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**Reforming Outdated Fence Law Provisions:
Good Fences Make Good Neighbors
Only if They are Fair**

by

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Reforming Outdated Fence Law Provisions: Good Fences Make Good Neighbors¹ Only If They Are Fair

Conflicts between persons engaged in animal husbandry and their neighbors have been a subject of adjudication by courts for centuries² and have given legislative bodies many challenges in responding to competing equities.³ One set of rules concerns the enclosure of domestic livestock,⁴ and legislative bodies have

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¹ "Good fences make good neighbors" is a phrase from a poem. ROBERT FROST, *Mending Wall*, COMPLETE POEMS OF ROBERT FROST 42 (1962).

² The earliest Anglo-American reported adjudication of such a case may be a short synopsis by James Dyer in 1592 of an unidentified case. 73 Eng. Rep. 22-23 (1592), reprinted in 3 DYER 372b (1907) (finding that cattle needed to be enclosed). Early American cases support the conclusion that persons looked to the judicial system for redress from conflicts involving animals. See, e.g., *Rust v. Stanwood*, 6 Mass. 90 (1809) (involving cattle that escaped onto another's property). Blackstone reported this fundamental common law concept in his *Commentaries* by maintaining that cattle entering on another's soil is a trespass. 3 WILLIAM BLACKSTONE, COMMENTARIES *211.

³ Offensive smells from farm animals have been a topic of repeated litigation under nuisance law, which contributed to new legislation, known as "right-to-farm" laws in every state. These laws offer anti-nuisance protection for existing agricultural land uses and activities. See, e.g., Terence J. Centner, *The Amended Georgia Right to Farm Law*, 25 GA. ST. BAR J. 36, 41 (1988) (noting that zoning may temper the protection afforded by right-to-farm statutes); Margaret R. Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 163-65 (delineating a model right-to-farm statute); Neil D. Hamilton & David Bolte, *Nuisance Law and Livestock Production in the United States: A Fifty-State Analysis*, 10 J. AGRIC. TAX'N & L. 99, 101 (1988) (analyzing the statutes of 50 states); Jacqueline P. Hand, *Right-to-Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. PITT. L. REV. 289, 350 (1984) (concluding that the statutes reverse the preference for development under traditional nuisance law to favor the less intensive use of land).

⁴ For example, "Cattle, Cornfields, [and] Fences" rated a separate section in the report of the COLONIAL LAWS OF MASSACHUSETTS. COLONIAL LAWS OF MASSA-

adopted assorted fence rules to resolve competing interests associated with grazing by such livestock.⁵ While many American states have come to embrace the traditional English rule that, under fence-in legislation, livestock owners (or "ranchers") are liable for damages their livestock causes to property of others,⁶ this was not always the norm.⁷ Moreover, alternative fence-out legislation still exists in some jurisdictions for open range and

CHUSETTS 17-20 (City Council of Boston 1887) (1672) [hereinafter COLONIAL LAWS]. This tome reports a court order in 1647 whereby persons were obliged to have a sufficient fence around cornfields. *Id.* In 1662, a court found that owners of lands not sufficiently fenced should bear damages arising from trespassing livestock. *Id.* at 20. Although livestock includes various species of animal, for this Article, it refers to domestic cattle exclusively.

⁵ See, COLONIAL LAWS, *supra* note 4, at 17-20. Research shows fence rules as being a significant political issue in some areas in the second half of the 19th century. Shawn Everett Kantor, *The Economic and Political Determinants of Fence Reform in Postbellum Georgia*, 150 J. INSTITUTIONAL & THEORETICAL ECON. 486 (1994) [hereinafter Kantor, *Fence Reform*] (arguing that by voting to maximize their political survival, Georgia legislators hindered economic development in the early postbellum period); Shawn Everett Kantor, *The Political Economy of Coalition-Formation: The Case of Livestock Enclosure in the Postbellum South*, 32 EXPLORATIONS IN ECON. HIST. 82 (1995) [hereinafter Kantor, *Livestock Enclosure*] (arguing that large planters used their political influence in the Georgia Legislature); J. Crawford King, *The Closing of the Southern Range: An Exploratory Study*, 48 J. S. HIST. 53 (1982) (questioning the popular view that the Old South was dominated by a planter society).

⁶ 73 Eng. Rep. 22-23 (1592), reprinted in 3 DYER 372b (1907). This may involve a duty to fence property, if set forth in the statute; otherwise it involves liability for trespassing livestock. *Id.*

⁷ See John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1263-64 (1996) (noting the compulsory enclosure of agricultural land in colonial America). Moreover, numerous nineteenth century cases based their decisions on the fact that English common law did not apply due to custom. See *infra* notes 28 and 30. A number of analyses of historic fence reform efforts have been reported. See, Kantor, *Fence Reform*, *supra* note 5, at 506 (finding that legislators responded to the economic interests of their districts when considering whether to close the open range); Kantor, *Livestock Enclosure*, *supra* note 5, at 105 (maintaining the open range in the South in the latter half of the 19th Century became a costly institution); Shawn Everett Kantor, *Razorbacks, Ticky Cows, and the Closing the Georgia Open Range: The Dynamics of Institutional Change Uncovered*, 51 J. ECON. HIST. 861 (1991) (Kantor analyzed historical developments in Georgia to explain the closing of the open range in that state); King, *supra* note 5, at 70 (concluding that the planter class did not control things in the antebellum South). The Virginia Supreme Court recently noted that, although under common law, the owner of cattle was liable for damages from trespassing livestock, the common law in Virginia was altered so that in some situations it no longer constituted the applicable rule. *Holly Hill Farm Corp. v. Rowe*, 404 S.E.2d 48, 48-49 (Va. 1991).

very rural areas.⁸ Under fence-out legislation, ranchers do not have to build fences to confine their animals; rather, persons who want to keep out stray livestock have the burden of putting up a fence.⁹ Many states with fence-out rules also have fence-in rules for municipalities and other locales that prefer the traditional English rule.¹⁰

Economists have given considerable attention to the externalities posed by livestock¹¹ and the economic consequences of fence-in and fence-out rules,¹² but have not considered the entire spectrum of scientific knowledge regarding the selection of a preferred rule. Specifically, economists have neither considered recent agro-research strategies, nor have they compared the protection available under either property or liability rules.

⁸ See TEX. AGRIC. CODE ANN. § 143.001 (West 1982) (requiring farmers and gardeners to erect fences to keep out animals); *Carrow Co. v. Lusby*, 804 P.2d 747, 749 (Ariz. 1990) (noting Arizona and other Western states are fence-out states); *Maguire v. Yanke*, 590 P.2d 85, 89 (Idaho 1978) (noting that Idaho has a fence-out rule); *Yager v. Deane*, 853 P.2d 1214, 1217 (Mont. 1993) (noting that Montana continues to be an open range state). See also Frank C. Mockler, Note, *The Open Range: A Vanishing Concept*, 13 WYO. L.J. 136 (1959).

⁹ If persons erect a lawful fence, they can collect damages arising from trespassing livestock. See, e.g., COLO. REV. STAT. ANN. § 35-46-102(1) (Bradford 1997).

¹⁰ See ARIZ. REV. STAT. ANN. §§ 3-1421 to 3-1422 (West 1995) (delineating rules for no-fence districts where property owners do not need to have fences to exclude livestock); IDAHO CODE §§ 25-2401 to 25-2409 (1990 & Supp. 1996) (delineating provisions for a herd district exception where property owners do not need to have fences to exclude livestock). See also *Easley v. Lee*, 721 P.2d 215, 218 (Idaho 1986) (discussing the herd district exception to the state fence-out rule, whereby the absence of a lawful fence around the herd district meant trespassing cattle from the open range did not present an action for damages).

¹¹ See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* (1991) (conducting research on fence law provisions for a county in California); Daniel W. Bromley, *Property Rules, Liability Rules, and Environmental Economics*, 12 J. ECON. ISSUES 43, 50-51 (1978) (discussing rights between a rancher and corn farmer); J. M. Buchanan, *The Coase Theorem and the Theory of the State*, 13 NAT. RESOURCES J. 579, 581-83 (1973) (explaining property and liability rules with an example of straying cattle); Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 2-8 (1960) (employing an example of straying cattle destroying a crop on neighboring land); Carlisle Ford Runge, *Common Property Externalities: Isolation, Assurance, and Resource Depletion in a Traditional Grazing Context*, 63 AMER. J. AGRIC. ECON. 595, 595 (1981) (addressing externalities and noting the problem of overgrazing); Kenneth R. Vogel, *The Coase Theorem and California Animal Trespass Law*, 16 J. LEGAL STUD. 149, 157-86 (1987) (analyzing externalities of trespassing livestock).

¹² See ELLICKSON, *supra* note 11, at 65-81 (looking at fence costs); Michael A. Taylor & L. Leon Geyer, *Land: Issues and Problems*, VIRGINIA COOPERATIVE EXTENSION, No. 79, Jan. 1993 (performing a cost-benefit analysis of fence provisions).

This Article addresses these two additional issues. Part I describes fence law entitlements and establishes a foundation for an analysis of fence law provisions. Given the ways that state legislatures choose to address competing interests in different fence rules,¹³ this Part inquires into the meaning of the rules today and their consistency with current events. This includes consideration of changes in circumstances, agro-research strategies, protection of riparian zones, and fence cost options. Part II examines property rights protection under property and liability rules and reviews economic considerations involving efficiency concepts to advocate a preference for a certain fence option. With this foundation, Part III turns to the legal issues concerning limitations of the police power. An analysis of the legitimacy of the public purpose, and changes in conditions affecting the legitimacy and appropriateness of the means of achieving the public purpose, reveals that some cost provisions of fence laws may violate a property owner's substantive due process rights. Part IV integrates the findings concerning fence entitlements and constitutional parameters to suggest that selected fence-out and cost-sharing provisions deserve reconsideration and reformation. Changed circumstances, agro-research strategies, and economic efficiency criteria justify a move from a fence-out to a fence-in rule for some areas¹⁴ and an alteration of unfair cost-sharing provisions. Drawing on economic criteria, this Article concludes that some historic allocations of fence-law entitlements by various state legislatures provide neither an equitable nor an economically efficient solution. If a state is interested in overall economic efficiency, or wants to safeguard additional private property rights,¹⁵ its legislative body needs to reexamine and

¹³ The most important interests are: (1) whether livestock can roam or property owners have a right to be free of trespassing livestock, and (2) who pays for a fence.

¹⁴ Fence rules can have variations for different areas of a state. *See supra* text accompanying note 10.

¹⁵ In the past few years, a new property rights movement has evinced considerable public interest in less governmental interference in the use of private property. *See* Jerome M. Organ, *Understanding State and Federal Property Rights Legislation*, 48 OKLA. L. REV. 191, 191 (1996) (discussing new and proposed property rights legislation). New legislation has been advanced in Congress (HR Bill No. 925) and several new state laws have been adopted. *See* MISS. CODE ANN. §§ 49-33-1 to 49-33-17 (Supp. 1996); MONT. CODE ANN. §§ 2-10-101 to 2-10-105 (1995); North Dakota Laws of 1995, ch. 312, SB 2388, § 3 (to be codified as N.D. CENT. CODE § 28-32-02.5); TEX. GOV'T CODE ANN. §§ 2007.001 to 2007.045 (West Supp. 1996); UTAH CODE ANN. §§ 78-34a-1 to 78-34a-4 (1994); WYO. STAT. ANN. §§ 9-5-301 to 9-5-305 (Michie 1995).

possibly to eliminate some fence-out and cost-sharing provisions.¹⁶

I

FENCE LAW ENTITLEMENTS

The term "fence-in" is used to describe the rule where owners of livestock are liable for damages if their animals trespass on another's property. In some areas of the United States, such a rule may exist because of a statutory command.¹⁷ While some states have created provisions for counties or municipalities to adopt fence-out rules,¹⁸ under statewide fence-in rules, neighbors generally have the right to be free of interference by others' livestock, and ranchers must build a barrier to keep livestock from entering the property of neighbors. Ranchers thereby incur costs for fences and incur liability if their livestock trespass on another's property.¹⁹

Although several states adopted the English common law fence-in rule, many states adopted fence-out rules to establish rules more appropriate for the vast areas of open grazing space.²⁰

¹⁶ This is not intended to imply that Western states totally eliminate fence-out rules; rather, a state may need to examine the scope of its open range policies for areas where livestock production is less important today than it was when the fence-out rule was adopted. States may already have an apparatus for herd districts whereby counties can alter the fence-out rule. See IDAHO CODE §§ 25-2401 to 25-2409 (1990 & Supp. 1996).

