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An Agricultural Law Research Article

The Constitutionality of Partition Fence Statutes in the Midwest

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I. Introduction

Fence law deals with the regulation of boundaries and fence disputes. Typically, laws in this category prescribe when a fence is required, what a legal fence is, how responsibility for a fence is divided, and how to resolve disputes between property owners. A primary area of fence law concerns the rights and duties of landowners on adjoining properties to jointly erect and maintain partition fences. A “partition” or “line” fence is a fence on or very near the boundary line separating adjoining properties. Numerous states statutorily require landowners of adjoining rural properties to erect and maintain partition fences between their properties. Generally, these statutes contain a “forced-contribution” or “cost-share” component that requires the adjoining landowners to share the cost of erecting and maintaining the partition fence.

In certain states, the forced-contribution component exists even where the partition fence is not statutorily required and only one landowner wishes to enclose his property. When one landowner properly requests that an adjoining landowner share in the cost of the erection and/or maintenance of a partition fence, the adjoining landowner is required to do so.

Frequently, partition fence statutes are enforced by “fence viewers,” typically local government officials or appointees.³ If a dispute arises, the fence viewers examine the situation and allocate responsibility for these types of fences. Generally, each landowner is responsible for his “fare share” of the cost.⁴

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³ In Wisconsin, for example, town supervisors, city aldermen, or village trustees. WIS. STAT. § 90.01.

⁴ In most states, the “right-hand rule” applies. Each landowner stands in the middle of the boundary line and faces the fence (or where the fence is planned to be constructed), and each is responsible for the construction and maintenance of the portion of the fence to his right. If the division is unfair due to water gaps, gullies, etc., the landowners, with the aid of fence viewers, if necessary, can agree to a different division.

Under most Midwestern states' statutory schemes, adjoining landowners are generally required to jointly maintain partition fences. If one of these persons fails to build or maintain his share of the fence, the aggrieved landowner may complain to the fence viewers. If the fence viewers determine the fence has not been properly built or maintained, they direct the delinquent landowner to build or repair the fence within a reasonable time. If the delinquent party does not do so, the aggrieved party may complete the construction or repairs and recover the expense by having the fence viewers determine the expense of building or fixing the fence. The aggrieved party can then seek payment from the delinquent party. If the delinquent owner does not pay, the aggrieved party can file a certificate of the fence viewers' determination with the appropriate local government official (in many cases, a town clerk) and receive payment from the local government treasury, which recoups the payment through a tax lien on the delinquent party's property.

Partition fence statutes are applicable only in rural areas where, historically, land was used primarily for the purpose of raising livestock or crops. This paper surveys the partition fence statutes currently in place in the Midwest where, over time, the use of rural property has evolved from exclusively agricultural to more often residential. This paper further explores the current constitutionality of those statutory schemes in light of the changed nature of rural land use since their enactment.

II. Examples

In certain circumstances, partition fence statutes make sense. Consider the following examples:

Example 1:

Neighbor A and Neighbor B each own ten acres of adjoining rural property. Both decide to raise livestock⁵ on their respective properties. Some states' partition fence statutes require that A and B share equally in the cost of erecting and maintaining the fence separating their properties. For the purpose of this paper, these statutory schemes are labeled "livestock provisions."

Example 2:

Neighbor A and Neighbor B each own ten acres of adjoining property. A decides to raise cattle. B decides to raise crops (or even use the land for a non-agricultural purpose). Some states' partition fence statutes require that A and B share equally the cost of erecting and maintaining the fence

⁵ For the purposes of this paper, "livestock" is broadly defined to include cattle, horses, mules, swine, sheep, and goats. Some Midwestern states also include farm deer, ostrich, rheas, emus, and other poultry.

separating A's cattle from B's property. This is another example of a livestock provision statute.

But what if only one of the neighbors wants or needs the fence? Should the other neighbor be required to pay half the cost of having it erected and maintained? Consider these examples:

Example 3:

Neighbor A and Neighbor B each own ten acres of adjoining property. A decides to use his property to grow pine trees for sale to the public at Christmas. B decides to use his land to grow apple trees for sale to the local grocer. A wants a fence; B does not. In some states, B will be required to pay half the cost of erecting and maintaining the fence that separates A's pine trees from B's apple trees, despite the fact that there is no livestock on either side of the fence. For the purpose of this article, this is an example of an "agricultural use" provision.

Example 4:

Neighbor A and Neighbor B each own ten acres of adjoining property. A decides to raise wheat on his property. B decides to build a log cabin but otherwise keep it as "natural" as possible. A wants a fence; B does not. In some states, B will be required to pay half the cost of erecting and maintaining the portion of the fence that separates A's cropland from B's property, despite the fact that A has no livestock to fence in and that B's property is not used for any agricultural purpose. This is another example of an agricultural use provision.

Example 5:

Neighbor A and Neighbor B each own ten acres of adjoining property. Both have a home on their properties, but neither plans to use the property for any type of agricultural purpose. A wants a fence; B does not. In some states, B will be compelled to pay for half the cost of erecting and maintaining the fence that divides the properties, regardless of the type of use of the property by either landowner. For the purpose of this paper, these types of statutory schemes are labeled "without regard to use provisions."

III. History of Partition Fence Statutes

Under the common law of England, a landowner had a duty to fence in his livestock and restrain them from running at large. He was strictly liable for injury to his neighbors or

damage to their property caused by his roaming animals.⁶ This “fencing-in” theory was brought to the United States and adopted in many of the colonial states.⁷

In less populated westerly states, a “fencing-out” or “open range” policy was embraced.⁸ There, a livestock owner had no legal duty to fence in his property. Any land not enclosed by a fence was considered open to livestock. A neighboring landowner had no cause of action for damage caused by the grazing stock.⁹ In effect, neighbors in fencing-out states had the options of doing nothing and risking the harm from trespassing animals or incurring the expense of building a fence.

