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Nuisance Immunity Provided by Iowa's Right-to-Farm Statute: A Taking Without Just Compensation

by

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NUISANCE IMMUNITY PROVIDED BY IOWA'S RIGHT-TO-FARM STATUTE: A Taking WITHOUT JUST COMPENSATION?

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Introduction

To preserve farmlands, agricultural protection laws, commonly known as right-to-farm laws, have been enacted in all fifty states.[1] The right-to-farm laws seek to adjust legal rights between competing property interests by protecting agriculture from nuisance claims, and is one way in which the important public policy of preserving land for agricultural uses is effectuated.[2]

Some modern trends in livestock production particularly animal feeding operations, have placed increased burdens on the environment and raised health and safety, as well as aesthetic concerns.[3] These changes in agriculture have in turn brought about concerns regarding the laws that protect land used for agricultural operations, whether they might have gone too far or are even serving their fundamental purposes.[4]

As the United States Supreme Court has recently become more protective of private property rights, the Constitution has emerged as a new weapon to strike at right-to-farm laws. In *Bormann v. Board of Supervisors,*[5] the Iowa Supreme Court held that an Iowa statute giving immunity from

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1. *See* Neil Hamilton & David Bolte, *Nuisance Law and Livestock Production in the United States: A Fifty-State Analysis*, 10 J. AGRIC. TAX'N & L. 99 (1988).

2. Alexander A. Reinert, Note, *The Right to Farm: Hog-Tied and Nuisance Bound*, 73 N.Y.U. L. REV. 1694 (1998) [hereinafter *Hog-Tied and Nuisance Bound*] (overview, purpose and critical examination of right-to-farm laws).

3. *See* Neil Hamilton, *A Changing Agricultural Law for a Changing Agriculture*, 4 DRAKE J. AGRIC. L 41 (1999) ("[A] North Dakota district court recently ruled in a 'citizen suit' that a large swine facility is not a farm operation but rather a 'pig factory' that must meet industrial waste handling standards. [citation omitted] Court cases such as these will continue to scrutinize the nature of the agricultural system being created and will test how traditional legal rules apply to this evolving system."); *See also* John D. Burns, Comment: *The Eight Million Little Pigs–a Cautionary Tale: Statutory and Regulatory Responses to Concentrated Hog Farming*, 31 WAKE FOREST L. REV. (1996).

4. *See* Neil Hamilton, *Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective,* 3 DRAKE J. AGRIC. L 103; *See also Hog-Tied and Nuisance Bound*, *supra* note 2.

5. Bormann v. Board of Sup'rs, 584 N.W.2d 309 (1998), *cert. denied*, Girres v. Bormann, 525 U.S. 1172 (1999).

nuisance suits to farming activities in areas designated as agricultural areas violated the Takings Clause of the Iowa and United States Constitutions. This decision has created speculation as to whether other states' right-to-farm laws might also be susceptible to a constitutional challenge.[6] An Idaho District court, for example, relied heavily upon the *Bormann* decision to strike down an Idaho nuisance and trespass immunity statute protecting field burning in agricultural operations as a violation of the Takings Clause of the Idaho Constitution as well as United States Constitution.[7]

This article examines how the Iowa court arrived at its determination that an immunization from tort liability is an unconstitutional taking of property without just compensation. It will discuss how the property right subject to the takings analysis is defined, and whether the *Bormann* court was correct in characterizing the nuisance immunity as a *per se* taking of property without just compensation. It will explore how the law has distinguished between trespass and nuisance cases in finding a taking of property. A wealth of decisions have been handed down from state and federal courts concerning avigation easements, a model for finding precedents to analyze this problem. In these cases, the courts have wrestled with the problem of whether the nuisances, typically loud noises, vibrations, and soot, must also include a physical invasion–a trespass in the property owner's airspace–to constitute a taking.

First State Court Holding a Right-to-farm Law Providing Nuisance Immunity Is Unconstitutional

The Iowa legislature gave the Iowa citizens and their local government various tools to achieve agricultural protection by enacting right-to-farm laws that provided for:

> creation of county land preservation and use plans and policies, adoption of an agricultural land preservation ordinance, or establishment of agricultural areas in which substantial agricultural activities are encouraged, so that land inside these areas or subject to those ordinances is conserved for the production of food, fiber, and livestock, thus assuring the preservation of agriculture as a major factor in the economy of this state . . . .[8]

The Iowa right-to-farm statute contained farmland preservation provisions that, upon request of a property owner and consent of the other property owners in the area to be designated, allowed the county board of supervisors to create an agricultural area.[9] The purpose of such a designation, as

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6. *See, e.g.*, Steven J. Laurent, Comment, *Michigan's Right to Farm Act: Have Revisions Gone too Far?* 2002 L. REV. M.S.U.-D.C.L. 213; Lisa N. Thomas, Comment: *Forgiving Nuisance and Trespass: Is Oregon's Right-to-Farm Law Constitutional?* [hereinafter *Forgiving Nuisance and Trespass*] 16 J. ENVTL. L. & LITIG. 445 (2001); Aaron M. McKown, Survey, *VI. Tort Law Hog Farms and Nuisance Law in* Parker v. Barefoot*: Has North Carolina Become a Hog Heaven and Waste Lagoon,* 77 N.C. L. REV. 2355 (1999); William C. Robinson, Casenote, *Right-to-Farm Statute Runs a 'Foul' with the Fifth Amendment's Taking Clause,* 7 MO. ENVTL. L. & POL'Y REV. 28 (1999).

7. *See* Moon v. North Idaho Farmers Association, unpublished opinion, No. CV 2002 3890, 2003 WL 21640506 (Id. Dist. June 4, 2003).

8. Iowa Code Ann. § 352.11 (1)(a) (West 2003).

9. *Id. at* § 352.6 (West 2003).

contemplated by the Iowa statute, was to preserve agricultural land.[10] The statute recognized "the importance of preserving the state's finite supply of agricultural land. Conversion of farmland to urban development, and other nonfarm uses, reduces future food production capabilities and may ultimately undermine agriculture as a major economic activity in Iowa."[11]

An area designated as an agricultural area pursuant to the Iowa right-to-farm statute was thereby protected from being determined to be a nuisance.[12] The immunity from nuisance suits provided by the statute was quite expansive, although a few limitations were contained in the statute. Activity carried on negligently, that violated a state or federal statute, or that caused water pollution or soil erosion, did not qualify for immunity protection.[13] To be entitled to protection there was no pre-existence requirement; a farming operation could commence or expand agricultural activities and receive nuisance immunity regardless of preexisting neighboring property uses.[14]

The right-to-farm statute defined "nuisance" as, "a public or private nuisance as defined either by statute, administrative rule, ordinance, or the common law."[15] A nuisance is defined under Iowa law as:

> Whatever is injurious to health, indecent, or unreasonably offensive to the senses, or an obstruction to the free use of property, so as essentially to unreasonably interfere with the comfortable enjoyment of life or property . . . and a civil action by ordinary proceedings may be brought to enjoin and abate the same and to recover damages sustained on account thereof.[16]

To understand the full impact that immunity from nuisance lawsuits would have, it is worth mentioning the activities that the statute could potentially immunize from nuisance claims:

> 1. The erecting, continuing, or using any building or other place for the exercise of any trade, employment, or manufacture, which, by occasioning noxious exhalations, unreasonably offensive smells, or other annoyances, becomes injurious and dangerous to the health, comfort, or property of individuals or the public.
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> 2. The causing or suffering any offal, filth, or noisome substance to be collected or to remain in any place to the prejudice of others.
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> . . . .

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10. *See id.* at § 352.1.

11. *Id.*

12. *See id.* at § 352.11(1)(a) (West 2003) (stating that "[a] farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation").

13. *See id.* at § 352.11(1)(b).

14. *Id.*

15. *Id.* at § 352.2 (9).

16. *Id.* at § 657.1.

