

# NUISANCE REVISITED ~~AFTER BUCHANAN~~AFTER BUCHANAN AND BORMANN

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“There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’ . . . [F]ew terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem.”<sup>1</sup>Is this quote in the 5th edition?

## I. INTRODUCTION

Two recent cases involving state Right to Farm Acts<sup>2</sup> have drawn the attention of ~~legal~~of legal scholars, attorneys and laymen alike to the common law ~~ancient~~ doctrine of nuisance. Both cases found that the Right to Farm Acts in question constituted a legislatively imposed easement across the property of affected landowners.<sup>3</sup> One court went on to opine that this imposition constituted a “physical

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1~~Prosser, William ..~~  
W. PAGE KEETON, ET AL.,; PROSSER AND KEETON ON THE LAW OF TORTS ~~Fourth~~–§86, at 616 (5th ed. 1984)~~571~~.

2. See *Bormann v. Board of Supervisors*, 584 N.W.2d 309 (Iowa 1998); *Buchanan v. Simplot Feeders, Ltd. Partnership*, 952 P.2d 610 (Wash. 1998); *Buchanan v. Simplot Feeders, Ltd. Partnership*, No. CS-95-236-FVS, 1998 U.S. Dist. LEXIS 21780 (E.D. Wash.).

3. See *Bormann*, 584 N.W.2d at 316; *Buchanan*, 1998 U.S. Dist. LEXIS 21780 at \*1-2.

invasion” of the affected property owner’s land, and thus a ~~per se~~ *categorical* taking of private property for public purposes without just compensation.<sup>4</sup>

This article ~~seeks to reexamine~~ the ~~fundamental~~ underpinnings of nuisance as established by judicial opinions~~s~~ and buttressed by the Second Restatement of Torts and ~~other~~ scholarly writings.<sup>5</sup> An in-depth discussion of two recent cases is given followed by a comparison of the case opinions to the fund~~a~~emental underpinnings of nuisance law.<sup>6</sup> Upon analysis neither opinion should be considered surprising or extraordinary, given the history of nuisance.

## II. NUISANCE GENERALLY

As a general rule, an owner is at liberty to use his property as he sees fit, without objection or interference from his neighbor, provided such use does not violate an ordinance or statute. There is, however, a limitation to this rule; one made necessary by the intricate, complex, and changing life of today. The old and familiar maxim that one must so use his property as to not injure that of another . . . is deeply imbedded in our law.<sup>7</sup>

The general rule that no one has absolute freedom in the use of his property, but is restrained by the coexistence of equal rights in his neighbor to the use of his property, so that each, in exercising his right, must do no act which causes injury to his neighbor, is so well understood, is so universally recognized, and stands so impregnably in the necessities of the social state, that its vindication by argument would be superfluous.<sup>8</sup>

“Nuisance” may be defined as:

interference with an owner’s reasonable use and ~~quiet~~ enjoyment of his property by means of ~~smoke~~-,~~smoke~~, odors, noise or vibration, obstruction of private eas~~e~~ments and rights of support, interference with public rights, such as free passage along streams and highways, enjoyment of public parks and places of recreation, and, in addition, activities and structures prohibited as statutory nuisances.<sup>9</sup>

4. See *Bormann* 584 N.W.2d at 321. The *Bormann* opinion refers to these types of takings as *per se* takings, apparently adopting the taxonomy of the plaintiffs. See *id.* at 313. The court in *Lucas v. South Carolina Coastal Council*, both the majority and dissent, refers to these types of takings as *categorical takings*. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 1050 (1992). This article retains the *Lucas* taxonomy.

5. See discussion *infra* Parts II-IV.

6. See discussion *infra* Parts VI-VII.

7. *Bove v. Donner-Hanna Coke Corp.*, 258 N.Y.S. 229, 231 (1932).

8. *Booth v. Rome, W. & O.T.R. Co.*, 35 N.E. 592, 594 (N.Y. 1893).

9. BLACK’S LAW DICTIONARY 961 (5th ed. 1979).

A nuisance may be classified as a “public nuisance” or a “private nuisance.”<sup>10</sup> A public nuisance consists of “an unreasonable interference with a right common to the general public.”<sup>11</sup> A nontrespassory interference with invasion of another’s interest in the private use and quiet enjoyment of their land constitutes a private nuisance.<sup>12</sup> –

To subject a person to liability for private nuisance, his conduct must be a legal cause of the interference in an invasion of someone else’s private use interest and quiet enjoyment of their land.<sup>13</sup> In addition, the invasion-interference must be either: (i) intentional and unreasonable; or (ii) unintentional, but “otherwise actionable under the rules controlling liability for a negligent, or –reckless conduct, or (iii) a for abnormally dangerous conditions or activities.”<sup>14</sup>

