Iowa Takings Clause to the loss in value of the affected land, and thereby enforce the statutory immunity with respect to the $46,000 in compensatory damages awarded by the district court was a serious analytical mistake and was not required by the statute cited. The key issue should have been the defendant's lack of a property right to impose the nuisance harms complained about by the plaintiff, and not the property right of the plaintiff to recover damages for these harms, which are authorized by Iowa common law and specific Iowa nuisance statutes. This unnecessary bifurcation in the traditional Iowa remedies for nuisances in the *Gacke* opinion has caused problems with the court's treatment of these farm nuisance cases ever since. Iowa courts have consistently followed *Gacke* Part I and ruled that the only effect of holding Iowa Code section 657.11(2) unconstitutional is that the statute cannot be enforced to prevent the recovery of provable loss in land value caused a plaintiff by a CAFO nuisance, but it prevents recovery of direct and indirect personal compensatory nuisance damages.

2. *Gacke* Part 2

In investigating the possibility that another provision of the Iowa Constitution might impact the constitutionality of Iowa's Freedom to Farm laws, the court addressed the question of whether the Inalienable Rights Clause in section 1 of the Iowa Bill of Rights applied to the facts of the case and rendered section 657.11(2) unconstitutional. The court held that this provision in the Iowa Bill of Rights, which expressly enshrines individual

71. *Gacke*, 684 N.W.2d at 174.

72. *Id.*

73. *Id.* at 175. The Missouri Supreme Court reached as similar result in a 2015 CAFO nuisance case but did not cite the *Gacke* case. *See generally* Labrayere v. Bohr Farms, LLC, 458 S.W.3d 319 (Mo. 2015).

rights with respect to "equal[ity]," "liberty," and "acquiring, possessing and protecting property," could, in a proper case, limit the statutory immunity under section 657.11(2).[74]

Next, the court decided that judicial review of this constitutional issue required a more rigorous review than the highly deferential application of the "rational basis" standard customarily applied to claims under the Iowa Inalienable Rights Clause.[75] The court applied what it described as a "reasonableness" standard of judicial review which entailed a more searching inquiry.[76]

Although the *Garrison* opinion, which overruled *Gacke*, later described the heightened review standard applied in *Gacke* Part 2 as "created out of whole cloth,"[77] the court in the *Gacke* decision was careful to ground its decision in over one hundred years of Iowa caselaw considering the force of the Inalienable Rights Clause in section 1 of the Iowa Bill of Rights.[78] As outlined by the *Gacke* court, its "reasonableness" review of the constitutionality of Iowa Code section 657.11(2) followed three steps. First, the court considered whether the claim for nuisance damages made by the Gackes was protected by section 1 of the Iowa Bill of Rights. The court concluded that the Gackes' claim clearly fit the "protecting property" language of the Inalienable Rights Clause.[79] Next, the court considered whether the statute at issue was a proper exercise of the State's police power by the Iowa General Assembly, with respect to both its purpose and the means chosen to implement that purpose.[80] This required a careful analysis looking at the purpose and of the statute and the means used to achieve its purpose. The court specifically examined the legislature's express policy reasons for enacting the statute and determined that the purpose of section 657.11(2) was indeed a legitimate exercise of the State's police power in the public interest.[81] The court noted that it was well settled Iowa law that police power exercises are not invalid just because some private interests are also benefited

74. *Id.* at 176.

75. *See id.*; TODD E. PETTYS, THE IOWA STATE CONSTITUTION 67–68 (2d ed. 2018).

76. *See Gacke*, 684 N.W.2d at 176–79. Although this type of judicial review was not completely novel, the court could cite only one other case involving a heightened level of judicial review of constitutional claims under section 1 of the Iowa Bill of Rights that resulted in a ruling that the section 1 Inalienable Rights Clause rendered the challenged legislation unconstitutional. *Id.* at 176. The case in *State v. Osborne* involved the out-of-state sale of buggies. State v. Osborne, 154 N.W. 294, 296 (Iowa 1915). The several cases where such a claim failed, however, provided a useful framework for examining this issue, and the court heavily utilized one of them, *Gravert v. Nebergall*, in its analysis. *Gacke*, 684 N.W.2d at 177. *See generally* Gravert v. Nebergall, 539 N.W.2d 184 (Iowa 1995).

77. Garrison v. New Fashion Pork LLP, 977 N.W.2d 67, 81 (Iowa 2022).

78. *Gacke*, 684 N.W.2d at 176–79.

79. *Id.* at 177.

80. *Id.* at 177–78.

81. *Id.* at 178.

by them, in the way Iowa CAFOs are benefited by section 657.11(2).[82] Finally, the court considered whether the means chosen to achieve the legitimate police power result were not only rationally related to the statute's purpose, but also whether they were inherently reasonable.[83] If rationally related to the purpose, but of questionable reasonableness, it was necessary under Iowa precedent to determine whether they were "unduly oppressive" to the individual citizen's rights protected by section 1 of the Iowa Bill of Rights.[84] Except for one case,[85] the few earlier Iowa cases addressing this issue had consistently found that challenged statutory means were not unduly oppressive, holding that mere inconvenience, increased private costs, or even reductions in the value of private property were not sufficient to invalidate an otherwise legitimate exercise of the police power as unduly oppressive.[86] Nevertheless, these cases created and applied the "unduly oppressive" test, and they provided the analytical framework the court utilized in this step of its analysis.

On the issue of whether the act was unduly oppressive on the Gackes' property rights, the court identified three facts in the *Gacke* case that they cited as determinative in finding section 657.11(2)'s immunity provision was unduly oppressive on the property rights of innocent landowners like the Gackes, and it was therefore unconstitutional under section 1 of the Iowa Bill of Rights.[87] The three facts specifically noted were (1) the Gackes gained no benefit from the statutory immunity (the importance of this fact was determinative to denying the claimed right in the *Gravert* case most heavily relied upon by the court in structuring its analysis),[88] (2) the Gackes experienced substantial personal harm from the continuation of the nuisance, and (3) the Gackes first occupied their land long before Pork Xtra began operating its CAFO and they had expended substantial resources improving their property before Pork Xtra came on the scene.[89] The court also observed that if section 657.11(2) was allowed to stand and the statute barred the Gackes from recovering the substantial damages awarded to them for the personal injuries they suffered from the nuisance, they would have incurred a harm the lower court valued at $46,000 and yet, would have had no right to recover for their loss.[90]

82. *Id.*

83. *Id.* at 178.

84. *Id.* This was the holding in *Gravert*, relied on by the court in *Gacke* Part 2. Gravert v. Nebergall, 539 N.W.2d 184, 186 (Iowa 1995).

85. *See* State v. Osbourne, 154 N.W. 294, 300 (Iowa 1915).

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

87. *Id.* at 179.

88. *See Gravert*, 539 N.W.2d at 186.

89. *See Gacke*, 684 N.W.2d at 178.

90. *See id.* at 179, 184–85.

Thus, applying its somewhat heightened judicial review standard in *Gacke* Part 2, the court held section 657.11(2) was unconstitutional under the Inalienable Rights Clause as applied to the Gackes. The court stressed that each case decided under section 1 of the Iowa Bill of Rights required close examination of the "unduly oppressive" question and must be decided on its own unique facts. In its closing comments, the court made a point of stating that it "express[ed] no opinion as to whether [section 657.11(2)] might be constitutionally applied under other circumstances" arising under the Inalienable Rights Clause.[91]

During the nearly twenty years before *Gacke* Part 2 was overruled by the Iowa Supreme Court in the *Garrison* case, lower Iowa courts had seemingly converted the somewhat complicated "unduly oppressive" analysis of *Gacke* Part 2 into a simple three-prong factual test. The factors in this test were based on the three key facts noted above that were highlighted by the court in Part 2 of the *Gacke* opinion as determinative of its outcome. This three-part test was later summarized by the Iowa Supreme Court in these terms: (1) whether the plaintiff received any particular benefit from the nuisance immunity other than that inuring to the public, (2) whether the plaintiff sustained significant hardship, and (3) whether the plaintiff resided on their property for a substantial time before any type of animal feeding operation was commenced by the defendant and had spent significant sums of money to improve their property before the claimed nuisance began.[92] This truncated version of the "unduly oppressive" analysis was accepted as the holding in *Gacke* Part 2 in six later cases—three district court CAFO nuisance cases,[93] one Iowa Court of Appeals CAFO case,[94] and two Iowa Supreme Court CAFO decisions[95] prior to the overturning of *Gacke* Part 2 in 2022.

F. IOWA CODE SECTION 657.11A: A THIRD FREEDOM TO FARM LAW

In a 2016 CAFO nuisance decision entitled *McIlrath v. Prestage Farms of Iowa, L.L.C.*, the Iowa Court of Appeals followed the *Gacke* precedent enforcing the Inalienable Rights Clause to award the plaintiff $100,000 in compensatory damages for loss of past enjoyment of her farm and $300,000

91. *Id.* at 179.

92. *See* Honomichl v. Valley View Swine, LLC, 914 N.W.2d 223, 234 (Iowa 2018), *overruled by* Garrison v. New Fashion Pork LLP, 977 N.W.2d 67 (Iowa 2022).

93. *See* McIlrath v. Prestage Farms of Iowa, L.L.C., No. 15-1599, 2016 WL 6902328, at *1 (Iowa Ct. App. 2016) (describing how the district court based its holding on the *Gacke* case); *Honomichl*, 914 N.W.2d at 229–30 (describing the district court's holding which invoked the *Gacke* case's "unduly" oppressive test); *Garrison*, 977 N.W.2d at 72 (describing the district court's application of the *Gacke* test).

94. *See McIlrath*, 2016 WL 6902328, at *3 (applying the *Gacke* holding and holding that section 657.11(2) was unconstitutional as applied).

95. *See Honomichl*, 914 N.W.2d at 235–37 (affirming the *Gacke* "unduly oppressive" test); *Garrison*, 977 N.W.2d at 78, 81 (acknowledging the *Gacke* test but later overruling it).

in damages for loss in future enjoyment of her farm.[96] In 2017 the Iowa General Assembly enacted a second amendment to Iowa Code section 657.11, which added statutory proof requirements for compensatory damage claims for loss in property value and personal injuries caused by a farm nuisance and capped noneconomic nuisance damages recoverable against a CAFO.

The timing of the passage of this new amendment to section 657.11 suggests the possibility that the large award of noneconomic damages in *McIlrath* stimulated the legislature to enact this third version of Iowa's Freedom to Farm law. I could find nothing in the legislative history to prove it did, but it is difficult to believe CAFO operators, leaders of farm organizations, and members of the legislature were not fully aware of the result in the *McIlrath* case. Perhaps a clue is provided by the inclusion of a provision in the new law limiting recovery to plaintiffs owning a legal interest in the land affected by the claimed CAFO nuisance—a legal requirement first introduced in the *McIlrath* decision.

