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# Immunities as Easments as "Takings": *Bormann v. Board of Supervisors*

by

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# IMMUNITIES AS EASEMENTS AS "TAKINGS": *BORMANN v. BOARD OF SUPERVISORS*

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## I. INTRODUCTION

"Incompatible land use" is the term typically used to describe the phenomenon of too many people with too many competing interests occupying too little land. When populations draw too near, activities once innocent take on dramatically different character. They become affirmative intrusions—one person's pleasure becoming another's peril.

America has responded to problems of incompatible land use primarily by turning to judges who have answered the call by applying common law. While the law of trespass[1] and negligence[2] has served in some instances, the major

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1. Trespass is the common law mechanism lying for recovery of damages caused by the direct application of force. 7 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 23:1 (1990). In the context of land use, a trespass would occur if an invasion of property interfered with exclusive possession of land as compared to an interference with use and enjoyment. *See, e.g.*, Nissan Motor Corp. v. Maryland Shipbuilding & Drydock Co., 544 F. Supp. 1104, 1116 (D. Md. 1982) (finding that a trespass action would not lie where soot and ash merely interfered with the

common law mechanism employed to redress land use disputes has been the law of nuisance.[3] Nuisance is defined as conduct "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."[4] Plaintiffs have used a nuisance theory to abate a wide array of obnoxious behaviors.[5] Common law nuisances are classified as public or private[6] and as per se or in fact.[7]

Judge-made law may be the primary source of legal doctrine for incompatible land use dispute resolution, but it does not stand alone. Statutory law

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property owners enjoyment or use of land and did not interfere with the right to exclusive possession).

2. Negligence is the common law mechanism lying for recovery of damages for the broad range of personal actions that fall below standards of due care, as determined by the exigencies of the particular case. 7 SPEISER ET AL., *supra* note 1, §§ 9:1, :4.

3. Nuisance is a comprehensive common law mechanism allowing relief for virtually any behavior that annoys or disturbs persons in the use of their land, or renders use less comfortable. 7 SPEISER ET AL., *supra* note 1, § 20:9.

4. IOWA CODE § 657.1 (1991). A "prima facie nuisance case" has been described as follows:

> A landowner who intentionally carries out activities, or permits natural conditions to develop, that are perceived as unneighborly under contemporary community standards shall be liable for all damages (measured by the diminution in the market value of plaintiff's land plus bonuses for diminutions in widely held subjective values) to all parties who are thereby substantially injured, and continuation of the activity may be enjoined by any party willing to compensate the landowner for any losses he suffers from that injunction.

Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 748 (1973).

5. *See generally* Schofield v. Material Transit, Inc., 206 A.2d 100, 100-01 (Del. Ch. 1960) (discussing a class action brought to abate a private nuisance based on dirt and sand in the air); Higgins v. Decorah Produce Co., 242 N.W. 109, 112 (Iowa 1932) (holding wholesale poultry and produce plant that emitted odor was not a nuisance per se); Alster v. Allen, 42 P.2d 969, 972 (Kan. 1935) (discussing "noise incident to the lawful operation of [a] business as an element of nuisance"); Cline v. Franklin Pork, Inc., 361 N.W.2d 566, 570-72 (Neb. 1985) (holding a hog lot was so offensive it constituted a nuisance). For a list of annotations listing, inter alia, the subject matter of nuisance actions, see 7 SPEISER ET AL., *supra* note 1, § 20, at 69-73.

6. A public nuisance is one of the effects that harms persons in their capacities as members of the public. Public nuisances are generally broad in geographic effect. *See* RESTATEMENT OF TORTS ch. 40, at 216-17 (1939). Private nuisances are those which affect persons in their private capacities. *Id.* They are usually more limited in their geographic reach. *Id.* Virtually every public nuisance is also a private nuisance, but the reverse is not true. 7 SPEISER ET AL., *supra* note 1, § 20:5.

7. A per se nuisance is an activity adjudged to be of nuisance quality regardless of its location. *See* Gerzeski v. State, 268 N.W.2d 525, 527 (Mich. 1978). A nuisance in fact is one which attains nuisance status principally because of its location. *Id.*

plays a role as well. Sometimes it has done so on a grand scale, effectively replacing common law with a comprehensive regulatory system.[8] More often, it has taken the less dramatic route of de facto modifying of the common law. Zoning laws are good examples: A zoning law modifies the common law of property by restricting the exercise of property rights. On yet other occasions, rather than overlay a common law regime, legislatures have acted to adjust its parameters. Statutes, for example, have declared certain behaviors to be nuisances.[9] A statutory provision of this sort reduces the burden of proof plaintiffs must carry in nuisance cases: when a so-called statutory nuisance is alleged, plaintiffs need only prove the fact of defendant's behavior, not its harm.[10]

None of the foregoing is remarkable. States through their legislatures have undisputed police power authority to modify the operation of common law.[11] Still, legislative action can trigger constitutional questions. One such question is whether a sovereign action has caused a taking of private property without just compensation. The genesis of this ground for objection is the Takings Clause of the Fifth Amendment of the Constitution.[12]

This is the legal setting for the recent decision of the Iowa Supreme Court in *Bormann v. Board of Supervisors.*[13] The *Bormann* case presented for judicial review the Iowa legislature's version of a "right-to-farm" law,[14] which purported to adjust the parameters of the common law of nuisance. The statute did so by supplying a certain class of defendants with an absolute defense, otherwise referred to as an immunity from suit.[15] The court held this immunity to be an

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8. *See, e.g.*, Milwaukee v. Illinois, 451 U.S. 304, 305 (1981) (holding that the Federal Clean Water Act Amendments of 1972, 33 U.S.C. §§ 1251-1387, preempted any remedy available under federal common law of nuisance for water pollution injuries from sewer discharges originating in a neighboring state); *see also* International Paper Co. v. Ovellete, 479 U.S. 481, 482 (1987) (discussing that common law of nuisance is preempted by federal statute); Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 22 (1981) (stating same).

9. *See* IOWA CODE § 657.2 (1999) (stipulating a wide array of actions to be nuisances, ranging from storing of flammable junk to obstructing a navigable river to keeping a tree infected with Dutch Elm disease).

10. *See, e.g.*, Patz v. Farmegg Prods., Inc., 196 N.W.2d 557, 561 (Iowa 1972) (noting that the burden of proof in common law nuisance cases is the "normal person's standard").

11. *See* Lawton v. Steele, 152 U.S. 133, 138 (1894).

12. U.S. CONST. amend. V (providing that "nor shall private property be taken for public use, without just compensation"). The clause was made applicable to states through the Fourteenth Amendment in 1896. Missouri Pac. R.R. v. Nebraska, 164 U.S. 403, 417 (1896).

