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Bormann Revisited: Using the Penn Central Test To Determine the Constitutionality of Right-To-Farm Statutes

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Bormann Revisited: Using the *Penn Central* Test To Determine the Constitutionality of Right-To-Farm Statutes

I. INTRODUCTION

All fifty states have enacted some form of right-to-farm statute[1] to protect farmers from nuisance suits.[2] These right-to-farm laws represent a legislative intent to change common law nuisance, which has long been held to be a constitutional exercise of legislative power.

> It is settled that, within constitutional limits not exactly determined, the Legislature may change the common law as to nuisances, and may move the line either way, so as to make things nuisances which were not so, or to make things lawful which were nuisances, although by so doing it affects the use or value of property.[3]

Although it is clear that a state legislature can change the common law of nuisance by adopting a right-to-farm law, questions still remain: What are the "constitutional limits" of right-to-farm laws? When do right-to-farm laws go "too far"[4] and effect a taking of

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1. Terence J. Centner, *Governments and Unconstitutional Takings: When Do Right-To-Farm Laws Go Too Far?*, 33 B.C. ENVTL. AFF. L. REV. 87, 87 (2006). For a list of the statutory citations of the right-to-farm laws for all fifty states, see Appendix 1 of the Centner article. *Id.* at 147.

2. NEIL D. HAMILTON, A LIVESTOCK PRODUCER'S LEGAL GUIDE TO: NUISANCE, LAND USE CONTROL, AND ENVIRONMENTAL LAW 21 (1992) ("Right to farm laws are designed to protect existing agricultural operations by giving farmers who meet the legal requirements a defense in nuisance suits.").

3. Town of Grundy Ctr. v. Marion, 1 N.W.2d 677, 682 (Iowa 1942) (quoting Commonwealth v. Parks, 30 N.E. 174, 174 (Mass. 1892)); *see also* Munn v. Illinois, 94 U.S. 113, 134 (1876) ("[T]he great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."); Jacqueline P. Hand, *Right-To-Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. PITT. L. REV. 289, 342–44 (1983) ("[T]he power of the legislature to modify common law rights is a crucial tool in the continued vitality of the common law. Without such a tool there is a great danger that the system will become rigid, unable to respond to changes in society.").

4. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

neighboring properties? What test should be used to determine if a taking has occurred?

In 1998, the Iowa Supreme Court faced these questions in *Bormann v. Board of Supervisors*[5] and became the first court to invalidate a right-to-farm law as an unconstitutional taking.[6] The *Bormann* court reasoned that the nuisance immunity granted to farmers under an Iowa right-to-farm statute created an easement over neighboring properties and therefore effected a permanent, nontrespassory physical invasion of the neighboring properties that was a per se unconstitutional taking.[7] The decision was not well received; some legal commentators disagreed with the court's holding entirely, and other commentators that agreed with its outcome questioned the court's reasoning.[8] Additionally, many commentators worried about the effect the court's rationale would have in other land use contexts[9]—a worry that came to fruition when an Iowa district court used the *Bormann* reasoning to declare a municipal zoning ordinance an unconstitutional taking.[10]

This Comment argues that the constitutionality of right-to-farm laws should be examined using the fact-sensitive *Penn Central* balancing test. By using this test, rather than adopting the *Bormann* reasoning, courts can uphold most right-to-farm statutes as constitutional exercises of the police power and invalidate the right-to-farm statutes that go too far, while avoiding the backlash and side effects that the *Bormann* court faced as a result of its legal reasoning.

Part II of this Comment gives a brief history of right-to-farm laws and discusses the different approaches to right-to-farm statutes. Part III examines the *Bormann* decision by giving the factual background of the case, the legal rationale used by the court, and the possible effects the decision may have on right-to-farm laws and other land use regulations. Part IV begins with a brief discussion of how, by viewing right-to-farm laws as regulations of neighboring

5. 584 N.W.2d 309 (Iowa 1998).

6. Eric Pearson, *Immunities as Easements as "Takings":* Bormann v. Board of Supervisors, 48 DRAKE L. REV. 53, 56 (1999); *see also Bormann*, 584 N.W.2d at 322. The Iowa Supreme Court is also the only court to invalidate a right-to-farm law as an unconstitutional taking. *See infra* text accompanying notes 110–12.

7. *Bormann*, 584 N.W.2d at 315–21.

8. *See infra* notes 125–26.

9. *See infra* note 113.

10. Harms v. City of Sibley, 702 N.W.2d 91, 95 (Iowa 2004) (discussing the procedural history of the case); *see infra* notes 117–23 and accompanying text.

property owners' bundle of property rights, courts can turn to the *Penn Central* balancing test to evaluate takings challenges to right-to-farm laws. This Part then discusses the *Penn Central* case and the three factors of the balancing test. Part V applies the *Penn Central* factors to the different right-to-farm approaches to identify the approaches that may be suspect under the *Penn Central* test. Part VI gives two factual scenarios and applies the *Penn Central* test to the scenarios to demonstrate how courts can uphold right-to-farm statutes that are valid exercises of the police power while striking down statutes that go too far and effect a regulatory taking. Part VII briefly points out the advantages of using the *Penn Central* test in takings claims involving right-to-farm laws. Finally, Part VIII gives a conclusion.

II. BACKGROUND

A. History of Right-To-Farm Laws

In 1978, Iowa, Louisiana, and Wyoming enacted the first statutes protecting farmers from nuisance suits.[11] Other states quickly followed suit, and "[a]lmost overnight the farmer . . . received some needed recognition from nearly all of the state legislatures."[12] By 1983, the vast majority of states had passed similar laws protecting farmers from nuisance suits.[13] The laws became known as "right-to-farm laws" because they "enabled farmers to continue with their husbandry pursuits rather than enjoining them from farming due to the presence of a nuisance."[14] These laws were designed to statutorily protect conduct that would be considered a nuisance under the common law.[15]

11. Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right To Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 WIS. L. REV. 95, 117–18 & n.108.

12. Randall Wayne Hanna, Comment, *"Right To Farm" Statutes—The Newest Tool in Agricultural Land Preservation*, 10 FLA. ST. U. L. REV. 415, 430 (1982).

13. Alexander A. Reinert, Note, *The Right To Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694, 1707 (1998) (stating that forty-two of the fifty states enacted right-to-farm laws between 1979 and 1983); *see also* Jennifer L. Beidel, Comment, *Pennsylvania's Right-To-Farm Law: A Relief for Farmers or an Unconstitutional Taking?*, 110 PENN ST. L. REV. 163, 168 (2005).

14. Centner, *supra* note 1, at 88.

15. Beidel, *supra* note 13, at 172 ("When a right-to-farm law is enacted, some conduct that previously would have constituted a nuisance becomes protected by statute."); *see also*

State legislatures passed right-to-farm laws for several reasons. One reason was to codify the coming to the nuisance doctrine, which holds that "if people move to an area they know is not suited for their intended use they can not argue the existing uses are nuisances. The court will hold the new use 'came to' the nuisance and therefore is not protected."[16] Legislatures enacted the laws in response to the "dwindling utility of the common law's 'coming to the nuisance' doctrine."[17] Although the coming to the nuisance defense was available in all fifty states, it was generally recognized as merely one factor in the nuisance analysis rather than as a complete defense,[18] and even then it was not considered the most important factor.[19] In some cases, the fact that the plaintiff came to an agricultural nuisance alone was sufficient to bar the plaintiff from prevailing.[20] In other cases, however, courts refused to bar the plaintiff's recovery against an agricultural operation merely because the plaintiff came to the nuisance.[21] The legislatures sought to

HAMILTON, *supra* note 2, at 43 ("The purpose of a right to farm law is to protect an activity which would be a nuisance."); Reinert, *supra* note 13, at 1733 (stating that in a narrow construction, a right-to-farm law "gives the farmer an entitlement to cause a nuisance and protect this entitlement with a property rule").

16. *See* HAMILTON, *supra* note 2, at 18.

17. Beidel, *supra* note 13, at 169; *see also* ROGER A. MCEOWEN & NEIL E. HARL, PRINCIPLES OF AGRICULTURAL LAW 11–49 (2005) (discussing the decrease in the utility of the coming to the nuisance doctrine and the corresponding increase in right-to-farm laws).

18. *See* RESTATEMENT (SECOND) OF TORTS § 840D (1977) ("The fact that the plaintiff has acquired or improved his land after a nuisance interfering with it has come into existence is not in itself sufficient to bar his action, but it is a factor to be considered in determining whether the nuisance is actionable."); *see also* 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' . . . ."); Hand, *supra* note 3, at 304 ("[T]he fact that plaintiff 'came to the nuisance' is not an absolute defense to a nuisance suit, but at most one factor which a court may weigh in determining whether or not the defendant's use is reasonable."); Hanna, *supra* note 12, at 428 (stating that the coming to the nuisance doctrine "has not served as a complete bar to nnisance actions, but has been considered in the balancing approach used by the courts").

19. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 611 (4th ed. 1971) ("'[C]oming to the nuisance' is merely one factor, although clearly not the mosr important one, to be weighed in the scale along with the other elements which bear upon the question of 'reasonable use.'").

