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William C. Robinson

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RIGHT-TO-FARM STATUTE RUNS A 'FOUL' WITH THE FIFTH AMENDMENT'S TAKING CLAUSE

Bormann v. Board of Supervisors in and for Kossuth County¹

I. INTRODUCTION

Pro-agricultural legislation has been enacted in some form in every state of the United States.² The original premise for right-to-farm laws was to protect pre-existing farms from nuisance claims against the encroaching urban sprawl, an apparent codification of the common law’s “coming to a nuisance.”³ Some advantages of right-to-farm laws include giving “farmers security in making investments in improving and expanding their farming operations . . . [as well as] place on notice those non-farm owners who move into agricultural areas that use of their property may be subject to the rights of the nearby pre-existing farm operations.”⁴ Generally, protection afforded by right-to-farm laws are subject to limitations that may include that the farming operation both pre-exist its neighbors for a requisite period of time and that the farming operation be conducted in a non-negligent manner.⁵

In Bormann, the plaintiffs challenge the validity of Iowa’s right-to-farm law.⁶ The law grants agriculturally designated areas immunity from nuisance suits, as well as other perquisites. The Iowa law retains the limitation that the farm, or farming operation, must be operated in a non-negligent manner but is void of the limitation that the farm, or farming operation, must pre-exist its neighbors.⁷

The purpose of this Note is to discuss to current position of the Iowa Supreme Court on its state’s right-to-farm law and how it may influence other jurisdictions. This Note will present a detailed look at the evolution of takings law in the Supreme Court; the applicable U.S. Constitutional provisions as well as the applicable Iowa Constitutional provisions; and will present an overview of the state law in question vis-à-vis takings law.

II. FACTS & HOLDING

In September 1994, various landowners (“Applicants”)⁸ in Kossuth County applied to the Kossuth County Board of Supervisors (“Board”) for the establishment of an agricultural area concerning 960 acres.⁹ The establishment of an agricultural area would permit the Applicants to generate a nuisance, by way of noise, odor, dust, and the like, notwithstanding vociferous objections of adjacent landowners.¹⁰ In November 1994, the Board denied the application on the following grounds: (1) the policy in favor of agricultural land preservation would not be furthered in this case; (2) such designation and the nuisance protections provided will have a direct and permanent impact on the existing and private property rights of the adjacent property owners; and (3) preservation of private property rights outweighs agricultural land preservation.¹¹ Subsequently, the applicants reapplied to the Board for an agricultural area

³ Hamilton, supra note 2, at 103-04.
⁴ Id. at 106.
⁵ Id. at 106.
⁷ Bormann, 584 N.W.2d at 314.
⁸ Bormann, 584 N.W.2d at 311. The applicants were Gerald and Joan Girres. Id. The applicants sought the establishment of an agricultural area for themselves and on behalf of other property owners. Id. The other property owners included Mike Girres, Norma Jean Thul, Gerald Thilges, Shirley Thilges, Thelma Thilges, Edwin Thilges, Ralph Reding, Loretta Reding, Bernard Thilges, Jacob Thilges, John Goecke, and Patricia Goecke. Id.
⁹ Id. at 106.
¹⁰ Id. at 106.
¹¹ Bormann, 584 N.W.2d at 311.
The Board approved the application this time, on a three-to-two vote, as they found that the designation was in compliance with, and consistent with, Iowa statute. 

In April 1995, Clarence and Caroline Bormann and Leonard and Cecelia McGuire ("Plaintiffs") filed a \textit{writ of certiorari} and declaratory judgment action in the district court naming the Board and individual board members as defendants. The Plaintiffs alleged that the Board violated their constitutionally inalienable right to protect property under the Iowa Constitution; that the Board deprived them of property without due process or just compensation in violation of both the U.S. and Iowa Constitutions; that the Board failed to follow res \textit{judicata} principles; and that the Board’s decision was arbitrary and capricious. The district court ruled that the Board’s actions were arbitrary and capricious – the only cause of action ruled on by the district court – and the foundation of their ruling was apparently the Board’s determinative coinflip. 

The Plaintiffs then filed for certification of appeal to the Iowa Supreme Court, which was granted. The Iowa Supreme Court first distinguished a private nuisance from a public nuisance and found that a private nuisance is a "civil wrong based on the disturbance of rights in land . . . the essence of which is an interference with the use and enjoyment of land . . . including disturbance of the comfort of the plaintiff, as by unpleasant odors, smoke, or dust." The Iowa Supreme Court presented a guide, or framework, for a takings analysis, to-wit: "(1) Is there a constitutionally protected private property interest at stake? (2) Has this private property interest been “taken” by the government for public use? and (3) If the protected property interest has been taken, has just compensation been paid to the owner?" 

