

AGRICULTURAL EXCEPTIONALISM, ENVIRONMENTAL INJUSTICE, AND U.S. RIGHT-TO-FARM LAWS

by Danielle Diamond, Loka Ashwood, Allen Franco,
Lindsay Kuehn, Aimee Imlay, and Crystal Boutwell

Danielle Diamond is a visiting fellow with the Brooks McCormick Jr. Animal Law & Policy Program at Harvard Law School. Loka Ashwood is an associate professor in the Department of Sociology at the University of Kentucky. Allen Franco has a J.D. and an LL.M. in agriculture and food law from the University of Arkansas, and is an assistant federal public defender with the Arkansas Capital Habeas Unit. Lindsay Kuehn is a former pig farmer, now a staff attorney with the Farmers' Legal Action Group. Aimee Imlay is a sociology Ph.D. candidate at the University of Kentucky. Crystal Boutwell has a master's degree in rural sociology and a bachelor's degree in natural resources management.

SUMMARY

While the environmental justice movement has gained traction in the United States, the relationship between agri-food systems and environmental injustices in rural areas has yet to come into focus. This Article explores the relationship between U.S. agricultural exceptionalism and rural environmental justice through examining right-to-farm laws. It demonstrates that the justification for these statutes, protecting farmers from nuisance suits, in practice transfers power from rural communities to industrial agriculture by safeguarding agribusiness interests and certain types of production from lawsuits and liability. It considers how the original impetus behind agricultural exceptionalism—to safeguard the food system through distributed and vibrant farms—can be reconciled with environmental justice by repealing right-to-farm laws.

Industrialized agriculture and its contribution to climate change and a host of other environmental and public health problems have received more attention in recent years. Many such accounts consider the law a regulatory tool that counters environmental injustice—for example, through the Clean Air Act (CAA)¹ and the Clean Water Act (CWA).² Less focus has been afforded to how the law enables environmental injustices through statutory mandates that enable the most egregious industrial practices. While rural scholars and environmental policy advo-

cates have increasingly recognized industrial agriculture as a central agent of rural environmental injustice,³ few have considered how laws shape environmental injustices in rural areas.⁴ This may be because laws and policies are often seen as solutions to, rather than potential drivers of, environmental injustices.⁵

Right-to-farm laws (RTFLs) exist at the interface of regulation, common law, and corporate power, with remarkable but underrecognized consequences for rural environmental justice. Legislatures passed RTFLs with the stated intent of protecting farmland and agriculture by limiting nuisance suits against agricultural operations.

Authors' Note: The authors wish to thank the Brooks McCormick Jr. Animal Law & Policy Program at Harvard Law School for hosting the lead author (Danielle Diamond) while completing this Article. Acknowledgment must also be given to the many partners, farmers, and rural residents who provided the inspiration for this Article. A portion of the research was funded by the U.S. Department of Agriculture's National Institute of Food and Agriculture (Grant No. 2018-68006-36699) with co-investigator the Farmers' Legal Action Group.

1. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.
2. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

3. See Kaitlin Kelly-Reif & Steve Wing, *Urban-Rural Exploitation: An Underappreciated Dimension of Environmental Injustice*, 47 J. RURAL STUD. 350 (2016); E. Paul Durrenberger & Kendall M. Thu, *The Expansion of Large-Scale Hog Farming in Iowa: The Applicability of Goldschmidt's Findings Fifty Years Later*, 55 HUM. ORG. 409 (1996); Kelley J. Donham et al., *Community Health and Socioeconomic Issues Surrounding Concentrated Animal Feeding Operations*, 115 ENV'T HEALTH PERSPS. 317 (2007).

4. Kelly-Reif & Wing, *supra* note 3.

5. See, e.g., JILL LINDSEY HARRISON, PESTICIDE DRIFT AND THE PURSUIT OF ENVIRONMENTAL JUSTICE (2011).

Building on prior research,⁶ this Article analyzes the history of RTFLs and details how these laws have played out in the courts. The Article also considers how agricultural exceptionalism creates environmental injustices by providing the impetus for repealing common-law private-property rights and permitting agriculture operations to operate outside environmental regulations. Our research demonstrates that RTFLs have tipped the balance of justice between competing property interests in favor of environmental degradation, by imposing one-sided protections for large-scale industrial polluters—demonstrating a failure of RTFLs to serve their fundamental purpose.

I. Background

Historically, common-law nuisance actions provided an avenue for rural landowners to defend their land, livelihoods, health, quality of life, and the environment from neighboring incompatible land uses.⁷ However, in response to concerns over suburban expansion into farmland areas in the 1970s and 1980s,⁸ state legislatures adopted the political narrative that nuisance lawsuits brought by suburban transplants posed a threat to agricultural resources.⁹ Every state has enacted some form of an RTFL—thereby solidifying the policy judgment that the social benefits of retaining agricultural land and protecting farming were so great that “the balance between agriculture and other uses should always be tipped toward agriculture.”¹⁰

The notion that farm life and food production require special protections is often referred to as “agricultural exceptionalism,” and traces its origins back to Jeffersonian notions of a well-distributed and agrarian food system. Based on this belief, farming and agriculture have historically been afforded special protections and exemptions from laws and regulations.¹¹ Indeed, agricultural exceptionalism has been infused into the national consciousness since the early periods of Euro-American history, where the welfare of agriculture was seen as “synonymous with

national well-being.”¹² Consequently, this resulted in significant government-sanctioned financial benefits and legal protection for the agriculture sector,¹³ which now receives public entitlements to promote its economic standing through various institutions.¹⁴

Agricultural exceptionalism, while notable in its original distributive tendencies, also derives from colonial settlements that dispossessed indigenous people. These old patterns of white agrarianism carry over today into special agricultural exemptions for large, corporate farms that impose structural racism through the disenfranchisement of farm laborers.¹⁵ There is a network of exceptions “from social, labor, health, and safety legislation [that have] . . . reinforced agriculture’s unique status in law and society.” Therefore, agricultural exceptionalism has legitimized the special treatment of the farm sector consecutively with the inequitable and unequal treatment of farmworkers.¹⁶

The U.S. government has played a crucial role in the industrialization and corporatization of agriculture. Federal farm policy opened up access to new sources of credit for farming operations, incentivized mass production and efficiency, and generally ushered in the “Get Big or Get Out!” era in farming. This movement allowed powerful business corporations to accumulate capital and resources, including land rights and food security, for the benefit of a select few, while compromising the ability of others to achieve the same.¹⁷ A national farm crisis in the 1980s further perpetuated the loss of small to medium sized farms as interest rates soared and commodity prices collapsed.¹⁸ This movement allowed for more vertical integration in the food and agriculture sectors and led to more concentrated and intensive agricultural production.¹⁹ The development of RTFL protections coincided with this increased market consolidation and intensified industrial agriculture production.²⁰

6. Loka Ashwood et al., *Property Rights and Rural Justice: A Study of U.S. Right-to-Farm Laws*, 67 J. RURAL STUD. 120 (2019).

7. Some say one of the first environmental cases was an English common-law nuisance case from the 1600s, when an action was brought by a property owner against a neighboring hog sty. William Aldred Case (1611) 77 Eng. Rep. 816, cited in H. Marlow Green, *Common Law, Property Rights, and the Environment: A Comparative Analysis of Historical Developments in the United States and England and a Model for the Future*, 30 CORNELL INT’L L.J. 541 (1997).

8. By the 1970s, the United States was experiencing not only an acceleration of suburban migration, but also the suburban encroachment onto land traditionally used for farming. Nearly 40% of the homes built between 1970 and 1979 were erected on large lots in rural areas. See NATIONAL AGRICULTURE LANDS STUDY: FINAL REPORT 35, at 4 (1981).

9. See Jacqueline P. Hand, *Right-to-Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. PITT. L. REV. 289, 291 (1984).

10. *Id.*

11. Charlotte E. Blattner & Odile Ammann, *Agricultural Exceptionalism and Industrial Animal Food Production: Exploring the Human Rights Nexus*, 15 J. FOOD L. & POL’Y 92, 102 (2020) (noting that agricultural exceptionalism removes farming “from the purview of the public, including in the areas of environmental law, animal law, and property law . . . trade law, employment law, and many other areas”).

12. See Guadalupe T. Luna, *An Infinite Distance?: Agricultural Exceptionalism and Agricultural Labor*, 1 U. PA. J. LAB. & EMP. L. 487, 490 (1998).

13. See *id.* (citing Jim Chen, *The American Ideology*, 48 VAND. L. REV. 809, 818 (1995)).

14. *Id.* In this context, special exemptions have imposed a form of structural racism on farm laborers.

15. *Id.*

16. See *id.* at 489 (citing ERNESTO GALARZA, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY 106 (1964) (“[e]xemptions from federal legislation provided to the agricultural sector comprise the doctrine of agricultural exceptionalism”); also referring to Carey McWilliams’ “Great Exception” model, wherein agribusiness is exempt from “the basic tenets of free enterprise”).

17. Philip McMichael, *Peasant Prospects in the Neoliberal Age*, 11 NEW POL. ECON. 407 (2006) (“It is this neoliberal trajectory of global capital accumulation . . . [t]he corporate food regime, which deepens the use, misuse and abandonment of natural and social resources. . .”).

18. Garret Graddy-Lovelace, *U.S. Farm Policy as Fraught Populism: Tracing the Scalar Tensions of Nationalist Agricultural Governance*, 109 ANNALS AM. ASS’N GEOGRAPHERS 395 (2019); see also Martin B. King, *Interpreting the Consequences of Midwestern Agricultural Industrialization*, 34 J. ECON. ISSUES 425 (2000).

19. Jennifer Clapp & S. Ryan Isakson, *Risky Returns: The Implications of Financialization in the Food System*, 49 DEV. & CHANGE 437 (2018); see also Sarah J. Martin & Jennifer Clapp, *Finance for Agriculture or Agriculture for Finance?*, 15 J. AGRARIAN CHANGE 549 (2015).

20. Industrial agriculture is often characterized by large-scale operations with unclear ownership and labor structures that utilize capital-intensive fossil fuel-based technology in place of people and off-site corporate involvement

In the wake of the North American Free Trade Agreement, the market advantage for profit accumulation in fewer and more transnational hands led to the decline of other types of industrial manufacturing jobs in the 1990s.²¹ At the same time, with the advent of the Internet in 1990, 200 million people in 184 countries worldwide recognized Earth Day.²² In 1994, President Bill Clinton issued an Executive Order directing federal actions to address environmental justice in minority and low-income populations.²³ This spurred a series of state and federal regulations and policy initiatives, based on the recognition that low-income and communities of color bear a disproportionate burden of environmental pollution and associated health effects.²⁴

Behind the smokescreen of U.S. agricultural exceptionalism, rural areas have increasingly been subjected to “distributive injustices.”²⁵ Over time, public decisionmakers have “traded rural welfare for some perceived collective benefit.”²⁶ Social space—notably rural areas—are only now beginning to receive scholarly recognition as an explicit dimension of environmental injustice.²⁷ However, the government has made no such acknowledgment. For example, the Code of Federal Regulations requires that nuclear power plants only be sited in rural areas, in effect enforcing the utilitarian principle that the fewest must bear the riskiest and most hazardous industries.²⁸ The same ideology shapes federal regulations and agencies’ cost-benefit analyses, wherein treating the rural equal to the urban rarely happens because—under such logic—the costs outweigh the benefits.²⁹

Industrial livestock production facilities, often referred to as concentrated animal feeding operations (CAFOs),³⁰ emblemize some of the most egregious outcomes of industrial agriculture. CAFOs can confine thousands and sometimes millions of animals within buildings or enclosed feedlots. The amount of waste produced at one site often exceeds most small cities in the United States. Animals raised for industrialized production are not afforded large enough parcels of land to absorb waste, as would those raised on smaller and diversified pasture-based farms.³¹ Instead, the vast amounts of concentrated pollutants produced are often amassed in “lagoons” or waste pits, which pose groundwater and surface water contamination risks through leakage, runoff, and so on.

Indeed, CAFO waste contains concentrated levels of nutrients, such as nitrogen and phosphorus, and heavy metals, pathogens, hormones, antibiotics, and ammonia, among other pollutants.³² Moreover, massive volumes of urine and manure, often liquified for easier handling, produce gaseous pollutants such as ammonia, methane, and hydrogen sulfide, among others.³³ Air and water pollutants also inevitably escape the boundaries of the facilities, which leads to various environmental problems and impacts the quality of life for people living nearby.³⁴

CAFOs have long been known to be one of the leading sources of surface water pollution in the United States, and to emit greenhouse gases that significantly contribute to climate change.³⁵ Consistent with the ideals of agricultural exceptionalism, CAFOs have largely escaped regulatory

driven by profit interests. Production, distribution, and marketing systems are vertically integrated into specialized business ventures controlled by a few key players, like large corporate entities such as Smithfield, Tyson, and Cargill. John M. Morrison, *The Poultry Industry: A View of the Swine Industry's Future?*, in PIGS, PROFITS, AND RURAL COMMUNITIES 145 (Kendall M. Thu & E. Paul Durrenberger eds., State Univ. of New York Press 1998).

21. *Id.*
22. *Id.* See National Archives—Richard Nixon Presidential Library and Museum, *Earth Day*, <https://www.nixonlibrary.gov/news/earth-day> (last visited July 8, 2022).
23. See Exec. Order No. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (Feb. 16, 1994), available at <https://www.archives.gov/files/federal-register/executive-orders/pdf/12898.pdf>.
24. JILL LINDSEY HARRISON, FROM THE INSIDE OUT: THE FIGHT FOR ENVIRONMENTAL JUSTICE WITHIN GOVERNMENT AGENCIES (2019).
25. Ann M. Eisenberg, *Distributive Justice and Rural America*, 61 B.C. L. REV. 189, 195 (2020), available at <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=3816&context=bclr>.
26. *Id.*
27. Loka Ashwood & Kate MacTavish, *Tyranny of the Majority and Rural Environmental Injustice*, 47 J. RURAL STUD. 271 (2016).
28. Another example that shows how rural areas are left out of federal environmental regulation is the Safe Drinking Water Act of 1974 (SDWA), Pub. L. No. 93-523, 88 Stat. 1660 (codified at 42 U.S.C. §§300f to 300j-26). This is the primary federal law that regulates groundwater and drinking water pollution. The Act generally only applies to community water supplies or “public water systems,” which leaves sparsely populated rural areas where many farmers and residents rely on private water wells unprotected. The SDWA defines “public water system” generally to mean “a system for the provision to the public of water for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals.” 42 U.S.C. §300f(4)(A).
29. See Eisenberg, *supra* note 25.

