# Comments

# Pennsylvania's Right-To-Farm Law: A Relief For Farmers Or An Unconstitutional Taking?

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## I. Introduction

Agriculture is Pennsylvania's largest industry.[1] It produces over forty-four billion dollars in annual revenue and provides approximately one in six of Pennsylvania's jobs.[2] In spite of the economic importance

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1. Dennis Wolff, *Governor's Proposal Critical for Preserving PA's Farmland*, CapNews, http://www.nichenews.com/c/guestspeakers/d_wolff.html (last visited May 30, 2005). In 2002, the total value of farm production in the state exceeded $2.1 billion, and the farming sector of the economy provided more than 84,300 jobs. *AgImpacts: The Role of Production Agriculture in the Local Economy*, Pennsylvania State University, http://agimpact.aers.psu.edu (last visited May 30, 2005). Many of Pennsylvania's agriculture sectors are among the largest in the nation. *Pennsylvania Agricultural Information*, Pennsylvania Farm Bureau, http://www.pfb.com/news/aginfo.html (last visited May 30, 2005). For example, Pennsylvania ranks first in the nation in mushroom production and fourth in dairy production. *Id.* The state also ranks first in the production of many snack foods, including potato chips, pretzels, and processed chocolate. *Id.*

2. American Farmland Trust, http://www.farmland.org/mid_atlantic/Pennsylvania.htm (last visited May 30, 2005).

of the agriculture industry, its viability is becoming increasingly threatened by urban sprawl,[3] which engulfs over 1.2 million acres of America's farmland per year.[4] In addition, urban sprawl brings with it new landowners who are unaccustomed to country life and are largely unwilling to deal with its shortcomings.[5]

Right-to-farm laws, which have been enacted in all fifty states,[6] are one piece of a larger puzzle of statutes designed to preserve land for agricultural use and to remedy conflicts between farmers and their non-farm neighbors.[7] Specifically, right-to-farm laws are intended to preserve agricultural operations by protecting them from nuisance suits.[8] Nuisance suits can be particularly damaging to farm operations because the time and money required to defend such actions may force farmers to

3. Urban sprawl is defined as "development that is inefficient use of land (i.e., low density); constructed in a 'leap frog' manner in areas without existing infrastructure, often on prime farmland, automobile dependent, and consisting of isolated single use neighborhoods requiring excessive transportation." *In re* Dolington Land Group, 839 A.2d 1021, 1029 n.8 (Pa. 2003).

4. Alan Gregory, *Who Bought the Farm?*, THE STANDARD SPEAKER, *available at* http://www.msnbc.msn.com/id/3765154/ (last visited May 30, 2005). In the fifteen years from 1982 to 1997, Pennsylvania lost over 10,000 farms and over 1,000,000 acres, or 13%, of its agricultural land. *Id.* Furthermore, in the five years from 1997 to 2002, Pennsylvania lost another 2,000 farms. *See 2002 Census of Agriculture*, U.S.D.A. Nat'l Agricultural Statistics Serv., Pa. State Data—Table 1, *available at* http://www.nass.usda.gov/QuickStats/ (last visited May 30, 2005).

5. The sounds of tractors and animals in the early morning, the smell of freshly fertilized fields, and the dirt and dust associated with farming often irritate non-farm neighbors. *See, e.g.*, Kent Fleming, *Farming in the Shadow of the City*, *in* 1989 YEARBOOK OF AGRICULTURE: FARM MANAGEMENT 308, 322-24 (Deborah T. Smith ed., 1989).

6. *See* Farmland Information Center, http://www.farmlandinfo.org/farmland_preservation_laws/ (last visited May 30, 2005) (database which provides links to the text of the right-to-farm laws of all fifty states).

7. Other methods currently used to preserve Pennsylvania farmland include the Purchase of Agricultural Conservation Easement (PACE) Program, which provides for the purchase of development rights for farmland in order to preserve its agricultural use, 3 PA. CONS. STAT. §§ 914.1-914.5 (West 2005), and the Agricultural Security Area Act, which protects areas of viable agricultural land that are greater than 250 acres. 3 PA. CONS. STAT. §§ 901-913 (West 2005). In addition, a new program created by the administration of Governor Edward Rendell will invest a portion of an appropriation amounting to hundreds of millions of dollars to preserve farmland and protect open space. *See Welcome to the Growing Greener Program*, Pennsylvania Department of Environmental Protection, http://www.dep.state.pa.us/growgreen/ (last visited May 30, 2005). *See also Pennsylvania Statutory and Regulatory Measures to Protect Agricultural Land and Open Space*, Pennsylvania General Assembly Local Government Commission, http://www.lgc.state.pa.us/deskbook03/Issues22.pdf (last visited May 30, 2005) (gives brief descriptions of over seventeen state programs intended to help preserve the state's agricultural land and operations).

8. Nuisance laws have been used to challenge agricultural practices since as early as 1610. Aldred's Case, 77 Eng. Reports 816 (1610) (emission of odor from livestock was alleged to be a nuisance).

sell all or part of their land.[9] In addition, since odors and noise are a natural part of any farm operation, it can be difficult for even the most diligent of managers to eliminate nuisances entirely. Nevertheless, liability can attach even after a farmer has acted reasonably to prevent the nuisance.[10] Therefore, without right-to-farm laws, it would become almost impossible for agricultural operations to exist in suburban areas, where the number of neighboring property owners increases the probability of nuisance suits.

Furthermore, as farms increase in size, they become more prone to challenge by non-agricultural neighbors.[11] In recent years, economies of scale[12] have driven the expansion of farm operations in a variety of agricultural sectors.[13] With this expansion has come an increase in the number of nuisance suits.[14]

In the two decades since right-to-farm laws have been implemented nationwide, they have consistently withstood legal challenges.[15]

9. Although most farmers are well-off in terms of capital assets, their businesses typically lack the cash flow required to defend a lengthy lawsuit. DALE M. JOHNSON ET AL., ASSESSING AND IMPROVING YOUR FARM CASH FLOW 7 (1998).

10. If a nuisance exists, the person responsible for it is strictly liable for the resulting damages even if he acted reasonably "to prevent or minimize the deleterious effect of the nuisance." Ryan v. City of Emmetsburg, 4 N.W.2d 435, 439 (Iowa 1942). In other words, a nuisance can exist even without a finding of negligence. *Id.*

11. *See, e.g.*, Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972) (nuisance suit brought against large cattle feedlot); Laux v. Chopin Land Ass'n, 615 N.E.2d 902 (Ind. Ct. App. 1993) (nuisance suit brought against large hog facility).