The third question was not at issue in this case as all concerned parties admit that there was no compensation paid to the plaintiffs. As to the initial question, the Iowa Supreme Court determined that state law establishes what constitutes a property right and, in turn, they held that an easement is a property right that Iowa law will protect. Next, the Iowa Supreme Court determined that the nuisance immunity provisions of the Iowa statute, pertaining to agricultural area designations, created an easement. The servient tenement is the adjacent landowners and the dominant tenement (i.e. the land entitled to the easement) is the recipient of the agricultural area designation. 

The Iowa Supreme Court, therefore, held that the nuisance easement amounted to a taking of private property and that the owners of the servient tenements were not justly compensated, hence the Iowa statute is violative of both the Fifth Amendment of the United States Constitution and article I, section 18 of the Iowa Constitution.

\textsuperscript{12} Id. 
\textsuperscript{13} Id. \textit{See} \textbf{IOWA CODE ANN.} \S 352.6 (1994). This statute provides, in pertinent part, that the agricultural area at its creation shall include at least 300 acres, unless the land is adjacent to farmland subject to the land preservation ordinance and then it may be less than 300 acres; the proposal must include a description of the land and the agricultural area may not be within corporate limits of a city. 
\textsuperscript{14} \textit{Bormann}, 584 N.W.2d at 312. 
\textsuperscript{15} Id. 
\textsuperscript{16} Id. 
\textsuperscript{17} Id. 
\textsuperscript{18} Id. 
\textsuperscript{19} Id. at 314. 
\textsuperscript{20} Id. at 315. 
\textsuperscript{21} Id. 
\textsuperscript{23} Id. 
\textsuperscript{24} \textbf{IOWA CODE ANN.} \S 352.11.1 (a)-(b) (1994). This statute provides in pertinent part: "A farm...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." \textit{Id.} This section excludes from nuisance immunity operations conducted in violation of state or federal regulations, negligently operated farms, nor for injury or damage caused prior to the agricultural area designation. \textit{Id.} 
\textsuperscript{25} \textit{Bormann}, 584 N.W.2d at 316. The court defines the servient tenement refers to the land burdened with the servitude. \textit{Id.} 
\textsuperscript{26} Id. The court defines dominant tenement as the land entitled to the easement. \textit{Id.} 
\textsuperscript{27} Id. at 321.
III. LEGAL BACKGROUND

For purposes of clarity, the legal background section of this Note is divided into four subsections. The inquiry will begin with a look at the applicable constitutional provisions. Next, this Note will attempt to trace the definition of property as it has been applied in takings jurisprudence. Third, this Note will attempt to trace the evolution of takings law to the decision announced in Bormann. The final subsection will describe the applicable Iowa legislation that is in dispute in this case.

A. The Constitutional Elements

The prudent place to begin the inquiry into the legal background of this case is the U.S. Constitution. The Fifth Amendment states, in pertinent part, that private property shall not be taken for public use without just compensation.28 Similarly, the Iowa Constitution places essentially the same restrictions on the taking of private lands for public use.29 The key components of the takings clause that are often the subject of inquiry by the courts include: “property”, “taken”, and “just compensation”.30 One commentator has noted that the framers’ intent of this provision was to prohibit “the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”31 The constitutional provisions and the framers’ intent appears to be straightforward, but the case law indicates an entirely different story.

B. Property

The definition of property has been the cause of some changes in takings jurisprudence. Initially, the term property was used only in its physical sense.32 In a 1843 case, the Supreme Court noted that the “constitution is made...for the inspection of the million...and it is consequently expressed in the terms that are most familiar to them. Words, therefore, which do not of themselves denote that they are used in a technical sense, are to have their plain, popular, obvious, and natural meaning.”33 This commentator noted that the trend in the law has been to move away from the constraints of the physical definition and more towards a definition that denotes ownership and possession as well as the non-physical interests such as the unrestricted right of use, enjoyment, and disposal.34 In Iowa, the law of easements establishes the right to maintain an action for nuisance.35 The Iowa Supreme Court has defined an easement as: “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.”36 Therefore, in the present case, the property interest in which the plaintiffs were trying to protect was their right to bring the nuisance, or an easement in land. Is this easement such an interest in property that the Supreme Court would deem to be protected under the Fifth Amendment’s taking clause? This issue is explored in the following subsection.

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28 U.S. Const. amend. V.
29 Iowa Const. art. I, § 18.
31 Id. at 165 (citations omitted).
34 Id. at 211.
36 Id. at 647.
C. The Evolution of Takings Jurisprudence

In 1871, the Supreme Court decided a case wherein the plaintiff sustained great damage that resulted from its land being flooded for approximately ten years. A Wisconsin statute authorized the construction of a dam over a river for hydraulic purposes which was apparently the proximate cause of the flooding. In holding that compensation should be afforded to the plaintiffs, the Supreme Court stated:

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority of invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.