The legislative history of Iowa Code section 657.11A is also unclear about the reason the Iowa legislature enacted this amendment to section 657.11. The amendment re-enacted the immunity provisions of section 657.11(2) in their entirety, but more importantly, it introduced a quite different approach to protecting hog CAFOs from overly large nuisance damage awards. Instead of relying solely on the immunity protection, the new law focused on regulating nuisance damages by both upgrading the proof requirements for recovering them and capping the size of noneconomic damages awards.[97] Section 657.11A(3) sets forth three subsections, each of which deals with a common type of compensatory nuisance damages: (1) loss in property value, (2) adverse health conditions, and (3) special indirect damages including "annoyance and the loss of comfortable use and enjoyment of real property."[98] Thus, a plausible explanation of the purpose of the newest Iowa Freedom to Farm law was to finally acknowledge the consistent Iowa Supreme Court rulings that nuisance actions to remedy harmful impositions on neighbors' property rights by Iowa CAFOs could not constitutionally be banned. The legislature, however, does have the constitutional power to regulate and to cap such nuisance claims to lower the costs they imposed on Iowa CAFOs. Section 657.11A(3) was in all likelihood an effort to exercise this regulatory power for the benefit of Iowa CAFOs that were successfully sued for nuisance harms by limiting the potential size of these compensatory damage awards. Iowa courts have yet to interpret Section 657.11A(3) in this manner, but it is difficult to fathom any other purpose for its enactment.

96. *See McIlrath*, 2016 WL 6902328, at *3, *8.

97. *See* IOWA CODE § 657.11A(2)–(3) (2025).

98. *Id.* § 657.11A(3)(a)–(c). Subsection (c) caps the recovery of noneconomic damages to fifty percent of the total recovery awarded under subsections (a) and (b).

G. THE HONOMICHL *DECISION*

1. The *Honomichl* Majority Decision

Honomichl v. Valley View Swine, LLC was a very complicated nuisance case originally involving sixty-nine plaintiffs who sued two large CAFOs that raised hogs under contract with JBS Live Pork, LLC.[99] The case came to the court through an interlocutory procedural appeal by the losing defendant, who claimed the summary judgment against the CAFO was awarded prematurely.[100] *Honomichl* was as close as Iowa courts have ever come to the size and complexity of the 2020 North Carolina case, *McKiver v. Murphy Brown, LLC*,[101] memorialized in the 2022 book *Wastelands*.[102]

After dividing the numerous plaintiffs into three groups, based on the special facts in their claims, Wapello County District Court Judge Scieszinski awarded a summary judgment to one group of eight plaintiffs, led by the Honomichls.[103] Judge Scieszinski ruled in the summary judgment that Iowa Code section 657.11(2), insofar as it sought to bar recovery of nuisance damages against CAFOs, was unconstitutional under *Gacke* Part 2's three-prong test that applied the Inalienable Rights Clause of section 1 of the Iowa Bill of Rights to claims.[104]

In the Iowa Supreme Court opinion in *Honomichl*, Justice Zager, writing for a unanimous court, reversed the ruling below on purely procedural grounds.[105] In his opinion, Justice Zager denied the plaintiff's claim that section 657.11(2) was unconstitutional on its face,[106] but approved the use of the *Gacke* three-prong test for determining its constitutionality as applied to the plaintiffs.[107] The only reason cited for the court's reversal was that the trial court had failed to hold a formal evidentiary hearing to closely examine the facts required to be considered in applying the *Gacke* Part 2 precedent.[108] The court unanimously ruled implementation of the *Gacke* Part 2 decision required some form of evidentiary hearing before summary judgment could be awarded.[109] In the course of its ruling, the *Honomichl* court unanimously reaffirmed the continued validity of the *Gacke* Part 2 analysis after being urged to overturn the earlier ruling on several grounds.

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99. *See Honomichl*, 914 N.W.2d at 228.

100. *See id.* at 227.

101. *See generally* McKiver v. Murphy-Brown, LLC, 980 F.3d 937 (4th Cir. 2020).

102. *See generally* CORBAN ADDISON, WASTELANDS: THE TRUE STORY OF FARM COUNTRY ON TRIAL (2022).

103. *See Honomichl*, 914 N.W.2d at 226, 227.

104. *See id.*

105. *See id.* at 238–39.

106. *See id.* at 238.

107. *See id.* at 237.

108. *Id.* at 238.

109. *Id.* at 239.

The court observed that all fifty states had adopted Freedom to Farm laws, but of the only six states where those laws faced constitutional challenges, only Iowa had ruled any part of such a law unconstitutional.[110] The opinion also noted that the Iowa "legal landscape" surrounding nuisance suits against hog CAFOs had changed somewhat since *Gacke* was decided.[111] In considering this concern, the court reviewed some legislative changes, including extending the setback distance between CAFOs and rural homes, a new requirement for CAFOs to adopt and follow a manure management plan, and adoption of a master matrix system for reviewing applications for new CAFOs.[112] Also cited by the court were some changes in the Iowa Department of Natural Resources' regulations governing hog CAFOs with respect to standards for manure storage.[113] Taking these changes into account, the court spent little time considering the possibility of overruling what it described as *Gacke*'s three-prong test for applying the Inalienable Rights Clause to Freedom to Farm laws. Instead, it unanimously chose to recognize and reaffirm *Gacke* Part 2 under the principle of *stare decisis*.[114] The court expressly concluded that the changes described above were insufficient to justify the court abandoning the analytical framework adopted in *Gacke* Part 2 and that decision was "still compatible with present conditions."[115] The court also stated that it could not discern "an alternative legal framework" to utilize in these cases that was better than the one applied in *Gacke* Part 2.[116] Thus, *Honomichl* unanimously rejected returning to the highly deferential rational basis standard for judicial review of constitutional claims based on section 1 of the Iowa Bill of Rights. *Honomichl* was decided only four years before the *Garrison* case that overruled *Gacke*.

2. The *Honomichl* Concurrence

A concurrence by two Justices in the *Honomichl* decision further expanded on the idea raised in the majority opinion that perhaps the *Gacke* decision deserved reconsideration and should possibly be overturned.[117] Justice Waterman, joined by Justice Mansfield, filed the concurrence.[118] It recited the same changes in the "legal landscape" cited in the majority opinion and strongly suggested that *Gacke* was "outdated," likely wrongly

110. *Id.* at 233.
111. *Id.* at 239.
112. *Id.* at 236.
113. *Id.*
114. *Id.* at 237.
115. *Id.*
116. *Id.*
117. *Id.* at 239.
118. *Id.*

decided, out-of-step with court decisions in other states, and therefore, the decision should be reconsidered and overruled.[119]

The concurrence also expressed a strong preference for returning to the highly deferential "rational basis" standard that was routinely used for Inalienable Rights claims prior to the *Gacke* Part 2 decision and noted that the rational basis standard had recently been applied by the court to review a different claim under the Inalienable Rights Clause, arguably reestablishing it as the proper judicial review standard for Inalienable Rights claims.[120]

In their concurrence, Justices Waterman and Mansfield also emphasized the uniqueness of Iowa's constitutional rulings on its Freedom to Farm laws in the *Bormann* and *Gacke* cases as compared to rulings upholding Freedom to Farm laws in all other states.[121] Finally, the concurrence claimed that the *Gacke* Part 2 decision failed to properly consider section 2 of the Iowa Bill of Rights that confirmed the police power as belonging to the people, and it argued that section 2 should be interpreted as countermanding section 1 by restricting judicial enforcement of the Inalienable Rights Clause.[122]

H. THE GARRISON *DECISION*

1. The *Garrison* Majority Opinion

The background facts of *Garrison v. New Fashion Pork LLP*[123] were mostly undisputed. The plaintiff, Garrison, owned three hundred acres of farmland in Emmet County, Iowa that he had owned since 1972.[124] The plaintiff made his home on this land, and for many years, he raised sheep, but he no longer did so.[125] When he raised sheep, he initially disposed of sheep manure by spreading it on his land as fertilizer, but in later years as his sheep numbers decreased, he simply placed the sheep manure as a solid waste in a large compost pile on his property.[126]

Defendant, New Fashion Pork LLP ("NFP"), began operating a large hog CAFO on the land adjacent to Garrison's land in December 2015.[127] NFP's CAFO building, which has a legal capacity to feed up to 8,800 hogs, was a half mile uphill from Garrison's land.[128] From 2016 to 2020, Garrison documented smelling a highly objectionable odor emanating from NFP's

119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 240.
123. *See generally* Garrison v. New Fashion Pork LLP, 977 N.W.2d 67 (Iowa 2022).
124. *Id.* at 72–73.
125. *Id.*
126. *Id.* at 73.
127. *Id.*
128. *Id.*

CAFO for at least one hundred days each year.[129] NFP also installed new tilling on the land immediately uphill from Garrison's land that Garrison claimed increased the nitrate pollution in a small watercourse that runs from NFP's land across his land.[130] NFP rejected Garrison's claim that his new tiling was causing an increased flow of nitrate pollution in the watercourse traversing Garrison's land.[131] Unfortunately for Garrison, water samples he took regularly from this creek failed to support his claim of nitrate pollution.[132] NFP responded to Garrison's odor complaint by installing an electrostatic precipitator across the side of its CAFO buildings facing Garrison's land.[133] There is no information in the case about whether this device reduced the odor, but it is likely it did not.[134]

Before filing his nuisance suit in Emmet County District Court, in 2018, Garrison first filed suit in the Federal District Court for the Northern District of Iowa.[135] His federal suit was based on the claim that NFP's CAFO was violating the Resource Conservation and Recovery Act ("RCRA") and the Clean Water Act ("CWA"), as well as multiple Iowa laws concerning trespass, nuisance, and unlawful drainage.[136] After numerous motions and cross motions, in 2020, Federal District Judge C.J. Williams granted NFP's motion for summary judgment.[137] Judge Williams ruled that invoking both the RCRA and the CWA required "current and ongoing" violations of the laws, and that Garrison had failed to prove NFP was engaged in such violations.[138] Having dismissed the two federal claims, the court also declined to exercise supplemental jurisdiction over the Iowa state claims.[139] Garrison chose not to appeal this ruling.

Having failed to gain legal footing in federal court, in 2020, Garrison brought a civil action against NFP in Emmet County District Court, seeking damages for a legal nuisance, trespass, and violation of state drainage laws.[140] Not surprisingly, NFP responded by claiming the immunity afforded CAFOs under Iowa Code sections 657.11(2) and 657.11A(5).[141] Garrison responded with a motion to strike NFP's affirmative defenses, and thereafter, the

129. *Id.*

130. *Id.*

131. *See id.* at 75.

132. *Id.* at 73–74.

133. *Id.* at 73.

