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# GOVERNMENTS AND UNCONSTITUTIONAL TAKINGS: WHEN DO RIGHT-TO-FARM LAWS GO TOO FAR?

TERENCE J. CENTNER\*

**Abstract:** State anti-nuisance laws, known as right-to-farm laws, burden neighboring property owners with nuisances. The purpose of the laws is to protect existing investments by offering an affirmative defense. Activities that are not a nuisance when commenced cannot become a nuisance due to changes in land uses by neighbors. While most state laws involve a lawful exercise of the state's police powers, a right-to-farm law may set forth protection against nuisances that is so great that it operates to effect a regulatory taking. Judicial rulings that two Iowa right-to-farm laws went too far in reducing neighbors' constitutionally protected rights augur an opportunity to rethink right-to-farm laws. Rather than relying upon a marketplace economy to protect businesses, a law based upon an economy of nature may be drafted to protect farmland and other natural resources.

## INTRODUCTION

Every state has adopted right-to-farm legislation that curtails the rights of persons to use nuisance law to secure relief from some situations and activities as listed in Appendix 1.<sup>1</sup> A major thrust of the legislation was to protect existing farm investments by reducing actions un-

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<sup>1</sup> NEIL D. HAMILTON, A LIVESTOCK PRODUCER'S LEGAL GUIDE TO: NUISANCE, LAND USE CONTROL, AND ENVIRONMENTAL LAW 24 (1992) (delineating a comprehensive analysis of nuisance law and issues); Neil D. Hamilton & David Bolte, *Nuisance Law and Livestock Production in the United States: A Fifty-State Analysis*, 10 J. AGRIC. TAX'N & L. 99, 101 (1988) (noting interpretations of right-to-farm laws and summarizing developments); see also Wendy K. Walker, Note, *Whole Hog: The Pre-Emption of Local Control by the 1999 Amendment to the Michigan Right to Farm Act*, 36 VAL. U. L. REV. 461, 461-64 (2002) (evaluating the Michigan right-to-farm law and its preclusion of local control of confined animal feeding operations).

der nuisance law that enjoined agricultural activities.<sup>2</sup> Another objective of the laws was to preserve farmland.<sup>3</sup> With respect to nuisance actions, many of the laws adopted a “coming to the nuisance” concept whereby activities that were not a nuisance when commenced would not become a nuisance due to the changed land uses of neighbors.<sup>4</sup>

The legislation became known as “right-to-farm” laws because the individual laws enabled farmers to continue with their husbandry pursuits rather than enjoining them from farming due to the presence of a nuisance.<sup>5</sup> However, some of the laws go further and apply to non-farming activities, so that the term “anti-nuisance” laws may more appropriately describe their provisions.<sup>6</sup> Moreover, the individualized state right-to-farm laws have diverged into very different laws as legislatures have formulated several approaches to providing protection against nuisance actions.<sup>7</sup>

During the past several years, concern has been expressed that a few right-to-farm laws have been amended to provide too much protection for agricultural pursuits and other activities at the expense of neighboring property owners.<sup>8</sup> While some of the arguments focus on

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<sup>2</sup> Jacqueline P. Hand, *Right-to-Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. PITT. L. REV. 289, 305–06 (1984) (observing that some right-to-farm statutes favor priority of agricultural uses).

<sup>3</sup> Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 152 (observing that the laws protect farmland by limiting nuisance lawsuits, but do not affect the application of environmental regulations).

<sup>4</sup> Hand, *supra* note 2, at 307 (noting priority in usage is consistent with the coming to the nuisance defense).

<sup>5</sup> See, e.g., Neil D. Hamilton, *Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective*, 3 DRAKE J. AGRIC. L. 103, 103–06 (1998); Hand, *supra* note 2, at 297–98 (implying right-to-farm laws protect farms by limiting nuisance suits).

<sup>6</sup> ALA. CODE § 6-5-127(a) (LexisNexis Supp. 2004) (applying to any qualifying “agricultural, manufacturing, or other industrial plant or establishment, farming operation facility, or any racetrack for automobiles or motorcycles”); GA. CODE ANN. § 41-1-7(b)(3)(F)–(G), (b)(3.1) (1997 & Supp. 2005) (protecting the processing and packaging of eggs and the manufacturing of feed for poultry or livestock, as well as food and forest products processing plants); IND. CODE ANN. § 32-30-6-9(a) (LexisNexis 2002) (covering agricultural and industrial operations).

<sup>7</sup> Jesse J. Richardson, Jr. & Theodore A. Feitshans, *Nuisance Revisited After Buchanan and Bormann*, 5 DRAKE J. AGRIC. L. 121, 128 (2000) (categorizing six different types of right-to-farm laws).

<sup>8</sup> Hamilton, *supra* note 5, at 105; Alexander A. Reinert, Note, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694, 1695 (1998) (arguing that right-to-farm laws establish privileges for agricultural land uses that may be unnecessary and unjust intrusions into the rights of neighbors).

the equity of favoring agriculture over other activities,<sup>9</sup> others raise questions about the burdens being placed on neighboring property owners.<sup>10</sup> In 1998, an Iowa right-to-farm law was found to create an easement that constituted an unconstitutional taking of private property.<sup>11</sup> More recently, a second Iowa right-to-farm law was found to violate the state's constitutional clause on inalienable rights.<sup>12</sup>

These Iowa cases highlight the conflict between state police power provisions and private property rights.<sup>13</sup> As Justice Holmes recognized more than eighty years ago in *Pennsylvania Coal Co. v. Mahon*, "if regulation goes too far it will be recognized as a taking."<sup>14</sup> Under our Fifth Amendment, compensation must be paid whenever private property rights are taken for the public's use.<sup>15</sup> The judicial findings that the Iowa legislature went too far in attempting to preserve farmland<sup>16</sup> and in encouraging business activities of an industry important to the state's economy<sup>17</sup> may forebode further restrictions on governmental provisions involving safeguarding and preserving public resources. Alternatively, the Iowa rulings may be an anomaly under the Iowa Constitution.

This article evaluates recent developments concerning right-to-farm legislation. Changes in agricultural production are highlighted to set the stage for analyzing the mechanisms used to limit situations where nuisance law can be employed to enjoin activities and practices. An analysis of two Iowa cases that found right-to-farm laws to be unconstitutional provides three reasons for disagreeing with these judicial pronouncements.<sup>18</sup> While the Iowa Constitution may provide distinct protection for private property rights, under the Federal Constitution, an ad hoc, factual inquiry is required to determine whether a law ef-

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<sup>9</sup> J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 *ECOLOGY L.Q.* 263, 315 (2000) (noting that environmental law is built on nuisance law such that right-to-farm exceptions to nuisance may unfairly burden neighboring property owners).

<sup>10</sup> Terence J. Centner, *Agricultural Nuisances: Qualifying Legislative 'Right-to-Farm' Protection Through Qualifying Management Practices*, 19 *LAND USE POL'Y* 259, 265 (2002) (suggesting that right-to-farm laws may go too far if they grant blanket immunity or permit unreasonable expansion).

<sup>11</sup> *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 321 (Iowa 1998), *cert. denied*, 525 U.S. 1172 (1999).

<sup>12</sup> *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 179 (Iowa 2004).

<sup>13</sup> *Id.* at 185; *Bormann*, 584 N.W.2d at 321-22.

<sup>14</sup> 260 U.S. 393, 415 (1922).

<sup>15</sup> U.S. CONST. amend. V. For a review of relevant Supreme Court case law, see *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233 (2003).

<sup>16</sup> *Bormann*, 584 N.W.2d at 321.

<sup>17</sup> *Gacke*, 684 N.W.2d at 174-75.

<sup>18</sup> See *infra* notes 289-436 and accompanying text.

fects an unconstitutional taking.<sup>19</sup> Turning to other states' right-to-farm laws, several projections may be offered in anticipation of further legal challenges.<sup>20</sup> Safeguards and strategies incorporated in most right-to-farm legislation may be expected to thwart similar constitutional challenges. However, states committed to the preservation of agricultural land might want to consider further action. Drawing upon the economy of nature, an additional right-to-farm law is proposed to protect farmland and other natural resources.

### I. CHANGES IN THE COUNTRYSIDE

The expansion of nonagricultural uses into the countryside and the corresponding loss of farmland provided justifications for right-to-farm legislation.<sup>21</sup> While farmland continues to be lost to residential, commercial, and industrial land uses,<sup>22</sup> an equally pronounced change involves the industrialization of agricultural production.<sup>23</sup> With economic forces driving producers to consolidate and specialize, our farming population has dwindled to less than two percent of the nation.<sup>24</sup> Two-thirds of American farms depend on a single commodity or commodity group for fifty percent or more of their total sales.<sup>25</sup> Farms have grown in size: the largest eight percent of our farms produce fifty-three percent of our nation's food.<sup>26</sup>

Especially significant have been the production changes accompanying animal production.<sup>27</sup> Plentiful supplies of food products have driven

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<sup>19</sup> *Brown*, 538 U.S. at 233; *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002).

<sup>20</sup> See *infra* Part IV.

<sup>21</sup> See, e.g., *Farm Nuisance Suit Act*, 740 ILL. COMP. STAT. ANN. 70/1 (West 2002).

<sup>22</sup> AM. FARMLAND TRUST, *FARMING ON THE EDGE: SPRAWLING DEVELOPMENT THREATENS AMERICA'S BEST FARMLAND* (2002), [http://www.farmland.org/farmingontheedge/Farming on the Edge.pdf](http://www.farmland.org/farmingontheedge/Farming%20on%20the%20Edge.pdf). From 1992–97, the United States converted more than 6 million acres of agricultural land to a more developed use. *Id.* It has been estimated that our country loses two acres of farmland every minute. *Id.*

<sup>23</sup> TERENCE J. CENTNER, *EMPTY PASTURES: CONFINED ANIMALS AND THE TRANSFORMATION OF THE RURAL LANDSCAPE* 145–57 (2004).

<sup>24</sup> EMERY N. CASTLE, *AGRICULTURAL INDUSTRIALIZATION IN THE AMERICAN COUNTRYSIDE* 12 (1998).

<sup>25</sup> JUDITH E. SOMMER ET AL., U.S. DEP'T OF AGRIC., *STRUCTURAL AND FINANCIAL CHARACTERISTICS OF U.S. FARMS, 1995: 20TH ANNUAL FAMILY FARM REPORT TO CONGRESS*, at iv (1998).

<sup>26</sup> ROBERT A. HOPPE ET AL., U.S. DEP'T OF AGRIC., *BULLETIN NO. 768, STRUCTURAL AND FINANCIAL CHARACTERISTICS OF U.S. FARMS: 2001 FAMILY FARM REPORT 7* (Robert A. Hoppe ed., 2001), available at <http://www.ers.usda.gov/publications/aib768/aib768.pdf>.

<sup>27</sup> See CENTNER, *supra* note 23, at 13–47.

down prices paid for meat and poultry products.<sup>28</sup> Thousands of producers have stopped raising animals and the remaining producers have markedly increased their production.<sup>29</sup> Production of hogs and poultry has moved indoors, with many producers tied to their markets through production or marketing contracts.<sup>30</sup> Cattle production often involves large feedlots that finish animals for market.<sup>31</sup> The industrialization of animal production has noticeably changed our rural environment.<sup>32</sup>

Given the small percentage of Americans who live on farms and the conflicts between concentrated animal facilities and other land users, the political landscape has changed.<sup>33</sup> Nonfarmers are flexing their political muscle to challenge objectionable agricultural activities.<sup>34</sup>

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<sup>28</sup> STEVE W. MARTINEZ, U.S. DEP'T OF AGRIC., VERTICAL COORDINATION OF MARKETING SYSTEMS: LESSONS FROM THE POULTRY, EGG AND PORK INDUSTRIES 23–24 (2002) (reporting efficiencies in poultry and pork production).

<sup>29</sup> See, e.g., CENTNER, *supra* note 23, at 22–23 (“Since 1960 hog farms have decreased by 92 percent; farms with dairy cows, by 93 percent; poultry operations, by 71 percent; and cattle operations, by 55 percent.”); WILLIAM D. MCBRIDE & NIGEL KEY, U.S. DEP'T OF AGRIC., ECONOMIC AND STRUCTURAL RELATIONSHIPS IN U.S. HOG PRODUCTION 5 (2003) (finding that for hog production “between 1994 and 1999, the number of hog farms fell by more than 50 percent”). During the past forty years there has been a marked reduction in the number of farms producing animals. CENTNER, *supra* note 23, at 22–23.

<sup>30</sup> See MCBRIDE & KEY, *supra* note 29, at 25; JANET PERRY ET AL., U.S. DEP'T OF AGRIC., BROILER FARMS' ORGANIZATION, MANAGEMENT, AND PERFORMANCE, 12–14 (1999). “[Eighty-five percent] of the total value of all poultry and egg production” comes from farms with production or marketing contracts with marketing firms. PERRY ET AL., *supra* at 12, 14. Eighty-two percent of feeder pigs and sixty-three percent of finished hogs are produced under contract. MCBRIDE & KEY, *supra* note 29, at 25.

<sup>31</sup> Econ. Research Serv., U.S. Dep't of Agric., *Cattle: Background*, <http://www.ers.usda.gov/Briefing/Cattle/Background.htm> (last visited Nov. 22, 2005). More than eighty percent of fed cattle come from feedlots with one thousand head or more. *Id.*

<sup>32</sup> CENTNER, *supra* note 23, at 74–87.

<sup>33</sup> See generally Jennifer K. Bower, Comment, *Hogs and Their Keepers: Rethinking Local Power on the Iowa Countryside*, 4 GREAT PLAINS NAT. RESOURCES J. 261 (2000) (examining legislative proposals to grant regulatory or zoning authority to local governments to regulate hog confinement facilities).

<sup>34</sup> For example, a number of citizen lawsuits have involved violations of the Clean Water Act. See, e.g., Concerned Area Residents for the Env't v. Southview Farms, 34 F.3d 114, 123 (2d Cir. 1994) (alleging that manure channeled from a field constituted discharges from a point source requiring a permit under the Clean Water Act); Water Keeper Alliance, Inc. v. Smithfield Foods, Inc., Nos. 4:01-CV-27-H(3), 4:01-CV-30-H(3), 2001 U.S. Dist. LEXIS 21314, at \*2–3 (E.D.N.C. Sept. 20, 2001) (alleging a failure to secure a concentrated animal feeding operation permit); Idaho Rural Council v. Bosma, 143 F. Supp. 2d 1169, 1177 (D. Idaho 2001) (denying defendants' motion for summary judgment in a citizen suit); Cmty. Ass'n for Restoration of the Env't (CARE) v. Henry Bosma Dairy, 65 F. Supp. 2d 1129, 1135 (E.D. Wash. 1999) (finding violations of the Clean Water Act by dairies); Cmty. Ass'n for Restoration of the Env't (CARE) v. Sid Koopman Dairy, 54 F. Supp. 2d 976, 981 (E.D. Wash. 1999)

They have pushed an agenda addressing nuisance, pollution, and food safety issues.<sup>35</sup>

The lax oversight of agricultural pollution may not be justified given the more demanding environmental provisions prescribed for other businesses and industries.<sup>36</sup> One highly visible issue has been the contamination of our nation's waters by agricultural activities.<sup>37</sup> In 2003, the Environmental Protection Agency amended the point-source provisions of the Clean Water Act to classify more animal production facilities as concentrated animal feeding operations.<sup>38</sup> These operations

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(finding defendants' dairies were concentrated animal feeding operations subject to point-source requirements).

<sup>35</sup> See, e.g., RES., CMTY., & ECON. DEV. DIV., U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-99-74, *FOOD SAFETY: THE AGRICULTURAL USE OF ANTIBIOTICS AND ITS IMPLICATIONS FOR HUMAN HEALTH* 1-3 (1999); Caroline Smith DeWaal, *Rising Imports, Biotechnology, and the Food Supply*, 59 FOOD & DRUG L.J. 433, 439 (2004) (advocating that other countries apply equally effective food safety systems with the same stringency); Blake B. Johnson, Student Article, *The Supreme Beef Case: An Opportunity to Rethink Federal Food Safety Regulation*, 16 LOY. CONSUMER L. REV. 159, 174 (2004) (concluding that "meat packing associations . . . are willing to fight against regulation designed to protect the public.").

<sup>36</sup> See Ruhl, *supra* note 9, at 316-21 (identifying exceptions for farmers).

<sup>37</sup> See, e.g., Charles W. Abdalla, *The Industrialization of Agriculture: Implications for Public Concern and Environmental Consequences of Intensive Livestock Operations*, 10 PENN ST. ENVTL. L. REV. 175, 190-91 (2002) (advocating greater regulatory attention to jurisdictional boundaries for regulating animals); Terence J. Centner, *Enforcing Environmental Regulations: Concentrated Animal Feeding Operations*, 69 MO. L. REV. 697, 701 (2004) (advocating that increased attention be directed to assisting states in administering and enforcing existing regulations); Terence J. Centner, *Establishing a Rational Basis for Regulating Animal Feeding Operations: A View of the Evidence*, 27 VT. L. REV. 115, 121 (2002) (exploring the quality of evidence being cited to justify new federal regulations for concentrated animal feeding operations); Theodore A. Feitshans & Kelly Zering, *Federal Regulation of Animal and Poultry Production Under the Clean Water Act: Opportunities for Employing Economic Analysis to Improve Societal Results*, 10 PENN ST. ENVTL. L. REV. 193, 212-13 (2002) (advocating regulations that consider social welfare and efficiency); Scott Jerger, *EPA's New CAFO Land Application Requirements: An Exercise in Unsupervised Self-Monitoring*, 23 STAN. ENVTL. L.J. 91, 98-99 (2004) (concluding that the government "missed opportunities . . . to encourage alternative, sustainable agricultural approaches . . . for the land application of agricultural waste."); Michael Steeves, *The EPA's Proposed CAFO Regulations Fall Short of Ensuring the Integrity of Our Nation's Waters*, 22 J. LAND RESOURCES & ENVTL. L. 367, 367 (2002) (discussing problems with concentrated animal feeding operation regulations); Nicholas M. White, Note, *Industry-Based Solutions to Industry-Specific Pollution: Finding Sustainable Solutions to Pollution from Livestock Waste*, 15 COLO. J. INT'L ENVTL. L. & POL'Y 153, 153-54 (2004) (addressing positive and negative incentives for livestock producers to effect cleaner and healthier operations); Amy Willbanks, Legislative Developments, *The Unified National Strategy for Animal Feeding Operations: Another Federal-State Partnership in Environmental Regulation*, 8 S.C. ENVTL. L.J. 283, 288-89 (2000) (intimating that the federal government will become more active in responding to water pollution problems).

<sup>38</sup> National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176, 7176-274 (Feb. 12, 2003) (codified at 40 C.F.R. pts. 122, 412).

need to secure a National Pollutant Discharge Elimination System permit, or a corresponding state permit.<sup>39</sup> Federal regulators are finding that ammonia emissions from poultry operations may violate the Comprehensive Environmental Response, Compensation, and Liability Act<sup>40</sup> and the Emergency Planning and Community Right-to-Know Act.<sup>41</sup> Concerns about transgenic crops and food security are leading to proposals to regulate agricultural production.<sup>42</sup>

However, one of the most worrisome problems for animal producers involves a surge of activities by neighbors to address concerns about odors, health, and property values.<sup>43</sup> Neighbors are realizing that their rights are being infringed upon by expanding agricultural operations, and are seeking legislative and legal assistance.<sup>44</sup> Environmental laws, zoning ordinances, health regulations, and nuisance lawsuits are being

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<sup>39</sup> 40 C.F.R. §§ 122.23(a), 123.25(a) (2004). Exceptions do exist for owners or operators of large concentrated animal feeding operations to secure an exception from the National Pollution Discharge Elimination System permit requirements if they have “no potential to discharge” . . . manure, litter or process wastewater.” 40 C.F.R. § 122.23(d), (f) (2004).

<sup>40</sup> 42 U.S.C. §§ 9601–9675 (2000). See *Sierra Club, Inc. v. Tyson Foods, Inc.*, 299 F. Supp. 2d 693, 699–701, 711 (W.D. Ky. 2003) (concluding that a chicken farm was a facility under the Comprehensive Environmental Response, Compensation, and Liability Act for which releases of ammonia must be reported).

<sup>41</sup> 42 U.S.C. §§ 11,001–11,050 (2000); see *Sierra Club*, 299 F. Supp. 2d at 699–701, 711 (concluding that a chicken farm was a facility under the Emergency Planning and Community Right-to-Know Act for which releases of ammonia must be reported).

<sup>42</sup> See, e.g., Margaret Rosso Grossman, *Biotechnology, Property Rights and the Environment*, 50 AM. J. COMP. L. 215, 219–21 (Supp. 2002) (noting environmental risks of the release of genetically modified crops); Drew L. Kershen, *Of Straying Crops and Patent Rights*, 43 WASHBURN L.J. 575, 577 (2004) (discussing how to handle the inadvertent presence of patented seeds and infringement in patent law); Gregory N. Mandel, *Gaps, Inexperience, Inconsistencies, and Overlaps: Crisis in the Regulation of Genetically Modified Plants and Animals*, 45 WM. & MARY L. REV. 2167, 2172–73 (2004) (advocating solutions for improving the regulatory system over genetically modified organisms and their products); David R. Nicholson, *Agricultural Biotechnology and Genetically-Modified Foods: Will the Developing World Bite?*, 8 VA. J.L. & TECH. 7, 23–41 (2003), [http://www.vjolt.net/vol8/issue2/v8i2\\_a07-Nicholson.pdf](http://www.vjolt.net/vol8/issue2/v8i2_a07-Nicholson.pdf) (discussing the reluctance of developing countries to embrace agricultural biotechnology).

<sup>43</sup> See, e.g., Michael M. Meloy, *An Overview of Nutrient Management Requirements in Pennsylvania*, 10 PENN ST. ENVTL. L. REV. 249, 294 (2002) (concluding that agriculture must do a better job of confronting the public’s environmental and health concerns); C.M. Williams, *CAFOs: Issues and Development of New Waste Treatment Technology*, 10 PENN ST. ENVTL. L. REV. 217, 240–41 (2002) (advocating greater use of technology to reduce objectionable activities).