¹⁷ See KAN. STAT. ANN. § 29-108 (1993) (requiring domestic livestock to be enclosed by a lawful fence); KY. REV. STAT. ANN. § 259.210 (Michie 1994) (precluding persons from allowing their cattle to run at large).

¹⁸ See UTAH CODE ANN. § 4-25-7 (1995) (allowing counties to adopt fence-out rules).

¹⁹ See UTAH CODE ANN. § 4-25-8 (1995) (providing for trespass liability except for areas with a fence-out rule). Common law and statutory fence rules may give rise to multiple causes of action against a person allowing livestock to trespass onto plaintiff's property. In a recent bankruptcy case, the court noted potential liability for persons who allow their cattle to run at large. *In re Anderson & Kenyon Partnership*, 165 B.R. 243, 244 (Bankr. C.D. Ill. 1994) (finding a statutory claim under 510 ILL. COMP. STAT. ANN. 55-1 (West 1993) as well as under common law).

²⁰ A Connecticut court noted that English common law did not apply because superseding state law obliged landowners to enclose fields to keep out livestock. *Studwell v. Ritch*, 14 Conn. 291, 294 (1841). A Colorado court noted that, although English common law was adopted, its fence-in provisions were unsuited and inapplicable to the present condition of the state and that legislative provisions effectively recognized the right of livestock to run at large. *Morris v. Fraker*, 5 Colo. 425, 427-30 (1880).

Some states adopted fence-out rules through legislative action.²¹ In other states, fence-out became the rule through custom at the time of settlement and subsequent legislative enactments.²² At least one state limited common law to the extent that "it is consistent with and adapted to the natural and physical conditions of this state."²³

With the adoption of a fence-out rule, ranchers can allow their livestock to roam²⁴ and may receive the benefit of forage grown by neighbors.²⁵ Consequently, neighbors may suffer harm when others' livestock enters their property; however, they will be unable to sue for damage caused by the livestock.²⁶ Moreover, those neighbors may themselves be liable for injuries to animals that break through an insufficient fence.²⁷ Given population growth and the demise of livestock production in some areas, many states have subsequently retreated from their fence-out provisions.²⁸

²¹ See *Holly Hill Farm Corp. v. Rowe*, 404 S.E.2d 48, 48-49 (Va. 1991) (reporting that the legislature enacted a fence-out rule in Virginia).

²² The Supreme Court of Ohio noted that it was state custom for domestic animals to roam "on the range of uninclosed lands." *Kerwhaker v. Cleveland R.R. Co.*, 3 Ohio St. 172, 182 (1854). See also, King, *supra* note 5, at 53-54 (reporting that a fence-out rule prevailed in the South from colonial times until after the Civil War).

²³ *Carrow Co. v. Lusby*, 804 P.2d 747, 751 (Ariz. 1990) (citations omitted).

²⁴ A livestock owner under a fence-out state may still have a duty of care with respect to motorists. *Id.* at 753 (finding that the owner of open range livestock owed a duty of care to motorists on a highway).

²⁵ Fence-out statutes may contain limitations regarding stocking rates to prevent ranchers from having more cattle than their land can support. See COLO. REV. STAT. ANN. § 35-46-102(2) (Bradford 1997) (providing that whenever a person stocks land with a greater number of livestock than such land can properly support, such person shall be deemed a trespasser).

²⁶ See ARIZ. REV. STAT. ANN. § 3-1427 (West 1995) (stating that a person cannot recover compensation for damages from trespassing livestock if there is no lawful fence enclosing the property). This includes situations where neighbors fail to have a lawful fence to exclude livestock. See *infra* notes 29-30 (discussing lawful fences).

²⁷ See TEX. AGRIC. CODE ANN. § 143.033 (West 1982) (imposing liability on persons with insufficient fences).

²⁸ King, *supra* note 5, at 54. Other states only retain fence-out standards for rural areas, or have districting provisions for areas that desire fences. For example, Colorado provides for partition fences "[w]here the agriculture or grazing lands of two or more persons adjoin" with a duty to construct a fence. COLO. REV. STAT. ANN. § 35-46-112 (Bradford 1997). At the same time, Colorado recognizes fence-out status by precluding recovery for trespass unless there was a lawful fence. COLO. REV. STAT. ANN. § 35-46-102. Idaho has adopted provisions for herd districts in areas where property owners may petition to create a herd district where animals cannot run at large. IDAHO CODE §§ 25-2401 to 25-2404 (1990 & Supp. 1996).

Fence-out rules generally include an additional provision concerning the construction of a lawful fence by a neighbor.²⁹ Persons with lawful fences have a right to be free of livestock, and if livestock break through a lawful fence, the fence owner may collect monetary compensation.³⁰ Thus, fence-out rules present neighbors with two potentially expensive options—do nothing and risk incurring harm from trespassing livestock, or expend funds to build a lawful fence. Once a neighbor has constructed a lawful fence, ranchers have no choice in the extinguishment of previous rights or the loss of grazing rights.

A. *The Allocation of Entitlements*

Differences in grazing regimes that exist under a fence-out rule, as opposed to a fence-in rule, present an opportunity to illuminate advantages of a particular fence rule.³¹ Historically, the allocation of rights and interests under fence-in and fence-out entitlements were explained through distributional goals.³² Competing interest groups struggled to adopt or maintain selected fence rules,³³ as ranchers preferred a fence-out rule to be able to

²⁹ See ARIZ. REV. STAT. ANN. § 3-1426 (1995) (prescribing what is a lawful fence); COLO. REV. STAT. ANN. § 35-46-101(c) (Bradford 1997) (defining a lawful fence as “a well-constructed three barbed wire fence with substantial posts set at a distance of approximately twenty feet apart, and sufficient to turn ordinary horses and cattle, with all gates equally as good as the fence, or any other fence of like efficiency.”).

³⁰ See ARIZ. REV. STAT. ANN. § 3-1428 (West 1995) (providing for damages for trespass of animals on property enclosed by a lawful fence); COLO. REV. STAT. ANN. § 35-46-102 (Bradford 1997) (allowing persons maintaining lawful fences to recover damages from persons who allow their livestock to break through such lawful enclosure).

³¹ Two features are important. First, under fence-out, livestock owners generally do not incur fence costs. Thus, livestock production has low costs. See Kantor, *Livestock Enclosure*, *supra* note 5, at 85 (describing why fence-out was adopted in the antebellum South). Second, due to the cost of fences to exclude livestock, fence-out can retard the use of land for crop production. King’s research shows that, in 1879, counties with fence-in rules in Alabama and Mississippi were the most important cotton-producing areas. King, *supra* note 5, at 65-66. In 1879, fence-in counties in Alabama had 62 acres of cotton per square mile compared to 28 acres of cotton per square mile in fence-out counties. King, *supra* note 5, at 66.

³² See Studwell v. Rich, 14 Conn. 291, 295 (1841) (“It was more convenient for our ancestors to enclose their cultivated fields than their pastures.”).

³³ In the South, the devastation of the Civil War led reformers to advocate changing from a fence-out rule to a fence-in rule. Kantor, *Livestock Enclosure*, *supra* note 5, at 83-84. Under a fence-in rule, increased use of the land resource for cultivated crops was expected to be economically advantageous. Kantor, *Livestock Enclosure*, *supra* note 5, at 83-84.

use the natural land resource for grazing.³⁴ Fence-out rules were often based on the assumption that constructing fences to enclose livestock was more expensive than building fences to exclude livestock from areas where they were not wanted.³⁵ Fence-out jurisdictions thus saddled neighbors, the presumed cheaper cost-avoider, with the cost of excluding roaming livestock.

While state legislatures had various reasons for the adoption of a fence-out rule, a distributional rule favoring ranchers may no longer be the desired solution, even if it is cost-efficient. In addition, the use of the land resource for livestock production may have considerably less importance than at the time when the fence-out legislation was originally adopted.³⁶ Rather, a majority of today's population likely favors traditional property rights by which ranchers pay for livestock production costs, including fencing, and by which neighbors can use their property unfettered by trespassing livestock. With the renewed interest in private property rights and a willingness of the people to take their grievances to the legislature,³⁷ fence-out rules are a topic ripe for legislative change.

³⁴ This would convert existing natural resources into farm income. Kantor, *Fence Reform*, *supra* note 5, at 488. Neighbors who found livestock to be objectionable or injurious could expend funds to erect a fence to restrain entry. This was the case despite the fact that cultivated crops may have constituted a better use of existing land resources. Kantor, *Livestock Enclosure*, *supra* note 5, at 105-06.

³⁵ This was especially true where fencing materials were scarce and, therefore, costly. One researcher has surmised that, for rural areas of California, "before the invention of barbed wire in 1874, the fencing of rangeland was rarely cost-justified." ELLICKSON, *supra* note 12, at 187-88. Another researcher noted that many areas of Mississippi lacked timber to replace the fences destroyed by the Civil War armies. King, *supra* note 5, at 57. The shortage of timber led crop growers to seek fence-in laws to replace the then-existing fence-out laws due to the expenses placed on crop growers. King, *supra* note 5, at 57.

³⁶ The significance of the private property rights movement is its support of less governmental interference in private property rights and of the increased public awareness that previous governmental restrictions on property usage may be modified. Society no longer accepts burdens imposed by fence-out provisions as above reproach. Terence J. Centner and Ronald C. Griffin, "Discerning a Preferred Policy for Fence-Rule Provisions After the New Property Rights Movement," Proceedings of the Canadian Law and Economics Association's Eighth John M. Olin Annual Conference in Law and Economics, September 28, 1996, University of Toronto, Toronto, Canada.

³⁷ Given this public clamor for the reassertion of private property rights, the property rights movement could serve as an impetus for future legislative modifications of existing fence-out and cost-sharing provisions or for judicial challenges of existing fence law provisions. See Organ, *supra* note 15, at 192 (noting frustration with the constitutional jurisprudence regarding regulatory takings).

Although the economic justifications, including ecological costs and crop production levels, for a fence-out rule may be questioned, the more pertinent inquiry is into the validity of the fence-out rule today. While a number of authors have commented on historical developments that precipitated or accompanied a change from a fence-out to a fence-in rule, little research addresses this issue based on contemporary conditions. Due to increased scientific knowledge and new technology, a fence-out rule will not always make economic sense for a particular jurisdiction. New developments mean that considerations supportive of fence-out rules may no longer apply in some areas where livestock production is the dominant activity.

1. *Changes in Circumstances*

Changes in population, technology, and the economy alter the welfare consequences of available fence-out rules. The most obvious change is an increase in the value or intensity of agricultural cultivation under which the efficiency reasons for selecting fence-out legislation diminish or completely cease to exist.³⁸ Moreover, an increase in nonranching land uses may create a situation under which an existing fence-out rule may no longer be preferable.³⁹

Emerging land-use demands, including recreation and ecological concerns,⁴⁰ may favor fence-in rules. As recreational activities, which often are dependent on the control and exclusion of livestock, and ecological concerns become more prevalent, even sometimes providing income opportunities for property owners,⁴¹ the new interdependencies among actors support a reallocation of rules. Fence-out rules generally condone the destruction of vegetation by livestock meandering near water

³⁸ The possibility that nongrazing uses are more important than grazing on an open range has already been incorporated into some state fence-out statutes. For example, in Idaho, herd districts are possible for areas where nongrazing uses predominate. See IDAHO CODE §§ 25-2401 to 25-2409 (1990 & Supp. 1996).

