

# RETURNING RIGHT-TO-FARM LAWS TO THEIR ROOTS

## INTRODUCTION

In 2014, some unlikely culprits—four chickens—generated negative headlines for then-Iowa Congressman Bruce Braley, who was in the midst of a close campaign for an open United States Senate seat.<sup>1</sup> After neighbor Pauline Hampton’s chickens roamed onto the Braleys’ property, the Braleys filed a formal complaint with the neighborhood homeowners association and allegedly threatened to sue.<sup>2</sup> If the Braleys had done so, questions of the scale of Hampton’s operation, how long she had had the chickens, and whether the Braleys or the chickens were in the neighborhood first would have been key considerations. Similar disputes between neighbors over agricultural land uses play out across America. This Note will focus on one attempt to manage these disputes: right-to-farm (RTF) laws.

This Note proceeds in six parts. Part I continues to introduce the tension between urban and rural land uses, the importance of understanding it, and the mechanism of RTF laws that legislatures have adopted to mitigate it. Part I goes on to explain how different states design their RTF laws and considers previous scholarly treatment of RTF laws. This Note is indebted to the pre-existing literature on RTF laws, and recognizes and aims to contribute to some of these existing critiques and proposals: First, in Part II, this Note aims to add concreteness to the literature’s critique of RTF laws by focusing on two particular ways in which RTF laws have improperly expanded immunity from nuisance liability and by delving into illustrative case law demonstrating how these expansions operate in practice.<sup>3</sup> In doing so, this Note will show how certain veins of RTF laws have become particularly unmoored from RTF laws’ origins as codifications of the coming-to-the-nuisance doctrine.<sup>4</sup>

In Part III, this Note then offers a concrete policy for returning RTF laws to their roots, ensuring agricultural operations are better held accountable for their effects on their communities. The Note cites a particular vein of RTF laws, namely Washington’s, focusing on desirable provisions, as an

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1. Adam P. Levy, *Iowa Chickens vs. Senate Candidate’s Yard*, CNN (Sept. 17, 2014, 10:39 AM), <https://www.cnn.com/2014/09/17/politics/iowa-senate-braley-chicken-dispute/index.html> [<https://perma.cc/GWY5-7CSL>].

2. Philip Rucker, *In Iowa, a Dispute over Neighbor’s Chickens Threatens Braley’s Senate Bid*, WASH. POST (Aug. 7, 2014), [https://www.washingtonpost.com/politics/in-iowa-a-dispute-over-neighbors-chickens-threatens-braleys-senate-bid/2014/08/07/4ae3d5e2-1e47-11e4-ae54-0cfe1f974f8a\\_story.html?utm\\_term=.0dbf619ba7a0](https://www.washingtonpost.com/politics/in-iowa-a-dispute-over-neighbors-chickens-threatens-braleys-senate-bid/2014/08/07/4ae3d5e2-1e47-11e4-ae54-0cfe1f974f8a_story.html?utm_term=.0dbf619ba7a0) [<https://perma.cc/ZZH9-U364>].

3. See discussion *infra* Section II.

4. See discussion *infra* Section II.

existing model for all states to consider adopting.<sup>5</sup> It recommends revising RTF laws with even greater textual specificity than Washington's so they only protect established agricultural operations facing urbanizing pressures.<sup>6</sup> It also proposes revising RTF laws so that an operation that substantially changes its nature loses its immunity. In addition to legislative reform, this Note's proposal also encourages jurists to consider the legislative intent and history behind RTF laws to better partner with legislatures in achieving their goals, echoing and defending Professor Andrew Reinert's argument on judicial interpretation.<sup>7</sup>

This Note will then argue in Part IV that this model best accommodates the literature's critique of RTF laws. While sharing some of these critiques, this Note approaches the literature with the perspective that reform of RTF laws is more likely than abolition. Therefore, it aims to answer but also temper some of the critiques by fleshing out two primary justifications supporting this reform: it restores the coming-to-the-nuisance doctrine's importance in RTF laws—thus honoring parties' expectations and property-for-personhood interests—and it reduces the economic inefficiency generated by RTF laws. In doing so, it draws on arguments from property theory, sociology, and economics to demonstrate why this Note's proposal strikes a healthy balance between the competing policy concerns RTF laws involve.<sup>8</sup> Part V considers public policy implications of implementing this reform. The Note then concludes.

## I. ORIGIN OF RTF LAWS

### A. *American Agriculture in the 21st Century*

Agriculture has been and is a mainstay of the American economy. At the heart of the American agricultural industry are America's farms. Millions of Americans work on farms, and agriculture- and food-related industries support millions more jobs.<sup>9</sup> The output of America's farms accounts for \$132 billion of America's gross national product, and enables other sectors of the American economy including food service, textiles, apparel, and

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5. See discussion *infra* Section III. In contrast, some research has only focused on one state's RTF Law. *E.g.*, Thomas B. McNulty, Comment, *The Pennsylvanian Farmer Receives No Real Protection from the Pennsylvania Right to Farm Act*, 10 PENN ST. ENVTL. L. REV. 81 (2001); L. Paul Goeringer & H.L. Goodwin, *An Overview of Arkansas' Right-to-Farm Law*, 9 J. FOOD L. & POL'Y 1 (2013).

6. See discussion *infra* Section IV.A.

7. See discussion *infra* Section IV.A.

8. See discussion *infra* Section IV.B.

9. *Ag and Food Sectors of the Economy*, U.S. DEP'T OF AGRIC., ECON. RES. SERV., <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/ag-and-food-sect-ors-and-the-economy/> [<https://perma.cc/YC84-637N>] (last updated Sept. 20, 2019).

leather manufacturing.<sup>10</sup> Less directly but no less importantly, farms support jobs in machinery manufacturing and construction, and farmers and ranchers invest in their own communities.<sup>11</sup> The political controversy over the effects of recent tariffs targeting America's agriculture industry speaks again to the continued economic importance of the industry, especially to America's rural communities.<sup>12</sup> The agriculture industry also influences how America's land is used and conserved as over half of America's land is devoted to agricultural production.<sup>13</sup>

### *B. Burgeoning Urban-Rural Tension*

Despite the continued importance of America's farms and ranches to shaping our economy and geography, urbanization has often forced them into retreat—and litigation. In the mid-twentieth century, 63 percent of American land was used for agricultural purposes.<sup>14</sup> In 2012, it had lowered to 52 percent.<sup>15</sup> In contrast, “[u]rban land . . . has nearly tripled in area since 1949.”<sup>16</sup> Urbanization puts farms under pressure. New residents, unused to living near farms, may find rural life less than idyllic; nuisance suits against agricultural operations are certainly nothing new.<sup>17</sup>

A landmark case exposing the tension between urbanization and established rural uses comes from Maricopa County, Arizona: *Spur Industries, Inc. v. Del E. Webb Development Co.*<sup>18</sup> Farmers had established themselves in the area in the early twentieth century, and the surrounding

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10. *Id.*

11. JOINT ECON. COMM. DEMOCRATIC STAFF, THE ECONOMIC CONTRIBUTION OF AMERICA'S FARMERS AND THE IMPORTANCE OF AGRICULTURAL EXPORTS (2013), <https://www.jec.senate.gov/public/cache/files/266a0bf3-5142-4545-b806-ef9fd78b9c2f/jec-agriculture-report.pdf> [<https://perma.cc/XRD8-ETG5>].

12. See, e.g., Monica Davey & Patricia Cohen, *Trade War Prospect Shakes Part of Trump Base: Midwest Farmers*, N.Y. TIMES (Mar. 10, 2018), <https://www.nytimes.com/2018/03/10/business/economy/tariffs-farmers.html> [<https://perma.cc/Y4FT-AQ8J>]; Jeff Daniels, 'We Are the Casualty: US Pig Farmers Brace for Second Round of Pork Tariffs from China, Mexico', CNBC (July 4, 2018, 12:24 PM), <https://www.cnbc.com/2018/07/04/us-pork-producers-brace-for-new-pork-tariffs-from-china-mexico.html> [<https://perma.cc/P3NV-J7RZ>].

13. *Land and Natural Resources*, U.S. DEP'T OF AGRIC., ECON. RES. SERV., <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/land-and-natural-resources/> [<https://perma.cc/3KCR-48B9>] (last updated Aug. 20, 2019).

14. *Id.*

15. *Id.*

16. *Id.*

17. Jonathan Morris, Comment, "One Ought Not Have So Delicate a Nose": CAFOs, Agricultural Nuisance, and the Rise of the Right to Farm, 47 ENVTL. L. 261, 264 (2017). Morris traces nuisance law both in early English common law and American law, and reports that as early as 1610, one neighbor sued another for constructing and operating a pigsty. *Id.* at 263–64; see also William Aldred's Case (1610) 77 Eng. Rep. 816 (KB).