13. Bormann v. Board of Supervisors, 584 N.W.2d 309 (Iowa 1998), *cert. denied*, 119 S. Ct. 1096 (1999).

14. IOWA CODE § 352 (1999).

15. *Id.*

unconstitutional taking of rights in property.[16] Many persons view this decision as cataclysmic,[17] threatening the traditional rural way of life in Iowa,[18] a reaction the Iowa Supreme Court itself foresaw.[19] Predictably, the case was appealed to the United States Supreme Court.[20]

As this controversial reaction demonstrates, the Iowa Supreme Court's decision in *Bormann* involves far more than a localized dispute between a hog feeding operation and irritated neighbors. The decision is the first time a right-to-farm law has been declared to be unconstitutional on takings grounds. All fifty states have right-to-farm laws,[21] which elevates the decision to one worthy of national attention. Beyond that, the ruling calls into serious question a vast array of other widely used land-use controls: If a right-to-farm law "takes" property and must be set aside, what about zoning ordinances, or growth control ordinances, or setback requirements, or landmark laws, or pollution controls?

The *Bormann* decision is the triggering device for this Article. After a discussion of the case itself, Part II of the Article isolates the conceptual principles that team up to produce the decision. The concepts are these: (a) the right-to-farm law creates an easement because the immunity from suit allows defendants to use the land of others; (b) the creation of an easement violates the Takings Clauses of the federal and state constitutions because it is unaccompanied by provision of just compensation for injured persons; and (c) therefore, the statute must be set aside. The Article contends that the Iowa Supreme Court erred in each of these particulars. In Part III, the Article will dispute the founda-

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16. Bormann v. Board of Supervisors, 584 N.W.2d at 321-22.

17. *See* Frank Santiago, *Hog Lots Lose Lawsuit Protection*, DES MOINES REG., Sept. 24, 1998, at A1 (reporting, inter alia, the fear that the decision will "unleash an avalanche of lawsuits").

18. *See* Jerry Perkins, *Ag Coalition to Appeal Ruling on Nuisance Suits*, DES MOINES REG., Dec. 3, 1998, at A10 (identifying opponents of the decision as including the Iowa Corn Growers Association, the Iowa Dairy Industry Association, the Iowa Institute for Cooperatives, the Iowa Cattlemen's Association, the Agribusiness Association of Iowa, and the Iowa Poultry Association). The decision has even drawn national attention. *See* Douglas Kendall, *Double-Edged Sword Cuts into 'Right to Farm' Law*, WIS. ST. J., Dec. 27, 1998, at 3I. Mr. Kendall is identified in the article as the founder and Executive Director of the Community Rights Council, based in Washington, D.C. *Id.*

19. *See* Bormann v. Board of Supervisors, 584 N.W.2d at 322 ("We recognize that political and economic fallout from our holding will be substantial.").

20. A petition seeking certiorari review from the United States Supreme Court was filed on December 21, 1998. Girres v. Bormann, 67 U.S.L.W. 3409 (1998). The Supreme Court denied the petition on February 22, 1999. Bormann v. Board of Supervisors, 584 N.W.2d 309 (Iowa 1998), *cert. denied*, 119 S. Ct. 1096 (1999).

21. *See* NEIL D. HAMILTON, A LIVESTOCK PRODUCER'S LEGAL GUIDE TO: NUISANCE, LAND USE CONTROL, AND ENVIRONMENTAL LAW 21 (1992).

tional principle that immunities are, or can be, easements. In Part IV, the Article will contest the notion that the creation of an easement—assuming that is what happened—is, without more, a taking.[22] Finally, in Part V, the Article will contend the court's invalidation of Iowa's right-to farm law was unwarranted.

## II. THE *BORMANN* DECISION

The right-to-farm statute examined in *Bormann* is a provision designed to promote the "vital public interest" of Iowa's leading industry—agriculture.[23] The statute promotes this goal by establishing a simple mechanism for ranchers and farmers to secure immunity from lawsuits based on the common law theory of nuisance.[24] Those persons can apply to local county boards to have land designated as an "agricultural area,"[25] which must be an area of at least three hundred acres in size, subject to exceptions,[26] the use of which is for a "farm operation."[27] Upon receipt of applications, the boards are directed to vote to approve or disapprove them.[28] If an application is approved, the affected farm operation receives an absolute immunity from lawsuits alleging common law nuisance.[29]

The events giving rise to the *Bormann* decision began in September 1994, when Gerald and Joan Girres, Iowa farmers, applied to the Kossuth County Board of Supervisors to designate a 960 acre parcel as an agricultural area under

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22. The constitutional discussion will be limited to the Federal Constitution, for it is this holding that gives the *Bormann* decision its national importance.

23. *See* Montgomery v. Bremer County Bd. of Supervisors, 299 N.W.2d 687, 696 (Iowa 1980) (noting the state's strong public policy interest in fostering agriculture).

24. IOWA CODE § 352.11 (1999).

25. *Id.* § 352.6.

26. *Id.* An area smaller than three hundred acres can qualify "if the farmland is adjacent to farmland subject to an agricultural land preservation ordinance pursuant to section 335.27 or adjacent to land located within an existing agricultural area." *Id.* § 352.2.

27. "Farm operation" is defined as:

> [A] condition or activity which occurs on a farm in connection with the production of farm products and includes but is not limited to the raising, harvesting, drying, or storage of crops; the care or feeding of livestock; the handling or transportation of crops or livestock; the treatment or disposal of wastes resulting from livestock; the marketing of products at roadside stands or farm markets; the creation of noise, odor, dust, or fumes; the operation of machinery and irrigation pumps; ground and aerial seeding and spraying; the application of chemical fertilizers, conditioners, insecticides, pesticides, and herbicides; and the employment and use of labor.

*Id.* § 352.2.

28. *Id.* §§ 352.6-.7.

29. *Id.* § 352.11.

the Iowa right-to-farm law.[30] One month after it received the application, however, the Board denied it. The Board believed the requested designation would not further the underlying statutory policy of preserving agricultural lands.[31] To the contrary, it found the designation would "have a direct and permanent impact on the existing and long-held private property rights of the adjacent property owners."[32]

Undeterred, the applicants tried again two months later.[33] This time, for unexplained reasons, the Board approved the application by a three-to-two vote.[34] The single-vote victory purportedly was based upon the "flip of a nickel."[35]

This approval produced a lawsuit, filed in the District Court of Iowa in April 1995, which alleged inter alia, that the Board's decision was arbitrary and constituted an unconstitutional taking of plaintiffs' property rights.[36] Plaintiffs in the case, including Clarence and Caroline Bormann, won on the first of these grounds in the district court.[37] The Board then corrected the "infirmity" of its prior decision and approved the application again,[38] presumably this time without flipping nickels. At this juncture, the plaintiffs sought additional appellate review, and the case made it to the Iowa Supreme Court.[39]

The Iowa Supreme Court, considering both the statute and the Board's grant of immunity on takings grounds, found what it termed to be a "flagrant" violation of the Takings Clauses of both the Federal and Iowa Constitutions.[40] The court was seriously offended by the specter of state government simply cordoning off entire farm operations from the reach of common law. The court's opinion, unsparing in tone and content, argued the award of immunity to defendants[41] was actually the award of a new property right.[42] Immunity, in the

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30. Bormann v. Board of Supervisors, 584 N.W.2d 309, 311 (Iowa 1998), *cert. denied*, 119 S. Ct. 1096 (1999).

31. *Id.* The Board saw no threatening non-agricultural development on the horizon. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 312.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 322 ("[T]he challenged scheme is . . . flagrantly . . . unconstitutional.").