³⁹ Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 660-61 (1986) (noting that the addition of people and field crops in California led to the demise of fence-out in that state).

⁴⁰ Grassland can be altered and shrubland vegetation may become predominant due to intensive grazing. ROBERT E. RICKLEFS, *THE ECONOMY OF NATURE* 443 (1993).

⁴¹ JOHN F. VALLENTINE, *RANGE DEVELOPMENT AND IMPROVEMENTS* 40-41 (3rd ed. 1989) (suggesting that landowners may wish to manage their property for big game animals as well as their domestic livestock).

sources, which, in turn, adversely affects the quality of fish habitats and sport activities. As recreational activities become more prevalent and provide income to property owners, previous assumptions dependent on the cheapest cost-avoider lose their foundation.

2. *Agro-Research Strategies*

More significant, however, are developments involving agro-research information on range management, new scientific management techniques, and options for alternative land uses.⁴² Livestock and plant populations require management to maximize animal production. Common strategies to enhance grazing resources include: rotation with the timing of grazing; management of stocking rates; distribution of grazing to manage plant species; breeding programs involving access to selected male animals; and soil protection through the preclusion of grazing.⁴³ If agro-research or changes in circumstances mean that the value of open grazing under a fence-out jurisdiction has declined relative to other land-dependent activities, the original economic preference for fence-out in terms of total welfare ceases to exist.

One solution is to preclude overgrazing that depletes or harms the grazing resource.⁴⁴ This problem may be controlled by a rotation program or by management of the timing or season of grazing. Next, range management is used to increase the quantity and quality of herbage for livestock.⁴⁵ Research shows that selected herbage may result in less efficient conversion of feed into an animal product.⁴⁶ Herbage quality is linked to an

⁴² See M. Hams, *Pasture Management and Productivity in Practice: The Rangelands*, in PASTURE MANAGEMENT 130 (David R. Kemp & David L. Michalk, eds., 1994) (submitting that alternative systems involving the rotation of animals to new areas would allow for the seed set of desirable species and the replenishment of carbohydrate reserves).

⁴³ VALLENTINE, *supra* note 41, at 432-33.

⁴⁴ Overgrazing may have deleterious effects on the biotic community and the long-term productivity of the resource. A common problem with overgrazing is that it can deplete better plants and therefore result in inferior quality and quantities of herbage. Hams, *supra* note 42, at 131. Further, excessive grazing may result in adverse plant responses. Hams, *supra* note 42, at 131.

⁴⁵ Research has shown that, through the regulation of plant species, improvements in the protein and mineral compositions of fodder are possible. C.J. PEARSON & R.L. ISON, AGRONOMY OF GRASSLAND SYSTEMS 81-83 (1987). Variations in digestibility of herbage impacts its quality as a food for livestock. *Id.*

⁴⁶ *Id.* at 82-84. Some plant species have higher protein concentrations, and there exist differences in protein solubility among different animal species. *Id.* at 82. Ad-

animal's intake, which, in turn, is linked to animal production.⁴⁷ Moreover, a reduced intake of feed due to a decrease in the amount of available feed can limit the rate of growth of animals such as cattle.⁴⁸

Along with increased productivity, secondary economic benefits of range management practices include increased water availability by replacing woody species with herbaceous plants.⁴⁹ Although many secondary economic benefits of range management practices are possible under both fence-in and fence-out rules, a fence-in rule may be accompanied by greater financial incentives to the land owner.⁵⁰ Under a fence-out rule, a neighbor's animals may appropriate some benefits that accompany a landowner's management practice.⁵¹ Thus, fence-in offers a preferred strategy to encourage management improvements involving the exclusion of livestock.

Accompanied by certain management techniques, a fence-in rule can assist in the control of weeds following initial herbicide application⁵² and the preservation of native vegetation and habitats.⁵³ Also, more active management under a fence-in rule prevents the destruction of vegetation by meandering livestock near water sources and minimizes any adverse effects on fish habitats

ditionally, low mineral concentrations may limit the usefulness of some herbage to livestock. *Id.*

⁴⁷ *Id.* at 92. Bacteria or fungi on or within a plant may need to be controlled if they cause animal disorders. *Id.* at 86. Injurious compounds found in herbage may cause over-eating, tremors, convulsion, goiter, anemia, paralysis, infertility, abortion, low milk production, or death. *Id.* at 85.

⁴⁸ *Id.* at 87.

⁴⁹ VALLENTINE, *supra* note 41, at 8.

⁵⁰ For example, a water impoundment may extend the season of water availability. In addition to the construction costs, a fence is recommended around the desilting area. VALLENTINE, *supra* note 41, at 422-23. In a fence-out jurisdiction, animals of neighbors could share in the increased availability of water while the neighbors would not need to contribute to the costs.

⁵¹ For example, if a rancher builds a water impoundment under fence-out, its use by neighboring livestock may diminish the use by the livestock of the rancher who built the impoundment.

⁵² See Hams, *supra* note 42, at 133 (advocating short-duration grazing to achieve better control of weed species); VALLENTINE, *supra* note 41, at 4 (concluding that under some weed management programs, grazing needs to be deferred until the key plants have matured to seed).

⁵³ See PEARSON & ISON, *supra* note 45, at 102 (noting that for some regimes, appropriate rotation of livestock may be required to ensure regeneration of a species).

and sport activities.⁵⁴ To be effective, the establishment of a management practice to increase productivity of a range may require protection from grazing for six months to a year.⁵⁵

3. *Protection of Riparian Zones*

Related to changes in circumstances and agro-research strategies is the management practice of precluding livestock from defined riparian zones in an effort to protect vegetation and water quality for native plant and fish species.⁵⁶ In 1996, the voters of Oregon considered and rejected a ballot initiative called the "Clean Streams Initiative."⁵⁷ This initiative raised new questions about the public's ability to take action that would require livestock owners to construct fences to prevent damage to public waters.

The Oregon initiative was specifically directed at water pollution caused by livestock.⁵⁸ Except as allowed under a water quality management plan,⁵⁹ the measure would have prohibited livestock owners from allowing their livestock to graze in designated riparian zones if the livestock would contribute to the violation of water quality standards and if the waterway had been identified as water quality limited.⁶⁰ The designated riparian zones could encompass the area up to one hundred feet on either side of a stream.⁶¹ By banning livestock from streams and riparian areas adjacent to streams, the Oregon initiative sought to

⁵⁴ Alternatively, to maximize limited water resources, fence-out may be preferred so that animals can get to water sources, including those on neighboring property. VALLENTINE, *supra* note 41, at 416-17.

⁵⁵ VALLENTINE, *supra* note 41, at 3.

⁵⁶ See *Oregon Natural Desert Ass'n v. Green*, 953 F. Supp. 1133, 1145 (D. Or. 1997) (comprehensive management plan allowing livestock grazing violated the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271-87 (1994), due to inadequate consideration of protecting and enhancing native plants and fisheries).

⁵⁷ OR. BALLOT MEASURE 38 of 1996, Prohibiting Livestock in Certain Polluted Waters or on Adjacent Lands.

⁵⁸ *Id.* § 1. "The waters of the State of Oregon shall be protected from water pollution caused by livestock." *Id.*

⁵⁹ OR. REV. STAT. §§ 568.900-568.933 (Supp. 1996). The State Department of Agriculture may describe the boundaries of a water quality management plan. *Id.* § 568.909. The plans should include input by soil and water conservation districts as local management agencies. *Id.* § 568.906.

⁶⁰ OR. BALLOT MEASURE 38 of 1996, at § 2. Standards of water quality may be established under OR. REV. STAT. § 468B.048 (1995).

⁶¹ OR. REV. STAT. § 308.792(2) (1995). The provision defining this term expired on December 31, 1997. *Id.* § 308.803(2).

restore vegetation to facilitate the restoration and reestablishment of native fish populations.

The initiative included an enforcement option of a civil suit against any person alleged to be in violation of its provisions.⁶² Individuals who favored the initiative noted that, without the citizen suit provisions, the initiative would basically involve voluntary efforts that would not effectively respond to the problem of livestock denigrating waterways.⁶³ Opposed to the civil suit provisions were livestock producers who argued that the citizen suit provisions would result in costly lawsuits which would stifle livestock production.⁶⁴

As might be expected, the Oregon initiative was controversial.⁶⁵ Livestock interests claimed that, while the initiative itself did not require fencing per se, ranchers' only real means of compliance was to fence-in their livestock.⁶⁶ Thus, passage of the initiative would cause many livestock operations to go out of business.⁶⁷ In support of the initiative was scientific data concerning the adverse effects of grazing near rivers and streams.⁶⁸ Studies have shown that grazing can preclude the reproduction of black cottonwood and willow stands in a riparian zone and thereby eliminates trees that offer shade to streams.⁶⁹ In the absence of shade trees and other riparian vegetation, a stream's

⁶² OR. BALLOT MEASURE 38 of 1996, at § 3.

⁶³ Greg Bolt, *Measure 38: Needed, or environmental BS*, THE BULLETIN (Bend, OR), Oct. 27, 1996, at H5.

⁶⁴ See Retha McCall, Editorial, *Nothing but negative effects*, THE BULLETIN (Bend, OR), Oct. 7, 1996, at A6.

⁶⁵ One newspaper suspended publication of letters on the initiative after having printed twenty-four such letters from readers. Editorial, *Whoa' on letters about Measure 38*, THE BULLETIN (Bend, OR), Oct. 20, 1996, at F2.

⁶⁶ OR. BALLOT MEASURE 38 of 1996, at § 2.

⁶⁷ Bolt, *supra* note 63, at H5 (reporting an industry claim that the Oregon initiative would "annihilate the livestock industry in Eastern Oregon").

⁶⁸ See Karl Hess, Jr. & Jerry L. Holechek, *Policy Roots of Land Degradation in the Arid Region of the United States: An Overview*, 37 J. ENVTL. MONITORING & ASSESSMENT 123 (1995) (discussing the institutions and policies that continue to result in the degradation of open range lands in the United States); Jerry L. Holechek & Karl Hess, Jr., *Government Policy Influences on Rangeland Conditions in the United States: A Case Example*, 37 J. ENVTL. MONITORING & ASSESSMENT 179 (1995) (noting that 1994 proposals by the U.S. Department of the Interior do not address the flaws in rangeland management). Scientific data concerning the adverse effects of grazing was also considered in litigation against the U.S. Bureau of Land Management. *Oregon Natural Desert Ass'n v. Bureau of Land Management*, 953 F. Supp. 1133, 1145, 1148 (D. Or. 1997).

⁶⁹ *Oregon Natural Desert Ass'n*, 953 F. Supp. at 1145.

water temperature may exceed the allowable maximum standard established for the protection of native coldwater fish.⁷⁰

B. Fence Cost Provisions

As expected, responsibilities for building and maintaining fences have varied among jurisdictions and over time. Due to the enormous costs associated with the enclosure of lands,⁷¹ various rules were developed in an attempt to provide a manageable and equitable policy.⁷² While the common law fence-in rules required ranchers owning livestock to pay for the costs of a fence, various jurisdictions adopted different rules. Especially significant are cost-sharing rules that preclude a landowner from receiving gratuitous benefits when his neighbor pays for the entire construction of a fence that benefits both landowners.⁷³

A jurisdiction typically adopts one of four major cost options. The first two options have already been noted: ranchers generally must pay for fences under fence-in, while neighbors generally incur the costs for fences under fence-out. The third option requires neighboring ranchers, but not nonranchers, to share fence costs.⁷⁴ This cost-sharing option may be described as a device under which persons benefiting from a fence equitably share in the fence's costs.⁷⁵ A corollary to this third option specifies that, whenever an adjoining property owner begins to use a fence previously constructed by a neighbor, this adjoining property owner must pay a proportionate share of the current value of the

⁷⁰ *Id.*

⁷¹ It was recently estimated that the cost of enclosing Iowa's farms was over \$400,000,000. David S. Steward, Note, *Iowa Agricultural Fence Law: Good Fences Make Good Neighbors*, 43 *DRAKE L. REV.* 709, 709 n.6 (1995).