4. The corrupting or rendering unwholesome or impure the water of any river, stream, or pond, or unlawfully diverting the same from its natural course or state, to the injury or prejudice of others.[17]

The Takings Lawsuit

Litigation arose after applicants to the Kossuth County Board of Supervisors (the "Board") received a designation of 960 acres of land as an agricultural area.[18] Although there were no allegations as to the existence of any nuisance actually resulting from agricultural operations in the newly designated agricultural area, several neighboring landowners, Clarence and Caroline Bormann and Leonard and Cecelia McGuire ("the neighbors"), filed a lawsuit challenging the Board's designation.[19] They did not offer any proof of a nuisance but instead levied a facial challenge to the statute alleging that granting nuisance immunity to the designated agricultural area resulted in a *per se* "taking of private property without the payment of just compensation in violation of federal and state constitutional provisions."[20]

The Board argued that "a *per se* taking occurs only when there has been a permanent physical invasion of the property or the owner has been denied all economically beneficial use of the property" and insisted that the record reflected that neither had occurred.[21] The Board also argued that the *Penn Central* balancing test should be applied.[22] The Iowa Supreme Court gave little credence to this argument and analyzed this matter as a *per se* taking. The court held that the section of the right-to-farm law providing for nuisance immunity was unconstitutional and without force and effect, pursuant to "the Fifth Amendment to the Federal Constitution and also under article I, section 18 of the Iowa Constitution."[23] Echoing the Supreme Court's sentiment in *Loretto v.*

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17. Bormann v. Board of Sup'rs, 584 N.W.2d 309, 314 (1998) (citing Iowa Code § 657.2 which deemed certain activities a nuisance). The court added that the statute provided only "skeletal" provisions for which "the common law would fill in the gaps." *Id.*

18. Iowa Code § 352.6 (1993).

19. The procedural history is actually more complex, including the Board's initial refusal to designate the area as an agricultural area, changing its ruling based on the flip of a coin resulting in a challenge brought in district court to the "arbitrary and capricious" nature of the Board's actions, and the subsequent action by the Board to remedy its procedures leaving the designation intact, and leading to the present challenge. *Bormann,* 584 N.W.2d at 312.

20. *Id.* at 313.

21. *Id.*

22. This is the test articulated by the United States Supreme Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) to be applied where there is a partial regulatory taking. The *Penn Central* analysis requires the court to make a factual inquiry taking three factors into account: the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.

23. *Bormann,* 584 N.W.2d at 321-22.

Teleprompter Manhattan CATV Corp.,[24] where the Supreme Court had declared that requiring landlords to allow a cable box and wires to occupy space on their buildings constituted a taking, the *Bormann* court maintained that the statute "appropriates valuable private property interests and awards them to strangers."[25]

The Bright Line Tests for Establishing a *Per Se* Taking

The Fifth Amendment to the United States Constitution states that "[n]o person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

In *Bormann* the challengers contended that "in a facial challenge context courts have developed bright line tests that spare them from this heavy burden" of proving a taking, and that, "these bright line tests provide that a governmental action resulting in the condemnation or imposition of certain specific property interests constitutes automatic or *per se* takings."[26] The *Bormann* court agreed with the challengers and held that the statute in question was unconstitutional, and further, that this was "not a close case."[27]

A "*per se*" challenge is one in which it is alleged that the regulation itself is unconstitutional, as contrasted with an "as applied" challenge in which the allegation is that the statute itself may be constitutional but its application to the challenger is unconstitutional. Two bright line tests have been articulated by the United States Supreme Court in the takings arena for establishing a *per se* taking.[28]

The first type of *per se* taking can be found when a regulation eliminates all economically beneficial or productive use of the land.[29] The United States Supreme Court declared this to be the law in *Lucas v. North Carolina Coastal Counsel*.[30] The Petitioner David Lucas had purchased two beachfront lots on a North Carolina barrier island intending to build single-family homes in conformity with neighboring uses. After his purchase the state enacted a law that prevented Lucas from building a permanent structure on his lots. Lucas contended that although the law was a valid exercise of the

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24. 458 U.S. 419, 436 (1982) (stating that "Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property."). (This case established the *per se* taking rule for permanent physical occupations).

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

26. *Id.* at 313.

27. *See id.* at 322.

28. "There are two categories of state action that *must* be compensated without any further inquiry into additional factors, such as the economic impact of the governmental conduct on the landowner or whether the regulation substantially advances a legitimate state interest. The two categories include regulations that (1) involve a permanent physical invasion of the property or (2) deny the owner all economically beneficial or productive use of the land." *Id.* at 316 (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)).

29. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

30. *See id.*

state's police power, it was a taking under the Fifth Amendment for which compensation should be paid since it denied him all economic use of his land.

The Supreme Court discussed the history of the takings clause, recalling Justice Holmes' warning in *Pennsylvania Coal Co. v. Mahon*[31] that if a regulation went too far, it would result in a taking.[32] In *Lucas* the Court held that the regulation had gone too far in depriving the property owner of any use of his land, resulting in a taking for which the government should provide compensation. The bright line was drawn at the point where the regulation deprived the property owner of all economically viable use of his land.[33] While the court preserved the right of the states to utilize their police power to prevent nuisances and harmful activities, they could not simply enact prohibitions under a noxious use rationale unless such activity could be enjoined under "background principles of the State's law of property and nuisance."[34] In other words, when the state prohibited a use of property that would have been historically considered a nuisance, there was no taking since the owner had no right to use his property in this manner. Here, Lucas could not be denied all economic use of his property when what he intended to do could not properly be characterized as a nuisance.

The second type of *per se* taking occurs when there is a permanent physical occupation of property. In *Loretto v. Teleprompter Manhattan CATV Corp,* a New York statute required landlords to allow the installation of a cable box and cable wire on their apartment buildings for the benefit of their tenants.[35] The property owner was not entitled to demand more than one dollar in compensation. The landlord brought his suit as a class action, claiming the cable box and wire constituted a trespass and that the statute that permitted it resulted in a taking without just compensation. The Supreme Court maintained that it had "long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause," and concluded that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve,"[36] and no inquiry is necessary into the extent of the economic interference with the owner's rights.[37]

A *Loretto per se* taking by physical invasion requires that the interference must be permanent and a physical occupation.[38] A physical occupation that is not permanent may amount to a taking but

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31. 260 U.S. 393 (1922).

32. *Lucas*, 505 U.S. at 1014.

33. *See id.* at 1016.

34. *See id.* at 1029.

35. *Loretto*, 458 U.S. at 421.

36. *Id.* at 426.

37. *Id.*

38. "The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical invasion is a taking. As *PruneYard Shopping Center v. Robins*, 447 U.S. 74; *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) and the intermittent flooding cases reveal, such temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: "they do not absolutely dispossess the owner of his rights

is not a *per se* taking. The Supreme Court described the navigation easement of passage in *Kaiser Aetna,* for example, as "not being a permanent occupation of land," and therefore not a *per se* taking, although as a "physical invasion [it] is a government intrusion of an unusually serious character."[39] Even the fact that there has been a physical invasion is not determinative as to whether a taking has occurred if the physical invasion is temporary.[40]

An easement has been held to be a permanent physical occupation and thus a *per se* taking in the case of a "classic right-of-way easement."[41] Here the easement is considered to be a permanent physical occupation insofar as "individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises."[42] The Supreme Court distinguished the "classic right-of-way easement" from the easements in *Kaiser* and *Pruneyard* that were not *per se* takings.[43]

The neighbors did not contend that the statute deprived them of all economically beneficial use of their property, so in order to establish a *per se* taking they needed to show that it was a permanent physical occupation. The *Bormann* court said it would restrict its discussion to the "physical invasion" category of *per se* takings.[44]

The *Penn Central* Test for Regulatory Takings

The Board asserted that the record reflected that no *per se* taking had occurred, and thus the balancing test set forth in *Penn Central*[45] must be applied, and if this balancing test were applied, the neighbors would lose.[46] After articulating the two categories of *per se* takings, the *Bormann* court acknowledged that a regulatory taking that did not rise to the level of a *per se* taking would have to be analyzed by applying the *Penn Central* analysis.[47] This analysis requires a court to

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to use, and exclude others from, his property." *Loretto*, 458 U.S. at 436 n.12.

39. *Loretto*, 458 U.S. at 436 (explaining *Kaiser*, 444 U.S. 164).

40. *Id.* at 434 (citing *PruneYard*, 447 U.S. at 84).

41. Nollan v. California Coastal Commission, 483 U.S. 825, 832 (1987).

42. *Id.*

43. *Id.* n.1. "The holding of PruneYard Shopping Center v. Robins . . . is not inconsistent with this analysis, since there the owner had already opened his property to the general public, and in addition permanent access was not required. The analysis of Kaiser Aetna v. United States . . . is not inconsistent because it was affected by traditional doctrines regarding navigational servitudes. Of course neither of those cases involved, as this one does, a classic right-of-way easement." (citations omitted).

44. *Bormann*, 584 N.W.2d at 317.

45. Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

46. *Bormann*, 584 N.W.2d at 313.

47. *Id.* at 316-17.

> [engage] in a case-by-case examination in determining at which point the exercise of the police power becomes a taking. This ad hoc approach calls for a balancing test that is essentially one of reasonableness. The test focuses on three factors: (1) the economic impact of the regulation on the claimant's property; (2) the regulation's interference with investment-backed expectations; and (3) the character of the governmental action.[48]

If the *Bormann* court were incorrect in its determination that a *per se* taking had occurred, then Iowa's right-to-farm statute would have to be analyzed by application of the *Penn Central* balancing test. This was the position taken by the Board, which contended that no *per se* taking had occurred.[49]

Bormann's Proposition: State Law Defines Property Rights

Property rights can be created by state law, but the existence of a property right can become a federal question when a taking without just compensation under the United States Constitution's Fifth Amendment is alleged.