41. The list of defendants in the case is expansive, including the Board of Supervisors as an entity and all its members in their personal capacities, and other landowners. *Id.* at 309. For simplicity of reference, however, the term "defendants" as used in this Article will refer exclusively to landowners who received immunity from suit.

court's assessment, was nothing less than a forced transfer of an easement from plaintiffs to defendants without providing plaintiffs the constitutional remedy of just compensation.[43] The easement was a taking for federal constitutional purposes, because it constituted a "permanent physical occupation" of plaintiffs' land.[44] Because the United States Supreme Court has declared government-imposed permanent physical occupations to be unconstitutional takings in every case,[45] regardless of any and all other considerations, the court invalidated the statute and thereby wiped out the immunity secured by defendants.[46]

## III. IMMUNITY AS EASEMENT

The premise upon which the *Bormann* opinion is built is the holding that immunity rights secured by defendants are, in fact and in law, easements in property. The Iowa Supreme Court reached this conclusion first, by defining "property for just compensation purposes [as including] 'every sort of interest the citizen may possess.'"[47] Having defined "property" so expansively, it was a short step to follow up with a declaration that "the right to maintain a nuisance is an easement."[48]

### A. *Property*

The assertion that this immunity is an easement is an essential precondition for all that is to follow, for if this immunity is not a property interest, its award to defendants cannot implicate the law of takings. In reaching its conclusion, the Iowa Supreme Court actually faced not one, but two legal issues. First, it needed to find that this immunity was "property" for purposes of Iowa's common law.[49] Having answered that question affirmatively, it needed to find that

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42. *Id.* at 316.

43. *Id.* at 322 ("When all the varnish is removed, the challenged statutory scheme amounts to a commandeering of reliable property rights without compensating the owners . . . .").

44. *Id.* at 317-19.

45. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982). *See also infra* notes 123-149 and accompanying discussion.

46. Bormann v. Board of Supervisors, 584 N.W.2d at 322.

47. *Id.* at 315 (quoting United States v. General Motors Corp., 323 U.S. 373, 378 (1945)). The court's full definition: "'[T]he group of rights inhering in the citizens' relation to the physical thing, as the right to possess, use and dispose of it.' In short, property for just compensation purposes includes 'every sort of interest the citizen may possess.'" *Id.* (quoting United States v. General Motors Corp., 323 U.S. at 378).

48. *Id.*

49. *Id.* at 316.

this common law property interest, in turn, qualified as property protected by the Takings Clause of the Federal Constitution.[50]

1. *Property for Common Law Purposes*

The question presented is whether this immunity qualifies an easement for purposes of Iowa's common law. For starters, immunities simply do not look like easements. Immunities are rights to resist legal challenges. They are statutory "shields" that empower persons to deter legal challenges to their activities.[51] Thus, in one context, an immunity allows a judge to dispose of a lawsuit challenging her behavior on the bench, and in another context, excuses a state from the duty of litigating certain classes of cases. Immunities such as these have not been found to be easements in judges or in the states. Only the bold would dare make the argument.

Easements, to the contrary, are not shields. Rather, they are enforceable property rights, either affirmative or negative by design, giving rights to persons who do not have possessory title to property.[52] Thus, use for example, an affirmative easement can authorize a person to cross the land of another or to send her sewage across by underground conveyance. A negative easement, on the other hand, empowers the holder to prohibit a person from taking actions that the person would otherwise be entitled to undertake on his own land. In short, easements are the right to use others' lands; immunities are not.[53] The *Bormann* immunity, in particular, is not an authorization for defendants to use plaintiffs' land. It is, to state the obvious, a defense made available by statute to certain litigants in one class of cases.

If one simply *must* view this immunity as a land-use right, still it cannot be an easement: it is not a use right held by one in the land of another. What the immunity does, *if anything*, is enhance the holder's right to use his or her own land. The immunity allows defendants to conduct farming and ranching operations with a greater freedom from legal challenge than they might have otherwise. It thereby enlarges the scope of uses defendants may pursue on their

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50. *Id.* at 316-17.

51. *See, e.g.*, 28 U.S.C. § 2679(b)(1) (1994) (disallowing common law tort actions against federal employees in their personal capacities).

52. *See* Bormann v. Board of Supervisors, 584 N.W.2d at 315 ("[A]n easement [is] 'a privilege without profit . . . .'") (quoting Churchill v. Burlington Water Co., 62 N.W. 646, 647 (1895)).

53. *See id.* at 316 (citing favorably the RESTATEMENT OF PROPERTY § 451 cmt. a, at 2911-12 (1944)) (defining an easement as an "interest in land which entitles the owner . . . to use or enjoy land in possession of another").

own land. Rather 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.

Some might see this distinction as conveniently formalistic. Urging a pragmatic approach, they might advance a "functional equivalence" argument: If the immunity operates as an easement for all practical purposes, then cut to the chase and call it what it really is, an easement. This argument, however, is fatally overinclusive. Calling something an easement because it operates like an easement is tantamount to asserting that there can only be one means to an end: If an easement could supply defendants a right to send odors over plaintiffs' property, then any mechanism producing the same result must also be an easement. Such a proposition is nonsense. There are typically various means to any single end. One can have a right to walk across land of another by license, easement, restrictive covenant, or contract, but no one would ever venture that a license is a restrictive covenant, or that a contract is an easement.

The Iowa Supreme Court's merging of immunity and easement has far-reaching ramifications. If a statutory defense in a right-to-farm law creates an easement, is it not necessarily true that a zoning law does so as well? Would not pollution control provisions, which restrict persons' use rights in land to protect the health of the public, be easements as well? Could not they be viewed as property rights taken from polluters and handed to neighbors? And what of rent control provisions, landmark laws, and the legion of other land-use controls?

What the Iowa Supreme Court fails to appreciate is that statutes can *affect* property, in its use and value, without *creating* property in the process. There are many statutes that do exactly this. Among these are zoning and landmark laws, rent control provisions, and environmental controls. These measures surely burden property rights of regulated persons, but they do not add to property rights of those who are unregulated. A police power restriction on the exercise of a land-use right is not itself a land-use right.