⁷² The cost of fencing was a major reason for opting for a fence-out rule in areas where most land was used for grazing or where there was limited need to exclude livestock. For example, the Supreme Court of Colorado observed that a rule requiring the enclosure of livestock would be detrimental to the state. *Morris v. Fraker*, 5 *Colo.* 425, 428-29 (1880).

⁷³ Massachusetts had cost-sharing provisions as early as 1642, whereby if a fence was erected to exclude livestock and a neighbor later enclosed adjacent lands, thereby benefiting from the existing fence, the neighbor was obliged to contribute. *COLONIAL LAWS*, *supra* note 4, at 19-20.

⁷⁴ See 765 *ILL. COMP. STAT. ANN.* 130/3 (West 1993) (providing that adjoining landowners "shall make and maintain a just proportion of the division fence between them").

⁷⁵ See *In re Wallis*, 659 N.E.2d 423, 428-29 (Ill. App. Ct. 1995) (finding that a just proportion did not mean an equal share based on the linear distance and that a landowner who did not need a fence did not need to pay for the fence).

fence.⁷⁶ A fence cost-sharing provision based on need might also be a response where ranchers must fence livestock out of riparian zones. If grazing by livestock is denigrating a waterway, it seems unfair that the owner should be forced to incur all of the costs to exclude the livestock, especially when others receive the benefits from the conservation of a riparian zone. Cost-sharing provisions seem most appropriate when fences are the principle means of preserving a public resource.⁷⁷

The fourth option requires neighbor and rancher to share the cost of a fence to control the rancher's livestock, regardless of the neighbor's need.⁷⁸ This mandatory cost-sharing approach has been adopted by one or more jurisdictions with fence-in or fence-out rules.⁷⁹ Thus, in jurisdictions with a cost-sharing fence-in rule where costs are shared equally, the rancher must pay only one-half of the cost of a fence on the boundary of property next to a neighbor; the neighbor is obligated to pay the other one-half.⁸⁰

⁷⁶ See MICH. COMP. LAWS ANN. § 43.53 (West 1991) (providing for sharing costs if an adjoining property owner begins to use a fence). An Illinois court agreed with a determination that, if a landowner decides to make use of a fence that was constructed by another, that landowner would be required to pay for costs associated with the existing fence. *In re Wallis*, 659 N.E.2d at 428-29. That same court deduced that, if the legislature had meant an equal share, it would have stated so through a term such as "one-half." *Id.* However, an allocation on an equal basis could result in undue hardship in certain cases, such as cases where one landowner did not need a fence. *Id.* Thus, the intent of the legislature was to provide flexibility for individual circumstances to avoid an inequitable contribution by a landowner. *Id.*

⁷⁷ In Oregon, Coordinated Resource Management Planning offers financial assistance for improving natural resources. OREGON COORDINATED RESOURCE MANAGEMENT TASK GROUP, PUBLIC FUNDING SOURCES FOR LANDOWNER ASSISTANCE, June 1995. Oregon Coordinated Resource Management lists as a mission to "support implementation of coordinated resource management plans that will achieve and sustain resource quality and compatible combinations of commodity and non-commodity resource uses consistent with the objectives of the resource owners, managers, and users, while contributing to the maintenance of viable ecosystems and biodiversity." *Id.*

⁷⁸ See KAN. STAT. ANN. § 29-301 (1993) (requiring the sharing of costs, although exceptions allow alterations); NEB. REV. STAT. § 34-103 (1993) (providing for sharing costs of a lawful wire fence); OHIO REV. CODE ANN. § 971.02 (Banks-Baldwin 1994) (requiring the sharing of costs even if an owner does not use the land for agricultural purposes). Alternatively, one court found unequal payments justified when one party had neither need for nor use of a fence. *Gravert v. Nebergall*, 539 N.W.2d 184 (Iowa 1995) (requiring adjacent landowners to maintain unequal portions).

⁷⁹ See KAN. STAT. ANN. § 29-301 (1993).

⁸⁰ See MO. ANN. STAT. §§ 272.010, 272.020, 272.060 (Vernon 1993) (stating that a person may be obligated to pay an adjacent neighbor who constructs a fence one-half of its value upon demand). See also *Glass v. Dryden*, 248 N.E.2d 54 (Ohio 1969) (denying injunctive relief to stop a fence assessment proceeding); *Kloeppe* v.

Under a cost-sharing method, whenever a neighbor is willing to expend one-half of the funds to build a fence, the adjacent landowner is burdened with an equivalent cost.⁸¹ A variation of this cost-sharing approach involves the levying of an annual property tax to pay for the construction and maintenance of fences.⁸²

Cost-sharing may prevent strategic behavior by requiring neighbors to contribute to the expense of a fence. While this may lower transaction costs,⁸³ in areas where many property owners do not need a fence, a statutory provision delineating an obligation to pay one-half of the cost of an unneeded fence may prove burdensome or oppressive.⁸⁴ Although courts have upheld cost-sharing provisions as serving a public purpose despite the inequity to one landowner, such provisions spark political debate that should be addressed by state legislatures in an effort to provide a more equitable and proactive solution for landowners who do not want fences.

II

USING FENCE LAWS TO PROTECT PROPERTY RIGHTS

Fence law provisions have been a major topic in the economic debate of preventing harmful externalities and protecting private property rights. Economic, social, and equity issues associated with competing land use and livestock grazing interests have led to the adoption of diverse provisions.⁸⁵ While scholars have used

Putnam, 63 N.E.2d 237 (Ohio Ct. App. 1945) (requiring a landowner growing crops to contribute to the cost of a fence adjoining a rancher).

⁸¹ See COLO. REV. STAT. ANN. §§ 35-46-112, 35-46-113 (Bradford 1997) (constructing and maintaining partition fences to be shared); IDAHO CODE § 35-103 (1994) (requiring neighbors to share in erection costs of partition fences).

⁸² IDAHO CODE § 25-2401 (1990) (authorizing a levy for costs and construction of fencing in herd districts where a fence-in rule applies).

⁸³ ELLICKSON, *supra* note 11, at 188 (submitting that where both parties need a fence, cost-sharing should be preferred).

⁸⁴ See Sweeney v. Murphy, 334 N.Y.S.2d 239, 242 (N.Y. App. Div. 1972), *aff'd*, 294 N.E.2d 855 (N.Y. 1973) (finding a fence law to not be reasonably necessary to any legitimate public purpose and oppressive); Choquette v. Perrault, 569 A.2d 455, 460 (Vt. 1989) (finding fence law to be burdensome, arbitrary and confiscatory). *But see* Glass v. Dryden, 248 N.E.2d 54 (Ohio 1969) (declining to grant injunctive relief to a landowner where there was some evidence that his property would derive value from a fence for which the landowner did not want to contribute funds).

⁸⁵ See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). A more recent and insightful analysis of property versus liability rules greatly expands our knowledge of the economic consequences of these institutions. Louis Kaplow &

property, liability, and inalienability rules to resolve conflicts and to regulate externalities,⁸⁶ legislatures have assigned property rights to create entitlements.⁸⁷ Because the relationships of different entitlements with externalities and transaction costs are an important topic of the externality literature,⁸⁸ a brief examination of these institutions offer further insight into the fence-rule debate.

A. *The Institutions*

A property rule provides an entitlement holder exclusive right in the use, control, and enjoyment of one's resource. A landowner can use legal proceedings to enjoin interference with this entitlement.⁸⁹ Only a voluntary exchange involving *ex ante* compensation will transfer an entitlement protected by a property rule from one party to another.⁹⁰ By that, the entitlement owner establishes the price before the transfer of the entitlement; the entitlement is transferred only after the owner is willing and agrees to depart with rights.⁹¹ Thus, property rules are an appro-

Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 715 (1996).

⁸⁶ This involves a joint property and torts approach. Calabresi & Melamed, *supra* note 85, at 1089.

⁸⁷ Legislation often makes a selection of the person to whom an entitlement is granted. For example, an entitlement may be granted to an injurer or the victim. Kaplow & Shavell, *supra* note 85, at 723. See also Calabresi & Melamed, *supra* note 85, at 1090 (defining an entitlement arising from conflicting interests).

⁸⁸ See Bromley, *supra* note 11, at 45-55 (providing a detailed delineation of the meaning of these alternatives with respect to resource issues); Harold Demsetz, *Toward A Theory of Property Rights*, 57 AM. ECON. ASS'N. 347, 348 (1967) (arguing that a primary function of property rights is to guide incentives to internalize externalities); A. K. Dragun, *Property Rights and Pigovian Taxes*, 17 J. ECON. ISSUES 111, 119-20 (1985) (proposing that, rather than assigning rights regarding externalities to selected groups of individuals, the government has the option of selling certain rights).

⁸⁹ Kaplow & Shavell, *supra* note 85, at 723 (defining a property rule). Injunctive relief is generally available against situations of continuing trespass. See *Hawkeye Land Co. v. Laurens St. Bank*, 480 N.W.2d 854, 857 (Iowa 1992).

⁹⁰ See David D. Haddock & Fred S. McChesney, *Do Liability Rules Deter Takings?*, in THE ECONOMIC CONSEQUENCES OF LIABILITY RULES 29-53 (Roger E. Meiners & Bruce Yandle, eds., 1991) (differentiating between *ex ante* and *ex post* negotiations).

⁹¹ This may be important because it affects the amount paid for the transfer. When the entitlement owner determines the price, it may be greater than would be paid under a liability rule where *ex post* compensation is determined by a court or some other means. Haddock & McChesney, *supra* note 90, at 30. In addition, property rule protection may be preferred when the components of loss are hard to mea-

priate means to provide for the protection of exclusive possessory rights in real property.⁹²

Alternatively, under a liability rule, an entitlement owner has rights in the use, control, and enjoyment of some resource, but the owner's transfer rights and transaction costs are distinct from those under a property rule.⁹³ Under a liability rule, others may infringe upon or appropriate an entitlement without permission and without the owner determining the timing of the expropriation.⁹⁴ An entitlement owner protected by a liability rule is entitled to compensation, but the amount is established by an independent third party, such as a jury, rather than by the entitlement holder.⁹⁵ Liability rules are an appropriate means to respond to harmful externalities.⁹⁶

The third rule of entitlement, an inalienability rule, involves societal preconditions for the transfer or sale of a property interest.⁹⁷ This involves the preclusion of a sale of an interest, an injunction based on policy grounds, or a constitutional preclusion of certain assignments of property interests.⁹⁸ As discussed at length later in this Article, substantive due process forbids governments from undue interference with certain rights held by property owners.

sure, such as occurs when a person attaches additional value to property. Kaplow & Shavell, *supra* note 104, at 730-31.

⁹² See Kaplow & Shavell, *supra* note 85, at 758 (delineating why property rules are superior to liability rules for the taking of possessory interests). This assumes an objective of maximizing the value of things. See Kaplow & Shavell, *supra* note 85, at 758.

⁹³ See Kaplow & Shavell, *supra* note 85, at 771-72 (distinguishing property and liability rules).