Historically, most Midwestern states were open-range states. In the late 1700s and early 1800s, as their populations increased states reversed their open-range laws and began to adopt and statutorily articulate fencing-in policies. In many Midwestern states, unlike under the common law statutes, owners of livestock could be held liable only if the livestock trespassed on neighboring property because of the livestock owner’s negligence. States also supplemented their fencing-in statutes with “partition” or “line” fence provisions requiring forced contribution. States reasoned that because the property owners on both sides benefited from the partition fence, ergo protection from destruction of their crops and property by their neighbors’ livestock, both landowners should be required to share the cost of erecting and maintaining the fence.¹⁰

Most of the Midwest partition statutes currently in effect have not meaningfully changed from the time of their enactment in the 1800s. Although the statutes apply only in “rural” areas, over time the use of rural land has significantly evolved from exclusively agricultural to more residential. Even though the land use has evolved, the statutes have not.

According to a recent United States Department of Agriculture publication,¹¹ the average annual rate of increase in non-farm, rural residential use of property in the United States has been approximately 1.2 million acres per year since 1980.¹² According to the U.S.

⁶ 73 Eng. Rep. 22-23 (1592), reprinted in 3 DYER 372b (1907).

⁷ See John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1263-64 (1996).

⁸ See Terence J. Centner, *Reforming Outdated Fence Law Provision: Good Fences Make Good Neighbors Only if They are Fair*, 12 J. ENVTL. L. & LIT., 267, 266-69 (1997).

⁹ *Id.*

¹⁰ Note, *The Iowa Fencing Laws*, 7 IOWA L. BULL., 176, 176-177 (1922).

¹¹ Marlow Vesterby & Kenneth S. Krupa, U.S. Department of Agriculture, *Major Uses of Land in the United States, 1997* (Statistical Bulletin No. 973, Aug. 2001). Unfortunately for the authors of this article, the “rural residential” classification is fairly new and information concerning it is not available by state.

¹² *Id.* at 22.

Census Bureau, from 1952 to 2002, the total amount of land in the Midwest¹³ used as farm land has declined from 404,000,000 acres to 352,100,000 acres and the total number of farms from 1,827,100 to 802,000.¹⁴ The result has been fewer and larger farms, and an overall increased amount of adjoining non-farming residential use of property in traditionally rural areas. Despite these trends, many Midwestern partition fence statutory schemes require the fences, and/or forced-contribution, regardless of whether livestock and/or crops are raised on one or both of the properties.

It is noteworthy that the cost of fencing is substantial. Currently in Wisconsin, for example, the cost of constructing a three-strand barbed wire fence in an agricultural environment runs about \$5-\$10 per foot for clearing and construction.¹⁵ On a forty acre-square parcel, each side being ¼ mile long, the cost of a partition fence on the boundary of the property would average between \$6,600 and \$13,200 per side.

IV. Constitutional Considerations

Because partition fence provisions can place obligations upon unwilling landowners, there have been several challenges to these laws as unconstitutional deprivations of property under the 5th and 14th Amendments of the United States Constitution and various similar provisions in state constitutions. Another challenge has been whether a state has properly exercised its police powers.

A. Understanding Police Power

Police power is defined as the authority conferred by the Tenth Amendment to the United States Constitution

upon the individual states, and, in turn, delegated to local governments, through which they are enabled to establish a special department of police, adopt such laws and regulations as tend to prevent the commission of fraud and crime, and secure generally the comfort, safety, morals, health, and prosperity of the citizens by preserving the public order, preventing a conflict of rights in the common intercourse of the citizens, and insuring to each an uninterrupted enjoyment of all the privileges conferred upon him or her by the general laws.¹⁶

¹³ For the purposes of this article, the authors include as Midwestern states those states that the U.S. Census Bureau includes in its Midwest region, specifically and in alphabetical order, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin.

¹⁴ UNITED STATES DEPARTMENT OF AGRICULTURE, NATIONAL AGRICULTURE STATISTICS SERVICE, 2002 CENSUS OF AGRICULTURE, *available at* <http://www.nass.usda.gov:81/ipedb/> (as summarized in Appendix A).

¹⁵ Based on estimates procured by authors from Madison, Wisconsin, fencing companies.

¹⁶ BLACK'S LAW DICTIONARY 1156 (6th ed.).

In layman's terms, it is the power of the state to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals, or the promotion of the public convenience and general prosperity.

A state's police power is not without limitations. It is subject to the restrictions of federal and state constitutions. For a state statute to pass constitutional muster, it must pass a two-prong test. The United States Supreme Court put it this way in *Lawton v. Steele*:¹⁷

[T]he state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. To justify the state in thus interposing its authority on behalf of the public, it must appear first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of that purpose, and not unduly oppressive upon individuals.¹⁸

Those who challenge the constitutionality of partition fence laws must also contend with the legal principle that state statutes are presumed to be constitutional and should be declared unconstitutional only with extreme caution and only when absolutely necessary.¹⁹

To determine whether the state's authority to enact and enforce partition fence laws is beyond the scope of their police powers, the first prong of the above-mentioned *Lawton* test requires courts to assess whether the laws serve the public generally. Courts have found a variety of potential societal/individual benefits that could be used to justify the exercise of their police powers, including freedom from unwanted intrusion by a neighbor's cattle, freedom from trespassing neighbors and an increase in privacy, diminution of lawsuits arising out of damage caused by straying cows, and discouragement of litigation by clearly marking the boundaries of rural lands.²⁰ Moreover, a law may serve the public purpose even though it benefits certain individuals more than others.²¹

¹⁷ 152 U.S. 133 (1894).

¹⁸ *Id.* at 136-37 (citations omitted).

¹⁹ See, e.g., *In re Bailey*, 626 N.W.2d 190 (Minn. App. 2001) (citing *In re Haggerty*, 448 N.W.2d 363 (Minn. 1989)).

²⁰ *Gravert v. Nebergall*, 539 N.W. 2d 184, 188 (Iowa 1995).

²¹ *John R. Grubb, Inc. v. Iowa Hous. Fin. Auth.*, 255 N.W.2d 89, 95 (Iowa 1977) (citing *Richards v. City of Muscatine*, 237 N.W.2d 48, 60 (Iowa 1975)).