134. Electrostatic precipitators are most commonly effective in reducing air pollution caused by the emission of small particulate matter, like fluoride from aluminum plants. *See* Renken v. Harvey Aluminum (Inc.), 226 F. Supp. 169, 172 (D. Or. 1963).

135. *See generally* Garrison v. New Fashion Pork LLP, 449 F. Supp. 3d 863 (N.D. Iowa 2020).

136. *Id.* at 865.

137. *Id.* at 874.

138. *Id.* at 870, 874.

139. *Id.* at 875.

140. Garrison v. New Fashion Pork LLP, 977 N.W.2d 67, 69 (Iowa 2022).

141. *Id.*

avalanche of legal paper exchanges continued for almost a year.[142] Garrison referenced Iowa's Taking Clause in his initial pleadings but concentrated his nuisance arguments mostly on the Inalienable Rights Clause in section 1 of the Iowa Bill of Rights as applied in Part 2 of the *Gacke* decision.[143] As a result, following the ruling in *Honomichl*, Iowa District Court Judge Borne held an evidentiary hearing to gather facts needed to apply the three-part judicial review test the *Honomichl* case said had been created by the *Gacke* Part 2 decision.[144] After this hearing, Judge Borne issued an order on May 4, 2021, denying Garrison's motion to strike NFP's immunity defense.[145] Garrison immediately noticed the lack of mention of his Takings Clause claim in this order.[146] He filed a motion on May 5, 2021, asking the court to reconsider and amend that part of its May 4th order to make clear that it was ruling only on the "applied" aspect of his claim under the Inalienable Rights Clause, and not on his Taking Clause claim for damages for the loss in value of his land caused by NFP's nuisance harms.[147] Then, on May 10, 2021, without first rendering a decision on Garrison's May 5 motion or even mentioning it, Judge Borne granted NFP summary judgment.[148] In his summary judgment opinion, Judge Borne not only ruled against Garrison's constitutional claims, he also rejected Garrison's drainage violation and nitrate pollution claims as unsubstantiated by the evidence, citing the holding of the U.S. District Court on the Garrison's failure to prove these claims. Garrison filed an appeal of the summary judgment.[149] Under longstanding Iowa appellate litigation rules, this meant that he ended the lower court case and thereby denied the district court jurisdiction to rule on his earlier motion trying to revive his Takings Clause claim.[150] This series of events was the reason the Iowa Supreme Court later ruled that the Takings Clause claim had not been properly preserved on appeal.[151]

Unlike every other appellate decision in this series of cases challenging legislation granting CAFOs special protection from neighbors' nuisance claims, *Garrison* was a closely divided 4-3 decision, with two separate dissents and a concurring opinion that sharply criticized the views of the dissenting justices.[152]

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142. *Id.* at 75.
143. *Id.*
144. *Id.* at 70.
145. *Id.*
146. *Id.* at 75.
147. *Id.*
148. *Id.*
149. *See id.* at 76.
150. *Id.* at 79–80.
151. *Id.* at 73.
152. *See generally id.*

As explained above, the Takings Clause question based on *Gacke* Part 1 was not before the court. *Gacke* Part 2, however, was squarely addressed by the court. This focus was largely because in *Gacke* Part 2, the court applied what it characterized as a "reasonableness" standard of judicial review to rule that Iowa Code section 657.11(2) violated Iowa's Inalienable Rights Clause to the extent it purported to grant CAFOs immunity from liability to pay personal compensatory damages for injuries caused by their nuisances.[153] Points raised in the *Honomichl* majority opinion and concurrence, where the court considered overruling *Gacke* Part 2, provided the framework for the majority's analysis in *Garrison*.[154] No doubt this was due to the circumstance that the *Garrison* majority opinion was written by Justice Waterman, who authored the special concurrence in *Honomichl*, that argued forcefully that *Gacke* Part 2 was wrongly decided, should be reconsidered, and ultimately overruled.[155]

The majority opinion overruled the two key holdings in *Gacke* Part 2. First, the *Garrison* majority rejected the somewhat heightened judicial review standard *Gacke* Part 2 adopted and applied to review the claim under the Inalienable Rights Clause in the case.[156] The heightened "reasonableness" standard used in *Gacke* for evaluating the means chosen to implement a police power exercise for "undue oppressiveness" to individual rights standard of judicial review was said to be "created out of whole cloth."[157] The court noted that in 2015 it had applied the rational basis test to reject another Inalienable Rights Clause claim,[158] and indicated the use of the rational basis test in that recent case had "superseded" the controversial test used in *Gacke* Part 2.[159] The *Garrison* majority then formally struck down what it described as the three-part test for applying the Inalienable Rights Clause to Iowa Freedom to Farm laws and replaced it with the more deferential "rational basis" review the court routinely employed to Inalienable Rights Clause claims before *Gacke* Part 2 was decided.[160]

The merits of judicial recognition of Garrison's constitutional claim based on the Inalienable Rights Clause of the Iowa Constitution was then reviewed under the rational basis test.[161] The court had no trouble concluding that a correct interpretation of section 657.11(2) would support enforcement of the nuisance immunity granted by the statute to deny recovery of personal

153. *See id.* at 72.

154. *See id.* at 81–86.

155. Honomichl v. Valley View Swine, LLC, 914 N.W.2d 223, 238–40 (Iowa 2018), *overruled by* Garrison v. New Fashion Pork LLP, 977 N.W.2d 67 (Iowa 2022).

156. *Garrison*, 977 N.W.2d at 77.

157. *Id.* at 81.

158. *See* City of Sioux City v. Jacobsma, 862 N.W.2d 335, 352 (Iowa 2015).

159. *Garrison*, 977 N.W.2d at 73.

160. *Id.* at 79.

161. *Id.*

compensatory damages.[162] The court stated that section 657.11(2) did not absolutely eliminate nuisance claims against CAFOs, "but only imposed reasonable limitations on recovery rights."[163] On that basis, the *Garrison* majority upheld the district court's denial of Garrison's motion to strike the defendant's affirmative defenses.[164] The court stated simply: "We hold section 657.11 survives rational basis review."[165] In short, the court ruled that the legislature can constitutionally prohibit a winning nuisance plaintiff from collecting any type of personal compensatory nuisance damages from an Iowa CAFO without violating the Inalienable Rights Clause.

The court then considered whether the district court's award of summary judgment to NFP was justified by the law and the facts of the case. Again, the court found no trouble affirming the lower court's rulings that Garrison had failed to qualify his lawsuit under the exceptions provided in section 657.11(2).[166]

Two main lines of argument were made for overruling *Gacke* Part 2. First, the court suggested the Inalienable Rights Clause was never intended to empower Iowa courts to declare otherwise legitimate acts of the legislature unconstitutional.[167] The court claimed this lack of judicial authority was justified by section 2 of the Iowa Bill of Rights, which affirmed that the police power belonged to the people, and thereby effectively prevented Iowa courts from asserting any veto power over legislative enactments based on enforcement of language in section one.[168]

Second, the court pointed out that decisions of the Iowa Supreme Court finding constitutional fault with Freedom to Farm laws were "outlier[s]" when compared to decisions in the other fifty states to such a degree they must be carefully re-examined.[169] The majority opinion characterized the entire Iowa constitutional response to Freedom to Farm legislation as "unique" among U.S. states, and it did not find any merit in arguments that this uniqueness was justified by any special language in the Iowa Constitution, in Iowa statutes, or by anything unusual about Iowa property law or nuisance law.[170] The court concluded that because of these serious flaws *Gacke* Part 2 did not merit application of traditional *stare decisis* and must be overturned.[171]

As a bottom line, I do not think it is an overstatement to say that the *Garrison* majority decision not only restored rational basis as the only judicial

162. *Id.* at 88.
163. *Id.* at 81.
164. *Id.* at 88.
165. *Id.*
166. *Id.* at 82.
167. *Id.* at 86.
168. *Id.* at 79.
169. *Id.* at 80.
170. *Id.* at 76.
171. *Id.* at 83.

review standard appropriate for reviewing constitutional challenges to Iowa Freedom to Farm laws under section 1 of the Iowa Bill of Rights, but also, it totally rejected reliance on the Inalienable Rights Clause as a viable constitutional basis for invalidating any aspect of Iowa's Freedom to Farm laws.

2. Justice Appel's Dissent

There were two strongly worded dissents in the *Garrison* case: one by Justice Appel and one by Justice McDonald.[172] Both dissents were joined by Justice Oxley.[173] The two dissents, however, were quite different. Justice Appel was the only present member of the court who was also on the court when *Gacke* Part 2 was decided. It is not surprising that his dissent squares more closely than the majority opinion on what *Gacke* Part 2 actually decided. His dissent makes a strong argument in defense of the correctness of *Gacke* Part 2 and finds serious fault with the majority's analysis in *Garrison* that justified overruling this part of the *Gacke* case.[174]

Justice Appel first disagreed with the majority's downplaying the significance of section 1 of the Iowa Bill of Rights in its importance in protecting Iowan's property rights. He reiterated the point emphasized in *Gacke* about the location (the first position in the Bill of Rights) and the wording of the Inalienable Rights Clause with its specific reference to "acquiring, possessing and protecting property."[175] He emphasized that unlike many states where the Inalienable Rights Clause language is part of a preamble to the state constitution or does not otherwise appear to confer any power on state courts for its judicial enforcement, in Iowa, it is the first provision in Iowa's Bill of Rights and was clearly intended to be enforced by the courts as creating individual constitutional rights.[176] Furthermore, the language of Iowa's Inalienable Rights Clause is addressed expressly to safeguarding Iowa citizens' private property rights.

Justice Appel also scoffed at the suggestion that the Inalienable Rights Clause in section 1 of the Iowa Bill of Rights was somehow countermanded by section 2 of the same document, which merely confirmed that the police power belonged to the Iowa people and said nothing about section 1.[177] He pointed out that unlike a state statute, the Iowa Constitution was voted on directly by the people of Iowa, who approved it. Therefore, applying the Iowa

172. *Id.* at 102 (Appel, J., dissenting); *Id.* at 113 (McDonald, J., dissenting).
173. *Id.* at 102 (Appel, J., dissenting); *Id.* at 113 (McDonald, J., dissenting).
174. *Id.* at 99, 100 (Appel, J., dissenting).
175. *Id.* at 96; IOWA CONST. art. 1, § 1.
176. *Garrison*, 977 N.W.2d at 96–98 (Appel, J., dissenting).
177. *Id.* at 97.