⁹⁴ This generally occurs when a harmful externality infringes upon the property of another, who, in turn, is entitled to damages. Calabresi & Melamed, *supra* note 85, at 1092 (noting that the value is determined objectively).

⁹⁵ This includes situations where the government takes property by eminent domain. Calabresi & Melamed, *supra* note 85, at 1108-10.

⁹⁶ See Kaplow & Shavell, *supra* note 85, at 719 (discussing the superiority of liability rules over property rules for harmful externalities). This even occurs when courts are uncertain about the magnitude of harm. Kaplow & Shavell, *supra* note 85, at 719.

⁹⁷ See Calabresi & Melamed, *supra* note 85, at 1092-93 (distinguishing inalienable entitlements).

⁹⁸ See *Sweeney v. Murphy*, 334 N.Y.S.2d 239 (N.Y. App. Div. 1972), *aff'd*, 294 N.E.2d 855 (N.Y. 1973) (finding a fence law that required persons without livestock to contribute to fence costs failed to serve any legitimate purpose and was oppressive); *Choquette v. Perrault*, 569 A.2d 455 (Vt. 1989) (finding that a fence law that required persons without livestock to contribute to fence costs was unconstitutional).

B. Livestock Trespass

Characteristics related to livestock straying onto the property of neighbors suggest that animal trespass involves two key aspects. First, the trespass results in a violation of the exclusive possessory rights of the property owner upon whose property the trespass occurs. Second, the trespass is a harmful externality rather than a taking of property.⁹⁹ Moreover, no component of common value exists between the parties, one of whom receives free grazing area, while the other must relinquish his right of quiet enjoyment. Although a rancher may view trespassing livestock as taking forage from another, the person whose property is entered often experiences the destruction of a crop or a ravaged property interest. There is no common value in the ruined object, no object exists to be returned to the second party, nor is a neighbor generally able to recover the physical object taken or destroyed by trespassing livestock. In short, the independence of injurer-benefit and victim-harm shows trespass as an externality.¹⁰⁰

Two further characteristics of animal trespass are significant. First, damages to neighbors often involve idiosyncratic and situational values.¹⁰¹ Because residential property owners may place a higher value on their specific property, others will underestimate the property's idiosyncratic value. For example, many homeowners have expended funds on their property for their personal enjoyment, which may vary from the enjoyment of the masses and thus are not considered ordinary damages. Trespassing livestock may also preclude property owners from enjoying their property at a specific moment, and the livestock's encroachment may affect the overall landscape of the property. Due to the existence of idiosyncratic and situational values, there exists imperfect information about the actual levels and kinds of harm caused by trespassing animals.¹⁰² Second, the determination of the amount of trespass damages is void of any bargaining process; neighbors must seek compensation for harm that has oc-

⁹⁹ See Kaplow & Shavell, *supra* note 85, at 771 (distinguishing takings from harmful externalities).

¹⁰⁰ See Kaplow & Shavell, *supra* note 85, at 771-72 (distinguishing takings from harmful externalities).

¹⁰¹ See Kaplow & Shavell, *supra* note 85, at 760.

¹⁰² See Kaplow & Shavell, *supra* note 85, at 758 (explaining imperfect information and its meaning).

curred and accept whatever payment is offered by the tortfeasor or by the court.

C. *Considerations for a Preferred Fence Rule*

Given this background in property and liability rules and in the characteristics of livestock trespass, some suggestions and preferences for fence rules come to the fore. Three concepts support the choice of a particular fence rule: economic optimization, fairness, and extraordinary damages.

1. *Economic Optimization*

The economic literature examining property and liability rules suggests that a property rule best protects possessory interests.¹⁰³ However, a fence-out rule that abrogates possessory property rights is not always economically efficient. This is perhaps the result of imperfect information of the value of the property to the owner¹⁰⁴ or of unsuccessful bargaining between parties.¹⁰⁵ Of course, where a significant exception is present, such as in rural areas where an overwhelming use of the land is for grazing purposes, this general rule should not apply.

2. *Fairness in Internalizing Production Costs*

Concepts of fairness incorporated in property law and common law constitute a second reason to recommend a particular fence rule. Given common law property assumptions, fences to keep animals off neighboring property are but one of the costs involved in the production of livestock. Fairness recommends that ranchers pay for fences to prevent their animals from intruding upon property of others. If livestock production is the major use of property in a locale, fences may not be needed. In that situation, fairness itself justifies a fence-out rule.

¹⁰³ See Kaplow & Shavell, *supra* note 85, at 758 (explaining this preference for a property rule over a liability rule).

¹⁰⁴ In the absence of a possessory interest entailing the right to exclude livestock, idiosyncratic or situational values mean that an owner cannot be fully compensated for interests taken by trespassing livestock. See Kaplow & Shavell, *supra* note 85, at 759-61.

¹⁰⁵ This occurs because takers actually have an incentive to take when courts underestimate value. Kaplow & Shavell, *supra* note 85, at 764. Ellickson reports that, under a fence-out rule, neighbors often do not receive full compensation. Ellickson, *supra* note 39, at 686.

Fence law decisions from New York¹⁰⁶ and Vermont¹⁰⁷ reflect a notion of fairness by requiring ranchers to internalize their costs of production. Specifically, the New York court found that curtailment of a liberty interest in the exercise of the police power must be accompanied by a public benefit.¹⁰⁸ Moreover, the holdings in the New York and Vermont fence cases infer that Virginia and other states with fence provisions that place costs on nonrancher neighbors may need to adjust their regulations as areas experience changes in property use. The addition of recreational uses, new buildings or structures, and the demise of livestock production may mean that a statutory provision placing costs on nonranchers is no longer related to a substantial public interest.

3. *Extraordinary Damages*

The third reason for advocating a certain fence rule is based in the possibility of extraordinary damages associated with trespassing livestock and in the societal need for delineating responsibility for damages before they occur.¹⁰⁹ Entitlements created by fence-in and fence-out legislation are subject to derogation whenever livestock unlawfully enter the property of another. Under fence-out laws, ranchers infringe another's entitlements whenever cattle unlawfully break through a neighbor's fence; under fence-in laws, entitlements are infringed whenever cattle escape from their owner's own barrier. The tortious appropriation of a property right that accompanies a trespass by livestock may result in the defendant paying the plaintiff ordinary damages that do not completely compensate for the neighbor's loss.¹¹⁰ If the plaintiff's property right is worth more under a property rule

¹⁰⁶ *Sweeney v. Murphy*, 334 N.Y.S.2d 239 (N.Y. App. Div. 1972), *aff'd*, 294 N.E.2d 855 (N.Y. 1973) (finding a fence law that required persons without livestock to contribute to fence costs failed to serve any legitimate purpose and was oppressive).

¹⁰⁷ *Choquette v. Perrault*, 569 A.2d 455 (Vt. 1989) (finding a fence law that required persons without livestock to contribute to fence costs to be unconstitutional).

¹⁰⁸ *Sweeney*, 334 N.Y.S.2d at 241.

¹⁰⁹ Animal trespass constituted one of the two most bitter issues in the California legislature in the 19th century. Vogel, *supra* note 11, at 163. Some rural residents were willing to resort to violent self-help against owners of trespassing livestock. Robert C. Ellickson, *A Critique of Economic and Sociological Theories of Social Control*, 16 J. LEGAL STUD. 67, 86-87 (1987).

¹¹⁰ See Kaplow & Shavell, *supra* note 85, at 758, 760 (discussing idiosyncratic and situational values).

than under a liability rule, recovery under a liability rule will undercompensate a plaintiff and provide the defendant a windfall.¹¹¹

Research suggests that this applies to livestock disputes because of social reasons and the inconvenience involved in the collection of damages.¹¹² Moreover, idiosyncratic and situational values accompanying livestock trespass suggest that damages may be underestimated. Thus, extraordinary damages support the use of a property rule to protect neighbors' entitlements with respect to trespassing livestock.

III

CONSTITUTIONAL CHALLENGES

In light of recent judicial pronouncements regarding police power regulations, cost-sharing and fence-out cost provisions may not pass constitutional muster. Statutory provisions requiring neighbors of livestock owners to incur fencing costs to keep livestock off their property have been challenged with mixed results. While distinctions among state statutory provisions mean that challenges beget unpredictable and seemingly conflicting results, three distinct arguments concerning substantive due process arise. First, cost provisions foisting expenses on landowners without livestock may lack a reasonable relationship to any legitimate public purpose, thereby violating substantive due process.¹¹³ A second constitutional challenge under a fence-out or cost-sharing provision is based in the claim that changed condi-

¹¹¹ See Haddock & McChesney, *supra* note 90, at 30 (noting that the law's ordinary remedies for takings provide less compensation than would occur through a negotiated payment). An Edgeworth box may be employed to show this dichotomy for neighbors' entitlements. Haddock & McChesney, *supra* note 90, at 31-32. A neighbor's utility function could be mapped over the neighbor's alienable entitlements, with a corresponding map for a rancher-defendant. Through the use of indifference curves and a contract curve, it may be shown that an *ex post* liability rule leaves the neighbor-plaintiff in an inferior position vis-à-vis an *ex ante* contract. Thus, tort damages for livestock trespasses under a fence-in rule often undercompensate neighbors. Haddock & McChesney, *supra* note 90, at 31-33.

¹¹² Ellickson, *supra* note 39, at 686 (concluding that trespass victims in Shasta County ignored some trespasses and used other trespasses to offset informal debts).

¹¹³ See Sweeney v. Murphy, 334 N.Y.S.2d 239 (N.Y. App. Div. 1972), *aff'd*, 294 N.E.2d 855 (N.Y. 1973); Choquette v. Perrault, 569 A.2d 455 (Vt. 1989). See also Michael J. Davis & Robert L. Glicksman, *To the Promised Land: A Century of Wandering and a Final Homeland for the Due Process and Taking Clauses*, 68 OR. L. REV. 393, 443 (1989) (separating substantive due process and its requirement of a proper purpose from the Fifth Amendment's taking clause).

tions result in the demise of a rational basis necessary to support the regulation. Third, the selected cost provision, years after its enactment, may no longer be an appropriate means of accomplishing the purposes of the regulation.¹¹⁴ Under any one of these arguments, a court could strike down a fence cost provision as an unconstitutional deprivation of property without any reference to takings law.

A. *Legitimate Purpose*

Government action must be substantially related to a legitimate public purpose to be a valid exercise of state's police power.¹¹⁵ For a cost-sharing provision, a landowner without livestock would have to show that his forced-share payment is not related to a valid public purpose.¹¹⁶ A plaintiff could make the same argument with respect to fence-out provisions: The statutory requirement of a landowner without livestock to pay for fences is an improper exercise of the state's police power.

A New York court considered the issue of a legitimate exercise of the state's police power in *Sweeney v. Murphy*.¹¹⁷ Plaintiff neighbors were directed to repair approximately one-half of a 2,200 foot fence next to a hundred-cow dairy operation.¹¹⁸ They challenged the statutory provisions of the New York Town Law¹¹⁹ which required adjacent landowners to share fence costs when only one neighbor needed the fence.¹²⁰

¹¹⁴ Davis & Glicksman, *supra* note 113, at 440 (reviewing a call for an intermediate level of scrutiny for determining whether a police power regulation pursues appropriate ends through proper means).

¹¹⁵ See *Sweeney*, 334 N.Y.S.2d at 242. While the focus is on the restriction, a fact-based analysis necessarily considers the application of the restriction to an individual plaintiff. *Id.* at 242 (finding that the statutory provisions of a New York fence cost-sharing provision were unconstitutional as applied to plaintiffs' property).

¹¹⁶ Courts may use a rational basis test, *Choquette*, 569 A.2d at 459, or follow the police power parameters set forth in *Lawton v. Steele*, 152 U.S. 133, 136-37 (1894). See also *Gravert v. Nebergall*, 539 N.W.2d 184, 186-88 (Iowa 1995) (following the *Lawton* parameters).

