

RIGHT TO FARM STATUTES AND THE CHANGING STATE OF MODERN AGRICULTURE

ROSS H. PIFER†

I. INTRODUCTION: PROTECTING FARMS FROM INCREASING URBANIZATION

In an idyllic view of agriculture from years gone by, farms were situated among other farms in stable rural communities where all of the residents of these communities accepted—and even embraced—the agricultural activities that were taking place in their midst. While this nostalgic version of agriculture may never have been completely accurate, it certainly is not the norm for agriculture in the twenty-first century where farms often are located among residential and commercial development. This national transformation from a predominately rural society to one that is increasingly suburban and urban in nature has created a number of challenges for agricultural operations.¹ The sights, sounds, and odors emanating on farms create the potential for conflict (and litigation) with neighbors.² These neighborhood conflicts also often lead to increased regulation at the local level.³ Additionally, the pressures of encroaching residential and commercial development often cause an increase in real estate values and, correspondingly, the real estate taxes that are due on agricultural lands.⁴ All of these factors can impose a strain on the economic viability of farms as well as provide an incentive for farmers to exit agricultural production.⁵

† Clinical Professor of Law, Director of the Agricultural Law Resource and Reference Center, Director of the Rural Economic Development Clinic, Penn State Law. B.S., The Pennsylvania State University; J.D., The Dickinson School of Law; LL.M., The University of Arkansas School of Law. The copyright for this article has been retained by the author, all rights reserved.

1. See generally Margaret R. Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 97 (1983) (describing the population movement from urban to rural areas in the post-World War II era).

2. See *id.*

3. See *id.*

4. See ROBERT E. COUGHLIN ET AL., NAT'L AGRIC. LANDS STUDY, THE PROTECTION OF FARMLAND: A REFERENCE GUIDEBOOK FOR STATE AND LOCAL GOVERNMENTS 17 (1981), available at <http://babel.hathitrust.org/cgi/pt?id=mdp.39015009285530;view=1up;seq=5> (noting that population migration from urban to rural areas often leads to increased demands for public services which has the effect of increasing the tax burden on property owners).

5. Jacqueline P. Hand, *Right-to-Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. PITT. L. REV. 289, 292-93 (1984).

In light of the threats to farms posed by increasing urbanization, policymakers must decide whether any action is needed to address this issue. Should farms receive some type of protection or preference to increase their chances for economic success? Should farms be treated differently than other non-agricultural businesses? Generally speaking, state legislatures have answered these questions in the affirmative, finding that farms are entitled to a number of protections and preferences.⁶ Although each state has addressed this issue differently, there are a number of common themes in the various state approaches. Most states utilize a variety of statutory tools.⁷ Right to Farm laws provide protection from nuisance lawsuits and ordinances.⁸ Agricultural district statutes define areas that are particularly well-suited for agriculture where farms receive specified protection.⁹ Preferential tax assessment programs lower the real estate taxes that are due on agricultural land.¹⁰ These and other related programs may be guided by a desire to preserve agricultural operations as an economic engine, as a source of food security, or as an important component of local heritage.¹¹ Regardless of the underlying motivation, these programs have the effect of increasing the economic viability of farms.

This Article will review one of these statutory tools that can be used to protect farms— Right to Farm statutes. Most Right to Farm statutes were enacted in the late 1970s and early 1980s, during a time when agriculture was markedly different than it is today. In recent years, many farms have utilized technological advancements and the resulting efficiencies to become larger while other, often smaller farms, have utilized opportunities for direct marketing to become prof-

6. Nicholas Clark Butino, *An Empirical Analysis of Agricultural Preservation Statutes in New York, Nebraska, and Minnesota*, 39 B.C. ENV'TL AFF. L. REV. 99, 104 (2012).

7. See Jennifer L. Beidel, *Pennsylvania's Right-to-Farm Law: A Relief for Farmers or an Unconstitutional Taking?*, 110 PENN ST. L. REV. 163, 164 (2005) (describing Right to Farm statutes as "one piece of a larger puzzle of statutes designed to preserve land for agricultural use and to remedy conflicts between farmers and their non-farm neighbors").