The second prong of the *Lawton* test requires courts to determine whether the statute is reasonably necessary to the accomplishment of the stated public purpose and whether it is unduly oppressive. “Courts widely defer to legislative judgment: the government need not employ the least restrictive means when exercising its police powers, but rather ‘a means narrowly tailored to achieve the desired objective.’”²² Further, “the single fact that a party must make substantial expenditures to comply with a regulatory statute does not render the statute unconstitutional.”²³

B. Illustrative Cases

Court challenges to the application of partition fence statutes have been, for the most part, based upon police power arguments: the reasonableness of the fence provision to the alleged public good; the continued legitimacy of the public purpose; or the appropriateness of the means selected by the legislature.²⁴ These statutes have been found facially constitutionally valid; the question is whether they are valid as applied under specific factual circumstances.

Forced share statutory provisions have been challenged with mixed results. In some states that have addressed the issue, courts have held that the social benefit of protecting the citizenry, along with minimal benefit to the landowner, was sufficient to justify the burden of the duty on an individual landowner to pay the cost of erecting and maintaining a portion of the partition fence. In other states, courts have held that the statutes were unconstitutional as applied to certain landowners, especially those not involved in farming activities, because the partition fence did not confer sufficient benefit on the individual landowner to justify the burden of the duty to erect and maintain the fence.

1. Statutes Held Valid As Applied

An Ohio court considered the state’s partition fence statute in *Kloepfel v. Putnam*,²⁵ and found no constitutional violation. Kloepfel owned a 40-acre grain farm. Kloepfel’s neighbor, Mox, requested a partition fence to be erected and asked the local fence viewers to visit the property and assign to him and Kloepfel an equal share of the fence. Over the objection of Kloepfel, the trustees did so and ordered Mox and Kloepfel each to build one-half of the fence.

When Kloepfel refused to comply with the order, the township trustees had the fence built by the lowest bidder. Kloepfel was charged for the expense via a tax, and after

²² Board of Trustees v. Fox, 492 U.S. 469, 480 (1989).

²³ Northwestern Laundry v. City of Des Moines, 239 U.S. 486, 492 (1916).

²⁴ Terence J. Centner, *Reforming Outdated Fence Law Provision: Good Fences Make Good Neighbors Only if They are Fair*, 12 J. ENVTL. L. & LIT., 267, 299 (1997).

²⁵ 63 N.E.2d 237 (Ohio Ct. App. 1945).

being threatened with a tax lien, sought judicial relief. The trial court found in favor of Putman, the Van Wert County treasurer, and dismissed Kloepfel's petition.

Kloepfel's two-pronged contention on appeal was that (1) because of the nature of the current and future use of her land, she derived no benefit from the construction of the fence, and (2) because she received no benefit from the construction of the fence, the assessment came within the constitutional inhibition forbidding the taking of private property for public use without compensation.²⁶

The Court of Appeals of Ohio upheld the trial court's decision, distinguishing the facts in Kloepfel's case from those in *Alma Coal Company v. Cozad*,²⁷ which involved a "wild" and "uncultivated" parcel of property. In that case, a coal company was assessed for the construction of a partition fence on their property; however, the order was subsequently overturned upon appeal. The Kloepfel court noted that:

[T]he [Alma] court did not hold the statutes, relating to the construction of partition fences, which are similar to the statutes now in effect relating to the same subject matter, were unconstitutional but simply denied the right to invoke their application to a situation such as was found in that case. The situation found in that case was that the lands of the coal company, which were assessed for the construction of a partition fence, were wild, uncultivated and unfenced, that the company had no intention to improve, fence or cultivate any portion of them, and that the fence could be of no value to it whatsoever and inured to the sole benefit of the adjoining proprietor.

The court, in its opinion, stated further that in that case there could be no compulsion, under the police power, to build the fence or contribute to the cost of it because there was no such use of the coal company's property as to indicate probable injury to its neighbors or the community in the absence of a fence.²⁸

In contrast, the court held that in Kloepfel's case, since her land was cultivated, it was undeniable that a fence benefited it. Citing *Jennings v. Nelson*,²⁹ a case involving a cropland and land on which livestock was raised, the court continued:

If land is cultivated, or to be cultivated, no one can deny that a fence is beneficial to it. A fence which partially encloses cultivated land is beneficial to some extent. If it encloses the field adjoining, it will prevent injury from stock in that field. Even if it does not enclose such field it will

²⁶ *Id.* at 238.

²⁷ 87 N.E. 172 (Ohio 1909).

²⁸ 63 N.E.2d at 238, 239.

²⁹ 15 Ohio App. 395 (1921).

prevent in some degree encroachment by stock kept on the other side of the fence. Besides, when a farm is fenced on one side it requires just that much less exercise of muscle and outlay of money to complete an entire enclosure, which is generally necessary to the proper cultivation of the tract. Every rod of partition fence added to a tract of land which is under cultivation and is intended for cultivation adds that much to the value of the farm. It is no argument for the landowner to say that because he does not want a fence, and will take all chances from straying livestock, the fence will be of no benefit or value to his land. Except in cases where the partition fence will be of no benefit, as when the land is wild and uncultivated and is to remain so, the owner must build his fences whether he regards them as of any benefit or not.³⁰

The court concluded that where land is cultivated (in other words, used for an agricultural purpose) and adjoined by land occupied by livestock, the cultivated land is presumed to benefit from the enclosure. Furthermore, the decision of benefit is not a subjective one to be made by the crop-farming landowner.

In 1969, the Supreme Court of Ohio considered the state's partition fence statute in *Glass v. Dryden*,³¹ and determined that the statute was constitutional, even where one of the adjoining properties was not used for any type of agricultural purpose. Glass owned two parcels of real estate in Huntington Township, Ohio, neither of which was used for agricultural purposes. Her neighbor, Cooper, also owned real estate in the Township and utilized his property for agricultural purposes, as well as the raising of cattle. Cooper desired to construct a new fence between their properties and, pursuant to Ohio's cost-share provision, sought financial contribution from Glass. Glass felt she would not benefit from the fence because her property was not used for agricultural purposes and was in the process of being divided into lots for residential and recreational purposes.