30. The term “concentrated animal feeding operation,” or CAFO, first appeared in the original federal CWA of 1972 under the definition of a “point source.” The CWA specifically defines the term “point source” to include CAFOs (33 U.S.C. §1362(14)).
31. Animal feeding operations (AFOs) are agricultural operations where animals are kept and raised in confined situations. An “AFO” is defined by the U.S. Environmental Protection Agency (EPA) as a lot or facility (other than an aquatic animal production facility) where the following conditions are met: animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility. See regulatory definition at U.S. EPA, *Animal Feeding Operations (AFOs)*, <https://www.epa.gov/npdes/animal-feeding-operations-afos> (last updated July 5, 2022). To be defined as a “CAFO,” an AFO must meet a certain size threshold depending on the type of animal confined and/or the characteristics of its waste treatment facilities.
32. U.S. EPA, ENVIRONMENTAL IMPACTS OF ANIMAL FEEDING OPERATIONS (1998).
33. CARRIE HRIBAR, NATIONAL ASSOCIATION OF LOCAL BOARDS OF HEALTH, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON COMMUNITIES (2010), https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf.
34. *Id.* See also Susan Bullers, *Environmental Stressors, Perceived Control, and Health: The Case of Residents Near Large-Scale Hog Farms in Eastern North Carolina*, 33 HUM. ECOLOGY 1 (2005); Susan S. Schiffman et al., *The Effect of Environmental Odors Emanating From Commercial Swine Operations on the Mood of Nearby Residents*, 37 BRAIN RSCH. BULL. 369 (1995).
35. See U.S. GOVERNMENT ACCOUNTABILITY OFFICE (GAO), CONCENTRATED ANIMAL FEEDING OPERATIONS: EPA NEEDS MORE INFORMATION AND A CLEARLY DEFINED STRATEGY TO PROTECT AIR AND WATER QUALITY FROM POLLUTANTS OF CONCERN (2008) (GAO-08-944), <http://www.gao.gov/new.items/d08944.pdf> [hereinafter GAO REPORT]; see also U.S. EPA, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990-2007 (2009), https://www.epa.gov/sites/default/files/2015-12/documents/ghg_2007entire_report-508.pdf.

oversight typical of other industries, despite their well-documented negative impact on the environment.³⁶ The health implications of CAFOs are also significant. The confinement of large numbers of animals in such inhumane and unnatural conditions creates risks for both the animals and the humans who work inside and live nearby.³⁷

Indeed, epidemiological concerns reach far beyond the boundaries of CAFO sites and the communities that surround them. CAFOs present unique opportunities for cross-species transmission of influenza.³⁸ Respiratory virus outbreaks, not unlike the COVID pandemic, can spread rapidly among both animal and human populations. The industry is also known for the overuse of antibiotics, which are needed to keep animals alive in confined conditions, leading to antibiotic resistance.³⁹ In 2019, the American Public Health Association called for a moratorium on new and expanding CAFOs due to the overwhelming evidence of the harms they cause and the lack of proper regulation.⁴⁰ It is well-documented that CAFOs negatively impact a farmer's sovereignty, pose public health risks, promote inhumane treatment of animals, perpetuate environmental injustices, and cause an overall loss of democratic self-governance.⁴¹

In the sections that follow, we identify how RTFLs enable these outcomes and consider how a more distributed agricultural system provides promise for correcting this rural wrong.

II. Right-to-Farm Laws

RTFLs exist at the nexus of the rapid expansion of large-scale, industrialized agriculture and the decline of a more distributed agricultural system. By 1982, an initial wave of RTFLs covered most of the United States. At that time, there were 2.24 million farms spanning over 987 million

acres.⁴² Since then, the number of farms has declined by nearly 10%, and almost 100 million acres of farmland have been lost.⁴³

RTFLs purport to protect agricultural operations against nuisance lawsuits brought by those who establish residences in traditional farming areas, which often allege pollution problems, odor, or other annoyances. To receive RTFL protections, most states require agricultural operations to be of commercial scale, meaning they must sell products or goods for the commercial market.⁴⁴ RTFLs also commonly protect different *types* of agricultural activities, but do not provide any specific protection for the farmland itself. Commonly, protected activities include the production of various crops or livestock, as well as processing, storage, and chemical application. No state's RTFL is specifically tailored to protect traditional or family-owned farms.

In a traditional common-law nuisance lawsuit, a successful plaintiff may be entitled to monetary damages, the nuisance-causing defendant may be ordered to alter or abate the nuisance, or both.⁴⁵ However, an alleged nuisance-causing party often has a defense in nuisance lawsuits, known as "coming to the nuisance." The "coming to the nuisance" defense holds that "if people move to an area they know is not suited for their intended use, they cannot argue the preexisting uses are nuisances."⁴⁶ In essence, the "coming to the nuisance" doctrine is grounded in equity and prioritizes the party that first made use of the land.⁴⁷ "This means courts had the power to reconcile disputes fairly without being bound to statutory mandates or strict rules of construction."⁴⁸ Thus, even before the enactment of RTFLs, existing agricultural land uses were protected from

36. See GAO REPORT, *supra* note 35; see also American Public Health Association, Policy No. 20194, Precautionary Moratorium on New and Expanding Concentrated Animal Feeding Operations (Nov. 5, 2019), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2020/01/13/precautionary-moratorium-on-new-and-expanding-concentrated-animal-feeding-operations>; see also BRENT F. KIM ET AL., JOHNS HOPKINS CENTER FOR A LIVABLE FUTURE, INDUSTRIAL FOOD ANIMAL PRODUCTION IN AMERICA: EXAMINING THE IMPACT OF THE PEW COMMISSION'S PRIORITY RECOMMENDATIONS (2013), <https://clf.jhsph.edu/sites/default/files/2019-05/industrial-food-animal-production-in-america.pdf>.

37. See KIM ET AL., *supra* note 36.

38. See, e.g., Thomas C. Moore et al., *CAFOs, Novel Influenza, and the Need for One Health Approaches*, 13 ONE HEALTH 100246 (2021), available at <https://www.sciencedirect.com/science/article/pii/S23527714211000367>.

39. Mary J. Gilchrist et al., *The Potential Role of Concentrated Animal Feeding Operations in Infectious Disease Epidemics and Antibiotic Resistance*, 115 ENV'T HEALTH PERSPS. 313 (2007).

40. American Public Health Association, *supra* note 36.

41. See PIGS, PROFITS, AND RURAL COMMUNITIES, *supra* note 20; Douglas A. Constance & Alessandro Bonanno, *CAFO Controversy in the Texas Panhandle Region: The Environmental Crisis of Hog Production*, 21 CULTURE & AGRIC. 14 (1999); Andrew D. McEachran et al., *Antibiotics, Bacteria, and Antibiotic Resistance Genes: Aerial Transport From Cattle Feed Yards Via Particulate Matter*, 123 ENV'T HEALTH PERSPS. 337 (2015); PEW COMMISSION ON INDUSTRIAL FARM ANIMAL PRODUCTION, PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA (2008), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/phg/content_level_pages/reports/pcfapfinal.pdf.

42. NATIONAL AGRICULTURAL STATISTICS SERVICE, U.S. DEPARTMENT OF AGRICULTURE, TABLE 1. HISTORICAL HIGHLIGHTS: 2012 AND EARLIER CENSUS YEARS (2014), https://agcensus.library.cornell.edu/wp-content/uploads/2012-New_York-st36_1_001_001.pdf [hereinafter 2012 AND EARLIER CENSUS YEARS].

43. NATIONAL AGRICULTURAL STATISTICS SERVICE, U.S. DEPARTMENT OF AGRICULTURE, TABLE 1. HISTORICAL HIGHLIGHTS: 2017 AND EARLIER CENSUS YEARS (2017), https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1_Chapter_1_US/st99_1_0001_0001.pdf [hereinafter 2017 AND EARLIER CENSUS YEARS].

44. See, e.g., N.J. REV. STAT. §4:1C-7 (2022); ME. REV. STAT. tit. 7, §152(5) (2022); NEB. REV. STAT. §2-4402 (2022).

45. See Margaret R. Grossman & Thomas Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 104 (1983).

46. NEIL D. HAMILTON, A LIVESTOCK PRODUCER'S LEGAL GUIDE TO NUISANCE, LAND USE CONTROL, AND ENVIRONMENTAL LAW 18 (1992).

47. "The term 'equitable' is defined as just or consistent with principles of justice and right, whereas 'inequitable' is defined as not fair." 27A AM. JUR. 2D EQUITY §1 (citing BLACK'S LAW DICTIONARY (14th ed. 2014)). Further:

Equity's purpose is to promote and achieve justice and to do so with some degree of flexibility. Consequently, the powers of a court sitting in equity are less hampered by technical difficulties than a court of law because a court of equity, being a court of conscience, should not be shackled by rigid rules of procedure that preclude justice being administered according to good conscience.

Id. §2.

48. In essence, a court in equity is a "court of conscience," meaning it has a degree of flexibility in how it achieves justice. *Id.*

nuisance suits brought by newly encroaching suburban developments or other kinds of incompatible land uses.⁴⁹

On a national scale, there has been an incomplete understanding of who or what benefits from RTFLs and how they vary among states. Because of this, we formed an interdisciplinary team consisting of practicing lawyers and social scientists to study the implications of RTFLs across the United States. Over three years, we compiled all original and current state RTFLs nationally and their legislative preambles. We researched case law and collected all published court opinions invoking RTFLs from all 50 states. We did this via keyword searches through both Westlaw and LexisNexis to identify case law where a state's specific RTFL statute was cited.

We then used NVivo software to code the statutes and cases, importing the original and the most recent versions of the statutes, as well as the most recent court rulings for each case. We also looked at each statute's legislative history to determine how each state's RTFL had changed over time. We then created static sets and ran matrix queries to identify trends, paying attention to attributes, including key legislative provisions and the types of parties involved in the cases (i.e., landowner, resident, CAFO, business entity, etc.).

While comprehensive and current through the end of calendar year 2021, our quantitative research is limited to court opinions accessible through Lexis and Westlaw. In this Article, we present statistical trends from cases where a state's RTFL was dispositive on an issue presented in the case. All of these cases take place in state intermediate appellate, state highest, federal district, and federal appellate courts, except for two heard by the Illinois Pollution Control Board.

In addition to identifying quantitative trends, we also completed in-depth qualitative analyses of each state. We looked at each state's RTFL, its legislative history, including the dates and content of any amendments, and so on, as well as how the courts have interpreted and applied each state's RTFL and specific provisions thereof. In addition, we searched for secondary sources of information, such as news articles and the like, to develop a greater understanding of any public debates or opinions regarding RTFL issues.

We then summarized each state's law and any significant cases pertaining to it. These summaries are currently available online on the One Rural website.⁵⁰ Since our research team consisted primarily of legal practitioners and social scientists, additional qualitative research (either through focused fieldwork or through participant observation, or both) also helped to inform this study.

We consider how agricultural exceptionalism drives RTFLs in legislative intent and rhetoric, but in substance

contract private-property rights as traditionally conceived by removing nuisance remedies for smallholders and, in effect, enabling forcible takings by corporate agriculture. Simultaneously, agricultural exceptionalism has paved the way for avoiding environmental, state, and federal law. Together, agricultural exceptionalism has enabled the consolidation of agriculture and the successful avoidance of the legal frameworks that hold other comparably sized industries responsible for their actions.

III. Results

Of the 293 cases we analyzed that utilized RTFLs, 154 included CAFOs or business firms as parties, or 52.6% of cases. By CAFOs we mean parties that we could identify as large-scale industrialized livestock production facilities in our reading of the case. By business firms, we mean incorporated entities like limited liability companies (LLCs), corporations, and partnerships.

Out of the total body of cases we analyzed, 197 were dispositive, meaning the RTFLs determined or related to the case's outcome. Of those 197 dispositive cases, CAFOs or business firms were either plaintiffs or defendants in 101 cases, 51.2% of the total. This is a remarkably large number of business firms and CAFOs relative to the purported purpose of RTFLs to protect family farms, which in contrast are often sole proprietorships. The U.S. Department of Agriculture (USDA) reports that "[t]he vast majority of family farms (89 percent) are operated as sole proprietorships owned by a single individual or family, and they account for 59 percent of the value of production."⁵¹ Essentially, the dispositive cases had a distribution of CAFO and business firms like the parties in cases at large.⁵²

CAFOs and business firms are using and prevailing with RTFLs at a level disproportionate to their share of production in U.S. agriculture. CAFOs, as a party, account for 18.3% of the total dispositive cases (see Table 1). However, they prevail in whole or in part in 69% of the cases they are party to, or in 25 out of the 36 cases where they were plaintiffs or defendants (see Table 2). By prevailing in part, we mean that some part of the ruling was in favor of the party at hand, but they did not win on all the merits of the case.

CAFOs, for example, won as defendants in 17 cases, won as plaintiffs in 12 cases, and won in part in 5 cases. Likewise, business firms tend to prevail in utilizing RTFLs, but not as much as CAFOs do. (Note that the analyses presented in Tables 1 and 2 are not mutually exclusive: CAFOs can also be business firms like corporations, for example, while corporations can also be CAFOs. However, one can exist without being the other). Business firms received favorable rulings in 65% of the 92 cases they were party to.

49. In common-law cases, courts base their decisions on case precedent and general principles of equity. This differs from statutory law, wherein courts must give deference to and base their decisions on applicable governing statutes.

50. See One Rural, *Right-to-Farm Laws by State*, <https://onerural.uky.edu/right-to-farm-map> (last visited July 8, 2022).

51. See ECONOMIC RESEARCH SERVICE, USDA, *AMERICA'S DIVERSE FAMILY FARMS: 2018 EDITION* 18 (2018).

52. The descriptors we use for parties in litigation related to RTFLs are not necessarily mutually exclusive. A party can be both a CAFO and a firm. Also, firms can sue one another, which can make the same case enter into multiple categories for party type as plaintiff, defendant, or split.

Table 1. CAFOs and Firms as Parties in Dispositive Cases

Party Type	Total Dispositive Cases
CAFO	36
Business Firm (business entity)	92

Table 2. CAFOs and Firms Prevailing as Defendants, Plaintiffs, and in Part

Prevailing Party Type	Prevail as Defendant	Prevail as Plaintiff	Prevail in Part	% of Cases Prevailed
CAFO	17	12	5	69%
Business Firm	45	9	11	65%

IV. Discussion

The capacity for certain parties to prevail, particularly business firms and CAFOs that do not easily align with RTFL preamble language regarding the importance of family farms, closely relates to specific statutory provisions. We identified statutory trends, and in Table 3, present language that exists in at least one-quarter of U.S. states. The broadly inclusive categories include conditions for immunity from nuisance lawsuits; limitations on immunity; definitions of “protected operation”; limitations on damages and relief; the power of local governance; and whether the statutes require operational compliance with the law to receive protection.

V. Case Studies Examining RTFLs

We find that while RTFLs were initially praised for protecting family farmers from urban expansion, they often shield only large-scale industrial agriculture operations at the expense of sole proprietor farmers and, more generally, rural property owners.⁵³ Following are case examples demonstrating how these various types of provisions from the categories in Table 3 shape court outcomes, leading to favorable treatment of the largest industrial operations.

A. Conditions for Immunity From Nuisance Claims and Limitations on Immunity

1. Protections for Operations That Have Existed for Prescribed Time Period

Initially, when first enacted, most state RTFLs stipulated that for a farming operation to receive protection, it would

53. Mark B. Lapping & Nels R. Leutwiler, *Agriculture in Conflict: Right-to-Farm Laws and the Peri-Urban Milieu for Farming*, in SUSTAINING AGRICULTURE NEAR CITIES 209 (William Lockeretz ed., Soil and Water Conservation Society 1987); Alexander A. Reinert, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694 (1988).

need to exist *before* the party claimed a nuisance.⁵⁴ However, amendments have been made over time to protect only particular types of agricultural activities and practices, regardless of whether or not those operations post-date neighboring land uses. Many RTFLs now permit new agricultural nuisances to develop through expansion, changing practices or ownership, or through the mere existence of the operation for a stipulated amount of time—often a period of just one year.⁵⁵ These amendments have eviscerated traditional notions of fairness by eliminating the “coming to the nuisance” doctrine for nonagricultural land uses.