12. The term "economies of scale" refers to the advantage that large businesses have over their smaller competitors because of their ability to reduce costs and increase profits. RONALD D. KNUTSON ET AL., AGRICULTURAL AND FOOD POLICY 226 (4th ed. 1998). Focusing on agriculture, there are three economies of scale that favor large operations and often drive farmers to expand. *Id.* First, a larger farm operation's average cost of production is typically lower than that of a smaller farm because the larger farm's input costs can be spread over a greater amount of output. *Id.* at 227. Second, a larger farm operation may be able to negotiate a lower price for farm inputs or a higher price for farm outputs, solely because of its large size. *Id.* at 228. Third, large farms are often more likely to benefit from technological advances because of their increased ability to afford new technology. *Id.*

13. Between 1997 and 2002, the number of dairy and beef farms with less than 499 head of cattle decreased by 15%, from 33,051 to 27,957. *See 2002 Census of Agriculture*, U.S.D.A. Nat'l Agricultural Statistics Serv., Pa. State Data—Table 12, *available at* http://www.nass.usda.gov/QuickStats/ (last visited May 30, 2005). During the same time period, the number of dairy and beef farms with between 500 and 5,000 head of cattle increased by 30%. *Id.* Other agricultural industries experienced similar trends. For example, the number of hog farms with less than 1,000 head decreased by 14%, while the number with over 1,000 head increased by 7%. *Id.* at Table 19.

14. *See, e.g.*, Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972) (nuisance suit brought against large cattle feedlot); Laux v. Chopin Land Ass'n, 615 N.E.2d 902 (Ind. Ct. App. 1993) (nuisance suit brought against large hog facility).

15. Steven J. Laurent, *Michigan's Right to Farm Act: Have Revisions Gone Too Far?*, 2002 MICH. ST. U. DETROIT C.L. REV. 213, 228 (2002) [hereinafter Laurent, *Michigan's Right to Farm*].

However, this impeccable track record was interrupted by a 1998 decision in which the Iowa Supreme Court struck down that state's right-to-farm statute as unconstitutional.[16] Subsequently, challenges arose in several other states.[17]

This Comment discusses the implications of these constitutional challenges on Pennsylvania's right-to-farm law[18] and offers suggestions for changes in the law that might make it less vulnerable to constitutional attack. Part II explains the fundamental principles of nuisance law. It also summarizes the policy concerns that led to the adoption of Pennsylvania's right-to-farm law and to its subsequent amendments. Part III-A describes the substantive distinctions between Pennsylvania's law and Iowa's law. These distinctions could help to insulate Pennsylvania's law from constitutional challenge. Part III-B critiques the reasoning behind Iowa's finding of unconstitutionality and proffers reasons why Pennsylvania courts may differ in their approach. Part IV concludes.

## II. Background

### *A. Nuisance Law Explained*

The common law of nuisance forbids individuals from using their property in a way that "unreasonably interferes" with another's use or enjoyment of his land.[19] Nuisance claims are highly fact-specific, so there are no bright-line rules to determine when conduct will amount to a nuisance.[20] However, a common test for determining the existence of a nuisance weighs the gravity of the harm to the plaintiff against the utility of the defendant's use.[21] The paramount question in determining if a

16. Bormann v. Bd. of Supervisors, 584 N.W.2d 309 (Iowa 1998).

17. In Washington, a challenge was raised by *Buchanan v. Simplot Feeders Ltd. P'ship*, 952 P.2d 610 (Wash. 1998). The court held that the Washington right-to-farm law insulated farmers from nuisance suits only when the suits arose from urban encroachment. *Id.* at 614. The portion of the law that purported to do more than codify the "coming to the nuisance" doctrine was struck down. *Id.* at 616. In Texas, a challenge was raised by *Tex. Natural Res. Conservation Comm'n v. Accord Agric., Inc.*, No. 96-00159, 1999 WL 699825 (Tex. Ct. App. Sept. 10, 1999). However, the plaintiff's challenge to Texas's right-to-farm law was dismissed on standing grounds due to lack of injury on the part of the plaintiff. *Id.* at *5.

18. Pennsylvania's right-to-farm law is found in 3 PA. CONS. STAT. ANN. §§ 951-957 (West 2005).

19. DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 10 (4th ed. 1994).

20. ROGER A. MCEOWEN & NEIL E. HARL, PRINCIPLES OF AGRICULTURAL LAW 11-45 (2005).

21. RESTATEMENT (SECOND) OF TORTS §§ 827-828 (1979). To determine the plaintiff's harm, the following factors are considered: (1) the extent and character of the

nuisance exists is "whether it is reasonable for the defendant to be doing what it is doing where it is doing it."[22]

There are two types of nuisances: public and private.[23] A public nuisance interferes with the rights of a community at large.[24] Conversely, a private nuisance interferes with an individual's use and enjoyment of his land.[25] Unlike trespass, which involves an actual physical invasion of property, a private nuisance typically involves the invasion of a property by an intangible substance, such as noises or odors.[26] Therefore, the extent to which others are affected by a nuisance determines whether it is public or private.[27]

Nuisance cases in many states[28] are guided by the Restatement (Second) of Torts's definition of nuisance.[29] Based on this definition, many prosperous agricultural operations were deemed nuisances prior to the advent of right-to-farm laws. For example, in *Pendoley v. Ferreira*,[30]

harm; (2) the social value of the use invaded; and (3) the burden on the plaintiff of avoiding the harm. *Id.* To determine the utility of the defendant's use, the following factors are considered: (1) the social value of the use; (2) the impracticality of avoiding the nuisance-like conduct; and (3) the suitability of the use to the area. *Id.* Pennsylvania defines a nuisance as "a class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property . . . to the right of another, or the public, producing such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequential damage." Feeley v. Borough of Ridley Park, 551 A.2d 373, 375 (Pa. Commw. Ct. 1988).

22. CALLIES, *supra* note 19, at 10.

23. *Id.* at 12.

24. Public nuisances may threaten the public health, safety or welfare, or damage community resources, such as public water supplies or roads. Commonwealth v. MacDonald, 347 A.2d 290, 301 (Pa. 1975).

25. Guzman v. Des Moines Hotel Partners, 489 N.W.2d 7, 10 (Iowa 1992).

26. Golen v. Union Corp., 718 A.2d 298, 300 (Pa. Super. Ct. 1998).

27. In Pennsylvania, the distinction between public and private nuisances is no longer relevant for right-to-farm cases. *See* Horne v. Haladay, 728 A.2d 954, 957-58 (Pa. Super. Ct. 1999) (holding that Pennsylvania's right-to-farm law applies with equal force to public and private nuisance claims).

28. The Pennsylvania Superior Court adopted the Restatement (Second) of Torts's definition of private nuisance in 1984. Kembel v. Schlegel, 478 A.2d 11, 14 (Pa. Super. Ct. 1984).

29. For example, section 822 of the Restatement, which helps to define nuisance and has guided numerous courts, provides:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either:
>
> (a) intentional and unreasonable, or
>
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Kirpiak v. Russo, 676 A.2d 270, 272 (Pa. Super. Ct. 1996) (quoting the RESTATEMENT (SECOND) OF TORTS § 822 (1977)).