8. Alexander A. Reinert, *The Right to Farm: Hog-Tied and Nuisance Bound*, 73 N.Y.U. L. REV. 1694, 1697 (1998).

9. See Joshua Wilkins, *Clean & Green: Tidying Up the Farm Tax Subsidy*, 115 PENN ST. L. REV. 473, 477 (2010). (describing the application of Pennsylvania agricultural district statute, the Agricultural Area Security Law).

10. *Id.* at 473.

11. See Garrett Chrostek, *A Critique of Vermont's Right-to-Farm Law and Proposals for Better Protecting the State's Agricultural Future*, 36 VT. L. REV. 233, 237 (2011) (acknowledging the "special status" that agriculture holds in society as well as citing a variety of benefits provided by agriculture); see also Katherine Pohl, *Fruit of the Vine: Understanding the Need to Establish Wineries' Rights Under the Right to Farm Law*, 116 PENN ST. L. REV. 223, 228 (2011) (noting that food security concerns are raised by the increasing loss of cropland).

itable. States have enacted Right to Farm statutes to provide protection to farms, but with these changes in modern agriculture, questions are raised as to what constitutes an agricultural operation or activity that is entitled to statutory protection. This Article will provide a brief discussion of Right to Farm statutes generally. The Article will then address two recent legal developments that sought to expand—in different directions—the protections that are provided by Right to Farm statutes. The Article will conclude by examining whether Right to Farm statutes have kept pace with the changes in modern agriculture in light of these recent legal developments.

II. PROTECTIONS GRANTED THROUGH RIGHT TO FARM STATUTES

Prior to the enactment of Right to Farm statutes, general nuisance common law resolved conflicts that existed between farms and their neighbors.¹² Pursuant to nuisance law, a landowner cannot use his land in a manner that unreasonably interferes with another landowner's use and enjoyment of his land.¹³ As such, the benefits and harms created by farms were considered in balancing the relative rights of the farmer and his neighbor.¹⁴ Historically, farms received protection from nuisance lawsuits through the application of the "coming to the nuisance" defense.¹⁵ Under this common law defense, farmers were protected from the nuisance claims asserted by neighbors as long as the farm was in operation before the complaining neighbor moved to the area.¹⁶ In essence, one who came to the nuisance was foreclosed from complaining about the nuisance. While this common law nuisance defense provided substantial protection to farmers, it was not consistently applied where the character of agricultural communities had changed due to urban and suburban encroachment. Two notable cases demonstrated that farms could not rely on this doctrine to protect them against nuisance lawsuits. In 1963, the Massachusetts Supreme Court forced the liquidation of a hog farm by ruling that the farm constituted a nuisance, even though the hog farm was in existence before the neighbors came to the nuisance.¹⁷ Similarly, in

12. See Beidel, *supra* note 7, at 164 n.8 (noting that agricultural operations have faced nuisance laws since as early as 1610).

13. See Jesse J. Richardson, Jr., & Theodore A. Feitshans, *Nuisance Revisited after Buchanan and Borman*, 5 *DRAKE J. AGRIC. L.* 121, 122-24 (2000) (discussing nuisance law generally).

14. See *id.* at 123 (describing the factors that are considered in determining whether a particular activity constitutes a nuisance).

15. Grossman, *supra* note 1, at 108.

16. Terence J. Centner, *Governments and Unconstitutional Takings: When Do Right-to Farm Laws Go Too Far*, 33 *B.C. ENVTL. AFF. L. REV.* 87, 95 (2006).

17. *Pendoley v. Ferreira*, 187 N.E.2d 142, 146 (Mass. 1963).

1972, the Arizona Supreme Court ordered the relocation of a long-standing feedlot due to its impact on a newly established retirement community.¹⁸

As the coming to the nuisance defense began to prove an ineffective remedy for farms facing complaints from their neighbors, national concerns rose about the impact of the increasing loss of farmland through its conversion to other uses. In the late 1970s, the United States Department of Agriculture and the President's Council on Environmental Quality led an interagency governmental effort to understand the causes and effects of this loss of agricultural land.¹⁹ Even before the release of the final report from this National Agricultural Lands Study, states began to take steps to protect farms through the passage of Right to Farm statutes.²⁰ From 1978 through 1983, there was widespread adoption of Right to Farm statutes,²¹ and today, each of the fifty states has such a law in force.²² While the specific provisions vary from state to state, Right to Farm statutes provide farmers some preferential treatment for resolving farming-related conflicts between themselves and non-farming neighbors.