18. 494 P.2d 700 (Ariz. 1972) (en banc).

communities were initially agriculturally oriented.<sup>19</sup> Cattle feeding was a particularly popular operation.<sup>20</sup> But the agricultural orientation of Maricopa County did not last. In the 1950s and 60s, real estate developer Del Webb began buying thousands of acres in Maricopa County, including ranch land, to construct the Sun City retirement community.<sup>21</sup> But development hit a snag: Spur Industries, a feedlot operator with over twenty thousand cattle.<sup>22</sup> The odors and flies generated by the feedlot drifted into Sun City, prompting complaints from new owners and hesitation from potential purchasers.<sup>23</sup> Webb sued, alleging that Spur was a public nuisance that rendered over a thousand of his lots “unfit” for development.<sup>24</sup> Although Spur maintained a lawful feedlot operation,<sup>25</sup> the Arizona Supreme Court found that Spur was “both a public and a private nuisance” and affirmed the trial court’s order enjoining its operations.<sup>26</sup> Even though the court ordered Spur to move its operations, it recognized that Spur was not at fault.<sup>27</sup> Webb knew of the area’s agricultural character when he started building, and the court found that “[i]n such an area plaintiffs cannot complain that legitimate agricultural pursuits are being carried on in the vicinity.”<sup>28</sup> Recognizing both the public’s need for relief and Webb’s role in creating the problem, the Arizona Supreme Court ordered Webb to indemnify Spur for its costs of moving or shutting down.<sup>29</sup> This judicial balancing is one approach to resolving what occurs when one comes to a nuisance<sup>30</sup> but other approaches soon sprang up.

### C. Right-to-Farm Laws: A Solution?

States and municipalities have attempted to mitigate the tensions between urbanization and existing rural land uses, such as those in *Spur*,

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19. *Id.* at 703.

20. *Id.* at 704.

21. *Id.*

22. *Id.* at 705.

23. *Id.*

24. *Id.*

25. *Id.* The court admitted that Spur had “good feedlot management and good housekeeping practices.” *Id.*

26. *Id.* at 706.

27. *Id.* at 708 (“Spur is required to move not because of any wrongdoing on the part of Spur . . .”).

28. *Id.* at 707.

29. *Id.* at 708.

30. See VICTOR E. SCHWARTZ ET AL., PROSSER, WADE & SCHWARTZ’S TORTS: CASES AND MATERIALS 860–61 (12th ed. 2010) (introducing the coming-to-the-nuisance doctrine); see also Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 105–06 (discussing judicial balancing in agricultural nuisance cases generally).

with a variety of land use policies, such as agricultural districting<sup>31</sup> and agricultural zoning.<sup>32</sup> However, due to weaknesses with each approach,<sup>33</sup> states sought a new approach: RTF laws.<sup>34</sup> North Carolina and Washington were the first states to pass versions of RTF laws on March 26, 1979.<sup>35</sup> Now, all fifty states have adopted RTF laws<sup>36</sup> and a couple states have even amended their constitutions to enshrine farming as a constitutional right.<sup>37</sup> In reference to RTF statutes, one commentator has determined that “[a]long with property tax breaks, they are by far the most ubiquitous farmland protection program in this country.”<sup>38</sup>

Some commentators consider North Carolina’s RTF law<sup>39</sup> a model statute.<sup>40</sup> It provides sweeping protection to agricultural land users, protecting “any facility for the production for commercial purposes of crops, livestock, poultry, livestock products, or poultry products.”<sup>41</sup> Further, an agricultural or forestry operation which has been established for longer than a year and was not a nuisance when it began operating may not become a nuisance no matter how nearby land uses change.<sup>42</sup> It keeps this immunity unless the operation undergoes a “fundamental change.”<sup>43</sup> Yet proving that a fundamental change has occurred is difficult because the statute provides

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31. Jacqueline P. Hand, *Right-to-Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. PITT. L. REV. 289, 294–95 (1984) (agricultural districting designates “a specific area for a long-term agricultural use”).

32. *Id.* at 295–96 (agricultural zoning occurs in both exclusive and non-exclusive forms and is characterized by zoning lots ranging from 10 to 160 acres).

33. *Id.* at 297. For example, it takes time and effort to create the political will to engage in agricultural districting or zoning all while rural and urban land uses continue clashing. *Id.*

34. See *States’ Right-to-Farm Statutes*, NAT’L AGRIC. L. CTR., <http://nationalaglawcenter.org/state-compilations/right-to-farm/>, for a database containing copies of all state RTF laws. This Note here retreads some well-covered ground in the literature to introduce unfamiliar readers but does not aim to provide a comprehensive survey of the fifty varying statutes.

35. Hand, *supra* note 31, at 298 n.47.

36. DANIEL R. MANDELKER ET AL., *PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS* 77 (Looseleaf 9th ed. 2016).

37. Missouri, for example, amended its constitution to add a right to farm:

That agriculture which provides food, energy, health benefits, and security is the foundation and stabilizing force of Missouri’s economy. To protect this vital sector of Missouri’s economy, the right of farmers and ranchers to engage in farming and ranching practices shall be forever guaranteed in this state, subject to duly authorized powers, if any, conferred by article VI of the Constitution of Missouri.

MO. CONST. art. I, § 35; *see also* N.D. CONST. art. XI, § 29.

38. Alexander A. Reinert, Note, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694, 1695 (1998).

39. N.C. GEN. STAT. ANN. §§ 106-700 to -701 (West 2019).

40. Reinert, *supra* note 38, at 1707 (“North Carolina’s Right-to-Farm Statute is considered a model statute.”); Nicholas Clark Buttino, *An Empirical Analysis of Agricultural Preservation Statutes in New York, Nebraska, and Minnesota*, 39 B.C. ENVTL. AFF. L. REV. 99, 107 n.77 (2012) (“Some consider North Carolina to have the model right-to-farm statute.”).

41. N.C. GEN. STAT. ANN. § 106-701(b).

42. § 106-701(a).

43. § 106-701(a)(3).

that changes in size and type of operation, and new technology use do not constitute fundamental changes.<sup>44</sup> The statute also nullifies and voids “[a]ny and all ordinances of any unit of local government” that would make the agricultural operation a nuisance.<sup>45</sup>

As states have adopted RTF laws, some states have adhered closely to North Carolina’s model<sup>46</sup> while others vary in protectiveness and how an operation qualifies for immunity from nuisance liability. For example, Mississippi offers an extremely protective statute: an agricultural operation which proves it has been in existence for one year or more receives an “absolute defense” from nuisance actions.<sup>47</sup> The statute does not even provide a potential plaintiff the option to plead that a fundamental change has occurred as one can in North Carolina. In contrast, Connecticut’s statute immunizes agricultural operations from nuisance actions in only five instances.<sup>48</sup> While these instances are broad and likely encompass the most common complaints against agricultural operations, limiting immunity to only defined instances is still more restrictive than the immunity North Carolina or Mississippi’s statutes provide.<sup>49</sup>

The statutes also diverge in determining how an agricultural operation qualifies for immunity from nuisance liability. There are two common ways an agricultural operation becomes immune from nuisance liability. First, an agricultural operation receives immunity by operating prior—typically for one<sup>50</sup> or two<sup>51</sup> years—to the plaintiff’s activity. The second common way an agricultural operation receives immunity is by operating in accordance with proper agricultural practices.<sup>52</sup> Some states demand operations meet both requirements to receive immunity.<sup>53</sup>

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44. § 106-701(a1)(1)–(5).

45. § 106-701(d).

46. See ARK. CODE ANN. §§ 2-4-101 to -08 (West 2019); KY. REV. STAT. ANN. § 413.072 (West 2019). Arkansas’s and Kentucky’s statutes use similar language in their purpose sections and in determining how agricultural operations qualify for immunity from nuisance liability.

47. MISS. CODE ANN. § 95-3-29 (West 2019). Ohio uses the language of “complete defense” from nuisance actions if agricultural operations qualify under a set of factors. OHIO REV. CODE ANN. § 929.04 (West 2019).

48. CONN. GEN. STAT. ANN. § 19a-341 (West 2019).

49. *Id.*

50. See, e.g., N.C. GEN. STAT. ANN. § 106-701(a); ARK. CODE ANN. § 2-4-107.

51. See, e.g., MINN. STAT. ANN. § 561.19(2)(a) (West 2019) (Minnesota goes on to premise immunity on additional factors, too).