Defining the Property Right

The *Bormann* court decided that the right to maintain a nuisance was an easement.[50] As the United States Supreme Court had already held that an easement was a property interest protected by the Fifth Amendment's Taking Clause,[51] this definition drove the conclusion that property "burdened"[52] by this nuisance-easement had suffered a taking. Having labeled the right as an easement, the *Bormann* court could now recount its attributes: "[an easement is] a privilege without profit, which the owner of one neighboring tenement [has] of another, existing in respect of their several tenements, by which the servient owner is obliged to suffer, or not do something on his own land, for the advantage of the dominant owner."[53]

> Another feature of easements is that easements run with the land: The land which is entitled to the easement or service is called a dominant tenement, and the land which is burdened with the servitude is called the servient tenement. Neither easements [n]or servitudes are personal, but they are accessory to, and run with, the land. The first with the dominant tenement, and the second with the servient tenement.[54]

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48. *Id.* (citing *Penn Cent*., 438 U.S. at 124).

49. *See id.* at 313.

50. *See id.* at 315.

51. *See* United States v. Causby, 328 U.S. 256-66 (1946); *see also* Griggs v. Allegheny County, 369 U.S. 84 (1962).

52. *Bormann*, 584 N.W.2d at 315 (citing Churchill v. Burlington Water Co., 62 N.W. 646, 647 (1895)).

53. *Id.* at 316 (citing Dawson v. McKinnon, 285 N.W. 258, 263 (1939)).

54. *Id.* at 316 (citing *Churchill*, 62 N.W. at 647).

In *Churchill* the language that the right to maintain a nuisance was an easement was used in reference to the defense of easement by prescription. The act of discharging soot for a number of years resulted in the acquisition of an easement by prescription.[55] The *Churchill* court applied the term "easement" from the law of adverse possession that the *Bormann* court then borrowed to designate a right it could then conclude was a *per se* taking in a Fifth Amendment case where no nuisance or invasion had ever been demonstrated.

Compare the definition of nuisance in *Bormann* to the Washington Supreme Court's explanation of a similar right-to-farm law immunizing against nuisances:

> The protection afforded by the nuisance exemption is *similar to a prescriptive easement*. When a farm establishes a particular activity which potentially interferes with the use and enjoyment of adjoining land, and urban developments subsequently locate next to the farm, those developers presumably have notice of those "farm" activities. The Right-to-Farm Act gives the farm a quasi easement against the urban developments to continue those nuisance activities.[56]

The Washington Court said the nuisance immunity in their right-to-farm law was like an easement, while the Iowa court said the nuisance immunity in their right-to-farm law actually was an easement. By analogizing their right-to-farm law to an easement rather than defining it as an easement, the Washington court avoided all of the legal implications that would inhere in applying the commonly used term easement that is understood to refer to an interest in land.

In *Overgaard v. Rock County Board of Commissioners*,[57] the plaintiffs claimed that Minnesota's right-to-farm statute's prohibition against bringing nuisance suits created an easement allowing the maintenance of a nuisance. Citing *Bormann* they alleged that this was a taking of their property. The Minnesota statute differed from Iowa's in that the nuisance immunity did not apply until two years from the date the operation began.[58] This effectively provided a two-year window in which a nuisance lawsuit could be filed.[59]

Interpreting the Minnesota Right to Farm Act, the federal district court held *Bormann* was inapplicable and that no easement was created.[60] "This is different from Iowa, where the Right to Farm Act creates immediate immunity from nuisance suit. In Minnesota, because neighboring landowners maintain their ability to bring suit for at least two years, no easement is created and the

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55. *Churchill*, 62 N.W. at 647.

56. Buchanan v. Simplot Feeders Limited Partnership, 952 P.2d 610 (1998) (emphasis added).

57. No. CIV.A.02-601 (DWF/AJB), 2003 WL 21744235 (D. Minn. July 25, 2003).

58. The Minnesota statute provided that "[a]n agricultural operation is not and shall not become a private or public nuisance after two years from its established date of operation if the operation was not a nuisance at its established date of operation." *Id.* at *7 (citing Minn. Stat. § 561.19(2)(a) (2002)).

59. *Id.* at *7.

60. *Id.*

neighboring landowners are not deprived of any property rights."[61] In effect, the statute protected the right to bring a lawsuit, and such right, although a limited right, prevented the characterization of the Minnesota statute as an easement.

In an unpublished opinion an Idaho district court discussed *Bormann* in *Moon v. North Idaho Farmer Association*.[62] The supporters of the Idaho right to farm act had argued that the *Bormann* decision only protected a property right in a nuisance cause of action. The Idaho district court opined, "*Bormann* doesn't protect a property right in a nuisance cause of action. *Bormann* declares that the legislature's immunization of a nuisance creates an easement without the payment of compensation, and that is what was held to be unconstitutional."[63] In *Moon* the court held the existence of the right to bring a nuisance suit for two years prevented the statute from being characterized as an easement, notwithstanding the fact that two years after the operation began there would be no such right. In Iowa and in Idaho the immediate immunization of nuisances resulted in the finding of an easement. In *Moon* focusing on the preservation of a cause of action as the right at issue resulted in finding no taking. In *Bormann* and *Moon* it was not the loss of the cause of action itself but the result of removing the cause of action, the immediate creation of an easement, that resulted in a taking.[64]

While there is no clear-cut way to define the property right, what is clear is that defining the right is of utmost importance. In *Bormann* defining the property right as an easement resolved the matter of whether there was a taking. Likewise, in *Overgaard* the determination that the right was not an easement settled the takings issue. When arguing the constitutionality of a right-to-farm law, how the property right is defined can have the effect of determining the outcome.

A Constitutionally Protected Property Right–A Federal Question

A takings analysis requires a determination of the existence of a property right that is the subject of the Fifth Amendment's protection. The *Bormann* court started with the proposition that what constitutes a property right is a matter of state law, citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith.*[65] With this understanding the *Bormann* court applied Iowa law to define the property right. Property rights often arise as a result of state laws, but state courts are not the ultimate arbiter of whether there is a property right under the Fifth Amendment's Takings Clause.

In *Webb's Fabulous Pharmacies* the issue was whether it was a violation of the takings clause for the county to retain as its own the interest accruing on funds deposited into the registry of the court pursuant to a Florida statute that provided for court deposit of funds in an interpleader action. The statute, which was interpreted by the Florida Supreme Court to apply to private funds

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61. *Id.*

62. No. CV. 2002 3890, 2003 WL 2164506 (Idaho Dist. June 4, 2003).

63. *Id.* at *15.

64. *But cf., Immunities as Easements as "Takings:"* Bormann v. Board of Supervisors, 48 DRAKE L. REV. 53, 64-65 (1999) (arguing that all the statute in *Bormann* did was to merely foreclose a tort cause of action which does not implicate a federally protected constitutional right).

65. *Bormann*, 584 N.W.2d at 315 (citing Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980)).

such as those at issue, stated that interest generated by money deposited into the court registry "shall be deemed income of the office of the clerk of the circuit court."[66]

There was no dispute that the interest earned was not retained as compensation for services provided by the court, as there was already another statute that specifically charged for the administrative costs of maintaining the fund. Thus, there was no justification for the state taking the interest generated other than the argument that it belonged, by reason of a statute defining it as state property, to the state. The constitutionality of the state's actions in taking the interest generated by funds on deposit turned upon whether the petitioners had a property right in the interest.

The Supreme Court held, "[w]e, of course . . . accept the . . . proposition . . . that [p]roperty interests . . . are not created by the Constitution"; rather, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ." [67] The Supreme Court did not, however, allow the Florida Court to delineate the property right. Instead it announced its rule–that interest follows the principal–citing cases from various jurisdictions to illustrate that this was a long-established general rule regarding principal and interest.[68] The property right was thus not ultimately defined by the state court but by the federal court, here the United States Supreme Court. The Court explained that the general rule of law both governed and created an expectation of a property right, and such an expectation gave rise to the property right.[69]

Likewise, in *Overgaard* the federal district court looked to state laws to determine the existence of a property right entitled to constitutional protection.[70] In *Overgaard* an action was brought by property owners objecting to the construction of a hog feeding lot near their property.[71] They challenged the procedures under which the feedlot was permitted, claiming a violation of their federal rights of procedural and substantive due process. They claimed the establishment of the feedlot violated Minnesota statutes and rules and a county ordinance, and in addition alleged an action for inverse condemnation, nuisance, trespass, and negligence.[72]

The plaintiffs sought protection of their federal constitutional rights by asserting a section 1983 action.[73] The court had to determine if the plaintiffs had a constitutionally protected property interest that could be asserted. The court stated,

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66. *Webb's Fabulous Pharmacies,* 449 U.S at 160 n.1.