The core component of most Right to Farm statutes is the nuisance shield afforded to farmers— protection against nuisance litigation and protection against the application of ordinances that would classify farm activities as a nuisance.²³ In some instances, these statutes codify the coming to the nuisance defense,²⁴ but many Right to Farm statutes go significantly further by protecting farms from all nuisance complaints regardless of whether the objectionable farm activities predate or postdate the complaining neighbors' residency.²⁵

18. *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700, 706 (Ariz. 1972).

19. The governmental agencies participating in the National Agricultural Lands Study included the Council on Environmental Quality, the Department of Agriculture, the Department of Commerce, the Department of Defense, the Department of Energy, the Department of Housing and Urban Development, the Department of the Interior, the Department of State, the Department of Transportation, the Department of the Treasury, the Environmental Protection Agency, and the Water Resources Council. COUGHLIN ET AL., *supra* note 4, at 41.

20. Reinert, *supra* note 8, at 1696-97.

21. *Id.* at 1696.

22. *Id.* at 1695; see also Katherine Pohl, *Fruit of the Vine: Understanding the Need to Establish Wineries' Rights Under the Right to Farm Law*, 116 PENN ST. L. REV. 223, 229 (2011).

23. See generally Rusty Rumley, *A Comparison of the General Provisions Found in Right-to-Farm Statutes*, 12 VT. J. ENVTL. L. 1 (2010) (highlighting various provisions contained in state Right to Farm statutes throughout the nation).

24. See Centner, *supra* note 16, at 98-116 (describing incorporation of the coming to the nuisance defense into a Right to Farm statute as a common approach utilized by states).

25. See Centner, *supra* note 16, at 95 (describing incorporation of the coming to the nuisance defense into a Right to Farm statute as a common approach utilized by states); Centner, *supra* note 17, at 98-116 (describing several state Right to Farm statutes that

Recognizing that it is in the interests of all parties to avoid the conflicts that often lead to the filing of litigation, California recently enacted legislation that mandated notification of the state's Right to Farm statute prior to the conveyance of real estate located within one mile of a designated agricultural area.²⁶ This notification requirement seeks to ensure that new landowners have basic knowledge about the characteristics of the environment into which they are planning to move. Pursuant to this statutory requirement, prospective purchasers must be provided with a notification containing the following language:

[T]he property may be subject to the inconveniences or discomforts resulting from agricultural operations that are a normal and necessary aspect of living in a community with a strong rural character and a healthy agricultural sector. Customary agricultural practices in farm operations may include, but are not limited to, noise, odors, dust, light, insects, the operation of pump and machinery, the storage and disposal of manure, bee pollination, and the ground or aerial application of fertilizers, pesticides, and herbicides. These agricultural practices may occur at any time during the 24-hour day. Individual sensitivities to those practices can vary from person to person. You may wish to consider the impacts of such agricultural practices before you complete your purchase.²⁷

By informing potential farm neighbors that the realities of agriculture may not match their views of "country living," some conflicts may be avoided.²⁸ From a broader perspective, this California notification requirement is instructive as it paints a picture of the general factual scenarios in which most Right to Farm statutes are designed to provide protection. States have enacted these statutes to address complaints raised by those who are located in close proximity to farms as a result of on-farm activities that cause off-farm impacts. Additionally, as described in the California notification requirement, Right to Farm statutes generally have application to those practices that are

provide nuisance protection to farmers even where the residence of the complaining neighbors predate the operation of the farm).

26. This notification is mandated for any conveyance of property that is located within one mile of any farmland that is designated as Prime Farmland, Farmland of Statewide Importance, Unique Farmland, Farmland of Local Importance, or Grazing Land. The terms of this legislation became effective on January 1, 2009. CAL. BUS. & PROF. CODE § 11010(b)(17) (West 2009).