<sup>44</sup> See, e.g., Charles W. Abdalla et al., *Community Conflicts over Intensive Livestock Operations: How and Why Do Such Conflicts Escalate?*, 7 DRAKE J. AGRIC. L. 7, 25–26 (2002) (reporting public concerns about large animal operations and frustrations with the failings of existing laws, regulations, and governmental oversight).



used to confront objectionable agricultural activities.<sup>45</sup> Furthermore, dissatisfied landowners are attempting to find ways to overcome the major defense offered by right-to-farm laws.<sup>46</sup> They are trying to reinstate nuisance law remedies to resolve conflicts between themselves and property owners protected by statutory provisions.

## II. ANALYZING THE PROTECTION MECHANISMS

Right-to-farm laws have been around for nearly twenty-five years.<sup>47</sup> Many state legislatures have amended their laws to address issues of state concern.<sup>48</sup> Some of these changes provide additional support for bothersome activities at the expense of neighboring property owners.<sup>49</sup> This means that current right-to-farm laws approach nuisances very differently than the early laws adopted in the 1980s.<sup>50</sup> Moreover, as courts have observed, the laws can have very different requirements and meanings.<sup>51</sup> Although the laws defy easy categorization, one can observe five significant approaches to anti-nuisance protection. Because these approaches concern affirmative defenses to be used in resolving conflicts, a law may incorporate more than one approach.<sup>52</sup>

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<sup>45</sup> See Ruhl, *supra* note 9, at 293–321 (discussing legislation that addresses pollution and problems associated with agricultural production).

<sup>46</sup> See Lisa N. Thomas, Comment, *Forgiving Nuisance and Trespass: Is Oregon's Right-to-Farm Law Constitutional?*, 16 J. ENVTL. L. & LITIG. 445, 445–47 (2001) (discussing challenges to Oregon's right-to-farm law).

<sup>47</sup> See Hand, *supra* note 2, at 297 (noting the addition of state right-to-farm laws in the early 1980s).

<sup>48</sup> See, e.g., GA. CODE ANN. §§ 41-1-7(b)(2), -7(c) (1997 & Supp. 2005) (delineating provisions for food and forest product processing plants so that they can qualify for protection against nuisance lawsuits); IDAHO CODE ANN. § 22-4803A(6) (Supp. 2004) (adding anti-nuisance protection for crop residue burning); see also S.B. 26, 148th Gen. Assem., Reg. Sess. (Ga. 2005), available at [http://www.legis.state.ga.us/legis/2005\\_06/pdf/sb26.pdf](http://www.legis.state.ga.us/legis/2005_06/pdf/sb26.pdf) (proposing to extend anti-nuisance protection to poultry and meat byproduct facilities).

<sup>49</sup> See Terence J. Centner, *Agricultural Nuisances Under the Amended Georgia 'Right-to-Farm' Law*, GA. ST. B.J., Sept. 1988, at 36, 36–37 (discussing the added protection provided by an amended Georgia right-to-farm law); Andrew C. Hanson, *Brewing Land Use Conflicts: Wisconsin's Right to Farm Law*, WIS. LAW., Dec. 2002, at 10, 12–13 (discussing Wisconsin's law).

<sup>50</sup> Rather than protecting farmland and farm operations, many current laws protect businesses and industries. See *supra* note 48.

<sup>51</sup> For instance, a California court noted there were seven requisites for establishing a right-to-farm defense under California's law, CAL. CIV. CODE § 3482.5 (West 1997). See *Souza v. Lauppe*, 69 Cal. Rptr. 2d 494, 500 (Ct. App. 1997); see also *infra* notes 231–57 and accompanying text (discussing laws that may involve excessive immunity).

<sup>52</sup> For example, a right-to-farm law may incorporate both the coming to the nuisance doctrine and qualifying agricultural practices. See COLO. REV. STAT. § 35-3.5-102 (2004).

The first approach incorporates a coming to the nuisance doctrine that requires the activity to predate conflicting land uses before the operation qualifies for the law's protection against nuisance lawsuits.<sup>53</sup> Second, some statutes restrain nuisance lawsuits by adopting a statute of limitations whereby persons who fail to file a nuisance lawsuit within a time period are precluded from maintaining a nuisance action.<sup>54</sup> A third approach allows operations to expand and adopt production changes.<sup>55</sup> Fourth, qualifying management practices are employed to delineate the scope of nuisance protection in some laws.<sup>56</sup> Finally, an approach adopted by a few statutes involves expansive immunity that raises questions about the constitutional rights of neighbors.<sup>57</sup>

### A. *Coming to the Nuisance*

The most common approach to providing an anti-nuisance defense is to incorporate a coming to the nuisance doctrine in a right-to-farm law.<sup>58</sup> People who elect to move next to objectionable agricultural activities are estopped from using nuisance law to abate the existing activities.<sup>59</sup> While legislatures may identify as their purpose encouraging agricultural production and preserving agricultural land,<sup>60</sup> the right-to-farm laws limit their protection to operations that preexisted surrounding land uses.<sup>61</sup> Legislatures adopting this approach did not intend that right-to-farm laws would accord qualifying property owners

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<sup>53</sup> Hamilton, *supra* note 5, at 104 (suggesting that the basic premise of right-to-farm laws was to codify the coming to the nuisance doctrine); see Hand, *supra* note 2, at 306–07 (tying right-to-farm laws to the coming to the nuisance doctrine); see also *infra* Part II.A.

<sup>54</sup> See, e.g., MINN. STAT. ANN. § 561.19, subdiv. 2(a) (West 2000 & Supp. 2005); MISS. CODE ANN. § 95-3-29(1) (2004); 3 PA. STAT. ANN. § 954(a) (West 1995 & Supp. 2005); TEX. AGRIC. CODE ANN. § 251.004 (Vernon 2004); see also *infra* Part II.B.

<sup>55</sup> See *infra* Part II.C.

<sup>56</sup> See *infra* Part II.D.

<sup>57</sup> See *infra* notes 231–87 and accompanying text.

<sup>58</sup> See Richardson & Feitshans, *supra* note 7, at 128.

<sup>59</sup> ALA. CODE § 6-5-127(a) (LexisNexis Supp. 2004); CAL. CIV. CODE § 3482.5(a)(1) (West 1997); GA. CODE ANN. § 41-1-7(c) (1997 & Supp. 2005); 740 ILL. COMP. STAT. ANN. 70/3 (West 2002); IND. CODE ANN. § 32-30-6-9(d) (LexisNexis 2002); NEB. REV. STAT. ANN. § 2-4403 (LexisNexis 2001); VT. STAT. ANN. tit. 12, § 5753 (2002 & Supp. 2005).

<sup>60</sup> Farm Nuisance Suit Act, 740 ILL. COMP. STAT. ANN. 70/1 (West 2002) (“It is the declared policy of the state to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products.”).

<sup>61</sup> *Swedenberg v. Phillips*, 562 So. 2d 170, 172–73 (Ala. 1990) (concluding the right-to-farm law did not apply because plaintiffs resided on their property prior to construction of the defendant's chicken house).

a preference over existing land uses and neighbors.<sup>62</sup> Therefore, the coming to the nuisance approach serves to protect investments.<sup>63</sup>

Requiring the operation to predate other land activities is achieved through different provisions in right-to-farm laws. Often, a right-to-farm law will address changes in nonagricultural land uses that extend into agricultural areas.<sup>64</sup> If there is no change of use next to an operation, the right-to-farm law does not apply.<sup>65</sup> Right-to-farm laws are designed to prevent people from moving near agricultural operations and then using nuisance laws to adversely affect existing operations.<sup>66</sup> Some laws are more direct and say that the operation shall not be a nuisance if it was not a nuisance when it began operating.<sup>67</sup>

Agricultural producers and others do not always appreciate the limitations of right-to-farm laws that incorporate the coming to the nuisance doctrine.<sup>68</sup> Rather than having protection against nuisance actions by their neighbors, they have protection against actions by fu-

<sup>62</sup> *Herrin v. Opatut*, 281 S.E.2d 575, 577–78 (Ga. 1981) (observing that the Georgia right-to-farm law simply limits the circumstances under which an agricultural operation can be deemed a nuisance).

<sup>63</sup> *Hamilton*, *supra* note 5, at 104 (noting a desire to “provide some sense of security for farmers making investments” in their operations).

<sup>64</sup> IND. CODE ANN. § 32-30-6-9(b) (LexisNexis 2002) (“The general assembly finds that when nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits. As a result, agricultural operations are sometimes forced to cease operations, and many persons may be discouraged from making investments in farm improvements.”).

<sup>65</sup> *Cline v. Franklin Pork, Inc.*, 361 N.W.2d 566, 572 (Neb. 1985).

<sup>66</sup> *Herrin*, 281 S.E.2d at 577 (listing “urban sprawl” into agricultural areas as justifying a legislative response); *Trickett v. Ochs*, 838 A.2d 66, 73 (Vt. 2003) (opining that the purpose of the right-to-farm law was to limit nuisance actions by persons moving into traditionally rural areas); *Buchanan v. Simplot Feeders Ltd. P’ship*, 952 P.2d 610, 614–15 (Wash. 1998) (concluding that the nuisance protection was for cases where urban encroachment occurred in established agricultural areas).

<sup>67</sup> 740 ILL. COMP. STAT. ANN. 70/3 (West 2002).

No farm or any of its appurtenances shall be or become a private or public nuisance because of any changed conditions in the surrounding area occurring after the farm has been in operation for more than one year, when such farm was not a nuisance at the time it began operation . . .

*Id.*

<sup>68</sup> *See, e.g., Swedenberg v. Phillips*, 562 So. 2d 170, 172–73 (Ala. 1990) (finding the statutory exception to nuisance actions did not apply because the plaintiffs’ use of their property preceded the defendant’s); *Wendt v. Kerkhof*, 594 N.E.2d 795, 798 (Ind. Ct. App. 1992) (holding the right-to-farm defense inapplicable because the operator commenced the hog operation five years after the plaintiffs had become adjacent landowners); *Finlay v. Finlay*, 856 P.2d 183, 188–89 (Kan. Ct. App. 1993) (determining that the Kansas right-to-farm defense was not available to a defendant who started a feedlot-type operation).

ture neighbors.<sup>69</sup> After the adoption of right-to-farm laws in the early 1980s, several cases disclose operators failing to recognize this important distinction.<sup>70</sup>

In a Georgia case, *Herrin v. Opatut*, a farmer constructed twenty-six poultry houses in a pasture adjacent to residential homes.<sup>71</sup> The neighbors filed suit against the egg farm to eliminate alleged flies and offensive odors generated by the poultry.<sup>72</sup> They asked that the farm be found a nuisance and the operation be shut down.<sup>73</sup> The defendants claimed that the right-to-farm law offered a defense and moved to dismiss the action.<sup>74</sup> On appeal, the Supreme Court of Georgia found that the property had been and was being used for an agricultural purpose, but the egg farm did not qualify for the right-to-farm statutory defense for two reasons.<sup>75</sup> First, since the egg farm was constructed after the residents had already moved into their homes, it failed to meet the statutory requirement of being in existence for at least one year prior to changed conditions.<sup>76</sup> Second, the alleged nuisance did not arise from changed conditions in the locality: the extension of nonagricultural land uses into existing agricultural areas.<sup>77</sup> Thus, the court found that the anti-nuisance defense was inapplicable.<sup>78</sup>

A pair of Nebraska cases demonstrate a similar result. In *Cline v. Franklin Pork, Inc.*, the court noted that the plaintiffs' use of their land preceded the defendant's operation of the pig facility.<sup>79</sup> This meant

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<sup>69</sup> See *Trickett*, 838 A.2d at 76 (finding that the plaintiffs' home had been a residence for nearly two centuries and that the operation of defendants' apple orchard was therefore not protected by the Vermont right-to-farm law).

<sup>70</sup> See, e.g., *Shatto v. McNulty*, 509 N.E.2d 897, 899 (Ind. Ct. App. 1987) (allowing the trier of fact to determine whether changes defeated the right-to-farm defense); *Flansburgh v. Coffey*, 370 N.W.2d 127, 131 (Neb. 1985) (finding the right-to-farm defense did not apply in the absence of changes "in and about the locality" of defendants' farm) (citation omitted); *Cline*, 361 N.W.2d at 572 (ruling the right-to-farm defense did not apply to neighbors who lived in their house prior to the operation of the new facility); *Mayes v. Tabor*, 334 S.E.2d 489, 491 (N.C. Ct. App. 1985) (observing no support for the right-to-farm defense where the neighboring summer camp had been in existence for sixty years).

<sup>71</sup> 281 S.E.2d at 576.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* (considering provisions of the Georgia law that have been subsequently amended).

<sup>75</sup> *Id.* at 577.

<sup>76</sup> *Id.*

<sup>77</sup> *Herrin*, 281 S.E.2d at 577-78. The court noted that it is not a change in the facility that causes the nuisance but rather changes in the uses of the surrounding lands. *Id.* at 578.

<sup>78</sup> *Id.* at 578-79.

<sup>79</sup> 361 N.W.2d 566, 572 (Neb. 1985).

that the farm operation did not exist prior to a change in surrounding land use, thus the right-to-farm law was not applicable.<sup>80</sup> In *Flansburgh v. Coffey*, the Supreme Court of Nebraska found that the defendant agricultural producer had commenced a new activity that was a nuisance.<sup>81</sup> Therefore, the Nebraska right-to-farm law did not apply.<sup>82</sup>

### B. Statutes of Limitation

In an effort to provide an effective defense for operators, Minnesota, Mississippi, Pennsylvania, and Texas have adopted statutes of limitation that defeat nuisance actions.<sup>83</sup> Under the statutory provisions, neighbors who fail to file a nuisance claim within a stated time period after the commencement of the offensive activity may not successfully maintain the nuisance lawsuit.<sup>84</sup>

A nuisance lawsuit against a poultry business in Pennsylvania, *Horne v. Haladay*, shows how the state's right-to-farm law serves as a statute of limitations.<sup>85</sup> The business commenced operation in 1993 and added a decomposition building for waste in August 1994; the plaintiffs filed their nuisance lawsuit in November 1995.<sup>86</sup> In finding the nuisance claim barred by the provisions of the right-to-farm law, the court quoted the Pennsylvania statute providing a limitation on public nuisances:

(a) No nuisance action shall be brought against an agricultural operation which has lawfully been in operation for one year or more prior to the date of bringing such action, where the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation and are normal agricultural operations, or if the physical facilities of such agricultural operations are substantially

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<sup>80</sup> *Id.*

<sup>81</sup> 370 N.W.2d 127, 131 (Neb. 1985).

<sup>82</sup> *Id.* at 130–31 (considering NEB. REV. STAT. §§ 2-4402, -4403 (Reissue 1983)).

<sup>83</sup> MINN. STAT. ANN. § 561.19, subd. 2(a) (West 2000 & Supp. 2005) (interpreted in *Overgaard v. Rock County Bd. of Comm'rs*, No. 02-601, 2003 U.S. Dist. LEXIS 13001, at \*20 (D. Minn. July 25, 2003)); MISS. CODE ANN. § 95-3-29(1) (2004) (interpreted in *Bowen v. Flaherty*, 601 So. 2d 860, 862 (Miss. 1992)); 3 PA. STAT. ANN. § 954(a) (West 1995 & Supp. 2005) (interpreted in *Horne v. Haladay*, 728 A.2d 954, 956–60 (Pa. Super. Ct. 1999)); TEX. AGRIC. CODE ANN. § 251.004 (Vernon 2004) (interpreted in *Barrera v. Hondo Creek Cattle Co.*, 132 S.W.3d 544, 547–50 (Tex. App. 2004)).

<sup>84</sup> See sources cited *supra* note 83.

<sup>85</sup> *Horne*, 728 A.2d at 956 (citing 3 PA. STAT. ANN. § 954(a) (1997)).

<sup>86</sup> *Id.* at 955.

expanded or substantially altered and the expanded or substantially altered facility has been in operation for one year or more prior to the date of bringing such action . . . .<sup>87</sup>

The plaintiff in *Horne* argued that the right-to-farm law was enacted to protect existing agricultural operations from the encroachment of residential development.<sup>88</sup> Since the plaintiff's residential use of his property predated the poultry operation, the plaintiff felt the right-to-farm law did not apply.<sup>89</sup> The court noted that the law encouraged the development of agricultural land and protected agricultural operations that were conducted in a manner that complied with federal, state, and local law.<sup>90</sup> The protection involved a defense against nuisance suits not filed within one year of either the inception of the operation or a substantial change of operation.<sup>91</sup> The right-to-farm defense was not conditioned upon whether the agricultural operation predated the neighboring land use.<sup>92</sup>

The distinction between a statute of limitations and a grant of immunity from nuisance lawsuits was also observed by a federal district court in *Overgaard v. Rock County Board of Commissioners*.<sup>93</sup> After acknowledging that the immunity granted by a right-to-farm law might effect an unconstitutional taking, the court found that the Minnesota right-to-

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<sup>87</sup> *Id.* at 956 (quoting 3 PA. STAT. ANN. § 954(a)).

<sup>88</sup> *Id.* at 957.

When nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits and ordinances. As a result, agricultural operations are sometimes forced to cease operations. . . . It is the purpose of this act to reduce the loss to the Commonwealth of its agricultural resources by limiting the circumstances under which agricultural operations may be the subject matter of nuisance suits and ordinances.

*Id.* at 956 (quoting 3 PA. STAT. ANN. § 951).

<sup>89</sup> *Id.* at 957 ("It is the declared policy of the Commonwealth to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products." (quoting 3 PA. STAT. ANN. § 951)).

<sup>90</sup> *Id.*

(b) The provisions of this section shall not affect or defeat the right of any person, firm or corporation to recover damages for any injuries or damages sustained by them on account of any agricultural operation or any portion of an agricultural operation which is conducted in violation of any Federal, State or local statute or governmental regulation which applies to that agricultural operation or portion thereof.

*Id.* at 956 (quoting 3 PA. STAT. ANN. § 954(b)).

<sup>91</sup> *Horne*, 728 A.2d at 957.

<sup>92</sup> *Id.*

<sup>93</sup> No. 02-601, 2003 U.S. Dist. LEXIS 13001, at \*21 (D. Minn. July 25, 2003).

farm act creates a two-year window in which nuisance claims can be brought against agricultural operations.<sup>94</sup> Because neighboring landowners retain their ability to bring nuisance lawsuits for those two years, there was no unconstitutional deprivation of property rights.<sup>95</sup> A subsequent case noted that the statutory two-year period is not absolute.<sup>96</sup> An operation may not constitute a nuisance but may subsequently adopt a new offensive activity that is a nuisance.<sup>97</sup> The two-year period commences with the introduction of the nuisance activity.<sup>98</sup>

Texas courts have found the Texas right-to-farm law creates a statute of repose.<sup>99</sup> "No nuisance action may be brought against an agricultural operation that has lawfully been in operation for one year or more prior to the date on which the action is brought," provided conditions remain substantially unchanged.<sup>100</sup> The Texas Supreme Court found that the right-to-farm law gave absolute protection to qualifying agricultural operations after the one-year time period.<sup>101</sup> The complaining party's discovery of the conditions creating the nuisance does not matter; rather, the issue is whether the conditions have existed for one year.<sup>102</sup>

At least three other states considered lawsuits in which the defendants argued that right-to-farm laws should be interpreted as imposing a statute of limitations.<sup>103</sup> In *Herrin v. Opatut*, the Supreme Court of Georgia declined to read such an expansive interpretation into the state's law.<sup>104</sup> The court opined that the Georgia General As-

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<sup>94</sup> *Id.* at \*20 ("An agricultural operation is not and shall not become a private or public nuisance after two years from its established date of operation if the operation was not a nuisance at its established date of operation." (quoting MINN. STAT. ANN. § 561.19, subdiv. 2(a) (2002))).

<sup>95</sup> *Id.* at \*21–22 (differentiating the facts from *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 321 (Iowa 1998), *cert. denied*, 525 U.S. 1172 (1999)).

<sup>96</sup> *Wendinger v. Forst Farms, Inc.*, 662 N.W.2d 546, 554–55 (Minn. Ct. App. 2003) (finding insufficient evidence to bar a nuisance claim).

<sup>97</sup> *See id.* at 553 (noting the statutory qualification whereby a two-year period is dependent on the operation not being a nuisance when it was established). If it is shown that an operation was a nuisance when it began, the right-to-farm defense does not apply. *Id.*

<sup>98</sup> *Id.* (citing MINN. STAT. ANN. § 561.19, subdiv. 2(a)).

<sup>99</sup> *Holubec v. Brandenberger*, 111 S.W.3d 32, 37–38 (Tex. 2003); *Barrera v. Hondo Creek Cattle Co.*, 132 S.W.3d 544, 547 (Tex. App. 2004).

<sup>100</sup> *Holubec*, 111 S.W.3d at 35 (quoting TEX. AGRIC. CODE ANN. § 251.004(a) (Vernon 2004)).

<sup>101</sup> *Id.* at 37–38.

<sup>102</sup> *Id.* at 38.

<sup>103</sup> *See Herrin v. Opatut*, 281 S.E.2d 575, 577 (Ga. 1981); *Payne v. Skaar*, 900 P.2d 1352, 1355 (Idaho 1995); *Laux v. Chopin Land Assocs.*, 550 N.E.2d 100, 101–04 (Ind. Ct. App. 1990).

<sup>104</sup> 281 S.E.2d at 577.

sembly had chosen to extend the right-to-farm immunity to limited situations where there was an extension of nonagricultural land uses into agricultural areas.<sup>105</sup> The court said it was not significant that the agricultural operation had existed for one year prior to the institution of the lawsuit.<sup>106</sup>

The Idaho Supreme Court found that a right-to-farm law was tailored to address the encroachment of urbanizing areas.<sup>107</sup> It did not permit the expansion of existing operations; there was therefore an issue of whether the plaintiffs had a viable nuisance action.<sup>108</sup> Defendants in *Laux v. Chopin Land Associates* argued that the Indiana right-to-farm law established a one-year statute of limitations that provided a defense against a nuisance lawsuit.<sup>109</sup> They convinced the appellate court to make such a finding,<sup>110</sup> but upon a motion for rehearing, the court vacated its finding and interpreted the one-year period as referring to changed conditions in the vicinity.<sup>111</sup> Thus, Georgia, Idaho, and Indiana courts have interpreted their respective right-to-farm statutes as delineating a time period that is part of the coming to the nuisance doctrine, rather than as defining a limited time period for initiating nuisance lawsuits.<sup>112</sup>

### C. Expansion, Production Changes, and New Technology

Firms expand business operations, commence new production activities, and adopt new technology as part of their evolving business

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<sup>105</sup> *Id.* The court went further to note the absurdity of reading the right-to-farm law as a statute of limitations:

Taken to its logical conclusion, this line of reasoning would permit the construction of an agricultural facility on vacant land centered in a developed, urban area which, after operating for one year, could never be abated as a nuisance. Clearly, this is not what the legislature sought to protect against.