The Trustees of Huntington Township viewed the property and made an assignment requiring each of the parties to share equally in the construction and maintenance of the fence. Glass subsequently commenced an action, seeking an injunction.

The court denied Glass' petition to enjoin the Township from proceeding on their order. A further appeal to the Court of Appeals of Ohio resulted in the appeals court reversing the trial court and granting an injunction to Glass. The case was ultimately heard by the Ohio Supreme Court.

The Supreme Court of Ohio reversed the appeals court and decided that the trial court had been correct in denying the injunction. The court analogized the order to build and maintain half of the fence to a special assessment against real property and determined that, given a public improvement of some nature, both properties received a benefit. The court stated:

³⁰ *Id.*

³¹ 248 N.E.2d 54 (Ohio 1969).

True, a partition fence is not a public improvement in the sense that the public uses it directly. Yet, as Judge Johnson conceded in Zarbaugh, the extent that '(t)he annoyance and inevitable trespassing upon adjoining fields and crops which would result from the absence of a fence' is prevented, the fence inures to 'the ulterior public advantage.' And, to the extent that the advantage inures to private property immediately adjacent to the fence, some benefit thereto may be presumed until the contrary is shown. Even in this case it appears that [Glass] has been vexed by damage from her adjoining owner's cattle straying onto her premises.³²

Although the Ohio statute contained an exception where the adjoining land was "laid out into lots," the court held that Glass failed to meet the exception or prove that her land would not be benefited by the addition of the fence.³³ Even though an agricultural use was not contemplated by the delinquent landowner, until the land was laid out into lots, the statutory exception was not applicable. A benefit to the landowner was presumed, and the statute was thus found constitutionally valid.

Iowa courts examined the state's partition fence statute in *Gravert v. Nebergall*.³⁴ There, the Iowa Supreme Court found the statute constitutional in application to adjoining landowners using the land for agricultural purposes.

The Graverts lived just within the city limits of Tipton, Iowa, and owned 12 acres of land, nine of which were leased out for crop farming. The Nebergalls were neighbors to the Graverts but lived just outside the city limits of Tipton in Center Township on 25 acres of land, most of which was used for raising miniature horses. A fence formerly existed between the two properties, dividing as well the City and Township, but it had fallen into disrepair. A dispute arose when the Nebergalls requested that the Graverts share in the cost of constructing and maintaining a new partition fence. When the Center Township trustees, acting as fence viewers, ordered both the Graverts and the Nebergalls to maintain separate portions of the fence, the Graverts appealed.

The trial court found in favor of the Graverts, holding that application of the law requiring forced contribution by both neighbors in the construction and maintenance of the partition fence was generally authorized by law but was unconstitutional under the circumstances presented here. The court stated:

[A] partition fence between abutting landowners, one rural and suited or used for the raising of livestock and the other city and prohibited from such use, confers no benefit to the latter and provides the former with a specific benefit unrelated to any legitimate governmental interest,

³² *Id.* at 56.

³³ *Id.* at 56-57.

³⁴ 539 N.W.2d 184 (Iowa 1995).

particularly in light of the underlying obligation of the livestock raiser to protect the general public from his animals.³⁵

The trial court concluded that the application of the partition statute to the facts before it violated the Fifth and Fourteenth Amendments to the United States Constitution, as well as, similar provisions in the Iowa Constitution.

The Iowa Supreme Court disagreed, indicating that the police power of the state was sufficient to authorize such legislation. The court found that while other jurisdictions were split on the issue, it was persuaded that even though the livestock owner would be the primary beneficiary under the law, benefits would also inure to the non-livestock owner neighbor. The court held that the fence law was reasonably necessary to further a variety of legitimate public interests, and quoted with approval the same factors cited by the trial court in *Choquette v. Perrault*.³⁶

The court noted that to properly comply with constitutional law, benefits need not be distributed between the parties equally. Noting that compliance with the fence law would undoubtedly require the Graverts to expend substantial sums of money, the court found that “a law does not become unconstitutional merely because it works a hardship.”³⁷ Finally, the court observed that should its decision appear oppressive or unfair, the appropriate venue for change would, of course, be the state legislature.³⁸

A Minnesota court considered a constitutional challenge to its forced-share partition fence statute in *In re Bailey*.³⁹ Relying heavily on the *Glass* decision, the court ruled in favor of the party seeking contribution.

Bailey owned approximately 500 acres of land used for cervidae (deer) farming. The Feldmans owned property adjoining Bailey’s property. It is unclear from the opinion for what purpose the Feldmans’ property was used. Bailey sought to construct a fence around his property and asked for contribution from the Feldmans pursuant to the Minnesota statute.

The County Commission charged with implementing the Minnesota fence law determined that it was appropriate to require the Feldmans to contribute toward the construction and maintenance of the fence. Ultimately, it was determined by the appointed fence viewers that, to keep the cervidae confined, a fence 96 inches tall was required, to which the Feldmans were required to contribute.

³⁵ *Id.* at 186 (quoting trial court).

³⁶ *Id.* at 188 (citing *Choquette*, 569 A.2d 455, 457-58 (Vt. 1989)).

³⁷ *Id.* (citations omitted).

³⁸ *Id.*

³⁹ 626 N.W.2d 190 (Minn. Ct. App. 1990).

On appeal by the Feldmans, the Commission's orders were affirmed. The Court of Appeals of Minnesota held that contribution required under the fence law of Minnesota was reasonably necessary to achieve the public purpose of confining animals, was not unduly oppressive to adjoining landowners, and accordingly, a valid exercise of the police powers of the state. The court quoting from the case *Glass v. Dryden* stated:

We find the reasoning in *Glass* persuasive. [The Feldmans] have asserted that the partition fence between their property and Bailey's property will not benefit their property. In fact, [the Feldmans] argue that their property will be adversely affected, because the fence will restrict wildlife movement in the area. [The Feldmans] have not presented any evidence in support of these assertions. We find that [the Feldmans] will be benefited in several ways by the application of Minnesota's partition fence statute including freedom from intrusion by neighboring livestock and increased privacy. Given these benefits, we find that Minnesota's partition fence law is not unduly oppressive. . . .⁴⁰

Thus, as in Ohio and Iowa, Minnesota found benefits flowing from the construction of partition fences between rural landowners sufficient to justify the application of the statute.