Indeed, most RTFLs protect a farming operation once it has been in operation for a specific period of time. Nationally, 48% of RTFLs protect operations once in operation for one year (see Table 3). Eight states provide protections based on varying periods of operation. For example, Minnesota, New York, and Oklahoma protect agricultural operations from nuisance suits once they are in operation for two years.

Initially, in Oklahoma, agricultural operations had to pre-date neighboring nonagricultural activities to claim protection from nuisance suits.⁵⁶ However, in 2009, the state’s RTFL was amended to expand protections, even for agricultural operations that were not there first.⁵⁷ Now, under Oklahoma’s RTFL, no nuisance action can be brought against an agricultural operation that has “lawfully been in operation for two (2) years or more prior to the date of bringing the action.”⁵⁸ Therefore, any type of agricultural operation that has been in operation for two years prior to the filing of a nuisance action will receive RTFL protections.⁵⁹ This can be the case even if there is a cessation or interruption in the farming operation.

2. Immunity Based on Definition of “Farm,” Despite Changes in Size, Products, Practices, Etc.

RTFLs initially faced limited applicability in court when plaintiffs could show a nuisance was caused by a substantial change in the farming operations. However, over time, many RTFLs have evolved to provide cover in such instances. Many RTFLs now protect farming operations even if, among other things, their boundaries or size change, or if different farm products are produced (see Table 3 for specific percentages).⁶⁰

54. This is the traditional “coming to the nuisance” doctrine, where a party cannot move to an area and then claim an already existing land use is causing a nuisance as explained above (see Reinert, *supra* note 53).

55. See examples at One Rural, *New Mexico’s Right-to-Farm Summary*, <https://onerural.uky.edu/right-to-farm/NM>, and *Arkansas’s Right-to-Farm Summary*, <https://onerural.uky.edu/right-to-farm/AR> (last visited Aug. 2, 2022).

56. See OKLA. STAT. tit. 50, §1.1 (1980).

57. 2009 Okla. Sess. Laws 147 (H.B. 1482) (amending, in relevant part, OKLA. STAT. tit. 50, §1.1).

58. OKLA. STAT. ANN. tit. 50, §1.1 (West 2020).

59. *Id.* §1.1(C). Additional amendments in 2017 clarified and added additional protections so that the two-year clock does not restart even if an agricultural operation expands or substantially changes its activities.

60. For example, in Michigan, a farm operation that conforms to “generally accepted agricultural and management practices” (GAAMPs) cannot be found to be a nuisance because of a change in ownership or size, a temporary ces-

Table 3. National Analysis of RTFLs

General RTF Criteria	Specific Statutory Feature	% Nationally	# of States
Operations are immune from lawsuits . . .	if boundaries or size of operation change	28%	14
	if change in locality	48%	24
	if new technology used	30%	15
	if operation produces a different product	26%	13
	if there is a cessation or interruption in the farming operation	26%	13
	once in operation for a year	48%	24
	if there first	46%	23
Operations are not immune . . .	from lawsuits when they were a nuisance at the time it began	38%	19
Definition of the farm, agriculture, or farm operation includes . . .	commercial	60%	29
	facility	50%	25
	land	50%	25
	machinery	40%	20
	noise, odor, or dust	40%	18
	processing	34%	17
	production	86%	43
	use of chemicals or pesticides	48%	24
	use of nutrients and/or fertilizer	38%	19
Attorney fees . . .	awarded to a prevailing defendant	34%	17
Power of local governance is . . .	superseded by RTFL generally	62%	31
	superseded by RTFL in agricultural zone	12%	6
Requires compliance with . . .	generally accepted practices	78%	37
	county law	44%	22
	environmental law	28%	14
	federal law	62%	31
	other laws	52%	26
	state law	66%	33

In practice, courts commonly hold that even if an agricultural operation significantly changes the size or scope of its operation, so long as whatever was taking place on the land was previously some kind of agricultural use, the operation is protected from nuisance claims. For example, if a parcel of land had been used for row crops for many

years and then transitions into a 20,000-head cattle feedlot, surrounding neighbors would be barred from bringing a nuisance suit against the feedlot, even if they attempted to do so within the first year of the feedlot's existence.⁶¹ Such decisions typically depend on the preexistence of a different agricultural use (i.e., from crops to a massive cattle confinement).

For example, in Indiana, amendments to the state's RTFL in 2005 created significant exclusions for what is considered a significant change in an agricultural operation.⁶² These exclusions include (1) the conversion from one type of agricultural operation to another type of agricultural operation; (2) a change in the ownership or size of the agricultural operation; (3) enrollment, reduction, or cessation of participation in a government program; or

sation or interruption of farming, enrollment in governmental programs, adoption of new technology, or a change in type of farm product being produced. MICH. COMP. LAWS ANN. §286.473(3)(3) (2021). See also the Kansas RTFL, which states:

(c) An owner of farmland who conducts agricultural activity protected pursuant to the provisions of this section:

(1) May reasonably expand the scope of such agricultural activity, including, but not limited to, increasing the acreage or number of animal units or changing agricultural activities, without losing such protection so long as such agricultural activity complies with all applicable local, state, and federal environmental codes, resolutions, laws and rules and regulations

KAN. STAT. ANN. §2-3202 (West 2021).

61. See, e.g., *Himsel v. Himsel*, 122 N.E.3d 935, 940 (Ind. Ct. App. 2019).

62. See 2005 Ind. Acts 23 (S.E.A. 267) (amending IND. CODE §32-30-6-9).

(4) the adoption of new technology.⁶³ Indiana courts have interpreted these amendments to protect operations that change from crops and smaller-scale livestock operations to industrial-scale CAFOs.

In one case, the Indiana Court of Appeals held that a farm, which consisted primarily of cropland and an accompanying historic dairy farm of approximately 100 cows, converted into a 760-head dairy CAFO, did not constitute a significant change.⁶⁴ In *Parker v. Obert's Legacy Dairy, LLC*, the court stated that “the Act removes claims against existing farm operations that later undergo a transition from one type of agriculture to another.”⁶⁵ Therefore, it found no “statutory support” for the neighboring plaintiff farmer’s argument. Plaintiffs asserted that

[t]he Act was never intended to bar a nuisance claim by landowners . . . who have lived in an area for more than 40 years and then are impacted by a significant change in use, such as the [concentrated] feeding operation, which is established long after the acquisition of the property and establishment of the use of the property by the landowners.⁶⁶

While the court reasoned that “the size of the transformation, from 100 cows to 760 cows . . . [was] substantial,” it held the operation’s transition did not constitute a significant change under the RTFL. The court disagreed with the notion that “the legislature could not have intended the Act to apply to long-time residents whose daily, rural life suffers at the hands of a ‘factory-like “mega-farm.””⁶⁷ Thus, the state’s RTFL insulated the defendant’s dairy CAFO expansion from a nuisance suit.

In a later case, another Indiana Court of Appeals ruled similarly.⁶⁸ In *Himsel v. Himsel*, the court held that conversion of a row crop farm to an 8,000-head hog CAFO did not constitute a “significant change” under Indiana’s RTFL.⁶⁹ Similar to the plaintiffs in *Parker*, the plaintiffs in *Himsel* were neighboring farmers whose farming operations pre-dated the conversion of the defendants’ crop farms into massive industrial livestock production facilities. The *Himsel* court opined that the state’s RTFL was plainly “intended to prohibit nonagricultural land uses from being the basis of a nuisance suit against an established agricultural operation,” and that the law was “essentially a codification of the doctrine of coming to the nuisance.”⁷⁰

63. IND. CODE ANN. §32-30-6-9(d)(1)(A)-(D) (West 2021).

64. Conversion of part of a farm’s operations from cropland to support dairy, to concentrated feeding operation, was not a “significant change” in the type of agricultural operation, and, thus, after being in operation for more than one year, was not a nuisance under the Right to Farm Act, even though the number of cows kept on the property increased significantly. *Id.* §§32-30-6-3(1)(A), 32-30-6-6, 32-30-6-9(d). *Parker v. Obert's Legacy Dairy, LLC*, 988 N.E.2d 319 (Ind. Ct. App. 2013).

65. 988 N.E.2d at 323-25 (referencing IND. CODE §32-30-6-9(d)(1)(A) (2013)).

66. *Id.* at 324.

67. *Id.*

68. See *Himsel v. Himsel*, 122 N.E.3d 935, 940 (Ind. Ct. App. 2019).

69. *Id.* (emphasis added).

70. *Id.* at 943-44.

Here, the court essentially recognized the fact that the original intent of the Act was not being served, as the defendant’s crop farm did not transition to a CAFO until well after the plaintiffs were there. Instead, the newly developed CAFO postdated other agricultural uses in the area. Therefore, the court acknowledged that before the state’s RTFL amendments were made in 2005, defendant’s CAFO development would have constituted a significant change in the agricultural operation, which would have rendered RTFL protections inapplicable.⁷¹ However, “[b]y specifying that a conversion from one agricultural operation to another is not a significant change, the Act restricts claims against existing farm operations that later undergo a transition from one type of agriculture to another.”⁷² Thus, the traditional “coming to the nuisance” doctrine, as applied by Indiana’s current RTFL, “now encompasses coming to the *potential future nuisance*.”⁷³

Similarly, under Pennsylvania’s RTFL, no

nuisance action shall be brought against an agricultural operation . . . if the physical facilities of such agricultural operations are substantially expanded or substantially altered, and the expanded or substantially altered facility has either: (1) been in operation for one year or more before the date of bringing such action or (2) been addressed in a nutrient management plan approved prior to the commencement of such expanded or altered operation . . . and is otherwise in compliance therewith. . . .⁷⁴

This statutory language has been interpreted by courts in such a way that it essentially legalizes pollution caused by the intensification of industrial animal agricultural production.⁷⁵

In *Burlingame v. Dagostin*, for example, a Pennsylvania court barred neighbors’ nuisance actions arising from a CAFO spreading its liquid swine waste on surrounding fields, which led to runoff and bacteria pollution in nearby waterways. The court’s rationale for protecting the facility from nuisance litigation was based on the fact that it had a nutrient management plan approved by the state’s Department of Agriculture one year prior.⁷⁶ Thus, under Pennsylvania law, a crop farm that transforms into a massive industrial livestock production facility, complete with an adjacent wastewater reservoir containing millions of gallons of waste, remains protected—regardless of resulting air and water pollution.

Following the court’s logic, this means that if a CAFO is not constructed one year prior to when a nuisance action is brought, the operation can still be protected under the RTFL so long as the operation has a waste plan approved within the prescribed time period. This creates a substantial

71. *Id.* at 943.

72. *Id.*

73. *Id.* (emphasis added).

74. 3 PA. STAT. §954(a)(1), (a)(2) (2021).

75. *Burlingame v. Dagostin*, 183 A.3d 462 (Pa. Super. Ct.), *appeal denied*, 648 Pa. 547 (Pa. 2018), *appeal denied*, *McCabe v. Dagostin*, 194 A.3d 559 (Pa. 2018).

76. *Id.*

injustice in that neighbors can be barred from defending themselves via a nuisance lawsuit prior to the construction of a CAFO, before they become aware of any potential problem. Even if plaintiffs file suit within one year of the commencement of operations at a CAFO, Pennsylvania's RTFL will still shut the courthouse doors if the operation submits a waste management plan (WMP) with the Department before that point.⁷⁷

These cases exemplify how state RTFLs have evolved to protect large-scale industrial and agricultural operations to the detriment of other types of farming operations. In many cases, RTFLs have done away with the traditional "coming to the nuisance" doctrine to protect new industrial operations and existing operations transitioning to more intense industrial practices from nuisance claims by other farmers that were there first. This counteracts and contradicts general principles of equity and fairness. It shields industrial agriculture operations from accountability for their negative impacts on surrounding farms and rural areas by forcibly taking dimensions of property rights from those neighboring such operations. It demonstrates how agricultural exceptionalism, advanced by RTFLs, provides industrialized agriculture special status and rights over other types of farming.

B. Limitations on Damages and Relief

1. Fee-Shifting, Caps on Damages, and Other Remedies

Some states also have dubious fee-shifting provisions that only allow a successful defendant in a nuisance lawsuit to recoup attorney fees and costs.⁷⁸ This poses a significant risk for prospective plaintiffs, which may consist of just a few family farm neighbors, who are often unable to pay the opposing side's legal fees should they be unsuccessful. RTFLs in 17 states stipulate that attorney fees be awarded to the prevailing defendant (Table 3). As Table 3 shows, business firms and CAFOs most often prevail as defendants, meaning they are positioned to benefit most from such statutes. In contrast, only eight states award attorney fees to the prevailing party generally.

These provisions tend to stifle nuisance cases brought against industrial and agricultural nuisances in the first place.⁷⁹ For example, in a 2000 lawsuit in Wisconsin, a crop and cattle farmer claimed his neighbor's commercial cranberry operation was flooding his property, creating a nuisance that curtailed his ability to graze his cattle and use his farmland.⁸⁰ The court ruled in favor of the cranberry operation, arguing that the cattleman did not meet

the required burden of proof that the cranberry operation caused the flooding. Under the state's RTFL, the court ordered the plaintiff to pay the defendant cranberry operation's litigation expenses, which included \$24,000 in attorney fees.⁸¹

The cattleman subsequently argued that the fee-shifting provision should not apply because the law was not intended to pit one agricultural use against another. Rather, the plaintiff asserted, the purpose of the state's RTFL was to hamper conflicts between "agricultural and other uses of land."⁸² The court disagreed, reasoning that the plain language of the statute "unequivocally" mandated the recovery of fees by a defendant "in *any action* in which an agricultural use or agricultural practice is alleged to be a nuisance."⁸³

Given that "litigation expenses" under the statute include attorney fees, expert witness and engineering fees, and the like,⁸⁴ the cost assessed to the plaintiff was significant. When litigation costs are shifted only to unsuccessful plaintiffs but not unsuccessful defendants, the law effectively deters people from filing nuisance suits. Often, the potential of having to bear both sides' litigation expenses can pose too great a risk for prospective plaintiffs, especially if they consist of a single neighboring farmer.

Some states have amended their RTFLs to tighten their anti-nuisance provisions limiting damage awards, among other criteria, after an agribusiness entity loses a case.⁸⁵ Such tightening occurred in response to a series of nuisance cases brought against a hog industry giant, Smithfield Foods, given the amount of damages awarded to plaintiffs. For example, more than 500 North Carolina residents neighboring Smithfield-owned Murphy-Brown hog facilities brought 26 lawsuits in federal court seeking compensation for the decades of suffering endured because of the adjacent hog facilities.⁸⁶ The awards, totaling millions, may seem like a significant amount of money. However, they may still not have the desired deterrent effect on future bad practices by the world's largest hog producer—held by WH Group Ltd., a financial holding company directed by Chinese executives and traded on the Hong Kong Stock Exchange.