An intentional interference with invasion of (or invasion) –another’s with another’s interest in the use of land is unreasonable if: (i) “the gravity of the harm outweighs the utility of the actor’s conduct,” or, (ii) “the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.”<sup>15</sup>

In determining the gravity of the harm from an intentional invasion of another’s interest in the use and enjoyment of land, the following factors are important: (i) the extent of the harm involved; (ii) the character of the harm involved; (iii) the social value that the law attaches to the type of use or enjoyment invaded; (iv) the suitability of the particular use or enjoyment invaded to the character of the locality; and (v) the burden on the person harmed of avoiding the harm.<sup>16</sup> The following factors weigh heavily in determining the utility of the conduct that causes the invasion of another’s interest in the use and enjoyment of land: (i) the social value that the law attaches to the primary purpose of the conduct; (ii) the suitability of the conduct to the character of the locality; and (iii) the impracticability of preventing or avoiding the invasion.<sup>17</sup> The analysis in Parker v. Barefoot is useful here as it distinguishes between the consequences of an activity itself being unreasonable and the consequences of the activity being unreasonable. In the former situation both abatement and monetary damages are available while in the latter only monetary relief is to be had. Nonetheless, in both situations there is a nuisance since the interference was unreasonab

10. See RESTATEMENT (SECOND) OF TORTS § 821A (1979).

11. *Id.* § 821B.

12. *See id.* § 821D.

13. ~~Id.~~ *See id.* § 822.

14. *Id.*

15. ~~Id.~~ *Id.* § 826.

16. *See id.* § 827.

17. ~~Id.~~ *See id.* § 828.

The law of nuisance plys [sic] between two antithetical extremes: The principle that every person is entitled to use his property for any purpose that he sees fit, and the opposing principle that everyone is bound to use his property in such a manner as not to injure the property or rights of his neighbor. For generations, courts, in their tasks of judging, have ruled on these extremes according to the wisdom of the day, and many have recognized that the contemporary view of public policy shifts from generation to generation.<sup>18</sup>

An unreasonable interference finding is not a question of law but a question of fact for the jury.<sup>19</sup> Once a nuisance has been determined to exist an appropriate remedy must be found. A different, but similar, balancing process guides the court in fashioning a remedy. Many courts balance “hardships” or “equities” in determining whether to enjoin the nuisance or to grant a judgment for damages.<sup>20</sup> ~~[See my comment above in regards to Parker v. Barefoot.]~~

Much confusion regarding nuisance law results from the tendency of courts to jumble both balancing tests (unreasonable interference and remedy) together into one analysis.

The fact that courts consider many of the same factors in each balancing test blurs the lines further. The North Carolina Court of Appeals clearly sets out the distinction between the two different balancing tests in Parker v. Barefoot.<sup>21</sup>

If a trier of fact determines that a defendant’s conduct is indeed an unreasonable interference with another’s use and enjoyment of their land, then the plaintiff is entitled to damages. . . . To award damages, the defendant’s conduct, in and of itself, does not need to be unreasonable. . . . In contrast, however, injunctive relief requires proof that the defendant’s conduct itself is unreasonable.<sup>22</sup>

18. Antonik v. Chamberlain, 78 N.E.2d 752, 759 (Ohio Ct. App. 1947).

19. See Parker v. Barefoot, 502 S.E.2d 42, 46 (N.C. Ct. App. 1998) rev’d, 519 S.E.2d 315 (N.C. 1999); KEETON ET AL., *supra* note 1, § 88, at 629 & n.27. While the North Carolina Supreme Court later reversed the holding, the analysis of the court continues to be valid. See Parker v. Barefoot, 519 S.E.2d 315 (N.C. 1999).

20. See ROBERT R. WRIGHT & MORTON GITELMAN, CASES AND MATERIALS ON LAND USE 48-49 (5th ed. 1997).

21. See Parker, 502 S.E.2d at 44. Note that the Parker case involved an intensive hog facility and the failure of the trial court to explicitly instruct the jury that “the law does not recognize as a defense to [nuisance claims] that defendants used the best technical knowledge available at the time to avoid or alleviate the nuisance. . . .” *Id.*

22. *Id.* at 46.

This analysis differentiates the two balancing tests on the basis of distinguishing the unreasonableness of the consequences of the defendant's actions versus the unreasonableness of the defendant's actions themselves.<sup>23</sup>

### III. LEGISLATIVE CHANGES OF COMMON LAW NUISANCE

As recognized by Justice Holmes:

[i]t is settled that within constitutional limits not exactly determined the legislature may change the common law as to nuisances and may move the line either way so as to make things nuisances which were not so, or to make things lawful which were nuisances, although by so doing it affects the use or value of property.<sup>24</sup>

Similarly, the zoning classification or the fact that the disputed use has been granted a governmental license provides persuasive, but not conclusive, evidence for the trier of fact.<sup>25</sup>