For these fundamental reasons, the *Bormann* rationale is flawed. But there is an additional overriding reason for its insufficiency. The statute examined in *Bormann* does not even affect property rights—it affects tort rights.[54] The statute modifies the common law of nuisance in Iowa, and nuisance law in Iowa is tort law.[55] The Iowa Supreme Court itself said as much in *Ryan v. City of Emmetsburg*, which was decided in 1942.[56] While it did not implicate immunities, *Ryan*, like *Bormann*, was an action to recover damages for the intru-

54. *Id.* at 314.
55. *See* Ryan v. City of Emmetsburg, 4 N.W.2d 435, 439 (Iowa 1942).
56. Ryan v. City of Emmetsburg, 4 N.W.2d 435 (Iowa 1942).

sion of "foul, noxious, and nauseous gases and odors" over private property.[57] In its opinion, the *Ryan* court flatly stated that "a private nuisance is a tort."[58] The assertion remains good law. As recently as 1992, in *Guzman v. Des Moines Hotel Partners, Ltd. Partnership*,[59] the court affirmed the principle when, in concluding a sidewalk obstruction constituted an actionable nuisance, it invoked a major treatise on tort law.[60] In that same case, the court went on to tie the fortunes of nuisance law to tort by ruling that, for pleading purposes, the nuisance and negligence counts should have been submitted as one theory.[61] That nuisance is tort and not property is made clear by the court's zoning cases as well, which have acknowledged the disconnect between nuisance law and property law by holding zoning classifications to be irrelevant to the resolution of disputes sounding in nuisance.[62]

The *Bormann* court disregarded these precedents, and looked instead back to 1895 to find a precedent in Iowa law to support its position.[63] The decision it found, *Churchill v. Burlington Water Co.*,[64] contains language declaring "the right to discharge soot and smoke . . . is an easement."[65] This snippet of language, however, does not prove the difficult position for which the Bormann Court employs it. First, *Churchill* may well be overruled by the above-cited more recent Iowa decisions. Even if not, the case is distinguishable. *Churchill* was a common law nuisance action involving air pollution emissions in which

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57. *Id.* at 438.

58. *Id.* at 439. The *Bormann* court expressly characterized the *Bormann* defendants' actions as a "private nuisance," stating "[w]e are dealing here with private nuisances." Bormann v. Board of Supervisors, 584 N.W.2d at 314.

59. Guzman v. Des Moines Hotel Partners, Ltd. Partnership, 489 N.W.2d 7 (Iowa 1992).

60. *Id.* at 10. The treatise relied upon by the court was W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 86, at 616-17 (5th ed. 1984). The court of appeals has signaled its agreement with this approach by its use and reliance upon the Restatement (Second) of Torts as authority for resolving nuisance claims. *See* Nash v. Schultz, 417 N.W.2d 241, 243 (Iowa Ct. App. 1987) (citing RESTATEMENT (SECOND) OF TORTS § 288 (1965)).

61. Guzman v. Des Moines Hotel Partners, Ltd. Partnership, 489 N.W.2d at 11. As the court explained: "Analysis of the authorities dealing with the area of nuisance establish that nuisance itself simply refers to the result. Negligence, as here, might be the cause. In those cases, the concepts of negligence and nuisance are interrelated, referred to by one court as 'negligence-nuisance' cases." *Id.*; *see also* Weinhold v. Wolff, 555 N.W.2d 454, 462 (Iowa 1996) (noting that nuisance conduct typically finds its origin in negligence).

62. *See* Schlotfelt v. Vinton Farmers' Supply Co., 109 N.W.2d 695, 698 (Iowa 1961) ("A building permit, or a commercial or industrial zoning, cannot be claimed to be an approval by the city of the conduct of a business so that a nuisance is caused to adjoining property owners.").

63. Bormann v. Board of Supervisors, 584 N.W.2d at 315.

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

65. *Id.* at 647.

was raised the defense of prescriptive right.[66] Defendants argued their alleged nuisance behavior was not actionable because it had ripened into a property right by virtue of the law of adverse possession.[67] In this context, the *Churchill* court ruled that discharging soot and smoke was an easement.[68] The court was doing no more than declaring that behaviors can ripen into property rights *because of* the common law of property, an unremarkable proposition at best.[69] *Churchill* comments neither on immunities nor on statutory modifications of tort law.

The Iowa Supreme Court could have looked to *Boardman v. Davis* for authority.[70] In the *Boardman* case, the Iowa Supreme Court rejected the argument that a zoning law, in this case a setback restriction, wrested an easement from affected property.[71] Recognizing that zoning ordinances of this sort often "lay an uncompensated burden" on property owners, the court nonetheless flatly affirmed that "such requirements do not constitute an easement upon the property."[72] If a zoning restriction, which is a direct burden on the use of property, is not an easement, surely a grant of immunity, not a burden at all on the use of property, cannot be.

### 2. *Property for Just Compensation Purposes*

Thus, one can conclude that an immunity is not property by any common law measure, and necessarily, for that reason, cannot be an easement. While this is important, it does not end the inquiry. Still unresolved is the question whether an immunity is property for federal constitutional purposes.

The Iowa Supreme Court is surely correct when it characterizes "property for just compensation purposes" broadly.[73] The United States Supreme Court itself has asserted that general proposition on numerous occasions.[74] It has

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66. *Id.*

67. *Id.* Actually, what was involved in the case was not adverse possession, but adverse use. The point is of no significance, however, because prescriptive rights, possessory or nonpossessory, arise—if at all—under essentially the same circumstances.

68. *Id.*

69. For another case acknowledging that nuisance actions can ripen into a prescriptive right, see Boat v. Van Veen, 44 N.W.2d 671, 673-75 (Iowa 1950).

70. Boardman v. Davis, 3 N.W.2d 608 (Iowa 1942).

71. *Id.* at 610.

72. *Id.*

73. Bormann v. Board of Supervisors, 584 N.W.2d 309, 315 (Iowa 1998), *cert. denied*, 119 S. Ct. 1096 (1999) (citing United States v. General Motors Corp., 323 U.S. 373, 378 (1945) for the proposition that property for purposes of the Federal Constitution's Takings Clause includes "every sort of interest the citizen may possess").

74. *See, e.g.*, Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982) ("The types of interests protected as 'property' are varied and, as often as not, intangible, relating 'to the whole

included as property for constitutional purposes more than conventional real and personal property. Accordingly, intangible property such as interest income generated by cash;[75] employment;[76] unsecured claims against estates;[77] statutory entitlements to monetary benefits;[78] and trade secrets, copyrights, and patents[79] have all received constitutional protection. But, even though property for just compensation purposes may be a broad term, it is not limitless. Not every conceivable interest is property.[80] Thus, the question whether an immunity is a property interest for constitutional purposes is not as simple as it might seem.

The contention that the right to cause a nuisance is federal constitutional property is tantamount to an assertion that common law tort is federal constitutional property. The Supreme Court has considered the question whether rights in tort are interests in property protected by the Federal Constitution's Due Process Clause,[81] which provides that persons shall not "be deprived of life, liberty, or property, without due process of law,"[82] and has concluded they are not.[83] In one case, the Court considered the question in the context of negligent actions of prison guards.[84] An inmate in a state prison had mail-ordered certain "hobby materials" valued at $23.50, but prison guards lost the goods upon delivery.[85] Alleging the negligent handling of his hobby materials was a deprivation of property under the Federal Constitution, the plaintiff sought relief under 42 U.S.C. § 1983.[86] A unanimous Supreme Court disposed of the claim readily.[87]

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domain of social and economic fact.'"). For an early and prescient article about the expansion of the meaning of federal constitutional property, see Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

75. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980).

76. Perry v. Sindermann, 408 U.S. 593, 601-02 (1972).

77. Tulsa Prof'l Collection Servs. v. Pope, 485 U.S. 478, 485 (1988) ("Little doubt remains that such an intangible interest is protected by the Fourteenth Amendment.").

78. Goldberg v. Kelly, 397 U.S. 254, 261 (1970).

79. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003-04 (1984).

