THE ANSWER, MY FRIEND, IS BLOWIN' IN THE WIND: NUISANCE SUITS AND THE PERPLEXING FUTURE OF AMERICAN WIND FARMS

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I. INTRODUCTION

The twenty-first century has seen a torrent of new research, development, construction, and implementation of renewable energy technologies. This fusillade of development includes solar photovoltaic power, hydropower, geothermal power, open- and closed-loop biomass, and wind power.[1] One of the most important growth spots is evidenced by the rapid growth of wind power.[2] Electricity generated from wind power has grown almost twenty-fold since 1999, going from 4.5 million megawatt hours in 1999, to 94.6 million megawatt hours in 2010.[3] Renewable energy, and wind power in particular, is extremely popular with the vast majority of the country.[4] A recent poll reports massive support for the construction of more wind farms, with a net favorability of eighty-seven percent.[5] Indeed, varying personalities and interest groups, traditionally at logger-

1. *See* INT'L ENERGY AGENCY, ORG. FOR ECON. COOPERATION AND DEV., RENEWABLES IN GLOBAL ENERGY SUPPLY: AN IEA FACT SHEET 4 (2007), http://www.iea.org/papers/2006/renewable_factsheet.pdf.

2. *Id.* (noting a 48.1 percent per annum increase in wind energy from 1971 to 2004 due to a "low base" in 1971 and "recent fast-growing development"); RENEWABLE ENERGY POLICY NETWORK FOR THE 21ST CENTURY, RENEWABLES 2010: GLOBAL STATUS REPORT 17 (2010), http://www.ren21.net/Portals/97/documents/GSR/REN21_GSR_2010_full_revised%20Sept2010.pdf; *see also Renewable & Alternative Fuels: Wind*, U.S. ENERGY INFO. ADMIN (Jan. 2011), http://ww w.eia.gov/cneaf/solar.renewables/page/wind/wind.html.

3. *Electric Power Annual 2010, Summary Statistics of the United States, 1999 Through 2010*, U.S. DEP'T OF ENERGY (Jan. 2012), http://www.eia.gov/electricity/annual/pdf/tablees1.pdf.

4. *See generally* Humphrey Taylor, *Large Majorities in U.S. and Five Largest European Countries Favor More Wind Farms and Subsidies for Bio-fuels, but Opinion is Split on Nuclear Power*, HARRIS INTERACTIVE (Oct. 13, 2010), http://www.harrisinteractive.com/vault/HI-FT-Renewable-Energy-2010-10-13.pdf (detailing survey describing the popularity of renewable energy, including wind energy).

5. *Id.*

heads—environmental advocacy groups like the Sierra Club,[6] large corporations like Shell,[7] British Petroleum,[8] and Google,[9] and even legendary oil-man T. Boone Pickens[10]—all support, in some measure, expansion of America's wind energy generation capacity.[11]

At the same time, wind power is generating an increasing number of detractors, including some who were once enthusiastic supporters.[12] Those against wind farms come from different backgrounds and have a variety of political outlooks and rhetorical approaches,[13] and occasionally, this produces surprising sources of opposition to the expansion of wind farms.[14] While wind energy has produced strange bedfellows in both the supporting and opposing camps, those

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6. *Clean Energy Solutions: Repower and Rebuild America*, SIERRA CLUB, http://www.sierraclub.org/energy/ (last visited Feb. 11, 2012) (noting Sierra Club's advocacy in promoting wind energy).

7. *Shell Wind Energy*, SHELL, http://www.shell.us/home/content/usa/innovation/wind/ (last visited Feb. 11, 2012) (noting Shell's involvement in wind projects).

8. BRITISH PETROLEUM, BP SUSTAINABILITY REPORTING 2009: ALTERNATIVE ENERGY 11 (2010), http://www.bp.com/assets/bp_internet/globalbp/STAGING/global_assets/e_s_assets/e_s_assets_2009/downloads_pdfs/Alternative_energy.pdf (noting BP's wind energy business included 1237 megawatts of wind energy capacity in 2009, with 1000 more megawatts of wind energy under construction).

9. *Are We Approaching a Clean Energy Revolution?*, GOOGLE, http://www.google.com/green/collaborations/investments.html (last visited Feb. 11, 2012) (detailing Google's investments in wind energy).

10. *See Wind*, PICKENS PLAN, http://www.pickensplan.com/theplan2/wind/ (last visited Feb. 11, 2012) (detailing Pickens' plan to increase wind energy production within the United States).

11. *See supra* notes 6–10.

12. *See* Joanna Kakissis, *Debating the Merits of Energy from Air*, N.Y. TIMES, Nov. 25, 2007, http://www.nytimes.com/2007/11/25/travel/25heads.html?ref=travel ("[A]n increasingly mobilized anti-wind farm lobby in Europe, North America and elsewhere is decrying the turbines as ugly, noisy and destructive, especially for picturesque locales that rely on tourism."); Sally Wylie, *Opinion: Hard Lessons from the Fox Islands Wind Project*, THE WORKING WATERFRONT, Dec. 8, 2009, http://www.workingwaterfront.com/online-exclusives/Opinion/13571/ (describing how one-time supporters of a wind farm project are now frustrated with the constant noise generated by the turbines).

13. *See* INDUSTRIAL WIND ENERGY OPPOSITION, http://www.aweo.org/ (last visited Feb. 11, 2012) (providing a series of essays written by opponents of wind farms).

14. *See* John Arnold McKinsey, *Regulating Avian Impacts Under the Migratory Bird Treaty Act and Other Laws: The Wind Industry Collides with One of Its Own, the Environmental Protection Movement*, 28 ENERGY L.J. 71, 75–87 (2007) (describing legal confrontations between wind farms and avian rights groups). The article discusses the legal issues a wind energy generator might face under specific federal and state statutes designed to protect avian wildlife. *Id.* For instance, a wind farm owner might face opposition or possible citizen suits under the Endangered Species Act, for "incidental takes"—the killing of a member of an endangered species—without a permit. *Id.* Some of these suits, especially ones over non-endangered birds and bats, could be the basis for a public nuisance suit. *See infra* Part III.B.

who live near wind farms have proved the fiercest and most consistent adversaries.[15] This reflects the NIMBYism—"Not In My Back Yard"—commentators have ascribed to the anti-wind movement.[16] While the contexts and locales of their opposition vary, at the core of their complaint is the claim that they have suffered serious loss of the use and enjoyment of their property. In opposing the expansion of wind energy production, they have asserted claims of both private and public nuisance in the courts and have been politically active as well, particularly at the local level; and they have been successful in delaying and, in some cases, preventing development of wind farms.[17] This anti-wind energy movement has elevated the concerns of property owners living in proximity to wind farms to the national spotlight.

These nuisance claims are not without precedent, but may pose many new legal challenges. For instance, it may be reasonable for the federal government to regulate wind farms the way other energy industries are regulated. Congress, in enacting a comprehensive renewable energy policy favoring expansion of the American wind industry, could justifiably conclude that preempting nuisance claims is a good idea. Indeed—given the exigencies of climate change, a geopolitical and economic need to lessen American reliance on foreign oil, a changing economy, and a world in which all of our major competitors are beginning to modernize their electric grids[18]—Congress and state legislatures should abrogate nuisance claims against wind farms through legislation, similar to right-to-farm laws, to encourage the growth and expansion of renewable wind energy generation. Nuisance immunity, in turn, raises the issue of whether a taking—physical or regulatory—has occurred of both a property owner's right to use and enjoy their property and their right to defend it through nuisance suits. Finally, the question of what sort of compensation may ultimately be due to property owners who live near wind turbines presents an additional set of challenges for these plaintiffs.

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15. Patricia E. Salkin & Ashira Pelman Ostrow, *Cooperative Federalism and Wind: A New Framework for Achieving Sustainability*, 37 HOFSTRA L. REV. 1049, 1068–71 (2009).

16. *Id.* at 1052.

17. Alex Kuffner, *Nantucket Wind Farm Proposal Gets Interior Department Approval*, PROJO.COM (Apr. 20, 2011), *available at* http://www.wind-watch.org/news/2011/04/20/nantucket-wind-farm-proposal-gets-interior-department-approval/ ("After nearly a decade of painstakingly slow progress, the Massachusetts wind farm has gained momentum over the last 12 months . . . . Cape Wind must still overcome challenges. A host of lawsuits have been filed against the project. The Alliance to Protect Nantucket Sound, a leading opponent, said development of the wind farm is not guaranteed.").

18. *See* M. Godoy Simoes et al., *Smart-Grid Technologies and Progress in Europe and the USA*, *in* 2011 ENERGY CONVERSION CONGRESS AND EXPOSITION 383, 384 (2011).

Part II of this Note discusses the background of wind energy. Part II.A discusses the exigency of producing electricity from renewable energy and some incentives created to promote that production, as well as the results these incentives have achieved. Part II.B discusses progress being made at the federal level. Part II.C discusses the way state legislatures are leading the way by enacting renewable portfolio standards and creating other incentives for renewable energy production. Part II.D will explain the success of these initiatives.

Part III of this Note discusses the law of nuisance, its elements, and how nuisance has been applied in nuisance suits against wind farms. Part III.A introduces the recent surge in nuisance suits against wind farms. Part III.B discusses the statutory and common law bases of nuisance law. Part III.C addresses the way in which nuisance law can be applied to wind farms. Part III.D explains early wind farm nuisance suit precedent. Part III.E addresses wind farm nuisance cases decided in the past five years. Part III.F concludes the section by discussing available remedies to victorious nuisance suit plaintiffs.

Part IV proposes that a workable solution to the current climate of nuisance suits against wind farms is for state legislatures to immunize wind farms from private nuisance suits. Part V of this Note addresses an important constitutional limitation—which one court has interpreted to invalidate nuisance immunity. Part V.A discusses the Takings Clause of the Constitution while Part V.B discusses inverse condemnation—the remedy a would-be nuisance suit plaintiff may be able to resort to in the face of a nuisance immunity statute. Part V.C discusses the analysis used by courts in takings cases. An important case to consider, discussed in Part V.D, is *Bormann v. Board of Supervisors*, a case in which the Iowa Supreme Court invalidated a nuisance immunity provision on the basis that it was an unconstitutional taking.[19] Part V.E addresses cases decided by other state supreme courts, all of which have elected not to follow *Bormann*. Part VI provides the conclusion to this Note.

II. BACKGROUND

A. *The Need for Renewable Energy Sources and the Emergence of Incentives for Wind Energy Production*

At the beginning of the 21st Century, we face an energy crisis. Despite heated debates on the matter, a consensus of scientists believes climate change—formerly called global warming—is very real and could have catastrophic ef-

19. Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 321 (Iowa 1998).

fects.[20] Critics of reliance on carbon sources of energy argue the burning of traditional fossil fuels has strongly contributed to the growth of climate change.[21] These groups have proposed to study, design, and implement the use of clean and renewable fuels and sources of energy.[22] Alternative, or renewable, sources of energy include: solar, geothermal, hydropower, biomass, and wind energy.[23] Over the past decade, many states have passed measures designed to incentivize the use of alternative forms of energy.[24] The federal government has also passed similar measures.[25]

B. *Federal Progress*

At the federal level, Congress has used a mixture of tax incentives and other subsidies to spur growth.[26] As legislators continue to address climate

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20. *Understanding the Urgency of Climate Change*, UNION OF CONCERNED SCIENTISTS, http://www.ucsusa.org/global_warming/science_and_impacts/science/understanding-urgency-climate-change.html (last modified May 27, 2010).

21. *Id.*

22. *See A Better Climate Bill: Raising Efficiency and Renewable Electricity Standards Increases Consumer Benefit*, UNION OF CONCERNED SCIENTISTS (2010), http://www.ucsusa.org/assets/documents/clean_energy/a-better-climate-bill-2010.pdf.

23. *Renewable Energy Sources in the United States*, NATIONALATLAS.GOV, http://www.nationalatlas.gov/articles/people/a_energy.html (last modified Jan. 26, 2011).