Despite non-domestic security beneficiaries, agribusiness industry groups, including the North Carolina Farm Bureau Federation, successfully pushed legislation significantly restricting the ability of impacted citizens to bring future nuisance lawsuits against livestock operations.⁸⁷ The

77. Unless there is an adequate public notice and input process that is triggered upon the submittal of CAFO WMPs with the Department, which there is not, potentially affected neighbors do not become aware of the fact that the one-year time clock to bring a nuisance action is ticking.

78. See, e.g., WIS. STAT. §823.08(4)(b) (2021); 740 ILL. COMP. STAT. ANN. 70/4.5 (2021).

79. See, e.g., MICH. COMP. LAWS §286.473 (2022).

80. Zink v. Khwaja, 608 N.W.2d 394 (Wis. Ct. App. 2000).

81. See WIS. STAT. §823.08(4)(a) (2022), (4)(b).

82. *Id.* §823.08(1).

83. Zink, 608 N.W.2d at 398-99 (emphasis added).

84. WIS. STAT. §823.08(4) (2022).

85. Lisa Sorg, *Neutering Nuisance Laws in North Carolina*, NC POL'Y WATCH (Nov. 15, 2017), <http://www.ncpolicywatch.com/2017/11/15/neutering-nuisance-laws-north-carolina/>.

86. Erica Hellerstein & Ken Fine, *A Million Tons of Feces and an Unbearable Stench: Life Near Industrial Pig Farms*, GUARDIAN (Sept. 20, 2017), <https://www.theguardian.com/us-news/2017/sep/20/north-carolina-hog-industry-pig-farms>.

87. See Sess. Law 2018-113, S.B. 711, Gen. Assemb., 2017 Leg. Sess. (N.C. 2018), available at <https://www.ncleg.net/Sessions/2017/Bills/Senate/PDF/5711v8.pdf>; see also Sorg, *supra* note 85.

new North Carolina Farm Act of 2018, which became law despite a veto by the state's governor (overridden by the legislature), now makes it far more difficult for plaintiffs to pursue such cases successfully. One such provision now requires that plaintiffs live within one-half-mile of the alleged nuisance, effectively eliminating the capacity to sue based on pollution plumes that travel further by air or water. Beyond this, the livestock industry was successful one year earlier in passing legislation capping the damages plaintiffs can be awarded, such that they can only be compensated for the loss of the value of their property, but not for the loss of quality of life. While this law was not in effect when the cases against Murphy-Brown were filed, it ensures against plaintiffs being compensated in any such way in the future.

Along the same lines, fee provisions in Missouri were tightened after a jury awarded neighbors \$11 million in a nuisance suit against Premium Standard Farms. Not long after plaintiffs were successful in this case, new legislation was passed into law significantly capping monetary damages that plaintiffs could be awarded to only the loss in fair market value to their property.⁸⁸ Also, in New Mexico, shortly after a set of nuisance cases were filed against several large-scale dairy operations that significantly impacted neighbors, an amendment to the state's RTFL was passed.⁸⁹ The amendment purported to protect the industry against future actions allegedly generated by "out-of-state attorneys seeking to put the state's dairy industry out of business."⁹⁰ Additionally, the American Legislative Exchange Council, a coalition of large corporate interest groups, such as the National Pork Producers Council, have created model anti-nuisance laws for states to use, some of which have been enacted verbatim.⁹¹

C. Protection Through Restrictions on the Power of Local Governance

1. Restrictions From Local Governmental Regulation

While purporting to protect farming and farmland, RTFLs not only strip individual landowners and farmers of the ability to protect their property, but also impact the ability of local governments to address agricultural nuisances and the negative environmental impacts that accompany them. Indeed, local laws and regulations are often restricted or superseded by RTFLs, depending on the state. RTFLs in 31 states specifically state that they supersede the power of local governments to act, while six states limit local governance in agricultural zones (see Table 3). These kinds of

provisions exacerbate the other barriers faced by rural communities in addressing environmental harms.

RTFLs often also specifically prohibit local zoning controls and regulation over land uses in agricultural areas and/or prevent local governments from having authority over where CAFOs are located. In essence, CAFOs and other intense agricultural uses have largely become exempt from local zoning laws.⁹² This removes the power of local communities to choose the kind of agriculture present in their communities, as well as their ability to decide appropriate locations for intense agricultural uses. Many RTFLs explicitly restrict local authority over these kinds of decisions and the ability of local governments to deal with public nuisances occurring on agricultural land.⁹³ For example, Arkansas' RTFL states:

Any and all ordinances adopted by any municipality or county in which an agricultural operation is located making or having the effect of making the agricultural operation or any agricultural facility or its appurtenances a nuisance or providing for an abatement of the agricultural operation or the agricultural facility or its appurtenances as a nuisance in the circumstances set forth in this chapter is void and shall have no force or effect.⁹⁴

In general, state statutes grant land use zoning powers to local governments through their police powers. Police powers are broadly intended for governments to promote public health, safety, morals, and general welfare.⁹⁵ Local governments use these powers to regulate and control the types

92. For example, in Illinois, most businesses that store, treat, transport, or dispose of waste are required to obtain permits from the Illinois Environmental Protection Agency. However, before a business can proceed with a permitting application for a "pollution control facility" with the state agency, it must obtain approvals from the local siting authority (i.e., the county or other municipal entity with jurisdiction). See 415 ILL. COMP. STAT. 5/39.2 (2022). County boards or governing municipal bodies are to provide for notice, hearing, and public input on permitting applications, and may also impose conditions on the land use that are not inconsistent with state regulations. See *id.*

However, when it comes to CAFOs, counties have no authority over siting decisions, and there are no constitutional due process protections for most potentially affected parties. See Livestock Management Facilities Act, 510 ILL. COMP. STAT. 77/1 et seq. (2022). See also *Helping Others Maintain Environmental Standards v. Bos*, 941 N.E.2d 347, 362 (Ill. App. Ct. 2010), where the court found that plaintiffs did not have standing to seek review of an Illinois Department of Agriculture siting decision of a CAFO. [Editor's Note: Danielle Diamond worked with the Illinois citizen group Helping Others Maintain Environmental Standards in her capacity as a Research Associate for Northern Illinois University, as well as in her capacity as an organizer and policy advocate with the Illinois Coalition for Clean Air & Water and the Socially Responsible Agriculture Project.]

93. ARK. CODE ANN. §2-4-105 (West 2022).

94. *Id.*

95. Local land use regulations are subject to constitutional limitations, such as governmental takings, due process, and so forth. A constitutional "taking" typically requires compensation when government action results in no other economically viable uses for the land. Due process protections ensure all parties involved (landowners and those who may be affected by a zoning action) have procedural rights, such as the rights to notice, hearing, and an impartial decisionmaker. Substantive due process, the Equal Protection Clause, and First Amendment also apply in land use decisions. Under the Supremacy Clause, the federal government and/or states can preempt certain land use regulations through express preemptions (if it can be assumed the state or federal government intended to regulate an entire field) and/or if a local zoning requirement directly conflicts with state or federal law.

88. Sorg, *supra* note 85.

89. See Jessica Johnson, "Right-to-Farm" Bill Tramples Rights of Residents, ALBUQUERQUE J. (Feb. 20, 2016), <https://www.abqjournal.com/727013/rightto-farm-bill-tramples-rights-of-residents.html>.

90. Personal communication by Danielle Diamond with an individual attending a legislative committee hearing on the bill (Feb. 2016).

91. Sorg, *supra* note 85.

of land uses allowed in certain areas through designated “zoning districts” and by imposing specific development controls, such as lot sizes, setbacks, building appearances, and so on. Also, certain types of land uses that are not automatically allowed in specified zoning districts can be allowed on a case-by-case basis via conditional or special use permits or through variances, etc.⁹⁶

In essence, zoning powers enable local governments to oversee community growth to ensure that varying kinds of land uses are compatible at their respective locations.⁹⁷ Zoning powers also include the ability to determine if and when certain types of industries can adjust their practices.⁹⁸ Again, these local powers are commonly restricted or prohibited by state RTFLs or, in some cases, via other state laws preempting the field of regulation over a type of agricultural practice and even through farmland preservation statutes.⁹⁹

For example, an Illinois court dealt directly with the applicability of the state’s agricultural exemption law. In *County of Knox ex rel. Masterson v. Highlands, L.L.C.*, neighbors of a large-scale hog confinement facility challenged the issuance of construction permits by their county allowing the facility to expand.¹⁰⁰ The neighbors appealed

the county permits, which then triggered a county zoning resolution that stayed the permits for the expansion.¹⁰¹ The facility appealed the county’s action in circuit court.

In their defense, the county and other objectors asserted that the state’s agricultural exemption¹⁰² did not apply and, therefore, the county had the jurisdiction to restrict the livestock facility’s proposal to expand. The county also argued that the animal confinement operation was more closely related to an “industry” rather than “agriculture.”¹⁰³ This was due to its “potential for affecting the public health, safety, comfort and general welfare of its environs” and that “as a matter of public policy, the potential environmental stress created by such an operation warrant[ed] a 21st-century clarification of what agriculture is in this State.”¹⁰⁴ Despite a strong dissenting opinion from a prior proceeding, the court rejected the county’s argument and found in favor of the hog confinement proposal.¹⁰⁵

Another case in Iowa involved a challenge to a local county board’s effort to regulate CAFOs by the Worth County Farm Bureau. Worth County enacted its Rural Health Family Farm Protection Ordinance, a “thoughtful product of the cumulative work of the Worth County Board of Health, a citizen advisory committee, and the Board of Supervisors,” to address concerns over air pollution and water contamination caused by industrial livestock operations. Responding to the Farm Bureau’s ordinance challenge, the Iowa Supreme Court held that it was expressly preempted by state statute, which “left no room for county regulation.”¹⁰⁶

Additionally, agricultural use exemptions are often worded to prevent local regulation over land being used for “agricultural purposes.” In effect, Iowa creates two-way zoning for agricultural exceptionalism: the creation of

96. The purpose behind local land use zoning laws is to separate incompatible land uses so that they do not interfere with each other or otherwise adversely impact public health and safety.

97. For example, a municipality might restrict the location of race car tracks in a residential zoning district as a measure to protect the health and safety of existing residents.

98. All other industries are subject to these kinds of controls. For example, music and dance halls are required to incorporate modern sound equipment and sound buffers into their business models so as not to impact neighboring landowners. All different categories of landowners are required to conduct themselves so they do not unreasonably interfere with others’ ability to use and enjoy their own property. The results often lead to innovation and advancement. In agriculture, however, state legislatures have dictated that agriculture operations are not required to act in the same neighborly manner.

99. The Illinois Counties Code restricts counties from zoning powers exercised so as to impose regulations, eliminate uses, buildings, or structures, or require permits with respect to land used for agricultural purposes, which includes the growing of farm crops, truck garden crops, animal and poultry husbandry, apiculture, aquaculture, dairying, floriculture, horticulture, nurseries, tree farms, sod farms, pasturage, viticulture, and wholesale greenhouses when such agricultural purposes constitute the principal activity on the land. 55 ILL. COMP. STAT. ANN. 5/5-12001 (2022). Also under the state’s Livestock Management Facilities Act, counties are only allowed to give the state Department of Agriculture an “advisory non-binding” opinion as to whether a livestock facility (utilizing a lagoon or housing more than 1,000 animal units) should be permitted within their jurisdictions. The Act states that a “county board shall submit . . . an advisory, non-binding recommendation to the Department about the proposed new facility’s construction.” 510 ILL. COMP. STAT. ANN. 77/12(b) (2022). This statute thus preempts counties from having a meaningful role in the siting of new CAFOs, as the Department of Agriculture can and commonly does override county recommendations objecting to the construction of new facilities.

Another example is Tennessee. Tennessee’s code regarding counties explicitly states that the “powers granted to counties by this part do not include the regulation of buildings used primarily for agricultural purposes; it being the intent of the general assembly that the powers granted to counties by this part should not be used to inhibit normal agricultural activities.” TENN. CODE ANN. §5-1-122 (West 2022). These kinds of statutes again show the pervasiveness of agricultural exceptionalism that has influenced policy even beyond state RTFLs.

100. 705 N.E.2d 128, 130 (Ill. App. Ct. 1998). This case was not included in our quantitative analyses on RTFLs. It is being referred to in this context for discussion purposes to demonstrate how agriculture can receive exemptions

from local regulation through other statutory means. In this particular case, the court considered the applicability of the Illinois Counties Code as opposed to the state’s RTFL.

101. *Id.*

102. The court stated:

The statutory authority granting Knox County the right to regulate and restrict the location and use of structures is found in section 5-12001 of the Counties Code (55 ILCS 5/5-12001) (West 1996). This section expressly states that counties have no authority to impose regulations or require permits with respect to land used or to be used for agricultural purposes.

Id. at 131.

103. *County of Knox ex rel. Masterson v. Highlands, L.L.C.*, 723 N.E.2d 256, 264, 30 ELR 20226 (Ill. 1999).

104. *Id.*

105. *Id.*; see also *County of Knox ex rel. Masterson v. Highlands, L.L.C.*, 705 N.E.2d 128 (Ill. App. Ct. 1998). Around the same time as the *Highlands* litigation was taking place, the state enacted a law preempting the county from having any binding authority to make siting decisions regarding CAFOs within their jurisdictions. Other laws preempting or restricting county or local municipal controls have similarly been enacted in other states. For example, Wisconsin has significantly limited local control over livestock facility siting permits. Wisconsin’s livestock siting law “not only expressly withdraws political subdivisions’ power to disapprove livestock facility siting permits absent some narrow exceptions, but also expressly withdraws political subdivisions’ power to impose certain conditions when they grant such permits.” *Adams v. State Livestock Facilities Siting Review Bd.*, 820 N.W.2d 404, 417, 42 ELR 20149 (Wis. 2012). “This imposition by the legislature leaves no authority to the political subdivisions to grant permits in a manner inconsistent with the Siting Law.” *Id.*

106. *Worth County Friends of Agric. v. Worth County*, 688 N.W.2d 257, 265 (Iowa 2004).

agricultural areas afforded nuisance protections for farming operations; and the simultaneous prohibition of zoning powers over agricultural areas.¹⁰⁷ Iowa's RTFL authorizes counties to create agricultural land preservation areas by passing ordinances to preserve land for agricultural use.¹⁰⁸ However, counties are prevented from regulating CAFOs in these areas.¹⁰⁹ State law restricts local authority to enact any ordinances that would regulate any condition or activity occurring on land used for the production, care, feeding, or housing of animals.¹¹⁰

It deserves to be mentioned that Iowa is one of the only states where a supreme court has held an RTFL unconstitutional. In *Bormann v. Board of Supervisors*, the Iowa Supreme Court ruled that restricting regulation in agricultural land preservation areas constituted an unjust taking, violating the constitutional protections afforded private-property ownership.¹¹¹ The court reasoned that the RTFL created an easement without just compensation for activities that would have been considered a nuisance if the land had not been designated as an agricultural area. However, the legal capacity to regulate CAFOs in such agricultural areas remains constrained.