27. *Id.*

28. See generally Tiffany Dowell, *Daddy Won't Sell the Farm: Drafting Right to Farm Statutes to Protect Small Family Producers*, 18 SAN JOAQUIN AGRIC. L. REV. 127, 149-52 (2009) (discussing education and disclosure requirements present in several Right to Farm statutes).

involved directly with agricultural production. The listing of the activities and impacts associated with customary agricultural practices in the California notice appears to focus primarily on the raising of crops or livestock as opposed to the marketing of agricultural products.

Two recent legal developments have addressed attempts to expand the scope of protections afforded to farmers through Right to Farm statutes. In Virginia, legislation was considered that would have amended the state Right to Farm statute to provide greater protection for those agricultural producers engaged in direct marketing.²⁹ In North Dakota, on the other hand, voters have approved a state constitutional amendment that will provide protections for agricultural operations outside of the traditional nuisance context.³⁰

III. WHAT IS A FARM?—DEFINING ACTIVITIES PROTECTED UNDER RIGHT TO FARM STATUTES

In enacting Right to Farm statutes, state legislators have determined that farms are entitled to certain protections. But, in effectuating this policy, what exactly is considered to be a farm that is entitled to protection?³¹ Even where it may be clear that a particular farm would qualify generally to receive protections under the Right to Farm statute, does the farm receive protection for all of its actions or rather only for specific activities? Modern agricultural operations that utilize direct marketing and those that pursue agritourism opportunities provide particular difficulties in determining the precise extent of the protections that Right to Farm statutes provide to individual farms.

In order to increase the chances for economic success, a farmer may add value to his agricultural commodities by engaging in the further processing of these commodities. For example, an apple orchard may convert its apples into apple butter. In order to sell the further processed products, this farmer may need to operate a retail location. At this farm store, the farmer may sell non-agricultural products to supplement the revenue produced by his farm products. Thus, the apple orchard referenced above may offer books about apples for sale at its farm store in addition to the home-produced apple butter. In order to generate sufficient foot traffic at their retail locations, the farmer also may offer farm-based activities, such as harvest tours, or host events such as family reunions. Each of these activities, though not

29. H.R. 1430, Reg. Sess. (Va. 2013).

30. N.D. CONST. art. XI, § 29.

31. See Rumley, *supra* note 23 (discussing the definition of “agriculture” and “agricultural activities” in Right to Farm statutes).

constituting agricultural production, may be vital to sustaining the farm and preventing the loss of farmland.

The difficulties posed by applying Right to Farm statutes to farms that engage in further processing and direct marketing are illustrated by the operations of a typical winery.³² Many wineries are located on the grounds of vineyards that supply some or all of the grapes that will be processed into wine. The actions involved with the growing of grapes certainly are agricultural activities that should be protected under an applicable Right to Farm statute.³³ Similarly, many states would consider the processing of grapes grown on-site into wine also to be a protected agricultural activity.³⁴ But many wineries do not grow enough grapes to supply all of their needs.³⁵ If a winery relies on grapes purchased from off-site sources, does it lose any protection that it would receive under a Right to Farm statute? Is there a particular threshold of “home-grown” grapes that a winery must utilize for it to be considered as a farm that is entitled to Right to Farm protection? The typical actions utilized by wineries to market their products raise more questions. Most wineries rely extensively on on-site sales of wine.³⁶ In order to sell a sufficient volume of wine to sustain the operation, the winery needs to host events to attract customers to the winery.³⁷ Thus, wineries host concerts, weddings, and other activities.³⁸ Should these events be considered to be agricultural activities entitled to Right to Farm protection when they take place on a winery that grows its own grapes and processes its grapes into wine? Does it make a difference if the winery demonstrates that hosting these events is necessary for the economic viability of the winery?

Farms that engage in direct marketing and agritourism are a growing segment of modern agriculture.³⁹ As policymakers consider to what extent these farms are entitled to Right to Farm protection,

32. See generally Pohl, *supra* note 11 (detailing the treatment of wineries under state Right to Farm statutes).

33. See 3 PA. CONS. STAT. ANN. § 4502 (West 2013) (defining “agricultural commodity” as including viticultural products).

34. See Pohl, *supra* note 11, at 234-44 (discussing the treatment of wineries under the Right to Farm statutes of California, Oregon, Ohio, and New York).