20. *See, e.g.*, Arbor Theatre Corp. v. Campbell Soup Co., 296 N.E.2d 11 (Ill. App. Ct. 1973); Dill v. Excel Packing Co., 331 P.2d 539 (Kan. 1958).

21. *See, e.g.*, Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972) (ordering a feedlot operator to move his operation after a developer built homes close to the feedlot); Pendoley v. Ferreira, 187 N.E.2d 142 (Mass. 1963) (ordering a pig farmer to liquidate his business after development approached his farm); *see also* HAMILTON, *supra* note

modify the common law concerning nuisance and "return the protection afforded by the 'coming to the nuisance' doctrine in earlier times,"[22] thereby giving farmers more protection than some courts were granting under the common law.

A second reason that states passed right-to-farm statutes was to help protect the nation's dwindling farm land.[23] During the early 1980s, it was estimated that the United States was losing approximately three million acres of agricultural land to non-agricultural uses each year.[24] Especially alarming was the fact that much of the disappearing farmland was "prime" farmland.[25] It was widely recognized that protecting farms from nuisance suits was an important step in protecting farmland from encroaching urbanization[26] because right-to-farm laws "encourag[ed] farmers to continue devoting their land to agricultural purposes."[27]

A third reason that state legislatures sought to protect farmers from nuisance suits was for farmers' economic protection. Even in cases where farmers successfully defended themselves in nuisance suits, "the cost of defending against the suits often threatened

2, at 22 (stating that the coming to the nuisance defense "is limited and the common law does not provide a definite protection for farm operations").

22. Beidel, *supra* note 13, at 170.

23. HAMILTON, *supra* note 2, at 21 ("Right to farm laws were developed in the 1970's as state lawmakers became concerned about the loss of agricultural land due to the movement of conflicting uses . . . ."); Reinert, *supra* note 13, at 1727 ("The main goal of RTF legislation is to reduce the conversion of farmland into development.").

24. Hand, *supra* note 3, at 289 (citing NATIONAL AGRICULTURAL LANDS STUDY, FINAL REPORT 35 (1981)); *see also* William C. Robinson, Note, *Right-To-Farm Statute Runs a "Foul" with the Fifth Amendment's Taking Clause*, 7 MO. ENVTL. L. & POL'Y REV. 28, 38 (1999) ("[F]rom 1985 to 1995 . . . nearly 40,000,000 acres of agricultural land was converted to non-agricultural uses as a result of the urban sprawl.").

25. Hand, *supra* note 3, at 291 ("[A]pproximately one million acres of the land annually converted to development uses is the most productive land, termed prime farmland."); Reinert, *supra* note 13, at 1699 ("While less than one-third of America's farmland is rated 'prime' for production, this farmland is also the most amenable to residential development.").

26. DAVID L. CALLIES, ROBERT H. FREILICH & THOMAS E. ROBERTS, CASES AND MATERIALS ON LAND USE 756 (4th ed. 2004); *see also* Dustin W. Mullin, *Old McDonald Had a Government-Regulated-Confined-Swine-Operation; A Substitute for H.B. 2950*, 38 WASHBURN L.J. 655, 677 (1999) (explaining a cycle of farmland loss caused by nuisance suits).

27. Hand, *supra* note 3, at 289; *see also id.* at 329 ("Right-to-farm statutes . . . are an effective tool in the overall effort to develop farmland preservation programs.").

farming operations or even forced them to close."[28] Protecting farmers from frivolous nuisance suits was thus related to the goal of preserving farmland because the nuisance protection would keep farmers from being forced to shut down their operation.[29]

Additional reasons for right-to-farm laws, along with other farmland protection tools, included

> [w]orries about losing cheap and dependable food supplies, disenchantment with sprawling urban development, concern about the loss of rural lifestyles, "a preference for the visual and aesthetic amenities associated with rural land, and the belief that the decline of agriculture as an industry [would] result in economic losses to local communities" . . . .[30]

By enacting right-to-farm laws, the state legislatures have made the policy judgment that "the social benefits of retaining land in agriculture are so critical that, rather than allowing courts to decide on a case-by-case basis whether an agricultural use is reasonable, the balance between agriculture and other uses should always be tipped towards agriculture."[31]

B. Different Approaches of Right-To-Farm Laws

Although every state has a right-to-farm statute,[32] each state's law is distinct. Most right-to-farm statutes are a combination of two or more of the following five basic approaches used to protect farmers from nuisance suits: (1) incorporating the coming to the

28. Beidel, *supra* note 13, at 168; *id.* at 164–65 ("Nuisance suits can be particularly damaging to farm operations because the time and money required to defend such actions may force farmers to sell all or part of their land."); *see also* HAMILTON, *supra* note 2, at 21 ("Even if a suit failed, the costs of defending it and the threat of future complaints would threaten the stability of the farm.").

29. *See* Beidel, *supra* note 13, at 168.

30. Hanna, *supra* note 12, at 415–16 (quoting Karl E. Geier, *Agricultural Districts and Zoning: A State-Local Approach to a National Problem*, 8 ECOLOGY L.Q. 655, 655 (1980)); *see also* Reinert, *supra* note 13, at 1731 ("Supporters of [right-to-farm laws] claim that protecting farming preserves the rural character of our small towns, retains open space, and safeguards national culture and history.").

31. Hand, *supra* note 3, at 305; *see also* Grossman & Fischer, *supra* note 11, at 117 ("The legislatures in right to farm states have limited the courts' discretion to balance the various factors involved in the nuisance action. Once the requirements of the statute are met, the court cannot weigh the policy of protecting the agricultural operation against other concerns . . . .").

32. *See* Centner, *supra* note 1, at 87.

nuisance doctrine, (2) imposing statutes of limitation to bringing nuisance suits, (3) allowing expansion and production changes, (4) requiring qualifying management practices, and (5) creating agricultural districts.[33] These five approaches are further explained below.

1. Coming to the nuisance

The first, and most common, approach to providing farmers with nuisance protection is a codification of the coming to the nuisance doctrine.[34] The desire to protect pre-existing farms from nuisance suits resulting from encroaching urban sprawl was the original premise for right-to-farm laws.[35] The United States Supreme Court stated that "[a] nuisance may be merely a right thing in a wrong place, like a pig in the parlor instead of the barnyard."[36] Right-to-farm laws "attempt to prevent the pig from becoming a nuisance merely because someone has built a parlor near the barnyard."[37] The codification of the coming to the nuisance defense "is consistent with our visceral sense that it is unfair to allow an individual buying property with full notice of a neighbor's activities (and perhaps at a discounted price because of those activities) to stop the neighbor's operation."[38]

As previously discussed, legislatures codified the coming to the nuisance doctrine because of its dwindling use by courts.[39] "Modern nuisance law ha[d] moved away from fault-based evaluations of conduct and toward flexible remediation by courts."[40] This flexibility was counterbalanced by unpredictability; when making investment decisions respecting their land, neither farmers nor their new

33. HAMILTON, *supra* note 2, at 27–28; Centner, *supra* note 1, at 94–95. In addition to these five basic approaches, there are other approaches, including notifying buyers of right-to-farm protections and adding fee shifting provisions that protect farmers from frivolous suits. HAMILTON, *supra* note 2, at 24, 36–38.

34. Centner, *supra* note 1, at 95.

35. Robinson, *supra* note 24, at 28; *see also* HAMILTON, *supra* note 2, at 18 (stating that the coming ro the nuisance doctrine "provided the theoretical basis for right to farm laws").

36. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

37. Grossman & Fischer, *supra* note 11, at 98.

38. Hand, *supra* note 3, at 307.

39. *See supra* notes 16–22 and accompanying text.

40. Reinert, *supra* note 13, at 1699; *see also* Hanna, *supra* note 12, at 430 ("While agricultural land is becoming scarce, courts are using the rather flexible nuisance doctrine to effectively remove productive land from agricultural uses.").

neighbors could proceed with any degree of certainty that their decisions would be protected by a court.[41] By codifying the coming to the nuisance defense, state legislatures have protected both farmers and non-farmers alike by making nuisance law more predictable.[42] The codification protects farmers because it gives them security that, if they meet the other statutory requirements of right-to-farm laws, their investments will be protected and not threatened by the surrounding changes made by their neighbors.[43] The codification also protects non-farmers because it puts them on notice that if they move next to an existing agricultural operation, they will be "subject to the rights of the nearby pre-existing farm operations" and will not be able to stop the operation through a nuisance suit.[44] Thus, because right-to-farm laws "call for a return to the fault-based world of the common law" and allocate blame based on priority of use,[45] they are a "rejuvenation of the 'coming to the nuisance' doctrine."[46]

2. Statutes of limitation

Some states have adopted statutes of limitation to defeat nuisance actions against farmers.[47] Under this approach, "neighbors who fail to file a nuisance claim within a stated time period after the commencement of the offensive activity may not successfully

41. Hand, *supra* note 3, at 305 ("The advantage of flexibility in the common law nuisance system is tempered by the lack of predictability inherent in such a broad balancing test.").

42. *See* Robinson, *supra* note 24, at 28 (discussing the policy behind right-to-farm statutes being protection of farmers); *see also* Centner, *supra* note 1, at 96 ("[T]he coming to the nuisance approach serves to protect investments.").

