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## Gun Range Immunity: An Argument against Legalized Nuisance and Non-Governmental Takings

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GUN RANGE IMMUNITY: AN ARGUMENT AGAINST  
LEGALIZED NUISANCE AND NON-GOVERNMENTAL  
TAKINGS

Match Dawson\*

ABSTRACT

*People exhausted by the increasingly fast-paced life and loud noises of the big city will often seek refuge in the solitude of quiet country living. Perhaps naïve, the romantic thought of waking to the scenic views of an early morning sunrise burning an orange hue across the pasture or the sweet sounds of a Bachman's sparrow singing from the birdhouse placed neatly within view of the kitchen window is abruptly squashed when rural landowners fall victim to the excessively loud sport of outdoor firearm shooting.*

*Protecting rural landowners' rights to the quiet use and enjoyment of their property has been a bedrock of American jurisprudence for more than two hundred years. State legislatures, however, saw fit to erode this once revered protection by seemingly favoring the advancement of corporate enterprise and urban growth through the passage of immunity laws that provide gun range owners with legal protection against noise abatement claims, thereby leaving landowners desperate for relief from the unwavering sounds of war that such gun ranges produce. Viewed positively, immunity statutes make excessive noise from a gun range a legalized nuisance. Viewed critically, immunity statutes result in the state sponsoring of non-governmental actors freely wielding unconstitutional private takings against rural landowners.*

*This Article discusses issues faced by rural landowners, described herein as "disregarded victims," who were living in their homes or operating a business*

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*prior to a gun range establishing a nearby operation. This Article specifically argues for legislative reform to curtail the immunity so generously afforded to gun range operators and to provide a justiciable pathway for existing rural landowners to seek noise abatement relief through private claims.*

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## INTRODUCTION

For people living in urban environments, it is commonplace to hear a wide variety of city noises, ranging from loud construction sites and Saturday morning lawn mowers to emergency sirens. For many, these sounds are a comfort of home. But others exhausted by the increasingly fast-paced life and loud noises of the big city will often seek refuge in the solitude of quiet country living. Perhaps naïve, the romantic thought of waking to the scenic views of an early morning sunrise burning an orange hue across the pasture or the sweet sounds of a Bachman's sparrow singing from the birdhouse placed neatly within view of the kitchen window is abruptly squashed when a rural landowner realizes that this way of life is under attack by the excessively loud sport of outdoor firearm shooting.<sup>1</sup>

Country living and recreational firearm use have a long and relatively positive relationship.<sup>2</sup> It is common for rural landowners to hear occasional gunfire in the distance that tends to increase during open hunting seasons. The pressing issue is not concerned with a solitary neighbor's occasional recreational use of firearms but rather the resulting harms incurred when a gun range moves to rural areas where landowners have been rightfully enjoying the peace and quiet that they so desperately sought.

For those unacquainted with outdoor sport shooting, it is a common misconception that a gun range merely consists of—as it did fifty years ago—a bare patch of rural land, a small ticket counter, and a single self-serviced range where gun enthusiasts go to fill the time and blow off steam. Today, the modern gun range has evolved to be a well-oiled and technological machine that provides options for every kind of shooter ranging from handgun users and long-distance marksmen to professional ballistics training.<sup>3</sup> Some of these modern day ranges

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1. See generally David G. Cotter, *Shooting Sports Versus Suburban Sprawl-Is Peaceful Coexistence Possible?*, 15 T.M. COOLEY L. REV. 21 (1998) [hereinafter Cotter, *Suburban Sprawl*] (discussing the tension between rural landowners, outdoor shooting ranges, and nuisance law, specifically exploring Michigan authorities).

2. See generally David G. Cotter, *Outdoor Sport Shooting Ranges: An Endangered Species Deserving of Protection*, 16 T.M. COOLEY L. REV. 163 (1999) [hereinafter Cotter, *Outdoor Sport Shooting*] (discussing various legal protections for outdoor sport shooting ranges).

3. See, e.g., THE RANGE AT AUSTIN, <https://therangeaustin.com> (last visited Oct. 25, 2023) (advertising a state-of-the-art gun range and shooting sports facility that provides users with options ranging from machine gun rentals to tactical urban combat training); SHOOTERS WORLD, <https://shootersworld.com> (last visited Oct. 25, 2023) (advertising a membership-based gun range facility that provides members with three world class locations and provides

even provide tactical training resources for local law enforcement.<sup>4</sup> Gun range membership levels can be as small as just a handful of members<sup>5</sup> while other clubs may have hundreds.<sup>6</sup> Many gun ranges will regularly host national and international shooting competitions, such as skeet shooting, long-range rifle shooting, and assault rifle speed drills.<sup>7</sup> One can imagine the volume of sound emanating from a gun range while local police engage in urban combat drills with fully automatic weapons. Some of these events record up to 125 firearms discharged every twelve minutes,<sup>8</sup> culminating in thousands of rounds fired over the course of a multi-day competition.<sup>9</sup>

Since the turn of the century, outdoor gun range owners have faced increasing, and understandable, legal challenges due to environmental issues, safety concerns, and nuisance claims.<sup>10</sup> Much of the opposition directly results from rural development<sup>11</sup> and the seemingly never-ending expansion of suburbs across the United States (U.S.).<sup>12</sup> Part I evaluates the most common causes of

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services ranging from private firearm training to advanced ballistics); *see also* Aaron C. Dunlap, *Come on Feel the Noise: The Problem with Municipal Noise Regulation*, 15 U. MIA. BUS. L. REV. 47, 62 (2006) (discussing various sources, including shooting ranges, and challenges regarding local noise regulation in the United States).

4. *See* Kolstad v. Rankin, 534 N.E.2d 1373, 1375 (Ill. App. Ct. 1989); Woodsmall v. Lost Creek Twp. Conservation Club, Inc., 933 N.E.2d 899, 902 (Ind. Ct. App. 2010).

5. *See* Minn. Pub. Int. Rsch. Grp. v. White Bear Rod & Gun Club, 257 N.W.2d 762, 774 (Minn. 1977).

6. *See* Racine v. Glendale Shooting Club, Inc., 755 S.W.2d 369, 371 (Mo. Ct. App. 1988); Anne Arundel Cnty. Fish & Game Conservation Ass'n v. Carlucci, 573 A.2d 847, 848 (Md. Ct. Spec. App. 1990).

7. *See* Racine, 755 S.W.2d at 371–72; *see also* Dunlap, *Feel the Noise*, *supra* note 3, at 62.

8. *See* Davis v. Izaak Walton League of Am., 717 P.2d 984, 985 (Colo. App. 1985); Cotter, *Suburban Sprawl*, *supra* note 1, at 26.

9. *See, e.g.,* Smith v. W. Wayne Cnty. Conservation Ass'n 58 N.W.2d 463, 467 (Mich. 1968) (describing a big bore tournament in which eight-member teams would each discharge over three hundred rounds every hour); *see also* Cotter, *Suburban Sprawl*, *supra* note 1, at 28–34 (discussing *Smith*).

10. *See* Cotter, *Outdoor Sport Shooting*, *supra* note 2, at 163; *see also* Twp. of Ray v. B & BS Gun Club, 575 N.W.2d 63, 65–67 (Mich. Ct. App. 1997) (discussing both the historical development of Michigan's Sport Shooting Ranges Act that protects gun range immunity from certain nuisance actions, and the lack of relevancy of plaintiff's environmental allegations due to the repeal of the Environmental Protection Act of 1970).

11. *See* Cotter, *Suburban Sprawl*, *supra* note 1, at 21.

12. *See* Jed Kolko & Shawn Bucholtz, *America Really is a Nation of Suburbs*, BLOOMBERG (Nov. 14, 2018), <https://www.bloomberg.com/news/articles/2018-11-14/u-s-is-majority-suburban-but-doesn-t-define-suburb>. (presenting evidence that the United States is

action that landowners bring against gun range owners in their pursuit to find meaningful relief.

Although multi-generational American jurisprudence has long held that a landowner has an unalienated right to the enjoyment of their property that is free from defect and noise, numerous state legislatures seemingly favor the advancement of corporate enterprise and urban growth. Many states therefore maintain protective laws that insulate gun range owners from a wide range of criminal and civil actions and consequentially destroy the rights afforded to landowners for more than two hundred years.<sup>13</sup> Although a significant number of gun ranges have been impacted by court injunctions due to violations of state or local ordinances,<sup>14</sup> Part II examines broader immunity laws and how violations of state or local ordinances serve only as a temporary speed bump easily overcome once a gun range satisfies compliance requirements.

Setting aside the current political ideologies regarding firearms and the oft-argued constitutional rights afforded by the Second Amendment,<sup>15</sup> the conflict between gun range owners and their adjacent landowners is an ever-present tug-of-war between two competing interests with each pursuing their rights to use their respective property as they best see fit.

In fairness, both sides appear to have legitimate arguments. From the gun range owner's standpoint, ranges provide a benefit to the community in the form of legal recreation and training facilities—for both public and private use—and have a long tradition in the fabric of American history. However, gun range owners, whether intentionally or not, subject neighboring landowners to negative external obsolescence that can result in noise pollution, annoyance, fear of potential bodily harm, damage to property, trespass, and interference with a landowner's quiet use and enjoyment of their property, which all lead to depressed property values.

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now majority suburban); *see also* Kim Parker, Juliana Menasce Horowitz, Anna Brown, Richard Fry, D'Vera Cohn & Ruth Igielnik, *What Unites and Divides Urban, Suburban and Rural Communities*, PEW RSCH. CTR. (May 22, 2018), <https://www.pewresearch.org/social-trends/2018/05/22/demographic-and-economic-trends-in-urban-suburban-and-rural-communities> (finding that predominantly rural counties gained moderate to significant population growth since the 2000 U.S. census).

13. *See infra* Section II.A.

14. *See, e.g.*, *Fraser Twp. v. Linwood-Bay Sportman's Club*, 715 N.W.2d 89, 96 (Mich. Ct. App. 2006) (issuing an injunction to enjoin the use of handguns and rifles at a gun range); *see also* Cotter, *Suburban Sprawl*, *supra* note 1, at 22 (stating “[n]oise nuisance [litigation] is by far the most common attack leveled at shooting ranges”).

15. U.S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

When viewed through the perspective of a neighboring business owner, loud sounds—such as those produced by a nearby gun range—can lead to increased employee stress, interference with productivity, reduced concentration, and an increase in workplace accidents.<sup>16</sup> Take, for example, a child daycare operating for years before a new gun range opens on an adjoining lot. Not much mental wrangling is needed to imagine how a parent would be concerned about the health and safety of their child playing outside as the sound of constant gunfire echoes in the immediate distance and thus, to no fault of the daycare, decides to place their child with a competing daycare business. Part III addresses this dilemma further by discussing the problems associated with noise regulation and its failure to provide appropriate measures of relief for rural landowners negatively impacted by a nearby gun range's operation.

Throughout this Article, these rural landowners are referred to as “disregarded victims” to illuminate the arguably intentional act of state legislatures to expressly eliminate the legal rights of existing landowners to seek any meaningful redress through their passage of gun range immunity statutes. The negative consequences that landowners face due to the enactment of gun range immunity laws do not appear, on their face, to be a simple oversight by state legislators. While the imposition of these harsh new realities onto landowners may not be intentional, the resultant loss of serenity by so many living in rural areas is seemingly a casualty of directives that are instead focused on state legislatures' desires for business growth, corporate tax revenue, and urban expansion.<sup>17</sup>

Although the discussion of whether a gun range operation constitutes a private nuisance is not one of first impression, research seems to suggest that the issue has largely been confined to the challenges presented by urban sprawl<sup>18</sup>—that is, the issue of increasing urban expansion finding itself upon the doorstep of an *existing* rural gun range.<sup>19</sup> In contrast, this Article discusses the frustrations

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16. See *Occupational Noise Exposure*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/noise/health-effects> (last visited Oct. 25, 2023).

17. See ROBERT W. WASSMER, INFLUENCES OF THE “FISCALIZATION OF LAND USE” AND URBAN-GROWTH BOUNDARIES, CAL. S. OFFICE OF RESEARCH 24 (Jan. 2002) (discussing how the fiscalization of urban land use drives legislative policymaking focused on increasing tax revenue).

18. See David Snyder, *Gun Ranges' Slow Retreat*, THE WASH. POST (Oct. 1, 2001), <https://www.washingtonpost.com/archive/local/2001/10/01/gun-ranges-slow-retreat-3487260a-1518-46b7-a4e6-55a7ced6b81f/>.

19. See *Urban Sprawl*, BRITANNICA, <https://www.britannica.com/topic/urban-sprawl> (last visited Oct. 25, 2023) (“[Urban sprawl is defined as] the rapid expansion of the geographic extent of cities and towns, often characterized by low-density residential housing,



and issues experienced by existing rural landowners who, without receiving prior notice or providing their informed consent, involuntarily became neighbors to a newly established gun range. Part IV reviews selected cases that illustrate common challenges rural landowners endure when a gun range moves in next door and *brings the nuisance* to them.

Adopting the perspective of a disregarded victim, Part V provides potential solutions by arguing the need for legislative reform that is aimed at avoiding the issues commonly associated with non-governmental actors exercising an unconstitutional takings power. Legislative reform would provide justiciable remedies to those already living on rural land who, without receiving just compensation for their injuries, had their quiet solitude violently interrupted by the unwavering sounds of war emanating from a newly established neighboring gun range. Such legislative reform would both functionally provide a pathway for disparaged landowners to seek redress under traditional causes of action to ensure their constitutional property rights are protected while also protecting gun range owners' abilities to continue operating their respective businesses.