35. See *Terry v. Sperry*, 930 N.E.2d 846, 848 (Ohio Ct. App. 2010) (stating that the winery in litigation purchased approximately ninety-five percent of the grapes used to produce wine), *rev'd*, 956 N.E. 276 (Ohio 2011).

36. See Susan Svrluga, *A Fight Over a Winery Crushes a Family and Divides a Neighborhood*, WASH. POST (Oct. 29, 2011), http://articles.washingtonpost.com/2011-10-29/local/35278504_1_winery-owners-farm-winerries-fast-growing-wine-industry (citing the economic difficulties that one winery, Martella Winery, has had when it was unable to operate an on-site tasting room).

37. Pohl, *supra* note 11, at 248.

38. *Id.* at 233.

39. See Svrluga, *supra* note 36 (noting the fast-growing nature of the wine industry in Virginia).

they must recognize that the overall economic success of these farms may be jeopardized if their entire operation does not have protection from nuisance lawsuits and ordinances.⁴⁰

The Virginia legislature recently considered the extent to which direct marketing activities were entitled to Right to Farm Act protection.⁴¹ House Bill 1430, also known as the Boneta Bill, was introduced in response to municipal enforcement actions undertaken against Martha Boneta, a small farmer in Fauquier County, Virginia.⁴² Boneta owned a small farm that was used for vegetable production, as well as for raising sheep and alpaca.⁴³ She reportedly had a farm store license from the local municipality to sell agricultural products, and she operated this retail outlet for a total of seven hours per week.⁴⁴ Upon learning that Boneta was engaging in activities that the county officials believed to be of a non-agricultural nature, these officials ordered Boneta to cease all non-agricultural activities.⁴⁵ The activities that were considered to be non-agricultural included hosting a birthday party for a ten-year-old girl,⁴⁶ advertising pumpkin

40. See Pohl, *supra* note 11, at 235 (noting a direct correlation between states with Right to Farm statutes protective of wineries and states with strong wine industries).

41. H.R. 1430, Reg. Sess. (Va. 2013).

42. Press Release, Scott Lingamfelter, Va. House Delegate, Delegate Scott Lingamfelter Introduces "The Boneta Bill" in Response to Property Rights Infringements by Government (Jan. 2, 2013) (on file with author), available at <http://va31st.com/press-release-delegate-scott-lingamfelter-introduces-the-boneta-bill-in-response-to-property-rights-infringements-by-government/>.

43. *Id.* The size of Boneta's "small" farm has been reported inconsistently. See Markus Schmidt, *Lingamfelter Touts Bill on Property Rights for Farmers*, RICHMOND TIMES-DISPATCH (Jan. 9, 2013), http://www.timesdispatch.com/news/state-regional/government-politics/lingamfelter-touts-bill-on-property-rights-for-farmers/article_1998cc2f-344b-5b3e-9afb-e5ff97880533.html (indicating that Boneta operated a seven-acre farm); *But see* Markus Schmidt, *House Passes Boneta Bill Stemming From Fauquier Farm Disputes*, RICHMOND TIMES-DISPATCH (Feb. 5, 2013) [hereinafter Schmidt – House Passes], http://www.timesdispatch.com/news/state-regional/government-politics/house-passes-boneta-bill-stemming-from-fauquier-farm-dispute/article_74efba41-f05c-5bba-b2db-b0378d0aaa80.html (indicating that Boneta operated a seventy-acre farm).

44. See Schmidt – House Passes, *supra* note 43 (indicating that Martha Boneta held a business license to operate a store); see also Mark Fitzgibbons, *Pitchfork Protest Goes to Richmond*, FACQUIERFREECITIZEN.COM (Jan. 26, 2013), <http://www.reuters.com/article/2013/01/26/va-pitchfork-protest-idUSnPnDC48863+160+PRN20130126> (noting that Boneta's farm store was open only for seven hours each week).

45. Editorial, *Fauquier County Steps over the Line*, WASH. EXAMINER (July 29, 2012), <http://washingtonexaminer.com/examiner-local-editorial-fauquier-county-steps-over-the-line/article/2503450>.