An unfortunate result of this case is that this taking by regulation formulation remained a dormant rule for quite some time. Takings law then assumed a much stricter interpretive approach as may be observed in the following case. Twenty-six years after the Pumpelly decision, the Supreme Court was faced with a very similar case, however it arrived at a dissimilar conclusion. In Gibson v. United States, a river was damned under the authority of legislation, which caused substantial destruction to the property owner’s landing and precluded the ingress and egress of the owner to ship her gardening products and to receive supplies. The Supreme Court denied compensation in this case because the damage complained of “was not the result of the taking of any part of her property . . . or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power.”

The Supreme Court, in 1914, decided Richards v. Washington Terminal Co., a case that involved the invasion of one’s property in the form of noxious gases, cinders, smoke and dust. The defendant owned and operated a railroad and a tunnel that was near, but not contiguous, with the plaintiff’s property. The facts in this case are somewhat similar to the facts in Gibson in that the dike was built near but not on the plaintiff’s land and the court found the resulting harm in Gibson to be incidental. In Richards, the Court strayed away from its prior holdings without completely eviscerating them. In Richards, the Court found that the effects of the normal operation of the railroad (e.g. the noise, vibrations, smoke, and cinders) that caused harm to the plaintiff’s land were damnum absque injuria vis-

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37 Pumpelly v. Green Bay Co., 80 U.S. 166 (1871).
38 Id. at 167.
39 Id. at 177-78.
40 Washburn, supra note 30, at 166.
41 166 U.S. 269 (1897).
42 Id. at 269.
43 Id. at 275.
44 233 U.S. 546 (1914).
45 Id. at 549.
46 Id. at 548.
47 Gibson v. United States, 166 U.S. 269 (1897).
48 This phrase is defined as a harm or damage without a legally recognized injury, which means that the law provides no cause of action to recover for one’s loss. BARRON’S LAW DICTIONARY 126 (4th ed. 1996).
à-vis most of the elements. The defendant, however, had installed a fanning system that forced the gas, smoke and cinders out of the tunnel and onto the plaintiff’s property. There was evidence adduced that showed that the damages resulted in a declination in the value of the plaintiff’s home as well as the personal property located thereon. The Court noted that the rule in this area is that while a legislative body “may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use.” The Court held that the damage to the plaintiff’s property as a result from the emissions from the fanning system were a “special and peculiar” burden on this plaintiff and were impermissible under the Fifth Amendment. The case was remanded to determine whether the harmful effects could be abated, and if they could not be, then the plaintiff’s property was necessary to the railroad’s operation and therefore the property owner must be justly compensated.

In United States v. Welch the Supreme Court rendered an opinion pertaining to easements in the realm of takings jurisprudence, rather than the fee interest. In this case a river was damned and this resulted in flooding the adjacent property. The plaintiff owned a parcel of land to the south of the flooded property and they also possessed an easement across the flooded land for the means of ingress and egress. The flooding precluded the plaintiff’s use of this easement and the Court noted that a private right of way is an easement and is land. The Court further stated that “[w]e perceive no reason why it should not be held to be acquired by the United States as incident to the fee for which it admits that it must pay.”

In 1922, the Supreme Court decided Pennsylvania Coal Co. v. Mahon, a case wherein the petitioners had retained mining rights to a tract of land but were prohibited from acting upon those mining rights because of an act passed by the state. The Court recognized that some rights inherent in property must yield to the state’s police power. The Court noted that police powers are limited by “extent of the diminution [and] when it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.” The Court overruled the act in question, noting that the right to coal includes the right to mine it and that the act attempted to abolish an estate in land without compensation. The Court further noted that “the rights of the public . . . are those that it has paid for . . . [t]he protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation.”

One scholar has noted that Justice Holmes’ opinion in Pennsylvania Coal Company v. Mahon set forth the basis for the regulatory-takings doctrine that is utilized in the modern, takings analysis. In 1922, the Supreme Court began to document the bundle-of-rights theory of property as it applies to takings jurisprudence. The Court was faced with a claim that the constant firing of military weaponry, and the imminent threat of such firing, with a trajectory that passed over a parcel of private

49 Richards, 233 U.S. at 551.
50 Id. at 549.
51 Id. at 551.
52 Id. at 553.
53 Id. at 558.
54 Id.
56 Id. at 338.
57 Id.
58 Id. at 339.
59 260 U.S. 393 (1922).
60 Id. at 393. In this case, the petitioner, the Pennsylvania Coal Company, deeded certain property to Mahon, yet retained the subsurface mining rights. Id.
61 Id. at 413.
62 Id.
63 Id. at 414.
64 Id. See also Washburn, supra note 30, at 168.
65 260 U.S. 393 (1922).
66 Washburn, supra note 30, at 168.

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property constituted a taking under the Fifth Amendment. The private property was previously utilized as a vacation resort, but as a result of the firing of the military weaponry, the property owner’s business was substantially impaired. The Court endorsed its previous finding that:

if the Government had installed its battery . . . with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise . . . with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation would be made.