67. *Id.* at 161 (citing Board of Regents v. Roth, 408 U.S. 564 (1972)).

68. *Id.* at 162-63.

69. *See id.* at 162.

70. Overgaard v. Rock County Board of Commissioners, 2003 WL 21744235.

71. *Id.*

72. *Id.* at *3.

73. "[42 U.S.C.] Section 1983 is not itself a source of substantive rights, but instead is a vehicle for asserting federal rights conferred elsewhere." *Id.* at *4.

> Protected property interests are created by state law, but federal law determines whether property interests rise to the level of constitutionally protected property interests. State law can create a property interest by explicitly creating a property right, by "establishing statutory or regulatory measures that impose substantive limitations on the exercise of official discretion," or by "understandings between the state and the other party."[74]

While states can define property rights in the sense of creating expectations that can ripen into property rights, "the meaning of 'property' as used in the Fifth Amendment . . . [is] a federal question, [and] 'it will normally obtain its content by reference to local law.'"[75] Thus, neither the court by interpreting its laws nor the legislature by enacting statutes affecting property rights can define property in such a way as to violate the constitution. If a state fails to find that a compensable property right was taken, this finding is subject to review when the result is alleged to be a deprivation of a constitutional right. It is not argued that a state cannot define a property right so as to afford such right the protection of its own state laws. The conclusion by the *Bormann* court that a taking occurred under the Iowa Constitution is therefore not questioned here, but rather the holding that the Iowa right-to-farm law violates the Fifth Amendment's Takings Clause.

Bright Line Rules for Shades-of-Gray Distinctions

Bright line rules such as the *per se* rules for establishing a taking at issue here can be criticized as elevating form over function, forcing the parties and the courts to have to define a right a certain way to reach what they believe to be a rational result.[76] The *Bormann* court, through the application of attenuated reasoning, defined the right at issue in such a way as to find a *per se* taking. The Oregon Supreme Court, by contrast, directly rejected the rule which it stated was adopted by a majority of state and federal courts, finding a taking and compensating property owners for trespasses but not nuisances created by airplane overflights.[77] In rejecting the thinly drawn line distinguishing trespass and nuisance cases where a taking would be found only in the former instance, the court stated, "[w]hether a plaintiff is entitled to recover should depend upon the fact of a taking, and not upon an arbitrary rule."[78]

The Oregon Supreme Court discussed the anomaly in the law whereby trespasses that sometimes caused no real harm to the landowner would certainly be subject to compensation, while a nuisance that markedly diminished the use and enjoyment of property might not entitle the owner

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74. *Id.* at *4 (citations omitted).

75. United States v. Causby, 328 U.S. 256, 266 (1946).

76. *See Loretto,* 458 U.S. at 451 (1982) (Blackmun, J., dissenting). "By directing that all 'permanent physical occupations' automatically are compensable, 'without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner,' . . . the Court does not further equity so much as it encourages litigants to manipulate their factual allegations to gain the benefit of its *per se* rule."

77. Thornburg v. Port of Portland, 376 P.2d 100 (Or. Sup. Ct. 1962).

78. *Id.* at 109.

to compensation.[79] The court further remarked that nuisance principles provided a more enlightened method for assessing damages. "[T]he nuisance theory provides the jury a useful method for balancing the gravity of the harm to the plaintiff against the social utility of the airport's conduct, in a way that would not be available if the trespass theory were used."[80]

Did the Right-To-Farm Statute Create an Easement Subject to the Just Compensation Clause of the Fifth Amendment?

The *Bormann* court found that the nuisance immunity granted by the right-to-farm statute was an easement, an interest in land. The court reasoned that the statute, when utilized to designate an agricultural area, provided nuisance immunity. The nuisance immunity eliminated the right to maintain a lawsuit for nuisance, which in turn conferred the right to maintain a nuisance. The right to maintain a nuisance–the property interest at stake–was an easement, which was an interest in land. The creation of an easement required just compensation under the Fifth Amendment to the United States Constitution.

The Zero Sum Assumption

In defining the property right the *Bormann* court determined that the tort immunity gave the farmers in the agricultural area an easement over their neighbors' properties to maintain a nuisance. The court then went on to hold that, therefore, the interest taken requiring just compensation was an easement. The court defined the right claimed to have been "taken" by reference to what rights were conferred by the statute on those whom it protected, rather than by assessing what damages, loss, diminution in value, or physical occupation had actually resulted from the statute to those it allegedly injured by a taking of their property without just compensation. This was the only way to approach the problem since no proof of loss was offered by the neighbors who had brought a facial challenge to the right-to-farm statute.

In finding that the right created in the holder of the nuisance immunity was an easement, the *Bormann* court inferred that the land subjected to the activities given nuisance immunity was burdened by an easement. By defining the right created by the right-to-farm statute in terms of what the beneficiary of this right held by virtue of the statute, the corresponding property right lost was predetermined to be an easement. With the creation of an easement over the neighbor's property appearing self-evident, the Bormann court proceeded to apply the black letter law of easements:

> The land which is entitled to the easement or service is called a dominant tenement, and the land which is burdened with the servitude is called the servient tenement. Neither easements [n]or servitudes are personal, but they are accessory to, and run with, the land. The first with the dominant tenement, and the second with the servient tenement.[81]

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79. *Id.*

80. *Id.* at 107.

81. Bormann v. Board of Sup'rs, 584 N.W.2d 309, 314 (1998) (citing THE RESTATEMENT 2nd OF PROPERTY § 451 at 2911-12 (1944)).

This reasoning has been criticized as logically flawed.[82] Referring to this as the "zero sum assumption," Pearson asserted, "[h]aving concluded the defendants gained something, the court perceived the plaintiffs to have lost precisely what the defendants gained. What was given to one must have been taken from the other. But rights can be enlarged for one person without diminishing or adversely affecting rights of other persons."[83] This analysis was premised upon the assumption that in *Bormann,* the immunity merely "enhances the holder's right to use his or her own land" rather than burdens the property rights of another; . . . [r]ather than being the extraction of a 'stick in the bundle' of property rights of plaintiffs, it is an additional stick added to defendants' own bundle."[84]

Whether or not the zero sum assumption bears out, there is still another problem stemming from the assumption of a loss rather than a showing of a loss. This failure of proof as to whether there were damages and, if so what is the amount of damages subject to just compensation under the Fifth Amendment, are part of what a challenger must prove in a Fifth Amendment Takings case.

The Measure of Just Compensation Is the Loss to the Owner

The Fifth Amendment is not violated merely by the taking of property; it proscribes taking without just compensation. When determining whether just compensation is due in a claim involving a *per se* taking by physical occupation or invasion, a *Loretto per se* claim, the value of what is taken is not measured by what the physical occupier or invader has gained but by what the owner has lost.[85]

In *Brown* the petitioners alleged that a taking of the interest earned on their money that had been placed in Interest on Lawyers' Trust Accounts (IOLTA account) violated the Fifth Amendment's requirement that they be paid just compensation.[86] Placing client funds into such an account in order to fund legal services for the poor was required by a rule of the Washington Supreme Court. The Washington Supreme Court's rules provided that a client's money would be pooled in an interest-generating account only if the money could not otherwise earn interest for the client. The rules also provided that if the client funds could earn interest, then they should not be placed in an IOLTA account. Typically the reason a client's funds would not earn interest would be due to administrative costs of maintaining an account outweighing the amount of interest the account could earn.

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

83. *Id.* at 60-61.

84. *Id*.

85. Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003). *See also* United States v. Causby, 328 U.S. 256, 266 (1946).

86. *Brown*, 538 U.S. at 228-29.

The Supreme Court in *Brown* held that the interest in the IOLTA account was the petitioners' private property.[87] They had no expectation in receiving any interest, however, because their money would not have earned interest had it not been placed in an IOLTA account in accordance with the IOLTA rules.[88] The Court held that compensation for the taking of this interest was not due because "the question is what has the owner lost, not what has the taker gained."[89] Posing the question this way, the Court found that even if there were a taking, the petitioners were not entitled to just compensation and there was no Fifth Amendment violation because petitioners had not lost anything; the value of their interest was zero.[90]

A taking by physical occupation as a *per se* taking does not require proof of the economic impact on the owner,[91] and there is no *de minimis* exception.[92] *Brown* was also analyzed as a *per se* taking by the Supreme Court.[93] As in *Brown,* when the issue is a *per se* taking but not a physical occupation or appropriation, it is not enough to allege that the taker gained something as a result of the statute to prove the challenger has lost something subject to just compensation. Insofar as the Supreme Court held that the Fifth Amendment was not violated when the value of the property right to the party losing that right was nil, *Brown* should be understood to add the requirement that a party alleging a Fifth Amendment violation has the burden of proving the value of what is lost in proving that his Fifth Amendment rights have been violated, even in a *per se* takings case, short of a physical occupation.