52. See, e.g., HAW. REV. STAT. ANN. § 165-4 (West 2019); MICH. COMP. LAWS ANN. § 286.473(1) (West 2020).

53. See, e.g., KAN. STAT. ANN. § 2-3202(a) (West 2019); NEV. REV. STAT. ANN. § 40.140(2)(a) (West 2019). For another approach to classifying RTF laws, see Hand, *supra* note 31, at 306–10 (classifying RTF laws into three categories: those focusing on priority of ownership, those focusing on priority of use, and those that do not require priority to receive immunity, with each category offering its own benefits and drawbacks).

RTF statutes also often contain purpose sections which declare why the state has enacted the statute. These sections are important both for determining a statute's proper scope and for evaluating resulting case law. North Carolina's "model"<sup>54</sup> statute's purpose section recognizes that "[w]hen other land uses extend into agricultural and forest areas, agricultural and forestry operations often become the subject of nuisance suits."<sup>55</sup> The legislature designed the statute to conserve such areas and encourage investments in improvements to agricultural operations.<sup>56</sup> While North Carolina and other states use the vague language of "other land uses,"<sup>57</sup> numerous states specify urbanization. Washington's statute, for example, reads, in part: "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 production."<sup>58</sup>

Even though RTF laws have become ubiquitous,<sup>59</sup> they are not free of controversy. First, these statutes have generated a significant amount of controversy—and academic commentary—over their constitutionality.<sup>60</sup> However, almost all courts have upheld the constitutionality of RTF laws and it is unlikely that this consensus will shift.<sup>61</sup>

Other criticisms have circulated as well. Professor Jacqueline Hand's seminal article on RTF laws outlines some of the early designs of RTF laws and issues with their scopes of immunization.<sup>62</sup> Reinert argues that RTFs suffer from lack of empirical justification and three main theoretical flaws.<sup>63</sup> These theoretical critiques are particularly foundational for this Note. First,

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54. Reinert, *supra* note 38, at 1707.

55. N.C. GEN. STAT. ANN. § 106-700.

56. *Id.*

57. *Id.* Many states refer to the rival uses as "nonagricultural." See ARK. CODE ANN. § 2-4-101 (West 2019); KAN. STAT. ANN. § 2-3201 (West 2019).

58. WASH. REV. CODE ANN. § 7.48.300 (West 2020); see also FLA. STAT. ANN. § 823.14(2) (West 2019); IDAHO CODE ANN. § 22-4501 (West 2019).

59. Hand, *supra* note 31, at 294–97.

60. RTF statutes' constitutionality has come under scrutiny because they create "an implicit negative easement in favor of a preexisting agricultural use." MANDELKER, *supra* note 36, at 78. Courts have considered whether this easement "constitutes an unconstitutional taking of property without payment of just compensation." *Id.*; see generally Terence J. Centner, *Governments and Unconstitutional Takings: When Do Right-to-Farm Laws Go Too Far?*, 33 B.C. ENVTL. AFF. L. REV. 87 (2006); Jeffrey R. Gittins, Comment, *Bormann Revisited: Using the Penn Central Test to Determine the Constitutionality of Right-to-Farm Statutes*, 2006 BYU L. REV. 1381.

61. See, e.g., *Moon v. N. Idaho Farmers Ass'n*, 96 P.3d 637, 642–46 (Idaho 2004); *Barrera v. Hondo Creek Cattle Co.*, 132 S.W.3d 544, 549 (Tex. App. 2004); *Lindsey v. DeGroot*, 898 N.E.2d 1251, 1257–59 (Ind. Ct. App. 2009). On the other hand, the Iowa Supreme Court found Iowa's RTF law to be an unconstitutional taking without just compensation. *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 170 (Iowa 2004), *aff'g Bormann v. Bd. of Supervisors ex rel. Kossuth Cty.*, 584 N.W.2d 309 (Iowa 1998).

62. See generally Hand, *supra* note 31.

63. Reinert, *supra* note 38, at 1714–17, 1728–35.

RTF laws do not allow for considerations of property-for-personhood interests because they do not recognize that some farmers may attach great personal value to their land while others do not.<sup>64</sup> RTF laws instead provide blanket rules that fail to distinguish between different levels of owners' attachment to the land.<sup>65</sup> Second, they lead to an inefficient allocation of resources because they shield farmers "from bearing the costs of their activities."<sup>66</sup> Because of the absence of nuisance liability, a farmer may engage in activities harmful to neighbors without ever having to fear paying damages.<sup>67</sup> For example, a hog confinement may emit odor that could disturb neighbors' enjoyment of their land. The threat of nuisance liability would incentivize the farmer to expend resources to reduce the odor, and thus internalize costs otherwise imposed on others. If he chooses not to do so, he may pay damages to neighbors and thus experience cost then. But with RTF laws removing the threat of litigation—and thus damages—the farmer has less incentive to rein in his activities and instead may continue to foist costs onto neighbors.<sup>68</sup> RTF legislation thus may shield farms operating inefficiently, "lead[ing] to inefficient land use, and ultimately environmental degradation."<sup>69</sup> Third, Reinert argues that RTF laws may be overprotective because they may deter legitimate suits or hinder beneficial legislation—municipal zoning, for example.<sup>70</sup>

Professor Neil Hamilton identifies ten flaws affecting RTF laws in his overarching critique of the laws' effectiveness.<sup>71</sup> Among his critiques, he argues that RTF laws are often not part of a comprehensive plan to conserve farmland and instead should exist in concert with other land use programs designed to limit the ability of non-farm users to intrude into agricultural areas.<sup>72</sup> The laws also favor large operations because such operations are more likely to cause nuisances.<sup>73</sup> Large operations blur a line that Hamilton draws between agricultural and industrial operations, and Hamilton argues that the latter do not always deserve such sweeping protection.<sup>74</sup> Lastly, while RTF laws may shield agricultural operations from nuisance liability,

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64. *Id.* at 1729–33; see discussion *infra* Section IV.B.1.b.

65. Reinert, *supra* note 38, at 1732–33.

66. *Id.* at 1735; see discussion *infra* Section IV.B.2.

67. Reinert, *supra* note 38, at 1733–35.

68. *Id.*

69. *Id.* at 1735.

70. *Id.*

71. 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, 107–08 (1998).

72. *Id.* at 117–18.

73. *Id.* at 112–13.

74. *Id.* at 113.

they may spur communities and legislatures to seek other ways to restrict such operations, like additional environmental regulation.<sup>75</sup>

## II. RTF LAWS IN PRACTICE: IMPROPER EXPANSION

Despite the origins of RTF adoption, numerous states provide immunity outside the context of urbanization. The following two cases illustrate certain expansions and the resulting ramifications of expanding RTF laws beyond their roots.

The first case, *Souza v. Lauppe*, concerns two agricultural operations near Sacramento, California.<sup>76</sup> Both operations had been rice farms for several years until the plaintiffs switched from rice to row crops in 1988, while the defendants continued growing rice.<sup>77</sup> The plaintiffs noticed that when the defendants continued flooding their rice fields, water seeped onto some of their land, making cultivating row crops difficult there and reducing their yields.<sup>78</sup> The plaintiffs sued the defendants who characterized the lawsuit as a nuisance suit and argued that California's RTF law immunized their operation from nuisance liability.<sup>79</sup> The plaintiffs argued that the RTF law should only be available for agricultural operations seeking protection from urbanization and that the legislature's concern for protecting agricultural uses from the forces of urbanization was the "sole impetus" for enacting the RTF law.<sup>80</sup>

The California Court of Appeal for the Third District rejected the plaintiffs' arguments.<sup>81</sup> The court found the RTF law's text unambiguous and thus determined there was no reason to examine evidence of the legislature's intent extrinsic to the statute's text.<sup>82</sup> The court proceeded to note that the statute's broad language signaled the legislature's intent to protect agricultural operations outside the scope of urbanization.<sup>83</sup> The court also specifically noted the facts of this case, which are indeed unusual, as important to its decision.<sup>84</sup> The *plaintiffs* changed their agricultural operation and then demanded that their neighbors adjust their farming practices, likely to the detriment of their neighbors' operation.<sup>85</sup> Relying on

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75. *Id.* at 109, 116.

76. 69 Cal. Rptr. 2d 494 (Ct. App. 1997).

77. *Id.* at 496.

78. *Id.*

79. *Id.* at 496–97; see CAL. CIV. CODE § 3482.5 (West 2019). The statute has not been amended since 1992 so its current form is the same as it was in 1997.

80. *Souza*, 69 Cal. Rptr. 2d at 494, 498.

81. *Id.* at 499–500.

82. *Id.* at 498–99.