Constitution to invalidate a state statute does not subvert the will of the people, it upholds it.[178]

He reminded readers that the founders of the Iowa Constitution understood the risk that unchecked special interests could dominate the political branches and adopt laws for their own benefit and not in the public interest. He argued that "[t]he Iowa Bill of Rights is a shield that protects the people's rights from the political process,"[179] and that "[p]lainly, article I, section 1 was designed to be enforced by the judiciary."[180]

In his concurrence, Justice Mansfield summarized his disagreement with Justice Appel's dissent in these words: "Justice Appel's [d]issent [t]ries to [s]ave *Gacke* by [f]inding [p]recedent [w]here [i]t [i]sn't and [p]roperty [w]here [i]t [i]sn't."[181] He disagreed with Justice Appel that the Inalienable Rights Clause in the Iowa Constitution could have the legal force the *Gacke* decision purported to give it. In essence, Justice Mansfield argued that a nuisance victim's right to recover damages for economic and noneconomic injuries incurred when his land is seriously harmed by a nuisance is not a property right but only a common law privilege that the legislature is free to eliminate as they see fit.[182]

3. Justice McDonald's Dissent

Unlike Justice Appel, Justice McDonald stated in his dissent that he would not continue to apply the heightened judicial review standard from *Gacke*.[183] He viewed the heightened standard as "unnecessary," and he favored simply applying a more rigorous rational basis review to legislation that is claimed to violate the Inalienable Rights Clause.

Justice McDonald's dissent began by taking the majority opinion to task for not applying the rational basis standard more rigorously. He argued that, properly applied, the means test should weigh the reasonableness of the means, not merely its rational connection, to the ends sought.[184] Thus, while promoting the growth of the hog industry within Iowa may be a proper subject for legislative action, accomplishing this goal by awarding CAFOs almost total immunity from private nuisance liability was an unreasonable means under Iowa law, if the language of Iowa's Constitution was correctly interpreted, and Iowa's judicial precedents in property law and nuisance law are properly

178. *Id.*

179. *Id.* at 98.

180. *Id.*

181. *Id.* at 94 (Mansfield, J., concurring).

182. *Id.*

183. *Id.* at 103 (McDonald, J., dissenting).

184. For example, a government could have attempted to stop the spread of COVID-19 by isolating every victim in a jail cell. Such an approach might be rational in terms of its connection to the desired ends but probably would not be judicially approved as a reasonable tactic constitutionally. This is the author's hypothetical, not Justice McDonald's.

applied. Thus, Justice McDonald thought that the *Gacke* heightened standard for judicial review was unnecessary because a more rigorous application of the traditional rational basis test would have resulted in striking down as unconstitutional the barring of personal nuisance damages against an Iowa CAFO.[185]

To better understand Justice McDonald's argument that rational legislative means must also be inherently reasonable, consider how a legislature might try to control the next viral pandemic.[186] Requiring all citizens to receive effective vaccinations would be both a rational response, and it would a reasonable strategy. On the other hand, forced euthanasia of pandemic victims, as we routinely do for poultry flocks infected with bird flu, might also be a rational means for gaining control over the pandemic, but it certainly would not be accepted by courts as a reasonable legislative tactic.

Justice McDonald's dissent also took issue with the majority's stated reasons for overruling *Gacke* Part 2 and argued they were not justified. First, he challenged the claim that *Gacke* Part 2 had been undermined as precedent by later decisions. To the contrary, while the majority could cite later cases where the application of the Inalienable Rights Clause had been rejected, in all the cases involving *Gacke* Part 2 as precedent, the later rulings had unanimously reaffirmed it.[187] Second, he disagreed with the idea that what other states did judicially with their Freedom to Farm laws was relevant to deciding Iowa farm nuisance cases under our constitution, statutes and caselaw. He argued that most of the out-of-state cases cited by the majority bore little resemblance to the series of CAFO nuisance cases decided by the Iowa Supreme Court.[188]

In his concurrence Justice Mansfield summarized his criticism of Justice McDonald's dissent in these terms: "Justice McDonald's [d]issent [t]ries to [s]ave *Gacke* by [a]ltering [w]hat *Gacke* [a]ctually [h]eld."[189] Justice Mansfield elaborated on this assessment by claiming that much of Justice McDonald's dissent was a disagreement with the legislative policy underlying section 657.11, and not a legal argument about the existence of enforceable property rights.[190]

4. Justice Mansfield's Concurrence

Justice Mansfield's concurrence in *Garrison* was joined by Justice Waterman. Besides directing sharp criticism at both dissents, the concurrence reinforced and elaborated the key arguments in the majority opinion. Unlike

185. *Garrison*, 977 N.W.2d at 103 (McDonald, J., dissenting).
186. This is the author's hypo, not Justice McDonald's.
187. *Garrison*, 977 N.W.2d at 105 (McDonald, J., dissenting).
188. *Id.* at 106.
189. *Id.* at 95. (Mansfield, J., concurring).
190. *Id.*

the majority opinion, Mansfield expressly confirmed his commitment to the *Gacke* Part 1 conclusion that section 657.11 was only partially unconstitutional.[191]

In his substantive comments about the *Garrison* case, Justice Mansfield first disagreed with the *Gacke* Part 2 application of the Inalienable Rights Clause. He claimed that, except for the 1915 case, *State v. Osborne*,[192] prior decisions of the court have viewed the Inalienable Rights Clause as "not adding anything to the more specific constitutional guarantees elsewhere in the Iowa Bill of Rights."[193] He also pressed the argument that the decision in *Gacke* Part 2 failed to take into account section 2 of the Iowa Bill of Rights awarding the state police power to the people, thereby severely limiting the importance of section 1.[194] Like the majority opinion, Justice Mansfield lamented the heightened scrutiny applied in *Gacke* Part 2 and claimed it was unjustified by Iowa precedent.[195] He concluded his criticism of *Gacke* Part 2 in these words: "To sum up, *Gacke*'s inalienable-rights analysis came out of nowhere and has no limiting principle."[196]

II. FURTHER REFLECTIONS ON NEARLY FORTY YEARS OF BACK AND FORTH ON CAFOS NUISANCES BETWEEN THE IOWA GENERAL ASSEMBLY AND THE IOWA SUPREME COURT

A. JUSTICE LAVORATO'S RULINGS IN WEINHOLD *AND* BORMANN

CAFO nuisance cases started reaching the Iowa Supreme Court in the 1970s.[197] The first hog CAFO case, *Weinhold v. Wolff*, was not decided until 1996.[198] I was greatly impressed by the judicial discretion demonstrated by Justice Lavorato's in his holding in the *Weinhold* case. Justice Lavorato declined the first opportunity for the Iowa Supreme Court to rule on the constitutionality of Iowa's 1979 Freedom to Farm law. He held that Iowa Code section 352.11 was not applicable in the *Weinhold* facts because the defendant had begun operating his hog CAFO a full year before he obtained the Agricultural Area designation for his farm.[199] I started including a copy of the *Weinhold* decision in my nuisance teaching materials nearly thirty years ago because it laid out so clearly the Iowa three-part test for determining the existence of a nuisance and explored so thoroughly the full range of remedies available to a winning nuisance plaintiff.

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191. *Id.* at 92.
192. *See generally* State v. Osborne, 154 N.W. 294 (Iowa 1915).
193. *Garrison*, 977 N.W.2d at 93 (Mansfield, J., concurring).
194. *Id.* at 92.
195. *Id.* at 92.
196. *Id.* at 94.
197. *See generally* Patz v. Farmegg Prods., Inc., 196 N.W.2d 557 (Iowa 1972).
198. *See generally* Weinhold v. Wolff, 555 N.W.2d 454 (Iowa 1996).
199. *See id.* at 462.

I was even more impressed by the boldness of Justice Lavorato's decision in the *Bormann* case, where he applied an easement analysis to strike down section 352.11 as an unconstitutional taking.[200] Justice Lavorato said that the legislature was free to exercise its police power to promote favored Iowa industries, but it could not do so by taking away a valuable private property interest from other Iowa landowners and granting it to a favored owner without paying the burdened landowner just compensation for the loss.[201] He concluded the unanimous opinion by advising the Iowa legislature and the Iowa legal community that in the court's view the challenged statute was "flagrantly unconstitutional."[202]

B. THE RESULT IN THE GACKE *DECISION WAS SOMETHING OF A SURPRISE*

When the *Gacke* decision was published in 2004, I was a little surprised that the court had unanimously agreed that the *Bormann* precedent applied so comfortably to Iowa Code section 657.11(2) and rendered it unconstitutional.[203] Before the decision, I thought the differences between section 352.11, which was held as unconstitutional in *Bormann*, and section 657.11(2) were sufficiently great that some Justices would deem *Gacke*, which reviewed section 657.11(2), not governed by the *Bormann* precedent. My prediction was wrong as all nine justices agreed that, notwithstanding the differences in statutory language, the *Bormann* precedent controlled.[204]

I thought at the time that the court went seriously off track with respect to the *Bormann* precedent when it decided section 657.11 was only partially unconstitutional and held the only nuisance remedy protected by the Iowa Takings Clause was recovery for the loss in market value of the plaintiff's land.[205] The *Gacke* court decided it was necessary to separate customary nuisance damages into damages compensating for a reduction in the value of the land affected by the nuisance (recoverable) and personal damages for economic and noneconomic harm suffered by people legally connected to the land the nuisance negatively impacted (not recoverable).[206] Here, I think the court misapplied the Iowa statute it cited. Iowa Code section 4.12 appears to contemplate a much more complex statute than what was before the court in considering the constitutionality of section 657.11(2). By denying nuisance plaintiffs the right to sue Iowa CAFOs for nuisance harms, under the *Bormann* easement analysis, section 657.11(2) imposed an easement in favor of the CAFO defendant without making any provision for paying the plaintiff just

200. Bormann v. Kossuth Cnty. Bd. of Supervisors, 584 N.W.2d 309, 321 (Iowa 1998).
201. *Id.*
202. *Id.* at 322.
203. *See* Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168, 185 (Iowa 2004).
204. *Bormann*, 584 N.W.2d at 322.
205. *Gacke*, 684 N.W.2d at 174.
206. *Id.* at 175.

compensation. The *Bormann* precedent makes that an unconstitutional taking. There is nothing left in section 657.11(2) to salvage and enforce, and no other elements of section 657.11 were challenged. As mentioned earlier, the property rights issue the court should have considered was the absence of any property right in the CAFO to impose the nuisance harms it did on the plaintiff without bearing any legal responsibility for them.[207]

This decision to bifurcate the legal remedies for a private nuisance necessitated *Gacke* Part 2, where the court turned to the Inalienable Rights Clause in section 1 of the Iowa Bill of Rights to support the recovery of compensatory personal damages.[208] This work-around in turn led to the adoption of a new heightened standard of judicial review to determine whether the legal force of the property protections in section 1 of the Bill of Rights made the immunity granted CAFOs by Iowa Code section 657.11(2) unduly oppressive on the Gackes' individual rights.