This ruling was the predicate of the air-easement cases that would soon follow. In the spring of 1946, the Supreme Court decided United States v. Causby wherein the plaintiffs were seeking compensation for an alleged taking by a neighboring airport. In that case, the plaintiff’s property abutted an airport and was positioned directly below the approach pattern of the aircraft that utilized the airport facility. The plaintiff alleged that the approach pattern was so low that it resulted in unbearable noise at all times of the day and that the aircraft completely illuminated the property in the evenings. The noise complained of was so disturbing that it caused the plaintiff to lose the use of its commercial chicken farm. The Court noted that if the property owner is to have “full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere.” The Court cited its previous holding in Portsmouth Harbor Land & Hotel Co. v. United States and stated that “it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking.” The ambiguity here is the use of the word “substantial” in defining damages. One scholar has defined substantial as “the effect a given invasion has upon the landowner – the diminution of his interest in use and enjoyment . . . the harm to him must be real . . . and appreciable enough to cause, not just a personal discomfort, but one that affects his enjoyment of the land.” The Supreme Court arrived at nearly the same conclusion with very similar facts some sixteen years later in Griggs v. Allegheny.

Contemporary takings law constitutes a compilation of Supreme Court cases decided between 1978 and 1987. It was during this period that the Supreme Court attempted, apparently, to give takings law the semblance of a quasi-doctrine, or at least something to give the lower courts guidance. In 1978, the Court decided Penn Central Trans. Co. v. New York City a case wherein the property owner wanted to build over an area that was designated a landmark by the city. The plaintiff was denied approval for such construction plans by the Landmarks Preservation Commission (“Commission”) and, as a result the plaintiff sought to be compensated because they believed this constituted a takings under the Fifth Amendment. The plaintiff, on appeal, argued that a taking had occurred in that the Commission denied them of gainful use of their superadjacent airspace.

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68 Id. at 328.
69 Id. at 329 (citations omitted).
70 United States v. Causby, 328 U.S. 256 (1946).
71 Id.
72 Id. at 258.
73 Id. at 259.
74 Id.
75 Id. at 264.
76 260 U.S. 327 (1922).
77 Causby, 328 U.S. at 266.
78 Stoebuck, supra note 32, at 231.
79 369 U.S. 84 (1962).
81 Id.
82 Id. at 119.
83 Id. at 130.
plaintiff further argued that the Landmark Preservation law is distinctly different from zoning laws in that the current law is subject to arbitrary and subjective designations, it applies only to individuals not to an area, and it is "inherently incapable of producing the fair and equitable distribution of benefits and burdens of governmental action."\footnote{Id. at 131-33.} The plaintiff's final contention was that the government acted in an enterprise capacity and "appropriat[ed] part of their property for some strictly governmental purpose."\footnote{Id. at 135.}

The Supreme Court summarily disposed of these arguments, despite their evident foundation in Supreme Court takings jurisprudence. The Supreme Court ruled that the acts of the Commission did not rise to the level of a takings under the Fifth Amendment, but it did identify some factors by which to determine the issue.\footnote{Id. at 124-25.} The three factors stated in this case have been summarized as: "(1) a regulation's impact on the claimant; (2) the regulation's interference with distinct investment-backed expectations; and (3) the character of the governmental action."\footnote{Robert K. Best, et al., Evolution and Thumbnail Sketch of Takings Law, SB14 ALI-ABA 1, 5 (1996), citing Penn Central Trans. Co., 438 U.S. at 124-25.} The Court emphasized that there is not an established formula for regulatory takings, rather that the inquiry is an \textit{ad hoc} approach and that the enunciated factors are merely factors to be considered.\footnote{Id. at 136.}

The Court concluded its inquiry in \textit{Penn Central} by considering the question of whether the law "interfer[ed] with [the] appellants' property [in] such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].'"\footnote{Id. at 124-25.} The Court summarized the plaintiff's assertions in this case as exaggerated and held that the plaintiff was not precluded from using the property for its primary purpose – a railroad terminal.\footnote{Id. at 142-43, quoting United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945)(emphasis supplied).}

The "primary purpose" language utilized by the majority drew the dissent's ire as the dissent noted that the majority defined property liberally and the term property is not used in the 'vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it]...denote[s] the group of rights inhering in the citizen's relation to the physical THING, AS THE RIGHT TO POSSESS, USE, AND DISPOSE OF IT... the constitutional provision is addressed to every sort of interest the citizen may possess."\footnote{Id. at 142.}

The dissent focused its inquiry on the words "property", "taken", and "just compensation" of the Fifth Amendment, and how these words have historically been interpreted by the Court.\footnote{Id. at 143.} The dissent concluded that the plaintiff was forever precluded from utilizing their "air rights" and as such they were "subjected to a nonconsensual servitude not borne by any neighboring or similar properties."\footnote{Robert K. Best, et al., supra note 87, at 6.}