83. *Id.*

84. *Id.*

85. *Id.* at 496, 499.

unusual facts and broad statutory language, the court construed the RTF so to immunize agricultural operations from nuisance liability outside the context of urbanization.

The second case concerns a kind of RTF law that expands immunization by protecting agricultural operations that comply with “generally accepted agricultural and management practices” (GAAMPs).<sup>86</sup> Michigan’s statute is exemplary, reading: “A farm or farm operation shall not be found to be a public or private nuisance if the farm or farm operation alleged to be a nuisance conforms to generally accepted agricultural and management practices according to policy determined by the Michigan commission of agriculture . . . .”<sup>87</sup> In Michigan, even as farms adopt new technology or change the type of farm product they produce, they continue to receive immunity as long as they comply with GAAMPs.<sup>88</sup>

*Charter Township of Shelby v. Papesh* exemplifies the consequences of this expansion of immunity.<sup>89</sup> The Papeshes bought property in Shelby Township on which there were already two chicken coops, and began raising chickens.<sup>90</sup> Developers built homes on surrounding land, and the new neighbors began complaining about the chickens.<sup>91</sup> After encouragement from these neighbors, Shelby Township sued the Papeshes, alleging that their operation constituted a nuisance and that the Papeshes were not operating in compliance with GAAMPs.<sup>92</sup> The Papeshes argued that Michigan’s Right to Farm Act (RTFA) protected their operations.<sup>93</sup> The court’s analysis of the case focused on whether the Papeshes complied with GAAMPs and whether their farm was a commercial operation: “[I]f [the Papeshes’] farm is commercial in nature and in compliance with the GAAMPs, it is a farm operation protected by the RTFA.”<sup>94</sup> Under this test, the appellate court remanded the case to the trial court because it could not conclude whether the Papeshes’ operation was commercial or whether it was fully in compliance with GAAMPs.<sup>95</sup> While the court did not resolve the particular controversy, its analysis is sufficient to demonstrate how the

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86. HAW. REV. STAT. ANN. § 165-4 (West 2019); *see also, e.g.*, MICH. COMP. LAWS ANN. § 286.473(1) (West 2020).

87. MICH. COMP. LAWS ANN. § 286.473(1). Section 286.472(2)(a) defines farms in part as entities engaged in commercial production. MICH. COMP. LAWS ANN. § 286.472(2)(a).

88. § 286.473(3); *see also* Hand, *supra* note 31, at 311 (noting the problem with eliminating the priority requirement in the early years of Michigan’s RTF law); Steven J. Laurent, Comment, *Michigan’s Right to Farm Act: Have Revisions Gone Too Far?*, 2002 L. REV. MICH. ST. U. DETROIT C.L. 213 (sharing concern that Michigan’s statute has problematically expanded).

89. 704 N.W.2d 92 (Mich. Ct. App. 2005).

90. *Id.* at 96.

91. *Id.*

92. *Id.* at 96–97.

93. *Id.* at 97.

94. *Id.* at 102.

95. *Id.*

premiering of immunity under RTF laws like Michigan's has drifted from the laws' theoretical foundation. The court's analysis did not consider whether there was an issue of coming-to-the-nuisance or questions of urbanization because the statute does not require this type of consideration.<sup>96</sup> These cases thus illustrate how some RTF laws have departed from the foundation on which they were built.

### III. CABINED LAWS, SENSIBLE RESULTS

If and when states choose to reform their RTF laws, they should study Washington's as a model, and other state courts should study Washington courts' jurisprudence on RTF laws, too. The statute's purpose statement makes clear that it aims to relieve agricultural and forestry operations in urbanizing areas from nuisance lawsuits.<sup>97</sup> It goes on to provide immunity from nuisance liability to agricultural operations that use good practices, were established prior to surrounding nonagricultural activities, and do not have a substantial adverse effect on public health and safety.<sup>98</sup> The following discussion of two Washington cases illustrates how a well-designed RTF law produces sensible outcomes in the courts.

Washington courts have narrowly construed Washington's RTF law. In *Buchanan v. Simplot Feeders Ltd. Partnership*, the Buchanans had farmed on their land for decades.<sup>99</sup> Simplot purchased a neighboring cattle ranch and expanded its operation while another defendant, IBP, Inc. (IBP), had purchased and expanded the operation of a meat processing plant.<sup>100</sup> These operations generated increasing amounts of odor, dust, and flies, spurring the Buchanans to sue Simplot and IBP as nuisances.<sup>101</sup> Simplot and IBP argued that Washington's RTF law immunized them from nuisance liability.<sup>102</sup> The Buchanans argued that Washington enacted the RTF law only to protect agricultural operations from urbanization and that it should not protect an agricultural operation from suit by another agricultural operation.<sup>103</sup>

After finding the statute ambiguous, the court conducted an extensive analysis of both the text and legislative history of the RTF law.<sup>104</sup>

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96. See *id.*; see also *Papadelis v. City of Troy*, No. 268920, 2006 WL 2683385, at \*3 (Mich. Ct. App. Sept. 19, 2006) (affirming the reasoning of *Papesh*), *rev'd on other grounds*, 733 N.W.2d 397 (Mich. 2007).

97. WASH. REV. CODE ANN. § 7.48.300 (West 2020).

98. *Id.* § 7.48.305.

99. 952 P.2d 610, 611 (Wash. 1998) (en banc).

100. *Id.* at 611–12.

101. *Id.*

102. *Id.* at 612.

103. *Id.* at 613.

104. *Id.*

Washington's RTF law includes a statement of purpose that emphasizes protecting farms from urbanization: "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 production."<sup>105</sup> This purpose colors the entirety of the RTF law and encourages a narrow construction by framing the law as a response to urbanization.<sup>106</sup> The legislative history of the statute also encourages a narrow construction.<sup>107</sup> Legislators explicitly noted their desire to protect farms from urbanization and described protecting rural landowners in coming-to-the-nuisance situations.<sup>108</sup>

Relying on the legislative history, the court ultimately held that:

[T]he nuisance protection afforded by the Right-to-Farm Act must be applied cautiously and narrowly. RCW 7.48.305 should not be read to insulate agricultural enterprises from nuisance actions brought by an agricultural or other rural plaintiff, especially if the plaintiff occupied the land before the nuisance activity was established.<sup>109</sup>

In coming to this conclusion, the Washington Supreme Court properly narrowed the state's RTF law to apply in urbanizing scenarios and recognized the importance of priority in time in determining nuisance liability.

Washington courts have since affirmed this reasoning. For example, in *Davis v. Taylor*, an apple orchard near a long-established residential subdivision was purchased and converted to a cherry orchard.<sup>110</sup> The orchard operators began using propane cannons and cherry guns to protect their crops from birds.<sup>111</sup> The neighbors sued, alleging that the agricultural operation constituted a nuisance due to the new increase in noise.<sup>112</sup> In interpreting the state and Yakima County RTF laws,<sup>113</sup> the court followed *Buchanan* and found that Washington's RTF law was meant to protect against urban encroachment and thus did not immunize the defendants from nuisance liability: "The act effectively codified the 'coming to the nuisance

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105. WASH. REV. CODE ANN. § 7.48.300 (West 2020).

106. *Buchanan*, 952 P.2d at 614.

107. *Id.* at 614–15.

108. *Id.*

109. *Id.* at 615–16.

110. 132 P.3d 783, 784 (Wash. Ct. App. 2006).

111. *Id.*

112. *Id.*

113. The county RTF law was "similar" legislation and accordingly functioned similarly. *Id.* at 785–86.

defense' (where a party moves to an existing nuisance)."<sup>114</sup> Washington's RTF law and its resulting case law thus provide a model for other states interested in returning their RTF laws to their theoretical foundations.

#### IV. HOW AND WHY TO CORRECT THE COURSE OF RTF LAWS

##### A. *Reforming RTF Laws*

This Note urges states to revise their laws with Washington's, not North Carolina's, statute as their model. It also urges courts to follow the model provided by Washington courts to help return RTF laws to a narrower and better purpose. States should reform their laws in a few specific ways. First, states should include purpose statements, such as Washington's, clarifying that the RTF law aims to provide protection in the face of urbanization.<sup>115</sup> Second, the law should then go on to premise immunity on whether the agricultural operation has priority in time compared to the competing use.<sup>116</sup> GAAMPs can still have a useful role in RTF statutes but following them should not alone shield agricultural operations from nuisance suits. Instead, asking for agricultural operations to follow GAAMPs in addition to enjoying priority in time to qualify for immunity from suit rewards agricultural operations for implementing best practices.<sup>117</sup> Third, states should modify RTF statutes so agricultural operations which significantly change their operations lose their immunity.<sup>118</sup> This provision is not a requirement that an operation remain static, never expanding or changing ventures. Instead, this requirement acknowledges that the scope

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114. *Id.* at 785 (citing *Alpental Cmty. Club, Inc. v. Seattle Gymnastics Soc'y*, 111 P.3d 257, 260–61 (Wash. 2005) (en banc); *Buchanan*, 952 P.2d at 615).