¹¹⁷ 334 N.Y.S.2d at 239.

¹¹⁸ *Id.* at 240. The plaintiffs owned 158 acres, used ten acres for cultivation, but did not keep any livestock or animals. *Id.*

¹¹⁹ N.Y. TOWN L. § 300 (1987).

¹²⁰ *Sweeney*, 334 N.Y.S.2d at 240-41. The statute, N.Y. TOWN L. §§ 300-309 (McKinney 1972) (subsequently amended in 1974), provided that any party who refused to erect or maintain a division fence would be liable for the expense in making or repairing the fence. *Sweeney*, 334 N.Y.S.2d at 240-41.

After noting the strong presumption of validity normally afforded a state legislative enactment, the court stated that a police power regulation curtailing the liberty of individuals must bear a reasonable relationship to the public good.¹²¹ The court reasoned that, although the fence provisions, originally enacted in 1788, may have once served a valid public purpose, application of the law to the plaintiffs would deprive them of property.¹²² Requiring a landowner who does not own livestock to share the cost of a fence was not reasonably necessary to further any legitimate public purpose and was therefore oppressive.¹²³

An Iowa court recently reached the opposite conclusion in *Gravert v. Nebergall*¹²⁴ when it held that a fence law provision forcing a neighbor without livestock to help pay for a fence bore a rational relation to the public advantage of having livestock enclosed.¹²⁵ In that case the plaintiffs resided in a city with ordinances restricting agricultural operations.¹²⁶ However, their property bounded a township and their adjacent landowners, the defendants, needed a fence to raise animals.¹²⁷ Under the statutory fence provisions applicable to fences in the township, the district court entered an order requiring plaintiffs to maintain a portion of the fence.¹²⁸

The plaintiffs appealed this order, arguing that application of the Iowa statute to plaintiffs' property was unconstitutional.¹²⁹

¹²¹ *Sweeney*, 334 N.Y.S.2d at 241.

¹²² *Id.* at 242.

¹²³ *Id.* The language selected by the court is noteworthy for what it does not say. The court did not say that the fence provisions failed to serve a proper public purpose; rather that it was not reasonably necessary for such purpose. *Id.*

¹²⁴ 539 N.W.2d 184 (Iowa 1995).

¹²⁵ *Id.* at 187-88. Iowa's fence law provisions are contained in chapter 359A. IOWA CODE ANN. §§ 359A.1-359A.25 (West 1994 & Supp. 1996). The court did not specifically consider any particular section of chapter 359A, but rather considered the chapter as a whole. *Gravert*, 539 N.W.2d at 185-89.

¹²⁶ *Gravert*, 539 N.W.2d at 185. The city had "ordinances restricting livestock and fencing within city limits." *Id.* There was, however, a factual dispute as to whether the ordinances would permit the plaintiffs to use their land for certain agricultural purposes. *Id.* at 189.

¹²⁷ *Id.* at 185.

¹²⁸ *Id.* The court noted that the state fence statute preempted the regulations of the city in which the plaintiffs resided. *Id.* at 188-89.

¹²⁹ *Id.* at 186-88. The district court had found a constitutional violation. *Id.* at 188. In reversing the lower court, the Iowa Supreme Court relied on the Ohio Supreme Court's decision in *Glass v. Dryden*, 248 N.E.2d 54 (Ohio 1969) (denying injunctive relief to stop a fence assessment proceeding). *Gravert*, 539 N.W.2d at 186-88.

The Supreme Court of Iowa noted that the Iowa fence-out provisions reversed common law and enabled livestock to run at large, except where there existed a lawful fence.¹³⁰ After finding that the primary purpose was to prevent livestock from roaming at large and causing damage, the court concluded that adjoining landowners without livestock would benefit from fencing.¹³¹ Because of these benefits, the law served a public purpose, and was, therefore, not unduly oppressive.¹³² To assuage the unfairness produced by their ruling, the court suggested that plaintiffs take their grievance to the legislature since “[i]t is for the legislature and not for the courts to pass on the policy, wisdom, advisability, or justice of a statute.”¹³³

The *Gravert* court cited the *Sweeney*¹³⁴ and *Choquette*¹³⁵ decisions, both of which had held those fence provisions unconstitutional as applied, and stated that these courts “believ[ed] no valid public purpose [was] served by requiring one landowner who has no interest in livestock to share in the cost of a fence for the benefit of a neighbor who does.”¹³⁶ This statement, however, misinterprets the reasoning in those cases. The *Sweeney* court had found the fence cost-sharing provision was “not reasonably necessary to any legitimate public purpose.”¹³⁷ The *Choquette* court, relying on *Sweeney*, concluded that the cost-sharing provision at issue in that case did not “legitimately further the statute’s

¹³⁰ *Gravert*, 539 N.W.2d at 186-87. The court acknowledged the common law rules, but not the different options for fence cost provisions. *Id.* Thus, the court avoided the issue whether the legislature could constitutionally provide for partition fences without forcing cost-sharing by neighbors who did not want a fence. *Id.*

¹³¹ *Id.* at 187. The court quoted several benefits from *Choquette v. Perrault*, 569 A.2d 455 (Vt. 1989). *Gravert*, 539 N.W.2d at 187. Yet *Choquette* had found that the provision of the Vermont fence law was “unconstitutional as applied to persons who own no livestock.” 569 A.2d at 459. It is unclear why the *Gravert* court drew upon the findings of *Choquette* and yet reached the opposite result.

¹³² *Gravert*, 539 N.W.2d at 187-88. The court was not concerned with whether the fence law created a simple hardship, as hardship alone does not mean a statute is oppressive. *Id.* Rather, the *Gravert* court seemed to indicate that, if there are benefits related to the statute, then it can be upheld under the parameters of *Lawton v. Steele*, 152 U.S. 133, 136-37 (1894). *Gravert*, 539 N.W.2d at 186-88. Such an argument still does not address the plaintiffs’ argument that the statute was unconstitutional as applied.

¹³³ *Gravert*, 539 N.W.2d at 188.

¹³⁴ *Sweeney v. Murphy*, 334 N.Y.S.2d 239 (N.Y. App. Div. 1972), *aff’d*, 294 N.E.2d 855 (N.Y. 1973).

¹³⁵ *Choquette*, 569 A.2d at 455.

¹³⁶ *Gravert*, 539 N.W.2d at 188.

¹³⁷ *Sweeney*, 334 N.Y.S.2d at 242.

purpose of clarifying the obligations and liabilities of adjoining landowners with respect to their livestock."¹³⁸

Neither *Sweeney* nor *Choquette* found the absence of a valid public purpose. The distinction between *Gravert*, on the one hand, and *Sweeney* and *Choquette*, on the other, involves the reasonableness of the relation between the fence law provision and the public purpose of the statutory requirements. In short, a fence law with a valid public purpose will not pass constitutional muster under *Sweeney* and *Choquette* if the provision under review is not reasonably related to the promotion of such purpose.¹³⁹ Because the *Gravert* court addressed the entire fence law and looked at the benefits of fencing, it never determined whether the cost-sharing provision was reasonably related to, or actually furthered, the public purpose.¹⁴⁰ Moreover, because the court's opinion did not address the issue of who should pay for division fences,¹⁴¹ the court did not consider the appropriateness of the means chosen by the Iowa Legislature to accomplish the stated legislative purpose. The existence of available alternative options for paying for division fences implies that the method chosen by the Iowa Legislature is not narrowly tailored to achieve the state's objective of preventing damages from trespassing livestock.¹⁴²

More notably, the *Gravert* court declined to consider the parties' factual dispute about whether the plaintiffs were free under applicable city ordinances to use their land for livestock purposes.¹⁴³ Given the plaintiffs' argument that the mandated statutory maintenance of the fence was unconstitutional as applied, it is unclear why the court did not consider the plaintiffs' allegations of an unduly oppressive situation.¹⁴⁴ The court claimed that

¹³⁸ *Choquette*, 569 A.2d at 460.

¹³⁹ *Sweeney*, 334 N.Y.S.2d at 242 ("Even if the division statutes in question are assumed to benefit the general public, questions remain whether the means are reasonably necessary to the accomplishment of that purpose."); *Choquette*, 569 A.2d at 460 (finding the police power not legitimately furthering the statute's purpose).

¹⁴⁰ *Gravert*, 539 N.W.2d at 185-87.

¹⁴¹ *Id.* at 188.

¹⁴² See 765 ILL. COMP. STAT. ANN. 130/3 (West 1993) (delineating an option that would meet the state's objective while protecting plaintiffs' property interests).

¹⁴³ 539 N.W.2d at 189. The court had noted cursorily that the plaintiffs' land was in a city with ordinances restricting livestock and fencing. *Id.* at 185.

¹⁴⁴ It would seem that, although the state statute may preempt the city ordinance, the plaintiff's inability to raise animals might support a finding that the application of the cost-sharing provision to the plaintiffs was unconstitutional. See *Sweeney*, 334 N.Y.S.2d at 239 (finding a fence provision oppressive).

the state fence law provisions were not affected by what a property owner cannot do under a city ordinance.¹⁴⁵ While this may be correct, it fails to address the question as to whether the application of the police power in question, namely, the forced maintenance of a fence, was reasonably related to the public purpose.

Ohio courts have also upheld fence law provisions assessing landowners costs for fences despite their neither wanting nor receiving major benefits from the fence.¹⁴⁶ The courts found that, where evidence existed that a fence would provide some value to the landowner, the statutory provisions should be enforced.¹⁴⁷ The Ohio courts do, however, offer a way for a particularly disadvantaged plaintiff to overcome the cost-sharing requirement.¹⁴⁸ A recent unreported decision suggests that a plaintiff's presenting evidence that the assessment for a fence is greater than the benefits to the plaintiff's land might justify relief from the cost-sharing provisions of Ohio's fence statute.¹⁴⁹

B. Changed Conditions

In determining whether a legitimate public purpose exists, courts sometimes consider changes in conditions that have occurred since the enactment of the contested statute. The *Sweeney* court made this determination when it noted that, although the fence cost-sharing provision "may have served a valid public interest [when adopted], later events may demonstrate that as

¹⁴⁵ *Gravert*, 539 N.W.2d at 189.

¹⁴⁶ See *Glass v. Dryden*, 248 N.E.2d 54 (Ohio 1969) (denying injunctive relief to stop a fence assessment proceeding); *Kloeppe v. Putnam*, 63 N.E.2d 237 (Ohio App. 1945) (requiring a landowner growing crops to contribute to the cost of a fence adjoining a rancher).

¹⁴⁷ In *Glass*, the court found that, where a party adduced proof that the fence would have benefits for the appellee who was contesting an assessment for fence costs, the trial court was correct in denying relief to the appellee. 248 N.E.2d at 55-56. In *Kloeppe*, the court found that the plaintiff derived sufficient benefit from the construction of the fence to sustain the validity of the assessment. 63 N.E.2d at 239.

¹⁴⁸ See *Glass*, 248 N.E.2d at 57 (noting that the appellee had not qualified for relief due to the absence of proof that cost of compliance would be in excess of benefits).