46. Press Release, Lingamfelter, *supra* note 42.

carvings,⁴⁷ and selling souvenir photographs of sheep to accompany sweaters made from wool produced by these sheep.⁴⁸

The Boneta Bill was introduced in the Virginia House on December 20, 2012, and it proposed to amend the definition of “agriculture operation” in the Virginia Right to Farm statute to include “the commerce and sale of certain items, such as art, literature, artifacts, furniture, food, beverages, and other items that are incidental to the agricultural operation and constitute less than a majority” of the sales or revenue for the agricultural operation.⁴⁹ Thus, the bill would have allowed Boneta to sell a certain amount of non-agricultural items in her farm store. The Virginia House of Representatives passed the bill on February 4, 2013, by a 77 to 22 vote, but the bill failed in the Virginia Senate when it was rejected by the Senate Committee on Agriculture, Conservation, and Natural Resources on February 14, 2013.⁵⁰ Opponents of the bill argued that the bill actually would harm agriculture by making it possible for non-agricultural businesses to operate within agricultural areas.⁵¹

IV. EXPANSION OF RIGHT TO FARM PROTECTIONS BEYOND NUISANCE

While the consideration of the Boneta Bill by the Virginia legislature represented an attempt to expand the types of activities that would be entitled to Right to Farm protection, a recent ballot measure in North Dakota expanded the protections that are granted through Right to Farm principles.⁵² The North Dakota Initiated Constitutional Measure No. 3 (“Measure 3”) has its background in the national

47. See *id.* (stating the birthday and pumpkin carvings were penalized as non-agricultural).

48. Hank Silverberg, *‘Pitchfork Protest’ Leads to Proposed Updates to Va. Farming Rights*, WTOP.COM (Jan. 9, 2013), <http://www.wtop.com/41/3185661/Pitchfork-protest-leads-to-proposed-updates-to-Va-farming-rights>.

49. H.R. 1430, § 3.2-302.1, Reg. Sess. (Va. 2013). In addition to expanding the definition of agricultural operations, the legislation also would have imposed personal liability upon an county official or employee “whose interpretation or enforcement of duties operates contrary to this chapter.” *Id.*

50. 2013 Session: *HB 1430 Right to Farm Act; Expands Definition of Agricultural Operations, etc.*, VA. LEGIS. INFO. SYS., <http://lis.virginia.gov/cgi-bin/legp604.exe?ses=131&typ=bil&val=hb1430> (last visited May 27, 2013).

51. Andrew Jenner, *Controversial Boneta Bill Passes Va. House*, LANCASTER FARMING (Feb. 9, 2013), http://www.lancasterfarming.com/results/S01LFWE-020913_1#.UaOjqJxIMwA. According to Trey Davis, Assistant Director for Government Relations with the Virginia Farm Bureau, “The way (the bill) is currently written it would allow for anything remotely related to agriculture to be deemed part of an agricultural operation. Opening this door would adversely impact the way local governments work with farmers.” *Id.*

52. See N.D. CONST. art. XI, § 29; *Initiated Constitutional Measure No. 3*, SEC’Y N.D. (Nov. 6, 2012), <https://vip.sos.nd.gov/pdfs/Portals/FullTextofMeasure3-Farming-Nov6,2012.pdf>.

debate over animal confinement standards. This national debate has been ongoing at a high level since the November 2008 election when voters in California passed Proposition 2, the Prevention of Farm Cruelty Act (“Proposition 2”).⁵³ Pursuant to this new California law, all farm animals in confinement are required to have sufficient space to allow them to stand up, turn around freely, and fully extend their limbs or wings.⁵⁴ Upon full implementation, the application of the standards enacted in this law will have a significant impact on California’s egg industry.⁵⁵ The passage of Proposition 2 represented one in a series of victories for statewide enactments of animal confinement standards in a campaign led by the Humane Society of the United States.⁵⁶ Proposition 2 was notable because it was the first of these statewide enactments whose application would have a large-scale impact on a significant animal agriculture industry. As a result, major animal agriculture organizations began to pursue legal strategies to prevent the imposition of California-style animal confinement standards in other states.⁵⁷ Measure 3, which passed by a sixty-seven percent to thirty-three percent margin, is a progeny of that movement.⁵⁸