30. Pendoley v. Ferreira, 187 N.E.2d 142 (Mass. 1963).

a farmer started a hog farm in a rural community in 1949.[31] His business prospered, and the number of hogs increased.[32] The farm was operated in compliance with state law, and there was no negligence on the part of the farmer; however, the farm smelled nonetheless.[33] Over the years, development spread toward the farm, and, in 1960, a small neighborhood was constructed nearby.[34] The farmer's new neighbors, bothered by the smell, brought a nuisance suit against him.[35] Ultimately, the court held that the farmer was creating a nuisance, despite his reasonable efforts to control the smell, and ordered him to liquidate his business.[36]

Even in cases where nuisance lawsuits ultimately failed, the cost of defending against the suits often threatened farming operations or even forced them to close.[37] This, among other factors, led to the widespread adoption of right-to-farm laws across the country between 1978 and 1983.[38]

### *B. Reasons for the Adoption of Pennsylvania's Right-to-Farm Law*

First enacted in 1982,[39] Pennsylvania's right-to-farm law was designed to protect farmland threatened by non-farm development.[40] When adopting the law, the legislature declared that when non-farm development extends into agricultural areas, agricultural operations are often subjected to nuisance suits and are "sometimes forced to cease operations."[41] Even those farmers that are not forced to close down may be discouraged from investing in farm improvements, as they may be uncertain as to whether those improvements will subject them to

31. *Id.* at 144.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 143.
36. *Id.* at 146.
37. Janie Hipp, *Right-to-Farm Laws: History and Future*, National Agricultural Law Center 1, *available at* http://www.farmfoundation.org/1998NPPEC/hipp.pdf (last visited May 30, 2005).
38. This period saw the methodical elimination of farmland as urban areas began to expand into traditionally rural land. Alexander A. Reinert, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694, 1697 (1998). The 1977 publication of the National Agricultural Lands Study, which warned of a national crisis created by the loss of farmland and recommended that states enact right-to-farm laws, had a marked influence on lawmakers in many states. *Id.* at 1696-97.
39. *See* Act of June 10, 1982, Pub. L. No. 454, No. 133.
40. *See* 3 PA. CONS. STAT. ANN. § 951 (West 2005). The legislature's objective when adopting the right-to-farm law was "to conserve and protect and encourage the development and improvement of its agricultural land for the production of food and other agricultural products." *Id.*
41. *See id.*

nuisance liability.[42]

A second motivating factor behind the passage of Pennsylvania's right-to-farm law was the dwindling utility of the common law's "coming to the nuisance" doctrine.[43] This doctrine, which is generally based on the theory of assumption of risk,[44] creates a defense to a nuisance claim for a plaintiff whose alleged nuisance-like conduct existed before the defendant moved into the area of the conduct.[45] The "coming to the nuisance" defense states that the first landowner to arrive in an area has certain rights to use the land regardless of the uses of later neighboring landowners.[46] For example, a property owner who builds a residence next to an established hog farm is deemed to have assumed the risk that the hog farm may produce unpleasant odors and noises, and the farmer is permitted to continue to use the land regardless of the effect on the neighbor's residence.[47]

Although this example illustrates the most desirable result of the "coming to the nuisance" doctrine, the doctrine is not always so effective. In *Spur Industries v. Del E. Webb Development Company*,[48] Spur Industries had successfully operated a cattle feedlot in a rural area for many years.[49] Gradually, urban sprawl crept into the area, and eventually a residential community was located on land adjacent to the feedlot.[50] In response to the developer's claim against the feedlot operator, the court recognized that the developer had come to the nuisance.[51] Nevertheless, the court found in favor of the developer and closed down the feedlot.[52] The outcome of this case illustrates the

42. *See id.* In most states, including Pennsylvania, zoning laws often allow for agricultural activity, but provide no definitive regulations, such as emission control standards. J. Patrick Wheeler, *Livestock Odor & Nuisance Actions vs. "Right-to-Farm" Laws: Report By Defendant Farmer's Attorney*, 68 N.D. L. REV. 459, 460-61 (1992). This leaves agricultural operators with little guidance regarding which activities may be deemed a nuisance. *Id.*

43. The continuing utility of the "coming to the nuisance" doctrine is frequently debated. *See, e.g.*, GREGORY, KALVERE & EPSTEIN, CASES AND MATERIALS ON TORTS 616, 677-81 (1977).

44. Assumption of risk is a principle of tort law that "one who has taken on oneself the risk of loss, injury, or damage consequently cannot maintain an action against the party having caused the loss." BLACK'S LAW DICTIONARY 121 (7th ed. 1999).

45. *See* GREGORY, KALVERE & EPSTEIN, at 677-81.

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

47. For an illustration of how the "coming to the nuisance" doctrine was traditionally applied, *see, e.g.*, Feldstein v. Kammauf, 121 A.2d 716, 721 (Md. 1956) (denying relief to plaintiffs who "knew or should have known" of existence of nuisance prior to moving).

48. *Spur*, 494 P.2d at 700.

49. *Id.* at 703-04.

50. *Id.*

51. *Id*. at 706.

52. *Id.* The court also required the developer to pay the costs of moving the

judiciary's decreasing willingness to enforce the "coming to the nuisance" doctrine.[53] Some courts entirely refuse to recognize the defense.

Currently, "coming to the nuisance" is[54] seen as only one of many factors in a nuisance action.[55] First in time is no longer absolutely first in right.[56] Consequently, right-to-farm laws fill the void and return the protection afforded by the "coming to the nuisance" doctrine in earlier times.[57]

### *C. The Operation of Pennsylvania's Right-to-Farm Law*

The Pennsylvania right-to-farm law provides agricultural operations with immunity from nuisance suit if certain conditions are met.[58] To qualify for immunity from suit, an agricultural operation must have lawfully been in existence for more than one year prior to the commencement of a nuisance action.[59] In addition, the conditions upon which the nuisance suit is based must be "normal agricultural operations"[60] and must have "existed substantially unchanged since the established date of operation."[61]

Even if the physical facilities of an agricultural operation are "substantially expanded or substantially altered," the operation is

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plaintiff's feedlot to a new location. *Id.* at 708.

53. JULIAN C. JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW § 14.4, at 640 (1998).

54. *Id.*

55. *See, e.g.*, Abdella v. Smith, 149 N.W.2d 537, 541 (Wis. 1967) ("A plaintiff, of course is not ipso facto barred from relief in the courts merely because of coming to the nuisance") (citations omitted).

56. "First in time, first in right" is a common law concept that was used to determine which of two claimants had rightful title to a parcel of land. 66 AM. JUR. 2D *Records and Recording Laws* § 39 (2004). Since there was no system for registration of land at common law, the first person to claim the land prevailed. *Id.* Despite the adoption of an elaborate system of land registration, the concept has remained a pervasive part of property law and is used to resolve disputes in many contexts. *Id.*

57. ROGER A. MCEOWEN & NEIL E. HARL, PRINCIPLES OF AGRICULTURAL LAW 11-49 (2005) (discussing the wane in the utility of the "coming to the nuisance" defense and the corresponding growth in right-to-farm laws).

58. *See* 3 PA. CONS. STAT. ANN. § 954(a) (West 2005).

59. *Id.* This essentially codifies the common law "coming to the nuisance" doctrine. *See supra* Part II-B.

60. 3 PA. CONS. STAT. ANN. § 952 (West 2005). A normal agricultural operation includes the "activities, practices, equipment and procedures" that farmers use in the production of "poultry, livestock and their products" and in the production of "agricultural, agronomic, horticultural, silvicultural and aquacultural crops and commodities." *Id.* § 952. Furthermore, a normal agricultural operation must be greater than ten contiguous acres in area or, if it is less than ten contiguous acres, must have an estimated yearly gross income of greater than $10,000. *Id.*

61. *Id.* § 954(a).

immune from suit as long as the altered facility has been in operation for at least one year.[62] This leaves farmers vulnerable to nuisance suits for the one-year period after any substantial change[63] in their operation, which may deter them from expanding or investing in improvements.