## I. EVALUATION OF CLAIMS

### A. *Types of Claims*

Litigation against gun range owners is most commonly brought for violations of state or local zoning ordinances,<sup>20</sup> such as failure to install an appropriate backstop to prevent bullet trespass onto adjacent properties<sup>21</sup> or breach of environmental laws related to lead use restriction.<sup>22</sup> In some instances, the lawsuits result in the permanent closure of the gun range,<sup>23</sup> a win for the landowner. However, permanent closure seemingly stems more from the gun range owner not having an appetite for continued litigation as opposed to a violation that would actually result in a permanent bar against gun range

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single-use zoning, and increased reliance on the private automobile for transportation. Urban sprawl is caused in part by the need to accommodate a rising urban population; however, in many metropolitan areas it results from a desire for increased living space and other residential amenities.”).

20. See *Kitsap Cnty. v. Kitsap Rifle & Revolver Club*, 337 P.3d 328, 340 (Wash. Ct. App. 2014).

21. See *Landolt v. Glendale Shooting Club, Inc.*, 18 S.W.3d 101, 106 (Mo. Ct. App. 2000); *Racine v. Glendale Shooting Club, Inc.*, 755 S.W.2d 369, 371 (Mo. Ct. App. 1988).

22. See *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.*, 624 N.W.2d 796, 806 (Minn. Ct. App. 2001).

23. See *Kolstad v. Rankin*, 534 N.E.2d 1373, 1374–75 (Ill. App. Ct. 1989).

activity.<sup>24</sup> For those living next to or near a gun range, private lawsuits, although commonly unsuccessful, generally assert claims for private nuisance,<sup>25</sup> trespass,<sup>26</sup> and private takings.<sup>27</sup> This Article examines and illuminates the deficiencies of each cause of action in terms of providing disregarded victims any form of meaningful relief.

### 1. Public v. Private Nuisance

Anyone who has experience in litigation knows that expenses can quickly spiral out of control, and for those who have not been party to lawsuits, this reality quickly becomes a hard-learned lesson. Many aggrieved landowners who wish to avoid drawn-out and expensive litigation will commonly seek refuge with their local governing officials first, demanding that the state and local noise ordinances be enforced.<sup>28</sup> Governmental agencies seeking to enforce such laws do so by criminal prosecution<sup>29</sup> or civil action<sup>30</sup> dependent on existing and relevant noise control laws. The most common statutes<sup>31</sup> enjoyed by gun range

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24. See Cotter, *Suburban Sprawl*, *supra* note 1, at 22.

25. See *infra* Section I.A.2.

26. See *infra* Section I.A.3.

27. See *infra* Section I.A.5.

28. See Cotter, *Outdoor Sport Shooting*, *supra* note 2, at 166. However, many states expressly prohibit local government from enacting noise ordinances related to gun ranges. See *infra* Part II (discussing state action that protects gun ranges from noise regulation and litigation).

29. See *State ex rel. Providence v. Auger*, 44 A.3d 1218, 1223 (R.I. 2012) (affirming lower court holding that defendant was guilty for violating city noise ordinance relating to radios, televisions, and similar devices); *N. Country Sportsman's Club v. Town of Williston*, 170 A.3d 639, 641 (Vt. 2017) (discussing township-issued citation to defendant gun range operator for violating local noise ordinance prohibiting "excessive or unreasonably loud noise that disturbs the peace of neighbors").

30. See *Barris v. Stroud Twp.*, 257 A.3d 209, 214–15 (Pa. Commw. Ct. 2021) (discussing landowner's appeal of lower court's dismissal of claims against township that determined landowner's use of their property as a gun range violated a local ordinance prohibiting the unauthorized discharge of a firearm).

31. See ALA. CODE § 6-5-341 (2023); ARK. CODE ANN. § 16-105-502 (2023); COLO. REV. STAT. § 25-12-109 (2022); GA. CODE ANN. § 41-1-9 (2022); IDAHO CODE § 55-2601 (2023); IND. CODE § 14-22-31.5-6 (2022); IOWA CODE § 657.9 (2023); LA. STAT. ANN. § 30:2055.1 (2023); ME. STAT. tit. 17, § 2806 (2023); MD. CODE ANN., CTS. & JUD. PROC. § 5-403.1 (West 2022); MONT. CODE ANN. § 76-9-101–105 (2021); NEV. REV. STAT. § 40.140 (2021); N.H. REV. STAT. ANN. § 159-B:2 (2023); N.J. STAT. § 13:1G-21.2 (2023); N.C. GEN. STAT. § 14-409.46 (2022); OKLA. STAT. tit. 63, § 709.2 (2022); OR. REV. STAT. § 467.131 (2022); 35 PA. STAT. § 4501 (2022); TENN. CODE ANN. § 39-17-316 (2022); TEX. LOC. GOV'T

owners provide for nearly complete immunity from criminal prosecution as well as civil liability based on noise levels or, more generally, noise pollution.<sup>32</sup>

If the landowner cannot get adequate assistance from their local officials, they can bring a lawsuit against the gun range owner for noise abatement under theories of public and private nuisance.<sup>33</sup> Public nuisance claims assert a violation of state or local noise ordinance laws that “affect[] an entire neighborhood or community.”<sup>34</sup> “Private nuisance affects only a single person or a determinate number of people”<sup>35</sup> and is predicated upon noise produced by a gun range that impairs the landowner’s quiet use and enjoyment of their property.<sup>36</sup> As discussed further in Section II.A, the most common immunity statutes protect gun range owners against private lawsuits based on noise nuisance as well as legal action by local officials.

While the sonic boom of a .50 caliber rifle or the sound of a belt-fed .308 light machine gun might be sounds of comfort to those enjoying the sport of firearm shooting, these sounds are arguably tantamount to nails scraping down a chalkboard for rural landowners living adjacent to the outdoor gun range, serving as the catalyst for litigation against gun ranges.<sup>37</sup> But despite the constant annoyance that outdoor gun ranges produce, gun range owners easily shield themselves under the generosity of legislative immunity and escape liability for noise-based claims.<sup>38</sup>

## 2. Private Nuisance

When a landowner “is menaced by noise, vibrations, or ambient dust, smoke, soot, or fumes, the possessory interest implicated is that of use and enjoyment, not exclusion, and the vehicle through which a plaintiff normally should seek a remedy is the doctrine of nuisance.”<sup>39</sup> The majority of private nuisance actions

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CODE ANN. § 250.001 (West 2021); UTAH CODE ANN. § 47-3-202 (West 2022); W. VA. CODE § 61-6-23 (2023); WYO. STAT. ANN. § 16-11-102 (2023).

32. See Cotter, *Outdoor Sport Shooting*, *supra* note 2, at 166.

33. See *id.* at 167.

34. *Wernke v. Halas*, 600 N.E.2d 117, 120 (Ind. Ct. App. 1992).

35. *Id.*

36. *Id.*

37. See Cotter, *Suburban Sprawl*, *supra* note 1, at 21–22.

38. See *infra* Section II.

39. *Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215, 222 (Mich. Ct. App. 1999).

The court’s recognition that a proper claim regarding the damage to a landowner’s use and enjoyment of their property rests in “the doctrine of nuisance” arguably serves to demonstrate the absurdity of states’ legislation barring landowners from bringing nuisance suits against gun range owner defendants. *Id.*

against gun ranges are based on noise and its negative effects on neighboring properties,<sup>40</sup> mainly asserting that gun range owners should be responsible for compensating the aggrieved landowner even when gun noise does not exceed legal limits.<sup>41</sup> This argument is premised on the notion that gun noise interferes with a nearby landowner's right to peacefully enjoy their land,<sup>42</sup> thereby creating an unreasonable interference with the private use of their affected property. For example, ranchers have complained of gun range noise causing stress and injury to their animals because gun shots can cause animals to panic and run into walls or fences.<sup>43</sup>

In order for noise to be reduced to an actionable claim of nuisance, the party asserting nuisance must establish a "condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it."<sup>44</sup> Courts will consider a number of factors when analyzing a nuisance claim, including the land usage involved in the interference, location, character of the affected neighborhood, and to what degree others are engaged in similar activity.<sup>45</sup> Additional factors include the extent, degree, frequency, and duration of the interference.<sup>46</sup> After considering these factors, courts will weigh them against the interests of the public and community at large.<sup>47</sup> The two main requirements of nuisance claims include (1) substantial interference and (2) an unreasonable discomfort or annoyance.<sup>48</sup>

Requiring *substantial* interference arguably demonstrates legislators' attempts to make it clear that nuisance regulation is not intended to protect

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40. See discussion *infra* Section V.

41. See discussion *infra* Section II.A (discussing how Oklahoma's statute may lead to permanent hearing loss).

42. See discussion *infra* Section V.

43. See *Little v. Winborn*, 518 N.W.2d 384, 385 (Iowa 1994); *In re Wade*, 566 S.W.3d 375, 378 (Tex. App. 2018) (regarding plaintiffs' allegations that discharge from a nearby gun range frightened their horses); Carlos Cristian Flores, *Oconee Co. Residents Raise Concerns of Local Gun Range Leaving Neighbors with Limited Options*, NBC WYFF4 (May 5, 2022), <https://www.wyff4.com/article/oconee-residents-concerns-gun-range-neighbors/39910156#> (discussing a landowner's concern that the noise produced by a nearby gun range will cause panicked horses to run through fences).

44. *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 593 (Tex. 2016) (citing *Holubec v. Brandenberger*, 111 S.W.3d 32, 37 (Tex. 2003)); *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 269 (Tex. 2004) (citing *Holubec*, 111 S.W.3d at 37).

45. See *Crosstex*, 505 S.W.3d at 600.

46. *Id.*

47. *Id.*

48. *Id.*

landowners from everyday disturbances or minimal annoyances. However, even if a landowner can establish the nuisance rose to the level of a substantial interference, unreasonable discomfort or annoyance must also be found to successfully claim nuisance.<sup>49</sup> Landowners who carry this burden against gun range owners face a nearly insurmountable hurdle when states such as Oklahoma pass noise immunization laws at absurd decibel levels,<sup>50</sup> thus implying that decibel levels of firearm discharge recorded below the state's threshold do not rise to an *unreasonable* discomfort or annoyance.

Most importantly, a nuisance must be a “type of legal injury that can support a claim or cause of action seeking legal relief.”<sup>51</sup> Nuisance is defined as “a type of injury that the *law has recognized* can give rise to a cause of action because it is an invasion of a plaintiff's legal rights.”<sup>52</sup> For landowners residing in states with gun range immunity laws, this recognition requirement results in landowners' nuisance lawsuits being dead on arrival.<sup>53</sup> Because the respective states expressly provide by statute that harms resulting from the unreasonable noise produced by a gun range is not a cause of action capable of relief, such landowners do not have standing to assert claims against gun range owners. Said differently, the noise obsolescence suffered by a neighboring landowner is not recognized as a compensable injury, thus leaving the burdened landowner without a starting line to even bring a claim. It begs the question—if nuisance is recognized as the proper cause of action for noise complaints<sup>54</sup> but states with immunity laws expressly exempt gun ranges from private nuisance claims based on noise pollution, what then is the proper cause of action?

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49. *Id.*

50. OKLA. STAT. tit. 63, § 709.2 (2023) (prohibiting governmental agencies and private individuals from bringing a lawsuit or seeking any claim for relief against a shooting range or its owner based upon noise emanating from the shooting range, provided that the noise does not exceed 150 decibels).

51. *Crosstex*, 505 S.W.3d at 594; *see also* *City of Tyler v. Likes*, 962 S.W.2d 489, 504 (Tex. 1997) (quoting William Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 416 (1942)) (noting that private nuisance is “a kind of damage done, rather than any particular type of conduct”); WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 594, 594 (3d ed. 1964) (stating that private nuisance “has reference to the interests invaded, to the damage or harm inflicted, and not to any particular kind of act or omission which has led to the invasion”).

52. *Crosstex*, 505 S.W.3d at 594 (emphasis added); *see also* *Atkins v. Crosland*, 417 S.W.2d 150, 153 (Tex. 1967) (quoting 54 C.J.S. *Limitations of Actions* § 168 (2005)) (stating that “the statute of limitations begins to run against an action sounding in tort” if “the act causing the damage . . . constitute[s] a legal injury”).

53. *See* Cotter, *Outdoor Shooting Sport*, *supra* note 2, at 167.

54. *See* *Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215, 216 (Mich. Ct. App. 1999).

Further, many states preemptively restrict local municipalities from enacting noise ordinances that regulate gun ranges thus leaving the responsibility solely to the state legislature.<sup>55</sup> Although Texas permits municipalities to regulate the discharge of firearms within the limits of the municipality, the state has an explicit preemption statute that prohibits municipalities from adopting any regulation relating to the discharge of a firearm *at a gun range*.<sup>56</sup> In addition, “[a] governmental official may not seek a civil or criminal penalty against a sport shooting range or its owner or operator based on the violation of a municipal or county ordinance, order, or rule regulating noise if (1) the sport shooting range is in compliance with the applicable ordinance, order, or rule; or (2) no applicable noise ordinance, order, or rule exists.”<sup>57</sup>

Texas also preempts a municipality’s ability to regulate the hours of a gun range’s operation beyond the restrictions of business operating hours that apply to non-firearm businesses within the municipality.<sup>58</sup> Thus, as long as the gun range is otherwise in compliance, it is permitted to operate eight hours a day, seven days a week, between the hours of 7:00 A.M. to 10:00 P.M. In other words, the gun range is lawfully permitted to subject its neighbors to the sounds of unwavering gunfire for 105 hours out of every 168-hour week or approximately 63% of every day. With such broad protection, there is no ample relief for those living or operating a business within close vicinity of an outdoor gun range.