2. Statutes Held Invalid As Applied

A New York court considered the constitutionality of its partition statute in *Sweeney v. Murphy*⁴¹ in 1972. The court found the statute unconstitutional in its application to a landowner who, while utilizing part of his land in an agricultural capacity, did not keep livestock. As a result, the statute was not reasonably necessary to further any legitimate public purposes and was therefore an oppressive and unconstitutional application of the statute.

The Murphys owned 158 acres of rural New York land on which they kept no livestock and tilled a mere 10 acres. The property was abutted on the north and east by 200 acres owned and operated as a dairy farm by Sweeney. Sweeney grazed approximately 110 milking cows on the land. The New York statute in effect at the time contained a shared-cost provision: "Each owner of two adjoining tracts of land . . . shall make and maintain a just and equitable portion of the division fence between such lands, unless both of said adjoining owners shall agree to let their lands lie open, along the division line"⁴²

The statute thereby obligated the Murphys to maintain (as the fence existed but was in a state of disrepair) one-half of the 2,200 foot section of fence dividing the plaintiffs' and

⁴⁰ *Id.* at 196.

⁴¹ 334 N.Y.S.2d 239 (N.Y. App. Div. 1972), *aff'd.*, 294 N.E.2d 855 (N.Y. 1973).

⁴² *Id.* at 241 (referring to Section 303 of the Town Law).

defendants' property. The Murphys refused to repair or maintain their part of the fence and instituted an action to have the statute declared unconstitutional.

At the trial court level, the Murphys' motion for summary judgment and Sweeney's motion for dismissal were denied. On appeal, the court granted the Murphys' motion for summary judgment, finding that the statute was not reasonably necessary to a legitimate purpose and was thus unconstitutional.

In reaching its decision, the court reiterated the long-established presumption in favor of the validity of legislative enactments and the fact that it was loathe to strike down a law as unconstitutional unless the invalidity of the law was established beyond a reasonable doubt. The court went on to say that any intrusion by the state into the liberties of individuals under the police power granted to the state must bear "a reasonable relationship to, some proportion to, the alleged public good on account of which this restriction on individual liberty would be justified."⁴³ The test used in determining the legitimacy of the state action was laid down in *Lawton v. Steele*: "it must appear – First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."⁴⁴

In summarily striking down the law as unconstitutional in its application to the plaintiffs, the court indicated that under this test, while the law may have served a valid purpose at one time, it no longer served a legitimate state interest. Accordingly, the court held that the law was arbitrary and confiscatory, and would deprive the plaintiffs of their property for an item they neither needed nor wanted.

In 1989, the Supreme Court of Vermont considered its own partition fence statute in *Choquette v. Perrault*⁴⁵ and reached a similar result. The applicable portion of the Vermont statute provided that "owners ... of adjoining lands, where adjoining lands are actually occupied, are responsible for making and maintaining 'equal portions' of the division fence between their lands."⁴⁶

The Choquettes were dairy farmers and grazed approximately 265 milking cows on a 310-acre pasture. Their property abutted the Perraults' property, which consisted of 50 wooded acres not used for farming purposes. Because the fence between the properties was in disrepair, the Choquettes' cows repeatedly escaped onto the Perraults' land. To alleviate the problem, the Choquettes requested that the Perraults rebuild an 850 foot portion of the fence. The Perraults refused the request. The Choquettes made the repairs themselves and subsequently sought to recover their expenses from the Perraults.

⁴³ *Id.* (relying on *Fenster v. Leary*, 229 N.E.2d 426, 429 (N.Y. 1967)).

⁴⁴ *Id.*

⁴⁵ 469 A.2d 455 (Vt. 1989).

⁴⁶ *Id.* at 457 (referring to 24 V.S.A. § 3802).

At the trial court level, judgment was for the Choquettes. Rejecting *Sweeney v. Murphy*⁴⁷ and relying on the rational basis standard, the trial court determined that the Vermont statute imparted benefits sufficient to make it neither arbitrary nor capricious. Those benefits included:

- (1) Freedom from unwanted intrusion by a neighbor's cattle.
- (2) Freedom from trespassing neighbors and an increase in privacy.
- (3) Elimination of "devil's lanes," unoccupied spaces between separate fences constructed by hostile neighbors.
- (4) Diminution of lawsuits arising out of damage caused by straying cows.
- (5) Discouragement of litigation by clearly marking the boundaries of rural lands.
- (6) Increase in value of all land by fostering the continued vitality of agriculture.⁴⁸

On appeal, the Supreme Court of Vermont considered both *Sweeney v. Murphy* and *Glass v. Dryden* and found:

The test, then, in determining a law's constitutionality under Article 7 when no fundamental right or suspect class is involved, is whether the law is reasonably related to the promotion of a valid public purpose. Employing this standard of review, we hold that [the partition fence statute] is unconstitutional as applied to persons who own no livestock.

Notwithstanding the trial court's effort to identify potential benefits accruing to the public and to adjoining landowners without livestock, the simple truth is that the fence law was enacted primarily to benefit landowners with livestock.

...

The argument that a landowner without livestock benefits to the extent that he or she is protected by straying livestock is delusive, considering the fact that, absent the statute, the liability for trespassing livestock lies solely with the owner of the livestock.⁴⁹

V. Survey of Current Partition Fence Statutes in the Midwest

The authors have identified three categories of partition fence statutes currently in place in the Midwest: livestock provisions, agricultural provisions, and "without regard to use" provisions. The former seems more likely than the latter to survive constitutional challenges, especially in the light of the changed rural landscape. To understand the affect of these statutes on adjoining landowners, it is important to remember that in each

⁴⁷ 334 N.Y.S.2d 239 (N.Y. App. Div. 1972).