In Idaho, cities, counties, taxing districts, and other political subdivisions are prohibited from enacting any ordinances or resolutions declaring “any agricultural operation, agricultural facility or expansion thereof that is operated in accordance with generally recognized agricultural

practices to be a nuisance.”¹¹² Likewise, under Colorado's RTFL, any ordinance or resolution by any local government unit making the operation of any agricultural operation a nuisance or providing for the abatement of a nuisance is considered void.¹¹³

D. Protections Based on Compliance With “Generally Accepted Practices” or Local, State, and/or Federal Laws

1. Protections Based on “Generally Accepted” or “Normal” Agricultural Practices

The phrases “generally accepted” or “normal” are frequent in RTFLs. Some versions of “general” or “normal accepted” practices are present in 74% of RTFLs (see Table 3). “Best management practices,” a more precise method of identifying acceptable practices, are only present in nine states. These phrases typically create a presumption that agricultural operations cannot be nuisances if operating consistently with applicable laws or “generally accepted agricultural practices.”

For example, Hawaii's RTFL stipulates “[t]here shall be a rebuttable presumption that a farming operation does not constitute a nuisance” for any reason “if the farming operation has been conducted in a manner consistent with generally accepted agricultural and management practices.”¹¹⁴ These presumptions can be extremely difficult for plaintiffs to overcome because agriculture is often exempted from most environmental laws, and “generally accepted agricultural practices” are rarely ever defined. Thus, if an operation is polluting and creating a nuisance, plaintiffs' cases may never be heard, given the difficulty in producing evidence that counters the vague language and undefined meaning of “generally accepted agricultural practices.”

Terms such as “normal agricultural operations” or “generally accepted agricultural practices” commonly are not defined, but may cross-reference other state or federal standards. Some states define these terms in their statutes, but others do not. For instance, in Michigan, a “farm or farm operation” shall not be found to be a public or private nuisance if the farm or farm operation alleged to be a nuisance conforms to “generally accepted agricultural and management practices” according to policy determined by the Michigan Commission of Agriculture and Rural Development.¹¹⁵

The law states that such “practices shall be reviewed annually by the Michigan commission of agriculture and revised as considered necessary.”¹¹⁶ Thus, standards like this can fluctuate, making it challenging for plaintiffs to establish the burden of proof.

107. See IOWA CODE ANN. §335.2 (2022) (“no ordinance adopted under this chapter applies to land, farmhouses, farm barns, farm outbuildings or other buildings or structures which are primarily adapted, by reason of nature and area, for use for agricultural purposes”).

108. IOWA CODE ANN. §352.1 (2022).

109. Iowa statute states:

A county shall not adopt or enforce county legislation regulating a condition or activity occurring on land used for the production, care, feeding, or housing of animals unless the regulation of the production, care, feeding, or housing of animals is expressly authorized by state law. County legislation adopted in violation of this section is void and unenforceable and any enforcement activity conducted in violation of this section is void. A condition or activity occurring on land used for the production, care, feeding, or housing of animals includes but is not limited to the construction, operation, or management of an animal feeding operation, an animal feeding operation structure, or aerobic structure, and to the storage, handling, or application of manure or egg washwater.

IOWA CODE ANN. §331.304A(2) (West 2022).

110. *Id.*:

County ordinance setting standards for toxic and odorous air emissions, safety for workers in confinement feeding operations, and water pollution by confinement feeding operations was expressly preempted by statute prohibiting county from adopting legislation regulating a condition or activity occurring on land used for the production, care, feeding, or housing of animals, even though county promoted ordinance as a public health ordinance, and thus ordinance was void and unenforceable; ordinance regulated activities that were part of livestock confinement operations.

Worth County Friends of Agric. v. Worth County, 688 N.W.2d 257, Westlaw Headnote 13 (Iowa 2004). In any nuisance action or proceeding against a feedlot brought by or on behalf of a person whose date of ownership of realty is subsequent to the established date of operation of that feedlot, proof of compliance with §§172D.3 and 172D.4 shall be an absolute defense, provided that the conditions or circumstances alleged to constitute a nuisance are subject to regulatory jurisdiction in accordance with either §172D.3 or §172D.4. IOWA CODE ANN. §172D.2 (West 2022).

111. 584 N.W.2d 309, 29 ELR 20235 (Iowa 1998).

112. IDAHO CODE ANN. §22-4504 (West 2022).

113. COLO. REV. STAT. ANN. §35-3.5-102(5) (West 2022).

114. HAW. REV. STAT. §165-4 (2022).

115. MICH. COMP. LAWS ANN. §286.473 (West 2022).

116. MICH. COMP. LAWS ANN. §286.47, Sec.3. (1) (West 2022).

In one instance, in *Steffens v. Keeler*, when a defendant hog facility was investigated by the Michigan Department of Agriculture and subsequently notified that it was *not* operating in compliance with “generally accepted and recommended livestock waste management practices,” a nuisance suit was still barred.¹¹⁷ Here, the court decided that because the violation notice from the Department stated that the “defendants *could* comply with, and be protected by, the RTFL if they developed and implemented a waste utilization plan,” the facility qualified for RTFL protections.¹¹⁸ Given that the defendant hog CAFO developed a WMP about one year later, which the Department deemed acceptable, the court rendered the facility in compliance with the state’s “voluntary right to farm guidelines.”¹¹⁹ The defendant’s motion for summary judgment was thus granted, denying the plaintiffs the right to have an evidentiary hearing on the matter.¹²⁰ So again, even in a case where the plaintiffs were able to prove that a state agency officially determined a facility had *not* been operating in accordance with “generally accepted agricultural practices,” the RTFL still barred them from seeking redress.

Notably, when a CAFO operates in accordance with “generally accepted” practices, it can still have negative impacts on surrounding neighbors and the environment.¹²¹ Air and water pollution, odor, flies, and other vectors inevitably escape the boundaries of CAFO sites.¹²² Accordingly, a nuisance can certainly exist, even when a CAFO complies with “generally accepted” or “recommended” waste management standards. As discussed, even in cases where a facility is deemed in *noncompliance* by a state regulatory entity, affected neighbors may still be prevented from having the opportunity to present evidence of the harms they were experiencing.

Broadly, the outcome of this case illuminates how agricultural exceptionalism is embedded in multiple levels of a state’s legal system, including holding industrial operations

to “voluntary” or “recommended” waste management standards. Basing RTFL protections on compliance (or anticipated compliance) with regulations that fail to address the problems being created effectively prevents affected neighboring farmers from addressing their grievances through both administrative processes and in courts of law.

2. Protections Based on Compliance With State or Federal Laws

Often, when courts are relied upon to define or interpret the applicability of other environmental laws in the RTFL context, courts frequently rationalize that an agricultural exemption applies. To fully understand how RTFLs operationalize these injustices, it is essential to understand how they interplay with other state and federal environmental laws. Often RTFLs appear reasonable because their protections hinge on an operation’s compliance with other applicable laws.

By looking on a general basis, it seems most RTFLs reference surface-level deference to other legal frameworks, whether county, environmental, federal, or state laws (Table 3). At 66% and 62% of RTFLs referencing state and federal laws, respectively, these laws seem to be of marked importance. However, what rarely comes into full focus is that most CAFOs and other types of intense industrial agricultural practices are largely exempt from most state and federal environmental laws, and local governments are often preempted from imposing regulations on them. This can create a near-impossible burden for most plaintiffs to overcome, as it is challenging to prove noncompliance with nonexistent or otherwise vague and toothless laws.

This section provides a synopsis of how CAFOs and industrial agriculture operations have escaped proper regulation and enforcement under federal and state environmental standards that are regularly and consistently imposed on other industries. At a fundamental level, this is because of a lack of transparency. There is little data on the amount of pollution released from industrial-scale animal facilities, which reduces the public’s ability to fully comprehend the magnitude of industrial agriculture’s pollution.¹²³

During the 1970s, the United States enacted some of its first and most important environmental laws, such as the CAA and the CWA.¹²⁴ These laws are administered by

117. *Id.* See *Steffens v. Keeler*, 503 N.W.2d 675, 677 (Mich. Ct. App. 1993). The court stated:

The RTFA [Right to Farm Act] prohibits nuisance litigation against a farm or farm operation that conforms to generally accepted agricultural and management practices After an inspection of defendants’ farm was conducted by Department of Agriculture . . . on July 14, 1989, defendants were notified that their farm operation was not in compliance with generally accepted and recommended livestock waste management practices. The notice stated defendants could comply with, and be protected by, the RTFA if they developed and implemented a waste utilization plan by May 30, 1990. The plan was developed and approved on July 16, 1990 . . . [the Department] found the plan to be acceptable . . . and indicated that defendants’ use of the plan’s manure management methods rendered defendants’ farm operation in compliance with the voluntary right to farm guidelines.

Considering this evidence, the court ultimately held that the defendants’ operation complied with accepted practices. *Id.*

118. See *Steffens*, 503 N.W.2d at 677 (emphasis added).

119. *Id.*

120. *Id.*

121. This is verified by personal observations from the field, as well as via communications with affected neighboring property owners from various states and regions in the country. [Editor’s Note: These observations and communications were made by Danielle Diamond in her capacity as a Director for the Socially Responsible Agriculture Project.]

122. See generally PEW COMMISSION ON INDUSTRIAL FARM ANIMAL PRODUCTION, *supra* note 41.

123. See, e.g., CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances From Animal Waste at Farms, 73 Fed. Reg. 76948 (Dec. 18, 2008). This rule

provides an administrative reporting exemption from particular notification requirements under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended. In addition, this final rule provides a limited administrative reporting exemption in certain cases from requirements under the Emergency Planning and Community Right-to-Know Act. Specifically, the administrative reporting exemption applies to releases of hazardous substances to the air that meet or exceed their reportable quantity where the source of those hazardous substances is animal waste at farms.

124. In 1972, Congress enacted the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. §1251(a). The CAA was enacted in 1970, and is the main comprehensive federal law that regulates air emissions via EPA. 42 U.S.C. §§7401 et seq.

the U.S. Environmental Protection Agency (EPA) or by the states via federally approved programs.¹²⁵ The CWA has been the primary federal environmental law applicable to CAFOs since the 1970s.¹²⁶ The first appearance of the term “concentrated animal feeding operation” was in the federal CWA, under the definition of a “point source.”¹²⁷ Despite its long history of regulatory authority over CAFOs, EPA has never adequately regulated the industry. The Agency unsuccessfully dealt with a series of challenges to its attempts via the CWA’s national pollution discharge elimination system (NPDES) program.¹²⁸

The NPDES program intends to “eliminate” pollution from point sources into the nation’s waters.¹²⁹ One of the most critical aspects of the NPDES program for CAFOs is that permit coverage hinges on the submittal of WMPs with permit applications. Then, WMPs are subject to regulatory agency review and public input and comment.¹³⁰ Additionally, citizens can appeal NPDES permits if they are deemed inadequate in preventing water pollution.

With CAFOs, WMPs are incorporated into the terms of NPDES permits, which then become enforceable if violated. NPDES permits are enforceable by EPA, authorized states, or by citizens via the CWA’s citizen suit provisions.¹³¹ EPA’s CAFO NPDES permitting program thus is structured to give the public access to important information about how CAFOs intend to manage their waste and also to allow the public a meaningful role in the regulatory process, especially when regulatory agencies fail to act.

In light of the growing environmental threats posed by CAFOs, in January 2001, EPA proposed to “revise and update” its first set of CAFO CWA regulations.¹³²

The Agency explained that its proposed new rule aimed to address “not only inadequate compliance with existing policy but also the ‘changes that have occurred in the animal production industries.’”¹³³ It was pointed out that the “‘trend toward fewer but larger operations, coupled with greater emphasis on more intensive production methods and specialization’ . . . along with ‘increased reports of large-scale discharges from these facilities’ and ‘continued runoff’” had contributed to a significant increase in pollution of many U.S. waterways.¹³⁴ The Agency promulgated its revised “Final CAFO Rule” in February 2003.¹³⁵ However, agribusiness industry pressure and court challenges largely resulted in the backsliding of EPA’s attempts to regulate the industry. In effect, EPA’s federal CAFO NPDES permitting program has been gutted.

Both environmental protection organizations and agribusiness industry groups challenged the revised 2003 rule in *Waterkeeper Alliance, Inc. v. Environmental Protection Agency*.¹³⁶ One of the unfortunate outcomes of this case was that the court decided that EPA did not have the authority to require all CAFOs to apply for NPDES permits based on their “potential to discharge.”¹³⁷ The court also found

125. *E.g.*, 33 U.S.C. §§1311(a), 1342, 1362.

126. *See* *Waterkeeper All., Inc. v. Environmental Prot. Agency*, 399 F.3d 486, 494 (2d Cir. 2005) (“the EPA first promulgated regulations for CAFOs in 1974 and 1976—regulations that, very generally speaking, defined the types of animal feeding operations that qualify as CAFOs, set forth various NPDES [national pollution discharge elimination system] permit requirements, and established effluent limitation guidelines for CAFOs” (citing 41 Fed. Reg. 11458 (Mar. 18, 1976); 39 Fed. Reg. 5704 (Feb. 14, 1974))).

127. 33 U.S.C. §1362(14) (“The term ‘point source’ means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. . .”).

128. *See, e.g., Waterkeeper All., Inc.*, 399 F.3d at 494; *see also* *National Pork Producers Council v. Environmental Prot. Agency*, 635 F.3d 738, 41 ELR 20115 (5th Cir. 2011).

129. 33 U.S.C. §§1311(a), 1342.

130. Under the CWA:

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

33 U.S.C. §1251 (West).

131. Citizen suit provisions provided for under federal environmental laws grant citizens the ability to step in the shoes of regulatory agencies when they fail to act. After providing the agency and the violator 60 days’ advanced notice of the intent to bring a citizen suit, if the problem remains unaddressed or if the responsible agency is not diligently prosecuting a violation, the citizen suit may proceed.

132. *Waterkeeper All., Inc.*, 399 F.3d at 495 (citing National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines

and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 2960 (proposed Jan. 12, 2001) [hereinafter Proposed Rule]).

133. Proposed Rule, 66 Fed. Reg. at 2972.

134. *Waterkeeper All., Inc.*, 399 F.3d at 495.

135. *Id.* (citing 40 C.F.R. §§9, 122, 123, 412); *see also* National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 68 Fed. Reg. 7176, 7176 (Feb. 12, 2003) [hereinafter Preamble to the Final Rule].

136. 399 F.3d at 494-95. Those that challenged the Final Rule included the “environmental petitioners” (*Waterkeeper Alliance, Inc.*, *Sierra Club*, *Natural Resources Defense Council, Inc.*, and *American Littoral Society*) and the “farm petitioners” (*American Farm Bureau Federation*, *National Chicken Council*, and *National Pork Producers Council*).

137. *Id.* at 495. In an important footnote in the opinion, the court stated:

Because we find that the EPA lacks statutory authorization to require potential dischargers to apply for NPDES permits, we need not consider whether the record here supports the EPA’s determination that Large CAFOs may reasonably be presumed to be such potential dischargers. We hasten to note, however, that if Congress were to amend the Clean Water Act to permit the imposition of a duty-to-apply, we believe the EPA would have ample reason to consider imposing this duty upon Large CAFOs. In our view, the EPA has marshaled evidence suggesting that such a prophylactic measure may be necessary to effectively regulate water pollution from Large CAFOs, given that Large CAFOs are important contributors to water pollution and that they have, historically at least, improperly tried to circumvent the permitting process . . . (“since the inception of the NPDES permitting program in the 1970s, a relatively small number of larger CAFOs has actually sought permits”); *see also* Preamble to the Final Rule at 7180 (describing a rise in the excess manure nutrients produced by animal feeding operations); *id.* at 7181 (detailing the ecological and human health impacts caused by CAFO manure and wastewater), *id.* at 7237 (noting the pollutants present in manure and other CAFO wastes and describing how they contribute to the impairment of water quality).