43. 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) (discussing the protection and security farmers receive in their investments due to the right-to-farm laws); *see also* HAMILTON, *supra* note 2, at 19 ("The major gain with right to farm laws is the [coming to the nuisance] protection becomes part of the state law and is not optional for the courts [to] recognize."); Hand, *supra* note 3, at 309 ("A farmer who initially locates his/her operation in an appropriate locality can be certain (at least within the limitations of the statute) that he has a legal right to continue his operation, a right that cannot be modified by any later action on the part of his neighbors.").

44. Hamilton, *supra* note 43, at 104.

45. Reinert, *supra* note 13, at 1703.

46. Hanna, *supra* note 12, at 430.

47. Centner, *supra* note 1, at 98.

maintain the lawsuit."[48] States which have adopted this approach include Minnesota,[49] Mississippi,[50] Pennsylvania,[51] and Texas.[52] Importantly, because the statutes of limitation allow neighbors an opportunity to bring suit during a set period of time, there is no need for the coming to the nuisance approach.[53]

3. Expansion and production changes

As with any enterprise, agricultural operations are not stagnant.[54] Farms expand business operations and start new production activities.[55] In the past few decades, farms have become bigger and more industrialized[56] as farmers feel the pinch to "follow[] that old agricultural rule: Get big or die."[57] This growth can cause conflict

48. *Id.*

49. MINN. STAT. ANN. § 561.19(2)(a) (West 2000 & Supp. 2005) ("An agricultural operation is not and shall not become a private or public nuisance after two years from its established date of operation . . . ."); *see also* Overgaard v. Rock County Bd. of Comm'rs, No. Civ.A.02-601, 2003 WL 21744235, at *7 (D. Minn. July 25, 2003) (stating that the Minnesota right-to-farm statute "creates a two-year window . . . before the immunity from nuisance suit applies").

50. MISS. CODE ANN. § 95-3-29(1) (2004) ("[P]roof that said agricultural operation has existed for one (1) year or more is an absolute defense to such action . . . ."); *see also* Bowen v. Flaherty, 601 So. 2d 860, 862 (Miss. 1992) ("The Legislature . . . placed a one-year limitation on nuisance actions against agricultural operations.").

51. 3 PA. STAT. ANN. § 954(a) (West 1995 & Supp. 2005) ("No nuisance action shall be brought against an agricultural operation which has lawfully been in operation for one year or more prior to the date of bringing such action . . . ."); *see also* Horne v. Haladay, 728 A.2d 954, 957 (Pa. Super. Ct. 1999) (rejecting the argument that the right-to-farm law protected only pre-existing agricultural operations and stating that nuisance actions must be filed "within one year of the inception of the agricultural operation or within one year of a substantial change in that operation").

52. TEX. AGRIC. CODE ANN. § 251.004(a) (Vernon 2004) ("No nuisance action may be brought against an agricultural operation that has lawfully been in operation for one year or more prior to the date on which the action is brought . . . ."); *see also* Barrera v. Hondo Creek Cattle Co., 132 S.W.3d 544, 549 (Tex. App. 2004) (holding that the Texas right-to-farm statute created a constitutional "statute of repose").

53. *See Horne*, 728 A.2d at 957 (rejecting the argument that right-to-farm laws protect only pre-existing agricultural operations).

54. Centner, *supra* note 1, at 104 ("Farming is not static. Changes in market demands may require that new activities occur on the production site.").

55. *Id.* at 101–02.

56. *See* John C. Becker, *Promoting Agricultural Development Through Land Use Planning Limits*, 36 REAL PROP. PROB. & TR. J. 619, 621–27 (2002) (discussing the emergence of industrialized agriculture).

57. Paul Larmer, *Bees Under Siege*, HIGHCOUNTRYNEWS.ORG, Jan. 20, 1997, http://www.hcn.org/servlets/hcn.Article?article_id=2991; *see also* Beidel, *supra* note 13, at

between farmers and their neighbors because while farmers feel the need to expand their operations, their neighbors feel it is unfair for the farmers to increase the size of their operations and, correspondingly, increase the nuisances produced by the operations.[58] The problem is exacerbated when the expansion is substantial or the production change is dramatic.[59] A major point of concern facing right-to-farm laws is that most right-to-farm laws "do not adequately address the significance of changes in the agricultural operation being protected."[60] The right-to-farm laws of the states that do address expansion and production changes have different approaches.[61]

With regards to expansion, some states do not allow expansion because the date of any expansion becomes the new establishment date of the operation.[62] Other states allow farming operations to reasonably expand by allowing moderate expansion without changing the established date of operation.[63] Still other states allow limitless expansion by allowing farms to expand without changing the established date of operation.[64] The date of establishment is

165 (explaining that "economies of scale" have demanded an increase in farm size in recent years).

58. *See* Centner, *supra* note 1, at 102 (discussing the conflict of interest between farm expansion and annoyance to neighbors of worsening nuisances).

59. *See, e.g.*, Herrin v. Opatut, 281 S.E.2d 575, 576 (Ga. 1981) (farmer constructed twenty-six chicken houses holding 500,000 birds on what was previously a cow pasture); Jewett v. Deerhorn Enters., 575 P.2d 164, 166 (Or. 1978) (hog farm was constructed where there had previously been greenhouses).

60. Reinert, *supra* note 13, at 1721; *see also* Grossman & Fischer, *supra* note 11, at 127 ("Most right to farm laws are silent on the effect of a change in farming operations.").

61. *See* HAMILTON, *supra* note 2, at 31 (listing different ways that state right-to-farm laws deal with expansions).

62. *See, e.g.*, TENN. CODE ANN. § 44-18-101(3) (2000 & Supp. 2005) ("[E]ach expansion is deemed to be a separate and independent 'established date of operation' . . . ."); TEX. AGRIC. CODE ANN. § 251.003 (Vernon 2004 & Supp. 2005) (same); WYO. STAT. ANN. § 11-39-101(a)(iii) (2005) (same).

63. *See, e.g.*, MINN. STAT. ANN. § 561.19(1)(b) (West 2000 & Supp. 2006) (stating that any agricultural operation that expands by less than twenty-five percent does not have a new established date of operation); MO. ANN. STAT. § 537.295(1) (West 2000) ("An agricultural operation protected pursuant to the provisions of this section may reasonably expand its operation in terms of acres or animal units without losing its protected status . . . .").

64. *See, e.g.*, GA. CODE ANN. § 41-1-7(d) (1997 & Supp. 2006) (stating that if the agricultural operation is expanded, the established date of operation does not change); N.M. STAT. ANN. § 47-9-3(C) (LexisNexis 2004) ("If an agricultural operation or agricultural facility is subsequently expanded or a new technology is adopted, the established date of

important because it determines the priority of use in statutes codifying the coming to the nuisance doctrine. The date of establishment also begins the running of time in statutes incorporating a statute of limitation.

Concerning production changes, "[m]ost right-to-farm statutes do not protect farms that change their production activities."[65] This is because most statutes incorporate the coming to the nuisance doctrine, and a change in production would constitute a new nuisance to which neighbors did not come.[66] Thus, a farmer who converts a corn field into a dairy farm would not be protected by most right-to-farm statutes absent "specific statutory provisions altering nuisance law."[67]

4. Qualifying management practices

Despite providing general nuisance protection to farmers, most right-to-farm statutes do not provide protection for farms that are operated in a negligent[68] or illegal[69] manner. Additionally, many right-to-farm statutes further restrict nuisance protection to farms that employ generally accepted agricultural management practices (GAAMPs).[70] Although different states use different terms—such as "generally accepted agricultural practices,"[71] "sound agricultural practices,"[72] or "best management practices"[73]—the purpose is the

operation does not change."); *see also* Centner, *supra* note 1, at 104 (stating that under the Georgia law, a farm may "expand exponentially and still qualify for whatever protection was available to the earlier facility").

65. Centner, *supra* note 1, at 106; *see, e.g.*, 3 PA. STAT. ANN. § 954(a) (West 1995 & Supp. 2005) (stating that the circumstances of the agricultural operation must have "existed substantially unchanged since the established date of operation").

66. Centner, *supra* note 1, at 106.

67. *Id.*

68. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 5-403(b)(1)(iv) (LexisNexis 2002) (stating that the Maryland right-to-farm law does not "[r]elieve any agricultural operation from liability for conducting an agricultural operation in a negligent manner"); MO. ANN. STAT. § 537.295(1) (stating that the Missouri right-to-farm law does not apply "whenever a nuisance results from the negligent or improper operation of any such agricultural operation").

69. *See, e.g.*, ALASKA STAT. § 09.45.235(b)(1) (2004) (denying protection for illegal conduct in agricultural operations); N.M. STAT. ANN. § 47-9-3(A) (same).

70. HAMILTON, *supra* note 2, at 25; *see, e.g.*, FLA. STAT. ANN. § 823.14(4)(a) (West 2006); HAW. REV. STAT. ANN. § 165-4 (LexisNexis 2000 & Supp. 2004); MICH. COMP. LAWS ANN. § 286.473 (West 2003).