Despite the right-to-farm law's protectionist purpose, it does not completely strip neighbors of their rights to bring nuisance suits against farmers.[64] Instead, neighbors are permitted to file suit as long as they do so within the one-year statutory period.[65] In addition, the right-to-farm law does not circumvent the right to recover damages for any injuries that result from the acts of an agricultural operation that violate the law[66] or result in a flood or the pollution of a stream.[67] Finally, the right-to-farm law does not interfere with the neighbors' ability to file suit against a farm under a theory other than nuisance.[68]

Beyond immunity from suit, the right-to-farm law also seeks to prevent local governments from infringing on agricultural operations.[69] The law limits the ability of municipalities to create local ordinances that define "normal agricultural operations" as public nuisances.[70] The right-to-farm law also contains a severability provision that would save the remainder of the law should any portion be invalidated.[71]

### *D. Reasons for the Amendment of Pennsylvania's Right-to-Farm Law*

In 1998,[72] Pennsylvania amended its right-to-farm law to provide further protection to farmers.[73] A portion of the amendment was designed to immunize farmers who sought to expand or substantially change their operations from nuisance suits.[74] Because the original law's one-year statutory period created a deterrent to investment, the

62. *Id.*

63. The right-to-farm law does not define what constitutes a "substantial change," which may leave a farmer guessing as to when his actions will make his vulnerable to suit.

64. *See* 3 PA. CONS. STAT. ANN. § 954(a) (West 2005).

65. *Id.*

66. *Id.* § 954(b).

67. *Id.* § 955.

68. *Id.* § 956. For instance, trespass and other tort actions are available alternatives. *See, e.g.*, City of Benton v. Adrian, 748 P.2d 679, 685 (Wash. Ct. App. 1988) (permitting a claim of trespass as an alternative to a nuisance claim).

69. *See* 3 PA. CONS. STAT. ANN. § 953(a) (West 2005).

70. *See id.* Municipalities are called upon to "encourage the continuity, development and viability of agricultural operations" within their jurisdictions. *Id.*

71. *Id.* § 957.

72. *See* Act of May 15, 1998, Pub. L. No. 441, No. 58, § 2.

73. According to the original version of the bill introduced in the Senate, the legislative purpose behind the amendment was to further provide for "limitation on public nuisances." S.B. 682, 182nd Gen. Assem., Reg. Sess. (Pa. 1997).

74. *See* 3 PA. CONS. STAT. ANN. § 954 (West 2005).

amendment sought to give farmers a way to opt out of the problematic one-year period.[75] Since the amendment, a farmer may avoid the one-year period by developing a nutrient management plan[76] in compliance with state law prior to substantially changing his operation.[77] As such, the farmer is provided with immediate immunity from suit and the deterrent to investment is removed.

Given the benefits of nutrient management plans to the environment, this amendment is beneficial not only to farmers but also to the community. It was part of a far-reaching legislative plan to encourage the voluntary development of nutrient management plans and to decrease the deleterious effects of improperly handled manure on the environment.[78]

## III. Analysis

### *A. Substantive Distinctions between Different Types of Right-to-Farm Laws*

In order to be effective, right-to-farm laws require a "reallocation of property"[79] interests between a farmer and his non-agricultural neighbors. When a right-to-farm law is enacted, some conduct that previously would have constituted a nuisance becomes protected by statute.[80] This may prompt concerns from non-agricultural property owners that their legal rights to enjoy their properties have been infringed.[81] To counter these concerns, many states' right-to-farm laws

75. *Id.*

76. *Id.* § 1703. A nutrient management plan is a "written site-specific plan [that] incorporates best management practices to manage the use of plant nutrients for crop production and water quality protection" consistent with certain established criteria. *Id.* The purpose of nutrient management plans is to educate farmers about the "proper utilization and management of nutrients" on their farms and to "prevent the pollution of surface water and ground water." *Id.* § 1702. While nutrient management plans are mandatory for the largest agricultural operations, they remain voluntary for most moderate- to small-sized operations. *Id.* § 1706(a). Nevertheless, the legislature wants to "promote the development of voluntary plans." *Id.* § 1706(h).

77. *Id.* § 954.

78. One month after the comprehensive amendment to the right-to-farm law, the legislature also amended the Agriculture-Linked Incentive Program, which relates to the voluntary adoption of nutrient management plans. *See* Act of June 18, 1998, Pub. L. No. 696, No. 90, § 1. The Incentive Program offers low-interest loans to encourage farmers to implement voluntary nutrient management plans. 3 PA. CONS. STAT. ANN. § 1722 (West 2005).

79. 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, 105 (1998).

80. *Id.*

81. *Id*. Hamilton says that, as a result, right-to-farm laws are on "somewhat

impose limitations on the degree of protection they provide to farmers.[82] Others, however, impose very few limitations and seek to protect farmers as much as possible.[83]

Therefore, there are generally two types of right-to-farm laws.[84] The first type ("Type One") provides a qualified immunity from nuisance suits to any farming operation that has been in existence for a given period of time.[85] These laws are essentially a codification of the common law "coming to the nuisance" doctrine.[86] The second type ("Type Two") provides an absolute immunity to all farming operations, regardless of how long they have been in existence.[87] This type of law is not connected to the "coming to the nuisance" doctrine, as the non-agricultural property owners who seek to sue may have been there before their farming neighbors.[88]

Therefore, Type One is a more conservative law that provides neighbors of agricultural operations with some remedy to prevent nuisances. In contrast, Type Two causes a substantial shift in the balance of property rights to the farmer and away from the neighboring residential occupants.[89]

In 1998, the Iowa Supreme Court ruled that the state's right-to-farm law was unconstitutional,[90] as a taking without just compensation in violation of the Fifth Amendment.[91] Iowa's law is a Type Two law

dangerous ground." *Id.* Drafters of right-to-farm laws must carefully justify the need for the special protection given to farmers and compose the legislative shield as "accurately and narrowly" as possible. *Id.*

82. *Id.* at 106. Pennsylvania's right-to-farm law is an example as it requires farmers to meet various criteria before they are entitled to nuisance immunity. *See* 3 PA. CONS. STAT. ANN. § 954 (West 2005).

83. *Id.* at 106. Hamilton says that there is little equitable justification for the expansion of right-to-farm laws, and that legislators must have "followed the maxim that if one aspirin is good then perhaps two are better" when expanding the laws. *Id.* at 108. Wisconsin's right-to-farm law is among the most protective. *See* WIS. STAT. ANN. § 823.08 (West 2005). The law immunizes farmers from suit even if negligent agricultural practices caused the nuisance. *Id.* In addition, the law contains no time requirement and provides farmers with immunity from suit no matter how long the farm has been in existence. *Id.*

84. *See* Christine H. Kellett, *Understanding "Right to Farm" Laws*, Pennsylvania State University, http://www.dsl.psu.edu/centers/aglawpubs/bomann2.cfm (last viewed May 30, 2005) [hereinafter Kellett, *Understanding*].