Nevertheless, Constitutional underpinnings influence judicial remake courts reluctant ~~usual~~ to license a nuisance.<sup>26</sup> The United States Supreme Court, in *Richards v. Washington Terminal Company*,<sup>27</sup> considered the question of legislative legalization of a private nuisance.<sup>28</sup> ~~[describe Richards facts and holding]~~ In Richards, the plaintiff filed suit under a nuisance theory to recover for damages resulting from the operation of a railroad and tunnel by defendant.<sup>29</sup> Plaintiff alleged that the operation of the railroad and tunnel amounted to a private nuisance.<sup>30</sup>

Plaintiff's property did not adjoin that of the defendant.<sup>31</sup> Two sets of railroad tracks ran through and from the tunnel at issue.<sup>32</sup> The defendant installed a fanning system in the tunnel that caused the gases and smoke (emitted by the trains while in the tunnel) to be forced out of the south portal.<sup>33</sup> About thirty trains per day used the tracks.<sup>34</sup> From the closest point of the plaintiff's home to the south portal, the distance totaled about one hundred fourteen feet, while the rear end of plaintiff's

23. See KEETON ET AL., *supra* note 1, § 87, at 623 (emphasis added).

24. Commonwealth v. Parks, 30 N.E. 174, 174 (Mass. 1892).

25. See JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW § 14.7, at 646-47 (1998); Maykut v. Plasko, 365 A.2d 1114, 1118 (Conn. 1976).

26. See JUERGENSMEYER & ROBERTS, *supra* note 24, § 14.7, at 647.

27. Richards v. Washington Terminal Co., 233 U.S. 546 (1914).

28. See *id.* at 548.

29. See *id.*

30. See *id.* at 549-50.

31. See *id.* at 548.

32. See *id.* at 549.

33. See *id.*

34. See *id.*

lot lay about ninety feet from the middle of the tracks.<sup>35</sup> Three houses stood between plaintiff's property and the railroad tracks, two of which were purchased and owned by the defendant.<sup>36</sup>

The large amounts of black or gray smoke, dust, dirt, cinders and gases emitted by the trains as they passed, as well as vibrations from the trains, damaged plaintiff's property.<sup>37</sup> The fair market value of the property, the rental value and the value of the personal property within the house depreciated as a result of the railroad operation.<sup>38</sup>

One significant point on which the court appeared to rely was that the plaintiff conceded that the railroad was not operated negligently and that Congress authorized the operation.<sup>39</sup> The Court held that the damages resulting from the plaintiff's close proximity to the portal and the fanning system's gas discharge effect and smoke imposed "so direct and peculiar and substantial a burden upon plaintiff's property" as to violate the Fifth Amendment's prohibition against the taking of private property for public purposes without just compensation.<sup>40</sup> The Court, in dicta, stated that "while the legislature 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 to a taking of private property for public use."<sup>41</sup>

Juergensmeyer and Roberts discuss this issue in terms of the Right to Farm Acts.<sup>42</sup> These authors generally dismiss the notion that Right to Farm Acts can constitute a taking of private property for public purposes.<sup>43</sup> However, they acknowledge that:

[t]he immunity in effect confers an affirmative easement on the ~~the~~ farmer to cast pollutants of odors, noise, or dust, as the case may be, on the neighbors land. If this is characterized as a physical invasion, then the prospects in a taking claim look brighter, but it is not clear that a court would so regard it.<sup>44</sup>

<sup>35.</sup> *See id.*

<sup>36.</sup> *See id.*

<sup>37.</sup> *See id.*

<sup>38.</sup> *See id.* at 550.

<sup>39.</sup> *See id.*

<sup>40.</sup> *Id.* at 557.

<sup>41.</sup> *Id.* at 553.

<sup>42.</sup> *See* JUERGENSMEYER & ROBERTS, *supra* note 25, § 14.7, at 647 & n.18 (suggesting that Right to Farm Acts may constitute a taking of private property for public purposes without just compensation).

<sup>43.</sup> *See id.* § 14.7, at 647-48.

<sup>44.</sup> *Id.* § 14.7, at 648.

## IV.

GRANTING OF PERMANENT DAMAGES AS CONDEMNATION~~III~~

—The seminal case, *Boomer v. Atlantic Cement Company*,<sup>45</sup> a case that all law students read in torts class, involved a large cement plant near Albany, New York.<sup>46</sup> The neighboring landowners alleged a nuisance from the resulting dirt, smoke and vibration emanating from the plant.<sup>47</sup> The court below found a nuisance after trial and granted temporary damages, while denying injunctive relief.<sup>48</sup> The New York Court of Appeals remitted the case to the Supreme Court of Albany County “to grant an injunction which shall be vacated upon payment by defendant of such amounts of permanent damage to the respective plaintiffs as shall for this purpose be determined by the court.”<sup>49</sup> The court acknowledged that, “[t]he theory of damage is the ‘servitude on the land’ of plaintiffs imposed by defendant’s nuisance.”<sup>50</sup> A servitude is a charge or burden resting upon one estate for the benefit of another.<sup>51</sup>