Measure 3 amended the North Dakota Constitution by adding article XI, section 29, which states, “The right of farmers and ranchers to engage in modern farming and ranching practices shall be forever guaranteed in this state. No law shall be enacted which abridges the right of farmers and ranchers to employ agricultural technology, modern livestock production and ranching practices.”⁵⁹ Thus, Measure 3 expanded Right to Farm protections beyond those relating to nuisance to prevent any future state law or municipal ordinance that would impact any aspect of farm operations involving “agricultural technology” or “modern” practices. In the wake of Proposition 2 in California, this measure was pursued as an affirmative action to protect the state’s

53. See generally Jonathan R. Lovvorn & Nancy V. Perry, *California Proposition 2: A Watershed Moment for Animal Law*, 15 ANIMAL L. 149 (2009) (detailing the legal campaign behind the passage of Proposition 2).

54. CAL. HEALTH & SAFETY CODE §§ 25990 – 25994 (2013).

55. See DANIEL A. SUMNER ET AL., UNIV. OF CAL. AGRIC. ISSUES CTR., ECONOMIC EFFECTS OF PROPOSED RESTRICTIONS ON EGG-LAYING HOUSING IN CALIFORNIA, at iv (July 2008), available at <http://aic.ucdavis.edu/publications/eggs/egginitiative.pdf> (predicting “the almost complete elimination of egg production in California within the six-year adjustment period”).

56. See generally Elizabeth R. Springsteen, *A Proposal to Regulate Farm Animal Confinement in the United States and an Overview of Current and Proposed Laws on the Subject*, 14 DRAKE J. AGRIC. L. 437 (2009) (providing a thorough review of the background behind the enactment of various state animal confinement statutes).

57. See *id.* at 455-57 (describing the legal efforts pursued by advocates of animal agriculture in Ohio).

58. *Id.*

59. N.D. CONST. art. XI, § 29.

livestock industry from outside influences.⁶⁰ By the inclusion of language relating to the use of technology, the measure appears to provide protections to farmers engaged in the use of agricultural biotechnology just as it does for those involved with livestock production.

V. THE ADAPTATION OF RIGHT TO FARM LAWS TO CHANGES IN MODERN AGRICULTURE

When the majority of Right to Farm statutes were enacted approximately thirty years ago, they sought to protect agricultural operations of that day from one of the primary threats to agriculture of that day—the loss of farmland through conversion to other uses.⁶¹ Conflicts created through increased urbanization in society continue to pose problems for agricultural operations just as they did in the late 1970s and early 1980s. As such, the nuisance protection provided through Right to Farm statutes continues to be a valuable tool for policymakers to use in ensuring that agricultural operations remain economically viable.

Today's farms, however, are different in many respects from the farms of yesterday. Many farmers are engaging in direct sales to consumers and restaurants to take advantage of current consumer demands to shorten the food chain from the producer to the consumer.⁶² Many current Right to Farm laws base their protections on activities related to agricultural production. This makes perfect sense as most farms in the late 1970s and early 1980s were engaged in activities that were almost solely related to agricultural production. For many of today's farms, however, the marketing of their products is as much a part of their identity as—and is arguably more critical to their economic success than—the production of these agricultural products.

Certainly, we do not want to extend Right to Farm protection to every business, such as a grocery store, that sells agricultural products. Similarly, we do not want to extend protection to every gift shop selling garden or animal-related trinkets. A farm that directly markets its own products, however, is fundamentally different from either

60. Jill Schramm, *Let the Voting Begin: Voters to Decide Fate of Five Measures in N.D.*, MINOT DAILY NEWS (Oct. 21, 2012), <http://www.minotdailynews.com/page/content.detail/id/570083.html>. According to North Dakota Farm Bureau President, Doyle Johannes, “[T]he intent of the measure is to prevent outside interests from interrupting farming and ranching interests by imposing costly, unnecessary rules.” *Id.*

61. See Hand, *supra* note 5, at 291 (discussing the “massive conversion of farmland to other uses”).

62. See Rep. Chellie Pingree, *Local Food Movement: From Maine to Washington, D.C.*, 8 J. FOOD L. & POL’Y 203, 204-05 (2012) (describing the local food movement as “one of the fastest growing parts of the American economy”).

of these two aforementioned business enterprises even when this farm does engage in the sale of some non-agricultural products or some agricultural products produced off-site. As long as the majority of the products sold on-site are produced by the farm, the sale of some non-agricultural products or agricultural products produced elsewhere does not change the character of the farming operation. The sale of these products will increase the farm's revenue, and increase its economic viability, while not changing the scope of the impacts that are caused to neighbors of the farm.