*Id.* at 578.

<sup>106</sup> *Id.* at 579.

<sup>107</sup> *Payne*, 900 P.2d at 1355 (considering Idaho Right to Farm Act, IDAHO CODE §§ 22-4501 to -4504 (1995)).

<sup>108</sup> *Id.*

<sup>109</sup> 550 N.E.2d 100, 101-02 (Ind. Ct. App. 1990) (considering IND. CODE § 34-1-52-4 (1988) (repealed and replaced by IND. CODE ANN. § 32-30-6-9 (LexisNexis 2002))).

<sup>110</sup> *Laux v. Chopin Land Assocs.*, 546 N.E.2d 115 (Ind. Ct. App. 1989), *withdrawn and vacated*, 550 N.E.2d 100, 100-01 (Ind. Ct. App. 1990).

<sup>111</sup> *Laux*, 550 N.E.2d at 103.

<sup>112</sup> See GA. CODE ANN. § 41-1-7(c) (1997 & Supp. 2005) (amended since *Herin*); IDAHO CODE ANN. § 22-4503 (2001) (amended since *Payne*); IND. CODE ANN. § 32-30-6-9(d) (LexisNexis 2002) (amended since *Laux*).



practices.<sup>113</sup> Such changes pose difficult issues under right-to-farm laws.<sup>114</sup> Operators need to be able to make changes while retaining the protection of the right-to-farm law if they are to continue their business.<sup>115</sup> Yet the expansion of an existing agricultural operation may be unfair to neighbors.<sup>116</sup> For example, if a farm commences new livestock production, this may notably alter the environment.<sup>117</sup> Most neighbors believe that they should not have to bear the increased inconvenience generated by expanded operations.

### 1. Permitted Expansion

While many right-to-farm laws address expansion, their approaches vary. Some do not allow expansion, some allow limited expansion, and a few are generous with allowing changes.<sup>118</sup> The Idaho statute<sup>119</sup> has been interpreted as not offering protection to expanded facilities that altered production inputs thereby causing odors.<sup>120</sup> Evidence that a cattle feedlot had increased the number of cattle fed, increased the quantity of odor-producing feed, and added odoriferous silage supported a conclusion that the defense of the right-to-farm law was inapplicable.<sup>121</sup> In a subsequent Idaho case, the court

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<sup>113</sup> The agricultural sector has had a two percent average annual rate of growth in output since 1948. V. Eldon Ball et al., *Agricultural Productivity Revisited*, 79 AMER. J. AGRIC. ECON. 1045, 1062 (1997).

<sup>114</sup> See, e.g., Grossman & Fischer, *supra* note 3, at 127 (noting that many of the early codifications of right-to-farm laws were silent on the effect of changes in farming operations); Hand, *supra* note 2, at 326 (noting that the laws often did not address the issue of whether neighbors accept the risk accompanying the existing activities or the risk of future activities).

<sup>115</sup> See Terence J. Centner, *Agricultural Nuisances and the Georgia "Right to Farm" Law*, GA. ST. B.J., Sept. 1986, at 19, 24 (suggesting under the Georgia right-to-farm law applicable in 1986 that the addition of poultry houses to a viable operation might be permitted but the construction of new buildings on property without current poultry production would be considered a new facility).

<sup>116</sup> See *Trickett v. Ochs*, 838 A.2d 66, 78 (Vt. 2003) (remanding the conflict so that the defendants could be given an opportunity to eliminate substantial and unreasonable interferences with plaintiffs' property since the right-to-farm law did not apply).

<sup>117</sup> See *Finlay v. Finlay*, 856 P.2d 183, 188 (Kan. Ct. App. 1993) (concluding that the commencement of a feedlot-type livestock operation changed the use of the defendant's property); *Flansburgh v. Coffey*, 370 N.W.2d 127, 130-31 (Neb. 1985) (finding that the right-to-farm law did not apply where the defendants introduced a hog confinement building).

<sup>118</sup> See Terence J. Centner, *Legal Structures Governing Animal Waste Management*, in NATIONAL CENTER FOR MANURE AND ANIMAL WASTE MANAGEMENT WHITE PAPERS, ch. 15, (Raleigh, NC: North Carolina State University, 2002).

<sup>119</sup> IDAHO CODE ANN. §§ 22-4501 to -4504 (2001).

<sup>120</sup> *Payne v. Skaar*, 900 P.2d 1352, 1355 (Idaho 1995).

<sup>121</sup> *Id.* at 1354-55.

found that the anti-nuisance defense does not preclude finding the expansion of a hog operation to be a nuisance.<sup>122</sup>

Other legislatures have recognized that some changes are necessary and have attempted to reconcile the protection.<sup>123</sup> Missouri allows reasonable expansion, with some guidelines explaining what is reasonable.<sup>124</sup> Minnesota places a percentage on the amount of expansion that does not qualify for anti-nuisance protection.<sup>125</sup> Any operation that expands by at least twenty-five percent in the number of a particular kind of animal or livestock located on an agricultural operation would have a new established date of operation.<sup>126</sup> Impliedly, expansion below twenty-five percent would relate back to the date the operation commenced.<sup>127</sup>

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<sup>122</sup> *Crea v. Crea*, 16 P.3d 922, 925 (Idaho 2000).

<sup>123</sup> See, e.g., CAL. CIV. CODE § 3482.6 (West 1997 & Supp. 2005) (providing that substantial increases in activities do not qualify for the statutory immunity defense); FLA. STAT. ANN. § 823.14(5) (West 2000 & Supp. 2005) (delineating a limitation on the defense if expansion results in more noise, dust, odor, or fumes, and the operation is adjacent to a homestead or business).

<sup>124</sup> MO. ANN. STAT. § 537.295(1) (West 2000).

An agricultural operation protected pursuant to the provisions of this section may reasonably expand its operation in terms of acres or animal units without losing its protected status so long as all county, state, and federal environmental codes, laws, or regulations are met by the agricultural operation. Reasonable expansion shall not be deemed a public or private nuisance, provided the expansion does not create a substantially adverse effect upon the environment or creates a hazard to public health and safety, or creates a measurably significant difference in environmental pressures upon existing and surrounding neighbors because of increased pollution. Reasonable expansion shall not include complete relocation of a farming operation by the owner within or without the present boundaries of the farming operation; however, reasonable expansion of like kind that presently exists, may occur. If a poultry or livestock operation is to maintain its protected status following a reasonable expansion, the operation must ensure that its waste handling capabilities and facilities meet or exceed minimum recommendations of the University of Missouri extension service for storage, processing, or removal of animal waste.

*Id.*

<sup>125</sup> MINN. STAT. ANN. § 561.19, subdvs. (1)(b), (2) (West 2000 Supp. 2005).

<sup>126</sup> *Id.*

<sup>127</sup> See *id.* A Minnesota court found that summary judgment for the defendant was improper because the trial court had not considered evidence concerning the number of animals and its significance as to whether the defendant's activities constituted an expansion or alteration permitted under the right-to-farm law. *Haas v. Telljohn*, No. C1-95-2229, 1996 Minn. App. LEXIS 289, at \*2-3 (Ct. App. Mar. 12, 1996).

Some legislatures have attempted to allow unlimited expansion and changes.<sup>128</sup> The Georgia right-to-farm law maintains that the expansion of physical facilities does not alter the established date of the agricultural operation.<sup>129</sup> Under this law, a business may expand exponentially and still qualify for whatever protection was available to the earlier facility.<sup>130</sup> The Pennsylvania law allows expansion or alterations so long as they have been “addressed in a nutrient management plan approved prior to the commencement of such expanded or altered operation.”<sup>131</sup> While this may not be as expansive as the Georgia provision, it allows expansion of animal operations that are often accompanied by egregious odors.<sup>132</sup> Thus, the Georgia and Pennsylvania statutes elicit strong support for protecting expansion under their right-to-farm laws.<sup>133</sup>

## 2. Production Changes

Like expansion, agricultural operations may be expected to have production changes and adopt new technology. Farming is not static. Changes in market demands may require that new activities occur on the production site.<sup>134</sup> Advances lead to new machinery, altered procedures, and the production of transgenic crops.<sup>135</sup> Producers need to be able to incorporate these inventions, and may need to qualify for the anti-nuisance protection of right-to-farm laws to do so.<sup>136</sup> Vagaries in

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<sup>128</sup> IOWA CODE ANN. § 352.11(1)(a) (West 2001 & Supp. 2005).

<sup>129</sup> GA. CODE ANN. § 41-1-7(d) (1997 & Supp. 2005).

<sup>130</sup> *See id.* No recorded case has addressed a nuisance challenge involving the exponential growth of an agricultural operation in Georgia.

<sup>131</sup> 3 PA. STAT. ANN. § 954(a) (West 1995 & Supp. 2005).

<sup>132</sup> *See* GA. CODE ANN. § 41-1-7(d); 3 PA. STAT. ANN. § 954(a). Nutrient management plans involve livestock facilities that may be accompanied by offensive odors. *See* Nutrient Management Act, 3 PA. STAT. ANN. §§ 1701–1718 (West 1998).

<sup>133</sup> *See* GA. CODE ANN. § 41-1-7(d); 3 PA. STAT. ANN. § 954(a). The strong support for expansion may raise questions about the infringement of neighbors' constitutional property rights. *See infra* Part IV.

<sup>134</sup> For example, the inability of an apple grower to rely on a local co-op store led to the addition of new equipment at the farm. *Trickett v. Ochs*, 838 A.2d 66, 74 (Vt. 2003); *see also* RONALD JAGER, *THE FATE OF FAMILY FARMING: VARIATIONS ON AN AMERICAN IDEA* 187–91 (2004) (noting the changes in storage of apples at a New Hampshire farm).

<sup>135</sup> *See, e.g.*, JAGER, *supra* note 134, at 152–55 (noting the addition of an egg packing and grading room at a New Hampshire farm that processes eggs from other farms); Grossman, *supra* note 42, at 227–35 (discussing how transgenic crops may constitute a nuisance).

<sup>136</sup> *See Trickett*, 838 A.2d at 68–69, 72–74 (explaining new storage, shipping, and packing equipment was in use, but barring anti-nuisance protection).

markets also may force a producer to make changes in production.<sup>137</sup> The ability to make such changes and retain protection against nuisance lawsuits is essential to American agriculture.

A North Carolina appellate court specifically considered a change in the type of farming operation in *Durham v. Britt*.<sup>138</sup> A farmer had been raising turkeys, but decided to switch to hogs.<sup>139</sup> A neighbor brought a nuisance action claiming there was a fundamental change in the nature of the agricultural activity so that the defendant could not qualify for the defense offered by North Carolina's right-to-farm law.<sup>140</sup> In responding to defendant's motion for summary judgment, the court decided that the defense did not apply to production facilities that had fundamentally changed.<sup>141</sup> The legislature intended that the statute apply to activities occurring at an operation when it commenced production; it did not intend to offer a defense for significant changes in the type of operation.<sup>142</sup>

A case from Florida involving a change in the application of poultry manure to hayfields shows a limitation on what changes are protected.<sup>143</sup> The farm had been applying dry manure but changed to wet manure due to a new chicken housing design.<sup>144</sup> In the subsequent lawsuit, the farm argued that it was protected by the Florida right-to-farm law.<sup>145</sup> The court disagreed.<sup>146</sup> Under the right-to-farm law, minor odor changes and minimal degradation of the environment were permitted.<sup>147</sup> However, the law did not protect the operation when substantial degradation has occurred.<sup>148</sup> Right-to-farm laws were not intended to serve "as an unfettered license for farmers to alter the environment of their locale."<sup>149</sup> The determination of whether the degradation was minor or major was an issue to be resolved by the trial court.<sup>150</sup>

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<sup>137</sup> See *Durham v. Britt*, 451 S.E.2d 1, 1–2 (N.C. Ct. App. 1994) (concerning a farmer who changed from raising turkeys to raising hogs).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 2–3.

<sup>141</sup> *Id.* at 3–4.

<sup>142</sup> *Id.* at 3.

<sup>143</sup> *Pasco County v. Tampa Farm Serv., Inc.*, 573 So. 2d 909, 912 (Fla. Dist. Ct. App. 1990).

<sup>144</sup> *Id.* at 910. It was undisputed that this change resulted in a substantial increase in odors. *Id.*

<sup>145</sup> *Id.* at 911; see FLA. STAT. ANN. § 823.14 (West 2000 & Supp. 2005).

<sup>146</sup> *Pasco County*, 573 So. 2d at 912.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 912.

<sup>150</sup> *Id.*

Most right-to-farm statutes do not protect operations that change their production activities.<sup>151</sup> Because traditional statutes incorporate a coming to the nuisance doctrine, changes at the production facility would cause the nuisance.<sup>152</sup> Thus, the protection for production changes requires specific statutory provisions altering nuisance laws.

### 3. Adopting New Technology

Right-to-farm statutes may attempt to include the adoption of new technology within the agricultural operations and activities covered by the law.<sup>153</sup> Under the definition of a normal agricultural operation, the Pennsylvania law expands the term to include “new activities, practices, equipment and procedures consistent with technological development within the agricultural industry.”<sup>154</sup> Equipment is defined to include “machinery designed and used for agricultural operations, including, but not limited to, crop dryers, feed grinders, saw mills, hammer mills, refrigeration equipment, bins and related equipment used to store or prepare crops for marketing.”<sup>155</sup> Under these provisions, producers can adopt new technology without losing the protection of right-to-farm laws.<sup>156</sup>

The recent Vermont case of *Trickett v. Ochs* typifies the difficulties in balancing equities of allowing a producer to alter an existing agricultural operation.<sup>157</sup> A farmhouse was sold to persons who had no involvement with the farm, its barn, or other farm buildings.<sup>158</sup> These farm structures were in close proximity to the farmhouse so that activities in the buildings could easily affect the plaintiffs’ enjoyment of their home.<sup>159</sup> As the farm adjusted its apple production, it adopted new technology and equipment that interfered with the plaintiffs’ residential use.<sup>160</sup> The apple producer began waxing apples and stor-

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<sup>151</sup> See, e.g., 3 PA. STAT. ANN. § 954(a) (West 1995 & Supp. 2005); *Durham v. Britt*, 451 S.E.2d 1, 3 (N.C. Ct. App. 1994).

<sup>152</sup> See *supra* Part II.A.

<sup>153</sup> See GA. CODE ANN. § 41-1-7(d) (1997 & Supp. 2005).

<sup>154</sup> 3 PA. STAT. ANN. § 952 (West 1995 & Supp. 2005).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* §§ 952, 954(a).

<sup>157</sup> See 838 A.2d 66, 73–77 (Vt. 2003).

<sup>158</sup> *Id.* at 74.

<sup>159</sup> *Id.* Evidence suggested the farmhouse was approximately fifty feet from the nearest farm building. *Id.*

<sup>160</sup> *Id.*

ing them on the farm, and the refrigerated tractor trailer trucks created noise and traffic that interfered with the plaintiffs' residence.<sup>161</sup>

The defendants raised the state's right-to-farm law as a defense against a nuisance lawsuit.<sup>162</sup> After examining the events associated with the nuisance action, the Supreme Court of Vermont concluded that the right-to-farm law did not apply.<sup>163</sup> The nuisance did not arise from the urbanization of the area but rather from the altered orchard operations.<sup>164</sup> The ability of the plaintiffs to enjoy living in their farmhouse needed to be reconciled with the ability of the defendants to make economic use of their farm buildings under the principles of nuisance law.<sup>165</sup>

#### D. *Qualifying Management Practices*

Several states have adopted right-to-farm laws with provisions restricting nuisance protection to operations employing qualifying management practices.<sup>166</sup> Different nomenclatures regarding the management practices that must be observed are delineated in these laws. Some laws address sound agricultural practices,<sup>167</sup> others address generally accepted agricultural practices,<sup>168</sup> and a few simply refer to best management practices.<sup>169</sup> By tying protection to management practices, right-to-farm laws encourage abstinence from poor husbandry practices that might constitute a nuisance.<sup>170</sup>

<sup>161</sup> *Id.* at 68.

<sup>162</sup> *Id.* at 72–73; *see* VT. STAT. ANN. tit. 12, §§ 5751–5753 (2002 & Supp. 2005).

<sup>163</sup> *Trickett*, 838 A.2d at 74.

<sup>164</sup> *Id.* at 73–74.

<sup>165</sup> *Id.* at 77–78.

<sup>166</sup> ARIZ. REV. STAT. ANN. § 3-112 (2002); COLO. REV. STAT. § 35-3.5-102 (2004); CONN. GEN. STAT. ANN. § 19a-341 (West 2003 & Supp. 2005); FLA. STAT. ANN. § 823.14 (West 2000 & Supp. 2004); LA. REV. STAT. ANN. § 3:3603 (2003); ME. REV. STAT. ANN. tit. 17, § 2805 (1983 & Supp. 2004); MASS. GEN. LAWS ch. 111, § 125A (2004); MICH. COMP. LAWS ANN. § 286.473 (West 2003); MINN. STAT. ANN. § 561.19 (West 2000 & Supp. 2005); N.J. STAT. ANN. § 4:1C-10 (West 1998 & Supp. 2005); N.Y. AGRIC. & MKTS. LAW § 308 (McKinney 2004); OHIO REV. CODE ANN. § 929.04 (West 1994); TENN. CODE ANN. § 43-26-103 (2000 & Supp. 2004); UTAH CODE ANN. § 78-38-7 (2002); VT. STAT. ANN. tit. 12, § 5753; VA. CODE ANN. § 3.1-22.29 (1994); WASH. REV. CODE ANN. § 7.48.305 (West 1992 & Supp. 2005); WYO. STAT. ANN. § 11-44-103 (2005).

<sup>167</sup> *E.g.*, UTAH CODE ANN. § 78-38-7.

<sup>168</sup> *E.g.*, MINN. STAT. ANN. § 561.19.

<sup>169</sup> *E.g.*, VA. CODE ANN. § 3.1-22.29.

<sup>170</sup> *See* Gill v. LDI, 19 F. Supp. 2d 1188, 1200 (W.D. Wash. 1998) (finding that noncompliance with water quality provisions meant that defendant had not engaged in good practices and therefore the right-to-farm statute did not apply).

Thus, the laws do not eliminate nuisances but rather provide an incentive for producers to refrain from unreasonable practices that may exacerbate interferences with the enjoyment of property by neighbors.<sup>171</sup> Protection against nuisance lawsuits conditioned upon reasonable agricultural practices requires producers to abstain from immoderate practices that are often the antitheses of neighborliness and environmental stewardship.<sup>172</sup>

The meaning of the good practices requirement can be discerned from a Washington case.<sup>173</sup> In *Gill v. LDI*, the plaintiffs complained that the defendant's quarrying activities constituted a nuisance.<sup>174</sup> The defendant claimed its activities qualified as "forest practices" under the state's right-to-farm law because its rock was being used to build roads.<sup>175</sup> Without deciding whether the quarrying activities were forestry practices protected by the law, the court considered the statutory precondition that the activities need to be consistent with good forest practices.<sup>176</sup> Because the defendant had not complied with several water quality laws, it did not meet the requirement of engaging in reasonable practices.<sup>177</sup> Therefore, the

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<sup>171</sup> For example, a Florida court noted that the state's right-to-farm act does not allow farmers to alter the environment of their locale merely because earlier practices were permitted. *Pasco County v. Tampa Farm Serv., Inc.*, 573 So. 2d 909, 912 (Fla. Dist. Ct. App. 1990).

<sup>172</sup> One of the arguments against right-to-farm laws is that they contribute to the degradation of the rural landscape. Reinert, *supra* note 8.

<sup>173</sup> *Gill*, 19 F. Supp. 2d at 1200.

<sup>174</sup> *Id.* (finding that the right-to-farm law did not offer a defense for the defendant's operations).

<sup>175</sup> *Id.*; see WASH. REV. CODE ANN. § 7.48.300 (West 1992 & Supp. 2005).

The legislature finds that agricultural activities conducted on farmland and forest practices in urbanizing areas are often subjected to nuisance lawsuits, and that such suits encourage and even force the premature removal of the lands from agricultural uses and timber productions. It is therefore the purpose of RCW 7.48.300 through 7.48.310 and 7.48.905 to provide the agricultural activities conducted on farmland and forest practices be protected from nuisance lawsuits.

*Gill*, 19 F. Supp. 2d at 1200 (quoting WASH. REV. CODE § 7.48.300 (1992)).

<sup>176</sup> *Gill*, 19 F. Supp. 2d at 1200.

<sup>177</sup> *Id.*

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

WASH. REV. CODE ANN. § 7.48.305 (West 1992 & Supp. 2005).

affirmative defense of the right-to-farm law was not available to defeat the nuisance allegation.<sup>178</sup>

The protection offered by right-to-farm laws may be tied to a requirement involving reasonable management practices.<sup>179</sup> The acknowledgment that activities should be sound, good, reasonable, or acceptable highlights a belief that exceptions to common law nuisance should be narrow.<sup>180</sup> If a right-to-farm law emasculates too many of the rights of neighboring property owners, it may be more objectionable than common law nuisance.<sup>181</sup> In crafting anti-nuisance protection, legislatures may attempt to balance the rights of producers and neighbors so that unreasonable activities remain nuisances.<sup>182</sup>

The employment of management practices as a precondition for protection against nuisance lawsuits presents the issue of who determines whether a practice qualifies for protection. As observed in the *Gill* case, the issue of whether a defendant meets the conditions required for a statutory right-to-farm defense often requires a judicial resolution.<sup>183</sup> However, it may be possible to have some other party respond to this question before resorting to litigation; two states, Michigan and New York,<sup>184</sup> involve input from an outside committee or regulatory official to determine whether a management practice meets the legislative qualification.<sup>185</sup> By drawing on the expertise of statutory designees concerning reasonable practices, the nuisance protection of a

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<sup>178</sup> *Gill*, 19 F. Supp. 2d at 1200.