24. *See, e.g.*, IOWA CODE § 476B.2 (2011). Section 476B.2 states: "The owner of a qualified facility shall, for each kilowatt-hour of qualified electricity that the owner sells or uses for on-site consumption during the ten-year period beginning on the date the qualified facility was originally placed in service, be allowed a wind energy production tax credit . . . ." *Id.*

25. *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1603(a), 123 Stat. 115, 364 (2009) ("Upon application, the Secretary of the Treasury shall . . . provide a grant to each person who places in service specified energy property to reimburse such person for a portion of the expense of such property."). The grant provides thirty percent of the cost of construction of specified properties, and ten percent of the cost of construction of any other property. *Id.* § 1603(b)(2)(A)–(B). Properties able to receive a thirty percent grant for construction costs include small wind energy property, solar property, qualified fuel cell property, and other "qualified property . . . which is part of qualified facility . . . described in [26 U.S.C. § 45]." *Id.* § 1603(d)(1). *See also* 26 U.S.C. § 45(d)(1) (Supp. IV 2010) (defining "qualified facility" to include "a facility using wind to produce electricity . . . owned by the taxpayer which is originally placed in service after December 31, 1993, and before January 1, 2013."). Section 1603 operates in lieu of the Renewable Energy Tax Credit so as to provide the economic incentive for creation of facilities that produce renewable energy up front. *See* American Recovery and Reinvestment Act of 2009 § 1603. The Renewable Energy Tax Credit itself, however, creates a formidable incentive for the production of renewable energy, providing "1.5 cents, multiplied by the kilowatt hours of electricity produced by the taxpayer from qualified energy resources . . . sold by the taxpayer to an unrelated person during the taxable year." 26 U.S.C. § 45 (a)(1)–(2)(B) (2006).

26. *See, e.g.*, 26 U.S.C. § 45(a)(1)–(2)(B) (2006) (calculating the renewable electricity production tax credit).

change and the need for renewable energy sources, environmental legislation will likely continue to contain provisions creating incentives for wind energy and other renewable energy sources. The American Clean Energy and Security Act of 2009, for example, was passed by the U.S. House of Representatives,[27] but was not passed by the U.S. Senate.[28] The Act contained sections that would have created additional tax incentives for wind energy, which would have encouraged generation of wind energy and increased numbers of wind energy generation facilities.[29] The Act also offered mortgage incentives for energy efficient housing and housing that takes advantage of opportunities for private renewable energy generation.[30]

Perhaps most ambitiously, the proposed Act authorized a regulatory scheme requiring retail electricity suppliers to demonstrate annual electricity savings—reductions in electricity consumption—three-quarters of which had to be represented by adopting certain renewable electricity generation practices, including wind energy production.[31] This portion of the Act would be a federal Renewable Energy Standard.[32]

The future of the Act is uncertain,[33] and unlikely to be passed by the current Congress. As of November 2010, however, a poll suggested that a majority of American voters favor implementation of legislation that encourages renewa-

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27. American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009). The Act was voted on in the House of Representatives on June 26, 2009 and passed by a vote of 219-212. 155 CONG. REC. H7469-70 (daily ed. June 26, 2009).

28. *See* 155 CONG. REC. S7153 (daily ed. July 7, 2009).

29. H.R. 2454, § 132(b)–(c) (directing the Administrator of the Environmental Protection Agency to distribute to states money for State Renewable Energy and Energy Efficiency Programs, twenty percent of which shall be used for "tax credits, production incentives, loans, loan guarantees, forgivable loans, direct provision of allowances, and interest rate buy-downs" for energy efficiency operations and "deployment of technologies to generate electricity from renewable energy sources"). Additionally, the Act specifies an otherwise unallocated forty-seven and a half percent of the distribution the Administrator makes to the state shall be used exclusively for an enumerated list of options, which includes generation of electricity from renewable energy sources. *See id.* § 132(c)(4).

30. *Id.* § 299I. The Act also provides funding for block grants to be distributed to communities that wish to make their buildings more energy efficient. *Id.* § 296 (proposing to amend the Housing and Community Development Act of 1974 by adding Section 123, which provides for the "Residential Energy Efficiency Block Grant Program").

31. *Id.* § 101 (seeking to amend the Public Utility Regulatory Policy Act, 16 U.S.C. § 2601, by adding a section requiring retail electricity suppliers to earn renewable electricity credits and submit them as part of a combined electricity savings program).

32. *Id.*

33. *See The Public's Political Agenda*, PEW RESEARCH CTR. PUBL'N (Jan. 25, 2010), http://pewresearch.org/pubs/1472/public-priorities-president-congress-2010 (stating that the public's main concern is the economy, and not the U.S. energy sector).

ble energy generation.[34] The continued vitality of support for renewable energy development gives hope that legislation akin to the Act will be raised at the federal level once again and may continue to be developed at the state level.

While Congress stalled on renewable energy legislation in 2010, the U.S. Department of the Interior continues to push forward. Secretary Salazar introduced plans to designate key offshore wind energy production areas and simplify the process for obtaining offshore leases from the federal government.[35] The American Wind Energy Association—a national trade association of wind energy generators—applauded Secretary Salazar's action.[36] On April 19, 2011, the Department of the Interior also announced approval of the 130-turbine wind farm in the Nantucket Sound.[37]

C. *State Renewable Energy Portfolios and Tax Incentives Are Leading the Way*

At the state level, Iowa is a leader in wind energy production, ranking second in the nation for wind energy production in terms of megawatts generated.[38] At the start of 2010, Iowa was first in the nation when it came to the portion of the electrical grid that wind energy provides.[39] David Osterberg and Teresa Galluzzo of the Iowa Policy Project are unsure where exactly electricity generated by wind energy is consumed, but Iowa's "total wind-powered generation is enough to serve the electric needs of 940,000 residences: nearly [seventy-five]

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34. *See* Press Release, League of Conservation Voters, Environmental Groups Applaud Defeat of Proposition 23 (Nov. 3, 2010), *available at* http://www.lcv.org/media/press-releases/environmental-groups-applaud-defeat-of-proposition-23.html (detailing a Nov. 2010 poll that found voters backed plans for renewable energy).

35. Press Release, U.S. Dep't of the Interior, Salazar Launches 'Smart From the Start' Initiative to Speed Offshore Wind Energy Development Off the Atlantic Coast (Nov. 23, 2010), http://www.doi.gov/news/pressreleases/Salazar-Launches-Smart-from-the-Start-Initiative-to-Speed-Of fshore-Wind-Energy-Development-off-the-Atlantic-Coast.cfm.

36. Press Release, American Wind Energy Association Applauds U.S. Dept. of the Interior's New Offshore Wind Initiative (Nov. 22, 2010), http://www.awea.org/newsroom/pressreleases/release_112210.cfm.

37. Kuffner, *supra* note 17.

38. AM. WIND ENERGY ASS'N, U.S. WIND INDUSTRY FOURTH QUARTER 2011 MARKET REPORT 4–5 (2012), *available at* http://www.awea.org/learnabout/industry_stats/upload/4Q-2011-AWEA-Pub lic-Market-Report_1-31.pdf (noting that Iowa produces 4322 MW of electricity through wind energy production each year, including 646 MW added in 2011).

39. U.S. DEP'T OF ENERGY, 2010 WIND TECHNOLOGIES MARKET REPORT 9 (2011), *available at* http:// www1.eere.energy.gov/wind/pdfs/51783.pdf. The Department of Energy estimated, however, that by the end of 2010 South Dakota would surpass Iowa in terms of the portion of its electrical grid generated via wind energy. *Id.*

percent of Iowa's homes."[40] Indeed, as of January 1, 2011, between 19.3% and 20.5% of Iowa's electricity was generated by wind energy.[41]

Texas, the national leader in wind energy production,[42] set forth an ambitious goal in 1999 of adding 2000 megawatts of generating capacity by January 1, 2009,[43] which was subsequently amended in 2005 such that the goal became adding 5000 megawatts of generating capacity produced by renewable sources of energy by January 1, 2015.[44] As of 2012, Texas more than doubled the amended goal.[45]

Iowa and Texas are certainly not the only states subsidizing clean energy and wind power.[46] Quite the contrary, several states have experimented with passing tax incentives for renewable energy, public policy statements in favor of and encouraging the development of renewable energy, and renewable portfolio standards.[47] This race to the top is an exciting example of the positive effect of the federalist notion of states as "laboratories of democracy."[48]

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40. DAVID OSTERBERG & THERESA GALLUZO, THE IOWA POLICY PROJECT, THINK WIND POWER, THINK 'IOWA' 1 (2010), *available at* http://www.iowapolicyproject.org/2010docs/100303-IPP-wind.pdf.

41. IOWA UTILS. BD., WIND-POWERED ELECTRICITY GENERATION IN IOWA, http://www.state.ia.us/government/com/util/energy/wind_generation.html (last visited Feb. 11, 2012).

42. AM. WIND ENERGY ASS'N, *supra* note 38, at 5 (noting that Texas produced 10,377 megawatts of electricity through wind production in 2011).

43. 1999 Tex. Sess. Law Serv. 405 (West) (codified at TEX. UTIL. CODE ANN. § 39.904 (West 2011) (amended 2005)).

44. *Id.*

45. *See* AM. WIND ENERGY ASS'N, *supra* note 38, at 5.

46. *See* ENERGY INFO. ADMIN., *supra* note 2 (citing *DSIRE: Database of State Incentives for Renewables & Efficiency*, U.S. DEP'T OF ENERGY, http://www.dsireusa.org (last visited Feb. 11, 2012) ("[Twenty-nine] States, the District of Columbia, and Puerto Rico have legislated renewable energy portfolio standards, and [seven] more States have adopted renewable portfolio goals.")).

47. *See, e.g.*, MD. CODE ANN. §§ 7-701(l)(2), 7-703 (LexisNexis 2010) (defining wind energy as a "Tier 1 renewable source" and requiring twenty percent of electricity generated by utility companies to be generated from wind energy by 2020); OR. REV. STAT. ANN. §§ 469A.025(l)(a), 469A.050–.075 (West 2003) (defining electricity generated in compliance with Oregon's renewable portfolio standard to include wind energy, and requiring utilities to obtain at least twenty-five percent of electricity from renewable sources by 2025); S.C. CODE ANN. § 12-6-3588 (2000) (providing a renewable energy tax incentive for investment in, or manufacture of, renewable energy operations); WASH. REV. CODE ANN. § 39.35.020 (2000) ("The legislature declares that it is the public policy of this state to insure that . . . renewable energy systems are employed in the design of major publicly owned or leased facilities and that the use of at least one renewable energy system is considered.").

48. New State Ice Co. v. Leibmann, 285 U.S. 262, 311 (1932) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory: and try novel social and economic experiments without risk to the rest of the country.").

D. *Success and Expansion of Wind Energy Production in the Twenty-First Century*

Many of these programs that have been implemented have yielded considerable success. In 2004, wind energy generated 0.4% of our nation's electricity.[49] Wind energy production, however, has more than tripled since 2006.[50] In fact, wind energy production more than doubled during 2008 and 2009.[51] Currently, United States wind energy producers produce 46,919 megawatts of electricity.[52] A single two-megawatt turbine can service about six hundred homes in the United States.[53]

The amount of electricity produced by wind energy is likely to grow, as the National Renewable Energy Laboratory, a project of the U.S. Department of Energy, released a report in 2010 finding that the contiguous forty-eight states of the United States could have the capacity to generate thirty-seven million gigawatt hours of electricity with wind energy.[54] Thirty-seven million gigawatt hours is nine times the current national level of electricity consumption.[55]

The enthusiasm of the wind industry and its supporters is warranted. Energy consumption has consistently risen over the last thirty years in the United States and will likely continue.[56] Take cars, for example: not only is electricity generated by wind energy applicable to modernizing our electric grid, but wind energy generation can make green cars greener.[57] One plausible complaint about electric cars is that they are "coal burners, once removed."[58] The logic of this complaint is simple: most of the United States' current electrical grid is generat-

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49. *FAQ—The Grid*, NATIONAL WIND WATCH, http://www.wind-watch.org/faq-electricit y.php (last visited Feb. 11, 2012) (citing ENERGY INFO. ADMIN., ANNUAL ENERGY OUTLOOK 2006, http://www.scag.ca.gov/rcp/pdf/publications/1_2006AnnualEnergyOutlook.pdf).