I think one major problem here was that the court in *Gacke* failed to recognize the difference between positive easements and negative easements. When Justice Lavorato ruled in the *Bormann* case that Iowa Code section 352.11 unconstitutionally took an easement from neighbors to the designated Agricultural Area, he was thinking of the immunity granted to the farm business as a negative easement over the neighbor's land, not a positive easement, like a roadway or access easement.[209] When a government condemns a positive easement, it is true that the only question raised in calculating a just compensation award is the before and after value of the land affected by the easement.[210]

Negative easements are different. Iowa property law clearly recognizes this difference. The Iowa statute limiting the time "use restrictions on land" are enforceable to twenty-one years[211] is routinely applied by Iowa courts to restrict the legal duration of negative easements, such as a covenant forbidding the commercialization of the servient land,[212] but not to the duration of positive easements like roadways. When the legislature legalizes an ongoing nuisance by denying the owner of the affected land the right to remedy the wrong through a lawsuit, the easement taken is a negative easement, and much more than the land value can be harmed by the taking. Except for its Freedom to Farm statutes, since 1851, no other Iowa statute has disallowed the recovery in nuisance actions of personal compensatory damages for economic and noneconomic injuries suffered by people residing on the affected land.

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207. *See supra* Section I.E.1.

208. *Id.* at 175–79.

209. *Bormann*, 584 N.W.2d at 316–17.

210. *See Gacke*, 684 N.W.2d at 174–75.

211. *See* IOWA CODE § 614.24(1) (2025).

212. *See* Franklin v. Johnston, No. 15-2047, 2017 WL 1086205, at *3–*6 (Iowa Ct. App. Mar. 22, 2017).

When a state statute takes a negative easement, fundamental fairness should allow recovery of the full range of nuisance remedies otherwise available to an injured landowner. In my view, the court's decision in *Gacke* overlooked this crucial difference between positive and negative easements in deciding that only a partial taking of land value resulted from granting the farm business immunity from nuisance liability, and that merely awarding compensation for the loss in land value fully rectified the civil wrong caused by the nuisance.

The *Gacke* court's failure to discern the difference between a common positive easement and the type of negative easement imposed by section 657.11(2) was compounded when the *Gacke* court may have mistakenly conceptualized the challenge to section 657.11(2) as an eminent domain issue. It is clear from the opinion in *Gacke* Part 1 that the court was treating the nuisance damages, that but for the Freedom to Farm statute would have been recoverable, as a handy source for providing the just compensation the statute lacked.[213]

This is not how Takings Clause law is supposed to work. If compensation must be paid for a government taking, it is the government that is supposed to pay, not the private party who benefited from the statute. Once the court acknowledged that section 657.11 unconstitutionally took an easement in the Gackes' private property without paying just compensation, that should have been the end of the matter—an uncompensated taking occurred, therefore the statute violated the Iowa Takings Clause and should have been ruled unconstitutional and unenforceable.

Section 657.11(2) imposed an easement to pollute on the Gackes' land that included immunity from legal responsibility for loss in value to the affected land and all personal losses suffered by those on the land. It is important to point out that under Iowa nuisance law, recoveries of damages for personal injuries caused by a nuisance are available only to people who have a connection to the land and who suffered harm proximately caused by the nuisance. The land connection can be as owners, tenants, or simply by reason of people's presence on land at the time the nuisance occurred. Iowa nuisance law protects more than the value of land, it expressly protects people's comfortable use and enjoyment of their lives and land. Thus, the right to recover for personal economic and noneconomic losses caused by a nuisance has long been regarded by Iowa courts as a property-based tort remedy.

When the *Gacke* court ruled that the Iowa Takings Clause did not extend its constitutional protection to compensatory damages for personal injuries caused by a nuisance, in my opinion, the court disregarded the importance Iowa property law places on the full range of nuisance remedies that have been conventionally recognized and applied by Iowa statutes and courts since

213. *Gacke*, 684 N.W.2d at 175.

before statehood. The *Bormann* decision, on which the *Gacke* decision relied, did not engage in any classification of nuisance damages. It was unnecessary there, however, because *Bormann* was a declaratory judgment case based on a claim of facial unconstitutionality of the challenged statute,[214] and the defendant made no claim that if invalidity was found it should apply only to a nuisance plaintiff's recovery for loss in land value, the defendant's claim made in *Gacke*. If Justice Lavorato had been forced to consider whether his ruling invalidated the statute only to the extent it prevented recovery of the loss in land value caused by a CAFO nuisance, I feel quite sure he would not have agreed it required such a limitation.

It is interesting to speculate about how Justice Lavorato would have applied his *Bormann* easement analysis to the *Gacke* case had he still been on the court at the time it arose. I think as an initial matter, Justice Lavorato would have pointed out, as did Justice McDonald in his *Garrison* dissent, that Iowa property law does not focus on property as a "corporeal thing," but rather looks to the bundle of legal rights enjoyed by a property owner.[215] Iowa nuisance law protects one of the most valuable rights in that bundle, namely the right to be free from unreasonable interference with the comfortable use and enjoyment of one's property. The immunity from nuisance lawsuits awarded CAFO operators by Iowa Code section 657.11(2) clearly prevents a landowner suffering a nuisance harm caused by a CAFO from asserting that important property right, thus in effect destroying it. Takings law generally regards the destruction of any right in the bundle of recognized property rights as an unconstitutional taking, unless just compensation is provided.

It was exactly this result that led Justice Lavorato in *Bormann* to determine that the challenged Freedom to Farm statute in that case granted qualified farm operators a negative easement to inflict nuisance harm that was imposed on all affected neighboring land.[216] Because the statute did not award the neighbors any just compensation for the property interest taken from them, it was held an unconstitutional taking.[217] Because Iowa law deems a legislative grant of immunity from nuisance liability to a private party as equivalent to the state appropriating a negative easement from the affected landowner and transferring it to the CAFO, it stands to reason that what the landowner lost due to the unconstitutional regulation was more than just a reduction in value of the land affected by the nuisance. Lost was the full range of nuisance remedies intended to assure landowners' comfortable enjoyment of their property.

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214. *See Bormann*, 584 N.W.2d at 312.

215. *See* Garrison v. New Fashion Pork LLP, 977 N.W.2d 67, 107 (Iowa 2022) (McDonald, J., dissenting).

216. *See Bormann*, 584 N.W.2d at 316–21.

217. *See id.*

I think he also would have pointed out that under Iowa property law, as mentioned earlier, a voluntarily transferred negative easement, in which a neighbor agrees to become the servient estate and consents to suffer the same type of harm done to their property and to them as the harm done to neighbors by nearby hog CAFOs in the Iowa nuisance cases, the dominant estate owner would certainly have paid for a covenant not to sue for all possible nuisance damages, not just the loss in land value. Why should the government taking an easement by legislative enactment be treated differently?

I also think that if Justice Lavorato had been writing the *Gacke* opinion, he would have focused his attention on the language of section 657.11(2) to reinforce this point. To make sure the new Freedom to Farm law would cover all possible nuisance claims against an Iowa CAFO, the drafters of the statute copied precisely the wording of Iowa Code section 657.1 defining a nuisance. The statute describes the nuisance suits it bans as covering unreasonable interferences "with another person's comfortable use and enjoyment of the person's *life* or property."[218] On its face, section 657.11(2) contemplates banning lawsuits to recover for nuisance harms caused by CAFO's to people as well as to property. Thus, the easement Iowa courts have construed such a statute as creating should be regarded as embracing the full range of legal remedies available to an Iowa plaintiff for nuisance harms to people and property.

Based on a little knowledge of his legal career before becoming a judge, I feel relatively confident in my prediction about how Justice Lavorato would have decided *Gacke* Part 1. Before becoming a judge, he was a Des Moines lawyer engaged in a general practice and would have been quite familiar with the intricacies of real estate law.[219] Thus, he certainly would have known how positive and negative easements operate quite differently.

There is a North Carolina case I have used in my classes for many years that provides an excellent example of how a voluntarily acquired negative easement can be used to curtail nuisance claims. In the case, a small North Carolina city purchased five acres in the middle of a rural 120-acre tract for the purpose of creating a new city landfill.[220] Knowing that the surrounding 115 acres were destined to become a rural residential subdivision, the city's lawyer was careful to obtain from the seller a negative easement over the remaining property that effectively prevented later homeowners from making nuisance claims based on the various offensive emissions expected to emanate from the landfill.[221] The list of potential nuisance harms set forth in this North

218. IOWA CODE § 657.11A(2) (2025) (emphasis added).

219. *Louis A. Lavorato (1986-2006)*, IOWA JUDICIAL BRANCH, https://www.iowacourts.gov/for-the-public/educational-resources-and-services/iowa-courts-history/past-justices/louis-a-lavorato [https://perma.cc/ZZ9S-UGF3].

220. Waldrop v. Town of Brevard, 62 S.E.2d 512, 512 (N.C. 1950).

221. *Id.* at 512–13.

Carolina easement bears strong similarity to the long list of nuisance activities that Iowa neighbors are barred from suing for under Iowa Code section 657.11. Coming as he did from an Iowa, general practice firm, I am certain Justice Lavorato would have easily recognized section 657.11(2) as a legislatively created negative easement imposed on CAFOs' neighbors without paying them any just compensation for the property interest lost—a flagrant taking just like the one he held unconstitutional in his *Bormann* opinion.

C. THE HONOMICHL *CASE*

The *Honomichl* decision added a sensible procedural requirement that lower courts must conduct a fact-finding hearing in applying the *Gacke* Part 2 analysis to the facts of a claimed variation of the Inalienable Right Clause.[222] But I thought the most important aspect of the *Honomichl* case was its unanimous reaffirmation of the *Gacke* Part 2 analysis of how the court should apply the Inalienable Rights Clause to protect property rights threatened by legislative action. I did not know quite what to make of the court later misconstruing the part of the *Gacke* Part 2 analysis that applied an "unduly oppressive" test in finding section 657.11(2) unconstitutional. The *Honomichl* opinion referred instead to the *Gacke* as applied, three-prong test, thereby truncating the lengthy three-step constitutional analysis the court actually performed in *Gacke* Part 2 into a simple three-prong factual test focused on the impact of the statute on the plaintiff's property.[223] Earlier, a couple of district court decisions had engaged in the same oversimplification in applying the analysis in *Gacke* Part 2, as had an Iowa Court of Appeals opinion.[224]

To me, the most troubling aspect of the case was the court's apparent willingness to even consider seriously the defendant's argument that *Gacke* should not be treated as a controlling precedent because the legal landscape has changed significantly since the case was decided. This argument made two different claims. First, that *Gacke* Part 2 should be disregarded as precedent because the Iowa General Assembly had tightened the rules governing the siting and operation of CAFOs, and the Iowa DNR had adopted new regulations on manure management.[225] Second, that *Gacke* Part 2 should not be followed as precedent because it was sharply inconsistent with constitutional decisions upholding Freedom to Farm laws in every other state that had considered the issue.[226]

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222. Honomichl v. Valley View Swine, LLC, 914 N.W.2d 223, 238 (Iowa 2018), *overruled by* Garrison v. New Fashion Pork LLP, 977 N.W.2d 67 (Iowa 2022).