<sup>179</sup> MICH. DEP'T OF AGRIC., GENERALLY ACCEPTED AGRICULTURAL AND MANAGEMENT PRACTICES FOR SITE SELECTION AND ODOR CONTROL FOR NEW AND EXPANDING LIVESTOCK PRODUCTION FACILITIES, at ii (2004), available at [http://www.michigan.gov/documents/MDA\\_siteselectionRedlineStrikeout2003\\_67605\\_7.pdf](http://www.michigan.gov/documents/MDA_siteselectionRedlineStrikeout2003_67605_7.pdf) [hereinafter MDA GAAMPS SITE SELECTION].

<sup>180</sup> This is somewhat analogous to provisions in many right-to-farm laws whereby any nuisance that "results from the negligent, improper, or illegal operation of any such facility or operation" is not accorded a defense. *E.g.*, GA. CODE ANN. § 41-1-7(c) (1997 & Supp. 2005).

<sup>181</sup> See Grossman & Fischer, *supra* note 3, at 162 (noting that a right-to-farm law may be overly broad if it applies to situations where a person fails to comply with environmental laws and regulations).

<sup>182</sup> See Grossman, *supra* note 42, at 234 n.116 (quoting Reinert, *supra* note 8, at 1736) (observing that right-to-farm laws incorporating a coming to the nuisance doctrine return to the "fault-based origins of nuisance law").

<sup>183</sup> See *Gill*, 19 F. Supp. 2d at 1200.

<sup>184</sup> MICH. COMP. LAWS ANN. §§ 286.471–.474 (West 2003); N.Y. AGRIC. & MKTS. LAW §§ 308, 308-a (McKinney 2004); see *infra* Part II.D.1–2.

<sup>185</sup> Michigan employs a committee to establish practices and governmental officials to respond to complaints. MICH. COMP. LAWS ANN. § 286.474. New York's Commissioner of Agriculture and Markets issues opinions on the soundness of agricultural practices. N.Y. AGRIC. & MKTS. LAW § 308.



right-to-farm law may be less likely to subject neighbors to undeserving activities and operations.<sup>186</sup>

One of the potential advantages associated with the regulatory provisions of these two states is that it moves a controversy to an alternative setting.<sup>187</sup> Rather than starting with a lawsuit, complainants report the offensive activity to a governmental designee.<sup>188</sup> When reviewing the complaint, the designee may consider methods to obviate the objectionableness of an activity.<sup>189</sup> In this manner, the statutory provisions operate to implement a supplementary dispute resolution procedure.<sup>190</sup> This may offer a more efficient and amicable means of resolving nuisance disputes.<sup>191</sup>

For neighbors, the major advantage of not using a judicial setting is that the parties are likely to have a better relationship after resolving their controversy.<sup>192</sup> Litigation under the adversarial system often leads parties to take extreme positions for the purpose of obtaining a better bargaining position, but at the cost of achieving a collaborative resolution.<sup>193</sup> By moving the controversy from the courtroom to a regulatory body, the parties may reduce hard feelings and avoid the charged atmosphere that often accompany litigation.<sup>194</sup>

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<sup>186</sup> For example, good practices can be very important in reducing odors from animal waste. See, e.g., J. Ronald Miner, *Alternatives to Minimize the Environmental Impact of Large Swine Production Units*, 77 J. ANIMAL SCI. 440, 444 (1999); RONALD SHEFFIELD & ROBERT BOTTCHEER, N.C. COOP. EXTENSION SERV., AG-589, UNDERSTANDING LIVESTOCK ODORS 13 (1999).

<sup>187</sup> MICH. COMP. LAWS ANN. § 286.474(1) (requiring an investigation by the director of the Michigan Department of Agriculture); N.Y. AGRIC. & MKTS. LAW § 308 (requiring the New York Commissioner of Agriculture and Marketing to issue an opinion on whether particular agricultural activities are sound).

<sup>188</sup> MICH. COMP. LAWS ANN. § 286.474(1); N.Y. AGRIC. & MKTS. LAW § 308.

<sup>189</sup> For example, the Michigan right-to-farm statute provides a procedure whereby persons creating a nuisance are given an opportunity to correct unacceptable practices and qualify for the statutory defense. MICH. COMP. LAWS ANN. § 286.474(3).

<sup>190</sup> Before resorting to litigation, the complaining party notifies a governmental designee, and there is an opportunity to resolve the dispute without a lawsuit. See *infra* Part D.1-2.

<sup>191</sup> This alternative resolution procedure may obviate litigation in which most parties incur significant legal expenses and are subjected to stressful proceedings. See MICH. COMP. LAWS ANN. § 286.474(3); N.Y. AGRIC. & MKTS. LAW § 308.

<sup>192</sup> Robert F. Cochran Jr., *Professional Rules and ADR: Control of Alternative Dispute Resolution Under the ABA Ethics 2000 Commission Proposal and Other Professional Responsibility Standards*, 28 FORDHAM URB. L.J. 895, 899 (2001) (observing that alternative dispute resolution is "especially important in cases in which the parties may have a future relationship").

<sup>193</sup> Edward A. Dauer, *Justice Irrelevant: Speculations on the Causes of ADR*, 74 S. CAL. L. REV. 83, 86 (2000) (observing that people involved in litigation claims defend their ground and "the whole effect of the process is one that calls forth strategies to win").

<sup>194</sup> *Id.*

## 1. The Michigan Right to Farm Act

Michigan has established additional regulatory procedures for resolving nuisance complaints against farming operations in the Michigan Right to Farm Act.<sup>195</sup> Farming operations need to conform to “generally accepted agricultural and management practices” to qualify for protection against nuisance lawsuits.<sup>196</sup> These management practices are determined by the Michigan Commission of Agriculture, a bipartisan group of citizens appointed by the governor and confirmed by the state senate.<sup>197</sup> While membership may be expected to be pro-agriculture, the commission must consider information from a broad range of governmental and institutional specialists, experts, and professionals for devising the qualifying practices.<sup>198</sup> The commission must give due consideration to information from agricultural experts so that the qualifying practices will be scientifically based, yet relate to practicalities pertaining to the production process.<sup>199</sup>

Under Michigan’s law, nuisance complaints involving a farm or farm operation are filed with the Michigan Department of Agriculture.<sup>200</sup> When the departmental director receives a complaint concerning manure, waste products, odors, water pollution, or other enumerated farm problems, the director must notify the local government and make an on-site inspection.<sup>201</sup> From the inspection, the director makes a determination as to whether the farm is using generally accepted agricultural and management practices.<sup>202</sup>

For situations where the source of an operation’s problem is caused by the use of other than generally accepted agricultural and management practices, the farm operator is advised to make changes to resolve the problem.<sup>203</sup> Changes to resolve or abate the problem should be made within thirty days.<sup>204</sup> For situations requiring a longer time period for resolving the problem, an implementation plan and

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<sup>195</sup> MICHIGAN DEP’T OF AGRIC., FISCAL YEAR 2004 ANNUAL REPORT: RIGHT TO FARM PROGRAM 2–3, [http://www.michigan.gov/documents/MDA\\_RTFFY04Annualreport\\_117010\\_7.pdf](http://www.michigan.gov/documents/MDA_RTFFY04Annualreport_117010_7.pdf) (last visited Nov. 22, 2005).

<sup>196</sup> MICH. COMP. LAWS ANN. § 286.473.

<sup>197</sup> *Id.* § 285.1.

<sup>198</sup> *Id.* § 286.472(d).

<sup>199</sup> *See id.*

<sup>200</sup> *See id.* § 286.474.

<sup>201</sup> *Id.* § 286.474(1).

<sup>202</sup> MICH. COMP. LAWS ANN. § 286.474(4).

<sup>203</sup> *Id.* § 286.474(3).

<sup>204</sup> *Id.*

schedule for completion are part of the regulatory procedure addressing the problem.<sup>205</sup>

Michigan has special provisions for new and expanding livestock production facilities.<sup>206</sup> The state requires producers to submit a livestock production facility siting request, whereby neighbors and local governments have an opportunity to be involved in the approval process of a new livestock facility.<sup>207</sup> Successful approval of a facility siting request—with the necessary adoption of generally accepted agricultural and management practices—provides the facility with protection against nuisance lawsuits.<sup>208</sup> Under this procedure, the state offers encouragement for new livestock facilities by allowing operators to qualify for protection against nuisance lawsuits prior to major investments in new facilities.<sup>209</sup>

The need for a procedure for the siting of new facilities may be discerned from the arguments presented in *Steffens v. Keeler*.<sup>210</sup> The defendants purchased a vacant dairy-farm and began to raise pigs.<sup>211</sup> The farm was in a mixed agricultural-residential area, with an operating dairy-farm adjacent to the defendants' farm.<sup>212</sup> Pursuant to the Michigan right-to-farm law, the plaintiffs' complaint about the pigs resulted in an inspection of the farm by Michigan Department of Agriculture officials.<sup>213</sup> The farm was found to be not in compliance with generally accepted and recommended livestock waste management practices, but the defendants came into compliance the following year.<sup>214</sup> Due to compliance, the defendants qualified for the protection afforded by the Michigan right-to-farm law.<sup>215</sup>

The *Steffens* court also considered the right-to-farm provision concerning changes in land use near farms.<sup>216</sup> The court found that since the surrounding land was predominantly agricultural, and there was no proof of a change to residential land uses, the defendants were

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<sup>205</sup> *Id.*

<sup>206</sup> MDA GAAMPS SITE SELECTION, *supra* note 179, at 7–8.

<sup>207</sup> *Id.* at 15.

<sup>208</sup> MICH. COMP. LAWS ANN. § 286.473.

<sup>209</sup> The Michigan law declines to give preference to earlier land uses as under a coming to the nuisance doctrine. *Id.*

<sup>210</sup> 503 N.W.2d 675 (Mich. Ct. App. 1993).

<sup>211</sup> *Id.* at 676–77.

<sup>212</sup> *Id.* at 677.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 678.

<sup>216</sup> 503 N.W.2d at 677.

entitled to the statutory defense.<sup>217</sup> By complying with accepted practices, the court found that the defendants qualified for the defense against the nuisance lawsuit.<sup>218</sup> Therefore, prior residential land users may need to accept new, acceptable agricultural practices that are a nuisance.<sup>219</sup> Accordingly, the Michigan right-to-farm law allowed agricultural facilities such as barns to be used for productive uses.<sup>220</sup>

## 2. New York's Right-to-Farm Law

New York's right-to-farm law offers nuisance protection to producers whose land is in an agricultural district or is used in agricultural production subject to an agricultural assessment.<sup>221</sup> However, producers must employ sound agricultural practices.<sup>222</sup> These are practices that are "necessary for the on-farm production, preparation and marketing of agricultural commodities."<sup>223</sup> The soundness of a practice is evaluated on a case-by-case basis.<sup>224</sup>

A challenge that the application of this law effected an unconstitutional taking was considered by a court in *Pure Air and Water, Inc. v. Davidsen*.<sup>225</sup> Under New York law, the state Commissioner of Agriculture and Markets analyzes whether a practice is sound.<sup>226</sup> An opinion that a practice is sound means the defendant can qualify for the statutory defense against nuisance actions.<sup>227</sup> Thus, New York law does not confer a "blanket authorization of agricultural practices based on location" because people can present proof to overcome the statutory nuisance defense.<sup>228</sup> Rather than creating an easement, the law provides a defense for qualifying activities in areas of the state where there is a desire to

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<sup>217</sup> *Id.* at 677–78.

<sup>218</sup> *Id.*

<sup>219</sup> *See id.* at 677. The residential landowners moved into their home more than two years before the defendants started raising hogs. *Id.* at 676–77. The court found that the earlier use of plaintiffs' land was irrelevant. *Id.* at 677.

<sup>220</sup> *See id.*

<sup>221</sup> N.Y. AGRIC. & MkTS. LAW §§ 303, 306, 308(3) (McKinney 2004).

<sup>222</sup> *Id.* § 308(1)(b); *see* *Pure Air & Water, Inc. v. Davidsen*, 668 N.Y.S.2d 248, 249 (N.Y. App. Div. 1998) (interpreting the New York statute).

<sup>223</sup> N.Y. AGRIC. & MkTS. LAW § 308(1)(b).

<sup>224</sup> *Id.* § 308(4).

<sup>225</sup> No. 2690-97 (N.Y. Sup. Ct. May 25, 1999).

<sup>226</sup> N.Y. AGRIC. & MkTS. LAW § 308(3).

<sup>227</sup> *See id.*

<sup>228</sup> *Pure Air & Water*, No. 2690-97, slip op. at 9.

protect agricultural lands and farmers.<sup>229</sup> The court found that this defense did not effect an unconstitutional taking.<sup>230</sup>

### E. *Expansive Immunity*

A few states have offered extremely favorable dispensation to agriculture by enacting right-to-farm laws that provide general nuisance immunity regardless of who was there first: farmer or neighbor.<sup>231</sup> Right-to-farm laws that provide a statute of limitations or involve regulatory designees in determining qualifying management practices may offer protection to new activities that are a nuisance.<sup>232</sup> Another type of expansive law involves provisions allowing farmers to start activities that are offensive to existing neighbors; right-to-farm laws adopted in Iowa, Georgia, and Idaho incorporate this concept.<sup>233</sup> They allow farmers to commence activities that are incompatible with neighboring land uses.<sup>234</sup>

The Iowa General Assembly adopted a law concerning incentives for agricultural land preservation that provided immunity from nuisance lawsuits to farms in agricultural areas.<sup>235</sup> A separate Iowa right-to-farm statute was enacted to provide nuisance immunity to animal feeding operations.<sup>236</sup> The Georgia right-to-farm law contains language that permits any subsequent expansion of physical facilities or adoption of new technology qualifies for nuisance immunity.<sup>237</sup>

In Idaho, a separate right-to-farm law focuses on objectionable smoke from crop residue burning.<sup>238</sup> Economic considerations led the legislature to authorize the activity of agricultural field burning,<sup>239</sup> with the Idaho Department of Agriculture adopting additional rules

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<sup>229</sup> *Id.*; see N.Y. AGRIC. & MKTS. LAW §§ 303, 306, 308.

<sup>230</sup> *Pure Air & Water*, No. 2690-97, slip op. at 10-11.

<sup>231</sup> *E.g.*, GA. CODE ANN. § 41-1-7 (1997 & Supp. 2005); IDAHO CODE ANN. §§ 22-4801, -4803 (2001 & Supp. 2004); IOWA CODE ANN. §§ 352.11, 657.11 (West 1998, 2001 & Supp. 2005); MICH. COMP. LAWS ANN. § 286.473 (West 2003).

<sup>232</sup> For a discussion of two statutes that attempted to protect new activities, see *infra* notes 259-87 and accompanying text.

<sup>233</sup> See GA. CODE ANN. § 41-1-7; IDAHO CODE ANN. §§ 22-4801, -4803, -4803A; IOWA CODE ANN. §§ 352.11, 657.11.

<sup>234</sup> See GA. CODE ANN. § 41-1-7; IDAHO CODE ANN. §§ 22-4801, -4803, -4803A; IOWA CODE ANN. §§ 352.11, 657.11.

<sup>235</sup> 1982 Iowa Acts 1245.

<sup>236</sup> 1995 Iowa Acts 195.

<sup>237</sup> GA. CODE ANN. § 41-1-7(d).

<sup>238</sup> IDAHO CODE ANN. § 22-4803A(6).

<sup>239</sup> See *id.* §§ 22-4801, -4803, -4804.

to regulate the activity.<sup>240</sup> However, neighbors continued to find the smoke a nuisance, and after an unfavorable court ruling,<sup>241</sup> the legislature enacted House Bill 391 in 2003.<sup>242</sup> This became known as “Idaho’s Right to Burn Act.”<sup>243</sup> The provisions provide that crop residue burning conducted in accordance with state law “shall not constitute a private or public nuisance or constitute a trespass.”<sup>244</sup> House Bill 391 was challenged in *Moon v. North Idaho Farmers Ass’n* as an unconstitutional taking.<sup>245</sup> After analyzing the provisions as a regulatory taking, the Idaho Supreme Court declared that Idaho Code section 22-4803A(6) was not offensive to the federal or state takings clauses.<sup>246</sup>

Provisions that offer nuisance immunity to subsequent agricultural activities and practices are quite different from the right-to-farm statutes that embody a coming to the nuisance doctrine.<sup>247</sup> Statutes incorporating the latter approach have extended protection against nuisance lawsuits pursuant to an equitable doctrine that may exist under common law.<sup>248</sup> States interpret the coming to the nuisance doctrine under traditional principles of equity.<sup>249</sup> The prevailing view is that the

<sup>240</sup> IDAHO ADMIN. CODE r. 02.06.16 (2004).

<sup>241</sup> See the notation regarding the lower court’s preliminary injunction in *Moon v. North Idaho Farmers Ass’n*, 96 P.3d 637, 640 (Idaho 2004).

<sup>242</sup> 2003 Idaho Sess. Laws 316 (codified at IDAHO CODE ANN. §§ 22-4803, -4803A).

<sup>243</sup> See David I. Stanish, Comment, *Will the Takings Clause Eclipse Idaho’s Right-to-Burn Act?*, 40 IDAHO L. REV. 723, 733 (2004) (concluding that Idaho Code section 22-4803A should withstand constitutional scrutiny).

<sup>244</sup> IDAHO CODE ANN. § 22-4803A(6).

<sup>245</sup> 96 P.3d 637, 641–46.

<sup>246</sup> *Id.* at 646.

<sup>247</sup> See *supra* Part II.A.

<sup>248</sup> See, e.g., *N. Ind. Pub. Serv. Co. v. Bolka*, 693 N.E.2d 613, 617 (Ind. Ct. App. 1998) (finding that the coming to the nuisance doctrine was not available for defendants with negligent operations); *Williams v. Oeder*, 659 N.E.2d 379, 382 (Ohio Ct. App. 1995) (concluding that the coming to the nuisance argument is one factor among others that may be relevant in determining the unreasonableness of an operation); *E. St. Johns Shingle Co. v. City of Portland*, 246 P.2d 554, 564–65 (Or. 1952) (applying the coming to the nuisance doctrine to authorized government functions that existed prior to the plaintiff’s acquisition of property).

<sup>249</sup> See, e.g., *Souza v. Lauppe*, 69 Cal. Rptr. 2d 494, 496 (Ct. App. 1997) (holding that the California right-to-farm statute applied to bar nuisance actions); *Laux v. Chopin Land Assocs., Inc.*, 550 N.E.2d 100, 102 (Ind. Ct. App. 1990) (finding the Indiana statute’s coming to the nuisance defense defeats claims where the defendant meets the statute’s qualifications). *Contra* *Mangini v. Aerojet-Gen. Corp.*, 281 Cal. Rptr. 827, 835–36 (Ct. App. 1991) (deciding that coming to the nuisance is not a defense in California).

doctrine is one of several factors to be considered in determining whether a nuisance exists.<sup>250</sup>

Priority in the use of property may be an element for special consideration in nuisance disputes.<sup>251</sup> While priority in use does not grant a property owner the right to continue an offensive activity, it is a factor that one may consider in determining whether to grant relief in a nuisance lawsuit.<sup>252</sup> People who come to a nuisance may be viewed less favorably than those who claim that a subsequent activity or land use created a nuisance.<sup>253</sup>

Right-to-farm laws that allow people to adopt activities offensive to existing neighbors do not have an equitable justification, unlike the coming to the nuisance doctrine.<sup>254</sup> Some other consideration may be needed to justify the enactment of legislation that burdens neighbors with new annoying activities.<sup>255</sup> The preservation of natural resources, the beneficial use of farmland, and the encouragement of business activities constitute such special considerations.<sup>256</sup> In other cases, the premature removal of lands from agricultural use and timber production

<sup>250</sup> 9 RICHARD R. POWELL & PATRICK J. ROHAN, *POWELL ON REAL PROPERTY* ¶ 64[2], 64-26 to -27 (Michael Allan Wolf ed., 2004); see *Captain Soma Boat Line, Inc. v. City of Wisconsin Dells*, 255 N.W.2d 441, 445 (Wis. 1977) (noting that plaintiffs are not barred from relief merely because they came to the nuisance); see also *Williams*, 659 N.E.2d at 382 (finding a jury instruction on coming to the nuisance was appropriate); *Abdella v. Smith*, 149 N.W.2d 537, 541 (Wis. 1967) (determining that coming to the nuisance is a factor that bears on the question of reasonable use of land).

<sup>251</sup> See, e.g., *Schott v. Appleton Brewery Co.*, 205 S.W.2d 917, 920 (Mo. 1947) (finding that priority of location was an appropriate factor to consider in declining to provide legal recourse to plaintiffs suing in nuisance); *E. St. Johns Shingle Co.*, 246 P.2d at 566 (finding no nuisance as the plaintiffs knew about the deleterious conditions when they purchased nearby properties).

<sup>252</sup> See, e.g., *Mark v. State ex rel. Dep't of Fish & Wildlife*, 84 P.3d 155, 163 (Or. Ct. App. 2004) (finding that defendants failed to prove that plaintiffs came to the nuisance because plaintiffs lacked the requisite knowledge of the defendants' offensive activity).

<sup>253</sup> See, e.g., *Kramer v. Sweet*, 169 P.2d 892, 896 (Or. 1946) (observing that "the court must take a less favorable view of defendant's case" under circumstances where the plaintiffs were there first) (citing *Conway v. Gampel*, 209 N.W. 562 (Mich. 1926)); *Mark*, 84 P.3d at 163 (quoting *Kramer*, 169 P.2d at 896).

<sup>254</sup> See *Stanish*, *supra* note 243, at 729-30 (noting that the legislation for crop residue burning did not incorporate the coming to the nuisance doctrine).

<sup>255</sup> For example, the preservation of important state farmland resources may serve as a basis for special dispensation. See Neil D. Hamilton, *Preserving Farmland, Creating Farms, and Feeding Communities: Opportunities to Link Farmland Protection and Community Food Security*, 19 N. ILL. U. L. REV. 657, 661 (1999).