85. *Id.*

86. *See supra* Part II-B for a discussion of the "coming to the nuisance" doctrine.

87. *See* Kellett, *Understanding*, *supra* note 84.

88. *Id.*

89. Laurent, *Michigan's Right to Farm*, *supra* note 15, at 232.

90. Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 321 (Iowa 1998).

91. The Fifth Amendment to the United States Constitution provides in relevant part that "[n]o person shall be . . . deprived of . . . property without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

because it precludes nuisance suits for all farms regardless of the length of time that they have been in operation.[92]

Iowa's right-to-farm law was held unconstitutional in *Bormann v. Board of Supervisors*,[93] where neighbors of an agricultural operation brought a facial challenge against the law.[94] The neighbors claimed that the law deprived them of a "constitutionally protected private [property] right" without the just compensation required by the Fifth Amendment Takings Clause.[95] For purposes of the Takings Clause, property includes "every sort of interest the citizen may possess" in relation to his land.[96] The Iowa court held that when a nuisance suit is barred by a right-to-farm law, an easement[97] is created in the neighboring property in favor of the farmer.[98] This is because the immunity from suit allows the farmer to act on his land in a manner that would constitute a nuisance if not for the easement.[99] Since easements are among the constitutionally protected private property interests, the Iowa court held that the establishment of an easement resulted in a taking.[100]

The *Bormann* decision was influenced by the fact that Iowa's right-to-farm law was Type Two.[101] Because the statute did not require that a farm be in operation before the arrival of neighboring landowners, the balance of rights had shifted too much to the side of the farmer.[102] In

92. *See* IOWA CODE ANN. § 352.11(1)(a) (West 2005). In Iowa, any farm operation located in an agricultural area is immune from nuisance suit "regardless of the established date of operation or expansion of the agricultural activities of the farm." *Id.* However, immunity does not apply to a nuisance resulting from either: (1) a violation of a state or federal law; (2) negligent operation of a farm; (3) injury caused prior to the creation of an agricultural area; or (4) injury resulting from water pollution or excessive soil erosion. *Id.* § 352.11(1)(b).

93. *Bormann*, 584 N.W.2d at 309.

94. *Id.*

95. *Id.* at 315. For the text of the Fifth Amendment Takings Clause, *see supra* note 91.

96. United States v. General Motors Corp., 323 U.S. 373, 378 (1945). Property rights include the right to possess, use, and dispose of property, and the right to exclude others from it. *Id.*

97. An easement is an interest in land which "entitles the owner of the easement to use or enjoy land in the possession of another." RESTATEMENT OF PROPERTY § 451 cmt. a (1944). The easement may entitle its owner to act on his own land in a manner that would constitute a nuisance if not for the easement. *Id.* Easements are included among the property interests subject to the requirements of the Takings Clause. United States v. Welch, 217 U.S. 333, 339 (1910).

98. *Bormann*, 584 N.W.2d at 316.

99. *Id. See also* Buchanan v. Simplot Feeders Ltd. P'ship, 952 P.2d 610, 615 (Wash. 1998) (holding that Washington's right-to-farm law gave farmers a "quasi easement" to continue their nuisance activities against neighboring urban developments).

100. *Bormann*, 584 N.W.2d at 316.

101. For the drawbacks of a Type Two law, *see supra* note 89 and the accompanying text.

102. Laurent, *Michigan's Right to Farm*, *supra* note 15, at 232.

essence, the farmer was given an "unfair influence" over his neighbors' land.[103]

Pennsylvania's current right-to-farm law is an amalgam of both Type One and Type Two laws. The law as it existed prior to the 1998 amendment[104] was entirely Type One, since it required an agricultural operation to have been in existence for at least one year before it could qualify for nuisance immunity.[105] The Pennsylvania Superior Court construed this portion of the state's law as a constitutional statute of limitations in 1999.[106] The court's determination was based on the fact that neighboring landowners were not "absolutely prohibited" from filing nuisance suits against their agricultural neighbors.[107] Instead, the neighbors were provided with a reasonable statutory period in which to rectify any complaints they may have had about any nuisance.[108] In other words, Pennsylvania's right-to-farm law was upheld because it was a Type One law that allowed non-agricultural landowners to retain a reasonable remedy against nuisances.[109]

Likewise, other states have found their Type One right-to-farm laws to be constitutional. For example, in interpreting Minnesota's right-to-farm law, a federal district court held that *Bormann*[110] was inapplicable because the Minnesota statute[111] provided a two-year period in which a nuisance lawsuit could be filed against a neighboring farmer.[112] Therefore, because Type One laws allow neighboring landowners to file suit for the statutory period, no easement is created and no taking

103. Christine Kellett, *Pennsylvania Right-to-Farm Protection Still Strong*, Pennsylvania State University, *2, http://aginfo.psu.edu/news/april99/right-to-farm.html (last visited Nov. 30, 2004) [hereinafter Kellett, *Pennsylvania*].

104. *See supra* Part II-C for a discussion of the operation of the law prior to the amendment.

105. *See* 3 PA. CONS. STAT. ANN. § 954(a) (West 2005).

106. Horne v. Haladay, 728 A.2d 954, 955 (Pa. Super. Ct. 1999). In *Horne*, a homeowner raised a nuisance challenge against a neighboring poultry business that had been in operation for approximately two years. *Id.* The homeowner alleged that the flies, odor, noise, and other waste (i.e. eggshells, feathers, and dead chickens) from the business caused substantial depreciation in the value of his home. *Id.*

107. *Id.* at 956. Neighboring landowners could file nuisance suits if they proved that: (a) the farm operation had been substantially changed in the previous year; or (b) the agricultural landowner was acting in violation of local, state, or federal law. *Id.* at 957.

108. *Id.*

109. *See id.*

110. Bormann v. Bd. of Supervisors, 584 N.W.2d 309 (Iowa 1998).

111. The Minnesota right to farm law provides, in relevant part that, "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." MINN. STAT. § 561.19(2)(a) (West 2005).

112. Overgaard v. Rock County Bd. of Comm'r, No. CIV.A.02-601, 2003 WL 21744235, at *7 (D. Minn. July 25, 2003).

results.[113]

The Type One line of cases implies that Pennsylvania's right-to-farm law is well-insulated against a takings challenge. However, the 1998 amendment to Pennsylvania's right-to-farm law may have made the law more vulnerable.[114] The amendment is Type Two, as it provides an absolute bar against nuisance suits for qualifying operations regardless of how long they have been in existence.[115] The constitutionality of this portion of Pennsylvania's law has yet to be decided; however, the Iowa court's decision to strike its Type Two law in *Bormann* suggests that the law may be vulnerable.[116] Nevertheless, the political atmosphere in Pennsylvania may shield the law from scrutiny. There is strong public policy in Pennsylvania that favors the protection of agricultural land,[117] and Pennsylvania's courts are often highly persuaded by the legislature's statement of public policy.[118] In addition, Pennsylvania's right-to-farm law is rarely used, which may reflect a tolerance for agriculture among rural Pennsylvania's population.[119]

### *B. Potential Flaws in the Iowa Court's Reasoning that its Right-to-Farm Law Resulted in an Unconstitutional Taking*

Even if the Pennsylvania courts choose to reject the substantive distinction between Type One and Type Two right-to-farm laws, they could still decline to follow the Iowa Supreme Court's reasoning. While some courts have adopted *Bormann's* reasoning,[120] several courts and commentators have rejected it as flawed.[121]

The framework for a "takings" analysis under the Fifth Amendment[122] requires three separate inquiries. First, the reviewing

113. *Id.* at *8 (holding that *Bormann's* easement theory was inapplicable).