We also note that the EPA has not argued that the administrative record supports a regulatory presumption to the effect that Large CAFOs *actually* discharge. As such, we do not now consider whether, under the Clean Water Act as it currently exists, the EPA might properly presume that Large CAFOs—or some subset thereof—actually discharge. *See generally* *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 110 S. Ct. 1542, 108 L. Ed. 2d 801 (1990); *National Mining Ass’n v. Babbitt*, 172 F.3d 906 (D.C. Cir. 1999).

Id. at 506 n.22.

the rule’s “agricultural stormwater exemption” proper.¹³⁸ Thus, as long as a CAFO applies its waste by “appropriate” waste management standards, water pollution occurring from waste disposal areas as a result of precipitation-related events are deemed allowable in the eyes of the law.¹³⁹ This exemption, however, has had much broader implications. In practice, even discharges of waste that occur from the overapplication of waste on cropland, as opposed to a result of runoff from a rainfall event, have escaped regulation.¹⁴⁰

After EPA issued a revised version of the 2003 rule to comply with the *Waterkeeper* holding, livestock agribusiness industry groups again challenged that rule in 2011 in the *National Pork Producers Council* case.¹⁴¹ As a result, the vast amount of water pollution caused by CAFOs has continued. This is because the court in the *Pork Producers* case ultimately overturned another attempt by EPA to require a large subset of CAFOs to apply for NPDES permits based on “proposed” discharges (as opposed to creating a regulatory presumption).

The *Pork Producers* court held that EPA lacked the authority to issue a regulation requiring CAFOs to apply for NPDES permits based on “potential” or “proposed” discharges because “there must be an actual discharge into navigable waters to trigger the CWA’s requirements and the EPA’s authority.”¹⁴² This decision, and EPA’s rewrite of its rules in response, then created a regulatory system whereby only CAFOs found to be dischargers “in fact” could be required to apply for NPDES permit coverage. This greatly limited the universe of CAFOs regulated under NPDES permits, as most CAFOs claim to be “zero-discharge” facilities.¹⁴³

Given that most CAFOs cause water pollution through the overapplication of waste on cropland and via runoff, often occurring without regulatory oversight pursuant to the “agricultural stormwater exemption,” water pollution problems continue unabated. While the risk of causing water pollution via land application area discharges is high, the risk of getting caught discharging without a permit and being subject to an enforcement action is low enough to outweigh the benefits of obtaining permit coverage.¹⁴⁴ Typically, only after a number of catastrophic pollution events or repeated documented pollution problems will EPA or an authorized state require a CAFO to obtain NPDES per-

mit coverage.¹⁴⁵ This results in little regulatory oversight of CAFOs and massive amounts of water pollution escaping regulation under the federal CWA program.¹⁴⁶

Scant federal regulatory oversight of the CAFO industry exists. Since a majority of CAFOs do not have NPDES permits, EPA and the public have little recourse to determine where and how CAFOs intend to dispose of and manage the immense amounts of waste they produce. This also limits the ability of regulators and the public to meaningfully weigh in on inadequate WMPs.

Correspondingly, the ability to enforce terms of site-specific WMPs is substantially weakened. In contrast, with permitted facilities, WMPs would otherwise be incorporated into the NPDES permits, and therefore would be enforceable regardless of whether a discharge occurs. In essence, the federal CWA NPDES program for CAFOs has become a reactionary regulatory program triggered only after significant water pollution has occurred. To summarize, a vast majority of CAFOs and their pollution have essentially escaped meaningful oversight and regulation by EPA under the CWA.

At this juncture, it should be noted that under the CWA, states that are authorized to administer the federal NPDES program are allowed and encouraged to enact more stringent requirements than EPA’s federal regulations. In principle, the CWA provides a floor, not a ceiling, for environmental protection. Despite this, states have largely followed suit in rolling back their corresponding CAFO regulations that have been weakened at the federal level.¹⁴⁷ Even states that had enacted more stringent laws prior to the *Pork Producers* case have resisted implementing those laws since the decision.¹⁴⁸

Implementation and enforcement of the federal CAA by EPA against CAFOs have had similar outcomes.¹⁴⁹ Many states and local units of government delegated the authority to administer the CAA have not enforced its provisions

138. *Id.* at 509. This portion of the rule essentially allowed CAFOs to have unpermitted “precipitation-related discharges,” referred to as “agricultural stormwater discharges” in circumstances where CAFOs have otherwise applied “manure, litter or process wastewater . . . in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization.” *Id.*

139. *Id.*

140. Personal observations by Danielle Diamond, based on experience with citizen-based CAFO water pollution monitoring and regulatory reporting programs.

141. *National Pork Producers Council v. Environmental Prot. Agency*, 635 F.3d 738, 41 ELR 20115 (5th Cir. 2011).

142. *Id.* at 751.

143. Personal observations by Danielle Diamond based on experience with citizen-based CAFO water pollution monitoring and regulatory reporting programs.

144. *See* Preamble to the Final Rule, 68 Fed. Reg. 7176, 7196-97 (Feb. 12, 2003).

145. Personal observations by Danielle Diamond based on communications and experience working with both state and federal regulatory entities.

146. The litigation challenging the program was led by some of the nation’s most powerful agribusiness industry groups, including the National Pork Producers Council, American Farm Bureau Federation, United Egg Producers, National Chicken Council, U.S. Poultry & Egg Association, Dairy Business Association, Inc., and the National Milk Producers Federation. *See National Pork Producers Council*, 635 F.3d 738.

147. *See, e.g., ILL. ADMIN. CODE tit. 35, §502.101(b)* (West 2022) (“The owner or operator of a CAFO must seek coverage under an NPDES permit if the CAFO discharges.”).

148. Personal observation based on interactions with state regulatory agencies in West Virginia, Delaware, and Arizona. [Editor’s Note: This observation was made by Danielle Diamond working in her capacity as a Director for the Socially Responsible Agricultural Project.] *See, e.g., Arizona Department of Environmental Quality (ADEQ), Concentrated Animal Feeding Operation Program (CAFO)*, <https://www.azdeq.gov/node/2710> (last revised Mar. 4, 2021) (stating that a “CAFO is not required to apply for an AZPDES [Arizona Pollutant Discharge Elimination System] permit unless the owner/operator informs ADEQ there will be a discharge of pollutants to U.S. waters”).

149. CAFOs emit a number of pollutants regulated by the CAA, 42 U.S.C. §§7401 et seq. *See Association of Irrigated Residents v. Environmental Prot. Agency*, 494 F.3d 1027, 1028 (D.C. Cir. 2007) (“The pollutants—ammonia, hydrogen sulfide, particulate matter, and volatile organic compounds—emanate from animal housing structures and areas used to store and treat manure.”).

concerning CAFOs. This has been the case since EPA entered into a consent agreement with the industrial livestock industry in 2005.¹⁵⁰ The CAFOs that entered into the agreement committed to participating in an air emissions study intended to help EPA develop air emissions modeling factors to regulate CAFOs with more consistency.¹⁵¹ All of the CAFOs that volunteered for the study were supposed to receive *some* immunity from prosecution for violating CAA permitting thresholds if they were found to be emitting pollutants that exceeded allowable limits. CAFOs that did not volunteer for the study were never granted this immunity.

The study was completed years ago and is officially over. However, EPA has yet to finalize the air emissions modeling standards for CAFOs. Given EPA's delay, most CAFOs, including those that never participated in the study and those that were not even in existence at the time, have resisted obtaining CAA permits, claiming that since EPA has not finalized its emissions modeling factors, there is too much uncertainty in measuring their emissions.¹⁵² Thus, very few CAFOs are currently regulated under the federal CAA, even though certain types and sizes of facilities are known to be significant sources of air pollution and should be regulated.

Notably, EPA's 2005 consent agreement and final order also intended to collect air monitoring data to determine compliance with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹⁵³ and the Emergency Planning and Community Right-to-Know Act (EPCRA).¹⁵⁴ However, CAFOs releasing pollutants in quantities sufficient to trigger these laws have also escaped regulation.

EPCRA has two primary purposes pertinent to this discussion.¹⁵⁵ The first involves compiling accurate, reliable information on the presence and release of toxic chemicals and disseminating said information to the public at the local level. The second is the "emergency planning" component, which uses the reported information to formulate emergency response plans at the local level to limit exposures and harm resulting from the accidental

release of toxic chemicals.¹⁵⁶ Thus, the primary purpose of collecting and reporting such information is to inform the public about possible exposures and assist in planning emergency responses.

Again, while CAFOs that volunteered to participate in the 2005 air study consent agreement were provided some immunity from certain past and ongoing CAA, CERCLA, and EPCRA violations, their participation did not give a blanket exemption from complying with these laws. Further, CAFOs "that choose not to sign . . . [the] Agreement [were] subject to potential enforcement action by the Federal Government for any CAA, CERCLA, or EPCRA violations, as would any AFO [animal feeding operation] that sign[ed] the Agreement but later drop[ped] out by not complying with the terms of the Agreement."¹⁵⁷ Nonetheless, the industry has still largely avoided regulation under federal public "right-to-know" laws. Examination of the inconsistencies between environmental regulation of CAFOs as compared to other highly regulated industries highlights that agricultural exceptionalism is deeply embedded in the system.

Agricultural exceptionalism prevailed in March 2018 when President Donald Trump signed into law the Fair Agricultural Reporting Method Act, or the FARM Act.¹⁵⁸ The FARM Act expressly exempts farms from reporting of air emissions from animal waste under CERCLA §103.¹⁵⁹ This pattern of continued regulatory rollbacks of basic information reporting has robbed the public of its right to know about potential pollution exposures and has limited opportunities for redress. This, coupled with the weakening of other related rules and the failure to implement and enforce any preexisting environmental laws, demonstrates the success of agribusiness in avoiding accountability for pollution caused by industrial agriculture. One of the main takeaways of this review of state and federal environmental regulatory efforts is how the CAFO industry, in particular, has avoided public transparency and proper monitoring and accountability for its pollution.

When considering that the CWA, the CAA, and EPCRA are only triggered by a small cohort of pollutants that reach regulatory thresholds (of the many other types and amounts of contaminants generated by CAFOs), the magnitude of the problem becomes even more apparent. In instances when the public pressures regulatory authorities to enforce monitoring and reporting requirements for the largest CAFOs, agribusiness groups respond accordingly. For example, citizens from the small town of Tonopah, Arizona, filed an informal complaint with EPA requesting enforcement of the CAA and EPCRA against a four million-plus-head egg-laying operation associated with "Hick-

150. Animal Feeding Operations Consent Agreement and Final Order; Notice, 70 Fed. Reg. 4958, 4959 (Jan. 31, 2005) [hereinafter Consent Agreement]. See *Association of Irrigated Residents*, 494 F.3d at 1028:

An AFO that releases these pollutants in sufficient quantities may be required to report them under CERCLA and EPCRA, and may be subject to various requirements under the Clean Air Act. . . . An AFO emitting these pollutants in quantities below the statutory thresholds, however, has no obligation under the Acts to obtain permits or report its emissions.

151. Consent Agreement, 70 Fed. Reg. at 4959.

152. This is based on personal observations and communications with responsible regulatory entities in various regions and states. [Editor's Note: These observations and communications were made by Danielle Diamond in her capacity as a Director for the Socially Responsible Agricultural Project.] While it may be true that EPA has not published its estimations, there is a wealth of available data to use to determine compliance or noncompliance with the CAA; yet it has rarely, if ever, been enforced by EPA since the Consent Agreement was entered into more than a decade ago.

153. 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405.

154. 42 U.S.C. §§11001-11050, ELR STAT. EPCRA §§301-330.

155. *Id.*

156. *Id.*

157. Consent Agreement, 70 Fed. Reg. 4958 (Jan. 31, 2005).

158. See Fair Agricultural Reporting Method Act, Pub. L. No. 115-141, §§1101-1103, 132 Stat. 1147 (2018).

159. Amendment to Emergency Release Notification Regulations on Reporting Exemption for Air Emissions From Animal Waste at Farms; Emergency Planning and Community Right-to-Know Act, 84 Fed. Reg. 27533 (June 13, 2019).

man's Family Farms" (this complaint pre-dated President Trump's FARM Act).¹⁶⁰

In response to the citizens' complaints, EPA Region 9 initiated an action to investigate the facility,¹⁶¹ but the investigation was halted when the Trump Administration took office. Shortly thereafter, local residents learned that companies involved with the operation and the agribusiness industry group, the United Egg Producers, met with then-new EPA Administrator Scott Pruitt to "thank him for efforts to help reduce unnecessary environmental regulatory burdens" and "to share the personal sense of what the CERCLA-EPCRA reporting requirements will mean for farmers, their businesses and families, and . . . to request his help."¹⁶² Despite the overwhelming evidence presented to local, state, and federal regulatory agencies that the facility exceeded pollution emission thresholds to trigger regulation under the CAA, no action has been taken. In fact, the Maricopa County Air Quality Department opposed requiring the facility to obtain a CAA permit for its volatile organic compound (VOC) emissions, despite ample evidence showing it was a major source of VOC pollution.¹⁶³

In summary, the agribusiness industry uses agricultural exceptionalism to justify its forcible disposition of neighboring property rights while evading federal and state environmental regulations. As they formatively consolidate and dominate the marketplace through advantageous corporate law, they simultaneously influence environmental regulations, leading to a scarcity of public transparency.¹⁶⁴ The increased lack of transparency makes it difficult to account for and to expose the extent of the impacts the industry is having on the public, the environment, and rural communities.

It is essential to note in this context that regulatory roll-backs at the federal level trickle down to the state level. While some states have their own environmental laws,

these often mirror federal requirements. There are very few, if any, environmental protection laws that apply to CAFOs, and very few regulatory agencies with the political will to implement and/or enforce those laws. Therefore, it is easy for CAFOs to claim compliance. Thus, plaintiffs have a high bar and are at a serious disadvantage when an RTFL preempts a nuisance suit against a CAFO via a presumption that it cannot be a nuisance if it complies with other applicable laws and regulations.