In *Bormann* the Iowa court found an unconstitutional taking without payment of just compensation by measuring what the "taker gained" rather than what the "owner lost." There was no evidence proffered by the neighbors about what was lost nor the economic impact of that loss, since their challenge alleged the statute resulted in a *per se* taking. What the *Bormann* court held was that the statute in and of itself accomplished a taking of their property, although there was no physical occupation or invasion–a fact the court held was not important to the takings claim. If the *Brown* case indicates an additional requirement for proving a taking in non-physical occupation cases, then the *Bormann* court erred in finding a Fifth Amendment violation in the absence of proof of some loss in value as a result of the taking subject to just compensation.

This is not to imply that the neighbors and other property owners who felt they had suffered a nuisance and had substantial interference with the use and enjoyment of their properties would then be left unable to ever challenge the right-to-farm statute's nuisance immunity. Nothing would preclude bringing a challenge that the statute as applied to them, an "as applied" claim, violated the

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87. *Id.* at 235.

88. *Id.* at 237-40.

89. *Id.* at 236-37 (citing Boston Chamber of Commerce v. Boston, 217 U.S. 189 (1910)).

90. *Id.* at 237.

91. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 425-36 (1982).

92. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).

93. In *Brown* the Supreme Court held that the property right should be analyzed as a *per se* taking rather than by application of the *Penn Central* analysis because "the transfer of the interest to the Foundation here seems more akin to the occupation of a small amount of rooftop space in Loretto." *Brown* at 217-18.

Fifth Amendment's Takings Clause.[94] In addition, a law that results in a taking without any provision for compensation could also be brought as a § 1983 action in which damages are sought in the amount of just compensation that should have been awarded.[95] In sum, a property owner who believes he has suffered a loss of a property right for which compensation is due must show the amount of damages or loss suffered as an element of his claim for just compensation.

Does The Right to Maintain a Nuisance Create an Easement Entitled to Fifth Amendment Compensation?

The Statute Immunized Nuisances, Not Trespasses

Before concluding that an easement created by the right to maintain a nuisance was the interest created by the statute, the *Bormann* court carefully distinguished the tort of nuisance from trespass. It concluded that the statute unequivocally provided immunity from nuisance-type conduct, not trespassory conduct:

> As distinguished from trespass, which is an actionable invasion of interests in the exclusive possession of land, a private nuisance is an actionable invasion of interests in the use and enjoyment of land. Trespass comprehends an actual physical invasion by tangible matter. An invasion which constitutes a nuisance is usually by intangible substances, such as noises or odors.[96]

What has been interchangeably referred to as trespassory invasions, physical invasions, or physical occupations are *per se* takings, and the *Bormann* court conceded this point. "Generally, when the government has physically invaded property in carrying out a public project and has not compensated the landowner, the United States Supreme Court will find that a *per se* taking has occurred."[97]

Having explained that the activities immunized by the right-to-farm statute were clearly nuisances and not trespasses, the court then sought to demonstrate that nontrespassory takings–the taking of an easement resulting from the right to maintain a nuisance–were physical invasions that qualified as *per se* takings.[98] In its review of the law, the *Bormann* court used the terminology "trespassory invasions" and "nontrespassory invasions" to refer, respectively, to easements arising from trespass and easements arising from a nuisance.

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94. Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

95. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999).

96. Bormann v. Board of Sup'rs, 584 N.W.2d 309, 315 (1998).

97. *Id.* at 317. In distinguishing between trespass and nuisance for the purpose of analyzing takings law, the court used the terminology "trespassory" and "nontrespassory" invasions to differentiate between trespass and nuisance-type activities.

98. *Id.* at 317-18.

The Right to Maintain a Nuisance Is an Easement and Compensable as a Taking Under the Iowa Constitution.

The *Bormann* court held that the property right at stake was that of an easement–the right to maintain a nuisance is an easement.[99] The Iowa Supreme Court looked to a 1895 Iowa case to support this proposition. In *Churchill,* the plaintiff sought damages and an injunction for the smoke and soot coming from defendant's smokestack into the plaintiff's home.[100] Burlington Water Co. defended that it should not be enjoined or liable for damages because it had acquired a prescriptive easement to continue to discharge soot and smoke onto plaintiff's property after several years of repeated incidents. The court agreed that such activity could ripen into an easement but that here the defendant had not satisfied all of the statutory elements for obtaining an easement by prescription, particularly the ten-year statutory period.

In *Churchill* the court likened the defendant's right to discharge soot and smoke to the right to pollute water. The "right acquired by time to send noxious vapors over another's land . . . generating gas, steam, and smoke, and distributing in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupting the free passage of light and air to and from adjoining premises"[101] are activities that constituted the taking of the easement. The court concluded that "the right to discharge soot and smoke upon the premises of another is an easement, and within the contemplation of the statute."[102]

For authority that an easement was subject to the requirement of just compensation under the Iowa Constitution, the *Bormann* court looked to the Iowa case of *Simkins v. City of Davenport*.[103] In *Simkins* a municipality had constructed a highway with a divided median abutting the Simkins' gas station.[104] The Simkins had previously enjoyed ready access to their gas station from vehicles heading in both directions on the public highway, but the newly-constructed median cut off access from the far side of the highway. Just compensation for the impairment or taking of the easement itself was not sought; the issue in *Simkins* was the admissibility of evidence showing the impairment of the access easement needed to prove the diminution in value of the gas station it served. Nevertheless, the *Bormann* court held: "Easements are . . . property interests subject to the just compensation requirements of our own Constitution."[105]

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99. *Id.* at 315.

100. Churchill v. Burlington Water Co., 62 N.W. 646-47 (1895).

101. *Id.* at 647.

102. *Id.*

103. 232 N.W.2d 561 (1975).

104. *Id.* at 562.

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

Although the *Bormann* court's use of a physical easement for ingress and egress as precedent to demonstrate a taking of an easement by the right-to-farm statute's nuisance-immunization is somewhat attenuated, the Iowa court's interpretation of the requirements of its own constitution is not questioned here. Their opinion thus established that under the Iowa constitution an easement arising from the right to maintain a nuisance is a taking. This position is not inconsistent with other state court decisions finding a taking by nuisance based upon their own constitutions or other principles of law.[106] What is argued here, however, is that this result is not mandated by the United States Constitution's Fifth Amendment Taking Clause. The precedential value this case has in determining the validity of other nuisance-immunizing statutes based upon a United States Constitutional challenge is therefore open to debate.

The Supreme Court Takings Cases Cited by Bormann Required a Physical Invasion.

Easements resulting from physical invasions have been found to be *per se* takings. By characterizing the right at issue as an "easement," the *Bormann* court concluded that the *per se* taking rule applied. In their analysis the *Bormann* court bypassed the underpinnings of the bright-line *per se* taking rule articulated by the Supreme Court that there must be a physical invasion.

The *Bormann* court rationalized its holding that a non-trespassory invasion of private property constituted a *per se* taking by citing to cases where a taking was found in absence of an invasion of the surface of the land. The court stated, "[t]o constitute a *per se* taking, the government need not physically invade the surface of the land."[107] While this is a correct statement of law–that the *surface* of the land need not be physically invaded to find a *per se* taking–this too narrowly states the constitutional test for finding a *per se* taking of real property. The landowner's rights that are subject to the protection of the Takings Clause encompass not merely the surface of the land, but also, for example, the mineral estate,[108] a private lagoon that had been dredged and connected to navigable waters,[109] and the low reaches of the atmosphere directly above his land.[110] In other

106. *See, e.g.*, Thornburg v. Port of Portland, 376 P.2d 100 (1962) (The Supreme Court of Oregon court distinguished between trespassory and nuisance-type activities, determining that maintenance of the latter may constitute a taking under the Oregon Constitution and concluding that on policy grounds, there is no defensible distinction between the two. City of Georgetown v. Ammerman, 136 S.W. 202 (1911) (finding the City's dump created a nuisance which was a taking under the Constitution without specifying whether the U.S. or Kentucky Constitution); Ivester v. City of Winston-Salem, 1 S.E.2d 88 (1939) (finding the case could proceed to trial on a taking claim based upon principles of equity and justice where a nuisance made property virtually uninhabitable) (All of the preceding cases were cited in Bormann). *See also* Batten v. United States, 306 F.2d 580, 583-84 (1962) (explaining that because damages alone without a physical invasion are not sufficient to find a taking under the Federal Constitution many state constitutions have provided that just compensation is required not only when the government takes property but also when the government damages property).