71. *See, e.g.*, CONN. GEN. STAT. ANN. § 19a-341(a) (West 2003 & Supp. 2006); MINN. STAT. ANN. § 561.19(2)(a)(3) (West 2000 & Supp. 2006).

72. *See, e.g.*, UTAH CODE ANN. § 78-38-7 (2004).

same: to "encourage abstinence from poor husbandry practices that might constitute a nuisance."[74] The use of GAAMPs is a "precondition for protection," meaning only properly operated farms will be protected from nuisance suits.[75] Some right-to-farm laws create a presumption of reasonableness; in other words, a court will presume that the farm is operated using GAAMPs unless the plaintiff can show otherwise.[76] Other statutes allow the state secretary of agriculture to define GAAMPs for the state.[77]

5. Agricultural districts

Another approach to nuisance protection is the creation of local agricultural districts.[78] Some states require the farm to be located within an agricultural district in order to have a complete defense against a private nuisance action.[79] A few states have agricultural districting laws that allow expansive nuisance protection by allowing farmers to establish an agricultural district and receive nuisance protection regardless of whether or not their operation existed prior to their neighbors' houses.[80] An example of an expansive districting law is the Iowa law that was at issue in the case of ***Bormann v. Board of Supervisors***,[81] which is discussed at length in the next Part.

III. *BORMANN V. BOARD OF SUPERVISORS*

In 1998, the Iowa Supreme Court made an historic decision in ***Bormann v. Board of Supervisors*** when it decided that an Iowa right-to-farm statute was facially unconstitutional as a governmental taking

73. *See, e.g.*, ME. REV. STAT. ANN. tit. 17, § 2805(2-A)(A) (2006); VA. CODE ANN. § 3.1-22.29(A) (1994).

74. Centner, *supra* note 1, at 107.

75. *Id.* at 109.

76. HAMILTON, *supra* note 2, at 35.

77. *See, e.g.*, MICH. COMP. LAWS ANN. § 286.472(d) (West 2003) (giving authority to the state commission of agriculture to define GAAMPs); N.Y. AGRIC. & MKTS. LAW § 308(1)(a) (McKinney 2004) (same).

78. *See* HAMILTON, *supra* note 2, at 27–28.

79. *See, e.g.*, N.Y. AGRIC. & MKTS. LAW § 308(3); OHIO REV. CODE ANN. § 929.04(A) (LexisNexis 1994).

80. *See, e.g.*, Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 313–14 (Iowa 1998) (discussing the Iowa statute that granted nuisance immunity to agricultural operations in agricultural areas).

81. *Id.* at 309.

without compensation.[82] This Part discusses the factual background of the *Bormann* case and the legal rationale the court used in holding the right-to-farm law to be an unconstitutional taking. Additionally, this Part discusses the possible implications that the *Bormann* decision could have on other right-to-farm laws and other land use regulations.

A. Factual Background

The Iowa right-to-farm law at issue in *Bormann* allowed farmers to apply to a county board of supervisors to establish an "agricultural area."[83] Establishing an agricultural area was beneficial to farmers because it gave them expansive immunity from nuisance suits, even if residential neighbors pre-dated the farming operation.[84] In 1994, Gerald and Joan Girres, representing themselves and other nearby farmers, applied to the Kossuth County Board of Supervisors in order to establish a 960-acre agricultural area.[85] The Board first denied the application, finding that "the Agricultural Area designation and the nuisance protections provided therein will have a direct and permanent impact on the existing and long-held private property rights of the adjacent property owners."[86] In 1995, the Girreses again applied for the agricultural area designation, which the Board approved by a three-to-two vote.[87]

A few months later, several neighbors who lived within the boundaries of the new agricultural area filed suit against the Board.[88] The neighbors claimed, among other things, that the Board's approval of the agricultural area violated both the Federal and Iowa Constitutions by depriving them of property without due process or just compensation.[89] The district court ruled in favor of the neighbors on the claim that the Board's decision had been arbitrary

82. *Id.* at 322. This was the first time that a court declared a right-to-farm law to be an unconstitutional taking. Pearson, *supra* note 6, at 56.

83. *Bormann*, 584 N.W.2d at 313 (citing IOWA CODE § 352.6 (1993)).

84. *Id.* at 314 (citing IOWA CODE § 352.11(1)(a)).

85. *Id.* at 311.

86. *Id.*

87. *Id.* at 311–12.

88. *Id.* at 312.

89. *Id.*

and capricious, while rejecting all other claims of the neighbors.[90] The Board later corrected the procedural infirmity that had rendered its decision arbitrary and capricious, but the neighbors appealed their other claims to the Iowa Supreme Court.[91]

B. The Iowa Supreme Court's Holding

The Iowa Supreme Court first analyzed the neighbors' claim that the statutory grant of nuisance immunity constituted an unconstitutional taking of property without just compensation.[92] The neighbors' claim constituted a facial challenge to the statute because they "presented neither allegations nor proof of nuisance."[93] The court laid out a takings analysis based on three questions: "(1) Is there a constitutionally protected private property interest at stake? (2) Has this private property interest been 'taken' by the government for public use? and (3) If the protected property interest has been taken, has just compensation been paid to the owner?"[94]

The court first held that the property interest at stake was an easement based on the right to maintain a nuisance and that the nuisance immunity provided by the Iowa statute created an easement over the neighbors' properties in favor of the farmers.[95] Therefore, this easement was a property interest subject to the constitutional requirements of just compensation.[96]

The court then recognized the two categories of per se takings, which "*must* be compensated without any further inquiry:"[97] (1) "permanent physical invasion of the property" and (2) regulations that deprived the owner of "all economically beneficial or productive use of the land."[98] Because the neighbors did not allege that they had been deprived of all economic use of their land, the court

90. *Id.* The court ruled that the Board's decision was arbitrary and capricious because the deciding vote was determined based on the flip of a coin. *Id.*

91. *Id.*

92. *Id.* at 313.

93. *Id.*

94. *Id.* at 315.

95. *Id.* at 315–16.

96. *Id.* at 316.

97. *Id.*

98. *Id.* (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992)).

limited its discussion to the physical invasion category of per se takings.[99]

The court began its discussion of the physical invasion category by noting that there was no actual physical trespass; nonetheless, the court then attempted to show that nontrespassory actions can be physical invasions, and therefore, per se takings.[100] In other words, the court decided that the government did not need to physically invade the property for there to be a physical invasion.[101] Through reasoning that has puzzled legal commentators,[102] the court determined that the easement constituted a permanent physical invasion of the neighbors' properties,[103] and therefore, was a per se taking of private property without just compensation.[104] Thus, the statute granting the nuisance immunity was held to be unconstitutional under both the Federal and Iowa Constitutions.[105]

The court held back no punches in its language.[106] It concluded its decision by declaring that

> this is not a close case. When all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners,

99. *Id.* at 317. The court did recognize that all other regulatory takings challenges that do not fit under the two categories of per se takings are reviewed on a case-by-case examination using the three factor balancing test derived from *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); however, the court never reached this case-by-case analysis because it determined that the nuisance immunity statute was a per se taking. *Bormann*, 584 N.W.2d at 316–17.

100. *Bormann*, 584 N.W.2d at 317; *see also* Beidel, *supra* note 13, at 181 ("Recognizing that nuisance-type conduct was not a trespass, the court attempted to show that non-trespassory invasions could still constitute a *per se* taking.").

101. *Bormann*, 584 N.W.2d at 317 ("To constitute a per se taking, the government need not physically invade the surface of the land.").

102. *See, e.g.*, Centner, *supra* note 1, at 123 (arguing that the court erred in concluding that there was a non-trespassory invasion by relying on cases that were "decided prior to the Supreme Court's clarifying comments regarding per se versus regulatory takings"); Pearson, *supra* note 6, at 70 ("[T]he so-called easement accomplishes no occupation whatsoever, and certainly none either permanent or physical."); Jesse J. Richardson & Theodore A. Feitshans, *Nuisance Revisited After* Buchanan *and* Bormann, 5 DRAKE J. AGRIC. L. 121, 136 (2000) ("The reasoning of the Iowa Supreme Court in holding that the easement created by the Right to Farm law amounts to a physical invasion is less than clear.").

103. *Bormann*, 584 N.W.2d at 317–19.

104. *Id.* at 321.

105. *Id.*

106. *See* Pearson, *supra* note 6, at 58 (stating that the court's opinion was "unsparing in tone and content").

> and sacrificing those rights for the economic advantage of a few. In short, it appropriates valuable private property interests and awards them to strangers.[107]

The court finished its opinion by recognizing that there would be substantial "political and economic fallout" as a result of its holding, but felt convinced that the challenged statute was "plainly" and "flagrantly" unconstitutional.[108]

C. Possible Effects of the Bormann *Decision*

The rationale in the *Bormann* decision, if adopted by other states, could have a serious impact on right-to-farm laws because *all* right-to-farm statutes could be found to be unconstitutional. This is because the *Bormann* decision does not distinguish between the different approaches to right-to-farm laws. All right-to-farm statutes, regardless of the approach, allow farmers to carry on activities that would otherwise be considered nuisances. Thus, under the reasoning of the *Bormann* court, any statute granting nuisance immunity to farmers "creates an easement in the property affected by the nuisance"[109] and would therefore constitute a permanent physical invasion of neighboring properties, thus rendering the statute a per se unconstitutional taking of property.