223. *Id.* at 234–36.

224. *See* notes 93–95 and accompanying text.

225. *Honomichl*, 914 N.W.2d at 236–37.

226. *Id.* at 232–33.

After examining these arguments, in my view, the court correctly invoked the *stare decisis* principle to rule that there were no "compelling reasons" that justified overturning the *Gacke* Part 2 decision.[227] Quoting an earlier Iowa decision, the court observed "*stare decisis* demands that we respect prior precedent and that we do not overturn them merely because we might have come to a different conclusion."[228]

In reviewing the changes in the legal landscape asserted by the defendant, the court stated firmly that "the analytical framework set forth by the *Gacke* factors, even with its limitations, are still compatible with present conditions," and that "the court is unable to discern a satisfactory alternative standard to apply [in such cases]."[229] It was interesting that the *Honomichl* court did not appear overly concerned with what the defendant claimed was the outlier position of Iowa courts' constitutional treatment of Iowa's Freedom to Farm legislation. It pointed out in only six states had courts ever considered the constitutionality of their Freedom to Farm laws, and none of those cases were very similar to the relevant Iowa CAFO cases.[230] Only one of the cases cited expressly rejected Iowa's "easement analysis."[231]

The special concurrence filed by Justices Waterman and Mansfield, however, strongly reinforced the defendant's arguments that *Gacke* Part 2 should be disregarded as precedent because the legal landscape had changed, it wrongly applied a judicial review standard more demanding than rational basis, the decision lacked adequate support in Iowa precedents, and it was seriously out of step with the constitutional treatment of Freedom to Farm laws everywhere else in the nation.[232] This special concurrence clearly set the stage for the narrow *Garrison* decision, which overruled *Gacke* four years later.

A quick note on the importance of changes in the legal landscape on the durability of controversial court decisions. Perhaps the most important change in the Iowa legal landscape during the fourteen years between the *Gacke* and *Honomichl* cases was the enactment by the Iowa legislature of section 657.11A in 2017. Although section 657.11A re-enacted the nuisance immunity provisions of the original section 657.11, the new provision embodied a quite different approach to limiting the nuisance liability of Iowa hog CAFOs. Instead of relying on the contested immunity grant, section 657.11A focused on limiting CAFO exposure to compensatory damages by tightening the evidentiary requirements for proving such damages and imposing a cap on noneconomic damages.

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227. *Id.* at 236.

228. *Id.* (quoting State v. Bruce, 795 N.W.2d 1, 3 (Iowa 2011)) (italics added).

229. *Id.* at 237.

230. *Id.* at 232–33.

231. *See* Lindsey v. DeGroot, 898 N.E.2d 1251, 1258–62 (Ind. Ct. App. 2009).

232. *Honomichl*, 914 N.W.2d at 239–40.

In my view, there were grounds for hope that this 2017 amendment to Iowa nuisance law marked a clear change in the Iowa legislature's approach to dealing with the potential nuisance problems it perceived might curtail the expansion in Iowa hog CAFOs. It was arguably an acknowledgement by the Iowa General Assembly that the constitutional problems associated with section 657.11 identified by the Iowa courts were legitimate and likely to continue. In any event, it was certainly a significant change in the legal landscape with respect to neighbors' nuisance suits against hog CAFOs, and it was not even mentioned in the *Honomichl* majority opinion or in Justice Mansfield's concurrence even though the case was decided a year after section 657.11A took effect. As noted below, this latest amendment to Iowa Code Section 657 was also barely mentioned in the *Garrison* case.

D. THE GARRISON *MAJORITY OPINION*

With respect to the *Garrison* majority opinion, I find it hard to understand why the Iowa Supreme Court chose to look backward to relitigate an issue that, before some sharp questioning in the majority opinion in *Honomichl* and the special concurrence by Justices Waterman and Mansfield in the same case, appeared to be well-settled Iowa law based on two consistent unanimous Supreme Court opinions in the *Gacke* and *Honomichl* cases.

The abruptness of the overruling is made even more puzzling when it is noted that by the time the *Garrison* case reached the Iowa Supreme Court, the Iowa legislature could be argued to have accepted the Iowa Supreme Court decisions in *Bormann* and *Gacke* regarding the unconstitutionality of immunizing CAFOs from nuisance liability and moved on to a different strategy in trying to promote more hog CAFOs in Iowa. The new nuisance law section 657.11A, enacted in 2017, declared CAFO nuisances "permanent nuisances," imposed stronger proof requirements on all types of compensatory damages awarded against a CAFO in a nuisance lawsuit and added a cap on recoverable noneconomic damages. While there are still some lingering questions about how the Iowa courts will interpret some ambiguous language in this latest Freedom to Farm legislation, there are hints in the *Garrison* decision that indicate the Iowa Supreme Court will have little difficulty in upholding its constitutionality once it is squarely before the court.

Why the court chose to ignore Iowa Code section 657.11A in its *Garrison* decision is difficult to understand. The fighting issue in the case was whether and to what extent Garrison's personal compensatory claims for nuisance damages were recoverable. This latest Iowa Freedom to Farm law took effect in 2017, three years before *Garrison* filed his claim in state court, and the new statute was definitely considered by the trial court. Garrison challenged the constitutionality of sections 657.11A(3) and 657.11A(5) in his pleadings.[233]

233. *See* Garrison v. New Fashion Pork LLP, 977 N.W.2d 67, 75 (Iowa 2022) (summarizing the holdings of the district court).

It was actively considered by the district judge handling the case below, who expressly ruled the new law constitutional.[234] If the court had taken section 657.11A into account, it could have graciously accepted the legislature's seeming partial acquiescence in the *Bormann* and *Gacke* decisions and applied the proof requirements and damages cap of the new statute to the facts of *Garrison*. Perhaps, in the process, the court could have provided an answer to the question about how to resolve the ambiguity relating to the word "only" in section 2 of the new statute.[235] As an exercise of prudent judicial discretion, this approach would have been much more in keeping with the court's traditional role in honoring the precedential effect of its earlier unanimous decisions than was upholding a confusing lower court summary judgment decision that applied the "*Gacke* factors" to rule that Garrison was not qualified to collect his nuisance damages claim, but also ultimately denied him access to any judicial relief by applying the immunity provisions of a statute that had been held an unconstitutional taking by a unanimous Iowa Supreme Court in a different part of the *Gacke* case.

The court's failure to engage with new Iowa Code section 657.11A is all the more puzzling when it is noted how the *Garrison* majority opinion goes out of its way to emphasize the primacy of the Iowa legislature in addressing legal questions relating to citizens' rights under Iowa property law. If the legislature is to have the final word on Iowa property rights, why doesn't the court pay closer attention to what the legislature has to say about the subject?

At one point, *Garrison* suggests that, although the Inalienable Rights Clause may have "some constitutional bite,"[236] judicial enforcement of it would be of little importance in protecting Iowans' private property rights. In his concurrence, Justice Mansfield explains this in part by stressing that section 2 of the Iowa Bill of Rights grants exclusive benefit of the state's police powers to the people, as if the juxtaposition of these two sections logically nullifies the property rights guaranteed in section one.[237] Justice Mansfield reinforces this theme in his concurrence by ridiculing "happiness," one of the terms listed as worthy of protection in section 1, by saying he would like "specific performance" of that right.[238] He also lists all the other constitutional rights mentioned in the Iowa Bill of Rights that include the word "shall" or "shall not" in their statement, arguing that they are the only rights entitled to judicial enforcement in contrast to section 1, for which he claimed judicial enforcement should be unavailable.[239]

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234. *See id.*

235. *See* IOWA CODE § 657.11A(2) (2025).

236. *See Garrison*, 977 N.W.2d at 84 (citing City of Sioux City v. Jacobsma, 862 N.W.2d 335, 352 (Iowa 2015)).

237. *See id.* at 92.

238. *Id.*

239. *Id.* at 92–93.

This argument, originally made in the *Honomichl* concurrence, is no more convincing today than it was then. As Justice Appel pointed out in his dissent, section 1 of "[t]he Iowa Bill of Rights cannot be stood on its head and made into a facilitator of legislative domination."[240] In contrast to the explicit language protecting property rights in section 1, section 2 of the Iowa Bill of Rights is a vague statement of political philosophy. It simply says the State's police power belongs to the people of Iowa.[241] It does not mention the Iowa General Assembly or purport to devolve the police power on it exclusively. All of the gloss about legislative hegemony through its exercise of the police power cited in *Garrison* is based on pronouncements by the Iowa Supreme Court over time.

Section 2 certainly does not make any reference to section 1's Inalienable Rights Clause or say anything that suggests limits on it. Why the natural meaning of both clauses should not be given equal credibility before the court is not explained. Unlike the emphasis in *Gacke* decision of Inalienable Rights protections being imbedded in section 1 of the Iowa Bill of Rights and Justice Appel's dissent recounting the history of section 1, no particular significance is accorded the placement of the protection of citizens' private property rights ahead of the police power in section 2. Also disregarded is the Iowa Bill of Rights singular focus on protecting individual rights rather than specifying various sources of governmental powers, except in section 2.

As Justice Appel also pointed out in his *Garrison* dissent, the drafters of the Iowa Constitution were very much aware that special interests could capture the police power politically within the legislature and exercise it to advance their private agendas in ways that could threaten Iowa citizens' individual rights. He posited this awareness of how powerful special interests could influence the legislature to do their bidding was the reason the Inalienable Rights Clause was placed first in section one of the Iowa Bill of Rights, and why Iowa courts should be particularly alert to the need to enforce it when the occasion presented itself.[242]

When you reflect on it for more than a moment, the Iowa General Assembly's repeated efforts to immunize hog CAFOs from nuisance liability provides a perfect example of how powerful special interests can gain sufficient power in the political arena to push through legislation on their behalf that will take away an Iowa citizen's individual civil rights. In this case, the right threatened is the legal authority to sue a nuisance that is seriously interfering with Iowa citizens' comfortable use and enjoyment of their home. Until the *Garrison* case, the Iowa Supreme Court had often said from time to time that the Iowa Bill of Rights was not just "glittering generalit[ies] without

240. *See id.* at 98.
241. IOWA CONST. art. I, § 2.
242. *See id.* at 97.

substance or meaning,"[243] and that the court should honor its provisions and protect the individual rights it enshrined.

Finally, my biggest quarrel with the *Garrison* decision concerns its unwillingness to apply ordinary *stare decisis* to the *Gacke* and *Honomichl* decisions. It is not every day when you see a state supreme court overrule its own decision that was unanimously reaffirmed only four years earlier. I question the persuasiveness of the majority's explanation for why *stare decisis* should not apply to prevent overruling of the *Gacke* and *Honomichl* decisions as wrongly decided because they are claimed to have applied an incorrect standard of judicial review and, in the majority's view, mistakenly found merit in a constitutional claim based on language expressly protecting Iowan's property rights in section 1 of the Iowa Bill of Rights.