114. *See supra* Part II-D for a discussion of the amendment.

115. *See* 3 PA. CONS. STAT. ANN. § 954 (West 2005).

116. Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 321 (Iowa 1998).

117. *See, e.g.,* Hopewell Township Bd. of Supervisors v. Golla, 452 A.2d 1337, 1343 (Pa. 1982) (holding that the preservation of agricultural land is an important government goal).

118. Kellett, *Understanding*, *supra* note 84.

119. Kellett, *Pennsylvania*, *supra* note 103, at *2.

120. For example, an Idaho district court relied heavily upon *Bormann* to strike down an Idaho nuisance and trespass immunity statute. Moon v. N. Idaho Farmers Ass'n, No. CV 2002 3890, 2003 WL 21640506, at *1 (D. Idaho June 4, 2003). The statute at issue in that case, which protected field burning in agricultural operations, was found to be a violation of the Takings Clause of both the Idaho and United States Constitutions. *Id.*

121. *See, e.g.,* Stephanie L. Dzur, *Nuisance Immunity Provided by Iowa's Right-to-Farm Statute: A Taking Without Just Compensation*, National Agricultural Law Center, http://www.NationalAgLawCenter.org (last visited Nov. 14, 2004) [hereinafter Dzur, *Nuisance Immunity*]. *See also* Laurent, *Michigan's Right to Farm*, *supra* note 15, at 233.

122. For the text of the Takings Clause of the Fifth Amendment, *see supra* note 91.

court must determine whether there is a constitutionally protected private property interest at stake.[123] Second, the court asks whether that private property interest has been "taken" by the government for public use.[124] Third, if a property interest has been taken, the court asks if just compensation has been paid to the owner.[125] Since it was clear in *Bormann* that just compensation had not been paid,[126] the court analyzed only the first and second of these issues.[127] First, the court attempted to establish the existence of a constitutionally protected property interest by drawing an analogy between nuisance immunity and easements.[128] However, this analogy is tenuous at best. Second, the Iowa court relied on a *per se* takings theory.[129] Since the issues were simply not that clear-cut, the court should have relied on regulatory takings theory.[130]

1. Right-to-Farm Laws Do Not Infringe a Constitutionally-Protected Property Interest because Nuisance Immunity Does Not Create an Easement

In an attempt to establish the existence of a constitutionally-protected private property interest, the Iowa court equated the nuisance immunity granted by right-to-farm laws with easements.[131] The court held that when a nuisance suit is barred by a right-to-farm law, an easement is created in the neighboring property allowing the farmer to act in a manner that would otherwise constitute a nuisance.[132] However, immunities are very different in kind from easements. Immunities give

123. Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 315 (Iowa 1998).
124. *Id.*
125. *Id.*
126. *Id.* at 310.
127. *Id.* at 315-19.
128. *Id.* at 315.
129. *Id.* Two categories of state action constitute *per se* takings that must be compensated. The first involves the permanent physical invasion of a property. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428 (1982). The second denies a property owner all economically beneficial use of his land. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).
130. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). If there is no *per se* taking, the court uses an ad hoc approach to determine if there has been a regulatory taking. *Id.* The reasonableness of the taking is determined by balancing: (1) the economic impact of the regulation; (2) the regulation's interference with investment backed expectations; and (3) the character of the governmental action. *Id.*
131. For a definition of easement, *see supra* note 97. In contrast, the Washington Supreme Court held that the right to maintain a nuisance was similar to, but not equivalent to, an easement in *Buchanan v. Simplot Feeders Limited Partnership*, 952 P.2d 610, 615 (Wash. 1998). By characterizing the right created as a quasi-easement, the Washington court avoided all of the legal implications that are inherent in using the term easement. Dzur, *Nuisance Immunity*, *supra* note 121, at 9.
132. Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 316 (Iowa 1998).

parties a "shield" against legal challenges.[133] Easements, however, are not shields. Instead, they are concrete property interests which authorize an individual to affirmatively use another individual's land.[134] Nuisance immunity does not authorize a farmer to enter upon or otherwise use his neighbor's land. At most, nuisance immunity enhances the farmer's right to use his own land. This is simply not enough to create an easement.[135]

In concluding that an easement had been created, the *Bormann* court relied on a 100-year-old Iowa opinion wherein the defendant obtained an easement to use the plaintiff's land by prescription after discharging soot onto his land for the statutory period.[136] This case, *Churchill v. Burlington Water Company*,[137] simply reaffirms the doctrine of adverse possession, which states that one property owner can obtain an interest in the property of another after a period of open and notorious use.[138] *Churchill* makes no remarks about nuisance immunity.[139] Nevertheless, the *Bormann* court borrowed the term "easement" from *Churchill*, and from the law of adverse possession, to conclude that the right to maintain a nuisance created an easement.[140] The result is an improper amalgamation of property doctrines.

Furthermore, defining nuisance immunity as an easement creates a slippery slope whereby other essential property devices could be classified as easements. Various statutes, such as pollution control provisions and landmark laws, restrict an individual's right to use his land and do so in favor of his neighbors and of the public good.[141] In fact, like right-to-farm laws, general zoning laws also burden the property rights of regulated individuals.[142] If zoning were defined as creating an easement, the state would be stripped of virtually all of its power to regulate land use.[143]

133. *See, e.g.*, 28 U.S.C. § 2679(b)(1) (1994) (immunizing federal employees from common law tort actions).

134. RESTATEMENT OF PROPERTY § 451 cmt. a (1944).

135. *Id.* (including in the definition of an easement the requirement that a landowner be entitled to "use or enjoy land in possession of another").

136. Churchill v. Burlington Water Co., 62 N.W. 646, 647 (Iowa 1895).

137. *Id.*

138. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY (5th ed. 2002).

139. *Churchill*, 62 N.W. at 646.

140. Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 315 (Iowa 1998).

141. Eric Pearson, *Immunities as Easements as "Takings": Bormann v. Board of Supervisors*, 48 DRAKE L. REV. 53, 61 (1999) [hereinafter Pearson, *Immunities*].

142. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 971 (5th ed. 2002) (describing permissible zoning restrictions).

143. *See* Boardman v. Davis, 3 N.W.2d 608, 610 (Iowa 1942) (holding that although zoning ordinances often "lay an uncompensated burden" on property owners, they do not "constitute an easement upon the property").