<sup>256</sup> E.g., GA. CODE ANN. § 41-1-7(a) (1997 & Supp. 2005) (conserving agricultural and forest land and facilities for the production or distribution of food and other agricultural products); Farm Nuisance Suit Act, 740 ILL. COMP. STAT. ANN. 70/1 (West 2002) (conserving and protecting agricultural land for the production of food and other agricultural products).

may justify right-to-farm legislation.<sup>257</sup> However, courts may balance these interests with the protection of neighbors' constitutional rights.<sup>258</sup>

### III. THE UNCONSTITUTIONALITY OF IOWA RIGHT-TO-FARM LAWS

The Supreme Court of Iowa has found two right-to-farm laws to be unconstitutional because they effect a taking of private property.<sup>259</sup> The right-to-farm law intended to provide incentives for the preservation of agricultural lands, Iowa Code section 352.11,<sup>260</sup> was found unconstitutional in *Bormann v. Board of Supervisors*.<sup>261</sup> The Iowa right-to-farm statute providing nuisance immunity to animal feeding operations, Iowa Code section 657.11,<sup>262</sup> was found unconstitutional in *Gacke v. Pork Xtra, L.L.C.*<sup>263</sup> These decisions suggest that other state right-to-farm laws may be scrutinized to determine whether similar provisions go too far and constitute a taking of private property without just compensation.<sup>264</sup>

To provide incentives for the preservation of agricultural lands, chapter 352 of the Iowa Code provided a mechanism whereby people could petition to create an "agricultural area."<sup>265</sup> Section 352.11(1)(a) provided that farm operations "located in an agricultural area shall not be found to be a nuisance regardless of the established date of opera-

<sup>257</sup> *E.g.*, WASH. REV. CODE ANN. § 7.48.300 (West 1992 & Supp. 2005).

<sup>258</sup> *See* Stanish, *supra* note 243, at 730.

<sup>259</sup> *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 173–74 (Iowa 2004); *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 321 (Iowa 1998), *cert. denied*, 525 U.S. 1172 (1999)).

<sup>260</sup> IOWA CODE ANN. § 352.11 (West 2001 & Supp. 2005).

<sup>261</sup> 584 N.W.2d at 321.

<sup>262</sup> IOWA CODE ANN. § 657.11 (West 1998 & Supp. 2005).

<sup>263</sup> 684 N.W.2d at 173.

<sup>264</sup> *See* Richardson & Feitshans, *supra* note 7, at 135–36 (observing that the *Bormann* result may find a firm foundation in takings laws, although noting that limitations may preclude its adoption in other states). Subsequent to the *Bormann* decision, courts in several states have considered takings challenges. No court has found an unconstitutional taking due to the application of a right-to-farm law. Terence J. Centner, *Anti-nuisance Legislation: Can the Derogation of Common Law Nuisance Be a Taking?*, 30 Env'tl. L. Rep. (Env'tl. Law Inst.) 10,253, 10,258–60 (2000) (suggesting that the *Bormann* decision should not lead to the demise of the nuisance protection afforded by most right-to-farm laws); *see also* Moon v. N. Idaho Farmers Ass'n, 96 P.3d 637, 649 (Idaho 2004) (finding the Idaho Right to Burn Act did not effect a taking) (citing IDAHO CODE ANN. § 22-4803A (Supp. 2004)); *Gillis v. Gratiot County*, No. 97-04351-AV, slip op. at 26 (Mich. Cir. Ct., Gratiot County Mar. 31, 1999) (concluding that an easement under the state's right-to-farm law did not effect an unconstitutional, regulatory taking); *Overgaard v. Rock County Bd. of Comm'rs*, No. 02-601 2003 U.S. Dist. LEXIS 13001, at \*21–22 (D. Minn. July 25, 2003) (distinguishing the facts from Iowa's *Bormann* case and finding no taking under a similar Minnesota statute); *Pure Air & Water, Inc. v. Davidsen*, No. 2690-97, slip op. at 10–11 (N.Y. Sup. Ct. May 25, 1999) (finding that New York's right-to-farm law did not operate to create an unconstitutional taking).

<sup>265</sup> IOWA CODE ANN. §§ 352.1–.11.



tion or expansion of the agricultural activities.”<sup>266</sup> After the approval of an agricultural area in Kossuth County, neighbors challenged its formation.<sup>267</sup> The neighbors argued that the designation of an area where landowners have a right to create a nuisance constituted an unconstitutional per se taking.<sup>268</sup>

The Iowa Supreme Court found that, by extinguishing the rights of neighbors to maintain nuisance lawsuits, section 352.11(1)(a) operated as an easement.<sup>269</sup> The law extinguished prospective rights to maintain lawsuits for noise, odors, and dust, thereby impelling easements upon neighboring properties in and around designated agricultural areas.<sup>270</sup> By categorizing the loss of future nuisance rights as a statutorily-created easement, the court found that the legislative provisions were subject to the just compensation requirements of the Fifth Amendment.<sup>271</sup> Moreover, the court found that section 352.11(1)(a) was unconstitutional as a per se taking.<sup>272</sup> By reaching this conclusion, the court declined to consider the ad hoc, factual inquiries required for regulatory takings.<sup>273</sup>

Subsequently, in *Gacke v. Pork Xtra, L.L.C.*, the Iowa Supreme Court was presented with an argument regarding the constitutionality of a second Iowa right-to-farm law.<sup>274</sup> The plaintiffs complained that the defendant’s hog confinement buildings were a nuisance, and the defendant raised Iowa Code section 657.11 as an affirmative defense.<sup>275</sup> The court struck down the defense, ruling that the right-to-farm law resulted in a taking of the plaintiffs’ property without just compensation.<sup>276</sup>

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<sup>266</sup> *Id.* § 352.11(1)(a).

<sup>267</sup> *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 313 (Iowa 1998), *cert. denied*, 525 U.S. 1172 (1999)).

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 315–16 (quoting *Churchill v. Burlington Water Co.*, 62 N.W. 646, 647 (Iowa 1895)).

<sup>270</sup> *Id.* at 321.

<sup>271</sup> *Id.* at 316.

<sup>272</sup> *Id.* at 321–22. The court only considered the physical invasion category of per se takings. *Id.* at 317.

<sup>273</sup> *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233 (2003) (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 321–23 (2002) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978))); *see Bormann*, 584 N.W.2d at 316–17.

<sup>274</sup> 684 N.W.2d 168, 172 (Iowa 2004); *see IOWA CODE ANN.* § 657.11(1) (West 1998 & Supp. 2005).

<sup>275</sup> *Gacke*, 684 N.W.2d at 171.

<sup>276</sup> *Id.* at 173–74.

Iowa Code section 657.11 sought to protect animal agricultural producers “from the costs of defending nuisance suits, which negatively impact upon Iowa’s competitive economic position and discourage persons from entering into animal agricultural production.”<sup>277</sup> It was enacted after the General Assembly had balanced competing interests.<sup>278</sup> To provide this protection, the section provided that animal feeding operations shall not be found to be a nuisance unless an injury was caused by certain enumerated conditions:

a. The failure to comply with a federal statute or regulation or a state statute or rule which applies to the animal feeding operation.

b. Both of the following:

(1) The animal feeding operation unreasonably and for substantial periods of time interferes with the person’s comfortable use and enjoyment of the person’s life or property.

(2) The animal feeding operation failed to use existing prudent generally accepted management practices reasonable for the operation.<sup>279</sup>

The Iowa Supreme Court found that the nuisance defense provided by section 657.11(2) was not distinguishable from that provided by section 352.11(1)(a).<sup>280</sup> Thus, the court followed *Bormann* and found that section 657.11(2) violated the takings clause of the Iowa Constitution.<sup>281</sup> However, significant for other states, the *Gacke* court declined to rule whether section 657.11(2) violated the federal Takings Clause.<sup>282</sup> These dicta suggest that the *Bormann* and *Gacke* inter-

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<sup>277</sup> IOWA CODE ANN. § 657.11(1).

<sup>278</sup> *Id.*

The purpose of this section is to protect animal agricultural producers who manage their operations according to state and federal requirements from the costs of defending nuisance suits, which negatively impact upon Iowa’s competitive economic position and discourage persons from entering into animal agricultural production. This section is intended to promote the expansion of animal agriculture in this state by protecting persons engaged in the care and feeding of animals. The general assembly has balanced all competing interests and declares its intent to protect and preserve animal agricultural production operations.

*Id.*

<sup>279</sup> *Id.* § 657.11(2).

<sup>280</sup> *Gacke*, 684 N.W.2d at 173.

<sup>281</sup> *Id.* at 173–74.

<sup>282</sup> *Id.* at 174 (noting that the court did not need to address the federal takings issue because it could base its decision on another section of the Iowa Constitution).

pretations of the Iowa right-to-farm laws are based on the Iowa Constitution, and that *Bormann* is erroneous regarding the court's finding under the Federal Takings Clause.<sup>283</sup>

The *Gacke* court also considered the constitutionality of section 657.11(2) under the inalienable rights clause found in Article I of the Iowa Constitution.<sup>284</sup> Employing factors considered in evaluating the reasonableness of the statute as an exercise of the state's police power, the court found that the immunity granted by section 657.11(2) had an oppressive effect on property owners.<sup>285</sup> Because the property owners in *Gacke* lived on and invested in their property before the commencement of the nuisance-generating activity, that right-to-farm statute placed a heavy burden on their property rights.<sup>286</sup> The court felt that, in the absence of any corresponding benefit to neighboring property owners, section 657.11(2) was unreasonable and violated the inalienable rights clause of the Iowa Constitution.<sup>287</sup>

Federal takings jurisprudence is replete with cases considering the scope of the Fifth Amendment's protection.<sup>288</sup> An analysis of case law suggests three reasons for disagreeing with the findings of the

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<sup>283</sup> The *Gacke* court emphatically stated it was not going to retreat from its earlier pronouncement in *Bormann*:

The defendant criticizes this holding, arguing that because there was no physical invasion of the plaintiffs' property—no trespass—a per se takings analysis was inappropriate. Although this court discussed the various scenarios involving trespassory and nontrespassory invasions in *Bormann*, our ultimate conclusion was simply that the immunity statute created an easement and the appropriation of this property right was a taking. Whether the nuisance easement created by section 657.11(2) is based on a physical invasion of particulates from the confinement facilities or is viewed as a nontrespassory invasion akin to the flying of aircraft over the land, it is a taking under Iowa's constitution. We decline to retreat from this view.

*Id.* at 173–74.

<sup>284</sup> IOWA CONST. art. I, § 1 (amended 1998); *Gacke*, 684 N.W.2d at 179.

<sup>285</sup> *Gacke*, 684 N.W.2d at 179.

<sup>286</sup> *Id.* This is quite different from property owners who come to a nuisance. *Id.*

<sup>287</sup> *Id.* The Idaho Supreme Court was presented with a similar argument in *Moon v. North Idaho Farmers Ass'n.*, 96 P.3d 637, 646 (Idaho 2004). Relying on the presumption of constitutionality, the court found that the restrictions on nuisances in Idaho Code section 22-4803A(6) did not violate the Idaho Constitution. *Id.* at 641, 646; see IDAHO CONST., art. I, § 1; IDAHO CODE ANN. § 22-4803A(6) (Supp. 2004).

<sup>288</sup> See, e.g., Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 138–57 (2001) (assessing how local governmental entities are responding to takings cases); David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. COLO. L. REV. 497, 533–47 (2004) (discussing limitations on the exercise of the police power).

*Bormann* and *Gacke* decisions. First, nontrespasory invasions are not physical invasions, and therefore do not constitute a per se taking under the U.S. Constitution.<sup>289</sup> Second, as regulations restricting the use of private property, right-to-farm laws involve legislation that needs to be scrutinized as a regulatory taking.<sup>290</sup> Third, because the *Bormann* challenge involved a county ordinance within the ambit of state legislation, the ordinance was analogous to a rent control ordinance, and needed to be analyzed as a regulatory taking.<sup>291</sup>

### A. No Physical Invasion

The Supreme Court has noted that the Fifth Amendment itself provides the basis for the judicial distinction between physical and regulatory takings.<sup>292</sup> Compensation must be paid whenever the government acquires private property for a public purpose.<sup>293</sup> Thus, compensation must be paid whenever a leasehold is taken that the government occupies for its own purposes.<sup>294</sup> For example, a governmental appropriation of a part of a rooftop for the provision of cable television access constitutes a taking.<sup>295</sup> Similarly, when all economically viable use has been taken by a regulatory restriction, there is a categorical taking for which compensation must be paid.<sup>296</sup>

Pursuant to judicial interpretations of the Fifth Amendment, it is clear that compensation must be paid for physical and categorical takings.<sup>297</sup> However, the Constitution contains no comparable reference regarding governmental regulations that prohibit property owners from making use of their private property.<sup>298</sup> The Supreme Court has

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<sup>289</sup> See *infra* Part III.A–C.

<sup>290</sup> See *infra* Part III.A–C.

<sup>291</sup> See *infra* Part III.A–C.

<sup>292</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002).

<sup>293</sup> *Id.* at 322.

<sup>294</sup> *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233 (2003) (quoting *Tahoe-Sierra*, 535 U.S. at 321–23 (citing *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945))).

<sup>295</sup> *Id.* at 233–34 (quoting *Tahoe-Sierra*, 535 U.S. at 321–23 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982))).

<sup>296</sup> *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1365 (Fed. Cir. 2004) (noting that the categorical rule is only applied to regulatory takings in extraordinary circumstances: when “no . . . economically beneficial use of land is permitted” (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992))); see *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1362 (Fed. Cir. 2001) (finding no categorical taking from the government’s restraint on coal mining).

<sup>297</sup> *Tahoe-Sierra*, 535 U.S. at 321–22.

<sup>298</sup> *Id.*

found that it is “inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a ‘regulatory taking.’”<sup>299</sup> Regulations limiting the number of hunting licenses available to landowners,<sup>300</sup> prohibiting landlords from evicting tenants unwilling to pay a higher rent,<sup>301</sup> banning uses on portions of an owner’s property,<sup>302</sup> forbidding the private use of certain airspace,<sup>303</sup> and taking interest from lawyers’ trust accounts to pay for legal services,<sup>304</sup> were not found to constitute per se or categorical takings.<sup>305</sup> Rather, governmentally imposed restrictions on the private use of property must be analyzed as regulatory takings.<sup>306</sup>

### 1. The Dichotomy of Per Se and Regulatory Takings

The *Bormann* court acknowledged the dichotomy of per se and regulatory takings, and proceeded to refer to judicial examples of nontrespassory invasions of private property.<sup>307</sup> The court found that the immunity of Iowa Code section 352.11(1)(a) involved private nuisances creating easements.<sup>308</sup> As such, the plaintiffs’ challenge was one of inverse condemnation, involving easements that allowed invasions of neighboring properties.<sup>309</sup> Although the court lacked allegations of a present nuisance,<sup>310</sup> it concluded that per se takings do not require physical invasions.<sup>311</sup> Therefore, the court classified the nontrespassory invasion as a per se taking.<sup>312</sup>

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<sup>299</sup> *Id.* at 323.

<sup>300</sup> *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1577, 1580 (10th Cir. 1995).

<sup>301</sup> *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 234 (2003) (citing *Block v. Hirsh*, 256 U.S. 135 (1921)).

<sup>302</sup> *Id.* (citing *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

<sup>303</sup> *Id.* (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

<sup>304</sup> *Id.* at 232.

<sup>305</sup> *Id.*

<sup>306</sup> *See id.*

<sup>307</sup> *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 317–20 (Iowa 1998), *cert. denied*, 525 U.S. 1172 (1999)). The court cited a 1967 law review article and placed principal reliance on *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914). *See Bormann*, at 318, 319. In relying on these sources, the court disregarded federal jurisprudence concerning regulatory takings. *See id.*

<sup>308</sup> *See Bormann*, 584 N.W.2d at 314–16.

<sup>309</sup> *Id.* at 314–17.

<sup>310</sup> *Id.* at 313.

<sup>311</sup> *Id.* at 317 (“To constitute a per se taking, the government need not physically invade the surface of the land.”).

<sup>312</sup> *See id.* at 321.

In *Bormann*, the court referenced a recognized treatise for its assessment,<sup>313</sup> but failed to recognize that the treatise did not assert that nontrespassory invasions are per se takings.<sup>314</sup> Rather, the treatise noted that government actions that were less than an invasion might constitute a taking, without differentiating between per se and regulatory takings.<sup>315</sup> The court cited judicial examples of nontrespassory invasions of private property, supporting the *Bormann* court's conclusion that there was a taking;<sup>316</sup> but, these cited cases were decided prior to the Supreme Court's clarifying comments regarding per se versus regulatory takings. While the *Bormann* court acknowledged *Lucas v. South Carolina Coastal Council*,<sup>317</sup> its assumption that easements were per se takings allowed it to circumvent considerations required for regulatory takings.<sup>318</sup>

While some easements permit physical invasions, other do not.<sup>319</sup> The required dedication of an easement in *Nollan v. California Coastal Commission*<sup>320</sup> involved a physical invasion because people had a "right to pass to and fro" across the Nollans' private property.<sup>321</sup> In a similar fashion, increased water runoff could result in the taking of a flowage easement by inverse condemnation.<sup>322</sup> However, not all physical invasions constitute takings.<sup>323</sup> If the government did not intend to invade a protected property interest, or if the invasion is a direct, natural, or probable result of an authorized activity, a plaintiff's losses might better be addressed under tort law.<sup>324</sup> Moreover, even if the government

<sup>313</sup> *Id.* at 317; 1 JOHN W. SHONKWILER & TERRY D. MORGAN, LAND USE LITIGATION § 10.02(2), at 370–72 (1986).

<sup>314</sup> See Centner, *supra* note 264, at 10,257.

<sup>315</sup> See SHONKWILER & MORGAN, *supra* note 313, § 10.02(2), at 370–72.

<sup>316</sup> *Bormann*, 584 N.W.2d at 319; see *Richards v. Wash. Terminal Co.*, 233 U.S. 546 (1914); *Thornburg v. Port of Portland*, 376 P.2d 100 (Or. 1962).

<sup>317</sup> 505 U.S. 1003 (1992).

<sup>318</sup> See *Bormann*, 584 N.W.2d. at 316–17.

<sup>319</sup> *E.g.*, *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 832 (1987) (finding that the easement involved a permanent physical invasion); *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1358 (Fed. Cir. 2003) (remanding the case to determine whether the plaintiff's loss constituted a taking of an easement or should be remedied under tort law).

<sup>320</sup> 483 U.S. at 828.

<sup>321</sup> *Id.* at 832.

<sup>322</sup> See *Ridge Line*, 346 F.3d at 1358.

<sup>323</sup> *Id.* (noting that the plaintiff's loss due to storm drainage might be appropriately addressed under tort law); *Hoeck v. City of Portland*, 57 F.3d 781, 788–89 (9th Cir. 1995) (finding that the city's presence on plaintiff's property was a temporary and valid exercise of the police power that did not support a claim of a physical taking).

<sup>324</sup> *Ridge Line*, 346 F.3d at 1355–56 (quoting *Columbia Basin Orchard v. United States*, 132 F. Supp. 707, 709 (Ct. Cl. 1955)) (citing *Owen v. United States*, 851 F.2d 1404, 1418

intended to invade a plaintiff's property, it may not constitute a compensable taking if the invasion does not preempt the owner's right to enjoy his property for an extended period of time.<sup>325</sup>

Looking at the facts presented in *Bormann*, no alleged physical invasion had occurred because there were no allegations or proof of nuisance activities.<sup>326</sup> Physical invasions of the property that offend the Fifth Amendment generally require the direct invasion of another's property or the taking of a leasehold.<sup>327</sup> The government must occupy the property for its own use.<sup>328</sup> Physical invasions require trespass actions for garnering relief,<sup>329</sup> such that per se takings occur where the state action requires landowners to submit to the physical occupation of their land.<sup>330</sup> In the absence of a physical invasion, the *Bormann* case could not involve a per se taking under federal law.<sup>331</sup>

## 2. Nuisances as Regulatory Takings

The *Bormann* court noted that it was the nuisance immunity that resulted in the taking.<sup>332</sup> However, immunity to nuisances does not in-

(Fed. Cir. 1988)); *Moon v. N. Idaho Farmers Ass'n*, 96 P.3d 637, 637 (Idaho 2004) (finding that a statutory defense for smoke from crop residue burning did not effect a taking).

<sup>325</sup> *Ridge Line*, 346 F.3d at 1356 (citing *S. Pac. Co. v. United States*, 58 Ct. Cl. 428 (1923)).

<sup>326</sup> 584 N.W.2d 309, 313 (Iowa 1998) (noting the challenge was a facial one because neighbors had not presented any proof of nuisance), *cert. denied*, 525 U.S. 1172 (1999)).

<sup>327</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321–22 (2002) (observing that compensation is required when a leasehold is taken); *Tuthill Ranch, Inc. v. United States*, 381 F.3d 1132, 1135 (Fed. Cir. 2004) (noting that even takings of temporary leaseholds demand compensation); *Covington v. Jefferson County*, 53 P.3d 828, 832 (Idaho 2002) (finding that alleged increases in noises, offensive odors, dust, flies, and litter did not constitute a physical invasion).

<sup>328</sup> *Tuthill Ranch*, 381 F.3d at 1135–36 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127–28 (1978)).

<sup>329</sup> *Williamson v. Fowler Toyota, Inc.*, 956 P.2d 858, 862 (Okla. 1998) (noting that trespass involves an actual physical invasion of the real estate of another without permission); see STEPHANIE L. DZUR, NAT'L CTR. FOR AGRIC. LAW, NUISANCE IMMUNITY PROVIDED BY IOWA'S RIGHT-TO-FARM STATUTE: A TAKING WITHOUT JUST COMPENSATION 16 (2004), available at [http://www.nationalaglawcenter.org/assets/articles/dzur\\_nuisanceimmunity.pdf](http://www.nationalaglawcenter.org/assets/articles/dzur_nuisanceimmunity.pdf).

<sup>330</sup> See *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992) (noting that compelled acquiescence is required for a physical taking); see also *Guimont v. Clarke*, 854 P.2d 1, 12–13 (Wash. 1993) (noting that property owners compelled to suffer a physical invasion or occupation of their properties are entitled to compensation).