Arizona's RTFL provides an excellent example.¹⁶⁵ Arizona's original RTFL provided protections against nuisance suits by creating a presumption that "[a]gricultural operations conducted on farmland that are consistent with good agricultural practices and established before surrounding nonagricultural uses" are reasonable and not a nuisance "unless the agricultural operation has a substantial adverse effect on the public health and safety."¹⁶⁶ The statute further creates the presumption that "[a]gricultural operations undertaken in conformity with federal, state and local laws and regulations are presumed to be good agricultural practices and not adversely affecting the public health and safety."¹⁶⁷ A 2021 amendment added, among other provisions:

A city, town, county, [or] special taxing district . . . may not declare an agricultural operation conducted on farmland to be a nuisance if the agricultural operation's practices are lawful, customary, reasonable, safe and necessary to the agriculture industry as the practices pertain to an agricultural operation's practices *as determined by the agricultural best management practices committee* established by §49-457, the Arizona department of agriculture or the department of environmental quality.¹⁶⁸

In practice, given that counties, the state Department of Environmental Quality, and the federal EPA have been complacent in enforcing existing environmental laws, despite significant public pressure, these regulatory presumptions pose substantial hurdles for prospective plaintiffs to overcome.¹⁶⁹ This is exacerbated by the fact that no other local units of government, including cities, towns, counties, and so forth, can declare an agricultural operation a nuisance if its practices comply with what the state's "agricultural best management practices committee" deems acceptable. Ironically, the president and chief exec-

160. See Press Release, Socially Responsible Agriculture Project, Groups to EPA: Investigate Hickman Egg Operations, Enforce Pollution Rules on Exploding Arizona Poultry Industry (Oct. 8, 2015), <https://sraproject.org/2015/10/press-release-groups-to-epa-investigate-hickman-egg-operations-enforce-pollution-rules-on-exploding-arizona-poultry-industry/>; see also Ray Stern, *Critics Try to Shut Down Arizona's Hickman's Eggs Plant With EPA Complaint*, PHX. NEW TIMES (Oct. 9, 2015), <https://www.phoenixnewtimes.com/news/critics-try-to-shut-down-arizonas-hickmans-eggs-plant-with-epa-complaint-7731311>. [Editor's Note: Danielle Diamond worked with the citizens' group from Tonopah, Arizona, in her capacity as a Director for the Socially Responsible Agriculture Project, providing technical and environmental policy and advocacy support to help the community address the negative impacts caused by the Hickman's egg-laying CAFO.]

161. See EPA Investigation Letter to Glenn Hickman, President and Chief Executive Officer, Hickman's Egg Ranch, Pursuant to Section 114 of the CAA (June 1, 2016), [https://media.kjzz.org/s3fs-public/ResponsiveRecords/2016-008848%20\(1\).pdf?_ga=2.40399138.1273173212.1646612364-1959672938.1646612364](https://media.kjzz.org/s3fs-public/ResponsiveRecords/2016-008848%20(1).pdf?_ga=2.40399138.1273173212.1646612364-1959672938.1646612364); see also Casey Kuhn, *EPA Files Letter Questioning Hickman's Family Farm Impact on Air Quality*, KJZZ (Sept. 30, 2016), <https://fronteradesk.org/content/373956/epa-files-letter-questioning-hickmans-family-farm-impact-air-quality>.

162. See *Egg Producers Met With EPA Head*, UNITED EGG PRODUCERS (May 19, 2017), <https://unitedegg.com/egg-producers-met-with-epa-head/>.

163. See Decision and Final Order at 10, In re the Appeal of Hickman's Egg Ranch, Permit No. 140062, No. MCAPHB2016-01-PA (Maricopa Cnty. Air Pollution Hearing Bd. Dec. 2, 2016).

164. MARY K. HENDRICKSON ET AL., THE FOOD SYSTEM: CONCENTRATION AND ITS IMPACTS—A SPECIAL REPORT TO THE FAMILY FARM ACTION ALLIANCE (2020).

165. ARIZ. REV. STAT. ANN. §3-112 (2021). It was recently amended in 2021, likely due to nuisance cases being filed against Hickman's four million-plus bird egg-laying operations located in Tonopah and Arlington in Maricopa County. See, e.g., Nicholas A. Verderame, *Plattner Verderame, P.C. Files Nuisance Lawsuit Against Hickman Family Farm*, LAWYERS.COM (Sept. 20, 2017), <https://blogs.lawyers.com/attorney/general-practice/plattner-verderame-p-c-files-nuisance-lawsuit-against-hickman-family-farm-42675/>.

166. ARIZ. REV. STAT. ANN. §3-112(A).

167. *Id.* §3-112(B).

168. *Id.* §3-112(E) (emphasis added).

169. See, e.g., Elizabeth Stuart, *Protesters Cry Fowl in Tussle With Maricopa County Over Stinky Egg Ranch*, PHX. NEW TIMES (Sept. 22, 2016), <https://www.phoenixnewtimes.com/news/protesters-cry-fowl-in-tussle-with-maricopa-county-over-stinky-egg-ranch-8668829>.

utive officer of Hickman's Family Farms is a committee member.¹⁷⁰ The 2021 amendment also added:

The court may not award punitive damages for a nuisance action unless the alleged nuisance emanated from an agricultural operation that has been subject to a criminal conviction or a civil enforcement action taken by a state or federal environmental or health regulatory agency pursuant to a notice of violation for the conduct alleged to be the source of the nuisance.¹⁷¹

This new provision is interesting, particularly given that both a nuisance action, as well as a citizen suit for violations of EPCRA, were filed against Hickman's four million-plus-head egg-laying operations in Arlington and Tonopah, Arizona, several years ago.¹⁷² Neither of these cases are included in our statistical analyses because they do not have dispositive rulings based on RTFL provisions, but they illustrate how political dynamics play out in the agribusiness context. The nuisance suit is still pending, whereas the EPCRA case is over.¹⁷³ Interestingly, the EPCRA suit was a citizen suit (brought before the FARM Act preempted it). Citizen suits can only proceed to court after providing 60 days' notice to the violator and the responsible regulatory authority. Then, if no corrective action or diligent prosecution is undertaken within 60 days, the citizen suit can proceed. In this case, the suit proceeded without any action taken by a responsible agency.

Paradoxically, in the EPCRA case, the court found undisputed evidence that Hickman's released more than 100 pounds of ammonia per day into the ambient air during the time period captured in the lawsuit. The court specifically stated that "[i]ndeed, Hickman's own expert found that the amount of ammonia generated at each facility likely exceeded 1500 pounds each day."¹⁷⁴ The court also found that Hickman's failed to comply with the written notice requirement under EPCRA for 592 days for the Tonopah facility and 1,825 days for the Arlington facility. The court then decided that these violations amounted to just two failures to report a continuous emissions release.¹⁷⁵ The maximum penalty for a continuous emissions release under EPCRA is \$25,000. Following this rationale on the

EPCRA stipulations, at a minimum, the penalties assessed by the court should have been at least \$50,000.

Plaintiffs pointed out the fact that Hickman's failed to take any action to come into compliance with EPCRA for more than a year and a half, even after receiving a 60-day notice letter, which should have triggered a harsher penalty.¹⁷⁶ However, the court reasoned that because there was evidence that the regulatory agency "was aware of Hickman's emissions, but chose not to pursue further action," there was "a basis for concluding that Hickman was not acting in bad faith."¹⁷⁷ The court also noted that Hickman's "regularly coordinates with state regulators," and that there was no evidence that the company was "in violation of any other state or federal environmental laws."¹⁷⁸

In understanding the background and history of the case, it is not difficult to infer that the reason no other violations had been prosecuted was likely more related to Hickman's political influence than the absence of violations.¹⁷⁹ Although Hickman's failed to take any action to comply with EPCRA, even after the plaintiffs provided the company the required 60-day prior notice of their intent to sue for the violations, the court elected to assess a fine of only \$1,500 for each facility—making the total fine \$3,000. Considering that Hickman's is one of the largest egg producers in the region and likely the country, the fine assessed was unconscionably low. Fines and penalties under federal environmental laws are intended to deter future violations. No doubt it cost less for Hickman's to violate the law than it did to come into compliance. This resulted in

176. *Don't Waste Ariz. Inc.*, 2018 WL 6629657, at *2:

On May 2, 2016, Plaintiff served written notice on Hickman's of its intent to file a citizen's action under provisions of . . . CERCLA . . . 42 U.S.C. §§9601-9675 and EPCRA, based on Hickman's alleged failure to submit notification under these statutes that reportable quantities of hydrogen sulfide and ammonia had been released at the Arlington and Tonopah Facilities. Nearly five months later, Plaintiff filed its Complaint. . . . The Complaint alleged that Hickman's violated EPCRA because it failed to file the necessary reports regarding the release of ammonia at the Arlington Facility and the Tonopah Facility. Hickman's filed an answer denying liability on October 21, 2016.

177. This rationale wholly goes against the purpose behind the citizen suit provisions provided for under federal law, which are specifically intended to allow for citizens to prosecute environmental violations in instances when regulatory agencies lack the resources or political will to act. To refer to the state's failure to prosecute as a favorable factor for the defendant in the court's assessment of guilt is in direct contradiction with the intent behind the citizen suit provisions that provided the citizens the ability to prosecute the violations in the first place.

178. Indeed, this is true, as there had been a CAA investigation that had been initiated by EPA against Hickman's Egg Ranch just prior to President Trump entering office, which then halted after Glenn Hickman met with President Trump's newly appointed EPA Administrator (*see supra* notes 162 and 163). What is also noteworthy is that hundreds of complaints had been filed by neighbors of the operation, but little to no action was taken by local and state regulatory agencies. In 2015, well over 100 complaints had been filed with just the Maricopa County Air Quality Department alone and 65 had been filed with the state. Almost all were odor-related. Hickman's was only cited three times (once "for operating generators without a permit, once for failing to control dust kicked up by trucks driving in and out of the facility on an unpaved road, and once for improperly containing manure during transport"). County Board Supervisor Clint Hickman states that "he recuses himself when board business directly affects the egg ranch." However, "he balked at" doing so for other air quality and environmental issues. Stuart, *supra* note 169.

179. *See id.*

170. *See* ADEQ Agricultural Best Management Practices (AgBMP) Committee, Meeting Minutes (July 28, 2021), https://static.azdeq.gov/aqd/agbmp/mtg_minutes_210728.pdf.

171. ARIZ. REV. STAT. ANN. §3-112(C)(3).

172. *See Don't Waste Ariz. Inc. v. Hickman's Egg Ranch Inc.*, No. CV-16-03319-PHX-GMS, 2018 WL 6629657 (D. Ariz. Dec. 19, 2018). *See also* Casey Kuhn, *Arizona Residents Challenge Local, National Regulations on Industrial Farm Emissions*, KJZZ (Dec. 22, 2017), <https://kjzz.org/content/583947/arizona-residents-challenge-local-national-regulations-industrial-farm-emissions>.

173. *Don't Waste Ariz. Inc. v. Hickman's Egg Ranch Inc.*, No. CV-16-03319-PHX-GMS, at 6 (D. Ariz. Nov. 2, 2018). The pending nuisance action was not used in our statistical analyses since it is still pending.

174. *Id.*

175. *Id.* (citing CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances From Animal Waste at Farms, 73 Fed. Reg. 76948, 76952 (Dec. 18, 2008)). This amount was notably less than EPA guidance, which the court acknowledged could have led to penalties up to \$278,000. *Id.* at 5.

virtually no incentive for Hickman's, or any other CAFOs in the county, to adhere to regulatory standards.

Aside from this inexplicable outcome, which did little to deter Hickman's from future violations, the 2021 amendment to the state's RTFL becomes even more intriguing. Should the amended RTFL be applied in the pending nuisance case against Hickman's, the company has clearly set itself up to avoid any punitive damages, as Hickman's should be able to demonstrate that the operation has not been subject to "a criminal conviction or a civil enforcement action *taken by a state or federal environmental or health regulatory agency* pursuant to a notice of violation for the conduct alleged to be the source of the nuisance."¹⁸⁰

This easy defense for Hickman's results from the failure of regulatory agencies to act in spite of significant pollution from Hickman's facilities. Affected citizens filed suit in the EPCRA case, not the regulatory agencies. Surprisingly, the court unjustifiably skirted consideration of imposing any criminal fines against the operation, despite the awareness of Hickman's ongoing violations and the company's blatant failure to address them. This demonstrates how a lack of enforcement by local, state, and federal regulatory agencies bolsters RTFL protections, even where significant pollution problems have been proven.

Hondo Creek Cattle Co. is another example. In this case, a Texas court barred a nuisance suit filed by 60 neighbors against a large-scale 6,000-head cattle operation based on the state's one-year statute of repose.¹⁸¹ This was despite documented pollution problems. The state's RTFL law offers protection from a nuisance action if an operation has been "lawfully" operated for a year or more prior to when the suit is brought.¹⁸²

While the Texas Natural Resource Conservation Commission had taken action against the feedlot to address the dust (or particulate matter) pollution problem, this evidence was considered insufficient by the court to prove the operation was being operated "unlawfully" for plaintiffs to overcome the one-year statutory bar.¹⁸³ The court prohibited the nuisance suit despite the facts of the case, which included a regulatory agency action focused on dust pollution caused by the facility, and without regard for an equitable balance of the competing land uses.¹⁸⁴ The plaintiffs were stripped of their ability to exert fundamental property rights based upon a mere passage of 12 months and despite clear evidence of noncompliance with environmental standards.

To overcome the kinds of protections afforded to agricultural operations, plaintiffs commonly must prove a "substantial adverse effect on public health and safety."¹⁸⁵

This can be an onerous burden to overcome because, as discussed, industrial agriculture is largely exempted from most environmental and public health and safety laws that require monitoring and reporting. Given that these operations are exempt from these laws, providing the required documentation to prove causation between the agricultural operation's activities and the health outcomes experienced by surrounding neighbors can be challenging. This is especially difficult when state and federal agencies lack the political will to implement and enforce the limited applicable laws on the books.

E. RTFLs Incentivize Industrial Operations, Leading to Inequitable Outcomes

By not providing explicit protection for small and medium sized farms, RTFLs enable the largest of operations by defining them most commonly in terms of production.¹⁸⁶ Even if not explicitly stipulated in a state's statute, RTFLs can incentivize more-intense agricultural operations on smaller parcels of land to the detriment of other surrounding farms and other less-intense land uses.

For example, in *Marsh v. Sandstone North, LLC*, an Illinois court expressly acknowledged that the purpose of the state's RTFL was to "reduce the loss" of its "agricultural resources" by protecting against nuisance suits that are often "precipitated by the extension of nonagricultural land uses into agricultural areas."¹⁸⁷ However, the court still favored a defendant's 7,000-head hog operation, although the surrounding landowner plaintiffs were also farmers. The court reasoned that the statute applied to "any nuisance action" against any "agricultural operation," even if the action is brought by other farmers trying to protect their farmland.¹⁸⁸ This case demonstrates how a state's RTFL can be utilized to safeguard large-scale industrial livestock production facilities at the expense of other surrounding farmers.¹⁸⁹

if consistent with good agricultural and forest practices and established prior to surrounding nonagricultural and nonforestry activities, are presumed to be reasonable and shall not be found to constitute a nuisance unless the activity or practice has a substantial adverse effect on public health and safety.

- (2) Agricultural activities and forest practices undertaken in conformity with all applicable laws and rules are presumed to be good agricultural and forest practices not adversely affecting the public health and safety for purposes of this section and RCW 7.48.300.

Id. §7.48.305.

186. For example, Nebraska only offers protections for large-scale commercial operations. *See* NEB. REV. STAT. §2-4403 (2022).

187. 179 N.E.3d 402, 422-23 (Ill. App. Ct. 2020), *appeal denied*, 163 N.E.3d 745 (Ill. 2021).