A vigorous dissent took issue with the ramifications of the permanent damages remedy in this instance. Judge Jasen felt that,

[i]n permitting the injunction to become inoperative upon the payment of permanent damages, the majority is, in effect, licensing a continuing wrong. . . This kind of inverse condemnation [citation omitted] may not be invoked by a private person or corporation for private gain or advantage. . . Nor is it constitutionally permissible to impose servitude on land, without the consent of the owner, by payment of permanent damages where the continuing impairment of the land is for a private use.<sup>52</sup>

## V. BRIEF OVERVIEW OF RIGHT TO FARM LAWS

All states and some local governments employ some form of a Right to Farm Act to protect working lands from the encroachment of residential development. Right to Farm statutes were created to address a growing concern that too much

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45. *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970).

46. *See id.* at 871-872.

47. *See id.* at 871.

48. *See id.*

49. *Id.* at 875.

50. *Id.* (citing *United States v. Causby*, 328 U.S. 256, 261 (1946)).

51. *See* BLACK’S LAW DICTIONARY 1229 (5th ed. 1979).

52. *Id.*

farmland was being overtaken by urban sprawl.<sup>53</sup> ~~(Grossman and Fischer, page 97)~~ As more urban dwellers moved into agricultural areas, “nuisance” lawsuits by those urbanites threatened the existence of many farms.<sup>54</sup> Nuisance suits frustrated farming operations and encouraged farmers to sell to developers, continuing the cycle.<sup>55</sup>

Right to Farm laws may be categorized generally into six different types: (i) traditional; (ii) laws requiring the use of GAAMP’s; (iii) laws listing specific protected agricultural activities; (iv) laws protecting animal feedlots; (v) laws requiring creation of agricultural districts; and (vi) local ordinances.<sup>56</sup> Traditional Right to Farm laws basically protect farm operations that existed prior to residential encroachment.<sup>57</sup> These laws codify the “coming to the ~~nuisance~~ nuisance” defense.<sup>58</sup> Activities that are negligently run are not afforded the protection of Right to Farm.<sup>59</sup>

The “coming to the nuisance” defense suggests that the “first one to arrive fixes forever the character of the area.”<sup>60</sup> However, some courts refuse to recognize the defense.<sup>61</sup> Those courts recognizing the defense of coming to the nuisance merely use it as a factor to consider.<sup>62</sup> The prevailing rule provides that, absent a prescriptive right,

the defendant may not condemn the surrounding premises to endure his operation, and that the purchaser is entitled to a reasonable use and enjoyment of his land to the same extent as any other owner, so long as he buys in good faith and not for the sole purpose of vexatious lawsuit.<sup>63</sup>

*Spur Industries, Inc. v. Del E. Webb Development Company*,<sup>64</sup> though recognizing this principle, put a new twist on the remedies question.<sup>65</sup> *Spur* remains the landmark remedies case in nuisance, also read, like *Boomer*, by all law students. *Webb*, a real estate developer, brought a nuisance action against *Spur*, who ran a

<sup>53.</sup> See Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1 WIS. L. REV. 95, 97-98 (1983).

<sup>54.</sup> See *id.* at 97.

<sup>55.</sup> ~~Grossman, Margaret Rosso and Thomas G. Fischer, "Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer", *Wisconsin Law Review* 95, 97 (1983)~~ See *id.*

<sup>56.</sup> See NEIL D. ~~HAMILTON~~HAMILTON, A LIVESTOCK PRODUCER’S LEGAL GUIDE TO: NUISANCE, LAND USE CONTROL, AND ENVIRONMENTAL LAW 24 (1992).

<sup>57.</sup> See JUERGENSMEYER & ROBERTS, *supra* note 25, § 14.6, at 645.

<sup>58.</sup> See *id.*

<sup>59.</sup> See *id.*

<sup>60.</sup> *Id.* § 14.4, at 640 & n.10.

<sup>61.</sup> ~~Id.~~ See *id.* § 14.4, at 640 & n.9.

<sup>62.</sup> See *id.* § 14.4, at 640 & n.10.

<sup>63.</sup> KEETON ET AL., *supra* note 1, § 88B, at 635.

<sup>64.</sup> *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700 (Ariz 1972).