<sup>331</sup> See 584 N.W.2d at 317. *Bormann* involved the approval of an agricultural area where landowners had a right to create a nuisance. *Id.* at 313. Although the plaintiffs did not show any physical invasion, the court found that the governmental action created an easement that resulted in a taking. *Id.* at 316, 321.

<sup>332</sup> *Id.* at 313, 321.

volve a physical invasion, but rather addresses a legal defense to qualifying lawsuits.<sup>333</sup> As defined by the *Restatement (Second) of Torts*, nuisances are nontrespassory invasions of another's interest in the private use and enjoyment of land.<sup>334</sup> Right-to-farm laws thus involve nontrespassory invasions that entail the encroachment of another's interest in the enjoyment of land.<sup>335</sup> Even when nuisances result in the physical presence of noise, light, and odors on neighboring property, they constitute an interference of enjoyment rather than a physical invasion.<sup>336</sup> Unless a plaintiff alleges that the damages incurred are unique, special, peculiar, or in some way different from those incurred by others, the inconveniences are not a per se taking.<sup>337</sup>

The distinction is significant because nontrespassory invasions need to be analyzed as regulatory takings to determine whether the regulation goes too far.<sup>338</sup> The analysis involves an "ad hoc, factual inquiry,"<sup>339</sup> recognized in *Penn Central Transportation Co. v. New York*

<sup>333</sup> See, e.g., *Flo-Sun, Inc. v. Kirk*, 783 So.2d 1029, 1036 (Fla. 2001) (finding that the Florida right-to-farm law provides a defense to a public nuisance action if the farm operation conforms to generally accepted agricultural and management practices); *Holubec v. Bradenberger*, 111 S.W.3d 32, 34 (Tex. 2003) (examining the right-to-farm act as an affirmative defense); *Vicwood Meridian P'ship v. Skagit Sand & Gravel*, 98 P.3d 1277, 1280 (Wash. Ct. App. 2004) (noting that right-to-farm laws throughout the country codify the common law defense of coming to the nuisance).

<sup>334</sup> RESTATEMENT (SECOND) OF TORTS § 821D (1979).

<sup>335</sup> See, e.g., *In re Chi. Flood Litig.*, 680 N.E.2d 265, 278 (Ill. 1997) (noting that nuisance involves an invasion in the use and enjoyment of property); *Domen Holding Co. v. Aronovich*, 802 N.E.2d 135, 139 (N.Y. 2003) (relying on the RESTATEMENT (SECOND) OF TORTS § 821D for determining a nuisance).

<sup>336</sup> *Moon v. N. Idaho Farmers Ass'n*, 96 P.3d 637, 643 (Idaho 2004) (finding that the smoke did not result in the loss of access, or of any complete use, and was therefore not a physical taking); *In re Chi. Flood*, 680 N.E.2d at 278 (noting that a private nuisance does not involve a "crass, physical invasion"); *Golen v. Union Corp.*, 718 A.2d 298, 300 n.2 (Pa. Super. Ct. 1998) (recognizing that the physical presence of noise and light may constitute a nuisance although no physical invasion occurs).

<sup>337</sup> *Spiek v. Mich. Dep't of Transp.*, 572 N.W.2d 201, 202 (Mich. 1998) (finding that the complaint was insufficient to support a taking because there was no harm differing in kind from the harm suffered by others); see *Covington v. Jefferson County*, 53 P.3d 828, 832 (Idaho 2002) (finding that flies, dust, and disturbing odors did not constitute a physical invasion). *Contra* *Ream v. Keen*, 838 P.2d 1073, 1074 (Or. 1992) (finding that the deposit of airborne particulates on another's land constitutes a trespass).

<sup>338</sup> See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

<sup>339</sup> *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 233 (2003) (quoting *Tahoe-Sierra*, 535 U.S. at 321–23); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)). The inquiry might involve three factors: (1) the economic impact of the restriction on the claimant's property; (2) the restriction's interference with investment-backed expectations; and (3) the character



City,<sup>340</sup> known as a “*Penn Central* inquiry.”<sup>341</sup> Assuming that the regulation does not effect a categorical taking, one must consider the reasons for the regulation.<sup>342</sup> Regulations must advance a legitimate governmental interest,<sup>343</sup> but may adversely affect private property rights.<sup>344</sup>

Applying regulatory takings jurisprudence to the *Bormann* challenge, it is appropriate to assess whether the elimination of nuisance rights was reasonably related to the preservation of agricultural land in forming the agricultural district.<sup>345</sup> This inquiry would allow the court to determine whether the state had sufficient justification under its police powers for interfering with the plaintiffs’ property rights.<sup>346</sup> For the *Gacke* challenge, the statute itself said that the Iowa General Assembly had balanced the competing interests before acting “to protect and preserve animal agricultural production operations.”<sup>347</sup> Because the Iowa Supreme Court in *Bormann* and *Gacke* accepted the plaintiffs’ arguments that there was a physical invasion, it did not analyze the governmental actions under the factors suggested for regulatory takings.<sup>348</sup>

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of the government action. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

<sup>340</sup> 438 U.S. 104.

<sup>341</sup> See *Tahoe-Sierra*, 535 U.S. at 334; *Palazzolo*, 533 U.S. at 635. For development exaction cases, a “rough proportionality” test has been employed. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). Other tests are appropriate for different types of regulatory takings. A circuit court adopted the “substantially advances” test involving a “reasonable relationship” between a legitimate public purpose and the means used to effectuate that purpose. *Chevron USA, Inc. v. Bronster*, 363 F.3d 846, 853–54 (9th Cir. 2004) (citing *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 700–01, 702–03 (1999)). The court also noted the “reasonable relationship” test involves an intermediate level of review that is more stringent than the rational basis test used in the due process context, but less stringent than the “rough proportionality” test used in the context of exactions under the Takings Clause. *Id.*

<sup>342</sup> This would enable the court to determine whether there is a sufficient nexus between the desired ends and the means employed in the challenged regulation. See *Dolan*, 512 U.S. at 386 (citing *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987)); see also Cori S. Parobek, Note, *Of Farmers’ Takes and Fishes’ Takings: Fifth Amendment Compensation Claims When the Endangered Species Act and Western Water Rights Collide*, 27 HARV. ENVTL. L. REV. 177, 200–04 (2003) (summarizing traditional takings jurisprudence to conclude that the judiciary has recently taken a friendlier stance toward property owners and a concomitantly harsher review of the purported government rationales for denigrating property rights).

<sup>343</sup> *Tahoe-Sierra*, 535 U.S. at 314.

<sup>344</sup> See *id.* at 324.

<sup>345</sup> See *Dolan*, 512 U.S. at 385.

<sup>346</sup> See *id.*

<sup>347</sup> IOWA CODE ANN. § 657.11(1) (West 1998 & Supp. 2005).

<sup>348</sup> *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (relying on the *Penn Central* factors); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124

Accepted jurisprudence treats nuisances as invasions of personal interests in land, but not physical invasions, due to the absence of a physical occupation.<sup>349</sup> Moreover, state action involving a condemnation generally requires a weighing of the public interests.<sup>350</sup> Because a nuisance does not result in a crass physical invasion,<sup>351</sup> most courts may be expected to evaluate challenges to right-to-farm laws as regulatory takings.<sup>352</sup> This will require an ad hoc, factual inquiry designed to allow the careful examination and weighing of all relevant circumstances.<sup>353</sup> In declining to make factual inquiries, the *Bormann* and *Gacke* courts failed to follow the familiar regulatory takings approach in determining whether the application of a county ordinance and state law resulted in unconstitutional takings.

### B. Regulations Restricting the Use of Private Property

Right-to-farm laws are land use regulations that permit nuisance activities if landowners meet the stated statutory conditions.<sup>354</sup> Land

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(1978) (noting that the Supreme Court's decisions have identified several factors that are significant for analyses of regulatory takings).

<sup>349</sup> The Supreme Court of Illinois noted that:

[T]he interference with the use and enjoyment of property must consist of an invasion by something perceptible to the senses. In private nuisance, the typical activity at issue does not result in a crass physical invasion, as in trespass, but rather results in an invasion of another's use and enjoyment of his or her property.

*In re Chi. Flood Litig.*, 680 N.E.2d 265, 278 (Ill. 1997) (citing 1 F. HARPER ET AL., TORTS § 1.23, at 82–83 (2d ed. 1986); 3 J.D. LEE & BARRY A. LINDAHL, MODERN TORT LAW § 35.10, at 203 (1990)); see also *Vogel v. Grant-LaFayette Elec. Coop.*, 548 N.W.2d 829, 834 (Wis. 1996) (declining to require a physical invasion for a nuisance action).

<sup>350</sup> See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980) (analyzing a zoning regulation and finding there was no taking); *Leon County v. Gluesenkamp*, 873 So. 2d 460, 467 (Fla. Dist. Ct. App. 2004) (concluding that a development moratorium did not constitute a taking).

<sup>351</sup> See *In re Chi. Flood*, 680 N.E.2d at 278 (reviewing allegations for damages that did not result in the physical invasion of flood waters as nuisances).

<sup>352</sup> See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323–24 (2002) (analyzing moratoria on the development of property as regulatory takings); *E. Enters. v. Apfel*, 524 U.S. 498, 522–23 (1998) (analyzing a challenge to the Coal Act as a regulatory taking); *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1183–84 (Fed. Cir. 2004) (analyzing regulations on communicable diseases that caused the plaintiff financial losses as a regulatory taking).

<sup>353</sup> *Tahoe-Sierra*, 535 U.S. at 322 (citing *Penn Central*, 438 U.S. at 124). Courts may examine the relative benefits and burdens associated with the regulatory action. *Bass Enters. Prod. Co. v. United States*, 381 F.3d 1360, 1370 (Fed. Cir. 2004); see also *supra* note 341.

<sup>354</sup> See *supra* Part II.A–E; see also *Souza v. Lauppe*, 69 Cal. Rptr. 2d 494, 500 (Ct. App. 1997) (discussing seven requisites for the right-to-farm defense).

owners' affirmative defenses against nuisance actions mean that right-to-farm laws may adversely impact the land use options of neighboring property owners.<sup>355</sup> In our society, property owners are cognizant that their use of property may be restricted by various measures enacted by governments in legitimate exercises of the government's police powers.<sup>356</sup> Because right-to-farm laws involve interferences with land use, it is appropriate to treat allegations of takings as regulatory takings.<sup>357</sup> Otherwise, considering land use regulations "*per se* takings would transform government regulation into a luxury few governments could afford."<sup>358</sup>

*Pennsylvania Coal Co. v. Mahon*<sup>359</sup> gave birth to our regulatory takings jurisprudence.<sup>360</sup> If a governmental "regulation goes too far it will be recognized as a taking."<sup>361</sup> Consideration of whether a regulation goes too far often involves "compar[ing] the value that has been taken from the [regulated] property with the value that remains in the property."<sup>362</sup> It also involves a determination of whether the regulation adequately advances legitimate governmental interests.<sup>363</sup> If a regulation does not substantially advance legitimate interests, it offends the Takings Clause.<sup>364</sup>

Right-to-farm laws interfere with the common law rights of property owners in the vicinity of the nuisance-generating activity. In enacting right-to-farm laws under their reserved police powers, states balance competing interests before granting a statutory defense to

<sup>355</sup> See, e.g., *Moon v. N. Idaho Farmers Ass'n*, 96 P.3d 637, 643 (Idaho 2004) (finding that the statutory provisions allowed farmers to burn their fields in a manner causing smoke to interfere with neighbors' full enjoyment); *Parker v. Barefoot*, 519 S.E.2d 315, 315 (N.C. 1999) (adopting dissenting opinion below of Martin, J., 502 S.E.2d 42, 48-49 (N.C. Ct. App. 1998) (upholding the jury's determination in favor of defendants, and denying relief to neighbors suffering from odors from an industrial hog production facility)).

<sup>356</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).

<sup>357</sup> See *Tahoe-Sierra*, 535 U.S. at 323-24.

<sup>358</sup> See *id.* at 324.

<sup>359</sup> 260 U.S. 393.

<sup>360</sup> *Tahoe-Sierra*, 535 U.S. at 326 (citing *Mahon*, 260 U.S. at 415).

<sup>361</sup> *Id.* at 326 (quoting *Mahon*, 260 U.S. at 415); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); *Lucas*, 505 U.S. at 1014; *Yee v. City of Escondido*, 503 U.S. 519, 529 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 853 (1987) (Brennan, J., dissenting) (citing *Mahon*, 260 U.S. at 415).

<sup>362</sup> *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987).

<sup>363</sup> *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

<sup>364</sup> *Tahoe-Sierra*, 535 U.S. at 314.

qualifying persons engaged in nuisances.<sup>365</sup> Right-to-farm legislation is a subset of a larger set of governmental laws and regulations that interfere with or change common law rights.<sup>366</sup> An evaluation of restrictions providing moratoria on development,<sup>367</sup> and controlling common law hunting,<sup>368</sup> discloses that limitations on the use of private property need to be analyzed as regulatory takings.

### 1. The *Tahoe-Sierra* Moratoria

The U.S. Supreme Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* considered two moratoria that temporarily prohibited property owners from using their land.<sup>369</sup> Because the moratoria involved neither a physical invasion nor the direct appropriation of private property, the Court concluded that they should be analyzed as regulatory takings.<sup>370</sup> The analysis requires the examination of a number of factors including the parcel-as-a-whole.<sup>371</sup> Inquiries of regulatory takings challenges focus “on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.”<sup>372</sup>

In *Tahoe-Sierra*, the Court found that its earlier evaluations of regulations in *First English Evangelical Lutheran Church v. County of Los Angeles*<sup>373</sup> and *Lucas v. South Carolina Coastal Council*<sup>374</sup> did not address whether either of the moratoria at issue effected a taking.<sup>375</sup> The cate-

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<sup>365</sup> See *supra* notes 61, 175, and *infra* note 411, for statutes containing policy declarations.

<sup>366</sup> See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978) (considering whether a landmark law unreasonably burdened property owners); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) (upholding an ordinance that precluded the mining of sand and gravel); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384–85 (1926) (discussing diminution in value caused by zoning law); *Hadacheck v. Sebastian*, 239 U.S. 394, 412–13 (1915) (allowing a city to preclude the petitioner from engaging in his business enterprise).

<sup>367</sup> See *Tahoe-Sierra*, 535 U.S. at 311.

<sup>368</sup> *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1576 (10th Cir. 1995).

<sup>369</sup> See generally 535 U.S. 302.

<sup>370</sup> *Id.* at 314, 324.

<sup>371</sup> *Id.* at 326–27.

<sup>372</sup> *Id.* at 327 (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130–31 (1978)). See generally Laurel A. Firestone, Case Comment, *Temporary Moratoria and Regulatory Takings Jurisprudence After Tahoe-Sierra* Preservation Council, Inc. v. Tahoe Regional Planning Agency, 27 HARV. ENVTL. L. REV. 277 (2003) (discussing recent takings jurisprudence and the use of the *Penn Central* ad hoc approach to regulatory takings).

<sup>373</sup> 482 U.S. 304 (1987).

<sup>374</sup> 505 U.S. 1003 (1992).

<sup>375</sup> *Tahoe-Sierra*, 535 U.S. at 328–29.

gorical taking rule did not respond to the question of whether a temporary prohibition of any economic use of land produces an unconstitutional taking.<sup>376</sup> In rejecting seven theories that might support a taking, the Court weighed all relevant circumstances and relied on the familiar *Penn Central* approach.<sup>377</sup>

The analysis of the moratoria in *Tahoe-Sierra* is instructive on how takings challenges to right-to-farm laws might be evaluated. Interference with the right of property owners to develop their properties was considered a regulatory taking.<sup>378</sup> Similarly, interferences with the right of property owners to bring nuisance actions need to be evaluated as regulatory takings. The rights destroyed need to be analyzed as part of the property owner's entire bundle of rights.<sup>379</sup> This "requires careful examination and weighing of all the relevant circumstances."<sup>380</sup>

As an exercise of the state's police powers, right-to-farm laws destroy one strand of a property owner's bundle of rights.<sup>381</sup> They generally abolish nuisance causes of action that have not yet accrued.<sup>382</sup> The owners retain other rights.<sup>383</sup> Thus, an allegation that a particular right-to-farm law effects a taking needs to be examined after weighing all of the relevant factors.<sup>384</sup> By declining to engage in the consideration of pertinent factors, the *Bormann* and *Gacke* courts failed to follow federal takings jurisprudence.<sup>385</sup>

## 2. Restricting the Common Law Right to Hunt

The finding of the Tenth Circuit Court of Appeals in *Clajon Production Corp. v. Petera*<sup>386</sup> is instructive as a second example of interference with common law rights. The State of Wyoming requires a license to

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<sup>376</sup> *Id.* at 330–31.

<sup>377</sup> *Id.* at 342.

<sup>378</sup> *Id.* at 314.

<sup>379</sup> *Id.* at 327 (quoting *Andrus v. Allard*, 444 U.S. 51, 65–66 (1979)) (noting that a regulatory taking requires an examination of all of a property owner's bundle of property rights).

<sup>380</sup> *Id.* at 335 (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)).

<sup>381</sup> Property owners lose their rights to enjoin nuisances or recover damages.

<sup>382</sup> *Moon v. N. Idaho Farmers Ass'n*, 96 P.3d 637, 645 (Idaho 2004). Many right-to-farm laws do this by incorporating the coming to the nuisance doctrine. Exceptions may exist where right-to-farm laws abolish current rights. These situations require a separate analysis.

<sup>383</sup> Property owners retain the ability to make some type of use of their properties. *See id.*

<sup>384</sup> *See Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

<sup>385</sup> *See generally Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168 (Iowa 2004); *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309 (Iowa 1998), *cert. denied*, 525 U.S. 1172 (1999)).

<sup>386</sup> 70 F.3d 1566 (10th Cir. 1995).

hunt,<sup>387</sup> and directed the Wyoming Game and Fish Commission to promulgate regulations governing hunting.<sup>388</sup> Pursuant to its authority, the Commission established limitations on the number of licenses per animal species that may be issued to landowners.<sup>389</sup> These agency restrictions interfered with the common law right to hunt.<sup>390</sup>

Wyoming ranchers challenged the licensing scheme as constituting a taking of their common law property right to hunt surplus game on their land.<sup>391</sup> The court recognized that the state's limitations on hunting was an interference with property rights that did not involve a physical taking.<sup>392</sup> Therefore, the court employed a regulatory takings analysis.<sup>393</sup> If the licensing scheme went too far in depriving the ranchers their property rights, it would be a taking.<sup>394</sup>

In analyzing the regulation's economic effect on the plaintiffs' properties, the court noted that the properties were still being used for ranching, farming, and other livestock operations.<sup>395</sup> Thus, the licensing scheme did not deny plaintiffs all beneficial use of their property so there was no categorical taking.<sup>396</sup> The court next turned to the issue of whether the regulations advanced a legitimate governmental interest.<sup>397</sup> The regulations advanced the state's interest in conserving wild game while "affording [its residents] a reasonable opportunity to hunt."<sup>398</sup> Thus, the court found that the licensing scheme did not result in a taking.<sup>399</sup>

Like the hunting scheme, state right-to-farm laws interfere with the common law. Whereas hunting schemes interfere with the right to hunt wild animals,<sup>400</sup> right-to-farm laws interfere with common law nuisance rights.<sup>401</sup> Like Wyoming's hunting restrictions, anti-nuisance

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<sup>387</sup> WYO. STAT. ANN. § 23-3-102 (2005).

<sup>388</sup> Wyo. Game & Fish Comm'n, Rules & Regs., ch. 44, § 2 (2005).

<sup>389</sup> *Id.* For example, the regulatory commission "annually determines the types of species available for hunting and the overall number of animals of each species that may be taken." *Clajon*, 70 F.3d at 1570.

<sup>390</sup> *Clajon*, 70 F.3d at 1575.

<sup>391</sup> *Id.* at 1576.

<sup>392</sup> *See id.*

<sup>393</sup> *Id.* at 1576–80.

<sup>394</sup> *Id.* at 1576.

<sup>395</sup> *Id.* at 1577.

<sup>396</sup> *See Clajon*, 70 F.3d at 1577.

<sup>397</sup> *Id.* at 1577–79 (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

<sup>398</sup> *Id.* at 1579.

<sup>399</sup> *Id.* at 1580.

<sup>400</sup> *See id.* at 1575.

<sup>401</sup> *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 175 (Iowa 2004); *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 316 (Iowa 1998), *cert. denied*, 525 U.S. 1172 (1999)).

provisions do not render properties valueless.<sup>402</sup> Thus, a right-to-farm law does not effect a categorical taking, and therefore needs to be analyzed as a regulatory taking.<sup>403</sup>

Under a government's exercise of its police power, it may reduce rights of property owners.<sup>404</sup> Because Iowa's right-to-farm laws<sup>405</sup> operated to reduce the value of the plaintiffs' properties, there was a need to determine whether the regulations resulted in an unconstitutional regulatory taking.<sup>406</sup> This calls for a *Penn Central* inquiry.<sup>407</sup> The Iowa Supreme Court never considered the justifications for the anti-nuisance provisions in the *Bormann* or *Gacke* challenges.<sup>408</sup> Therefore, the court was not able to determine whether the governmental actions constituted an unconstitutional taking under federal law.<sup>409</sup>

### C. Analogy to Rent Control Ordinances

*Bormann* considered potential nuisances permitted by Iowa Code section 352.11 in areas that were designated as agricultural districts.<sup>410</sup> The Iowa legislature set forth its justifications for the nuisance protection as including the orderly use and development of land and related natural resources, as well as the importance of preserving the state's finite supply of agricultural land.<sup>411</sup> Agricultural districts may be formed

<sup>402</sup> See *Bormann*, 584 N.W.2d at 321. The property owners in *Bormann* were subjected to an easement that left them with a restricted number of land uses due to the activities of their neighbors. *Id.*

<sup>403</sup> See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

<sup>404</sup> *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 473 (1986) (recognizing that only when a diminution of value of private property reaches a certain magnitude is compensation required (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922))); *Rose Acre Farms, Inc. v. United States*, 373 F.3d 1177, 1190 (Fed. Cir. 2004) (noting that the exercise of a government's police powers may reduce the value of private property); *Vulcan Materials Co. v. City of Tehuacana*, 369 F.3d 882, 894–95 (5th Cir. 2004) (explaining that no compensation is required under a government's police powers to abate public nuisances).