⁴⁸ 469 A.2d at 457 (quoting the lower court's decision).

⁴⁹ *Id.* at 459.

of the Midwestern states, fencing-in is the rule and, generally, liability for damage by straying livestock is attached to the owner of the livestock.

A. Livestock Provisions

The category of partition fence statutes most likely to survive a constitutional challenge are those that require cost-sharing only where at least one of the parties raises livestock on his property, such as the situation described in Examples 1 and 2 above.⁵⁰ Many of the cases involving partition fences where at least one of the landowners has livestock speak to the benefits accruing to the each of the landowners. These benefits have been found sufficient to support the cost-sharing provisions of these statutes.

Missouri

Missouri amended its fence law on August 28, 2001. The new law, inter alia, provides that forced contribution is required only if the neighboring landowner also has livestock placed against the division fence.⁵¹ In other words, property owners cannot be forced to pay for the construction or maintenance of a fence if they do not have livestock placed against that fence at the time of construction. If the property owner subsequently decides later to place livestock against the fence, he is generally responsible for paying half of the construction cost to his neighbor.

Procedurally, the livestock owner builds the fence with his own money and then records the bill with the circuit judge, who then records it on both landowners' deeds. If the neighbor decides later to place livestock against the fence, he is generally responsible for paying half the construction cost to his neighbor.

The new law does not apply in all Missouri counties. Certain counties previously adopted a local option that requires that neighbors can be forced to contribute to one-half the building and maintenance of a boundary fence as long as one or the other has need for it, even if livestock is against neither side.⁵²

Michigan

Michigan law requires that only the landowner who constructs the fence is required to pay for its construction and maintenance.⁵³ The adjoining landowner (or tenant of the landowner) is not required to contribute to those costs unless and until such time as he

⁵⁰ See *supra* Part II, at p.2.

⁵¹ MO. REV. STAT. § 272.060.

⁵² Fourteen Missouri counties currently observe the local option: Bates, Clinton, Daviess, Harrison, Knox, Linn, Mercer, Newton, Putnam, Schuyler, Scotland, Shelby, St. Clair, and Sullivan.

⁵³ MICH. COMP. LAWS § 43.53(1) ("The owner of real property who constructs a fence shall pay for the construction and maintenance of that fence").

subsequently begins to use the fence for restraining or containing animals.⁵⁴ At that time, the adjoining property owner must compensate his neighbor who constructed the fence for his own “proportionate share of the current value of the fence.”⁵⁵ Alternatively, the adjoining property owner may build his own fence.⁵⁶

South Dakota

In South Dakota, landowners are generally liable for one-half of the expense of erecting and maintaining a partition fence between their properties. However, no forced-contribution is required of either owner “if neither keeps livestock on the affected tract of land and neither derives any substantial benefit from the fence for a period of five years from the date of erection or repair of the fence.”⁵⁷

South Dakota’s right-hand rule is statutorily delineated. Unless adjoining landowners otherwise agree, if a partition fence is required, “each owner of adjoining lands shall build that half of the fence which shall be upon his right hand when he stands upon his own lands and faces the line upon which the proposed fence is to be built.”⁵⁸

B. Agricultural Provisions

This category of statutes requires cost sharing when one of the properties is used for any type of farming or agricultural purpose. Generally, and for the purpose of this paper, agricultural use includes the raising of livestock or the growing of trees or crops for sale. As discussed above, when liability for straying cattle is on the owner, the benefit of the partition fence to the adjoining crop farmer or non-farming landowner is barely perceptible. In the case where neither landowner has livestock against the fence, but one farms the land, such as in Examples 3 and 4,⁵⁹ the benefit to the other crop farmer or non-farming landowner is non-existent.

Wisconsin

Wisconsin law, which applies in agricultural areas, provides that if either adjoining property of two neighbors is used for farming or grazing, and unless the landowners otherwise mutually agree, a partition fence is required. The terms *farming* and *grazing* are not statutorily defined. The neighbors share the cost of building and maintaining the fence. “The respective occupants of adjoining lands used and occupied for farming or

⁵⁴ *Id.* at § 43.53(2).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ S.D. CODIFIED LAWS § 43-23-1.

⁵⁸ *Id.* at § 43-23-2.

⁵⁹ See *supra* part II, at pps. 2-3.

grazing purposes, and the respective owners of adjoining lands when the lands of one of such owners is used and occupied for farming or grazing purposes, shall keep and maintain partition fences between their own and the adjoining premises in equal shares so long as either party continues to so occupy the lands [. . .]⁶⁰

Wisconsin's partition fence law applies when subdivisions lie next to agricultural land and Wisconsin law specifically authorizes town boards to require subdividers to construct half of the fence on subdivision land adjoining land used for farming or grazing as a condition of plat approval by the town.⁶¹ Absent such a requirement, the individual landowners are responsible for their portions of the partition fence.

A Wisconsin attorney general opinion addressed the issue of whether the owners of adjoining lands (one used for farming purposes and the other for forest crop lands) can be compelled to share in the cost of erecting and maintaining a partition fence.⁶² The attorney general concluded that: "It is the opinion of this office that under the provisions of the statute . . . the owner of lands adjoining other lands which are used and occupied for farming purposes must share in the maintenance of the partition fences, whether or not the lands first mentioned are forest croplands."⁶³

Indiana

Indiana amended its fence law in 2003 to essentially provide that the duty to build and maintain partition fences does not apply to a fence separating two adjoining parcels of property unless at least one of the adjoining parcels is agricultural land.⁶⁴ Agricultural land is statutorily defined as land that is (1) zoned or otherwise designated as agricultural land, (2) used for growing crops or raising livestock, or (3) reserved for conservation.⁶⁵ Previously, compelled contribution was the rule regardless of use.⁶⁶

C. Without Regard to Use Provisions

In some states, forced-contribution is required regardless of how the land on either side of the fence is used. These types of statutes would be the least likely to pass constitutional muster, since the rationale for constructing the fence is indiscernible. Perhaps, for that reason, a number of states with "without regard to use" provisions

⁶⁰ WIS. STAT. § 90.03.