Farms that engage in agritourism as an ancillary component of their overall farming operations should be treated in a similar manner to those farms that engage in direct marketing. While farms that directly market are selling farm products to the consuming public, farms that engage in agritourism are selling farm services to a segment of the general public who wish to become more knowledgeable about, and involved with, the agricultural system. Just as with direct marketing, agritourism can provide farms with needed revenue to sustain operations.⁶³ It is true that agritourism activities may cause some adverse impacts to neighbors, but so also do activities directly involved with agricultural production. Right to Farm statutes recognize that farm activities will cause some impacts upon neighboring property owners, but nonetheless provide a preference to farms because of the societal benefits that they provide. If we are willing to provide a farmer with protections for the impacts that he creates when planting and harvesting a corn crop, then we also should be willing to extend those protections when the farmer decides to operate a corn maze, which likely will have a lesser impact on the local community, as part of his overall farm operations. Where the income generated from an agritourism enterprise does not exceed a specified threshold, such as twenty-five percent or fifty percent of total farm income, the farmer should receive Right to Farm protection when engaging in that activity. In such a case, agricultural production remains the primary function of the farm, but these agritourism activities may be vital to the success of the farm.

The Virginia legislature's consideration of the Boneta Bill sought to expand the class of activities that would receive protection under the Right to Farm statute, but the basic application of the statute would have been unchanged. The recently enacted North Dakota constitutional amendment, however, represents the granting to farms of

63. See Elizabeth Dooley, *Watch Where You're Steppin' Out Here: Why States Should Adopt Legislation to Promote the Diversified Farming Practice of Agritourism*, 15 DRAKE J. AGRIC. L. 455, 458 (2010) (describing agritourism as "a viable and sustainable diversification option for increasing farmer income and saving the family farm").

protection that is of a different type than that granted through traditional Right to Farm statutes. The existence of conflict—or the potential for conflict—between farms and their neighbors has provided the impetus for the enactment of traditional Right to Farm statutes. On the contrary, the conflict that gave rise to the new constitutional Right to Farm protection in North Dakota is perceived to be between in-state interests and out-of-state interests. There is no direct balancing of neighboring property rights in this instance as there is with the normal Right to Farm preferences afforded to agricultural operations. Farms are simply given general protection. But just as traditional Right to Farm statutes were enacted in response to a perceived threat to agriculture—the conversion of farmland—so too was the new constitutional Right to Farm protection.

Today, one of the perceived threats to agriculture is the imposition of animal confinement standards. Based upon the numerous states in which standards have been imposed over the past decade, this threat is a very real one for the livestock and poultry producers who utilize conventional production methods.⁶⁴ North Dakota's enactment of this new Right to Farm protection does come at a cost as municipal governments in the state are now restricted in their ability to regulate agricultural operations. Similar restrictions on local control, however, are present in most traditional Right to Farm statutes. Thus, North Dakota's passage of Measure 3 takes Right to Farm protections in a new direction by moving beyond nuisance to address a relatively new threat facing a large segment of the agricultural community.

VI. CONCLUSION

Right to Farm statutes have been enacted to provide agricultural operations with certain protections and preferences to enhance their economic viability. Through these enactments, policymakers are indicating that agricultural operations provide value to society such that they are entitled to some degree of favorable treatment over their neighbors and the general public. The recent experience in North Dakota with Measure 3 demonstrates that Right to Farm principles are flexible and can be used to address new threats to agricultural operations. Unfortunately, the recent Virginia experience highlights the continued problems that are faced by those farmers who rely upon direct marketing and other alternative means of revenue generation.

64. See Springsteen, *supra* note 56 (providing a thorough review of the background behind the enactment of various state animal confinement statutes).