<sup>405</sup> IOWA CODE ANN. § 352.11 (West 2001 & Supp. 2005).

<sup>406</sup> See *Gacke*, 684 N.W.2d at 173–74; *Bormann*, 584 N.W.2d at 316–17.

<sup>407</sup> *Tahoe-Sierra*, 535 U.S. at 321–22.

<sup>408</sup> *Gacke*, 684 N.W.2d at 173–74; *Bormann*, 584 N.W.2d at 316–17.

<sup>409</sup> See *Gacke*, 684 N.W.2d at 174.

<sup>410</sup> IOWA CODE ANN. § 352.11(1)(a) (West 2001 & Supp. 2005); see *Bormann*, 584 N.W.2d at 313.

<sup>411</sup> The Iowa legislature enumerated its findings in the purpose of the law:

It is the intent of the general assembly and the policy of this state to provide for the orderly use and development of land and related natural resources in Iowa for residential, commercial, industrial, and recreational purposes, preserve private property rights, protect natural and historic resources

whenever an application is presented to and approved by a county board of supervisors.<sup>412</sup> The agricultural district considered in *Bormann* was adopted pursuant to this state authority.<sup>413</sup>

Therefore, the *Bormann* challenge involved a governmental determination that it was in the public interest to grant nuisance protection to farm operations within agricultural districts.<sup>414</sup> Rather than finding that the ordinance created an easement that was a per se taking, the question was whether the county-created easement went too far in denying property owners existing rights under nuisance law.<sup>415</sup> By approving the formation of the agricultural district, did the county's action produce an unconstitutional taking?

This governmental procedure of allowing counties to establish agricultural districts is analogous to the adoption of municipal rent control ordinances.<sup>416</sup> In the furtherance of public welfare, states have enacted statutes that allow local governments to restrict rental activi-

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and fragile ecosystems of this state including forests, wetlands, rivers, streams, lakes and their shorelines, aquifers, prairies, and recreational areas to promote the efficient use and conservation of energy resources, to promote the creation and maintenance of wildlife habitat, to consider the protection of soil from wind and water erosion and preserve the availability and use of agricultural land for agricultural production, through processes that emphasize the participation of citizens and local governments.

The general assembly recognizes the importance of preserving the state's finite supply of agricultural land. Conversion of farmland to urban development, and other nonfarm uses, reduces future food production capabilities and may ultimately undermine agriculture as a major economic activity in Iowa.

It is the intent of the general assembly to provide local citizens and local governments the means by which agricultural land may be protected from nonagricultural development pressures. This may be accomplished by the creation of county land preservation and use plans and policies, adoption of an agricultural land preservation ordinance, or establishment of agricultural areas in which substantial agricultural activities are encouraged, so that land inside these areas or subject to those ordinances is conserved for the production of food, fiber, and livestock, thus assuring the preservation of agriculture as a major factor in the economy of this state.

IOWA CODE ANN. § 352.1.

<sup>412</sup> *Id.* § 352.6; *Bormann*, 584 N.W.2d at 313.

<sup>413</sup> *Bormann*, 584 N.W.2d at 311.

<sup>414</sup> The state law enumerated the public purposes, while the county board of supervisors considered the evidence and made the determination. *Bormann*, 584 N.W.2d at 313 (citing IOWA CODE §§ 352.1, 352.6 (1998)).

<sup>415</sup> Not all easements effect unconstitutional takings. See *supra* notes 319–31 and accompanying text.

<sup>416</sup> See, e.g., Mobilehome Residency Law, CAL. CIV. CODE §§ 798 to 798.88 (West 1982 & Supp. 2005). See generally *Yee v. City of Escondido*, 503 U.S. 519 (1992).



ties.<sup>417</sup> Communities are permitted to adopt local ordinances within the ambit of state law in order to further public objectives.<sup>418</sup> As might be expected, rent control has been controversial.<sup>419</sup> Property owners have challenged the provisions as unconstitutional takings of their properties.<sup>420</sup>

Under California's Mobilehome Residency Law,<sup>421</sup> the City of Escondido adopted an ordinance that set rental rates and required city council approval for any increase.<sup>422</sup> In *Yee v. City of Escondido*, the City was sued by owners of a mobile home park who claimed that the City's action was a taking.<sup>423</sup> Under the state law and a local ordinance, mobile home park owners could no longer set rents or evict home owners.<sup>424</sup> As petitioners, the park owners argued that home owners were able "to occupy the land indefinitely at a submarket rent."<sup>425</sup> Petitioners claimed that the benefits accruing to mobile home owners from park owners due to the rent control provisions were "no less than a right of physical occupation of the park owner's land."<sup>426</sup>

In analyzing the impacts of the state and local rent control provisions, the *Yee* court found the rental ordinance did not create a physical taking.<sup>427</sup> Park owners were not required to submit to the physical occupation of their land.<sup>428</sup> Therefore, there was no per se taking.<sup>429</sup>

<sup>417</sup> For example, the California Mobilehome Residency Law was enacted to limit the bases upon which a mobile home park owner could terminate a mobile home owner's tenancy. CAL. CIV. CODE §§ 798 to 798.88. Local governments have the authority to regulate the contractual provisions used by park owners. *Id.*

<sup>418</sup> See, e.g., *Yee*, 503 U.S. at 524 (considering a state law allowing communities to adopt rent control ordinances for mobile home parks).

<sup>419</sup> E.g., Craig Gurian, *Let Them Rent Cake: George Pataki, Market Ideology, and the Attempt to Dismantle Rent Regulation in New York*, 31 FORDHAM URB. L.J. 339, 339-42 (2004) (finding the debate over rent control to involve a battleground between those who believe in the free market and those who do not); see also S. Keith Garner, Comment, "Novel" Constitutional Claims: Rent Control, Means-Ends Tests, and the Takings Clause, 88 CAL. L. REV. 1547, 1549 (2000) (advancing the argument that sensitively designed rent control programs should withstand constitutional scrutiny under the Takings Clause); Elizabeth Naughton, Comment, *San Francisco's Owner Move-In Legislation: Rent Control or Out of Control?*, 34 U.S.F. L. REV. 537, 554-70 (2000) (suggesting that a rent control scheme is unconstitutional).

<sup>420</sup> E.g., *Yee*, 503 U.S. at 522-23.

<sup>421</sup> CAL. CIV. CODE §§ 798 to 798.88.

<sup>422</sup> *Yee*, 503 U.S. at 524-25.

<sup>423</sup> *Id.* at 525.

<sup>424</sup> *Id.* at 526.

<sup>425</sup> *Id.* at 527.

<sup>426</sup> *Id.*

<sup>427</sup> *Id.* at 531-32.

<sup>428</sup> *Yee*, 503 U.S. at 527 (citing *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 259, 261 (1964); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 82-84 (1980)).

<sup>429</sup> *Id.* at 539.

Because the government does not need to “pay[] compensation for all economic injuries that [its] regulations entail,”<sup>430</sup> the determination of whether a rent control ordinance goes too far involves a regulatory taking analysis.<sup>431</sup> While rental ordinances have been upheld as valid police power regulations,<sup>432</sup> it is possible for a rent control ordinance to effect an unconstitutional taking.<sup>433</sup>

The potential loss of wealth experienced by mobile home park owners under rental ordinances is similar to the potential loss by neighbors under the anti-nuisance provisions of Iowa Code sections 352.11 and 657.11.<sup>434</sup> Rental ordinances limit the ability of park owners to increase rents and evict tenants, thereby diminishing the value of the real estate.<sup>435</sup> Iowa Code sections 352.11 and 657.11 prevent landowners from bringing nuisance actions against qualifying farm operations,<sup>436</sup> thereby diminishing the values of their properties. Since rental ordinances are considered regulatory takings, it follows that anti-nuisance provisions should also be evaluated as regulatory takings.

#### IV. IMPLICATIONS FOR OTHER STATES’ RIGHT-TO-FARM LAWS

While *Bormann v. Board of Supervisors* and *Gacke v. Pork Xtra, L.L.C.* have no direct effect on other states’ laws, municipal and agricultural interest groups are concerned.<sup>437</sup> Under their police powers, govern-

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<sup>430</sup> *Id.* at 528–29 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982)).

<sup>431</sup> *Cashman v. City of Cotati*, 374 F.3d 887, 889 (9th Cir. 2004) (alleging a rent control ordinance effects a regulatory taking), *withdrawn*, 415 F.3d 1027 (9th Cir. 2005); *see also* *Ventura Mobilehome Cmty. Owners Ass’n v. City of San Buenaventura*, 371 F.3d 1046, 1049 (9th Cir. 2004) (citing appellant’s argument that rent and vacancy controls constituted a regulatory taking).

<sup>432</sup> *See, e.g., Yee*, 503 U.S. at 538–39; *Apartment & Office Bldg. Ass’n v. Washington*, 381 A.2d 588, 590 (D.C. 1977).

<sup>433</sup> *Cashman*, 374 F.3d at 896.

<sup>434</sup> *Compare Yee*, 503 U.S. at 524–25 (examining whether mobile home ordinance effected a taking), *with Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 171–72 (Iowa 2004) (holding that a right-to-farm law providing nuisance immunity was unconstitutional), *and Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 313 (Iowa 1998) (finding that a right-to-farm law intended to preserve agricultural lands was unconstitutional), *cert. denied*, 525 U.S. 1172 (1999)).

<sup>435</sup> *Yee*, 503 U.S. at 524–25.

<sup>436</sup> *Gacke*, 684 N.W.2d at 170–71 (citing IOWA CODE § 657.11(2) (1999)); *Bormann*, 584 N.W.2d at 313 (citing IOWA CODE § 352.11(1)(a) (1993)). The *Bormann* plaintiffs, depending on a facial challenge to the ordinance, never presented allegations or proof of a nuisance or lost values. *Bormann*, 584 N.W.2d at 313.

<sup>437</sup> *See generally* Elisa Paster, Student Writing, *Preservation of Agricultural Lands Through Land Use Planning Tools and Techniques*, 44 NAT. RESOURCES J. 283 (2004) (suggesting that

ments have been active in devising restrictions on the use of property.<sup>438</sup> If a nontrespasory invasion under a right-to-farm law effects a taking,<sup>439</sup> What about similar invasions occurring under zoning,<sup>440</sup> historic preservation,<sup>441</sup> land use plans,<sup>442</sup> and other types of laws, regulations, and ordinances? The Iowa decisions suggest that courts may redefine the line between valid exercises of police power and unconstitutional takings.<sup>443</sup>

While the *Gacke* decision backed away from finding an unconstitutional taking under the Fifth Amendment, the court did proceed to adhere to its earlier pronouncement that a state right-to-farm law effected an unconstitutional taking under the Iowa Constitution.<sup>444</sup> Will other states be tempted to recognize a dichotomy between state and federal constitutional protections to hold that laws or regulations valid under the Fifth Amendment are invalid under a state constitu-

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land use planning might be paired with other strategies such as right-to-farm laws to help save vital agricultural lands).

<sup>438</sup> See, e.g., Carol Necole Brown, *Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claims After Property Transfers*, 36 CONN. L. REV. 7, 16 (2003) (recognizing the accepted right of governments to employ police power regulations to burden the use and enjoyment of property); Pat A. Cerundolo, Comment, *The Limited Impact of Lucas v. South Carolina Coastal Council on Massachusetts Regulatory Takings Jurisprudence*, 25 B.C. ENVTL. AFF. L. REV. 431, 435 (1998) (noting that a broad interpretation of police powers thwarts takings challenges).

<sup>439</sup> In *Bormann*, there was no evidence of a current nuisance or a physical invasion of odors or particles. See 584 N.W.2d 309, 313 (Iowa 1998), cert. denied, 525 U.S. 1172 (1999).

<sup>440</sup> See *Brandywine, Inc. v. City of Richmond*, 359 F.3d 830, 834 (6th Cir. 2004) (describing plaintiffs' claim that the enforcement of the zoning scheme resulted in the unconstitutional taking of their property).

<sup>441</sup> See, e.g., *Dist. Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 876 (D.C. Cir. 1999) (alleging a taking by the government's denial of construction permits due to the property's landmark status).

<sup>442</sup> See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 306 (2002) (considering constitutionality of land use plan); see also *supra* notes 369–77377 and accompanying text.

<sup>443</sup> This is an objective of the property rights movement. See, e.g., Oliver A. Houck, *More Unfinished Stories: Lucas, Atlanta Coalition, and Palila/Sweet Home*, 75 U. COLO. L. REV. 331, 343–44 (2004) (suggesting that the movement sought to undermine institutions such as zoning, rent control, workers' compensation laws, and progressive taxation); Eduardo Moises Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 ECOLOGY L.Q. 227, 264 (2004) (noting that the movement sought to blunt the force of land use regulations on a person's ability to "exploit the land as freely and profitably as they have in the past."); Mark E. Sabath, Note, *The Perils of the Property Rights Initiative: Taking Stock of Nevada County's Measure D*, 28 HARV. ENVTL. L. REV. 249, 277 (2004) (rationalizing that property rights legislation takes the place of the judicially crafted takings doctrine to subordinate the public good to the private good).

<sup>444</sup> *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 174 (Iowa 2004).

tion?<sup>445</sup> States can either continue to adhere to federal takings jurisprudence—as established by the U.S. Supreme Court and circuit courts of appeals—or afford people higher levels of rights under their state constitution.

### A. Federal Takings

Right-to-farm laws interfere with the property rights of neighbors. By allowing qualifying property owners to engage in activities that are objectionable, they often interfere with neighbors' ability to enjoy their properties.<sup>446</sup> The laws may reduce the values of properties in close proximity to nuisance-generating activities.<sup>447</sup> Although some statutes may create an easement,<sup>448</sup> the laws do not involve the occupation of property. No leasehold is taken so there is no physical invasion.<sup>449</sup> Therefore, the right-to-farm laws do not effect a per se taking under the Fifth Amendment.

Right-to-farm laws also do not result in neighboring properties being rendered valueless.<sup>450</sup> Consequently, the laws do not effect a categorical taking.<sup>451</sup> Rather, right-to-farm laws involve a regulatory taking. Issues of whether plaintiffs can prove an unconstitutional taking of their properties will need to be evaluated by employing an ad

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<sup>445</sup> See, e.g., *Cologne v. Westfarms Assocs.*, 469 A.2d 1201, 1206 (Conn. 1984) (noting that states are not precluded from affording higher levels of rights than provided by the Federal Constitution); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 211–12 (Ohio 1999) (finding no reason to conclude that the religion clauses of the Ohio Constitution should be coextensive with similar clauses in the Federal Constitution).

<sup>446</sup> For two cases where plaintiffs had to suffer their neighbors' bothersome activities, see *supra* note 355.

<sup>447</sup> The defense of right-to-farm laws is raised after neighbors sue in nuisance. In many cases, the neighbors initiate a lawsuit due to the diminution of value of their properties by the defendant's activity. See, e.g., *Swedenberg v. Phillips*, 562 So. 2d 170, 172–73 (Ala. 1990) (observing that the plaintiffs were concerned about the lower value of their property); *Travis v. Preston*, 643 N.W.2d 235, 238–40 (Mich. Ct. App. 2002) (considering plaintiffs' reduced property values and a right-to-farm defense).

<sup>448</sup> E.g., *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 315–16 (Iowa 1998), *cert. denied*, 525 U.S. 1172 (1999)). *Contra* *Moon v. N. Idaho Farmers Ass'n*, 96 P.3d 637, 644 (Idaho 2004).

<sup>449</sup> See *supra* Part III.A.

<sup>450</sup> See *supra* notes 402–03 and accompanying text.

<sup>451</sup> See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330–31 (2002) (noting that a permanent obliteration of value is normally required for a categorical taking).

hoc, factual inquiry as prescribed by the Supreme Court in *Penn Central Transportation Co. v. New York City*.<sup>452</sup>

Federal regulatory takings jurisprudence suggests it is doubtful that other courts will follow the Iowa decisions to find that a right-to-farm law effects a taking.<sup>453</sup> Under state police powers, legislatures are able to take actions aimed at promoting and safeguarding public interests.<sup>454</sup> Nearly all of the interferences caused by right-to-farm laws may be justified by legitimate state interests involving the protection of land resources,<sup>455</sup> viable business operations,<sup>456</sup> and overall state economies.<sup>457</sup> Because each law has distinct provisions and is accompanied by its own justifications, each will require a separate inquiry as to whether it effects a taking. However, several projections can be made concerning each of the five approaches legislatures have taken in delineating their anti-nuisance protection.

Under state laws that employ the traditional right-to-farm doctrine, plaintiffs will not be able to mount successful takings challenges.<sup>458</sup> The coming to the nuisance doctrine is a permissible extension of state law.<sup>459</sup> Legislatures can establish rules whereby persons who move next to a nuisance are estopped from maintaining an action to abate the existing nuisance.<sup>460</sup> Under equitable principles, grounded on a public purpose, legislatures can regulate land uses and future nuisance rights.<sup>461</sup>

<sup>452</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); see *supra* note 339.

<sup>453</sup> See *supra* notes 289–436 and accompanying text.

<sup>454</sup> See *Kelo v. City of New London*, 125 S. Ct. 2655, 2665 (2005) (finding a city's development plan served a public purpose and satisfied the public use requirement of the Fifth Amendment).

<sup>455</sup> See, e.g., *supra* note 60.

<sup>456</sup> See, e.g., *supra* note 64.

<sup>457</sup> See, e.g., IDAHO CODE ANN. § 22-4803 (2001 & Supp. 2004) (supporting agriculture).

<sup>458</sup> See *supra* Part II.A.

<sup>459</sup> The coming to the nuisance doctrine generally is one factor that may be considered in determining whether a land use is reasonable. See *Mark v. State ex rel. Dep't of Fish & Wildlife*, 84 P.2d 155, 163 (Or. Ct. App. 2004) (finding that the coming to the nuisance doctrine is only one considerations for determining whether an activity is a nuisance); *Captain Soma Boat Line, Inc. v. City of Wisconsin Dells*, 255 N.W.2d 441, 445 (Wis. 1977).

<sup>460</sup> This follows an early common law rule that a latter arriving inhabitant must suffer inconveniences from existing properties in the vicinity. *E. St. Johns Shingle Co. v. City of Portland*, 246 P.2d 554, 556 (Or. 1952); see also *Vill. of Wilsonville v. SCA Servs., Inc.*, 426 N.E.2d 824, 835 (Ill. 1981) (noting that coming to the nuisance may "constitute a defense or operate as an estoppel").

<sup>461</sup> See, e.g., Robert H. Cutting, "One Man's Ceiling Is Another Man's Floor": *Property Rights as the Double-Edged Sword*, 31 ENVTL. L. 819, 861 (2001) (noting that the traditional police power to regulate land use remains strong).

Right-to-farm laws that provide statutes of limitation have been challenged and have withstood scrutiny.<sup>462</sup> Statutes of limitation offer predictability and finality that contribute to the orderly administration of justice.<sup>463</sup> Limitations on the time period for filing nuisance lawsuits protect defendants from stale claims or surprises.<sup>464</sup> These purposes are important to businesses adopting new activities and technologies because they bring closure to whether the activity or technology can be found to be a nuisance.<sup>465</sup> Because statutes of limitation provide a window of opportunity for bringing nuisance actions, there is no unconstitutional deprivation of property rights.<sup>466</sup>

Given the array of different provisions concerning expansion, production changes, and new technology, it is difficult to establish a common projection on whether a statute might produce an unconstitutional taking.<sup>467</sup> Over time, businesses and their activities change. In deciding to conserve agricultural land and encourage business activities, the legislative dispensation impliedly includes some expansion, adjustments in production, and technological changes.<sup>468</sup> Right-to-farm laws that extend their protection to minor adjustments of activities should withstand scrutiny.<sup>469</sup> However, laws that foist significant burdens on neighboring property owners by providing a defense for new

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<sup>462</sup> See *supra* Part II.B.

<sup>463</sup> *E.g.*, *Sundance Homes, Inc. v. County of DuPage*, 746 N.E.2d 254, 267 (Ill. 2001).

<sup>464</sup> See, *e.g.*, *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348 (1944) (noting how statutes of limitation promote justice by cutting off old claims and preventing surprises); *Mominee v. Scherbarth*, 503 N.E.2d 717, 721 (Ohio 1986) (noting the goal of preventing stale claims).

<sup>465</sup> With closure, businesses are assured that investments can be utilized for productive purposes and are given information for gauging further investments. Statutes of limitation for nuisance actions, therefore, help encourage ongoing business activities.

<sup>466</sup> *Overgaard v. Rock County Bd. of Comm'rs*, No. 02-601, 2003 U.S. Dist. LEXIS 13001, at \*21 (D. Minn. July 25, 2003).

<sup>467</sup> See *supra* Part II.C.

<sup>468</sup> An analogy to a case from Nebraska shows why it should be concluded that a right-to-farm defense should apply for minor adjustments to qualifying properties. In *Flansburgh v. Coffey*, the court noted that persons residing in rural areas need to expect that their residences will be subjected to normal rural conditions. 370 N.W.2d 127, 131 (Neb. 1985). Similarly, legislatures intended the protection accorded by right-to-farm laws to include normal changes in activities and technology.

<sup>469</sup> Right-to-farm laws are clothed with a presumption of validity so that the burden of proof is on plaintiffs to show an unconstitutional taking. *Moon v. N. Idaho Farmers Ass'n*, 96 P.3d 637, 641 (Idaho 2004). As noted in the *Moon* case concerning crop residue burning, governmental actions may involve temporary inconveniences and diminished property rights for neighbors. *Id.* at 645.

nuisance activities may go too far.<sup>470</sup> Statutes that allow major expansion or extensive changes might produce an unconstitutional taking.

The inclusion of a provision on qualifying management practices serves as a limitation on defendants who qualify for a defense from a nuisance lawsuit.<sup>471</sup> However, right-to-farm statutes may incorporate a procedure whereby an outside committee or regulatory designee determines whether a management practice meets the legislative qualification.<sup>472</sup> Lower court decisions in Michigan and New York found that right-to-farm statutes incorporating this procedure did not effect unconstitutional takings.<sup>473</sup> The decisions suggest that the involvement of a governmental designee in assessing cases on an individual basis may provide a procedure lending support to a valid exercise of a state's police powers.