80. For example, while employment can be property, a mere unilateral interest in employment is not. *See* Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Similarly, a person's interest in her own reputation is not an interest in property. Paul v. Davis, 424 U.S. 693, 712 (1976).

81. U.S. CONST. amends. V & XIV, § 1.

82. U.S. CONST. amend. V.

83. *See* Parratt v. Taylor, 451 U.S. 527, 543-44 (1981), *overruled by* Daniels v. Williams, 474 U.S. 327 (1986).

84. *Id.* at 537.

85. *Id.* at 529.

86. *Id.* Forty-two U.S.C. § 1983 provided in 1974:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of

Conceding the hobby materials were property in the conventional sense,[88] the Court, nonetheless, found the cause of action in tort lacked constitutional dimension.[89] Speaking for the Court, Justice Rehnquist stated:

> To accept respondent's argument that the conduct of the state officials in this case constituted a violation of the Fourteenth Amendment would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment under § 1983. It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation under § 1983. Such reasoning "would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."[90]

Five years later, in another case presenting the same issue, the Court affirmed that the "Due Process Clause is simply not implicated by a *negligent* act causing unintended loss of or injury to life, liberty, or property."[91] Moreover, "[i]t is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns."[92]

The Court has come to the same conclusion in its constitutional takings cases. In the landmark decision in *Pennsylvania Coal Co. v. Mahon*,[93] a case described as the "Everest" of takings jurisprudence,[94] the Court found an unconstitutional taking when a state statute, the Kohler Act, stripped away the entire value of the land to which the statute had been applied.[95] While *Pennsylvania Coal* is best known for the principle that a sovereign act will be deemed uncon-

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> any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

*Id.* at 532 (quoting 42 U.S.C. § 1983 (1974)).

87. *Id.* at 543-44.

88. *Id.* at 536.

89. *Id.* at 543-44.

90. *Id.* at 544 (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)).

91. Daniels v. Williams, 474 U.S. 327, 328 (1986); *see also* Schweiker v. Chilicky, 487 U.S. 412, 425 (1988) (holding no constitutional cause of action is cognizable for infliction of mental distress and for other injuries caused by the improper cancellation of welfare benefits).

92. Daniels v. Williams, 474 U.S. at 333.

93. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

94. BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 156 (1977).

95. Pennsylvania Coal Co. v. Mahon, 260 U.S. at 414.

stitutional if it diminishes the value of the affected land too much, the dissent clarified a point relevant here. In the dissent, Justice Brandeis maintained no taking should have been found because the Kohler Act, in his view, was regulating mere nuisance behavior, what he termed a "noxious use."[96] His reasoning was straightforward and undisputed: As there is no property right to cause a nuisance, there can be no takings issue when government prohibits nuisance behavior.[97]

The Supreme Court had announced the point as early as 1887 in the landmark case of *Mugler v. Kansas*.[98] *Mugler* involved a regulation prohibiting the manufacture of intoxicants for other than medical, scientific, or mechanical purposes.[99] The effect of the statute on the plaintiff was severe, as it effectively shut down the plaintiff's brewery and beer sales operation.[100] Yet, the Court found no constitutionally cognizable harm:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.[101]

Again the message is clear: The Takings Clause is relevant only when a regulation controls activity that itself originates in the law of property. Only in that circumstance is it legally possible for the regulation to accomplish a "taking" of "property." A regulation of nuisance, such as the *Bormann* grant of immunity, is a regulation not of rights originating in the law of property, but of rights arising in tort. Such a regulation, *perforce*, cannot implicate the Takings Clause.

The Supreme Court's most recent reworking of takings doctrine confirms the point yet again. The 1992 decision in *Lucas v. South Carolina Coastal Council*[102] brought before the Court a government statute that prohibited all use

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96. *Id.* at 417 (Brandeis, J., dissenting).

97. *Id.* (Brandeis, J., dissenting). The majority disagreed not on the principle espoused in the dissent, but only on the relevance of its application in the particular case. *Id.* at 413-14.

98. Mugler v. Kansas, 123 U.S. 623 (1887).

99. *Id.* at 624.

100. *Id.* at 657.

101. *Id.* at 668-69.

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

of property other than to serve as open space.[103] The prohibition reduced the value of the plaintiff's property to zero.[104] Finding a taking, the Court honored the noxious-use principle espoused in *Pennsylvania Coal* and *Mugler*.[105] In his opinion for the majority, Justice Scalia, after establishing a per se rule regarding regulations that strip land of all its value,[106] took care to except from that rule any sovereign regulation that does "no more than duplicate the result that could have been achieved in the courts—by adjacent landowners . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise."[107]

### 3. *Power to Decide*

Even if immunity is not property, either for common law or federal constitutional purposes, there is still the consideration of who will make the determination. The *Bormann* court stated that, federal precedent notwithstanding, "[s]tate law determines what constitutes a property right . . . . Thus, in this case, Iowa law defines what is property."[108]

Is it Iowa's right to decide what is property? Surely the state can determine the question for common law and state constitutional purposes, but just as surely, it may not for purposes of the Federal Constitution. The United States Supreme Court enjoys the right and duty to decided what is property. One need only reach back to *Marbury v. Madison*[109] for the principle that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[110] When Justice Marshall issued that proclamation he was not carving any implied exceptions.

If the Iowa Supreme Court is correct, while the United States Supreme Court would determine what is "speech," "cruel and unusual punishment," or "search and seizure," the federal tribunal would have no such right when it comes to "property." It would mean that the constitutional rights in place to protect against government encroachments could be extinguished by the very government actors responsible for the encroachments. Rights of national citi-

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103. *Id.* at 1007-08.
104. *Id.* at 1009.
105. *Id.* at 1022.
106. *Id.* at 1019.
107. *Id.* at 1029.
108. Bormann v. Board of Supervisors, 584 N.W.2d 309, 315 (Iowa 1998), *cert. denied*, 119 S. Ct. 1096 (1999).
109. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
110. *Id.* at 177.

zenship would depend on state citizenship. And actions entirely constitutional when undertaken in one state, could be unconstitutional in another.

Because the Iowa Supreme Court surely knows of *Marbury v. Madison* and of the primacy of the United States Supreme Court in matters of federal constitutional interpretation, the question is why did the court self-locate this interpretational authority? The answer is found in the misreading of precedent. The Iowa Supreme Court cited as its sole authority for this proposition a 1980 United States Supreme Court decision, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*.[111] *Webb's* stands for the principle that interest on money is the property of the owner of the money; accordingly, a state statute that claimed interest to be public property violated the Takings Clause.[112] In *Webb's*, the Court borrowed the following language from several of its due process cases: "'Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .'"[113]

This language, not quoted in the *Bormann* opinion, is slim authority upon which to reverse *Marbury v. Madison*. *Webb's* does not stand for the proposition that states can unilaterally control the meaning and reach of the Federal Constitution. Notably, the quoted sentence addresses only the matter of origins of property. The sentence states that "'[p]roperty interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source *such as* state law . . . .'"[114] The sentence surely ties state law to federal constitutional property determinations, but it does not represent an abdication of responsibility by the United States Supreme Court.