On a private level, Texas law also prohibits a civil action against a gun range owner for recovery of private nuisance damages that result from the discharge of firearms<sup>59</sup> so long as the gun range is otherwise “in compliance with all applicable municipal and county ordinances, orders, and rules regulating noise [if any].”<sup>60</sup> Further, many states have failed to adopt any maximum decibel level

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55. See, e.g., TEX. LOCAL GOV’T CODE ANN. § 229.001(a)(3) (West 2023) (“[A] municipality may not adopt regulations relating to: . . . (3) the discharge of a firearm or air gun at a sport shooting range.”).

56. *Id.*

57. TEX. LOC. GOV’T CODE ANN § 225.001(b), (c) (West 2023) (prohibiting a governmental official or private person from bringing a nuisance or similar cause of action against a sporting range that “is in compliance with all applicable municipal and county ordinances,” or “if no applicable noise ordinance . . . exists”).

58. See TEX. LOC. GOV’T CODE § 229.001(b)(7) (West 2023).

59. TEX. CIV. PRAC. & REM. CODE § 128.052(a) (West 2011) (“[A] civil action may not be brought against a sport shooting range, the owner or operator of a sport shooting range, or the owner of the real property on which a sport shooting range is operated for recovery of damages resulting from, or injunctive relief or abatement of a nuisance relating to, the discharge of firearms.”).

60. TEX. LOC. GOV’T CODE ANN § 250.001(c) (West 2023) (“A person may not bring a nuisance or similar cause of action against a sport shooting range based on noise: (1) if the

ordinances that would apply to gun ranges at all,<sup>61</sup> or went so far as to expressly exempt gun ranges from any reasonable noise regulation.<sup>62</sup> Thus, a landowner wishing to find relief under a private nuisance claim is quickly faced with closed doors and a wall of despair. Provided that the gun range is engaged in lawful operation, the owner-operator can be shielded from any and all private noise complaints.

For those landowners residing in states that regulate gun range noise production,<sup>63</sup> it remains inequitable for them to be involuntarily subjected to the constant noise of a gun range that is otherwise operating within the statutorily prescribed decibel level. If existing landowners have no power to stop a nearby gun range owner from operating its business at any hour every day of the week, the respective legislatures seemingly suggest that these disregarded victims must suffer from all noise levels—even those that are *legally acceptable but otherwise excessive*. Just as any reasonable person would not enjoy being subjected to loud rock music that otherwise adheres to the local noise ordinance yet emanates from their neighbor's garage ten hours a day, seven days a week, the same holds true for a neighboring landowner who is subjected to the constant sounds of gunfire at lawfully acceptable decibel levels.

Notably, private nuisance claims are not limited to noise pollution. Landowners have brought nuisance claims against gun range owners over other concerns such as stray bullets from a gun range leading to property damage or personal injury<sup>64</sup> or restricting the landowner's use of their property due to the fear that they, or a family member, will be harmed by a bullet. Although a hazard that causes a landowner to be in "constant fear for the safety of his life or property

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sport shooting range is in compliance with all applicable municipal and county ordinances, orders, and rules regulating noise; or (2) if no applicable noise ordinance, order, or rule exists.”).

61. Research for this Article demonstrated only a minority of states have adopted statutes that restrict the maximum decibel level a gun range may lawfully produce. *See, e.g.*, ARIZ. REV. STAT. ANN. § 17-602 (2011) (stating that noise produced by an outdoor gun range shall not exceed sixty-four decibels when such gun range is located near certain residential areas); CAL. CIV. CODE § 3482.1 (West 2023) (restricting nighttime shooting to sixty decibels or below); MINN. STAT. § 87A.05 (2023) (allowing noise levels for a gun range according to specific metrics to each noise area's classification); OKLA. STAT. tit. 63, § 709.2 (2023) (limiting civil and criminal nuisance claims as long as noise produced by a gun range does not exceed 150 decibels); N.Y. GEN. BUS. LAW § 150 (McKinney 2023) (implementing a weighted decibel system not to exceed ninety decibels).

62. *See* Cotter, *Outdoor Sport Shooting*, *supra* note 2, at 167, 172.

63. *See id.* at 168 (citing to state statutes that regulate the maximum decibel level of a gun range).

64. *See* Layton v. Ball, 396 S.W.3d 747, 750 (Tex. App. 2013).

is such a serious interference so as to constitute a private nuisance,<sup>65</sup> to be reasonably justified, a plaintiff's fear must be based upon more than speculation.<sup>66</sup> Determining what constitutes "more than speculation," however, does not appear to be statutorily defined. Unfortunately, clearing the speculation hurdle may either require tragedy for a rural landowner or evidence that a gun range's patron was, albeit unknowingly, dancing on the razor's edge of inflicting such tragedy. Perhaps, for example, photographs of bullet holes through a dining room window, carcasses of livestock killed by errant rounds, or a stray bullet removed from the stud in a newborn's nursery would suffice.

Safety-based private nuisance claims are more common where there is not a required buffer zone<sup>67</sup> between the gun range and neighboring landowners. In these cases, courts will consider whether the gun range is in compliance with local and state ordinances by being equipped with safety devices such as natural or manmade berms and backstops.<sup>68</sup> Other considerations may include the local topography, physical orientation of the gun range in relation to the neighboring landowner, construction guidelines from the National Rifle Association's (NRA) *Range Source Book*,<sup>69</sup> or whether the gun range limits patrons to using handguns as opposed to permitting rifle use through which bullets travel a substantially farther distance.<sup>70</sup>

However, should the gun range be found in violation of local or state ordinances, the neighboring landowner's remedy is most often limited to a simple temporary injunction that at least provides the landowner with some relief

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65. *Hays v. Hartfield L-P Gas*, 306 N.E.2d 373, 376 (Ind. Ct. App. 1974) (citing *Tyner v. People's Gas Co.*, 31 N.E. 61, 62 (Ind. 1892)).

66. *Id.* at 376 ("[M]ere fear or apprehension of danger caused by the presence of fuel storage tanks, without more, is not a sufficient basis to establish a nuisance.")

67. *See Pacurariu v. Commonwealth*, 744 A.2d 389, 394 (Pa. Commw. Ct. 2000) (defining a buffer or "safety zone" as the area within a 150-yard radius of a gun range); *see also* MINN. STAT. § 87A.03(6) (2023) (requiring gun range owners to acquire additional land to establish a sufficient buffer zone).

68. *See* John R. Remakel, *A Minnesota Armistice? The Enactment and Implementation of the Minnesota Shooting Range Protection Act*, 31 *HAMLIN L. REV.* 197, 203 (2008); *Haines v. Lapeer Cnty. Sportsmen's Club*, No. 183269, 1996 WL 33360714, at \*1 (Mich. Ct. App. Aug. 9, 1996) (discussing court's consideration of the plaintiffs' argument as to issue of whether the use of metal backstops was sufficient to reduce danger of bullet ricochet).

69. *See* NAT'L RIFLE ASS'N, *THE RANGE SOURCE BOOK: A GUIDE TO PLANNING & CONSTRUCTION* (1999) (providing generally accepted construction guidelines—such as the placement of backstops, the use of natural topography, and other safety protocols—to assist with adhering to state and local safety regulations).

70. *See* *Racine v. Glendale Shooting Club, Inc.*, 755 S.W.2d 369, 372 (Mo. Ct. App. 1988); *Kolstad v. Rankin*, 534 N.E.2d 1373, 1377; *see also*, Remakel, *supra* note 68, at 223.



from the offensive noise—albeit for a short period of time.<sup>71</sup> Upon the gun range’s satisfaction of the zoning requirements, users are once again permitted to discharge firearms and the landowner is left with little to no permanent relief. Unfortunately, for a landowner to obtain any form of meaningful relief under a private nuisance claim, the landowner must prove some harm other than the occurrence of noise pollution such as damage to property, injury,<sup>72</sup> or trespass.<sup>73</sup> Seemingly, legislatures do not feel that excessive noise rises to a compensable harm even though, as discussed in Section II.A, continual exposure to unacceptable noise levels may result in health-related injuries.<sup>74</sup>

### 3. Trespass

Trespass is another action landowners may assert. However, it provides only indirect relief from the main issue of noise pollution. Trespass is defined as “the unauthorized entry upon the land of another by a person or an object as a result of a person’s actions, regardless of the amount of force used or the amount of damage done.”<sup>75</sup> However, a landowner asserting trespass must prove more than an encroachment of noise.<sup>76</sup> Trespass is a proper action only when a gun range owner fails to prevent bullets from being retained on the gun range’s property.<sup>77</sup> Absent a showing of actual injury to persons or property, trespass claims against gun range owners have proven particularly challenging for adjacent landowners. For example, even if a stray bullet ultimately lands on an adjacent property, it

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71. See, e.g., *Sara Realty, LLC v. Country Pond Fish & Game Club, Inc.*, 972 A.2d 1038, 1041 (2009) (holding for a gun range owner on the grounds that the nuisance abatement action was barred pursuant to statutes prohibiting noise-related nuisance claims against shooting ranges); *Layton v. Ball*, 396 S.W.3d 747, 750 (Tex. App. 2013) (reviewing trial court’s issuance of temporary injunction prohibiting gun range operation until such time the owner complied with safety regulations).

72. See *Citizens for a Safe Grant v. Lone Oak Sportsmen’s Club, Inc.*, 624 N.W.2d 796, 804–05 (Minn. Ct. App. 2001).

73. Research for this Article did not result in the identification of a single case of noise pollution constituting trespass. See *infra* Section I.A.3 (discussing trespass as a potential claim, albeit only for temporary relief, for disregarded victims of a gun range’s meandering bullets).

74. See discussion *infra* Section II.A (discussing the negative health effects of exposure to excessive noise).

75. *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 455 n.2 (Mo. 2011) (quoting *Rychnovsky v. Cole*, 119 S.W.3d 204, 211 (Mo. Ct. App. 2003)).

76. *Id.* at 454.

77. *Id.*

would be extremely difficult to prove that the bullet causing harm did, in fact, originate from the gun range.<sup>78</sup>

However, given the ultrahazardous nature of firearm shooting,<sup>79</sup> if it can be established that bullets originating from the gun range damaged an affected landowner's property, then courts will issue temporary injunctions until proper measures have been implemented to prevent stray bullets.<sup>80</sup> In some limited situations, courts will order permanent injunctions for continued violations.<sup>81</sup> Out of an abundance of caution, injunctive relief, whether temporary or permanent, is almost certain when the landowner can establish that bullets originating from the gun range caused personal injury, harm to livestock,<sup>82</sup> or property damage.<sup>83</sup> But, as noted above, in most instances landowners enjoy only limited relief until the gun range owner proves their compliance with state and local safety regulations, at which time the gun range may re-enter operation and resume creating noise pollution.

#### 4. Private Takings—A Brief History

Although the U.S. Constitution does not expressly grant eminent domain power to the federal government, the Takings Clause of the Fifth Amendment expressly provides for the payment of “just compensation” when private land is subject to condemnation,<sup>84</sup> evidencing that a takings power was intended to be

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78. See *Woodsmall v Lost Creek Twp Conservation Club, Inc.*, 933 N.E.2d 899, 904 (Ind. Ct. App. 2010).

79. See *Vermillion v. Pioneer Gun Club*, 918 S.W.2d 827, 832 (Mo. Ct. App. 1996) (citing *Lee v. Hartwig*, 848 S.W.2d 496, 500 (Mo. Ct. App. 1992)) (observing that, generally, defendants in negligence suits are held to lower an ordinary standard of care, whereas defendants in negligence suits dealing with firearms are held to a very high degree of care).

80. See *Fraser Twp. v. Linwood-Bay Sportsman's Club*, 715 N.W.2d 89, 91 (Mich. Ct. App. 2006).

81. See *Skyway Trap & Skeet Club, Inc. v. Sw. Fla. Water Mgmt. Dist.*, 854 So. 2d 676, 679 (Fla. Dist. Ct. App. 2003) (holding a gun range in contempt for continued trespass in violation of a court order that enjoined the discharge of firearms on wetlands).

82. See *Spirit Ridge Mineral Springs, LLC v. Franklin Cnty.*, 337 P.3d 583, 584 (Idaho 2014) (regarding a gun range that was temporarily closed by county mandate for a determination of whether stray bullets that killed plaintiff's horses had originated from the defendant's gun range).

83. See *Vermillion*, 918 S.W.2d at 830 (finding that stray bullets allegedly originating from defendant's gun range impacted plaintiff's house and surrounding trees).

84. U.S. CONST. amend. V; see also *First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 322 (1987) (holding that the Fifth Amendment does not prohibit taking of private property for public use, but rather places conditions on such

within the scope of federal powers. Further, the Constitution does not restrict state condemnation,<sup>85</sup> having been adopted in state constitutions across the country.<sup>86</sup> Arkansas, for example, holds property rights “before and higher than any constitutional sanction” and provides that “private property shall not be taken, appropriated or damaged for public use, without just compensation therefor.”<sup>87</sup>

Eminent domain—the power to seize property without requiring the owner’s consent—is often regarded as the most intrusive government power, only to be exercised by a sovereign body when necessary for the advancement of public needs.<sup>88</sup> Physical takings occur when a governmental body has taken actual possession of property without first acquiring title to it.<sup>89</sup> A regulatory taking occurs when the government’s conduct, or a statute, unreasonably interferes with a property owner’s use and enjoyment of their property.<sup>90</sup>

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taking); *Jacobs v. United States*, 290 U.S. 13, 16 (1933) (holding that Fifth Amendment creates duty to pay for property taken by the U.S. government); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 331–32 (1922) (holding that taking of private property by United States creates a contract between the U.S. government and the property owner that requires payment for property taken).