<sup>65.</sup> See *id.* at 707.

cattle-feeding operation.<sup>66</sup> Spur commenced the cattle feeding operations in an agricultural area well outside boundaries of any city.<sup>67</sup> Subsequently, Webb purchased land nearby and commenced an extensive retirement community development.<sup>68</sup> The Supreme Court of Arizona held that Webb was entitled to enjoin Spur's cattle feeding operation as a nuisance.<sup>69</sup> However, the court further held that Webb had "brought people to the nuisance to the foreseeable detriment of Spur."<sup>70</sup> Therefore, the court ordered Webb to indemnify Spur for a reasonable amount of the cost of moving or shutting down.<sup>71</sup> One may argue that the court in *Spur* allowed the plaintiff to "condemn the surrounding premises to endure his operation."<sup>72</sup>

The second type of Right to Farm law protects farmers who use Generally Accepted Agricultural Management Practices (GAAMPs).<sup>73</sup> The third type of right to farm law specifically lists certain agricultural practices.<sup>74</sup> For example, a law may list odors from livestock, manure, fertilizer or feed as protected.<sup>75</sup> Some laws also protect feedlots specifically. Other forms of Right to Farm laws provide different legal protections to farm operations located within a designated agricultural district.<sup>76</sup> (Hamilton, page 25)

Finally, some local governments have passed Right to Farm ordinances. Most of these ordinances are similar to the traditional Right to Farm laws, but many local governments have passed innovative Right to Farm ordinances.<sup>77</sup> (Hamilton, page 28)

#### VI. *BORMANN V. BOARD OF SUPERVISORS OF KOSSUTH COUNTY, IOWA*

In *Bormann v. Board of Supervisors*,<sup>78</sup> ~~584 N.W.2d 309 (Iowa 1998)~~, the Iowa Supreme Court held that one Iowa Right to Farm law constituted a taking of private property from the neighbor of the farmer for public purposes without just compensation.<sup>79</sup> The defendants applied to their local county Board of Supervisors

66. *See id.* at 705.

67. *See id.* at 704.

68. *See id.*

69. *See id.* at 706.

70. *Id.* at 708.

71. *See id.*

72. KEETON ET AL., *supra* note 1, § 88B, at 635.

73. *See* HAMILTON, *supra* note 56, at 25.

74. *See id.* at 26.

75. *See Spur Indus., Inc.*, 494 P.2d at 708.

76. *See* ~~HAMILTON~~HAMILTON, *supra* note 56, at 27.

77. *See id.* at 28.

78. *Borman v. Board of Supervisors*, 584 N.W.2d 309 (Iowa 1998).

79. *See id.* at 311.

for approval of an “agricultural area” they wanted to establish.<sup>80</sup> The proposed agricultural area included the land of several neighbors as well as that of the defendants.<sup>81</sup> The agricultural area proposed encompassed 960 acres and the Board subsequently approved the application.<sup>82</sup>

An agricultural area in Iowa includes, among other activities: raising and storing of crops; the care and feeding of livestock; the treatment or disposal of waste resulting from livestock; and the creation of noise, odor, dust or fumes.<sup>83</sup> ~~(Iowa Code Section 35.2(6))~~ Iowa law further provides that a farm or farm operation located in an agricultural area does not constitute a nuisance.<sup>84</sup> ~~(Iowa Code Section 352.11(1)(a))~~ This classification holds regardless of the established date of operation or the date of the agricultural activities expansion of the farm or farm operation.<sup>85</sup> ~~(Iowa Code Section 352.11(1)(a))~~

This immunity from nuisance suits does not apply to nuisances resulting from: (i) a violation of a federal law or regulation; (ii) a violation of a state law or rule; (iii) the negligent operation of a farm or farm operation; (iv) an injury to a person or damage to property caused by the farm or a farm operation prior to creation of the agricultural area; or (v) an injury or damages sustained by the person bringing suit “because of pollution or change in condition of the waters of a stream, the overflowing of the person’s land, or excessive soil erosion onto another person’s land, unless the injury or damage is caused by an act of God.”<sup>86</sup> ~~(Iowa Code, Section 35.11(1)(b))~~

The Iowa Code defines nuisance as “whatever is injurious to health, indecent, or unreasonably offensive to the senses, or an obstruction to the free use of property, so as essentially to unreasonably interfere with the comfortable enjoyment of life or property.”<sup>87</sup> ~~(Iowa Code, Section 657.1)~~ Iowa Code section 657.2 lists certain activities that constitute a nuisance:<sup>88</sup>

1. The erecting, continuing, or using of any building or other place for the exercise of any trade, employment, or manufacture, which, by occasioning noxious exhalations, unreasonably offensive smells, or other

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80. *See id.*

81. *See Id.*

82. *See id.* at 312. The approval actually occurred on the second application. *See id.* at 311-12. For procedural reasons, a third vote was necessary. *See id.* at 312. None of these procedural issues affected the substance of this case.

83. *See IOWA CODE* § 352.2(6) (1999).

84. *See id.* § 352.11(1)(a).

85. *See id.*

86. *Id.* § 352.11(1)(b).

87. *Id.* § 657.1.

88. *See id.* § 657.2.

annoyances, becomes injurious and dangerous to the health, comfort, or property of individuals or the public.

2. The causing or suffering any offal, filth, or noisome substance to be collected or to remain in any place to the prejudice of others.