107. *Bormann*, 584 N.W.2d at 317.

108. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

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

110. *See, e.g.*, United States v. Causby, 338 U.S. 256 (1946).

words, interests other than the surface may be subject to a trespass or physical invasion invoking the protections of the Fifth Amendment's Takings Clause.

In the avigation easement cases discussed by the *Bormann* court although the land surfaces were not invaded and *per se* takings were found, frequent trespasses into the superadjacent atmosphere resulted in the creation of an easement by physical invasion subject to the requirement of just compensation. It is argued here that in reaching its conclusion that a nontrespassory (nuisance-type) invasion of private property is a *per se* taking, the *Bormann* court mischaracterized the easements in the Supreme Court cases to support its takings theory with decisions premised upon both physical invasions as well as nuisances.

The Iowa Supreme Court discussed several United States Supreme Court holdings that an easement is a property interest that, when taken by the government, required that just compensation be paid pursuant to the Fifth Amendment of the constitution. Those cases, insofar as they concerned activities that, when carried on so as to constitute the taking of an easement requiring just compensation, involved trespassory activities. These cases contain language describing the harm-generating activities in nuisance terms, as well as trespass (physical invasion), terms, creating confusion as to whether a nuisance or trespass was the basis for finding a taking. The nuisance aspects–noise and vibrations–in the flight navigation easements cases were described as interfering with the use and enjoyment of property, but that alone was not the basis for the Court's finding of a taking in the nature of an easement. Trespass was an indispensable ingredient in each of the Supreme Court cases the *Bormann* court cited where a flight navigation easement was a Fifth Amendment taking.

One of the foundations of the *Bormann* holding was that "[e]asements are property interests subject to the just compensation requirements of the Fifth Amendment to the Federal Constitution."[111] In support, the court discussed *U.S. v. Welch*[112] in its opinion. In *Welch* the petitioners owned an easement of access located upon their neighbor's property that was their only means of ingress and egress to their own property. The easement was permanently obstructed by flooding that prevented their using the easement to access their property. The Supreme Court held not just that an easement was an *interest* in land subject to the takings clause, but that the easement *was land* and that a taking resulted from the permanent physical occupation of flood waters obstructing the easement.[113] Proving that a classical easement of access that is actually land itself, as was the case in *Welch,* brings us no closer to the submission that an easement that was no more than the right to commit nontrespassory, non-physical invasions of private property (a nuisance) constituted a *per se* taking.

The *Bormann* court turned to *United States v. Causby*[114] to argue that nontrespassory invasions can result in a *per se* taking.[115] In *Causby* the easement at issue was an avigation

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

112. 217 U.S. 333, 339 (1910).

113. *Id.* at 339.

114. *Causby*, 328 U.S. 256.

115. *Bormann*, 584 N.W.2d at 317-18.

easement resulting from frequent and continuous trespass by airplanes flying 83 feet above the Causby's property. The Supreme Court discussed the fact that the United States in general has the right to use navigable airspace and a property owner did not have a claim to such airspace because otherwise airplanes would be constantly subject to trespass claims.[116] The Court found that in this instance airplanes were flying at a height that was not considered navigable airspace but was space to which the landowner had a property right, just as, by analogy, he owned the space between his buildings.[117]

While the Court in *Causby* referred to the interference with the use and enjoyment of land, language typically used to describe a nuisance, the trespassory basis for its decision was also a critical factor in the Court's holding. The low altitude of the overflights were within the property owner's dominion and were thus considered to be trespassing within airspace to which the landowner had a superior right. In *Causby* there was a taking resulting from a physical invasion but the Court additionally vindicated its determination that there was a taking with a nuisance rationale.[118] The avigation cases typically involved either nuisances or physical invasions, and sometimes both, but the outcomes often turned upon which one had been proven. One scholar described this aspect of the avigation cases as found in *Causby*:

> The trespass/nuisance split personality of Causby underlies the most consistent difference between the federal and state flight cases. The federal cases, stressing the trespass basis of Causby, generally limit takings recovery for airplane overflights to those directly over one's land. By contrast, almost all state cases, highlighting the nuisance basis of Causby, allow recovery regardless of whether the land owner's airspace was invaded.[119]

In *Griggs v. Allegheny County,*[120] cited by the *Bormann* court for its holding that the imposition of a servitude on plaintiff's land was a taking, the government had changed the altitudes

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116. "The air is a public highway, as Congress has declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits." *Causby*, 328 U.S. at 261.

117. *Id.* at 265.

118. *See also* Batten v. United States, 306 F.2d 580, 584 (1962). "In *Causby* the Supreme Court held that the continuous invasions of the airspace superadjacent to the property of the landowner by military planes taking off and landing at a nearby base was 'in the same category as invasions of the surface' and that the damages were not 'merely consequential' but 'the product of a direct invasion of respondent's domain.' The plaintiffs argue that the actual damage in *Causby* resulted from noise and vibration and that if recovery is permitted for sound and shock waves traveling vertically, it should also be allowed for such waves traveling laterally. The unacceptability of this theory was demonstrated in *Nunnally v. United States* [cite omitted] where recovery was denied because of diminution in value of a recreational cottage by practice bombing on an adjoining federal proving ground. The Fourth Circuit pointed out that there was *no physical invasion* of the plaintiff's property and that there was at the most a 'sharing in the common burden of incidental damages' because the annoyance was the same as that to which everyone living in the vicinity was subject to varying degrees." [emphasis added].

119. ROBERT MELTZ, DWIGHT H. MERRIAM, & RICHARD M. FRANK, THE TAKINGS ISSUE, CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION 339 (1999).

120. 369 U.S. 84 (1962).

navigable airspace was defined to encompass in order to include airspace necessary for takeoffs and landings. The only salient difference between *Griggs* and *Causby* was that the low-altitude flights, although at the same altitude as the flights in *Causby*, were now in air space redefined by the legislature as part of the public navigation servitude. The Supreme Court refused to differentiate *Griggs* from *Causby* notwithstanding the new definition of navigable airspace, holding that the planes were physically invading superadjacent airspace belonging to the property owner, "otherwise no home could be built, no tree planted, no fence constructed, no chimney erected."[121] The crux of the decision in *Griggs* was that a physical invasion required compensation. Congress could not avoid paying just compensation for a physical invasion by redefining the private property invaded as being public property.

Portmouth Harbor Land & Hotel Co. v. United States[122] was also cited by the *Bormann* court to demonstrate that nontrespassory invasions created an easement subject to the takings provision. While also considering the nuisance aspects of defendant's activities, the Court nevertheless characterized the government's action in firing military weapons repeatedly over plaintiff's property as a trespass: "But even when the intent thus to make use of the claimants' property is not admitted, while a single act may not be enough, a continuance of them in sufficient number and for a sufficient time may prove it. Every successive trespass adds to the force of the evidence."[123]

The Iowa Avigation Cases

The *Bormann* court cited the Iowa case of *Dolezal v.City of Cedar Rapids*[124] for the same principle as *Causby* and *Griggs*, that is, "a [flight] navigation easement [is] one that permits free flights over land including those so low and so frequent as to amount to a taking of property."[125] The basis for finding a taking requiring just compensation in *Dolezal* was that the planes were flying at such low altitudes that they were within the physical domain of the landowner invading airspace under the landowner's dominion. This case adds nothing to the argument that a nontrespassory invasion can be a *per se* taking.

Fitzgarrald v. City of Iowa City[126] was yet another avigation easement case that was supposed to support the *Bormann* court's assertion that a non-physical invasion was a *per se* taking: "To constitute a *per se* taking, the government need not physically invade the surface of the land."[127] If anything, the court's discussion of *Fitzgarrald* seems to support the necessity of a physical invasion to be a *per se* taking. The following is from the *Bormann* court's discussion of *Fitzgarrald*:

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121. *Id.* at 88.

122. 260 U.S. 327 (1922).

123. *Id.* at 329-30.

124. 209 N.W.2d 84 (Iowa 1973).

125. Bormann v. Board of Sup'rs, 584 N.W.2d 309, 318 (1998) (discussing Dolezal v. City of City Rapids, 209 N.W.2d 84, 87 (Iowa 1973)).

126. 492 N.W.2d 659 (Iowa 1992).

127. *Bormann*, 584 N.W.2d at 317-18.