85. *Kelo v. City of New London*, 545 U.S. 469, 482–83 (2005); see Abraham Bell, *Private Takings*, 76 U. CHI. L. REV. 517, 525 (2009) (providing a historical analysis of eminent domain and private takings); see also *City of Houston v. Boyle*, 148 S.W.3d 171, 178 (Tex. App. 2004) (explaining that a governmental agency exercises its power of eminent domain through the process of condemnation); *Villarreal v. Harris Cnty.*, 226 S.W.3d 537, 542 (Tex. App. 2006) (defining condemnation as the procedure by which the state exercises its right to take property of a private owner for public use, without consent, upon the payment of just compensation).

86. See Harry N. Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States 1789–1910*, 33 J. ECON. HIST. 232, 235 (1973); see also Harry N. Scheiber, *The Jurisprudence—and Mythology—of Eminent Domain in American Legal History*, in LIBERTY, PROPERTY, AND GOVERNMENT: CONSTITUTIONAL INTERPRETATION BEFORE THE NEW DEAL 217, 222–223 (Ellen Frankel Paul & Howard Dickman, eds. 1989) (discussing the federal allowance for state level takings power); Bell, *supra* note 85, at 525 (discussing how the U.S. Constitution does not prohibit adoption of takings power into state constitutions).

87. ARK. CONST. art. II, § 22.

88. See generally RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN I* (Harv. Univ. Press 1985) (discussing permissible and impermissible private takings and the limits that Fifth Amendment places on the government to protect private property).

89. See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071 (2021).

90. See *City of Lorena v. BMTP Holdings, L.P.*, 409 S.W. 3d 634, 644 (Tex. 2013); see also Emilio R. Longoria, *The Case for the Rodeo: An Analysis of the Houston Livestock Show and Rodeo’s Inverse Condemnation Case Against the City of Houston*, 52, ST. MARY

To properly plead a regulatory takings claim, the plaintiff must assert that (1) a government has acted intentionally, (2) the government's action resulted in the uncompensated taking of private property, and (3) the taking was for a public use.<sup>91</sup> Although governmental takings have been generally accepted, albeit begrudgingly on behalf of those subjected to the taking, there are numerous cases that espouse the common but incorrect assumption that the U.S. legal system does not provide for "private" takings.<sup>92</sup> This Article defines private takings as acts of eminent domain carried out by non-governmental agencies. Contrary to the long-held belief that only governmental agencies can exercise a takings power, private takings by non-governmental agencies have a long and storied history in the U.S. legal system.

In the late 1800s and early 1900s, as Americans ventured west to tame the wild frontiers and the Great Migration to the Pacific Coast began, railroads were granted state power to seize private land that encroached on the route intended for the construction of the rail line.<sup>93</sup> Under general Mills Act legislation already adopted by several states throughout the United States,<sup>94</sup> agricultural operators were authorized to take private land for the construction of new mills.<sup>95</sup> In an additional effort to advance the mill industry, the Mills Act state legislation also authorized riparian owners to dam waterways in order to power the newly

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L.J., 125, 138–142 (2020) (arguing that the government-forced closure of an economically impactful livestock show in Texas to prevent the spread of the coronavirus disease was a permissible regulatory taking).

91. See *State v. Hale*, 146 S.W.2d 731, 736 (Tex. 1941) (observing whether acts by a government agency were intentional in regards to a taking of property); see also *Barto Watson, Inc. v. City of Houston*, 998 S.W.2d 637, 640 (Tex. App. 1999) ("To recover on an inverse condemnation claim, a property owner must establish that (1) the State . . . intentionally performed certain acts (2) that resulted in the taking . . . of owner's property (3) for public use.").

92. See, e.g., *Miller & Lux v. Enter. Canal & Land Co.*, 147 P. 567, 577 (Cal. 1915) (holding that a private corporation was entitled to the continued operation of a canal that impeded on the riparian rights of lower landowners); *Conaway v. Yolo Water & Power Co.*, 266 P. 944, 948 (Cal. 1928) (holding that a private corporation exercising eminent domain over a watershed must adequately compensate landowners subjected to the condemnation).

93. See, e.g., *Holbert v. St. L., K. C. & N. R. Co.*, 45 Iowa 23, 26 (1876) (holding that "the authority to take land for the right of way for railroads is conferred by" statute "and must be exercised" accordingly).

94. See *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 16–19 (1885) (providing a list of the Mills Act legislation adopted by various states from the late 1700s through the date of the opinion).

95. See, e.g., *Scudder v. Trenton Delaware Falls Co.*, 1 N.J. Eq. 694, 708 (N.J. Ch. 1832) (holding that "[p]rivate property may be taken for a private corporation, when the object is for public use . . . [and if] a corporation is calculated, or intended, to produce public benefit, then it is public in its nature, and for public use").

constructed mills, resulting in the flooding of neighboring land.<sup>96</sup> In some instances, corporations deemed to provide a necessary “public good” maintained state-granted takings power in their corporate organizational charters.<sup>97</sup> By the early 1900s, every state in the country had delegated a takings power in some form,<sup>98</sup> subject to the due process and compensation requirements set forth in the Fourteenth Amendment,<sup>99</sup> to privately held companies. State-delegated takings powers authorized private companies to condemn privately owned land deemed necessary for a public good such as for the construction of bridges, canals, and related infrastructure.<sup>100</sup>

By the turn of the twentieth century, the state delegation of takings power to non-governmental agencies became increasingly unpopular and many states began to narrow the circumstances under which landowners could be deprived of their property.<sup>101</sup> Nonetheless, to this day, states continue to empower private companies to exercise condemnation power. For example, Alabama authorizes private electric companies to exercise eminent domain power for the construction, maintenance, and expansion of electrical utilities throughout the state.<sup>102</sup> Alabama extends the same takings power to private satellite system

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96. *See, e.g., id.* at 720 (observing that the “proceedings of the defendants are sought to be justified under the act of incorporation already mentioned, giving them authority to create a waterpower . . . [and providing] the mode to be pursued by the company in surveying, appropriating and acquiring title to such lands and property as may be necessary for the purposes of their grant”).

97. *See, e.g., Eppley v. Bryson City*, 73 S.E. 197, 197 (N.C. 1911) (providing that the state’s 1911 act granted eminent domain power to a corporation for the purposes of owning and operating an electrical plant).

98. *See Bell, supra* note 85, at 545.

99. *See Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 239 (1897) (holding that under the “[F]ourteenth [A]mendment, compensation for private property taken for public uses constitutes an essential element in ‘due process of law,’ and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the [U.S. Constitution]”).

100. *See Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 16 (1885).

101. *See, e.g., In re Niagara Falls & W. Ry. Co.*, 15 N.E. 429, 432 (N.Y. 1888) (striking down utility provider’s takings power because of Court of Appeals of New York’s narrowing view of what constitutes public use); *Ryerson v. Brown*, 35 Mich. 333, 346 (1877) (holding that even though the water utility provided a public use, utility provider’s takings power was not necessary to further the public good and thus struck down); *see also, Bell, supra* note 85, at 545 (providing examples of states’ retraction on the delegation of private takings power).

102. ALA. CODE 1975 § 37-6-3 (2023) (“[Private electric companies are authorized to] exercise the power of eminent domain in the manner provided by the laws of this state for the exercise of that power by corporations constructing or operating electric generating, transmission, or distribution lines, or systems; and, in the construction and operation of water

operators as well as private operators of water containment and sanitation systems.<sup>103</sup>

Similarly, Arkansas, Indiana, Oklahoma, and Texas adopted legislation that authorizes private actors to exercise eminent domain power.<sup>104</sup> Other states have expanded the power of private condemnation by allowing mining and logging operators to exercise their private takings power to condemn land to build roads and rail lines for the transportation of goods,<sup>105</sup> or even granting such power to private actors simply wanting to transport water for irrigation purposes.<sup>106</sup> In

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systems and sanitary sewer systems and television reception systems through the use of television program decryption equipment and subscriber owned, leased or rented satellite dishes, to exercise the power of eminent domain in the manner provided in Title 18.”).

103. *Id.*

104. *See, e.g.,* Ark. Power & Light Co. v. Harper, 460 S.W.2d 75, 76 (Ark. 1970) (recognizing that company that exercised eminent domain power over twenty-six acres of privately owned land for the construction of electrical tower lines had power to take private property); Hagemeyer v. Ind. & Mich. Elec. Co., 457 N.E.2d 590, 594 (Ind. Ct. App. 1983) (“Even if an electric utility can acquire an ingress-egress easement by necessity for a transmission line, statutory eminent domain requirements applicable to the actual easement must prevail in relation to utility’s right to clear condemnees’ land.”); McInturff v. Okla. Natural Gas Transmission Co., 475 P.2d 160, 161 (Okla. 1970) (holding that landowner was not entitled to any damages in “[c]ondemnation proceeding commenced by Oklahoma Natural Gas Transmission Company for the purpose of determining the amount of damages . . . as the result of the condemnor’s taking, under eminent domain, of a right-of-way, [sixty-six] feet in width and 3,383 feet in length, across a described governmental survey quarter-section of land in Okmulgee County for the construction, operation, and maintenance of a [twenty-two]-inch gas pipe line”); Aqua Aquila Sw. Pipeline Corp. v. Gupton, 886 S.W.2d 497, 499 (Tex. App. 1994) (recognizing appellant as a gas utility was “vested with the power of eminent domain to acquire easements and rights-of-way to construct, operate, and maintain natural gas pipelines”).

105. *See, e.g.,* OR. REV. STAT. § 772.410 (2023) (“Any corporation organized for the purpose of opening or operating any gold, silver, or copper vein or lode, or any coal or other mine, or any marble, stone or other quarry, or for cutting or transporting timber, lumber, or cordwood, or for the manufacture of lumber: . . . [m]ay condemn so much of said land as may be necessary for the purposes of this section, not exceeding 60 feet in width by a condemnation action as prescribed by ORS chapter 35.”).

106. *See, e.g.,* COL. REV. STAT. § 37-86-104(1) (2023) (“Upon the refusal of owners of tracts of land through which said right-of-way is proposed to run, to allow passage through their property, the person desiring such right-of-way may proceed to condemn and take . . . .”); UTAH CODE ANN. § 73-1-6 (West 2023) (“Any person shall have a right of way across and upon public, private and corporate lands, or other rights of way, for the construction, maintenance, repair and use of all necessary reservoirs, dams, water gates, canals, ditches, flumes, tunnels, pipelines and areas for setting up pumps and pumping machinery or other means of securing, storing, replacing and conveying water for domestic, culinary, industrial and irrigation purposes or for any necessary public use, or for drainage, upon payment of just compensation therefor . . . .”).

delegating these powers to private actors, states are essentially positioning these non-governmental agencies to be the sole arbiters as to what land should be subject to their private takings power. A discussion of the inherent conflict of interest that this scheme produces is outside the scope of this Article, but it is worth noting that such a conflict exists when states permit these private actors to be the beneficiaries of the very takings that they exercise.

At the very least, immunity laws that bar landowners from seeking any justiciable relief unquestionably rise to an unconstitutional regulatory taking. If viewed from the perspective of a rural landowner whose right to use their property free from defect and excessive noise has been condemned, the real-life consequences of legislative immunity arguably results in a physical taking. Thus, states that enact laws immunizing gun range owners from noise abatement claims are effectively granting gun range owners with a private takings power. When this power can be wielded without any concern for liability, including money damages for taken property, it becomes hard to conclude that this scheme is anything other than an unconstitutional state-sponsored private takings program.

## 5. Unconstitutional Private Takings

As previously discussed, there are two fundamental limitations on the exercise of condemnation powers. First, the takings power may only be exercised for the advancement of a “public use.”<sup>107</sup> Second, “just compensation” must be paid to the owner of the property.<sup>108</sup>

### a. The Public Use Requirement

Under federal law, a constitutional taking requires a public use before property may be taken from a private owner.<sup>109</sup> Absent a public use, a “taking cannot be constitutional even if compensated.”<sup>110</sup> To establish that a taking has a legitimate public use, the government only needs to establish that the taking would be constitutionally permissible under the Public Use Clause of the

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107. U.S. CONST. amend. V (“[O]r shall private property be taken for public use, without just compensation.”).

108. *Id.*

109. *See Berman v. Parker*, 348 U.S. 26, 31 (1954).

110. *Armendariz v. Penman*, 75 F.3d 1311, 1320 n.5 (9th Cir. 1996); *see also Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 185-86 (1985), *overruled on other grounds by Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162 (2019) (holding that damages award for temporary interference with developer’s property due to zoning ordinance and regulations was premature because final decision had not been reached as to application of regulations to property).

Constitution.<sup>111</sup> Unfortunately, the bar that determines “public use” is low since courts liberally find for public use, even if that public use requires the property to be transferred to a private beneficiary.<sup>112</sup> For example, the U.S. Supreme Court made abundantly clear that the government’s transfer of taken property to a private beneficiary is not unconstitutional under the Public Use Clause,<sup>113</sup> leaving little uncertainty to the lack of weight the clause actually imposes. Thus, provided that “the exercise of the eminent domain power is rationally related to a conceivable public purpose,” courts will uphold the takings power regardless if it benefits, or was intended to benefit, a private actor.<sup>114</sup>

Courts will generally not undermine or question legislative judgment on what constitutes the best interests of the public or how to best serve public welfare unless the use is “palpably without reasonable foundation.”<sup>115</sup> Because there are few, if any, constitutional restrictions on the takings power of private actors deemed to be effectuating a public good, such as gun range owners, the Public Use Clause<sup>116</sup> places few restrictions on the actual exercise of this power, thus serving as a silver platter to effectuate legislators’ intent to protect the rights of gun range owners at the collective expense of rural landowners.<sup>117</sup> Operating under the protection of a statutory get-out-of-jail-free card, gun range owners enjoy a state-sponsored private takings power, effectively insulating them from any nuisance liability.

Arguably, states that have adopted gun range immunity laws, and thereby granted a private takings power unto gun range owners, ironically feel the most appropriate party to solely bear the injuries resulting from the exercise of this power are the very people subjected to the injury. That is, rural landowners who are cast aside as the disregarded victims in a program created by the state for the advancement of a greater public use.