In the first place, the court's assumption that rational basis review denotes a well-defined and uniform practice among appellate judges is simply overstated. As Justice McDonald's dissent illustrates, judges are not of one mind at all about how consistent rational basis review is now, has been over time, or should be. The reasonableness review applied by the *Gacke* court to section 657.11(2) was hardly a high level of judicial scrutiny and might fit some judges' understanding of a more demanding rational basis review.

Secondly, *Gacke* Part 2 did not come "out of nowhere"[244] as Justice Mansfield claimed in his *Garrison* concurrence. Its analysis was firmly based on two unanimous Iowa Supreme Court cases, which it cited several times.[245] Does the *Garrison* majority totally reject the authority of the *Osborne* and *Gravert* cases cited in *Gacke*, which insisted that if the legislature is to eliminate or limit a well-established common law right, not only must the purpose of the legislative change be rational, but the means used must be reasonably necessary to achieve the legislative purpose and not unduly oppressive on the right affected? Was the *Gacke* court so egregiously wrong to rely on these Iowa precedents that the decision must be reversed after being followed by a number of courts for almost twenty years? It is clear to me in carefully examining the cases at issue, the biggest change in the Iowa legal landscape in the past twenty years has been an almost total turnover in the membership of the Iowa Supreme Court. Does that change in judicial personnel on the state's highest court justify giving such short shrift to Iowa's well-established principle of *stare decisis*?

On the subject of overruling, the *Garrison* majority would have been wise to have followed the counsel of U.S. Supreme Court Chief Justice Roberts. In his majority opinion in the 2019 case of *Knick v. Township of Scott*,[246] Chief

243. *See* Gacke v. Pork Xtra, L.L.C., 684 N.W.2d 168, 176 (Iowa 2004) (citing State v. Osborne, 154 N.W. 294, 300 (Iowa 1915)).

244. *See Garrison*, 977 N.W.2d at 94 (Mansfield, J., concurring).

245. *See Gacke*, 684 N.W.2d at 176, 177. The two cases are State v. Osborne 154 N.W. 294 (1915) and Gravert v. Nebergall, 539 N.W.2d 184 (1995).

246. *See generally* Knick v. Twp. Of Scott, 588 U.S. 180, 191 (2019).

Justice Roberts wrote, "We have identified several factors to consider in deciding whether to overrule a past decision, including 'the quality of [its] reasoning, the workability of the rule it established, its consistency with other related decisions . . . and reliance on the decision.'"[247] Applying these factors to the *Gacke* decision, just four years earlier, the *Honomichl* decision had unanimously confirmed that *Gacke* was well reasoned, the factors it created were workable, there was nothing about it that was inconsistent with other Iowa nuisance law rulings, and it had been relied upon by three Iowa district court decisions, one court of appeals decision and one recent Iowa Supreme Court decision.[248]

In justifying the need to overrule *Gacke*, the court not only described *Gacke* as wrongly decided, but the majority opinion also included a separate section detailing what it described as Iowa's "[u]nique [j]urisprudence" regarding the constitutionality of statutory nuisance immunity for CAFO, suggesting this too was a reason to overrule *Gacke* and *Honomichl*.[249] In this section of the opinion, the court traced the history of the legislature's enactment of Freedom to Farm laws and the court's constitutional review of those laws in *Bormann*, *Gacke*, and *Honomichl*. The opinion cited nine nuisance cases involving Freedom to Farm laws from other jurisdictions.[250] In at least one of these decisions, the court expressly refused to apply the so-called "Iowa easement analysis."[251] The obvious premise of this argument is that if these Iowa nuisance cases reach a result so different from every other jurisdiction, they must be wrongly decided. In my view, the court was not justified in jumping so easily to that conclusion.

The cases from other states cited by the court in *Garrison* to demonstrate that Iowa law is an "outlier" were not all decisions by the state's highest court as are the Iowa cases the court highlighted.[252] Typically, the cases from other states involve provisions in state constitutions quite different than Iowa's Constitution, different common law and statutory versions of nuisance and property law, and most often very different factual situations than those involved with the unbearable living conditions that continuing nuisance harms from Iowa hog CAFOs can impose on neighbors.[253] It is not self-evident that the holdings reached by Iowa courts in this series of cases that ruled unconstitutional nuisance immunity for CAFOs were legally inferior to other states or were somehow fundamentally wrong. The Iowa cases were based on the Iowa Constitution, Iowa common law, and Iowa statutory law respecting

247. *Id.* at 203 (alteration in original) (quoting Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 585 U.S. 878, 917 (2018)).

248. *See* notes 93–95 and accompanying text.

249. *See Garrison*, 977 N.W.2d at 76.

250. *Id.* at 78–79.

251. *Id.*

252. *See id.*

253. *See id.*

private property rights and Iowa nuisance law. The U.S. Supreme Court recognizes that property law may be somewhat different from one state to another in recognition that the states themselves can be very different in ways that influence the formulation of their property law.[254]

Iowa property law is sometimes very different from other states, but that fact is rarely argued to make the Iowa law so wrong that the Iowa Supreme Court should no longer treat it as precedent. For example, Iowa's property law on adverse possession is somewhat unique nationally in its requirement that an adverse possession claimant must prove color of title or present a good faith claim of right to prevail in an Iowa court.[255] Similarly, the Iowa property law on the acquisition of an easement by prescriptive right is different than most states both in common law and by statute.[256] In eminent domain law, Iowa rejects what the court calls "the unit rule."[257] This rule is followed by most other states in calculating eminent domain compensation for property owned by more than one person.[258] Iowa's statute limiting the enforceability of a real estate covenant or a negative easement to twenty-one years, unless it is periodically renewed, is also unique.[259] Iowa law authorizing the condemnation of easements to benefit private parties is also different than most states. Iowa statutes allow a local government to use eminent domain to acquire an access easement to benefit a private landowner whose land is landlocked and does not have access to a public road.[260] Iowa law also allows a local government to acquire a solar access easement on behalf of an Iowa landowner who intends to install solar collectors on his property.[261] Finally, Iowans are justifiably proud of the integrity of real estate titles in the state. That presumably is the reason Iowa law does not authorize the creation of the title insurance business in the state.[262] I believe Iowa is the only state in the United States that does not routinely rely on title insurance to protect the security of real estate titles.

Is Iowa wrong on title insurance or in these other instances where Iowa law is different than other states? It is my impression that Iowa property lawyers generally are proud of these differences between Iowa law and property law in other states, and many regard Iowa property law as superior to other states. I suspect they would disagree that just because certain Iowa property laws do not conform to similar laws in other states, they must be

254. *See* Murr v. Wisconsin, 582 U.S. 383, 398 (2017).
255. *See* Carpenter v. Ruperto, 315 N.W.2d 782, 786 (Iowa 1982).
256. *See* IOWA CODE § 564.1 (2025).
257. *See* City of Des Moines v. Housby-Mack, Inc., 687 N.W.2d 551, 553 (Iowa 2004).
258. *See id.*
259. *See* IOWA CODE § 614.24.
260. *See id.* § 6A.4(2).
261. *See id.* § 564A.5.
262. *See id.* § 515.48(10).

prima facie wrong and not entitled to *stare decisis* treatment by the Iowa Supreme Court.

E. THE MANSFIELD CONCURRENCE

My main disagreement with Justice Mansfield's concurrence concerns his extremely narrow conception of what constitutes a "property right" in Iowa. Justice Mansfield's concurrence argued that the Inalienable Rights Clause cannot possibly protect compensatory personal nuisance damages from a legislative ban against their recovery because these damages are not based on a "property right."[263] He characterized Iowans' recovery of personal nuisance damages as a mere freestanding "common law rule" that the legislature can change or ignore as it sees fit.[264] So far as I can tell, nowhere in the Iowa Constitution does it say that well-established common law rules can never be entitled to special constitutional protection. Some might argue that was the whole point of having an Inalienable Rights Clause in the Iowa Constitution and placing it first in the Iowa Bill of Rights?

To support his view that common law rights are completely vulnerable to legislative termination, Justice Mansfield cites English law, where with no written constitution to consider, it is well settled that Parliament can change or eliminate any common law rule it does not like.[265] It is my understanding that this English version of absolute legislative power was rejected by American law about the time of the American Revolution and that the current presence of inalienable rights provisions in many state constitutions was one manifestation of this rejection. There is certainly nothing in the history of the Iowa Constitution that suggests a desire to embrace the English style of parliamentary power; Just the opposite is true.

Justice Mansfield's "no property right" claim is also hard to square with Iowa Code section 657.1, which defines a legal nuisance as "to interfere unreasonably with the comfortable enjoyment of life or property" and authorizes a civil action "to abate" and "recover damages sustained."[266] The statute does not say "damages sustained to land." People have lives, not land, so the statute logically means "damages sustained by people or by land." Iowa nuisance law has always awarded recovery of these compensatory personal damages for nuisance violations. Iowa Code section 657.2 goes on to further define nuisances by including business activities "occasioning noxious exhalations, unreasonably offensive smells, or other annoyances [that] become[] injurious and dangerous to the health, comfort, or property of

263. Garrison v. New Fashion Pork LLP, 977 N.W.2d 67, 92 (Iowa 2022) (Mansfield, J., concurring).

264. *Id.* at 91.

265. *See id.*

266. *See* IOWA CODE § 657.1 (2025).

individuals or the public."[267] Thus, the Iowa nuisance statutes appear to expressly contemplate awarding damages to individuals connected to the land who were harmed by the nuisance activity, not just damages for loss in value of the affected land.

Justice Mansfield's argument that recovery of compensatory nuisance damages for economic and noneconomic losses is not an Iowa property right also seems inconsistent with section 657.11A, the latest amendment to the Iowa Code governing nuisance law. If these personal nuisance damages are not recoverable under Iowa law as property rights, why did the legislature see fit to single out economic and noneconomic nuisance damages against a CAFO for special treatment with new proof requirements and by placing a cap on noneconomic damages? It would seem not even the Iowa General Assembly agrees with Justice Mansfield's truncated concept of what constitutes a property right in Iowa.