\* \* \*

4. The corrupting or rendering unwholesome or impure the water of any river, stream, or pond, or unlawfully diverting the same from its natural course or state, to the injury or prejudice of others.<sup>89</sup>

Note that this statutory definition of nuisance does not modify common law nuisance.<sup>90</sup> (~~*Bormann*, p. 314~~) The common law fills in the gaps of the statute.

With this background, the court in *Bormann* addressed whether the Right to Farm law at issue in that case constituted an unlawful “taking.”<sup>91</sup> The Fifth Amendment of the U.S. Constitution provides that private property [shall not] be taken for public use, without just compensation.<sup>92</sup> The United States Supreme Court has fashioned a test to determine whether a government regulation exacts a taking of private property without just compensation.<sup>93</sup> An interpretation of the test delineated in *Lucas* follows:

- A. Is the purpose of the regulatory action a legitimate state interest?<sup>94</sup>
  1. if yes, go to B.;
  2. if no, a compensable taking has occurred.<sup>95</sup>
- B. Does the means used to achieve the objective substantially advance the intended state purpose?<sup>96</sup>
  1. if yes, go to C.;
  2. if no, a compensable taking has occurred.<sup>97</sup>
- C. Does the alleged taking compel the property owner to suffer a physical invasion of his property (or the equivalent)?<sup>98</sup>
  1. if yes, a compensable taking has occurred;<sup>99</sup>
  2. if no, go to D.

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<sup>89.</sup> *Id.*

<sup>90.</sup> See *Bormann* v. Board of Supervisors, 584 N.W.2d 309, 314 (Iowa 1998).

<sup>91.</sup> See *id.* at 315.

<sup>92.</sup> U.S. CONST. amend. V.

<sup>93.</sup> See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030-32 (1992).

<sup>94.</sup> See *id.* at 1014-15.

<sup>95.</sup> See *id.* at 1015.

<sup>96.</sup> See *id.* at 1024.

<sup>97.</sup> See *id.* at 1026.

<sup>98.</sup> See *id.* at 1015.

<sup>99.</sup> See *id.*

- D. “No economically viable use” test:<sup>100</sup>
1. Does the alleged taking deny the property owner of all economically beneficial or productive use of the land?<sup>101</sup>
    - i. if yes, go to 2.;
    - ii. if no, go to E.
  2. Does the regulation simply make explicit what already inheres in the title itself, in the restrictions that the background principles of the state’s law of nuisance already imposed on the ~~land owner~~landowner?<sup>102</sup>
    - i. if yes, go to E.;
    - ii. if no, -a compensable taking has occurred.<sup>103</sup>
- E. Apply the *Penn Central* balancing test,<sup>104</sup> balancing:
1. the economic impact of the regulation on the landowner;<sup>105</sup>
  2. the landowner’s investment backed expectations;<sup>106</sup> and,
  3. the character of the government activity.<sup>107</sup>

In applying the *Lucas* test, the Iowa Supreme eCourt declared that under Iowa law, the right to maintain a nuisance suit is an easement.<sup>108</sup> ~~(Bormann, p. 315)~~ An easement is an interest in ~~land which~~land that entitles the owner of the easement to use or enjoy land in the possession of another.<sup>109</sup> ~~(Restatement of Property, Section 451, comment a, at 2911-2912)~~ A right of way for ingress or egress is a common type of easement.

The Court found that the Board’s approval of the application for an agricultural area triggered the provisions of the state statute affording the applicants immunity from nuisance suits.<sup>110</sup>

This immunity resulted in the Board’s taking of easements in the neighbors’ properties for the benefit of the applicants. This amounts to a taking of private property for public use without payment of compensation in violation of the Fifth Amendment to the Federal Constitution. This also

100. See *id.* at 1016-1019.

101. See *id.* at 1016.

102. See *id.* at 1028-29.

103. See *id.* at 1029.

104. See *id.* at 1017-18; *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

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

106. See *id.*

107. See *Lucas*, 505 U.S. at 1030-32; *Penn Cent. Transp. Co.*, 438 U.S. at 124.

108. See *Bormann v. Board of Supervisors*, 584 N.W.2d 309, 315 (Iowa 1998).

109. See *RESTATEMENT OF PROPERTY* § 451, cmt. a (1944).

110. See *Bormann*, 584 N.W.2d at 321.

amounts to a taking of private property for public use in violation of article 1, section 18 of the Iowa Constitution.<sup>111</sup>

~~b~~By taking this easement from the neighboring landowners, the ~~State of Iowa had action of the Board~~ essentially physically invaded the neighbors property.<sup>112</sup> The state now allowed the farmer to conduct activities that constituted a nuisance, where the farmer was not allowed to conduct these activities in the past.<sup>113</sup> In other words, the Iowa Supreme Court reasoned that this law took one of the sticks (the right to not be subject to unreasonable interference with the reasonable use of your land) from the bundle representing the property rights of the farmer's neighbor.