115. *See, e.g.*, WASH. REV. CODE ANN. § 7.48.300 (West 2020); *see also* Hand, *supra* note 31, at 305–06 (encouraging the use of purpose statements); Grossman & Fischer, *supra* note 30, at 122–25 (also arguing for limiting RTF laws' application to the context of urban sprawl where plaintiffs come to the nuisance).

116. *See, e.g.*, WASH. REV. CODE ANN. § 7.48.305(1). This Note's conception of priority matches what Hand categorizes as priority in ownership because it aims to be "consistent" with the coming-to-the-nuisance doctrine and recognizes the "visceral sense that it is unfair to allow an individual buying property with full notice of a neighbor's activities . . . to stop the neighbor's operation." Hand, *supra* note 31, at 306–07 (footnote omitted). Hand makes two critiques of RTF laws adopting this conception of priority: (1) such statutes may make it harder for individuals to sell their land because the new purchaser will not have the option to sue a neighboring agricultural operation for nuisance; and (2) such statutes limit their own applicability. *Id.* at 307–08. Regarding the former, this Note believes that this consequence is a permissible concession because this proposal aims to prevent arriving land uses from suing existing land uses because the arriving use could have chosen to locate elsewhere. And regarding the latter, this Note argues that limiting RTF laws' applicability is in fact desirable.

117. WASH. REV. CODE ANN. § 7.48.305(1).

118. Washington's law does not state this provision explicitly although it has been interpreted to function in this manner. *See Davis*, 132 P.3d 783. Idaho's RTF law is an example where the law's protections do not apply in cases of improper or negligent expansions of operations. *See IDAHO CODE ANN.* §§ 22-4503, 22-4505 (West 2019).

of some changes may drastically alter an operation's nature and the externalities it produces. Long-established neighbors may find their operations drastically affected yet would have no recourse in a nuisance suit under some expanded RTF laws. This proposal draws no hard lines as to what constitutes a significant change, although several courts have already considered the issue.<sup>119</sup> It will necessarily be a fact-based inquiry whose central mission should be determining whether the newly-changed operation remains compatible with the surrounding uses which existed prior to the change.

Additionally, in interpreting future cases concerning RTF laws, this proposal encourages judges to consider the legislative intent and history behind these laws in accordance with a purposivist philosophy.<sup>120</sup> The Washington Supreme Court analyzed the state's RTF law in part by considering the history of RTF laws and how the law's purpose section colored the entire statute in adopting its narrowing construction.<sup>121</sup> Considering the policy context behind RTF laws contributes to courts producing sensible resolutions and helps courts better respect a legislature's will, avoid inserting their own beliefs into the text, and have a base for resolving ambiguities in the statutes.<sup>122</sup> Looking to legislative history also avoids the personal bias inherent in a purely textual inquiry.<sup>123</sup> This Note acknowledges that the use of legislative intent or history in statutory interpretation is controversial but it is not without precedent.<sup>124</sup> The United

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119. See discussion *infra* Section IV.B.2.

120. This Note here echoes and aims to supplement one of Reinert's proposals. See Reinert, *supra* note 38, at 1735. For introductions to purposivism, see John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 85–91 (2006) (discussing tools used by modern purposivists in their inquiries, and similarities in analysis to textualists); Michael C. Mikulic, Case Comment, *The Emergence of Contextually Constrained Purposivism*, 91 NOTRE DAME L. REV. ONLINE 128, 140–42 (2016) (discussing modern pattern of reading statutes in light of their purposes); see also Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1538 (2003) (illustrating how understanding a statute's history enriches statutory interpretation).

121. *Buchanan v. Simplot Feeders Ltd. P'ship*, 952 P.2d 610, 614 (Wash. 1998) (en banc) ("Our ability to interpret and apply the Right-to-Farm Act is enhanced by the Legislature's express statement of findings and purpose."); see also *Payne v. Skaar*, 900 P.2d 1352, 1355 (Idaho 1995) (noting the law's statement of legislative intent).

122. Mikulic, *supra* note 120, at 140–42; see also STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 85–88 (2005) (comparing purposivism and textualism); STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* 94–98 (2010); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 457–58 (1988).

123. Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 142 (2012).

124. Some of America's leading jurists have rejected considering legislative intent or history. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 29–37 (Amy Gutmann ed., 1997); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988). See Farber & Frickey, *supra* note 122, at 453, for a direct response to these criticisms.

States Supreme Court recently examined the policy context of statutes in several major cases and found policy and history more persuasive than purely textual arguments.<sup>125</sup> This Note does not argue that the legislative intent or history should dictate a statute's interpretation, but rather argues that the aforementioned benefits of considering the policy context of RTF laws in judicial analyses help produce sensible outcomes in RTF cases.

### *B. Justifying Reform*

Two primary justifications exist for revising RTF statutes in this way. First, this revision's emphasis on priority-in-time returns RTF laws to their foundation in the coming-to-the-nuisance doctrine. As *Spur* illustrated, urbanization can upset long-established rural land uses. In the face of urbanization, this doctrine protects parties' expectations and honors parties' property-for-personhood interests. Second, this revision reduces the economic inefficiency generated by RTF laws. The broader the immunization from liability is, the greater the inefficiency generated will be. Revised statutes restricting immunity to instances of urbanization where the agricultural operator has priority-in-time reduce the total instances of immunity and thus reduce economic inefficiency. Similarly, if operations that change significantly lose their immunity, the pool of immune operators continues to shrink and exposes more operations to liability, continuing to reduce inefficiency.

#### *1. The Value of the Coming-to-the-Nuisance Doctrine*

Expanding RTF laws to provide immunity for agricultural operations against nuisance suits from long-established rural neighbors or any neighbor on the ground of following GAAMPs alone is improper. First, it unmoors RTF laws from their original theoretical underpinnings as attempts to codify the coming-to-the-nuisance doctrine.<sup>126</sup> This doctrine should not be abandoned. Courts have long considered whether a party having priority in

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125. See Note, *The Rise of Purposivism and Fall of Chevron: Major Statutory Cases in the Supreme Court*, 130 HARV. L. REV. 1227, 1229–37 (2017) (analyzing recent cases and finding the Court taking a purposivist approach); see also Mikulic, *supra* note 120, at 130.

126. MANDELKER, *supra* note 36, at 78.

time matters in nuisance suits.<sup>127</sup> Many courts have determined that it does, including in the context of agricultural operations.<sup>128</sup>

*a. Protecting Expectations*

The coming-to-the-nuisance doctrine helps protect parties' "legitimate expectations."<sup>129</sup> "[A] broadly shared feeling that claims of right arise from temporal priority" exists.<sup>130</sup> One scholar, R.E. Hawkins, in a thought experiment based off the landmark *Boomer v. Atlantic Cement Co.* case,<sup>131</sup> considers why an established operation, by virtue of temporal priority, should prevail in a conflict between it and a new use.<sup>132</sup> A property owner may establish an interest in his property, an interest around which behavior and values may develop.<sup>133</sup> When an established interest clashes with an arriving one, a court should consider these developed behavior and values in adjudicating property rights.<sup>134</sup> To do otherwise unethically ignores a distinction between an established and a new interest: that the nature of being established—of having a degree of permanence and the behaviors that come with it—deserves recognition in and of itself.<sup>135</sup> Also, an established operation has "legitimate expectations of permanence."<sup>136</sup> Hawkins identifies these expectations as being at the heart of the "ethical underpinnings of the concept of property."<sup>137</sup> Thus, disregarding temporal priority risks disregarding one aspect of what makes property property.<sup>138</sup>

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127. See, e.g., *McCarty v. Nat. Carbonic Gas Co.*, 81 N.E. 549, 550 (N.Y. 1907) ("Location, priority of occupation, and the fact that the injury is only occasional, are not conclusive, but are to be considered in connection with all the evidence . . ."); *McIntosh v. Brimmer*, 230 P. 203, 204 (Cal. Dist. Ct. App. 1924) (citing *McCarty*). But see *Campbell v. Seaman*, 63 N.Y. 568, 584 (1876) ("It matters not that the brick-yard was used before plaintiffs bought their lands or built their houses."); *Richards v. Ohio River R.R. Co.*, 49 S.E. 385, 386 (W. Va. 1904) ("If one comes to a nuisance, that does not debar him in legal proceedings for harm from it or to restrain it.").