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111. See *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 230–31 (1984).

112. See *Berman v. Parker*, 348 U.S. 26, 33–34 (1954) (noting “[t]he public end may be as well or better served through an agency of private enterprise than through a department of government”).

113. *Id.* at 35–36.

114. *Midkiff*, 467 U.S. at 241.

115. *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896).

116. See 26 AM. JUR. 2D *Eminent Domain* § 52 (2023); see generally WILLIAM MEADE FLETCHER, *FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS* § 2914 (2022) (explaining generally the broad nature of what constitutes public use).

117. See *3 Rivers Logistics, Inc. v. Brown-Wright Post No. 158 of Am. Legion, Dep’t of Ark., Inc.*, 548 S.W.3d 137 (Ark. 2018) (stating that the statute immunizing a gun range owner from noise pollution claims did not constitute a taking of neighboring landowners’ properties, even though there were claims of reduced enjoyment, property use, and property value); see also FLETCHER, *supra* note 116, at § 2914.



Curiously, how does the government determine that the paid-for relocation of a gun range<sup>118</sup> is a public good that prevails over two hundred years of a landowner's right to the quiet use of their property? When balanced against the rights of existing landowners, immunity statutes serve little to no advancement of public good, and the private takings exercised under these statutes are arguably unconstitutional. Even if it could be argued that these private takings satisfied the Public Use Doctrine, it appears that no state currently requires a gun range owner to compensate displaced rural landowners whose rights were substantially and materially impacted by the respective state's relocation program.<sup>119</sup> The dominance that ensued the broad interpretation of the Public Use Clause is ever present today as it was fifty years ago, and it is difficult to imagine how its broad stroke will prove any challenge for private takings to be used offensively by gun range owners in the future.

However, even if a gun range owner proceeding under the authority of a delegated takings power could adequately prove that a newly operable shooting range satisfied the public use requirement, a constitutional taking still requires just compensation to be paid to the injured party.<sup>120</sup> The following Section discusses how the passage of immunity laws have seemingly left the rural landowner in an untenable position, solely bearing the injuries that result from being deprived of the quiet use and enjoyment of their property and suffering from the state's failure to justly compensate them for their loss.

#### b. Just Compensation

Determining what constitutes just compensation has served as the basis for extensive litigation and a wealth of scholarly literature that has sought to determine what amount of compensation is sufficient to balance the interests of those exercising a takings power and those on the receiving end of it.<sup>121</sup> Particularly challenging are the difficulties in creating an appropriate valuation for partial takings; i.e., a private individual acting under a state's immunity

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118. See, e.g., MONT. CODE ANN. § 76-9-105(2)(b) (2021) (“[T]he agency or unit of local government obtaining the closure pays the appraised cost of the land together with improvements to the operators of the shooting range. In return the shooting range operators shall relinquish their interest in the property to the agency or unit of local government obtaining the closure.”).

119. See *infra* Section II.A.

120. See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

121. See generally Katrina Miriam Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239 (2007) (discussing post-*Kelo* just compensation reform attempts for government takings).

statute to strip a landowner not of the underlying property itself but of the landowner's right to the unencumbered use and quiet enjoyment of their property.

This Article focuses on the resulting loss of a property's fair market value as one determinable measure of the adequate compensable damages owed to the landowner. One may conclude that difficulties in valuations—especially valuations associated with partial private takings—may undercompensate landowners,<sup>122</sup> which leaves little reason to believe that legislators have any incentive or desire to pass protective laws that ensure that valuations are objectively measurable and not an administrative farce to simply check off a box. Given that compensation itself acts a deterrent to the exercise of condemnation powers and that current compensation laws do not recognize private takings by non-governmental agencies, there are little to no barriers restricting gun range owners from exercising their unconstitutional takings power on a broader scale. As long as gun range owners are entitled to immunity and displaced landowners receive no just compensation, gun range owners enjoy their takings freedom that's akin to shooting fish in a barrel.

## II. A CLOSER EXAMINATION OF IMMUNITY LAWS

### A. *Immunity from Legal Action Based on Noise*

Legislatures enacting protective laws that immunize gun range owners seem more inclined to keep Second Amendment enthusiasts firing lead down range than they are on protecting the once revered interests of landowners.<sup>123</sup> With noise pollution being the primary complaint,<sup>124</sup> many jurisdictions provide outdoor gun range owners with umbrella protection under two primary types of statutory protection.

First, the less common form of protection exempts outdoor gun ranges from state and/or local noise ordinance statutes.<sup>125</sup> Arkansas,<sup>126</sup> Tennessee,<sup>127</sup> and Wyoming<sup>128</sup> have statutes that immunize outdoor gun range owners from state

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122. See Thomas J. Miceli, *Compensation for the Taking of Land Under Eminent Domain*, 147 J. INST. & THEOR. ECON. 354, 361 (1991).

123. See Cotter, *Outdoor Sport Shooting*, *supra* note 2, at 170–71.

124. See Cotter, *Suburban Sprawl*, *supra* note 1, at 22.

125. See *supra* sources accompanying note 31.

126. See ARK. CODE ANN. § 16-105-502 (2023).

127. See TENN. CODE ANN. § 39-17-316 (2022).

128. See WYO. STAT. ANN. § 16-11-102 (2023).

department noise regulation. Maine<sup>129</sup> and Oklahoma<sup>130</sup> have statutes immunizing outdoor gun ranges from local noise ordinances, while Georgia,<sup>131</sup> North Carolina,<sup>132</sup> and Texas<sup>133</sup> statutes immunize outdoor gun ranges from both state department and local noise regulations. Fourteen states have fully exempted outdoor gun ranges from noise control laws, thus curbing private individuals from bringing claims against gun range owners.<sup>134</sup>

Second, the most common form of protection immunizes gun range owners from criminal and civil actions based on noise pollution and, more concerningly, from private nuisance lawsuits.<sup>135</sup> Twenty-three states have passed and formally adopted this type of statutory protection.<sup>136</sup> Notably, creative litigation illuminates the desperation faced by landowners in their attempts to find some form of meaningful relief.<sup>137</sup> In what appears to be a proactive response to a variety of untraditional claims that may be used by disparaged landowners clinging to any argument that could potentially provide relief,<sup>138</sup> additional statutory protections have been passed, such as immunizing outdoor gun range

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129. See ME. STAT. tit. 30-A, § 3011 (2023).

130. See OKLA. STAT. tit. 63, § 709.2 (2022).

131. See GA. CODE ANN. § 41-1-9 (2022).

132. See N.C. GEN. STAT. § 14-409.46 (2022).

133. See TEX. LOC. GOV'T CODE ANN. § 229.001(a)(3) (West 2021); see also TEX. HEALTH & SAFETY CODE ANN. §§ 756.0411, .045 (West 2021) (requiring gun ranges operating in Texas population centers that exceed 150,000 persons to meet national design standards and to carry minimum levels of liability insurance).

134. See generally *Gun Range Protection Statutes*, NRA OFFICE OF THE GENERAL COUNSEL (2013), <https://rangeservices.nra.org/media/4075/gun-range-protection-statutes.pdf> (providing an overview of state-level gun range protection laws in the United States).

135. See *supra* sources accompanying note 31.

136. See *supra* sources accompanying note 31.

137. See, e.g., *Christensen v. Hilltop Sportsman Club*, 573 N.E.2d 1183, 1184 (Ohio Ct. App. 1990) (regarding property owner and occupants' complaint that shooting activities at nearby "sportsman" club "constituted both a public and a private nuisance").

138. See *Midshore Riverkeeper Conservancy, Inc. v. Franzoni*, 429 F. Supp. 3d 67, 71 (D. Md. 2019) (regarding plaintiff's suit against the neighboring gun range owners alleging that a lead shot entered waterways and crop land in violation of federal environmental law); *State v. Milwaukee Gun Club, Inc.*, 482 N.W.2d 670 (Wis. Ct. App. 1992) (unpublished table decision) (affirming trial court order finding gun club in violation of state littering statutes); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2145, 2156 (2022) (holding that New York's proper cause requirement was unconstitutional and finding state's argument that restricting private carry of handguns was intended in part to protect the public against the incitement of terror as unpersuasive); see also Cotter, *Suburban Sprawl*, *supra* note 1, at 21–22 (discussing different types of lawsuits brought by rural property owners seeking relief from nearby shooting ranges).

owners from lawsuits for littering<sup>139</sup> and domestic terrorism<sup>140</sup> to exempting sport shooting from being classified as the unlawful discharge of a weapon.<sup>141</sup>

After repeated complaints from its residents, one township in Michigan passed complex licensing requirements to make compliance difficult for a gun range operating within the township boundaries.<sup>142</sup> In response, Michigan lawmakers passed legislation fully exempting outdoor gun ranges from all local regulation.<sup>143</sup> Not all is lost, however, as landowners appear to have some minimal preemptive protection; in order to avail themselves of Michigan's immunity laws, gun range owners must first comply with both state level noise ordinances and operation practices established by the Natural Resources Commission (NRC).<sup>144</sup> Under the Michigan immunity statute, the NRC is authorized to determine acceptable operation practices, which are heavily based on the NRA's *Range Manual*.<sup>145</sup> Utah's statute is similar, in that it requires gun range owners to comply with national standards in order to not be classified as a public health nuisance.<sup>146</sup>

In addition to state and national standards, some states appear to provide additional protection to existing landowners by imposing a "substantial change" test.<sup>147</sup> That is, an existing landowner would have standing to bring noise abatement claims if they can establish that shooting activities at the gun range

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139. *See, e.g.*, MONT. CODE ANN. § 76-9-102 (2021) (exempting shooting range operation from being restricted or prohibited by state agencies or local governments for exceeding pollution standards for lead, copper, or brass deposits resulting from shooting activities).

140. *See, e.g.*, IDAHO CODE § 18-8104 (2023) (exempting public shooting from the Terrorist Control Act); N.M. STAT. ANN. § 30-20A-4 (2022) (exempting public shooting from the state's anti-terrorism act); 8 PA. CONS. STAT. § 5515 (2022) (exempting public shooting from the state's prohibition against paramilitary training).

141. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3107 (2022) (providing an exception from a charge of a class 2 misdemeanor for discharge of a firearm within the limits of any municipality if discharged on a properly supervised range).

142. *See* *Twp. of Ray v. B & BS Gun Club*, 575 N.W.2d 63, 64 (Mich. Ct. App. 1997).

143. MICH. COMP. LAWS § 691.1542 (2023); *see* Cotter, *Outdoor Sport Shooting*, *supra* note 2, at 173.

144. *See* MICH. COMP. LAWS § 691.1541 (2023); Memorandum from the State of Mich. Dep't of Nat. Res. to Daniel Eichinger, Dir. of the State of Mich. Dep't of Nat. Res. (Mar. 28, 2019) (on file with the State of Michigan), [https://www.michigan.gov/-/media/Project/Websites/dnr/Documents/Ranges/GenerallyAccepted\\_Ops\\_Ranges\\_2019.pdf?rev=65c7587c022c426b89338546759a1304](https://www.michigan.gov/-/media/Project/Websites/dnr/Documents/Ranges/GenerallyAccepted_Ops_Ranges_2019.pdf?rev=65c7587c022c426b89338546759a1304).

145. *See Twp. of Ray*, 575 N.W.2d at 67.

146. UTAH CODE ANN. § 47-3-202 (2023).

147. *See, e.g.*, IDAHO CODE § 55-2602 (2023); IOWA CODE § 657.9 (2023); ME. STAT. tit. 17, § 2806 (2023); N.C. GEN. STAT. § 14-409.46 (2023); W. VA. CODE § 61-6-23 (2017).

rose to a “substantial change.” However, in failing to define what amounts to a substantial change,<sup>148</sup> these statutes serve only to cause more confusion than the relief they seemingly intend to provide. For example, would increasing the number of days the gun range is open to the public constitute a substantial change? If, in prior years, the gun range only permitted the use of small caliber rifles but expanded to loud .50 caliber heavy machine guns, would this rise to the level of a substantial change? What about allowing cannons, exploding targets, or low altitude mortar shells?

Such ambiguity takes the focus off the real issue—the landowner’s right to enjoy the quiet use and enjoyment of their property—and shifts it to forced litigation to determine solely whether any measurable change at a gun range is substantial.<sup>149</sup> Moreover, a violation of a substantial change would seemingly only serve as the basis for a temporary relief order.<sup>150</sup> Nothing in current state statutes appears to restrict a gun range from simply discontinuing the activities deemed to be a substantial change and continuing with all prior noisemaking activities. Further, these statutes are seemingly directed at those acquiring property adjacent to, or near, an existing gun range and not to those individuals already living on the land before a new gun range opens nearby. Notably, Utah promotes transparency by requiring purchasers of new subdivision developments to provide informed consent and accept any noise nuisance created by the common and customary usage of a gun range that is located within a close vicinity to the subdivision.<sup>151</sup>

Wholly missing from most of these statutes, however, is any protection afforded to those already enjoying quiet country living who, to no fault of their own, discover that the orange hue burning across the pasture was no longer that of the morning sun but rather the muzzle flashes of the local SWAT team engaged in close-quarter combat drills. With no requirement to receive prior consent from neighboring landowners, gun range owners are free to open shop anywhere they desire and engage in a legalized nuisance with complete impunity.

Undoubtedly, landowners faced with a gun range moving to them would deem its sudden existence as a substantial change to their standard of quiet country living. Curiously, while remedies generally exist when a nuisance moves

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148. See IDAHO CODE § 55-2602 (2023); IOWA CODE § 657.9 (2023); ME. STAT. tit. 17, § 2806 (2023); N.C. GEN. STAT. § 14-409.46 (2023); W. VA. CODE § 61-6-23 (2017).