In \textit{Agins v. City of Tiburon},\footnote{Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).} the Court set forth two circumstances that would at least produce a regulatory taking: "(1) the regulation does not substantially advance legitimate state interests, and (2) the regulation denies an owner economically viable use of his land."\footnote{447 U.S. 255, 266 (1980).} In 1982, the Court furthered this doctrinal approach by announcing that there was a per se taking when there is a permanent physical occupation of the premises, notwithstanding the important public interest sought to be served or the minimal economic impact on the owner.\footnote{Robert K. Best, et al., supra note 87, at 6.}
Robert M. Washburn, a Professor of Law at Rutgers School of Law, has pointed to a series of Supreme Court rulings in takings law as the 1987 Trilogy Cases.97 Professor Washburn states that these cases were an attempt to resolve the tempestuous outcry that resulted from Penn Central’s three-factor approach.98 The first case in the trilogy was Nollan v. California Coastal Commission.99 In this case, the Court noted that the nexus between the stated governmental purpose and the condition was tenuous and that the condition could not survive the takings analysis because “it did not substantially advance legitimate state interests.”100 As Professor Washburn noted, the Court emphasized the bundle of rights that are inherent in the ownership of property,101 apparently reiterating the dissent’s view in Penn Central.

The second case in the trilogy series was First English Evangelical Lutheran Church v. County of Los Angeles.102 The Court in this case held that even a temporary taking was entitled to just compensation under the Fifth Amendment.103

The final case in the so-called trilogy cases was Keystone Bituminous Coal Ass’n v. DeBenedictis.104 The Court found in favor of the regulation, holding that neither of the two prongs of the Agins test had been satisfied.105 The Court held that the act in this case supported a legitimate state interest, and that the act did not preclude the petitioners from “profitably engaging in their business, [nor] that there has been undue interference with their investment backed expectations.”106 Professor Washburn notes that Keystone illustrates the Court’s “increasing concern for the rights of individuals over their property and an indication of its readiness to broaden its construction of the Takings Clause protections for individual owners of property” notwithstanding the Court’s holding that no taking had occurred.107

The next controversial decision handed down by the Supreme Court was Lucas v. South Carolina Coastal Council.108 The South Carolina Supreme Court upheld an act that denied the petitioner the opportunity to build residentially on his property based on the noxious use line of cases announced by the Supreme Court.109 The U.S. Supreme Court acknowledged this prior rule but stated that “these cases are better understood . . . on the ground that the restrictions were reasonably related to the implementation of a policy – not unlike historic preservation – expected to produce a widespread public benefit and

97 Washburn, supra note 30, at 173.
98 Id.
99 483 U.S. 825 (1987). In this case, a property owner sought to replace the existing structure on his beachfront property with something more practical. Id. at 825. When he applied for a building permit, its issuance was conditioned upon the owner’s granting of an easement such that the public would have access to the beach by way of his property. Id. The owner challenged this requirement, asserting that it resulted in a taking without compensation. Id.
100 Id. at 175, citing First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). In this case there was a building prohibition in a flood hazard area that eventually resulted in a permanent prohibition. Id. at 304. The church owned acreage in the prohibited area and brought an action for inverse condemnation seeking. Id.
101 Id. at 174.
102 Id. at 175, citing First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). In this case there was a building prohibition in a flood hazard area that eventually resulted in a permanent prohibition. Id. at 304. The church owned acreage in the prohibited area and brought an action for inverse condemnation seeking. Id.
103 Id. at 175, quoting First English.
104 Washburn, supra note 30, at 175, citing Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470 (1987). In this case, like that in Pennsylvania Coal, there was a regulatory act that prohibited mining operations that would cause damage to dwellings or other surface buildings. Keystone Bituminous Coal Ass’n, 480 U.S. at 470. The enforcement of the act required that fifty percent of the coal be left in place to support the surface structures. Id. As in Pennsylvania Coal the surface deeds reserved the right to mine the subsurface coal for another. Id. The mining rights owners brought a takings claim asserting that the prohibition to mine the coal resulted in a takings under the Fifth Amendment. Id.
105 Washburn, supra note 30, at 177.
106 Keystone Bituminous Coal Ass’n., 480 U.S. at 485.
107 Washburn, supra note 30, at 176-77.
108 505 U.S. 1003 (1992). In this case the petitioner, Lucas, had purchased two residential parcels of property on a South Carolina barrier island for the purchase price well-nigh one million dollars. Id. at 1003. At the time when the purchase was made, Lucas was not prohibited from building thereon. Id. Subsequent legislation had the effect of precluding such residential construction. Id. The trial court held in favor of Lucas and awarded damages of more than $1.2 million dollars. Id. The South Carolina Supreme Court reversed. The Supreme Court framed the question as “whether the Act’s dramatic effect on the economic value of Lucas’ lots accomplished a taking of private property under the Fifth and Fourteenth Amendments requiring the payment of ‘just compensation.’” Id. at 1006.
109 Id. at 1020.
The Court stated that "where the State seeks to sustain regulation that deprives land of all economically enjoyable use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with." The Court further stated that traditional takings jurisprudence has been "guided by the understandings of our citizens regarding the content of, and the State’s power over, the “bundle of rights” that they acquire when they obtain title to property." The Court, in looking at regulations that deprive the land of economically beneficial use, stated that:

a law or decree with such an effect must . . . do no more than duplicate the result that could have been achieved in the courts — by adjacent owners (or other uniquely affected persons) 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.

The Court stated that under a total-taking inquiry, courts must now undergo, “as the application of state nuisance law ordinarily entails”, an analysis of:

[1] the degree of harm to public lands and resources, or adjacent private property, posed by the claimant’s activities, [2] the social value of the claimant’s activities and tier suitability to the locality in question, and [3] the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government alike. The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition.

The Court ultimately found that the erection of residential buildings would not have been prohibited under common-law principles and if the state wanted to prohibit such construction: “it must identify background principles of nuisance and property law that prohibit uses he now intends in circumstances in which the property is presently found.”

The Iowa courts have long since held that a taking may occur without the appropriation of the fee, so long as it “substantially deprives one of the use and enjoyment of his property or a portion thereof.”

In summary, there are two noteworthy aspects of takings law that may be ascertained from this section. The first is that the past 128 years of takings jurisprudence has been anything but uniform. The second is that for several decades the Supreme Court has essentially recognized the “condemnation by nuisance” theory as it is evidenced in several other cases. The second aspect establishes that what the Iowa Supreme Court held in Bormann was not a novel, legal theory; rather it was an application of judicial precedent.

D. Iowa Legislation In Dispute

The Iowa legislature has armed the individual counties of Iowa with the power and authority to create or expand agricultural areas. This statute provides the counties with certain criteria that an applicant must meet in order for such a designation to be approved. The statute specifies permissible

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110 Id. at 1023.
111 Id. at 1027.
112 Id.
113 Id. at 1029.
114 Id. at 1030-31 (citations omitted).
115 Id. at 1031.
117 Stoebuck, supra note 32, proffered this phraseology.
119 IOWA CODE ANN. § 352.6 (1994).
120 Id.
uses of the agriculturally designated area, and it also provides the county with some discretion to allow for uses not enumerated in the statute. The Iowa legislature provided incentives to land designated as agricultural areas, such as immunity from nuisance claims and water priority over all other uses excluding uses for ordinary household purposes. The Iowa legislature also defines nuisance as "whatever is injurious to health, indecent or unreasonably offensive to the senses, or an obstruction to the free use of the property, so as essentially to unreasonably interfere with the comfortable enjoyment of life or property." Finally, to reiterate the first subsection of this section, the both U.S. Constitution and the Iowa Constitution prohibit the taking of private property for public use unless the property owner is first justly compensated.

IV. INSTANT DECISION

In Bormann v. Bd. of Supervisors in and for Kossuth County, the Iowa Supreme Court held that a nuisance-immunity provision, as established in the agricultural land preservation statutes, was triggered when the board granted the landowners' application for designation as an agricultural land area. The Iowa Supreme Court determined that (1) the applicants, by virtue of the nuisance-immunity provision, were permitted to do something on their land that would otherwise constitute a nuisance, and (2) that the nuisance-immunity statute constituted the grant of an easement that benefited the zoned area and burdened the adjoining properties. The Iowa Supreme Court concluded that the action by the Board resulted in a taking without just compensation, hence it was unconstitutional.

The Iowa Supreme Court established that it would focus its inquiry on two questions: "(1) is there a constitutionally protected private property interest at stake? and (2) has this private property interest been taken by the government for public use?"

The Iowa Supreme Court first determined that the type of nuisance involved in this case was a private nuisance, as opposed to a public nuisance, because the situation here would involve the interference with the use and enjoyment of one's land, specifically the disturbance of a property owner's comfort by unpleasant odors. The court further noted that a private nuisance of this kind was distinguishable from a trespass because a trespass is an invasion in the exclusive possession of land, and a nuisance action is predicated upon the invasion of the interests in the use and enjoyment of one's land. The Iowa Supreme Court noted also that the element of negligence is not essential in a nuisance action because the party creating or causing the nuisance will be liable for the resulting damages irrespective of the actor's reasonable measures taken to "prevent or minimize the deleterious effect of the nuisance."