128. See, e.g., *Davis v. Taylor*, 132 P.3d 783, 786 (Wash. Ct. App. 2006) (paying particular attention to the fact that the change in the orchard's activity occurred after the plaintiff neighbors had arrived). For a much earlier case in the agricultural context, see *Hall v. Budde*, 169 S.W.2d 33, 33 (Ky. 1943) ("[T]he fact that the complainants 'moved to the nuisance' is but a factor, though an important one, to be considered . . .").

129. Jeff L. Lewin, *Boomer and the American Law of Nuisance: Past, Present, and Future*, 54 ALB. L. REV. 189, 284 (1990).

130. *Id.* at 284–85 (citing, among others, R.E. Hawkins, 'In and of Itself': *Some Thoughts on the Assignment of Property Rights in Nuisance Cases*, 36 U. TORONTO FAC. L. REV. 209, 216–17 (1978)).

131. 340 N.Y.S.2d 97 (1972).

132. Hawkins, *supra* note 130, at 217.

133. *Id.* at 215.

134. *Id.*

135. *Id.* at 215–16.

136. *Id.* at 217.

137. *Id.*

138. *Id.*

An agricultural operation that begins operating in a rural area almost certainly has established patterns of behavior and legitimate expectations of permanence. Agricultural operators invest significant amounts of capital at their operations' outset. Public accountant Shawn Williamson calculated how much it would cost to assemble various farming operations—such as wheat, grain, and dairy operations—from scratch.<sup>139</sup> He found that these operations require millions of dollars in start-up funds.<sup>140</sup> And none of these potential operations were industrial in scale, meaning that larger farms almost certainly demand even more capital. Faced with such high entry costs, operators only start farming if they believe they will be able to continue their operations in the future.<sup>141</sup> If another operator comes onto the scene and, as part of its operations, demands that the first operator change or cease its operation to accommodate the new operation, it upsets the first operator's legitimate expectations.<sup>142</sup> Privileging the first operation maintains those expectations and recognizes that the second user is “usually the ‘least-cost-avoider’ of the conflict”.<sup>143</sup> The first operator already incurred costs of selecting its location and starting operations.<sup>144</sup> The second would-be operator has yet to incur these costs, has the opportunity to research the first operator's operation and determine whether they are “incompatible uses,” and has the opportunity to find another location.<sup>145</sup> Reformed RTF laws recognize that honoring the coming-to-the-nuisance doctrine helps protect operators' legitimate economic expectations.

*b. Property as Personhood*

The party with priority in time also likely values its operation more not just due to its expectations but due to emotional ties, too. Professor Margaret

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139. See Shawn Williamson, *How Much \$ Does It Take to Become a Farmer?*, SUCCESSFUL FARMING (June 27, 2017), <https://www.agriculture.com/farm-management/business-planning/how-much-h-does-it-take-to-become-a-farmer> [https://perma.cc/D5Q2-7K9G] [hereinafter Williamson, *How Much \$ Does It Take to Become a Farmer?*]; Shawn Williamson, *What's the Cost of Grain Farming in Iowa vs. Nebraska Dairy or Kansas Wheat?*, SUCCESSFUL FARMING (Aug. 17, 2017), [https://www.agriculture.com/farm-management/business-planning/whats-the-cost-of-grain-farming-in-ia-vs-neb-dairy-and-ks-wheat?did=165347&utm\\_campaign=todaysnews\\_081817&utm\\_medium=email&utm\\_source=ag-new-sletter](https://www.agriculture.com/farm-management/business-planning/whats-the-cost-of-grain-farming-in-ia-vs-neb-dairy-and-ks-wheat?did=165347&utm_campaign=todaysnews_081817&utm_medium=email&utm_source=ag-new-sletter) [https://perma.cc/AER3-VH3X].

140. Williamson, *How Much \$ Does It Take to Become a Farmer?*, *supra* note 139.

141. Hand, *supra* note 31, at 292–93. Hand describes the “impermanence syndrome” a farmer may experience if he or she perceives that his operation could be declared a nuisance: “This syndrome is characterized by a disinclination on the part of a farmer to invest in farm buildings or equipment because of a belief that he or she is unlikely to be farming on that property over the long term.” *Id.*

142. Lewin, *supra* note 129, at 285.

143. *Id.* The first operation can not only capitalize on its initial investment, but this privileging also “give[s] it] an incentive to develop [its] land without having to worry about future nuisance conflicts.” *Id.* at 286.

144. *Id.* at 285.

145. *Id.*

Jane Radin has argued extensively that not all personal properties are fungible commodities.<sup>146</sup> Instead, we identify with certain objects that are so important to us that they make up part of our personhood.<sup>147</sup> These items have “an appropriate connection to our conception of human flourishing.”<sup>148</sup> Radin identifies an object like “a wedding ring, a portrait, an heirloom, or a house” as being objects “closely bound up with personhood.”<sup>149</sup> This type of connection is often present between farmers and their land.<sup>150</sup> Place attachment research demonstrates that places have special meaning for individuals.<sup>151</sup> Farmers both give and receive a sense of security from their land: “The farm provides a sense of peace and sometimes even helps farmers through difficult personal journeys.”<sup>152</sup> Radin proposes that a connection like this should receive special protection in adjudicating claims:

Where we can ascertain that a given property right is personal, there is a *prima facie* case that that right should be protected to some extent against invasion by government and against cancellation by conflicting fungible property claims of other people. This case is strongest where without the claimed protection of property as personal, the claimants’ opportunities to become fully developed persons in the context of our society would be destroyed or significantly lessened, and probably also where the personal property rights are claimed by individuals who are maintaining and expressing their group identity.<sup>153</sup>

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146. See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1907 (1987). Reinert also discusses RTF laws in the context of Radin’s scholarship and argues that because RTF laws are insensitive to context, they preclude courts from adequately weighing property-for-personhood interests. Reinert, *supra* note 38, at 1732–33. This Note aims to supplement and respond to his critique by connecting Radin’s scholarship with recent scholarship on place attachment theory and by arguing that reforming RTF laws in the proposed way will help ensure that only agricultural operators with property-for-personhood interests in their land, at least as compared to a rival, litigious land use, receive protection under RTF laws.

147. Radin, *supra* note 146, at 1907–09. Radin argues that there are “three main, overlapping aspects of personhood: freedom, identity, and contextuality.” *Id.* at 1904 (discussing these aspects).

148. *Id.* at 1908 (discussing what makes a connection appropriate).

149. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982).

150. See generally Claudia Baldwin et al., *Love of the Land: Social-Ecological Connectivity of Rural Landholders*, 51 J. RURAL STUD. 37 (2017); Courtney E. Quinn & Angela C. Halfacre, *Place Matters: An Investigation of Farmers’ Attachment to Their Land*, 20 HUM. ECOLOGY REV. 117 (2014); Carol Hunter, Opinion, *Sale of Family Farm Spawns Tug of Emotions*, DES MOINES REG. (Dec. 21, 2014, 12:42 PM), <https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2014/12/21/sale-family-farm-spurs-emotions/20722877/> [<https://perma.cc/K2SF-CJPH>] (personal account of a farm family’s ties to its land).

151. See generally Maria Lewicka, *Place Attachment: How Far Have We Come in the Last 40 Years?*, 31 J. ENVTL. PSYCHOL. 207 (2011).

152. Quinn & Halfacre, *supra* note 150, at 127.

153. Radin, *supra* note 149, at 1014–15.

A reformed, cabined RTF law better provides this special protection only to deserving operators. By returning RTF laws to their roots in the coming-to-the-nuisance doctrine, this Note's proposal ensures that operators benefiting from RTF laws' protections are operators who have been in the area longer than the arriving, urbanizing land use from which they receive protection. So by design, only operators with comparatively strong property-for-personhood interests benefit from the reformed RTF law. The arriving rival land uses have simply not had the time to develop property-for-personhood relationships with their land. In his critique, Reinert had suggested that smaller farms deserve more protection in part as a proxy for privileging farmers with strong property-for-personhood interests.<sup>154</sup> This Note believes that time spent with the land rather than size is a better proxy for privileging these interests because the passage of time is critical in allowing a farmer to bond with his or her land, no matter how many acres it may be. In short, farmers bond with their land through work and play, and this consideration of place attachment weighs in favor of prioritizing the coming-to-the-nuisance doctrine in RTF laws to better privilege these bonds.<sup>155</sup>

## 2. *Promoting Economic Efficiency*

In addition to restoring temporal priority as the key criterion in RTF statutes, this proposal aims to reduce the amount of economic inefficiency generated by these statutes.<sup>156</sup> Narrowing RTF laws in the proposed way reduces inefficiency by reducing eligibility for immunity, thus exposing more operations to liability. Removing immunity incentivizes an operation to reduce the negative externalities it produces because it now faces the prospect of liability and damages. In doing so, an operation internalizes the costs of its activity that it had previously foisted on others. Returning RTF laws to their roots thus leads to laws that strike healthier balances between economic efficiency and other public policy justifications for these laws.<sup>157</sup>

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154. Reinert, *supra* note 38, at 1737. Reinert does note that "size may not be the best proxy for whether a farmer has developed a valued relationship with the land that cannot be compensated." *Id.* This Note here offers another proxy for consideration.