⁶¹ *Id.* at § 90.05(2).

⁶² 24 Op. Att'y. Gen. 128 (1931).

⁶³ *Id.*

⁶⁴ IND. CODE § 32-26-9-2.

⁶⁵ *Id.* at § 32-26-9-0.5.

⁶⁶ *Id.* at § 32-10-9-2 (repealed).

statutorily allow for exceptions to the general rule of forced-contribution under certain circumstances.

Iowa

In Iowa, the current statute provides that “the respective owners of adjoining tracts of land shall upon request of either owner be compelled to erect and maintain partition fences, or contribute thereto, and keep the same in good repair [. . .]⁶⁷ As noted above, in *Gravert v. Nebergall*,⁶⁸ the Iowa Supreme Court found the statute constitutional in application to adjoining property owners, one of whom raised miniature horses and the other crops. Whether the court would reach a similar result in a case not involving agricultural activities is less certain.

Illinois

In Illinois:

When any person wishes to inclose his land, located in any county having less than 1,000,000 population according to the last preceding federal census and not within the corporate limits of any municipality in such county, each owner of land adjoining his land shall build, or pay for the building of, a just proportion of the division fence between his land and that of the adjoining owner and each owner shall bear the same proportion of the costs of keeping the fence maintained and in good repair.⁶⁹

The “just proportion” language in the statute ameliorates the apparent harshness of the “without regard to use” type statutes. In *In re Wallis*,⁷⁰ for example, a landowner without livestock lived in a nursing home and was on public aid. The fence viewers ordered the neighboring landowner, who wanted to run livestock on the adjoining property, to assume the responsibility of maintaining the entire partition fence. The fence viewers determined that the nursing home-bound landowner would receive no benefit from the fence and therefore required him only to keep brush back three feet from his side of the fence.

The adjoining landowner contended that the Illinois statute required landowners to equally divide the cost of maintaining a fence if they could not agree on appropriate

⁶⁷ IOWA CODE § 359A.1A.

⁶⁸ *Gravert v. Nebergall*, *supra* notes 34-38 and accompanying text. See also *Sinnot v. District Court*, 207 N.W. 129, 131 (Iowa 1926). Ironically, as this case points out, prior to amendment, the statute specifically required forced-contribution only where each owner derived a benefit or revenue from his land.

⁶⁹ 765 ILL. COMP. STAT. 130/4.

⁷⁰ *In re the Estate of Wallis*, 559 N.E.2d 423 (Ill. App. 1995).

proportions. Upon finding the statutory language unambiguous, the court determined that the nature of the “just proportion” phrase “indicates its intended flexibility so as to be able to consider the circumstances in each individual case.”⁷¹

Allocating the costs of maintaining a fence between adjacent landowners on an equal basis would result in undue hardship in certain cases. For example, a parcel of one acre owned by an individual on a fixed retirement income who merely homesteads on the parcel might be located adjacent to a 1,000-acre parcel owned by a wealthy agribusiness engaged in livestock production. The homesteader should not be required to evenly split the cost of a section of high-tech fence built by the agribusiness to divide its parcel from the homesteader's parcel.⁷²

Nebraska

The rule in Nebraska is as follows: “When two or more persons shall have lands adjoining, each of them shall make and maintain a just portion of the division fence between them; PROVIDED, HOWEVER, this shall not be construed to compel the erection and maintenance of a division fence where neither of the adjoining landowners desires such division fence.”⁷³

There do not appear to be any recorded cases of constitutional challenges to the Nebraska statute; however, one would suspect that if challenged, reference might be made to Illinois cases interpreting the “just proportion” clause.

Minnesota

Generally, Minnesota law requires a forced contribution by an adjoining landowner where the land is “improved and used,” regardless of the type of use. “If all or a part of adjoining Minnesota land is improved and used, and one or both of the owners of the land desires the land to be partly or totally fenced, the land owners or occupants shall build and maintain a partition fence between their land in equal shares.”⁷⁴ No explanation is provided on what constitutes a sufficient improvement and use; however,

⁷¹ *Id.* at 428.

⁷² *Id.*

⁷³ NEB. REV. STAT. § 34-102.

⁷⁴ MINN. STAT. § 344.03. See also *Rice v. Kringler*, 517 N.W.2d 606, 608 (Minn. App. 1994). But see MINN. STAT. § 383C.809 (exempting certain St. Louis County landowners who do need partition fences from the requirements of the fence law), MINN. STAT. § 344.011 (allowing town boards to pass a resolution exempting adjoining properties from the obligations of the fence law when those lands, when taken together, contain less than 20 acres), and MINN. STAT. § 344.20 (providing an option for towns to adopt their own fence law policies).

the Minnesota Court of Appeals has held that pasturing cattle is a sufficient improvement and use under that statute.⁷⁵

Minnesota courts have upheld the constitutionality of the state's partition fence law. Most recently, the Court of Appeals in *In re Bailey*,⁷⁶ reaffirmed the constitutionality of the law. "We believe it is clear that the partition fence law serves the broad purposes of mediating boundary, fence, and trespass disputes by requiring adjoining landowners to share the cost of a partition fence."⁷⁷ The court adopted a position similar to that in Ohio, presuming the adjoining property owner is benefited by the fence, unless he can prove sufficient evidence to the contrary.⁷⁸

North Dakota

In North Dakota, forced contribution is generally the rule: "The occupants and coterminous owners of lands inclosed with fences are mutually and equally bound to maintain the partition fences between their own and the next adjoining enclosures unless one of such owners chooses to let his land lie open."⁷⁹

"When unenclosed ground is enclosed, the owner or occupant thereof shall pay one-half of the value of each partition fence standing upon the line between his land and the enclosure of any other owner or occupant."⁸⁰

If a person shall determine not to fence any of his lands adjoining a partition fence . . . he shall not be required to maintain any part of the fence during the time his lands are open.⁸¹

Kansas

The Kansas statute provides that:

No person not wishing his land enclosed, and not occupying or using it otherwise than in common, shall be compelled to contribute to or erect or maintain any fence dividing between his land and that of an adjacent

⁷⁵ Brom v. Kalmes, 230 N.W.2d 69 (Minn. 1975).