The Iowa Supreme Court noted that both the Iowa and the U.S. Constitutions prohibited the government from taking property (which in this sense includes every interest a person may possess, including use and enjoyment) for the good of the public without just compensation. The Iowa Supreme Court noted that the third question deemed to be important in this analysis by the Iowa Supreme Court (i.e. in the event that there was a private property interest that was taken) was whether the government provided just compensation to the owner. However, the parties in this case stipulated that no such compensation was given, hence there was no need to address this question.

121 Id.
123 Id.
125 U.S. Const. amend. V.
126 Iowa Const. art I, § 18.
128 Bormann v. Bd. of Supervisors in and for Kossuth County, 584 N.W.2d 309, 321 (Iowa 1998).
129 Id.
130 Id.
131 Id. at 315. The third question deemed to be important in this analysis by the Iowa Supreme Court (i.e. in the event that there was a private property interest that was taken) was whether the government provided just compensation to the owner. However, the parties in this case stipulated that no such compensation was given, hence there was no need to address this question. Id.
132 Id. at 314-15.
133 Id. at 315.
134 Id.
135 Id.
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Court further stated that the right to maintain an action for a nuisance is that of an easement and that easements are property rights that require compensation under both the Iowa and the U.S. Constitutions. It is important to reiterate that the U.S. Supreme Court has previously established that the individual states are left to determine what constitutes a property right and here the Iowa Supreme Court concluded that an easement is a property right to be protected.

The Iowa Supreme Court next reviewed case law that defines what constitutes a taking with regard to governmental eminent domain proceedings. It noted that their definition (i.e. “a taking . . . may be anything which substantially deprives one of the use and enjoyment of his property or a portion thereof”) was in accord with the weight of authority.

In short, the Iowa Supreme Court determined that the nuisance immunity statute was unconstitutional under both the U.S. Constitution and the Iowa Constitution because: (1) the nuisance-immunity statute allows an owner of property, located in an area designated as a agricultural land by state, to create a nuisance and not be subject to litigation resulting therefrom; (2) the nuisance by its nature results in an easement in favor of the dominant tenement over the servient tenement; (3) the creation of the easement by the state results in a taking pursuant to established eminent domain principles; and (4) the statute does not provide for just compensation for the servient tenement.

V. COMMENT

In a period of ten years, from 1985 to 1995, one commentator has noted that nearly 40,000,000 acres of agricultural land was converted to non-agricultural uses as a result of the urban sprawl. This may indicate that there is a legitimate need to protect the farming industry when in fact the urbanites come to the nuisance. Protecting the farming industry in this scenario is established by the common law principle of coming to the nuisance, thus lessening the need for over-reaching right-to-farm legislation.

The rural, farming areas were accustomed to an environment where the foul smells of farm life were expected. However, the urban population relocating to the rural environment is less receptive of such odors. This observation, coupled with society’s reliance on the farming industry, elucidates the necessity to protect the pre-existing farm against nuisance claims from their new neighbors from the city. However, the right-to-farm legislation should be limited to this set of facts in the event that the common law would not afford adequate protection to the farmer. As such, the right-to-farm acts, which have been enacted in some form or manner in all fifty states, may have a valuable place in contemporary society, as long as the legitimate interests of others are not sacrificed in the process.

Many right-to-farm statutes observe the fact that there are competing interests involved. As a result, many statutes impose limitations on the availability of protection from suit to include: “[1] that the farm be reasonably conducted, [2] not to be conducted negligently, and [3] the fact that they pre-existed for a required time before a change occurs in land use in the surrounding area.” The third limitation

136 Id.
138 Bormann, 584 N.W.2d at 321.
139 Id.
140 Id.
141 U.S. CONST. amend. V.
142 IOWA CONST. art. I, § 18.
143 Bormann, 584 N.W.2d at 321.
144 H.W. Hannah, Farming in the Face of Progress, 11-OCT PROB. & PROP. 8, 9 (1997).
145 Id. at 9.
146 Id.
148 Id. at 106.
149 Id.
ostensibly codifies the common law defense of “coming to the nuisance.”\textsuperscript{150} This appears to add to the validity and justification of the right to farm laws in a general sense.\textsuperscript{151}

The Iowa statute in dispute in the present case was eviscerated of such limitations by the 1995 amendments to the act.\textsuperscript{152} As a result, the validity and justification (i.e. balancing the interests of all concerned parties) may have been effectively removed at the time the amendments removed the limitations. The result of this case may have been different had the limitations still been in effect. If all of the limitations were still in effect at the time this litigation was instituted, the statute clearly would not have applied to the adjacent landowners that initiated this action because their property interests predated the agriculture use designation.