Although the *Bormann* rationale could potentially be used to invalidate right-to-farm laws in other states, it has not yet been accepted by courts outside of Iowa. The *Bormann* reasoning was distinguished by the Idaho Supreme Court in *Moon v. North Idaho Farmers Ass'n*[110] and by the United States District Court of Minnesota in *Overgaard v. Rock County Board of Commissioners.*[111] The only reported case that has looked favorably upon the *Bormann* holding is *Gacke v. Pork Xtra, L.L.C.*, in which the Iowa Supreme Court upheld the *Bormann* decision in invalidating another Iowa

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

108. *Id.*

109. *Id.* at 316.

110. 96 P.3d 637, 644 (Idaho 2004) (distinguishing *Bormann* by holding that no Idaho authority supported the view that the right to maintain a nuisance creates an easement, unlike the Iowa legal authority cited by the *Bormann* court).

111. No. Civ.A.02-601, 2003 WL 21744235, at *7 (D. Minn. July 25, 2003) (holding that the *Bormann* reasoning was "not applicable to the Minnesota Right to Farm Act" because the act allows neighbors to bring a nuisance suit within two years from the established date of the farming operation).

right-to-farm law that protected animal feeding operations from nuisance suits.[112]

The *Bormann* rationale could also have a serious impact on other land use issues, such as landmark laws, pollution control provisions, and even general zoning laws.[113] As one commentator stated, "if adopted in other contexts, the court's ruling [in *Bormann*] will cause serious problems for communities."[114] Using the rationale that nuisance immunity confers an easement over neighboring property "creates a slippery slope whereby other essential property devices could be classified as easements."[115] For example, general zoning laws also burden property rights of individuals and could be viewed as creating an easement under the *Bormann* rationale; and if zoning were held to be a taking that required compensation, "the state would be stripped of virtually all of its power to regulate land use."[116]

The fact that courts could use the *Bormann* rationale to invalidate zoning regulations as unconstitutional takings is evidenced by an Iowa district court's holding in *Harms v. City of Sibley*.[117] In *Harms*, the City of Sibley rezoned land from light industrial to heavy industrial so that a ready mix plant could be constructed on the property.[118] Kenneth and Myrna Harms, whose house across the street from the rezoned property decreased in value as a result of the nuisances produced by the plant, brought an inverse condemnation claim by arguing that the City had taken their private property by rezoning the property and allowing the construction of the plant.[119]

112. 684 N.W.2d 168 (Iowa 2004).

113. *See* Beidel, *supra* note 13, at 178 (identifying landmark laws, pollution control provisions, and general zoning laws as areas of law that have similar impacts as right-to-farm laws); *see also* Doug Kendall, *Double-Edged Sword Cuts into "Right To Farm" Law*, WIS. ST. J., Dec. 27, 1998, at 3I (stating that the Clean Water Act and workplace safety regulations could be susceptible to challenge); Pearson, *supra* note 6, at 56 (questioning whether growth control ordinances, setback requirements, landmark law, or pollution controls might be susceptible to the *Bormann* reasoning); Richardson & Feitshans, *supra* note 102, at 136 (stating that wetland protection regulations and endangered species habitat protection regulations could be viewed as creating easements).

114. Kendall, *supra* note 113, at 3I.

115. Beidel, *supra* note 13, at 178.

116. *Id.*; *see also* Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

117. 702 N.W.2d 91, 95 (Iowa 2004) (discussing the procedural history of the case).

118. *Id.* at 93.

119. *Id.* at 94.

The district court, relying heavily on the *Bormann* holding,[120] agreed with the Harms and concluded that by rezoning the property, the City had allowed the plant "to create a nuisance, causing substantial damage to the Harms."[121] The court concluded that this was a taking and that the Harms were entitled to compensation from the City.[122] Although the Iowa Court of Appeals eventually reversed the district court's holding and the Iowa Supreme Court affirmed the reversal,[123] the case clearly demonstrates the potential effects that the *Bormann* decision could have if adopted in other land use contexts.

IV. *PENN CENTRAL* AND ITS APPLICATION TO RIGHT-TO-FARM LAWS

The Iowa Supreme Court proved prophetic in declaring that its decision in *Bormann* would result in political backlash.[124] Following the decision, several law review articles were published criticizing the court's holding.[125] Even legal commentators who agreed with the result of the case criticized the court's legal reasoning,[126] arguing, among other things, that the right to maintain a nuisance is not an easement,[127] that there was no physical invasion of property,[128] and that invalidation of the statute was not the correct remedy.[129]

This Comment, however, focuses on the contention that courts that have in the past and will in the future encounter takings challenges to right-to-farm laws can, by using the balancing factors enunciated by the Supreme Court in *Penn Central Transportation*

120. *Id.* at 101.

121. *Id.* at 95.

122. *Id.* (quoting the district court's holding).

123. *Id.* at 96.

124. *See* Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 322 (Iowa 1998). ("We recognize that political and economic fallout from our holding will be substantial.").

125. *See, e.g.*, Pearson, *supra* note 6.

126. *See, e.g.*, Kendall, *supra* note 113, at 31 ("For however laudable the policy result, the Iowa Supreme Court's analysis in Bormann vs. Board of Supervisors [sic] is badly off the mark . . . ."); Richardson & Feirshans, *supra* note 102, at 136 (stating that the court's reasoning was "less than clear").

127. *See* Pearson, *supra* note 6, at 60 (distinguishing nuisance immunities from easements); Beidel, *supra* note 13, at 177–79 (stating that the analogy between immunity and easements is "tenuous at best").

128. *See* Pearson, *supra* note 6, at 70 ("[T]he so-called easement accomplishes no occupation whatsoever, and certainly none either permanent or physical.").

129. *See id.* at 75–76.

Co. v. New York City,[130] uphold most right-to-farm statutes and invalidate the right-to-farm statutes that go too far, while avoiding the backlash and side effects that the *Bormann* court faced as a result of its legal reasoning. This Part begins with a brief discussion of how, by viewing right-to-farm laws as regulations of neighboring property owners' bundles of property rights, courts can turn to the *Penn Central* balancing test to evaluate takings challenges to right-to-farm laws. This Part then gives a brief summary of the *Penn Central* case and an explanation of the factors of the *Penn Central* balancing test.

A. Penn Central*'s Application to Right-To-Farm Laws*

To see why the *Penn Central* test should be applied to right-to-farm laws requires looking at right-to-farm laws in a different light than the *Bormann* court did. In *Bormann*, the Iowa Supreme Court focused on the effect the right-to-farm laws had on the neighbors' properties; in other words, the court viewed the right-to-farm statute as affirmatively giving the farmers the right to use part of the neighbors' properties.[131] This viewpoint allowed the court to conclude that the statute granted the farmers an easement over neighboring properties.[132]

The better view, however, is that right-to-farm laws are a regulation of how the neighbor uses his own property. Since under these statutes a neighbor cannot use the law of nuisance to preclude farmers from engaging in agricultural practices that could be viewed as nuisances, the neighbor's right to exclude has been regulated, which the Supreme Court has held to be constitutional.[133] The right to keep offensive odors from interfering with the use and enjoyment

130. 438 U.S. 104 (1978). Although this Comment occasionally refers to the legal argument that the *Bormann* court should have used the *Penn Central* balancing test because the statute at issue did not effect a per se taking, a detailed argument of this line of reasoning is beyond the scope of this Comment. For a more detailed reading on this issue, see, e.g., Centner, *supra* note 1, at 117–24; Beidel, *supra* note 13, at 180–83.

131. *See* Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 316 (Iowa 1998) (holding that the nuisance immunity provided by the right-to-farm law gave the farmers an easement over the neighboring property, making the farmers' property the dominant tenement and the neighbors' properties the servient tenements).

132. *Id.*

133. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 82 (1980) (holding that even though the California Constitution, as interpreted by the California Supreme Court, regulated a property owner's right to exclude people from his property, the regulation did not constitute a taking).

of one's property—or the right to maintain a nuisance action against an offending party—is a property right; it is one of the "sticks" in the property owner's "bundle."[134] This right is similar to the right to exclude others from one's property, which was the property right at issue in *PruneYard Shopping Center v. Robins*.[135] In *PruneYard*, the Supreme Court held that the right to exclude others from private property is "one of the essential sticks" in a property owner's bundle.[136] The Court held that although the California Supreme Court's interpretation of the California Constitution effectively destroyed this stick in the owner's bundle, "not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense."[137]

Because the right to bring a nuisance suit against neighbors is a stick in the property owner's bundle, state legislatures can regulate it, albeit within constitutional limits, through the police power.[138] Right-to-farm laws regulate this property right by not allowing property owners to use it when the nuisance is caused by a farmer who meets the statutory obligations of the right-to-farm law, such as following generally accepted management practices and operating in a non-negligent manner. Although the state legislatures can regulate the property interest of bringing nuisance suits, the legislatures are not given limitless regulatory power. If the regulation "goes too far,"

134. Richardson & Feitshans, *supra* note 102, at 133 ("[T]he Iowa Supreme Court reasoned that this law took one of the sticks (the right to not be subject to unreasonable interference with the reasonable use of your land) from the bundle representing the property rights of the farmer's neighbor."); *see also* Hand, *supra* note 3, at 339 ("This group [of rights constituting 'property'], or 'bundle' is made up of a number of individual 'strands,' such as the rights to possess, to use and to dispose of the property. The strand or right lost by a potential plaintiff under right-to-farm acts is the right to a cause of action against a defendant agricultural operation for interference with the use and enjoyment of his property.").