149. See, e.g., *Kitsap Cnty. v. Kitsap Rifle & Revolver Club*, No. 57628-7-II, 2023 WL 4105179, at \*1–3 (Wash. Ct. App. 2023) (affirming trial court’s order that the gun range significantly changed its existing use, and that injunction was proper unless the gun range received a conditional use permit or reduced activity to pre-nonconforming use levels).

150. *Id.*

151. See UTAH CODE ANN. § 47-3-202 (4) (West 2022).

near an injured party, existing landowners are not protected when a gun range-caused nuisance moves to them. Outdoor gun ranges operating in safe harbor states enjoy complete immunity from the costs and hazards of litigation. The absurd reality of legal immunity begs the question as to whether the use of fully automatic weapons, high caliber rifles like .50 caliber heavy machine guns, exploding weapons, or cannons were contemplated by state legislators when passing such broad and sweeping immunity statutes.

It should be emphasized that the beforementioned protective statutes are not absolute but instead require gun range owners to be in compliance with all applicable state and local laws before availing themselves of the immunity afforded. For example, gun ranges must comply with the applicable noise ordinances when the range was first built or began its operations.<sup>152</sup> Still, these compliance requirements serve as a veiled attempt to protect surrounding neighbors from obtrusive noise. Much akin to the used car dealership approving an application for a car loan at 28% interest, it is a solution that is not a viable one. For example, instead of requiring compliance with reasonable noise ordinances, Oklahoma provides carte blanche immunity as long as the noise emanating from a gun range does not exceed 150 decibels (dB).<sup>153</sup> To provide context, a subway train horn produces 110 dB.<sup>154</sup> When setting the decibel limit so high, Oklahoma arguably created the strongest immunity statute in the country.

Given that permanent hearing loss begins at extended exposure to 80 dB,<sup>155</sup> Oklahoma's statute is rather perplexing. A comparison of sounds is illuminating:

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152. See, e.g., N.H. REV. STAT. ANN. § 159-B:2 (2023) (“The owners, operators, or users of shooting ranges shall not be subject to any action for nuisance and no court shall enjoin the use or operation of a range on the basis of noise or noise pollution, provided that the owners of the range are in compliance with any noise control ordinance that was in existence at the time the range was established, was constructed, or began operations.”).

153. See OKLA. STAT. ANN. tit. 63, § 709.2 (2022).

154. See *Decibel Comparison Chart*, NAT'L HEARING CONSERVATION ASS'N, <https://www.hearingconservation.org/assets/Decibel.pdf> [hereinafter NAT'L HEARING CONSERVATION ASS'N].

155. See *Decibel Level Comparison Chart*, YALE ENV'T HEALTH & SAFETY, <https://ehs.yale.edu/sites/default/files/files/decibel-level-chart.pdf> [hereinafter YALE ENV'T HEALTH & SAFETY].

lawnmowers produce 94 dB,<sup>156</sup> circular saws generate up to 120 dB,<sup>157</sup> jet engines produce 140 dB during takeoff,<sup>158</sup> and gunfire also produces 140 dB.<sup>159</sup> Discomfort begins at 90 dB and physical pain begins at 125 dB.<sup>160</sup> Short-term exposure at sounds in excess of 140 dB can cause permanent hearing loss even with the use of hearing protection.<sup>161</sup> In fact, the Occupational Safety and Health Administration (OSHA) requires that exposure to 115 dB or more be limited to fifteen minutes.<sup>162</sup>

Perhaps the Oklahoma legislature reckoned that neighboring landowners involuntarily subjected to continued and excruciating gunfire at 150 dB would have their funds diverted away from nuisance litigation to, instead, pay for the resulting medical costs associated with permanent hearing loss and the rehabilitative care needed to learn how to communicate in sign language.<sup>163</sup>

### B. *Biased Promotional Laws*

Urban sprawl and the ensuing change in demographics have made the continued operation of some outdoor gun ranges impracticable due to increased concerns over the growing community's health and safety. It would arguably be irresponsible to allow a historically located rural gun range to continue its operations in an area that has experienced a significant increase in population

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156. *See How Loud Is Too Loud*, HEARING CTR. FOR EXCELLENCE, <http://hearing.health.mil/Prevention/Preventing-Noise-Induced-Hearing-Loss/How-Loud-is-TooLoud#:~:text=Car%20horn%3A%20110%20decibels,Ambulance%20siren%3A%20112%20decibels> (last visited Oct. 25, 2023).

157. *See Noise Abatement for Circular Saws*, NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH 4 (1999).

158. *See Decibel Levels*, HEARING HEALTH FOUNDATION, <https://hearinghealthfoundation.org/decibel-levels> (last visited Oct. 25, 2023).

159. *See* NAT'L HEARING CONSERVATION ASS'N, *supra* note 154.

160. *See* YALE ENV'T HEALTH & SAFETY, *supra* note 155.

161. *See* NAT'L HEARING CONSERVATION ASS'N, *supra* note 154.

162. *Id.*

163. *See, e.g.*, Penny E. Mohr, Jacob J. Feldman, Jennifer L. Dunbar, Amy McConkey-Robbins, John K. Niparko, Robert K. Rittenhouse & Margaret W. Skinner, *The Societal Costs of Severe to Profound Hearing Loss in the United States*, 16 INT'L J. TECH. ASSESSMENT IN HEALTH CARE 1120, 1129 n.4 (2000) (determining that severe hearing loss is expected to result in productivity and resource losses of approximately \$300,000 per individual); *Patients with Untreated Hearing Loss Incur Higher Health Care Costs Over Time*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Nov. 8, 2018), <https://publichealth.jhu.edu/2018/patients-with-untreated-hearing-loss-incur-higher-health-care-costs-over-time> (describing that older adults with untreated hearing loss incur 46% more in total healthcare costs over a ten-year period).

and the related development of nearby subdivisions, schools, hospitals, and other services common to a community transitioning from a rural to a predominantly urban environment.<sup>164</sup> However, some states have passed promotional laws to proactively encourage and advance participation in outdoor shooting sports.<sup>165</sup> From the perspective of the rural landowner, equity does not factor into legislative solutions that purportedly attempt to balance the concerns of the growing community with that of the gun range owner wishing to continue their business operations. This failure is demonstrated where, for example, informed consent is required for individuals who voluntarily choose to move to or near an existing gun range, but informed consent is not required from existing rural landowners when a gun range wishes to move to them.

Montana combated the issue of urban sprawl by siding with gun range owners and protecting their interests while neglecting the interests of the landowners. To ensure no confusion exists as to whom the Montana legislature chose to side with, the state passed legislation clearly defining the state's interests in protecting the locations where gun range may operate and the investments in those gun ranges.<sup>166</sup> To further protect gun range owners who may be ordered or threatened with closure due to urban sprawl and the enactment of a new restrictive local zoning ordinance, Montana also passed legislation requiring local governments to compensate the owner for the fair market value of the

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164. *See, e.g.*, KY. REV. STAT. ANN. § 150.620 (West 2022) (“For the purpose of encouraging and developing public interest in wildlife and carrying out the policy of the Commonwealth of Kentucky under KRS Chapter 150, the Department of Fish and Wildlife Resources Commission, as a state agency, and based upon investigations and recommendations of the commission, is hereby authorized to acquire lands including any improvements thereon by purchase, condemnation or lease from the State Property and Buildings Commission or from others, and partly by any or all of such means, and to thereafter establish, improve, maintain, and operate public shooting.”); N.M. STAT. ANN. § 17-7-2 (2023) (“There is created in the state treasury a special fund to be known as the ‘shooting range fund’. All money appropriated to this fund or accruing to it as a result of gift, deposit or from other sources, except interest earned on the fund which shall be credited to the general fund, shall not be transferred to another fund or encumbered or disbursed in any manner except as provided in the Shooting Range Fund Act. Appropriated money in the fund shall not revert to the general fund. Money in the fund shall be used for construction or improvement of public shooting ranges.”).

165. *See, e.g.*, MONT. CODE ANN. § 76-9-101 (2021) (“It is the policy of the state of Montana to provide for the health, safety, and welfare of the citizens of the state by promoting the safety and enjoyment of the shooting sports among the citizens of the state and by protecting the locations of and investment in shooting ranges for shotgun, archery, rifle, and pistol shooting.”).

166. *Id.*



shooting range as well as any improvements made to the land.<sup>167</sup> In passing such legislation, Montana statutorily deemed restrictive ordinances to be a taking, thus entitling the gun range owner to fair compensation.<sup>168</sup> Yet, through the passage of immunity statutes, the state failed to deem noise pollution caused by a gun range as a taking against the landowner when that gun range owner relocates next door to them.

As an additional protection, the Montana legislature prohibited local governments from excluding gun ranges in local zoning ordinances.<sup>169</sup> In doing so, the Montana legislature enacted a state-sponsored relocation program that created a mechanism for the compensated closure of a gun range in a more populated area that merely results in the relocation of that affected gun range to an area not as likely to be immediately impacted by growth and development—in other words, surrounding areas already occupied by rural landowners.<sup>170</sup>

Thus, in the state's attempt to immunize gun range owners, Montana addressed the takings issue by enacting biased and promotional laws that serve only to enable gun range owners to exercise state-granted private condemnation power with little to no consideration given to rural landowners. It must be asked, if Montana is willing to pass legislation that so thoroughly protects the interests of gun range owners, where is the legislation that protects the landowner who comes to find a gun range in their backyard? Just as the gun range owner is entitled to fair compensation, shouldn't the landowner be entitled to the same? Why is the landowner, who is deprived of the quiet use and enjoyment of their property, so purposefully disregarded?

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167. *See* MONT. CODE ANN. § 76-9-105(2)(b) (2021) (“[T]he agency or unit of local government obtaining the closure pays the appraised cost of the land together with improvements to the operators of the shooting range. In return the shooting range operators shall relinquish their interest in the property to the agency or unit of local government obtaining the closure.”)

168. *See id.*

169. *See* MONT. CODE ANN. § 76-9-103 (2021) (“The laws of this state concerning planning or growth policies, as defined in 76-1-103, may not be construed to authorize an ordinance, resolution, or rule that would (1) prevent the operation of an existing shooting range as a nonconforming use (2) prohibit the establishment of new shooting ranges, but the ordinance, resolution, or rule may regulate the construction of shooting ranges to specified zones; or (3) prevent the erection or construction of safety improvements on existing shooting ranges.”); MONT. CODE ANN. § 76-9-104 (2021) (“A planning district growth policy, recommendation, resolution, rule, or zoning designation may not (1) prevent the operation of an existing shooting range as a nonconforming use (2) prohibit the establishment of new shooting ranges, but it may regulate the construction of shooting ranges to specified zones; or (3) prevent the erection or construction of safety improvements on existing shooting ranges.”).

170. *See* MONT. CODE ANN. § 76-9-105(2) (2021).

### III. PROBLEMS WITH NOISE REGULATION AND ITS FAILURE TO PROVIDE APPROPRIATE MEASURES OF RELIEF

#### A. *What Does “Noise” Even Mean?*

“Noise” is a term that proves difficult to squarely define, largely due to different meanings depending on the environment it is being used to describe. There is a medical definition for noise,<sup>171</sup> an acoustic definition,<sup>172</sup> and a variety of statutory definitions.<sup>173</sup> From the standpoint of those involuntarily subjected to noise pollution, the better definition of noise is that of an unwanted sound.<sup>174</sup> Such definitions, however, do not adequately convey the frustrations experienced by landowners who are constantly bombarded with the sounds of war. For these disregarded victims, perhaps the best definition of noise would be waste created by various human activities or, more fitting, waste created by a gun range operation.

It is worth noting that the harms of noise pollution are not limited to the encroachment on one’s quiet use and enjoyment of their property, but also include the physical and mental toll that noise can take on the human body.<sup>175</sup> Continued exposure to noise pollution can affect people’s ability to concentrate; impair sleeping patterns; negatively impact blood pressure; increase risk profiles for the development of heart disease, ulcers, strokes, and digestive disorders; and

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171. See Michael D. Seidman & Robert T. Standing, *Noise and Quality of Life*, 7 INT’L J. ENV’T RSCH. PUB. HEALTH 1330 (2010) (“Noise is defined as an unwanted sound or a combination of sounds that has adverse effects on health. These effects can manifest in the form of physiologic damage or psychological harm through a variety of mechanisms.”).

172. See *Noise*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/science/noise-acoustic> (last visited Oct. 25, 2023) (“Noise, in acoustics, any undesired sound, either one that is intrinsically objectionable or one that interferes with other sounds that are being listened to.”).

173. See MD. CODE ANN., ENV’T § 3-101(c)(1) (West 2023) (“‘Noise’ means the intensity, frequency, duration, and character of sound. (2) ‘Noise’ includes sound and vibration of subaudible frequencies.”); CAL. HEALTH & SAFETY CODE § 46022 (West 2023) (“‘Noise’ means and includes excessive undesirable sound, including that produced by persons, pets and livestock, industrial equipment, construction, motor vehicles, boats, aircraft, home appliances, electric motors, combustion engines, and any other noise-producing objects.”).

174. See Daniel Fink, *A New Definition of Noise: Noise is Unwanted and/or Harmful Sound. Noise is the New ‘Secondhand Smoke’*, 39 PROC. MEETINGS ON ACOUSTICS 050002, 8 (2020); Dunlap, *supra* note 3, at 62 (describing sound as an unwanted noise).