50. AM. WIND ENERGY ASS'N, U.S. WIND INDUSTRY YEAR-END 2010 MARKET REPORT 2 (2011), *available at* http://awea.org/learnabout/publications/loader.cfm?csModule=security/getfile &PageID=5083.

51. *Id.*

52. AM. WIND ENERGY ASS'N, *supra* note 38, at 2.

53. AM. WIND ENERGY ASS'N, WINDPOWER OUTLOOK 2010 3, http://archive.awea.org/pubs/documents/Outlook_2010.pdf.

54. NAT'L RENEWABLE ENERGY LAB., NREL TRIPLES PREVIOUS ESTIMATES OF U.S. WIND POWER 1 (2011), http://www.nrel.gov/docs/fy11osti/51555.pdf.

55. *See id.*

56. *See History of Energy Consumption in the United States, 1775–2009*, U.S. ENERGY INFO. ADMIN. (2011), http://eia.gov/todayinenergy/detail.cfm?id=10.

57. *See The Coal Truth: Will the Coming Generation of Electric Cars Just Be Coal-Burners, Once Removed?*, SCI. AM., May 4, 2010, http://www.scientificamerican.com/article.cfm?id=earth-talk-the-coal-truth.

58. *Id.*

ed by coal-burning power plants.[59] By plugging in an electric or hybrid car at night, the electric-vehicle owner is actually powering her vehicle—not with a green-friendly, emission-free battery—but rather the harmful, pollutant-rich smokestack of a coal-fired power plant.[60] Significant increases in wind energy generation—along with investments in increased production of other renewable, alternative energy sources—can obviate this problem. Indeed, Portugal, which derives nearly forty-five percent of its grid from wind energy, plans on installing "a national network of charging stations for electric cars."[61] As Portugal's development shows, a smart, renewable electrical grid, which is fully funded and supported by a comprehensive, long-term growth and regulatory scheme, can alleviate energy consumption and environmental woes, both at home and on the road.

Moreover, as the United States moves forward and the extent of our electrical grid generated by wind power grows, it may be necessary for either state or federal governments to abrogate or preempt laws or causes of action that could interfere with the progress of the wind energy generation in the United States. At least one writer predicts this and has compared it to other attempts to encourage industry or commerce.[62]

III. NUISANCE SUITS AGAINST WIND FARMS

A. *The Emergence of Nuisance Suits Against Wind Farms*

While proponents of wind energy stress a myriad of benefits, many citizens living near wind farms complain, with no lack of force, that wind turbines

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59. *Id.*

60. *Id.* ("It stands to reason that, unless we start to source significant amounts of electricity from renewables . . . coal-fired plants will not only continue but may actually increase their discharges of mercury, carbon dioxide and other toxins due to greater numbers of electric cars on the road.").

61. Elisabeth Rosenthal, *Portugal Gives Itself a Clean-Energy Makeover*, N.Y. TIMES, Aug. 9, 2010, http://www.nytimes.com/2010/08/10/science/earth/10portugal.html.

62. *See* LaVonda N. Reed-Huff, *Dirty Dishes, Dirty Laundry, and Windy Mills: A Framework for Regulation of Clean Energy Devices*, 40 ENVTL. L. 859, 866–83 (2010) (comparing attempts at renewable energy regulation to other state and federal regulatory schemes, including right-to-farm acts, right-to-dry laws, and the Over the Air Reception Devices ("OTARD") Rule). The OTARD rule is designed to encourage purchases of satellite dish television receptors. *See id.* at 867. Professor Reed-Huff compared renewable energy devices to residential satellite dishes, evaluating the response of neighbors and efficacy of takings claim responses to the Over the Air Reception Device (OTARD) rule. *Id.* at 877–79. The rule operates by preempting nuisance claims against satellite dishes. *Id.* at 876.

constitute nuisances in a variety of ways.[63] Several nuisance suits have been filed against wind farms.[64] The plaintiffs tend to allege both public and private nuisance.[65] One challenge currently faced by the anti-wind movement in nuisance suits is that in some scenarios, they are suing too early, or making allegations of nuisance as a conceptual result of changes in county zoning ordinances which would allow for the development of nearby wind energy generation facilities.[66] This will undoubtedly change with time.

The complaints run the gamut from routine claims that wind turbines are too loud or "ruin the look of pastoral landscapes to more elaborate allegations that they have direct physiological impacts like rapid heartbeat, nausea and blurred vision caused by the ultra-low-frequency sound and vibrations from the machines."[67] One common criticism is the sound of wind turbines and the generators to which turbines are connected.[68] The likely common complaints, however, will not be limited to noise. It is probable that common grievances will also focus on aesthetic complaints regarding the impairment of certain vistas,[69] as well as the somewhat-related "shadow flicker,"[70] the dangers to wildlife, particularly birds,[71] and finally, the potential to fling debris from the turbine blades, and to fling the blades themselves.[72] Finally, some claims are more unusual: from causing radar interference and disrupting wireless communication and television signals, to depriving neighbors of their own kinetic energy from wind.[73]

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63. *See* Tom Zeller, Jr., *For Those Near, the Miserable Hum of Clean Energy*, N.Y. TIMES, Oct. 5, 2010, http://www.nytimes.com/2010/10/06/business/energy-environment/06noise.html.

64. *Id. See, e.g.*, Muscarello v. Ogle Cnty. Bd. of Comm'rs, 610 F.3d 416, 419–20 (7th Cir. 2010); Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 508 (Tex. Ct. App. 2008).

65. *See Rankin*, 266 S.W.3d at 508. For a discussion of the distinction between a public nuisance and a private nuisance, see text accompanying notes 93–98, *infra*.

66. *See Muscarello*, 610 F.3d at 427 (dismissing both nuisance and takings claims as unripe).

67. Zeller, *supra* note 63.

68. *Id.*

69. *See, e.g.*, *Rankin*, 266 S.W.3d at 510–11 (discussing plaintiffs' various visual complaints regarding a nearby wind farm).

70. *See, e.g.*, *Muscarello*, 610 F.3d at 419; AM. WIND ENERGY ASS'N, WIND TURBINES AND HEALTH 2 (2010), http://www.awea.org/_cs_upload/learnabout/publications/4140_3.pdf ("Shadow flicker occurs when the blades of a turbine pass in front of the sun to create a recurring shadow on an object.").

71. *See* Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc., 166 Cal. App. 4th 1349, 1355–57 (2008); *see also* McKinsey, *supra* note 14, at 85–87.

72. *See, e.g.*, *Muscarello*, 610 F.3d at 419; Rassier v. Houim, 488 N.W.2d 635, 638 (N.D. 1992).

73. *Muscarello*, 610 F.3d at 419.

Complaints will likely increasingly allege a combination of these harms. For instance, a complaint might allege that a wind turbine is loud, causes a strobe effect, blows dirt and dust particles onto adjoining pieces of property, and reduces property values.

B. *The Common Law and Statutory Bases of Nuisance*

Nuisance is generally "a nontrespassory invasion of another's interest in the private use and enjoyment of land."[74] Such an invasion is "nontrespassory" because the interest affected by the invasion is not the interest in "exclusive possession of land"—as in the case of trespass—but rather the interest in the "private use and enjoyment of land."[75] The doctrine has its origins in common law—going back as far as the Twelfth Century[76]—and sounds in tort.[77] Many states also provide a statutory cause of action against nuisances.[78] Iowa, which provides a statutory cause of action against nuisances,[79] also provides a list of specific nuisances through a series of enumerations.[80] The Iowa Supreme Court, however, has recognized that "the . . . statutory enumerations do not modify the common-law application to nuisances."[81] Common law, in essence, fills in the gaps of the statutory definition.[82]

In contrast, some jurisdictions provide a statutory cause of action for nuisance claims and do not apply a common law nuisance concept.[83] Where the statutory definition mirrors the common law concept of nuisance, the common

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74. RESTATEMENT (SECOND) OF TORTS § 821D (1979).

75. *Id.* at cmt. d.

76. *Id.* at cmt. a.

77. *Id.* at cmt. d.

78. *See, e.g.*, IOWA CODE § 657.1 (2011) ("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 interfere unreasonably with the comfortable enjoyment of life or property, is a nuisance, and a civil action by ordinary proceedings may be brought to enjoin and abate the nuisance and to recover damages sustained on account of the nuisance."): *see also* Rassier v. Houim, 488 N.W.2d 635, 636 (N.D. 1992) (quoting N.D. CENT. CODE § 42-01-02 (1992)).

79. IOWA CODE § 657.1 (2011).

80. *Id.* § 657.2.

81. Bates v. Ready-Mix Co., 154 N.W.2d 852, 857 (Iowa 1967).

82. Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 314 (Iowa 1998) (quoting Weinhold v. Wolff, 555 N.W.2d 454, 459 (Iowa 1996)).

83. *Rassier*, 488 N.W.2d at 636 (citing Jerry Harmon Motors, Inc. v. Farmers Union Grain Terminal Ass'n, 337 N.W.2d 427 (N.D. 1983)) (stating that a "common-law nuisance concept does not apply in North Dakota").

law concept remains relevant.[84] Thus, in many cases, common law is relevant as either the whole law, as interstitial law, or as an interpretive tool.

Analytically, nuisance has been described in terms of "unreasonable interference."[85] The threshold of "unreasonable interference" at which a successful nuisance claim attaches "'is determined by weighing the gravity of the harm to the plaintiff against the utility of the defendant's conduct.'"[86] Determining the existence of a nuisance is a question of fact.[87] Unreasonable interference, under nuisance law, is closer to strict liability than nuisance.[88] Thus, nuisance suits involve extensively fact-specific balancing of intrusion of property, on the one hand, and social value of activity, on the other.

This balancing test has played a prominent role in nuisance suits against defendants operating wind turbines.[89] It is well-suited to describe the wind turbine nuisance debate, though equally ill-suited to resolve it. The problem is that alternative energy and the values of conservation are undeniably important, but the alleged effect upon those who neighbor wind turbines is not one our society conceives as generally acceptable merely because of the purported social benefit of the alleged nuisance. Quite to the contrary, if one believes the allegations of the average plaintiff in a nuisance suit against a wind farm, then the cost felt by neighbors of wind farms greatly impairs the asserted value of wind turbines.

As a doctrine that is subject to both common and statutory law, the elements of nuisance can be subject to some diversity.[90] While the generally accepted phrasing of nuisance—"unreasonable interference"[91]—may prevail in a general sense, jurisdictions may vary in their approach to this historically common law doctrine. These subtle variations may impact the availability of relief to nuisance suit plaintiffs. One example of a variation is the availability of certain de-

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84. *Id.* (citing McLean Cnty. Comm'rs v. Peterson Excavating, Inc., 406 N.W.2d 674 (N.D. 1987)).

85. Pitsenbarger v. N. Natural Gas Co., 198 F. Supp. 665, 672 (D. Iowa 1961) (applying Iowa law) ("The question of what conduct constitutes a nuisance generally resolves itself to a question of fact and involves a determination of whether there is an unreasonable interference with the interest and the use and enjoyment of the complainant's property.").

86. *Id.* (quoting WILLIAM PROSSER, PROSSER ON TORTS § 72 (2d ed. 1955): *see also* 58 AM. JUR. 2d *Nuisances* § 1 (2010) (footnotes omitted) ("The term 'nuisance' is incapable of an exact and exhaustive definition which will fit all cases, because the controlling facts are seldom alike, and because of the wide range of subject matter embraced under the term.").

87. *Pitsenbarger*, 198 F. Supp at 672 (applying Iowa law).

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

89. *See, e.g.*, Rose v. Chaikin, 453 A.2d 1378, 1381–82 (N.J. Super. Ct. Ch. Div. 1982) (citations omitted).

90. Bates v. Quality Ready-Mix Co., 154 N.W.2d 852, 857 (Iowa 1967) (noting that common law fills the gaps left in enumerated statutory definitions of nuisance).