¹⁴⁹ *In re McDonald*, 1995 Ohio App. LEXIS 733 (Ohio App. 4th, Feb. 21, 1995) (relying on *Glass*, 248 N.E.2d at 54, to find that the plaintiffs had failed to present evidence to support a conclusion that assessment under the fence statute was improper).

applied to certain real property it is now arbitrary and confiscatory."¹⁵⁰

A more poignant example of changed circumstances was presented in *Choquette v. Perrault*,¹⁵¹ a fence cost-sharing case from Vermont. The *Choquette* plaintiffs brought a suit to collect costs of a division fence authorized by Vermont law.¹⁵² In contesting their need to comply with the statutory provisions, the defendants claimed "that the Vermont fence law unconstitutionally exceeds the permissible police power of the state."¹⁵³ Addressing the issue of whether the fence law was reasonably related to the promotion of a valid public purpose, the court found the law to be unconstitutional as applied to landowners who own no livestock.¹⁵⁴

The court noted that, given the land-use patterns of the previous century when most rural landowners were livestock owners, the Vermont fence law had once served the broad public interest.¹⁵⁵ However, due to changing land-use patterns, the fence law was currently applicable to many landowners without livestock.¹⁵⁶ Given this situation, the court concluded the "fence law [was] burdensome, arbitrary, and confiscatory" and that "[t]he police power as applied to defendants [no longer] legitimately further[ed] the statute's purpose of clarifying the obligations and

¹⁵⁰ *Sweeney v. Murphy*, 334 N.Y.S.2d 239, 241-42 (N.Y. App. Div. 1972), *aff'd*, 334 N.E.2d 855 (N.Y. 1973) (citing *Defiance Milk Products Co. v. DuMond*, 132 N.E.2d 829, 830-31 (N.Y. 1956)).

¹⁵¹ 569 A.2d 455 (Vt. 1989). This case followed an earlier appeal to the Vermont Supreme Court in which the case had been remanded to pursue an administrative remedy. *Choquette v. Perrault*, 475 A.2d 1078, 1082 (Vt. 1984).

¹⁵² *Choquette*, 569 A.2d at 456. Plaintiffs had followed the procedures set forth by the statutory provisions, and, because the defendants refused to reconstruct the fence or to pay a proportionate share, had brought suit to collect the sum expended in the construction of defendants' share of the fence. *Id.*; VT. STAT. ANN. tit. 24, §§ 3808, 3816 (1992). The provision at issue under the constitutional challenge concerned the fence cost-sharing provision for owners "of unimproved and unoccupied land adjoining occupied land of another person." VT. STAT. ANN. tit. 24, § 3802 (1992).

¹⁵³ *Choquette*, 569 A.2d at 456. The court interpreted this as a challenge of the entire fence scheme, thereby differentiating the case from *Glass v. Dryden*, 248 N.E.2d 54-55 (Ohio 1969) (stating that the appellee never argued that the fence statute was invalid *per se*). *Choquette*, 569 A.2d at 457-58.

¹⁵⁴ *Choquette*, 569 A.2d at 459.

¹⁵⁵ *Id.* at 460.

¹⁵⁶ *Id.* The court did not cite a source supporting this conclusion.

liabilities of adjoining landowners with respect to their livestock.”¹⁵⁷

The Virginia Supreme Court reached a different result in *Holly Hill Farm Corp. v. Rowe*.¹⁵⁸ There, the corporation asked residential neighbors on subdivided property adjacent to a large cattle farm to participate in constructing and paying for one-half of the cost of a division.¹⁵⁹ Although the corporation owning the cattle farm was seeking an award for one-half of the costs, the neighbors filed a lawsuit seeking declaratory judgment based on the allegation that the Virginia fence law provision was unconstitutional as applied.¹⁶⁰ The trial court agreed with the neighbors and declared two sections of the Virginia fence law unconstitutional.¹⁶¹

The corporation appealed this decision, challenging the trial court's determination that part of section 55-317 of the Virginia fence law was special legislation.¹⁶² After reviewing the historical development of fence-out legislation in the state, the Virginia Supreme Court addressed the issue of the reasonableness of the classification delineated by section 55-317.¹⁶³ Although the classification favoring agricultural landowners was discriminatory, the court found the statute neither unreasonable nor arbitrary.¹⁶⁴ Moreover, it applied to all persons similarly situated.¹⁶⁵ Thus, as the provision was deemed general legislation, the Virginia

¹⁵⁷ *Id.*

¹⁵⁸ 404 S.E.2d 48 (Va. 1991).

¹⁵⁹ *Id.* at 49. This was pursuant to the statutory provisions of the Virginia fence law. Section 55-317 requires contribution for some adjacent landowners, while section 55-318 provides a procedure for the construction and contribution for a division fence. *Id.* VA. CODE ANN. §§ 55-317 to 55-318 (Michie 1995).

¹⁶⁰ *Holly Hill Farm*, 404 S.E.2d at 49. When the residents refused to participate or contribute, the corporation owning the cattle farm initiated actions for an award from each neighbor. *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 49-50 (considering VA. CODE ANN. § 55-317 (Michie 1986)). It being special legislation because the Virginia Constitution prohibits laws aimed at economic favoritism for one group over another. *Holly Hill Farm*, 404 S.E.2d at 49-50.

¹⁶³ *Holly Hill Farm*, 404 S.E.2d at 50-51. The issue centered on the provision, VA. CODE ANN. § 55-317 (Michie 1986), which distinguished adjacent industrial, commercial, and subdivided landowners from other landowners such as agricultural landowners. *Holly Hill Farm*, 404 S.E.2d at 49. Industrial, commercial, and subdivided landowners had to build or contribute to one-half of the fence, while other landowners could choose to allow their lands to lie open and not contribute to the cost of a fence. *Id.*

¹⁶⁴ *Id.* at 51-52.

¹⁶⁵ *Id.* The court found that the distinction between landowners was not repugnant to constitutional proscriptions against special legislation. *Id.* at 51. Rather, the

Supreme Court reversed the trial court's judgment.¹⁶⁶ While this decision meant that the Virginia fence provisions survived constitutional scrutiny, the scrutiny neither involved nor addressed a due process challenge¹⁶⁷ of the type considered by the courts in the *Sweeney* or *Choquette* cases.

C. *An Inappropriate Means*

A third avenue to challenge fence law provisions is through the general due process requirement that "the means selected by the legislature bear a reasonable and substantial relation to the purpose sought to be attained."¹⁶⁸ Although courts widely defer to legislative judgment, a statute may be found unconstitutional if less severe means could achieve the desired goals.¹⁶⁹ At the same time, the government is entitled to some leeway; it need not employ the least restrictive means, but rather "a means reasonably tailored to achieve the desired objective."¹⁷⁰ As fence law provisions infringe constitutional private property interests of landowners, the means chosen by a state must bear a reasonable and rational relation to the public purpose.

classification constituted an economic decision that is favorable to agricultural property owners. *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 53 (Carrico, C.J., dissenting) ("If this be the effect of the legislation, it is woefully lacking in due process protection.")

¹⁶⁸ *In re* Forfeiture of 1969 Piper Navajo, 592 So.2d 233, 235 (Fla. 1992). Various state courts have reached this conclusion in a wide range of cases. *See* State v. Hodges, 506 So.2d 437, 442 (Fla. 1987) (closing of a portion of the St. Johns River served a valid purpose of reserving an area for the development of young shrimp); *In re Forfeiture of 1969 Piper Navajo*, 592 So.2d at 235-36 (preserving public safety by assuring conformity with federal regulations was permissible, but the method chosen by the state was not narrowly tailored to the objective of flight safety); *Desnick v. Dep't Prof'l Regulation*, 665 N.E.2d 1346, 1358 (Ill. 1996) (analyzing whether a regulation impinging upon commercial expression directly advances the state interest involved); *In re American Reliance Ins. Co.*, 598 A.2d 1219, 1226 (N.J. 1991) (questioning whether the means chosen to accomplish the goal are reasonable).

¹⁶⁹ *See* *Large v. Superior Court*, 714 P.2d 399, 408-09 (Ariz. 1986) (finding that a conflict between state interests and fundamental personal liberties requires a carefully selected means to minimize the possible infringement of protected rights); *In re Forfeiture of 1969 Piper Navajo*, 592 So.2d at 236 (finding that the forfeiture of an airplane due to a nonconforming fuel tank was not narrowly tailored to the objective and, therefore, was unconstitutional); *Desnick*, 665 N.E.2d at 1361-62 (finding a good fit between the legislature's ends and the means chosen to accomplish those ends).

¹⁷⁰ *Desnick*, 665 N.E.2d at 1359 (quoting Board of Trustees of the State Univ. v. Fox, 492 U.S. 469, 480 (1989)).

An unusual case involving fences examined this issue. In *Moorman v. Department of Community Affairs*,¹⁷¹ a governmental authority issued a regulation precluding property owners from constructing a fence without a permit because the fence might interfere with the habitat of an endangered deer species.¹⁷² Four property owners who had been denied permits to construct fences challenged the regulations.¹⁷³ All of the property owners had advanced safety reasons to justify their need of a fence—one owner wanted a fence for the safety of their children, and others wanted to protect against trespass and crime.¹⁷⁴ Owners of one lot wanted a fence to prevent their dog from harming the endangered Key deer.¹⁷⁵

At the hearing concerning the fence permit applications, a biologist employed by the governmental agency opposing issuance of the permits offered expert testimony to the effect that some fences did not harm the endangered species.¹⁷⁶ Moreover, the biologist stated that there was no biological basis for denying three of the four fence applications because the property of those applicants was not Key deer habitat.¹⁷⁷ The court concluded that, because a governmental blanket prohibition on fences only inconsistently furthered the conservation of the Key deer, a complete ban on fences was not needed to protect and preserve the endangered species.¹⁷⁸ Therefore, the court found the regulation unconstitutional on its face: “[T]he means chosen by the legislature . . . [was] not narrowly tailored to achieve the state’s objective of protecting the Key [d]eer.”¹⁷⁹

IV

REFORMING UNFAIR FENCE LAWS

Externalities accompanying domestic animal production have led to fence law provisions that assign property rights among

¹⁷¹ 626 So.2d 1108 (Fla. App. 1993).

¹⁷² *Id.* at 1109-10. The Monroe County Land Development Regulations at issue banned fences in areas of critical concern for Key deer. *Id.* In general, fences in those areas interrupted the normal movement of the Key deer. *Id.*

¹⁷³ *Id.* at 1109 (reporting that four property owners had separately applied for fence permits, each expressing individual reasons for desiring to have a fence).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1110.

¹⁷⁹ *Id.*

competing interests. Wide variations in land use and in fence-rule alternatives suggest that distinct options should exist for different needs.¹⁸⁰ Yet it is not clear that existing provisions are consistent with recent changes in land use, agro-research strategies, and economic efficiency institutions; indeed, often they are historical anachronisms.

Especially egregious are provisions on costs under which persons without livestock must incur significant expenses to support a neighbor's ranching activities.¹⁸¹ Some cost-share provisions in fence-out and fence-in rules are so burdensome that they actually violate substantive due process. Rules imposing costs on persons without livestock are an invalid exercise of the state's police power when a court finds a statute wanting either a legitimate public purpose or lacking a substantial relation to a legitimate public objective. Three criteria advocate the reform of selected fence-law provisions.

A. *Return to a Fence-In Rule*

Fence laws, like other legislation, may become outdated due to changes in circumstances. While ranching or animal husbandry activities may have justified a fence-out exception that abrogated the common law fence-in rule, a central question is whether fence-out rules are justified given changes that have occurred in rural America. In many areas, livestock production has become less important than other land uses due to dryland farming production techniques, the use of irrigation, new recreational land uses, and ecological concerns. Even without a change in land use, new agro-research strategies may alone support the termination of a fence-out regime.¹⁸²

Changes in circumstances favor the return to a fence-in rule, yet, given the low priority of this issue, a legislature may not amend existing fence provisions. Moreover, other reasons exist for a legislature to resist changing its fence laws. Changing from fence-out to fence-in may disrupt existing ranching operations and displace long-established practices. For example, the 1970

¹⁸⁰ When many states adopted fence-out provisions, differences for some very rural areas may mean they are unsuited for fence-in provisions. *See supra* notes 20 & 22 and accompanying text.

¹⁸¹ *See supra* notes 78-84 and accompanying text (discussing forced cost-sharing provisions).