The *Bormann* court's reasoning that nuisance immunity creates an easement has also been criticized as a logically-flawed "zero sum assumption."[144] The court defined the property rights at issue by reference to what was gained by the farmers protected by the right-to-farm statute.[145] The court should have, instead, assessed what damages had actually resulted to those who had allegedly been injured by a taking of their property without just compensation.[146] According to one critic, "[h]aving concluded that the defendants gained something, the court perceived the plaintiffs to have lost precisely what the defendants gained. What was given to one must have been taken from the other. But rights can be enlarged for one person without diminishing or adversely affecting rights of other persons."[147] In fact, nuisance immunity merely enhances an agricultural landowner's right to use his own land. It does not burden the property rights of the neighboring landowners.[148]

Finally, the *Bormann* court failed to consider the possibility that the rights at issue were not rooted in property principles at all. While property is a broad concept, not every conceivable interest is property.[149] The role of defining property interests is reserved for the states.[150] In Iowa, as in many other states, nuisance is a component of tort law, not property law.[151] The United States Supreme Court has held that rights in tort are not interests in property protected by the Takings Clause.[152] Therefore, the regulation of rights arising in tort, such as a grant of nuisance immunity under the right-to-farm law, does not constitute a taking of property.[153]

144. Pearson, *Immunities*, *supra* note 141, at 60-61.

145. *Bormann*, 584 N.W.2d at 321.

146. Pearson, *Immunities*, *supra* note 141, at 60-61.

147. *Id.* at 76.

148. Pearson, *Immunities*, *supra* note 141, at 60-61 ("Rather than being the extraction of a 'stick in the bundle' of property rights of plaintiffs, [nuisance immunity] is an additional stick added to defendants' own bundle"). *See also* Brown v. Legal Found. of Wash., 538 U.S. 216, 236-37 (2003) (holding that when determining whether a taking has resulted "the question is what has the owner lost, not what has the taker gained").

149. *See, e.g.*, Paul v. Davis, 424 U.S. 693, 712 (1976) (holding that a person's interest in her own reputation is not property); Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (holding that while employment can be property, a mere unilateral interest in employment is not).

150. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980) ("Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.").

151. *See* Ryan v. City of Emmetsburg, 4 N.W.2d 435, 438 (Iowa 1942). In an action to recover damages for the intrusion of "foul, noxious, and nauseous gases and odors" over private property, the court stated that "a private nuisance is a tort." *Id.* at 438.

152. Daniels v. Williams, 474 U.S. 327, 328 (1986).

153. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992) (stating that even when regulations strip land of all of its value, they do not constitute a *per se* takings when

2. The Iowa Court's Reliance on Per Se Takings Theory was Unwarranted

In *Bormann*, there was a complete lack of evidence that a nuisance actually resulted from the defendant's agricultural operation.[154] Therefore, the plaintiff's chose to bring a facial challenge alleging that the right-to-farm statute resulted in an unconstitutional taking.[155] The United States Supreme Court has been extremely hesitant to find a taking based upon a facial challenge to a statute.[156] Nevertheless, the Iowa Supreme Court held that the state's right-to-farm law "appropriates valuable private property interests and awards them to strangers."[157] To invalidate the law, the court relied on a *per se* takings analysis.[158]

Two categories of state action constitute *per se* takings that must be compensated. The first involves the permanent physical invasion of a property.[159] The second involves regulations that deny the owner of a property of all economically beneficial use of his land.[160] The *Bormann* court restricted its discussion to the permanent physical invasion category of *per se* takings.[161]

The permanent physical invasion category of *per se* takings is derived from *Loretto v. Teleprompter Manhattan CATV Corporation.*[162] An analysis of *Loretto* reveals that nuisance immunity is not what the United States Supreme Court had in mind when it announced its *per se* takings rule. In *Loretto,* the plaintiff had been forced by the government to install communication equipment on his apartment building.[163] The Supreme Court held that this permanent physical invasion of plaintiff's building infringed upon his right to use his property and was a *per se*

they "no more than duplicate the result that could have been achieved . . . by adjacent landowners . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally").

154. Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 312 (Iowa 1998).

155. In a facial challenge, the statute itself is alleged to be unconstitutional. Dzur, *Nuisance Immunity*, note 122, at 5. In contrast, an applied challenge is one in which the statute's application to the challenger is alleged to be unconstitutional, even though the statute may be constitutional on its face. *Id.*

156. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 471 (1987) (to establish a taking when making a facial challenge, one must show that a statute "makes it impossible for petitioners to profitably engage in their business, or that there has been undue interference with investment backed expectations").

157. *Bormann*, 584 N.W.2d at 322.

158. *Id.* at 316.

159. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428 (1982).

160. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).

161. *Bormann*, 584 N.W.2d at 317-19.

162. *Loretto*, 458 U.S. at 428.

163. *Id.* at 422.

taking.[164] Therefore, *Loretto* involved a true permanent physical occupation of private property.[165] The plaintiff in *Loretto* was permanently ousted from occupying a portion of the physical space in his apartment building.[166] This type of permanent physical occupation is not created by right-to-farm laws. First, odors and noise are not permanent. They vary by time of day, wind direction, and other factors.[167] Second, neither odors nor noises oust a private property owner from physical possession of his property.[168]

The *Loretto* Court itself denied that intrusions of the type implicated by right-to-farm laws could constitute permanent physical occupations.[169] This pronouncement was consistent with its belief that the Court had "consistently distinguished between . . . cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within, on the other. A taking has always been found only in the former situation."[170] Clearly, right-to-farm laws involve government action outside the non-agricultural landowner's property, typically on a neighboring farm. Even if this activity causes consequential damages to the neighboring property, the Court has clearly stated that this is not enough to constitute a *per se* taking.[171]

Nevertheless, the *Bormann*[172] court attempted to demonstrate that nuisance immunity could constitute a permanent physical occupation.[173] Recognizing that nuisance-type conduct was not a trespass,[174] the court attempted to show that non-trespassory invasions could still constitute a *per se* taking.[175] It did so by citing to cases where a taking was found in

164. *Id.* at 438.
165. *Id.*
166. *Id.* at 434.
167. Pearson, *Immunities*, *supra* note 141, at 71.
168. *Id.*
169. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428 (1982).
170. *Id.*
171. The Supreme Court has refused to extend *Loretto* to situations that go beyond permanent physical occupations. *See, e.g.*, Yee v. City of Escondido, 503 U.S. 519 (1992). In *Yee*, the owner of a mobile home park alleged that a permanent physical occupation resulted from rent control provisions that restrained his right to terminate rentals. *Id.* at 525. The Court disagreed, holding that "the state and local laws at issue here merely regulate petitioners' use of their land by regulating the relationship between landlord and tenant." *Id.* at 528.
172. Bormann v. Bd. of Supervisors, 584 N.W.2d 309 (Iowa 1998).
173. *Id.* at 317-19.
174. *Id.* at 315 (holding that, unlike a trespass, which "comprehends an actual invasion [of land] by tangible matter," nuisance-like activities are usually accompanied only by "intangible substances, such as noises and odors").
175. *Id.* at 318.

the absence of an invasion of the surface of the land.[176] Although there were nuisance aspects to each of these cases, these aspects alone were not the basis for the Court's finding that there was a taking in each case.[177]

Furthermore, the *Bormann* court's heavy reliance on the Supreme Court's navigation cases[178] ignores the distinction between the "classic right-of-way" easement[179] and the navigation easement.[180] When a classic right-of-way easement is created, it constitutes a permanent physical occupation and thus a *per se* taking.[181] However, when a navigation easement of passage is created, it is not a permanent occupation of land and therefore not a *per se* taking.[182] Instead, it is a temporary taking subjected to a more complex regulatory takings analysis to determine whether it constitutes a taking.[183] Likewise, the *Bormann* court should have subjected the right-to-farm law to a regulatory takings analysis to determine whether a taking had resulted.