91. *See, e.g.*, *Bormann*, 584 N.W.2d at 314 (quoting IOWA CODE §657.1 (1998)).

fenses and privileges, which can render either conduct or equipment otherwise constituting a nuisance not a nuisance.[92]

Private nuisance must be distinguished from the similar cause of action of public nuisance. Public nuisance is a catchall offense "consisting of an interference with the rights of a community at large. This may include anything from the obstruction of a highway to a public gaming house or indecent exposures."[93] Public nuisance claims seem somewhat ill-suited to claims against wind farms, though analysis of public nuisance suits against wind farms may remain relevant. The reason public nuisance suits are inapplicable to most nuisance suits inheres in the claims most nuisance plaintiffs make against wind farms. Public nuisance involves interference with the rights of a community at large, but nuisance plaintiffs organize their claims around personal rights.[94] Aesthetic claims, however, may fit the mold of public nuisance more readily than other claims. Specifically, public nuisance might be more pertinent in the context of offshore wind farms. The reason is that the best claim against an offshore wind farm is that a spine of turbines poking up over the horizon ruins a right of the public at large: the right to an unspoiled view.

Private nuisance, however, involves injury to a specific individual's rights.[95] It is a state law claim closer to trunk of the family tree of torts than its cousin—public nuisance—which is more akin to a policy judgment. The Iowa Supreme Court has described private nuisance thusly:

> [P]rivate nuisance . . . is a civil wrong based on a disturbance of rights in land . . . . The essence of a private nuisance is an interference with the use and enjoyment land. Examples include vibrations, blasting, destruction of crops, flooding, pollution, and disturbance of the comfort of the plaintiff, as by unpleasant odors, smoke, or dust.[96]

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92. *See, e.g.*, Rassier v. Houim, 488 N.W.2d 635, 637–38 (N.D. 1992) (discussing the coming-to-the-nuisance doctrine as a basis for dismissing plaintiff's claim). *Compare* Burch v. NedPower Mount Storm, LLC, 647 S.E.2d 879, 892 (W. Va. 2007) ("[U]nsightly activity may be abated when it occurs in a residential area and is accompanied by other nuisances."), *with* Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 511 (Tex. App. 2008) (citing Maranatha Temple, Inc. v. Enter. Prod. Co., 893 S.W.2d 92, 100 (Tex. App. 1994) (holding that Texas law does not support a nuisance claim for unsightly activity)).

93. *Bormann*, 584 N.W.2d at 314 (quoting Guzman v. Des Moines Hotel Partners, 489 N.W.2d 7, 10 (Iowa 1992)).

94. *See generally id.*

95. *See, e.g.*, *id.*; *Bates*, 154 N.W.2d at 857.

96. *Bormann*, 584 N.W.2d at 314.

Private nuisance is the primary weapon of the wind farm nuisance suit plaintiff.[97] Indeed, the complaints alleged cater more obviously to this type of nuisance.[98]

C. *Application of Nuisance Law to Wind Farms*

Applying nuisance laws to the facts involved requires balancing the utility of wind farms against the private harm that they inflict. While there is enormous potential for value in the maintenance of wind farms, landowners whose property abuts wind farms argue fervently that wind farms' effects are unbearable.[99]

Most nuisance cases will likely turn on expert testimony regarding decibel levels. Several studies have already been completed.[100] The Acoustic Ecology Institute has followed the issue of wind turbine noise for some time and compiles studies yearly. In the 2009 year in review of studies, it expressed the opinion that "many people, in all parts of the country, have been dramatically impacted by the noise of wind farms near their homes."[101] The report also concluded, however, the noise is difficult to calculate and depends on factors other than simply the decibels of sound generated by wind turbines.[102] The report underscores the likely evidentiary issue in nuisance suits against wind farms: the actual level of noise varies according to a number of factors.[103] While some industry representatives assure local residents that the volume of wind turbines is approximately forty decibels, some analysts conclude actual levels are more accurately described as in the range of ninety-eight to 104 decibels.[104]

D. *Early Wind Turbine Nuisance Precedent*

1. *Rose v. Chaikin*

Because of the recent emergence of a large-scale wind energy generation industry, a rich body of existing case law is lacking. Nuisance suits against wind

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97. *See* Zeller Jr., *supra* note 63.

98. *Id.*

99. *See Wind Farm Noise: 2009 in Review*, ACOUSTIC ECOLOGY INST. 3 2010, http://acousticecology.org/docs/AEI_WindFarmNoise_2009inReview.pdf ("Many rural residents share the shock of one woman in Maine who discovered that, at night in rural areas, '40dB is loud!'").

100. *See, e.g.*, *id.* at 12–21.

101. *Id.* at 2.

102. *Id.* at 2–3.

103. *Id.*

104. *Id.* at 3.

turbine operations are not altogether new, however. In 1982, the New Jersey Chancery Court decided a nuisance claim against a windmill owner/operator in *Rose v. Chaikin*.[105] In *Rose*, the defendant operated a sixty-foot windmill connected to a motor on the roof of his home in a residential neighborhood in New Jersey.[106] The adjoining neighbors brought suit to enjoin use of the windmill.[107] The court noted, "Noise is an actionable private nuisance if two elements are present: (1) injury to the health and comfort of ordinary people in the vicinity, and (2) unreasonableness of that injury under all the circumstances."[108]

The New Jersey Chancery Court observed, "[T]he character, volume, frequency, duration, time, and locality are relevant factors in determining whether the annoyance materially interferes with the ordinary comfort of human existence."[109] Of these, the court considered the character, volume, and duration of the noise generated by the defendant's windmill the most significant factors.[110] The character of the noise was important because it was "distinctive" and "[i]ts intrusive quality [was] heightened because of the locality."[111] The volume of the noise was significant, as "[a]t all times the windmill operated in violation of the [fifty decibel] standard."[112] Finally, the duration was significant because "the prevailing winds keep the unit operating more or less constantly . . . ."[113]

The defendants argued "the windmill further[ed] the national need to conserve energy by the use of an alternate renewable source of power,"[114] and the court found "[t]he social utility of alternate sources cannot be denied . . . ."[115] However, the court articulated the gravity of Chaikin's interference:

> The ability to look to one's home as a refuge from the noise and stress associated with the outside world is a right to be jealously guarded. Before that right can be eroded in the name of social progress, the benefit to society must be clear and the intrusion must be warranted under all of the circumstances.[116]

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105. Rose v. Chaikin, 453 A.2d 1378 (N.J. Super. Ct. Ch. Div. 1982).
106. *Id.* at 1380.
107. *Id.*
108. *Id.* at 1381.
109. *Id.* (quoting Lieberman v. Saddle River Twp., 116 A.2d 809, 812 (N.J. Super. Ct. App. Div. 1955)).
110. *Rose*, 453 A.2d at 1382.
111. *Id.*
112. *Id.* at 1383 (referring to the fifty decibel standard later in the opinion in the context of an alternative claim against defendant for violation of a local zoning ordinance).
113. *Id.* at 1382.
114. *Id.*
115. *Id.*
116. *Id.* at 1383.

The court thus concluded that "the social utility of this windmill [was] outweighed by the quantum of harm that it create[d]."[117] The New Jersey Chancery Court did, however, leave open the possibility that not all windmills or wind turbines would constitute a nuisance.[118] This is perhaps most accurately characterized as an awareness that nuisance sounds in tort, and tort claims frequently depend on very specific details. It is also a valuable lesson in the very likely fact-specific nature of nuisance suits against wind farms. Location of a windmill other than in a residential neighborhood and operation below a fifty-decibel standard therefore might not constitute a nuisance.

Rose was an early case, decided in 1982, long before the rise of large-scale wind energy generation, and it occurred in a far more residential context than modern nuisance suits.[119] Interestingly, though, the arguments on both sides are roughly the same ones still being made today: the plaintiff alleges unbearable interference as a result of the wind turbine, while the defendant argues that the social utility outweighs the incidental harm.

2. *Rassier v. Houim*

Ten years later, a similar suit confronted the North Dakota Supreme Court. On the facts presented, it decided the case the other way—holding in favor of the operator of the wind turbine and generator.[120] In *Rassier v. Houim*, the defendant operated a tower with a "wind generator" on his residential lot.[121] The defendant installed the turbine in 1986, and the plaintiff moved into the neighborhood two years later, in 1988.[122] Later dismayed at the presence of the defendant's wind generator, Rassier sued Houim in 1990, claiming private nuisance in addition to breach of a restrictive covenant.[123] The district court dismissed Rassier's claims.[124]

The North Dakota Supreme Court evaluated the plaintiff's claim in the context of the "coming-to-the-nuisance doctrine," but also noted that the doctrine

117. *Id.*
118. *Id.*
119. *Id.*
120. Rassier v. Houim, 488 N.W.2d 635, 636 (N.D. 1992).
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*

is but one factor used to determine whether a nuisance exists.[125] Other factors used by the court "include[d] a balancing of the utility of [the] defendant's conduct against the harm to the plaintiff, plaintiff's attempts to accommodate defendant's use before bringing the nuisance action, and plaintiff's lack of diligence in seeking relief."[126]

The North Dakota Supreme Court discussed whether Houim's conduct was unreasonable in terms of the loudness of the generator, which was forty feet from the plaintiff's property.[127] Because the trial court made a finding that the interference caused by the generator was not unreasonable, that factual finding would only be set aside if it was clearly erroneous.[128] Like the windmill in *Rose*, the wind generator operated at a little over fifty decibels.[129] The plaintiff provided proof of this decibel level by retaining an "environmental scientist from the North Dakota State Department of Health and Consolidated Laboratories, and a mechanical engineer who worked in the area of psychoacoustics . . . ."[130] Both witnesses also testified as to the significant health effects wind generators can have on their neighbors.[131] The plaintiff also alleged the generator interfered with conversations in her family's yard, and that on one occasion in her yard she found "an ice chunk she suspected was thrown from the wind generator."[132]

The defendant offered testimony from other neighbors that the noise level was not unreasonable.[133] Moreover, he offered evidence of Rassier's two-year delay in seeking relief "after conflicts arose between Mr. Rassier and Houim."[134] Houim also "offered to teach Rassiers to turn the wind generator off when the noise bothered them, but they did not attempt this accommodation."[135] He also pointed out that he used a smaller generator than his tower could hold, "and that safety features eliminated the danger of blades, or ice, being thrown from the wind generator."[136]

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125. *Id.* at 638 (citing Jerry Harmon Motors, Inc. v. Farmers Union Grain Terminal Ass'n., 337 N.W.2d 427 (N.D. 1983)). The "coming-to-the-nuisance doctrine" operates to extinguish some nuisance claims because the interference is considered all the less unreasonable if the plaintiff willingly "'came to the nuisance.'" *Id.*

126. *Id.*

127. *Id.*

128. *Id.* (citing N.D. R. CIV. P. 52(a)).

129. *Id.* (measuring between fifty and sixty-nine decibels); Rose v. Chaikin, 453 A.2d 1378, 1380 (N.J. Super. Ct. Ch. Div. 1982) (measuring between fifty-six and sixty-one decibels).

130. *Rassier*, 488 N.W.2d at 638.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

The North Dakota Supreme Court affirmed the district court's finding that this was not an unreasonable interference with the use or enjoyment of plaintiff's land.[137] Justice Meschke dissented from some of the majority opinion.[138] In particular, Justice Meschke noted that an ample body of North Dakota case law supported the conclusion that "[e]xcessive noise can annoy, disturb, and unreasonably interfere with other persons in the use and enjoyment of their homes."[139] Justice Meschke quoted the comments of Restatement (Second) of Torts, Section 827, in support of his conclusion that noise is more likely to be unreasonable at night.[140] Justice Meschke continued, "The character of the locality at the time that the interfering activity is begun is one of the most important factors to be weighed."[141] He quoted the comments of Section 827 of the Restatement (Second) of Torts again for the proposition, "[e]ven between socially desirable and valuable uses of land there is a degree of incompatibility that, in some cases, is so great that they cannot be carried on in the same locality."[142] It was particularly relevant for Justice Meschke that Houim's lot and the nearby lots were subdivided for residential purposes.[143] Integral to Justice Meschke's concurrence and dissent is the position that "Houim's wind turbine on part of his lot was not well suited to this residential locale."[144]

Implicit in the dissenting Justice's position is the notion that wind turbines lack a residential purpose.[145] His discussion of locality and character of the nuisance is relevant to modern nuisance suits, particularly because *Rassier* and *Rose* both differ from more recent frustration over wind farms because they dealt with strictly residential wind turbines.[146] Thus, the precedential value of these early cases is considerably diminished; the fact-specific—and thus location-specific—analysis of nuisance undercuts the use of *Rose* and *Rassier* because the circumstances, particularly the likely greater ordinary distance between modern turbines and their neighbors, are likely significantly different. Nonetheless, as the issues, allegations, and arguments are similar, these early cases provide useful guideposts for modern courts.