Nor does the United States Supreme Court concede it lacks power to interpret the term "property" in the Federal Constitution. In fact, the best indicator of the United States Supreme Court's reading of its own power and duty in this regard can be found in the *Webb's* case itself. In *Webb's*, the State of Florida had declared certain interest income produced by private capital to be property of the state.[115] In other words, it had declared this interest income *not* to be the property of the owners of principal. The United States Supreme Court, however, far from viewing itself as bound by the state law determination, overruled it:

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111. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980).

112. *Id.* at 164-65.

113. *Id.* at 161 (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)) (alterations in original).

114. *Id.* (quoting Board of Regents v. Roth, 408 U.S. at 577) (emphasis added).

115. *Id.* at 156-57.

> Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court. The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry.
>
> To put it in another way: a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Takings Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.[116]

*Webb's*, in other words, stands for the notion that states have no free hand in determining what is property for takings purposes. The United States Supreme Court has shown a willingness to be deferential to states in this regard,[117] but deference is not abdication.[118]

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116. *Id.* at 164.

117. For a case in which the Court defers to a state judicial determination regarding the meaning of property as that term is meant in the Due Process Clause of the Federal Constitution, see *Bishop v. Wood*, 426 U.S. 341 (1976).

118. For a recent affirmation of the same point, see *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998). The case involved facts similar to those in *Webb's*. The State of Texas, under its Interest on Lawyers' Trust Account (IOLTA) program, required interest on certain lawyers' client accounts to be applied toward supplying legal services for low-income persons, and the Court was again asked to determine if the practice was a taking. *Id.* at 159-60. The Court affirmed the central point in *Webb's*, that interest on income was private property, both for purposes of the state's common law and the Federal Constitution:

> As we explained [in *Webb*'s], "a State by *ipse dixit*, may not transform private property into public property without compensation" simply by legislatively abrogating the traditional rule that "earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." In other words, at least as to confiscatory regulations (as opposed to those regulating the use of property) a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law.

*Id.* at 167 (citation omitted); *see also* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992) (commenting that a state's declaration that property was always held under an "implied limitation" cannot control the resolution of the federal takings issue due to the declaration's inconsistency with "the historical compact recorded in the Takings Clause that has become part of our constitutional culture").

## IV. EASEMENT AS TAKING

It would appear, therefore, that the right to maintain a nuisance should not be viewed as a right in property either for state law or for federal constitutional purposes. Even if it did, however, the case for an unconstitutional taking is not made. The Takings Clause of the Fifth Amendment of the Constitution is not violated unless government action *deprives* one of property.

Federal takings doctrine, as constructed by the United States Supreme Court, finds deprivations of property to be unconstitutional, if at all, by resort to two independent judicial tests. Under the first test, any government action found to be either a "permanent physical occupation" of private property[119] or to have reduced the value of private land to zero,[120] is deemed to be a taking per se, without regard to other circumstances. The second test, covering the remaining universe of takings disputes, is the antithesis of the first. The second test requires courts to determine takings questions by balancing three independent factors: (a) the "character of the government action" that produces the harm to private property rights, if any; (b) the degree of interference of "investment-backed expectations" of titleholders of property caused by the government action; and (c) the "economic impact" produced by the government action.[121] The facts in *Bormann* do not demonstrate an unconstitutional deprivation of property, that is, a taking, under either test.

### A. *Did the Statute Cause a Per Se Taking?*

Having determined the immunity to be an easement, the *Bormann* court held its creation to be a permanent physical occupation of plaintiffs' land, per se violative of the Federal Constitution[122] in accord with the Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*[123] The problem with this holding is factual: the so-called easement accomplishes no occupation whatsoever, and certainly none either permanent or physical.[124]

This reality becomes clear upon comparison to the *Loretto* decision itself. The permanent physical occupation examined in *Loretto* is entirely dissimilar to

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119. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

120. Lucas v. South Carolina Coastal Council, 505 U.S. at 1016.

121. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). The Supreme Court has failed to specify the appropriate weight each factor deserves in the balance.

122. Bormann v. Board of Supervisors, 584 N.W.2d 309, 317-19 (Iowa 1998), *cert. denied*, 119 S. Ct. 1096 (1999).

123. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

124. *See* Bormann v. Board of Supervisors, 584 N.W.2d at 317-19.

the so-called occupation in *Bormann.*[125] *Loretto* was a challenge to the actions of the City of New York in requiring owners of residential buildings to provide access for cable television hookups.[126] The plaintiff in the case had been forced against his will to allow the installation of cable and certain other communication equipment along approximately thirty feet of his apartment building.[127] The Supreme Court, while finding the city's actions served a valid public purpose, found this condition to constitute a "permanent physical occupation" of plaintiff's building[128] and, for that reason, to be a taking regardless of the valid public purposes the ordinance may have served.[129]

*Loretto* involved a true permanent physical occupation of private property. Cable television equipment, affixed to plaintiff's building, was occupying *physical* space. As a direct and unavoidable result, plaintiff's right and ability to possess that physical space had been infringed in a real sense. Compare these facts to those of *Bormann*: odors and fumes are not permanent. They vary by time of day, by wind direction, and by other factors. Similarly, neither odors nor fumes oust one of physical possession.

The Court in *Loretto* distinguished between intrusions of the type implicated in *Bormann* and true permanent physical occupations: "[T]his Court has consistently distinguished between . . . cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within, on the other. A taking has always been found only in the former situation."[130]

The Supreme Court has refused to extend *Loretto.* In its 1992 decision, *Yee v. City of Escondido,*[131] the Court examined a rent control provision that restrained mobile home park owners from terminating rentals of space for tenants.[132] The owners argued the law effected a permanent physical occupation under *Loretto* in that the statute empowered tenants to remain in occupation of land at sub-market rental costs against the wishes of the landowners.[133] The Supreme Court unanimously disagreed, commenting "[t]he government effects a

125. *Compare* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. at 419-56, *with* Bormann v. Board of Supervisors, 584 N.W.2d at 309-22.

126. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. at 421-25.

127. *Id.* at 422.

128. *Id.* at 438.

129. *Id.* at 441.

130. *Id.* at 428.

131. Yee v. City of Escondido, 503 U.S. 519 (1992).

132. *Id.* at 525.