Thus, the third prong of the takings test, as set out previously, had been met.<sup>114</sup> This step constitutes a *categorical* taking; meaning that no further inquiry is necessary to determine if the action amounts to a taking of private property for public purposes without just compensation.<sup>115</sup>

The *Bormann* court cited *Richards v. Washington Terminal Company*<sup>116</sup> in which the United States Supreme Court neither explicitly reasoned that the right to maintain a nuisance suit was an easement, nor discussed easements as physical invasions.<sup>117</sup> However, the definitions of nuisance and easement lend themselves to the categorization. The categorical rule of takings for physical invasion easily applies to easements. Therefore, the *Bormann* result and reasoning comports with the United States Supreme Court's decision in *Richards*. Similarly, the *Bormann* result adheres to hornbook land use law as recognized by Justice Holmes in *Commonwealth v. Parks*.<sup>118</sup> over 100 years ago.

## VII. *BUCHANAN V. SIMPLOT FEEDERS LIMITED PARTNERSHIP AND IBP*

Another court decision, from Washington state, raises further concerns about the constitutionality of Right to Farm Acts across the country. *Buchanan v. Simplot Feeders Limited Partnership and IBP*<sup>119</sup> involved judicial opinions by the Supreme

111. *Id.* Note that the language of the Iowa Supreme Court's holding also implies that a taking could be found under the first prong of the *Lucas* test. See *id.* Namely, if the easement was for the "benefit of the applicant," the governmental action appears to lack a proper purpose. See *id.* The Iowa Supreme Court goes on to state that the action was for "public use," however, with no explanation. See *id.* Contrast this approach with the *Boomer* dissent. See discussion *supra* Part IV.

112. See *Borman*, 584 N.W.2d at 317-21.

113. See *id.* at 316.

114. See *id.* at 317-21.

115. See *id.* at 321.

116. *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914).

117. See *id.* at 546-58.

118. See *Commonwealth v. Parks*, 30 N.E. 174, 174 (Mass. 1892).

119. See *Buchanan v. Simplot Feeders, Ltd. Partnership*, 952 P.2d 610, 612 (Wash. 1998); *Buchanan v. Simplot Feeders, Ltd. Partnership*, No. CS-95-236-FVS 1998 U.S. Dist. LEXIS 21780, at

Court of Washington and the United States District Court for the Eastern District of Washington.<sup>120</sup>

The Buchanans purchased a farm in 1960 and began farming in 1961.<sup>121</sup> The farm ~~grows-grew~~ alfalfa, row crops, orchard fruit and melons.<sup>122</sup> In 1969, a small feedlot was developed on adjoining property that was previously rangeland.<sup>123</sup> In 1970, a beef processing plant was built near the feedlot.<sup>124</sup>

In 1979, IBP installed a wastewater lagoon system. The system was in compliance with government permits, but it ~~is-was~~ uncontroverted that it emitted odors. In 1983, IBP obtained approval to expand its wastewater system. In 1993, IBP obtained approval to again expand its wastewater system by replacing the existing lagoon with a larger one covering forty acres. In 1995, IBP obtained approval to expand the ~~sprayfield-sprayfield~~ on which it [~~places-placed~~] wastewater, from 255 acres to 1,538 acres.<sup>125</sup>

In 1992, Simplot purchased the feedlot and substantially expanded operations ~~to- There are now~~ 580 acres of pens holding an estimated 40,000 head of cattle.<sup>126</sup> Like IBP, Simplot ~~is-was~~ in compliance with the applicable county permits and regulations for the land.<sup>127</sup>

Plaintiffs complained that manure, dust, and fly infestations from the defendants' land ruined their crops.<sup>128</sup> Furthermore, the smell from both the defendants' operations infringed on the enjoyment of their property.<sup>129</sup> The Buchanans filed suit against Simplot and IBP.<sup>130</sup> Both opinions in this case address~~ed~~ the issue of Washington State's Right to Farm Act and its relationship to Simplot and IBP.<sup>131</sup> The Washington Supreme Court answered questions certified to it by the U.S. District Court, which had diversity jurisdiction over the case.<sup>132</sup>

In a finding similar to ~~one-the~~ conclusion ~~of-in~~ the *Bormann* case, the Supreme Court of Washington found that the Washington state Right to Farm Act

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\*1 (E.D. Wash. May 29, 1998).

120. See *Buchanan*, 952 P.2d 610; *Buchanan*, 1998 U.S. Dist. LEXIS 21780, at \*1.

121. See *Buchanan*, 1998 U.S. Dist. LEXIS 21780, at \*1.

122. See *id.*

123. See *id.*

124. See *id.* at \*1-2.

125. *Id.* at \*2.