This decision is sound. The Iowa Supreme Court has merely put the legislature on notice that such broad-reaching statutes cannot withstand the scrutiny of neither the Fifth Amendment of the U.S. Constitution nor article I, section 18 of the Iowa Constitution. The better way to protect the state’s interest in the farming community is to do so by acts that do not have such a broad-reaching effect as the one in place prior to this decision. That being said, the ripples created by this holding may have an effect upon only those states that impose similarly broad-reaching protection in their right-to-farm legislation. In passing or amending laws that justifiably protect the farming community, the legislatures must keep in mind that there are other persons within their borders who are entitled to have their rights protected as well. When the legislation ignores the latter in favor of the former, it would appear that this holding might serve upon such acts the same devastating blow as it did here. As long as the legislature protects the farming community from the effects of urban sprawl, while protecting those persons who have been established in the rural community, the holding here will not render such a harmful blow.

The Washington Supreme Court employed a similar analysis in Buchanan v. Simplot Feeders Ltd. Partnership, Inc.\textsuperscript{153} In Buchanan, the plaintiff brought a suit alleging nuisance (by way of a significant increase in flies and foul and obnoxious odors) against its neighboring corporate feedlot.\textsuperscript{154} The plaintiff’s farm pre-existed the defendant’s corporate feedlot.\textsuperscript{155} The defendant’s feedlot covered nearly 600 acres and was home to approximately 40,000 cows.\textsuperscript{156} The cause was initially heard in federal court, but the federal court certified a question to the Washington Supreme Court pertaining to an interpretation of the state’s right-to-farm statute.\textsuperscript{157} The Washington Supreme Court held that the Washington’s right-to-farm act “should be applied cautiously and narrowly” and that the correct interpretation thereof “should not be read to insulate agricultural enterprises from nuisance actions brought by an agricultural or other rural plaintiff, especially if the plaintiff occupied the land before the nuisance activity was established.”\textsuperscript{158} Furthermore, the Washington Supreme Court stated “the Act was designed to protect farmland from eradication in urbanizing areas,”\textsuperscript{159} a statement that embraces the common-law “coming-to-the-nuisance” theory.
The Missouri statute that provides for nuisance immunity in its agricultural operations is somewhat vague.\textsuperscript{160} The opening sentence provides that "no agricultural operation or any of its appurtenances shall be deemed to be a nuisance . . . after the facility has been in operation for more than one year."\textsuperscript{161} It does take into account the existing neighbors' rights, but only in a section which pertains to the expansion of the agricultural entity.\textsuperscript{162} In addition to providing nuisance immunity to qualifying farms, Missouri's statute creates a disincentive for a landowner to bring a nuisance suit against a qualifying farm.\textsuperscript{163} As such, Missouri's attempt to protect the agricultural industry may in fact suffer from the same defects as did the Iowa statute because it provides broad protection from nuisance suits for the farmer against, ostensibly, both the urban sprawl and existing residents.

It is therefore left up to the elected legislators to protect their constituents in equal force, and to enact legislation that distinguishes between those persons currently situated and those who may encroach upon the farming community. Otherwise, the current judicial atmosphere, in at least two states, is to strike down the broad-reaching statutes in favor of a policy that seeks to protect balance the interest's of both the farming operation and the adjacent neighbors.

VI. CONCLUSION

The sovereign, state courts may independently interpret their respective constitutional takings provisions. The \textit{Bormann} case is illustrative of this long-standing proposition. Read most liberally, this case would indicate that even minute invasions of a property owner's bundle-of-rights pursuant to statutory authorization will result in a taking by the government, and as a result just compensation must be afforded to the land owner who is so burdened. The impact of this result is dubious. It certainly has a devastating impact on the right-to-farm laws as they were previously promulgated in Iowa. The impact of this case in Iowa also puts to task the Iowa legislature to enact legislation that is a compromise of all concerned interests. However, inasmuch as it appears to be extending the concepts set forth in \textit{Lucas}, the result may be limited to the precise fact pattern in this case. Contrarily, it may be persuasive to states with right-to-farm laws where the farming industry has minimal impact on the state's economy, and less persuasive in states that rely more heavily on the farming industry and whose courts may not be willing to take such a broad step.

\textbf{WILLIAM C. ROBINSON}

\textsuperscript{160} \textit{Mo. Rev. Stat.} \textsection 537.295 (1994).
\textsuperscript{161} \textit{Id.}
\textsuperscript{162} \textit{Id.} This provision provides that "reasonable expansion shall not be deemed a public or private nuisance, provided that the expansion does not create a substantially adverse effect upon the environment or creates a hazard to public health and safety, or creates a measurably significant difference in environmental pressures upon existing and surrounding neighbors because of increased pollution." \textit{Mo. Rev. Stat.} \textsection 537.295 (1) (1994).
\textsuperscript{163} \textit{Mo. Rev. Stat.} \textsection 537.295 (5) (1994). This provision states that "in any nuisance action brought in which an agricultural operation is alleged to be a nuisance, and which is found to be frivolous by the court, the defendant shall recover the aggregate amount of costs and expenses determined by the court to have been reasonably incurred in his behalf in connection with the defense of such action, together with a reasonable amount for attorney fees." \textit{Id.}

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