⁷⁶ 626 N.W.2d 190 (Minn. Ct. App. 2001).

⁷⁷ *Id.* at 195.

⁷⁸ *Id.* at 196.

⁷⁹ N.D. CENT. CODE § 47-26-05.

⁸⁰ *Id.* at § 47-26-16.

⁸¹ *Id.* at § 47-26-17.

owner; but when he encloses or uses his land otherwise than in common, he shall contribute to the partition fence.⁸²

By its language, and in the opinion of the Kansas attorney general, two conditions must be satisfied before the statute applies: the land must be used “in common,” and the complaining landowner does not want the fence. Unfenced tracts are not used in common when they are used for different purposes (i.e., crop raising and cattle grazing). Thus, when a crop farmer (or other non-livestock owner) adjoins a livestock owner (as in Example #2, above), or when a crop farmer adjoins a non-agricultural use landowner (as in Example #3, above) both adjoining landowners must contribute an equal share to the building or maintaining of a partition fence because the tracts are not used in common.⁸³

Ohio

In Ohio, if one landowner wants to construct a partition fence, the neighboring landowner must share equally in the cost of building the fence. Specifically, the law states that “[t]he owners of adjoining lands shall build, keep up and maintain in good repair, in equal shares, all partition fences between them....”⁸⁴ The law appears harsh when examined from the perspective of a landowner who doesn’t plan to use the fence. But in Ohio, with a few exceptions, a landowner must share in the costs even if she is not a farmer, does not have livestock, or never intends to use the fence. The fence law clearly states: “The fact that any land or tract of land ... is not used, adapted, or intended by its owner for use for agricultural purposes shall not excuse the owner thereof from the obligations imposed by this chapter....”⁸⁵

However, the Ohio Supreme Court has developed an exception to the partition fence law that addresses the perceived unfairness of the law. The duties are extinguished “if the cost to build or maintain the fence ‘exceed[s] the difference between the value of the land before and after the repair or construction of the fence.’ In other words, if the cost of construction, maintenance, or repair of a partition fence exceeds the beneficial value of the fence to one of the adjoining landowners....”⁸⁶

VI. Conclusion

⁸² KAN. STAT. ANN. § 29-309.

⁸³ See Kan. Att’y Gen. Op. No. 83-43 (Mar. 25, 1983) and 87-28 (Feb. 16, 1987). See also ROGER A. MCEOWEN, KANSAS STATE UNIVERSITY (C-663), KANSAS FENCE LAW (Apr. 2004).

⁸⁴ OHIO REV. CODE ANN. § 971.02.

⁸⁵ *Id.*

⁸⁶ Hickory Grove Golf Club, Inc. v. Hedrick, No. 2002-A-0031, 2003 WL 21750632, at *4 (Ohio Ct. App. July 25, 2003).

Historically, most fence laws were written to facilitate the competing interests of an agricultural society. As the court stated in *Choquette*.⁸⁷

In the context of the land-use patterns of the nineteenth century, Vermont's fence law served the broad public interest. Though not all Vermonters were engaged in agricultural pursuits, the land was predominantly open and farmed, and most rural landowners were also livestock owners. This is not the case today. Much of the open farmland that existed at the turn of the century has reverted to woodlands or otherwise been developed. We can no longer assume that the fence law affects livestock owners almost exclusively. As a result of changing land-use patterns, the law more and more often applies to landowners without livestock. In such situations, the fence law is burdensome, arbitrary and confiscatory, and therefore cannot pass constitutional muster.⁸⁸

Do good fences make good neighbors? In his poem *Mending Wall*, Robert Frost and his neighbor used their land to raise apple and pine trees, respectively. Frost's neighbor thought the fence a good idea, but Frost was not convinced:

There where it is we do not need the wall:
He is all pine and I am apple orchard.
My apple trees will never get across
And eat the cones under his pines, I tell him.
He only says, "Good fences make good neighbours."⁸⁹

Perhaps, as time goes by, more and more courts and legislatures will be persuaded by these realities, and the above-mentioned conclusion will be embraced. The New York and Vermont cases cited herein appear to confront the changing face of rural America, while the other court decisions discussed seem to cling to an out-of-date view of our rural environment and, like Frost's neighbor, a questionable rationale for fence-building. Only time will tell which will ultimately prevail.

⁸⁷ 569 A.2d. 455 (Vt. 1989).

⁸⁸ *Id.* at 460.

⁸⁹ ROBERT FROST, *MENDING WALL* (North of Boston, 1915).

Appendix A

STATE	Farms number 1952	Land in Farms acres 1952	Farms number 2002	Land in Farms acres 2002	% change farms number	% change acres number
Illinois	192,000	31,600,000	76,000	27,700,000	-66.6	-12.3
Indiana	162,000	19,900,000	63,000	15,400,000	-61.3	-22.7
Iowa	203,000	34,900,000	92,500	32,600,000	-54.6	-6.6
Kansas	129,000	50,500,000	63,000	47,400,000	-51.2	-6.1
Michigan	151,000	17,500,000	52,000	10,400,000	-65.7	-40.6
Minnesota	176,000	33,300,000	79,000	28,400,000	-55.2	-14.7
Missouri	222,000	35,600,000	107,000	29,800,000	-51.8	-16.3
Nebraska	105,000	48,300,000	52,000	46,400,000	-50.5	-3.9
N. Dakota	64,600	42,700,000	30,000	39,400,000	-53.7	-7.7
Ohio	192,000	21,000,000	78,000	14,700,000	-59.5	-30
S. Dakota	65,500	45,200,000	32,500	44,000,000	-50.5	-2.6
Wisconsin	165,000	23,500,000	77,000	15,900,000	-53.4	-32.3
Total	1,827,100	404,000,000	802,200	352,100,000	-56.1	-12.8