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137. *Id.* at 639.

138. *Id.* (Meschke, J., concurring and dissenting).

139. *Id.* (citations omitted).

140. *Id.* at 640 (quoting RESTATEMENT (SECOND) OF TORTS § 827 cmt. b (1979)) ("The gravity of the harm from noises that disturb a person's sleep, for example, is ordinarily much greater when the noises occur at night than it is when the noises occur in the daytime.").

141. *Id.*

142. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 827 cmt. on Clause (d) (1979)).

143. *Id.*

144. *Id.* at 641.

145. *See id.*

146. *Id.* at 636; Rose v. Chaikin, 453 A.2d 1378 (N.J. Super Ct. Ch. Div. 1982).

E. *Modern Wind Turbine Nuisance Precedent*

1. *Burch v. NedPower Mount Storm*

Since the rise of wind power in the United States in the twenty-first century, nuisance suits have emerged with greater frequency. In 2003, the Public Service Commission (PSC) granted NedPower Mount Storm, LLC "a certificate of convenience and necessity to construct and operate a wind power electric generating facility . . . ."[147] In 2005, seven homeowners living at distances varying a half-mile to two miles from the projected site of a wind farm sued to enjoin the defendants "from constructing and operating the wind power facility on the basis that it would create a private nuisance."[148]

> Specifically, the [plaintiffs] asserted that they [would] be negatively impacted by noise from the wind turbines; the turbines [would] create a 'flicker' or 'strobe' effect when the sun is near the horizon; the turbines [would] pose a significant danger from broken blades, ice throws, and collapsing towers; and the wind power facility [would] cause a reduction in [their] property values.[149]

They lived at distances from the wind farm far greater than the forty feet in *Rassier*.[150] The trial court "granted the [defendants'] motion for judgment on the pleadings and dismissed the [plaintiffs'] action with prejudice."[151] As summarized by the West Virginia Supreme Court of Appeals,

> The circuit court based its ruling on the following grounds: it has no jurisdiction to enjoin the construction of a project that was approved by the PSC; most of the assertions made by the appellants concern activities that constitute a public rather than a private nuisance; a prospective injunction is not a proper remedy in this case because the wind facility is not a nuisance *per se* and does not constitute an impending or imminent danger of certain effect; and the PSC's approval of the facility collaterally estops the appellants from challenging it in circuit court.[152]

Plaintiffs appealed, citing the circuit court's "finding that the siting certificate granted by the PSC . . . immunize[d] the [defendants] from liability under the common law doctrine of nuisance," and that the circuit court had erred in finding the plaintiffs had failed to prove their claims.[153]

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147. Burch v. NedPower Mount Storm, LLC, 647 S.E.2d 879, 884 (W. Va. 2007) (footnote omitted).

148. *Id.* at 885.

149. *Id.*

150. *Id.*; Rassier v. Houim, 488 N.W.2d 635, 638 (N.D. 1992).

151. *Burch*, 647 S.E.2d at 885.

152. *Id.*

153. *Id.* at 886.

The Supreme Court of Appeals of West Virginia noted that the common law provides a cause of action for nuisance.[154] West Virginia defines private nuisance as "'a substantial and unreasonable interference with the private use and enjoyment of another's land.'"[155] Explaining when an interference would become an actionable nuisance, the court stated, "'[a]n interference with the private use and enjoyment of another's land is unreasonable when the gravity of the harm outweighs the social value of the activity alleged to cause the harm.'"[156]

The court first noted that the PSC lacked jurisdiction to immunize the defendants from nuisance suits.[157] Although the wind farm was under the PSC's jurisdiction generally, the PSC did not have the power to grant immunity from nuisance suit.[158]

Relying on precedent from other nuisance cases, the court noted that "'[n]oise alone may create a nuisance, depending on the time, locality and degree.'"[159] Specifically, the court reasoned that "'[w]here an unusual and recurring noise is introduced in a residential district, and the noise prevents sleep or otherwise disturbs materially the rest and comfort of the residents, the noise may be inhibited by a court of equity.'"[160] Finding quiet enjoyment of one's home to be a right, the court held "noise is cognizable under [West Virginia] law as an abatable nuisance."[161]

The court was more hesitant, however, to find that the "'flicker' or 'strobe' effect" constitutes a nuisance.[162] The court balked at the allegation, in part, because the allegation was related specifically to the appearance of the wind turbines.[163] While precedent provided support for the notion that courts will not take action to abate a nuisance merely because it is unattractive or visually offensive,[164] "[w]hen an unsightly activity . . . is accompanied by other interferences to the use and enjoyment of another's property," abatement of the nuisance may be

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154. *Id.*

155. *Id.* at 887 (quoting Hendricks v. Stalnaker, 380 S.E.2d 198, 199 (W. Va. 1989)).

156. *Id.* (quoting *Hendricks*, 380 S.E.2d at 199).

157. *Id.* at 889 (The court concluded this from the express language of a number of statutes governing the PSC.).

158. *Id.* at 889, 898–99 (Justice Benjamin dissented, arguing that the wind farm was a public utility equipped with the power of eminent domain, and thus would have limited the relief to the plaintiffs to money damages and not granted a preliminary injunction).

159. *Id.* at 891 (quoting Ritz v. Woman's Club of Charleston, 173 S.E. 564, 565 (1934)).

160. *Id.* (quoting *Ritz*, 173 S.E. at 565).

161. *Id.*

162. *See id.*

163. *Id.* ("Second, the appellants allege that 'flicker' or 'strobe effect from the turbines will create an eyesore.").

164. *Id.* (citing Parkersburg Builders Material Co. v. Barrack, 191 S.E. 368, 371 (W. Va. 1937)).

available.[165] Accordingly, "unsightly activity may be abated when it occurs in a residential area and is accompanied by other nuisances."[166]

Regarding the diminution in property values the wind turbine neighbors alleged was likely to occur, the court recognized that mere diminution in property value is usually not actionable.[167] As with unsightliness, however, diminished property value—when accompanied by other interferences—is actionable.[168]

The keystone of the neighbors' claims was noise.[169] While the plaintiffs survived a motion to dismiss, they did so only because noise satisfies the requirements of an actionable nuisance claim.[170] Therefore, at trial, if the plaintiffs were unable to persuade the jury that the noise associated with wind turbines was an unreasonable interference with the use and enjoyment of their land, the fact that the jury might agree with the plaintiffs that the "flicker" or "strobe" effect posed an unreasonable interference would be of no aid.

The supreme court of appeals also discussed the appropriate remedy. Because this suit was filed before the construction of the wind turbines, plaintiffs sought to permanently enjoin defendants from constructing the turbines.[171] However, the court noted that West Virginia courts disfavor injunctions before a nuisance has occurred unless the activity will constitute a nuisance per se,[172] and that government-authorized businesses do not constitute nuisances per se.[173] In spite of this, the court concluded, "[A] business that is not a nuisance *per se* may still constitute a nuisance in light of the surrounding circumstances."[174] A prospective injunction is possible where "'danger of injury from it is impending and imminent, and the effect certain.'"[175] "'Mere possible, eventual or contingent danger is not enough'" for injury to be certain.[176] In addition, "'[t]hat injury will result must be shown beyond question . . . not resting on hypothesis or conjecture, but established by conclusive evidence.'"[177] The court noted that where injunction is sought to prevent the construction of a building for legitimate use, "the fact that it

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165. *Id.*
166. *Id.* at 892.
167. *Id.* (quoting Martin v. Williams, 93 S.E.2d 835, 843–44 (W. Va. 1956)).
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 885.
172. *Id.* at 892 (citing Chambers v. Cramer, 38 S.E. 691 (W. Va. 1901)).
173. *Id.*
174. *Id.* at 893.
175. *Id.* (quoting Pope v. Bridgewater Gas Co., 43 S.E. 87, 89 (W. Va. 1903)).
176. *Id.* (quoting *Pope*, 43 S.E. at 89).
177. *Id.* (quoting *Pope*, 43 S.E. at 89).

will be a nuisance . . . must be made clearly to appear, beyond all ground of fair questioning.'"[178]

Applying precedent to the case at bar, the court concluded that the remedy of prospective injunction should be available to the plaintiffs on remand.[179] The court reasoned that if the plaintiffs "are able to adduce sufficient evidence to prove these allegations beyond all ground of fair questioning, abatement would be appropriate."[180] This conclusion was based on plaintiffs' allegations of nuisance stemming from the noise, unsightliness, and possible diminution in property value of the proposed wind turbines.[181]

2. *Rankin v. FPL Energy, LLC*

The Court of Appeals of Texas reached a different conclusion in *Rankin v. FPL Energy, LLC*.[182] In *Rankin*, several individuals and one corporation sued a wind farm, seeking injunctive relief for public and private nuisance.[183] FPL moved for partial summary judgment, "contending that Plaintiffs could not assert a nuisance claim based upon the wind farm's aesthetical impact . . . ."[184] The trial court granted defendants' partial summary judgment motion on plaintiffs' nuisance claims "to the extent they were based on the wind farm's visual impact."[185] The trial court also issued a jury instruction that the jury could not consider the visual impact of the wind turbines in relation to the plaintiffs' remaining nuisance claims.[186] On the remaining issues of private nuisance, "[t]he jury found against Plaintiffs, and the trial court entered a take-nothing judgment."[187] The plaintiffs asserted three bases of error on appeal, but only one is relevant to this Note: granting the defendant's motion for partial summary judgment.[188]

178. *Id.* (quoting Chambers v. Cramer, 38 S.E. 691 (W. Va. 1901)).
179. *Id.*
180. *Id.* at 893–94 .
181. *Id.* at 893.
182. Rankin v. FPL Energy, LLC, 266 S.W.3d 506, 513 (Tex. App. 2008) (finding partial summary judgment proper as Texas does not provide a nuisance cause of action for purely emotional harm).
183. *Id.* at 508.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*

Texas's common law definition of "nuisance" is similar to that of other jurisdictions, except that it explicitly includes "discomfort or annoyance."[189] Moreover, "[n]uisance claims are frequently described [by Texas courts] as a 'non-trespassory invasion of another's interest in the use and enjoyment of land.'"[190] "In practice, successful nuisance actions typically involve an invasion of a plaintiff's property by light, sound, odor, or foreign substance."[191]

Despite defining nuisance to include annoyance, the court of appeals observed, "Texas courts have not found a nuisance merely because of aesthetical-based complaints."[192] This court asserted the basis for this by stating:

> [A]n alleged nuisance must be of a real and substantial character . . . . [F]or if the injury or inconvenience be merely theoretical, or if it be slight or trivial, or fanciful, or one of mere delicacy or fastidiousness, there is no nuisance in the legal sense. Thus the law will not declare a thing a nuisance because it is unsightly or disfigured . . . or because it is unpleasant to the eye . . . for the law does not cater to men's tastes or consult their convenience merely, but only guards and upholds their material rights . . . .[193]

FPL argued from a public policy perspective that this was correct "because notions of beauty or unsightliness are necessarily subjective in nature . . . ."[194] Plaintiffs supplied affidavits, however, asserting damages to the area's scenic beauty, which interfered with the use and enjoyment of plaintiffs' property.[195] Linda Brasher, a plaintiff, testified that the aesthetic complaints were not grounded in a simple dislike, but rather a deeper emotional impact she characterized as "the death of hope."[196]

The court of appeals proceeded to consider whether "Plaintiffs' emotional response to the loss of their view" was "sufficient to establish a cause of action."[197] The court noted that Texas precedent did not support such a cause of action.[198] The cited case, *Maranatha Temple, Inc. v. Enterprise Products Co.*,

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189. *Id.* at 509 (quoting Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d 264, 269 (Tex. 2004)) ("[A] condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities.").

190. *Id.* (quoting GTE Mobilnet of S. Tex. Ltd. P'ship v. Pascouet, 61 S.W.3d 599, 615 (Tex. App. 2001)).