133. *Id.*

physical taking only where it requires the landowner to submit to the physical occupation of land."[134] Government flooding of land or, as in *Loretto*, the government's authorization of installation of cable communications equipment, might qualify,[135] but, in *Yee*, "[p]ut bluntly, no government has required any physical invasion of petitioners' property."[136] "[T]he state and local laws at issue here merely regulate petitioners' use of their land by regulating the relationship between landlord and tenant."[137]

The Iowa Supreme Court, however, cites *Richards v. Washington Terminal Co.*,[138] a 1914 United States Supreme Court case, to demonstrate that physical invasions need not involve physical touchings or permanent occupations to fall under the rule in *Loretto*.[139] In *Richards*, the plaintiff's residential property, located near railroad tracks, bore the burden of smoke, dust, cinders, and vibration caused by the normal operation of railroad facilities.[140] Furthermore, because the property was near a train tunnel, it suffered greater harm than other properties because gas and smoke rushed from the tunnel, and onto plaintiff's land, in exceedingly concentrated amounts.[141]

The plaintiffs secured a recovery in *Richards*,[142] but their victory undercuts, rather than supports, the *Bormann* rationale. The *Richards* Court found that the plaintiff enjoyed a right to be free from special and peculiar interferences to his use of land caused by the ventilation system in the tunnel.[143] Exposing the plaintiff to these special and peculiar harms resulted in a taking.[144] Notably, the *Richards* Court expressly held that no taking had occurred due to harms caused by the normal operation of the railroad.[145] The Court found these harms were not cognizable for takings purposes because the government decision to construct the railroad in the first instance represented a conferral of immunity to the railroad from nuisance suits of this sort.[146] Thus, the only relief allowed in *Richards* was for harms above and beyond the normal inconveniences to be

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134. *Id.* at 527.
135. *Id.*
136. *Id.* at 528.
137. *Id.*
138. Richards v. Washington Terminal Co., 233 U.S. 546 (1914).
139. Bormann v. Board of Supervisors, 584 N.W.2d 309, 319 (Iowa 1998), *cert. denied*, 119 S. Ct. 1096 (1999).
140. Richards v. Washington Terminal Co., 233 U.S. at 549.
141. *Id.* at 549-50.
142. *Id.* at 557-58.
143. *Id.* at 557.
144. *Id.*
145. *Id.* at 557-58.
146. *See id.* at 557.

expected by non-negligent railroad operations.[147] *Richards,* therefore, is actually the United States Supreme Court's authority for the notion that government *may* create immunities without offending the Takings Clause.

One other distinction between *Loretto* and *Bormann* deserves emphasis. The plaintiffs in *Bormann* offered no evidence of *any* intrusion of fumes, odors, or noise over their lands.[148] Without an intrusion of some sort, there can be no occupation, permanent or temporary, physical or intangible.[149]

### B. *Does the Statute Cause a Taking Under the* Penn Central *Balancing Test?*

A taking has not been shown to have occurred under the balancing test of *Penn Central Transportation Co. v. New York City.*[150] The adverse economic impact factor of *Penn Central*[151] is unavailing, as there is no evidence on the *Bormann* record of any harm to plaintiffs' property.[152] The character of the government action factor would similarly tend to a finding of no taking: The government action in *Bormann* was nothing more than a legislatively mandated adjustment of the economic realities of life.[153] *Penn Central* characterized such government actions as weighing in on the side of a no-taking resolution.[154] Last, the plaintiffs in *Bormann* cannot lay claim to an interference with investment-

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147. *Id.* at 558.

148. Bormann v. Board of Supervisors, 584 N.W.2d 309, 321 (Iowa 1998), *cert. denied,* 119 S. Ct. 1096 (1999).

149. As another citation of authority, the *Bormann* court invokes the famous overflight case, *United States v. Causby,* 328 U.S. 256 (1946). In *Causby,* the government had undertaken frequent and intensely intrusive flights over private land, sufficient to destroy plaintiff's residential and commercial use of the property. *Id.* at 259. The *Causby* Court concluded the intrusion was sufficiently onerous to rise to the level of an unconstitutional taking. *Id.* at 265-66. *Causby* is inapplicable to the facts of *Bormann* because the holding depends on the severity of injury suffered by the aggrieved plaintiffs. In *Bormann,* there is no interference with plaintiffs' land use at issue. The Iowa court cites *Fitzgarrald v. City of Iowa City,* 492 N.W.2d 659 (Iowa 1992), for the same point. Bormann v. Board of Supervisors, 584 N.W.2d at 318. Like *Causby, Fitzgarrald* involved overflights of aircraft interfering with private use of property. Fitzgarrald v. City of Iowa City, 492 N.W.2d at 663. In *Fitzgarrald,* the Iowa court rejected the takings claim because the harms had failed to cause any significant decrease in market value of the lands. *Id.* at 665-66. *Fitzgarrald,* like *Causby,* depends for its conclusion on an examination of the specific harms visited on plaintiffs' property. *Id.* at 666. No such harms are implicated in *Bormann.*

150. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124, 138 (1978); *see supra* text accompanying note 121.

151. *Id.* at 124; *see supra* text accompanying note 121.

152. *See supra* text accompanying note 148.

153. *See* Bormann v. Board of Supervisors, 584 N.W.2d at 311-12.

154. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. at 124.

backed expectations.[155] They obviously knew they were living in an area dominated by farming and ranching, so any expectations they might have had regarding expected future uses of their property necessarily took into account precisely the sorts of impacts of which they now speculate.

As it turns out, the immunity provision may not even have worked to preclude a *Bormann* plaintiff's future lawsuit. If defendants have engaged in what is known as a "permanent nuisance" under Iowa law,[156] one for which plaintiffs must bring a single cause of action for all damages—past, present, and future,[157] and if the permanent nuisance behavior predated the immunity grant, plaintiffs have a cause of action barred by neither the statute nor the immunity grant.[158] Moreover, if plaintiffs could show that defendants undertook farming and ranching operations negligently, they could file an action on that basis as well.[159]

Beyond that, it is plausible, if not likely, that a nuisance action brought by these plaintiffs against these defendants would fail in any event. Nuisance cases, simply put, are not easy to win. As Dean Prosser commented:

> The plaintiff must be expected to endure some inconvenience rather than curtail the defendant's freedom of action, and the defendant must so use his own property that he causes no unreasonable harm to the plaintiff. The law of private nuisance is very largely a series of adjustments to limit the reciprocal rights and privileges of both. In every case the court must make a comparative evaluation of the conflicting interests according to objective legal standards, and the gravity of the harm to the plaintiff must be weighed against the utility of the defendant's conduct.[160]

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155. *See id.*

156. A permanent nuisance is one which has caused injury indefinite in duration and significant in degree. Mel Foster Co. Properties v. American Oil Co., 427 N.W.2d 171, 174 (Iowa 1988). The distinction between a temporary nuisance and a permanent nuisance can be difficult to determine as it depends on the particular circumstances of each case. *Id.*

157. *See* Wesley v. City of Waterloo, 8 N.W.2d 430, 432 (Iowa 1943).

158. IOWA CODE § 352.11(1)(b) (1999); Weinhold v. Wolff, 555 N.W.2d 454, 462 (Iowa 1996).

159. IOWA CODE § 352.11(1)(b).

160. WILLIAM L. PROSSER, THE LAW OF TORTS § 89, at 596 (4th ed. 1971). One major difficulty facing plaintiffs is the tendency of courts to balance hardship and equities.

> In determining whether the defendant's activity is a nuisance at all, courts traditionally balanced the benefit[s] derived from that activity with the harm it caused. A balance of harms, costs, utilities and hardships suggests, for example, that a very valuable industry which is causing annoyance to neighbors might not be a nuisance at all in the light of the relative utilities.

DAN B. DOBBS, LAW OF REMEDIES § 5.7(2), at 518-19 (2d ed. 1993).