A few right-to-farm laws provide expansive immunity whereby property owners may start new offensive activities and retain the statutory defense.<sup>474</sup> Iowa Code section 657.11 sought to provide such immunity to animal feeding operations.<sup>475</sup> Under these statutes, neighbors' existing rights are being denigrated. Challenges to these statutes may result in decisions that the anti-nuisance protection goes too far and effects a regulatory taking.

### B. State Takings

Federal takings law does not preclude states from developing different rules concerning takings under their state constitutions.<sup>476</sup> As shown by the *Gacke* decision, states can afford protection to rights that

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<sup>470</sup> These are analogous to statutes providing expansive immunity.

<sup>471</sup> See *supra* Part II.D.

<sup>472</sup> MICH. COMP. LAWS ANN. § 286.474 (West 2003); N.Y. AGRIC. & MKTS. LAW § 308 (McKinney 2004).

<sup>473</sup> *Gillis v. Gratiot County*, No. 97-04351-AV, slip op. at 26 (Mich. Cir. Ct., Gratiot County Mar. 31, 1999); *Pure Air & Water v. Davidsen*, No. 2690-97, slip op. at 10-11 (N.Y. Sup. Ct. May 25, 1999).

<sup>474</sup> See *supra* notes 231-87 and accompanying text.

<sup>475</sup> See IOWA CODE ANN. § 657.11(1) (West 1998 & Supp. 2005); see *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 173 (Iowa 2004).

<sup>476</sup> See, e.g., J. David Breemer, *Overcoming Williamson County's Troubling State Procedures Rule: How the England Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. LAND USE & ENVTL. L. 209, 256 (2003) (discussing differing factors used in state and federal takings analyses); James E. Holloway & Donald C. Guy, *The Impact of a Federal Takings Norm on Fashioning a Means-Ends Fit Under Takings Provisions of State Constitutions*, 8 DICK. J. ENVTL. L. & POL'Y 143, 152-240 (1999) (discussing federal and state takings jurisprudence).

are not recognized under the U.S. Constitution.<sup>477</sup> Property rights are defined by state law.<sup>478</sup> Moreover, courts may expand physical takings to include particulate noise, odors, and matter.<sup>479</sup> Since the protection of private property rights is a weighty consideration, a court might decide that a divergence in state and federal constitutional rights is warranted to protect a selected interest.<sup>480</sup>

## V. THE FUTURE OF RIGHT-TO-FARM LAWS

State right-to-farm laws were enacted due to dissatisfaction with nuisance law. One objective of the right-to-farm laws was to preserve agricultural land for future generations.<sup>481</sup> Legislatures also sought to preserve the economic viability of existing business units, most significantly family farms.<sup>482</sup> Subsequent amendments of some statutes expanded the coverage to protect businesses and qualifying activities,<sup>483</sup> resulting in more neighbors being adversely affected by properties with nuisance activities.

One of the consequences of the expanded protection may be the overall demise of the justifications for exceptions from nuisance law. While the protection of farmland and family farms has widespread support, there may be less support for the protection of ancillary

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<sup>477</sup> *Gache*, 684 N.W.2d at 174.

<sup>478</sup> Cutting, *supra* note 461, at 838 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992)).

<sup>479</sup> See, e.g., *Ream v. Keen*, 828 P.2d 1038, 1040 (Or. Ct. App. 1992) (finding that an intrusion of airborne particulates on another's land constituted a trespass), *aff'd*, 838 P.2d 1073 (Or. 1992).

<sup>480</sup> See, e.g., *In re S.A.J.B.*, 679 N.W.2d 645, 648 (Iowa 2004) (finding that federal decisions are persuasive but not binding on Iowa courts where claims are based on the Iowa Constitution rather than the Federal Constitution); *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 6 (Iowa 2004) (concluding that Iowa might apply a rational basis test independently of federal law to reach a dissimilar outcome from those reached by federal courts).

<sup>481</sup> See, e.g., Hand, *supra* note 2, at 349–50 (observing that right-to-farm laws may show legislatures attempting to stand up to developers to save agricultural land for future generations).

<sup>482</sup> See, e.g., Grossman & Fischer, *supra* note 3, at 126–27 (explaining that a monetary prerequisite for a right-to-farm statute could allow small, family farms to qualify for the defense against nuisance actions); Walker, *supra* note 1, at 489–90 (noting that the Michigan right-to-farm law was enacted when family farms were being threatened by encroaching development, whereas the 1999 amendment offered protection to industrial-scale feedlots).

<sup>483</sup> A selected industry may be so significant to a state's economy that a legislature decides an annoying business practice should be sanctioned. See, e.g., IDAHO CODE ANN. §§ 22-4801 to -4804 (2001 & Supp. 2004) (providing businesses growing crops the right to engage in crop residue burning).



business activities such as feed mills and processing plants.<sup>484</sup> The public may find that widespread interference with common law nuisance is not in its best interest. A court may find that an expansive anti-nuisance provision goes too far in denigrating property interests of neighbors.<sup>485</sup>

The *Bormann* and *Gacke* decisions augur an opportunity to rethink right-to-farm laws.<sup>486</sup> Nuisance law and right-to-farm statutes involve personal preferences and incorporate consideration of property rights and investments. Right-to-farm statutes protecting businesses are based on economic factors whereby a legislature makes a conscious choice in allowing some nuisances. Often, neighbors are forced to bear minor negative externalities such as smells,<sup>487</sup> noise,<sup>488</sup> dust,<sup>489</sup> flies,<sup>490</sup> traffic,<sup>491</sup> or light glare.<sup>492</sup>

However, right-to-farm statutes do not need to be based primarily on a marketplace economy. Instead, a right-to-farm law might be written to offer a narrower scope of protection based upon the economy of nature.<sup>493</sup> Rather than providing expansive anti-nuisance protection for businesses, legislatures might seek to define right-to-farm laws as a land preservation tool for protecting farmland and other natural resources.<sup>494</sup> A new right-to-farm paradigm might separate the market

<sup>484</sup> *E.g.*, GA. CODE ANN. § 41-1-7(b)(3) (1997 & Supp. 2005).

<sup>485</sup> See *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 174 (Iowa 2004); *Bormann v. Bd. of Supervisors*, 584 N.W.2d 309, 321 (Iowa 1998), *cert. denied*, 525 U.S. 1172 (1999)).

<sup>486</sup> See, *e.g.*, William C. Robinson, Casenote, *Right-to-Farm Statute Runs a 'Foul' with the Fifth Amendment's Taking Clause*, 7 MO. ENVTL. L. & POL'Y REV. 28, 28 (1999) (claiming that one of the advantages of right-to-farm laws is security in making investments in their properties); Stanish, *supra* note 243, at 729 (noting that right-to-farm laws provide some sense of security to farmers making investments in improving their properties and delineating rights).

<sup>487</sup> See *Horne v. Haladay*, 728 A.2d 954, 955–57 (Pa. Super. Ct. 1999).

<sup>488</sup> See *Holubec v. Brandenberger*, 111 S.W.3d 32, 34, 38 (Tex. 2003).

<sup>489</sup> See *Barrera v. Hondo Creek Cattle Co.*, 132 S.W.3d 544, 546, 550 (Tex. App. 2004).

<sup>490</sup> See *Holubec*, 111 S.W.3d at 34.

<sup>491</sup> See *Trickett v. Ochs*, 838 A.2d 66, 68, 73 (Vt. 2003).

<sup>492</sup> See *id.* (discussing light glare).

<sup>493</sup> See Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1442–43 (1993) (describing an economy of nature as being different from the views of property rights embedded in a normal marketplace economy).

<sup>494</sup> Right-to-farm laws seeking to protect farmland would be based on an ecological perspective whereby the land's role in food production would receive greater consideration. See Zygmunt J.B. Plater, *The Three Economies: An Essay in Honor of Joseph Sax*, 25 ECOLOGY L.Q. 411, 417–20 (1998) (offering a comparison of a marketplace economy with an economy of nature).

economy from the economy of nature, interjecting civic-societal concerns.<sup>495</sup>

Land consists of systems defined by their function.<sup>496</sup> In a society governed by rules, land serves everyone, not just its owner.<sup>497</sup> Because farmland performs important services in its unaltered state, special protection may be advantageous to safeguard it for future generations.<sup>498</sup> Other lands might deserve special protection to be free of waste and the negative effects of others.<sup>499</sup> Adopting the assumption that the residents of a state have a special desire to preserve long-term natural resources—including soil fertility and the productivity of land—for future generations, separate right-to-farm laws might be devised to protect farmland.<sup>500</sup>

The suggested approach is to bifurcate anti-nuisance protection and have one statute offering protection for resources including land, businesses, places, or activities, and a second for protecting farmland.<sup>501</sup> In a marketplace economy, land, labor, and capital are important to the viability of business enterprises and a state's total economy.<sup>502</sup> Under their reserved powers, states may take action to adjust property rights for the benefit of the majority. States may have a desire

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<sup>495</sup> See *id.* at 429–30; see also Zygmunt J.B. Plater, *Environmental Law and Three Economies: Navigating a Sprawling Field of Study, Practice, and Societal Governance in Which Everything Is Connected to Everything Else*, 23 HARV. ENVTL. L. REV. 359, 369 (1999) (discussing the civic-societal economy as one that considers societal concerns that exist beyond the elements of a marketplace economy).

<sup>496</sup> See Sax, *supra* note 493, at 1442.

<sup>497</sup> See Cutting, *supra* note 461, at 839.

<sup>498</sup> This might assure proportionality between the needs of the ecosystem and the imposition of burdens on private land uses. Erik C. Martini, Comment, *Wisconsin's Milldam Act: Drawing New Lessons from an Old Law*, 1998 WIS. L. REV. 1305, 1325 (quoting Sax, *supra* note 493, at 1454).

<sup>499</sup> See Cutting, *supra* note 461, at 833 (citing Sax, *supra* note 493, at 1445).

<sup>500</sup> This would involve adding a new right-to-farm law without interfering with existing statutes.

<sup>501</sup> The farmland protection under such a right-to-farm law would be narrower than existing right-to-farm statutes. Because existing right-to-farm laws would be retained, protected businesses and activities would not be affected by the new statutes. However, if an existing statute is found to be invalid, as occurred in Iowa, farmland would still have protection against nuisance lawsuits under the second right-to-farm law.

<sup>502</sup> Oregon specifically notes that “[f]arming and forest practices are critical to the economic welfare of this state.” OR. REV. STAT. § 30.933(1)(a) (2003). Many right-to-farm laws acknowledge this tangentially with language noting that it is state policy “to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products.” TEX. AGRIC. CODE ANN. § 251.001 (Vernon 2004).

to assist farmers in passing farms to the next generation and assisting businesses so that they remain competitive in the global marketplace.<sup>503</sup>

The protection of farmland, however, involves government action of a different character.<sup>504</sup> In only protecting farmland and necessary accompanying activities, the scope of the governmentally sanctioned immunity is much narrower than a right-to-farm law protecting businesses.<sup>505</sup> It omits the protection of labor and capital, and emphasizes the natural resource of soil fertility.<sup>506</sup> While human intervention may be significant in augmenting the productivity of this resource, the emphasis is on the nonhuman, innate properties of the soil.<sup>507</sup> A right-to-farm law applying exclusively to the long-term conservation and preservation of soil fertility and land productivity would exclude nuisance protection for businesses and farm structures.<sup>508</sup>

By limiting the anti-nuisance protection to a natural resource, a right-to-farm law reduces the categories of interferences and has a more limited impact on the expectations of neighboring property owners.<sup>509</sup> These distinctions are important because they affect the economic impact and character of the governmental action, factors prescribed by *Penn Central Transportation Co. v. New York City* for evaluating regulatory takings.<sup>510</sup> If a right-to-farm law simply protects owners of farmland against nuisance lawsuits, most neighboring property owners should not incur significant economic losses. A majority of the neighboring property owners should be using their properties for

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<sup>503</sup> *E.g.*, IOWA CODE ANN. § 657.11(1) (West 1998 & Supp. 2005) (noting a need to protect Iowa's competitive economic position).

<sup>504</sup> The character of the government action is a factor that is evaluated for regulatory takings challenges. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

<sup>505</sup> The anti-nuisance protection would necessarily need to cover the machinery and activities needed for cultivation. Other activities receiving protection would be at the discretion of the legislature. Currently, some right-to-farm laws are premised on a conclusion that protection of off-farm activities such as processing plants and feed mills are necessary to protect farming. Taken to a logical ending, steel mills, tire manufacturing facilities, grocery stores, and petroleum distribution facilities are also important to agriculture. The issue is where to draw the line. The greater the interference with the property rights of neighbors, the greater the likelihood that a court will be called upon to resolve a conflict.

<sup>506</sup> The narrower scope of a law based upon the economy of nature would mean that it is less likely to be challenged as a taking. *See Sax, supra* note 493, at 1442.

<sup>507</sup> *See id.*

<sup>508</sup> *See id.* This would severely limit the facilities that would receive protection against nuisance lawsuits.

<sup>509</sup> *See id.* Most owners of farmland expect the land to be employed for agricultural production and anticipate the annoyances that stem from ordinary farm activities.

<sup>510</sup> *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

compatible agricultural or residential purposes, and anticipate the activities accompanying the use of farmland. Therefore, interferences with investment-backed expectations should be limited.<sup>511</sup>

An examination of the character of the government action involves looking at the land, as well as related cultivation and husbandry activities, rather than at a business firm.<sup>512</sup> Existing right-to-farm laws already include consideration of the character of farmland.<sup>513</sup> However, many of the takings challenges have concerned business operations.<sup>514</sup> Under a law based on the economy of nature, private business firms and ancillary business activities would not be protected.<sup>515</sup> Because the protection of farmland and its long-term productivity is based upon preservation of a public resource, a strong public purpose justifies the governmental action.

### CONCLUSION

Right-to-farm laws may adversely affect property rights of owners who are precluded from employing common law nuisance to garner relief from an offensive activity. Legislatures rationalized the denigration of the rights of neighboring property owners as necessary to support agricultural land uses and business activities important to their economies.<sup>516</sup> Statutes protecting existing activities from nuisance lawsuits by future neighbors incorporate an equitable coming to the nuisance doctrine. However, a few legislatures have adopted right-to-farm law provisions that go further and grant a preference whereby future incompatible activities are protected against nuisance lawsuits. Under a

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<sup>511</sup> This would especially be true under right-to-farm laws that only provide a defense against nuisances to farmland in an agricultural district. *See* N.Y. AGRIC. & MKTS. LAW § 308(3) (McKinney 2004).

<sup>512</sup> *See Loretto*, 458 U.S. at 426; *see also supra* note 339.

<sup>513</sup> This occurs due to a legislative policy of conserving and protecting "the development and improvement of . . . agricultural land for the production of food and other agricultural products." Farm Nuisance Suit Act, 740 ILL. COMP. STAT. ANN. 70/1 (West 2002).

<sup>514</sup> Many of the right-to-farm challenges have involved nuisances created by increases in the numbers of animals housed in farm structures. *See, e.g.*, *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 171 (Iowa 2004) (dealing with confined hog operation); *Horne v. Haladay*, 728 A.2d 954, 955 (Pa. Super. Ct. 1999) (dealing with 122,000 laying hens); *Holubec v. Brandenberger*, 111 S.W.3d 32, 34 (Tex. 2003) (dealing with a new feedlot for sheep); *Barrera v. Hondo Creek Cattle Co.*, 132 S.W.3d 544, 546 (Tex. App. 2004) (dealing with cattle feedlot). If a right-to-farm law protecting farmland does not include farm structures, confined animal production will not receive anti-nuisance protection.

<sup>515</sup> *See, e.g.*, IND. CODE ANN. § 32-30-6-9 (LexisNexis 2002) (delineating protection for agricultural and industrial operations and their appurtenances).

<sup>516</sup> This included a desire to assist farmers in passing their farms to the next generation and helping businesses remain competitive in a global marketplace.

provision protecting future nuisances, the interference with a neighbor's property rights may be so great that it operates to effect a regulatory taking.

An analysis of right-to-farm laws shows a range of provisions that can protect people against nuisance lawsuits. Because a regulatory taking only occurs when government action goes too far, very few laws approach the threshold distinguishing a valid regulation from an unconstitutional taking. While the Iowa statutes may have crossed this threshold, most right-to-farm laws are valid exercises of the police power. However, if a law approaches this line of demarcation, a legislature may want to consider enacting a second right-to-farm statute based upon an economy of nature. By providing protection against nuisance lawsuits only for farmland and related cultivation and husbandry practices, a state will have greater assurance that its natural resources will be preserved for future generations.

## APPENDIX 1: STATE RIGHT-TO-FARM LAWS

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State	State Codifications
Alabama	ALA. CODE § 6-5-127 (LexisNexis 1996 & Supp. 2004)
Alaska	ALASKA STAT. § 09.45.235 (2004)
Arizona	ARIZ. REV. STAT. ANN. § 3-112 (2002)
Arkansas	ARK. CODE ANN. § 2-4-107 (1996 & Supp. 2005)
California	CAL. CIV. CODE §§ 3482.5–.6 (West 1997 & Supp. 2005)
Colorado	COLO. REV. STAT. § 35-3.5-102 (2004)
Connecticut	CONN. GEN. STAT. ANN. § 19a-341 (West 2003 & Supp. 2005)
Delaware	DEL. CODE ANN. tit. 3, § 1401 (2001)
Florida	FLA. STAT. ANN. § 823.14 (West 2000 & Supp. 2005)
Georgia	GA. CODE ANN. § 41-1-7 (1997 & Supp. 2005)
Hawaii	HAW. REV. STAT. ANN. §§ 165-1 to -6 (LexisNexis 2000 & Supp. 2004)
Idaho	IDAHO CODE ANN. §§ 22-4501 to -4504 (2001) IDAHO CODE ANN. §§ 22-4801 to -4804 (2001 & Supp. 2004) IDAHO CODE ANN. § 22-4803A (Supp. 2004)
Illinois	740 ILL. COMP. STAT. ANN. 70/1 to /5 (West 2002)
Indiana	IND. CODE ANN. § 32-30-6-9 (LexisNexis 2002)
Iowa	IOWA CODE ANN. §§ 172D.1–.4 (West 1999 & Supp. 2005) IOWA CODE ANN. § 352.11 (West 2001 & Supp. 2005) IOWA CODE ANN. § 657.11 (West 1998 & Supp. 2005)
Kansas	KAN. STAT. ANN. §§ 2-3201 to -3203 (2001) KAN. STAT. ANN. § 47-1505 (2000)
Kentucky	KY. REV. STAT. ANN. § 413.072 (LexisNexis 1992 & Supp. 2003)
Louisiana	LA. REV. STAT. ANN. §§ 3:3601–:3609 (2003)
Maine	ME. REV. STAT. ANN. tit. 17, § 2805 (1983 & Supp. 2004)
Maryland	MD. CODE ANN., CTS. & JUD. PROC. § 5-403 (LexisNexis 2002)
Massachusetts	MASS. GEN. LAWS ch. 111, § 125A (2004) MASS. GEN. LAWS ch. 243, § 6 (2004)
Michigan	MICH. COMP. LAWS ANN. §§ 286.471–.474 (West 2003)
Minnesota	MINN. STAT. ANN. § 561.19 (West 2000 & Supp. 2005)
Mississippi	MISS. CODE ANN. § 95-3-29 (2004)
Missouri	MO. ANN. STAT. § 537.295 (West 2000)
Montana	MONT. CODE ANN. §§ 27-30-101 to -105 (2005)
Nebraska	NEB. REV. STAT. ANN. §§ 2-4401 to -4404 (LexisNexis 2001)
Nevada	NEV. REV. STAT. ANN. § 40.140(2) (LexisNexis 2002)
New Hampshire	N.H. REV. STAT. ANN. §§ 432:32–:35 (2002)
New Jersey	N.J. STAT. ANN. §§ 4:1C-1 to -10 (West 1998 & Supp. 2005)
New Mexico	N.M. STAT. ANN. §§ 47-9-1 to -7 (LexisNexis 1995)
New York	N.Y. AGRIC. & MKTS. LAW §§ 308, 308-a (McKinney 2004)
North Carolina	N.C. GEN. STAT. §106-701 (2003)
North Dakota	N.D. CENT. CODE §§ 42-04-01 to -05 (1999 & Supp. 2005)
Ohio	OHIO REV. CODE ANN. § 929.04 (West 1994) OHIO REV. CODE ANN. § 3767.13 (West 1998)
Oklahoma	OKLA. STAT. ANN. tit. 2, § 9-210 (West 2003 & Supp. 2006)

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	OKLA. STAT. ANN. tit. 50, § 1.1 (West 2000 & Supp. 2006)
Oregon	OR. REV. STAT. §§ 30.930–.947 (2003)
Pennsylvania	3 PA. STAT. ANN. §§ 901–904 (West 1995 & Supp. 2005)
	3 PA. STAT. ANN. §§ 951–957 (West 1995 & Supp. 2005)
Rhode Island	R.I. GEN. LAWS §§ 2-23-1 to -7 (1998 & Supp. 2004)
South Carolina	S.C. CODE ANN. §§ 46-45-10 to -70 (1987 & Supp. 2004)
South Dakota	S.D. CODIFIED LAWS §§ 21-10-25.1 to -25.6 (Supp. 2003)
Tennessee	TENN. CODE ANN. § 43-26-103 (2000 & Supp. 2004)
	TENN. CODE ANN. §§ 44-18-101 to -104 (2000 & Supp. 2004)
Texas	TEX. AGRIC. CODE ANN. §§ 251.001–.006 (Vernon 2004 & Supp. 2005)
Utah	UTAH CODE ANN. §§ 78-38-7 to -8 (2002)
Vermont	VT. STAT. ANN. tit. 12, §§ 5751–5753 (2002 & Supp. 2005)
Virginia	VA. CODE ANN. § 3.1-22.29 (1994)
Washington	WASH. REV. CODE ANN. §§ 7.48.300–.310 (West 1992 & Supp. 2005)
West Virginia	W. VA. CODE ANN. §§ 19-19-1 to -5 (LexisNexis 2004)
Wisconsin	WIS. STAT. ANN. § 823.08 (West 1994 & Supp. 2004)
Wyoming	WYO. STAT. ANN. §§ 11-39-101 to -104 (2005)
	WYO. STAT. ANN. §§ 11-44-101 to -103 (2005)

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