175. See U.S. ENV’T PROT. AGENCY, NOISE EFFECTS HANDBOOK, at 53–60 (Oct. 1979); DR. ALICE H. SUTER, NOISE AND ITS EFFECTS, ADMIN. CONF. U.S. (Nov. 1991); see also Dunlap, *supra* note 3, at 51–52 (discussing noise-induced hearing loss, negative effects that noise has on children, and other problems attributable to noise pollution).

lead to the development of learning disabilities.<sup>176</sup> Further, long-term exposure to noise pollution may lead to increased levels of anxiety and hostility, a generally lower quality of life,<sup>177</sup> and even a reduced life expectancy.<sup>178</sup>

To combat the resultant harms of noise, local jurisdictions will commonly enact noise regulation in an attempt to provide a middle ground for the community to peacefully coexist.<sup>179</sup> While local noise regulation may be helpful for some noises, such as a neighbor's loud music playing late into the night, jurisdictions are often handcuffed by legislative action prohibiting the passage of ordinances that regulate noise from a gun range.<sup>180</sup>

### B. *Mechanics of Noise Ordinances*

Generally, noise regulations come in two basic varieties. First, noise ordinances can specify maximum decibel limits that may be produced during certain periods of the day.<sup>181</sup> Second, noise ordinances can ban loud noise outright, irrespective of the time of day.<sup>182</sup> Between the two, state courts generally favor decibel limit regulations, given that such regulations are generally more measurable and less subject to varying interpretations as to what constitutes "loud noise."<sup>183</sup> Decibel regulations, however, are not immune to

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176. Dunlap, *supra* note 3, at 52.

177. *Id.*

178. See Lisa Mulcahy, *You Can't Ignore All That Road Noise: It Could Shorten Your Life*, L.A. TIMES (Jan. 9, 2016), <https://www.latimes.com/health/la-he-road-noise-20160109-story.html>.

179. See *infra* Section III.B.

180. See generally Cotter, *Outdoor Sport Shooting*, *supra* note 2, at 44–46 (discussing how many states expressly prohibit local governments from enacting noise ordinances related to gun ranges).

181. See, e.g., *McCray v. City of Citrus Heights*, No. Civ.S-99-1984WBSDAD, 2000 WL 1174728, at \*1 (E.D. Cal. Aug. 7, 2000) (reviewing noise ordinance restrictions of amplified music between the hours of 10:00 P.M. and 8:00 A.M.); *State v. Clarksburg Inn*, 375 N.J. Super. 624, 635 (N.J. Super. Ct. App. Div. 2005) (reviewing the constitutionality of daytime and nighttime noise ordinances); see also Dunlap, *supra* note 3, at 56 (stating that “[g]enerally, well-drafted noise ordinances and nuisance laws . . . regulate a decibel limit or the unreasonableness of the amount or type of noise”).

182. See, e.g., *United States v. Doe*, 968 F.2d 86, 87 (D.C. Cir. 1992) (reviewing the constitutionality of a federal noise ordinance that broadly bans noise levels in excess of sixty decibels); see also Dunlap, *supra* note 3, at 56.

183. See *Doe*, 968 F.2d at 89 (holding that a local ordinance defining unlawful noise to be any sound in excess of sixty decibels did not pass constitutional scrutiny, observing that “it is impossible not to conclude that the means chosen [are] substantially broader than necessary to achieve the government’s interest”).

constitutional review.<sup>184</sup> Additionally, noise ordinances commonly define where and how noise measurements must be taken to create uniformity against what should be an objectively measurable standard.<sup>185</sup> This ensures that the readings will be as consistent, uniform, and correct as possible. It can also assist gun range owners by enabling them to purchase their own decibel meters to determine whether they are complying with the specifications set out in an ordinance.

For localities passing noise ordinances that are without specific decibel limits, enforcement can become challenging, especially when the regulation has ambiguous language like banning “unnecessary or unusual noise which annoys, injures, or endangers comfort.”<sup>186</sup> Absent specific decibel limits, regulations based on subjective determination are often struck down by courts for failing to survive constitutional scrutiny.<sup>187</sup> Having noise ordinances that limit loud and excessive noise is certainly a start, but day-to-day application and enforcement of these ordinances are not without practical issues. For example, there are issues pertaining to the training of law enforcement as well as the funding to purchase equipment necessary to monitor decibel levels. For those living in rural environments, it is not uncommon for law enforcement to be stretched thin or without funds to purchase decibel reading devices, thereby leaving landowners with a type of impromptu-vigilante enforcement responsibility. If decibel reading devices are not used, ambiguity abounds when determining what constitutes excessive noise. Further, even if law enforcement receives a complaint, the wrongdoer could temporarily discontinue the activity, only to start again after law enforcement leaves.<sup>188</sup>

In many respects, noise ordinances are akin to the proverbial “all hat and no cattle”—a solution on its face but “[m]ost anti-noise laws have . . . been almost entirely unworkable.”<sup>189</sup>

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184. *Id.* at 90.

185. *See, e.g.*, ARIZ. REV. STAT. ANN. § 17-602 (2023) (providing specific requirements for the measurement of noise pursuant to the American National Standards Institute’s standard methods (ANSI S1.2-1962)).

186. *Nichols v. City of Gulfport*, 589 So. 2d 1280, 1281 (Miss. 1991) (holding that a local noise ordinance providing that “unnecessary or unusual noises shall not be made or caused to be made or continued to be made which either annoys, injures or endangers the comfort, repose, health or safety of others” failed to pass constitutional scrutiny); *see also* Dunlap, *supra* note 3, at 72 (stating that ordinances have been struck down “for being based too much on subjective determinations”).

187. *See Nichols*, 589 So.2d at 1282.

188. *See* Dunlap, *supra* note 3, at 73.

189. Steven N. Brautigam, *Rethinking the Regulation of Car Horn and Car Alarm Noise: An Incentive-Based Proposal to Help Restore Civility to Cities*, 19 COLUM. J. ENV’T L. 391 (1994).

*C. The Tug-of-War Between Neighbors and the Problems with Noise Regulation*

Since the Great Migration west,<sup>190</sup> one fundamental privilege has been afforded to American landowners—the right to use their property as they so desire.<sup>191</sup> This right was conferred under the Fifth Amendment of the U.S. Constitution.<sup>192</sup> The right, however, is not absolute. A maxim often cited in nuisance cases—*sic utere tuo ut alienum non laedes*—translates that one shall use their property in a manner that does not cause injury to another’s property.<sup>193</sup> Courts have applied this maxim to hold that “one may not make such an unreasonable use of [their] property that it substantially impairs the right of another to peacefully enjoy [their own] property.”<sup>194</sup>

These rights seem to be the opposite sides of the same coin, effectively posing neighbor against neighbor. Take for example, owner A, an avid carpenter who builds elaborate art in their backyard studio on Saturday mornings. Owner B, the next-door neighbor, works a late shift on Fridays and is not able to get to bed until late Saturday morning when, just a few short hours later, they are violently awoken from sounds of commercial grade circular saws and benchtop sanding tables. Who wins?

Absent an express ordinance restricting carpentry in private backyards, should A be permitted to continue making noise on Saturday mornings? Should B prevail because the noisy sounds of circular saws clearly interfere with B’s quiet use and enjoyment of their property? Or does B simply have to endure it, every Saturday morning, week after week? If the basis to prevent A from using their backyard studio is *any* sound that will negatively affect B’s enjoyment of their property, what is A left to do? Each time B finds a noise offensive, can B simply knock on A’s door and demand it to stop? Can A then slam the door in B’s face knowing that there is not an actionable violation? These questions are

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190. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415–16 (1922).

191. *See* Racine v. Glendale Shooting Club, Inc., 755 S.W.2d 369, 372 (Mo. Ct. App. 1998) (“The general rule is that a property owner has the right to exclusive possession and control of his property and the right to devote it to any type of lawful use which satisfies his interests.”); *see also* City of Fredericktown v. Osborn, 429 S.W.2d 17, 22 (Mo. Ct. App. 1968) (“[A] owner has the right to the exclusive possession and control of his property, and the right to devote it to such lawful uses as will subserve his interests.”).

192. *See* U.S. CONST. amend. V.

193. *See* Dep’t of Transp. v. PSC Res., Inc., 419 A.2d 1151, 1157 (N.J. Super. Law. Div. 1980) (“Calling the law of nuisance the oldest form of land use control, the court stated that it evolved from the ancient maxim ‘Sic utere tuo et alienum non laedes’-one must so use his rights as not to infringe on the rights of others.”).

194. *Racine*, 755 S.W.2d at 372.

difficult to answer and even more difficult to police. Notably, when it comes to gun ranges, states with noise ordinances set the acceptable decibel levels so high that police enforcement would never realistically occur.<sup>195</sup>

#### IV. ILLUSTRATIVE CASES

The following cases illustrate the growing frustrations and dismay many landowners experience when realizing that their state positioned them to be a casualty of development and left with no pathway to seek redress against the legalized nuisance of gun range operations. Absent a showing of actual property damage or physical injury, private nuisance claims are all but toothless,<sup>196</sup> providing gun range owners with a statutory get-out-of-jail-free card that allows them to pollute their surrounding airspaces with the noxious sounds of war and to do so without concern for the disregarded landowner victims substantially harmed as a result.

##### A. Shepard v. The Pollution Control Board

In *Shepard v. The Pollution Control Board*,<sup>197</sup> plaintiff landowners brought noise pollution claims against a local gun range that provided skeet and trap shooting on its property.<sup>198</sup> The shooting primarily occurred on Thursdays from 5:00 P.M. to 10:00 P.M.<sup>199</sup> Occasionally, the shooting activities would be scheduled for Wednesdays and Fridays, along with certain holidays.<sup>200</sup> In their complaint, the aggrieved homeowners alleged violations of the Illinois Environmental Protection Act (IEPA) and sought a cease and desist order restricting all sound emissions from the gun range.<sup>201</sup> Further, the landowners alleged that the sound emanating from the gun range negatively interfered with the quiet use and enjoyment of their property, restricted their outdoor recreational activities, and depreciated the value of their property.<sup>202</sup>

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195. See, e.g., OKLA. STAT. tit. 63, § 709.2 (2022) (ensuring gun ranges are in compliance with the law so long as the noise emanating from the range does not exceed 150 decibels).

196. See *supra* Section I.A.1, I.A.2.

197. 651 N.E.2d 555 (Ill. App. Ct. 1995).

198. *Id.* at 557.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

On appeal, the state appellate court evaluated section 24 of the IEPA, which provided that “[n]o person shall emit beyond the boundaries of his property any noise that unreasonably interferes with the enjoyment of life or with any lawful business activity, so as to violate any regulation or standard adopted by the Board under this Act.”<sup>203</sup> However, any confidence in finding relief under section 24 was quickly dismissed because certain activities are expressly excluded from the regulation; “[n]o Board standards for monitoring noise or regulations prescribing limitations on noise emissions shall apply to any organized amateur or professional sporting activity . . . .”<sup>204</sup>

As yet another example of losing the war before it began, the IPEA defines organized sporting activity to include “skeet, trap or shooting sports clubs in existence prior to January 1, 1975 . . . .”<sup>205</sup> Thus, the appellate court affirmed that the shooting club was exempt from noise pollution regulation.<sup>206</sup>

B. *Concerned Citizens of Cedar Heights-Woodchuck Hill Road. v. DeWitt Fish & Game Club, Inc.*

In *Concerned Citizens of Cedar Heights-Woodchuck Hill Road. v. DeWitt Fish & Game Club, Inc.*,<sup>207</sup> plaintiff landowners filed a lawsuit against the owner of a gun range seeking a permanent injunction to prevent defendant’s use of property as a commercial sporting range.<sup>208</sup> In four separate causes of action, the plaintiffs alleged the gun range constituted (1) a private nuisance, generally, (2) “a public nuisance by virtue of the impulse noise” caused by the discharge of firearms as well as (3) a public and (4) private nuisance due to the discharge of lead.<sup>209</sup> Defendant submitted proof that “it was in compliance with the local noise control” regulation.<sup>210</sup>

The Appellate Division of the New York Supreme Court granted the gun range owner’s motion for summary judgment.<sup>211</sup> The court held that the plaintiffs failed to demonstrate the defendant’s use of the property caused a substantial and

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203. *Id.* at 558; *see also* 415 ILL. COMP. STAT. 5/24 (2022).

204. *Shepard*, 651 N.E.2d at 559 (emphasis added).

205. *Id.*

206. *Id.* at 562.

207. 755 N.Y.S.2d 192 (N.Y. App. Div. 2003).

208. *Id.* at 193.

209. *Id.*

210. *Id.*

211. *Id.*

unreasonable interference with the use of their property and “failed to allege an injury different from that suffered by other residences in their community.”<sup>212</sup>

C. Woodsmall v. Lost Creek Township Conservation Club, Inc.

In *Woodsmall v. Lost Creek Township Conservation Club, Inc.*,<sup>213</sup> defendant operated a gun range in rural Indiana, providing users access to handgun and large caliber rifle ranges.<sup>214</sup> In 1972, the trial court issued an order “restricting skeet and trap shooting . . . to certain times and days and banning ‘any shooting whatsoever’” after 10:30 P.M.<sup>215</sup> Some thirty years later, shooting at the gun range increased significantly when the local police department began using it for training, after losing the use of another range at a nearby federal penitentiary.<sup>216</sup> Plaintiffs filed a complaint seeking injunctive relief to abate the nuisance and specifically requested that all firearm discharge cease or, alternatively, to restrict the usage of rifles and handguns.<sup>217</sup> After a bench trial, the court denied the plaintiffs’ injunctive relief.<sup>218</sup>

On appeal, the plaintiffs alleged that the increase in shooting activity at the gun range interfered with the quiet enjoyment of their property.<sup>219</sup> One plaintiff complained of “feeling anxious after hearing sounds of gunfire.”<sup>220</sup> Plaintiffs argued that stray bullets landed on some of their property but the court did not see much weight in the stray bullet evidence because plaintiffs could not definitively establish that the defendant’s property was the source of the hazard.<sup>221</sup> The court reasoned that “a factfinder could infer that shooting in the heavily wooded area near the [plaintiff’s property] is not limited to . . . [defendant’s] members and visitors.”<sup>222</sup> Another plaintiff testified to “hearing a shot, and [that] four or five days later her husband found a spent bullet lying on

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212. *Id.* (quoting *Saks v. Petosa*, 584 N.Y.S.2d 321, 322 (N.Y. App. Div. 1992)) (holding that petitioners who fail to allege an injury different from that suffered by other residents in their community could not maintain an action alleging public nuisance).