191. *Id.*

192. *Id.*

193. *Id.* at 510 (quoting Shamburger v. Scheurrer, 198 S.W. 1069, 1071–72 (Tex. Civ. App. 1917)).

194. *Id.*

195. *Id.* at 511.

196. *Id.*

197. *Id.*

198. *Id.* at 511–12 (citing Maranatha Temple, Inc. v. Enterprise Prods. Co., 893 S.W.2d 92, 100 (Tex. App. 1994)).

involved a church that brought a nuisance claim against a hydrocarbon storage facility, alleging emotional harm caused by the nuisance.[199] Texas allows nuisance claims based on emotional harm to prevail, but only in cases of nuisance per se.[200] The distinction between nuisance per se and nuisance-in-fact is "critical," in that lawful activities cannot constitute nuisance per se in Texas.[201] Thus, Texas does not provide a nuisance cause of action for emotional harm, where the alleged tortfeasor has acted lawfully within industry standards.[202]

Summary judgment was thus appropriate in *Rankin*, "[b]ecause Texas law does not provide a nuisance action for aesthetical impact."[203] While the court recognized the importance of a landowner's view, it also noted that a landowner's view is largely determined by his neighbors' activity.[204] The court sympathized with the plaintiffs but concluded that, "recognizing a new cause of action for aesthetical impact causing an emotional injury is beyond the purview of an intermediate appellate court."[205] Furthermore, unlike the West Virginia Supreme Court of Appeals in *Burch v. NedPower Mount Storm*,[206] the *Rankin* court found that to "include aesthetics as a condition in connection with other forms of interference is a distinction without a difference."[207]

Perhaps the simplest lesson from *Burch* and *Rankin* is that aesthetic impact alone is currently insufficient.[208] Even where *Burch* accepted the plaintiffs' allegations of unsightliness as relevant to the consideration of damages, it did so only after the plaintiffs had provided evidence of other bases for finding an actionable nuisance sufficient to shoulder the plaintiffs' aesthetic and emotional

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199. *Maranatha Temple, Inc.*, 893 S.W.2d at 96, 99; *see Rankin*, 266 S.W.3d at 511–12 (discussing generally the court's decision in *Maranatha*).

200. *Maranatha Temple, Inc.*, 893 S.W.2d at 99–100, n.6 (finding that Texas does not allow nuisance in fact claims "based on fear, apprehension, or other emotional reaction[s resulting] from the lawful operation of industries in Texas," but that Texas does allow claims of nuisance per se in some instances).

201. *Rankin*, 266 S.W.3d at 511–12; *Maranatha Temple, Inc.*, 893 S.W.2d at 100.

202. *Rankin*, 266 S.W.3d at 512–13.

203. *Id.* at 513.

204. *Id.* at 512 (noting that "[u]nobstructed sunsets, panoramic landscapes, and starlit skies have inspired countless artists and authors and have brought great pleasure to those fortunate enough to live in scenic rural settings. The loss of this view has undoubtedly impacted Plaintiffs. A landowner's view, however, is largely defined by what his neighbors are utilizing their property for. Texas caselaw recognizes few restrictions on the lawful use of property. If Plaintiffs have the right to bring a nuisance action because a neighbor's lawful activity substantially interferes with their view, they have, in effect, the right to zone the surrounding property.").

205. *Id.*

206. Burch v. Ned Power Mount Storm, LLC, 647 S.E.2d 879, 892 (W. Va. 2007).

207. *Rankin*, 266 S.W.3d at 512.

208. *Burch*, 647 S.E.2d at 891 (quoting Parkersburg Builders Material Co. v. Barrack, 191 S.E. 368, 369 (W. Va. 1937)); *Rankin*, 266 S.W.3d at 513.

claims.[209] Thus, if the *Burch* plaintiffs had failed to proffer evidence of harm beyond aesthetic displeasure—as was the case in *Rankin*—their claim would have likely failed.

F. *Remedies Available to Plaintiffs in Nuisance Suits*

A range of remedies are available in nuisance suits.[210] A plaintiff seeking to abate a nuisance may seek injunctive damages.[211] As evidenced by *Burch v. NedPower Mount Storm*, a prospective injunction is also available, even before the construction begins on the wind farm.[212] Monetary damages, however—including damages for diminution of the value of property—are also available to nuisance suit plaintiffs.[213] Most plaintiffs in nuisance suits against wind farms seek injunctive damages, however, as opposed to monetary damages. There may be a variety of reasons for this, many of which are fact-specific. In *Rose* and *Rassier*, for example, the defendants were individual property owners, and thus presumably less likely to be able to pay a large damage award.[214] The choice to seek injunctive damages, therefore, reflects a pragmatic choice to seek actually available relief. Against larger wind farms that are likely to generate large amounts of income, the availability of injunctive relief—a total halt to construction and operation in the case of a prospective injunction—likely makes the prospect of a nuisance suit a better bargaining chip for the neighbors of wind farm sites.

IV. LEGISLATIVE BODIES SHOULD IMMUNIZE WIND FARMS AGAINST NUISANCE CLAIMS

State common law nuisance claims can be preempted by a sufficiently broad and intricate regulatory scheme,[215] even when the statute includes a "sav

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209. *See Burch*, 647 S.E.2d at 893.

210. *See, e.g.*, *id.* at 893–94 (concluding a prospective injunction should be available to plaintiffs on remand); Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 363 (2d Cir. 2009) (discussing the availability of injunctive damages as opposed to compensatory damages); Georgia v. Tenn. Copper Co., 206 U.S. 230, 237–39 (1915) (assessing the adequacy of injunctive relief).

211. Rose v. Chaikin, 453 A.2d 1378, 1384 (N.J. Super. Ct. Ch. Div. 1982).

212. *See Burch*, 647 S.E.2d at 893 (stating to sustain an injunction one must show a danger of injury that is impending and imminent and the effect is certain).

213. *Id.* at 892.

214. *See* Rassier v. Houim, 488 N.W.2d 635, 636 (N.D. 1992); *Rose*, 453 A.2d at 1380.

215. *See* United States v. Kin-Buc, Inc., 532 F. Supp. 699, 702 (D.N.J. 1982).

ings clause" preserving the rights of citizens to file suits.[216] This issue will likely grow in relevance with relation to wind energy, as wind energy is not currently very heavily regulated, but may be more heavily regulated in the future.[217] In addition, courts might, on their own, view a federal regulatory scheme—which regulates wind energy production and incentivizes both large-scale and private wind energy production—as sufficiently broad to occupy the field, thus preempting some or all state law nuisance claims. Indeed, the renewable electricity standard from the American Clean Energy and Security Act of 2009 might have accomplished just such a task.[218] In addition, there has been some attention paid to small, personal use wind mills on apartment buildings and at least one commentator theorizes that increased incentives for this type of clean energy may eventually preempt claims and protect the owners of clean energy devices.[219] This would vary from jurisdiction to jurisdiction, based on state eminent domain law.

But waiting for preemption should not be public policy. Public policy should affirmatively promote socially, economically, and environmentally valuable practices.[220] A generalized policy in favor of promoting renewable energy, or providing tax incentives for renewable energy generation, or defining a renewable energy portfolio standard or goals, is at odds with leaving wind farms exposed to costly, lengthy, and unpredictable nuisance suits. Under appropriate

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216. *See* North Carolina v. Tenn. Valley Auth., 615 F.3d 291, 303–04 (4th Cir. 2010) (discussing preemption of federal common law public nuisance claim by the Clean Air Act, in spite of the savings clause found in 42 U.S.C. § 7604(e) (2006), which ostensibly permits common law causes of action notwithstanding the statutory framework).

217. *See* Kathryn B. Daniel, *Winds of Change: Competitive Renewable Energy Zones and the Emerging Regulatory Structure of Texas Wind Energy*, 42 TEX. TECH. L. REV. 157, 163–64 (2009) (discussing the effect of Texas legislation aimed at regulating the availability and expansion of wind energy).

218. *See* American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. § 101 (2009) ("Combined Efficiency and Renewable Energy Standard") (proposing a regulatory scheme requiring retail electricity suppliers to submit renewable electricity credits, each of which represents one megawatt hour of electricity generated by renewable energy sources).

219. *See* Reed-Huff, *supra* note 62, at 909.

220. *Cf.* S. NATURAL RES. AND AGRIC. COMM. STATEMENT, S. 854-1983 c. 31 (N.J. 1983) (The Committee stated: "The principal purpose of this bill is to promote, to the greatest extent practicable and feasible, the continuation of agriculture in the State of New Jersey while recognizing the potential conflicts among all lawful activities in the State. . . .The purpose of the committee [established by this Bill] is to aid in the coordination of State policies which affect the agricultural industry in a manner which will mitigate unnecessary constraints on essential farming practices by recommending to appropriate State departments a program of agriculture management practices which, if consistent with relevant federal and State law, and nonthreatening to the public health and safety, *would afford the farmer protection against municipal regulations and private nuisance suits*." (emphasis added)).

circumstances, Congress and state legislatures should proactively immunize rural, utility-scale wind farms from nuisance liability as one facet of encouraging increased wind energy generation. Professor Reed-Huff has called for a specific rule, which would function like the OTARD rule, to abrogate or preempt common law private nuisance claims that might otherwise inhibit the future construction or operation of wind energy generation devices.[221]

Granting wind farms nuisance immunity would offer several benefits to society: cleaner energy, a safe and homegrown alternative to foreign fossil fuels, and economic boosts through the creation of jobs and the generation of surplus electricity.[222] Moreover, nuisance immunity assuages the uncertainty of economic viability of wind farms by removing one obstacle from their path. Given the immense productive capacity of wind farms combined with the realities of effective siting, a policy that offers certainty of long-term growth and operation should be pursued. The exigencies of the twenty-first century—the desirability of energy independence, climate change, the risk of war, and rising utility costs—call for bold action based on a long-term strategy. Wind energy should be encouraged and permitted to grow and flourish. Accordingly, state legislatures should immunize wind farms from ordinary nuisance liability in order to encourage the continued growth and vitality of their benefits.

At the same time, the concerns of wind farm neighbors should also be recognized. In keeping with the sensitive balance of public utility and private burden—which inheres in nuisance analysis—legislative bodies should carefully reflect on the costs imposed on the neighbors of wind farms. While the benefits of wind energy are manifold, the allegations of its harm should not be ignored. Noise levels, diminution in property value, possible agricultural effects and health effects, and even severe annoyance should be carefully studied before enacting legislation immunizing wind farms from nuisance suits. An administrative body could be tasked with evaluating and compensating claims of diminished property value.[223] The administrative body could be new and at the federal or state level.[224] Alternatively, existing local or county zoning boards could be assigned the task. Although time-consuming and carrying the potential to become permeated with litigation regarding the current considerations of nuisance this framework would seek to avoid, administrative pre-approval could offer certainty and finality before ground is broken on a new wind farm.

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221. Reed-Huff, *supra* note 62, at 909.

222. *See* AM. WIND ENERGY ASS'N, AMERICAN WIND POWER, http://www.awea.org/learnabout/publications/upload/AmericanWindpowerBrochure.pdf (last visited Feb. 11, 2012).

223. *See, e.g.*, N.J. STAT. ANN. § 4:1C-9(i) (West 2011).

224. *See, e.g.*, *id.*

Workable models for such a rule already exist.[225] Congress, and state legislatures, may not even need to look as far as the OTARD rule.[226] Several states have already have passed Right-to-Farm Acts.[227] Right-to-Farm Acts immunize farming operations from nuisance claims.[228] Further, New Jersey already explicitly includes wind energy generation in its Right-to-Farm Act.[229] State legislatures should look to existing Right-to-Farm acts in drafting legislation that would immunize wind farms from nuisance liability and even consider simply amending their current Right-to-Farm acts to include wind energy generation among accepted agricultural practices. Amending existing legislation would offer two principal benefits. First, by grouping wind farms with other agricultural enterprises, legislatures will limit the immunity to wind farms that could fit agricultural designations. This can assuage the fears of some detractors of wind farms that such legislation would open the floodgates to wind turbines in places the public might find more objectionable, such as more crowded areas like commercial zones or suburban neighborhoods. Because it would be, at most, a one-step-at-a-time approach, the legislature could treat wind farms in rural areas differently from wind turbines in commercial and suburban areas. Second, states with existing Right-to-Farm Acts may have a body of existing jurisprudence. This would allow legislative bodies to be confident that interstices in the law and the finer points being adjudicated by courts will have a workable starting point for analysis.