155. Quinn & Halfacre, *supra* note 150, at 128. It is important to note that this Note does not argue that any land use with priority in time should automatically be insulated from nuisance liability in all contexts. We must be mindful that "if coming to the nuisance were an automatic bar [to pursuing a nuisance claim], a defendant who carried on certain activities 'could condemn all the land in his vicinity to a servitude without paying any compensation.'" Grossman & Fischer, *supra* note 30, at 108 (quoting RESTATEMENT (SECOND) OF TORTS § 840D cmt. b (AM. LAW INST. 1977)). This discussion's preference for prioritizing the coming-to-the-nuisance doctrine is limited to this proposal for reforming RTF statutes.

156. See discussion *supra* Section II.

157. See generally JOHN P. BLAIR, LOCAL ECONOMIC DEVELOPMENT: ANALYSIS AND PRACTICE 32–33 (1995) (discussing why evaluating externalities cannot provide all the answers).

*a. Externalities in Agriculture*

“An externality is . . . the effect of one person’s decision on someone who is not a party to that decision.”<sup>158</sup> Externalities play an important role in American law and politics: “[M]any scholars have made the point that externalities set the stage for discussions of government regulation or other sorts of intervention. . . . Externalities likewise permeate the work of the judiciary . . . .”<sup>159</sup>

It is no secret that agricultural operations and policies generate negative externalities. Professor Terence J. Centner, for example, has examined environmental problems posed by concentrated animal feeding operations and how to counteract these problems with different land practices.<sup>160</sup> By immunizing qualifying agricultural operations from nuisance liability, RTF laws reduce one way in which society attempts to prevent an “oversupply of some dangerous activities.”<sup>161</sup> In addition, Reinert argues that RTF laws generate economic inefficiency by “discourag[ing] mutually beneficial gains from trades between farmers and other landowners.”<sup>162</sup> Farms may not always be the most economically efficient use of the land, yet most RTF laws, as currently written, shield them from “bearing the costs of their activities.”<sup>163</sup>

Freed from nuisance suits incentivizing cost-internalization, operators may be able to expand or change the nature of their operations in ways that impose far more costs on neighboring land, far more than their neighbors ever could have anticipated.<sup>164</sup> Michigan’s RTF statute is particularly lenient. As previously referenced, Michigan’s RTF law allows farms to be exempt from nuisance liability if they conform with GAAMPs.<sup>165</sup> Another subsection of the Michigan RTF law specifically provides that an operation

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158. R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 24 (1988).

159. Lisa Grow Sun & Brigham Daniels, *Externality Entrepreneurism*, 50 U.C. DAVIS L. REV. 321, 341, 344 (2016) (citing David D. Haddock et al., *Property Rights in Assets and Resistance to Tender Offers*, 73 VA. L. REV. 701, 722 (1987); Fred S. McChesney, *Current Excuses for Regulating Futures Transactions: Avoiding the E-Word*, 74 CORNELL L. REV. 902, 903 (1989)).

160. Terence J. Centner, *Concentrated Feeding Operations: An Examination of Current Regulations and Suggestions for Limiting Negative Externalities*, 25 COLUM. J. ENVTL. L. 219 (2000); see also Terence J. Centner, *Nuisances from Animal Feeding Operations: Reconciling Agricultural Production and Neighboring Property Rights*, 11 DRAKE J. AGRIC. L. 5, 11 (2006) (discussing objectionable practices by agricultural operations).

161. Giuseppe Dari-Mattiaci, *Negative Liability*, 38 J. LEGAL STUD. 21, 22 (2009). “The law internalizes negative externalities by providing general tort liability rules.” *Id.* at 21; see also Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1115–16 (1972) (discussing different liability rules for how nuisance suits can attempt to control pollution).

162. Reinert, *supra* note 38, at 1734.

163. *Id.* at 1735; see discussion *supra* Section I.C.

164. See Dari-Mattiaci, *supra* note 161, at 22.

165. MICH. COMP. LAWS ANN. § 286.473(1) (West 2020); see discussion *supra* Section II.

conforming with GAAMPs cannot become a nuisance even if it changes in size, adopts new technology, or changes the type of farm product being produced.<sup>166</sup> It is conceivable that any one of these changes could lead to neighboring land uses experiencing drastically different conditions than they had experienced before the change.

Changing an operation's scale may bring many new problems. More livestock, for example, produce more waste and thus more odor. A new technology may operate perfectly but still generate more noise than previous technology did. Changing farm products may come in the form of changing from producing grain to raising livestock, or changing the type of livestock raised. Livestock is noisier and more odiferous than grain, and one type of livestock may generate more noise or waste per capita than the previously raised livestock.

*Laux v. Chopin Land Associates, Inc.* sheds some light on how courts may treat these types of changes.<sup>167</sup> The Lauxes, previously grain farmers, started raising hogs on their farm, beginning with only a few dozen but soon growing to a few hundred hogs.<sup>168</sup> A developer owning neighboring land sued, alleging that the hogs constituted a nuisance due to odor.<sup>169</sup> The Lauxes argued that Indiana's RTF law protected their operation.<sup>170</sup> Under Indiana's statute, an agricultural operation that significantly changes loses its protection.<sup>171</sup> The court found that changing from a grain growing operation to a hog raising operation did constitute a significant change.<sup>172</sup> But the court found that the increase in the number of hogs and the accompanying construction of buildings to house them did not constitute a significant change.<sup>173</sup> The apparent conclusion that going from a few dozen hogs to a few hundred does not constitute a significant change in operation shows how much leeway some courts allow RTF statutes to give farmers to alter their operations, and thus potentially the conditions of their neighborhood, all while keeping their immunity.<sup>174</sup> Between GAAMP-premised immunity and lenient courts, RTF expansions clearly risk

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166. MICH. COMP. LAWS ANN. § 286.473(3).

167. 550 N.E.2d 100 (Ind. Ct. App. 1990). Reinert also identifies *Laux* as problematic case law, arguing that the Indiana court had misapplied the statute, illustrating the unclear application of RTF laws generally. Reinert, *supra* note 38, at 1724–25. This Note argues that this case also serves to illustrate how expanded RTF laws have the potential to let operators greatly alter their vicinity's externality balance without exposing themselves to liability.

168. *Laux*, 550 N.E.2d at 101.

169. *Id.*

170. *Id.*; see IND. CODE ANN. §§ 32-30-6-1, 32-30-6-5, 32-30-6-9 (West 2019).

171. § 32-30-6-9(d)(1).

172. *Laux*, 550 N.E.2d at 103.

173. *Id.* (“[M]erely increasing or decreasing the size or numbers of an operation will not serve to change the type of operation.”).

174. Not every court presented with a *Laux*-like situation has held similarly. See *Crea v. Crea*, 16 P.3d 922, 925 (Idaho 2000) (finding an expanding hog operation ineligible for RTF protection).

generating increased economic inefficiency. Revised statutes rein in this inefficiency by immunizing only agricultural operations that have priority in time in the face of urbanization.

*b. Tempering the Critique*

However, despite the general indictment of RTF laws for economic inefficiency the aforementioned scholars provide, this Note aims to temper the force of this paradigm's critique of RTF laws in recognition of some of the paradigm's limits. Reinert admits that it may be difficult to accurately evaluate the externalities created by farming.<sup>175</sup> Professor Ronald Coase notes that, from an economic standpoint, there is reciprocal responsibility for the creation of a nuisance; the agricultural operation is not solely to blame.<sup>176</sup> He provides an especially apt example of how it is hard to frame externalities by posing a conflict between a rancher and a farmer.<sup>177</sup> The rancher's cattle damage the farmer's crops while roaming.<sup>178</sup> Coase writes: "[I]t is true that there would be no crop damage without the cattle. It is equally true that there would be no crop damage without the crops. . . . If we are to discuss the problem in terms of causation, both parties cause the damage."<sup>179</sup>

It is also hard to frame externalities because a single action may generate positive or negative externalities depending on one's standpoint.<sup>180</sup> There is a "slipperiness" to nuisance law and "individual cases often turn on who can tell the most compelling externality story."<sup>181</sup> Further, externalities are subject to exaggeration.<sup>182</sup> For example, an "externality entrepreneur" may highlight a "dread risk" posed by an activity that evokes an emotional reaction among community members that is disproportionate to the burden the activity actually imposes.<sup>183</sup>

Agricultural operations also have the potential to create positive externalities, including providing economic opportunities, enhancing a

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175. Reinert, *supra* note 38, at 1734 (noting the complicated balance of positive and negative externalities generated by farms).