In Iowa, three factors control common law nuisance actions: priority of location, nature of the neighborhood, and character of the wrong complained of.[161] In a nuisance case filed against the *Bormann* defendants, the court would be required to examine each of these factors. With respect to priority of location, if in fact defendants' farm operation predated the plaintiffs' occupation of their own land, the plaintiffs, in all likelihood, would not prevail.[162] The other factors—the nature of the neighborhood and the character of the wrong complained of—on balance would favor the defendants as well.

Under nuisance law, moreover, even winning plaintiffs are not assured the remedy of abatement.[163] Courts may refuse to order abatement even in cases of severe injury if doing so would produce yet a greater injury.[164] Or, in an interesting variation, it can order abatement, but charge the cost to the aggrieved plaintiff.[165]

## V. INVALIDATION AS REMEDY

Even if we assume this immunity to be an easement, as the Iowa Supreme Court urges, and assume the creation of the easement works a taking, again as the court urges, still there is no basis for the invalidation of the right-to-farm law for all purposes. The *statute,* it must be remembered, did not take property from anyone. It was the specific grant of immunity to defendants that occasioned this result, if at all. What the enactment of the statute did was establish a legal framework for grants of immunity in the future; it established a new policy only. The enactment of a statute, without more, should not be found to have caused a taking except in truly extraordinary circumstances.[166] In this case, if a taking occurred, it was by the grant of immunity, for only at that juncture can the force of the statute be seen as bearing on specific property rights. The United States

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161. Patz v. Farmegg Prods., Inc., 196 N.W.2d 557, 561 (Iowa 1972).

162. The *Bormann* opinion gives no indication which party took up occupancy first.

163. *See, e.g.*, Boomer v. Atlantic Cement Co., 257 N.E.2d 870, 871 (N.Y. 1970) (commenting that the grant of injunctive relief in nuisance actions is discretionary with the court).

164. *See* DANIEL R. MANDELKER & ROGER A. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT, CASES AND MATERIALS 39 (3d ed. 1990).

165. *See, e.g.*, Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700, 706, 708 (Ariz. 1972) (addressing the question of whether a nuisance plaintiff may be made to indemnify one who maintains a nuisance and answering in the affirmative where equity requires it in a case where a plaintiff "came to the nuisance").

166. United States v. Salerno, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully . . . .").

Supreme Court has been extremely hesitant to find a taking based upon a facial challenge to a statute.[167]

There may be instances where the simple act of enacting a statute can cause a taking. Under the principle established in *Lucas*, the enactment of a statute could cause a per se taking if the enactment, without more, caused a complete devaluation of every parcel of property to which it applies.[168] A rezoning of land for "greenspace" use only, precluding any "development" of that parcel, could be such a case. Absent such circumstances, though, a statute should not be read to cause a taking before it is applied and enforced.[169]

## VI. CONCLUSION

The *Bormann* decision suffers from two logical distortions. First is what might be termed a "context confusion." Unlike other immunities, the one examined in *Bormann* keeps company with property rights. It functions, if at all, to expand the allowable regime of property uses. Given this context, it is easy to think of the immunity as itself being property. But a legal right is not property merely because its operation implicates property. A legal right is property only if by design it qualifies for that status. Immunities simply do not qualify.

A second logical distortion of the decision might be loosely styled as the "zero sum assumption." Having 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. Take, for example, a municipal decision to authorize a commercial use on property previously dedicated exclusively to residential purposes. The decision might be as innocent as allowing the use of a home office in a pri-

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167. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 471 (1987) (noting that in order to establish a taking or a facial challenge, one must show that a statute "makes it impossible for petitioners to profitably engage in their business, or that there has been undue interference with investment backed expectations"); Hodel v. Virginia Surface Miners and Reclamation Ass'n, 452 U.S. 264, 295-96 (1981) (confining the issue of pre-enforcement, facial challenges to "whether the 'mere enactement' of the [statute] constitutes a taking" and setting forth the test to be applied as whether the statute "denies an owner economically viable use of his land").

168. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015-32 (1992).

169. For an interesting view on the issue of facial challenges in takings cases, see Justice Scalia's dissenting opinion in *Pennell v. City of San Jose*, 485 U.S. 1, 15-24 (1988) (Scalia, J., dissenting). *Pennell* involved a rent-control law that limited amounts rental lessors could charge based in part on the net wealth of the lessees. *Id.* at 4-6. Justice Scalia believed the law to be a facial taking because it forced upon affected lessors an inordinate share of a public burden, in effect establishing a welfare program to be funded by lessors. *Id.* at 19-24 (Scalia, J., dissenting).

vate dwelling. Such a permission does not typically deprive next-door neighbors at all, as their land use rights remain undisturbed. Indeed, if every enlargement of use rights for one were a taking of property of another, a municipality could never repeal a zoning restriction or grant a zoning exception.[170]

In fact, if the court's zero sum assumption is true, casino gambling in Iowa violates the state constitution. Iowa has recently made the significant choice to allow excursion boat casino gambling and pari-mutuel dog and horse racetracks[171] within the jurisdiction.[172] Prior to that action, such gambling was a public nuisance.[173] Allowing a person to conduct casino gambling operations is, under the *Bormann* doctrine, the extraction of an easement from neighbors. Whereas, neighbors once could shut down gaming enterprises on public nuisance grounds, with the change in statutory policy, now they may not. Perhaps the ongoing debate about legislatively sanctioned gambling will afford the Iowa Supreme Court its next opportunity to examine these issues. If it does get the opportunity, in deference to the wise judicial policy counseling restraint from declaring statutes to be unconstitutional in doubtful circumstances,[174] it should overturn its decision in *Bormann*.

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170. The Iowa Supreme Court has found rezoning to be constitutional. In *Keller v. City of Council Bluffs*, the court reviewed the rezoning of a parcel of land on which stood a convalescent home. Keller v. City of Council Bluffs, 66 N.W.2d 113, 115 (Iowa 1954). Prior to the rezoning, the land use violated the prevailing zoning laws. *Id.* The zoning amendment ratified the prior use as a matter of law. *Id.* at 120-21. The court affirmed the zoning amendment in major part because it found the rezoning imposed "[n]o substantially new burden . . . upon adjoining property owners[,] . . . for the [newly authorized land use] had been in existence for many years." *Id.* at 121; *see also* Montgomery v. Bremer County Bd. of Supervisors, 299 N.W.2d 687, 696-97 (Iowa 1980) (finding that a board of supervisors decision to rezone agricultural land was not arbitrary or capricious).

171. IOWA CODE § 99F.4A (1999).

172. *Id.* § 99F.3.

173. *Id.* § 657.2(6) (declaring "gambling houses" to be a nuisance); *see, e.g.*, Guzman v. Des Moines Hotel Partners, Ltd. Partnership, 489 N.W.2d 7, 10 (Iowa 1992) (finding "[a] public or common nuisance . . . may include . . . a public gaming house . . .").

174. *See* NLRB v. Catholic Bishop, 440 U.S. 490, 500 (1979) (stating "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available"); Moorman Mfg. Co. v. Bair, 254 N.W.2d 737, 743 (Iowa 1977) ("Where the constitutionality of a statute is merely doubtful this court will not interfere as it must be shown that legislative enactments clearly, palpably and without doubt infringe upon constitutional rights before an attack will be upheld.").