Drafting new legislation, in a statute dedicated only to wind farms, on the other hand, allows the legislative body to perform its own fine-tuning and address any specific concerns it may have directly. Some states may desire to create a new, comprehensive, stand-alone piece of legislation, particularly if the legislature's conclusion of an appropriate balancing of interests between the wind farm developer, the state, and the adjoining property owner merits an administrative scheme of pre-approval and possibly immediate compensation for a taking by eminent domain. In this vein, a stand-alone approach that is both holistic and built upon an administrative scheme favoring wind farm neighbors may offer progressive legislators an effective compromise to offer their legislative opposi-

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225. *See id.* (including generation of power from wind energy in the New Jersey Right-to-Farm Act). The Coastal Zone Management Act, 16 U.S.C. §§ 1451 *et seq.*, provides an example of federal-state administrative collaboration in coastal development that provides for conflicting claims to be raised and resolved.

226. Reed-Huff, *supra* note 62, at 870 (discussing "right to install, maintain, and use an over-the-air reception device on private property . . . .").

227. *Id.* at 883.

228. *See, e.g.*, IOWA CODE § 352.11(1)(a) (2011) (stating "[a] farm or farm operation located in an agricultural area shall not be found to be a nuisance.").

229. N.J. STAT. ANN. § 4:1C-9(i).

tion, likely encouraging broader support for the bill. This alternate approach lacks the categorical clarity of simple immunization from nuisance suits, but may offer legislators a practical modicum of progress where the state's constitution, politics, business, or citizenry may significantly impede a more ambitious solution.

V. INVERSE CONDEMNATION PROCEEDINGS AND THE TAKINGS CLAUSE

A. *The Takings Clause of the Fifth Amendment to the Constitution*

In spite of the myriad benefits of granting nuisance immunity to wind farms, insulating wind farms from nuisance liability raises another litigation spectre: The Takings Clause of the Fifth Amendment of the Constitution. The Fifth Amendment to the U.S. Constitution states, in pertinent part: "[N]or shall private property be taken for public use, without just compensation."[230] The Takings Clause of the Fifth Amendment is part of the overall framework of Due Process provided by the U.S. Constitution.[231] Indeed, the Takings Clause is spiritually connected to the Due Process Clause. The Due Process Clause is derived from the Magna Carta,[232] and is "intended to secure the individual from the arbitrary exercise of the powers of government."[233] The similar protections of individual rights reflect a similar underlying fear of oppressive or tyrannical governmental acts.

Analytically, the Takings Clause contains four elements: 1) there has been a taking 2) of property, 3) for public use, and 4) that just compensation is required to be paid to the owner of the property.[234] This section of the Note concerns the primary question of whether a taking has occurred. The second com-

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230. U.S. CONST. amend. V. Because the Fifth Amendment's Takings Clause has been incorporated against the states through the Fourteenth Amendment, *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 239 (1897), the Fifth Amendment provides a floor of protection for individuals and private entities. Many state constitutions also contain takings clauses, however. *See, e.g.*, IOWA CONST. art. I, § 18 ("Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken."); ARK. CONST., art. 2, § 22 ("The right of property is before and higher than any constitutional sanction: and private property shall not be taken, appropriated or damaged for public use, without just compensation therefor.").

231. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321 (2002).

232. Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368 (1911).

233. Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819).

234. *See* ERWIN CHEMERINKSY, CONSTITUTIONAL LAW 663–64 (3d ed. 2009).

ponent—whether the taking is of property—is addressed in this Note in the context of a possible property right that could exist in nuisance immunity. The third element—whether such a taking is for the public use—requires the government to return the property if the taking was not for the public use.[235] "Public use" has been interpreted broadly by the United States Supreme Court to include economic development.[236] This Note presumes that a taking caused by nuisance immunity granted to wind farms—which could constitute public use as economic development under the broadest reading of the Clause, but also public use under the considerably more exiguous basis of environmental benefit—would be for the public use. The fourth component—the just compensation due the property owner—is determined after a taking has occurred, and the central concern is whether the compensation paid the property owner is sufficient.[237] This Note does not attempt to address this question.

B. *Inverse Condemnation*

In addition to the statutory provisions pursuant to the Takings Clause that allow the United States Government to take privately owned land, "the United States is capable of acquiring privately owned land summarily, by physically entering into possession and ousting the owner."[238] Such a suit is "inverse" because it is brought by the affected owner, not the condemner.[239] Inverse condemnation might prove especially valuable in a situation where nuisance claims are preempted by regulatory action. The reason for this is that while preemption of nuisance claims may be necessary for the efficient functioning of a regulatory scheme, the government may not have intended to preempt nuisance claims, and thus may not have foreseen the need to afford compensation to potential nuisance claimants. More obviously, the governing body, such as a state legislature, may

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235. *Id.* at 664.

236. *See* Kelo v. City of New London, 545 U.S. 469, 485 (2005) ("Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose."). *Kelo* involved the condemnation of Suzette Kelo's home, among others, so that New London, Connecticut could "revitalize" the former Fort Trumbull area by creating a "small urban village" and inviting Pfizer Inc. to establish a research facility there. *Id.* at 473–74. Justice Stevens, writing for the majority, concluded that economic development can be a public purpose, even if it will "benefit individual private parties." *Id.* at 484–86. Justice O'Connor dissented, arguing the Majority's holding was in essence a transfer from A to B. *Id.* at 494 (O'Conner, J., dissenting) (quoting Calder v. Bull, 3 Dall. 386, 388 (1798)) ("'[A] law that takes property from A. [sic] and gives it to B . . . is against all reason and justice . . . .'").

237. CHEMERINKSY, *supra* note 234, at 664.

238. Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 5 (1984).

239. United States v. Clarke, 445 U.S. 253, 257 (1980).

not have conceived that a Takings claim would follow from preemption of a nuisance claim.

C. *Takings Clause Analysis*

1. *Permanent Physical Invasions*

The United States Supreme Court has recognized two categorical, per se rules where a taking will always be found. The first categorical, per se taking rule is that "a permanent physical occupation of property" is a taking.[240] This rule was established in *Loretto v. Teleprompter Manhattan CATV Corp*.[241] In *Loretto*, New York law required the landlord of an apartment building to allow a cable company to install cable boxes on the roofs of tenant buildings and allow wires to connect the cable.[242] Justice Marshall, writing for the Court, concluded that the permanent physical occupation had taken place, even though the cable boxes occupied very little space on the roof.[243] Addressing the dissent, Marshall wrote,

> Few would disagree that if the State required landlords to permit third parties to install swimming pools on the landlords' rooftops for the convenience of the tenants, the requirement would be a taking. If the cable installation here occupied as much space, again few would disagree that the occupation would be a taking. But constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.[244]

The small amount of space occupied would still be relevant, although the relevance of the extent of occupation is relegated to measurement of compensation due the property owner.[245]

Justice Blackmun, dissenting, did not contest that some physical occupation had occurred, but rather—among other arguments—argued that it was insufficient to find a taking because the amount of space occupied was *de minimus*.[246] Justice Blackmun articulated a test that would find a taking where the occupation was "severe" enough to limit "alternative uses" by the property owner.[247] In Justice Blackmun's opinion, the Court should not have adopted a categorical approach.[248] Although the majority's categorical approach offers predictability and

240. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434–35 (1982).
241. *Id.*
242. *Id.* at 421.
243. *Id.* at 437–38.
244. *Id.* at 436.
245. *Id.* at 437.
246. *Id.* at 453–54 n.10 (Blackmun, J., dissenting).
247. *Id.* at 453.
248. *Id.*

ease of administration, there is a common sense to Justice Blackmun's dissent: a taking should not be found where the invasion is socially valuable and the extent of the invasion is *de minimus*.

Ironically, both Justice Marshall's position that "whether a permanent physical occupation has occurred presents relatively few problems of proof"[249] and Justice Blackmun's view that the extent of occupation is relevant may merit more concrete analysis.[250] The reason for this is that a wind turbine may actually kick up dust and, during the winter, fling ice,[251] creating a nuisance claim, which would underlie the Takings claim, and would entail *some* actual physical invasion of the claimant's property. As with nuisances caused by sound, however, proof might be difficult to establish, particularly in the case of dust. Moreover, dust particles kicked up by wind turbines push Justice Blackmun's *de minimis* argument to the extreme, suggesting that a taking should not be found.

2. *Regulatory Takings*

The second categorical rule is that a taking exists "where regulation denies all economically beneficial or productive use of land."[252] This rule relates to regulatory takings and derives from the Supreme Court's holding in *Lucas v. South Carolina Coastal Council*.[253] In *Lucas*, David Lucas, the Petitioner, bought two parcels of land near the coast of the Atlantic Ocean intending to build single family dwellings.[254] Two years after Lucas bought the parcels, the South Carolina Legislature enacted the Beachfront Management Act.[255] The Act prohibited construction of permanent habitable structures on Lucas's parcels.[256]

The Court held that there are "two discrete categories of regulatory action" that will constitute a taking.[257] The first is a permanent "physical invasion" as described by the Court in *Loretto*.[258] The second is "where regulation denies all economically beneficial or productive use of land."[259] Justice Scalia, writing for the Court, accepted Justice Brennan's proffered justification, that "total dep-

249. *Id.* at 437 (majority opinion).
250. *Id.* at 453 (Blackmun, J., dissenting).
251. *See, e.g.*, Muscarello v. Ogle Cnty. Bd. of Comm'rs, 610 F.3d 416, 419 (7th Cir. 2010) (plaintiff alleged nearby wind turbines would fling ice onto plaintiff's property).
252. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).
253. *Id.*
254. *Id.* at 1006–07.
255. *Id.* at 1007.
256. *Id.* (citing S.C. CODE ANN. §48-39-290(A) (Supp. 1990)).
257. *Id.* at 1015.
258. *Id.* (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435–40 (1982)).
259. *Id.* (citations omitted).

rivation of beneficial use" is tantamount to a taking.[260] In any event, the result achieved by proscribing economically beneficial use is distinguishable from the basis of prior regulatory takings precedent: government may make regulations, which "[adjust] the benefits and burdens of economic life"[261] without "paying for every such change . . . ."[262] Where a claimant, however, can show a total economic deprivation, a per se taking will have occurred.[263]

In other regulatory takings cases, the Court has "generally eschewed any 'set formula' for determining how far is too far, preferring to 'engag[e] in . . . essentially ad hoc, factual inquiries.'"[264] "This ad hoc approach calls for a balancing test that is essentially one of reasonableness. The test focuses on three factors: (1) the economic impact of the regulation on the claimant's property; (2) the regulation's interference with investment-backed expectations; and (3) the character of the governmental action."[265]

D. *Bormann v. Board of Supervisors*

In 1993, the Iowa Legislature enacted a Right-to-Farm Act.[266] The act provided that certain farming activities conducted by farmers, which would otherwise constitute nuisances, would per se not be considered nuisances.[267] Specifically included on that list is hog farming.[268] In *Bormann v. Board of Supervisors*, several agriculturally-oriented individuals applied to the Board of Supervisors of Kossuth County, Iowa, for a change in designation of a 960-acre parcel of land to an "'agricultural area'" designation.[269] Their application was initially

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260. *Id.* at 1017 (citing San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting) (arguing that "[p]olice power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property . . . . It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a 'taking' . . . where the effects completely deprive the owner of all or most of his interest in the property.")).

261. *Id.* at 1017–18 (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

262. *Id.* at 1018 (quoting Penn. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).

263. Bormann v. Bd. of Supervisors, 548 N.W.2d 309, 316 (Iowa 1998) (citing *Lucas*, 505 U.S. at 1017).

264. *Lucas*, 505 U.S. at 1015 (quoting Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

265. *Bormann*, 548 N.W.2d at 316–17 (citing Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

266. 1993 Iowa Acts 146, § 7 (codified as amended at IOWA CODE § 352.11(1)(a) (2011)).