135. 447 U.S. at 74.

136. *Id.* at 82.

137. *Id.* (quoting Armstrong v. United States, 364 U.S. 40, 48 (1960)); *see also* Andrus v. Allard, 444 U.S. 51, 65–66 (1979) ("[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking.").

138. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 125 (1976) ("[I]n instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests."); *see also* Grossman & Fischer, *supra* note 11, at 141–42 ("The state can regulate an owner's use of his or her own property when that regulation is necessary to promote the public interest.").

it is a taking,[139] and the test used to determine if the regulation goes too far is the *Penn Central* test.[140]

B. The Penn Central *Decision*

In *Penn Central Transportation Co. v. New York City*, Penn Central Transportation Company claimed that the New York City Landmarks Preservation Law constituted an unconstitutional taking of property.[141] Penn Central owned Grand Central Terminal, one of the most famous buildings in New York City.[142] The Terminal was designated a "landmark" by New York City's Landmarks Preservation Committee.[143] As a result of this designation, Penn Central was required to acquire government approval in order to make any alterations to the exterior of the building.[144] Penn Central wanted to construct a multistory office building above the Terminal,[145] but the Commission twice denied Penn Central's plans for the construction.[146] Penn Central then brought suit against the city, claiming that its property had been taken without just compensation.[147]

The Supreme Court began its opinion by stating that "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[148] The Court further stated that a case-by-case analysis is required to determine if a regulation goes so far as to require

139. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

140. *See* Gary Lawson et al., *"Oh Lord, Please Don't Let Me Be Misunderstood!: Rediscovering the* Mathews v. Eldridge *and* Penn Central *Frameworks*, 81 NOTRE DAME L. REV. 1, 3 (2005) (stating that *Penn Central* "continues to serve as the canonical standard for regulatory takings analysis").

141. *Penn Cent. Transp. Co.*, 438 U.S. at 119.

142. *Id.* at 115.

143. *Id.*

144. *Id.* at 112.

145. *Id.* at 116.

146. *Id.* at 116–17.

147. *Id.* at 119.

148. *Id.* at 124.

compensation.[149] The Court then listed three factors of "particular significance" in engaging in the balancing of interests: (1) "the character of the governmental action," (2) "[t]he economic impact of the regulation on the claimant," and (3) "the extent to which the regulation has interfered with distinct investment-backed expectations."[150] Applying these factors, the Court held that the Landmarks Law (1) was "substantially related to the promotion of the general welfare,"[151] (2) permitted "reasonable beneficial use" of the Terminal,[152] and (3) did not interfere with Penn Central's "primary expectation" regarding the use of the Terminal.[153] Thus, the Court concluded that the Landmarks Law did not amount to an unconstitutional taking of the property.[154]

1. Character of the government action

The first factor in the *Penn Central* balancing test has puzzled legal commentators because the Court did not explain the meaning of "character of the government action."[155] One view is that this factor requires an inquiry into whether the regulation has a legitimate public purpose and whether the regulation reasonably effectuates the public purpose.[156] Some commentators, however, feel that this view was foreclosed by the recent Supreme Court decision in *Lingle v. Chevron U.S.A., Inc.*, in which the Court stated that "whether a regulation of private property is *effective* in achieving some legitimate public purpose. . . . is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment."[157]

Another possible interpretation of the governmental character factor is that "it is designed to evaluate the extent to which the

149. *Id.* ("[W]e have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" (quoting United States v. Cent. Eureka Mining Co., 357 U.S. 155, 168 (1958))).

150. *Id.*

151. *Id.* at 138.

152. *Id.*

153. *Id.* at 136.

154. *Id.* at 138.

155. *Id.* at 124.

156. *See* Thomas D. Somerville, *King County, Washington Ordinance 15053: Is "the Most Restrictive Land-Use Law in the Nation" Constitutional?*, 36 ENVTL. L. 257, 274 (2006).

157. 544 U.S. 528, 529 (2005); *see also* Lawson et al., *supra* note 140, at 46–47.

government action resembles what has been uncontroversially understood to constitute a taking."[158] In other words, in a "continuum" of regulatory governmental actions,[159] at one end are regulations that effect a permanent physical invasion of private property, and therefore are a "taking per se because they closely resemble the formal exercise of the eminent domain power."[160] At the other end of the continuum are "routine land use regulations," such as zoning laws, which most likely do not effect a regulatory taking.[161] Under this view, a court would look at where the regulation falls on the continuum, and "the more closely that a regulatory measure resembles a paradigmatic taking, the more likely that a regulatory taking exists under the Penn Central framework."[162]

2. Economic impact produced by the government action

The second factor in the *Penn Central* balancing test is the economic impact produced by the government action.[163] This factor "compares the value that has been taken from the property with the value that remains in the property."[164] However, apart from total deprivation of economically viable use,[165] the Court has never identified "a threshold of [economic] impact above which a finding of a taking would occur or below which a finding of a taking would be precluded."[166] It is clear, however, that the diminution of property values alone is not enough to establish a taking.[167]

158. Lawson et al., *supra* note 140, at 46.

159. *Id.*

160. *Id.*; *see also Penn Cent. Transp. Co.*, 438 U.S. at 124 (stating that a taking is more readily found when there is a physical invasion by the government).

161. Lawson et al., *supra* note 140, at 46.

162. *Id.*

163. *Penn Cent. Transp. Co.*, 438 U.S. at 124.

164. Arthur J. Anderson, *Zoning and Land Use*, 58 SMU L. REV. 1229, 1233 (2005); *see also* James S. Burling, *A Short History of Regulatory Takings—Where We Have Been and What Are the Hot Issues of Today* (ALI-ABA Course of Study, Sept. 29–Oct. 1, 2005), SL012 ALI-ABA 1, 29 ("To measure economic impact one should compare the before and after value of the property: before the regulatory action was taken and after the regulatory action was taken.").

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

166. John D. Echeverria, *Is the Penn Central Three-Factor-Test Ready for History's Dustbin?*, 52 LAND USE L. & ZONING DIG. 3, 5 (2000).

167. *Penn Cent. Transp. Co.*, 438 U.S. at 131 (stating that decisions sustaining land use regulations "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking'").

3. Degree of interference with investment-backed expectations

The third factor of the *Penn Central* balancing test is the degree of interference with investment-backed expectations. The Court originally referred to "distinct" expectations,[168] but later modified the factor to be "reasonable" expectations.[169] As with the other *Penn Central* factors, the Court did not give much guidance on exactly what this factor meant;[170] however, "the general consensus is that the individual circumstances surrounding the property in question, such as the owner's investment motives or his or her primary expectation concerning the use of the property are relevant considerations" that a court should consider.[171]

V. ANALYSIS OF RIGHT-TO-FARM STATUTES UNDER THE *PENN CENTRAL* TEST

This Part discusses the application of the *Penn Central* test to the different approaches to right-to-farm laws.[172] The three *Penn Central* factors are analyzed in the context of the different approaches to determine which approaches might support a finding of constitutional regulation in favor of a farmer and which approaches might support a finding of an unconstitutional taking in favor of a neighboring landowner.

A. Character of the Government Action

In the context of right-to-farm laws, the first *Penn Central* factor will usually favor the farmer, especially if the court uses the first interpretation of looking for a legitimate public purpose. Many states have a legislative intent section included in their right-to-farm laws, which specifies the purpose of the legislature. One good example is North Carolina's statement of legislative determination:

168. *Id.* at 124.

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

170. *See* Lawson et al., *supra* note 140, at 40 (stating that this factor "adds its own layer of confusion").

171. JULIA H. MILLER, A LAYPERSON'S GUIDE TO HISTORIC PRESERVATION LAW: A SURVEY OF FEDERAL, STATE, AND LOCAL LAWS GOVERNING HISTORIC RESOURCE PROTECTION 27 (2004).

172. See *supra* Part II.B for a discussion of the different approaches to right-to-farm laws.

> It is the declared policy of the State to conserve and protect and encourage the development and improvement of its agricultural land and forestland for the production of food, fiber, and other products. When other land uses extend into agricultural and forest areas, agricultural and forestry operations often become the subject of nuisance suits. As a result, agricultural and forestry operations are sometimes forced to cease. Many others are discouraged from making investments in farm and forest improvements. It is the purpose of this Article to reduce the loss to the State of its agricultural and forestry resources by limiting the circumstances under which an agricultural or forestry operation may be deemed to be a nuisance.[173]

With a statement of legislative intent such as this, it would be easy for a court to find that the state had a legitimate purpose in enacting the right-to-farm statute.