> [W]e had occasion to consider a physical invasion claim involving overflying aircraft. As in *Causby,* the plaintiffs in *Fitzgarrald* claimed the overflying aircraft so adversely affected the use and enjoyment of their property that a taking had resulted. We rejected the claim because the plaintiffs had failed to prove a "measurable decrease in market value" due to the overflying aircraft. [citation omitted]. Nevertheless, we cited *Causby* for the proposition that "[i]n some circumstances, overflying aircraft may amount to a physical invasion." We recognized that when interferences with property from overflying aircraft result in a measurable decrease in property market value, a taking has occurred. In such cases, we said "the right to recovery is not for the nuisance that must be endured but for the loss of value that has resulted." The loss-in-value measure of damages is what we would ordinarily use in eminent domain cases.[128]

The failure to prove a decrease in market value as a basis for rejecting the claim was anomalous in context of the claim in *Fitzgarrald* that there had been a physical invasion of their property. While the court had noted that there was some evidence of a physical invasion and had opined that even a *de minimis* physical invasion was a *per se* taking requiring just compensation, the court denied their claim for failure to prove any diminution in value.[129]

This "decrease in property value" measure of damages referred to by the Iowa court in *Fitzgarrald* is better explained by looking where the Iowa court looked for authority for this requirement. The *Fitzgarrald* opinion referred to a Minnesota Supreme Court decision premised upon the Minnesota Constitution's takings clause, which recognized a taking based upon a nuisance claim, and required proof of a decrease in market value.[130]

The Fitzgarralds (the Iowa plaintiffs) had premised their arguments, in part, on the Minnesota constitutionally-recognized right to claim a compensable taking in a nuisance-easement case in support of their own claim that a taking by physical invasion (a trespass-easement) had occurred. The *Bormann* court picked up on this language, using the *Fitzgarrald* (trespass avigation easement) case to support finding a taking in the nuisance-easement situation. Whether intentionally or unintentionally, the *Bormann* court's authority for finding the right to maintain a nuisance was a taking (absent proof of actual physical invasion) was from a Minnesota case cited within an Iowa case asserting a takings claim under the Minnesota constitution.

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128. *Id.* at 318 (citation omitted).

129. "If some physical invasion is in fact demonstrated, there is no *de minimis* rule. As the Supreme Court has observed: [N]o matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation [for a physical invasion]." *Fitzgarrald,* 492 N.W.2d at 665 (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992)).

130. *See* Alevizos v. Metropolitan Airports Comm. of Minneapolis and St. Paul, 216 N.W.2d 651 (Minn. 1974).

Some Federal Courts Have Recently Allowed Takings Claims for Non-Physical Invasions.

After the decision in *Causby*, the "paradigm of overflight takings cases,"[131] the federal courts generally allowed recovery for avigation easements only where it was shown that the airplanes passed within a certain altitude of plaintiffs' properties, generally less than 500 feet in less populous areas or 1,000 feet in congested areas, and denied compensation in other circumstances, consistent with its physical invasion theory of takings.[132] Claims for noise, vibrations, and smoke were rejected as being merely consequential damages, and a nineteenth century Supreme Court case, *Richards v. Washington Terminal Company*, that had found a takings in a nuisance context, was explained away as only allowing recovery to the extent there was a physical invasion.[133]

Justifying the deafening and ceaseless roar of jets and its characteristic interference with use and enjoyment of property as incidental injury that was unavoidably attendant to the public's use of the public navigation servitude, the court in *Aaron v. United States*[134] once again denied relief, holding there was no taking as long as flights were above a certain height and within the federal navigation easement, the height defined by Congress as being the minimum safe altitude. Language in *Aaron* portended what would soon follow, a taking based solely upon the nuisance created by the thunderous jet engines:

> [A] case could . . . arise where the unavoidable damage to a person's property occasioned by travel in the navigable air space would be so severe as to amount to a practical destruction or a substantial impairment of it. When such a case arises we would then have to consider whether the relevant statutes and regulations violated the property owners' constitutional rights; but plaintiffs have not made out such a case.[135]

Finally in *Argent v. United States*,[136] groups of navy planes were relentlessly flying "touch-and-go landings" (a practice of repeated take-offs and landings performed to practice landings on naval carriers) over plaintiffs' property on a regular basis–hundreds of times a week.[137] Most of the flights were above 500 feet, which was within the federal avigation servitude, only a few were below

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131. Argent v. U.S., 124 F.3d 1277, 1281 (1997).

132. *See* Batten v. United States, 306 F.2d 580 (1962); Aaron v. United States, 311 F.2d 798 (1963).

133. "*Richards* . . . allowed recovery because smoke and fumes were driven out of a tunnel by an exhaust fan in such manner that they were directed across plaintiff's property, but in so doing expressly recognized the invasion principle." *Id*. at 584 (explaining Richards v. Washington Terminal Co., 233 U.S. 546 (1914).

134. 311 F.2d 798 (1963).

135. *Id.* at 801.

136. 124 F.3d 1277 (1997).

137. *Id.* at 1279-81.

500 feet of altitude.[138] If the *Argent* court were to follow the *Causby* rule insulating flights above 500 feet from takings claim, the intrusions could avoid being labeled as physical invasions and thereby avoid the requirement of just compensation.

The *Argent* court regarded the basis for the interference with the landowner's use and enjoyment of his property as emanating from the noise and vibration of the overflights, and therefore focusing on altitude as the touchstone for finding a physical intrusion requiring just compensation completely missed the mark. In *Argent* the court held that although in the case of physical invasions the government had invariably found a taking, "the law is flexible enough to recognize non-invasive Governmental action that nonetheless threatens to destroy the owner's enjoyment of his estate."[139]

The court looked to *Richards* this time, emphasizing the nuisance rather than the physical invasion aspects.[140] The court also noted that in *Griggs* and *Branning v. U.S.*[141] the government could not avoid the characterization of the governments actions as a taking where take-offs and landings at altitudes below 500 feet invaded property owners' dominions by defining take-off and landings as part of the federal avigation servitude.[142] The government could not envelope itself in a blanket immunity merely by delimiting the reaches of the public avigation servitude. The focus should properly be on the extent of the interference with the plaintiffs' use and enjoyment of his property, and when it reached a certain magnitude a taking would occur. The court held that to state a cause of action, the plaintiff must show a "peculiarly burdensome pattern of activity, including both intrusive and non-intrusive flights, that significantly impairs their use and enjoyment of their land, those plaintiffs may state a cause of action." [143]

While this opened the door for takings by nuisance in the federal courts, that is not to say that a nuisance was a *per se* taking, only that a nuisance could rise to the level of a taking.

Nuisance Immunity as a Taking

The Supreme Court's Decision Almost a Century Ago

A nuisance immunity had been declared unconstitutional by the United States Supreme Court before in *Richards v. Washington Terminal Company,*[144] which the *Bormann* court stated was factually similar to the case it was deciding. *Richards* involved a nuisance lawsuit against a

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138. *Id.*

139. *Id.* at 1284.

140. *Id.* at 1281.

141. 654 F.2d 88 (1981).

142. *Id.*

143. *Argent*, 124 F.3d at 1282-85.

144. 233 U.S. 546 (1914).

railroad company that enjoyed an immunity from nuisance lawsuits as a result of certain acts of Congress in authorizing the construction of a railroad.

The petitioner alleged that a taking had occurred as a result of the nuisance imposed upon his property by the railroad company. He had a home and lot that were less than a hundred feet from the railroad tracks. The train passed through a tunnel that was ventilated by fans that blew gases and smoke directly onto the petitioner's property. The house and all of its furnishings had depreciated in value from the smoke, cinders, and gases that had entered into the house. The air in the house was "contaminated," and the vibrations from the train had cracked the walls of the house and broken window glass.

In *Richards*, the Supreme Court distinguished between two kinds of damages that were caused by the train, which the *Bormann* court explained:

> As to the first activity, the Court denied compensation because it was the kind of harm normally incident to railroading operations. As to the second activity--gases and smoke from the tunnel--the Court concluded the plaintiff was entitled to compensation for the "special and peculiar damage" resulting in diminution of the value of the plaintiff's property.[145]

The Supreme Court allowed recovery of damages that, were it not for the nuisance immunity, would underlie a private cause of action for a nuisance. It denied recovery for the harms commonly caused by the railroads that would amount to a public nuisance, for which the nuisance immunity was upheld.[146]

The *Bormann* court concluded that *Richards* "entirely does away with the requirement of a physical taking or touching."[147] If the issue in *Bormann* were merely whether a nuisance can ever amount to a taking of property without compensation in violation of the Fifth Amendment, then clearly the answer in *Richards* is yes. The issue in *Bormann*, however, was not whether a nuisance can ever be found under any circumstances to be a taking, but rather, whether the Iowa nuisance-immunity statute resulted in a *per se* taking. If not, as the *Bormann* court had conceded, the *Penn Central* analysis would be the framework for deciding whether there was a taking.