267. IOWA CODE § 352.11(1)(a) (2011).

268. *Id.* (List found in IOWA CODE § 352.2(6), definition of a "farm operation").

269. *Bormann*, 548 N.W.2d at 311 (citing IOWA CODE § 352.6 (1993)).

denied, in part because the nuisance protection provisions in the Right-to-Farm Act would deprive the applicants' neighbors of use and enjoyment of their property by providing the applicants with nuisance immunity.[270] It was then approved two months later.[271] The Bormanns, the plaintiffs, objected to the change in designation and sought declaratory relief in 1995,[272] alleging that regulatory taking had occurred.[273]

The Iowa Supreme Court began by asking whether a "constitutionally protected private property interest was at stake."[274] The court then noted the property interest at stake was an easement.[275] The *Bormann* court cited *Churchill v. Burlington Water Co.*, an 1895 case, for the proposition that "the right to maintain a nuisance is an easement."[276] The Iowa Supreme Court noted that *Churchill*'s holding mirrored the Restatement of Property's notes on Affirmative Easements.[277]

Turning to whether a taking had occurred, the court then expounded that limits exist on the legislature's power over nuisances, including constitutional ones.[278] The court examined two types of takings: trespassory and nontrespassory invasions.[279] Noting the findings of takings when a government entity operates a "nuisance-producing enterprise,"[280] the court concluded that the Board's decision constituted a taking under the Iowa and Federal Constitutions.[281]

Bormann's rationale is somewhat ambiguous.[282] The Iowa Supreme Court articulated three separate bases for finding a taking, but did not ultimately identify which one served as the foundation of the court's holding.[283] The court's discussion of nonphysical, nontrespassory invasions signals it was not deciding

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270. *Id.*
271. *Id.* at 311–12.
272. *Id.* at 312.
273. *Id.* at 313.
274. *Id.* at 315.
275. *Id.* (citing Churchill v. Burlington Water Co., 62 N.W. 646, 647 (Iowa 1895)).
276. *Id.* (citing *Churchill*, 62 N.W. at 647).
277. *Id.* at 315–16 (quoting RESTATEMENT (SECOND) OF PROP. § 451 cmt. a (1944) ("[The easement] may entitle [its] owners to do acts on his own land which, were it not for the easement, would constitute a nuisance.")).
278. *Id.* at 319 (quoting 66 C.J.S. *Nuisances* § 7 (1950)).
279. *Id.* at 317–20.
280. *Id.* at 320.
281. *Id.* at 321 (holding that the "easements entitle the applicants to do acts on their property, which, were it not for the easement, would constitute a nuisance").
282. *See id.* at 317–18.
283. *Id.* at 316–21: *see also* Gacke v. Pork Extra, L.L.C., 684 N.W.2d 168, 173 (Iowa 2004) ("Although this court discussed the various scenarios involving trespassory and nontrespassory invasions in *Bormann*, our ultimate conclusion was simply that the immunity statute created an easement and the appropriation of this property right was a taking.").

this strictly under *Loretto*.[284] *Bormann*, in essence, either pushes Justice Blackmun's *de minimus* in *Loretto* argument past any conceivable extreme, to include particulates or other nontrespassory invasions, or else creates a new type of per se taking based on an easement within the meaning of the RESTATEMENT (SECOND) OF PROPERTY, section 451. *Bormann*, however, has been tested, and reaffirmed, by the Iowa Supreme Court as recently as 2010.[285]

E. *Challenges to the Bormann Logic: Some Courts Have Held the Right to Maintain a Nuisance Is Not an Easement*

Other courts have explicitly declined to follow the holding of *Bormann* in roughly the same context.[286] The first court to do so was the Idaho Supreme Court in *Moon v. North Idaho Farmers Ass'n*. *Moon* presents a law fairly similar to the nuisance immunity provision involved in *Bormann*.[287] A plaintiff brought suit, alleging nuisance created by grass smoke caused by bluegrass growers burning their fields.[288] The district court concluded the nuisance immunity provision was unconstitutional,[289] following the reasoning of *Bormann*.[290]

The Supreme Court of Idaho disagreed, noting that Idaho case law does not support the contention that "the right to maintain a nuisance is an easement."[291] The court, furthermore, declined the opportunity to do so.[292]

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284. *See Bormann*, 548 N.W.2d at 317–20.

285. *See, e.g.*, Dalarna Farms v. Access Energy Coop., 792 N.W.2d 656, 661–65 (Iowa 2010) (citing *Bormann*, 584 N.W.2d at 314); *Gacke*, 684 N.W.2d at 173–74 (discussing the continued vitality of *Bormann*).

286. *See, e.g.*, Moon v. N. Idaho Farmers Ass'n, 96 P.3d 637, 645 (Idaho 2004); Lindsey v. DeGroot, 898 N.E.2d 1251, 1259 (Ind. App. Ct. 2009) (stating: [W]e have found nothing to suggest that Indiana has adopted the seemingly unique Iowa holding that the right to maintain a nuisance is an easement . . . . Therefore, we expressly decline the [plaintiffs'] invitation to adopt Iowa's proposition that the right to maintain a nuisance . . . creates an easement in favor of [defendant].).

287. *Moon*, 96 P.3d at 641.

288. *Id.* at 640.

289. *Id.*

290. *Id.* at 645.

291. *Id.*

292. *Id.* (declining to adopt RESTATEMENT OF PROP. § 451 (1944)) (stating, "An affirmative easement entitles the owner thereof to use the land subject to the easement by doing acts which, were it not for the easement, he would not be privileged to do."). *But see* Ransom v. Topaz Mktg., L.P., 152 P.3d 2, 5 (2006) (citing RESTATEMENT OF PROP. § 451) (approving of section 451 because it is the general "Affirmative Easement" section). However, the value of the *Ransom* court's approval of section 451 is unclear: the *Ransom* court discussed the statements in comment a., but in connection with trespass, not nuisance. *Id.* (quoting RESTATEMENT OF PROP. § 451 cmt. a). The *Ransom* court discussed neither *Moon* nor *Bormann*. *Id.*

The Court of Appeals of Indiana reached a similar result in *Lindsey v. DeGroot*.[293] In *Lindsey*, the plaintiffs brought a nuisance suit to enjoin a dairy operation.[294] The trial court granted summary judgment for the defendant on the grounds that the Indiana Right-to-Farm Act barred plaintiffs' nuisance claims.[295] The plaintiffs appealed, challenging the Act's constitutionality, arguing it constituted a taking.[296]

The court of appeals discussed *Bormann*, citing *Churchill*'s proposition of nuisance immunity as an easement and the logical underpinning of *Bormann*.[297] The court then discussed *Moon*, identifying the *Moon* court's refusal to find that nuisance immunity creates an easement in favor of the allegedly offending farmers.[298] The court considered *Bormann*'s holding "seemingly unique" and recognized no Indiana precedent that indicated a right to maintain a nuisance constituted an easement.[299] Like the *Moon* court, the *Lindsey* court similarly refused to adopt such a holding.[300]

Thus, the lynchpin of the *Bormann* logic is the notion that the right to maintain a nuisance constitutes an easement. While *Bormann*'s central holding—that nuisance immunity provisions are takings—may seem like the more dynamic, fundamental, and novel legal concept, the underlying grant of easement through nuisance immunity is the heart of its rationale. Thus, states that decline to adopt the view that the right to maintain a nuisance is an easement are unlikely to find a taking requiring just compensation. These states, in particular, should go forward and enact nuisance immunity laws for clean energy devices, in general, or appropriately sited wind turbines, in particular.

The Iowa Supreme Court, however, should not apply *Bormann*'s holding to statutory nuisance immunity for wind farms. In fact, wind farms, and the nuisance immunity the General Assembly should provide them, represent an opportunity to reconsider *Bormann*'s holding. *Bormann* rests upon *Churchill*'s outdated holding,[301] which is not often applied in Iowa and is out of keeping with other states. *Churchill*'s novel holding, and *Bormann*'s application of it—treating a

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293. *See* Lindsey v. DeGroot, 898 N.E.2d 1251, 1258–59 (Ind. Ct. App. 2009).
294. *Id.* at 1256.
295. *Id.*
296. *Id.* at 1257.
297. *Id.* at 1258 (citing Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 313 (Iowa 1998)).
298. *Id.* (citing Moon v. North Idaho Farmers Ass'n, 96 P.3d 637, 645 (Idaho 2004)).
299. *Id.* at 1259 ("[W]e have found nothing to suggest that Indiana has adopted the seemingly unique Iowa holding that the right to maintain a nuisance is an easement . . . .").
300. *Id.*
301. *Bormann*, 584 N.W.2d at 315.

right to conduct activity otherwise a nuisance as an easement[302] —is untenable and poses economic risks not only to Iowa wind farms, but conventional Iowa farms as well.

Bormann effectively constitutionalizes the remarkably unpredictable common-law nuisance test because its holding only applies when the state immunizes a nuisance. This essentially calls for a consideration of whether a certain activity is a nuisance in every case challenging a nuisance immunity provision, despite the legislature's repeated intention to protect and encourage Iowa business. In doing so, *Bormann* may even make some innocuous regulations incapable of achievement.

The type of regulation posed by nuisance immunity for wind farms is simply not the arbitrary, nearly tyrannical action that the Takings Clause was meant to address.[303] Nuisance immunity is significantly more akin to economic regulation and should be treated under the balancing test articulated by the United States Supreme Court in *Penn Central*.[304] This type of regulation offers the State an opportunity to encourage business development and also valuable policies like maintaining a greener electrical grid and reducing dependence on foreign oil. It also eases the minds of potential investors by making legal outcomes more predictable. The alternative—constitutionalizing the fact-specific, hence uncertain, but seemingly universally applicable common-law nuisance test—can only discourage investment by increasing the uncertainty of siting and neighbor relations.

Society is a balance of the rights of the individual against the utility to the public. Government deservedly has the authority to "adjust[] the benefits and burdens of economic life,"[305] and it may encourage socially, environmentally, and economically beneficial activities by insulating them, *within reason*, from legal activity that would otherwise inhibit their occurrence or development. The Takings Clause should not be construed to prevent it from doing so by making it essentially coextensive with nuisance law.[306] *Churchill* and *Bormann*, however, inexorably tilt the societal balance against progress and government, and risk turning regulatory authority on its head, giving those who oppose their neigh-

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302. *Id.*

303. Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819).

304. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). The test is composed of three factors: 1) the economic impact of the regulation on the claimant's property: 2) the regulation's interference with investment-backed expectations: and 3) the character of the governmental action. *Id.*

305. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017–18 (1992) (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

306. *See id.* (quoting Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

bor's otherwise authorized, legitimate activities a veto over those very activities.[307]

VI. CONCLUSION

America's electrical grid is receiving an overhaul. In less than a decade we have vastly increased the portion of electricity we receive from renewable energy. This growth is timely, environmentally responsible, economically valuable, and politically viable. A comprehensive, dedicated renewable energy policy deservedly boasts the possibility of creating hundreds of thousands of jobs, lessening our dependence on fossil fuels and foreign countries, and providing *nine* times the electricity to satisfy our current energy consumption. This growth, and the potential for future, long-term growth, is dependent on a stable, comprehensive, renewable energy policy, however. Such a policy should emphasize research and development and tax incentives designed to foster increased production, and it should also remove the uncertainty nuisance suits pose to wind farm development. Nuisance suits are costly, inefficient and can have unpredictable results. The renewable energy policy should therefore include nuisance immunity for wind farms.

While there is an interest in the benefit of regulations that incentivize wind energy and insulate them from nuisance suits, it is important to remember the neighbors of these farms of tomorrow. These neighbors have an interest in the use and enjoyment of their property. Indeed, rights of property justly receive constitutional protection and represent an important interest. Carefully weighing these interests will be a key part of any legislature or judiciary's consideration of nuisance immunity for wind farms.

307. *See* Muscarello v. Ogle Cnty. Bd. of Comm'rs, 610 F.3d 416, 421–22 (7th Cir. 2010); *see also* Bormann v. Bd. of Supervisors, 854 N.W.2d 309, 321 (Iowa 1998); Churchill v. Burlington Water Co., 62 N.W. 646, 647 (Iowa 1895).