126. See *id.*

127. See *id.*

128. See *id.*

129. See *id.*

130. See *id.*

131. See *id.* at \*11; *Buchanan v. Simplot Feeders, Ltd. Partnership* 952 P.2d 610, 612 (Wash. 1998).

132. See *Buchanan*, 952 P.2d at 616.

gives the protected farm "a quasi-easement against urban developments to continue those activities" ~~(134 Wash. 2d, at page 683).~~<sup>133</sup> The question of the constitutionality of the Washington State Right to Farm Act was not certified to the Washington Supreme Court not before the court, so this finding is likely dicta.

Several other issues make the *Buchanan* opinions interesting. First and foremost, both ~~Courts courts~~ found that Washington state's Right to Farm Act only ~~applies applied~~ to nuisance suits arising from *subsequent nonagricultural development* and filed by one engaged in a *nonagricultural activity*" ~~(134 Wash. at page 683; 1998 U.S. Dist. LEXIS, at page 11).~~<sup>134</sup> Therefore, the Washington state Right to Farm Act does not apply when an agricultural or other rural person files suit against an agricultural enterprise.<sup>135</sup> ~~(1998 U.S. Dist. LEXIS, at page 11)~~

Secondly, the United States District Court for the Eastern District of Washington held that IBP did not qualify for protection in any case because meat processing is not an agricultural activity.<sup>136</sup> ~~(1998 U.S. Dist. LEXIS, at page 11)~~ The court construed agricultural activity narrowly.

In contrast, the ~~Court court~~ found that Simplot's feedlot operation, although an *unconventional farm* constituted an agricultural operation.<sup>137</sup> Again, however, because of Buchanan's status as-is a farmer, the Right to Farm Act did not apply.<sup>138</sup> Finally, like *Bormann*, the complaining party in the *Buchanan* cases was not a recently transplanted suburbanite. To the contrary, in both cases, the complaining party was another farmer. ~~This trend in reported cases raises serious issues about right to farm acts generally.~~

## VIII. CONCLUSION

In light of the *Richards* case, as well as other early nuisance case law, like *Boomer*, the holdings in *Bormann* and *Buchanan* are neither a surprise nor a contradiction of basic nuisance principles. Jurists recognized as early as the *Boomer* case, the allowance of a nuisance constitutes an easement.<sup>139</sup> In the early cases the concern centered upon the awarding of permanent damages, which, in essence,

133. *Id.* at 616.

134. *See id.* at 615; *Buchanan, v. Simplot Feeders, Ltd. Partnership*, No. CS-95-236-FVS, 1998 U.S. Dist. LEXIS 21780, at \*11 (E.D. Wash. May 29, 1998).

135. *See Buchanan*, 1998 U.S. Dist. LEXIS 21780, at \*11.

136. *See id.*

137. *See id.* at \*14.

138. *See id.*

139. *See discussion supra* Part IV.

allowed the taking of private property for private purposes with just compensation.<sup>140</sup>  
Today, the early dissenters have gathered a majority in the *Bormann* court.<sup>141</sup>

The *Bormann* result and reasoning find firm foundation in settled nuisance law principles and takings law reasoning.<sup>142</sup> In elucidating these basic, yet difficult, principles the *Bormann* court brings the law back to the future. The *Bormann* opinion, and its ramifications, are not anomalies.

Nonetheless, *Bormann* may remain a minority rule for two reasons. First, courts of other jurisdictions may decline to find that Right to Farm laws create easements despite dicta in *Buchanan* that supports that view.<sup>143</sup> Such a finding implies that a wide range of regulatory restrictions, like wetland protections and endangered species habitat protections, may also create easements. Widespread adoption of the *Bormann* reasoning on easements as a physical invasion results in unprecedented restrictions on the ability of the federal government to regulate land use for environmental protection.

Secondly, even if other courts hold that Right to Farm Acts create easements, the courts may not be willing to take the further step and hold that such easements constitute a physical invasion. Indeed, many easements, including the entire class of negative easements, appear to involve no physical invasion.<sup>144</sup> The reasoning of the Iowa Supreme Court in holding that the easement created by the Right to Farm law amounts to a physical invasion is less than clear.<sup>145</sup>

If the easement creates no physical invasion, then no categorical taking results and the *Penn Central* balancing test must be applied.<sup>146</sup> Therefore, whether other courts will find a particular Right to Farm law constitutes a taking of private property for public purposes without just compensation remains unclear.

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140. See discussion *supra* Part V.

141. See discussion *supra* Part VI.

142. See discussion *supra* Part II-VI

143. See *Buchanan v. Simplot Feeders, Ltd. Partnership*, 952 P.2d 610, 615 (Wash. 1998).

144. See BLACK'S LAW DICTIONARY 457-58 (5th ed. 1979). Negative easements are those easements "where the owner of the servient estate is prohibited from doing something otherwise lawful upon his estate, because it will affect the dominant estate." *Id.* at 458.

145. See discussion *supra* Part VI.

146. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).