Many states, however, do not include such a section in their right-to-farm laws.[174] A court may be able to find a legitimate public purpose through other means, such as court opinions[175] and legislative history. Nevertheless, it may be advisable for these states to include a legislative intent section to their right-to-farm laws in order to clarify their intent to promote the general good and therefore the character of their action.

Even if the right-to-farm laws are viewed under the second interpretation of the governmental action factor, the continuum of government regulatory actions, it is likely that the first factor of the balancing test will still weigh in favor of the farmer. In placing a right-to-farm law on the regulation continuum, it would likely fall nearer to the "routine land use regulations" side rather than the "formal exercise of the eminent domain power" side. Right-to-farm statutes are more similar to zoning regulations because although they may affect property values, they do not generally effect a permanent physical invasion of the neighboring properties. However, a right-to-farm law may move to the other end of the continuum if

173. N.C. GEN. STAT. § 106-700 (2005).

174. Reinert, *supra* note 13, at 1718 & n.138 (listing twenty-six right-to-farm laws that do not have a statement of purpose).

175. *See, e.g.*, Montgomery v. Bremer County Bd. of Supervisors, 299 N.W.2d 687, 696 (Iowa 1980) (recognizing that Iowa "has a vital public interest in preserving the open spaces devoted to agriculture"); Woodbury County Soil Conservation Dist. v. Ortner, 279 N.W.2d 276, 278 (Iowa 1979) (judicially recognizing that agriculture "is important to the welfare and prosperity" of Iowa).

the nuisance permitted by the law is so pervasive and constantly present on neighboring property that a court could view it as approximating a permanent physical invasion.

B. Economic Impact Produced by the Government Action

The second *Penn Central* factor would likely be the most straightforward factor for a court to apply when analyzing a right-to-farm law. If a right-to-farm law proscribes a neighbor from bringing a nuisance suit where the nuisance has caused a substantial devaluation of the neighbor's property, then this factor clearly weighs in favor of the neighbor. If, however, the nuisance does not have a substantial effect on the property value, then the factor weighs in favor of the farmer. Each court, however, will have to decide where the line lies between "substantial" and "negligible" effects.

C. Degree of Interference with Investment-Backed Expectations

This factor may weigh in favor of the farmer if the state has incorporated the coming to the nuisance doctrine or a statute of limitation in its right-to-farm statute. This is because most people who purchase a house have a reasonable expectation that they will be able to live comfortably in the house, whereas, it would be an unreasonable expectation for someone to move next to a pig farm expecting to be free from pig odor. Thus, as previously discussed, a coming to the nuisance element of a right-to-farm law confirms expectations for the house purchaser, as well as for the farmer.[176]

A statute of limitation approach to a right-to-farm law has essentially the same effect of confirming expectations. Most people purchase a house with the expectation of being able to keep out unreasonable interferences to the use and enjoyment of their house, especially if the nuisance did not exist at the time the house was purchased. The statute of limitation element fulfills this expectation by giving the neighbor an opportunity to bring a nuisance action against a farmer, even if for a limited time.[177]

This factor would favor the neighbors if the right-to-farm statute allows limitless expansion or generously allows for production

176. *See supra* text accompanying notes 42–44.

177. *See* Overgaard v. Rock County Bd. of Comm'rs, No. Civ.A.02-601, 2003 WL 21744235, at *7 (D. Minn. July 25, 2003) ("[T]he Minnesota Right to Farm Act creates a two-year window before the immunity from nuisance suit applies").

changes, since it is probably not reasonable for neighbors to assume that the agricultural operations in their area will dramatically change.[178] For example, it would be unreasonable to assume that someone who moves next to a cow pasture would expect that the pasture would be replaced with chicken houses containing half a million chickens.[179] It would also be unreasonable to assume that someone who moves next to a small pig farm would expect the farm to expand from one hundred pigs to thirty thousand pigs. Neighbors may well expect reasonable, moderate expansion that is a part of any profitable business, but they most likely would not expect the limitless expansion and generous production changes allowed by some right-to-farm statutes.

This factor also would favor the neighbors if the right-to-farm statute does not require the farmer to follow qualifying management practices, since a reasonable person would not expect a negligently operated farm to be protected by the law. Someone who moves into the vicinity of a farming operation will likely expect the farmer to follow accepted farming practices when engaging in farming activities, such as applying pesticides to fields, handling animal waste, etc.

VI. APPLYING *PENN CENTRAL* IN RIGHT-TO-FARM TAKINGS CHALLENGES

Using the *Penn Central* balancing test in takings challenges to right-to-farm laws will allow courts to require compensation for right-to-farm statutes that go too far in modifying the common law of nuisance, while at the same time allowing courts to uphold right-to-farm laws that do not go so far as to effect a regulatory taking. To demonstrate this principle, this Part applies the *Penn Central* test in two hypothetical cases. The first section presents a hypothetical situation based on the *Bormann* case that demonstrates a situation in which a court would likely find that the *Penn Central* test weighs in favor of the neighboring landowners, which would lead the court to conclude that the right-to-farm statute effects an unconstitutional regulatory taking. The second section, based on the facts of *Moon v.*

178. *See* Andrew C. Hanson, *Wisconsin's Right To Farm Law*, WIS. LAW., Dec. 2002, at 10, 60 (arguing that under Wisconsin's right-to-farm law, "if a nuisance plaintiff came to a 40-acre cornfield, he or she also unwittingly came to a 3,000-cow dairy confinement").

179. This was the fact scenario in *Herrin v. Opatut*, 281 S.E.2d 575 (Ga. 1981).

North Idaho Farmers Ass'n,[180] presents a fact scenario in which a court applying the *Penn Central* test would likely find that the test weighs in favor of the farmer, which would lead the court to conclude that the right-to-farm statute is a constitutional exercise of the police power.

A. Hypothetical #1: Best Case Scenario Bormann

It is impossible to determine what the outcome of *Bormann* would have been had the Iowa Supreme Court evaluated the Iowa statute under the *Penn Central* test because the *Bormann* opinion does not provide many of the facts necessary to conduct a *Penn Central* balancing test, such as priority of use, extent of the nuisance, and monetary amount by which the neighbors' properties were devalued. Nevertheless, this section presents a hypothetical fact scenario that could have occurred under the Iowa right-to-farm statute at issue in *Bormann* in order to demonstrate that the Iowa Supreme Court could have—with the right facts—reached the same outcome in *Bormann* by using the *Penn Central* test.[181]

In 1980, Ned Neighbor moves from a big city to a small community in Iowa. He buys a ten-acre plot of land that is surrounded by corn fields owned by Fred Farmer. In 1990, Farmer and other farmers in the area successfully petition the county board of commissioners to form an agricultural area, thereby receiving the broad grant of immunity from nuisance suits that comes along with the agricultural area designation. A few years later, Farmer plows up the corn field next to Neighbor's house and builds a 4,000-cow dairy farm, complete with a twenty-five million gallon manure lagoon. The smells from the dairy farm are nauseating and constantly present. Neighbor considers filing a nuisance claim, but discovers that Farmer is protected by the nuisance immunity protection afforded by the agricultural area designation. Neighbor can no longer stand to live by the farm, so he decides to sell his house and move back to the city. However, he is shocked to learn that the value

180. 96 P.3d 637 (Idaho 2004).

181. The hypothetical fact scenario in this section presents a "best case scenario" for the application of the *Penn Central* test. In other words, this hypothetical presents the factual basis that would most readily allow the Iowa Supreme Court to find a regulatory taking under the *Penn Central* test without permanent physical invasion or total deprivation of economic use. The *Bormann* decision as published did not include enough of the factors pertinent to reaching a conclusive determination using the *Penn Central* test.

of his house has decreased by seventy percent as a result of the smells emanating from Farmer's dairy. Neighbor then brings suit claiming that the government has taken his property without just compensation.

If this had been the factual basis on which the Iowa right-to-farm law was challenged, the Iowa Supreme Court could have easily applied the *Penn Central* test to establish that an unconstitutional taking of property resulted from the statute. The court would first look at the character of the government action to determine where the regulation is on the continuum and could find that because the nauseating odors are constantly present on Neighbor's property, the right-to-farm law falls closer to the "physical invasion" end of the continuum.[182] Thus, the first factor would tip the scale in favor Neighbor.

The court would then look at the economic impact that the right-to-farm law has on Neighbor's property. In this scenario, the court would likely find that the regulation resulted in a substantial impact on the property value because of the seventy percent decrease in the value of the house. Although it may not be clear exactly where the line is between substantial impact and minimal impact, it is not unreasonable for the court to find a seventy percent decrease in property value to be a substantial economic impact. Thus, the second factor would further tip the scale in favor of Neighbor.

The court would next analyze the right-to-farm law's interference with Neighbor's investment-backed expectations. Obviously, Neighbor's expectation was to be able to live in his house. Although he may have reasonably expected that moving next to a corn field could present some minor nuisances—such as occasional tractor noises, dust, and pesticide smells—Neighbor did not expect that the corn field would be replaced by a huge odor-producing dairy farm. Thus, a court would likely find that there was a "substantial interference with investment-backed expectations,"[183] and this third factor would also weigh in favor of Neighbor.[184]

182. For a discussion of the regulatory continuum, see *supra* text accompanying notes 158–62.

183. Fitzgarrald v. City of Iowa City, 492 N.W.2d 659, 665 (Iowa 1992) (citing Stone v. City of Wilton, 331 N.W.2d 398, 404 (Iowa 1983)).