¹⁸² *See supra* notes 42-55 and accompanying text (describing agro-research strategies).

Virginia General Assembly determined that agricultural landowners should have primary control over the establishment of division fences.¹⁸³ So that landowners with domestic animals not suffer hardship because of their proximity to intruding commercial, industrial, and subdivided land uses, the Virginia General Assembly determined that landowners of these intruding nonagricultural uses should contribute to the costs of fences needed to keep animals off of their own properties.¹⁸⁴

If a legislature fails to adjust its fence-out provisions to new circumstances, an injured party may challenge a statute under one of the three major substantive due process arguments: the reasonableness of the fence provision to the alleged public good;¹⁸⁵ the continued legitimacy of the public purpose;¹⁸⁶ or the appropriateness of the means selected by the legislature.¹⁸⁷ However, without an argument concerning an unfair cost-sharing provision, it is unlikely that an injured party will prevail in the judicial arena.¹⁸⁸

B. Contributions of Fence Costs by Neighbors Without Livestock

Fence laws with provisions requiring a contribution by neighbors without livestock present opportunities for legislative and judicial interference. The *Sweeney* and *Choquette* cases reveal that landowners may be able to mount a successful constitutional challenge against fence cost-sharing provisions that foist costs on neighbors without livestock. However, *Holly Hill Farm Corp.*

¹⁸³ See *Holly Hill Farm Corp. v. Rowe*, 404 S.E.2d 48, 51 (Va. 1991) (following an earlier legislative decision which was economically favorable to agricultural owners).

¹⁸⁴ *Id.* at 51-52.

¹⁸⁵ See *Sweeney v. Murphy*, 334 N.Y.S.2d 239, 242 (N.Y. App. Div. 1972), *aff'd*, 294 N.E.2d 855 (N.Y. 1973) (requiring persons without livestock to share fence costs failed to further a legitimate public purpose).

¹⁸⁶ *Choquette v. Perrault*, 569 A.2d 455, 460 (Vt. 1989) (finding that due to changing land use patterns, a fence law that required persons without livestock to contribute to fence costs was confiscatory).

¹⁸⁷ See *Moorman v. Dep't of Community Affairs*, 626 So.2d 1108, 1110 (Fla. App. 1993) (finding the fence provision was not needed to accomplish the stated purpose).

¹⁸⁸ This presumes that fence legislation is a valid exercise of the police power and that courts are generally hesitant to interfere with legislative discretion. See *Sweeney*, 334 N.Y.S.2d at 241 (noting the presumption of validity); *Gravert v. Nebergall*, 539 N.W.2d 184, 186 (Iowa 1995) ("courts accord legislatures a highly differential standard of review").

and *Gravert* are themselves unsuccessful challenges against cost-sharing provisions.¹⁸⁹

While those courts referenced the unfairness of the fence cost-sharing provisions and noted the deeper and divisive political issue,¹⁹⁰ plaintiff landowners must be exacting in formulating allegations and developing evidence to prove that the provision works on an unconstitutional hardship. Because substantive due process is multifaceted, a plaintiff must first scrutinize each facet to decide whether it offers a viable claim.¹⁹¹ A plaintiff then needs to develop evidence to support the selected argument. For example, if the argument focuses on the reasonableness of the regulation to the alleged public good, then the plaintiff must put forth all available evidence supporting a finding of unreasonableness. This specific evidence should include data and studies concerning changes in circumstances that have affected the levels of the public good, agro-research strategies that diminish the advantages of a fence-out rule, and efficiency criteria.

C. Efficiency Criteria

Economic criteria have been cited for justifying changes in fence rules.¹⁹² In fact, many instances of legislative abrogation of fence-in rules in favor of fence-out rules have their basis in economic criteria.¹⁹³ The question remains whether efficiency still

¹⁸⁹ *Holly Hill Farm Corp. v. Rowe*, 404 S.E.2d 48, 48-49 (Va. 1991) (upholding a cost-sharing provision that forced persons living on subdivided property to contribute to fence construction); *Gravert*, 539 N.W.2d at 186-88 (finding no constitutional problem with contributions for the maintenance of a fence by persons without livestock). According to the dissent of Chief Justice Carrico in the *Holly Hill Farm* case, the court did not consider a due process argument. 404 S.E.2d at 53.

¹⁹⁰ In *Holly Hill Farm*, the Virginia Supreme Court determined that the General Assembly had "made a decision economically favorable to agricultural owners." 404 S.E.2d at 51. In *Gravert*, the Iowa Supreme Court opined that "[w]hatever unfairness the Graverts see in the fence law is of political, not constitutional, dimensions." 539 N.W.2d at 188.

¹⁹¹ For example, the *Gravert* opinion suggests that the plaintiff lost the positioning battle. 539 N.W.2d at 187-88. Instead of concentrating on the legitimacy of a specific cost-sharing provision, the court focused on the benefits accruing to private property due to fences and found no constitutional violation. *Id.*

¹⁹² See Kantor, *Livestock Enclosure*, *supra* note 5, at 91-95 (finding an increase in the value of farms due to the shift from a fence-out to a fence-in rule).

¹⁹³ The Supreme Court of Colorado has noted that, although the livestock industry was one of the leading industries of the state, a rule requiring livestock owners to keep their stock within a close would seriously cripple the industry. *Morris v. Fraker*, 5 Colo. 427, 427-30 (1880).

favors a fence-out rule for some areas¹⁹⁴ when the decline of livestock production and new agro-research strategies are better served by a fence-in rule. Several additional economic reasons form an economic justification for abrogating a fence-out rule.

First, economic considerations concerning the optimization of possessory rights suggest that property owners should have the right to be free of trespassing livestock.¹⁹⁵ Except in limited situations generally involving large expanses of open range, fence-out provisions often prove uneconomical. A fence-out rule where a person wishing to exclude livestock incurs all fencing expenses may hinder total economic performance since persons forgo more viable economic activities. For example, landowners may forgo raising crops to the detriment of an area's productivity and economy if they must pay to keep out his neighbors' trespassing livestock.¹⁹⁶

While fence-out rules work to the detriment of overall livestock production due to a free-rider problem,¹⁹⁷ the ability to use another's property may deter an owner from making range improvements. For example, the development of a stockwater reservoir with accompanying fencing to control the desilting area might be economically feasible if an owner could capture all of the benefits;¹⁹⁸ yet, if cattle of neighboring ranchers share in the benefits of this improvement, this management improvement may prove too expensive for the rancher-landowner to undertake alone. Thus, states having a fence-out option should assess their

¹⁹⁴ Fence-out rules often exist where a majority of taxpayers, perhaps inefficiently, have chosen to alter the fence-in rule. See ARIZ. REV. STAT. ANN. § 3-1421 (West 1995) (providing that a majority of taxpayers can petition for a no-fence district); UTAH CODE ANN. § 4-25-8 (1995) (providing that owners are liable for trespassing animals except where a fence-out rule was adopted). However, there remains a question as to whether provisions are completely fair. For example, Texas requires signatures of a majority of the freeholders in some cases. TEX. AGRIC. CODE ANN. § 143.021 (West 1982). This kind of requirement is so exacting that it might well withstand a constitutional challenge.

¹⁹⁵ See Kaplan & Shavell, *supra* note 85, at 758 (addressing the optimization of possessory rights).

¹⁹⁶ One scholar has estimated that the closing of the range in certain Georgia counties in the 19th century increased farm values by thirty-one percent. Kantor, *Livestock Enclosure*, *supra* note 5, at 105.

¹⁹⁷ The "tragedy of the commons" could occur if too many livestock were allowed to graze in a given area. See Runge, *supra* note 11, at 595. For the original discussion of the "tragedy of the commons," see Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

¹⁹⁸ See VALLENTINE, *supra* note 41, at 422-24.

provisions to ascertain whether they continue to be an efficient economic solution.

Second, cost-sharing provisions lack popular support. Our society generally regards the production of livestock as an industry that should internalize its own production costs.¹⁹⁹ While society could regulate trespassing livestock like it attempts to control air and water pollution, economic principles support responding to negative externalities with a liability rule.²⁰⁰ This result is reached by granting landowners a possessory interest of being free of trespassing livestock and then by awarding damages whenever a rancher's livestock commit a trespass.

Third, the placement of costs on persons who do not raise livestock does not merely mean that livestock producers have prevailed on an economic issue.²⁰¹ Rather, it means that fences may or may not be built due to factors separate from the economic efficiency of livestock production or of other profit-seeking ventures. A simple example illustrates this issue. Assume that a landowner desiring to maximize individual economic returns is deciding whether to raise cattle or corn. Given the two possible agricultural activities, the landowner will select the activity that generates the most profit for the landowner without giving consideration to the economic well-being of his neighbor. Assume further that cattle production is more profitable only because the landowner's neighbors pay for one-half of the fence, and that if the landowner had to pay for the entire fence, corn would yield greater profits for the landowner. Under a cost-sharing rule, the landowner would choose to raise cattle only because the neighbors were making a financial contribution to his chosen enterprise. Thus, the decision to raise cattle may negatively impact the area's local economy by limiting the neighbor's ability to select the most profitable activity.

Lastly, fence-out provisions also may foist extraordinary damages on property owners who experience a livestock trespass.²⁰²

¹⁹⁹ See Vogel, *supra* note 11, at 152.

²⁰⁰ See Kaplow & Shavell, *supra* note 85, at 719 (citing research favoring a liability rule over a property rule).

²⁰¹ While the decision to maintain these provisions may be a political issue, their endorsement has important economic and cost-allocative ramifications.

²⁰² See Kaplow & Shavell, *supra* note 85, at 758, 771-72.

Research suggests that idiosyncratic or situational values may not be fully compensated under a fence-out rule.²⁰³

It is unlikely that a court would find any one of these economic reasons sufficient to overcome the presumption of validity that accompanies statutory pronouncements, especially since courts generally defer to the wisdom of the state legislature. However, all economic arguments necessarily bear on the reasonableness or appropriateness of a fence-out rule. Moreover, economic claims logically supplement arguments based on changed circumstances or in agro-research strategies. Ultimately, the most logical use of these economic arguments is in the legislative development of revised fence rules.

CONCLUSION

Legislatures and courts have employed available information regarding fence rules to respond to the issues under consideration. While legislative provisions and judicial pronouncements have reacted to various historical, political, financial, land use, and constitutional issues, many of the declarations are now decades old. Technological changes and new information imply that the framing of the issues has changed such that historic conclusions regarding fairness are no longer valid. Given the inequities that exist under many fence law provisions, courts and legislatures will face these issues with an increasing frequency.

While the findings of this Article support revisions of fence-out and cost-sharing provisions and show that some provisions probably offend substantive due process, a more important conclusion is that existing fence rules are economically inefficient. In a society where efficiency of production is critical, no jurisdiction should continue to support an outdated and inefficient solution to conflicting property rights. Although a coalition supporting ranching and domestic livestock production may have the political influence to prevent legislative changes, the findings of this Article should give any responsible party pause to reconsider a self-centered and economically inefficient agenda.

Historic cost-sharing and fence-out provisions will come under additional scrutiny because of the increased public attention arising from civil disputes like the *Holly Hill Farm* case. Private

²⁰³ Ellickson, *supra* note 39, at 686 (concluding that trespass victims ignored some trespasses and used others to offset informal debts).

property rights legislation being advanced in Congress and state legislatures also discloses a resurgence of interest in legislation derogating property rights.²⁰⁴ A public desirous of safeguarding private property rights may find that legislation foisting fence costs on neighbors without livestock is an example of excessive governmental interference in private property. By challenging specific fence-out and fence cost-sharing provisions in courts as well as in state legislatures, neighbors can work to regain the common law property right of quiet enjoyment that has been denigrated by fence-out legislation over the past three centuries.

²⁰⁴ See *supra* note 15 (regarding property rights legislation).