188. The court disregarded the lower court's interpretation of the Act that it was not intended to pit agricultural interests against each other. *Id.*

189. Another example is Michigan's RTFL, which specifies that a farming operation cannot be found to be a nuisance if it is commercial in nature and conforms to GAAMPs. *See* MICH. COMP. LAWS ANN. §286.472 (West 2022) (GAAMPs are agricultural and management practices, including manure management, developed annually by the Michigan commission of agriculture). *See id.* §286.473, Sec.3(1). It expressly preempts local laws, ordinances, or resolutions that conflict with the RTFL or GAAMPs, and provides attorney fees and costs to defending farm operations that prevail in nuisance

180. ARIZ. REV. STAT. ANN. §3-112 (2022) (emphasis added).

181. *Barrera v. Hondo Creek Cattle Co.*, 132 S.W.3d 544, 546, 549 (Tex. App. 2004).

182. TEX. AGRIC. CODE ANN. §251.004(b) (Vernon 2021).

183. *Barrera*, 132 S.W.3d at 546, 549.

184. *Id.* at 547.

185. WASH. REV. CODE ANN. §7.48.305(1) (2022) (emphasis added). For example, Washington's RTFL states:

- (1) Notwithstanding any other provision of this chapter, agricultural activities conducted on farmland and forest practices,

Due to the extreme consolidation and concentration of livestock production onto small parcels of land via CAFOs, farmland owners can reap economic benefits from intensifying livestock production while selling off farmland acreage—so long as they do not live proximate. In *Laux v. Chopin Land Associates Inc.*, a family farm operation consisting of approximately 123 acres sold approximately 113 acres to a residential developer.¹⁹⁰ The remaining 10 acres were controlled by the family's eldest sons, who converted the property to a concentrated hog operation. Here, a family farming operation generated a financial benefit from the sale of a majority of its farmland to a residential developer while still utilizing a small fraction of the original farmland acreage for a more-intense industrial agricultural use.

When the proposed residential development began to take shape—a development anticipated at the time of the land sale—the hog operation was able to rely on Indiana's RTFL to expand its operation, adversely impacting the half-converted and otherwise useless residential land. Thus, although the nuisance action resulted from a change in the land use of the plaintiff's land, the agricultural operation's land sale of its own land for residential development was the reason that any form of residential development was allowed to happen in the first place. This illuminates how RTFLs can encourage the conversion of farmland for residential and other uses while consecutively providing protections for more-intense agricultural uses on smaller parcels of land.

In *Rancho Viejo, LLC v. Tres Amigos Viejos, LLC*, the California Court of Appeals highlights similar trends.¹⁹¹ Here, a family ranch sold a portion of its property to a residential developer, but retained a portion of the property that contained an avocado and orange-growing operation uphill from the proposed development. The family subsequently sold the upper property to the defendant's avocado operation. The defendant's grove was irrigated by pumping water uphill from the nearby river regularly. However, because the defendant could not rely on a municipal water source, it was forced to apply more water than would ordinarily be necessary to dilute the water's salinity.

After the plaintiff discovered that the irrigation was causing damage to and destabilizing the slope above his developing subdivision, the plaintiff requested that the defendant implement a water control system to prevent excess runoff. The defendant refused. The court denied the plaintiff's subsequent nuisance lawsuit and held that California's RTFL precluded the plaintiff from claiming a trespass theory of liability.

This case might appear to have protected agricultural land, because the orchard was able to continue its irrigation practices unchanged in the face of a nuisance lawsuit.

However, it is important to note that the avocado operation was protected from having to correct the problems it was creating for the neighboring residential development, which would not have existed but for the land sale of part of the farm to the developer. In essence, there was an economic benefit in selling off a portion of the farm for residential land use, but no corresponding duty to operate responsibly and in a compatible manner.

This was the case even though alternative water management protocols could have addressed the problem. Clearly, the avocado farm was a preexisting land use, which gave it a priority interest over the residential development. However, if not for the RTFL, the court may have still enjoined a bad actor to utilize other available alternative water management procedures. This could have remedied negligent nuisance causing runoff while still honoring the priority interest in maintaining the farming operation.

What these cases demonstrate is that RTFLs can incentivize more-intense industrial agricultural uses on smaller parcels of farmland while disincentivizing innovations to address environmental harms resulting from more-intense farming practices. These trends have disrupted the equitable balancing of rights previously granted through traditional common-law nuisance lawsuits. Pre-RTFL courts could balance case-specific facts and competing interests to fashion equitable outcomes.¹⁹² In fact, this suggests that agricultural exceptionalism, if maintaining a distributive focus, could be reconcilable with environmental justice aims.

192. For example, in *Dill v. Excel Packing Co.*, 331 P.2d 539, 540-42 (Kan. 1958), various suburban property owners brought a nuisance action against a neighboring cattle feedlot that pre-dated the suburban development. The plaintiffs had bought homes in a developing subdivision while the neighboring feedlot held only 27 cattle. The feedlot then expanded to reach a total number of 840 cattle. The plaintiffs alleged that the cattle feedlot's dramatic change in size had eviscerated their ability to use and enjoy their property by destroying the value of their homes, depleting the water supply, and generating fowl and offensive waste odors. *Id.* at 541. Importantly, the court noted that livestock in any amount in a residential area constituted a nuisance. *Id.* at 548. However, it was also pointed out that the plaintiffs lived in an "agriculture area" that had existed for more than 30 years. Ultimately, the court in *Dill* held that because the plaintiffs chose to live in an agricultural area, they could not complain about adjacent agricultural activities or the resulting depreciation in the value of their homes. Thus, without the existence of an RTFL, the court equitably assessed the interests at stake and opted to protect the large livestock operation from the effects of urban encroachment.

Similarly, in another pre-RTFL case, *Gerrish v. Wishbone Farm of New Hampshire, Inc.*, 108 N.H. 237, 231 A.2d 622 (N.H. 1967), the defendant poultry operation invested \$600,000 in a waste disposal system of various open-air manure lagoons causing extensive odors on neighboring properties. *Id.* at 239. However, the defendant admitted that their geographic location was not suitable for open-air manure waste disposal because the parcel lacked the adequate land to maintain the lagoons' size. *Id.* at 239-40. Nevertheless, the defendant argued that because the disposal system was so expensive, they should not be enjoined from operating. *Id.* at 239. The court held that the defendant was to cease using the waste disposal system. *Id.* at 240. The key here is that the court noted that defendant could apply to the trial court by an appropriate motion if they wished to extend the effective date of the court's injunction to test other remedial technology potentially available to fix the problem. *Id.* at 240. Thus, the equitable balance of land use interests encouraged better environmental practices because as long as an agriculture operation is taking steps to mitigate nuisance-causing activities, the operation could avoid a doomsday injunction later feared by RTFL authors.

cases. See *id.* §§286.474(6), 286.473b. This system has essentially had a chilling effect on the ability of local communities and aggrieved citizens to address negative impacts they are experiencing from CAFOs in their areas.

190. 615 N.E.2d 902, 904 (Ind. App. 3d Dist. 1993). This case was not included in our statistical analyses, but is helpful in further understanding how RTFLs can create the reverse of what they were originally intended for.

191. 123 Cal. Rptr. 2d 479 (Cal. Ct. App. 2002).

This begs the question as to whether actions brought pursuant to traditional common-law nuisance claims were not already effective mechanisms for courts to equitably balance the rights of landowners in rural areas while still protecting farmland and agriculture without the aid of RTFLs.¹⁹³ Logic would suggest courts are and always have been capable of fashioning equitable remedies without being required to follow statutory laws that effectually take away the rights of rural people.¹⁹⁴ Justice and equity cannot be served when laws strip away the ability of people to protect themselves, particularly those who are already disadvantaged by their socioeconomic standing or geography, to provide cover for a harmful polluting industry.

VI. Conclusion

RTFLs have paved the way for the rapid expansion of large-scale, industrialized, corporate-owned agriculture by reducing the property rights attuned to more distributive ends vis-à-vis trespass and nuisance claims. Firms, such as business firms and CAFOs, benefit disproportionately from RTFLs. The development of RTFL protections across the country coincided with increased market consolidation of our food system and intensified industrial agricultural production by corporate and increasingly financialized international agribusinesses. Concerns over the loss of farms and farmland inspired enactment of these, which did not necessarily contemplate the negative social, economic, and environmental consequences of an increasingly industrialized food system. And while the environmental justice movement has made strides since its inception, the rural United States has not been an area of focus.¹⁹⁵

Despite their original intent, RTFLs have not prevented the loss of farmland. Since the early 1980s, when most were enacted, the number of farms has declined by nearly 10%, and there has been a loss of almost 100 million acres of farmland.¹⁹⁶ Yet, through the tenets of agricultural exceptionalism, these laws have flourished to the detriment of small and more regional property holders. While RTFLs clearly have local consequences, these consequences also have global implications.

The pollution caused by industrial agriculture at the local level feeds into the global and systemic-level climate emergency,¹⁹⁷ along with direct human health implications for frontline populations.¹⁹⁸ While greenhouse gas emissions from other industrial sectors have decreased since the 1990s due to efforts by the United States to reach its Paris Climate Agreement commitments, recent data show an overall increase caused by industrial agriculture and CAFOs of at least 10%.¹⁹⁹ This provides even more justification for the environmental justice movement to focus its attention on rural environmental injustices.

RTFLs have become state-sanctioned mechanisms enabling industrial agribusiness entities to pollute and escape accountability at the expense of rural people and the environment. This is not a sound policy approach, nor does it respect the rights and autonomy of small to medium sized farmers and rural communities. Despite this, RTFLs continue to be widely supported. During the spring 2022 legislative session, new legislation and proposed state constitutional amendments have been filed in at least seven states to strengthen RTFL protections further.²⁰⁰

193. For example, in *Patz v. Farmegg Products Inc.*, 196 N.W.2d 557 (Iowa 1972), the Iowa Supreme Court affirmed a trial court ruling that the defendant's large chicken operation constituted a nuisance because it was located less than 1,000 feet from the plaintiff's preexisting farmstead. The court considered the priority of the location, the nature of the neighborhood, and the harms complained of in its decision. *Id.* at 561. It reasoned that the defendants had intentionally planned their chicken operation with knowledge of the neighboring farmstead, and the defendant caused the noxious odors by operating it without proper care. Therefore, the defendant could not knowingly establish a bothersome nuisance adjacent to preexisting landowners, even if the character of the locality was primarily rural. *Id.* Here, the court balanced the rights of each party and, considering the facts, had the ability to protect the preexisting residents and the operation of their farmstead.

194. Based on a cursory review of pre-RTFL cases, including those discussed in the footnotes above, courts were able to provide proper remedies that balanced competing interests based on the facts of each case, regardless of the size and intensity of the agricultural operation in question.

195. See Lisa R. Pruitt, *Legal Deserts: A Multi-State Perspective of Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15 (2018).

196. See *id.* at 67. See also 2012 AND EARLIER CENSUS YEARS, *supra* note 42; 2017 AND EARLIER CENSUS YEARS, *supra* note 43.

197. Ben Lilliston, *Latest Agriculture Emissions Data Show Rise of Factory Farms*, INST. FOR AGRIC. & TRADE POL'Y, (Mar. 26, 2019), <https://www.iatp.org/blog/201904/latest-agriculture-emissions-data-show-rise-factory-farms>:

New data from the U.S. Environmental Protection Agency (EPA) shows a steady increase in agriculture-related greenhouse gas emissions, much of it linked to industrial systems of crop production and the rise of factory farm systems of animal production. . . . While emissions in many sectors are declining, those from the agriculture sector have increased more than 10 percent since 1990, according to the EPA.

This percentage does not include on-farm energy and fuel use, shifts in cropland, the production of ammonia fertilizer, or emissions caused by the transport of food and agricultural goods or the processing and waste.

198. Joe Wertz, *How Big Farms Got a Government Pass on Air Pollution*, CTR. FOR PUB. INTEGRITY (Sept. 16, 2020), <https://publicintegrity.org/environment/factory-farming-air-pollution-pass-cafos/>. See also Nina G.G. Domingo et al., *Air Quality-Related Health Damages of Food*, 118 PNAS e2013637118 (2021).

199. Lilliston, *supra* note 197.

200. See, e.g., H.B. 1150, 2021/2022 Reg. Sess. (Ga. 2022) (amending Freedom to Farm Act, Georgia Code §41-1-7), available at <https://www.legis.ga.gov/legislation/61581>; S.J.R. 2, Gen. Assemb., 2022 Sess. (Ind. 2022) (adding a provision to the Constitution of Indiana), available at <http://iga.in.gov/legislative/2022/resolutions/senate/joint/2>; H.B. 578, 2022 Reg. Sess. (Miss. 2022) (creating a Mississippi On-Farm Sales and Food Freedom Act), available at <http://billstatus.ls.state.ms.us/2022/pdf/history/HB/HB0578.xml>; S. 268, Gen. Assemb., 2021/2022 Sess. (Vt. 2022) (amending the state's RTFL), available at <https://legislature.vermont.gov/Documents/2022/Docs/BILLS/S-0268/S-0268%20As%20Introduced.pdf>; S.J.R. 6, 2022 Reg. Sess. (W. Va. 2022) (adding a new section to Article III of the West Virginia Constitution recognizing the right of citizens to farm and ranch), available at https://www.wvlegislature.gov/Bill_Status/Resolution_History.cfm?year=2022&sessiontype=RS&input4=6&billtype=jr&houseorig=s&btype=res; S.J.R. 4, 2022 Reg. Sess. (W. Va. 2022) (amending Article III of the West Virginia Constitution relating to the right of farmers and agricultural producers to engage in modern agricultural practices), available at https://www.wvlegislature.gov/Bill_Status/Resolution_History.cfm?year=2022&sessiontype=RS&input4=4&billtype=jr&houseorig=s&btype=res; S.B. 126, 2022 Reg. Sess. (W. Va. 2022) (amending West Virginia Code §19-19-2 and §19-19-7 relating to the right to farm), available at https://www.wvlegislature.gov/Bill_Status/bills_history.cfm?INPUT=126&year=2022&sessiontype=RS; H.B. 253 1st Sub., 2022 Gen. Sess. (Utah 2022) (enacting Utah Code §4-1-112 and repealing §17-27a-1101 to rescind county authority to adopt land use ordinances for large CAFOs), available at <https://le.utah.gov/-2022/bills/hbillint/HB0253S01.pdf>; S.B. 2622, 2022 Gen. Assemb. (Tenn. 2022) (amending Tennessee Code Annotated Title 5, Title 6, Title 7, Title 43, Title 44, and Title 53; categorizing dairy creamer-

RTFLs emblemize the injustices imposed by agricultural exceptionalism. They create barriers for distributive agriculture, which ultimately moves us further away from reconciling rural environmental harms. As opposed to being stripped away, the private-property rights of rural people should be protected to advance environmental justice.

We wish to draw attention to the wisdom of the common-law nuisance doctrine, having evolved for nearly a half-century before RTFLs were enacted. In analyzing

agricultural nuisance case outcomes from both before and after the enactment of RTFLs, a plausible policy solution emerges—that states should consider rescinding RTFLs and allow common-law doctrine to continue to evolve. The original impetus behind agricultural exceptionalism—to safeguard the food system through distributed and vibrant farms—could be reconciled with environmental justice by repealing RTFLs.

ies, bottling plants, and certain slaughterhouses as agriculture operations that are not subject to local zoning requirements when located on agricultural land), *available at* <https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB2622>.