184. This factor could, however, weigh in favor of Farmer in some instances, such as if the court were to find that the area where Neighbor purchased his home was an area that was

Thus, given the right factual conditions, the Iowa Supreme Court could have applied the *Penn Central* balancing test and easily concluded that the Iowa districting statute went so far as to effect a taking of Neighbor's property, and Neighbor would be entitled to just compensation for the diminution in the value of the property.

B. Hypothetical #2: Moon v. North Idaho Farmers Association

This second hypothetical is based on the facts of *Moon v. North Idaho Farmers Ass'n*[185] and demonstrates a case in which a court applying the *Penn Central* balancing test would likely find that a right-to-farm statute did not effect a regulatory taking. In *Moon*, a group of plaintiffs who claimed sensitivity to grass smoke filed for a preliminary injunction to prevent local grass seed farmers from burning the post-harvest stubble in their fields, which was a traditional farming practice in the area.[186] During the course of the litigation, the governor signed House Bill 391, which was passed as an "emergency measure."[187] This bill amended part of the Smoke Management and Crop Residue Disposal Act of 1999 by adding a new statute that stated that "[c]rop burning conducted in accordance with [the Act] shall not constitute a private or public nuisance" and that "[n]othing in this chapter shall be construed to create a private cause of action against any person who engages in or allows crop residue burning . . . ."[188] The plaintiffs argued that the bill effected an unconstitutional taking of property without compensation.[189]

Had the Idaho Supreme Court applied the *Penn Central* balancing test, the court first would have looked at the character of the government action. The court would have likely found that the Idaho statute would be at the opposite end of the regulatory continuum from the Iowa statute in the previous fact scenario. The Idaho statute does not fall on the "permanent invasion" end of the continuum because the smoke is not constantly present. The statute

known for dairy production and that Neighbor—as a reasonable person—could have foreseen the likelihood that a dairy farm would be built somewhere in the proximate area.

185. 96 P.3d 637 (Idaho 2004).

186. *Id.* at 640.

187. *Id.*

188. *Id.* at 640–41 (quoting IDAHO CODE ANN. § 22-4803A(6) (2004)).

189. *Id.* at 641.

allowed farmers to burn their fields "only during a 45-day window and only on days designated as being conductive [sic] for adequate smoke dispersion pursuant to smoke management plans."[190] And even during this forty-five-day window, the smoke would only affect certain properties based on where the burning fields were located and which way the wind was blowing. Thus, because the Idaho statute was far from a permanent invasion, the statute would likely fall on the "routine land use regulations" end of the continuum, and the first factor would weigh in favor of the farmers.

In applying the second *Penn Central* factor, the Idaho Supreme Court would have likely discovered that the economic impact of the statute on the plaintiffs' properties was negligible. The plaintiffs in this case were individuals who suffered from chronic pulmonary disorders and who claimed that "the farmers' burning practices aggravate[d] their conditions forcing them to remain confined in their homes and in some situations leave the area completely during burning episodes."[191] However, although the plaintiffs claimed personal discomfort, they did not claim that the burning practices had caused a diminution in the values of their properties. Presumably, the plaintiffs could not realistically claim any substantial property value decrease because the properties could have been sold to individuals not suffering from pulmonary conditions for very close to fair market value. Thus, because the economic impact of the statute on the plaintiffs' properties was negligible, the second factor would also weigh in favor of the farmers.

In applying the third *Penn Central* factor, the Idaho Supreme Court would have likely found that the statute did not interfere with investment-backed expectations. As noted by the court, the farmers had "traditionally" burned their fields "as part of their farming activities."[192] Northern Idaho farmers had "used agricultural field burning as an effective means of clearing crop residue for over twenty years."[193] Thus, it is likely that most of the plaintiffs

190. David I. Stanish, Comment, *Will the Takings Clause Eclipse Idaho's Right-To-Burn Act?*, 40 IDAHO L. REV. 723, 727 (2004) (citing IDAHO CODE § 22-4803(3) (Michie Supp. 2003)).

191. *Id.* at 730 (citing Class Action Complaint at 3–10, Moon v. N. Idaho Farmers Ass'n, No. CV-2002-3890 (Idaho 1st Dist. Ct. June 10, 2002)).

192. *Moon*, 96 P.3d at 640.

193. Stanish, *supra* note 190, at 726 (citing IDAHO DEP'T OF ENVTL. QUALITY, 2001 NORTH IDAHO VOLUNTARY FIELD BURNING SMOKE MANAGEMENT PLAN 1 (2001)).

purchased their houses knowing that farmers burned their field stubble each fall. The court would likely find that it would be unreasonable for a homeowner to purchase a house in the area where such burning practices have been occurring for many years and expect that the wind would never blow some of the smoke over his or her property. Thus, the third factor would also weigh in favor of the farmers.

Thus, after applying the three factors of the *Penn Central* balancing test, the Idaho Supreme Court would have most likely found that all three factors weigh in favor of the farmers. The court would then have been able to determine with relative ease that the statute was a constitutional exercise of Idaho's police power and did not effect a regulatory taking of the plaintiffs' properties.

VII. ADVANTAGES OF USING THE *PENN CENTRAL* TEST

Had the Iowa Supreme Court used the *Penn Central* test in its analysis rather than the easement approach,[194] the court could have avoided many problems that resulted from its decision. This Part addresses some of the benefits that the *Bormann* court would have experienced using the *Penn Central* test. At the same time, this Part discusses why it would be advantageous for other courts to employ the *Penn Central* balancing test when facing takings challenges to right-to-farm laws in the future.

The first benefit of using the *Penn Central* test is that it more closely follows United States Supreme Court precedent for regulatory takings. Because right-to-farm statutes do not involve permanent physical invasion or complete deprivation of economic use, they are not per se takings.[195] Therefore, courts should analyze a right-to-farm takings challenge as a regulatory taking, and the *Penn Central* test is the "canonical standard for regulatory takings analysis."[196]

The second benefit of applying the *Penn Central* test would be to avoid the consequences that the *Bormann* rationale produced and

194. *See supra* text accompanying notes 95–104.

195. *See* Centner, *supra* note 1, at 117–28 (arguing that because there was no total economic deprivation or physical invasion, the *Bormann* court should have evaluated the right-to-farm statute under a regulatory taking analysis rather than a per se taking analysis); Beidel, *supra* note 13, at 180–83 (arguing that the *Bormann* court's use of the per se takings analysis was unwarranted and that the court's reliance on Supreme Court authority was misplaced).

196. Lawson et al., *supra* note 140, at 3.

may produce in the future.[197] As the *Harms* case shows, the *Bormann* rationale could be used to invalidate land use regulations, such as zoning laws,[198] that have long been considered constitutional and important to municipal development. The *Penn Central* test, on the other hand, can be easily applied to other land use regulations without such negative effects.

The third, and most important benefit, is that courts will be able to require compensation for right-to-farm statutes that go too far in modifying the common law of nuisance without invalidating *all* right-to-farm statutes. Applying the *Penn Central* test allows a court to determine when nuisance modification is outside "constitutional limits"[199] without affecting the majority of right-to-farm laws that constitutionally modify the common law. Courts could restrict state legislatures from unreasonably and unconstitutionally modifying the common law while still allowing the legislature to grant protection to farmers above the protection afforded by the common law.

VIII. CONCLUSION

Right-to-farm laws are a valuable tool used in protecting farmers from nuisance suits and thereby protecting valuable farmland. While the majority of right-to-farm laws are constitutional modifications of common law nuisance, some right-to-farm laws that provide expansive relief from nuisance suits may exceed constitutional limits and thus effect an unconstitutional taking of neighboring property. The Iowa right-to-farm law at issue in *Bormann* might well have been an example of a right-to-farm statute that went too far in modifying the common law. However, the *Bormann* rationale, which holds that nuisance immunity statutes create an easement over neighboring properties, leaves much to be desired. The *Bormann* rationale arguably did not follow the precedent of the United States Supreme Court, and, if adopted by other courts, could result in all right-to-farm laws and other land use regulations being held to be unconstitutional takings.

197. *See supra* Part III.C.

198. Harms v. City of Sibley, 702 N.W.2d 91, 95 (2005) (quoting the district court's holding).

199. Town of Grundy Ctr. v. Marion, 1 N.W.2d 677, 682 (Iowa 1942) (quoting Commonwealth v. Parks, 30 N.E. 174, 174 (Mass. 1892)).

By viewing right-to-farm laws as regulations of neighboring property and analyzing the laws under the *Penn Central* factors, the Iowa Supreme Court could likely have reached the same decision without the negative effects. Likewise, as other courts are faced with unconstitutional takings claims to right-to-farm laws, they can effectively distinguish between constitutional right-to-farm laws and those that exceed constitutional limits by applying the *Penn Central* test. The *Penn Central* test allows courts to strike a balance between legislative protection through a modification of the common law and legislative overprotection that unduly burdens neighboring property.

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