The *Bormann* court's reliance on *Richards v. Washington Terminal Company*[184] to demonstrate that permanent physical occupations do not require physical touching is also misplaced.[185] In *Richards*, the plaintiffs**'** residential property, located near a railroad tunnel, was burdened by smoke and ash from the railroad.[186] Although the plaintiffs recovered in *Richards*,[187] they did so only because of their right to be free

176. The Takings Clause protects more than the owner's rights to the surface of his land. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 165 (1979) (holding that a private lagoon that had been dredged and connected to navigable waters is protected by the Takings Clause); United States v. Causby, 328 U.S. 256, 266 (1946) (holding that the low reaches of the atmosphere directly above the land are protected by the Takings Clause); Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (holding that the mineral estate is protected by the Takings Clause).

177. Trespass was still an indispensable ingredient of each case. For example, in *United States v. Causby*, the low altitude of the overflights were within the property owner's dominion and were thus considered trespasses. *Causby*, 338 U.S. at 267. *See also* Portmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 329-30 (1922) (holding that the government's action in firing military weapons repeatedly over plaintiff's property was a trespass).

178. *Bormann*, 584 N.W.2d at 318.

179. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 832 (1987).

180. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

181. *Nollan*, 483 U.S. at 832. With a right-of-way easement, "individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Id.* This is enough to constitute a permanent physical occupation. *Id.*

182. *Kaiser Aetna*, 444 U.S. at 175.

183. *Id*.

184. Richards v. Wash. Terminal Co., 233 U.S. 546 (1914).

185. *Id.* at 549.

186. *Id.*

187. *Id.* at 557-58.

from the "special and peculiar damage" to their property that resulted from a defective ventilation system in the tunnel.[188] The *Richards* Court held that no taking had resulted from the normal operation of the railroad because the government's decision to construct the railroad conferred immunity on the railroad from this type of nuisance suit.[189] Therefore, *Richards* actually stands for the proposition that government may create immunities without offending the Takings Clause.[190]

3. Even if Regulatory Takings Doctrine were Used to Determine the Constitutionality of Right-to-Farm Laws, They Would Likely Withstand Challenge.

Had Iowa's right-to-farm law been subjected to regulatory takings analysis, it likely would have withstood constitutional challenge.[191] The regulatory takings doctrine says that, even in the absence of a *per se* taking, a regulation on the use of land may still constitute a taking in some circumstances.[192] An ad hoc approach is used to determine if there has been a regulatory taking.[193] The Court balances: (1) the economic impact of the regulation; (2) the regulation's interference with investment backed expectations; and (3) the character of the governmental action.[194]

Evaluated under this test, right-to-farm laws arguably do not result in a taking. First, there is rarely evidence of any economic harm to non-agricultural property in right-to-farm cases.[195] Second, the character of the government action with right-to-farm laws amounts only to a "rational legislative attempt" to support an important industry.[196] In other words, right-to-farm laws are merely regulatory in nature. The United States Supreme Court has held that such important government actions weigh against the finding of a taking.[197] Finally, there is often no

188. *Id.* at 557.

189. *Id*.

190. *See, e.g.*, Pearson, *Immunities*, *supra* note 141, at 72-73.

191. This issue has never been litigated with respect to right-to-farm laws. *See* Laurent, *Michigan's Right to Farm*, *supra* note 15, at 234.

192. DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 307-08 (4th ed. 1994) (discussing the evolution of the regulatory takings doctrine).

193. The first case to advance the doctrine was Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

194. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (holding that New York's landmark law did not constitute a taking when applied to Grand Central Station).

195. *See, e.g.*, Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 311-12 (Iowa 1998). In *Bormann*, there was no evidence of economic harm to the plaintiff's property. *Id.*

196. Laurent, *Michigan's Right to Farm*, *supra* note 15, at 234.

197. *Penn Cent.*, 438 U.S. at 124. In contrast, government actions that result in the physical invasion of property are weighed in favor of a taking. *Id.*

interference with investment-backed expectations in right-to-farm cases because the non-agricultural neighbors have "come to the nuisance."[198] The choice to live in an area dominated by farming suggests that the neighbors have considered the likelihood of odors and dust from farms when arriving at their investment-backed expectations.[199]

## IV. Conclusion

There is little doubt that Pennsylvania's right-to-farm law provides valuable protection for agriculture.[200] It offers a sense of security to farmers and puts neighboring non-farm owners on notice that their rights may be tempered by the rights of pre-existing farm operations.[201] Although Iowa's right-to-farm law failed to withstand constitutional challenge, Pennsylvania's law is likely to be upheld.

Pennsylvania's right-to-farm law differs significantly in approach from Iowa's law. While Iowa's law was entirely Type Two, Pennsylvania's law is predominantly Type One. Therefore, Pennsylvania's law vests the neighboring landowner with much greater rights as against an agricultural neighbor than does Iowa's law. Although the 1998 amendment to Pennsylvania's law is Type Two, the legislative policy behind the law suggests that Pennsylvania courts would be inclined to uphold it. Furthermore, even if the 1998 amendment failed, the law's severability clause would allow the bulk of the law to remain in effect.

In addition, the *Bormann* court's reasoning may contain some fatal flaws which would make Pennsylvania courts less inclined to adopt it. There is no constitutionally-protected private property interest at issue in right-to-farm cases. Although the *Bormann* court attempted to establish a protected interest by reference to easement law, the link between nuisance immunity and easements is tenuous at best. Instead, nuisance immunity is firmly rooted in tort law, and any flaws with right-to-farm laws should be remedied using tort principles. In addition, right-to-farm laws do not constitute a *per se* taking because they do not result in permanent, physical occupations of neighboring land. At most, right-to-farm laws may create a regulatory taking, but even this is unlikely. Both the legitimate public purpose behind right-to-farm laws and their limited impact on the economic interests of non-agricultural property owners

198. *See supra* Part II-B.

199. *Bormann*, 584 N.W.2d at 321.

200. It is impossible to gauge just how many prospective legal actions are not filed due to the existence of the law. *See* 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, 104 (1998).

201. *See id.*

suggest that a regulatory takings claim could not be proven.

Nevertheless, farmers should consider taking steps to avoid nuisance complaints in the future, especially if they are relying on the Type Two portion of Pennsylvania's right-to-farm law for nuisance immunity. Farmers should discuss their plans to spread manure or apply chemicals with their neighbors and be candid with them about the impacts that these activities may have on their properties.[202] This will allow neighboring property owners to prepare themselves to deal with the inconvenience in advance. If neighboring property owners know that a farmer is doing his best to protect their rights, mutual respect will be fostered. Although right-to-farm laws are important, the agriculture industry's ultimate goal should be to eliminate problems with non-agricultural property owners before they start. Educating these property owners about the benefits and detriments of farming can help the industry to achieve this goal.

202. Jeff Feirick, Farm Protection From Nuisance Lawsuits 4 (Penn State University Agricultural Law Research and Education Center 2001).