Equally important is that *Richards* also held that the legislature *can* immunize some nuisance activities from lawsuits, and such immunization does not always implicate the Takings Clause. The Supreme Court stated:

> [s]uch roads are treated as public highways, and the proprietors as public servants, with the exemption normally enjoyed by such servants from liability to private suit, so far as concerns the incidental damages accruing to owners of nonadjacent land through the proper and skillful management and operation of the railways. Any

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145. Bormann v. Board of Sup'rs, 584 N.W.2d 309, 319 (1998) (citing Richards v. Washington Terminal Company, 233 U.S. 546, 557 (1914)) (citations omitted).

146. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).

147. *Bormann*, 584 N.W.2d at 319 (citing William B. Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect,* 71 DICK. L. REV. 207, 220-21 (1967)).

> diminution of the value of property not directly invaded nor peculiarly affected, but sharing in the common burden of incidental damages arising from the legalized nuisance, is held not to be a 'taking' within the constitutional provision. The immunity is limited to such damages as naturally and unavoidably result from the proper conduct of the road and are shared generally by property owners whose lands lie within range of the inconveniences necessarily incident to proximity to a railroad. It includes the noises and vibrations incident to the running of trains, the necessary emission of smoke and sparks from the locomotives, and similar annoyances inseparable from the normal and non-negligent operation of a railroad.[148]

Although *Richards* was decided decades before *Penn Central*, its balancing-of-interests factual inquiry is evocative of the *Penn Central* test for determining whether a taking occurred. The Court looked at the character of the activity sanctioned by the government and its economic impact on the petitioner. The Court considered the important public purpose served by the railroad but indicted the nature of the injuries inflicted upon the Petitioner as lacking any real necessity. It considered the impact the railroad's activities were having on Richards' property, rendering it "less habitable" and diminishing its value.

Other considerations that factored into the Court's decision were whether the public good or benefit of having a railway system could continue if the railroads could not receive immunity from nuisance claims; whether damages were the result of negligence; whether the damages were avoidable; the particular and individualized nature and impact of the harm on the petitioner, and whether there was actually a physical invasion or a nuisance (a physical invasion would be a *per se* taking). The "incidental" or consequential damages justifications were sometimes used to deny compensation in overflight takings cases where claims were based upon noise and vibrations rather than trespass.[149]

The balancing of interests undertaken by the Supreme Court in *Richards* is subsumed within the takings analysis the Supreme Court articulated in *Penn Central* almost a hundred years later. A takings analysis under current jurisprudence involves the initial determination of whether there is a *per se* taking and if not, the *Penn Central* balancing test should be applied. This was the position taken by the Board of Supervisors in the *Bormann* case. The Board argued that the petitioners had failed to demonstrate a *per se* taking had occurred, and therefore the *Penn Central* balancing test should be applied.[150]

Right-to-Farm Immunity from Trespass Would Be a Taking

Given the Supreme Court's history of finding a *per se* taking where there is a physical occupation, and the holding in *Nollan v. California Coastal Commision*[151] that a right-of-way easement authorizing continuous physical invasions would require just compensation, a right-to-farm law immunizing trespass from lawsuits would probably violate the Fifth Amendment's Takings

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148. *Richards,* 233 U.S. at 554.

149. *See, e.g.*, Batten v. U.S., 306 F.2d 580, 584 (1962).

150. *Bormann*, 584 N.W.2d at 313.

151. 483 U.S. 825 (1987).

Clause. Oregon's right-to-farm statute,[152] immunizing both trespass and nuisance claims from lawsuits, would be unlikely to be upheld as it immunizes trespasses–physical invasions–as well as nuisances.[153]

California's right-to-farm immunity statute[154] only explicitly immunizes nuisances from lawsuits; however, the California Supreme Court has interpreted the statute as also encompassing trespass immunity.[155] The theory was that in California nuisance law is not limited to intangible intrusions but could include physical invasions as well, and "thus, many activities will give rise to liability both as trespass and a nuisance. . . ."[156] Given the overlap between nuisance and trespass law in California, the court wanted to avoid circumvention of the statutory shield by pleading a case as a trespass rather than a nuisance action.[157]

Like the Minnesota right-to-farm statute, the California statute has a three-year window in which a plaintiff can bring his suit for a nuisance before the nuisance immunity applies. That raises the issue of whether limiting rather than eliminating a nuisance cause of action can avoid an unconstitutional taking.

A Taking or a Series of Occasional Torts?

As a matter of Iowa state law, the right to maintain a nuisance was held to *be* an easement, while under Washington law, the right was not an easement but was *like* an easement. This distinction is important because if state law does not hold, as does Iowa law, that a nuisance immunity statute creates an easement, a plaintiff would then have to prove more than just an isolated nuisance in order to establish that a taking had occurred.

In *Portsmouth Harbor Land & Hotel Co. v. United States,*[158] the petitioner had alleged that the government's placing a gun battery near his property and firing over the property destroyed its usefulness and constituted a taking. The petitioners had twice before filed suit and suffered dismissals of their complaints due to insufficient proof that the government intended to continue its conduct.[159] Only after thrice bringing suit alleging the government was physically invading and destroying the petitioner's recreational use and enjoyment of his property–a hotel–did the United States Supreme Court reverse the trial court's dismissal of the complaint. The Court finally sustained the petitioner's claim, finding that,

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152. Or. Rev. Stat. Ann. § 30.935-30.937 (West 2003).

153. *See* Thomas, supra note 6.

154. Cal. Civ. Code Ann. § 3482.5 (West 2003).

155. Rancho Viejo, LLC v. Tres Amigos Viejos, LLC, 123 Cal.Rptr.2d 479 (2002).

156. *Id.* at 486-97.

157. *Id.* at 487.

158. 260 U.S. 327 (1922).

159. *See* Peabody v. United States, 231 U.S. 530 (1913) (first dismissal); 250 U.S. 1 (1919) (second dismissal).

> the repetition of those acts through many years and the establishment of the fire control may be found to show an abiding purpose to fire when the United States sees fit, even if not frequently, or they may be explained as still only occasional torts. That is for the Court of Claims when the evidence is heard.[160]

Portsmouth placed the burden of proof on the petitioners to show that the activities being conducted on their property were of such a nature that they could be considered to have some permanency, like an easement, and were not just a series of occasional torts. *Portsmouth* suggested that the focus of a federal takings inquiry might be upon the extent, frequency, and permanence of the activities constituting a nuisance in deciding whether there is an easement amounting to a taking. Thus proving a taking would be more difficult than proving an isolated instance of a nuisance. In a nuisance context, this might be proven by showing that the defendant's conduct created a permanent nuisance.[161] In *Argent* the court suggested that what the plaintiffs needed to prove was the defendant's intent to continue the nuisance indefinitely. In *Argent* a statute of limitations defense was raised, so the court had to decide when the taking of an avigation easement had commenced. The court held that "[t]he taking of an avigation easement by the Government occurs when the Government begins to operate aircraft regularly and frequently over a parcel of land at low altitudes, *with the intention of continuing such flights indefinitely*."[162] [emphasis added]. Thus the intent to continue to commit nuisances in the future could prove the intent necessary to show the taking of an easement.

CONCLUSION

As urban sprawl moves out into the rural areas, and with the more recent development of concentrated animal feeding operations, the issues on both sides become all the more compelling–agriculture's hope for protection of farmlands and the environment and urban dwellers' desires to enjoy their homes without being accosted by unpleasant sights, sounds, and smells. Balancing these interests, already a difficult task, will also have to consider the outer parameters set by the Constitution.

New issues will arise if right-to-farm laws immunizing nuisance claims are found to be constitutional. First, an action for a taking based upon a state or federal constitution would supplant the common law nuisance claim. The burdens of proof will of course change, consistent with the new cause of action.

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160. Portsmouth Harbor Land & Hotel Co. v. U.S., 260 U.S. 327, at 330.

161. The Iowa Supreme Court explained, "[t]he distinction has been explained this way: An action in damages may be maintained for the creation of a nuisance and a subsequent and separate action may be maintained for the continuance of such nuisance. The determination of whether a single right of action or successive rights are created by a nuisance for damages depends primarily upon whether the cause of injury is permanent or temporary. The nature of the damages, as being temporary or permanent, is determined by the character of the nuisance to which the land is subjected and not by the quantity of resultant damages. The question generally is one of fact for the jury." Weinhold v. Wolff, 555 N.W.2d 454 (1969).

162. Argent v. U.S., 124 F.3d at 1285 (citing Lacey v. United States, 595 F.2d 614, 616 (1979) (emphasis added).

Second, the defendant will change. Instead of suing the nuisance-generator, a plaintiff will have to go after the political unit that enacted or authorized the immunity. This, in turn, raises a host of new issues, as well as policy and economic considerations.