213. *Woodsmall v. Lost Creek Twp. Conservation Club, Inc.*, 933 N.E.2d 899 (Ind. Ct. App. 2010).

214. *Id.* at 901.

215. *Id.* at 901–02.

216. *Id.* at 902.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 903.

221. *Id.*

222. *Id.*



the back deck” with its origin unknown.<sup>223</sup> The court held that plaintiffs failed to establish a claim of private nuisance and affirmed the lower court’s denial of relief for the landowner plaintiffs.<sup>224</sup>

D. 3 Rivers Logistics, Inc. v. Brown-Wright Post No. 158 of American Legion, Department of Arkansas, Inc.

In *3 Rivers Logistics, Inc. v. Brown-Wright Post No. 158 of American Legion, Department of Arkansas, Inc.*,<sup>225</sup> defendant was a charitable organization that owned forty acres in rural Arkansas County.<sup>226</sup> Plaintiffs included a business that operated from a tract land adjacent to defendant as well as landowners residing on property that adjoined the defendant’s property.<sup>227</sup> All plaintiffs occupied their property prior to the defendant’s construction of the gun range that provided users with designated areas to discharge handguns, rifles, and shotguns.<sup>228</sup> After shooting began, the plaintiffs filed a complaint contending that the noise produced by the gun range constituted a private nuisance and interfered with their “use and enjoyment of their property.”<sup>229</sup> Additionally, the plaintiffs argued that immunizing defendant from noise-based lawsuits constituted an unconstitutional private taking<sup>230</sup> as the excessive noise emanating from the gun range was not consequential or incidental, and substantially diminished the value of their property without just compensation.<sup>231</sup> The plaintiffs thus sought injunctive relief and damages for the decrease in the value of their property.<sup>232</sup>

The defendant argued that it was immune from noise-based lawsuits.<sup>233</sup> The circuit court found the defendant’s argument persuasive and granted its motion

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223. *Id.* at 904.

224. *Id.* at 904–05.

225. *3 Rivers Logistics, Inc. v. Brown-Wright Post No. 158 of Am. Legion, Dep’t of Arkansas, Inc.*, 548 S.W.3d 137 (Ark. 2018).

226. *Id.* at 139.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 143; *see also* ARK. CONST. art. 2, §22 (“The right of property is before and higher than any constitutional sanction; and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor.”).

231. *See 3 Rivers Logistics*, 548 S.W.3d at 143.

232. *Id.* at 139.

233. *Id.*; *see also* ARK. CODE ANN. § 16-105-502(a) (2023) (“Notwithstanding any other provision of law to the contrary, a person who operates or uses a sport shooting range in this state shall not be subject to civil liability or criminal prosecution for noise or noise pollution”).

to dismiss.<sup>234</sup> On appeal, the court affirmed, holding that the “burden on appellants’ use of their property, and its diminution in value, is insufficient to rise to the level of a taking.”<sup>235</sup> The court also emphasized that “the mere fact that a partial use of one’s property is burdened by regulation does not amount to a taking.”<sup>236</sup> Regarding the issue of nuisance, the court held that because the county had not passed any noise control regulations applicable to the gun range, the defendant was by default in compliance and the immunity statute applied.<sup>237</sup>

E. *Landolt v. Glendale Shooting Club, Inc.*

In *Landolt v. Glendale Shooting Club, Inc.*,<sup>238</sup> defendant was an owner-operator of a gun range in rural Missouri and subject to a trial court injunction in 1987 resulting from nuisance complaints brought by the Racines, the original plaintiffs who alleged the noise emanating from the range constituted a public and private nuisance.<sup>239</sup> The injunction did not bar all activities at the defendant’s range but instead, in an effort to reduce noise, restricted the volume of shooting activities, the caliber of weapons, and the times and days during the week that they could occur.<sup>240</sup> On appeal, the state appellate court affirmed the trial court’s injunction.<sup>241</sup> In 1988, the Missouri legislature enacted an immunization statute, protecting gun ranges from nuisance actions.<sup>242</sup> The defendant moved to dissolve

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resulting from the operation or use of the sport shooting range if the sport shooting range is in compliance with noise control ordinances of local units of government that applied to the sport shooting range and its operation at the time the sport shooting range was constructed and began operation.”).

234. *See 3 Rivers Logistics*, 548 S.W.3d at 140.

235. *Id.* at 143.

236. *Id.* at 143 (citing *J.W. Black Lumber Co., v. Ark. Dep’t of Pollution Control & Ecology*, 717 S.W.2d 807 (Ark. 1986)).

237. *See id.*

238. 18 S.W.3d 101 (Mo. Ct. App. 2000).

239. *Id.* at 103.

240. *See Racine v. Glendale Shooting Club, Inc.*, 755 S.W.2d 369, 372 (Mo. Ct. App. 1988).

241. *See Landolt*, 18 S.W.3d at 103 (citing *Racine v. Glendale Shooting Club, Inc.*, 755 S.W.2d 369, 374 (Mo. Ct. App. 1988)).

242. MO. REV. STAT. § 537.294(2) (2023) (“All owners and authorized users of firearm ranges shall be immune from any criminal and civil liability arising out of or as a consequence of noise or sound emission resulting from the use of any such firearm range. Owners and users of such firearm ranges shall not be subject to any civil action in tort or subject to any action for public or private nuisance or trespass and no court in this state shall enjoin the use or operation of such firearm ranges on the basis of noise or sound emission resulting from the

the injunction, which was later inherited by the Landolts as the substituted plaintiff and the new owners of the affected property, asserting that it had been rendered unjust due to the enactment of the new statute.<sup>243</sup>

Holding for the defendant, the court noted that “a permanent injunction based on a condition subject to change may be vacated or modified in order to avoid unjust or absurd results when a change occurs in the factual setting or the law which gave rise to its existence.”<sup>244</sup> The court further reasoned that “[e]ven if an injunction has matured into a final judgment, when the legislature amends the substantive law on which an injunction is based, the injunction may be enforced only insofar as it conforms to the changed law.”<sup>245</sup>

Although the case was a matter of first impression for the Missouri Court of Appeals, it looked to a Pennsylvania case that was virtually identical. In *Soja v. Factoryville Sportsmen’s Club*,<sup>246</sup> landowners who were located near a gun range filed a nuisance complaint based on noise.<sup>247</sup> The trial court granted injunctive relief that limited the days and hours the gun range could operate.<sup>248</sup> After the injunction was issued, the Pennsylvania legislature passed an immunity statute nearly identical to that of Missouri.<sup>249</sup> The defendant sought to have the injunction dissolved and the Supreme Court of Pennsylvania agreed, holding that a permanent injunction is continuing in nature but it does not provide the injured party a perpetual right to enforce the injunction should the law that warranted the initial injunction change in a manner that it would no longer warrant such relief.<sup>250</sup> Persuaded by *Soja*, the court remanded the case to determine whether

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use of any such firearm range. Any actions by a court in this state to enjoin the use or operation of such firearm ranges and any damages awarded or imposed by a court, or assessed by a jury, in this state against any owner or user of such firearm ranges for nuisance or trespass are null and void.”).

243. *Landolt*, 18 S.W.3d at 104.

244. *Id.* at 105 (quoting *Lee v. Rolla Speedway, Inc.*, 668 S.W.2d 200, 204–205) (Mo. App. 1984)).

245. *Id.* (citing *Viacom, Inc. v. Ingram Enterprises, Inc.*, 141 F.3d 886, 890 (8th Cir. 1998)).

246. *Soja v. Factoryville Sportsmen’s Club*, 610 A.2d 491 (Pa. Super. Ct. 1992).

247. *Id.* at 492.

248. *Id.*

249. *Id.*

250. *Id.* at 494–495 (stating “a permanent injunction is executory and continuing in nature and does not give the aggrieved party a perpetual or vested right in the remedy, the law governing the order, or the effect of the injunction” and “the enactment of the statute was clearly a change in the law warranting dissolution of the injunction”).

the defendant was operating within the range of normal use as required by the state's immunity statute.<sup>251</sup>

As these cases demonstrate, immunity statutes effectively strip existing landowners with any ability to preserve their constitutional rights to the quiet use and enjoyment of their respective properties. The void of legal enforcement mechanisms for disregarded landowner victims' rights demonstrates the necessity for legislatures across the country to amend these statutes in a manner that accommodates the rights of rural landowners that have been acclaimed and enjoyed for generations.

#### V. THE SOLUTION

The solution is not to police noise decibel levels. As previously addressed, doing so is not feasible when put into practical application.<sup>252</sup> There are, however, a few solutions that may provide the best opportunity for gun range owners and rural landowners to find middle ground.

First, state legislators must pass reforms that both require gun range owners who desire to open a new range within a reasonable vicinity of existing landowners to receive prior informed consent and provide a statutory requirement for fair and just compensation to those landowners who do not consent. This provides a mechanism to the gun range owner who is keen on opening the gun range at a specific location and protects non-consenting landowners from the resulting loss of property value once the gun range is operational.

Second, if informed consent is viewed as too intrusive when balanced against the rights of the gun range owner, then legislation should be reformed to provide existing rural landowners the right to bring noise abatement claims against newly established gun range owners operating within close proximity. In turn, legislation should also put the onus on the landowner by requiring the complaint to be filed within a reasonable time of the gun range beginning its operation, such as within two years. Should the landowner fail to file within the prescribed statute of limitations, then the gun range owner is free to operate without concern of future claims.

Third, if existing landowners do not provide their prior informed consent to the establishment of a new gun range or if landowners wishing to assert claims have moved to or near an existing gun range, legislation should permit such landowners to bring claims for noise abatement when operations at the gun range

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251. Landolt v. Glendale Shooting Club, Inc., 18 S.W.3d 101, 105 (Mo. Ct. App. 2000).

252. See *supra* Section III.C.

rise to a substantial change.<sup>253</sup> This approach provides the gun range a mechanism to continue its existing operation and creates a pathway for redress for landowners who moved to the nuisance if the existing gun range substantially changes its activities, such as a gun range expanding its previous outdoor handgun-exclusive range to include the use of large caliber rifles or increasing its usage from two days per week to four.

Any of the above three solutions avoid the issues associated with non-governmental actors exercising an unconstitutional takings power<sup>254</sup> and provide a pathway for disparaged landowners to seek redress under traditional and recognized causes of action that ensure landowners' constitutional property rights remain protected.<sup>255</sup>

#### CONCLUSION

After nearly two hundred years of American jurisprudence protecting a landowner's right to the quiet use and enjoyment of their property, state legislatures across the country saw fit to erode this once revered protection due to their apparent focus on the advancement of corporate enterprise and providing a mechanism for greater urban expansion. Accomplished by states adopting broad and sweeping immunity laws, gun range owners enjoy the freedom to operate with near complete impunity by being fully protected against public and private nuisance claims brought by landowners desperately seeking relief from the unwavering noise obsolescence produced by a nearby gun range.

Under the most favorable interpretation, legislative immunity has effectively protected loud and excessive gun range noise by codifying it as a legalized nuisance. Under the least favorable interpretation, immunity statutes have created state-sponsored frameworks for private individuals to freely exercise an unconstitutional takings power over rural land. Landowners, as the disregarded victims, have been cast aside and seemingly forgotten.

Reforms must accommodate the rights of existing landowners. State legislators must pass reforms that both require newly established gun operations to receive prior informed consent from landowners who will be adversely affected by the introduction of a gun range neighbor and provide a statutory requirement for fair and just compensation to harmed landowners who do not provide their consent. Alternatively, if informed consent is viewed as too intrusive when balanced against the rights of the gun range owner, then

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253. Such a solution is only viable, however, if the statute clearly and *reasonably* defines what constitutes a substantial change. *See supra* Section II.A.

254. *See supra* Section I.A.4, I.A.5.

255. *See supra* Section I.A.

legislation should be reformed to allow existing rural landowners to bring noise abatement claims against newly established gun range operations, and to also allow noise abatement claims when the activities and noise levels of an existing gun range have substantially changed. Any of these solutions avoid the issues associated with non-governmental actors that exercise an unconstitutional takings power and provide a pathway for disparaged landowners to seek redress under traditional and recognized causes of action that ensure landowners' constitutional property rights remain protected.

Father Time is often the best barometer to determine who was on the right side of history, and one has to question the intent behind the passage of the immunity laws discussed in this Article. Legislators should be mindful that the negative consequences imposed by gun range immunity laws are not simply limited to the impairment of a landowner's quiet use and enjoyment of their property. Immunity laws also provide no recourse for those living or working near a gun range whose health has been negatively affected by gun range operations, such as through resultant permanent hearing loss or the mental anguish of not feeling safe in one's own home out of fear of stray bullets causing bodily harm or death.

Without legislative reform, rural landowners are left to question what, if anything, can be done. As a great orator of our time once said, "[i]f you don't like it, learn to love it,"<sup>256</sup> and, for the time being, this may be the only coping mechanism these disregarded victims must begrudgingly adopt.

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256. *The 10 Best Quotes of 'Nature Boy' Ric Flair's Career*, THE ATLANTA CONST. (Aug. 14, 2017), <https://www.ajc.com/sports/the-best-quotes-nature-boy-ric-flair-career/yEXintoJyar6tp3BVhakWJ/>.