176. R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2-6 (1960).

177. *Id.*

178. *Id.*

179. *Id.* at 13; *see id.* at 8-15 (Coase applying this thinking to numerous cases).

180. See Charles B. Moss & Andrew Schmitz, *Positive and Negative Externalities in Agricultural Production: The Case of Adena Springs Ranch*, 45 J. AGRIC. & APPLIED ECON. 401, 402 (2013).

181. Sun & Daniels, *supra* note 159, at 348.

182. *Id.* at 357. Professors Sun and Daniels refer to this process as heightening the "cognitive salience" of an externality. *Id.*

183. *Id.* at 327, 341. "[A]n externality entrepreneur is a person who strategically identifies, selects, frames, and publicizes externalities to create opportunities to influence political and legal outcomes." *Id.* at 327. The very existence of this type of actor demonstrates that calculating and dealing with externalities is not a straightforward problem.

geographic identity, stabilizing the climate, and preserving biodiversity and viable ecosystems.<sup>184</sup> And, returning to Coase, evaluating nuisance law involves “dealing with a problem of a reciprocal nature.”<sup>185</sup> It is important to evaluate the rival use, such as urbanizing real estate development, accusing the agricultural operation of being a nuisance.<sup>186</sup> “The problem is to avoid the more serious harm.”<sup>187</sup> Urbanizing development often gives rise to negative externalities such as increased traffic congestion and pollution.<sup>188</sup> Overall, “[t]he externality problem increases rapidly as urban density increases.”<sup>189</sup> The host of environmental land use regulations arising in response to land use policy speaks to the risks that development poses.<sup>190</sup> Additionally, the development coming in contact with agricultural uses may represent a particularly troubling kind of development: urban sprawl that may engender new or exacerbate existing issues.<sup>191</sup> Unfortunately, expanding suburbs often collide with highly productive farmland.<sup>192</sup> Multiple scholars have identified urban sprawl as a threat to public health and the environment.<sup>193</sup> Reforming RTF laws in the manner proposed reduces some of the worst economic inefficiency generated by RTF laws while recognizing that agricultural uses generate positive externalities, too, and that rival uses, such as urbanization, may not present more favorable externality balances, either.

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184. See Anastasija Novikova, *Valuation of Agricultural Externalities: Analysis of Alternative Methods*, 2 RES. FOR RURAL DEV. 199, 201 (2014) (cataloging positive and negative externalities generated by agricultural operations).

185. Coase, *supra* note 176, at 2.

186. *Id.*

187. *Id.*

188. BLAIR, *supra* note 157, at 27.

189. *Id.* at 30 (citing William J. Baumol, *Macroeconomics of Unbalanced Growth: The Anatomy of Urban Crisis*, 57 AM. ECON. REV. 415 (1967)).

190. See, e.g., MANDELKER, *supra* note 36, at 517 (introducing environmental land use regulations).

191. Gregory D. Squires, *Urban Sprawl and the Uneven Development of Metropolitan America*, in URBAN SPRAWL: CAUSES, CONSEQUENCES & POLICY RESPONSES 1, 2 (Gregory D. Squires ed., 2002) (“Sprawl can be defined as a pattern of urban and metropolitan growth that reflects low-density, automobile-dependent, exclusionary new development on the fringe of settled areas often surrounding a deteriorating city.”); see also OLIVER GILLHAM, *THE LIMITLESS CITY: A PRIMER ON THE URBAN SPRAWL DEBATE* 3 (2002).

192. Squires, *supra* note 191, at 26; see also GILLHAM, *supra* note 191, at 88–89 (discussing consequences of losing farmland to urbanization).

193. See David J. Cieslewicz, *The Environmental Impacts of Sprawl*, in URBAN SPRAWL: CAUSES, CONSEQUENCES & POLICY RESPONSES, *supra* note 191, at 23, 23–35 (discussing environmental impacts of urban sprawl); GILLHAM, *supra* note 191, at 121–22 (summarizing pollution and public health issues posed by urban sprawl); Howard Frumkin, *Urban Sprawl and Public Health*, 117 PUB. HEALTH REP. 201, 212 (2002) (concluding that urban sprawl is associated with both health benefits and costs, and some costs disproportionately affect vulnerable populations).

## V. IMPLICATIONS OF IMPLEMENTATION

Certain legislators, farmers, interest groups, or other entities may all resist this proposal for fear that farmers will face more nuisance suits. To those who share these concerns, this proposal can be implemented as part of a concert of action communities and states take to manage the relationship between agriculture and urbanization. RTF laws can and should be one part of a slate of land use planning policies.<sup>194</sup> For example, as previously discussed, RTF laws were introduced in part because of concerns over the efficacy of agricultural zoning and districting.<sup>195</sup> Using a combination of these tools to create flexibility in land management is one way in which communities can move forward. For example, if a community wants to make sure agricultural operations receive protection from urbanization, instead of relying on an overly broad RTF law, that community can zone land exclusively for agricultural uses. This type of zoning is sometimes disfavored because of how *effective* it is, and it can thus provide broad protection in certain areas if that is desired.<sup>196</sup> RTF laws should be only one tool in the toolbox for crafting land use policy.

A second implication of the proposal concerns whether RTF laws may be able to provide a legal framework for urban farming in American cities.<sup>197</sup> Urban farming has become increasingly common in America and provides a host of positive externalities.<sup>198</sup> However, some city planners have balked at the growth of urban farming operations due to both environmental and economic concerns.<sup>199</sup> One analysis of several RTF laws found a shortcoming when it comes to protecting urban agriculture.<sup>200</sup> The remedy for this situation is outside the scope of this Note. Narrowing the protection provided by RTF laws would certainly not help urban farms. Due to the relative newness of urban farms, they would likely have difficulty establishing priority in time. And because urban farms may operate under communal ownership it may be more difficult to argue that a property-as-

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194. Hamilton, *supra* note 71, at 117–18; *see also* MANDELKER, *supra* note 36, at 577–82 (excerpting Mark W. Cordes, *Takings, Fairness, and Farmland Preservation*, 60 OHIO ST. L.J. 1033, 1045–48 (1999)) (surveying agricultural land preservation policies).

195. Hand, *supra* note 31, at 297.

196. *Id.* at 296.

197. *See* Susanne A. Heckler, Note, *A Right to Farm in the City: Providing a Legal Framework for Legitimizing Urban Farming in American Cities*, 47 VAL. U. L. REV. 217 (2012). MANDELKER, *supra* note 36, at 79, also raises this question.

198. *See generally* Lisa Palmer, *Urban Agriculture Growth in US Cities*, 1 NATURE SUSTAINABILITY 5 (2018); Rachel Obordo, *'Fresh, Free and Beautiful': The Rise of Urban Gardening*, GUARDIAN (June 7, 2018), <https://www.theguardian.com/world/2018/jun/07/fresh-free-and-beautiful-the-rise-of-urban-gardening> [<https://perma.cc/N3FM-96PK>].

199. Heckler, *supra* note 197, at 218.

200. *Id.*

personhood relationship has developed. Again, communities should look to all the tools available to them in crafting their land use policies. RTF laws may be poor solutions to encouraging or protecting urban farms.<sup>201</sup> New legislation or policies targeting urban farming will likely be more effective than overly broad RTF laws.

#### CONCLUSION

In certain states, RTF laws have become divorced from their foundations. This Note proposes reforming these laws by returning them to their roots: agricultural operations should only be shielded from nuisance liability when sued by new neighbors in the context of urbanization. Some states' current expansive immunities that allow changed operations to shield themselves from fellow, established rural neighbors or to rely only on complying with GAAMPs unmoor the laws from their theoretical foundation and generate too much economic inefficiency. Under one of these more expansive laws, if then-Congressman Braley had sued his neighbor, it is possible he would have had little recourse, even if the chickens had only just arrived. States should not rely on overly broad RTF laws to protect agricultural operations. Narrower RTF laws provide more sensible resolutions in conflicts between agricultural operations and their neighbors.

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201. *But see id.* at 261 (proposing modifications to RTF laws to accommodate urban agriculture).

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