CONCLUSION

The *Garrison* decision marked an abrupt turning point in the Iowa Supreme Court's handling of constitutional challenges to Iowa Freedom to Farm laws. For over twenty five years, from the first consideration of a Freedom to Farm law in the 1996 *Weinhold v. Wolff* case to the 2018 *Honomichl* v. *Valley View Swine, LLC* case, the court had consistently ruled unanimously in favor of neighboring landowners harmed by a farm nuisance and repeatedly held unconstitutional the Freedom to Farm law cited by the defendant in its defense. Prior to *Garrison,* the question posed in Justice Appel's *Garrison* dissent (with which this Essay leads off) about whether the Iowa legislature could constitutionally immunize a specific type of farm business against legal liability for serious nuisance harms imposed on its neighbors would have been answered with a resounding NO. By a 4–3 margin, the *Garrison* decision overturned this line of cases. It refused to grant these unanimous decisions *stare decisis*, stating the earlier courts had applied an incorrect judicial review standard and the decisions were wrongly decided on the merits. The *Garrison* majority opinion justified its decision by citing the broad powers of the Iowa legislature to enact laws to benefit the Iowa economy, powers not subject to close judicial review. There is little doubt the *Garrison* decision leaves open important questions about (1) the continued enforceability of Iowa nuisance law by neighbors of Iowa CAFOs; (2) the constitutionality of specific parts of Iowa's Freedom to Farm Laws; and (3) the applicability of Iowa Code section 657.11A, which appears to authorize awards of nuisance damages for harms imposed by Iowa CAFOs, subject to new standards of proof and a cap on indirect damages.

267. *See id.* § 657.2.

A. WHAT DID GARRISON *DECIDE?*

The three points of Iowa law that the *Garrison* decision clearly decided were:

(1) Rational basis was re-established as the correct judicial review standard.

The *Garrison* decision clearly decided that "rational basis" should be the judicial review standard for Iowa courts to apply to constitutional challenges to Iowa statutes based on the Inalienable Rights Clause in the Iowa Bill of Rights. The heightened "reasonableness" review standard created for this purpose by *Gacke* Part Two was flatly struck down in favor of the more highly deferential rational basis review standard.

(2) Takings Clause protection continues to be limited to losses in property value as ruled in Gacke *Part 1.*

The *Garrison* decision impliedly reaffirmed the decision in *Gacke* Part 1 interpreting the Iowa Takings Clause in section 18 of the Iowa Bill of Rights to be limited to protecting landowners only against losses in property values caused by a CAFO nuisance. Although this *Gacke* ruling was never mentioned in the majority opinion, Justice Mansfield expressly reaffirmed a commitment to this limit in his concurrence, and the author of the majority opinion joined in the concurrence.[268] It is hoped that when section 657.11(2) is again before the Iowa Supreme Court, the court will consider the arguments made in this Essay against this limitation imposed as part of the *Gacke* decision and will rule that the statute is an unconstitutional taking of a negative easement as to all the conventional remedies available to a nuisance plaintiff under Iowa law, not just the loss in property value.

(3) Rejection of the Inalienable Rights Clause in section 1 of the Iowa Bill of Rights as authorizing court enforcement of the individual rights to which it refers.

Garrison holds that the Inalienable Rights Clause of section 1 of the Iowa Bill of Rights provides no constitutional basis to recover personal nuisance damages for economic or noneconomic losses caused by a CAFO nuisance when the legislature acts expressly to bar such recovery. The majority opinion rules that the express reference to property in section 1 of the Bill of Rights does not create an individual constitutional right that the legislature must honor, or that courts are empowered to enforce.

B. WHAT DID GARRISON *NOT DECIDE?*

(1) The Takings Clause Issue.

The *Garrison* majority opinion makes very clear that the application of the Iowa Takings Clause in section 18 of the Iowa Bill of Rights to Iowa Code section 657.11(2) was not before the court.[269] *Garrison* expressly ruled this

268. *Garrison*, 977 N.W.2d at 91 (Mansfield, J., concurring).

269. *Id.* at 79–80 (majority opinion).

issue was not preserved by the plaintiff on appeal.[270] Thus, the continued validity of both *Gacke* Part 1 and the entire *Bormann* decision, which found a violation of the Iowa Takings Clause, were not directly affected by the *Garrison* decision.

(2) The Relevance of Iowa Code Section 657.11A to CAFO Nuisances.

The *Garrison* case was all about the recovery of personal compensatory damages for economic and noneconomic harm resulting from what the plaintiff claimed was a nuisance interference caused by a hog CAFO. In 2017, an Iowa statutory amendment added proof requirements and a cap on exactly these damages sought in nuisance cases against a CAFO, and yet this recent statute is barely mentioned and not even considered in the majority opinion. It seemed very odd that the *Garrison* majority opinion, which so strongly emphasized the power of the legislature to change existing legal rules, totally ignored the Iowa legislature's latest enactment that focused directly on changing the existing rules governing the recovery of economic and economic nuisance damages from a CAFO. One explanation for section 657.11A not figuring in the *Garrison* decision could have been that the case was filed before the statute took effect. But no, the new law took effect in 2017, and the *Garrison* case was not filed in the Emmet County district court until June 1, 2020. For whatever reason the court may have had, the *Garrison* case decided nothing explicitly about the relevance or constitutionality of this latest Freedom to Farm law to reach the court. This was unfortunate because Iowa lawyers who follow these cases are naturally curious about how the court will resolve a key ambiguity in the language of the statute.

C. *What Does* Garrison *Portend Regarding Future Nuisance Lawsuits against Iowa CAFOs?*

It is always difficult to project from the language of a single case that does not directly consider an important background issue how the court will rule on that issue once it is finally before them. I have little doubt that the Iowa hog industry will continue to urge the Iowa Supreme Court to overrule the *Bormann*, *Gacke* Part 1, and *Honomichl* holdings that a legislative grant to large-scale animal producers of immunity from nuisance liability violates the takings clause of the Iowa Constitution, at least insofar as land values are concerned.

I also have little doubt that, as the numbers of hogs and poultry in Iowa CAFOs continue to increase, CAFO nuisance cases will reach Iowa courts at the regular rate they have over the past two decades. One of those cases will soon provide an opportunity for the court to reconsider its commitment to its challenged prior holdings—what a bold heading in the *Garrison* majority opinion described as "Iowa's Unique Jurisprudence on the Constitutionality of Statutory Nuisance Immunity for Farming Operations."[271] The tone and

270. *Id.* at 80.

271. *Id.* at 77.

language of the *Garrison* majority opinion leave little doubt that at least two Justices are more than ready to welcome the opportunity to reconsider the *Bormann* and *Gacke* Part 1, decisions holding section 657.11(2) commits an unconstitutional taking of an easement and overturn them. Whether there are currently two other justices ready to overrule these decisions is not so certain. It is difficult, however, to read everything the majority opinion and the concurrence had to say disparaging the "outlier" character of Iowa's constitutional law decisions on its Freedom to Farm statutes, without thinking that the *Bormann* and *Gacke* Part 1 takings analysis based on an "easement" analysis could be in big trouble the next time the takings issue regarding section 657.11(2) is before the court.

For reasons that have never been clear to me, Iowa is a state that places a strong emphasis on laws that define, protect, and reinforce property rights, like nuisance law. Perhaps it is because we have so much highly valued farmland. Perhaps it is a cultural matter inherited from the pioneers who first settled Iowa. Perhaps it is just that abusing others' property rights is not tolerated within the "Iowa nice" ethos. But for whatever reason, my sixty-four years living here convince me what I observe is true—property law is unusually important to Iowans.

Conventional private nuisance law in most states, including Iowa, rarely supports the abatement of a nuisance through an injunction. Courts today strongly prefer instead to award a winning nuisance plaintiff permanent damages for the loss to the value of the affected land and any other personal damages proved to be caused by the nuisance.[272] Once the nuisance defendant has paid the permanent damages award, the law in almost all states, including Iowa, recognizes that the defendant now has the property right to continue to cause the same level of harm indefinitely without further liability to the plaintiff.[273] Most lawyers would easily characterize this type of court-granted property right as a negative easement.

Why then is it controversial to apply this same easement reasoning to a state statute that entitles one landowner to avoid liability for inflicting grievous nuisance harm on neighbors with respect to their comfortable use and enjoyment of their lives and property? Lest readers think "grievous" is too strong an adjective, they should carefully examine the factfindings on the extreme level of discomfort suffered by the nuisance plaintiffs in the *Farmegg* and *Weinhold cases* or read the book *Wastelands*, which describes in detail the misery caused an entire community by a cluster of hog CAFOs in North Carolina that produced dreadful odor nuisance conditions affecting nearby homesteads.[274]

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272. *See, e.g.*, Riter v. Keokuk Electro-Metals Co., 82 N.W.2d 151, 162 (Iowa 1957); Boomer v. Atlantic Cement Co., 257 N.E.2d 870, 875 (N.Y. 1970).

273. *See, e.g.*, *Riter*, 82 N.W. 2d at 161–62; *Boomer*, 257 N.E2d at 874.

274. *See generally* ADDISON, *supra* note 102.

In *Bormann*, Justice Lavorato rightly labeled the type of legislatively conferred property right created by section 657.11(2) as an easement, and the Iowa Supreme Court unanimously ruled this easement had been taken from the neighbor by the state without just compensation and was therefore an unconstitutional taking. To my way of thinking as a property law teacher, Justice Lavorato got the Iowa law right in *Bormann*, and nothing has happened since to justify abandoning his firmly held conclusion that the statute granting certain farm businesses immunity from nuisance liability to their neighbors was "flagrantly unconstitutional." This Essay suggests that if Justice Lavorato had still been on the court to write the *Gacke* opinion, the whole course of Iowa constitutional law relating to CAFO nuisances might have developed differently than it did. Nevertheless, *Gacke* Part 1 is still the law in Iowa, but there is always the possibility that the Iowa Supreme Court will reconsider what I think was a flawed decision in that case and no longer limit the scope of the Iowa Takings Clause to invalidate only that part of the Freedom to Farm law that caused a loss in the plaintiff's property value. After *Garrison*, I suspect it is more likely a future Iowa Supreme Court decision will overturn Bormann's "easement analysis" and uphold a legislative grant of nuisance immunity to Iowa CAFOs.

In refusing to apply *stare decisis* to recent fully-considered unanimous court decisions invalidating specific Freedom to Farm law provisions under the Iowa Inalienable Rights Clause, the 4–3 *Garrison* decision seems curiously out of step with the Iowa Supreme Court's traditional respect for well-reasoned precedents that are followed by later courts and that appear to be working well in practice, even though members of the present court would have decided them differently.

Finally, it is worth noting that the *Garrison* decision also appears inconsistent with the Iowa state motto: "Our liberties we prize and our rights we will maintain."[275] In the court's 2004 unanimous decision in *Gacke* Part 2, it clearly recognized and raised an important constitutional right—to use and enjoy a rural residence free from noxious local agricultural nuisances—that the *Garrison* decision emphatically refused to maintain.

275. LEGIS. SERVS. AGENCY, IOWA STATE SYMBOLS 1, https://www.legis.iowa.gov/docs/publications/IF/782979.pdf [https://perma.cc/NX4N-Z3A6] (describing Iowa's state seal which depicts the motto).